

1-1-1999

# Ethics Consult: An Ethics Problem Involving Financial Abuse

Michael K. McChrystal

Marquette University Law School, michael.mcchrystal@marquette.edu

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## Publication Information

Michael K. McChrystal, Ethics Consult: An Ethics Problem Involving Financial Abuse, Elder's Advisor, Fall 1999, at 47. "This article was published by Marquette University Law School. All rights reserved."

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## Repository Citation

McChrystal, Michael K., "Ethics Consult: An Ethics Problem Involving Financial Abuse" (1999). *Faculty Publications*. Paper 248.  
<http://scholarship.law.marquette.edu/facpub/248>

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## ETHICS CONSULT

# *An Ethics Problem Involving Financial Abuse*

*What are a lawyer's ethical obligations to a client after termination of duties contracted? Is the legal professional responsible for actions on the part of a party other than the client as a result of advice given to a client? Exactly who is the client when more than one person is involved?*

**By Michael K.  
McChrystal**

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*Michael K. McChrystal* is a professor of law at Marquette University, Milwaukee, Wisconsin, and a consultant on legal ethics to law firms, corporations, and government agencies.

### **The Problem**

*Arnold and his girlfriend, Esther, consult Attorney Elder (A.E.) about establishing a guardianship for the man's elderly father, Noah, with whom the couple has lived for the past two years. A.E. met with the couple in his office for approximately one hour and learned that Arnold is receiving unemployment compensation, after recently leaving a job that he held for 14 months until he was injured in a car accident. A.E. also learned that Esther is employed in a retail sales job. Later, A.E. visited for the better part of an hour with Noah privately in his modest home, which is clean and well maintained. Noah said that Esther takes good care of him and the home, and he does not object to Arnold and Esther taking care of his finances because they do that already. Noah had a stroke two years earlier and he has difficulty walking and speaking. He also has difficulty hearing. After visiting Noah, A.E. spoke briefly on the phone with Noah's primary care physician,*

*who agreed that Noah's competence is questionable, based more on the medical records than on his recollection of Noah. On the basis of these discussions, A.E. proceeded to have Arnold declared guardian for his father. Several weeks later, Esther called A.E. to tell him that she has left Arnold because of his accelerating abuse of alcohol and drugs, that Arnold is wasting Noah's assets, mostly equity in the house, by taking out home equity loans, and that Noah is suffering from severe neglect. What are A.E.'s ethical obligations as a lawyer under these circumstances?*

### **The Analysis**

Hard problems often provoke strong, intuitive answers. Where the law is well developed, careful legal analysis takes us through the issues implicit in the problem so that we can be sure that our response reflects the best that our intellect and judgment can produce. The guardianship problem above involves a set of complicated legal issues that strike at the heart of the lawyer's role. However strong your reaction to

this problem might be, however certain you are of your response, a careful consideration of the law is likely to lead to a better-grounded decision about what to do.

### **Who Is the Client?**

The first step in analyzing most legal ethics problems is identifying who the clients are. Here, that is quite unclear. Arnold and perhaps Esther may have a reasonable basis for believing that they are A.E.'s clients. They initiated the representation when they contacted A.E., and they identified the objective of making Arnold the guardian for his father. Noah also is a possible client, of course. A.E. met privately with him, and his interests are substantially at stake in the representation.<sup>1</sup>

Various tests are applied to determine client status. A mutual intent to form a lawyer-client relationship will almost always suffice, even in the absence of a fee. Moreover, a person becomes a client, at least for purposes of a malpractice action, when he or she seeks and receives legal advice from a lawyer, if reliance on that advice is foreseeable or expected. In addition, statements made in confidence to a lawyer are protected as such, if the statements are made as a prelude to forming a lawyer-client relationship or in the reasonable belief that such a relationship then exists.

Thus, it is possible on these facts that Arnold, Esther, and Noah all were clients to whom A.E. owed duties. A.E. should have made clear to all concerned who was a client and who was not. Legal ethics rules often

require as much. For example, the District of Columbia, in a particularly comprehensive provision in its ethics rules, spells out the lawyer's duty in these terms:

#### **Rule 4.3 Dealing with Unrepresented Person**

In dealing on behalf of a client with a person who is not represented by counsel, a lawyer shall not:

(a) give advice to the unrepresented person other than the advice to secure counsel, if the interests of such person are or have a reasonable possibility of being in conflict with the interests of the lawyer's client;

(b) state or imply to unrepresented persons whose interests are not in conflict with the interests of the lawyer's client that the lawyer is disinterested. When the lawyer knows or reasonably should know that the unrepresented person misunderstands the lawyer's role in the matter, the lawyer shall make reasonable efforts to correct the misunderstanding.

#### *Comment*

[1] An unrepresented person, particularly one not experienced in dealing with legal matters, might assume that a lawyer will provide disinterested advice concerning the law even when the lawyer represents a client. In dealing personally with any unrepresented third party on behalf of the lawyer's client, a lawyer must take great care not to exploit these assumptions.

[2] The rule distinguishes between situations involving unrepresented third parties

whose interests may be adverse to those of the lawyer's client and those in which the third party's interests are not in conflict with the client's. In the former situation, the possibility of the lawyer's compromising the unrepresented person's interests is so great that the rule prohibits the giving of any advice, apart from the advice that the unrepresented person obtain counsel. A lawyer is free to give advice to unrepresented persons whose interests are not in conflict with those of the lawyer's client, but only if it is made clear that the lawyer is acting in the interests of the client. Thus the lawyer should not represent to such persons, either expressly or implicitly, that the lawyer is disinterested. Furthermore, if it becomes apparent that the unrepresented person misunderstands the lawyer's role in the matter, the lawyer must take whatever reasonable, affirmative steps are necessary to correct the misunderstanding.<sup>2</sup>

This rule strongly cautions against excess informality in a matter such as the one A.E. confronted. The interests of Arnold and Noah potentially were in conflict. This made it especially important for A.E. to clarify whom he was representing from the beginning. It also dictated caution in giving advice or expressing opinions to whomever was not a client, whether Noah or Arnold. It is a little late to decide now whether A.E. was representing Arnold or Noah or both. That was a decision to be made and announced up front. If it wasn't, A.E. may have engaged in multiple representation involving conflicting interests.

Elder law practice, like many forms of family law practice, involves situations in which the lawyer's role, to state it in a positive way, is multifaceted. (More skeptical observers might say such representation often is riddled with multiple representation involving irreconcilable conflicts of interest.) The safest course for the lawyer and the family is to make clear to all concerned where the lawyer's obligations, loyalties, and priorities lie.

***Does the Lawyer Have an Obligation to Assist a Former Client in Matters Pertaining to the Prior Representation?***

A.E. served as lawyer as requested, and presumably no further services have been provided to any of the parties. Has A.E. any further obligation to these clients?

It is clear that certain negative duties continue beyond the conclusion of the representation. The duty of confidentiality, to cite the most important example, continues indefinitely.<sup>3</sup> Former clients also are protected by conflict-of-interest rules that prevent their former lawyers from representing clients who are adverse to them in cases substantially related to the prior representation.<sup>4</sup> Thus, even after the representation ends, lawyers are bound by the negative duties not to disclose confidential information or use it adversely to the former client and not to switch sides in a case to represent a new client against the former client.

Affirmative duties to advance a client's interests, on the other hand, operate only within the

scope of the representation.<sup>5</sup> Lawyers usually have no responsibility as to matters that are unrelated to the representation or that arise after the representation is concluded.<sup>6</sup> Thus, even if A.E. represented Noah in relation to the guardianship, A.E. has no duty to continue to monitor the results of those services performed in the past and intervene if circumstances warrant. At the same time, lawyers are certainly free to come to the aid of former clients whom they know to be in need. Therefore, as a general matter, a lawyer is free to contact a former client to provide further assistance with respect to the same matter, but the lawyer is not required to do so.

The same reasoning applies to A.E.'s representation of Arnold. Upon learning that Arnold may be violating his fiduciary duties to Noah, A.E. is permitted to contact Arnold to advise him of his responsibilities but generally he is not required to do so.<sup>7</sup> Again, the representation being at an end, the lawyer is not generally required to reinstate it. Thus, under generally applicable principles, it is up to A.E. whether to ignore the allegation that Arnold is financially abusing Noah or to intervene to warn Arnold about the risks he would be running by his alleged misconduct. The law of legal ethics generally leaves that decision in the lawyer's hands.

These standards reflect a strong policy favoring freedom for lawyers in deciding whether to provide (or refrain from providing) legal services in any particular matter. The lawyer-client relationship is personal for the lawyer, as well as for the client,

and lawyers have an expansive freedom to contract with what clients they choose for whatever scope of services they agree upon.

***Does the Lawyer Have an Obligation to Act to Prevent an Injury by or to a Former Client?***

As the earlier analysis explains, a lawyer generally has no duty to assist, or even prevent an injury to, a former client. Once the representation is at an end, any future harm that befalls a client is generally beyond the scope of the concluded representation.

Another factor must be considered, however. An exception to the duty of confidentiality sometimes permits, or even requires, a lawyer to take action to prevent a client from seriously injuring others. Under Model Rule 1.6(b)(1), a lawyer may reveal confidential information "to the extent the lawyer reasonably believes necessary . . . to prevent the client from committing a criminal act that the lawyer believes is likely to result in imminent death or substantial bodily harm."

Some states go a step further and require the disclosure of confidential information in some circumstances. Wisconsin ethics law provides, for example:

A lawyer shall reveal [confidential] information to the extent the lawyer reasonably believes necessary to prevent the client from committing a criminal or fraudulent act that the lawyer reasonably believes is likely to result in death or substantial bodily harm or in substantial

injury to the financial interest or property of another.<sup>8</sup>

In states with disclosure requirements of this sort, an array of interpretive issues must be resolved before the lawyer's duty is clear. In our example, we would have to determine whether Arnold is (or was) a client of A.E. Does Esther's statement about Arnold's misconduct relate to that representation? Does A.E. believe that Arnold will commit a future crime or fraud (presumably against Noah or some third party extending credit on the strength of Noah's assets)? Does A.E. believe that this crime or fraud is likely to have one of the serious consequences identified in the rule? Are those beliefs reasonable under the circumstances? If the answers to all of these questions are "yes," then A.E. would be required to take preventive action in the minority of states with disclosure requirements similar to Wisconsin's.

Note, however, that most states are similar to the Model Rules in not requiring the disclosure of confidential information to prevent a client from injuring third parties.<sup>9</sup> Thus, the question in most states is not whether A.E. must act to prevent further misconduct by Arnold but whether such action is even permissible. In those states, if the information from Esther relates to the representation of Arnold, it is confidential and may not be disclosed except to prevent life-threatening criminal acts. Perhaps the financial abuse and neglect that Arnold is inflicting on Noah qualify under this standard. If not, the law of many

states may limit A.E., as former counsel for Arnold, to admonishing Arnold to stop his abusive conduct. Other measures that A.E. takes to protect Noah could involve violations of the ethical duty of confidentiality.

Confidentiality rules strongly emphasize the lawyer's duty of loyalty to a client. Confidentiality prevails except in the most egregious contexts, involving seriously wrongful acts that imminently threaten dire consequences to others. With such a powerful duty, it is clearly important to identify who the client is from the outset. That is perhaps the most important lesson to be learned from A.E.'s predicament.

In addition, it is important to realize that the law of legal ethics can be quite complex. Difficult problems can involve multiple legal ethics issues and require complex analysis. A lawyer's intuition about the right thing to do may overlook or undervalue important principles embedded in the law.

Finally, legal ethics rules often leave some "wobble room" that permits the lawyer involved to choose from a range of possible responses. This opportunity for discretion may be lost, however, if the identity of the client or the scope of the representation is left in doubt.

Arnold seeking to have him appointed guardian. Nevertheless, A.E. could have entered a lawyer-client relationship with Noah, however inadvisably, in counseling him on the benefits and risks of a guardianship.

2. *Compare* American Bar Association Model Rules of Professional Conduct, Rule 4.3 (hereafter "Model Rule"). ("In dealing on behalf of a client with a person who is not represented by counsel, a lawyer shall not state or imply that the lawyer is disinterested. When the lawyer knows or reasonably should know that the unrepresented person misunderstands the lawyer's role in the matter, the lawyer shall make reasonable efforts to correct the misunderstanding.")
3. *See* Model Rule 1.9 cmt. 12 ("Information acquired by the lawyer in the course of representing a client may not subsequently be used or revealed by the lawyer to the disadvantage of the client."). *See also* Swidler & Berlin v. United States, \_\_\_ U.S. \_\_\_ (No. 97-1192) (June 25, 1998) (federal attorney-client privilege continues to apply even after the death of the client).
4. *See* Model Rule 1.9.
5. *See* Model Rule 1.2 cmt. 4 ("The objectives or scope of services provided by a lawyer may be limited by agreement with the client or by the terms under which the lawyer's services are made available to the client. For example, a retainer may be for a specifically defined purpose."); *but see* Model Rule 1.16(d) ("Upon

#### Endnotes

1. Under the practice in most states, it is unlikely that A.E. would have represented Noah in the guardianship proceeding itself. More likely, A.E. would file a petition as attorney for

- termination of representation, a lawyer shall take steps to the extent reasonably practicable to protect a client's interests . . .").
6. It is possible that in unusual circumstances, a lawyer who performed work for a client, such as drafting an estate plan, may have a duty of reasonable care to advise the client if changes in the law, to the lawyer's knowledge, seriously compromise the value of the services performed.
  7. *See generally*, Geoffrey Hazard, *Liability Insurance Conflicts and Defense Lawyers: From Triangles to Tetrahedrons*, 4 CONN. L.J. 101 (1997).
  8. Wisconsin Sup. Ct. Rule 20:1.6(b).
  9. Under Model Rule 1.6, disclosure is permitted "to the extent the lawyer reasonably believes necessary . . . to prevent the client from committing a criminal act that the lawyer believes is likely to result in imminent death or substantial bodily harm. . . ." *But see* Model Rule 3.3 (candor toward the tribunal may require disclosure of confidential information in some circumstances).