CONTINUING LEGAL EDUCATION

WINTER 2018

FEBRUARY 1, 2018

ETHICAL ISSUES IN REPRESENTING CLIENTS WITH DIMINISHED CAPACITY

Alexandra Keeling, Esq. and Naomi Weinstein, Esq.

Sponsored by:
Appellate Division, First Department and the
Assigned Counsel Plan for the First Department

Hypothetical #1

You represent Roslyn who is facing a felony assault charge. She attacked a postal worker because she believes there is a conspiracy involving the post office stealing her letters from the President. Roslyn has no psychiatric history. However, Roslyn has a very involved family who has tried to get her hospitalized in the past. Roslyn does not want you talking to any of her family. Roslyn has a basic understanding of the court process, but is insisting that she is innocent because she was merely defending her rights when she assaulted the postal worker. She insists on going to trial and if convicted faces a prison term of seven years. She is also insisting that you subpoena the President and various members of the postal service that have nothing to do with the assault. Do you raise the issue of competency? Do you contact her family? What happens if Roslyn tries to fire you for refusing to subpoena the President and other postal workers? Do you seek to be recused? What if the Court refuses to let you recuse yourself?

Hypothetical #2

You represent Apollo who is facing a misdemeanor charge for assault. The offense occurred while Apollo was receiving treatment in a psychiatric hospital, where he hit a staff member while being restrained. At the time of the assault, Apollo was not taking his medication. When you first met him, he was taking his medication and doing much better. He told you he wants to face his charges said he would rather stay in prison than go back to the hospital. He faces up to a year of imprisonment. Since that time, he stopped taking his medication. He is still insisting that he would rather stay in prison than go back to the hospital. If you raise the issue of competency, although his criminal charges will be dismissed, he could face indefinite commitment at a psychiatric hospital. The client has already spent half a year in prison waiting for trial and will likely get time served if he pleads guilty. Do you raise the issue of competency?

Hypothetical #3

You represent Boomer who is facing an attempted murder charge. Boomer and his daughter allegedly conspired together to murder their neighbor. Boomer is 85 years old. Boomer's daughter says it was all his idea to murder their neighbor. Boomer is showing signs of dementia; his short-term memory is impaired and he keeps talking about how the neighbor is still alive and he just spoke with the neighbor recently. One of the doctors at the prison offhand tells you, he thinks your client might be malingering. Do you raise the issue of competency? What about the fact that if he really does have dementia he is unlikely to ever be restored to competency? Do you raise the insanity defense? Do you ask for a guardian or guardian ad litem?

15 Cardozo Pub. L. Pol'y & Ethics J. 73

Cardozo Public Law, Policy and Ethics Journal
Fall/Winter, 2016/2017

Article

Michael L. Perlin, Esq.[a1] Naomi M. Weinstein, Esq.[aa1]

SAID I, 'BUT YOU HAVE NO CHOICE': WHY A LAWYER MUST ETHICALLY HONOR A CLIENT'S DECISION ABOUT MENTAL HEALTH TREATMENT EVEN IF IT IS NOT WHAT S/HE WOULD HAVE CHOSEN[fl]

*74 INTRODUCTION

In this paper, we address a question that has been raised to each of us innumerable times since we began to practice law: "How can you possibly represent to the court what your client is asking for?" We are asked this question - and many variations on the theme - because of who our clients are: by and large, persons who have been committed to, or had been committed to, or are subject to being committed to) psychiatric institutions.

For the purposes of this article, it is necessary to start with a bit about us.[1] Before becoming a law professor, the first author (MLP) litigated on behalf of persons with mental disabilities in the civil and criminal justice system for eleven years: three years as the head of the Mercer County (Trenton, NJ) Office of the Public Defender, and eight years as director of the Division of Mental Health Advocacy in the NJ Department of the Public Advocate.[2] The second author (NMW) has spent six years doing similar work with the Mental Hygiene Legal Service in NYC, and continues to do so. So, the questions we address here *75 are ones that we have confronted hundreds of times in "real life" as practicing attorneys.

And, more times than we care to count, we have been asked-dating back to the 1970s in MLP's case-"how can you represent those people?!"[3] In the context of mental disability law cases, it is sometimes slightly more nuanced: "How can you argue that your client has a right to refuse treatment?" (Or, "how can you argue that your client has a right to sexual interaction?" (Or, "how can you argue [insert description of controversial legal issue]?").[4]

These have never been particularly complicated questions for us to answer. We believe that lawyers have an ethical responsibility to represent their clients in accordance with their clients' wishes.[5] But-focusing *76 here more closely on civil matters involving persons in the mental disability law system-the answers to these questions are complicated here in the public's view because of the erroneous, sanist,[6] and pretextual[7] assumption that persons institutionalized because of mental disabilities are presumptively incompetent to engage in autonomous decision-making,[8] and that the lawyer should substitute his/her "ordinary common sense"[9] as to the client's "best interests,"[10] a position often abetted by the use of the vividness heuristic.[11] A model of "paternalism/best *77 interests" is regularly substituted for a traditional legal advocacy position, and this substitution is rarely questioned.[12]

Our position is a simple one: this presumption flies in the face of statutory law,[13] constitutional law,[14] and international human rights law,[15] and must be rejected. It also is contrary to the principles of the school of therapeutic jurisprudence[16] with which we both firmly align ourselves.[17] Moreover, this presumption is also contrary to all the valid and reliable evidence that has been available for decades.[18]

Virtually no one ever says that a lawyer should substitute his/her view of "best interests" in a divorce case, a malpractice case, or a contract case. Consider the recent case of Kevin Durant, the star professional basketball player. Apparently, Durant was offered $40.7 million dollars to return to play another season for the Oklahoma City Thunder,[19] but he turned that down for a contract that paid $27 million per *78 year for two years to play for the Golden State Warriors, the team that had defeated the Thunder in the 2016 NBA Western Conference finals.[20] His attorney might have persuaded him to not sign the contract (as it was less financially attractive), but no one-to our knowledge-has ever suggested that, in such a situation, the attorney should usurp his client's decision-making power and force him to sign another contract with another team.[21]

When it comes to mental disability law, the law is clear: if there is an issue as to the client's capacity to engage in autonomous decision-making, then the lawyer must aid the client in supported decision-making, rather than impose

substituted decision-making.[22] This is the centerpiece of an Article in the UN's Convention on the Rights of Persons with Disabilities (CRPD)[23] and must be at the forefront of any discussion of this area of law and social policy. The difference between supported and substituted decision-making is a critical one in international human rights law, yet is rarely discussed domestically. It is time that that changes. In this paper, we will look at the issues that are raised by this state of affairs, and we will focus on these points:

Why a lawyer must always honor her client's choices, even if they are not the ones that the lawyer would have chosen, except in very limited ***79** circumstances, in accordance with the American Bar Association Model Rules of Professional Conduct

The implications of criminal law, elder law, and juvenile law, and how the ethical obligations in these types of law are no different than in cases of clients with mental disabilities or those institutionalized

The multi-textured meanings of "competency" and "capacity" and how they affect resolution of these issues, especially in the context of forced medication, psychiatric advance directives, and sexual autonomy

The implications of rules governing counsel-client relationships for implementation of the supported decision-making requirement of Article 12 of the UN Convention on the Rights of Persons with Disabilities and under the American with Disabilities Act

The relationship between these issues and therapeutic jurisprudence, and why adherence to TJ is further demanded as a matter of dignity[24]

First though, we consider the four factors that contaminate the practice of all aspects of mental disability law: sanism,[25] pretextuality,[26] heuristic thinking,[27] and false "ordinary common sense" (OCS).[28] These factors - that we will explain in depth subsequently - must be kept in mind at all times in any consideration of the issues at hand. We cannot forget how they poison all of mental disability law, specifically including what counsel does in the representation of persons with mental disabilities;[29] it is thus impossible to give any meaning to the questions ***80** before us without taking these seriously.

At the same time, it is also critical that we consider how therapeutic jurisprudence offers us a means of redemption.[30] Again, as we will discuss at length subsequently, therapeutic jurisprudence (TJ) offers us a new model for assessing the impact of case law and legislation, recognizing that, as a therapeutic agent, the law that can have therapeutic or anti-therapeutic consequences.[31] Its ultimate aim-to determine whether legal rules, procedures, and lawyer roles can or should be reshaped to enhance their therapeutic potential while not subordinating due process principles[32]-is one that must be central to our consideration of the questions that we raise.[33]

Our paper's title comes from Bob Dylan's song, As I Went out One Morning,[34] a song that, unfortunately, he has only performed once in public.[35] Of significance to our title is the opening couplet:

> As I went out one morning
>
> To breathe the air around Tom Paine's.[36]

Thomas Paine considered "rights of the mind" among the natural liberties,[37] and has often been cited as an inspiration for much of the early litigation on behalf of persons with mental disabilities, seeking to grant them autonomy in decision-making and behavior.[38] We use the ***81** quote from this song here to underscore that the lawyer--if s/he is to provide constitutionally adequate representation-has no choice but to honor her client's wishes, and to keep in mind the centrality of individual autonomy to all questions that arise in any discussion of mental disability law.[39]

And we believe - without equivocation - that that is a good thing.

I. THE CONTAMINATING FACTORS

A. Sanism[40]

Sanism infects both our jurisprudence and our lawyering practices.[41] Sanism is largely invisible and largely socially acceptable.[42] It is based predominantly upon stereotype, myth, superstition, and deindividualization,[43] and reflects the assumptions that are made by the legal system about persons with mental disabilities--who they are, how they got that way, what makes them different, what there is about them that lets society treat them differently, and whether their condition is immutable.[44] These assumptions--that reflect societal fears and apprehensions about mental disability, persons with mental disabilities,[45] and the possibility that any individual may become mentally disabled[46]--ignore ***82** the most important question of all--why do we feel the way we do about "these people" (quotation marks understood)?[47]

Decision-making in mental disability law cases is inspired by (and reflects) the same kinds of irrational, unconscious, bias-driven stereotypes[48] and prejudices that are exhibited in racist, sexist, homophobic, and religiously and ethnically bigoted decision-making.[49] Sanist decision-making infects all branches of mental disability law and distorts mental disability law jurisprudence.[50] Paradoxically, while sanist decisions are frequently justified as being therapeutically based, sanism customarily results in anti-therapeutic outcomes.[51]

We thus ignore, subordinate, or trivialize behavioral research in this area, especially when acknowledging that such research would be cognitively dissonant with our intuitive (albeit empirically flawed) views.[52] "Sensational media portrayals of mental illness" exacerbate the underlying tensions.[53] We believe that "[m]ental illness can be easily identified by lay persons and matches up closely to popular media depictions."[54] It is commonly assumed that persons with mental illness cannot be trusted.[55] Common stereotypes about people with mental ***83** illness include the beliefs that they are invariably dangerous, unreliable, lazy, responsible for their illness or otherwise blameworthy, faking or exaggerating their condition, or childlike and in need of supervision or care.[56]

Social science research confirms that mental illness is "one of the most--if not the most-stigmatized of social conditions."[57] Historically, individuals with psycho-social disabilities "have been among the most excluded members of society .... Research firmly establishes that people with mental disabilities are subjected to greater prejudice than are people with physical disabilities."[58] One might optimistically expect, though, that this gloomy picture should be subject to change because of a renewed interest in the integration of social science and law, and greater public awareness of defendants with mental disabilities. One might also expect that litigation and legislation in these areas would draw on social science data in attempting to answer the questions at hand.

But yet, any attempt to place mental disability law jurisprudence in context, results in confrontation with a discordant reality: social science is rarely a coherent influence on mental disability law doctrine.[59] Rather, the legal system selectively - teleologically[60]-either accepts or rejects social science data depending on whether or not the use of that data meets the a priori needs of the legal system. In other words, social science data is privileged when it supports the conclusion the fact finder wishes to reach, but it is subordinated when it questions such a conclusion. ***84** [61] These ends are sanist. In other words, decision-making in mental disability law cases is inspired by (and reflects) the same kinds of irrational, unconscious, bias-driven stereotypes and prejudices that are exhibited in racist, sexist, homophobic, and religiously and ethnically bigoted decision-making.

Judges are not immune from sanism.[62] "[E]mbedded in the cultural presuppositions that engulf us all,"[63] judges reflect and project the conventional morality of the community; judicial decisions in all areas of civil and criminal mental disability law continue to reflect and perpetuate sanist stereotypes,[64] a global error that is most critical in criminal law and procedure cases. Judges' refusals to consider the meaning and realities of mental illness cause them to act in what appears, at first blush, to be contradictory and inconsistent ways and, teleologically, to privilege (where that privileging serves what they perceive as a socially-beneficial value) and subordinate (where that subordination serves what they perceive as a similar value) evidence of mental illness.[65]

B. Pretextuality[66]

Sanist attitudes lead to pretextual decisions. "Pretextuality" means that courts accept (either implicitly or explicitly) testimonial dishonesty and engage similarly in dishonest (and frequently meretricious) decision-making, specifically where witnesses, especially expert witnesses, show a high propensity to purposely distort their testimony in order to ***85** achieve

desired ends.[67] This pretextuality is poisonous; it infects all participants in the judicial system, breeds cynicism and disrespect for the law, demeans participants, and reinforces shoddy lawyering, blasé judging, and, at times, perjurious and/or corrupt testifying.[68]

Pretextual devices such as condoning perjured testimony, distorting appellate readings of trial testimony, subordinating statistically significant social science data, and enacting purportedly prophylactic civil rights laws that have little or no "real world" impact, dominate the mental disability law landscape.[69] Judges in mental disability law cases often take relevant literature out of context,[70] misconstrue the data or evidence being offered,[71] and/or read such data selectively,[72] and/or inconsistently.[73] Other times, courts choose to flatly reject this data or ignore its existence.[74] In other circumstances, courts simply "rewrite" factual records so as to avoid having to deal with social science data that is cognitively dissonant with their view of how the world "ought to be."[75]

*86 *C. Heuristics*[76]

"Heuristics" is a cognitive psychology construct that refers to the implicit thinking devices that individuals use to simplify complex, information-processing tasks,[77] the use of which frequently leads to distorted and systematically erroneous decisions,[78] and causes decision-makers to "ignore or misuse items of rationally useful information."[79] One single vivid, memorable case overwhelms mountains of abstract, colorless data upon which rational choices should be made.[80] Empirical studies reveal jurors' susceptibility to the use of these devices.[81] Similarly, legal scholars are notoriously slow to understand the way that the use of these devices affects the way individuals think.[82] The use of heuristics "allows us to willfully blind ourselves to the 'gray areas' of human behavior,"[83] and predispose "people to beliefs that accord with, or are heavily influenced by, their prior experiences."[84]

Experts are similarly susceptible to heuristic biases,[85] specifically ***87** the seductive allure of simplifying cognitive devices in their thinking.[86] Further, they frequently employ such heuristic gambits as the vividness effect or attribution theory in their testimony.[87] Also, biases are more likely to be negative; individuals retain and process negative information as opposed to positive information.[88] Judges' predispositions to employ the same sorts of heuristics as do expert witnesses further contaminate the process.[89] As discussed earlier, the vividness heuristic is "a cognitive-simplifying device through which a 'single vivid, memorable case overwhelms mountains of abstract, colorless data upon which rational choices should be made."[90] Through the "availability" heuristic, we judge the probability or frequency of an event based upon the ease with which we recall it.[91] Through the "attribution" heuristic, we interpret a wide variety of additional information to reinforce pre-existing stereotypes.[92] Through the "typification" heuristic, we characterize a current experience via reference to past stereotypic behavior.[93] And through "confirmation bias," people tend to favor information that confirms their theory over disconfirming information.[94]

D. "Ordinary Common Sense"[95]

"Ordinary common sense" (OCS) is a "powerful unconscious animator of legal decision making."[96] It is a psychological construct that ***88** reflects the level of the disparity between perception and reality that regularly pervades the judiciary in deciding cases involving individuals with mental disabilities.[97] OCS is self-referential and non-reflective: "I see it that way, therefore everyone sees it that way; I see it that way, therefore that's the way it is."[98] It is supported by our reliance on a series of heuristics-cognitive-simplifying devices that distort our abilities to rationally consider information.[99]

Trial judges typically say, "he [the defendant] doesn't look sick to me," or, even more revealingly, "he is as healthy as you or me."[100] In short, advocates of OCS believe that simply by using their OCS, jurists can determine whether defendants conform to "popular images of 'craziness.'"[101] If they do not, the notion of a handicapping mental disability condition is flatly, and unthinkingly, rejected.[102] Such views - reflecting a false OCS - are made even more pernicious by the fact that we "believe most easily what [we] most fear and most desire."[103] Thus, OCS presupposes two "self-evident" truths: "First, everyone knows how to assess an individual's behavior. Second, everyone knows when to blame someone for doing wrong."[104]

E. Conclusion

It is impossible to understand any aspect of mental disability law without coming to grips with the "malignant and corrosive impact" of the factors we have just discussed.[105] We have discussed the significance of understanding the power of these factors in a previous article ***89** on shame and humiliation and the law,[106] and one of the co-authors (MLP) has discussed that significance in multiple papers about such topics as the death penalty,[107] neonaticide,[108] criminal sentencing,[109] disability classification systems,[110] the Americans with Disabilities Act,[111] and on all "aspect[s] of mental disability law."[112] We must focus on this reality as we consider the role of counsel in the representation of this population.

Importantly, "it is not enough that lawyers and judges learn about mental illness, diagnoses, etc.; it is essential that they learn also about attitudes."[113] Consider the disappointing results reported nearly 40 years ago by Dr. Norman Poythress-that merely training lawyer about psychiatric techniques and psychological nomenclature made little difference in ultimate case outcomes, unless they were also trained about attitudes.[114] It is critical that lawyers understand those factors that poison the entire criminal justice system in the context of the representation of persons with mental disabilities to be able to do an effective job of representing drug court defendants.[115]

*90 II. THE ROLE OF COUNSEL

We begin with what courts have made clear forever: "The governing standard for the representation of [persons with disabilities] is not the protection of their best interests, but, to the extent possible, the zealous advocacy of their expressed preferences."[116] This is at the core of the attorney-client relationship, whether the substantive issues in questions relate to criminal law (generally, the focus of this conversation) or other areas in which the question of "how can you do that?" might be raised, such as elder law or juvenile law. Model rules dealing with professional standards of practice attempt to address these ethical issues that may arise when representing someone with diminished capacity.

A. Model Rules

The Model Rules of Professional Conduct of the American Bar Association ("ABA") guide attorneys through ethical issues involving persons with diminished capacity.[117] Rule 1.14 states:

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

(b) When the lawyer reasonably believes that the client has diminished capacity, is at risk of substantial physical, financial or other harm unless action is taken and cannot adequately act in the client's own interest, the lawyer may take reasonably necessary protective action, including consulting with individuals or entities that have the ability to take action to protect the client and, in appropriate cases, seeking the appointment of a guardian ad litem, conservator or guardian.

(c) Information relating to the representation of a client with diminished capacity is protected by Rule 1.6. When taking protective action pursuant to paragraph (b), the lawyer is impliedly authorized under ***91** Rule 1.6(a) to reveal information about the client, but only to the extent reasonably necessary to protect the client's interests.[118]

The commentary to the ABA Rule notes, "when the client is a minor or suffers from diminished mental capacity, maintaining the ordinary client-lawyer relationship may not be possible in all respects."[119] However, the ABA concedes that a client with diminished capacity "often has the ability to understand, deliberate upon, and reach conclusions about matters affecting the client's own well-being."[120] Further, the fact that a client suffers from a disability "does not diminish the lawyer's obligation to treat the client with attention and respect."[121] In cases where an attorney may have to take protective action, a client's poor judgment does not suffice to warrant protective action under Rule 1.14(b).[122]

Although Rule 1.14 seeks to enhance the representation of persons with disabilities, the rule is inconsistent and vague in certain aspects, which leads to confusion when applying the rule to the practical world.[123] Rule 1.14 does not define impaired capacity or "seriously diminished capacity" yet places the onus on the attorney to make this determination.[124] "The lack of a clear test leads to a circular [and subjective] determination of diminished capacity."[125]

Another criticism of the rule is that it can encourage an attorney to disclose attorney-client communications for the purposes of institutional proceedings, like guardianships or civil commitment hearings.[126] Further, the rule is silent with regard to some of the most serious ethical dilemmas facing attorneys who represent clients with mental disabilities including the right to refuse treatment, the right of a defendant to choose their own defense including the rejection of an insanity defense, ***92** and the right to sexual interaction.[127]

Competency applies not just to the client, but to the attorney as well.[128] Model Rule 1.1 defines competent representation as having "the legal knowledge, skill, and thoroughness and preparation necessary for the representation."[129] Attorneys practicing elder law, disability law, or estate planning often need to go beyond basic services in order to serve their clients so it is important that they have the requisite knowledge and skill to help their clients.[130] An attorney must obtain informed consent from the client, which is "the agreement by a person to a proposed course of conduct after the lawyer has communicated adequate information and explanation about the material risks of and reasonably available alternatives to the proposed course of conduct."[131] An attorney also has the duty to effectively communicate with the client, which means that the lawyer shall:

(1) promptly inform the client of any decision or circumstance with respect to which the client's informed consent, as defined in Rule 1.0(e), is required by these Rules;

(2) reasonably consult with the client about the means by which the client's objectives are to be accomplished;

(3) keep the client reasonably informed about the status of the matter;

(4) promptly comply with reasonable requests for information; and

(5) consult with the client about any relevant limitation on the lawyer's conduct when the lawyer knows that the client expects assistance not permitted by the Rules of Professional Conduct or other law.[132]

A lawyer also has to "explain a matter to the extent reasonably necessary to permit the client to make informed decisions regarding the ***93** representation."[133]

Although the Model Rules provide a starting point for addressing ethical issues that may arise when representing clients with mental disabilities, there is much that is not covered. The overlap between criminal law, elder law, juvenile law, and mental disability law illustrate how sanism and other biases can prevent the ethical and zealous representation for persons with disabilities. We now turn to each of these areas of the law.

B. Criminal Law Analogies

Historically, "[t]he American lawyer's professional model is that of zeal: a lawyer is expected to devote energy, intelligence, skill, and personal commitment to the single goal of furthering the client's interests as those are ultimately defined by the client."[134] By way of example, Abbe Smith tells us that the requirement of zealous advocacy is "the central ethical mandate for criminal lawyers."[135] The question that we must confront is this: Can it/should it/may it be any less of a "central ethical mandate" for lawyers who represent persons with mental disabilities?[136] It is not insignificant that the phrase "zealous advocacy" has been used in over 2400 published cases but, when the phrase < /p "civil commitment" "psychiatric hospitalization"> is added to a WESTLAW search, there are zero cases to be found.[137]

There is nothing in the law-or in valid/reliable research-that tells us that there should be any difference in the cases of representation of persons with mental disabilities. We know, of course, that a client's mental health and cognitive impairment matter at every stage of the lawyer-client relationship in the criminal justice process, from the first meeting to case strategizing to the plea/trial decision to the sentencing process and beyond. At each juncture, defense counsel must take seriously ***94** all issues related to such impairments.[138] But this reality has never been effectively "translated" into the civil commitment process.

In this context, reflect on the circumstances of institutionalization in se,[139] and its impact on an individual's sense of self.[140] Think also of the overlap between those in the criminal justice system and those in the institutional mental health system.[141]

And think of the tension that may arise - in most cases, inevitably arises - in the ethical decision-making process in the context of representing a client with mental disabilities.[142] As in the criminal context, it is just as important when representing someone with mental illness to make sure that the process lacks coercion, especially when considering issues of informed consent in treatment issues.[143]

Professor John King clearly sets out the blueprint for counsel, in the context of criminal cases, and we see no reason it should be otherwise in civil cases:

The conscientious defense lawyer should attempt not to do necessarily what is "best" for the mentally impaired client, but attempt to ***95** discern what the client's wishes would be absent the mental impairment that prevents the client from making a rational decision. This approach could include consultations not only with the client but also with family members and others who are close with the defendant. Such an approach may be cumbersome and is certainly easier in theory than in practice. It has, however, the virtues of imposing some sort of check on the discretion of the defense lawyer and of honoring the true autonomy of the client.[144]

But, somehow, this seems "different" to so many of us, in large part because we (the global "we") assume that persons institutionalized because of mental disability are presumptively incompetent to enter into autonomous decision-making.[145] This is a reflection of the basest sort of sanism that contaminates the legal process and often poisons the attorney-client relationship. Consider, from this perspective, the question of whether lawyers are very different than, say, police officers in this context. We know that "[police] officers' stereotypes included the idea that it is not possible to have a meaningful conversation with [persons with mental disabilities,] and officers hold on to the idea that [mentally disabled] persons are completely irrational and cannot be reasoned with."[146] Can we safely say that lawyers, in the aggregate, are any different?

This sanist assumption (fueled by the vividness heuristic and false OCS) is rebutted by (1) case law and statutes that explicitly forbid making ***96** this presumptive assumption,[147] and (2) the best available research (from the MacArthur Group and others) that tells us that mental patients are not inherently more incompetent than non-mentally ill medical patients.[148] As Professor William Brooks has perceptively noted, "That psychiatrists do not generally complain about intensive cross-examination in other legal contexts may well mean the general lack of adversarialness in the civil commitment context has created an expectation that patients' lawyers should play only a perfunctory role in the commitment process."[149]

C. Conclusion

Consider the specific circumstances of the issues we are addressing here in these contexts. When the presumption of incompetency exists, so too does the possibility for disparate treatment of people-virtually always improperly-deemed incompetent. As noted above, our research in this area and our experience as trial lawyers shows that this is most prevalent in cases involving the refusal of medication[150] and the right to ***97** engage in voluntary sexual interaction[151]-the two precise categories of cases in which the "how can you do that?" question is most often raised to lawyers. These questions, of course, ignore the fact that courts have ruled-with virtually no exceptions-that competent patients who are not currently an active danger to self or others have a constitutional right to refuse antipsychotic medication,[152] and that institutionalized patients had a right to engage in voluntary sexual relations as an aspect of the patient's rights to be placed either in the "least restrictive environment."[153] But, of course, these decisions are dissonant with the community's (false) "ordinary common sense."[154]

The task of improving the skills level of defense counsel in the representation of persons with mental disabilities thus has to be approached on two parallel, interlocking tracks:

1. Education about mental disabilities and their impact on defendants in the criminal justice system, especially those in drug courts, and

2. Education about factors that contaminate the entire criminal justice process: sanism, pretextuality, heuristics, and the use of false "ordinary common sense."

It is clear that unless the second track is included, education about disabilities - standing alone - is not a sufficient predicate for systemic meaningful change.[155]

III. IMPLICATIONS OF COUNSEL DUTIES AND RESPONSIBILITIES IN RELATED/OVERLAPPING AREAS OF THE LAW

In this section, we will consider the issues we are discussing in ***98** this paper in the context of related and overlapping areas of the law: elder law, juvenile law and the case law interpreting the Americans with Disabilities Act.

A. Elder Law

Elder law raises fundamental issues involving capacity, property, health care, and zealous advocacy.[156] As medical and technological advances allow persons to live longer, one of the greatest fears (as with mental illness) is to "lose one's mind." Yet, the mere fact that a person may be experiencing cognitive issues does not mean that his or her needs, wants, and desires should be ignored. Even a client who arguably lacks legal competence often has the ability to "understand, deliberate upon, and reach conclusions about matters affecting [his or her] own well-being."[157] Further, capacity is fluid and different legal acts require different degrees of capacity.[158]

Elder law is different from many other types of law in that it often involves transactional and litigation matters where there is no clear winner or loser.[159] Guardianships take away many, if not all, rights of allegedly incapacitated persons, and can take away their dignity by stripping away the ability of such persons to make any decisions involving their life.[160] Respect for client autonomy is a key component of zealous advocacy.[161] Moreover, the attorney should start with the presumption that the client has the necessary capacity to make decisions, much like the presumption of innocence in criminal law.[162] A lawyer representing an elderly person facing guardianship must take into account ***99** his client's wishes and not substitute his own judgment or take a paternalistic approach.[163] Further, attorneys who represent persons facing guardianships should take on an adversarial role in order to protect the civil rights of their clients.[164]

Like persons with mental illness, elderly persons with cognitive issues face sanism, heuristic biases and OCS, all of which lead to poor outcomes for the marginalized individuals. Persons who suffer from mental illness and are elderly "endure a double prejudice about who they are, what desires and needs they have, and to what sort of life they aspire."[165] These desires include the right to sexual freedom.[166] Yet due to sanism and ageism,[167] elderly people are perceived as asexual, or, if interested in sex, then hypersexual to the point of perversion.[168] In some cases, sexual activity can lead to criminal prosecution.[169] Elderly persons face the same issues of unnecessary institutionalization that persons with mental illness face, and despite the deinstitutionalization movement, much of this population continues to reside unnecessarily in institutions for years.[170] For elderly persons committed to, and unable to be discharged from psychiatric institutions or nursing care facilities against their will, presumptions about their abilities should be challenged ***100** and litigation brought on their behalf to establish a right to treatment in a community setting.[171]

Cultural competence is a key component in providing effective representation and resolving any ethical dilemmas that may arise in elder law, just as it is in mental disability law.[172] The link between illness and the cultural and social context of a person's identity and community influences the way in which illness is defined and perceived.[173] Being culturally competent is also a way to combat sanism, OCS, and heuristics.[174] Providing culturally competent representation ensures that clients' civil rights will be protected and that their wishes are being followed.

B. Juvenile Law

Many of the same ethical issues that arise in elder and mental disability law, are also present when representing juveniles. The Supreme Court in In Re Gault, recognized that due process requires the right to counsel for juveniles facing delinquency cases.[175] The Court found that proceeding where the child could be found delinquent and subject to the loss of liberty for years is "comparable in seriousness to a felony prosecution" and requires "the assistance of counsel to cope with problems of law, to make skilled inquiry into the facts, to insist upon regularity of the proceedings, and to ascertain whether [the child] has a defense and to prepare and submit it."[176]

***101** Despite the growing consensus on following a client-centered approach when representing juveniles, there is a lack of specialized training on how to interact with children in a non-suggestive and developmentally-sensitive way.[177] The role of a zealous advocate is "far from uniform in juvenile practice,"[178] and goes beyond zealous advocacy to include "social

work"-based legal practice.[179] In child custody cases involving abuse or neglect, the role of the lawyer is even more unclear and inconsistent.[180] This lack of specialized training and consistency in representation exists also for persons with mental illness involved in the justice system.

One of the major ethical dilemmas that face attorneys who represent juveniles is when counsel may usurp the client's autonomous decision-making rights and raise the issue of whether the client is competent over the client's objection.[181] Some child advocates argue for a paternalistic approach because the legal rights of juveniles are routinely restricted in many areas; like the inability to vote, purchase alcoholic beverages, work, and obtain medical care.[182] Paternalistic advocacy persists in efforts to not only rehabilitate children but also to completely transfer decision-making authority from children to adults.[183] Yet the client may have a legitimate reason in not wanting his or her competency raised as an issue at trial.[184] If a guardian is appointed or other agencies become involved as part of a protective action under Model Rule 1.14, disclosures could be made to the Court and others that could hurt the client at trial.[185]

***102** Another ethical issue that often arises is whether parents should be consulted. Model Rule 1.14 appears to imply that counsel should seek the appointment of a guardian rather than consult with the child's parents, caregivers, or immediate family members.[186] Nonetheless, if there is an adverse relationship between the child and parent, to consult with the parent would create a conflict of interest.[187] Further, the parent-directed approach assumes that the parents have a desire to act in the best interests of their child, that the parents are more competent than the child, and that the parents have a sufficient understanding of the legal issues that face their child.[188]

Finally, the issue of capacity of a child due to cognitive and developmental limitations can potentially have a negative impact on the attorney-client relationship.[189] Zealous advocacy not only depends on the attorney's efforts but also on the ability of the child to engage in effective cognitive reasoning.[190] Instead of focusing on whether the child is making the "correct" decision, the lawyer should focus on the ability of the child to engage in the decision-making process.[191] Juveniles involved in the justice system face the same prejudices and sanism that elderly persons and persons with mental illness face.[192]

Paternalistic approaches can lead to unnecessary and unjustified institutionalization. Effective representation can combat paternalistic attitudes and ensure that a juvenile's rights are protected.

IV. THE MULTI-TEXTURED MEANINGS OF CAPACITY AND COMPETENCY

As previously discussed, the issue of capacity affects not just mental ***103** disability law, but also touches upon all aspects of the law including criminal law, elder law, and juvenile law.[193] Complicating the issues of capacity is the fact that capacity (competency) is fluid. Further, different legal acts require different thresholds for capacity.[194] A finding of incapacity in one area does not mean a person is incompetent for all decisions or all future decisions.[195] It is also important to distinguish incapacity from undue influence by a third party.[196]

One of the ethical issues that criminal attorneys face is whether or not to raise the issue of competency and by extension, whether to raise the issue of competency over the defendant's objection.[197] The issue of competency for mentally ill defendants is further complicated by the pretextuality that permeates all aspects of the court process.[198] An attorney must be both a zealous advocate and an officer of the Court and those duties conflict when a criminal defendant may be incompetent.[199] Before a defense attorney makes the determination that a competency evaluation is necessary, the potentially disastrous consequences for the defendant for even merely participating in the evaluation must be considered.[200]

Raising the issue of competency of a client can lead to a guardianship ***104** proceeding.[201] For persons subject to guardianships, whether they are limited or plenary guardianships, they still can - at least theoretically under prevailing domestic law - maintain meaningful rights under state and constitutional law.[202] Being subject to a guardianship does not prevent a person from entering into an enforceable, implied contract for certain attorney services.[203] Further, the right to procedural and substantive due process is not extinguished by guardianship.[204] For an attorney representing someone subject to a guardianship, the attorney must maintain a normal attorney-client relationship unless the attorney reasonably believes that doing so would place the client at risk of substantial physical, financial or other harm.[205]

A. Forced Treatment Issues

Persons with mental illness are often subject to forced treatment that occurs both in an institutional and outpatient setting.[206] The right to refuse treatment is a constitutionally protected right and the burden is on the proponent of involuntary medication to prove that the person lacks capacity in order to override this right.[207] When representing persons with mental illness facing forced treatment it is important that the attorney is aware of the humiliating consequences that arise from taking away their client's autonomy and ability to direct their own care.[208]

Informed consent has become the basis for all medical intervention and requires that that the person is capable of understanding the information presented, competent, free from undue influence, and that ***105** the decision is voluntary.[209] Regarding the right to refuse treatment, the issue becomes not only whether the person is incompetent, but also whether the treatment is the least restrictive alternative and whether the benefits of treatment outweigh the risks.[210] Coercing consent for treatment of persons with mental illness legally and ethically invalidates informed consent.[211]

For persons with mental illness facing criminal charges, the issue of forced treatment remains controversial and highly contested.[212] In Sell v. United States, the Supreme Court held that when a mentally ill defendant faces serious criminal charges, the government may involuntarily administer antipsychotic drugs if the treatment is medically appropriate, substantially unlikely to have side effects that undermine the trial's fairness, and necessary to further important government trial-related interests.[213] This test is different from the one set forth in Washington v. Harper, which limited the right of convicted felons to refuse treatment and found the need to balance the liberty interest in avoiding unwanted treatment with prison safety and security.[214] Sell also differs from Riggins v. Nevada (a case involving a competent insanity defense-pleader), where the Supreme Court held that use of antipsychotic medication violated the defendant's right to a fair trial and focused on the litigational side effects that might have compromised the defendant's participation in trial.[215] Attorneys representing criminal defendants with mental illness must not only be familiar with the law, but also the consequences of forced treatment on their clients' potential outcomes at trial.

*106 *B. Psychiatric Advance Directives*

One way to address the issue of wavering capacity for persons with mental illness is through the use of psychiatric advance directives.[216] A psychiatric advance directive is a legally enforceable document that specifies the manner in which treatment decisions are to be made in the event the person later becomes incompetent.[217] It can specify both who should make treatment decisions and also what specific treatment should be administered, including psychiatric medication, in the event of incapacity. Competency to execute a psychiatric advance directive requires the ability to understand and appreciate the risks and benefits of treatment, the ability to engage in rational deliberation, and the capability of understanding the meaning and significance of the delegation.[218]

The use of these psychiatric advance directives may have significant therapeutic value.[219] Such directives can empower persons with mental illness to have control over their treatment and may encourage their clinicians to treat them with dignity and respect, rather than paternalistically.[220] They can foster a more collaborative model of care for psychiatric treatment and encourage voluntary treatment.[221] They may also avoid the need for a finding of judicial incapacity[222] and could avoid the need for a guardian.[223]

Nevertheless, psychiatric advance directives raise serious ethical issues ***107** when it comes to the issue of potential revocation is raised.[224] The most important issue to be considered is whether psychiatric advance directives should override the constitutional right to refuse medication.[225] This issue applies not just to persons facing institutionalization but also persons with mental illness who are in the criminal justice system.[226] Some psychiatric advance directives purport to be irrevocable which can cause particular problems for patients who have chosen to be treated with specific medication.[227] Even if refusing psychiatric treatment may limit the person's ability to act autonomously and even to lose competency, the person may authoritatively choose that course of action while still competent.[228] Consider the case of a patient who seeks to enforce her right to refuse antipsychotic medication but who previously agreed to a psychiatric advance directive listing specific medication to which she would consent; should the advance directive override her right to refuse treatment? Does it matter if the client can articulate the side-effects she is experiencing?[229] What if the client no longer believes he or she is suffering from a mental illness; would that automatically make them incompetent?[230]

Psychiatric advance directives also create issues when a treating clinician who is unfamiliar with the patient may be reluctant to administer the specific treatment,[231] or does not think following the patient's ***108** advance directives would be in the

patient's best interests.[232] Further, patients may be subject to coercion with regard to their decision-making as to whether or not to accept a psychiatric advance directive.[233] In an ideal world, psychiatric advance directives could provide a meaningful way for clients to direct their own care according to their own wishes.[234] However, because of the limitations of the mental health system that already exists, there are ethical issues and concerns that attorneys must be aware of in order to provide the best representation for their clients.

C. Right to Sexual Interactions

The right to voluntary sexual interaction for persons with mental disabilities is a controversial topic.[235] The Supreme Court has implicitly recognized the right to sexual privacy in Lawrence v. Texas.[236] In striking down a Texas statute that criminalized certain intimate voluntary sexual conduct engaged in by two persons of the same sex, the Court emphasized the respect the Constitution demands for the autonomy of a person making intimate and personal choices.[237] However, the Supreme Court has not directly addressed issues involving collateral sexual privacy rights, such as individual right to purchase and use of sexual aids, a question about which the federal circuit courts have split.[238]

Sanism and pretexuality rob persons with mental disabilities from basic dignity and from exercising their right to sexuality in institutional settings.[239] Compounding the issue is that there is no standard to determining ***109** competency to engage in sexual interaction because of the fluidity of such a determination.[240] At the most basic, the test requires that an individual have the capacity to understand there is a decision to be made and have an ability to consent or not.[241]

Elderly persons face the same discrimination when it comes to voluntary sexual interaction that persons with mental disabilities face. Sexuality does not disappear with age and it may take on even greater importance for persons with dementia because it can provide a sense of connection to other people.[242] As with other aspects of the law, it is important for attorneys in dealing with these issues to not substitute their own judgment in place of that of their clients.[243]

D. Supported Decision-Making under International and Domestic Law

As we noted earlier, supported decision-making rather than substituted decision-making is the centerpiece of the CRPD under Article 12 and must be at the forefront of any discussion on this area of law and social policy.[244] Article 12 of the CRPD guarantees that persons with disabilities have the right to recognition everywhere as persons before the law.[245] To be recognized as full persons before the law means that one's legal capacity, including the capacity to act, is equally recognized.[246] Article 12 underscores the importance of legal capacity as an ***110** inalienable right and provides for safeguards to ensure that a person's capacity is not subject to abuse.[247] Instead of paternalistic guardianship laws, the CRPD's supported-decision making model "recognizes first, that all people have the right to make decisions and choices about their own lives."[248] This principle must guide attorneys when faced with ethical questions regarding a client's capacity.

Supported decision-making is also reinforced in US law under the American with Disabilities Act ("ADA"). Title II of the ADA prohibits discrimination based on disabilities by public entities in their services, programs, or activities.[249] Guardianships unnecessarily isolate persons with psychosocial impairments.[250] This unjustified isolation can be viewed as discrimination based on a disability in violation of the ADA.[251] A declaration of incapacity by the Court can lead to feelings of helplessness and loss of control, which are detrimental to a person's mental well-being and create feelings of shame and humiliation.[252] Substituted decision-making can lead to unjustified confinement for persons with mental illness.[253] When attorneys use substituted judgment in making legal decisions for their clients, there are no checks and balances.[254]

Supported decision-making allows individuals with limitations to receive support in order to understand relevant information and available choices in order to make decisions based on their preferences, instead of completely taking away their ability to make any decisions.[255] Attorneys representing persons with diminished capacity must carefully consider their client's wishes and assist them in making legal decisions. It is important to consider the context in which individuals face decisions ***111** and not just the personal characteristics of the individual with a disability.[256] Education and training are also important for all parties involved in supported decision-making, including the clients.[257] Attorneys should only intrude on their clients' autonomy in the short-term and only to the extent necessary to facilitate their clients' autonomy in the long term.[258]

V. THERAPEUTIC JURISPRUDENCE[259]

Over the past two decades, one of the most significant legal theoretical developments has been the creation and dynamic growth of therapeutic jurisprudence.[260] One of the co-authors (MLP) has described this development:

[T]herapeutic jurisprudence presents a new model for assessing the impact of case law and legislation, recognizing that, as a therapeutic agent, the law [] can have therapeutic or anti-therapeutic consequences.[261] The ultimate aim of therapeutic jurisprudence is to determine whether legal rules, procedures, and lawyer roles can or should be reshaped to enhance their therapeutic potential while not subordinating ***112** due process principles.[262]

David Wexler clearly identifies how the inherent tension inherent in this inquiry must be resolved: "[T] he law's use of mental health information to improve therapeutic functioning [cannot] impinge upon justice concerns."[263] As one of us (MLP) has written elsewhere, "[A]n inquiry into therapeutic outcomes does not mean that therapeutic concerns 'trump' civil rights and civil liberties."[264]

Therapeutic jurisprudence "look[s] at law as it actually impacts people's lives"[265] and assesses law's influence on "emotional life and psychological well-being."[266] Therapeutic jurisprudence mandates that "law should value psychological health, should strive to avoid imposing anti-therapeutic consequences whenever possible, and when consistent with other values served by law, should attempt to bring about healing and wellness."[267] From therapeutic jurisprudence, we gain "a new and distinctive perspective utilizing socio-psychological insights into the law and its applications."[268] Therapeutic jurisprudence is "... a sea- ***113** change in ethical thinking about the role of law ... a movement towards a more distinctly relational approach to the practice of law ... [emphasizing] psychological wellness over adversarial triumphalism."[269] It thus supports an ethic of care.[270]

Professor Amy Ronner describes the "three Vs": voice, validation and voluntariness,[271] arguing:

What "the three Vs" commend is pretty basic: litigants must have a sense of voice or a chance to tell their story to a decision maker. If that litigant feels that the tribunal has genuinely listened to, heard, and taken seriously the litigant's story, the litigant feels a sense of validation. When litigants emerge from a legal proceeding with a sense of voice and validation, they are more at peace with the outcome. Voice and validation create a sense of voluntary participation, one in which the litigant experiences the proceeding as less coercive. Specifically, the feeling on the part of litigants that they voluntarily partook in the very process that engendered the end result or the very judicial pronunciation that affects their own lives can initiate healing and bring about improved behavior in the future. In general, human beings prosper when they feel that they are making, or at least participating in, their own decisions.[272]

A. The Role of Dignity

A core central principle of therapeutic jurisprudence is a commitment ***114** to dignity.[273] In a recent article about dignity and the civil commitment process, Professors Jonathan Simon and Stephen Rosenbaum embrace therapeutic jurisprudence as a modality of analysis, and focus specifically on this issue of voice: "When procedures give people an opportunity to exercise voice, their words are given respect, decisions are explained to them their views taken into account, and they substantively feel less coercion."[274]

The question to be posed here is this: can we adhere to Professor Ronner's "3 V's", unless we eschew the level of paternalism that is mandated by the "best interests" model? David Wexler made it clear almost a quarter of a century ago that "[t]herapeutic jurisprudence in no way supports paternalism, coercion, or a therapeutic state."[275] The "paternalistic role" of lawyers at [civil commitment] hearings represents sanism and pretextuality, and turns the adversary process into a "farce and a mockery,"[276] in such a way that repudiates therapeutic jurisprudence. Forensic psychologist Kathy Faulkner Yates has urged the use of therapeutic jurisprudence as a "diagnostic tool to identify the malignant way that pretextuality poisons forensic and judicial relationships."[277]

The best interests model - one that inevitably leads to substituted decision-making - is the essence of the paternalism that Professor Wexler rejects. It is utterly incompatible with any and all of the precepts of therapeutic jurisprudence. We believe that it is only through the embrace of TJ can the issues that we raise here be resolved in a way that, per Professor Ronner,

provides dignity to persons with mental disabilities by honoring the principles of "voice, validation and voluntariness."[278]

*115 VI. CONCLUSION

As we noted above,[279] the law review literature is astonishingly bereft of considerations of "zealous advocacy" in the context of the representation of persons with mental disabilities. We hope, modestly, that this article leads others to consider the issues we discuss here, and build on our work. We offer these thoughts in the hopes that that does happen.

First, client autonomy must be in the forefront of any client-attorney relationship, and an attorney must thus always follow their clients' wishes except for in very limited cases (where there is a preexisting finding of civil incompetency). Second, if an attorney feels that a client is unable to make a decision completely on her own, the attorney should seek out others who might assist in supported decision-making; an attorney should never substitute her own judgment for "what is best."[280] Third, persons with mental disabilities have the same civil rights as all other persons; the existence of a question as to competency does not mean that a person is stripped of all their decision-making power, or that the person's expressed needs/desires are not valid.

Fourth, the pressure will likely be the greatest in cases that involve the exact controversies (the ""How can you do that?" cases)[281] that create the most dissonance and are likely of the greatest importance to the client - questions involving involuntary medication and sexual autonomy. Fifth, attorneys must take seriously international human rights law that mandates such supported decision-making. Finally, attorneys must embrace the principles and tenets of therapeutic jurisprudence as a means of best ensuring the dignity of their clients and of maximizing the likelihood that voice, validation and voluntariness[282] will be enhanced.

*116 The narrator of Dylan's song, As I Went out One Morning,[283] locates himself clearly in the ambit of Tom Paine.[284] Paine was the philosopher who considered "rights of the mind" among the natural liberties.[285] We hope that this article encourages lawyers who represent persons with mental disabilities to similarly locate themselves, and to privilege-not subordinate-the autonomy in decision-making that all persons with mental disabilities deserve. As with the narrator in Dylan's song, simply put, she has no choice.

Footnotes

fl An earlier version of this paper was given by one of the co-authors (MLP) as the keynote presentation at the annual conference on Ethics and Mental Health, sponsored by the Journal of Ethics in Mental Health, Thompson Rivers University, and McMaster University, Kamloops, BC, Canada, June 2016.
The authors wish to thank Alex Perlin for identifying the sources related to Kevin Durant's contract decision-making.

a1 Michael L. Perlin, Esq. is a Professor Emeritus of Law at New York Law School in New York, NY. He is also the Founding Director of the International Mental Disability Law Reform Project and a Co-founder of the Mental Disability Law and Policy Associates.

aa1 Naomi Weinstein, Esq. is an Associate Attorney with the Mental Hygiene Legal Service in New York, NY. The views expressed in this article are of the author and may not be representative of Mental Hygiene Legal Service.

1 We realize that this information is usually shortened and relegated to an asterisked footnote after the title of the article. We include it in the body of the text here, however, to emphasize how the issues we discuss in this paper have always been central to our practices.

2 While he was a professor, besides teaching multiple courses in mental disability law and other subjects, MLP provided legal services to persons with mental disabilities through a "live client" clinic (Federal Litigation Clinic), through a "placement" clinical-type program (Mental Disability Litigation Seminar and Workshop) and through an advocacy/human rights-based clinic (Building a Disability Rights Information Center in Asia and the Pacific Clinic).

31 Loy. U. Chi. L.J. 403

Loyola University Chicago Law Journal
Spring 2000

Article
Joseph A. Rosenberg[a1]

ADAPTING UNITARY PRINCIPLES OF PROFESSIONAL RESPONSIBILITY TO UNIQUE PRACTICE CONTEXTS: A REFLECTIVE MODEL FOR RESOLVING ETHICAL DILEMMAS IN ELDER LAW

*405 I. Introduction

Ethical dilemmas that arise in representing older people and their families are difficult for attorneys to resolve because they concern fundamental issues involving property, health care, family relationships, and mortality.[1] Lawyers must apply norms of professional conduct within a murky landscape of human frailty and emotional turmoil in an atmosphere permeated with the dread of mental incapacity, the possible need for long-term care, and the inevitability of death. When a client's legal problems are deeply intertwined with a family's interpersonal, emotional, economic and social dimensions, it is common for family members to be involved.[2] The traditional concept of a solitary client making decisions about a legal problem isolated from the interests of others simply does not apply.

The practice of elder law occurs in a context that often makes it difficult to discern how to best fulfill the professional duty to zealously represent a client's interests because the ends of the representation are not necessarily quantifiable or marked by criteria clearly indicating "victory." The legal problems of elderly clients may not be resolved through an adversarial proceeding in which a "winner" and "loser" emerge.[3]

The principles of professional responsibility are clear: loyalty,[4] competence,[5] respect for client autonomy,[6] and zealous advocacy.[7] An understanding of the codes of conduct and other sources of law governing lawyers can help identify issues, but

vast areas of discretionary decision-making remain that require the lawyer to search not only the applicable law, but also his or her professional soul and ***406** conscience. The legal profession has evolved toward a statutory model of lawyer governance in the Model Rules of Professional Conduct[8] and has embraced more precise codes of conduct for specific areas of practice.[9] The human condition and the unique circumstances of clients, however, continually create ethical dilemmas that defy precise categories and rules.

Lawyers will always be faced with situations that demand discretion, analysis, and hard choices. The principles of the Code and the Model Rules provide limited guidance for attorneys grappling with varied and complex ethical dilemmas, particularly in practice contexts that depart from the adversarial model.[10] My premise is that this large area of discretionary decision-making requires conceptual models that will inform ethical analysis and enhance the quality of legal representation. The reflective model described in this Article will help guide professional discretion in elder law and other similar practice contexts.

A. Ethical Dilemmas in Elder Law

In the area of elder law, there are a few paradigmatic cases that vividly illustrate the need for conceptual models that inform the analysis of ethical quandaries: an elderly couple attempting to plan for the consequences of dementia; an aging parent concerned with the future care of a developmentally disabled adult child; and a parent with dementia whose children are involved with the representation.[11] The ***407** most common ethical issues that arise in representing these clients include:[12] (1) identifying the client; (2) preserving client confidentiality and the attorney-client privilege when members of the client's informal and formal support networks are closely involved; (3) recognizing and resolving conflicts of interest between clients; (4) representing a client with diminished decision-making capacity; (5) counseling and representing a client engaged in Medicaid planning; and (6) representing or acting as a fiduciary. For example, it is common for an adult child to call on behalf of a parent and say, "My mother wants a simple will and power of attorney to protect her house if she has to go into a nursing home."[13] The catalyst for seeking legal assistance may be a recent diagnosis of Alzheimer's Disease (or other neurological impairment), or the progression of a degenerative condition to the point where cognitive or physical functioning is impaired. Particularly if the elderly client does not have a spouse, family members may help with paying bills, shopping, and other daily activities. As the elder's condition progresses, the fear and prospect of needing home care or going into a nursing home leads to recognition of the need for planning and for legal representation.

B. The Professor and Supervising Attorney: Where Worlds Collide

As a professor and supervising attorney in Main Street Legal Services, the City University of New York School of Law's clinical program,[14] I hear countless stories that raise ethical dilemmas. These ***408** professional responsibility issues arise so often in an elder law practice that they are part of the fabric of virtually every case in our clinic. For each case with a solitary individual as client, we have another case in which family members or friends are involved in the representation. For every potential client who calls the clinic on her own behalf, a social worker, friend, or family member also calls the clinic on behalf of the purported client. We constantly grapple with issues of multiple representation, confidentiality, and the impact of dementia on a client and her family.

The clinical method of education provides students with a rich and practical experience in identifying ethical issues and exercising structured discretionary judgment to resolve them.[15] One of my primary roles is to prepare student interns to counsel and represent clients. Prior to client interviews, I meet with the student interns to review their interview plans. When family members of the elderly person appear to be involved, the elderly person has Alzheimer's Disease or other neurological impairment, or other ethical dilemmas are foreseeable, I pose several questions designed to provoke thought, analysis, and discussion, including: (1) Who is the client? (2) Can we represent multiple clients? Should we? (3) Are there conflicts of interest--if so, how should we analyze them? (4) How would the presence of a third party (e.g., a social worker or adult child) affect ***409** confidentiality and the attorney-client privilege? and (5) What is the extent of the decision-making ability of a person who may be incapacitated--what assumptions (if any) should we make about her ability to make decisions? I encourage students to research New York's Code of Professional Responsibility[16] and other authorities,[17] identify the universe of possible issues, and develop preliminary conclusions about how to deal with the foreseeable ethical dilemmas to conduct the interview effectively.

After my meetings with students, I often ponder my own questions and advice. As I sit in my office, my thoughts sometimes drift to haunting images of relatives and clients who have struggled with the devastation of terminal illness, Alzheimer's Disease, and other forms of neurological impairment and chronic disease. The vague fear people express about "being kept alive" in a nursing home triggers my own memories of ghosts in nursing homes, sustained by feeding tubes, restrained and confined to their beds in the fetal position, occupying a space somewhere between life and death.

The lucky ones are able to live at home, totally dependent on a spouse or, less frequently, an adult child. From the outside, the caretaker is a hero; in reality, each day is a grueling struggle to survive that can only end in despair. The caretaker is sustained by the desire to preserve a few shreds of dignity and comfort for her loved one, but the moments of joy become less frequent and eventually surrender to the grinding inevitability of loss and death. Unless one is a caretaker or a person suffering from terminal illness, severe disease or advanced dementia, it is only possible to catch glimpses into the maelstrom of fear, powerlessness, isolation, and alienation that is so damaging.

In these quiet moments in my office, I struggle to make sense of this complex reality for my students, my clients, and myself. I console myself with the thought that the work of lawyers is a small but important piece of the tapestry of old age, dementia, and long-term care.

*410 C. An Overview of Ethical Dilemmas, Law and Aging

Professional responsibility issues and ethical dilemmas are omnipresent in legal practice. They range from global issues such as the tension between professional role differentiation and personal morality, to issues of professional integrity involving safeguarding of client funds, to ethical quandaries that arise in daily practice related to confidentiality, client identity, multiple representation, client capacity, the role of interested third parties, and conflicts of interest. These ethical issues become particularly complex, compelling, and distinctive when working with clients grappling with "the stubborn human facts about frailty, dependency, aging, and death, facts most of us would prefer to avoid."[18]

People we label as "elderly"[19] and "disabled"[20] have a broad range of functional capacities and conditions that invite comparison, yet are singular and diverse in their origins and manifestations. The ever-increasing number of older adults, including those with Alzheimer's Disease or other forms of dementia, and people with developmental disabilities and other neurological impairments present ethical issues that are far removed from the paradigmatic client envisioned by the drafters of codes of conduct.[21]

*411 The traditional model of the lawyer and the ethical rules that govern the profession have their roots in a practice context that exalts zealous advocacy for the interests of the client in isolation from all other considerations.[22] This model must be adapted to adequately represent the interests of clients grappling with old age, dementia, long-term care, and death and who present ethical and legal problems that fall outside the traditional adversarial paradigm. In an elder law context, lawyering is preventive, problem solving, and primarily a non-adversarial process. The lawyer who engages in transactional, "preventive law" by drafting documents (such as wills, trusts, powers of attorney, and advance medical directives) and providing counseling and representation in connection with eligibility for government benefits practices "in the shadow of the court."[23] Although the elder law attorney's primary arena is outside the courtroom, many legal problems can only be resolved through litigation and the adversarial process.[24]

These ethical quandaries are fraught with escalating spirals of uncertainty and professional norms provide insufficient guidance.[25] As *412 a result, they can only be resolved with a coherent framework and approach that bridges the principles of professional responsibility doctrine and the facts of individual cases.

D. A Reflective Model for Resolving Ethical Dilemmas in Elder Law

This Article describes a reflective model that guides the professional discretion necessary to resolve the ethical dilemmas that arise in elder law practice. This model integrates the profession's core values of loyalty, fidelity, and zealous advocacy with an awareness that the circumstances of clients dealing with decisions involving incapacity, property, and death are complex and singular. This approach includes the following components, which should be part of a lawyer's ethical analysis:

1. Interplay Between Legal Doctrine and Ethical Analysis. The model begins with the foundational step of recognizing and identifying ethical issues, which is inseparable from the underlying legal doctrine. The lawyer must understand the nuances of the substantive law in order to effectively frame and resolve ethical issues. For example, a lawyer must zealously advocate for the "interests" of a client, yet identifying the precise nature of a client's interests in an elder law context can be difficult and subtle, depending on the nature of the case.

2. Cultural Competence. A lawyer's cultural competence is the product of an interactive dynamic between the lawyer's perceptive lens and the client's personal and cultural reality. The ingredients of cultural competence include the lawyer's professional and social perspective, knowledge about gerontological theory, the cultural and family background of the client, the impact of aging and dementia on the client, and attitudes toward long-term care. The outcome of ethical analysis depends in part on a lawyer's view of professional responsibility and of the client's cultural context.[26] A lawyer's ***413** understanding (or ignorance) of the aging process, dementia,[27] disability, long-term care, and family relationships informs the way in which ethical dilemmas are conceived and resolved.

3. Role Versatility and Adaptability. Because lawyers perform a defined role within a profession in which there are codes of conduct and professional norms, they operate within a framework that defines the range of roles that are considered appropriate. These roles range from individual representation of a single client to various forms of multiple representation, tread fine lines between client autonomy and professional paternalism, and reflect the nuanced ways in which lawyers and clients define their relationships and make decisions about objectives and strategies. Role versatility and adaptability enable attorneys to locate the decisions they make daily in response to ethical dilemmas within a broader context, expand their repertoire of approaches to representation, and ultimately help to provide legal services that are more responsive to the needs of their clients.

***414** 4. Anticipating Outcomes and Consequences. The final component of the framework recognizes that the framing, analysis, and resolution of ethical dilemmas affects the substantive outcome of a case. The impact of ethical decisions on the need for litigation, with its attendant financial and emotional costs, the value of preventing litigation, and alternative means for resolving disputes are incorporated as part of this analysis.

Part II of this Article consists of the Allen case study, which illuminates the human context and ethical issues that are subsequently discussed.[28] Part III explains how the legal profession's ethical norms and culture reflect a paradigm of lawyering that is adversarial and surveys alternative models of the lawyer's role.[29] Part IV describes a reflective model for resolving recurring ethical dilemmas in an elder law practice.[30]

II. Diminished Capacity and Representing Spouses: The Allen Case[31]

The ethical duty of a lawyer representing a client of questionable capacity has been the subject of much discussion, and the issues raised are challenging.[32] The decision in the law office about a client's decision-making capacity has profound personal consequences and a severe economic impact for poor clients. A working class elderly couple facing the ravages of the husband's Alzheimer's Disease may be ***415** forced to spend a significant percentage of their life savings on a guardianship proceeding that can be avoided if the husband has the capacity to sign a power of attorney.[33] The following case study illustrates some of the ethical issues facing elder law attorneys.

Mrs. Allen called the clinic regarding a power of attorney for her husband.[34] In addition to basic financial information about income and assets, the clinic intake form indicated that Mr. Allen had Alzheimer's Disease. Mr. and Mrs. Allen arrived at the clinic for their interview with Howard, a clinical student. Howard and I had met earlier in the week to discuss his interview plan and the ethical and substantive issues he anticipated. We talked about the issues of client identity, confidentiality, the potential for a conflict of interest, and the need to assess Mr. Allen's decision-making capacity. Howard anticipated that we would be representing both Mr. and Mrs. Allen. From a culturally competent perspective, we first discussed Howard's attitudes and knowledge about Alzheimer's Disease and explored issues of disclosure and consent if we decided to represent both spouses. The potential for a conflict of interest was troubling, and Howard wanted to make sure that Mr. Allen's interests were protected. Howard was aware that we had to make choices about our role, particularly if Mr. Allen's capacity was questionable. We discussed the costs of a guardianship proceeding and Howard instantly focused on the financial impact a guardianship would have. Howard and I then talked about the structure of the interview and ***416** the need to do a lot of listening, particularly at the beginning of the interview, and not to limit the scope of the interview to the presenting problem.

After the interview with Mr. and Mrs. Allen, Howard came into my office and reviewed the information he had obtained. Mr. and Mrs. Allen lived on their respective Social Security Retirement benefits, plus a small pension from Mr. Allen's last job as a carpenter. They owned their house and had a combined total of $3000 in savings. Mr. Allen was recently diagnosed with Alzheimer's Disease and had become increasingly difficult to deal with around the house: he was alternatively hostile and docile and had begun wandering. Mrs. Allen had to secure the doors to the house from the inside, and moved the stove to the basement because Mr. Allen (who had worked as a baker for many years) would not stay away from it. Mrs. Allen presented Howard with a note from Mr. Allen's doctor which read: "Please accept August Allen's signature because his condition is deteriorating due to Alzheimer's Disease."

Mrs. Allen wanted a power of attorney so she could manage their property and make decisions for her husband. Although there were no transactions that had to be performed immediately, Mrs. Allen expressed concern that if something had to be done with the house or mortgage, she wanted the means to act on behalf of her husband. Mrs. Allen also raised the specter of nursing home care and her concern about losing the house as a result. She wanted to know if the power of attorney would give her the authority to transfer the house to herself. She had heard that if one spouse might need to go into a nursing home, all the property should be transferred to the other spouse.

Howard clearly felt a sense of urgency and described his conversation with Mr. Allen about the power of attorney. It appeared that Mr. Allen understood it was a document that would allow his wife to make decisions about his property.[35] He probably did not understand each provision of this complex document--Howard had to decide if Mr. Allen's understanding was sufficient to sign. As the supervising attorney (and notary public, the person to whom he had to acknowledge his signature), I had to be satisfied that Mr. Allen had sufficient capacity to understand the nature and consequences of the power of attorney.

***417** Howard was certain that Mr. Allen had sufficient capacity to sign the power of attorney. "How do you know?" I asked. Howard said that Mr. Allen had acknowledged that he had problems with his memory and understanding from the Alzheimer's Disease. Mr. Allen said that he trusted his wife and "she took care of everything already." As Howard reviewed with Mr. Allen each of the powers listed in the document,[36] he reported that Mr. Allen's concentration appeared to wane. Although conceding that it was difficult for Mr. Allen to articulate complete answers without prompting, Howard was adamant that Mr. Allen understood the basic purpose of the document, its legal effect, and was capable of making an informed decision to sign it. What about the risk of abuse by his spouse? Howard scoffed at the notion--Mr. and Mrs. Allen had been married for almost fifty years and it appeared that Mrs. Allen was genuinely focused on helping her husband through this tragedy. Mrs. Allen had been emotional throughout the interview and Howard interpreted this as a strong indication that she would act in her husband's best interest.

I asked Howard what would happen if Mr. Allen was not able to sign the power of attorney. Howard understood that an adult guardianship was the alternative to a power of attorney.[37] Howard thought we should help Mr. Allen sign the power of attorney. If a proceeding to appoint an adult guardian was initiated, he argued, the court would merely appoint Mrs. Allen as guardian and deplete one-quarter of their meager savings. The power of attorney would give her the same authority, without the excess costs and the indignity of a formal judicial finding of incapacity. I asked Howard if his sense of justice and respect for the dignity of the Allens was influencing his judgment. What if Mr. Allen was confused about the power of attorney and didn't have the requisite capacity to sign the document? Would it be ethical to engage in a kind of "nullification" and supervise the signing of the document because ***418** subjecting Mr. and Mrs. Allen to a formal guardianship proceeding would be damaging emotionally and financially?

Howard said that he explained to Mr. and Mrs. Allen that we were representing both of them, and that no information provided by either could be withheld from the other.[38] I played the role of Mr. Allen's advocate. How can we represent both of them--aren't their interests different? After all, Mrs. Allen may just want to control ownership of the house as a prelude to throwing Mr. Allen into a nursing home. Is it not in Mr. Allen's best interest to maintain an ownership interest in the house so he is not forced into the nursing home? Howard recounted his observations about the couple: as Mr. Allen read the "consumer notice" section in capital letters at the top of the first page of the power of attorney, haltingly but correctly, and discussed it with Howard, Mrs. Allen sat quietly, understanding and respecting the need for us to make an assessment of her husband's capacity. The few times she intervened, her tone and words were loving and supportive. She showed remarkable restraint in not interfering. The strain and tension in her face revealed the struggle to maintain her composure as she watched

her husband struggle to maintain his dignity as his mental capacity waned before our eyes.

Howard and I had to make a decision. Howard said, "I think he can do it and we shouldn't wait any longer." I agreed to follow his recommendation, with one condition: when they returned the following day, Howard had to review the document with Mr. Allen in my presence in a way that would establish that he had sufficient capacity.

A final task remained--Howard had to draft a fairly sophisticated gift making provision to include in the power of attorney. This power would authorize Mrs. Allen in her capacity as agent to transfer ownership of any real property to herself as spouse. The provision was broader than the basic "default" gift provision in the statutory form[39] and had to be precise. It was designed to enable Mrs. Allen to assume ***419** sole ownership of the home, primarily to avoid a potential estate recovery by Medicaid[40] and secondarily to be able to obtain secured loans, refinance the existing mortgage, or sell the property. Howard would have to counsel Mr. Allen about the customized power.

Howard was clearly working "under the gun." He was concerned that Mr. Allen would not maintain the same level of understanding when they returned. That afternoon Howard researched Medicaid transfer of asset rules and drafted the clause in the power of attorney. Finally, Howard reviewed his plan for supervising Mr. Allen's signing of the document.

When the Allens returned the next day, we were ready for the execution of the power of attorney. Howard met with them for a few minutes and explained how he planned to proceed. I then entered the conference room, introduced myself, and sat behind the couple, who faced Howard across a conventional desk. For the next twenty-five minutes, Howard and Mr. Allen talked about the power of attorney--or perhaps more accurately, Howard talked to Mr. Allen who clearly was having difficulty comprehending all that was being said. Finally, Howard decided the time had come for Mr. Allen to sign the power of attorney. With some assistance, Mr. Allen finally initialed the appropriate powers to be granted to the agent and signed the document. Because I was acting as notary, Mr. Allen had to acknowledge that the instrument he signed was a power of attorney. I initially tried to ask the question in an open ended fashion: "What is the document you just signed?" Mr. Allen said it "makes her the boss." It was obvious he was not going to utter the words "power of attorney" without prompting. In response to my closed ended question, "Is the document you just signed a power of attorney?" Mr. Allen said that it was. I notarized the document, with a trace of uneasiness.

The case of Mr. and Mrs. Allen illustrates the ethical dilemmas contained within a "garden variety" legal problem. Difficult decisions often have to be made within short time periods. The elements of the ***420** reflective paradigm--the interplay between legal doctrine and ethical analysis, cultural competence, role versatility and adaptability, and anticipating outcomes and consequences--provide a framework for analyzing ethical dilemmas. They provide both a linear structure for analysis and a series of interactive elements that loop among each other in a dynamic process.

The threshold task of recognizing the issue and grasping the underlying doctrine prepared the student to deal with the issues: the client's questionable capacity, multiple representation, and the potential conflict of interest between the spouses. A meaningful decision about whether there is a conflict of interest can only be made with a culturally competent perspective on the life circumstances of clients and self-consciousness about one's own attitudes and assumptions. In the case of Mr. and Mrs. Allen, the student developed a relationship with the clients during a comprehensive and emotional interview that revealed a great deal about their relationship. In preparing for the interview, the student also examined his "self-fulfilling prophecies" about how Alzheimer's Disease would affect Mr. Allen. The student considered various alternative roles for the representation and reconciled them within a conflict of interest analysis. An understanding of the traditional conception of the lawyer's role and its alternatives enabled the student to understand the theories underlying the different roles, and to draw on each of them. There is no question that the student felt strongly that it would be extremely harsh to subject these clients to a formal guardianship, and integrated ideals of fairness and social justice into his thinking. Interestingly, in this case we were acting as zealous advocates within a preventive law orientation, because we thought there was much at stake and wanted to work with Mr. Allen to get the power of attorney signed. The difficulties Mr. Allen exhibited during the two hours he spent at our office, and Mrs. Allen's description of the progression of his disease, raised the possibility that it was "now or never." The cost of not acting swiftly was significant: a formal court proceeding that would culminate in a finding that Mr. Allen was an "incapacitated person."[41] In addition, the costs of the guardianship proceeding[42] would deplete a substantial portion of their assets. In this case, the alternative to litigation had enormous advantages.

***421** But what about safeguarding against abuse? Were we giving Mrs. Allen a "license to steal" from her husband?[43] In this

situation, the intimate relationship of the principal and the agent, their existing ownership of their property, and the obvious dedication of Mrs. Allen to her husband made this a relatively easy dilemma to resolve.[44]

Later that week in rounds,[45] Howard described his meeting with Mr. and Mrs. Allen. We had decided in advance that he would not reveal how the meeting ended (i.e., with the signing of the power of attorney), but that we would ask each member of the group to decide whether Mr. Allen had sufficient capacity to sign the document. After a full discussion structured around the elements of the reflective model, each student wrote down their vote. It was unanimous--everybody thought we acted properly in going forward with the signing of the document, notwithstanding the lingering questions about Mr. Allen's capacity. The students were, however, equally divided into three groups in their reasoning. Some based their opinion on a careful assessment of Mr. Allen's capacity to sign a power of attorney measured against the governing legal standard for capacity to sign this document.[46] Others were swayed by the totality of the circumstances in concluding that we should resolve questions about capacity in favor of signing the document. The most significant factors for these students were the duration of the marriage between Mr. and Mrs. Allen, their equal ownership of the property with mutual rights of survivorship, and the belief of the students that there was no actual conflict of interest. The third group of students justified their decision on considerations of fairness and social justice, although most insisted that if Mr. Allen truly ***422** did not have the capacity to sign a power of attorney, it would be unethical for us to allow him to do it and notarize his signature.

We tried to place ourselves in the shoes of Mr. Allen and examine the extent to which this transaction was unfair to him. Although he was giving a great deal of power to his wife, the students thought it was inevitable that Mr. Allen would need an adult guardian appointed and that Mrs. Allen, assuming continued good health, would be appointed. There was a considerable amount of discussion about Mr. and Mrs. Allen's dignity--the prospect of a court proceeding seemed to be something to be avoided, an affront to their brave efforts to live their lives independently. Most saw our decision as consistent with our duty to provide zealous advocacy. The students perceived our decision to supervise the signing of the power of attorney and to provide advice and counseling about its use as fulfilling our duty as attorneys.[47]

The Allen case captures many of the issues and themes that will be discussed in this Article. It demonstrates the impact a reflective model of ethical decision-making has on lawyering choices. The handling of the Allen case does not fit traditional norms of an adversarial system. In the next section, I discuss the traditional conception of the lawyer's role, alternative models, and how ethical obligations change depending on the practice context.

III. The Traditional Conception of the Lawyer's Role and Modern Professional Norms

The traditional conception of the lawyer and the development of professional ethical norms derive from a litigation-based perspective.[48] Lord Brougham's definition of the advocate's role in his defense of ***423** England's Queen Caroline in her 1820 divorce trial on grounds of adultery captures the concept of the "neutral partisan:"[49]

> An advocate, in the discharge of his duty, knows but one person in all the world, and that person is his client. To save that client by all means and expedients, and at all hazards and costs to other persons, and, amongst them, to himself, is his first and only duty; and in performing this duty he must not regard the alarm, the torments, the destruction which he may bring upon others.[50]

The assumption underlying this clarion call is that saving one's client necessarily involves hazard, torment, and destruction to others. Although this approach to zealous advocacy is frequently utilized in criminal defense and certain civil litigation contexts, in many practice areas the interests of the client and the role of the lawyer are more nuanced and complex.[51] Within the context of representing elderly clients, "saving" a client frequently requires that the lawyer relate to others in constructive ways, rather than the potentially destructive "damn the torpedoes" approach described by Lord Brougham.

A. A Brief History of Codes of Conduct Governing American Lawyers

In 1908, the American Bar Association ("ABA") promulgated the Canons of Professional Ethics, purportedly to elevate the norms of the profession; but in reality to create obstacles to immigrants seeking to practice law at a time when women and African-Americans were already effectively kept out of law schools and prevented from being admitted to the bar.[52] The Canons regulated the profession in a number of areas: advertising and solicitation; improving the image of the profession by

prohibiting actions that were viewed as unethical; ordering the relationship between lawyers and clients; and providing guidance, albeit limited, on ethical dilemmas that confront lawyers in daily practice. The genteel language of the Canons barely concealed its attack on the droves of ethnic minorities who began practicing law in urban areas and threatened the monopoly of the Anglo-Saxon Protestant firms that served corporate interests.[53] Because of the social and ***424** political context out of which the Canons emerged, the professional norms that have governed the profession for most of this century reflect a particular notion of the professional role that cannot be separated from its tainted origins.

In 1969, the ABA replaced the 1908 Canons with the Code of Professional Responsibility in order to correct problems that made the Canons difficult to enforce, interpret, and apply. The Code of Professional Responsibility, like its predecessor, is premised on a traditional rights based approach to the lawyer-client relationship, with the lawyer exercising professional judgment solely for the benefit of the client.[54]

The ABA established the Kutak Commission to improve continuing problems experienced with the Code[55] and in 1983, the ABA adopted the Model Rules of Professional Conduct. The Model Rules replaced the Code's hierarchy of Canons, Ethical Considerations, and Disciplinary Rules with a more streamlined form limited to mandatory rules and lengthier comments. Most states have subsequently adopted the Model Rules, although Illinois, New York, North Carolina, Oregon, and Virginia follow codes that rely to varying extents on both the Model Code and Model Rules. California has rejected both the Model Rules and the Model Code and follows its own regulatory structure.[56]

The Model Rules depart in some respects from the Code and create a slightly different model that purports to elevate the lawyer's role as "officer of the legal system and a public citizen having special responsibility for the quality of justice" to a more prominent place, nearly co-extensive with the lawyer's role as client advocate.[57] Critics ***425** of the Model Rules have sought to locate this broader notion of the professional role in historical context by asserting both that the lawyer's duty as "officer of the court" is fulfilled by serving the undivided interests of individual clients, and that the lawyer's obligation to clients remains undiminished by the language in the Model Rules.[58] In addition, the Model Rules include provisions that attempt to respond to the needs of lawyers outside of litigation settings. For example, there is a provision that guides lawyers acting in the role of intermediary.[59]

The Code and Model Rules are the primary mechanisms by which the legal profession governs itself.[60] Although adapted and modernized in response to the changes that have occurred in society and in the legal profession, substantial portions of each code retain strong connections to their predecessors.[61] Despite their differences, the Code and Model Rules have not changed the fundamental norms governing the professional obligations of lawyers and are both broad in scope and geared primarily to litigation. Regardless of whether one views this ***426** breadth as a strength or weakness, there is a great deal of space for lawyers to infuse their own conception of appropriate professional behavior and to exercise discretion within the spare guidelines of the codes.[62]

B. Profile of the Lawyer's Role Under the Code and Model Rules

The codes of conduct were originally based upon a litigation paradigm and a conception of the lawyer's role as zealous advocate, willing to aggressively pursue the interests of clients fighting for wealth, power, status, and property rights.[63] The specific provisions that define the parameters of the lawyer-client relationship and regulate the conduct of lawyers reflect broader societal and cultural values in which legal rights increasingly define the relationship among individuals and between the individual and the state, cooperation is based upon formal contracts, and the private realm dominates civic virtue and the public interest.[64]

A lawyer's duty is to pursue the client's lawful objectives[65] and, in a ***427** traditional context, to achieve a clear cut victory at all costs.[66] It is generally assumed that a lawyer contracts to achieve the client's goals through every reasonably available strategy that is legal, without regard to the morality of the client's goals or their impact on third parties. In order to accomplish this ideal of zealous representation, the lawyer often needs to distinguish and set aside her own ethical and moral perspective in order to fulfill the demands of the professional role.

Respect for client autonomy is at the heart of the traditional profile of the zealous advocate. Ideally, this principle requires that a lawyer develop insight into and understand, rather than merely assume, the client's perspective and represent her interests accordingly. In order to develop this insight, the lawyer must engage in a full dialogue with the client about the legal

problem or issue and advise the client about the risks and benefits of a course of action or strategy to assure that the client's decisions are informed.[67] Under the traditional notion of ***428** professionalism and role differentiation, a lawyer is duty bound to follow the directions of a client even if it means that the lawyer acts in ways that violate the lawyer's own sense of morality and ethics, provided the proposed course of action does not violate any provisions of the governing code of conduct or other applicable law.[68]

Monroe Freedman has written that this traditional adversarial, rights-based perspective views the lawyer's role as "helper" to the client, whose goal is to seek "full and equal rights" for the client and pursue that goal through any means necessary within the bounds of the law.[69] The conception of the lawyer's role as helper or agent of the client has its origins in the United States Constitution and is realized through our adversarial system of justice.[70]

In many contexts adversarial zeal is essential to secure individual rights and further the principles that are the essence of our system of justice. However, the role differentiation that is part of the professional education of every lawyer and is justified as an essential ingredient of the lawyer's role can have disturbing consequences.[71] The famous case ***429** of Spaulding v. Zimmerman[72] highlights the moral and ethical dissonance that can occur when a lawyer acts according to the professional norms of zealous advocacy. In a personal injury case involving a minor, a doctor hired by the defendant's attorney examined the plaintiff and discovered a life threatening aortic aneurysm that might have been caused by the accident.[73] Disclosure of the condition could potentially save the boy's life, but would also expose the defendant to much greater liability. The defendant's lawyer's ethical duty of confidentiality prohibited him from revealing this information. The case settled for $6500, and the aneurysm was discovered years later in a physical examination conducted by the military.[74] The plaintiff moved to vacate the settlement, and the trial court granted the motion, reasoning that although there was no duty to reveal the existence of the aneurysm while the relationship of the parties was "adverse," once the settlement was agreed upon, the defendants had an obligation to fully disclose all the relevant facts to the court.[75]

The ethical dilemma facing the defendant's lawyer was fairly easy from a professional obligation perspective, but harrowing from a broader sense of morality. The lawyer was only concerned with the narrow interest of the client (limiting liability) in furtherance of a clearly defined objective (resolving the case quickly). The professional values that not only permitted, but required, the defendant's attorney to ignore the potential threat to the life of the plaintiff is antithetical to our shared moral sensibility. The court's reasoning is based on the "logic" of role differentiation that justifies the duty of disclosure to the court as part of the settlement presentation, but denies the same duty with respect to the plaintiff with the life threatening aneurysm.

Even within a traditional adversarial role, the defendant's attorney's blind reliance on professional rules of ethics in Spaulding v. Zimmerman represents an extreme. The dialogue between attorney and client often includes a more textured discussion that includes dialogue, a shifting balance between autonomy and paternalism, persuasion and reconciliation, and other dynamics.[76]

***430 1. Justifications of the Neutral Partisan Role**

The role of "neutral partisan" is justified as the best way to protect client autonomy and further the American justice system: opposing adversaries each present their case, the judge acts as a referee and decides legal issues, and findings of fact are made by the judge or a jury. In the criminal defense context, the integrity of the system requires that the accused be provided with the most vigorous defense possible.

Professor David Luban uses a "criminal defense paradigm" and "civil suit paradigm" to illustrate how justification for the system, and the concept of professional roles on which it is predicated, wanes and ultimately disappears outside of a narrow group of cases.[77] It is easy to justify the role of the criminal defense attorney to defend the accused at all costs, regardless of actual innocence or guilt, as protecting individuals against the abuse of state power, thus preserving a fundamental pillar of a free society. Professor Luban writes:

> The criminal defense paradigm includes any litigation context in which zealous advocacy is justified by virtue of the fact that we have political reasons to aim at prophylactic protection from the state, even at the expense of justice. In the same way we can speak of a 'civil suit paradigm': this involves any litigation context in which, because we are confronted with a dispute between relatively evenly matched private parties, our primary aim is legal justice, the assignment of rewards and remedies on the basis of the parties' behavior as prescribed by legal norms.[78]

Because of their vast power over individuals, Luban includes cases involving "private megaliths" in the "criminal defense paradigm."[79] He demonstrates that the rationale for the system breaks down as the law moves away from the criminal paradigm because the institutional justification for partisanship and non-accountability disappear in the civil suit paradigm. Representation "by all means necessary" is justified to protect individuals against the state. But it becomes difficult, perhaps impossible, to justify these "ethical duties" when the state or a "private megalith" is no longer the opponent. For example, in the Spaulding v. Zimmerman scenario, jeopardizing a settlement is insufficient justification for a defense lawyer to not disclose the existence of a life threatening aneurysm to a child plaintiff.

***431** The justification for the adversarial approach erodes further with the knowledge that even in traditional criminal and civil litigation context the overwhelming majority of cases are settled without going to trial, and much of the lawyer's work representing clients takes place outside the supervision of an impartial "referee." Even litigated cases decided by a judge or jury are often resolved with alternatives to a "zero sum, winner take all" solution.[80] As the posture of a case moves further away from this traditional model, the skills of combat must yield to the counseling, negotiating, problem solving, persuading and advocacy needed to represent clients and deal with the ethical dimension of their cases with integrity and candor.[81]

In addition, many cases do not have recognizable adversaries in the traditional sense, and at the conclusion of the proceeding there is no real declaration of winner and loser. Lawyers need to think differently about how they should adjust to these changing contexts; yet Professor Menkel-Meadow points out that "the 'adversary model' employed in the courtroom has bled inappropriately into and infected other aspects of lawyering, including negotiations carried on both 'in the shadow of the court' and outside of it in lawyers' transactional work."[82] In many practice contexts, the law office, not the courtroom, is the locus of activity, reflecting the reality that "the overwhelming preponderance of legally significant decisions are made by lawyers, not judges, legislators or theorists; and the overwhelming preponderance of lawyer decisions will never be reviewed or even perceived by any other official."[83]

An adversarial conception of the lawyer's role and purpose may be ill-suited to optimum lawyering in many cases. Alternative paradigms are needed to guide the exercise of discretion and good judgment that is the professional reality and destiny of lawyers.

2. From Autonomy to Paternalism: Alternative Models of the Lawyer's Role

In contrast to the model of the zealous advocate are alternate conceptions of the lawyer's role that balance the value of client autonomy with countervailing ethical, moral, and social justice values. ***432** These models necessarily involve an activist approach by the lawyer that is more paternalistic, because they do not view client autonomy as the only value, but rather as one important value that may be diminished by the lawyer's values.

For example, a lawyer's role has been compared to a "spouse" who has a responsibility to modify the client's actions to prevent the client from acting improperly.[84] Another image of the lawyer is that of a friend primarily concerned with the client's goodness, who is not afraid to influence and engage the client in moral discourse because the lawyer's goal is to make the client a better person.[85]

The lawyer as friend engages her client in a discussion about the morality of her position and appeals to the client's sense of virtue.[86] This approach is justified on the basis of fidelity to the lawyer's personal moral values of care, mercy, and reconciliation. The ultimate goal of this Judeo-Christian morality is not client victory in a legal dispute, enhanced client autonomy, or persuasion to "do the right thing," but "client goodness."[87] The lawyer as friend wants the client to become a better person.

Applying this to Spaulding v. Zimmerman and assuming that the client is unwilling to disclose the existence of the aneurysm, the lawyer as friend may try a variety of other approaches. He might have engaged the "bad" client in discussions about the morality of his decision, although it is likely that the economic bottom line (i.e., nondisclosure preserves a $6500 settlement for an injury that is potentially worth a great deal more) will be more persuasive than "doing the right thing." Ultimately, the lawyer would insist on terminating the representation, even if the governing code of conduct prohibited withdrawal. The attorney would also likely disclose the existence of the aneurysm to the plaintiff despite the duty of confidentiality.

Another form of morality-based lawyering is embodied in Professor David Luban's moral activism, based on a notion of conventional morality in furtherance of the public good.[88] Client counseling and law reform are the pillars of Luban's moral activism. The moral activist lawyer assumes a more paternalistic posture and engages the client in dialogue if the lawyer believes the client's position is immoral or ***433** unjust.[89] The lawyer as moral activist need not possess "extraordinary moral insight, only the same moral insight that anybody else has."[90] The attractions of Luban's conception of the lawyer's role are its accessibility (the student or lawyer need not be a philosophy expert) and its focus on the public interest dimension of law practice.

From a social justice perspective, William Simon argues that lawyers should exercise "reflective judgment" to represent clients in ways that promote justice.[91] In the Spaulding v. Zimmerman scenario, Simon might say that the "defense counsel's responsibility is to move the case toward a fair result."[92] The client's purpose is "problematic" when it clearly "endangers [the] fundamental value[ ]" of fairness.[93] The attorney would therefore exercise his discretion to make the disclosure about the aneurysm, regardless of the client's wishes and the dictates of the professional code. Simon's approach infuses the lawyer with the authority to exercise discretion and judgment based on substantive fairness, social justice and the public interest. In his conception, the outcome of the representation is based on the lawyer's social justice values, rather than those of the client. Simon uses the example of a lawyer who represents a financial planner and decides to interpret a tax statute conservatively to the detriment of the client, even though the language would support a less stringent construction.[94] The lawyer is presumably fulfilling goals that comport with a fairer system of taxation and distribution of wealth. Conversely, when representing a welfare recipient receiving benefits so low that they violate fundamental norms, the lawyer can interpret the statute as permitting any client goal not explicitly precluded in order to enhance the benefits available.[95]

Justice Louis Brandeis was famous for defying the conventional image of the lawyer as subservient to the client's wishes. Brandeis, perhaps practicing for the judiciary, demanded that clients convince him that their case was just before he agreed to represent them.[96] Despite ***434** his legendary status as a progressive lawyer who fought vigorously in the public interest, Brandeis has been criticized for being willing to impose his own solutions on clients without adequately explaining to them the role he adopted and its implications for their interests.[97]

Brandeis has influenced several generations of lawyers, including those who reject role differentiation because it ignores moral imperatives and contributes to an unacceptable schism between a lawyer's personal and professional identities.[98] Professor Richard Wasserstrom, a leading critic of role differentiation, encourages lawyers to adopt a "moral point of view" when dealing with clients, even if this requires a paternalistic approach that nullifies the client's autonomy.[99]

Wasserstrom uses the examples of a client who wants to make a will disinheriting children because they oppose the Vietnam War and a wealthy client who could benefit from a tax loophole.[100] In the first case, Wasserstrom states that the lawyer should refuse to draft the will on personal moral grounds.[101] In the other circumstance, he asserts that the lawyer should withhold information about the tax loophole, on the theory that institutions perpetuate social injustice and are incapable of correcting themselves.[102] This position requires that the lawyer assume an activist position and nullify the client's rights to the extent that exercising those rights offends the lawyer's morality.

According to Monroe Freedman, Wasserstrom's rejection of role differentiation constitutes the worst form of immoral professional conduct, because its level of paternalism substitutes the lawyer's judgment about morality, ethics, and justice for that of the client.[103] Despite Wasserstrom's recognition that the lawyer should respond to the social, moral, and ethical consequences of a client's course of ***435** action, his particular form of paternalism unduly diminishes client autonomy and empowerment and grants the lawyer too much authority and control over the client. Furthermore, it assumes that lawyers will utilize their power to achieve goals of social justice and fairness; it is not difficult, however, to imagine that lawyers will blunt client wishes to pursue more nefarious ends that perpetuate the institutional oppression that Wasserstrom finds so offensive. Freedman points out that lawyers often assume clients want to press for every advantage--if this also reflects the value system of the lawyer, we may be better served by limiting the lawyer's power over client decisions and hoping that clients choose a more balanced approach to vindicating their rights and resolving disputes. From the perspective of client autonomy, "[i]f a lawyer chooses to represent a client . . . it would be immoral as well as unprofessional for the lawyer, either by concealment or coercion, to deprive the client of lawful rights the client elects to pursue after appropriate counseling."[104]

These critiques of the traditional conception reflect differences in the emphasis that a lawyer places on the relative

importance of the client's rights and the lawyer's sense of morality and ethics.[105] The "pure" adversarial advocate is not concerned with moral issues, and along the continuum, the lawyer's engagement with the morality of the client's position increases.[106]

Between the paternalistic mastery espoused by Wasserstrom and the blind servitude associated with the traditional conception of the lawyer's role[107] lies collaboration, dialogue, and mutual empowerment between a lawyer and her client. The lawyer-client relationship should be informed by the lawyer's understanding of the client's goals, insight into the lawyer's own perspective on those goals, knowledge of the ***436** available means to achieve the goals, awareness of the roles that the lawyer may adopt, and the consequences of decisions that implicate both ethical concerns and substantive aspects of the client's case. Enhanced concern for a client's relationships and emotional dimension is consistent with a feminist ethic of care,[108] the "philosophical map" of a mediator,[109] and therapeutic jurisprudence.[110]

C. The Relationship Between Ethical Obligations and Practice Context

The nature of the lawyer's role and justifications for that role are shaped by a number of variables related to the practice context. The legal landscape is filled with a rich diversity of cases and a virtually infinite number of client goals. Ethical dilemmas, and approaches to resolve them, are similarly diverse. There is a continuum that begins with the criminal defense attorney, followed by a plaintiff in a civil suit against a powerful private entity, which are contexts in which the traditional conception may be easier to justify. It continues along toward private commercial disputes between parties of relatively equal stature and moves through cases in which family relationships and care of dependents (including children and incapacitated adults) are decided. The continuum ends with mediation and transactional cases in which the interested parties have relationships that are significantly different than the typical civil dispute or there are no adversaries at all.

Within these different contexts, the ethical dilemmas that arise and the best approach for resolving these dilemmas are diverse and not susceptible to a singular approach. Thus, the kind of ethical dilemmas ***437** that arise and the "fit" of the relevant provisions of the code vary according to the practice context.

The nature of the client's goals define a case's "success" or optimum outcome which in turn shapes how a lawyer frames and resolves ethical issues.[111] Even within similar kinds of cases, the way in which a client defines her interests varies. Accordingly, in a criminal context, lawyers may pursue a strategy to obtain an acquittal or advise the client that a plea bargain may provide a better result based on the client's circumstances.[112] In transactional contexts, it is not uncommon for lawyers to represent multiple clients and facilitate agreements between clients to prevent potentially damaging litigation. When a lawyer is counseling in a planning context, the lawyer advises the client about the relevant law, available options to meet the client's goals, and strategies to take advantage of "loopholes."

Elder law is a prime example of an area of practice that encompasses goals for representation that often fall outside a conventional litigation context. The fear of long-term care and the related specter of incapacity undergirds many aspects of representing the elderly and their families.[113] Decisions that present themselves under the rubric of "professional responsibility" often have significant consequences for the future care and quality of life for the vulnerable elderly person.

For example, if a person wants to execute an advance directive (e.g., a power of attorney or health care proxy), the lawyer's approach to representation (i.e., decision about client identity, the role of family members, multiple representation, and the decision-making capacity of the vulnerable person) has a direct influence on whether an advance directive is executed, who is named the decision-making agent, and the scope of the agent's powers. These "ethical decisions" may determine ***438** whether a person is cared for at home, placed in a nursing home, or receives the kind and degree of medical care she wants.

D. The Goals of Elder Law Clients

Although there is no "typical" elder law client, below are three paradigmatic clients followed by various goals they may have for legal representation:[114]

1. The husband and wife who seek estate, disability, and Medicaid planning because one spouse has Alzheimer's Disease (or some other form of neurological impairment).[115] These clients may seek to: (1) plan their affairs to create a mutually agreed

upon estate plan; (2) execute documents that would prevent the need for a formal guardianship; (3) transfer assets to assure that the impaired spouse would qualify for Medicaid coverage of home care or nursing home care; (4) preserve the autonomy of the "well spouse"; (5) preserve the dignity of the impaired spouse in the event long-term care (at home or in a nursing home) becomes necessary; (6) transfer assets to avoid a Medicaid lien or recovery against the estate of a Medicaid recipient; (7) obtain the necessary surrogate decision-making powers to place the "sick" spouse in a nursing home to relieve the healthy spouse from the caregiving burden even if it compromises the dignity of the ailing spouse; or (8) maximize Medicaid coverage of long-term care to preserve assets for the healthy spouse, even if the quality of care is diminished.

2. The aging parent of an adult child with a disabling physical, mental or emotional disability. This client may seek to: (1) develop an appropriate estate and disability plan for the elder; (2) plan for the future care of the disabled adult child; (3) create sufficient support and resources to allow both the elder and adult child to reside at home or in a residential setting; (4) maximize the government benefits for which the adult child may be eligible; (5) prevent litigation over either the parent's estate or the trust established for the benefit of the child; (6) petition the court for broad powers as guardian for the disabled child to limit the autonomy of the child; or (7) find a placement for the disabled child in a facility where the cost of care will be covered by Medicaid so ***439** that the "normal" children will receive a greater share of the client's estate.

3. The adult child, relative or friend of an elder with legal needs due to the onset of Alzheimer's Disease or other neurological impairment. This client may seek to: (1) assist the elder in executing advance directives that will enable the "helper" to make decisions relating to health care and finances; (2) plan for the distribution of the elder's property upon her death; (3) arrange for home care to allow the elder to remain at home for as long as possible; (4) apply to nursing homes because the elder is no longer able to reside at home; (5) transfer the elder's assets so that she can qualify for Medicaid coverage of home care or nursing home care; (6) obtain the necessary powers to place the elder in a nursing home even if it compromises her dignity; or (7) maximize Medicaid coverage of long-term care to preserve assets even if the quality of care is diminished.

In addition to being shaped by the nature of the legal problem, the goals of representation may also be affected by the client's individual culture which includes, but is not limited to, ethnicity, race, gender, family structure and relationships, sexual orientation, age, health, education, and class. All of these factors influence how a client perceives and experiences her legal problem, and affect the ethical obligations of the lawyer.[116]

E. The Paradoxical Nature of Advance Directives and Guardianships

Consider the potential issues that arise when representing an elderly couple struggling with one spouse's diminished capacity. Depending on the extent to which the impaired client's decision-making capacity has diminished, it may be possible to prevent the need for a guardianship through the use of advance directives such as a power of attorney for property and a health care proxy for medical treatment.

Each of these documents both empowers and diminishes the client's freedom by enabling her to choose the person who will have the authority to make decisions on her behalf, while also implementing a structure in which her power to make decisions is reduced. These planning documents formalize a legal agency relationship that may be long term and involve the most intimate aspects of the person's life. There is no "winner" or "loser" in this situation in the traditional sense, and the relationships among the interested parties (client, agent, family members, friends, support professionals) are clearly different than in an ***440** adversarial case. To prevent the possibility of abuse, and to assure that the documents serve their intended purpose, the attorney for the elderly client may have to involve members of the client's support network.

Even if the client does not have the capacity to make decisions and it is necessary for a court to appoint a guardian, the nature of the proceeding and the outcome are often different than the paradigmatic legal dispute.[117] Although it is true that the appointment of a guardian diminishes fundamental liberty and due process interests, it also may be the only way to preserve those interests for a person with diminished capacity.[118] The person who petitions the court is frequently a family member who wants to be appointed guardian by the court. As limited guardianship statutes that honor the autonomy of the alleged incapacitated person become more prevalent,[119] the varying interests at ***441** stake and the parties' conception of a successful outcome are more nuanced.[120] For example, under a limited guardianship statute, a court will not grant a guardian broad powers over the incapacitated person if it is possible to craft less restrictive, more individualized powers. Therefore, a successful outcome may include the appointment of a guardian whose powers are limited to arranging home care and other support services that will allow the incapacitated person to remain at home. The goal is to allow the incapacitated person to

retain to greatest amount of autonomy and control possible given the particular functional limitations that created the need for a guardian.

F. The Economics of Aging and the Lawyer's Role

Many elderly people live in fear of impoverishment if they need long-term care at home or in a nursing facility. One type of client concerned with the planning of financing long-term care is a middle class couple where the "well" spouse does not know if she can afford to ***442** pay for the cost of home care or nursing home care. The client may have one or more of the following goals: (1) create eligibility for Medicaid coverage in the most aggressive way possible with minimal regard for the letter of the law; (2) utilize whatever means and strategies are available within the bounds of the law to become eligible for Medicaid; (3) obtain the best quality home care or nursing home care regardless of the cost; or (4) make a fully informed decision based on the attorney's thorough counseling of the available alternatives.

The Code and Model Rules mandate that a lawyer do her best to help the client make an informed decision.[121] In the above example, option (1) may be problematic under the prevailing codes of conduct if it involves client fraud. Option (2) may be problematic for the lawyer ethically if the lawyer has doubts about the use of the Medicaid program by people with at least some financial ability to pay for the cost of home care or nursing home care. Option (3) may be troubling to the lawyer concerned about the potential impoverishment of the well spouse and who believes that government benefits for long-term care should be maximized. It is clear, however, that the lawyer representing a client who wants to preserve assets has a duty to represent the client in a way that facilitates her eligibility for Medicaid, provided the lawyer is not involved in furthering activity that constitutes criminal conduct.[122]

***443** In the next section, I set forth a reflective model for analyzing and resolving ethical dilemmas that regularly occur in an elder law context. The core components of the model apply to other practice contexts that share characteristics of elder law.[123] Although it may be beneficial to create a "specialized" code of conduct for elder law, I believe that it is inevitable, and beneficial, that lawyers continue to exercise discretion and judgment to resolve recurring ethical quandaries, regardless of the specificity of such a code.[124]

IV. A Reflective Model for Resolving Ethical Dilemmas in Elder Law

The design and structure of the governing codes of conduct inevitably allow lawyers a great deal of autonomy and discretion in determining how a particular ethical dilemma should be resolved. Ethical dilemmas are a classic example of the kind of "indeterminate zone of practice" described by the late Donald A. Schon in his book, Educating the Reflective Practitioner:

> These indeterminate zones of practice--uncertainty, uniqueness, and value conflict--escape the canons of technical rationality. When a problematic situation is uncertain, technical problem solving depends on the prior construction of a well-formed problem--which is not itself a technical task. When a practitioner recognizes a situation as unique, she cannot handle it solely by applying theories or techniques derived from her store of professional knowledge. And in situations of value conflict, there are no clear and self-consistent ends to guide the technical selection of means.[125]

***444** Resolving ethical dilemmas in an elder law practice involves a reconception of zealous advocacy, because the interests of the client may be difficult to discern and the goals of representation do not always involve an easily quantified, win-lose outcome. The following discussion focuses on how to extend and apply what is valuable in the concept of zealous client-centered advocacy to practice contexts that are qualitatively different than the litigation paradigm of practice upon which the Code and Model Rules are premised.

Regardless of the regulatory structure, there will always be situations in which principles, rules, and values clash. According to Dr. Harry R. Moody, a philosopher specializing in aging issues, "[e]thical dilemmas--sometimes called 'quandary ethics'--arise when principles come into conflict, as they often do. Ethical analysis then consists of clarifying or resolving the conflict, while at the same time uncovering presuppositions and implications brought out by the case at hand."[126]

In the field of bioethics, a four principle paradigm developed by Tom L. Beauchamp and James Childress illustrates the

process by which the gap between general rules and principles is bridged.[127] These four principles-- respect for autonomy, nonmaleficence, beneficence, and justice--are balanced to guide those grappling with ethical decisions in medicine or biotechnology. Bioethics emerged as a practical form of ethics at a time when society was coming to terms with death and dying issues, including the appropriate use of life-prolonging technology and the scope of autonomy and self-determination as determined by courts faced with cases involving the issue of whether to withhold, terminate, or administer life-sustaining treatment for people with terminal illness or in a permanent vegetative state.[128]

***445** Within the legal context, the governing principles and rules are found in the Code and Model Rules. The Code's ethical aspirations are analogous to the principles created by Beauchamp and Childress insofar as they express the "common morality" of the law.[129] In the law, "common morality" refers to broad principles that reflect the legal culture's diverse professional assumptions and values. These fundamental principles include, but are not limited to: the aspiration to maintain the integrity of the profession, the duty to preserve confidences and secrets, and the obligation to represent a client zealously. These rules and principles are of limited utility, however, because they do not help resolve particular ethical dilemmas. The process of "specification" marshals the particulars of a situation to overcome moral conflicts and the gaps in the framework of principles and rules.[130]

The elements of the reflective model--the interplay between legal doctrine and ethical analysis, cultural competence, role versatility and adaptability, and anticipating outcomes and consequences--provide a unifying framework to apply professional responsibility principles and rules to ethical dilemmas in elder law practice, as well as other areas in which a significant percentage of cases fall outside the traditional adversarial model.[131] Although it may be true that "good moral judgment is the heart of legal ethics,"[132] informed analysis and a reasoned interpretation of all relevant factors are also critical.

A. Interplay Between Legal Doctrine and Ethical Analysis

The ability to recognize ethical issues and locate them within the governing laws of lawyering is the foundational step for resolving ethical issues and is recognized as a fundamental lawyering skill.[133] ***446** Examinations of recurring ethical dilemmas in elder law reveals that "recognizing the issue" involves both an understanding of the underlying substantive legal problems, relevant provisions of the Code of Professional Responsibility and Model Rules of Professional Conduct, and other applicable sources of law.

1. Who Is the Client?

The question of client identity arises repeatedly in elder law practice. If spouses grappling with dementia seek joint representation,[134] the attorney must disclose any potential conflicts and obtain informed consent from each spouse.[135]

The lawyer has an obligation to counsel clients who "want to make wills" about a variety of issues, including planning for disability, financing long-term care (including the opportunity for Medicaid coverage), and the potential benefits of alternative plans that may involve trusts, transfers of property during life, and decisions about long-term care and living arrangements. Previously unforeseen potential conflicts of interest become apparent as the nuances of these choices unfold. When faced with these conflicts, the available choices for the lawyer include representing one spouse, representing both spouses jointly, or representing each spouse separately.[136] A lawyer is not prohibited from representing both ***447** spouses, and in fact typically does represent both spouses jointly,[137] but the process of disclosing and explaining the conflict of interest and obtaining informed waivers is complex. Under most circumstances, despite the presence of potential conflicts of interest, the clients will waive any conflicts in order to receive the benefits of joint representation.[138]

Another example of the interplay between the ethical rules and the substantive law, perhaps more difficult than the spouse hypothetical, occurs when an adult child seeks advice about a legal problem of an elderly parent. When the case involves an issue that does not implicate the interests of the adult child--for example, an employment discrimination case--there is no question that the attorney represents the elderly person. If, however, the legal question relates to the need to plan for the elder's disability or the distribution of property upon the elder's death, the interests of the adult children are frequently implicated, the identity of the client is less clear, and issues of elder abuse must be considered. Although the lawyer's options for representation may be obvious--the attorney may represent one or more adult children, the elderly parent, all the members of the family, or some combination thereof--choosing among them can be challenging.

Initially, the lawyer must determine whether the adult child contacting the lawyer is acting individually or as an informal agent or intermediary for the elderly person, who may be presumed to be the actual client. The adult child may make it clear that she is calling only to schedule an appointment for the mother and not engage the lawyer in any conversation about the direction of the estate plan. This is an easy case--the client is the mother.

The analysis becomes a bit more complex and troublesome if the adult child seeks legal advice on behalf of her mother who has Alzheimer's Disease. The child says that the mother wants to make a ***448** will that gives the mother's house and entire estate to the daughter and nothing to the mother's other child. Further, the daughter intends to pay the attorney's fee and wants to be informed about and involved in the preparation of documents and related decisions during the course of representation. This scenario requires the lawyer to clarify at the outset of the representation the exact identity of the client and the terms of the representation. In this case, a lawyer who agrees to represent both the interests of the adult child (i.e., in having the mother's will benefit her to the exclusion of her sibling) and the mother (who has yet to express her wishes) is asking for trouble.

The initial inquiry often evolves from a simple request for legal advice or services to a complicated morass of facts in which the caller may frame the representation for his own benefit (e.g., by asking how he can become his father's guardian, apply for Medicaid, and preserve the family home for himself). By the end of the initial phone conversation, there may be uncertainty about the identity of the client, the nature of potential conflicts of interest, how to deal with the adult child's self-interest, and whether the elderly father has decision-making capacity.

One possible response for a lawyer faced with such uncertainties is that the client is always the "vulnerable" or elderly person. This eliminates conflict of interest problems of multiple representation but may not produce a satisfactory result.[139] Even if the issue of client identity is resolved in favor of the elder, the adult child may expect to be part of the interview meeting, perhaps even at the request of the parent. The ethical issue then shifts to preservation of the duty of confidentiality and the attorney-client evidentiary privilege. The adult child's presence as a casual, disinterested third party may automatically "destroy" the attorney-client privilege,[140] or his presence may be ***449** considered similar to that of a helpful translator whose presence does not destroy the privilege.[141]

A major challenge is to integrate an open-ended approach to interviewing[142] with a strategy for dealing with foreseeable ethical dilemmas.[143] Within the context of the initial interview, identifying the client and the presence of the third party ethical dilemmas are often the first to arise. When an adult child or "friend" accompanies the elderly person, the challenge is to begin the attorney-client relationship in a way that creates rapport and mutual trust while counseling the client that if the friend or relative attends the interview the attorney-client privilege may be waived. In order to obtain a pure glimpse of the ostensible client, practitioners should devise strategies designed to enable them to meet alone with the client for at least a portion of the interview. Clients can have difficulty grasping why the lawyer needs to meet with them alone when the client is focused on getting help with ***450** their legal needs, not on the minutia of a lawyer's professional responsibility. The lawyer's goal is to honor the client's relationship with the third party while protecting the integrity of the attorney-client privilege.

Analyzing the problem from a multiple representation/conflict of interest perspective, one can conclude that multiple representation is possible, and perhaps desirable, because it enables the lawyer to help both the elder and the adult child achieve their goals. If after meeting with both mother and daughter, the lawyer is satisfied that the mother has sufficient decision-making capacity to make a will and engage in estate planning, determines that their interests in the disposition of the mother's property are mutual, and each consents, the lawyer may decide to treat both as clients.

Recognizing the true nature of the ethical problem in this scenario can only occur when the lawyer recognizes the underlying substantive issues involved in drafting wills for estate planning. Whenever there is a possibility of a will contest, a lawyer must take heightened precautions to insure that any documents prepared will be immune from successful challenge.[144] In this hypothetical, the mother's Alzheimer's Disease (regardless of whether it impairs her decision-making capacity) and the omission of the other sibling from the mother's will are potential grounds for a challenge. On the surface, the solution appears simple: treat the mother as the client, and make every effort to remove the daughter from the representation. Even if the daughter consents to not be represented, however, and the mother in fact makes a will leaving everything to the daughter, enough of a suggestion of undue influence and an appearance of impropriety may exist to support a successful challenge to the will.

To avoid having to withdraw from representing either person, the attorney must be sensitive to the ethical dilemma at the time of the initial contact by the adult child and be prepared to proceed in a way that allows each potential client to make an informed choice about the representation. The attorney must be able to determine the identity of the client and, assuming the client is the elderly parent, analyze ancillary issues such as the role of the adult child and the extent to which information will be disclosed to her. Recognizing an ethical dilemma does not depend solely on an analysis of the relevant provisions of the Code or Model Rules, but on an understanding of the ***451** interplay between those rules and the substantive legal issues that are part of the case.

When an adult child calls about a power of attorney for a parent, the ethical dilemma is slightly different than the "child as beneficiary" hypothetical.[145] Once again, it is virtually impossible to recognize and understand the ethical issue without knowledge of both the applicable provisions of the codes of conduct and the substantive legal issues presented by the case. Determination of whether the client is the parent, the adult child in either an individual or fiduciary capacity, or both the child and parent depends on multiple factors. One option is to select the parent as the client, despite the fact that the parent has not initiated an attorney-client relationship and may be incapable or unwilling to do so. The question then becomes whether to represent the adult child as a fiduciary of the parent or individually, and whether to represent the adult child alone or jointly with the parent.

A power of attorney is a widely used instrument that delegates decisions about property to an agent and raises ethical issues that have garnered far less attention than those related to fiduciaries in estate planning and guardians for people with diminished decision-making capacity. The power of attorney is a double-edged sword: it is relatively simple and inexpensive to obtain and can prevent the need for a guardianship proceeding if the person creating the power of attorney becomes incapacitated, but also has the potential to wreak havoc if the designated agent is unscrupulous. The agent is a fiduciary who has the obligation to refrain from any self-dealing, to be loyal to the principal, and to act in the principal's best interests.

The interests of the agent and the principal are the same and at least in theory representing an agent under a power of attorney is virtually identical to representing the principal. An attorney may wish to represent the elderly person, but in a case like the hypothetical above, circumstances make that impossible either because the adult child wants representation or the elder is not able or willing to initiate representation alone. If a lawyer agrees to represent the adult child, there is a question whether the lawyer has any obligation to the principal.

Alternatively, the lawyer may agree to meet with both parties, assuming they will both be clients. During the initial meeting, it may become clear that the elder does not have the decision-making capacity to execute the power of attorney. The quandary then becomes whether the attorney can represent the adult child in an adult guardianship ***452** proceeding or whether the lawyer has an impermissible conflict of interest. Conflict of interest analysis by definition involves either a former client, a current client, or an interest in the attorney that would prevent the lawyer from providing adequate representation.[146] If the mother was never a client, there may be no problem in representing the daughter as petitioner in a guardianship proceeding.

There may, however, be a problem with confidentiality and an appearance of impropriety.[147] The confidentiality issue arises if the mother disclosed any information that falls within the domain of confidentiality and may be used by the attorney in the guardianship proceeding. The appearance of impropriety issue depends in part on the perceptions of the attorney about whether: the mother's presence at the initial meeting was an implicit request for representation; the mother has the capacity to consent to appointing the adult child as guardian; the guardianship is furthering the interests of the mother; and the mother objects to having a guardian appointed.

These ethical dilemmas also arise when an elderly parent of an adult child with a developmental disability wants to begin the process of "future care planning."[148] The presenting problem may be the need to ***453** appoint a guardian for the disabled child. The elderly parent often arrives with the adult child and insists that they be interviewed together. Under these circumstances, a lawyer must explain the potential for a conflict of interest between mother and daughter and generally should interview the parent alone because she is viewed as the client. The professional norm of isolating a client, however, may clash with the client's expectations, desires, and deeply held beliefs.

In a particularly poignant clinic case, we provided lengthy disclosures of potential conflicts to an elderly parent with AIDS

and her disabled daughter, who functioned at a high level despite her developmental disability. We recommended that the adult daughter retain separate counsel. After a great deal of discussion, the mother assured us that she wanted her daughter present, and further that she wanted us to represent both of them. We again expressed our concern that the daughter should have her own attorney because the interests of mother and daughter were potentially in conflict--the mother wanted a guardian appointed for her daughter, which by definition would diminish the daughter's autonomy.[149] Another lengthy discussion ensued between mother and daughter. Their response eloquently affirmed the unity they felt and their mutual desire to work together to make whatever arrangements were necessary for the daughter to maintain the support system to stay within her community. It was clear that they viewed their interests as complementary, not conflicting. We decided that it was appropriate to represent them jointly and concluded that the daughter had the capacity to consent to the joint representation. Ultimately, the daughter executed a health care proxy, and we were able to develop a "future care plan" without the need for a guardianship.[150]

The differing interests of the parties would cause an attorney working from a traditional adversarial perspective to shy away from multiple ***454** representation: to represent one client or to represent neither. The result of the adversarial approach would be a formal guardianship proceeding requiring at least one new attorney (and possibly separate attorneys), with the attendant financial drain and emotional strain of a formal legal proceeding.

A reflective model helps to view ethical problems from a different perspective to accomplish the client's goals. It may lead to an entirely different course of action or yield a broader set of options for decision even if the same result is obtained. A reflective approach enables the lawyer to determine whether there is an actual conflict of interest, decide if it is appropriate to represent both parties, choose among a variety of potential roles, and seek to avoid a guardianship proceeding if at all possible.[151]

The question of "who is the client" may be resolved through a "clean" selection of a single client that avoids the problems of multiple representation. Yet the inquiry itself often requires analysis of whether it is appropriate and desirable to represent more than one party. The issues of client identity, multiple representation, confidentiality, and interests of third parties are part of an integrated analysis because each must be considered in order to resolve the ethical dilemma.

2. Multiple Representation and Conflicts of Interest

According to Professor Geoffrey Hazard, the architect of the Model Rules, a conflict of interest requires not only divergent interests but a desire to pursue those interests to the point at which they adversely impact the other person.[152] Hazard notes that clients' desires to pursue their own interests, "inevitably depends on circumstances. It also depends on the legal advice they may get, which turns the question into a circle."[153]

In order to fully analyze whether a conflict of interest precludes multiple representation, a lawyer must make a searching inquiry into the ***455** underlying attitudes, feelings, and circumstances of individual clients to understand their respective interests. As Kenneth Penegar noted,

> Instead of conceding or recognizing that the situation confronting the lawyer may be one of considerable indeterminacy of objectives or deep ambivalence of feeling and attitude, the Code simply erects a concept of 'interests' with which the client is inexorably identified. 'Interests' is never defined or discussed. The term is rather like a black box into which the lawyer presumably dumps his own projections of what the client would desire, intend, feel, or anticipate.[154]

If the lawyer is considering representing more than one client, a number of issues arise that present both problems and opportunities. A lawyer who represents multiple parties in an elder law context takes a risk that the elder's trust and confidence in the lawyer may erode, that a vulnerable client may be silenced by the other clients, and that the client's civil rights will be undermined. In many situations, it will only be through a one-on-one relationship with a client that a lawyer can make informed decisions about the nature of the legal problem, decision-making capacity, multiple representation, and the interests of third parties. The traditional model of individual representation has to retain a primary role in order to protect the most vulnerable clients.

The decision whether to represent multiple family members illustrates the extent to which ethical issues require lawyers to

make reflective and discretionary judgments. Both the Code and Model Rules have provisions dealing with multiple representation. The Code generally prohibits representing two or more clients with differing interests unless it is obvious that the lawyer can adequately represent the interests of each client and each client consents after full disclosure of the impact of the conflict on the lawyer's exercise of professional judgment.[155] Although this principle is generally sound, it is rarely "obvious" in practice that a lawyer can adequately represent the interests of each client.

The Model Rules prohibit representation of multiple clients with interests directly adverse or when representation may be "materially limited" by the lawyer's responsibility to another client.[156] If the lawyer reasonably believes that there will not be an adverse effect and the client consents after consultation, the material adversity limitation on the representation may be cured.[157] The provisions in Model Rule 1.7 ***456** explicitly incorporate any limits on the nature of the representation that are agreed to by the attorney and the client, which may in effect diminish the effectiveness of representation for a particular client.[158] The Model Rules also include a provision that authorizes an attorney to act as intermediary between clients.[159]

In all but the most clear cut cases, it is necessary to define the precise nature of the "conflict of interest" in order to determine if it is possible (or desirable) to represent multiple clients. The professional value of independent judgment for an individual client must be adapted when a lawyer represents multiple clients, serves as intermediary, or acts as "counsel for the situation."[160]

If a lawyer concludes that it is possible to provide adequate representation to multiple clients despite a conflict of interest, the next step is to provide sufficient disclosures to allow the clients to make an informed decision whether or not to waive the conflict of interest. Generally, under both the Code and Model Rules, a lawyer may accept a client's waiver of a conflict of interest if the lawyer is satisfied that she can provide adequate representation under the circumstances.[161] Essentially the client and lawyer are free to agree upon the terms of representation, subject to the limitations of the Code and Model Rules with respect to disclosure and adequacy of representation.[162]

In some cases, a conflict of interest may preclude dual representation as a matter of law. In Klemm v. Superior Court,[163] a California appeals court held that in a litigation context, a client's waiver of an actual conflict is ineffective even if the client was fully able to assess his best ***457** interests.[164] The holding in Klemm represents a departure from the provisions of California's governing code of conduct (as well as the Code and Model Rules) that allow clients the autonomy to waive conflicts once the attorney concludes that she can provide adequate representation to both clients.[165] The provisions in the California code governing conflicts of interest are based on the premise that the impartial lawyer will provide sufficient information to enable the client to make an informed decision, urge the client to obtain independent counsel, and honor the client's ultimate decision.[166]

Klemm involved a marriage dissolution in which the parties agreed that the husband would not have to pay child support.[167] The case, however, was referred to the agency that provided AFDC benefits to Mrs. Klemm, which determined that Mr. Klemm should pay a monthly amount in child support that would reimburse the agency for past and future benefits paid to the mother.[168] The actual conflict was thus between the couple and the government agency.

The court's decision rested on the distinction between an "actual" and "potential" conflict. Because the conflict between the spouses was only potential (they currently agreed that the husband should not pay child support, although at some point in the future they might disagree), the court would not prohibit the lawyer from representing each against the government agency.[169] The court remanded the case back to the trial court to determine whether the waivers that were filed were informed.[170] The court's decision suggests that a limitation should be imposed on the autonomy of lawyers and clients to establish the terms of representation when there is an actual conflict.

The court in Klemm emphasized the importance of providing clients with sufficient disclosures about the conflict of interest to permit an informed waiver.[171] The content of those disclosures must be adapted ***458** to the specific nature of the conflict, potential or actual. For example, although joint representation of spouses is usually appropriate, there are potential hazards that demonstrate the need for clear understanding of the terms of representation (including its duration) at the outset and adequate disclosure of potential conflicts.[172] Consider the classic case of the spouse who wants to change an estate plan devised when the lawyer represented the couple jointly. Husband meets with lawyer alone. Husband requests that lawyer prepare "mirror wills" for Husband and Wife, distributing all their property to each other, and upon the death of the surviving spouse, distributing one-half of the remaining balance in equal shares to adult Daughter A and to the trustee of a

supplemental needs trust established for the benefit of Daughter B, who suffers from mental illness and receives government benefits due to her disability. Husband explains that Wife has been increasingly forgetful and appears to be in the early stages of Alzheimer's Disease. Husband is planning to schedule an appointment with a neurologist, but has not talked about this with Wife, because he fears it will upset her too much. The lawyer agrees to draft the documents, but advises Husband that it will be necessary to meet with Wife in person to explain the provisions of her Will and assess her capacity to sign it. The lawyer ***459** also makes it clear that although all information is confidential as to others, there will be no confidentiality between Husband and Wife. Lawyer subsequently meets with Husband and Wife and supervises the execution of the documents. Several years later, after the representation has ended, Husband contacts the lawyer and explains that Wife's condition is deteriorating and he wants to remove Wife as beneficiary under the Will so that if he dies before Wife, all his property will be distributed equally between Daughter A and the supplemental needs trust for Daughter B. Husband explains that his purpose is to make sure that Wife will be eligible for Medicaid to pay for the long-term care she will probably need.

Because of the passage of time (and absent an agreement to the contrary), there is no longer an ongoing attorney-client relationship, but the lawyer's professional responsibilities to the clients continues. The duty of confidentiality requires that the lawyer protect the confidentiality of Husband's proposed change in his estate plan.[173] The lawyer would thus be justified in refusing to provide separate representation unless Husband authorized disclosure of his plan to Wife. If the request from Husband occurred during the representation of Husband and Wife, the ethical dilemma becomes more difficult. In a New York State Bar Association ethical opinion involving disclosure of information among business partners, the majority favored protection of one partner's confidence and withdrawal from the representation, while the dissenters viewed the duty to disclose to the partner who could be harmed as superseding the duty of confidentiality to the partner in possession of the damaging information.[174]

3. Assessing Decision-Making Capacity

Another recurring issue in elder law concerns the decision-making capacity of an elderly client who has a form of dementia. An attorney must understand the guidelines of the applicable code of conduct, the legal definition of incapacity as it relates to specific contexts (e.g., entering into an attorney-client relationship, estate planning, execution of documents such as a will or power of attorney), methods of assessing capacity, and when to consult with an outside expert.

The mere fact that a person has been diagnosed with Alzheimer's Disease or other neurological impairment does not mean that she lacks the decision-making capacity to enter into an attorney-client ***460** relationship, participate in the representation, and sign documents or agreements. Because the determination of incapacity is based on the functional ability of the person who is impaired rather than a medical diagnosis, a person with Alzheimer's Disease may nevertheless have the ability to make decisions related to the representation.

The lawyer's obligation to a client under a disability is treated somewhat differently under the Code and the Model Rules. Under Canon 7 of the Code, entitled "A Lawyer Should Represent a Client Zealously within the Bounds of the Law," the lawyer is encouraged to maintain a normal relationship with the client, but is prohibited from seeking to have a guardian appointed or otherwise initiating any protective action.[175] The Code acknowledges that the responsibilities of a lawyer may vary depending on the circumstances of the client and the nature of the proceeding.[176] When a client is not capable of making decisions, the lawyer must look to the guardian or other authorized decision maker. An Ethical Consideration states that in a court proceeding, the lawyer may have to make decisions for a client but should try to obtain the assistance of the client and make only those decisions that advance and safeguard the interests of the client. A lawyer cannot make decisions that only the client or a duly appointed guardian could make.[177]

***461** The Code's Ethical Considerations do not assist an attorney trying to determine if a client has the capacity to make an informed judgment or what to do if the attorney and client disagree about the client's ability to do so. They state only what an attorney should do and impose no ethical obligations with respect to the representation of an incapacitated client.[178]

Under the Model Rules, an attorney has the option to take action to have a guardian appointed or to take other protective action.[179] This provision is an improvement over the Code because it explicitly authorizes the attorney to take some protective action. The decision to disclose a confidence or initiate a guardianship or less restrictive arrangement, however, is still a difficult one.

The lawyer must engage in two levels of analysis: first, he must assess whether the client is capable of making a particular decision; second, he must decide what, if any, protective action is appropriate. The determination of the client's decision-making capacity or lack thereof should be based on a functional assessment. If the issue is whether the client can enter into an agreement to retain the lawyer, the analysis should focus on the particular elements that are crucial to this decision: does the client want to retain the lawyer, can the client explain the purpose of the representation, and can the client articulate the goals of the representation. If the assessment is for the purpose of waiving a conflict of interest or the attorney-client privilege, the dialogue between the attorney and client must include the information that is relevant to that particular decision. The lawyer must be cognizant of the possibility that the client's apparent lack of capacity may be due to medication or a treatable condition such as depression.[180]

*462 A difficult dilemma occurs when it appears to the lawyer that the client is making decisions that are unorthodox, that treat family members unequally, or that are not in the client's best interests. The duty of confidentiality prohibits the lawyer from disclosing confidences, effectively preventing the lawyer from taking any action. Under the Model Rules, the lawyer may take protective action, but runs the risk of acting based on the lawyer's idea of the client's best interests rather than the client's own expressed wishes. Under the Code of Professional Responsibility, the lawyer is relieved of the burden of having to decide whether to take protective action, but may place the client at risk if no action is taken.

B. Cultural Competence and Professional Responsibility

The concept of "cultural competence" expresses a multi-dimensional perspective that encompasses the lawyer's consciousness of her own "perceptive lens," the lawyer's insight into how the client's culture may affect the client's perception of her legal "problems" within the context of the client's life circumstances, and how cultural issues may impact the resolution of ethical dilemmas.[181]

Cultural diversity generally refers to groups that have been historically oppressed, and an expansive definition includes people of color (particularly African-Americans, Latinos, and American Indians), women, the aged, gays and lesbians, people with physical, developmental, and emotional disabilities, the indigent, and other oppressed and marginalized groups.[182] For purposes of this Article, I discuss cultural competence primarily as it applies to elders and secondarily to particular groups within the aging population. My premise is that attorneys need to understand the biological, social, and emotional aspects of the aging process in order to provide high quality legal representation in general and to resolve ethical dilemmas in ways that are sensitive and empowering to clients and their families.

*463 1. Cultural Competence in Elder Law

There is a link between illness and health and the cultural and social context of a person's identity and community.[183] This cultural and social context influences the ways in which health and illness are "defined, perceived, experienced, explained, and maintained."[184] This influence extends to those legal problems intertwined with illness, health, incapacity, and death and that invariably involve family members.[185] The choices a lawyer must make to resolve the inevitable ethical dilemmas that elderly clients present must take these factors into account.

Cultural competence operates on two levels in an elder law context: first, knowledge about the aging process, dementia, and long-term care, and second, the particular culture, ethnicity, and race of the client. There are cultural commonalties shared by older adults, and perhaps by others who experience these aging issues directly or indirectly by virtue of family or friendship connections with the elderly. There is also the cultural and ethnic identity of the client that is at once separate from and intertwined with the culture of aging.

This integrated perspective sees the client as a whole person (not just a legal problem) with attitudes and values shaped by family, culture, and ethnicity who is part of a network of family and support (informal and formal) relationships. A genuine understanding of the client's world and her unique perspective is essential for the attorney to define the client's "interests" in a meaningful way that approximates the true essence of the client rather than a mere reflection of the lawyer's construct and projections.

At the beginning of a relationship with a client, the attorney needs to utilize strategies that facilitate the gathering of

information that provides insight into the client. When meeting initially with a client, an open-ended approach that incorporates sensitive listening skills and empathetic communication will create an atmosphere that helps the client share her perspective.[186] The lawyer must become adept in ***464** interpreting verbal and nonverbal information, responding to presenting problems and unarticulated concerns, and must filter these layers of information through the prism of the lawyer's own construct of the client and the particular legal issues involved.

This perspective helps a lawyer perceive and define the client's goals. It enables a lawyer to assess how a legal problem affects the client personally and how culture, ethnicity, race, and family relationships impact the way a client defines her interests. It draws on social work perspectives for framing problems and weighing the interests of third parties.[187]

A culturally competent perspective focuses initially on the welfare of the vulnerable person and the nature of relationships within the family "system," but there is a risk that an emphasis on the vulnerable elderly person's "fit" within her informal and formal support systems will submerge the rights of the elder. The attorney must balance a client centered approach[188] and the duty of confidentiality with the need to reach out into the elder's support network, particularly if diminished capacity prevents the elder from providing the attorney with complete information about her legal problems.[189] A culturally competent and holistic perspective seeks to involve the client's support network and magnify the human dimensions of the legal problem, while heightening sensitivity to the possibility of physical, emotional, or financial exploitation and abuse.

In their book, Lawyers, Clients and Moral Responsibility, Thomas Shaffer and Robert Cochran, Jr. use a Wendell Berry short story, "The Wild Birds," to illustrate and describe the "intellectual virtues of reflectiveness, tolerance, humility, honesty, and care in a law office" as the "virtues of moral discourse."[190] The interview between the lawyer, Wheeler Catlett, and his client, Burley Coulter, captures the dynamic interplay between the lawyer's awareness of his preconceived notions and his developing insight into the client's perspective. Burley, an ***465** elderly, unmarried man, came to Wheeler with Nathan, his nephew and sole heir, and tells Wheeler that he wants to give his property to Danny, his nonmarital child.[191] This offends Wheeler's "commitment to the orderly succession of family farms and the defense as well of orderly families."[192]

Shaffer & Cochran describe how Wheeler undergoes an emotional transformation as he begins to understand that Burley's wishes reflect a deep, personal commitment to justice and forgiveness. This insight into Burley, together with Wheeler's awareness of the limitations of his own notions of morality, bridge the preconceived notions of the lawyer and a client whose cultural difference arise from his age and family structure.

The client-centered model has been criticized for making clients neutral and interchangeable, thereby ignoring the possible impact of racial and cultural differences on the lawyer's characterization of a client as "difficult."[193] Indeed, if a lawyer lacks awareness of this "filtering" process, meaningful understanding of the client will be limited and the quality of representation will suffer. A lawyer who frames and resolves ethical dilemmas without understanding the impact of these differences risks marginalizing the client by imposing the lawyer's own values and dictating the terms of the lawyer-client relationship. The following example shows how cultural "incompetence" can have a detrimental effect on the quality of a lawyer's work.

2. Lawyer as Fiduciary: The "Adversarial Guardian"

The clinic represented Clara, an African-American woman whose life partner of twenty-five years, Dan, had been living in a nursing home for about a year because of severe Alzheimer's Disease. Dan had never divorced his wife. Dan and his wife still owned the house in which Clara and Dan had lived together for all those years. Dan's children never accepted Clara, and their hatred of her burned brightly. As his health deteriorated, Dan tried to give Clara the right to live in the house if something happened to him. Dan and Clara executed two separate long-term leases, and Dan also made a homemade "will" that expressed ***466** his wish that Clara be allowed to live in the house. When the nursing home brought a guardianship proceeding, Clara did not seek to be appointed guardian because of the dispute with Dan's wife and children.

The court appointed an independent lawyer as guardian, a common role for attorneys. In this context, the lawyer acts not as an advocate, but as a fiduciary with the ethical obligation to act on behalf of the incapacitated person. The guardian's narrow perspective in this case epitomized the problems that can arise with an adversarial mindset that ignores cultural differences. The guardian, who made it known that she had a husband and children, viewed Clara as an outlaw because she was not married to Dan. The guardian, white and privileged, could barely conceal her contempt for Clara's poverty and failure to lead a more conventional life. The guardian refused to accept the validity of Clara's relationship with Dan because they were

never married. She ignored the evidence that Dan did everything he could to protect Clara, and refused to recognize the documents that expressed Dan's wish to have Clara live in the house. To the guardian, twenty-five years of a shared life meant nothing, and she viewed her obligation as protecting the rights of the legal spouse against Clara.

The guardian's narrow perspective marginalized Clara and prevented the guardian from fulfilling her obligation to act on behalf of Dan. the incapacitated person. The guardian viewed her role through a narrow, adversarial prism--she elevated the legal status of Dan's marriage over the reality of his life with Clara. The guardian ignored the importance of understanding her own cultural bias and the need to examine her assumptions about Dan's wishes and best interests.

3. Gerontology, Dementia, and Long-Term Care Issues

Lawyers must understand the aging process and its subtle and mysterious relationship to dementia in order to be "culturally competent" to work with elderly clients and make determinations about clients' capacity to enter into the lawyer-client relationship.

Although one may hear forgetful colleagues joke about having a "senior moment," research has shown that Alzheimer's Disease, Parkinson's Disease and other chronic conditions are deviations from a stable cognitive level. Dementia is not a natural part of the aging process; rather, it is "[a] global cognitive syndrome caused by diseases acquired in adulthood . . . ."[194] It is believed that about fifty illnesses ***467** may cause dementia, and while some dementias are reversible (e.g., chronic metabolic dysfunctions and hepatic or renal failure or benign tumors and other structural lesions in the central nervous system), the most notorious and prevalent are progressive and irreversible, including Alzheimer's Disease, Parkinson's Disease, Huntington's Disease, and Pick's Disease.[195] Atherosclerosis or hypertension often reduce blood flow or cause a hemorrhage, thereby causing multi-infarct dementia, which individually or in combination with Alzheimer's Disease is the next most common form of dementia.[196]

Although the risk of acquiring Alzheimer's Disease increases with aging, Alois Alzheimer first discovered senile dementia, which is the hallmark of Alzheimer's Disease, in a fifty-one year old woman in 1907.[197] The original Alzheimer's patient was initially suspicious about the motives of her physician, and then became paranoid, suffered loss of memory, and developed problems with reading, writing, and speech. This patient suffered from the peculiar mix of cognitive (neuropsychological) and behaviorial (psychiatric) problems.[198] Typically, a person with Alzheimer's Disease will have difficulty remembering recent events, names and faces, and her ability to manage and function her daily life will diminish.[199] The person will often be at a loss for words, which leads to aphasia, or language impairment. The extent of aphasia may not reflect the receptive ability of the person. In addition, the way in which the person perceives the world through sight and sound may be distorted, causing difficulty in organizing disparate sensory experiences into a coherent whole. The disease begins to affect daily activities that require financial acumen and interaction with the outside world, then impairs fundamental activities such as bathing, feeding, and eating, followed by loss of recognition of spouse and family members, and ultimately results in incontinence and total dependence on others. Suspicion, hostility, paranoia, depression, and hallucinations are behavioral signs of Alzheimer's Disease. The person may become delusional and imagine that others (especially the spouse/caregiver) are treating her badly, abusing her, or stealing her possessions. The precise causes of Alzheimer's Disease are unknown ***468** and research continues into the role of genetic and environmental factors.

The extent to which the legal practitioner understands the nature of dementia influences her perception of a client's "personhood" and decision-making capacity. A medical diagnosis of dementia is merely a point of departure because the diagnosis alone does not illuminate how or if the disease impairs the person's functional capacity. At one end of the spectrum is a person whose cognitive abilities are substantially intact, and although the person has been diagnosed with Alzheimer's Disease (or another illness), she is able to maintain virtually the same level of functioning as before her diagnosis. At the other end of the spectrum is a person whose ability to function and make decisions has been severely compromised by the dementia. Even at this stage there may be periods of lucidity and only in the most advanced cases is the person's functional capacity completely nonexistent. Between these extremes, dementia manifests itself uniquely in each individual and can only be understood within the context of the person's "baseline" level of functioning and "deficits" that are part of the normal process of aging.

A guidepost to a person's cognitive ability is the awareness of, and thoughts and feelings about, the personal and social consequences of the disease.[200] This awareness generally diminishes as the dementia becomes more severe, and those with

advanced dementia often have anosognosia, or the "inability to recognize or acknowledge their dementia."[201]

Joseph M. Foley uses the transcript of a conversation with an elderly man who has been diagnosed with Alzheimer's Disease to illustrate its impact on a person who is able to maintain a high level of functioning. The person is aware of memory problems, and after initially denying any problem with managing finances, remembers that he agreed to delegate certain tasks to his secretary.[202] The man also has difficulty describing what his books were about, but it is noteworthy that he had recently published.[203] He also could not remember the year when the interviewer paused in the interview to assess the patient's orientation to time. The patient acknowledges that he "fumble[s] and stutter[s]" at times, but has developed "stratagems" to overcome this problem.[204] ***469** After this portion of the discussion, the patient could not remember the name of the president or vice-president.[205] At the conclusion of the interview, the patient emphasizes his ability to maintain his level of activity, and responds to a question about what is "hard" about the disease by stating that "[t]he difficult thing is that it has a tail end to Alzheimer's and I'm not too anxious to get to that point."[206]

Despite some difficulties, the patient is able to explain his feelings about his disease: he is aware he has an incurable medical problem that is Alzheimer's Disease; is worried about the latter stages; is determined to continue living life to the fullest; understands how he copes with the disease and the problems it presents; and has insight into some of the ways in which he is impaired, although he either fails to remember or actively denies many of his "failures."[207]

Foley states:

> [I]f we are going to talk about ethics in relation to dementia, we must know not just about cognitive capacity but also about awareness, feelings, and emotional reactions to the personal and social consequences of dementia. I fear that sometimes we assume too much. We too often assume that the absence of emotional display means that no emotion is being experienced. We too often assume that because communication is absent, internal mental process has stopped.[208]

Foley points to insight as a key aspect of the disease and laments the paucity of literature on the subject in the fields of geriatrics, psychology, or gerontological psychiatry.[209] He speculates that this dearth of literature is because insight cannot really be quantified and tested, and that information about insight can only be acquired "by history, by repeated observation, and by sometimes painful discussion with the patient."[210]

Foley also describes the main character in a Dutch novel whom he suggests is a model for understanding the impact of dementia on an individual. The seventy-one year old Dutchman, living in Massachusetts with his wife, articulates his feelings and thoughts about his dementia. As his mind falters, he struggles to cope with his limitations and the reactions of his wife and others. He finds himself doing strange things, such as watching for the children going to school on Sunday. When he wakes up in the middle of the night, can't go back to sleep, gets dressed and reads, he cannot explain to his wife why he is ***470** dressed.[211] He speaks of "vanished memories" and years after retiring, fills up his briefcase and goes to an empty house for a meeting with his former co-workers. Foley notes that "Maarten still verbalizes the disorder of his thinking and feeling self--the misinterpretation of the actions of others, the frustrations of his own failures, the hallucinations, the delusions, the loss of the significance of places, the failure of sequences in time, the confusion about who other people really are."[212]

Foley suggests that Maarten is a model for how people with dementia think and feel. Although Foley's description of these "cases" provides worthwhile guideposts to understanding dementia, he concludes with the caveat that its impact on each individual is unique and generalizations about the disease must yield to the particular ways in which it affects each individual:

> Variations in level of awareness, in affect, and in appropriateness of behavior involve a multitude of variants such as circadian rhythms, fatigue, fever, level of physical and social stimulation, biochemical and pharmacological changes of the internal environment, physical and social alterations of the external environment, and, of course, the severity of the disease process. Depending on the circumstances, the variation in intellectual and emotional functioning may occupy weeks, or days, or even hours or minutes. Some seemingly moderately advanced patients have windows of clarity which open and close irregularly and allow the normal personality and the normal intelligence to emerge from the shadow of the dementia.[213]

4. Cultural Competence and the Limits of Informed Consent: End of Life Health Care Treatment

In addition to understanding the process of aging and dementia, a lawyer must recognize the influence of the client's individual culture on how the client perceives her legal problems and the role of family members in relation to those legal problems. It is not uncommon for the professional values of the lawyer and the personal values of the client to clash.

In an elder law practice, it is important, perhaps a professional obligation, to counsel clients about issues that are related either directly or indirectly to the "presenting problem." For example, it is an article of professional faith that a client who wants to make a will should be counseled about other planning options, such as revocable trusts, ***471** powers of attorney, health care proxies and living wills.[214] These options are tools of empowerment for clients to maintain their autonomy and independence by appointing agents and providing directions for decision-making after they become incapacitated.[215] The goals underlying this mantra of professional responsibility--client autonomy and independence--are emblematic of the values of mainstream American culture. Other cultures' attitudes toward planning for disability and death, however, illustrate the need for a culturally competent perspective toward client counseling and informed consent. When it comes to health care and end of life decision-making, the values of a client must be understood in order to know how (or if) to raise the issues, counsel the client, and draft an appropriate advance directive. The lawyer also needs to be aware of her own attitudes toward the right of self-determination, the medical profession, illness, and death. These issues engender very different responses from lawyers and clients, even among those who share a common culture. Some communities have values and moral perspectives that are very different than mainstream Western biomedicine and bioethics.[216]

For example, in the traditional Navajo culture, it is believed that events are shaped by thought and language.[217] For a traditional Navajo patient, the standard client-centered approach of disclosing risks, sharing bad news, and counseling clients about planning for incapacity violates the Navajo value of thinking and speaking in the "positive way."[218] A health care provider or lawyer from mainstream Western culture typically views the client's interests as best served by counseling about options to facilitate an informed decision. The client who resists this discussion could be viewed as "difficult" and undermining her own ***472** best interests. The professional may not even be aware of the extent to which her own (positive) attitudes toward the medical profession and mainstream health care influences her judgment about the client's attitudes.[219]

By contrast, a culturally competent perspective changes the lawyer's perception of the client's case. The point of departure is not the narrow expression of the client's wishes in isolation, but the understanding of those wishes in the broader context of the client's life. The deviation of the client's stance from mainstream values, in this case ambivalence or antipathy to modern medicine, is easily understood because alternative thinking is an inherent value. Finally, the culturally competent elder lawyer critically examines her own attitudes and understands the need to be aware of those that may diminish or negate the client's point of view.

Once the lawyer recognizes and articulates the particular ethical issue, the process of specification requires an in-depth understanding of the client's interests that results from the interplay between the lawyer's perceptive lens and exploration of the client as a whole person. With deeper insight into the client, the lawyer must then make choices about the professional role that will shape the direction of the representation. In the next section, I describe how the multi-faceted and diverse roles that lawyers play apply in elder law practice.

C. Role Versatility and Adaptability

Lawyers must continually build a repertoire of approaches to representation in order to respond to ethical dilemmas and the legal problems of clients. The diversity of lawyering roles and settings reflect the evolving role of law in society and the inadequacy of the neutral partisan role in many situations. Depending on the context, the lawyer may be cast in the role of advocate, counselor, negotiator, and mediator. Some conceptions of the lawyer's role include a strong sense of morality and social justice that can only be realized by changing the way that lawyers and clients interact and make decisions.

The context of a particular case will influence the extent to which one or more of these alternative models apply or are incorporated. Although a lawyer may fully embrace one conception of her role to the exclusion ***473** of others, it is more likely that the traditional conception and alternative models will form the raw materials from which lawyers construct their individual professional identities and chart their course of action in a particular case. The development of role versatility and adaptability is a process in which lawyers become aware of their multiple and nuanced roles, grow comfortable in various

roles, and adapt them to the demands of individual cases.

1. The Zealous Advocate: Representing an Alleged Incapacitated Person

On the continuum of potential roles, the first is the traditional role of the zealous advocate in the courtroom. Although a lawyer often acts as a counselor and prevents legal problems from ripening into full-blown disputes, it is important to recognize when a more adversarial role is appropriate. For example, a lawyer representing a person who is alleged to be incapacitated and in need of a guardian has a duty to provide zealous representation that protects the civil rights of the client. Even if the client needs a guardian because of diminished mental capacity, the lawyer may be successful in preventing harmful medical evidence from being disclosed in violation of the physician-patient privilege. There also may be more than one person seeking to be guardian, each with a different perspective on the scope of powers that should be granted by the court. Among the most significant powers that are litigated are the power to determine the place of abode, the power to consent to major medical treatment, and the power to engage in estate and Medicaid planning. When the proceeding concerns these fundamental rights, it may only be through vigorously contested litigation that a just result is possible.

When the circumstances are slightly different, the role of the zealous advocate is more problematic. Consider a lawyer who represents a client with moderate dementia for purposes of estate and disability planning. During the course of representation, it becomes increasingly obvious that the client's dementia is progressing and that she is placing herself at risk of harm. Although she originally sought to "protect her home" from Medicaid, the client later instructs the lawyer that she only wants to make a will and is not interested in advice about Medicaid. In addition, the client is increasingly disorientated and on one occasion wandered out of the law office into traffic.

A lawyer adopting a traditional approach to confidentiality would not disclose any of these problems to the client's family. Under the Model *474 Rules, an attorney is permitted to seek a guardianship or take other protective action.[220] Under the Code of Professional Responsibility, however, the duty to preserve the confidences and secrets of the client appears to preclude the attorney from making any kind of disclosure.[221] Under these circumstances, the duty to preserve confidentiality should yield to a more compelling obligation to disclose information to family members so that they can initiate appropriate protective action. Although the Model Rules permits such action, a lawyer must still decide if disclosure is appropriate.

In deciding what role to play, the lawyer may be guided by the other elements of the reflective model. An understanding of the substantive law of guardianships provides the framework for assessing capacity and determining if protective action is appropriate. A lawyer who is culturally competent will be able to apply the legal definition of capacity to the client's particular form of dementia. In addition, the lawyer would have gathered sufficient information about the client's family relationships and values to determine if disclosure is consistent with the client's expressed goals, or whether the lawyer is venturing into "best interests" territory.[222] As the options emerge, the lawyer may benefit from utilizing a variety of other roles that advocate a more actively protective role by the attorney.

2. Influencing Clients: Lawyer as Moral Agent

An alternative conception of the lawyer's role is the lawyer as professional who influences the client's moral and ethical sensibility.[223] Regardless of the particular analogy (i.e., friend, spouse, moral agent), the common theme is that the lawyer should engage the client in a moral discourse and attempt to influence the client to be a better person and do the right thing (as viewed by the lawyer). This formulation creates a *475 wholly different role for the lawyer and assumes that lawyers have a better understanding of the "right thing to do" than clients. It also runs the risk that lawyers will impart their own values on clients, rather than providing representation that allows the clients to realize their goals. Despite these limitations, there are potentially significant benefits to the quality of representation when lawyers consider the ethical and moral dimensions of their cases.

In the Allen case study, the student intern inferred the "goodness" of Mrs. Allen based on what he observed, his interpretation of the client's words, and his assumptions about how she would treat her husband and exercise her newly acquired fiduciary powers.[224] The student played a passive role and did not engage the client in the moral and ethical dimensions of the representation. Imagine that our assumptions about Mrs. Allen were completely wrong. Although at one time she was a loving spouse, wholly devoted to preserving her husband's dignity, his Alzheimer's Disease had taken its toll emotionally.

She now wanted only to dump him in a nursing home and use the power of attorney to transfer the house to herself. Her ultimate goal was to make sure that he had adequate care and then to resume a new life on her own, leaving the destruction of Alzheimer's Disease behind.

An attorney who included concern for the morality of the client on the agenda of important issues to deal with might have actively engaged Mrs. Allen in a discussion of how she intended to care for her husband in the future. With enough skill, the attorney could have surfaced Mrs. Allen's "darker" feelings about being a caretaker for a person with Alzheimer's Disease. Perhaps she was not fully aware of her feelings, and realized that she needed to work through some of the complexities and difficulties she was facing in her caregiver role. The attorney might have been able to help her turn away from her darker impulses and more fully realize the importance of honoring the wishes of her husband to remain at home. Instead of merely providing Mrs. Allen with the power of attorney, the attorney as "influencer of the client's morality" might have given her a great deal more.

In reality, the results will be less dramatic than this kind of revelation. I overdramatize the lawyer's ability to "save" the client to make the point that the quality of representation in the Allen case would have been improved with a more direct discussion with Mrs. Allen. The purpose would be to elicit her feelings about being a caretaker for her husband and explore the implications of those feelings for her future ***476** actions related to his living arrangements, care, and ownership of their home.

3. Lawyer as Moral Activist and Social Justice Advocate

When the goal of representation includes promoting the public good[225] and social justice[226] the lawyer may take an approach that diminishes the role of client autonomy to accomplish what the lawyer believes is a just result or one that furthers the public interest. In the Allen case, the student's desire to help the clients avoid a guardianship proceeding was motivated by his desire to achieve a just result and one that promoted social justice concerns because it enabled the clients to bypass the court system, preserve their dignity and privacy, and save a significant percentage of their savings.

This activist lawyering manifested itself in the decision to provide joint representation and the determination that Mr. Allen had sufficient decision-making capacity to sign the power of attorney. A more conventional approach might have been to represent one spouse, or having interviewed both, advised them to each seek separate counsel, because a guardianship proceeding was possible, if not probable. Mr. Allen's borderline decision-making capacity could easily have supported a decision not to go forward with the signing of the power of attorney. Were it not for the desire to achieve what the student perceived was a fair result for these clients, it is possible that the "difficulty" of "finding" Mr. Allen's capacity might not have seemed all that important. In addition, the student believed that it would be a harsh injustice for the Allens to pay almost twenty-five percent of their liquid assets on a guardianship. The value to society of helping clients, particularly those who are poor, to avoid the formality, expense, and indignities of the court system was particularly important.

These "activist" conceptions of the lawyer's role, although not free from risk, broaden awareness of how moral considerations and social justice concerns inform the lawyer's analysis, notwithstanding the different approaches they each represent.[227] There is a role continuum ranging from neutral partisan to pursuer of social justice, with gradations of moral advocacy in between.

*477 4. The Family as Client: An Option Beyond Multiple Representation?

When the possibility of representing more than one client exists or there are interested third parties involved in the representation, a lawyer must understand the different possibilities for structuring the attorney-client relationship. The problems with multiple representation have led to proposals that would allow an attorney to represent a family unit as a client, rather than only its individual members.[228] Representing the family as an entity appears to be a beneficial option in elder law practice, where family members are frequently involved with the legal problem of the older person. Issues involving property distribution, fiduciary powers, health care, and long-term care create a different array and quality of "interests" than are usually found in more traditional adversary circumstances. Despite its benefits, even if family representation was permitted as an option, it should only be exercised under rare circumstances.

When there are more than two potential clients (e.g., a vulnerable elderly person, a spouse, at least one adult child, and perhaps other members of the extended family), each person relates to the legal issues or problems in different ways and with different degrees of involvement. It is difficult to identify the "best interests" of the family--does the lawyer exercise the discretion to decide what is best and limit the role of the family client, or does he follow the wishes of the majority and risk ignoring the minority interest or the vulnerable elderly person? Further complicating matters is the possibility that a family member may agree to the representation but fail to be involved and later create an insoluble conflict of interest.[229]

The problems of reconciling differing interests are magnified when the interests of each family member must be catalogued and meshed ***478** together as a whole to define the interests of the family unit. How does a lawyer for a family chart a course of representation when there is no clear consensus or majority? Consider the following examples and imagine a lawyer has represented each family as a unit over a period of time during which all members had decision-making capacity:

1. Two adult children want to place their father in a nursing home; the spouse wants to keep him at home with twenty-four hour home care regardless of the cost; and the father wants to stay home but does not want to pay for any care.

2. An elderly father has Alzheimer's Disease and has had marginal cognitive awareness for several years, is unable to walk, is incontinent, and needs assistance with all daily living activities. The father recently lost his gag reflex and has been hospitalized for a few weeks. There is no hope that he will dramatically improve; at best he will be able to return home or go into a nursing home. The family is now facing the dreaded decision about whether to insert a nasogastric tube into the father.

3. One spouse is deteriorating and may need long-term care. The family wants advice about Medicaid planning. The "best" option is to transfer the house to the well spouse. The well spouse, however, created an estate plan that provided for all of her children, but not equally. One of the smaller shares is in a trust for a daughter with a history of mental illness.

In each of these scenarios, it is difficult, if not impossible, to determine what the family wants or what is in their best interests. With a multi-generational family "client," the wishes of the majority could define the interests of the unit. Where there is only one surviving elder, the adult children usually constitute the majority that decisively influence the course of action. If the decision involves a choice between home care in the community or nursing home placement and the lawyer represents the wishes of the majority, there is a great risk that the wishes and interests of the elder will be marginalized and silenced. Even a lawyer with a longstanding relationship with a family will not be able to determine with any accuracy what is in the best interests of a family. If one factors in the reality that family members often live at great distances, it becomes apparent that family representation is appropriate and possible only when there is a rare confluence of circumstances.

The benefits that flow from representing the family group can often be attained by representing one or more individual members of the family, and shaping the terms of the representation to attain the family's ***479** common goals.[230] In the above examples, the lawyer may be able to achieve a more just result that comports with the wishes and interests of the vulnerable person through multiple representation of certain individual members of the family.

When there are differing interests among family members, family representation may end up being the tyranny of the majority, or a paternalistic exercise in determining what is in the family's "best interests." Perhaps a variation on the Brandeis approach is better--to act as the "lawyer for the problem" rather than the lawyer for the family. This would require the lawyer to define the representation in terms of the legal problem and a common goal for resolving it, rather than a more inchoate effort to represent the interests of the family unit. At the outset, the lawyer and clients could together sharply define the nature of the legal problem and the goal for representation.

5. Guardianship and Multiple Representation: The Lee Family

The following example illustrates the fine line between multiple representation of individual family members and the family as a unit. It demonstrates that the benefits associated with family representation may be achieved when a family agrees on the goals of representation and waives confidentiality so that non-client family members can be involved in the representation.

A family friend who directed the local community center called our office and described how the Lee family had been struck by tragedy: Ralph, the father, died in October, 1996, and Alba, the mother, in her seventies, suffered from Alzheimer's Disease and resided in a local nursing home. Bert, an adult son, was gainfully employed and lived about twenty miles from

the family home. Another adult son, Cal, had a neurological disorder that prevented him from working. Cal received Supplemental Security Income benefits due to his disability. Irene, the oldest child, was in her early forties and was slowly recovering from *480 two strokes that had rendered her disabled. Irene was receiving Social Security Disability Insurance benefits based on her employment record.

The family needed legal representation to have a guardian appointed for the mother, who now was the sole owner of the home. The family friend was afraid they would lose the home to Medicaid, which paid for the cost of the mother's nursing home. Cal lived in the family home, where he resided for all of his thirty-one years. Irene rented a small apartment nearby. Cal and Irene wanted to be interviewed together and appeared to want dual representation. Assuming it was possible to adequately represent both of their interests, there would have to be sufficient disclosures about any potential conflicts and each client would have to have the capacity to give informed consent. Their goal for the representation was to protect the family home, perhaps by transferring it to Cal.

From a culturally competent perspective, it was apparent that neither Cal nor Irene could imagine meeting with lawyers alone. The family had endured many hardships and their "family culture" was a powerful influence on how they viewed themselves in relation to legal representation. They had lived together or in close proximity for their entire lives and had a close family structure. They were also part of a small community support network, which the father's death, the mother's incapacity and Irene's strokes had made even more important. The profession's traditional preference for individual representation was clearly not appropriate given the reality of this family's circumstances.

The possibility of multiple representation was complicated by a number of factors. Although Cal was disabled for purposes of employment, he appeared to function well, albeit with some assistance. If Cal acted as petitioner in the guardianship proceeding, we would be asking the court to approve the transfer of the family home to him, although the mother would retain a life estate. Because the transfer was for Cal's benefit, there was a possibility that the court would view the petition as designed to benefit Cal, rather than to fulfill the intent of the incapacitated mother. In addition, the transfer of assets fit into a narrow exception to the Medicaid prohibition on transfers, and the Medicaid rules on transfers were too conceptually complex for Cal to fully understand. As a result, we determined that Irene would be a more appropriate petitioner to act as guardian for purposes of making the transfer.

To analyze the conflict of interest, we needed to identify the interests of the potential clients. Both Cal and Irene wanted to help Cal stay in the house because that was what their parents wanted. Therefore, the conflict of interest was only potential, and not actual. Irene understood *481 that the transfer to Cal would take away the possibility that she would inherit a share of the house upon her mother's death. This concern was mitigated by the possibility that without the transfer, Medicaid would assert its right to seek reimbursement against the mother's estate when she died for the cost of her care in the nursing home.[231]

After extensive counseling, Cal and Irene gave their consent for us to represent both of them. In a sense, we were representing the entire family. Bert, the employed brother, indicated his agreement that Cal should own the house. Bert, however, did not need legal representation, and consulting him on every decision would have been inconvenient and perhaps disruptive. Moreover, although he wanted to be involved, Bert had no interest in becoming a client.

A lawyer practicing in a more adversarial, non-reflective mode would have seen irreconcilable conflict everywhere. He might have failed to explore the roots of the family's relationships and the meaning of the family home. Perhaps he would have seen his role in terms of which individual to represent, and not as a counselor for two clients seeking to accomplish the same goal, intermediary between clients, or lawyer for the family situation.[232]

D. Anticipating Outcomes and Alternatives

The final element of the reflective model is oriented to outcomes and consequences. It factors in the actual consequences that flow from a lawyer's solutions to ethical dilemmas, such as preventing or triggering litigation. Non-adversarial legal processes such as preventive law planning, problem solving, counseling, negotiation, and alternative dispute resolution are often preferable to formal litigation. A preventive law orientation recognizes that lawyers play an important role as counselors and problem solvers to help clients avoid litigation.[233] The *482 ability to resolve problems informally, or through alternative methods of dispute resolution, avoids the heavy financial and emotional cost of litigation. In the elder law context, solutions are explored from a "least restrictive alternative" perspective that is the foundation of progressive guardianship

statutes. These statutes craft nuanced and individualized arrangements that preserve the autonomy and liberty of the incapacitated person.[234]

When dealing with a client of questionable capacity, the determination of whether the client has decision-making capacity has significant consequences. If the lawyer believes the client has sufficient capacity to enter into an attorney-client relationship and make alternative arrangements,[235] the client will not face the emotional and financial costs incident to a formal guardianship.[236] In the Allen case study, the signing of the power of attorney was less intrusive than a formal guardianship proceeding. On the other hand, a decision not to represent multiple family members may create the need for separate counsel, with the attendant costs and risk of transforming differing interests into irreconcilable conflicts. Lawyers who practice in the ***483** adversarial model tend to see clients as parties in a lawsuit and fail to explore alternatives with sufficient rigor.[237]

Although the "bias" of the model favors alternatives to litigation, in some cases litigation is inevitable and necessary to obtain the relief to which the client is entitled. The elements of the model interact and loop to inform each other's analysis. For example, a culturally competent perspective heightens awareness of the possibility of financial, physical, and emotional abuse of vulnerable clients, which would indicate a need for formal legal intervention and possibly protective services. Under those circumstances, it is obviously critical for the vulnerable person to have a zealous advocate. Informal arrangements that rely on family members would not be appropriate if there is suspected abuse. This rebuttable presumption is inherent in each of the elements of the reflective paradigm--although non-adversarial solutions are favored, in a particular case a more traditional adversarial approach may be more appropriate.[238]

V. Conclusion

A reflective model provides an alternative way for lawyers to analyze and resolve ethical dilemmas that arise in elder law practice by connecting the particular ethical dilemma with a coherent framework that includes factors that guide and inform a lawyer's analysis. The model reflects the reality that ethical dilemmas frequently arise and are resolved in a zone of decision-making that is to a large degree discretionary. The model also seeks to respond to the growing recognition that particular kinds of lawyering practice require a reconception of the lawyer's role and ethical obligations. By incorporating key factors that are, or should be, part of the lawyer's analytical process, this model provides theoretical and practical assistance not only to elder law attorneys, but to practitioners in other areas who grapple with nontraditional ethical dilemmas.

It is tempting to look to practice-specific codes of conduct as the answer to the troublesome ambiguity in professional responsibility. There is little doubt that more practice-sensitive codes could provide ***484** more relevant guidance across a broader spectrum of practice areas. It is impossible, however, and perhaps unwise, to completely eliminate the discretion that lawyers utilize when grappling with ethical quandaries. Conceptual models that make explicit the factors inherent in the decision-making process will help inform the quality of analysis and improve the quality of client representation.

Footnotes

a1 Assistant Professor, City University of New York School of Law; B.S. 1980, Northwestern University; J.D. 1986, City University of New York School of Law. Special thanks to Stephen Loffredo, Vanessa Merton, and Amy Rosenberg for their feedback and comments on an earlier draft and to Penny Andrews, Sue Bryant, Kristin Booth Glen, Dorothy Matthew, and Bob Seibel for being supportive colleagues in trying times. The genesis of this Article was a paper presented at the 1997 Fourth International Clinical Conference sponsored by U.C.L.A. School of Law. Thanks to my panel colleagues, Susan Kupfer, Alan Paterson, Paul Tremblay, and Fred Zemans. Finally, this Article could not have been written without the love, help and understanding of my wife Kathy and my children, Emma and Hannah.

1 These circumstances are not limited to older clients and the practice of elder law. For example, family law involves complex family relationships and people of all ages have health-related concerns. Yet the prevalence of these circumstances among the elderly and their families pose singular challenges for elder law attorneys.