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# The Communitarian Approach in the Elder Law Construct

*This article examines the communitarian approach to the client-lawyer engagement and representation when focused on elder law. It reviews the current accepted practice of joint and multiple representation and promotes optional family entity representation as a limited form of legal representation.*

**By A. Frank Johns**

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## Introduction

This article begins with a brief historical perspective of legal creeds, codes, ethics, and professional conduct as the basis for examining changes in the practice of law as the century turns. It next turns to the debate regarding elder law attorneys representing the family as it unfolded in testimony before the American Bar Association Commission on the Evaluation of the *Model Rules of Professional Conduct* (*Ethics 2000 Report*). The article then

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focuses on how elder law attorneys initiate consultations and engagements with families, looking at story narratives and hypothetical case studies that should guide elder law attorneys, estate planners, and tax advisors when engaged by family members to provide legal services.<sup>1</sup>

## The Current Status of the Legal Profession and Its Creeds, Codes, Ethics and Rules of Professional Conduct

Whether at the turn of the 20th century or the turn of the new one, the legal profession and its lawyers have pondered the public's view of it and them.<sup>2</sup> Moliterno's 1997 article highlighted this point by merging quotes from 1902, 1906, and 1931 with quotes from 1986 and 1993.

Unquestionably, "popular respect for the legal profession is steadily falling"; there is "much cause for discouragement and some cause for alarm." "[L]awyers . . . are blamed for some serious public problems," including the enormous costs of increased litigation. "Year by year the various law schools send increasing armies of new recruits, far beyond the requirements of even this litigious community." Lawyers act with "exaggerated contentious[ness]," as if they were "gladiator[s]" in a war, making every effort to "wipe out the other side." Among the causes of this crisis is the attitude that the law is no longer a profession, but a mere competitive business in which its members face increased "economic pressure[s]." Better legal education may not even help because "[t]he evil . . . is not so much a professional as an American fault. It has its source in our inordinate love for the almighty dollar."<sup>3</sup>

However, the attempt to counter the bashing of the legal profession has had little impact on the

cynical, even negative, swell against lawyers, which has in recent years risen to the level of a national past time. As the butt of jokes on Jay Leno's *Tonight Show*, or the target of ridicule on *Late Night with David Letterman*, lawyers and lawyering often are center stage. There are ample sources for pithy sound bites and crude depictions, from Judge Judy to Judge Starr, from O.J. Simpson to Oprah Winfrey. If the ethics of any culture are found in its stories and narratives,<sup>4</sup> then woe be unto the legal profession, for the stories and narratives depict too many lawyers violating that which society perceives as right.<sup>5</sup> The moral of countless stories or narratives is that lawyers and their profession are no longer perceived as elite.<sup>6</sup>

In the past, the bar's narratives framed the reality of lawyers and lawyering, creating a myth of elitism that possessed power.<sup>7</sup>

These narratives, and others, have shaped the self-conception of the legal profession for generations. And the state's law has for the most part embraced these narratives in the construction of the law of lawyering.<sup>8</sup>

Simply stated, Ross believes state law has in the past granted the legal profession extensive privileges and immunities, based on the myth of elitism as the foundation, excluding other agents, actors or, for that matter, professions.<sup>9</sup> However, the myth has held little currency outside the profession.<sup>10</sup> As the myth crumbles even further, it is not only changing the public's perception of lawyers, but the legal profession's internal understanding of itself as well.<sup>11</sup>

Laypersons have always viewed our profession with distrust and antipathy. Yet, the contemporary expressions of public disregard for the profession may represent a new high, or low, depending on your perspective. Also, even within the profession, the myth's standing has changed. When the lawyers of previous generations gathered for Law Day speeches and heard the bar's narratives, they received those stories presumably with some real sense that the speechmaker was describing their profession, albeit tempered with some self-conscious recognition of the gap between their ideals and the reality of day-to-day lawyering.<sup>12</sup>

Ross finds this evolution significant because it suggests a dramatic change in the bar's conception of itself and in the content of the state's law governing lawyering, demonstrated in the civil liability

law that determines a lawyer's liability to non-clients for negligence.<sup>13</sup>

During the decade of the 1990s, response from the legal profession had little real impact on society's lack of trust in lawyering as a profession.<sup>14</sup> The profession seemed content in placing "band-aids" on the broken bonds of faith with the public. These came in the form of internal American Bar Association (ABA) conferences such as the 1997 Leadership Conference of the ABA's Coalition for Justice.<sup>15</sup> In the future, however, such efforts may not be enough to regain the public's trust, allowing non-lawyer organizations and professions to gain in-roads and steal clients of the legal profession,<sup>16</sup> defying the profession with what has typically been considered the unauthorized practice of law.<sup>17</sup>

Exceptions have been recognized in two commissions formed in recent years, examining how lawyers practice and recommending changes in professional conduct and standards.<sup>18</sup> Over the last several years, the ABA and state bars have confronted the changing status of the legal profession by generally responding to ethical and practice changes, many of which are specifically impacting on elder law and estate planning attorneys. Through the Center for Professional Responsibility, the ABA has been developing and interpreting standards and scholarly resources in legal ethics, professional regulation, professionalism, and client protection mechanisms.<sup>19</sup> In recent years, the ABA has gone further, organizing two commissions, one to look internally at the profession's ethics beyond the year 2000, and one to look externally at how law practices will be organized into the new century.

The Commission on the Evaluation of the *Model Rules of Professional Conduct* (Ethics 2000 Commission) began its activities in August 1997 and plans to report its recommendations to the ABA House of Delegates this year.<sup>20</sup> The 13-member Ethics 2000 Commission, reflecting the ABA's diversity with judges, law professors, government lawyers, corporate counsel, civil and criminal practitioners, and one non-lawyer, is charged with:

1. Conducting a comprehensive study and evaluation of the ethical and professionalism precepts of the legal profession;
2. Examining and evaluating the ABA *Model Rules of Professional Conduct* and the rules governing professional conduct in the state and federal jurisdictions;

3. Conducting original research, surveys and hearings; and
4. Formulating recommendations for action.

On March 23, 1999, the Ethics 2000 Commission published for comment and consideration, revisions of Model Rules 1.4, 1.6, 1.7, 1.8, 1.9, 1.10, and 2.2, with accompanying comment.<sup>21</sup> On November 15, 1999, it published for comment and consideration, revisions of Model Rules 1.5, 1.15, 1.18 (a proposed new rule), 4.4, 5.1, 5.2, and 5.3, with accompanying comment. On February 21, 2000, it published for comment and consideration the most recent revisions of Model Rules 1.16, 1.17, 2.1, 3.6, 4.1, 4.2, 4.3, 5.6, 6.2, and 6.4, with accompanying comment. Of significant interest are the proposed new rule, 1.18, Prospective Client, and the draft revision of rule 1.14, Client with Diminished Capacity.<sup>22</sup>

The ABA Commission on Multidisciplinary Practice (MDP Commission) was created in August 1998 to face the unprecedented challenges of revolutionary advances in technology and information sharing of the globalization of the capital and financial services markets and of more expansive government regulation of commercial and private activities. The MDP Commission's members include a cross section of the legal profession including distinguished practitioners, judges, and academicians. It has worked at a feverish pitch over the last six months, believing that there is a degree of urgency with the emergence of consulting firms that are aggressively soliciting clients, offering services remarkably similar to those traditionally offered by law firms, such as advice on mergers and acquisitions, estate planning, human resources, and litigation support systems.<sup>23</sup>

The work of the MDP Commission is found in its *Background Paper on Multidisciplinary Practice: Issues and Developments*;<sup>24</sup> in its development of hypotheticals and models, based on some of the testimony and comments received by the commission through the summer of 1999;<sup>25</sup> and in the written remarks of the more than eighty witnesses appearing at public hearings conducted over the last eighteen months.<sup>26</sup> The scope of this article is not broad enough to further analyze or discuss MDP and its ramifications on elder lawyers and estate planners, especially in light of its defeat in the ABA House of Delegates in August.<sup>27</sup> Focus is directed here at the work of the Ethics 2000

Commission to revise the *Model Rules of Professional Conduct*, and the attention of the National Academy of Elder Law Attorneys (NAELA) to those revisions relating to joint, multiple, and family representation and clients with mental impairment.

### **NAELA's Ethics Goal, Its Position Statement and Testimony Before the ABA Ethics 2000 Commission**

NAELA was organized in 1988 to provide organization to the mounting numbers of lawyers addressing the needs of elderly clients. During the last ten years,<sup>28</sup> one goal of NAELA has been ethics. The objective of NAELA's ethics goal is to educate elder law attorneys about ethics in the elder law construct, promoting the application of rules of professional conduct in the elder law bar across the country. Two years ago, NAELA organized a Professionalism and Ethics Task Force to further promote the ethics goal.<sup>29</sup> After reviewing a broad spectrum of literature and rules, the task force intends to draft recommendations for approval by the NAELA board. Additionally, the task force has targeted plenary and breakout sessions and workshops on ethics during the NAELA Symposium and the Advanced Institute this fall.

### **Developing New Client-Lawyer Relationships**

NAELA's visibility and involvement in developing new ways to be engaged in the client-lawyer relationship and delivering legal services to the elderly is a primary benefit to consumers, especially when based on the high standards of the *Model Rules of Professional Conduct*. If the legal profession expands the *Model Rules of Professional Conduct* to provide positive guidance for lawyering that involves joint, multiple, and family-member representation, then elder law attorneys, estate planners, and family practitioners will be able to more easily engage clients and compete in the new world of expanding multidisciplinary practices.

When hearings were scheduled before the ABA Ethics 2000 Commission, NAELA's leadership concluded that NAELA needed to be visible, sharing its position with those charged with the responsibility of rewriting and editing the rules. To that end, NAELA prepared a position statement on recommended revisions of the rules being considered by the Ethics 2000 Commission. At the time, the commission was looking, in part, at Rules 1.6, 1.7, and

2.2, rules of primary interest to NAELA. It was also beginning an examination of Rule 1.14, Clients with Disability, in which NAELA has a significant interest as far as its members' clients are concerned.

### **NAELA's Position Statement<sup>30</sup>**

The focus of NAELA's position statement was not that the recommendations were inappropriate, but that they did not go far enough. Supporting a communitarian approach<sup>31</sup> to the law of lawyering, NAELA asserted in its position paper that too much negativity was written into the comments supporting Rules 1.6, 1.7, and 2.2.<sup>32</sup> The negativity is found in the language that continually warns of the consequences of joint or multiple representation, placing a chilling effect on elder law attorneys thinking about implementing joint or multiple family representation for the benefit of their clients.<sup>33</sup> The position paper offered an additional comment to Rule 1.7 that suggests proactive support of such engagements when the primary qualifications regarding direct or material conflict are resolved by the lawyer.

### **NAELA's First Appearance Before the Ethics 2000 Commission<sup>34</sup>**

In addition to the statement of position, NAELA's leadership also believed that it should appear before the Ethics 2000 Commission. Initially, when making the request, the NAELA leadership was told that it would have two or three minutes at the most and, but for that limitation, NAELA was welcome to be on the agenda. NAELA accepted.

As the afternoon hearing approached, Professor Rebecca C. Morgan, NAELA past president, and Laury Adsit, NAELA executive director, coached the author in preparation of what was assumed to be a two- to three-minute sound bite. Since so little time was available, it was decided that as president of NAELA the author would stand alone before the Ethics 2000 Commission, offer a two-minute summary of NAELA's position, and sit down. It was assumed that what was important was to honor the time given and to leave the commissioners with the primary point of concern to NAELA, namely the need for a softening of the comments, allowing for a greater application of the communitarian approach to representation. What happened was unexpected. Once the author started to comment about the NAELA position paper and the commu-

nitarian approach, a somewhat heated and lengthy debate ensued with the time expanding well beyond that which was allotted, mainly at the insistence of the commissioners. During that time, your author, as NAELA's president, commented that it was more like arguing *en banc* before a circuit court of appeals on an emotionally divisive legal issue than appearing before a commission charged with the responsibility of conducting hearings on ethical issues of the day.

While appreciative of NAELA's position, what primarily concerned the commissioners was the use of the term "family entity" or "family unit." Many commissioners insisted that the communitarian approach would not be considered in the comments if it included the family as a single entity, or single unit, simply because they were of the opinion that the family is not legally defined.<sup>35</sup> Several commissioners were certain that such an expansive comment would create more difficulty and generate greater conflicts, especially when other areas of practice were considered, namely family or domestic relations. One commissioner opined that the matrimonial attorneys had already insisted that the family as a unit of representation be an authorized client-attorney relationship when going to court in divorce actions. This author agreed with several commissioners that family-entity representation in that context was clearly adversarial, creating a direct and material conflict that, as a matter expressly addressed in the rules, could not be waived by the client. This author made clear to the commissioners that NAELA would qualify the communitarian engagement, limiting it when members of the family are adversarial with each other, disallowing it all together when there is any form of litigation between them.

The Ethics 2000 Commission welcomed NAELA's offer to write with greater specificity about how the communitarian approach would actually be applied by elder law attorneys to families seeking engagement regarding aging issues. It was made clear, however, by one commissioner that some hybrid of agency between the parent or parents and other family members be considered, allowing just as much involvement by the children, but still directed at and focused on the best interests of the parent or parents.

NAELA achieved its goal of involvement and visibility. The *ABA Journal* published a report on the Ethics 2000 Commission hearing, and specifically

wrote about the debate that went back and forth between the author and the commissioners on client representation and the communitarian approach.<sup>36</sup> The article spawned additional comment and dialogue from scholars, judges, and lawyers asking just how family representation would work, with some opposition for various reasons.<sup>37</sup>

### **NAELA's Second Appearance Before the ABA Ethics 2000 Commission**

The author was again before the Ethics 2000 Commission in February, 2000, during the ABA Midwinter Conference in Dallas, Texas. While primarily there to comment about the revisions to Rule 1.14, the author also provided further comment on the communitarian approach and how additional proactive comments might be written to guide lawyers offering such engagements to clients.<sup>38</sup>

This author asserted in written remarks that the comments to Rule 1.7 should expressly declare that no family whose members were adversarial in administrative or judicial forums could waive the material, direct conflict inherent in having one lawyer representing all members of the family individually or as an entity before the bar.<sup>39</sup> The written remarks also offered as a comment Professor Steven Hobbs' definition of family for the purpose of framing the legal engagement.<sup>40</sup>

During the public hearing, the Ethics 2000 Commission's members remained entrenched in the position that no comment would be considered that tried to expressly authorize the client-lawyer relationship comprised of the family as an entity or unit. Commission member Professor Geoffery Hazard articulated his well-published position that unlike the legal definition of a corporate entity, with the collective representation of shareholders, there is no legal definition of a family entity or unit.

As the ABA Commission on Legal Problems of the Elderly asserted to the Ethics 2000 Commission, this is certainly an area that needs further dialogue and consideration.<sup>41</sup> Professor Hazard offered middle ground when he suggested that the Ethics 2000 Commission would better receive and consider the comment offered in August if it read differently. The revised comment, I propose, might read as follows:

[32] While there is potential for conflict in joint or multiple representation that includes different genera-

tions with respect to asset distribution and/or decisions regarding health care, lawyers should carefully assess the benefits of collectively identifying the elderly person or persons, and their family members as those to whom the lawyer's duty of loyalty should be owed. If joint or multiple representation of spouses, and intergenerational family members as *collective clients* is appropriate after reasonable assessment at the outset, then further representation should continue with execution of the necessary written engagement or agreement, disclosing relevant, adverse confidences, and potential conflicts related to the common purposes of such representation. *The focus is the collective consideration of all members of the family as multiple clients.*

Hazard thought that replacing the entity or unit approach with representation of the family members might be the positive language that NAELA is seeking without moving into language not now acceptable. That brings the focus of the session full circle to how elder law attorneys are currently engaged by clients, and what may need to be incorporated into practice development to clarify the "how to's" in offering joint, multiple, and family-members' collective client-lawyer engagements.

### **NAELA's Third Appearance Before the ABA Ethics 2000 Commission**

NAELA appeared a third time before the Ethics 2000 Commission in June 2000, following through with additional comment on the revision of Rule 1.14 and the proposed new Rule 1.18.

### **Client-Lawyer Engagements**

For elder law attorneys, representation in the 21st century will go beyond identification of the single client, often including joint and multiple representation, involving intergenerational and multigenerational family layers. More importantly, representation may in the future take family entity or unitary form. Before representation may be established, there must be confirmation that the prospective client has sufficient competence or capacity to enter into the client-lawyer engagement. Once the identification of the client is confirmed, the engagement may address quality of life and quality of services of the elders in the family. Concomitant with medical and health care needs, the engagement may also delve into considerations of long-term care insurance, estate and divestment planning for tax or gov-

ernmental benefits consideration, asset exemptions and transfers, and in-home options often leading to transition into assisted living or nursing home environments, or even transition of residency, domicile, and state citizenship.

### **The Inception of Engagement**

At the inception of being engaged, elder law attorneys must generally deal with attorney competence, communication, confidences, and loyalty as do all other attorneys in the legal profession. However, because of the needs of many people in the aging population, elder law attorneys must also assess the client's competence to hire counsel, or to have sufficient informed consent to enter into a contractual relationship that delivers future legal services. Many elder law attorneys have included as an element of the scope of prospective representation a reasonable screen, assessment, or calculation of client capacity within the consult. Acting with sensitivity, reasonable legal competence, and diligence, elder law attorneys assess client capacity, while honoring client confidences and protecting property.

### **Initial Client Contact**

Whether denominated lawyer-client, or client-lawyer,<sup>42</sup> the legal profession has proceeded at a snail's pace when it comes to including client capacity in discussions about the initial client conference. One of NAELA's leader's, an elder law authority, writing about the representation of older clients, states that "although the *Model Rules of Professional Responsibility* . . . recognize the non-litigation roles of attorneys more explicitly . . . , the *Model Rules* still provide no practical guidance to elder law attorneys."<sup>43</sup> Since that is so, little is found outside the elder law construct to guide elder law attorneys through the rigors of confirming sufficient client competence or capacity at initial contact, allowing consultation, or determining what, if any, future legal services may be contracted. At the time of this writing, there is movement by the Ethics 2000 Commission to develop a model rule relating to the prospective client. However, at the time of this writing, the rule only concerns itself with conflicts, providing no guidance relating to

the competence or capacity of the prospective client to enter into the legal engagement.

### **Proposed New Model Rule 1.18, Prospective Client<sup>44</sup>**

The proposed new rule relating to the prospective client begins with a concise definition, addresses confidentiality and examines material adverse interests with the prospective client.

#### PROPOSED RULE 1.18—PROPOSED FINAL DRAFT OCT 2, 2000

New material is underlined. (This draft Rule is an addition to the current Model Rules.)

#### DUTIES TO A PROSPECTIVE CLIENT

- (a) A person who discusses with a lawyer the possibility of forming a client-lawyer relationship with respect to a matter is a prospective client.
- (b) Even when no client-lawyer relationship ensues, a lawyer who has had discussions with a prospective client shall not use or reveal information learned in the consultation, except as Rule 1.9 would permit with respect to information of a former client.
- (c) ~~Neither a~~ A lawyer subject to paragraph (b) ~~nor a lawyer to whom disqualification is imputed under Rule 1.10~~ shall not represent a client with interests materially adverse to those of a prospective client in the same or a substantially related matter if the lawyer received information from the prospective client that could be significantly harmful to that person in the matter, except as provided in paragraph (d). If a lawyer is disqualified from representation under this paragraph, no lawyer in a firm with which that lawyer is associated may knowingly undertake or continue representation in such a matter, except as provided in paragraph (d).
- (d) Representation is permissible if both the affected client and the prospective client have given informed consent, confirmed in writing, or
  - (1) the disqualified lawyer is timely screened from any participation in the matter and is apportioned no part of the fee therefrom; and
  - (2) written notice is promptly given to the prospective client.

Currently there is no connection between this new rule defining the prospective client, and cur-

rent Model Rule 1.14, Client with Disability. Rule 1.14 is framed in language that addresses the ongoing client-lawyer relationship. There should be a connection between the two rules, providing guidance to lawyers dealing with prospective clients with diminished capacity.

### **Formation of Client-Lawyer Relationship**

The legal profession first views the relationship of the client and lawyer based on the manifestation of the person's intent. The relationship arises when a person manifests to a lawyer the person's intent that the lawyer provide legal services for the person.<sup>45</sup> While intent is founded on capacity, general legal texts address the client-lawyer relationship based on the client having fully informed consent, and based on what the lawyer discloses to the client about the benefits and advantages of the proposed representation and conflicts of interest. There is general legal comment about legally incompetent clients who require representation for which they are personally incapable of giving consent. However, the writings identify those who are already incompetent and are either represented by a guardian or, if minors, represented by their parents.<sup>46</sup>

### **Current and Future Consideration of the Prospective Client**

Currently, few general writings of the legal profession mention the attorney's need to assess the elderly client's competence to hire counsel, or to assess capacity to function with informed consent.<sup>47</sup> In fact, the legal profession initially looks at competence only in terms of the lawyer's ability to deliver legal services. Consider Model Rules 1.2 and 1.16, bracketing the beginning and the ending of the client-lawyer relationship. These rules are more concerned with the lawyer's role, and whether what the lawyer is being asked to do is moral or ethical, than whether the client has capacity to consummate the engagement.

### **The Lawyer's Duties to Prospective Clients**

Even if not engaged, the lawyer may have duties to prospective clients that include protecting confidential information, property, and providing reasonable care. This is where emphasis on the client's capacity commands attention. However, attention to client capacity is not currently examined generally in the legal profession until the client-attorney

relationship has been established and is ongoing.<sup>48</sup> Many earlier texts referenced above provide ample information and basic primers on structuring initial contact, intake, and the first consultation in an elder law practice. It begins with the initial call, proceeds to the initial appointment, and continues through the first conference.

### **Applying the Proposed New Rule 1.18 on Prospective Client**

As discussed above, times may be changing with the proposed new Model Rule 1.18, Prospective Client.<sup>49</sup> While the proposed new rule is currently limited to concern for conflicts, it should be expanded to address capacity and informed consent of the prospective client as well.

### **Additions to the Proposed New Rule 1.18**

This author will be proposing to the Ethics 2000 Commission that there be added to proposed Rule 1.18 language addressing the client's capacity and ability to exercise informed consent by merging language from Rule 1.14, Client with Diminished Capacity, with language from the proposed revision to Rule 1.4, addressing informed consent.

#### **ADDITION TO THE PROPOSED NEW RULE 1.18—PROSPECTIVE CLIENT:**

- (b) When the lawyer has reason to believe that the prospective client may have diminished competence or capacity, then
- (1) the lawyer shall, as far as reasonably possible, ascertain whether the prospective client is capable of adequately engaging in and maintaining a normal client-lawyer relationship and making adequately considered decisions in connection with the proposed engagement for legal representation.
  - (2) The level of the prospective client's competence or capacity should be considered adequate at that lowest threshold of cognitive function that still allows for the exercise of the prospective client's informed consent to a proposed course of conduct after the lawyer has communicated reasonably adequate information and explanation regarding the representation as found in Rule 1.4 (b) and (c).
  - (3) When a prospective client's competence or capacity is determined to be below the threshold



to initially engage the lawyer and make adequately considered decisions in connection with the representation, then the lawyer may be engaged by the prospective client's attorney-in-fact, except when the prospective client's interests are materially adverse to those of the attorney-in-fact or guardian.

(4) When the lawyer has determined that the prospective client has diminished capacity below the above described threshold, is at risk of substantial physical, financial or other harm unless action is taken, and the prospective client is unable to adequately act in his or her own interest, the lawyer may take reasonably necessary protective action, including consulting individuals or entities that have the ability to take action to protect the prospective client, and, in appropriate cases, seeking the appointment of a guardian ad litem, conservator, or a guardian.

### **The Consultative Process**

Elder law attorneys go through the consultative process countless times. The consultative process begins with the initial call. Even with the initial call, staff should be trained to say certain things, making certain inquiries, all with appropriate language in order to sensitize callers to the need for certain facts and responses about the situation, and to be sensitive toward the callers, often times in crisis-oriented difficulties. Internally this is where conflicts checks should be completed.

### **Initial Appointment**

If an appointment is made, then one strategy is to send the client a notice of appointment, including a one-page, prescreen worksheet and the lengthier legal and data information questionnaire.<sup>50</sup> Often the questionnaire is brought to the conference, but the prescreen worksheet should be returned without delay in advance of the conference.

### **First Conference**

For purposes of this section, assume that the prescreen worksheet reflects facts that raise an issue of competence or capacity of the person or persons involved in the conference. All too often elder law attorneys are initially directed by the conferees to what the conferees believe are the primary issues to be discussed, circumventing, or overlooking facts that impact on the question of capacity of one or more of them. The elder law attorney must control

the initial conference to determine client identity, client confidences, and client capacity.

### **Client Identity**

While maintaining initial control, the attorney must gain clarification from the conferees of who the client is or clients are. If client identity is not clarified at the beginning of the first conference, any further direction may later be wrecked by the realization that the client is someone other than who the elder law attorney assumed the client was at the beginning, or that it might be several of the individual family members, or all of the family members individually as the family. The problems often exist from the beginning because the *Model Rules* do not clearly define client.<sup>51</sup> However, as noted above, the proposal of new Model Rule 1.18, Prospective Client, may have a significant impact on the initiation of the process.

### **Client Confidences**

Once the client is, or multiple clients are, identified, the elder law attorney must confirm client confidences. This often becomes a sensitive situation. If the children are in the room, the attorney may need to ask that they be excused in order to discuss with a parent, or both parents whether or not confidential, client information is to be shared with the children. How this presents itself, depending upon who is with the parent or parents during the initial conference, may be more complicated than this example. Sometimes those who are with the lawyer in the first conference declare that the client is not even present. Often the conference ends with joint and multiple representation involving the whole family. How an understanding of the interests of all persons involved is gained is no easy process. Initial dialogue may be sufficient to determine a threshold of informed consent and that there are no problems or difficulties between family members. Lengthier questioning or screening may be needed as shown later in the text.

### **Conflict of Interest**

While there may be differences between family members, the differences may not rise to the level at which they are perceived to be so strong that they are material. The attorney should thoroughly discuss the differences, raising questions as to the depth and significance of those differences that might be considered material. As a part of the

engagement, multiple family clients must waive in writing any differences and conflicts, authorizing the lawyer to represent each of them and all of them.

### Client Capacity

If there are questions raised about the capacity of any participants, then how the lawyer resolves the questions will often depend on the initial threshold of facts taken at intake and the initial conference. The attorney should be able to discern whether or not the person or persons identified as the client or clients have capacity to engage an attorney or to grant to others the client's authority to engage an attorney.

### Releases

Have medical and health care releases signed by the person or persons identified as the client or clients, authorizing receipt of evaluations, medical records and opinions of attending physicians, or related service professionals who have confirmed the capacity (or lack thereof) for purposes of engagement and future legal services.

### Multi-Disciplinary Assessment

Many attorneys arrange for a multidisciplinary geriatric assessment that includes health care or medical opinions regarding capacity and informed consent of the elderly person or persons involved or identified as a client or clients.

### Screens and Mini-Exams

Many writers suggest that elder law attorneys use their own, simple screening tool or tools:

1. *Client Capacity Indicators*. Professor Larry Frolik offers a one-page, six-section questionnaire that is a good beginning.<sup>52</sup>
2. *Mental Ability Assessment, Functional Assessment, and Safety Assessment*. Harry Margolis has developed in the *Elder Law Forms Manual* three simple assessment tools that construct questions that look at mental ability, basic activities of daily living and self-help determination, and concerns for physical safety of the client.<sup>53</sup>
3. *Client Capacity Assessment*. Michael Gilfix offers a client capacity assessment form directed contextually, rather than globally, based on a general assessment of capacity. The form

offered in his forms manual is developed within the context of estate planning. Gilfix suggests that for different issues, or objectives, the elder law attorney construct the questions relevant to the subject, and critical to development of a particular legal document, or accomplishment of a particular goal. It is interesting to note that at the bottom of the form Gilfix suggests that the assessment should be given in a way that eliminates distractions, that the assessor speak loudly and clearly, and that the assessment be given based on the assumption "that you will have a competent client."<sup>54</sup>

4. *Preliminary Assessment*. Several, more sophisticated, instruments have been designed for nonmedical, nonpsychological, and non-health care professionals in recent years to screen or preliminarily assess the ability of a client or family member to exercise informed consent. The instruments qualify in broad categories the client's ability to exercise sufficient cognitive ability in order to maintain a threshold level of capacity necessary to access alternatives to guardianship or conservatorship:<sup>55</sup>
  - a. The Legal Capacity Questionnaire (LCQ);<sup>56</sup>
  - b. The Mini-Mental State Examination (MMSE);<sup>57</sup>
  - c. The Client Capacity Screen (CCS);<sup>58</sup> and
  - d. The Behavioral Dyscontrol Scale (BDS).<sup>59</sup>

### Standard of Practice.

If the above instruments are used in an elder law attorney's practice, and the attorney asserts as a matter of habit she or he uses the screening instrument or mini-exam or assessment to establish a threshold of capacity and informed consent, then the actual recollection by the attorney of her or his client's abilities and function at the time in question is not the only source of evidence since the screen or measurement should be in the client's file. Once incorporated into a standard of practice by attorneys, the screens are easy to administer, and to retrieve.<sup>60</sup>

### Objection to Screens.

Objection to screens, instruments, or processes used by attorneys includes the inaccuracy of the instruments, or mistakes in usage of the screens, and the so-called snapshot of informed consent and capacity. Medical and health care professionals have expressed concern that a one-time assessment

of individuals to determine their capacity is inefficient and often inaccurate. The psychiatric community has criticized the screens, observing that competency is not a fixed state, but may fluctuate as a natural course of an individual's illness, in response to treatment, or with psychodynamic factors.<sup>61</sup> There are legitimate arguments for and against client-capacity screens and other assessment instruments. If elder law attorneys choose not to use a capacity screen, then they should incorporate in their standard of practice consistent ways by which they resolve the issue of capacity and informed consent with each client.<sup>62</sup>

### **Joint, Multiple, and Family Member Representation**

As shown in the initial intake process above, elder law attorneys often involve themselves in representations that include more than just one person. At times, husbands, wives, and children meet with counsel. While acknowledging one or the other spouse, elder law attorneys often find themselves advising the couple and the children together. Just as often, elder law attorneys receive children seeking legal advice and services for their parents. While acknowledging one or the other children, the lawyers find themselves advising the family members as a whole. There are many aspects of the practice of elder law that are similar to the practice of estate, tax-planning, and family-law attorneys. However, what distinguishes elder law from so many other areas of law is the construct. Within the elder law construct there is equal interest not only in assets, and their preservation, but also in the quality of life and quality of services provided at the end of life.

### **Elder Law's Embrace**

Elder law embraces a multidisciplinary, holistic approach that is singular and plural. This emerging practice welcomes involvement by medical, social, and psychological professionals in a team approach to serving the intergenerational layers of the family.<sup>63</sup> It is lawyering that counsels and advises at the initial consult, based on alternative legal approaches, including individual and communitarian perspectives, that best serve the representative interests of the members of the family after assessing issues

of loyalty and zealousness measured against material and direct conflicts.

### **Education and Guidance**

Elder law attorneys have been guided by the collective writing that was produced at the Fordham Conference on Ethics and the Elderly,<sup>64</sup> and the subsequent writings compiled by the American College of Trust and Estate Counsel in the *ACTEC Commentaries*.<sup>65</sup> Most recently, additional writing was published in the symposium, "*Should the Family Be Represented as an Entity?: Re-examining the Family Values of Legal Ethics*."<sup>66</sup> It is interesting to note that several of the writers for the Fordham conference were also writers for the Seattle symposium four years later.<sup>67</sup>

### **Fordham Analysis**

Within the context of elder law, legal ethicists have for years struggled with the delivery of legal services within a joint, multiple, or family-entity representation construct. In December of 1993, a major conference on legal ethics in representing older clients convened at the Fordham University School of Law.<sup>68</sup> Conference participants generally developed ways by which professional responsibility problems may be resolved. Conference participants specifically developed professional practice recommendations that may enable lawyers to better serve older clients in various contexts.<sup>69</sup> There were also separate articles examining intergenerational representation,<sup>70</sup> ethical management of assets,<sup>71</sup> ethical considerations of Medicaid estate planning,<sup>72</sup> and family values that create competing approaches.<sup>73</sup> Other writers have also weighed in on the examination of older clients as a definable client group, addressing joint, multiple, family, and unitary forms of representation.<sup>74</sup>

Pertinent to this article are the published recommendations of the Fordham Ethics Conference addressing intergenerational conflicts<sup>75</sup> and divestments.<sup>76</sup>

### **Intergenerational Conflicts.<sup>77</sup>**

Recognizing a great potential for conflict among intergenerational family members, the working group on intergenerational conflicts strongly recommended that lawyers approached by families should early on identify which family member is

the client.<sup>78</sup> The working group offered an addition to the comments to Rule 1.7:

There is a heightened potential for conflict in representing different generations with respect to asset distribution and/or decisions regarding health care. In these cases a lawyer should be careful to identify the person or persons to whom the lawyer's duty of loyalty is owed.<sup>79</sup>

The working group addressed multiple representation of intergenerational clients. It asserted that lawyers should clarify at the outset who their client is, with disclosure of all relevant adverse consequences related to common purposes, reducing it to writing.<sup>80</sup> The working group identified for discussion the following areas of concern: models for determining client identity that included identifying the one who pays as the client;<sup>81</sup> identifying a primary client and the client's special or third-party beneficiary who is owed certain duties;<sup>82</sup> identifying the relationship with multiple parties or persons as joint representation; and identifying the relationship with multiple parties or persons as a unit or entity representation.<sup>83</sup>

Patricia M. Batt and Thomas L. Shaffer<sup>84</sup> promote representation of the family as an entity with its own interests, distinct from those of its members. Arguing that Model Rule 1.13(a) (which states that "a lawyer employed or retained by an organization represents the organization acting through its duly authorized constituents") "invents the legal fiction that a corporation is one unit that speaks with one voice," Batt asserts that "elder lawyers should be allowed to indulge in the same abstraction." Batt distinguishes this "entity theory" from the "group" or "intermediary" theory in Model Rule 2.2,<sup>85</sup> where consensus among group members is required or else the "group" falls apart and individual representation becomes necessary.<sup>86</sup> This form of representation is criticized by Teresa Stanton Collett on the premise that there is confusion resulting from the individual family members having strong personal interests in the day-to-day conduct of the family creating the reasonable perception by the participants that the entity is merely the alter ego of the family members, and thus the family entity's lawyer is also counsel to each shareholder.<sup>87</sup>

### **Case Study 1: Families with Capacity and Competency, Functional and in Harmony—The Last Tuesday with Morrie**

You know Morrie;<sup>88</sup> he held class on Tuesdays, teaching us how to live through a better understanding of how to die. In the book, *Tuesdays with Morrie*,<sup>89</sup> Mitch Albom reported that Morrie had a wonderful companion and wife of thirty or forty years, and children, all together with him in a very functional family. At least that is how Albom portrayed them in his biography of Morrie's death. Ever the consummate professor, Morrie allowed extraordinary visibility of one of the most private events in his life. The account of Morrie Schwartz's death may in time become a classic example of the American way of death at the turn of the 21st century. This case study is a fictional account, illustrating the communitarian approach to legal representation, of how it might have been if Morrie and his family received the counsel of an elder law attorney. It is based on joint and multiple family representation in a legal engagement.<sup>90</sup>

*Rob sat with his brother, Jon, in the Florida offices of Robertson and Associates, an elder law firm. Although not present at the appointment, Morrie and Charlotte had actually arranged for their sons to meet with Charlie, the lawyer. Morrie could not leave his home, struggling with the ravages exacted on his body by Parkinson's Disease. Charlotte stayed with Morrie, unable or unwilling to leave him at that time.*

*Charlie was not just an elder law attorney, but considered the first elder law attorney in the state. Morrie, Charlotte, Rob, and Jon had already filled out an intake form that was quite lengthy, including family history, relationships, health and insurance data, investments and deferred benefit funds, and an abundance of additional information.*

*Charlie asked initial questions about the family, and the relationship between parents and sons. He then asked where Morrie and Charlotte were. Their situation was explained, and Charlie asked if Morrie was able to speak on the phone. Having answered in the positive, Charlie had the number dialed and set up the speakerphone for consultation with Morrie and Charlotte.*

*At first, Charlie asked Rob and Jon to return to the reception area while he spoke to Morrie and Charlotte in private. However, as soon as he began the discussion with them, he learned quickly that*

separation was unnecessary. Morrie and Charlotte made clear to Charlie that they wanted their sons involved in every aspect of what they were planning and what they would be going through. They also explained that their family was close and committed to each other. Charlie mentioned that while he might represent them as spouses, it was not the best practice to represent the children as well, or represent the family as one. He explained his duties of competence, loyalty, and zeal to the client and how those duties may be difficult to carry out if having to cover multiple clients or even the family as a whole. Charlie did not gloss over the situation and gave lengthy commentary about maintaining confidences, avoiding material conflicts, and diligently advocating the interests of the client.

Morrie spoke with authority belying his fragile situation. He explained that the family wanted to do this together and for Charlie to represent them as a family. He made clear that he and the others understood the risks, and appreciated Charlie's concern. Regardless of those risks, Morrie insisted that Charlie agree to represent them as a family. Charlie asked if it would be sufficient for him to agree to represent them as multiple-client family members with all confidences shared. Morrie asked if there was really a difference between multiple-client family members and having the family as the client.

Charlie admitted that this was a gray area, and that he was not sure how to answer Morrie. He explained that he actually thought he could only represent the individual spouse, or spouses, but not spouses and children as a family. He honestly deferred, stating that he would seek advice from you, an elder law ethics expert.

**Analysis:** After being carefully counseled, individuals exercise their choice that the lawyer represent the members of the family collectively; that there be family-entity representation. With no undue influence and sufficient informed consent to make the choice, the choice should stand. That the choice is somehow suspect and should be overridden by the lawyer choosing to represent only one of the individuals as the client may be overreaching. And if the lawyer offers a convoluted multi-client engagement, then the family cynically wonders whether the lawyer is just after one more way to bill them. Many experts, consumer groups, and self-interested product salesmen want to dump all people with

age in a vat of old age, creating a homogenized class of old people presumed to be too vulnerable and weak to decide on their own how they should be represented.

The advice to Charlie is clear. Based on the facts presented, he clearly may offer multiple-client family member engagement. The current *Model Rules of Professional Conduct* do not expressly authorize such representation. However, the comments to the proposed revisions<sup>91</sup> expressly acknowledge such client-lawyer relationships. At a time when parents take the communitarian approach, concluding that in the collective representation of family members they are neither sacrificing individual autonomy or liberty, their choice should be honored, especially after being taken through careful consultation by counsel on loyalty and zealousness and given the lawyer's conclusion that there are no material conflicts of interest.<sup>92</sup>

However, it is not clear that Charlie may offer representation of the family as an entity.<sup>93</sup> After careful consideration, discussion of loyalty and zealousness, assessment of differences and nonmaterial conflicts under the current *Model Rules of Professional Conduct* and their comments, there is greater risk for Charlie and Morrie's family to embrace the family as an entity of engagement even though the representation is neither illegal, nor unethical or sanctionable. It is not even uncomfortable—for Morrie, Charlotte, Rob, and Jon.

Why should Charlie's worry and discomfort (and that of the profession as well) be of greater concern and have greater weight in the decision of how the client-lawyer relationship is formed? While we laud the legal profession's lofty ideals that developed the *Model Rules of Professional Conduct* to protect the consumers, should they be exercised in such a way as to smother autonomy and individual choices? Based on these facts, and how the Schwartz family presents as the prospective client, there is no greater risk to them.

**Epilogue:** Charlie took the advice of a respected ACTEC colleague who sent him a copy of an engagement letter published in an ACTEC guidebook that generally deals with situations like that presented by the Schwartz family. Charlie went to Morrie's home at a time when Morrie was having a good day. He explained that he was confident that multiple-client-member representation was appropriate in this case and offered the engagement let-

ter. Morrie asked if that meant that Charlie would not represent them as a family entity. Charlie said it did. Morrie asked if that meant that such representation was illegal or unethical. Charlie said it didn't, but it made it more risky. Morrie declined the offer.

Although the intergenerational working group made it clear that joint, multiple, and family representation is complex and difficult, it only cautioned practitioners to carefully adhere to appropriate disclosure, notice, and written documentation of the engagement. It never asserted that the only model lawyers should apply in the practice of law is singular, individual representation, and neither did the Ethics 2000 Commission with its proposed changes to the *Model Rules* and comments.<sup>94</sup> Many elder law attorneys and estate planners know from their countless experiences with families as clients that joint, multiple, and family client-lawyer relationships are the reality of current law practice, that in the proper context, and when properly counseled and guided, they inevitably work to the best interests of all who embrace the engagement.

The confusing aspects of Model Rule 1.7, when and how to apply material limitation when direct adversity is not present, are the target of the proposed change to Model Rule 1.7 by the Ethics 2000 Commission.<sup>95</sup> The Reporter's Explanation of Changes to Model Rule 1.7 describes how, if the rule changes are adopted, it should make it easier for lawyers to apply "material limitation," "consentability," and "informed consent" to the assessment of "who the client is" when initiating client-lawyer relationships. It also explains the expansion of the comment to Model Rule 1.7 to provide better guidance to lawyers.

Unlike present paragraph (b), in which a conflict exists if the representation "may be" materially limited by the lawyer's interests or duties to others, proposed paragraph (a)(2) limits conflicts to situations in which there is "a significant risk" that the representation will be so limited. This proposed change is not substantive but rather reflects how present paragraph (b) is presently interpreted by courts and ethics committees.

Unlike the present rule, the proposed rule contains a single standard of consentability and informed consent, applicable both to direct adversity and material limitation conflicts. This standard is set forth in a separate paragraph, both to reflect

the separate steps required in analyzing conflicts (i.e., first identify potentially impermissible conflicts, then determine if the representation is permissible with the client's consent) and to highlight the fact that not all conflicts are consentable.

Conflict of interest doctrine is complicated, and the Ethics 2000 Commission believes that lawyers are in need of additional guidance. Therefore, the commission is recommending substantial changes to the Comment to Rule 1.7. The changes are designed to clarify basic conflicts doctrine and to address a number of recurring situations. The proposed organization provides an introduction (Comments 1 through 3), a general roadmap to conflicts analysis (Comments 4 through 13) and finally an elaboration of different types of conflicts.<sup>96</sup>

**Divestment.**<sup>97</sup> In recognition of the fact that neither the *Model Rules of Professional Conduct*, nor their comments, provide guidelines regarding the specific responsibilities of lawyers counseling older clients, the Fordham Ethics Conference working group on divestments recommended that lawyers provide counsel that addresses issues and options in long-term care, providing various ways to accomplish financing and promote the quality of life of the client while preserving dignity and autonomy. It further recommended that practice guidelines identify approaches for addressing important issues without expressly mandating or prohibiting particular conduct by attorneys, asserting instead that lawyers should be directed by client goals and objectives and by clients' fundamental values.<sup>98</sup>

Seasoned, competent elder law attorneys know that one of the most difficult problems in dealing with older Americans of the working and middle classes is asset preservation in view of the cost of long-term care, especially when resources will not cover the cost of health care, and when older Americans are not able to qualify for long-term care insurance.<sup>99</sup> Situations as described in the case study above present difficulties for lawyers at the initial stage of client-lawyer relationships because they are often brought to the lawyers' attention by the children, not the older parents who are usually the clients. Such initial contacts create no conflicts in and of themselves, and do not by themselves mandate a rejection of joint, multiple, or family representation.<sup>100</sup>

**Case Study 2: Families with One or More Family Member(s) with Diminished Capacity, Functional Problems and Differences—Nettie and Tommy.**

Consider Nettie and her only son Tommy. Nettie, in her late eighties, is a crusty, combative, controlling, and possessive old battle-ax. Nettie has been overly mothering, so smothering and possessive of Tommy that he did not marry until he was in his late forties. The lifelong yoke that Nettie kept on Tommy was painfully apparent in his cowering slump-shouldered appearance. So self-consumed and possessive was Nettie that she even made Tommy put her name on a deed to land that Tommy bought with his own money just after he was married. Tommy never much objected, trying to respect his mother and respond to her bidding, even to the dismay and disgust of his wife. In return, Nettie, on her own, went to Tommy's attorney (L), executed a durable power of attorney with Tommy as her attorney-in-fact, and signed her will leaving everything in her modest (certainly not her view of it) estate of approximately \$185,000 to Tommy half of which was the value of the home place.

As Nettie became disabled, she insisted that Tommy and his wife move into the home and be her care providers. After a year of catering to Nettie's every whim, Tommy and his wife were worn out. They took the advice of Nettie's doctor and contracted for in-home services at Nettie's expense. However, Nettie became more and more combative, chasing away the help, contributing to Tommy's declining health due to the stress and anxiety of trying to care for Nettie around the clock. The more Nettie lost control the more she insisted that she would never go to a nursing home, and certainly would not pay for it. Tommy finally had a mild heart attack while fighting with Nettie just trying to lift her in the bathroom. The doctor took the initiative to have Nettie placed in a nursing home.

Having regained his health, Tommy sought the advice of L for his mother's benefit. While assessing the client-lawyer relationship, the lawyer carefully addressed the risks involved, finding no direct adversity and concluding that her representation of the family was not limited by any material conflicts. The lawyer confirmed that she could continue representing Nettie through Tommy's exercise of the power of attorney, and that she would repre-

sent Tommy as well, understanding that all confidences between them would be shared.

The lawyer prepared a divestment plan that would gain Medicaid eligibility for Nettie through asset transfer of property once the property had been restructured as exempt under the state Medicaid guidelines. As allowed in the state's Medicaid guidelines, the divestment plan would actually deliver the property to Tommy during Nettie's lifetime, circumventing the state's Medicaid lien. L concluded that Nettie and Tommy had aligned interests. However, the transfers would require court approval.

Under state law, the divestment plan required a special proceeding for the authorized transfer of the real property if the grantor of the power of attorney could not give informed consent for the transfer to the attorney-in-fact. State law also required the appointment of an attorney guardian ad litem to represent the grantor. L filed the petition in special proceeding, and included notice on the state Medicaid agency director who chose not to appear or to respond to the special proceeding. The guardian ad litem testified that although very confused, Nettie was adamant that she did not want her property taken away, angrily insistent that the nursing home and the government not be allowed to take her money. The guardian ad litem advised the court that the divestment plan with authorized gifting to the attorney-in-fact should be granted. The probate judge granted the petitioner's request.

L followed through with the transfers of property under the divestment plan and the special proceeding order. She then assisted Tommy in filing for Medicaid eligibility for Nettie.

**Analysis:** Analysts and writers, contending in the past that so-called Medicaid planning was primarily driven by the children of those facing the expense of long-term care, decried such planning at a minimum as a violation of public policy, and at a maximum as immoral,<sup>101</sup> even criminal.<sup>102</sup> However, countless elder law attorneys ardently disagreed.<sup>103</sup> Attorneys who specialize in serving the elderly responded that it was far more often that the parents were the ones initiating the inquiry into how they might preserve their estates in order to transfer wealth while living, assuring their children's inheritances, while accessing those governmental benefits to which they contended they had a right.<sup>104</sup>

Most lawyers know that there are many legal options by which elderly clients' goals of asset preservation related to the cost of health care may be met. This is where potential liability of lawyers may expand. If the lawyer has not provided all options from which the older American client may choose, if the lawyer has not prepared the documents correctly, or if the lawyer has not analyzed the guidelines and regulations correctly, the result may be that the client is denied Medicaid benefits, or the client is impoverished by the expense of long-term care when insurance coverage was affordable, reachable, and available. If the loss of governmental benefits drains the estate of the elderly client, then the children, possibly derivative clients of the lawyer, may have a right to initiate an action against the lawyer for the loss of their inheritance.<sup>105</sup>

Divestment is often the goal when there are multigenerational<sup>106</sup> clients. As described in sections above, lawyers should confirm loyalty, confidences, conflicts, and duty between them early on and in writing. When there are differences and conflicts not determined to be material, then written waiver and disclosure are necessary. Written waiver and disclosure are also required when there are relationships where the lawyer has a conflict, but is allowed to continue the representation. When the differences are mild, written engagement is strongly advised, but not yet mandatory.

### **Case Study 3: Families with Capacity and Competency of Members, Dysfunctional and In Material Conflict—Multiple Decades with Multiple Generations**

*The Smith family has had L as their attorney for over forty years. L has for decades been counsel to the Smith Family Corporation, which Father Smith as president has run with an iron fist since its inception. It's a solid business with net annual sales greater than \$50 million. Father Smith has run his family no differently, wielding control over his wife and children as if they were servants or employees. L has served all members of the family over the years involving many different legal situations, including a comprehensive estate plan that was woven through the financial structure of the business and through each child's family and their individual financial situations, including generation skipping. The children have made choices and plans based on the inheritance acknowledged in past plans by Father Smith. These have been*

*memorialized in the preparation of wills, trusts, and advance directives for all of them. Father Smith made sure that Mother Smith and each child received copies of his documents, and instructed L to discuss with each of them what was planned.*

*In the last ten years, L has changed the focus of his legal practice to elder law. On several occasions, L has mentioned the need for the Smith family to meet and redefine the client-lawyer relationship and to discuss transfer of the operation of the family business to the children. Father Smith arbitrarily dismissed it all, contending that there was no benefit in such a meeting, except for L to churn the account and charge more money. Recently, when L countered that there was a need to meet because of an escalation of conflicts between Father Smith and other members of the family. Father Smith fumed over such nonsense, contending that he called the shots and what he said was it.*

*To make clear that he controlled, Father Smith insisted that L meet with him separately, and at which time he instructed L to completely change his estate plan. At the meeting, Father Smith ranted and raved about everything, including his wife and children, and declared that L could not tell his wife or children. If the revision of the estate plan is consummated, then Father Smith's estate will be sufficiently diminished to require changes in the children's estate plans.*

**Analysis:** This is a situation where dysfunction has risen to a level of material conflict. However, the parties are multiple clients. Should L withdraw? And if that is an option, should it be noisy, or quiet? This is an option that is abrasive to lawyers for many reasons, none the least of which is the loss of very good fees from a very good business client.

In a similar case study,<sup>107</sup> five other options are examined:

1. Finish the estate plan—no questions asked;
2. Attempt to have dialogue with Father Smith to reconsider his plan because of the impact it will have on prior estate planning;
3. Tell Father Smith that he needs to tell the children so that they can rearrange their estate plans;
4. Surreptitiously tell Mother Smith and the children what Father Smith intends to do; or
5. After finishing Father Smith's plan and having it executed, unilaterally tell the children.



Professor Collett provides guidance to practitioners by identifying which of the actions is the better option to take. She asserts that the first option is the least professional response because the lawyer is primarily acting as a scrivener and not fulfilling the duties of advisor and counselor of law. The second action while presenting conduct consistent with the lawyer's ethical obligations to the father is the bare bones minimum, on the premise that the father may not understand the nature of his donative act and the general effect upon his estate. The third option is worth consideration because it shows some concern for the well-being of the children, the lawyer's other clients. However, it clearly creates a dilemma, pitting the father against the son; the lawyer advising the father to act inconsistent with his objectives, and concern with the possibility that disclosure will provoke family strife. Action four clearly violates father's confidence and promotes family discord before the actual change of the estate plan occurs. Action five is considered the most appropriate and advantageous action, while it still violates confidentiality owed to father.<sup>108</sup>

Collett's analysis was written more than five years ago and perhaps if she revisited it today she might give more detailed analysis of what it means to have multiple clients in the same family and how unexpected material conflicts often send them all to other counsel because they will not allow disclosure and nothing had been previously agreed to about sharing confidences, and they do not agree that L may continue representing any of them.<sup>109</sup>

## Conclusion

This article began with the premise that public trust and faith in the legal profession has eroded to a level of disdain and cynicism the likes of which make lawyer jokes the national pastime. It then reported on the ABA Commission on Multidisciplinary Practice and on the Ethics 2000 Commission, promoting better ways by which the legal profession may relate to clients. It then highlighted the involvement of NAELA in the development of ethics revisions and in drafting new *Model Rules* to assist consumers in the ever-changing world of lawyering and the unauthorized practice of law. The article then reviewed the client-lawyer relationship, from intake, through consideration of the prospective client, to the client capacity screen and the capacity of the

client to engage the lawyer. From initial intake, the article then focused on client-lawyer engagements in the areas of intergenerational clients and divestments serving the elderly and their families. As part of the article, there are three case studies to help practitioners apply the *Model Rules* to their own legal practices.

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## Endnotes

1. This manuscript is an expansion and update of remarks given at the Redesign Your Practice Seminar in Washington, DC in November 1998, the position statement written by the author for the hearing held on August 5, 1999 and February 2000, before the Ethics 2000 Commission as part of the annual meeting of the ABA House of Delegates in Atlanta, Ga. and the author's three part article, *Ethics in Elder Law*, ELDER LAW ADVISORY, in the April, May, and June issues of 1999. See *infra* note 27.
2. See James E. Moliterno, *Lawyer Creeds and Moral Seismography*, 32 WAKE FOREST L. REV. 781, 781 (1997).
3. See *id.*, citing at 818 (n.1, Morris Gisnet, A Lawyer Tells the Truth 11-12 (1931); n.2, ABA COMM.ON PROFESSIONALISM, 112 F.R.D. 243, 253 (1986); n.3, 10 THE LAW STUDENT'S HELPER 35 (Sprague 1902) (on file with the author); n.4, ROSCOE POUND, THE CAUSES OF POPULAR DISSATISFACTION WITH THE ADMINISTRATION OF JUSTICE, reprinted in 29 A.B.A. REP. 29 at 395, 406 (1906); n.5, Robert L. Haig & Robert S. Getman, *Does "Hardball" Litigation Produce the Best Result for Your Client?*, N.Y. STATE B.J., Jan. 1993, at 24, 26 (quoting a local bar president).
4. See NINA ROSENSTAND, *The Moral of the Story: An Introduction to Ethics*, ETHICS IN NARRATIVES 23 (3d ed. 2000).
5. See *id.* at 10. (Every functional society on earth has had a "philosophy" of what one should do or be in order to be considered a good person doing the right thing. Sometimes this moral code is expressed orally in stories or songs. . . . *Id.*)
6. See Thomas Ross, *Knowing No Other Duty: Privity, the Myth of Elitism, and the Transformation of the Legal Profession*, 32

- WAKE FOREST L. REV. 819, 820 (1997) (Many political leaders today are lawyers, but few seem anxious to publicize that feature of their political resume." *Id.*)
7. *See id.*
  8. *See id.*
  9. *See id.*
  10. *See id.* Our society believes that lawyers do not cling to the myth of elitism, especially the idea that they are the best and the brightest, or that the practice of law is a truly "public service," but merely just another way to make a buck. *See id.* at 821. A short trip on the World Wide Web quickly presents current lawyer narratives that graphically represent one way that society now views lawyers and the legal profession. One harrowing website is <<http://www.deadlawyers.com>>, describing how lawyers have been killed, or unwittingly met their demise.
  11. *See id.* at 820.
  12. *See id.*
  13. *See id.*
  14. *See* Moliterno, *supra* notes 2, 3 and accompanying text.
  15. *See* Philip J. Anderson, *President's Message—Incremental Steps Toward Justice*, 85 ABA J. 8 (Jan. 1999) (commenting on the work of the Coalition for Justice, whose mission is to restore public confidence in the justice system).
  16. *See* Charles F. Robinson, *Written Remarks to the A.B.A. Commission on Multidisciplinary Practice* (Feb. 5, 1999) <<http://www.abanet.org/cpr/multicom.html>>; *see also* Laurel S. Terry, *Written Remarks to the A.B.A. Comm. on Multidisciplinary Practice* (Mar. 12, 1999) <<http://www.abanet.org/cpr/multicom.html>>.
  17. Examples of the marketing efforts of the American Institute of Certified Public Accountants (A.I.C.P.A.) and individual professional service providers are all around us. *See* for example <<http://www.aicpa.org>>.
  18. *See* James Podgers, *Ethics in 2000 and Beyond: Profession Hustles to Keep Apace of Changing Standards*, 85 A.B.A. J. 96 (Aug. 1999).
  19. With substantial overlap and interaction, the Center describes its departments: The Ethics Department is the place for study, development, and implementation of model legal and judicial ethics standards; The Professionalism Department provides counsel to various A.B.A. committees as well as support in efforts to improve the professionalism and competence of lawyers and judges; The Professional Regulation Department provides legal support and policy guidance for various A.B.A. committees as well as responds to requests for information on case law, statistics, and procedural standards; and The Client Protection Department serves the concerns and best interests of the client population through programs that prevent or redress harm done in the practice of law or the rendering of legal services. *See* <<http://www.abanet.org/cpr/home.html>>.
  20. In support of its assertion that it has maintained a great leadership role in ethics and professionalism of the legal profession, the A.B.A. cites the adoption of its ethical standards by virtually every jurisdiction, implicitly acknowledging that it is a recognized leader and the appropriate forum for discussing, drafting, and adopting rules governing lawyer conduct. *See Ethics 2000 Home Page*, <<http://www.abanet.org/cpr/ethics2k.html>>.
  21. *See generally* <<http://www.abanet.org/cpr/ethics2k.html>>.
  22. Many of the current rules will be more fully examined later in the text. No attempt is being made in this text to compare how the proposed rule revisions impact on the law of lawyering. *See* <<http://www.abanet.org/cpr/ethics2k.html>> for the draft proposed revision of Model Rule 1.14, and the proposed new Model Rule 1.18, Prospective Client, with its Reporter's Comments.
  23. The Commission met in executive session in September, November, and December, 1999, and held two-day public hearings in November, 1999, February, March, June, and July 2000. The Commission submitted progress reports, considered the most important issue to face the legal profession this century, in August, at the 1999 Annual Meeting (New York) of the ABA House of Delegates.
  24. The Commission anticipates submitting a final report with recommendations in the fall of

2000. The A.B.A. Ethics 2000 Commission invites the public, members of the House of Delegates, ABA entities, and all other interested persons and organizations to respond to its most recent posting of proposed new rules, revised and edited rules, repealed rules and the minutes of the July 7, 2000 meeting of the Commission. See A.B.A. Ethics 2000 Commission <<http://www.abanet.org/cpr/070700mtg.html>>.
25. The MDP Commission notes that in some designated instances, the hypotheticals are based on the *Restatement (Third) of The Law Governing Lawyers* (Proposed Final Draft No. 1, 1996).
26. The papers of the MDP Commission, and the written comments of the witnesses, are published on the home page of the Multidisciplinary Commission. See <<http://www.abanet.org/cpr/multicom.html>>.
27. See A. Frank Johns, *Ethics in Elder Law: A Three Part Article*, 97 ELDER L. ADVISORY 1 (Apr. 1999); A. Frank Johns, *Ethics in Elder Law: Part Two of a Three-part Article*, 98 ELDER L. ADVISORY 1 (May 1999); A. Frank Johns, *Ethics in Elder Law: Part Three of a Three-part Article*, 99 ELDER L. ADVISORY 1 (June 1999).
28. Cynthia Barrett, JD, CELA, NAELA Fellow, and NAELA past president 1993–94, an early leader and visionary of NAELA, is credited with the wisdom and foresight to propose and organize the Fordham Conference on Issues of Ethics and the Elderly. See *infra* note 68 and accompanying text.
29. NAELA past president Clifton B. Kruse, Jr., and immediate past president Rebecca C. Morgan co-chair the task force and are responsible for the significant educational opportunities being generated by the task force for NAELA.
30. See A. Frank Johns, Clifton B. Kruse, Jr., and Rebecca C. Morgan, NAELA's Position Statement to A.B.A. *E2K Comm.* (Aug. 1999) <<http://www.abanet.org/cpr/naela899.html>>.
31. See Russell G. Pearce, *Forward, Symposium: Should the Family Be Represented as an Entity?: Reexamining the Family Values of Legal Ethics*, 22 SEATTLE U. L. REV. 1, 2, n. 5, n. 6, n. 33 (1998). ("[I]n the context of bar organization deliberations, arguments for a communitarian construction of legal ethics codes has been offered. . . . Apparently as a result of lobbying by bar groups, the American Law Institute modified the *Restatement of Law Governing Lawyers* to permit lawyers greater flexibility in limiting their obligations to individual family members in joint representation; see also Naomi Cahn and Robert Tuttle, *Dependency and Delegation: The Ethics of Marital Representation*, 22 SEATTLE U. L. REV. 97, 106 (1998); Teresa Stanton Collett, *Love Among the Ruins: The Ethics of Counseling Happily Married Couples*, 22 SEATTLE U. L. REV. 139, 139 (1998).
32. The Ethics 2000 Commission has recommended the repeal of Model Rule 2.2 in its entirety, folding its directive into a comment under Model Rule 1.7.
33. See generally <<http://www.abanet.org/cpr/ethics2k.html>>.
34. A. Frank Johns, Rebecca C. Morgan, and Laury Adsit attended the public hearing on August 5, 1999, held in conjunction with the A.B.A. annual meeting in Atlanta.
35. See Geoffrey C. Hazard, Jr., *Conflict of Interest in Estate Planning for Husband and Wife*, 20 THE PROB. LAWYER, 1, 19–22 (1994).
36. See John Gibeaut, *Ethics 2000 Work Continues: Commission Cautious About Proposal to Allow Lawyers to Represent Families*, 85 A.B.A. J. 91, 91 (Oct. 1999).
37. The author received one letter in opposition from a probate judge. The judge's primary concern addressed the potential of lawyers appearing in court representing both parties in the adversarial process. The letter is on file at NAELA.
38. See A. Frank Johns, Position Statement to A.B.A. *Ethics 2000 Comm.* (Feb. 2000). This statement was not that of NAELA, but was proposed to NAELA for acceptance at a subsequent board meeting. See <<http://www.abanet.org/cpr/naela2.html>>.
39. See *id.*
40. See *id.*

41. See Charles P. Sabatino, A.B.A. COMM. ON LEGAL PROBLEMS OF THE ELDERLY STATEMENT (Feb. 9, 2000).
42. See GEOFFREY C. HAZARD, JR. & WILLIAM HODES, *THE LAW OF LAWYERING*, pt. 1 at 1 (2d ed. 1996) (Supp. 1998), (hereinafter *THE LAW OF LAWYERING*) explaining that the four duties (competence, communication, confidentiality, and loyalty) of the core principles of the law of lawyering run to the client, and noting that The Kutak Commission symbolized the primacy of client interests by reversing the common “lawyer-client” reference; see also ACTEC COMMENTARIES ON THE MODEL RULES OF PROFESSIONAL CONDUCT (3d ed. 1999) (hereinafter ACTEC COMMENTARIES).
43. See William E. Adams & Rebecca C. Morgan, *Representing the Client Who Is Older in the Law Office and in the Courtroom*, 2 ELDER L. J. 13 (Spring 1994) (citing among others, Ronald C. Link et al., *Developments Regarding the Professional Responsibility of the Estate Planning Lawyer: The Effect of the Model Rules of Professional Conduct*, 22 REAL PROP. PROB. & TR. J. 1 (1987)).
44. It is noted at this time that in addition to the Ethics 2000 Commission proposing the creation of a new Rule 1.18, the A.B.A. MDP Commission has also identified a proposed new Rule 1.18 relating to professional independence. As the rules are finalized, the numbering will change.
45. See RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS (hereinafter RESTATEMENT 3D—LAW GOVERNING LAWYERS), Counsel Draft No. 11, v.1., ch. 2, *The Client-Lawyer Relationship*, at 2-2. (as of the writing of this article [Feb. 2000], the final draft of *Restatement 3d—Law Governing Lawyers* has been approved by the A.B.A. House of Delegates.) For purposes of this outline, the currently available final drafts are referenced and quoted.
- The client’s intent may be manifest from surrounding facts and circumstances, as when the client discusses the possibility of representation with a lawyer and then sends the lawyer relevant papers or a retainer requested by the lawyer. The client may hire the lawyer to work in its legal department. The client may demonstrate intent by ratifying the lawyer’s acts . . . or the client may communicate intent through someone acting for the client, such as a relative or secretary.
46. See *id.* at 2-12. Reporter’s note referencing case law addressing legally incompetent clients based on minority
47. Cf. Erica Wood & Audrey Straight, *Effective Counseling of Older Adults*, A.B.A. COMM. LEGAL PROBLEMS OF THE ELDERLY AND LEGAL COUNSEL FOR THE ELDERLY, INC. REP. (1995) (noting age myths that stereotype older people as senile, confused, disabled, and the like, promote the dangers of “ageism.” While some degree of short-term memory loss is part of normal aging, a significant or complete failing in mental abilities is not a normal part of the aging process.)
48. See MODEL RULES OF PROFESSIONAL CONDUCT RULE 1.14. See also RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 35, Client Under Disability, at 2-69–2-75, § 43, Termination of Lawyer’s Authority, 2-103–2-110; ACTEC COMMENTARIES at 131.
49. See *supra* note 44 and accompanying text.
50. The many texts cited in this outline have countless options for developing data collection and questionnaires. NAELA’s Practice Development SIG (Dan Tulley, Chair) also provides numerous samples in its resource bank.
51. See Adams & Morgan, *supra* note 43, at 13, n.72 (citing J. Donaldson, *The Ethical Considerations of Representing the Elderly*, TR. & EST. J., July 1991, at 18).
52. See LAWRENCE A. FROLIK & MELISSA C. BROWN, *ADVISING THE ELDERLY OR DISABLED CLIENT*, app. 2–3 *Client Capacity Indicators* (1999).
53. See HARRY MARGOLIS, COMPETENCY EVALUATION, ch. 4, *Elder Law Forms Manual* (1994, Supp. 1999). See specifically Form 4.2, Functional Assessment; Form 4.3, Safety Assessment; and Form 4.4, Mental Ability Assessment.

54. See JOHN REGAN & MICHAEL GILFIX, TAX, ESTATE AND FINANCIAL PLANNING FOR THE ELDERLY: FORMS AND PRACTICE, pt. A, *Managing the Elder Law Practice, Check Lists*, pt. A:6.1, *Possible Indicators of Incapacity, Undue Influence or Abuse*, pt. B:2.5, *Planning for Incapacity*, pt. B:2.6, *Incapacity Decisions*; Form A:6.1, *Client Capacity Assessment* (1992, Cum. Supp. 1998).
55. However, there are those who believe that such a screening process or preliminary assessment is outside the realm of the practice of law and should not be a part of the attorney's office practice. There has also been criticism of the instruments, specifically whether or not the screens and assessments sufficiently examine the ability of an individual or a client to function, or seek assistance to function in life. Regardless of the instrument used, attorneys may be too far out of their expertise to deal with such a complex area. It has been difficult even for psychiatrists and neurologists. See ARTHUR WALSH ET AL., MENTAL CAPACITY—MEDICAL AND LEGAL ASPECTS OF THE AGING ch. 4, *Diagnosis of Brain Damage* (Cum. Supp. 1993):

Human behavior is an extremely complex multifaceted entity. The understanding of its disruption in brain disease has proved to be a substantial and often times frustrating problem to the clinician who is faced with the tasks of diagnosis and management. The patients with originally related changes in intellectual or emotional behavior unfortunately have often fallen just outside the limits of both psychiatry and neurology. Behavioral problems within this somewhat uncharted borderland have long been subsumed under the rubric of "the organic brain syndromes," a vague and overly inclusive term covering any possible behavior change from brain damage or dysfunction. The term has little utility for specific diagnosis, description, or patient management. In recent years, however, there has been a renewed interest in these organic mental syndromes, and it is now possible to understand many of these conditions and to assign specific

patterns of behavioral deficits to specific diseases or to damage in particular regions of the brain. *Id.* at 133, 134 (citing RICHARD L. STRUB & F. WILLIAM BLACK, THE MENTAL STATUS EXAMINATION IN NEUROLOGY 1 (1977)).

*Cf.* BAIRD B. BROWN ET AL., MENTAL CAPACITY—LEGAL AND MEDICAL ASPECTS OF ASSESSMENT AND TREATMENT, *Mental Capacity*, § 7.06 *Mental Status Exam* (2d ed. 1994), (hereinafter MENTAL CAPACITY).

An examination of mental status should be part of any thorough neurologic or psychiatric evaluation of the older adult. In the hands of a skilled examiner, the mental status examination can provide valuable information regarding such areas as an individual's ability to attend and concentrate, use speech and language appropriately, remember various types of information, perform visual and spatial activities, and access the higher cognitive functions involved in abstract reasoning, judgment, and mathematical calculations. Several short, compact forms of mental status exams have been introduced in recent years, and although these can be both efficient and effective diagnostically, an understanding of the basic step involved in a more comprehensive examination is important.

56. Baird B. Brown, *Determining Clients' Legal Capacity*, IV THE ELDER L. REP., no. 7, at 1 (1993). (Brown provides a careful explanation of the LCQ, a guide for giving the LCQ and an answer sheet for scoring the LCQ). See also Brown et al., *supra* note 55, § 5 *Assessment of Capacity*. (This is the second edition of the Walsh text cited in note 55.)
57. Marshal F. Folstein et al., *Mini-Mental State: A Practical Method for Grading the Cognitive State of Patients for the Clinician*, 12 J. PSYCHIATRIC RES. 189-198 (1975). The Mini-Mental State Evaluation (MMSE) has been identified as the most widely used test with excellent test and retest reliability.

58. Steven Fox et al., *A Client Capacity Screen: A Tool for Evaluating Mental Capacity*, 4th NAELA Symposium § 11 (1992). The authors note that the client capacity screen is not a replacement for the use of medical professionals, but provides a structure for assessment that assures relevant information, and provides the attorney with an easy and accessible method of documenting the file regarding such assessment.
59. Brown, *supra* note 56. (Brown explains that the Behavioral Dyscontrol Scale (BDS) is a standardized test designed to assess the integrity of the frontal lobes of the brain.)
60. Some attorneys charge for the administration of the screen or assessment. Of course, the client should understand in advance that the test is not part of the primary consultation, but billed separately.
61. See Laura Coker & A. Frank Johns, *Guardianship for the Elderly: Process and Issues*, 20 J. GERONTOLOGICAL NURSING, 25 (1994), (citing Paul Appelbaum & Loren Roth, *Clinical Issues in the Assessment of Competency*, 138 AM. J. PSYCHIATRY, 1462-67 (1981) (Appelbaum and Roth recommend that, in non-emergency situations, more than one assessment of competency should be conducted.))
62. See Wood & Straight, *supra* note 47, IV *Knowing the Techniques*, at 13.
63. This seems contrary to the position of Professor Janet Dolgin and her assertion that the morality of legal representation is a morality of individualism. See Janet L. Dolgin, *The Morality of Choice: Estate Planning and the Client Who Chooses Not to Choose*, 22 SEATTLE L. REV. 31, 31 (1998).
64. See *infra* note 68 and accompanying text.
65. See ACTEC COMMENTARIES, *supra* note 42. The ACTEC COMMENTARIES have as their themes (1) the relative freedom that lawyers and clients have to write their own charter with respect to a representation in the trusts and estates field; (2) the generally nonadversarial nature of the trusts and estates practice; (3) the utility and propriety, in this area of law, of representing multiple clients, whose interests may differ but are not necessarily adversarial; and (4) the opportunity, with full disclosure, to moderate or eliminate many problems that might otherwise arise under the *Model Rules of Professional Conduct*. See *id.* John R. Price, Reporter's Note, ACTEC COMMENTARIES at 1, <<http://www.actec.org/public/commorder.asp>>.
66. See Pearce, *supra* note 31 and accompanying text.
67. The same authors writing for Fordham and Seattle were Russell G. Pearce, Steven Hobbs, and Teresa Stanton Collett. Pearce notes that Collett has in the past championed a more individualistic approach to the ethics rules and opposed communitarian proposals for family representation. Whether a shift in her thinking or an elaboration, Pearce surmises that the relatively narrow communitarian scope of Collett's proposal in the Seattle writing suggests she may only be expanding the boundaries of her analysis within the context of an individualistic framework, and not abandoning her earlier conclusions. See Pearce, *supra* note 31, at 12, n. 85.
68. The conference was a collaboration of the National Academy of Elder Law Attorneys (NAELA) and five other organizations: (1) the American Association of Retired Persons (AARP), (2) the A.B.A. Commission on Legal Problems of the Elderly, (3) the A.B.A. Section on Real Property, Probate, and Trust Law, (4) the American College of Trust and Estate Counsel (ACTEC), and (5) Fordham Law School's Stein Center for Ethics and Public Interest Law.
69. See Bruce A. Green & Nancy Coleman, *Forward, Ethical Issues in Representing Older Clients*, 62 FORDHAM L. REV. 961 (1994).
70. See Teresa Stanton Collett, *The Ethics of Intergenerational Representation*, 62 FORDHAM L. REV. 1453, 1484-85 (1994).
71. See generally Steven H. Hobbs & Fay Wilson Hobbs, *The Ethical Management of Assets for Elder Clients: A Context, Role and Law Approach*, 62 FORDHAM L. REV. 1411 (1994).
72. See generally Eleanor M. Crosby & Ira M. Leff, *Ethical Considerations in Medicaid Estate Planning: An Analysis of the A.B.A. Model Rules of Professional Conduct*, 62 FORDHAM L. REV. 1503 (1994).

73. See generally Russell G. Pearce, *Family Values and Legal Approaches to Conflicts in Representing Spouses*, 62 FORDHAM L. REV. 1253 (1994).
74. See Green & Coleman, *supra* note 69, at 965 n.8, citing a host of recent writings.
75. See Mary Daly (group leader), *Report of Working Group on Intergenerational Conflicts, in Ethical Issues in Representing Older Clients*, 62 FORDHAM L. REV. 1037, 1037 (1994); Green & Coleman, *supra* note 69.
76. See Jack Guildroy (group leader), *Report of Working Group on Divestments, in Ethical Issues in Representing Older Clients*, 62 FORDHAM L. REV. 1063 (1994); Green & Coleman, *supra* note 69.
77. See Recommendations of the Conference, V, *Intergenerational Conflicts*, 62 FORDHAM L. REV. 989, 997 (Bruce A. Green ed., 1994).
78. See *id.* at 1037, 1039–40.
79. See *id.* at 997. The effects of the working group's proposed addition may be one reason for the way changes have been proposed to Model Rule 1.7 and its comments. See the proposed comment to Model Rule 1.7, *Non-litigation Conflicts*, §§ 26, 27 (providing an example of conflicts arising in estate planning and administration and when a conflict is consentable) and *Special Considerations in Joint Representation*, §§ 28–32 (examining current antagonisms, effect on lawyer-client confidentiality, clarifying lawyer's nonpartisan role) <<http://www.abanet.org/cpr/ethics 2k.html>> or <<http://www.abanet.org/cpr/e2k/rule17draft.html>>.
80. See Green, *supra* note 77, at 992.
81. *But see*, MODEL RULES OF PROFESSIONAL CONDUCT RULE 1.8 (proposed revision), *Concurrent Conflict of Interest*, Comment, § 18, Interest of Person Paying for a Lawyer's Services <<http://www.abanet.org/cpr/ethics 2k.html>> or <<http://www.abanet.org/cpr/e2k/rule18draft.html>>.
82. See MODEL RULES OF PROFESSIONAL CONDUCT RULE 1.6 (proposed revision) §§ (b)(2), (b)(3) *Crimes or Frauds Involving Substantial Economic Harm to Others*; see also accompanying comment, *Disclosure Adverse to Client* (providing a rationale underlying the exception to maintaining confidentiality.) <<http://www.abanet.org/cpr/ethics 2k.html>> or <<http://www.abanet.org/cpr/e2k/rule16draft.html>>.
83. See Pearce, *supra* note 73, at 1258, n.17 (citing Patricia M. Batt, Note, *The Family Unit As Client: A Means to Address the Ethical Dilemmas Confronting Elder Law Attorneys*, 6 GEO. J. LEGAL ETHICS 319 (1992)).
84. See generally Thomas L. Shaffer, *The Legal Ethics of Radical Individualism*, 65 TEX. L. REV. 963 (1987).
85. See Batt, *supra* note 83. A proposed change by Ethics 2000 Commission is to completely delete Model Rule 2.2, moving any discussion of joint representation to the Model Rule 1.7 comment, preferring the term "intermediation" be eliminated. <<http://www.abanet.org/cpr/e2k/rule22memo.html>>.
86. See Batt, *supra* note 83.
87. See Collett, *supra* note 70. This author accepts the position of Batt and Shaffer, the family as client works if the engagement is structured properly.
88. Not all of us have read the book, and know Morrie. See <<http://www.naela.org>>.
89. See generally MITCH ALBOM, *TUESDAYS WITH MORRIE* (1997).
90. This is based on the format developed by the ACTEC Professional Standards Committee. See *Representation of Multiple Generations of the Same Family Engagement Letter, Engagement Letters: A Guide for Practitioners*, ACTEC REP. 19–25 (June 1999).
91. See Green, *supra* note 79 and accompanying text.
92. See Steven H. Hobbs, *Family Matters: Nonwaivable Conflicts of Interest in Family Law*, 22 SEATTLE L. REV. 57 (1998).
93. See Green, *supra* note 79 and accompanying text.
94. See *id.*

95. *See id.*
96. *See* the proposed change of Model Rule 1.7 and comment in up-to-date work of the Ethics 2000 commission at <<http://www.abanet.org/cpr/e2k/rule17draft.html>>.
97. *See* Green, *supra* note 77, VIII. Divestment at 1001. *See also* Green & Coleman, *supra* note 69.
98. *See id.*
99. Elder law attorneys welcome the new generation of viable long-term care insurance products, making this an option that may better fit the long-term care financing needs of older Americans. Elder law attorneys have also been alerted to the future certification of long-term insurance agents, identifying them on a higher standard, and recognizing them as long-term care insurance professionals. The recognized leaders of the long-term care insurance industry have long recognized the sale of long-term care insurance as part of the elder law client's overall financial picture. The industry has committed itself to provide the proper training of agents necessary to create the opportunity for them to be welcomed by elder law attorneys to the team for multidisciplinary planning and practice in the future. The multidisciplinary planning and practice of elder law in the future will not include what was once termed Medicaid planning. What it will include will be asset preservation and appropriate asset transfers that will co-exist with the appropriate sale of long-term care insurance. Medicaid eligibility, as an issue for the long-term care insurance industry, should only be raised in the over-all context of affordability and pre-existing health issues that eliminate long-term care insurance as an option. That is when asset preservation for gaining eligibility to governmental benefits becomes the focus of the producers' clients who do not qualify for long-term care insurance. *See also* ADVISING THE ELDERLY CLIENT § 24 (Louis A. Mezzullo & Mark Woolpert eds., 1992 Supp. 1999).
100. *See supra* note 79 (proposed changes to Model Rule 1.7).
101. In the past, estate and asset preservation planning was attacked when the objective was to gain governmental benefits supposedly reserved for the poor. The antagonists painted broad strokes and pithy sound bites decrying the so-called Medicaid planners. *See, e.g.*, Jane Bryant Quinn, "Poor" Middle Class Eats Up Medicaid Program, THE GREENSBORO NEWS & RECORD (Sept. 15, 1996). "[Medicaid planning] pops up when elderly people think about nursing homes. They may be able to pay the bill, at least for the first year or two. But they'd prefer to leave the money to their kids (or their kids would prefer it; they sometimes initiate this game)." *Id.*
- There is no argument that the means-tested system of governmental benefits has at times been abused by wealthy individuals seeking Medicaid financing as a first option to cover long-term care, giving no consideration to any other viable option, including long-term care insurance. In reality, however, that is rarely the case. What elder law attorneys see more often is middle-class Americans who cannot afford the price of long-term care insurance, who have pre-existing medical conditions that make them ineligible, or who are already in crisis.
102. *See* Pub. L. 104-191 (H.R. 3103), The Health Insurance Portability and Accountability Act of 1996 (Kassebaum-Kennedy) amending § 1128B(a) [42 U.S.C. 1320a-7b(a)(6)] of the Social Security Act, by inserting the following language:
- (6) knowingly and willfully disposes of assets (including any transfer in trust) in order for an individual to become eligible for medical assistance under a State plan under title XIX, if disposing of the assets results in the imposition of a period of ineligibility for such assistance under section 1917(c).
- Cf.* New York State Bar v. Reno, 999 F. Supp. 710 (N.D.N.Y. 1998) (granting preliminary injunction), 97 CV 1768 (N.D.N.Y., September 14, 1998) (unpublished) (granting permanent injunction). The court examined whether or not the above amendment § 1128B(a) [42 U.S.C. 1320a-7b(a)] of the Social Security Act (§ 4734 the Balanced Budget Act of 1997) is constitutional. The Justice Department responded that it would neither defend the constitutionality of § 4734, nor would it enforce criminal sanction. The Justice Department further declared in letters to Congress that the amendment could not be saved by severance and that Congress should immediately consider accepting the Justice Department's assistance in writing law that



- would be more reflective of contemporary First Amendment jurisprudence. On September 14, 1998, Chief Judge McAvoy granted plaintiff's motion for summary judgment and permanent injunction. The defendant has subsequently withdrawn its appeal.
103. See Michael Gilfix, *Fraudulent Conveyances: Alien to the World of Public Entitlements*, 7 NAELA Q. J. 1 (1994); Frances M. Pantaleo and Robert M. Freedman, *In Defense of Medicaid Planning: Federal Law Prohibits States from Applying Debtor-Creditor Laws to Transfer Assets*, 7 NAELA Q. J. 15 (1994).
  104. A majority of the almost 4,000 members of NAELA see tens of thousands of older Americans of moderate wealth each year. These older Americans are the primary inquirers about access to Medicaid and other means-tested governmental benefits without having to spend down assets, creating literal impoverishment. Most often, if the children are involved, they just want their parents to have the highest quality of life possible at the end of their lives. If not already considered, or clearly unavailable, elder law attorneys generally will advise the clients to first examine every viable option, including long-term care insurance before pursuing means-tested governmental benefits.
  105. This is specifically mentioned in the proposed revision to the Model Rule 1.7, comments 26 and 27, <<http://www.abanet.org/cpr/e2k/rule17draft.html>>.
  106. Many writers use the term "intergenerational" to describe the same groups of people.
  107. See Teresa Stanton Collett, *To Tell or Not To Tell: The Ethics of Disclosure and Confidentiality*, 51 ELDER L. ADVISORY 2 (1995).
  108. Cf. *Hotz v. Minyard*, 403 S.E.2d 634 (S.C. 1991). In *Hotz*, the South Carolina Supreme Court found that a fiduciary duty had been breached when an attorney met with a daughter and discussed the father's will with her. Subsequently a depletion of one of the items of distribution from the will occurred. The South Carolina court found that an attorney-client relationship had been created, that the relationship is by nature a fiduciary one and that the beneficiary of the will had a special confidence in that attorney. In the case, the father had created a second will and had instructed his attorney not to let the daughter know. However, the South Carolina Supreme Court declared that the attorney owed the daughter the duty to deal with her in good faith and not actively misrepresent the first will.
  109. See Teresa Stanton Collett, *supra* n. 31 at 141. (The article is focused on two hypotheticals dealing with spouses in the Seattle University College of Law's Symposium: "Should the Family Be Represented as an Entity?": *Reexamining the Family Values of Legal Ethics*).