

ETHICAL ISSUES FOR ELDER LAW ATTORNEYS

David L. McGuffey, CELA¹

202 W. Crawford Street, Suite B
 Dalton, Georgia 30720
 (706) 428-0888
 www.mcguffey.net
 david@mcguffey.net

“In the nature of law practice ... conflicting responsibilities are encountered. Virtually all difficult ethical problems arise from conflict between a lawyer’s responsibilities to clients, to the legal system, and to the lawyer’s own interest in remaining an upright person while earning a satisfactory living. The Rules of Professional Conduct prescribe terms for resolving such conflicts. Within the framework of these Rules many difficult issues of professional discretion can arise. Such issues must be resolved through the exercise of sensitive professional and moral judgment guided by the basic principles underlying the Rules.” TRPC, Preamble, Comment 9.

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¹ Mr. McGuffey limits his practice to Elder Law. He is admitted to practice in Georgia, Tennessee and Michigan, and is admitted to practice before the Eleventh Circuit Court of Appeals, the Sixth Circuit Court of Appeals, District Courts for the Northern District and Middle District of Georgia, and the Eastern District of Tennessee. Mr. McGuffey is a Certified Elder Law Attorney (NELF) and is Certified as an Elder Law Specialist (Tennessee Commission on Continuing Legal Education and Specialization). He presently serves as Chair, Tennessee Bar Association Elder Law Section, and as Vice Chair, Association of Trial Lawyers of America Nursing Home Litigation Group. He is actively involved in his community, serving on the Board of Directors of the Northwest Georgia Healthcare Partnership, the Georgia Chapter of the Alzheimer’s Association (Local Northwest Georgia area); and the Ross Woods Adult Day Care Clinic. Mr. McGuffey is a member of the National Academy of Elder Law Attorneys and various other legal organizations.

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These materials are not limited to Tennessee law; however, since this program is in Nashville, some mention of Tennessee law is appropriate. The Tennessee Supreme Court approved the *Tennessee Rules of Professional Conduct* (TRPC) on August 27, 2002. Those rules govern the legal profession in this State. The text of the rules as well as the history of their adoption is on the Tennessee Bar Association website at <http://www.tba.org/committees/Conduct/index.html>. *The Model Rules of Professional Conduct* appear at: http://www.abanet.org/cpr/mrpc/mrpc_toc.html.

Getting Started: Initial Issues

Legal ethics is a subject about which reasonable minds sometimes differ.² A major criticism of the present ethical framework is that it was written by litigators, for litigators. See Fleming, *Elder Law Answer Book 2nd Edition* Q 2:3 (Aspen Publishers 2004). More often than not, however, Elder Law Attorneys act as advisor rather than as an advocate. “Elder law attorneys frequently find themselves trying to help clients get as close to their legal goals as possible, in the face of family, medical, religious, or social concerns about the propriety or advisability of the client’s chosen course of action.” *Id.*

Still, the ethics rules approved by the bar are the ruler against which our conduct is measured. Therefore, familiarity with the rules is imperative.

Diverging for a moment from the impending discussion of those rules, the framework under which we operate is essentially a construct of legal positivism, although one could argue in some cases that it is modern natural law theory. The following table summarizes various ethical theories and may be helpful in identifying ethical dilemmas confronted in this paper and in practice.

Natural law theory ³	Traditional natural law theory offers arguments for the existence of a “higher law.” Cicero wrote: “True law is right reason in agreement with nature; it is of universal application, unchanging
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² “Law is an imperfect profession in which success can rarely be achieved without some sacrifice of principle. Thus, all practicing lawyers – and most others in the profession – will necessarily be imperfect, especially in the eyes of young idealists. There is no perfect justice, just as there are no absolutes in ethics. But there is perfect injustice, and we know it when we see it.” A. Dershowitz, *Letters to a Young Lawyer* 9 (Basic Books 2001).

³ B. Bix, *Natural Law Theory*, Chapter 14, in *A Companion to Philosophy of Law and Legal Theory* (Blackwell Publishers 1999).

and everlasting; it summons to duty its commands, and averts from wrongdoing by its prohibitions.” Religious scholars might argue that adherence to natural law is righteousness, while a violation would be sin. This theory is expressed in Acts 4:19 where Peter asked the ruling counsel whether it was right to obey them rather than God. Traditional natural law theory focuses, to a large extent on issues that sound like morality. In response to criticism from writers such as Austin, Holmes and Kelson, and more recently by Hart, a modern natural law theory developed. Modern natural law, as argued by Fuller, is premised, not so much on morality, but on law’s function. In terms of function, Fuller claims law must meet eight requirements: (1) laws should be general; (2) they should be promulgated, that citizens should know the standards to which they are being held; (3) retroactive rule-making and application should be minimized; (4) laws should be understandable; (5) they should not be contradictory; (6) laws should not require conduct beyond the abilities of those affected; (7) they should remain constant through time; and (8) there should be a congruence between the laws as announced and their actual administration. Dworkin, also linked to modern natural law theory, finds his focus in adjudication. Dworkin notes that judges and juries disagree about what legal rules require; in his view, law grows through adjudication with the appellate judge taking the central role as law’s interpreter. One problem associated with natural law theory is paternalism, discussed in more detail below.

Legal positivism⁴

Proponents of legal positivism include Austin, Kelsen, Hart and Raz. All positivists share two central beliefs: first, that what counts as law in any particular society is fundamentally a matter of social fact or convention (“the social thesis”); second, that there is no necessary connection between law and morality (“the separability thesis”). Hart, for example, distinguishes societal norms from law and further states that “legal” norms provide agents with special reasons for acting, reasons they would not have accepted if they were not “legal” norms. Hart would argue, for example, that the moral value of a norm cannot be its legal value since the two are sometimes contradictory. Instead, legal norms are driven by accounts of authority to compel action. In this regard, Austin defines law in terms of fact, not value. One problem associated with legal positivism is its tendency to authorize what is legal, even where it fails to benefit the appropriate party; or where it authorizes inaction in circumstances where action should be taken (e.g., the other scholars who passed by before the “Good Samaritan”).

Legal realism⁵

Advocates of legal realism include Llewellyn, Frank, Cohen, Oliphant, Cook, Moore, Yntema and Radin, a group of law school professors writing in the United States in the 1920s and 1930s. This school of thought examines the law in terms of what judges really do. According to realists, they decide cases according to how the facts strike them and not because legal rules require

4 See J. Coleman & B. Leiter, *Legal Positivism*, Chapter 15, in *A Companion to Philosophy of Law and Legal Theory* (Blackwell Publishers 1999).

5 See B. Leiter, *Legal Realism*, Chapter 16, in *A Companion to Philosophy of Law and Legal Theory* (Blackwell Publishers 1999).

particular results. According to realists, judges are largely fact-responsive rather than rule-responsive in reaching their decisions. This view might be expressed with the adage: bad facts make bad law. One problem associated with legal realism is its failure to provide a legal methodology underlying the decision making process. Critics might call it Monday morning quarterbacking.

Another ethical model worth considering before we consider the rules themselves, is a form of medical or bioethics known as Principlism. “Medicine, even at its most technical and scientific levels, is an encounter between human beings, and the physician’s work of diagnosing disease, offering advice, and providing treatment is embedded in a moral context.” A. Jonsen et al., *Clinical Ethics 5th Edition* 1 (McGraw Hill Medical Publishing Division 2002). Clinicians are taught to “present” a patient by stating in order “(1) the chief complaint, (2) history of the present illness, (3) past medical history, (4) family and social history, (5) physical findings, and (6) laboratory data.” *Id.*, at 2. (For attorneys, this correlates to MRPC Rule 1.1, Comment 5, and to MRPC Rule 1.3). Once done, the appropriate course of treatment must be determined. Principlism suggests that medical ethics begins, initially, with diagnosis of the medical condition, respect for patient autonomy, application of the principles of beneficence, nonmaleficence, and justice (loyalty and fairness). *Id.*, at 12. These ‘principles’ form a framework within which particular cases (moral problems) are analyzed. They are not “rules” per se “because prima facie principles do not contain sufficient content to address the nuances of many moral circumstances.” T. Beauchamp & J. Childress, *Principles of Biomedical Ethics 5th Edition* 15 (Oxford University Press 2001). These concepts, and how they can be applied in the context of Elder Law, are considered in more detail below.

§ 1.1 The Lawyer’s Role:

“A lawyer is a representative of clients, an officer of the legal system, and a public citizen having special responsibility for the quality of justice.” MRPC, Preamble, Comment 1, at <http://www.abanet.org/cpr/mrpc/preamble.html>; TRPC, Preamble, Comment 2.

“As a representative of clients, a lawyer performs various functions. **As an advisor**, a lawyer provides a client with an informed understanding of the client’s legal rights and obligations and explains their practical implications. **As an advocate**, a lawyer zealously asserts the client’s position under the rules of the adversary system. **As a negotiator**, a lawyer seeks a result advantageous to the client but consistent with requirements of honest dealing with others. **As an intermediary between clients**, a lawyer seeks to reconcile their divergent interests as an advisor and, to a limited extent, as a spokesperson for each client. A lawyer acts as an **evaluator** by examining a client’s legal affairs and reporting about them to the client or to others.” MRPC, Preamble, Comment 2.

Cases:

In re Tax Appeal of Hawaiian Flour Mills, 76 Haw. 1 (1994) (LEVINSON, concurring) “I go to the trouble

of writing separately, despite the fact that I join fully in the opinion of the court, because I feel impelled [***52] to get off my chest some additional and personal observations that are born of almost twenty-two years in the legal profession, almost seventeen of them as a private practitioner. **If I have learned anything in that time, it is that what "goes around" truly does "come around" and that lawyers represent their clients' interests best when they discharge their responsibilities in accordance with the preamble to the Hawaii Rules of Professional Conduct (HRPC)**, which reflect the tireless efforts of various members of the Hawaii bench and bar to whom we owe a debt of gratitude, and which became effective on January 1, 1994 by order of this court dated December 6, 1993. That preamble, which summarizes "a lawyer's responsibilities," provides in relevant part [terms substantially similar to those in the MRPC and TRPC]. ... We would do well to heed the wisdom of Judge Frankel, as reported in the Washington Post on May 7, 1978: We [lawyers] must alter our prime axiom -- that we are combat mercenaries available indifferently for any cause or purpose a client is ready to finance. . . . We should all be what I would term "ministers of justice." As such, we would have to reconsider and revise a system of loyalty to clients that results too often in coverups A favorite quotation in the legal profession . . . is Lord Brougham's declaration that an advocate "knows but one person in all the world, and that person is his client. . . ." For him Lord Brougham said, the advocate would stand against the world. . . . Lord Brougham was wrong; we should be less willing to fight the world and . . . more concerned to save our own souls. As ministers of justice, we should find ourselves more positively concerned than we now are with the pursuit of truth." (Emphasis added).

Tyler v. State, 47 P.3d 1095 (Alaska 2001). "Although a lawyer's paramount duty is to pursue the client's interests vigorously, that duty must be met in conjunction with, rather than in opposition to, [the lawyer's] other professional obligations. ... Implicit in the lawyer's role as officer of the court is the general duty of candor."

In re Redondo, 176 Ariz. 334 (Az 1993). "Redondo did not always separate his role as a lawyer from his role as a relative and estate heir. He failed to provide accountings [***5] to the estate and did not advise the personal representatives to advise all the heirs of ongoing distributions of monies from the estate."

People v. Donaldson, 93 Cal. App. 4th 916 (2001). "As an advocate, the lawyer's task is to present the client's case and to test the evidence and arguments put forth by the opposing side."

In re Marriage of Bonds, 71 Cal. App. 4th 290 (1999). "When the lawyer knows or reasonably should know that the unrepresented person misunderstands the lawyer's role in the matter, the lawyer shall make reasonable efforts to correct the misunderstanding."

Avila v. People, 52 P.3d 230 (Colorado 2002). Avila's participation in the falsification of public records arose out of his then belief that an attorney's function was to prevail on behalf of his client at any cost. At the time of those events, Avila was thirty-six years old, was practicing by himself, had no mentoring relationship with other attorneys and was driven by a compulsion to secure favorable rulings for his clients. His willingness to violate the law was the direct result of his lack of experience, lack of guidance [*16] in the practice of law, misunderstanding of a lawyer's role in the adversarial process and a willingness to break the rules to obtain the desired result.... Almost immediately after Avila's convictions, he acknowledged the wrongfulness of his misconduct and began the lengthy process of restructuring his life. (Attorney reinstated after prior disbarment).

Observations: The Preamble and its Comments indicate that the lawyer's duties are not simply to her client. While this does not suggest a higher duty in the religious or natural law context, it does indicate that we cannot advance a client's interests in a manner that ignores other duties imposed by law. For example, Rule 1.15(e) recognizes that property may come into the lawyer's possession and that persons other than the client may have a claim against it (e.g., a subrogation claim in the context of a personal injury settlement). In that instance, the lawyer may not ignore the interests of other parties.

§ 1.2. Competence, MRPC Rule 1.1:

A lawyer shall provide competent representation to a client. Competent representation requires the legal knowledge, skill, thoroughness, and preparation reasonably necessary for the representation.

Practice Tip: The MRPC does not require instant expertise before accepting a client. The Comments to the MRPC make it clear that we are all practicing law. Instead, if the lawyer's training and experience are inadequate to prepare her for a particular matter, the MRPC requires that she take steps to provide competent representation for each client through study, association with a more experienced lawyer, or other means.

A different view of why competence is critical for the professional, and thus ethically mandated, appears in R. Kennedy, Why Military Officers Must Have Training in Ethics, at: <http://www.usafa.af.mil/jscope/JSCOPE00/Kennedy00.html>. There, Kennedy writes:

The *sine qua non* of professionalism is specialized knowledge, and not just any sort of specialized knowledge. It is an accumulated and ordered knowledge, built up over time by the experience, analysis, and insight of predecessors in the field. It is knowledge that penetrates to the root of the matter and gives its possessor an understanding not only of *how* things are, but *why* they are that way. It is also hard-won knowledge that requires time and effort to possess, knowledge that many people cannot achieve.

The professional, as a result, is the opposite of the "self-made man." The professional is a man or woman who is deeply indebted to others from the start. Principal among these others are predecessors in the field who have discovered and systematized the knowledge and who have passed it on. Furthermore, the professional is indebted to the community. Virtually all professional education these days takes place in the context of a university, and the community (e.g., tax exemptions, land grants, donations, and tax deductions for donations, etc) heavily supports universities in many ways. The community offers this support because it values the contributions of the professional so highly, and because it expects a reciprocal dedication.

The professional is therefore obligated in justice to use his or her knowledge well, as partial compensation for the sacrifices that have made it possible for that person to become educated. In addition, he must add to the accumulated knowledge where possible, correcting it, refining it, and generally increasing its depth and breadth.

Such knowledge is powerful, and like many powerful things it can produce great benefits if used well, and great evils if used badly. For this reason, professionals have generally been careful throughout history to share their knowledge only with those personally committed to using it well, and to dismiss from their company those who evidence deep flaws in character. This is certainly true of the profession of arms, which in various ways (though sometimes unfairly or unwisely) aggressively filters out candidates for commission or promotion that it considers unworthy, regardless of their mastery of military knowledge.

Cases:

State ex rel. Okla. Bar Ass'n v. Dobbs, 2004 OK 46 (2004): "A lawyer's license is a certificate of professional fitness to deal with the public as a legal practitioner. Professional competence is a mandatory obligation imposed upon licensed practitioners. It is the very minimum to be expected from a lawyer. It epitomizes professionalism. Anything less is a breach of a lawyer's duty to serve the client. Respondent failed to demonstrate competence in his handling of the quiet title action. His services to Mrs. Cargile were substandard even for a new practitioner. His lack of competence resulted in injury to his client, an elderly woman who was sued by her relatives [**18] in connection with the matter respondent was handling for

her. We find clear and convincing evidence that respondent failed to provide Mrs. Cargile with competent representation in violation of ORPC Rule 1.1. We also find that respondent violated RGDP Rule 1.3, which authorizes discipline for acts contrary to prescribed standards of conduct that might reasonably be found to bring discredit upon the legal profession. Respondent's failure to act with reasonable competence in representing Mrs. Cargile constituted a marked departure from the standards of competence imposed by ORPC Rule 1.1 and is grounds for discipline under RGDP Rule 1.3."

The following is a list of materials that might be used to enhance a practitioner's knowledge in the field of Elder Law:

Author	Publication
American Health Lawyers Association	United States Health Care Laws & Rules (one volume manual reprinting federal laws and regulations relating to health care)
Begley & Jeffreys	Representing The Elderly Client: Law and Practice (Aspen Law and Business/Panel Publishers)
Carlson	Long-Term Care Advocacy (Lexis-Nexis)
CCH	Medicare & Medicaid Guide (Five volume set). Primarily written from a provider's perspective, covering reimbursement issues. Also available online
CCH	Medicare & Medicaid Laws and Regulations (Two volume set reprinting federal laws and regulations relating to Medicare and Medicaid)
Collett	Ethics and Elder Law, KELN.org Bibliography, http://www.keln.org/bibs/collett.html
Fleming	Elder Law Answer Book 2nd Edition (Aspen Publishers)
Fratcher	Scott on Trusts (Little, Brown & Company) (Multi-volume treatise on Trust Law)
Frolik & Brown	Advising the Elderly or Disabled Client 2nd Edition (Warren, Gorham & Lamont)
Margolis	The ElderLaw Forms Manual (Aspen Law & Business)
Margolis (Braun)	The ElderLaw Portfolio Series (Aspen Law & Business)
Margolis	The ElderLaw Forms System (Aspen Law & Business)
Mezzullo & Woolpert	Advising the Elderly Client (Clark Boardman & Callaghan) (Three volume set)
NHeLP (National Health Law Program)	An Advocate's Guide to the Medicaid Program (One volume)
Radford	Redfern's Wills and Administration in Georgia, 6th Edition (Harrison) (Two volume set)
Regan, Gilfix, Morgan & English	Tax, Estate & Financial Planning for the Elderly: Forms & Practice (Matthew Bender) (also available online through Lexis)
Robinson & Mobley	Pritchard on Wills and Administration of Estates [in Tennessee] (Michie) (Three volume set)

Author	Publication
Stein & Chiplin	The Medicare Handbook (Aspen Publishers) (One volume handbook, updated annually)
Takacs	Elder Law Practice in Tennessee (Lexis-Nexis) (also available online)
Takacs, Fleming & Morgan	NAELA E-Bulletin, a weekly electronic news bulletin provided to members of the National Academy of Elder Law Attorneys covering current issues in aging and Elder Law
West Group	Federal Social Security Laws: Selected Statutes and Regulations (One volume updated annually)

§ 1.3. Common Ethical Issues Confronting Elder Law Attorneys:⁶

1. Conflicts of interest (MRPC Rule 1.7):

There are at least three common scenarios, discussed in more detail below, under which conflicts arise when representing the Elderly. They are: (1) conflicts arising when representing spouses; (2) conflicts between interests of family members from different generations; and (3) conflicts relating to representation of a fiduciary (such as a guardian, conservator or agent under a power of attorney). The resolution of actual conflicts is governed by MRPC Rule 1.7 and 1.8, discussed below.

2. Potential (e.g., future or perceived) conflicts of interest:

Potential conflicts are those which are not actual conflicts when the representation begins. They may later arise when interests diverge. Fleming provides the following example: suppose you represent the Elder in preparing a power of attorney. Later, after the Elder is incapacitated, the agent seeks counsel concerning a gifting strategy that could (or would) impoverish the Elder. A potential conflict may now be an actual conflict. At this point, Rules 1.7, 1.8 (current clients) and 1.9 (former clients) may apply.

Practice Tip: This issue might be dealt with by having a discussion with the client regarding the scope of the agent's potential activities when the power of attorney is executed and by including specific language in the power of attorney authorizing the agent to engage in gifting. The power of attorney should also authorize the agent to discuss those matters with the attorney, if desired.

3. Confidentiality:

⁶ See R. Fleming, *Elder Law Answer Book*, 2d Ed. Q. 2:1 (Aspen Publishers 2004). See also T. Takacs, *Elder Law Practice in Tennessee*, 2nd Edition § 2.02 (Lexis-Nexis 2004).

In the course of planning, a lawyer frequently gathers a substantial amount of confidential information about the client. Confidentiality is addressed in MRPC Rule 1.6, discussed below.

4. Decision making capacity (or incapacity) of the Elder:

The Elder may or may not be competent to participate in the representation. However, because Elder Law typically focuses on the Elder's needs and/or her assets, her interests must be considered. After all, if the representation involves an asset protection strategy, whose assets are being protected? Capacity issues are addressed in MRPC Rule 1.14, discussed below.

§ 1.4. Conflicts: Who is the Client?

Hypothetical 1, Part 1:

Sally calls your office. Her mom, Mildred, is 84 and has been disagreeable lately. Sally's sister, Mary, took matters into her hands and filed a Petition to establish a Conservatorship. A doctor opined that Mildred is fully disabled. Sally wants you to visit Mildred and speak with her about this matter.

Hypothetical 2, Part 1:

Jane, Sue and Mary visit your office. They inform you that they can provide better care for Mom than the nursing home and that they intend to take Mom home next week. They have not yet consulted with the doctor. They want you to help them transfer Mom's assets to Mary (who will be the primary caregiver at home) so, if Mom later needs to return to the nursing home, she will be eligible for Medicaid.

In many situations, the initial contact is made by a family member or a caregiver. That person may come alone, may transport the elder to the lawyer's office or may be present during interviews. If the elder is present, she may prefer or insist on having the caregiver participate in the meeting. In all likelihood, the family member or caregiver will attempt to participate in the interview and will seek legal advice.

The MRPC neither defines the term "client" nor does it tell the lawyer how to determine the identity of the client. There is no magic formula for determining the client's identity. What the lawyer must do is ensure that the persons involved understand who the client is, and who the client is not. Preferably before, but no later than the conclusion of the initial interview, the persons involved should have reason to "believe" (defined in Rule 1.0) the scope of the representation is defined. It is preferable if this relationship is reduced to writing.

Most Elder Law Attorneys prefer to represent the elder. That is, after all, what we do. If the attorney will represent the Elder, but will be paid by the other family members, then the Elder must consent to the payment arrangement. In addition, the attorney must not allow the other family members to influence his or her professional judgment in rendering legal services to the Elder.

If the attorney represents the family members, then he or she should not give

legal advice to the Elder and should ensure that the Elder has an opportunity to secure separate counsel. The attorney may represent both the senior citizen and other family members if it is obvious that he or she can represent each of their interests appropriately and they all consent to the multiple representation.

Practice Tip: the lawyer should: Identify in writing who he/she is representing and who will direct the scope of representation; Determine, if the Elder is the client, whether he/she has capacity to hire the lawyer and direct the representation; and If multiple parties are present, determine whether their interests diverge.

In the first hypothetical above, it is unclear what Sally is asking the attorney to do, but if she is requesting assistance regarding the conservatorship, there is a clear conflict from the outset. Sally is taking a position that is adverse to Mildred. *See In re Aida M.*, 1997 Conn. Super. LEXIS 889 (“The very appointment of the guardian admits the potential conflict between the respondent's declared wishes and their, undeclared, best interests.”). The second hypothetical is less clear. At first glance it appears as though the Elder’s interests are being advanced. There is no reason to believe that mom can’t contract with her children to provide care if that is her wish and if they can provide the care she needs. Further diligence will be necessary to ensure that the transaction is appropriate.

Hypothetical 1, Part 2:

You meet with Mildred and she responds to your questions with clarity. She is physically frail and is homebound. You ask her whether she understands what Mary proposes. She responds that she loves Mary, but does not want Mary telling her what to do. (Sally is present during this interview and is supportive of Mom). Later, Sally calls you and tells that she spoke with Mary and Mildred and that its OK to proceed as long as she is co-Conservator with Mary.

Conflicts of Interest: General Rule, MRPC Rule 1.7

(a) A lawyer shall not represent a client if the representation of that client will be directly adverse to another client, unless:

- (1) the lawyer reasonably believes the representation will not adversely affect the relationship with the other client; and
- (2) each client consents in writing after consultation.

(b) A lawyer shall not represent a client if the representation of that client may be materially limited by the lawyer’s responsibilities to another client or to a third person, or by the lawyer’s own interests, unless:

- (1) the lawyer reasonably believes the representation will not be adversely affected; and
- (2) the client consents in writing after consultation. When representation of multiple clients in a single matter is undertaken, the consultation shall include explanation of the implications of the common representation and the advantages and risks involved.

The classic example of this type of conflict is where a married couple arrives for consultation regarding estate planning, followed by disclosure by one spouse of a potential conflict (e.g., disclosure of an illegitimate child unknown to the other spouse). Lawyers may attempt to diffuse this situation by sending correspondence to the potential client prior to the initial meeting explaining potential conflicts and how they must be resolved. A written conflict waiver may be used. One ethical question is whether the waiver is effective if the nature of the conflict is not disclosed.

Another potential conflict is where the caregiver arrives, continuing with the second hypothetical described above and, following discussions, it becomes clear that the caregiver is not interested in advancing the elder's interests; instead, the caregiver's sole concern is asset protection. We believe this presents a conflict because the caregiver does not own the assets he or she is attempting to protect and, therefore, any action taken must be done in the name of (and allegedly for the benefit of) the elder. The conflict is more problematic because, in this instance, we presume the elder is unable to consent to a waiver. We believe Principlism is helpful in resolving this dilemma. In particular, we look briefly at *Fickett v. Superior Court*, 558 P.2d 988 (1976). There, the Arizona Court of Appeals employed a balancing test which, although done in a different context, sheds light on this issue. Resolving the dilemma "involves the balancing of various factors, among which are the extent to which the transaction was intended to affect the plaintiff, the foreseeability of harm to him, the degree of certainty that the plaintiff suffered injury, the closeness of the connection between the defendant's conduct and the injuries suffered, the moral blame attached to the defendant's conduct, and the policy of preventing future harm." *Id.*, at 990. This, in our humble opinion, sounds like Principlism.

Cases:

In re Blair, 840 So. 2d 1191 (La. 2003): "For over twenty years, respondent's mother-in-law, Beverly Victorienne, lived next door to Alicemae Casanave, a woman in her eighties. Ms. Victorienne, a retired nurse, became close friends with Ms. Casanave and assisted her in her daily needs. In the summer of 1997, Ms. Casanave's cousin, Mary Ellen Strong, took Ms. Casanave from New Orleans to Atlanta for a period of time. During that time, Ms. Casanave purportedly executed a quitclaim deed, dated August 2, 1997, which provided that Ms. Casanave was transferring her home, valued at approximately \$ 100,000, to Ms. Strong for the sum of \$ 10. When Ms. Casanave returned to New Orleans, her health and mental acuity had declined. She advised Ms. Victorienne and her other friends she had been abducted against her will and feared that Ms. Strong would put her in a nursing facility in order to get her home. Another neighbor contacted Ms. Casanave's next of kin, Marguerite [Pg 2] Thompson, Ph.D., a niece who resided in New York, to advise of her aunt's abduction and her marked change in health. In early August, 1997, Dr. Thompson arrived in New Orleans. She consulted respondent about protecting Ms. Casanave's legal rights. **After meeting with Dr. Thompson, Ms. Casanave and Ms. Victorienne, respondent suggested Ms. Casanave execute a power of attorney in favor of Dr. Thompson. Respondent had Ms. Casanave and Dr. Thompson each sign an employment contract providing that he would be paid a retainer**, in addition to an hourly fee for rendered legal advice and services. ... During the course of the litigation, respondent gave a deposition stating he was retained for the purpose of protecting Ms. Casanave from being abducted again by her cousin. Respondent testified he considered Ms. Casanave to be his only client, and that he had never received legal fees from Dr. Thompson. Respondent maintained that the second power of attorney was drafted because Ms. Casanave wanted his mother-in-law included in the revised power of attorney to assist in handling Ms. Casanave's affairs with Dr. Thompson, who intended to return to New York. Additionally, respondent testified Ms. Casanave made it

clear she did not wish to [*1194] leave her entire estate to Dr. Thompson, and that she did not want the terms of her testament disclosed to anyone..... **The hearing committee determined the ODC proved by clear and convincing evidence that respondent engaged in a conflict of interest in violation of Rules 1.7(b). The committee rejected respondent's position that Ms. Casanave was his only client, noting that the undisputed evidence established Dr. Thompson had signed a retainer agreement,** the committee [**10] found no merit in respondent's argument that Ms. Casanave was his only client. It also determined respondent improperly represented his mother-in-law as executrix and himself in the will contest litigation instituted by his own client, Dr. Thompson. (Emphasis added).

§ 1.5. Scope of the Representation and Allocation of Authority between the Lawyer and Client, MRPC Rule 1.2

(a) Subject to paragraphs (c) and (d), **a lawyer shall abide by a client's decisions** concerning the objectives of the representation and may take such action on behalf of the client as is impliedly authorized to carry out the representation. A lawyer shall abide by a client's decision whether to settle a matter. In a criminal case, the lawyer shall abide by the client's decision as to a plea to be entered, whether to waive jury trial, and whether the client will testify.

(b) A lawyer's representation of a client, including representation by appointment, does not constitute an endorsement of the client's political, economic, social, or moral views or activities.

(c) A lawyer may limit the scope of a client's representation if the limitation is reasonable under the circumstances and the client gives consent, preferably in writing, after consultation.

(d) A lawyer shall not counsel a client to engage, or assist a client, in conduct that the lawyer knows or reasonably should know is criminal or fraudulent, but a lawyer may discuss the legal consequences of any proposed course of conduct with a client and may counsel or assist a client to make a good faith effort to determine the validity, scope, meaning, or application of the law.

(Emphasis added).

Practice Tip: The client, not the lawyer, directs the ultimate scope of the representation. Comment 1 to Rule 1.2 provides: "Both lawyer and client have authority and responsibility in the objectives and means of the representation. The client has ultimate authority to determine the purposes to be served by legal representation, within the limits imposed by law and the lawyer's professional obligations. Also, the decisions specified in paragraph (a), such as whether to settle a civil matter, must be made by the client. Other decisions may be made by the lawyer pursuant to the lawyer's implied authority to take action necessary to carry out the representation, subject to the lawyer's duty to keep the client reasonably informed about the status of the representation. See RPC 1.4. A clear distinction between objectives and means sometimes cannot be drawn, and in many cases the client lawyer relationship partakes of a joint undertaking. In questions of means, for example, the lawyer normally will assume responsibility for technical and legal tactical issues, but the lawyer usually will defer to the

client regarding such questions as the expense to be incurred and concern for third persons who might be adversely affected. Law defining the lawyer's scope of authority in litigation varies among jurisdictions.” (Emphasis added).

While morality is a part of ethics, at least in the philosophical sense, in legal ethics it is generally the client's perception of morality that carries the day, so long as the client's proposed course of action is "legal." See MRPC Rule 1.2; TRPC Rule 1.2. Nonetheless, the lawyer is free to advise the client concerning moral issues. In that regard, we offer the following thoughts.

“The importance of morality and its effect on the results of asset protection planning has been overlooked in the professional literature, where the question of how to protect particular assets eclipses the larger and more important question of whether those assets should be protected at all. Nevertheless, these issues are intertwined. A good asset protection plan may fail if the client is in the wrong, and a bad asset protection plan may succeed if the client is in the right.” J. Adkisson & C. Riser, *Asset Protection: Concepts & Strategies for Protecting Your Wealth* 28 (McGraw Hill 2004).

Cases:

In re Brantley, 260 Kan. 605 (1996). “Brantley never consulted [***31] with Mary Storm as to whether she wanted to have her household property auctioned off. Instead, he relied on Louise Wendler's and the guardian ad litem's statements that Mary Storm had agreed to the sale. At the September 29, 1989, [*622] court appearance, when he learned that Paul Oller had filed an objection to the sale on behalf of Mary Storm and the conservatorship had been terminated, Brantley represented to Judge Goering that Hendrix was misappropriating Mary Storm's funds and convinced the judge that a temporary restraining order needed to be issued. Brantley followed that representation by filing the petition for involuntary conservatorship signed by Ralph Pfenninger. Brantley's authority to act on behalf of Mary Storm ended when the voluntary conservatorship was terminated. (Attorney publicly censured; restitution of attorney's fee ordered).

§ 1.6 Communication with the Client, MRPC Rule 1.4

- (a) A lawyer shall keep a client reasonably informed about the status of a matter and comply with reasonable requests for information within a reasonable time.
- (b) A lawyer shall explain a matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation.

Practice Tip: It goes without saying that the client cannot effectively participate in the scope of the representation unless the client is informed. You must communicate regularly with your clients.

In the context of medical care, the phrase “informed consent” has peculiar meaning. “When a patient consults a physician for a suspected medical problem, the physician makes a diagnosis and recommends treatment.⁷ The physician

⁷ This initial step combines the elements of competence (Rule 1.1) and due diligence.

explains these steps to the patient, giving the reason for the recommended treatment, the options of alternative treatment, and the benefits and burdens of all options. The patient understands the information, assesses the treatment choices and expresses a preference for one of the options proposed by the physician. This ideal scenario captures the essence of the informed consent process.” A. Jonsen et al., *Clinical Ethics 5th Edition* 50 (McGraw Hill Medical Publishing Division 2002).

Without communication necessary to establish “informed consent,” the lawyer will violate Rule 1.2 because the client will have insufficient information to direct the scope of the representation. Thus, Rule 1.2, to a great extent, defines the scope of communication required by Rule 1.4 and the rules should be read together.

Hypothetical 1, Part 3:

Mildred calls you and lets you know that, as much as she loves Mary and Sally, you should not speak with them further. She disagrees with what they are proposing and she wants you to represent her in presenting her side of things. (Privately, you are not certain Mildred can direct the scope of the representation).

§ 1.7 Confidentiality, MRPC Rule 1.6

MRPC Rule 1.6 provides:

(a) Except as provided below, a lawyer shall not reveal information relating to the representation of a client unless the client consents after consultation, except that the lawyer may make such disclosures as are impliedly authorized by the client in order for the lawyer to carry out the representation.

(b) A lawyer may reveal information relating to the representation of a client to the extent the lawyer reasonably believes disclosure is necessary:

- (1) to prevent the client or another person from committing a crime, including a crime that is reasonably certain to result in substantial injury to the financial interest or property of another, unless disclosure is prohibited or restricted by Rule 3.3;
- (2) to secure legal advice about the lawyer’s compliance with these Rules; or
- (3) to establish a claim or defense on behalf of the lawyer in a controversy between the lawyer and the client, to establish a defense to a criminal charge or civil claim against the lawyer based upon conduct in which the client was involved, or to respond to allegations in any proceeding concerning the lawyer’s representation of the client.

(c) A lawyer shall reveal information relating to the representation of a client to the extent the lawyer reasonably believes disclosure is necessary:

- (1) to prevent reasonably certain death or substantial bodily harm;

(2) to comply with an order of a tribunal requiring disclosure, but only if ordered to do so by the tribunal after the lawyer has asserted on behalf of the client all non-frivolous claims that the information sought by the tribunal is protected against disclosure by the attorney-client privilege or other applicable law; or
(3) to comply with Rules 3.3, 4.1, or other law.

Do you violate Rule 1.6 by releasing a Power of Attorney to an Agent?

PA Eth. Op. 2002-52, 2002 WL 32077996 (Pa.Bar.Assn.Comm.Leg.Eth.Prof.Resp.)

Your inquiry to the Committee on Legal Ethics and Professional Responsibility has been referred to me for a response.

You have asked if you may release a certain power of attorney to the brother of the document's principal; the brother being also the agent named in the document. In your letter to Louise M. Lamoreaux, PBA Ethics Coordinator, you state the following facts.

Several years ago, you prepared a Durable Power of Attorney. At that time, your client was elderly, but competent. Then, as now, she has been estranged from all of her likely heirs (who may have standing in a guardianship proceeding), to wit: her daughter and her three brothers. Apparently for that reason, she instructed you verbally, at the time of execution, not to release the power of attorney document to the agent, her brother, without her specific direction.

Since the time of execution, her circumstances have changed in several significant ways. She has been admitted to a nursing facility. She failed to pay a judgment creditor, so that her house was sold at Sheriff's sale.

Other circumstances tend to suggest she has become less able to protect herself, financially. You were told she told others that she will not deposit in a bank the approximately \$25,000.00 she is to receive from the Sheriff, but will instead keep the proceeds in her drawer at the nursing home. You have attempted to telephone her, but have been told by the nurses that she will not accept any calls (not even from her own attorney).

As to her financial affairs, the situation is exigent, as her personalty must be removed from the home, and there is the matter of protecting the realty sale proceeds.

The brother who is named as agent in the Durable Power of Attorney has telephoned you, demanding that you release the document to him.

Rule of Professional Conduct 1.14(b) provides that a lawyer may take protective action with respect to a client, but "only when the lawyer reasonably believes that the client cannot adequately act in the client's own interest."

In my opinion, you may release the power of attorney document to the brother, notwithstanding the prior verbal instruction of your client, but only after you have satisfied yourself on competent evidence that you reasonably believe the client cannot adequately protect her financial interests. I mention "competent evidence" to encourage you to visit the client personally, in the nursing home, to enable yourself to make a first-hand evaluation as to her competency, rather than to rely on the hearsay statements of others.

In doing so, you should keep in mind the admonition of Rule 1.14(a) that you should "as

far as possible, maintain a normal client lawyer relationship with the client."

***2 In summary, I recommend that you visit the client, and then release the power of attorney to the named agent, if you are able to satisfy yourself that the client does suffer a mental disability sufficient to prevent her from protecting her interests; recognizing that this mental disability could preclude her from perceiving her own situation, such that she cannot give the direction to you to release the document; and recognizing further that the document was doubtlessly intended by her to be used in just such a situation as that she apparently faces.**

Your only alternative course of action would be to seek an emergency guardianship order, which you could seek, yourself, under Rule 1.14, if necessary. However, this would be more expensive to the client and more time-consuming. As such, it would less suit the exigency of this situation. Moreover, the existence of the power of attorney would ordinarily be a defense to a guardianship action, in any case. Consequently, I believe the course of action described in the prior paragraph would seem more protective of the client.

Finally, you should explain to the brother his fiduciary duties under the revised power of attorney statutes, and endeavor to assist him, if feasible, in meeting those duties.

Please note that this opinion is advisory only, and is not binding on the Disciplinary Board of the Supreme Court of Pennsylvania, or any court. It carries only such weight as an appropriate reviewing authority may choose to give it. Moreover, this is the opinion of only one member of the Committee, and is not an opinion of the full Committee.

(Emphasis added).

Do you violate Rule 1.6 by disclosing a client's intent to harm himself/herself?

CT Eth. Op. 00-5, 2000 WL 1370782 (Conn. Bar. Assn.).

In the context of the facts we have been asked to assume and subject to the qualifications set forth below, it is our opinion that a lawyer, without the client's consent, may disclose the client's intent to commit suicide in order to prevent it. The basis for this opinion is Rule 1.14, Client Under A Disability. ... Under normal circumstances a lawyer may not reveal information relating to representation of a client without the client's explicit or implicit consent. Rule 1.6(a). ... Rule 1.14(b) applies only when "the lawyer reasonably believes that the client cannot adequately act in the client's own interest." In such a situation, "[a] lawyer may seek the appointment of a guardian or take other protective action with respect to a client" Rule 1.14(b). The phrase "take other protective action" is broad and in our judgment, notwithstanding Rule 1.6, must be interpreted to include disclosing the client's suicidal intent to someone who can help prevent the suicide. Interpreting "other protective action" to exclude disclosure would defeat the purpose of Rule 1.14(b). Protecting the health and safety of a client who is unable to act in his own interest is more important than maintaining complete confidentiality of all information about the client.

See also SC Adv. Op. 99-12, 1999 WL 1893872 (S.C.Bar.Eth.Adv.Comm.) (similar result).

Is the Rule different if property is in jeopardy?

CT Eth. Op. 98-17, 1998 WL 988207 (Conn.Bar.Assn.).

You represent an elderly man who owns and manages a mobile home park in which he resides. He is assisted by a professional bookkeeper. Recently the two of you have noticed that the gentleman slurs his speech at times, makes decisions regarding the rental of his property which you characterize as "questionable," and has failed to complete leases and maintain the documentation necessary for evictions. The bookkeeper has informed you that she suspects alcohol abuse. The client lives alone and is without family of any kind since the suicide of a long-term companion. [Committee determines you cannot consult with client's doctor]. ... Your next question deals with whether you must seek the appointment of a conservator for your client, even over his objection, if you feel his behavior continues to interfere with his business. Again, we refer you to Rule 1.14 and the Commentary thereto. The general rule under subsection (a) of Rule 1.14 is that "when a client's ability to make adequately considered decisions in connection with the representation is impaired, ... the lawyer shall, as far as reasonably possible, maintain a normal client-lawyer relationship with the client." Subsection (b) permits the lawyer "to seek the appointment of a guardian or take other protective action with respect to a client only when the lawyer reasonably believes that the client cannot adequately act in the client's own interest." (Emphasis added.) The language of the general rule is mandatory. The language of subsection (b) is permissive but authorizes intervention only where the lawyer acts upon reasonable belief that the client is not competent to make decisions in his own interest. Clearly subsection (b) means more than a belief that the client is a bad businessman.

Hypothetical 1, Part 4:

You continue to represent Mildred opposing the Conservatorship. As you continue discussing her case with her, she expresses a desire to have her daughters help her with her finances, but gives you no direction concerning how she would structure that relationship. You suggest several alternatives and she refuses to make a decision. You make repeated calls and visits, but Mildred will not give you direction. The hearing is tomorrow.

Hypothetical 1, Part 4 presents a problem that seems to be insurmountable. First, it assumes you have gotten beyond the initial issue of who is the client and that you are representing Mildred. She is opposed to the Conservatorship and you have begun representing her in opposing it. Now it appears as though she cannot assist you in that regard (e.g., she probably needs assistance). Can you disclose that to the court? The comments to Rule 1.14 provide some assistance in answering this question, but essentially leave that decision to "the professional judgment of the lawyer." Comment 7, Rule 1.14.

§ 1.8 Client With a Disability, MRPC Rule 1.14

(a) When a client's ability to make adequately considered decisions in connection with the representation is impaired, whether because of minority, mental disability, or for some other reason, the lawyer shall, as far as reasonably possible, maintain a normal client-lawyer relationship with the client.

(b) A lawyer may seek the appointment of a guardian or take other protective action with respect to a client only when the lawyer reasonably believes that the client cannot adequately act in the client's own interest.

Reviewing Hypothetical 1:

1998 NC Eth. Op 16, 1999 WL 33262173 (N.C.St.Bar.)

Opinion rules that a lawyer may represent a person who is resisting an incompetency petition although the person may suffer from a mental disability, provided the lawyer determines that resisting the incompetency petition is not frivolous.

Inquiry # 1:

Wife, who is elderly, was removed from the marital home. Husband, who is also elderly, contacted Attorney A because Husband did not understand why his wife was removed from the home. He asked Attorney A to investigate. Attorney A discovered that Wife was the subject of an involuntary incompetency proceeding. When Attorney A gained access to Wife, she indicated that she wanted Attorney A to represent her in resisting the involuntary incompetency petition. She repeatedly said that she wanted to go home to live with her husband.

Attorney A also learned that Husband was investigated by police relative to allegations of abuse and neglect of Wife. Attorney A met with Husband and told him that he could not represent Wife in resisting the incompetency petition and represent Husband in defending against an action in connection with Wife's care or treatment. Husband agreed that Attorney A's representation would be limited to representing Wife in resisting the incompetency petition and that Husband would be responsible for paying the legal fees for that representation. A written fee agreement memorializing this arrangement was executed. Although Wife was held in a hospital at this time, she continued to express unequivocally that she desired Attorney A to represent her.

When Attorney A visited Wife, he noticed abnormalities in her behavior but he also witnessed extended periods of apparent lucidity. She repeatedly told Attorney A she wanted to go home, that she did not want an appointed guardian, and that she did not want to be declared incompetent. Attorney A filed several motions in the incompetency proceeding, including a motion to remove the guardian and for a jury trial. At the incompetency hearing before the clerk, the attorney for the Department of Social Services (DSS) and the guardian ad litem who had been appointed for Wife by the clerk, contended that Attorney A had no "standing or authority" to pursue motions on behalf of Wife. They argued that Attorney A had a conflict of interest due to his initial representation of Husband and Husband's continued payment for the representation. The clerk found that Attorney A was without "standing or authority" to represent Wife and summarily denied all motions filed on Wife's behalf by Attorney A. Attorney A's motion to stay the incompetency proceeding was also denied.

During the incompetency hearing, Attorney A was not allowed to participate as counsel for Wife. Attorney A was called as a witness, however. Wife, when she testified, could not identify Attorney A as her lawyer. However, she expressed a desire to return home with her husband to avoid becoming a ward of the state. At the close of the evidence, the clerk declared Wife incompetent and appointed the director of DSS to be her legal guardian.

*2 Thereafter Attorney A filed a notice of appeal seeking a trial de novo in superior court on the issues of right to counsel, incompetency, and right to a jury trial. The attorney for DSS now contends that Attorney A has no authority to represent Wife because she has been adjudicated incompetent and only her legal guardian may make decisions about her legal representation. The DSS lawyer now demands that Attorney A provide the guardian with a copy of every document in Wife's legal file.

Does Attorney A have a conflict of interest because he initially represented Husband?

Opinion # 1:

No. The representation of Wife in the incompetency proceeding is not a representation that is adverse to the interest of Husband. Furthermore, Attorney A obtained the consent of Husband to represent only Wife in the incompetency proceeding. The exercise of Attorney A's independent professional judgment on behalf of Wife is not impaired by the prior representation of Husband. See Rule 1.7 and Rule 1.9.

Inquiry # 2:

Does it matter that Husband pays for the representation of Wife?

Opinion # 2:

No. Rule 1.8(f) of the Revised Rules of Professional Conduct permits a lawyer to accept compensation for representing a client from someone other than the client if the client consents after consultation; there is no interference with the lawyer's independent professional judgment or the attorney-client relationship; and the confidentiality of client information is protected.

Inquiry # 3:

Wife has been declared incompetent by the state and a guardian appointed to represent her interests. Does Attorney A have to treat Wife as incompetent and defer to the decision of the guardian relative to the representation of Wife?

Opinion # 3:

No. Wife is entitled to counsel of her own choosing particularly with regard to a proceeding that so clearly and directly affects her freedom to continue to make decisions for herself. Rule 1.14(a) provides as follows: "[w]hen a client's ability to make adequately considered decisions in connection with the representation is impaired, whether because of minority, mental disability, or for some other reason, the lawyer shall, as far as reasonably possible, maintain a normal client-lawyer relationship with the client." If Attorney A is able to maintain a relatively normal client-lawyer relationship with Wife and Attorney A reasonably believes that Wife is able to make adequately considered decisions in connection with her representation, Attorney A may continue to represent her alone without including the guardian in the representation. However, if Attorney A has reason to believe that Wife is incapable of making decisions about her representation and is indeed incompetent, the appeal of the finding of incompetency may be frivolous. If so, Attorney A may not represent her on the appeal. See Rule 3.1 (prohibiting frivolous claims and defenses).

Inquiry # 4:

*3 Once the guardian was appointed for Wife, did the guardian become Attorney A's client, or otherwise step into the shoes of Wife, such that Attorney A may only take directions from the guardian and not from Wife?

Opinion # 4:

No. Rule 1.14(a) quoted above indicates that a lawyer may represent a client under a mental disability. The lawyer owes the duty of loyalty to the client and not to the guardian or legal representative of the client, particularly if the lawyer concludes that the legal guardian is not acting in the best interest of the client.

Inquiry # 5:

Does Attorney A have to turn over Wife's legal file to Wife's appointed guardian?

Opinion # 5:

No. When a guardian is appointed for a client, a lawyer may turn over materials in the client's file and disclose other confidential information to the guardian if the release of such confidential information is consistent with the purpose of the original representation of the client or consistent with the express instructions of the client. See, e.g., RPC 206 (attorney for deceased client may release confidential information to the personal representative of the estate). However, where, as here, the release of confidential information to a guardian is contrary to the purpose of the representation, the lawyer must protect the confidentiality of the client's information and may not release the legal file to the guardian absent a court order. See Rule 1.6(d)(3).

The Lawyer as an Advisor

Hypothetical 2, Part 1:

John and Nancy are married. John was recently admitted to a nursing home and Nancy is in your office seeking public benefits advice. Together, they have accumulated just under \$200,000 in liquid assets and own a home. All property is jointly owned. Nancy is afraid she will have to spend their savings paying for nursing home care and is afraid she will lose the home.

§ 2.1 The Lawyer's Role as Advisor, MRPC Rule 2.1

In representing a client, a lawyer shall exercise independent professional judgment and render candid advice. In rendering advice, a lawyer may refer not only to law, but to other considerations such as moral, economic, social, and political factors that may be relevant to the client's situation.

Hypothetical 2, Part 2:

After speaking with Nancy, you visit with John in the nursing home. He appears confused at first. As you speak with him, he begins to understand who you are. John: (a) Is willing to sign a power of attorney giving Nancy authority to transfer all martial assets to herself; or (b) Is afraid Nancy will leave him and refuses to sign a power of attorney or other transfer documents.

Hypothetical 2, Part 3:

Instead of meeting with Nancy, you are meeting with John's son, Paul. Nancy is deceased. John is certain his Dad would never want to spend all of his assets paying for nursing home care and wants you to help him protect Dad's assets. In this case, Paul wants to protect John's assets. In our view, John's interests must be considered and John must be viewed as the intended beneficiary of the asset protection plan. Taken a step further, unless Paul brings with him the power to transfer John's assets, the Elder Law

Attorney cannot transfer those assets without John's consent.⁸ Moreover, even if John has consent, the attorney must not assist a client in taking action that the lawyer knows is criminal or fraudulent.⁹

TRPC Rule 5.4(c): "A lawyer shall not permit a person who recommends, employs, or pays the lawyer to render legal services for another to direct or regulate the lawyer's professional judgment in rendering such legal services."

TRPC Rule 1.7(b): "A lawyer shall not represent a client if the representation of that client may be materially limited by the lawyer's responsibilities to another client **or to a third person, ...**" (Emphasis added).

CT Eth. Op. 97-35, 1997 WL 816056 (Conn.Bar.Assn.).

You represent a four year old child in connection with the child's application for Social Security disability benefits. The mother of the minor child has applied for benefits on behalf of the child and has retained you to represent the child on a contingency basis. [FN1] You believe that the child is likely to be found disabled and eligible to receive benefits.

The child's parents have a continuing history of verbal and physical conflict. Your client's father has informed you that the mother has a history of drug addiction and arrests for prostitution. He also reports that the Department of Children and Family Services has taken the child from the mother more than once due to neglect and abuse. The child's father has a criminal record. In your dealings with your client's parents you have found the father to be more stable than the mother.

The mother has called you and informed you that she wants to be the representative payee for the child. When you informed her that you could not guarantee that she would be the representative payee for the child, the mother told you that she was withdrawing the application. The father subsequently called and told you to proceed. The father appears genuinely concerned with the welfare of the child and would prefer a representative payee other than himself or the mother. You believe it is in the child's best interest to proceed with the application for benefits. You have not indicated who you feel would be an appropriate representative payee. You have informed a member of this committee over the telephone that from your interactions with the child and because of the child's youth you do not believe the child is able to make an informed decision.

You have asked how you should proceed with the case in order to meet your obligation to the child. You have also asked what your obligation is to the child's mother and father.

Obligation to the child:

Your client is the child. Pursuant to Rule 1.14(a) "When a client's ability to make adequately considered decisions in connection with the representation is impaired,

⁸ MRPC Rule 1.2(d). In considering whether a transfer of assets might be prohibited by Rule 1.2(d), we present the following example: "A person commits theft of property if, with intent to deprive the owner of property, the person knowingly obtains or exercises control over the property without the owner's effective consent." T.C.A. § 39-14-103.

⁹ MRPC Rule 1.7. Regardless of client identity, because property rights cannot be transferred without the consent of the owner or his authorized representative, the Elder Law Attorney cannot engage in Medicaid Planning without taking the Elder's interests into account. Even if the Elder is not the client, we believe that creates the type of responsibility to the Elder described in Rule 1.7(b). Furthermore, if the client represents the Elder's personal representative, the lawyer may have a duty to prevent or rectify misconduct. *See* MRPC Rule 1.4, Note 4. In sum, we do not believe the Elder Law Attorney may ethically abandon the Elder's well-being in favor of other persons who are interested in acquiring the Elder's assets.

whether because of minority, mental disability or for some other reason, the lawyer shall, as far as reasonably possible, maintain a normal client-lawyer relationship with the client."

The maintenance of a "normal attorney-client relationship requires competence (Rule 1.1), adherence to the client's instructions (Rule 1.2), diligence (Rule 1.3), communication (Rule 1.4), confidentiality (Rule 1.6), avoidance of conflict (Rules 1.7 through 1.10) and safe keeping of property (Rule 1.15)" (Informal Opinion 94-29). The comments to the rule advise that the "normal attorney-client relationship is based upon an assumption that" the child is capable of making decisions about important matters when properly advised and assisted.

*2 You have informed us that from your interactions with the child, the child is unable to make an informed decision on the issue due to the child's youth (4 years old). [FN2] In situations like this one, where the parents are at odds, and the child has no opinion, you are an appropriate person to protect the best interests of the child. (See, *Schult v. Schult*, 241 Conn. 767,779- 81 (1997) (where the court discussed the role of the attorney for the child in divorce proceedings where the child cannot directly express an opinion in holding that the attorney for the child could even advocate a position different from that of the guardian ad litem, if the trial court permits it)). Since you state that you believe it is in the child's best interest to proceed with the application for benefits, you should do what is legally necessary to accomplish that goal for your client. If in your professional judgment you decide after a thorough review of the circumstances that the child cannot act in his or her best interest and it is in the child's interest to have a conservator or a guardian ad litem appointed through the Probate Court, the rule permits you to seek such an appointment. (Rule 1.14(b)) (See also Informal Opinion 97-19 attached.)

Obligation to the parents:

Your relationship with the parents is governed by Rule 5.4(c) which provides: "A lawyer shall not permit a person who recommends, employs, or pays the lawyer to render legal services for another to direct or regulate the lawyer's professional judgment in rendering such legal services." Therefore, you have no obligation to abide by the wishes of either parent in advocating on behalf of your client. As discussed above, your obligation is to represent the child according to your own professional judgment even if it conflicts with the desires of the parent or parents. You may not, however, advocate a position that is against the best interest of the child. The parents, if they wish, may obtain their own counsel to represent their interests. (See Informal Opinion 92-7 and Informal Opinion 87-13).

The Lawyer as an Advocate

§ 3.1 Meritorious Claims and Contentions, MRPC Rule 3.1

A lawyer shall not bring or defend or continue with the prosecution or defense of a proceeding, or assert or controvert or continue to assert or controvert an issue therein, unless after reasonable inquiry the lawyer has a basis for doing so that is not frivolous, which includes a good faith argument for an extension, modification, or reversal of existing law. ...

§ 3.2 Expediting Litigation, MRPC Rule 3.2

A lawyer shall make reasonable efforts to expedite litigation.

§ 3.3 Candor Toward the Tribunal, MRCP Rule 3.2

(a) A lawyer shall not knowingly:

- (1) make a false statement of fact or law to a tribunal; or
- (2) fail to disclose to the tribunal legal authority in the controlling jurisdiction known to the lawyer to be directly adverse to the position of the client and not disclosed by opposing counsel; or
- (3) in an ex parte proceeding, fail to inform the tribunal of all material facts known to the lawyer that will enable the tribunal to make an informed decision, whether or not the facts are adverse.

(b) A lawyer shall not offer evidence the lawyer knows to be false, except that a lawyer who represents a defendant in a criminal proceeding, and who has been denied permission to withdraw from the defendant's representation after compliance with paragraph (f), may allow the client to testify by way of an undirected narrative or take such other action as is necessary to honor the defendant's constitutional rights in connection with the proceeding.

(c) A lawyer shall not affirm the validity of, or otherwise use, any evidence the lawyer knows to be false.

(d) A lawyer may refuse to offer or use evidence, other than the testimony of a client who is a defendant in a criminal matter, that the lawyer reasonably believes is false, misleading, fraudulent or illegally obtained.

(e) If a lawyer knows that the lawyer's client intends to perpetrate a fraud upon the tribunal or otherwise commit an offense against the administration of justice in connection with the proceeding, including improper conduct toward a juror or a member of the jury pool, or comes to know, prior to the conclusion of the proceeding, that the client has, during the course of the lawyer's representation, perpetrated such a crime or fraud, the lawyer shall advise the client to refrain from, or to disclose or otherwise rectify, the crime or fraud and shall consult with the client about the consequences of the client's failure to do so.

(f) If a lawyer, after consultation with the client as required by paragraph (e), knows that the client still intends to perpetrate the crime or fraud, or refuses or is unable to disclose or otherwise rectify the crime or fraud, the lawyer shall seek permission of the tribunal to withdraw from the representation of the client and shall inform the tribunal, without further disclosure of information protected by Rule 1.6, that the lawyer's request to withdraw is required by the Rules of Professional Conduct.

(g) A lawyer who, prior to conclusion of the proceeding, comes to know that the lawyer has offered false tangible or documentary evidence shall withdraw or disaffirm such evidence without further disclosure of information protected by Rule 1.6.

(h) A lawyer who, prior to the conclusion of the proceeding, comes to know that a person other than the client has perpetrated a fraud upon the tribunal or otherwise committed an offense against the administration of justice in connection with the proceeding, and in which the lawyer's client was not implicated, shall promptly report the improper conduct to the tribunal, even if so doing requires the disclosure of information otherwise protected by Rule 1.6.

(i) A lawyer who, prior to conclusion of the proceeding, comes to know of improper conduct by or toward a juror or a member of the jury pool shall report the improper conduct to the tribunal, even if so doing requires the disclosure of information otherwise protected by Rule 1.6.

(j) If, in response to a lawyer's request to withdraw from the representation of the client or the lawyer's report of a perjury, fraud, or offense against the administration of justice by a person other than the lawyer's client, a tribunal requests additional information that the lawyer can only provide by disclosing information protected by Rule 1.6 or 1.9(c), the lawyer shall comply with the request, but only if finally ordered to do so by the tribunal after the lawyer has asserted on behalf of the client all non-frivolous claims that the information sought by the tribunal is protected by the attorney-client privilege.

§ 3.4 Fairness to the Opposing Party and Counsel, MRCP Rule 3.4

A lawyer shall not:

(a) unlawfully obstruct another party's access to evidence or unlawfully alter, destroy, or conceal a document or other material having potential evidentiary value. A lawyer shall not counsel or assist another person to do any such act; or

(b) falsify evidence, counsel or assist a witness to offer false or misleading testimony; or

(c) knowingly disobey an obligation under the rules of a tribunal except for an open refusal based on an assertion that no valid obligation exists; or

(d) in pretrial procedure, make a frivolous discovery request or fail to make a reasonably diligent effort to comply with a legally proper discovery request by an opposing party; or

(e) in trial,

- (1) allude to any matter that the lawyer does not reasonably believe is relevant or that will not be supported by admissible evidence;
- (2) assert personal knowledge of facts in issue except when testifying as a witness; or
- (3) state a personal opinion as to the justness of a cause, the credibility of a witness, the culpability of a civil litigant or the guilt or innocence of an accused; or

(f) request a person other than a client to refrain from voluntarily giving relevant information to another party unless:

- (1) the person is a relative or an employee or other agent of a client; and
- (2) the lawyer reasonably believes that the person's interests will not be adversely affected by refraining from giving such information; or

(g) request or assist any person to take action that will render the person unavailable to appear as a witness by way of deposition or at trial; or

(h) offer an inducement to a witness that is prohibited by law; or pay, offer to pay, or acquiesce in the payment of compensation to a witness contingent on the content of his testimony or the outcome of the case. A lawyer may advance, guarantee, or acquiesce in the payment of:

- (1) expenses reasonably incurred by a witness in attending or testifying;
- (2) reasonable compensation to a witness for that witness's loss of time in attending or testifying; or
- (3) a reasonable fee for the professional services of an expert witness.

Practical Issues:

1. **Settlements.** Client can no longer assist in directing the litigation. A settlement offer is on the table.

PA Eth. Op. 2003-07, 2003 WL 1901443 (Pa.Bar.Assn.Comm.Leg.Eth.Prof.Resp.)

Dear Attorney:

You are the attorney for the plaintiff in a personal injury lawsuit and you have received a favorable offer in settlement but despite diligent search you cannot find your client. Under such circumstances, is it improper to settle the suit on behalf of your client?

The hornbook answer is this: it is professionally improper for an attorney to settle a lawsuit and direct the cashing of a settlement check without authorization by the client and such impropriety requires discipline. The basis for such a hornbook answer is a literal reading of the language in Rule 1.2(a) of the Rules of Professional Conduct: "... A lawyer shall abide by a client's decision whether to accept an offer of settlement of a matter."

Likely the most-cited case on this issue is *In re Walner*, 119 Ill.2d 511, 116 Ill.Dec. 688, 519 N.E.2d 903 (1988) ("the Walner case"). The Illinois Supreme Court considered the following facts: one of 4 plaintiffs was missing and could not be located despite a diligent search and the attorney retainer agreement stated "no settlement will be made without the consent of the injured party" even though another of the plaintiffs assured the lawyer that all the plaintiffs agreed to the settlement. In the Walner case the Illinois Supreme Court still ruled that it was improper for the lawyer to settle the missing plaintiff's claim and to deduct even a reasonable attorney fee without authority from the client. The Illinois Supreme Court did impose censure, not suspension or disbarment, because the lawyer's conduct seemed to spring from a misguided sense of efficiency and was designed to accommodate clients who were difficult to reach.

I would, however, point out to you Rule 1.14 Clients Under A Disability, particularly subsection (b): A lawyer may seek the appointment of a guardian or take other protective action with respect to a client, only when the lawyer reasonably believes that the client cannot adequately act in the client's own interest. It seems to me that a client who, voluntarily or involuntarily, has disappeared and cannot be found, is in the same relation to the attorney as a client who is underage or who suffers from a mental disorder or disability.

After a hearing with the missing client separately represented and the proposed offer put on the record, the Court thus would be acting on behalf of the client in giving you authority to settle the case and to pay out attorney fees and to hold the balance until/unless the client abandons that property by not reappearing.

It would appear reasonable and professional to request the Court to appoint a guardian or legal representative in proceedings where the Court will be asked to approve the settlement proposal and to approve attorney fees and to direct how long to set aside the balance for the missing client to reappear and make a claim before the balance is escheated.

*2 Ordinarily, I would conclude by asking whether you agree to publication of this letter. However, I do not consider this as an Ethical Opinion on behalf of the Committee. Rather, it is a lawyer to lawyer communication on how to address a problem with implications for the efficient administration of the legal system despite the hornbook answer which would have this case stand dormant unless the client somehow resurfaces. I am sending a copy of this letter to the Committee; you and the Committee may wish to follow up on the incredibly interesting issue raised in this Inquiry.

(Emphasis added).

2. Lawyer as Witness (or potential witness). Tenn. Formal Ethics Opinion Number 81-F-10 (June 25, 1981). The lawyer should decline representation where he/she (or the lawyer's staff) would appear as a witness.

The Lawyer as Intermediary

§ 4.1 Lawyer Serving as Intermediary Between Clients, MRPC Rule 2.2

(a) A lawyer represents clients as an intermediary when the lawyer provides impartial legal advice and assistance to two or more clients who are engaged in a candid and non-adversarial effort to accomplish a common objective with respect to the formation, conduct, modification, or termination of a consensual legal relation between them.

(b) A lawyer shall not represent two or more clients as an intermediary in a matter unless:

- (1) as between the clients, the lawyer reasonably believes that the matter can be resolved on terms compatible with the best interests of each of the clients, that each client will be able to make adequately informed decisions in the matter, that there is little risk of material prejudice to the interest of any of the clients if the contemplated resolution is

- unsuccessful, and that the intermediation can be undertaken impartially;
- (2) the lawyer's representation of each of the clients, or the lawyer's relationship with each, will not be adversely affected by the lawyer's responsibilities to other clients or third persons, or by the lawyer's own interests;
 - (3) the lawyer consults with each client about:
 - (i) the lawyer's responsibilities as an intermediary;
 - (ii) the implications of the intermediation (including the advantages and risks involved, the effect of the intermediation on the attorney-client privilege, and the effect of the intermediation on any other obligation of confidentiality the lawyer may have);
 - (iii) any circumstances that will materially affect the lawyer's impartiality between the clients; and
 - (iv) the lawyer's representation in another matter of a client whose interests are directly adverse to the interests of any one of the clients; and any interests of the lawyer, the lawyer's other clients, or third persons that will materially limit the lawyer's representation of one of the clients; and
 - (4) each client consents in writing to the lawyer's representation and each client authorizes the lawyer to disclose to each of the other clients being represented in the matter any information relating to the representation to the extent that the lawyer reasonably believes is required to comply with Rule 1.4.

(c) While representing clients as an intermediary, the lawyer shall:

- (1) act impartially to assist the clients in accomplishing their common objective;
- (2) as between the clients, treat information relating to the intermediation as information protected by Rule 1.6 that the lawyer has been authorized by each client to disclose to the other clients to the extent the lawyer reasonably believes necessary for the lawyer to comply with Rule 1.4; and
- (3) shall consult with each client concerning the decisions to be made with respect to the intermediation and the considerations relevant in making them, so that each client can make adequately informed decisions.

(d) A lawyer shall withdraw from service as an intermediary if:

- (1) any of the clients so requests;
- (2) any of the clients revokes the lawyer's authority to disclose to the other clients any information that the lawyer would be required by Rule 1.4 to reveal to them; or
- (3) any of the other conditions stated in paragraph (b) are no longer satisfied.

(e) If the lawyer's withdrawal is required by paragraph (d)(2) the lawyer shall so advise each client of the withdrawal, but shall do so without any further disclosure of information protected by Rule 1.6.

Attorney's Fees

Setting fees may be difficult and little guidance exists concerning what fees should be charged. It is clear, however, that an unreasonable fee can result in disciplinary sanctions. In that regard, Rule 1.5 provides as follows:

§ 5.1 Fees, MRPC Rule 1.5

(a) A lawyer's fee and charges for expenses shall be reasonable. The factors to be considered in determining the reasonableness of a fee include the following:

- (1) the time and labor required, the novelty and difficulty of the questions involved, and the skill requisite to perform the legal service properly;
- (2) the likelihood, if apparent to the client, that the acceptance of the particular employment will preclude other employment by the lawyer;
- (3) the fee customarily charged in the locality for similar legal services;
- (4) the amount involved and the results obtained;
- (5) the time limitations imposed by the client or by the circumstances;
- (6) the nature and length of the professional relationship with the client;
- (7) the experience, reputation, and ability of the lawyer or lawyers performing the services;
- (8) whether the fee is fixed or contingent;
- (9) prior advertisements or statements by the lawyer with respect to the fees the lawyer charges; and
- (10) whether the fee agreement is in writing.

(b) When the lawyer has not regularly represented the client, the basis or rate of the fee shall be communicated to the client, preferably in writing, before or within a reasonable time after commencing the representation.

(c) A fee may be contingent on the outcome of the matter for which the service is rendered, except in a matter in which a contingent fee is prohibited by paragraph (d) or other law. A contingent fee agreement shall be in writing, signed by the client, and shall

state the method by which the fee is to be determined, including the percentage or percentages that shall accrue to the lawyer in the event of litigation, settlement, trial, or appeal; other expenses to be deducted from the recovery; and whether such expenses are to be deducted before or after the contingent fee is calculated. Upon conclusion of a contingent fee matter, the lawyer shall provide the client with a written statement stating the outcome of the matter and whether there was a recovery, and showing the remittance, if any, to the client and the method of its determination.

(d) A lawyer shall not enter into an arrangement for, charge, or collect:

(1) any fee in a domestic relations matter, the payment or amount of which is contingent upon the securing of a divorce or the award of custodial rights, or upon the amount of alimony or support, or the value of a property division or settlement, unless the matter relates solely to the collection of arrearages in alimony or child support or the enforcement of an order dividing the marital estate and the fee arrangement is disclosed to the court; or

(2) a contingent fee for representing a defendant in a criminal case.

(e) A division of a fee between lawyers who are not in the same firm may be made only if:

(1) the division is in proportion to the services performed by each lawyer or, by written consent of the client, each lawyer assumes joint responsibility for the representation; and

(2) the client is advised of and does not object to the participation of all the lawyers involved; and

(3) the total fee is reasonable.

Cases:

Atty. Griev. Comm'n v. McLaughlin, 372 Md. 467 (2002): In the case before us, respondent offered his clients, generally elderly nursing home applicants and/or their caretakers, the "opportunity" to secure an asset protection plan designed by him. The purpose of the plan, ostensibly, was to manage the clients' assets so that they might qualify for Medicaid benefits without being penalized for improperly transferring their assets. McLaughlin had his clients sign a fee agreement, which called for the client to pay a "design engagement fee" initially and, thereafter, an "implementation engagement fee" to carry out the terms of the plan. All fees under the agreement were "earned when paid and [were] deposited into the firm's operating account." McLaughlin charged a design engagement fee to each of his four clients whose complaints initiated this case. The Perkins were charged \$ 9,000, Glennys [***43] Wise was charged \$ 6,000, and Roland Burkner and Arlene Glomp individually were charged \$ 10,000.

The so-called "implementation engagement fee" was a "contingent, sliding scale based on a set percentage of the projected savings," namely 25% of savings with a maximum of \$ 40,000. According to the terms of the fee agreement, the projected savings was computed by considering some or all of the following sources:

- a. Transfers/Gifts made. If a specific past transfer is not included it must be specified here.
- b. Protected spending, including but not limited to: funeral payments, care contracts, attorney's fees, house improvements, car purchases, etc.
- [*498] c. Although Attorney's fees are a protected expense, they are not considered a savings for purposes of calculating the fee.
- d. Net savings on sale of the house. Includes Capital Gains savings, etc.
- e. The Spousal Impoverishment amount.
- f. Future earnings on amounts transferred that would have not been available otherwise.
- g. Increased savings in monthly income that would have not been available otherwise.
- h. Value of death value in protected Life Insurance Policies.

If the applicant was unable to qualify for Medicaid, McLaughlin provided various alternative remedies:

...

When McLaughlin failed to perform any services under all of the fee agreements in this case, the clients were forced to accept respondent's chosen option for repayment. With the Perkins and Burkers, he chose to repay the unearned fees over a period greater than thirty days, thereby, creating a lending arrangement with these clients, in which he was a borrower and the clients were unsuspecting lenders. His activities in this regard, his failure to respond to his clients' requests, his failure to provide services in return for the fees he received, and his improper handling of his clients' fee payments constituted violations of numerous Rules of Professional Conduct as well as several statutes governing attorney conduct. We explain.

The Perkins family paid McLaughlin a total of \$ 40,000 and never received any plans. The Glomps paid a total of \$ 10,000 and received nothing in return. Glennys Wise, who represented [*502] the interests of both her mother, Irene Ellsworth, and her aunt, Edna Terhall, in qualifying for medical assistance, paid \$ 12,000 as a fee to McLaughlin, who failed to perform any services of appreciable value for the three women. Mrs. Ellsworth died on March 12, 1999, and none of the unearned fee was returned to Ms. Wise, notwithstanding her request. ...

In sum, McLaughlin received a total of \$ 72,000 from the four clients. In determining the reasonableness of that amount, we need not consider the factors under MRPC 1.5(a). Because little or no work was performed in exchange for that fee, we deem McLaughlin's fees in the cases before us to be unreasonable per se. Monfried, 368 Md. at 393, 794 A.2d at 103 ("A fee charged for which little or no work was performed is an unreasonable fee."). None of the four client families received any asset protection plans; in fact, they received nothing of value. Accordingly, we agree with the hearing judge that the fees charged were exorbitantly excessive and constituted a violation of 1.5(a).

Conclusion

The MRPC provides a framework within which we must operate as members of the Bar. Neither requires that lawyers take action adverse to the interests of the Elderly or infirm. Where appropriate, Elder Law Attorneys should develop an "Elder-centered" approach to assist their clients. In that regard, Principlism should be considered.

Principlism as an Ethical Framework

Principlism is an ethical framework which we suggest is helpful in Elder Law cases, particularly where the Elder's capacity to consent is questionable. It consists of four elements: beneficence, autonomy, non-maleficence, and justice. Each of these principles is discussed below.¹⁰

Beneficence: Do Good

Elder Law is a practice where attorneys can make a difference in the quality of their lives. It is often said that "elder law attorneys can do well by doing good."¹¹ How does an elder law attorney "do good"?

For us, the attorney-client relationship often begins amidst a health care crisis. Initially, the Elder, or, more likely, the Elder's surrogate, seeks the advice of the Elder Law Attorney. The Elder has been hospitalized and may already have been moved to a skilled nursing facility. Mom cannot return home, and the family does not know what to do. They need the counsel of an Elder Law Attorney to help them sort out their options and advise them what to do.¹² The attorney should be proactive and should provide sound advice.¹³

Autonomy: Respect for Client Choices

Respect for individuality is a core value in our society and is reflected in MRPC Rule 1.2. Implicit within any discussion of autonomy is the concept of equality, at least as it relates to human dignity. Autonomy is the natural by-product of that value and is therefore an ideal foundation on which we build an ethical framework. Frequently, the attorney is called on to maximize the client's autonomy.¹⁴

"Personal autonomy is, at a minimum, self-rule that is free from both controlling interference by others and from limitations, such as inadequate understanding, that prevent meaningful choice."¹⁵ Exercising autonomy depends upon relevant information and implies a capacity to use that information. This refers to our discussion above of medicine's concept of "informed consent." The principlism approach to dealing with ethical conflicts, whether in medicine or law, begins by educating the client concerning available options and the probable consequences of each option. Unless autonomy is counterbalanced against another principle, the client exercises autonomy by choosing

10 This portion of this paper is based on unpublished material developed jointly by Timothy L. Takacs and David L. McGuffey.

11 See NAELA Web site, "National Elder Law Month," at <http://www.naela.com/media/elderlawmonth.htm>.

12 MRPC Rule 1.2.

13 T. Begley & J. Jeffreys, *Representing the Elderly Client: Law & Practice* § 8.01 (Aspen 2003); MRPC R. 1.1 and 1.4.

14 M. Freedman, *Legal Ethics and the Suffering Client*, 36 Cath. U. L. Rev. 331 (1987). The attorney assists in maximizing autonomy "by counseling clients candidly and fully regarding the clients' legal rights and moral responsibilities as the lawyer perceives them." *Id.*, at 332. In Freedman's opinion, after the lawyer accepts a case, her "principle function is to serve the client's autonomy."

15 Beauchamp & Chambless, at 58. For Beauchamp & Chambless, autonomous choice and capacity to choose are not coequal. Persons with capacity sometimes fail to make such choices. In the legal context, the lawyer has a duty to assist clients who have capacity in a manner that will ensure that choices are made autonomously.

among his options.

The problem inherent with beneficence (discussed above) is that it may lead to paternalism. By their superior training, knowledge, and experience, Elder Law Attorneys, like physicians, are better positioned to determine and advocate for the client's best interests.¹⁶ Those qualifications, however, are not a mandate which overrules the Elder's wishes. Failure to respect the Client-Elder's right to make choices can result in paternalism.

We emphasize that it is not the attorney's place to make decisions for the client. The attorney must respect the client's right to make choices. Once these choices are made, autonomy trumps beneficence, and the lawyer must allow the client to direct the scope of representation, *but only after the lawyer has discharged his duty to communicate in a manner the triggers informed consent.*¹⁷ In other words, to enable the Client-Elder to make informed decisions about the scope of the representation, the Elder must be given adequate information on the risks and the benefits of the scope of action. This is called the "informed consent process." Obtaining informed consent is as essential to elder law practice as it is to the medical profession. The principlism approach is satisfied through the informed consent process, provided the Elder has capacity to exercise her right to autonomy *or* the Elder's surrogate who exercises autonomy on her behalf does not have a conflict of interest.¹⁸

As Elder Law Attorneys, we frequently encounter situations where we have reason to question the Elder's mental capacity to understand his options. If we believe that the Elder's mental capacity is insufficient for adequate understanding of his options, true autonomy cannot exist.¹⁹ Instead, autonomy is exercised through a surrogate. Otherwise stated, a recurring problem we face is the identification of our client or, in this case, the moral agent.²⁰ An ethical dilemma—or conflict of interest—arises when the Elder lacks capacity, the Elder's surrogate has a conflict of interest (that is, the surrogate's interest in protecting the Elder's assets for his own benefit) that diverges from the Elder's interests, *and* there is no clear guidance from the Elder to enable us to resolve the issue with reasonable certainty. In these circumstances, *MRPC* Rules 1.14 and 1.7(b) suggest that the principle of autonomy should be weighed against the principles of

16 Beauchamp & Chambless, 178. Beachamp and Chambless define paternalism as "the intentional overriding of one person's known preferences or actions by another person, where the person who overrides justifies the action by the goals of benefiting or avoiding harm to the person whose preferences or actions are overridden." *Id.* Under this definition, paternalism is never justified in the context of legal representation *if the Elder has capacity to make her own decisions*. Paternalism in some form may be justified under *MRPC* Rule 1.14, however, where the Elder cannot make her own decisions. Note 2 to Rule 1.14 contemplates that, in certain instances, the lawyer may act as de facto guardian, and Rule 1.14(b) contemplates instances where the lawyer may seek the appointment of a guardian. These actions are ethical paternalism.

17 *MRPC* Rule 1.2 and 1.4

18 *MRPC* Rules 1.4 and 2.1.

19 The lawyer nonetheless has a duty to treat the Elder with attention and respect. *MRCP* Rule 1.14, note 2.

20 With the passage of the Patient Self Determination Act, it is clear that health care providers no longer serve as the Elder's moral agent. Omnibus Budget Reconciliation Act of 1990, P. L. 101-508, sec. 4206 and 4751, 104 Stat. 1388, 1388-115, and 1388-204 (classified respectively at 42 U.S.C. 1395cc(f) (Medicare) and 1396a(w) (Medicaid) (1994)).

nonmaleficence, beneficence, and justice.²¹

We believe the principle of autonomy and the conflict of interest rules are interwoven. While surrogate decision-making can render the issue problematic, careful application of the conflict rules (guided by the principles of nonmaleficence, beneficence and justice) will unravel the Gordian knot.

In practice, how does this work? First, the Elder Law Attorney should consider who engaged the attorney's services. If it is the Elder, Rule 1.2 provides that the Elder guides the scope of the representation. If it is a surrogate, Rules 1.2(d) and 1.14 require that the lawyer prevent misconduct. Even where the Elder is clearly not the client, Rule 1.7(b) requires that Elder Law Attorneys weigh the interests in favor of the Elder.²² It is, after all, the Elder's health and finances which often hang in the balance.

Nonmaleficence: Do No Harm

Elder law attorneys frequently engage in Medicaid planning, which can have the effect of impoverishing Mom so she can qualify for Medicaid-financed nursing home care. Until she attains Medicaid eligibility, Mom has retained only enough money to purchase and receive the basic package of nursing home services. Once Medicaid begins to pay, Mom continues to receive that basic package. Only the source of payment for the basic package has changed (from private pay to Medicaid). That type of Medicaid Plan is unethical because it violates the principle of nonmaleficence.²³ Although she qualifies for Medicaid, Mom is nonetheless harmed because the Medicaid Plan deprives her of resources that she could use to purchase supplemental long-term care services that are not included in the basic services paid for by Medicaid. Worse, if there is a possibility that the Elder's needs can be met by not relying on Medicaid to pay for long-term care (for example, the Elder leaves the nursing home), the Medicaid Plan violates the principle of nonmaleficence by making that an economic impossibility.

Medicaid provides a limited bundle of benefits. It finances care that must include certain required elements,²⁴ including, among other things, nursing home care for residents in a manner and in an environment that promotes maintenance or enhancement of each resident's quality of life.²⁵ Each resident must receive and the facility must provide the necessary care and services to attain or maintain the resident's highest practicable physical, mental and psychosocial well-being, in accordance with the

21 The attorney weighing the elements of principlism should be mindful of the agent's fiduciary duty to his principle. *See, e.g., In re Estate of Myers*, 2003 WL 22037527 (Tenn. Ct. App. Jan. 8, 2003).

22 *See Restatement, supra*, § 51(3).

23 Our conclusion that the Plan is unethical presupposes that Mom was unable to and did not understand or request the Plan. "Lawyers are not free to act contrary to their client's desire merely because the lawyer believes such actions to be the better course." AK Eth. Op 94-3, *supra*, at *3. Instead, consistent with MRPC Rule 1.14, in certain cases it may be necessary to seek the appointment of someone who can act for the client to participate on the client's behalf in the normal attorney-client relationship. *See State Bar of Michigan Standing Committee on Professional and Judicial Ethics, Opinion No. RI-213*, 1994 WL 423008 (June 8, 1994).

24 42 C.F.R. § 442.100 et seq.

25 42 C.F.R. § 483.15.

resident's comprehensive assessment and plan of care.²⁶

There is, unfortunately, no compelling reason to assume the elder's needs *will be* met in a nursing home. The shortcomings in nursing home care are well known. Recent studies indicate that the quality of care in nursing homes remains deficient.²⁷ Deficiencies in good nursing home care have been laid directly at the doorstep of inadequate staffing. According to a major federal study, more than 90 percent of nursing homes do not have enough workers to take proper care of residents.²⁸

Respect for client autonomy does not abrogate or excuse the lawyer's duty to prevent harm to the client. The Elder Law Attorney is ethically justified in advising the Elder or directing the Elder's surrogate to focus the Plan on bettering the Elder's life, with asset protection concerns becoming secondary. Elder Law Attorneys are not only advisors but advocates for their Client-Elders. As client choices are made, the attorney's duty shifts to ensuring that someone is (or will be) available to speak for the Client-Elder and that misconduct or harm is addressed, mitigated, or avoided. "The lawyer is then free, except in circumstances where the [personal representative] might be abusing the position, to follow the [personal representative's] instructions. The burden of determining what is in the best interests of the disabled person is then lifted from the lawyer's shoulders, allowing the lawyer to perform more traditional functions in an objective environment."²⁹

Justice

The fourth principle is justice. Writing in 2002, Takacs and McGuffey implicitly applied the principles of contributive justice and distributive justice in reaching our conclusion that Medicaid planning is justified in a macro-ethics setting.³⁰ In a free market health care system, distributive justice protects only access to health care—and, even then, largely only for those with the ability to pay. As a consequence, the duty owed by each individual within this health care market is to pay only for one's own health care. In such a system, justice does not require the health care purchaser to pay a higher price if she can obtain a lower price without violating the system's legal or ethical norms (without, for example, concealing assets which is Medicaid fraud).

26 42 C.F.R. § 483.25.

27 Recently, the General Accounting Office discussed continuing quality of care problems in *Nursing Home Quality: Prevalence of Serious Problems, While Declining, Reinforces Importance of Enhanced Oversight* (GAO-03-561 July, 2003).

28 Ordered by Congress in 1990, Phase I of "Report to Congress: Appropriateness of Minimum Nurse Staffing Ratios In Nursing Homes," was issued by the Clinton administration in July 2000. Phase II was issued in March 2002. For the Phase I report, see <http://cms.hhs.gov/medicaid/reports/rp700hmp.asp>; for the Phase II report, see <http://www.cms.hhs.gov/medicaid/reports/rp1201home.asp>.

29 MI Eth. Op. RI-213, *supra*, at *4. The reasoning here is that the client has a system of checks and balances, as contemplated under the "joint" decision-making scheme described in *MRPC* Rule 1.2 where there is someone other than the lawyer involved in the decision-making process. Where the lawyer serves as guardian, de facto guardian, under a power of attorney or otherwise, "the ward is essentially at the mercy of his single representative." *Id.*, at *5.

30 See T. Takacs & D. McGuffey, *Medicaid Planning: Can It Be Justified?: Legal and Ethical Implications of Medicaid Planning*, 29 William Mitchell Law Review 111 (2002).

In the micro-ethics setting, however, we focus instead on the principle of commutative justice. What duty does the Elder's agent or surrogate owe him? One duty, discussed above, is to avoid doing harm to the Elder. This duty gains special poignancy where the relation is one of trust between principal and agent and the presumption is that the Elder has selected the agent specially to avoid harm in the event the Elder becomes helpless. Moreover, the principle of justice invokes yet another, related duty: the duty to respect the Elder's human dignity.³¹ Within the micro-ethics setting, this duty requires that the Elder's agent not regard his principal, the Elder, solely as a source of economic gain to the agent.

Applying Principlism: An Elder-Focused Approach

The elements of Principlism are meaningless unless we apply them. We choose to do so in the context of public benefits planning, since that is often the work of an Elder Law Attorney. In that context, if we begin with an assessment of the Elder's needs, we believe an Elder Care Plan will take a different view from simply engaging in asset protection planning.

Every plan should begin by assessing the Elder's needs with a view toward providing quality care in the least restrictive environment possible. That may involve preserving assets, not for the purpose of passing them to heirs, but for the purpose of spending them on home health care or assisted living. As Beauchamp and Chambless argue, we should contribute to our client's welfare.

In problem-solving for clients, Elder Law Attorneys should be mindful of general demographic trends and should make themselves aware of the Elder's client's specific wishes. Generally, when needs must be addressed, most Elders want them satisfied at home. Of those persons over age 70 living in the community and seriously ill, research shows that 29 percent would rather die than go to a nursing home.³² Of equal significance, home care tends to improve overall health.³³ Regarding the specific client, there is no substitute for taking the time to speak with the Elder or, if that is not possible, exploring other means of determining the Elder's wishes.

Absent an understanding of Medicare and Medicaid home health programs, as well as other caregiver resources available in the community, the Elder Law Attorney's planning will focus primarily if not solely on asset protection. Elder Law Attorneys who do not familiarize themselves with those programs and resources will be more likely to leap

31 A surrogate's respect for the Elder's human dignity loops back into our discussion of autonomy. In the health care context, potential surrogate decision makers are encouraged to gather information about "the lives of residents, their values and preferences" which will help shape good decisions following incapacity. *See Incapacitated and Alone, supra*, at 46. Surrogates in non-health care situations should act similarly.

32 R. Kane & R. Kane, *What Older People Want From Long-Term Care, And How They Can Get It*, 20 HEALTH AFFAIRS 114, 115 (2001).

33 "Familiar surroundings can have a positive effect on a person's sense of well-being, which can lead to a quicker, more complete recovery or, in cases where recovery is not expected, to a better quality of life." A. Perry, *American Medical Association Guide to Home Caregiving 1* (John Wiley & Sons 2001).

directly to nursing home care. Nursing home care, however, will separate the Elder from a familiar environment, will impose a more rigid schedule on the Elder and, even if family visits are not physically impeded, will make them more clinical. Where the Elder Law Attorney lacks expertise necessary to recommend home health options, utilization of a geriatric care manager may be appropriate.³⁴

When the Elder's needs for long-term care can no longer be met either inside the home or without the intervention of paid providers, the Elder enters, as we say, "the long-term care system." The Elder (and the Elder's family) are now embarking on an arduous journey through murky waters. Let them begin their journey with the observation that "the current system in our country for addressing long-term care is a non-system, a hodgepodge of services that fails to meet the needs of the elderly and disabled in the variety of long term care settings. It is economically inefficient and it fails to assure the quality of services which are provided."³⁵ The "system" does not fund assisted living and provides home health care in a hodgepodge fashion. As a consequence, the long-term care financing system is biased in favor of providing long-term care in an institutional setting, which usually means a nursing home, even though it costs less to support individuals in their own homes and communities than in nursing homes and other institutional settings.³⁶

The ethics rules are not hand-cuffs. Instead, they provide a framework within which we can resolve ethical dilemmas. If the legal profession hopes to maintain credibility in the community, our rules of ethics must be interpreted in manner consistent with accepted notions of justice or morality. Elder Law Attorneys should adhere to the ethics rules and accepted notions of morality and justice instead of hiding behind ethics rules which exalt the principle of autonomy alone, particularly where capacity is questionable. This can be accomplished by planning, before the representation begins, to focus on the well-being of the Elder. Anything less will contribute to negative impressions of the legal professional already prevalent in society and will impede our ability as professionals to contribute to the overall well-being of our clients.

34 Geriatric Care Managers (GCM) can be located in most communities. For assistance locating a GCM, contact the National Association of Professional Geriatric Care Managers at <http://www.caremanager.org/>.

35 National Academy of Elder Law Attorneys, *White Paper on Reforming the Delivery, Accessibility and Financing of Long-Term Care in the United States* § 3.1 (2000).

36 National Council on Disability, *National Disability Policy: A Progress Report, December 2001-December 2002*, July 26, 2003. See < http://www.ncd.gov/newsroom/publications/progressreport_final.html > (last visited September 15, 2003) and "Feds and the States Have Failed to Implement *Olmstead*, Says Federal Report" *The NAELA E-Bulletin*, August 26, 2003.