

1-1-1999

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Publication Information

Michael K. McChrystal, Ethics Consult: Client Choice, Wise Counsel, and Economic Realities: The Forces That Shape the Representation of Elders, *Elder's Advisor*, Summer 1999, at 75. "This article was published by Marquette University Law School. All rights reserved."

Repository Citation

McChrystal, Michael K., "Ethics Consult: Client Choice, Wise Counsel, and Economic Realities: The Forces That Shape the Representation of Elders" (1999). *Faculty Publications*. Paper 246.
<http://scholarship.law.marquette.edu/facpub/246>

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Client Choice, Wise Counsel, and Economic Realities: The Forces That Shape the Representation of Elders

The relationship between a client and attorney, while always complex, may become even more complicated when the client is elderly. This column explores three aspects of particular importance in such cases.

By Michael K. McChrystal

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Representation of older clients, particularly in the context of major life decisions such as end-of-life financial planning and changes from independent living, presents difficult challenges in structuring the attorney-client relationship. In many cases, the challenges include the client's diminished capacity or the active involvement of family members in defining the client's needs and wishes. But even without these complicating circumstances, attorneys and clients are torn by three, sometimes conflicting, forces that influence all attorney-client relationships: (1) the right of the client to make informed decisions (*client autonomy*), (2) the desire of the client to receive *wise counsel*, and (3) the need to contain costs (*economic reality*).

Client Autonomy

A key aspect of legal ethics, derived from agency principles, is that the client (as the principal) runs the show in an attorney-client relationship. According to this view, the job of the lawyer is to gather relevant facts, research

relevant law, and provide the client with a balanced presentation of the available options, including the benefits and risks of each alternative. It is then for the client to decide how to proceed and to instruct the attorney as to what to do next.

Professor Paul Tremblay has expressed this view of the attorney's role quite succinctly:

[A] lawyer should ordinarily refrain from expressing an opinion regarding the relative merit of any choice available to the client. To guide the client's decision by doing so is inconsistent with the policy of informed consent because clients are unlikely to resist lawyer influence, which results in lawyer-centered rather than client-centered decisions. Although perhaps not exactly a breach of ethics [cite omitted], such a practice is tactically inappropriate.¹

The strength of the concern for client autonomy is well illustrated by the powerful rules of confidentiality and attorney-client privilege. These rules protect client autonomy by estab-

lishing that the client remains in control of information developed in the course of legal representation. The client's right to control the information means that the client may be more willing to share information, thereby leading to a more comprehensive factual picture and a more appropriate set of options to pursue. In this way, the law protects the client's autonomy.

The resilience of the duty of confidentiality can be seen in two cases involving the attorney-client evidentiary privilege after the death of the client. *In re John Doe* (the *Stuart* case) involved a client who had a lengthy conversation with his attorney shortly before taking his own life.² The *Stuart* case was covered heavily in the popular media, beginning with the recording of an emergency 911 call from a car phone in which Charles Stuart reported that he and his pregnant wife had been shot in their car by an African-American assailant while returning from an expectant parents class. The Boston police were accused of numerous civil rights violations in the intensive investigation that ensued. Over the course of the next few months, evidence began to suggest that Stuart himself had killed his wife and unborn child, that the 911 call was a hoax, and that with the assistance of his brother, he had covered up his crime. Stuart killed himself as the investigation was closing in. In an inquiry after his death, the prosecutor sought to compel testimony from Stuart's lawyer as to what was said in the conversation shortly before his death. The Massachusetts court held that

the attorney-client privilege survived Stuart's death and the testimony was disallowed.

More recently, the U.S. Supreme Court in *Swidler & Berlin* held that the attorney for Vince Foster could not be compelled by Kenneth Starr, the independent prosecutor investigating President Clinton, to testify about Foster's communications to him shortly before Foster's suicide.³ Again, the attorney-client privilege was held to so far outweigh competing concerns that no exception to the privilege would be recognized. The Court held:

Clients consult attorneys for a wide variety of reasons, only one of which involves possible criminal liability. Many attorneys act as counselors on personal and family matters, where, in the course of obtaining the desired advice, confidences about family members or financial problems must be revealed in order to assure sound legal advice. The same is true of owners of small businesses who may regularly consult their attorneys about a variety of problems arising in the course of the business. These confidences may not come close to any sort of admission of criminal wrongdoing, but nonetheless be matters which the client would not wish divulged.

The contention that the attorney is being required to disclose only what the client could have been required to disclose is at odds with the basis for the privilege even during the client's lifetime. In related cases, we have said that the loss of

evidence admittedly caused by the privilege is justified in part by the fact that without the privilege, the client may not have made such communications in the first place [cite omitted]. This is true of disclosure before and after the client's death. Without assurance of the privilege's posthumous application, the client may very well not have made disclosures to his attorney at all, so the loss of evidence is more apparent than real.⁴

These cases establish and demonstrate the sanctity of the attorney's duty to protect the client's control of information, a key aspect of the principle that the purpose of the attorney-client relationship is to enhance the client's autonomy to control her case and her life. These cases are a bit chilling, as well, when we consider that they vindicate the autonomy of clients who performed what is perhaps the ultimate autonomous act: suicide.

Wise Counsel

As Professor Tremblay suggests in the paragraphs quoted above, when an attorney expresses an opinion as to the best course of action for a client, the client's autonomy may thereby be diminished. Whether or not this is true (and there is a good argument that autonomy is, in fact, enhanced by reliance on others), many clients consult an attorney particularly in order to receive wise counsel about what to do. Providing wise counsel and enhancing client autonomy can be conflicting goals at times. Nevertheless, many clients are

eager for the advice of counsel in sorting through the options available to them.

The role of the attorney as an advisor is outlined in the Model Rules of Professional Conduct in Rule 2.1:

In representing a client, a lawyer shall exercise independent professional judgment and render candid advice. In rendering advice, a lawyer may refer not only to law but to other considerations such as moral, economic, social and political factors, that may be relevant to the client's situation.⁵

Anthony Kronman, in his book *The Lost Lawyer*, credits attorneys with possessing an uncommon ability at practical judgment.⁶ Attorneys see situations repeated again and again, both in their practice and through careful reading of analogous cases. Through this firsthand and vicarious experience, an attorney can discover which strategies succeed and which fail in addressing particular types of problems. The benefits of specialized practice and legal scholarship are that attorneys can develop the experience and expertise to suggest successful strategies to their clients.

The client's desire to receive the benefits of a professional's judgment cuts across a broad range of service fields. Whether we consult a physician, a financial planner, a real estate broker, or even an auto mechanic, we tend to look not only for facts and options but for judgment and recommendations. As consumers, we seek out service providers who have the experi-

ence, integrity, and judgment to advise us what to do, and who then, with our instructions, follow through on that advice.

The difficulty for many clients is in choosing an attorney whose judgment they can trust. When an attorney is chosen out of the yellow pages or from a television ad, it is difficult to assume that the attorney will be a wise counselor. In such circumstances, a balanced presentation of the client's options may be all the client reasonably can expect.

Another impediment to the attorney as wise counselor is that wise counsel requires a good knowledge of the client, including personal circumstances, resources, and values. Television shows and movies give the public a very false impression of how quickly an attorney can understand the facts of a problem. As attorneys know all too well, achieving an accurate and complete picture of the client's circumstances may require considerable time and expense. Moreover, getting to know the elder client's values and goals can be difficult as well, particularly if the attorney and client have little in common in terms of age, gender, culture, education, religion, values, and personality, or if the client has diminished capacity.

Economic Realities

It is less expensive to buy a suit off the rack than to have one made especially by a tailor. The same is true of legal services. The more a client's needs are viewed and addressed individually, the more costly the service will be to provide. A realistic appraisal of the range and depth of the legal

services that an attorney can provide to the client must include affordability for the client and efficiency and profitability for the attorney.

Good attorneys develop cost-effective services that will be useful for a number of clients. At the same time, the attorney who sells the same off-the-shelf service to every client who walks through the door may cost the client far more, in the long run, than the most expensively tailored legal services ever would. An estate plan that defeats the client's wishes may be far worse than no estate plan at all, and the wrong decision about where and how the client should live could actually shorten the client's life. The attorney who says, "I always do it this way," needs to consider carefully whether one size ever fits all when it comes to legal services.

We expect that the most precious services we receive—education, health care, legal services—will be personalized to meet our needs. We expect that an elementary school classroom will not have 50 students, because personal attention will be far too compromised. We expect to be examined personally before being administered a medical treatment. And we expect that an attorney will understand our personal circumstances before a legal solution is proposed. But all of this personal attention, all of these tailored services, take time and money. And so a balance must be struck.

Integrated Attorney-Client Relationships

Client autonomy, wise counsel, and economic realities should

combine to shape an attorney-client relationship. One of them should not be allowed to dominate to the complete exclusion of another. We can imagine the attorney-client relationship as a three-legged stool, with client autonomy, wise counsel, and economic realities each forming one of the legs. Without each, the relationship will not hold up.

Several principles should guide attorneys in shaping the representation of their elder clients:

1. *The attorney should identify the client's objectives.* Generally, the elder client and attorney should meet without others present, and the attorney should encourage the client to state the objectives he or she wants the lawyer to pursue. Ideally, the client should not simply agree or disagree with statements of objectives that are articulated by the attorney or others. The point here is to be sure that the client has the freedom (and ability) to identify his or her objectives, with minimal guidance from the attorney and minimal intervention by family or friends.
2. *The attorney should know the client's circumstances.* Fact gathering is a prerequisite to formulating a sound legal strategy. While a client's account of the facts often suffices, at least when it appears to be complete and there are no unexplained inconsistencies, an account provided by someone other than the client generally should be verified. This is especially true when

the facts are provided principally by someone who may not be objective, such as a family member. Even well-meaning family members or friends unwittingly may substitute their views for the client's.

3. *The attorney should identify and evaluate alternative strategies that may help the client meet his or her objectives.* Service providers often are predisposed to provide routine services without carefully assessing whether the client is seeking those particular services. Attorneys should be especially cautious about this when advising elder clients, whose financial and medical conditions may fit familiar patterns, but whose values and nonfinancial resources often differ markedly. The elder client should be advised of the range of alternative approaches, even if one particular approach seems preferable to the attorney. At the same time, the attorney must use judgment in identifying appropriate alternatives and in explaining their respective benefits, costs, and risks.

The attorney who applies these principles may have to make house calls, in some cases, in order to become familiar with the client's circumstances or to assure a confidential relationship with the elder client. This may become especially important when a family member, such as an adult child, arranges the appointment and accompanies

the elder client to the office. While private meetings with the elder client may cause some awkwardness when the family member is taken out of the loop of the attorney-client relationship, these uncomfortable feelings may be reduced if the attorney announces at the first client interview that private, at-home meetings with the elder client are a routine practice. The added cost attributable to the lawyer's time in making a house call will usually be justified by the resulting information and the strengthening of the attorney-client relationship.

One feature of attorney-client relationships is that an attorney can provide most legal services outside of the client's presence. However, when legal services relate to a client's most important life decisions, as is often the case with elder clients, the time spent with the client is crucial. It is then that the client sets the course for the attorney, and thereafter it is the attorney who may set the course for the client's life. For this reason, the attorney should not short-change the time needed with the client, for in that time there is much work to be done.

Endnotes

1. Paul Tremblay, *On Persuasion and Paternalism: Lawyer Decisionmaking and the Questionably Competent Client*, 1987 Utah L.R. 515, 577.
2. See generally *In re John Doe Grand Jury Investigation*, 408 Mass. 480, 562 N.E.2d 69 (1990).

3. *See Swidler & Berlin v. United States*, 118 S. Ct. 2081, 2086-7 (1998).
4. *Id.*
5. American Bar Association Model Rules of Professional Conduct (1997).
6. *See generally* ANTHONY KRONMAN, *THE LOST LAWYER*, (1993).