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Adapting Unitary Principles of Professional Responsibility to Unique Practice Contexts: A Reflective Model for Resolving Ethical Dilemmas in Elder Law

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Adapting Unitary Principles of Professional Responsibility to Unique Practice Contexts: A Reflective Model for Resolving Ethical Dilemmas in Elder Law

Joseph A. Rosenberg*

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I. INTRODUCTION

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

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

The principles of professional responsibility are clear: loyalty,⁴ competence,⁵ respect for client autonomy,⁶ and zealous advocacy.⁷ An understanding of the codes of conduct and other sources of law governing lawyers can help identify issues, but vast areas of discretionary decision-making remain that require the lawyer to search not only the applicable law, but also his or her professional soul and

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

2. I use the term "family" in its broadest sense, which includes unmarried life partners, unrelated groups of people who live together, and the full range of "blended" families.

3. In this sense these problems are not "disputes" between opposing parties and do not lend themselves to a "binary" solution found in the traditional adversarial setting. See Carrie Menkel-Meadow, *The Trouble With the Adversary System in a Postmodern, Multicultural World*, 38 WM. & MARY L. REV. 5, 24-27 (1996) (critiquing the adversarial system because it restricts what can be accomplished in ways other than, or in addition to, monetary relief when the conflict is limited to two opposing sides).

4. See MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.7 (1983).

5. See *id.* at Rule 1.1.

6. See *id.* at Rules 1.2, 1.4.

7. See *id.* at Rules 3.1 to 3.9.

conscience. The legal profession has evolved toward a statutory model of lawyer governance in the Model Rules of Professional Conduct⁸ and has embraced more precise codes of conduct for specific areas of practice.⁹ The human condition and the unique circumstances of clients, however, continually create ethical dilemmas that defy precise categories and rules.

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

A. *Ethical Dilemmas in Elder Law*

In the area of elder law, there are a few paradigmatic cases that vividly illustrate the need for conceptual models that inform the analysis of ethical quandaries: an elderly couple attempting to plan for the consequences of dementia; an aging parent concerned with the future care of a developmentally disabled adult child; and a parent with dementia whose children are involved with the representation.¹¹ The

8. In this Article, I refer to the Code of Professional Responsibility as "the Code" and the Model Rules of Professional Responsibility as "the Model Rules."

9. Specific ethical standards have been developed to govern particular areas of practice. New York, for example, has created such standards for prosecutors, matrimonial attorneys, and mediators. There have also been proposals for codes of conduct that apply to specific areas of practice in order to respond to the diversity of roles and practice contexts that exist. See, e.g., Stanley Sporkin, *The Need for Separate Codes of Professional Conduct for the Various Specialties*, 7 GEO. J. LEGAL ETHICS 149 (1993) (explaining the need for a more individualized code of conduct that applies specifically to lawyers who practice in the areas of corporate and securities law).

10. The ABA Committee on Significant New Developments in Probate and Trust Law Practice has recognized that the Model Rules inadequately address ethical issues faced by estate planners. See Ronald C. Link, *Developments Regarding the Professional Responsibility of the Estate Planning Lawyer: The Effect of the Model Rules of Professional Conduct*, 26 REAL PROP. PROB. & TR. J. 1, 22-23 (1991); see also Fred C. Zacharias, *Reconceptualizing Ethical Roles*, 65 GEO. WASH. L. REV. 169, 197 (1997) (describing how, in areas such as matrimonial, elder, probate, real estate, transactional, mental health, social services, juvenile law, and mediation, the desire of one party to cooperate with or get advice from the opposing party conflicts with the traditional adversarial system).

11. These "classic" elder law clients differ from the typical "trusts and estates" clients that are used as examples in the American College of Trust and Estate Counsel ("ACTEC") Commentaries on the Model Rules of Professional Conduct. The ACTEC Commentaries are nevertheless quite helpful in an elder law context, particularly in their insights about the role of the attorney in

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

B. The Professor and Supervising Attorney: Where Worlds Collide

As a professor and supervising attorney in Main Street Legal Services, the City University of New York School of Law's clinical program,¹⁴ I hear countless stories that raise ethical dilemmas. These

multiple representation contexts, and there is obviously a close relationship between elder law and trusts and estates practice. Perhaps what distinguishes elder law practice is the primacy of the role and impact of dementia, the emphasis on Medicaid planning and financing long-term care, and the unique aspects of adult guardianships. In contrast, the focus of the ACTEC Commentaries is on estate planning for healthy spouses and the role of the fiduciary in trust and estate administration planning. Finally, the ACTEC Commentaries do not consider how or if a client's cultural background affects the lawyer's analysis and resolution of ethical dilemmas.

12. See generally Bruce A. Green & Nancy Coleman, *Foreword, Ethical Issues in Representing Older Clients*, 62 *FORDHAM L. REV.* 961, 964-69 (1994) (discussing these ethical dilemmas and how the Model Rules are inadequate in addressing these types of issues).

13. In this hypothetical, the presenting problem is the request for a "simple will to protect my home." The client perceives a will as the remedy for the problems that may arise if she requires long-term care. The manner in which the client presents the problem may provide clues to the underlying issues or may obscure the true nature of the legal problem and possible solution. It is axiomatic that the client's expression of a legal or nonlegal problem or complaint must be constantly reassessed as additional facts are gathered and legal issues are researched and analyzed. See generally GARY BELLOW & BEA MOULTON, *THE LAWYERING PROCESS: MATERIALS FOR CLINICAL INSTRUCTION IN ADVOCACY* 124-272 (1978) (discussing the lawyer's role in client interviewing).

14. The City University of New York ("CUNY") School of Law opened its doors in 1983 to pursue its mission as a public interest law school with the motto, "[l]aw in the service of human

professional responsibility issues arise so often in an elder law practice that they are part of the fabric of virtually every case in our clinic. For each case with a solitary individual as client, we have another case in which family members or friends are involved in the representation. For every potential client who calls the clinic on her own behalf, a social worker, friend, or family member also calls the clinic on behalf of the purported client. We constantly grapple with issues of multiple representation, confidentiality, and the impact of dementia on a client and her family.

The clinical method of education provides students with a rich and practical experience in identifying ethical issues and exercising structured discretionary judgment to resolve them.¹⁵ One of my primary roles is to prepare student interns to counsel and represent clients. Prior to client interviews, I meet with the student interns to review their interview plans. When family members of the elderly person appear to be involved, the elderly person has Alzheimer's Disease or other neurological impairment, or other ethical dilemmas are foreseeable, I pose several questions designed to provoke thought, analysis, and discussion, including: (1) Who is the client? (2) Can we represent multiple clients? Should we? (3) Are there conflicts of interest—if so, how should we analyze them? (4) How would the presence of a third party (e.g., a social worker or adult child) affect

needs." The student body is more diverse, older, and more strongly committed to public interest law than is typical at most law schools. It is not unusual for students to bring personal and professional experiences that are directly relevant to the work they do at the law school. The law school emphasizes clinical education in its broadest sense, beginning with first year simulations and culminating in a requirement that third year students enroll in an externship "concentration" or in one of the law school's nationally acclaimed clinics. See, e.g., John M. Farago, *The Pedagogy of Community: Trust & Responsibility at CUNY Law School*, 10 NOVA L.J. 465 (1986); Charles R. Halpern, *A New Direction in Legal Education: The CUNY Law School at Queens College*, 10 NOVA L.J. 549 (1986); Howard Lesnick, *Infinity in a Grain of Sand: The World of Law and Lawyering as Portrayed in the Clinical Teaching Implicit in the Law School*, 37 UCLA L. REV. 1157 (1990); Howard Lesnick, *The Integration of Responsibility and Values: Legal Education in an Alternative Consciousness of Lawyering and Law*, 10 NOVA L.J. 633 (1986); Vanessa Merton, *The City University of New York Law School: An Insider's Report*, 12 NOVA L. REV. 45 (1987).

15. See David Luban & Michael Millemann, *Good Judgment: Ethics Teaching in Dark Times*, 9 GEO. J. LEGAL ETHICS 31, 40 (1995); see also William H. Simon, *Ethical Discretion in Lawyering*, 101 HARV. L. REV. 1083, 1090-1119 (1988) (arguing that lawyers should exercise discretion to resolve ethical issues in the interests of social justice). There is widespread recognition that the seeds of change in the area of professional responsibility must be planted in the law school curriculum. See generally Robert MacCrate, *Legal Education and Professional Development—An Educational Continuum*, 1993 A.B.A. SEC. OF LEGAL EDUC. & ADMISSIONS TO THE BAR REP. [hereinafter "MacCrate Report"] (recognizing that existing lawyers must engage in assisting and educating new lawyers to maintain the integrity and competence of the legal profession).

confidentiality and the attorney-client privilege? and (5) What is the extent of the decision-making ability of a person who may be incapacitated—what assumptions (if any) should we make about her ability to make decisions? I encourage students to research New York's Code of Professional Responsibility¹⁶ and other authorities,¹⁷ identify the universe of possible issues, and develop preliminary conclusions about how to deal with the foreseeable ethical dilemmas to conduct the interview effectively.

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

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

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

16. New York is one of the few states governed by its own version of the Code of Professional Responsibility. Although not governing in New York, the Model Rules are helpful because their commentaries compare provisions of the Code and Model Rules.

17. There are a variety of sources for researching ethical issues, including case law, ethics opinions of the American Bar Association and state and local bar associations. *See, e.g.*, ACTEC, COMMENTARIES ON THE MODEL RULES OF PROFESSIONAL CONDUCT (2d ed. 1995) [hereinafter ACTEC, COMMENTARIES]; RESTATEMENT (THIRD) OF LAW GOVERNING LAWYERS (Final Draft No. 2 1998).

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

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

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

18. HARRY R. MOODY, *ETHICS IN AN AGING SOCIETY* 5 (1992).

19. Categorizing a person as “elderly” or “old” is arbitrary and depends on the specific context. For purposes of this Article, I use the term to describe people who are age 65 or older. I do not intend this to overlook other factors that contribute to the image of a person as “youthful” or “old,” such as functional capacity, social activity, physical health, and mental state.

20. The concept of disability includes a range of conditions that include, but are not limited to, physical disabilities, developmental disabilities, mental retardation, traumatic brain injuries and neurological impairments such as Alzheimer’s Disease associated with old age. The term “disabled” may conjure up very different images, depending on our knowledge and understanding of people with disabilities. For purposes of eligibility for Social Security benefits based on disability:

[a]n individual shall be considered to be disabled for purposes of this subchapter if he is unable to engage in any substantial gainful activity by reason of any medically determinable physical or mental impairment which can be expected to result in death or which has lasted or can be expected to last for a continuous period of not less than twelve months.

42 U.S.C.A. § 1382c(a)(3)(A) (West 1992), *amended by Welfare Reform Act*, Pub. L. No. 104-193, § 211(a)(1), 110 Stat. 2188 (1996).

21. We are in the process of creating “a global society that is by far the oldest in the history of the world. This aging process will be one of the dominant trends over the coming decades in the industrialized world—and, for different reasons, in the third world as well—reshaping societies across the globe.” Nicholas D. Kristof, *Aging World, New Wrinkles*, N.Y. TIMES, Sept. 22, 1996, § 4, at 1. Between 1990 and 1995, the number of people age 65 and older increased by 48 million to a total of 368 million, which represented 6.4% of the world’s population. See Kevin Kinsella, *The Demography of an Aging World*, in *THE CULTURAL CONTEXT OF AGING: WORLDWIDE PERSPECTIVES* 17, 18 (Jay Sokolovsky ed., 2d ed. 1997).

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

These ethical quandaries are fraught with escalating spirals of uncertainty and professional norms provide insufficient guidance.²⁵ As

As a result of low birth rates prior to and during World War II, the elderly population will remain relatively static between 1995 and 2010. *See id.* Beginning in 2010, however, the elderly population will rapidly increase as the so-called “baby boomers” begin to reach age 65. *See id.* Within the elderly population, different age cohorts may increase more rapidly. *See id.* Of particular significance is the rapid growth of the group of people over 80 years old (the “oldest old”). *See id.* In industrialized countries, the group 80 and over represent 20% of the total elderly population; in Scandinavia, France, and Switzerland, this group is 4% of the total population. *See id.* The percentage of the “oldest old” may be deceptive: in China, they are a relatively small proportion of the population, but at 9.4 million people they are numerically the largest group of “oldest old” in the world. *See id.* at 19. These statistics have substantial implications for public policy because the “oldest old” have higher levels of illness and disability and disproportionately consume social services and government benefits. *See id.* at 20.

22. *See* MONROE H. FREEDMAN, UNDERSTANDING LAWYERS’ ETHICS 71 (1990) (arguing that lawyers should be morally accountable while at the same time should protect client’s lawful rights with zeal). *Cf.* Russell G. Pearce, *Rediscovering the Republican Origins of the Legal Ethics Codes*, 6 GEO. J. LEGAL ETHICS 241 (1992). Professor Pearce discusses the pervasive but unheralded influence of George Sharswood’s republican conception of the lawyer’s role on the drafting of the predecessor of the Code and Model Rules. *See id.* at 243-48. Sharswood viewed the lawyer as an advocate for individuals but also, as a member of the professional elite, believed that lawyers had an obligation to promote the public good and protect property interests from government. *See id.* at 250-58. Professor Pearce notes that Sharswood’s role has been largely overlooked or minimized and most commentators and practitioners have embraced the Code and Model Rules as the embodiment of the adversarial model of the lawyer, at the expense of the republican ideal that also informed the drafters of the original Canons. *See id.* at 243-48.

23. Menkel-Meadow, *supra* note 3, at 7 (explaining that the adversarial system has “infected” negotiations outside of a courtroom setting).

24. For example, if an elderly person is alleged to be incapacitated and a petition for guardianship is filed, the only way for the person to contest the petition is through a formal adversarial proceeding in which her attorney vigorously defends her liberty interests.

25. *See* Sporkin, *supra* note 9, at 149. “These existing ethics codes merely espouse certain

a result, they can only be resolved with a coherent framework and approach that bridges the principles of professional responsibility doctrine and the facts of individual cases.

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

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

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

2. Cultural Competence. A lawyer's cultural competence is the product of an interactive dynamic between the lawyer's perceptive lens and the client's personal and cultural reality. The ingredients of cultural competence include the lawyer's professional and social perspective, knowledge about gerontological theory, the cultural and family background of the client, the impact of aging and dementia on the client, and attitudes toward long-term care. The outcome of ethical analysis depends in part on a lawyer's view of professional responsibility and of the client's cultural context.²⁶ A lawyer's

general principles that apply to all lawyers, such as you don't co-mingle a client's funds with your own. They do not provide enough fact-specific provisions that apply directly to many of the various legal specialties." *Id.*

26. In virtually all countries, women have a longer life expectancy than men, with the greatest gap of 10.3 years in Russia and the narrowest margin of one year in India. *See Kinsella, supra* note 21, at 27-28 (citing the U.S. Bureau of Census, International Database). As of 1994, the only countries in which men had a greater life expectancy at birth than women were Afghanistan, Bangladesh and Bhutan. *See id.* at 31 n.6. Although more men are born each year than women, the mortality for men usually exceeds that of women at all ages. *See id.* at 27. Beginning at age 30-35, women start to outnumber men, a trend that continues in most countries; in Austria and Germany, in the over age 80 cohort, women outnumber men by two to one. *See id.*

Globally, household structures are changing owing to "urbanization, economic development, increased female education and labor force participation." *Id.* at 28. Traditional extended family

understanding (or ignorance) of the aging process, dementia,²⁷ disability, long-term care, and family relationships informs the way in which ethical dilemmas are conceived and resolved.

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

structures are yielding to nuclear families as the patterns of Western industrialized nations undulate throughout the world. *See id.* As women are liberated from traditional gender roles, delay marriage, divorce, and in their later years outlive their spouses, the number of women living alone increases. *See id.* These broad trends have enormous implications for caregiving, social support, and provision of health care for the elderly. There are large numbers of people in their 50's and 60's providing demanding and lengthy care for people 80 years of age or older, a growing number of whom have a chronic illness, including Alzheimer's Disease, Parkinson's Disease, and other cognitive impairments. *See id.* at 28-29.

What are the implications of these statistics for the practice of law in the service of older adults and their families? In the realm of a lawyer's professional responsibility and ethical dilemmas, where so much depends on how a lawyer perceives or understands a client's "interests," lawyers need insight into the circumstances of their clients to provide optimum representation. In most countries, a majority of women over the age of 65 are widowed and are particularly vulnerable to poverty, isolation, and health problems. *See id.* at 28. Women have a lower "health life expectancy" than men, meaning that they can expect to live a higher percentage of their years after the age of 65 with some limitation of function due to chronic disease. *See id.* at 29-32. Thus, the role of gender is an increasingly significant factor in the practice of elder law. This may have significant implications for elder law attorneys, particularly in the area of professional responsibility. The ethical precepts of the Code and Model Rules not only derive from a litigation-based perspective, but the ethical norms were drafted almost exclusively by men. When considering the "interests" of clients, the assumption often made about clients wanting to maximize their selfish interests at the expense of others reflects a male orientation. In contrast, women are far more likely to embrace an "ethic of care" that dramatically reshapes the client's perception of her interests, the role of interested third parties, and the definition of success in a particular case or transaction. *See generally* CAROL GILLIGAN, *IN A DIFFERENT VOICE* (1993) (discussing the different ways women, as opposed to men, view the world).

27. As the percentage and numbers of the elderly increase, there is a corresponding rise in the prevalence of dementia and other cognitive impairments and the need for long-term care at home or in a nursing home. The impact of dementia on a person and her family, the costs of long-term care, and the role of the Medicare and Medicaid programs are defining issues in elder law. An understanding of the complicated matrix of medical, social, psychological, and financial issues is essential.

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

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

II. DIMINISHED CAPACITY AND REPRESENTING SPOUSES: THE ALLEN CASE³¹

The ethical duty of a lawyer representing a client of questionable capacity has been the subject of much discussion, and the issues raised are challenging.³² The decision in the law office about a client's decision-making capacity has profound personal consequences and a severe economic impact for poor clients. A working class elderly couple facing the ravages of the husband's Alzheimer's Disease may be

28. See *infra* Part II.

29. See *infra* Part III.

30. See *infra* Part IV.

31. "Allen" is a pseudonym. This case study is based on actual clients of Main Street Legal Services, the clinical program at CUNY School of Law. Aside from the clients' names, only minor facts have been changed to protect confidentiality.

32. See, e.g., Stanley S. Herr, *Representation of Clients With Disabilities: Issues of Ethics and Control*, 17 N.Y.U. REV. L. & SOC. CHANGE 609, 621-33 (1989-90) (discussing the difficulties that arise in representing mentally disabled clients due to the lack of the traditional lawyer-client relationship); Peter Margulies, *Access, Connection, and Voice: A Contextual Approach to Representing Senior Citizens of Questionable Capacity*, 62 FORDHAM L. REV. 1073, 1093-96 (1994) (suggesting that in representing senior citizens, attorneys should act neither out of paternalism nor libertarianism but instead act out of concern for both the welfare and autonomy of their clients); Jan Ellen Rein, *Clients With Destructive and Socially Harmful Choices—What's An Attorney to Do?: Within and Beyond the Competency Construct*, 62 FORDHAM L. REV. 1101, 1104-05 (1994) (discussing the difficulty an attorney encounters in determining mental capacity of clients who make self-destructive or anti-social decisions); Linda F. Smith, *Representing the Elderly Client and Addressing the Question of Competence*, 14 J. CONTEMP. L. 61, 97-103 (1988) (examining the aging process and approaches available to attorneys when representing a senior client with questionable competence); Paul R. Tremblay, *On Persuasion and Paternalism: Lawyer Decisionmaking and the Questionably Competent Client*, 1987 UTAH L. REV. 515, 577-83 (1987) (arguing that it is proper for an attorney to use persuasion with a client of questionable capacity).

forced to spend a significant percentage of their life savings on a guardianship proceeding that can be avoided if the husband has the capacity to sign a power of attorney.³³ The following case study illustrates some of the ethical issues facing elder law attorneys.

Mrs. Allen called the clinic regarding a power of attorney for her husband.³⁴ In addition to basic financial information about income and assets, the clinic intake form indicated that Mr. Allen had Alzheimer's Disease. Mr. and Mrs. Allen arrived at the clinic for their interview with Howard, a clinical student. Howard and I had met earlier in the week to discuss his interview plan and the ethical and substantive issues he anticipated. We talked about the issues of client identity, confidentiality, the potential for a conflict of interest, and the need to assess Mr. Allen's decision-making capacity. Howard anticipated that we would be representing both Mr. and Mrs. Allen. From a culturally competent perspective, we first discussed Howard's attitudes and knowledge about Alzheimer's Disease and explored issues of disclosure and consent if we decided to represent both spouses. The potential for a conflict of interest was troubling, and Howard wanted to make sure that Mr. Allen's interests were protected. Howard was aware that we had to make choices about our role, particularly if Mr. Allen's capacity was questionable. We discussed the costs of a guardianship proceeding and Howard instantly focused on the financial impact a guardianship would have. Howard and I then talked about the structure of the interview and

33. In New York, the filing fees for an adult guardianship under Article 81 of the Mental Hygiene Law are \$240, the fee for the court evaluator (the "eyes and ears" of the court, similar to a guardian ad litem), which is set by rules of the court, may be anywhere from \$750-\$3000 (based on an hourly fee), and the fee for the petitioner's attorney is in the range of \$1500-\$3000 (depending on the complexity of the matter and the hourly fee). See N.Y. MENTAL HYG. LAW § 81.09(f) (McKinney 1999) (authorizing "reasonable allowance" to the court evaluator); § 81.16(f) (authorizing "reasonable compensation" for the attorney for the petitioner). In addition, if an attorney is appointed for the alleged incapacitated person, that attorney is entitled to "reasonable compensation" under § 81.10(f) and any guardian appointed is also entitled to compensation pursuant to § 81.28(a). See N.Y. MENTAL HYG. LAW §§ 81.10(f), 81.28(a) (McKinney 1999). All of these costs are generally payable from the estate of the person who is determined to be incapacitated. There may also be other costs and expenses in a given case. In contrast, the attorney's fee for preparing a power of attorney is probably less than \$250.

34. A power of attorney is a document in which a principal delegates decision-making authority to a designated agent (the "attorney-in-fact"). Generally, the power of attorney is limited to decisions about property. See, e.g., N.Y. GEN. OBLIG. LAW § 5-1501(1) (McKinney 1999). In New York, the principal must affirmatively grant powers to the agent. See *id.* It is a double-edged tool—although it is a less restrictive alternative that generally is in the best interests of the client and her family, there is potential for abuse if the agent is not trustworthy. There is some empirical evidence that the abuse of powers of attorney is widespread. See, e.g., JONATHAN FEDERMAN & MEG REED, ALBANY LAW SCHOOL, ABUSE AND THE DURABLE POWER OF ATTORNEY: OPTIONS FOR REFORM (1994) (illustrating the problem of abuse through a survey in which 94% of respondents believe abuse occurs either occasionally or frequently).

the need to do a lot of listening, particularly at the beginning of the interview, and not to limit the scope of the interview to the presenting problem.

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

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

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

35. A functional approach to determining decision-making capacity is tailored to the specific decision that must be made. Therefore, the elements of capacity may vary according to the complexity of the decision, or nature of the document to be signed. See N.Y. MENTAL HYG. LAW § 81.03 (McKinney 1999) (setting forth the criteria for assessing a person's functional level and limitations).

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

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

36. There is a basic default "menu" of powers included in a power of attorney, including but not limited to, real estate transactions, banking, and a gifting power limited to \$10,000 to a spouse and children. The statute contains explanations of each power that in turn must be further explained to even the most sophisticated and well-educated clients. See N.Y. GEN. OBLIG. LAW § 5-1502A-5020 (McKinney 1999).

37. In this case, the couple owned bank accounts together and each had access to them. Absent a power of attorney, a guardianship was the only way Mrs. Allen could get the authority to make transactions concerning the house. If they did not own real property and thus did not face the prospect of changing title to the home, a representative payee arrangement for Mr. Allen's Social Security benefits was an "available resource" that could avoid the need for a guardianship. See N.Y. MENTAL HYG. LAW § 81.03(e) (McKinney 1999). With respect to medical treatment decisions, a Health Care Proxy would give Mrs. Allen the legal authority to act.

subjecting Mr. and Mrs. Allen to a formal guardianship proceeding would be damaging emotionally and financially?

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

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

A final task remained—Howard had to draft a fairly sophisticated gift making provision to include in the power of attorney. This power would authorize Mrs. Allen in her capacity as agent to transfer ownership of any real property to herself as spouse. The provision was broader than the basic "default" gift provision in the statutory form³⁹ and had to be precise. It was designed to enable Mrs. Allen to assume

38. The attorney's duty of confidentiality under the Model Code of Professional Responsibility does not allow the attorney to knowingly reveal a confidence or secret of his client; use a confidence or secret of his client to the disadvantage of the client; or use a confidence or secret of his client for the advantage of himself or of a third person, unless the client consents after full disclosure. See MODEL CODE OF PROFESSIONAL RESPONSIBILITY DR 4-101(B) (1980). The corresponding provision of the Model Rules provides that a lawyer shall not reveal information relating to representation of a client unless the client consents after consultation, except for disclosures that are impliedly authorized in order to carry out the representation, and except as relating to criminal acts and controversies between lawyer and client. See MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.6 (1983).

39. The form's gifting power was limited to \$10,000 to spouse and descendants—this was clearly inadequate for the kind of transfer that would be necessary for the Allens.

sole ownership of the home, primarily to avoid a potential estate recovery by Medicaid⁴⁰ and secondarily to be able to obtain secured loans, refinance the existing mortgage, or sell the property. Howard would have to counsel Mr. Allen about the customized power.

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

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

The case of Mr. and Mrs. Allen illustrates the ethical dilemmas contained within a “garden variety” legal problem. Difficult decisions often have to be made within short time periods. The elements of the

40. Medicaid only has a right of recovery against the estate of a deceased person who received Medicaid services over the age of 55 if there is no surviving spouse or child who is a minor under 21, blind or disabled. See 42 U.S.C. § 1396p(b)(1) (1994). Medicaid cannot recover the costs of Medicaid paid to the “first to die” spouse against the estate of the surviving spouse unless the surviving spouse had the means to support the Medicaid recipient at the time Medicaid was received. See *In re Estate of Craig*, 624 N.E.2d 1003, 1004 (N.Y. 1993); see also *In re Budney*, 541 N.W.2d 245, 246 (Wis. Ct. App. 1995) (holding that a Wisconsin statute authorizing recovery against surviving spouse for Medicaid expenditures to “first to die” spouse violated federal law). In the Allen case, it is advisable for the house to be transferred to Mrs. Allen. Otherwise, if she died before her husband, he would die the sole owner of the house and it would be subject to Medicaid’s estate recovery. See 42 U.S.C. § 1396p(b)(1) (1994).

reflective paradigm—the interplay between legal doctrine and ethical analysis, cultural competence, role versatility and adaptability, and anticipating outcomes and consequences—provide a framework for analyzing ethical dilemmas. They provide both a linear structure for analysis and a series of interactive elements that loop among each other in a dynamic process.

The threshold task of recognizing the issue and grasping the underlying doctrine prepared the student to deal with the issues: the client's questionable capacity, multiple representation, and the potential conflict of interest between the spouses. A meaningful decision about whether there is a conflict of interest can only be made with a culturally competent perspective on the life circumstances of clients and self-consciousness about one's own attitudes and assumptions. In the case of Mr. and Mrs. Allen, the student developed a relationship with the clients during a comprehensive and emotional interview that revealed a great deal about their relationship. In preparing for the interview, the student also examined his "self-fulfilling prophecies" about how Alzheimer's Disease would affect Mr. Allen. The student considered various alternative roles for the representation and reconciled them within a conflict of interest analysis. An understanding of the traditional conception of the lawyer's role and its alternatives enabled the student to understand the theories underlying the different roles, and to draw on each of them. There is no question that the student felt strongly that it would be extremely harsh to subject these clients to a formal guardianship, and integrated ideals of fairness and social justice into his thinking. Interestingly, in this case we were acting as zealous advocates within a preventive law orientation, because we thought there was much at stake and wanted to work with Mr. Allen to get the power of attorney signed. The difficulties Mr. Allen exhibited during the two hours he spent at our office, and Mrs. Allen's description of the progression of his disease, raised the possibility that it was "now or never." The cost of not acting swiftly was significant: a formal court proceeding that would culminate in a finding that Mr. Allen was an "incapacitated person."⁴¹ In addition, the costs of the guardianship proceeding⁴² would deplete a substantial portion of their assets. In this case, the alternative to litigation had enormous advantages.

41. The ordeal of a formal judicial proceeding should not be underestimated—the emotional cost to Mr. and Mrs. Allen would be incalculable, notwithstanding the non-adversarial nature of the proceeding. The guardianship symbolizes the end of a large chapter in the life of the incapacitated person and his family. It forces everybody to confront the reality of the incapacitated person's disability, without any possibility for improvement.

42. These costs include a \$170 filing fee, the fee of the Court Evaluator appointed by the court

But what about safeguarding against abuse? Were we giving Mrs. Allen a “license to steal” from her husband?⁴³ In this situation, the intimate relationship of the principal and the agent, their existing ownership of their property, and the obvious dedication of Mrs. Allen to her husband made this a relatively easy dilemma to resolve.⁴⁴

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

in every case to investigate and the fee for the required Guardian training. At a minimum, the total cost would be \$750, and probably would be closer to \$1500.

43. There is growing concern that the utility of the power of attorney is offset by its potential for abuse. See FEDERMAN & REED, *supra* note 34, at 110-11.

44. The more difficult case involves the elderly parent and an adult child who is named as decision-making agent. In this case, questions about capacity may be resolved more cautiously. The prospect of judicial supervision of a guardian may be the kind of external safeguard that is desirable to prevent abuse. We would also be more reluctant to act quickly without a more detailed fact investigation.

45. Case rounds consist of approximately eight students presenting cases on which they are working. The goal is to develop oral presentation skills, the ability to concisely explain the issue and salient facts of a case and promote brainstorming and collaboration among the students.

46. The capacity to sign a power of attorney requires an understanding of the nature and consequences of the document, specifically that it gives another person decision-making power over property. See 2A C.J.S. *Agency* § 28 (1972). The principal can give the “attorney-in-fact” very limited powers or broad powers. The gifting power at issue in the Allen case was quite specific, but complex in its implications for Mr. Allen.

did not have the capacity to sign a power of attorney, it would be unethical for us to allow him to do it and notarize his signature.

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

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

III. THE TRADITIONAL CONCEPTION OF THE LAWYER'S ROLE AND MODERN PROFESSIONAL NORMS

The traditional conception of the lawyer and the development of professional ethical norms derive from a litigation-based perspective.⁴⁸ Lord Brougham's definition of the advocate's role in his defense of

47. We also discussed potential problems that may arise in the future. What if Mrs. Allen predeceased Mr. Allen? If this occurred, a court would have to appoint a guardian without the benefit of Mrs. Allen's testimony. There was some concern about this because the only child of Mr. and Mrs. Allen was estranged from them. There was no guarantee the court would be provided with this information. Furthermore, we discussed the potential problem (based on another actual case) if Mrs. Allen came back in the future, when Mr. Allen was in a nursing home, and asked us to draft a will for her that did not provide for Mr. Allen and to represent her in the transfer of her home to a "close family friend." This discussion focused on our obligations to both spouses and whether representing Mrs. Allen in this new case constituted an impermissible conflict of interest. The questions we grappled with included: Do we have an obligation to advise Mr. Allen about Mrs. Allen's intent to disinherit him? Is he protected by the spousal right of election (the "forced share") to which spouses are entitled? *See* N.Y. EST. POWERS & TR. LAW § 5-1.1-A (McKinney 1999). Would it be permissible to represent the wife on the theory that her actions are in the husband's "best interests"?

48. *See supra* note 22 (noting that most commentators and practitioners have supported the adversarial model of the lawyer as embodied in the Code and Model Rules).

England's Queen Caroline in her 1820 divorce trial on grounds of adultery captures the concept of the "neutral partisan:"⁴⁹

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

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

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

In 1908, the American Bar Association ("ABA") promulgated the Canons of Professional Ethics, purportedly to elevate the norms of the profession; but in reality to create obstacles to immigrants seeking to practice law at a time when women and African-Americans were already effectively kept out of law schools and prevented from being admitted to the bar.⁵² The Canons regulated the profession in a number of areas: advertising and solicitation; improving the image of the profession by prohibiting actions that were viewed as unethical; ordering the relationship between lawyers and clients; and providing guidance, albeit limited, on ethical dilemmas that confront lawyers in daily practice. The genteel language of the Canons barely concealed its attack on the droves of ethnic minorities who began practicing law in urban areas and threatened the monopoly of the Anglo-Saxon Protestant firms that served corporate interests.⁵³ Because of the social and

49. See DEBORAH L. RHODE, *PROFESSIONAL RESPONSIBILITY: ETHICS BY THE PERVASIVE METHOD* 142-44 (1994).

50. *Id.* at 142.

51. Even within the criminal defense context, there are nuances that are not fully captured by the caricature of Lord Brougham involving plea bargaining, defense tactics, and other matters. See Interview with Professor Vanessa Merton, Associate Dean, Pace University School of Law, in Hastings-On-Hudson, N.Y. (Oct. 17, 1999).

52. See RHODE, *supra* note 49, at 46-47.

53. See JEROLD S. AUERBACH, *UNEQUAL JUSTICE: LAWYERS AND SOCIAL CHANGE IN MODERN AMERICA* 52 (1976). Auerbach states that the Canons were a "counter revolutionary

political context out of which the Canons emerged, the professional norms that have governed the profession for most of this century reflect a particular notion of the professional role that cannot be separated from its tainted origins.

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

The ABA established the Kutak Commission to improve continuing problems experienced with the Code⁵⁵ and in 1983, the ABA adopted the Model Rules of Professional Conduct. The Model Rules replaced the Code's hierarchy of Canons, Ethical Considerations, and Disciplinary Rules with a more streamlined form limited to mandatory rules and lengthier comments. Most states have subsequently adopted the Model Rules, although Illinois, New York, North Carolina, Oregon, and Virginia follow codes that rely to varying extents on both the Model Code and Model Rules. California has rejected both the Model Rules and the Model Code and follows its own regulatory structure.⁵⁶

The Model Rules depart in some respects from the Code and create a slightly different model that purports to elevate the lawyer's role as "officer of the legal system and a public citizen having special responsibility for the quality of justice" to a more prominent place, nearly co-extensive with the lawyer's role as client advocate.⁵⁷ Critics

thrust" in the legal profession. *See id.* For example, the professional associations focused more on whether contingent fees were ethical rather than the consequences of widespread industrial accidents that were a product of unsafe working conditions. *See id.* at 64.

54. *See* FREEDMAN, *supra* note 22, at 8.

55. The Kutak Commission's initial work suggested it was prepared to depart dramatically from the Code by, inter alia, limiting the scope of confidentiality, requiring pro bono work, creating regulations governing conflicts of interests, and expanding disclosure requirements in negotiation and litigation. However, during the several years in which it issued drafts of recommendations and received public comments, these provisions were scaled back. Ultimately, the ABA adopted the Kutak Commission's proposals as the Model Rules of Professional Responsibility in 1983. *See* CHARLES W. WOLFRAM, MODERN LEGAL ETHICS § 2.6.4 (practitioner's ed. 1986); *see also* Deborah L. Rhode, *Ethical Perspectives on Legal Practice*, 37 STAN. L. REV. 589, 600-01 (1985).

56. *See* RICHARD A. ZITRIN & CAROL M. LANGFORD, LEGAL ETHICS IN THE PRACTICE OF LAW 7 (1995) (citing BNA LAWYER'S MANUAL OF PROFESSIONAL CONDUCT 1:3-1:4 (rev. 1994)).

57. FREEDMAN, *supra* note 22, at 9 (quoting MODEL RULES OF PROFESSIONAL CONDUCT Preamble (1983)).

of the Model Rules have sought to locate this broader notion of the professional role in historical context by asserting both that the lawyer's duty as "officer of the court" is fulfilled by serving the undivided interests of individual clients, and that the lawyer's obligation to clients remains undiminished by the language in the Model Rules.⁵⁸ In addition, the Model Rules include provisions that attempt to respond to the needs of lawyers outside of litigation settings. For example, there is a provision that guides lawyers acting in the role of intermediary.⁵⁹

The Code and Model Rules are the primary mechanisms by which the legal profession governs itself.⁶⁰ Although adapted and modernized in response to the changes that have occurred in society and in the legal profession, substantial portions of each code retain strong connections to their predecessors.⁶¹ Despite their differences, the Code and Model Rules have not changed the fundamental norms governing the professional obligations of lawyers and are both broad in scope and geared primarily to litigation. Regardless of whether one views this

58. *Id.* at 9-10 (citing *Polk County v. Dodson*, 454 U.S. 312, 318, (1981); *In re Griffiths*, 413 U.S. 717, 724 (1973); and referring to *Cammer v. United States*, 350 U.S. 399 (1956)). Freedman asserts that the broader "officer of the legal system" language in the Model Rules is an effort to substitute the "discredited" "officer of the court" language in *Dodson* and that the Model Rules reject the "client-centered" approach of the Model Code. *Id.* at 10.

59. See MODEL RULES OF PROFESSIONAL CONDUCT Rule 2.2 (1983). The text of Rule 2.2 is:

(a) A lawyer may act as intermediary between clients if:

- (1) the lawyer consults with each client concerning the implications of the common representation, including the advantages and risks involved, and the effect of the attorney-client privileges, and obtains each client's consent to the common representation;
- (2) the lawyer reasonably believes that the matter can be resolved on terms compatible with the clients' best interests, that each client will be able to make adequately informed decisions in the matter and that there is little risk of material prejudice to the interests of any of the clients if the contemplated resolution is unsuccessful; and
- (3) the lawyer reasonably believes that the common representation can be undertaken impartially and without improper effect on other responsibilities the lawyer has to any of the clients.

(b) While acting as intermediary, the lawyer shall consult with each client concerning the decisions to be made and the considerations relevant in making them, so that each client can make adequately informed decisions.

(c) A lawyer shall withdraw as intermediary if any of the clients so requests, or if any of the conditions stated in paragraph (a) is no longer satisfied. Upon withdrawal, the lawyer shall not continue to represent any of the clients in the matter that was the subject of the intermediation.

Id. There is currently a proposal before the ABA Ethics 2000 committee to eliminate Rule 2.2.

60. The profession is also regulated by standards for professional malpractice; further, other sources of law provide standards, although they may not be mandatory. See *supra* note 17 (discussing a variety of sources for researching ethical issues).

61. See Pearce, *supra* note 22, at 242.

breadth as a strength or weakness, there is a great deal of space for lawyers to infuse their own conception of appropriate professional behavior and to exercise discretion within the spare guidelines of the codes.⁶²

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

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

A lawyer's duty is to pursue the client's lawful objectives⁶⁵ and, in a

62. More particularized guidance to lawyers may be found in a variety of sources. Ethical opinions by the ABA's Standing Committee on Ethics and Professional Responsibility and by state and local bar associations are generally issued in response to individual requests by lawyers. In addition, the ABA and groups of lawyers practicing in discrete areas have promulgated parallel, albeit less authoritative, rules. See ABA Standards Relating to the Administration of Criminal Justice (2d ed. 1980 & Supp. 1986); Bounds of Advocacy: American Academy of Matrimonial Lawyers Standards of Conduct (1991); MODEL CODE OF JUDICIAL CONDUCT (1999). Professor Charles Wolfram, under the aegis of the American Law Institute, is completing an updated Law Governing Lawyers.

63. See, e.g., ZITRIN & LANGFORD, *supra* note 56, at 4-5 (discussing the source of a lawyer's duty before the Code and Model Rules).

64. See Kenneth L. Penegar, *The Five Pillars of Professionalism*, 49 U. PITT. L. REV. 307, 390 (1988) (discussing how social and political ideas of lawyers' professional behavior are reflected in the Model Code of Professional Responsibility).

65. See MODEL CODE OF PROFESSIONAL RESPONSIBILITY DR 7-101(A) (1980); MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.2 (1983). DR 7-101 (A) provides:

(A) A lawyer shall not intentionally:

(1) Fail to seek the lawful objectives of his client through reasonably available means permitted by the Disciplinary Rules, except as provided by DR 7-101(B). A lawyer does not violate this Disciplinary Rule, however, by acceding to reasonable requests of opposing counsel which do not prejudice the rights of his client, by being punctual in fulfilling all professional commitments, by avoiding offensive tactics, or by treating with courtesy and consideration all persons involved in the legal process.

MODEL CODE OF PROFESSIONAL RESPONSIBILITY DR 7-101(A) (1980). The text of Rule 1.2 is:

(a) A lawyer shall abide by a client's decisions concerning the objectives of representation, subject to paragraphs (c), (d) and (e), and shall consult with the client as to the means by which they are to be pursued. A lawyer shall abide by a client's decision whether to accept an offer of settlement of a matter. In a criminal case, the lawyer shall abide by the client's decision, after consultation with the lawyer, as to a plea to be

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

Respect for client autonomy is at the heart of the traditional profile of the zealous advocate. Ideally, this principle requires that a lawyer develop insight into and understand, rather than merely assume, the client's perspective and represent her interests accordingly. In order to develop this insight, the lawyer must engage in a full dialogue with the client about the legal problem or issue and advise the client about the risks and benefits of a course of action or strategy to assure that the client's decisions are informed.⁶⁷ Under the traditional notion of

entered, whether to waive jury trial and whether the client will testify.

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

(c) A lawyer may limit the objectives of the representation if the client consents after consultation.

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

(e) When a lawyer knows that a client expects assistance not permitted by the rules of professional conduct or other law, the lawyer shall consult with the client regarding the relevant limitations on the lawyer's conduct.

MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.2 (1983).

66. See, e.g., L. Ray Patterson, *Legal Ethics and the Lawyer's Duty of Loyalty*, 29 EMORY L.J. 909, 910 (1980); Zacharias, *supra* note 10, at 170 (discussing partisanship in practice). One problem with this formulation is that "victory" may not be easy to define. For example, a prosecutor of a batterer may not define victory as the maximum amount of punishment and incarceration, but any solution that will stop the violence. See Interview with Professor Vanessa Merton, *supra* note 51.

67. Monroe Freedman states that the most prevalent form of amoral or immoral conduct by lawyers occurs when lawyers nullify a client's moral judgments by assuming that the client wants to "win" by any legal means necessary without regard to non-legal factors and less frequently, by making our own decisions about the most moral course of conduct without consulting the client. See FREEDMAN, *supra* note 22, at 51. Freedman's position is therefore considerably more nuanced than the extreme image of a lawyer who merely "follows orders" from a client without communicating vigorously on the merits of a particular position. Freedman's goal of "providing the fullest advice and counsel" suggests a form of "communicative ethics" that, in an elder law context, requires that we examine how the aging process, dementia, incapacity, and mortality inform the lawyer-client relationship in general, and the analysis of ethical dilemmas in particular. MOODY, *supra* note 18, at 37-40 (describing "communicative ethics"); see also Roger W. Andersen, *Informed Decisionmaking in an Office Practice*, 28 B.C. L. REV. 225, 230-36 (1987) (dis-

professionalism and role differentiation, a lawyer is duty bound to follow the directions of a client even if it means that the lawyer acts in ways that violate the lawyer's own sense of morality and ethics, provided the proposed course of action does not violate any provisions of the governing code of conduct or other applicable law.⁶⁸

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

In many contexts adversarial zeal is essential to secure individual rights and further the principles that are the essence of our system of justice. However, the role differentiation that is part of the professional education of every lawyer and is justified as an essential ingredient of the lawyer's role can have disturbing consequences.⁷¹ The famous case

curring informed consent in an estate planning context).

68. There are some circumstances in which a lawyer is not required, and indeed is prohibited, from providing counseling or assistance to a client. For example, a lawyer is prohibited under Model Rule 1.2 to counsel a client to engage in or conceal criminal or fraudulent behavior, and may not assist the client in such behavior. See MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.2 (1983). The corresponding provisions of the Model Code include DR 7-102(A)(7) (a lawyer shall not "counsel or assist his client in conduct that the lawyer knows to be illegal or fraudulent"); DR 7-102(A)(6) (a lawyer shall not "participate in the creation or preservation of evidence when he knows or it is obvious that the evidence is false"); DR 7-106 (a lawyer shall not "advise his client to disregard a standing rule of a tribunal or a ruling of a tribunal . . ."); EC 7-5 (a lawyer "should never encourage or aid his client to commit criminal acts or counsel his client on how to violate the law and avoid punishment therefor"); DR 2-110(C)(1)(c) (permitting a lawyer to withdraw if a client "insists" that the lawyer engage in "conduct that is illegal or that is prohibited under the Disciplinary Rules"). See, e.g., *In re Price*, 429 N.E.2d 961 (Ind. 1982) (sanctioning an attorney for failing to disclose the existence of settlement proceeds which helped a client obtain Medicaid benefits for which she was not eligible); *In re Siegel*, 471 N.Y.S.2d 591 (App. Div. 1984) (suspending a lawyer for participating in a scheme to defraud the shareholders of the corporation for which he was counsel).

69. FREEDMAN, *supra* note 22, at 7.

70. See *id.*; see also GEOFFREY HAZARD, *ETHICS IN THE PRACTICE OF LAW* 123 (1978). For example, in a criminal law context, an accused has the right to trial by jury and representation by counsel. See FREEDMAN, *supra* note 22, at 20. In a civil context, litigants are entitled to certain due process rights and the right to a trial by jury. See *id.* at 21.

71. For example, the lawyer's role has also been analogized to that of a "friend" who does not impose his own moral values on the client. See Charles Fried, *The Lawyer as Friend: The Moral Foundations of the Lawyer-Client Relation*, 85 YALE L.J. 1060, 1071 (1976). This view is not without its critics. See, e.g., William H. Simon, *The Ideology of Advocacy: Procedural Justice and Professional Ethics*, 1978 WIS. L. REV. 30, 108 (1978) (pointing out that the defining attributes of friendship do not include a contractual relationship in which a person is paid for her services).

of *Spaulding v. Zimmerman*⁷² highlights the moral and ethical dissonance that can occur when a lawyer acts according to the professional norms of zealous advocacy. In a personal injury case involving a minor, a doctor hired by the defendant's attorney examined the plaintiff and discovered a life threatening aortic aneurysm that might have been caused by the accident.⁷³ Disclosure of the condition could potentially save the boy's life, but would also expose the defendant to much greater liability. The defendant's lawyer's ethical duty of confidentiality prohibited him from revealing this information. The case settled for \$6500, and the aneurysm was discovered years later in a physical examination conducted by the military.⁷⁴ The plaintiff moved to vacate the settlement, and the trial court granted the motion, reasoning that although there was no duty to reveal the existence of the aneurysm while the relationship of the parties was "adverse," once the settlement was agreed upon, the defendants had an obligation to fully disclose all the relevant facts to the court.⁷⁵

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

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

72. *Spaulding v. Zimmerman*, 116 N.W.2d 704 (Minn. 1962).

73. *See id.* at 707.

74. *See id.* at 708.

75. *See id.* at 708-09.

76. *See Tremblay, supra* note 32, at 577-83 (arguing that lawyers are justified in engaging in various modes of persuasive dialogue with clients of questionable capacity).

1. Justifications of the Neutral Partisan Role

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

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

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

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

77. See DAVID LUBAN, LAWYERS AND JUSTICE: AN ETHICAL STUDY 63 (1988).

78. *Id.*

79. *Id.* at 65-66. Professor Luban defines a “private megalith” as a large organization with concentrated economic power. See *id.*

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

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

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

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

In contrast to the model of the zealous advocate are alternate conceptions of the lawyer's role that balance the value of client autonomy with countervailing ethical, moral, and social justice values.

80. Menkel-Meadow, *supra* note 3, at 24-27 (discussing alternative solutions a court should consider outside of a right or wrong conclusion)

81. Professor Menkel-Meadow cites two kinds of cases that do not fit the binary (win/lose, right/wrong) solution: cases in which it is difficult to determine the facts with accuracy, where each party has legitimate, albeit, competing rights, and cases involving "human or emotional equities" that defy a sharp division. *Id.* at 6-7.

82. *Id.* at 7-8.

83. Luban & Millemann, *supra* note 15, at 38.

These models necessarily involve an activist approach by the lawyer that is more paternalistic, because they do not view client autonomy as the only value, but rather as one important value that may be diminished by the lawyer's values.

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

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

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

Another form of morality-based lawyering is embodied in Professor David Luban's moral activism, based on a notion of conventional morality in furtherance of the public good.⁸⁸ Client counseling and law reform are the pillars of Luban's moral activism. The moral activist lawyer assumes a more paternalistic posture and engages the client in dialogue if the lawyer believes the client's position is immoral or

84. See LUBAN, *supra* note 77, at 167-69.

85. See THOMAS L. SHAFFER & ROBERT F. COCHRAN, JR., *LAWYERS, CLIENTS AND MORAL RESPONSIBILITY* 48 (1994).

86. See *id.* at 48-49.

87. *Id.* at 44.

88. See LUBAN, *supra* note 77, at 160-61.

unjust.⁸⁹ The lawyer as moral activist need not possess “extraordinary moral insight, only the same moral insight that anybody else has.”⁹⁰ The attractions of Luban’s conception of the lawyer’s role are its accessibility (the student or lawyer need not be a philosophy expert) and its focus on the public interest dimension of law practice.

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

Justice Louis Brandeis was famous for defying the conventional image of the lawyer as subservient to the client’s wishes. Brandeis, perhaps practicing for the judiciary, demanded that clients convince him that their case was just before he agreed to represent them.⁹⁶ Despite

89. See *id.* at 173-74.

90. *Id.* at 171.

91. See Simon, *supra* note 15, at 1083 (suggesting that independent lawyer discretion is more appropriate than formal ethics rules).

92. *Id.* at 1099.

93. *Id.* at 1106.

94. See *id.* at 1104-05.

95. See *id.* at 1105-07. Simon calls this permissive method of interpretation as “treating the relevant norms formally.” *Id.* at 1103.

96. See Clyde Spillenger, *Elusive Advocate: Reconsidering Brandeis as People’s Lawyer*, 105 YALE L.J. 1445, 1474-77 (1996) (discussing Brandeis as “the Independent Lawyer” who rejected the hired gun mentality of the profession).

his legendary status as a progressive lawyer who fought vigorously in the public interest, Brandeis has been criticized for being willing to impose his own solutions on clients without adequately explaining to them the role he adopted and its implications for their interests.⁹⁷

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

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

According to Monroe Freedman, Wasserstrom's rejection of role differentiation constitutes the worst form of immoral professional conduct, because its level of paternalism substitutes the lawyer's judgment about morality, ethics, and justice for that of the client.¹⁰³ Despite Wasserstrom's recognition that the lawyer should respond to the social, moral, and ethical consequences of a client's course of

97. *See id.* at 1502-11 (analyzing Brandeis's role in the case of James T. Lennox, who sought advice about dealing with the creditors of his business, which gave rise to Brandeis's famous phrase, "I should say that I was counsel for the situation").

98. *See* Richard Wasserstrom, *Lawyers as Professionals: Some Moral Issues*, 5 HUM. RTS. 1, 7-11 (1975) (discussing moral criticisms of lawyers concerning the attorney-client relationship).

99. *Id.* at 21-22.

100. *See id.* at 7-8.

101. *See id.*

102. *See id.* at 7-8, 10.

103. *See* FREEDMAN, *supra* note 22, at 46-47. Freedman's position is informed by the role context plays in establishing one's moral responsibilities. *See id.* For example, if a deranged elderly person stops one on the street, one's response depends on their relationship to the person. *See id.* A stranger might call the police or merely extricate himself from the unpleasant encounter; a friend or relative would presumably engage the person and provide assistance; a psychiatric social worker could respond differently depending on whether she was inside or outside her professional role. *See id.* Freedman's point is that role differentiation is unavoidable, and one's decisions vary depending on the personal, social, and professional context. *See id.*

action, his particular form of paternalism unduly diminishes client autonomy and empowerment and grants the lawyer too much authority and control over the client. Furthermore, it assumes that lawyers will utilize their power to achieve goals of social justice and fairness; it is not difficult, however, to imagine that lawyers will blunt client wishes to pursue more nefarious ends that perpetuate the institutional oppression that Wasserstrom finds so offensive. Freedman points out that lawyers often assume clients want to press for every advantage—if this also reflects the value system of the lawyer, we may be better served by limiting the lawyer’s power over client decisions and hoping that clients choose a more balanced approach to vindicating their rights and resolving disputes. From the perspective of client autonomy, “[i]f a lawyer chooses to represent a client . . . it would be immoral as well as unprofessional for the lawyer, either by concealment or coercion, to deprive the client of lawful rights the client elects to pursue after appropriate counseling.”¹⁰⁴

These critiques of the traditional conception reflect differences in the emphasis that a lawyer places on the relative importance of the client’s rights and the lawyer’s sense of morality and ethics.¹⁰⁵ The “pure” adversarial advocate is not concerned with moral issues, and along the continuum, the lawyer’s engagement with the morality of the client’s position increases.¹⁰⁶

Between the paternalistic mastery espoused by Wasserstrom and the blind servitude associated with the traditional conception of the lawyer’s role¹⁰⁷ lies collaboration, dialogue, and mutual empowerment between a lawyer and her client. The lawyer-client relationship should be informed by the lawyer’s understanding of the client’s goals, insight into the lawyer’s own perspective on those goals, knowledge of the

104. *Id.* at 71.

105. *See id.*

106. This continuum of roles does not exist in a vacuum, but is circumscribed by prevailing professional norms. Thus, as a lawyer assumes a more activist stance, she may violate provisions of the governing code of conduct that requires a lawyer to zealously advocate for a client’s interests and not nullify a client’s position by substituting her own perspective. The “morality axis” is one way of looking at the lawyer’s role—how does the lawyer deal with the morality of her client? This may correspond with an “adversarial/non-adversarial axis” (i.e., litigation/nonlitigation) to the extent that the theory of the adversary system is that it functions best when there are opposing advocates battling for victory, a referee who enforces the rules, and a person or group who decides who wins. It also functions independently, because a lawyer may assume more or less of a “moral activist” role regardless of the nature of the case.

107. Although the prior discussion placed Monroe Freedman as the opposing viewpoint to Wasserstrom’s paternalistic activism, Professor Freedman does not advocate an extreme form of “blind servitude.” Instead he envisions a more collaborative dialogue between lawyer and client that ultimately retains the primacy of the client’s wishes. *See* FREEDMAN, *supra* note 22, at 57.

available means to achieve the goals, awareness of the roles that the lawyer may adopt, and the consequences of decisions that implicate both ethical concerns and substantive aspects of the client's case. Enhanced concern for a client's relationships and emotional dimension is consistent with a feminist ethic of care,¹⁰⁸ the "philosophical map" of a mediator,¹⁰⁹ and therapeutic jurisprudence.¹¹⁰

C. The Relationship Between Ethical Obligations and Practice Context

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

Within these different contexts, the ethical dilemmas that arise and the best approach for resolving these dilemmas are diverse and not susceptible to a singular approach. Thus, the kind of ethical dilemmas

108. See, e.g., JUSTICE AND CARE: ESSENTIAL READINGS IN FEMINIST ETHICS (Virginia Held ed., 1995). A feminist ethic of care:

recognizes that caring for children and dependent persons is an important activity involving moral values; it sees persons as interdependent rather than as independent individuals and holds that morality should address issues of caring and empathy and relationships between people rather than only or primarily the rational decisions of solitary moral agents.

Id. at 1. This perspective seeks to integrate an alternative ethic of care with the equally important ethic of social justice in society.

109. See, e.g., Leonard L. Riskin, *Mediation and Lawyers*, 43 OHIO ST. L.J. 29, 43-49 (1982) (stating that the extent and quality of interconnections between and among disputants and others, the emotional needs of the parties, and the importance of yearnings for mutual respect, equality, security, and other non-material interests, are essential to the analysis of the mediator).

110. See, e.g., DAVID B. WEXLER, THERAPEUTIC JURISPRUDENCE: THE LAW AS A THERAPEUTIC AGENT 4 (David B. Wexler ed., 1990) (defining therapeutic jurisprudence as "the study of the use of the law to achieve therapeutic objectives"); Dennis P. Stolle, *Professional Responsibility in Elder Law: A Synthesis of Preventive Law and Therapeutic Jurisprudence*, 14 BEHAV. SCI. & L. 459, 469-76 (1996) (discussing how therapeutic jurisprudence and preventive law can protect the interests of the elderly).

that arise and the “fit” of the relevant provisions of the code vary according to the practice context.

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

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

For example, if a person wants to execute an advance directive (e.g., a power of attorney or health care proxy), the lawyer’s approach to representation (i.e., decision about client identity, the role of family members, multiple representation, and the decision-making capacity of the vulnerable person) has a direct influence on whether an advance directive is executed, who is named the decision-making agent, and the scope of the agent’s powers. These “ethical decisions” may determine

111. See Zacharias, *supra* note 10, at 190-204.

112. See *id.* at 175-76. Zacharias lists the following potential goals that may be included in the criminal process, which is the paradigm of traditional adversarial practice: “[w]inning at all costs; producing effective (adversarial) truth seeking; winning without undermining adversarial truth seeking; enhancing client dignity or autonomy; screening cases/keeping government honest; obtaining fair results; ensuring an evenhanded trial; protecting the defendant’s reputation.” *Id.* at 183.

113. It is estimated that 20% of people over 65, and 50% of those over 85, will need some kind of long-term care at home or in a residential facility. See LAWRENCE A. FROLIK & ALISON MCCRYSTAL BARNES, *ELDER LAW: CASES AND MATERIALS* 328 (2d ed. 1999). In 1996, approximately 4% of those over age 65 and 20% of the 85 and over population resided in a nursing home. See Administration on Aging, U.S. Dept. of Health and Human Services, *A Profile of Older Americans: 1999* (last modified Nov. 9, 1999) <<http://www.aoa.dhhs.gov/aoa/stats/profile/default.htm>>.

whether a person is cared for at home, placed in a nursing home, or receives the kind and degree of medical care she wants.

D. The Goals of Elder Law Clients

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

1. The husband and wife who seek estate, disability, and Medicaid planning because one spouse has Alzheimer’s Disease (or some other form of neurological impairment).¹¹⁵ These clients may seek to: (1) plan their affairs to create a mutually agreed upon estate plan; (2) execute documents that would prevent the need for a formal guardianship; (3) transfer assets to assure that the impaired spouse would qualify for Medicaid coverage of home care or nursing home care; (4) preserve the autonomy of the “well spouse”; (5) preserve the dignity of the impaired spouse in the event long-term care (at home or in a nursing home) becomes necessary; (6) transfer assets to avoid a Medicaid lien or recovery against the estate of a Medicaid recipient; (7) obtain the necessary surrogate decision-making powers to place the “sick” spouse in a nursing home to relieve the healthy spouse from the caregiving burden even if it compromises the dignity of the ailing spouse; or (8) maximize Medicaid coverage of long-term care to preserve assets for the healthy spouse, even if the quality of care is diminished.

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

114. Although most of the goals listed are laudatory, I have also included potential goals that are not as noble. In the real world, not all clients are ethical. Lawyers must develop strategies for recognizing when family members who are assisting or acting on behalf of an older person may not be acting according to the expressed wishes or best interests of the elderly person.

115. See *supra* Part II (describing the Allen case study).

that the “normal” children will receive a greater share of the client’s estate.

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

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

E. The Paradoxical Nature of Advance Directives and Guardianships

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

Each of these documents both empowers and diminishes the client’s freedom by enabling her to choose the person who will have the authority to make decisions on her behalf, while also implementing a structure in which her power to make decisions is reduced. These planning documents formalize a legal agency relationship that may be long term and involve the most intimate aspects of the person’s life. There is no “winner” or “loser” in this situation in the traditional sense, and the relationships among the interested parties (client, agent, family members, friends, support professionals) are clearly different than in an

116. See *infra* Part IV.B (examining and discussing cultural competency).

adversarial case. To prevent the possibility of abuse, and to assure that the documents serve their intended purpose, the attorney for the elderly client may have to involve members of the client's support network.

Even if the client does not have the capacity to make decisions and it is necessary for a court to appoint a guardian, the nature of the proceeding and the outcome are often different than the paradigmatic legal dispute.¹¹⁷ Although it is true that the appointment of a guardian diminishes fundamental liberty and due process interests, it also may be the only way to preserve those interests for a person with diminished capacity.¹¹⁸ The person who petitions the court is frequently a family member who wants to be appointed guardian by the court. As limited guardianship statutes that honor the autonomy of the alleged incapacitated person become more prevalent,¹¹⁹ the varying interests at

117. In a guardianship proceeding, the "opposing" parties are frequently close family members, the results of the case frequently have a dramatic effect on the interests of third parties, and the subject of the proceeding has some degree of diminished mental capacity. These elements are in sharp contrast to a "typical" civil matter involving more traditional opponents.

118. A lawyer who represents a client who loses the capacity to make decisions faces a difficult ethical dilemma. Under Model Rule 1.14(a), a lawyer is supposed to maintain a "normal" lawyer-client relationship. *See* MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.14(a) (1983). Rule 1.14(b), however, permits a lawyer to "seek the appointment of a guardian or take other protective action" only if the lawyer reasonably believes that the client is unable to act in his best interests. *Id.* at Rule 1.14(b). Thus, in a jurisdiction governed by the Model Rules, there is clear guidance for a lawyer. *See* ABA Comm. on Ethics and Professional Responsibility, Formal Op. 96-404 (1996) (interpreting Rule 1.14 to permit consultation with a diagnostician and limited disclosures to family members without violating the duty of confidentiality under Rule 1.6). In contrast, while the Code recognizes that the obligations of a lawyer may vary depending on the "mental condition" of the client, *see* MODEL CODE OF PROFESSIONAL RESPONSIBILITY EC 7-11 (1980), the duty to preserve the confidences and secrets of a client under Canon 4 apparently prohibits the disclosure of any information even if such disclosure would be in the client's best interests. *See id.* at Canon 4. A 1987 ethics opinion of the Association of the Bar of the City of New York stated that a lawyer may disclose confidential information to have a guardian appointed if that is necessary to protect the client's interest. *See* N.Y. City Ass'n B. Comm. Professional Judicial Ethics, Op. 1987-7 (1987), 1987 WL 346197. The application, however, should be made in camera and the filing should be sealed. *See id.* In contrast, another ethics opinion prohibited a lawyer from disclosing his observations about the client's decision-making capacity to the family of an incapacitated client. *See* Nassau County Bar Ass'n, Op. 90-17 (1990). Although apparently contradictory, a rationale for allowing disclosure is that the appointment of a guardian will serve the client's interests and therefore is consistent with providing zealous representation. An attorney who represents an incapacitated client who is at risk of harm without a guardianship or other protective arrangement has to balance the ethical duty of confidentiality with the possibility that the failure to act may cause irreparable harm to the client. The New York City ethics opinion cited above may provide limited guidance to an attorney and provide a basis for justifying any action that requires disclosure of client confidences.

119. *See, e.g.*, N.Y. MENTAL HYG. LAW §§ 81.01 to 81.44 (McKinney 1996). The legislative findings and purpose section of Article 81 captures the essence of the concept of limited guardianship beautifully:

The legislature hereby finds that the needs of persons with incapacities are as diverse and complex as they are unique to the individual. The current system of conservator-

stake and the parties' conception of a successful outcome are more nuanced.¹²⁰ For example, under a limited guardianship statute, a court will not grant a guardian broad powers over the incapacitated person if it is possible to craft less restrictive, more individualized powers. Therefore, a successful outcome may include the appointment of a guardian whose powers are limited to arranging home care and other support services that will allow the incapacitated person to remain at home. The goal is to allow the incapacitated person to retain to greatest amount of autonomy and control possible given the particular functional limitations that created the need for a guardian.

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

Many elderly people live in fear of impoverishment if they need long-term care at home or in a nursing facility. One type of client concerned with the planning of financing long-term care is a middle class couple where the "well" spouse does not know if she can afford to

ship and committee does not provide the necessary flexibility to meet these needs. Conservatorship which traditionally compromises a person's rights only with respect to property frequently is insufficient to provide necessary relief. On the other hand, a committee, with its judicial finding of incompetence and the accompanying stigma and loss of civil rights, traditionally involves a deprivation that is often excessive and unnecessary. Moreover, certain persons require some form of assistance in meeting their personal and property management needs but do not require either of these drastic remedies. The legislature finds that it is desirable for and beneficial to persons with incapacities to make available to them the least restrictive form of intervention which assists them in meeting their needs but, at the same time, permits them to exercise the independence and self-determination of which they are capable. The legislature declares that it is the purpose of this act to promote the public welfare by establishing a guardianship system which is appropriate to satisfy either personal or property management needs of an incapacitated person in a manner tailored to the individual needs of that person, which takes into account the personal wishes, preferences and desires of the person, and which affords the person the greatest amount of independence and self-determination and participation in all the decisions affecting such person's life.

Id. § 81.01.

120. Of course, by its nature, a guardianship poses a threat to the autonomy of a person alleged to be incapacitated. In some cases, the interests of the petitioner and the incapacitated are adversarial and most statutes, including New York, provide due process protections for the subject of the guardianship proceeding. Under the New York model, the statute is structured in a way that recognizes that guardianship proceedings have varying degrees of adversity. For example, a "court evaluator" is appointed to investigate the need for a guardianship and, if appropriate, recommend the scope of the guardian's powers. See N.Y. MENTAL HYG. LAW § 81.09 (McKinney 1999). The court, however, has the authority not to appoint a court evaluator if the alleged incapacitated person requests an attorney, or other circumstances exist that make the appointment of counsel mandatory. See *id.* § 81.10. If an attorney is not appointed, the role of the court evaluator as the eyes and ears of the court is deemed sufficient to protect the person's interests, even though the court evaluator is not acting as an advocate for the alleged incapacitated person. See *id.*

pay for the cost of home care or nursing home care. The client may have one or more of the following goals: (1) create eligibility for Medicaid coverage in the most aggressive way possible with minimal regard for the letter of the law; (2) utilize whatever means and strategies are available within the bounds of the law to become eligible for Medicaid; (3) obtain the best quality home care or nursing home care regardless of the cost; or (4) make a fully informed decision based on the attorney's thorough counseling of the available alternatives.

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

121. Model Rule 1.4 provides that: "(a) A lawyer shall keep a client reasonably informed about the status of a matter and promptly comply with reasonable requests for information; (b) A lawyer shall explain a matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation." MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.4 (1983). Under the Code of Professional Responsibility, EC 7-8 states that "a lawyer should exert his best efforts to insure that decisions of his client are made only after the client has been informed of relevant considerations." MODEL CODE OF PROFESSIONAL RESPONSIBILITY EC 7-8 (1980). EC 9-2 states that "a lawyer should fully and promptly inform his client of material developments in the matters being handled for the client." *Id.* at EC 9-2.

122. The ethics of Medicaid counseling are not merely a function of the lawyer's personal sense of ethics and the retainer agreement between lawyer and client. The Balanced Budget Act of 1997, signed into law by President Clinton on August 5, 1997, made it a crime (misdemeanor) for a paid advisor to knowingly and willfully counsel or assist another to dispose of assets for the purpose of obtaining Medicaid assistance, where the disposition of assets results in the imposition of a Medicaid penalty period. *See* Balanced Budget Act of 1997, Pub. L. No. 105-33, § 4734, 111 Stat. 560 (to be codified at 42 U.S.C. § 1320a-7b(a)(6)). This legislation replaces the prior criminal penalty enacted on January 1, 1997, which targeted the Medicaid applicant or recipient who made the prohibited transfers. *See id.* Not only is this legislation an unconstitutional infringement on free speech in violation of the First Amendment, it is also extremely troublesome from a public policy standpoint. Congress is unable or unwilling to restrict eligibility for Medicaid through legislation or regulation, yet it attempts to use criminal sanctions to prevent paid attorneys and other advisors from counseling clients about the full range of options relating to Medicaid eligibility. In a March 11, 1998 letter to Congress, Attorney General Janet Reno stated that the law was unconstitutional and she would not enforce it. *See* Senior Law, *Letter from Attorney General Janet Reno to Speaker Newt Gingrich* (visited Feb. 26, 2000)

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

IV. A REFLECTIVE MODEL FOR RESOLVING ETHICAL DILEMMAS IN ELDER LAW

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

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

<<http://www.seniorlaw.com/reno.htm>>. Chief U.S. District Judge Thomas J. McAvoy of the Northern District of New York entered a final judgment and permanent injunction against the enforcement of the law. See *New York State Bar Ass'n v. Reno*, 999 F. Supp. 710, 716 (N.D.N.Y. 1998).

123. See *supra* note 9 and accompanying text (explaining the need for specific ethical codes for particular areas of practice).

124. For example, Zacharias suggests that specialized codes of conduct should also deal with questions such as:

[h]ow lawyers should implement their conclusions that the adversary is ‘nontraditional.’ How much should lawyers focus on enhancing future familial or business relationships that are only directly pertinent to the instant transaction? To what extent should lawyers rely on the adversary’s good will despite the client’s sense that the good will is nonexistent? When should a lawyer discount her own client’s demands because the client is temporarily or partially incapacitated or overcome by emotion? Should lawyers be able to depart from the traditional demands of confidentiality and client-centered decisionmaking on the basis that doing so is in the client’s best interests?

Zacharias, *supra* note 10, at 197-98.

125. DONALD A. SCHON, *EDUCATING THE REFLECTIVE PRACTITIONER: TOWARD A NEW*

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

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

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

DESIGN FOR TEACHING AND LEARNING IN THE PROFESSIONS 6 (1987). In this book, Schon analyzes an architecture “practicum” to demonstrate the experiential process by which expertise is acquired by students.

126. MOODY, *supra* note 18, at 32-33 (quoting EDMUND PINCOFFS, *QUANDRIES AND VIRTUES: AGAINST REDUCTIVISM IN ETHICS* (1986)).

127. See TOM L. BEAUCHAMP & JAMES F. CHILDRESS, *PRINCIPLES OF BIOMEDICAL ETHICS* x (2d ed. 1983) (introducing the four principles of autonomy, nonmaleficence, beneficence, and justice discussed in chapters three through six); see also Tom L. Beauchamp, *Principles and Other Emerging Paradigms in Bioethics*, 69 *IND. L.J.* 955, 956 (1994) (describing these same four principles).

128. See MOODY, *supra* note 18, at 23-24 (noting that bioethics is closely intertwined with the law and its dominant model of informed consent and autonomy). The model is also designed to be applied in hospitals in situations that require a prompt, if not immediate, decision. See *id.* Moody criticizes the dominant model as alienated from practice and cites the “overwhelming consensus against paternalism in all but exceptional circumstances” as in conflict with the practice of clinicians. *Id.* at 33. Moody concludes that bioethics does not appreciate the “more intuitive and interpersonal ingredients of ethical deliberation: the role of individual character, the tex-

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

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

A. Interplay Between Legal Doctrine and Ethical Analysis

The ability to recognize ethical issues and locate them within the governing laws of lawyering is the foundational step for resolving ethical issues and is recognized as a fundamental lawyering skill.¹³³

ture of lived experience, and the importance of interpretation and communication." *Id.* (citing Ronald A. Carson, *Interpretive Bioethics: The Way of Discernment*, in *THEORETICAL MED.* II, 51, 59 (1990)).

129. See Beauchamp, *supra* note 127, at 957 (discussing how ideals, virtues, and conscience produce common moral standards).

130. See *id.* at 959 (citing Henry S. Richardson, *Specifying Norms as a Way to Resolve Concrete Ethical Problems*, 19 *PHIL. & PUB. AFF.* 279 (1990)).

131. According to Beauchamp, the general (principles, rules and theories) and the more particular (feelings, perceptions, case judgments, practices and parables) "should be coherently united." *Id.* at 971.

132. Luban & Millemann, *supra* note 15, at 31.

133. The MacCrate Report lists ethical issue spotting as Skill 10 in the statement of Fundamental Lawyering Skills. See MacCrate Report, *supra* note 15, at 194. This section of the MacCrate Report is itself divided into three sections: Familiarity with the Nature and Sources of Ethical Standards; Familiarity with the Means by Which Ethical Standards are Enforced; and Familiarity with the Processes for Recognizing and Resolving Ethical Dilemmas. See *id.* at 194-97. The Report

Examination of recurring ethical dilemmas in elder law reveals that “recognizing the issue” involves both an understanding of the underlying substantive legal problems, relevant provisions of the Code of Professional Responsibility and Model Rules of Professional Conduct, and other applicable sources of law.

1. Who Is the Client?

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

The lawyer has an obligation to counsel clients who “want to make wills” about a variety of issues, including planning for disability, financing long-term care (including the opportunity for Medicaid coverage), and the potential benefits of alternative plans that may involve trusts, transfers of property during life, and decisions about long-term care and living arrangements. Previously unforeseen potential conflicts of interest become apparent as the nuances of these choices unfold. When faced with these conflicts, the available choices for the lawyer include representing one spouse, representing both

[r]ecognizes that competent, ethical practice requires more than just knowledge of the applicable rules and principles of professional responsibility. It also requires that a lawyer faithfully apply these rules and principles to his or her daily practice by scrutinizing the ethical propriety of practices which he or she is contemplating or which are urged upon him or her by others This section takes into account the practical consideration that even lawyers who are aware of their ethical obligations may not adequately perceive the existence of an ethical problem in a particular situation or may not know how to respond to a problem they have perceived. The analysis calls for an understanding of the means for identifying and solving ethical problems in one’s own practice

Id. at 207.

134. See, e.g., Teresa Stanton Collett, *And the Two Shall Become as One . . . Until the Lawyers Are Done*, 7 NOTRE DAME J.L. ETHICS & PUB. POL’Y 101 (1993) (discussing models for representing spouses); *Report of Working Group on Spousal Conflicts, in Ethical Issues in Representing Older Clients*, 62 FORDHAM L. REV. 1027, 1033-34 (1994). For purposes of this analysis, I will assume that the issues and analysis are the same if it is an unmarried or gay or lesbian couple who seek representation.

135. See MODEL CODE OF PROFESSIONAL RESPONSIBILITY DR 5-105(C) (1980) (“[A] lawyer may represent multiple clients if it is obvious that he can adequately represent the interest of each and if each consents to the representation on the exercise of his independent professional judgment on behalf of each.”); MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.7(a) (1983) (“A lawyer shall not represent a client if the representation of that client will be directly adverse to another client, unless: (1) the lawyer reasonably believes the representation will not adversely affect the relationship with the other client; and (2) each client consents after consultation.”); see also *infra* Part IV.A.2 (discussing client autonomy and waivers of conflicts of interest).

spouses jointly, or representing each spouse separately.¹³⁶ A lawyer is not prohibited from representing both spouses, and in fact typically does represent both spouses jointly,¹³⁷ but the process of disclosing and explaining the conflict of interest and obtaining informed waivers is complex. Under most circumstances, despite the presence of potential conflicts of interest, the clients will waive any conflicts in order to receive the benefits of joint representation.¹³⁸

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

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

The analysis becomes a bit more complex and troublesome if the adult child seeks legal advice on behalf of her mother who has Alzheimer's Disease. The child says that the mother wants to make a

136. Although the choice to represent spouses separately seems unwise, and there is no explicit authority to do so under the Model Rules or the Code, the ACTEC Commentaries recognize that some practitioners utilize this form of representation with the appropriate disclosures and consents. See ACTEC, COMMENTARIES, *supra* note 17, at 65 (noting that "a lawyer may represent a husband and wife . . . whose dispositive plans are not entirely the same").

137. In the area of trusts and estates, and other nonadversarial contexts, joint representation has substantial benefits. For example, the ACTEC Commentaries on the Model Rules of Professional Conduct recognize "[t]he utility and propriety, in this area of law, of representing multiple clients, whose interests may differ but are not necessarily adversarial . . ." *Id.* at 1.

138. One benefit of joint representation is the cost savings to the joint clients with respect to their lawyer's fees. More importantly, joint representation honors and supports the primacy of relationships over individual interests.

will that gives the mother's house and entire estate to the daughter and nothing to the mother's other child. Further, the daughter intends to pay the attorney's fee and wants to be informed about and involved in the preparation of documents and related decisions during the course of representation. This scenario requires the lawyer to clarify at the outset of the representation the exact identity of the client and the terms of the representation. In this case, a lawyer who agrees to represent both the interests of the adult child (i.e., in having the mother's will benefit her to the exclusion of her sibling) and the mother (who has yet to express her wishes) is asking for trouble.

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

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

139. A rigid, bright-line policy regarding representation may satisfy an attorney's desire for clarity but does not respond to a client's emotions and family relationships. Of course, representation of multiple family members requires thorough counseling, appropriate disclosures and informed consent.

140. Statements made in the presence of a third party are usually not privileged because there is then no reasonable expectation of confidentiality. *See, e.g.,* *United States v. United Shoe Mach. Corp.*, 89 F. Supp. 357, 358 (D. Mass. 1950); *Kratzer v. Kratzer*, 595 S.W.2d 453 (Mo. Ct. App. 1980) (finding attorney-client privilege destroyed by presence of the grantor's niece during a meeting concerning a deed because the niece's presence was not essential to the communication and she was not protecting the grantor's interests); *see also* Michael G. Walsh, Annotation, *Applicability of Attorney-Client Privilege to Communications Made in Presence of or Solely to or by Third Person*, 14 A.L.R. 4th 594 (1982). The attorney-client privilege is a creature of statute in the State of New York. *See* N.Y. C.P.L.R. § 4503(a) (McKinney 1999). The statute provides, "[U]nless the client waives the privilege, an attorney or his employee, or any person who obtains without the knowledge of the client evidence of a confidential communication made between the

considered similar to that of a helpful translator whose presence does not destroy the privilege.¹⁴¹

A major challenge is to integrate an open-ended approach to interviewing¹⁴² with a strategy for dealing with foreseeable ethical dilemmas.¹⁴³ Within the context of the initial interview, identifying the client and the presence of the third party ethical dilemmas are often the first to arise. When an adult child or "friend" accompanies the elderly person, the challenge is to begin the attorney-client relationship in a way that creates rapport and mutual trust while counseling the client that if the friend or relative attends the interview the attorney-client privilege may be waived. In order to obtain a pure glimpse of the ostensible client, practitioners should devise strategies designed to enable them to meet alone with the client for at least a portion of the interview. Clients can have difficulty grasping why the lawyer needs to meet with them alone when the client is focused on getting help with

attorney . . . and the client in the course of professional employment, shall not disclose . . . such communication. . . ." *Id.*

Canon 4 of the Code of Professional Responsibility is entitled "A Lawyer Should Preserve the Confidences and Secrets of a Client." MODEL CODE OF PROFESSIONAL RESPONSIBILITY Canon 4 (1980). The Code provides that "[b]oth the fiduciary relationship existing between lawyer and client and the proper functioning of the legal system require the preservation by the lawyer of confidences and secrets of one who has employed or sought to employ him." *Id.* at EC 4-1. The Code further states "[t]he attorney-client privilege is more limited than the ethical obligation of a lawyer to guard the confidences and secrets of his client." *Id.* at EC 4-4.

An attorney-client relationship occurs when a person contacts an attorney in his capacity as such for the purpose of obtaining legal advice or services. As the Model Code indicates, "[a] client must feel free to discuss whatever he wishes with his lawyer and a lawyer must be equally free to obtain information beyond that volunteered by his client." *Id.* at EC 4-1.

141. *See, e.g.,* *Mass v. Bloch*, 7 Ind. 202 (1855). The intent of the client and the role of the third party determines whether the attorney-client privilege is waived. *See, e.g.,* *Baldwin v. Commissioner of Internal Revenue*, 125 F.2d 812 (9th Cir. 1942) (holding that the presence of client's son did not waive privilege because they met with the lawyer as their common agent); *Hofmann v. Conder*, 712 P.2d 216, 217 (Utah 1985) (finding the presence of a hospital nurse was reasonably necessary under the circumstances when petitioner was in the intensive care unit); *Benge v. Superior Court*, 182 Cal. Rptr. 275, 282 (Ct. App. 1982) (holding a meeting between union members and attorney was confidential although all participants did not ultimately retain the attorney).

142. *See, e.g.,* ANDREW WATSON, *THE LAWYER IN THE INTERVIEWING AND COUNSELING PROCESS* 3 (1976) (suggesting that interviews be conducted in a "free ranging" manner).

143. An understanding of the interpersonal dimension of interviewing and counseling, ethical rules, their theoretical underpinnings and their application to the case at hand is essential to avoid counseling that shocks the client. At the extreme, advising the client about confidentiality can sound like a Miranda warning: "Ms. Ewing, everything we discuss is confidential. I cannot disclose any information gained in the course of our relationship without your consent. If you are involved in an adversarial proceeding related to information you provided, you have the right to invoke the attorney-client evidentiary privilege." Before the client knows what has happened, the lawyer whom she hoped would solve her problem has put her in an adversarial posture against the family member (often a spouse) whom she wants only to help.

their legal needs, not on the minutia of a lawyer's professional responsibility. The lawyer's goal is to honor the client's relationship with the third party while protecting the integrity of the attorney-client privilege.

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

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

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

144. See, e.g., Leon Jaworski, *The Will Contest*, 10 BAYLOR L. REV. 87, 88 (1958) (discussing the need to properly prepare a will to avoid future litigation).

interplay between those rules and the substantive legal issues that are part of the case.

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

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

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

Alternatively, the lawyer may agree to meet with both parties, assuming they will both be clients. During the initial meeting, it may become clear that the elder does not have the decision-making capacity to execute the power of attorney. The quandary then becomes whether the attorney can represent the adult child in an adult guardianship

145. See *supra* notes 34-36 and accompanying text (discussing powers of attorney).

proceeding or whether the lawyer has an impermissible conflict of interest. Conflict of interest analysis by definition involves either a former client, a current client, or an interest in the attorney that would prevent the lawyer from providing adequate representation.¹⁴⁶ If the mother was never a client, there may be no problem in representing the daughter as petitioner in a guardianship proceeding.

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

These ethical dilemmas also arise when an elderly parent of an adult child with a developmental disability wants to begin the process of "future care planning."¹⁴⁸ The presenting problem may be the need to

146. See MODEL CODE OF PROFESSIONAL RESPONSIBILITY EC 5-14 (1980); MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.7 (1983).

147. The Code of Professional Responsibility explicitly entitles a Canon: "A Lawyer Should Avoid Even the Appearance of Professional Impropriety." MODEL CODE OF PROFESSIONAL RESPONSIBILITY Canon 9 (1980); cf. MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.9 cmt. 5-6 (1983) (explaining why the "appearance of impropriety" standard for disqualification was rejected by the drafters of the Model Rules).

148. This kind of case embodies the issues that arise when aging parents struggle to plan for children with disabilities. The independent living movement and advances in the treatment and care of people with disabilities have enhanced opportunities and increased longevity. The diverse needs of people with disabilities often require legal representation in connection with eligibility for government benefits, housing, and financial planning. As parents age, there is a growing recognition of the critical need to arrange housing and support services as part of a comprehensive "future care plan." Future care planning for people with disabilities seeks to make arrangements for support and care that will replicate the role of parents and family when they are incapable of providing advocacy and care due to geographical distance, the aging process, disability, or death. The primary issues of future care planning—financial support, entitlement to government benefits, housing and guardianship—are buffeted by the winds of a rapidly changing political climate, in which budgetary pressures continue to drive public policy, and the concept of entitlement to Medicaid and other government benefits is increasingly vulnerable. Families often need a variety of services from an attorney that may involve multi-generational estate and disability planning. In this context, although the attorney usually represents the parent, there are instances in which multiple members of the family need representation. Increasingly, elderly parents are caring for middle-aged and elderly disabled children, and it is not unusual for the parent or parents to request legal assistance for the adult disabled child. For example, many children live at home and are employed in supportive work environments. Over the years, they have saved a substantial sum of money and have not accessed any government benefits. The parents start to contemplate their own mortality and realize that alternative housing arrangements are necessary. Community

appoint a guardian for the disabled child. The elderly parent often arrives with the adult child and insists that they be interviewed together. Under these circumstances, a lawyer must explain the potential for a conflict of interest between mother and daughter and generally should interview the parent alone because she is viewed as the client. The professional norm of isolating a client, however, may clash with the client's expectations, desires, and deeply held beliefs.

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

The differing interests of the parties would cause an attorney working from a traditional adversarial perspective to shy away from multiple

residences usually require that clients be recipients of Medicaid, which pays for a substantial amount of the cost of care. To be eligible for Medicaid, the disabled person must either spend down her assets or transfer them into a supplemental needs trust. Under these circumstances, the attorney may be called upon to represent both the parents and the child.

149. A guardian may be appointed for a person who is unable to make decisions regarding property and/or personal needs. *See, e.g.*, N.Y. MENTAL HYG. LAW § 81.02 (McKinney 1996). Traditionally, medical diagnosis was the grounds for appointing a guardian, who typically would have virtually unlimited powers. The modern trend is to utilize a functional approach for the determination of incapacity: this requires specific fact finding as to the actual limitations a person has in performing various activities of daily living, including bathing, eating, ambulating, toileting, decision-making regarding finances (e.g., banking) and personal needs (e.g., medical treatment), and any other necessary activities.

150. This is an example of lawyering with the goal of crafting a solution that is the least restrictive alternative and taking a nontraditional approach to assessing the capacity of a person with a developmental disability.

representation: to represent one client or to represent neither. The result of the adversarial approach would be a formal guardianship proceeding requiring at least one new attorney (and possibly separate attorneys), with the attendant financial drain and emotional strain of a formal legal proceeding.

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

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

2. Multiple Representation and Conflicts of Interest

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

In order to fully analyze whether a conflict of interest precludes multiple representation, a lawyer must make a searching inquiry into the

151. Admittedly, there are many people in advanced stages of Alzheimer's Disease, with severe developmental disabilities, or who are profoundly mentally ill who clearly do not have decision-making capacity. In these instances, a lawyer has no difficulty in assessing the lack of decision-making capacity. However, a substantial number of people with some form of dementia or mental incapacity have some degree of understanding and ability to exercise knowing choice. It is often unclear if decision-making capacity exists and the lawyer's determination involves judgment and discretion and the weighing of factors. *See generally* Margulies, *supra* note 32 (identifying the uncertainty of the assessment criteria); Tremblay, *supra* note 32 (addressing the issue of informed consent in the context of an impaired client).

152. *See* HAZARD, *supra* note 70, at 78-79.

153. *Id.*

underlying attitudes, feelings, and circumstances of individual clients to understand their respective interests. As Kenneth Penegar noted,

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

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

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

The Model Rules prohibit representation of multiple clients with interests directly adverse or when representation may be "materially limited" by the lawyer's responsibility to another client.¹⁵⁶ If the lawyer reasonably believes that there will not be an adverse effect and the client consents after consultation, the material adversity limitation on the representation may be cured.¹⁵⁷ The provisions in Model Rule 1.7

154. Penegar, *supra* note 64, at 327.

155. See MODEL CODE OF PROFESSIONAL RESPONSIBILITY DR 5-105 (1980).

156. See MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.7 (1983).

157. See *id.*

explicitly incorporate any limits on the nature of the representation that are agreed to by the attorney and the client, which may in effect diminish the effectiveness of representation for a particular client.¹⁵⁸ The Model Rules also include a provision that authorizes an attorney to act as intermediary between clients.¹⁵⁹

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

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

In some cases, a conflict of interest may preclude dual representation as a matter of law. In *Klemm v. Superior Court*,¹⁶³ a California appeals court held that in a litigation context, a client's waiver of an actual conflict is ineffective even if the client was fully able to assess his best

158. *See id.*

159. *See id.* at Rule 2.2. When a lawyer acts as intermediary with clients, the lawyer must provide enough information so that any conflicts of interest and limitations on the attorney's role are disclosed. *See id.* at Rule 2.2(a)(1). Additionally, a lawyer must obtain the consent of the clients. *See id.* During the course of the representation, the lawyer must withdraw if any of the clients request that she withdraw. *See id.* at Rule 2.2(c).

160. Spillenger, *supra* note 96, at 1502-11 (describing the content of Justice Brandeis's famous statement that he was the "counsel for the situation"). The concept of independent judgment is expressed in Canon 5 of the Code and reflects the legal profession's restrictive view of a client's interests. *See* MODEL CODE OF PROFESSIONAL RESPONSIBILITY Canon 5 (1980). When the interests of multiple clients are intertwined there are often areas of harmony and conflict. The respective interests of the clients may only be fully realized if the lawyer reconciles those interests, which requires a more interdependent view of the lawyer's role.

161. *See* MODEL CODE OF PROFESSIONAL RESPONSIBILITY DR 5-105(C) (1980); MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.7 (a)(2) (1983).

162. One of the basic themes of the ACTEC Commentaries is "[t]he relative freedom that lawyers and clients have to write their own charter with respect to a representation in the trusts and estates field." ACTEC, COMMENTARIES, *supra* note 17, at 1.

163. *Klemm v. Superior Court*, 142 Cal. Rptr. 509 (Ct. App. 1977).

interests.¹⁶⁴ The holding in *Klemm* represents a departure from the provisions of California's governing code of conduct (as well as the Code and Model Rules) that allow clients the autonomy to waive conflicts once the attorney concludes that she can provide adequate representation to both clients.¹⁶⁵ The provisions in the California code governing conflicts of interest are based on the premise that the impartial lawyer will provide sufficient information to enable the client to make an informed decision, urge the client to obtain independent counsel, and honor the client's ultimate decision.¹⁶⁶

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

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

The court in *Klemm* emphasized the importance of providing clients with sufficient disclosures about the conflict of interest to permit an informed waiver.¹⁷¹ The content of those disclosures must be adapted

164. *See id.* at 512.

165. *See* CALIFORNIA RULES OF PROFESSIONAL CONDUCT Rule 3-310 (1999) (outlining the "informed written consent" of a client necessary for acceptance or continuation of representation by an attorney).

166. *See id.* at Rule 3-300 (outlining the procedure attorneys should follow in order to avoid interests adverse to a client).

167. *See Klemm*, 142 Cal. Rptr. at 510-11.

168. *See id.* at 511.

169. *See id.* at 512.

170. *See id.* at 513-14.

171. Professor Zacharias criticizes the existing rules because they offer little guidance to lawyers regarding what constitutes sufficient disclosures to clients about conflicts and do not provide a balance to the incentives that exist for a lawyer to seek waivers of conflicts. *See* Fred C. Zacharias, *Waiving Conflicts of Interest*, 108 YALE L.J. 407, 427-29 (1998). He proposes alternative

to the specific nature of the conflict, potential or actual. For example, although joint representation of spouses is usually appropriate, there are potential hazards that demonstrate the need for clear understanding of the terms of representation (including its duration) at the outset and adequate disclosure of potential conflicts.¹⁷² Consider the classic case of the spouse who wants to change an estate plan devised when the lawyer represented the couple jointly. Husband meets with lawyer alone. Husband requests that lawyer prepare “mirror wills” for Husband and Wife, distributing all their property to each other, and upon the death of the surviving spouse, distributing one-half of the remaining balance in equal shares to adult Daughter A and to the trustee of a supplemental needs trust established for the benefit of Daughter B, who suffers from mental illness and receives government benefits due to her disability. Husband explains that Wife has been increasingly forgetful and appears to be in the early stages of Alzheimer’s Disease. Husband is planning to schedule an appointment with a neurologist, but has not talked about this with Wife, because he fears it will upset her too much. The lawyer agrees to draft the documents, but advises Husband that it will be necessary to meet with Wife in person to explain the provisions of her Will and assess her capacity to sign it. The lawyer

rules that attempt to reconcile the interests of clients, lawyers, and the legal system. One rule would identify circumstances in which the client would be prohibited from waiving the conflict, even if the waiver would benefit the client. Another rule would delineate the information that must be provided by an attorney to enable the client to make an informed decision about a waiver. The final rule would encourage lawyers to take systemic interests into account when waivers should not be accepted and to focus exclusively on the interests of clients in situations where waivers are permitted. *See also* Nancy J. Moore, *Restating the Law of Lawyer Conflicts*, 10 GEO. J. LEGAL ETHICS 541, 555-57 (1997) (comparing the Code, Model Rules and Restatement provisions); *cf.* RESTATEMENT OF THE LAW GOVERNING LAWYERS (THIRD) § 202(2) (Proposed Final Draft No. 1, 1996) (prohibiting representation when the conflict cannot be waived, including when “one client will assert a claim against the other in the same litigation” or in which “it is not reasonably likely that the lawyer will be able to provide adequate representation”).

172. Apart from issues related to joint representation, questions of confidentiality and the attorney-client privilege arise when elderly clients come to an interview accompanied by a family member or friend. The presence of a third party does not relieve the attorney of the ethical duty to preserve the confidences and secrets of a client, but it does waive the attorney-client privilege. *See* MODEL CODE OF PROFESSIONAL RESPONSIBILITY EC 4-4 (1980) (explicitly upholding privilege in light of the presence of other persons); MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.6 (1983) (upholding attorney-client privilege without mention of relief if a third party is present). In order to determine whether there is a reason not to have the third party present, the attorney should attempt to meet with the client alone, for at least the initial part of the interview. During this time, the attorney can explain the attorney-client privilege and gather enough information from the client to assess whether there are reasons to meet with the client alone. If the client is reluctant to meet with the lawyer alone, an alternative strategy is to meet with the client and the third party in order to explain the attorney-client privilege and give the client an opportunity to make an informed decision, albeit in the presence of the third person. *See supra* notes 140-41 (discussing the impact of a third party’s presence).

also makes it clear that although all information is confidential as to others, there will be no confidentiality between Husband and Wife. Lawyer subsequently meets with Husband and Wife and supervises the execution of the documents. Several years later, after the representation has ended, Husband contacts the lawyer and explains that Wife's condition is deteriorating and he wants to remove Wife as beneficiary under the Will so that if he dies before Wife, all his property will be distributed equally between Daughter A and the supplemental needs trust for Daughter B. Husband explains that his purpose is to make sure that Wife will be eligible for Medicaid to pay for the long-term care she will probably need.

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

3. Assessing Decision-Making Capacity

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

The mere fact that a person has been diagnosed with Alzheimer's Disease or other neurological impairment does not mean that she lacks the decision-making capacity to enter into an attorney-client

173. See N.Y. City Ass'n B. Comm. Professional Judicial Ethics, Op. 1999-7 (1999).

174. See N.Y. City Ass'n B. Comm. Professional Judicial Ethics, Op. 555 (1984) (discussing the prohibited revelation of confidential communications to joint clients).

relationship, participate in the representation, and sign documents or agreements. Because the determination of incapacity is based on the functional ability of the person who is impaired rather than a medical diagnosis, a person with Alzheimer's Disease may nevertheless have the ability to make decisions related to the representation.

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

175. To do so would require the lawyer to reveal confidential information.

176. The full text of the provision in the Code is:

The responsibilities of a lawyer may vary according to the intelligence, experience, mental condition or age of a client, the obligation of a public officer, or the nature of a particular proceeding. Examples include the representation of an illiterate or an incompetent, service as a public prosecutor or other government lawyer, and appearances before administrative and legislative bodies.

MODEL CODE OF PROFESSIONAL RESPONSIBILITY EC 7-11 (1980).

177. The full text of the provision in the Code is:

Any mental or physical condition of a client that renders him incapable of making a considered judgment on his own behalf casts additional responsibilities upon his lawyer. Where an incompetent is acting through a guardian or other legal representative, a lawyer must look to such representative for those decisions which are normally the prerogative of the client to make. If a client under disability has no legal representative, his lawyer may be compelled in court proceedings to make decisions on behalf of the client. If the client is capable of understanding the matter in question or of contributing to the advancement of his interests, regardless of whether he is legally disqualified from performing certain acts, the lawyer should obtain from him all possible aid. If the disability of a client and the lack of a legal representative compel the lawyer to make decisions for his client, the lawyer should consider all circumstances then prevailing and act with care to safeguard and advance the interests of his client. But obviously a lawyer cannot perform any act or make any decision which the law requires his client to perform or make, either acting for himself if competent, or by a duly constituted representative if legally incompetent.

Id. at EC 7-12.

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

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

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

178. See Committee on Professional Responsibility, *A Delicate Balance: Ethical Rules for Those Who Represent Incompetent Clients*, 52 REC. ASSOC. OF THE BAR OF THE CITY OF NEW YORK 34, 35 (1997) (stating that there are "few cases or ethical opinions to fill the gap").

179. Model Rule 1.14 reads as follows:

(a) When a client's ability to make adequately considered decisions in connection with the representation is impaired, whether because of minority, mental disability or for some other reason, the lawyer shall, as far as reasonably possible, maintain a normal client-lawyer relationship with the client. (b) A lawyer may seek the appointment of a guardian or take other protective action with respect to a client, only when the lawyer reasonably believes that the client cannot adequately act in the client's own interest.

MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.14 (1983); see also ABA Formal Ethics Opinion 96-404 (1996) (discussing the impact of the Model Rules in light of clients under a disability).

180. See generally Robert P. Roca, *Determining Decisional Capacity: A Medical Perspective*, 62 FORDHAM L. REV. 1177 (1994) (describing the clinical methods by which physicians determine whether elderly patients lack decision-making capacity).

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

B. Cultural Competence and Professional Responsibility

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

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

181. The term cultural competence has been used primarily in the fields of social work and health care. For an analysis of cultural competence in social work, see LATINO ELDERS AND THE TWENTY-FIRST CENTURY: ISSUES AND CHALLENGES FOR CULTURALLY COMPETENT RESEARCH AND PRACTICE (Melvin Delgado, Ph.D. ed., 1998) [hereinafter "Delgado"]. In the health care context, see Jacquelyn C. Campbell & Doris W. Campbell, *Cultural Competence in the Care of Abused Women*, 41 J. NURSE-MIDWIFERY 457, 457-62 (1996); Karin Downs et al., *Providing Culturally Competent Primary Care For Immigrant and Refugee Women: A Cambodian Case Study*, 42 J. NURSE-MIDWIFERY 499, 499-508 (1997); Jo-Anna L. Rorie et al., *Primary Care for Women: Cultural Competence in Primary Care Services*, 41 J. NURSE-MIDWIFERY 92, 92-100 (1996).

182. See Steven Lozano Applewhite, Ph.D., *Culturally Competent Practice with Elderly Latinos*, in Delgado, *supra* note 181, at 1.

1. Cultural Competence in Elder Law

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

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

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

At the beginning of a relationship with a client, the attorney needs to utilize strategies that facilitate the gathering of information that provides insight into the client. When meeting initially with a client, an open-ended approach that incorporates sensitive listening skills and empathetic communication will create an atmosphere that helps the client share her perspective.¹⁸⁶ The lawyer must become adept in

183. See Rorie et al., *supra* note 181, at 92 (citing RACHEL E. SPECTOR, CULTURAL DIVERSITY IN HEALTH AND ILLNESS (1991)).

184. *Id.*

185. For example, in the realm of estate planning for distribution of property upon death, Professor Thomas Shaffer sees the family as the prism through which we can make sense of death, the meaning of property, and the need for planning. See Thomas L. Shaffer, *The Legal Ethics of Radical Individualism*, 65 TEX. L. REV. 963, 966-67 (1987).

186. Although the works of Binder, Bergman & Price on interviewing and counseling are pre-eminent, numerous others have contributed to this area. See, e.g., ROBERT M. BASTRESS & JOSEPH D. HARBAUGH, INTERVIEWING, COUNSELING AND NEGOTIATING: SKILLS FOR

interpreting verbal and nonverbal information, responding to presenting problems and unarticulated concerns, and must filter these layers of information through the prism of the lawyer's own construct of the client and the particular legal issues involved.

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

A culturally competent perspective focuses initially on the welfare of the vulnerable person and the nature of relationships within the family "system," but there is a risk that an emphasis on the vulnerable elderly person's "fit" within her informal and formal support systems will submerge the rights of the elder. The attorney must balance a client centered approach¹⁸⁸ and the duty of confidentiality with the need to reach out into the elder's support network, particularly if diminished capacity prevents the elder from providing the attorney with complete information about her legal problems.¹⁸⁹ A culturally competent and holistic perspective seeks to involve the client's support network and magnify the human dimensions of the legal problem, while heightening sensitivity to the possibility of physical, emotional, or financial exploitation and abuse.

In their book, *Lawyers, Clients and Moral Responsibility*, Thomas Shaffer and Robert Cochran, Jr. use a Wendell Berry short story, "The Wild Birds," to illustrate and describe the "intellectual virtues of reflectiveness, tolerance, humility, honesty, and care in a law office" as the "virtues of moral discourse."¹⁹⁰ The interview between the lawyer, Wheeler Catlett, and his client, Burley Coulter, captures the dynamic interplay between the lawyer's awareness of his preconceived notions and his developing insight into the client's perspective. Burley, an

EFFECTIVE REPRESENTATION (1990); BELLOW & MOULTON, *supra* note 13; THOMAS SHAFFER & J. ELKINS, *LEGAL INTERVIEWING AND COUNSELING* (2d ed. 1988); WATSON, *supra* note 142.

187. See, e.g., Joan L. O'Sullivan et al., *Ethical Decisionmaking and Ethics Instruction in Clinical Law Practice*, 3 *CLINICAL L. REV.* 109, 168 (1996) (explaining that the "prime virtue" of the social work perspective is its "holistic approach to client service").

188. See, e.g., DAVID A. BINDER ET AL., *LAWYERS AS COUNSELORS: A CLIENT-CENTERED APPROACH* 16-30 (1991) (describing the main characteristics of the client-centered approach as a superior way to deal with a client's individual problems).

189. This can place the attorney at risk of violating a confidentiality provision of the Code or the Model Rules.

190. SHAFFER & COCHRAN, JR., *supra* note 85, at 52-53.

elderly, unmarried man, came to Wheeler with Nathan, his nephew and sole heir, and tells Wheeler that he wants to give his property to Danny, his nonmarital child.¹⁹¹ This offends Wheeler's "commitment to the orderly succession of family farms and the defense as well of orderly families."¹⁹²

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

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

2. Lawyer as Fiduciary: The "Adversarial Guardian"

The clinic represented Clara, an African-American woman whose life partner of twenty-five years, Dan, had been living in a nursing home for about a year because of severe Alzheimer's Disease. Dan had never divorced his wife. Dan and his wife still owned the house in which Clara and Dan had lived together for all those years. Dan's children never accepted Clara, and their hatred of her burned brightly. As his health deteriorated, Dan tried to give Clara the right to live in the house if something happened to him. Dan and Clara executed two separate long-term leases, and Dan also made a homemade "will" that expressed

191. *See id.* at 53. I use the term "nonmarital" because it is descriptive and avoids the (no doubt unintended) pejorative quality of the term "illegitimate" used by Shaffer & Cochran.

192. *Id.*

193. *See, e.g.,* Michelle S. Jacobs, *People From the Footnotes: The Missing Element in Client-Centered Counseling*, 27 GOLDEN GATE U. L. REV. 345, 346 (1997) (discussing the failure of the two prevailing client-centered models to address the effects of race, class and gender on the lawyer-client relationship, and revealing the presentation of client characteristics as interchangeable under both models, despite race, class and gender differences).

his wish that Clara be allowed to live in the house. When the nursing home brought a guardianship proceeding, Clara did not seek to be appointed guardian because of the dispute with Dan's wife and children.

The court appointed an independent lawyer as guardian, a common role for attorneys. In this context, the lawyer acts not as an advocate, but as a fiduciary with the ethical obligation to act on behalf of the incapacitated person. The guardian's narrow perspective in this case epitomized the problems that can arise with an adversarial mindset that ignores cultural differences. The guardian, who made it known that she had a husband and children, viewed Clara as an outlaw because she was not married to Dan. The guardian, white and privileged, could barely conceal her contempt for Clara's poverty and failure to lead a more conventional life. The guardian refused to accept the validity of Clara's relationship with Dan because they were never married. She ignored the evidence that Dan did everything he could to protect Clara, and refused to recognize the documents that expressed Dan's wish to have Clara live in the house. To the guardian, twenty-five years of a shared life meant nothing, and she viewed her obligation as protecting the rights of the legal spouse against Clara.

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

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

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

Although one may hear forgetful colleagues joke about having a "senior moment," research has shown that Alzheimer's Disease, Parkinson's Disease and other chronic conditions are deviations from a stable cognitive level. Dementia is not a natural part of the aging process; rather, it is "[a] global cognitive syndrome caused by diseases acquired in adulthood"¹⁹⁴ It is believed that about fifty illnesses

194. Robert H. Binstock et al., *The Challenges of Dementia*, in *DEMENTIA AND AGING: ETHICS, VALUES, AND POLICY CHOICES* 1, 1 (Robert H. Binstock et al. eds., 1992).

may cause dementia, and while some dementias are reversible (e.g., chronic metabolic dysfunctions and hepatic or renal failure or benign tumors and other structural lesions in the central nervous system), the most notorious and prevalent are progressive and irreversible, including Alzheimer's Disease, Parkinson's Disease, Huntington's Disease, and Pick's Disease.¹⁹⁵ Atherosclerosis or hypertension often reduce blood flow or cause a hemorrhage, thereby causing multi-infarct dementia, which individually or in combination with Alzheimer's Disease is the next most common form of dementia.¹⁹⁶

Although the risk of acquiring Alzheimer's Disease increases with aging, Alois Alzheimer first discovered senile dementia, which is the hallmark of Alzheimer's Disease, in a fifty-one year old woman in 1907.¹⁹⁷ The original Alzheimer's patient was initially suspicious about the motives of her physician, and then became paranoid, suffered loss of memory, and developed problems with reading, writing, and speech. This patient suffered from the peculiar mix of cognitive (neuropsychological) and behavioral (psychiatric) problems.¹⁹⁸ Typically, a person with Alzheimer's Disease will have difficulty remembering recent events, names and faces, and her ability to manage and function her daily life will diminish.¹⁹⁹ The person will often be at a loss for words, which leads to aphasia, or language impairment. The extent of aphasia may not reflect the receptive ability of the person. In addition, the way in which the person perceives the world through sight and sound may be distorted, causing difficulty in organizing disparate sensory experiences into a coherent whole. The disease begins to affect daily activities that require financial acumen and interaction with the outside world, then impairs fundamental activities such as bathing, feeding, and eating, followed by loss of recognition of spouse and family members, and ultimately results in incontinence and total dependence on others. Suspicion, hostility, paranoia, depression, and hallucinations are behavioral signs of Alzheimer's Disease. The person may become delusional and imagine that others (especially the spouse/caregiver) are treating her badly, abusing her, or stealing her possessions. The precise causes of Alzheimer's Disease are unknown

195. See Peter J. Whitehouse, *Dementia: The Medical Perspective*, in DEMENTIA AND AGING: ETHICS, VALUES, AND POLICY CHOICES 21, 21-22 (Robert H. Binstock et al. eds., 1992).

196. See *id.* at 22.

197. See *id.* at 23.

198. See *id.* at 23-24.

199. See *id.* at 24.

and research continues into the role of genetic and environmental factors.

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

A guidepost to a person's cognitive ability is the awareness of, and thoughts and feelings about, the personal and social consequences of the disease.²⁰⁰ This awareness generally diminishes as the dementia becomes more severe, and those with advanced dementia often have anosognosia, or the "inability to recognize or acknowledge their dementia."²⁰¹

Joseph M. Foley uses the transcript of a conversation with an elderly man who has been diagnosed with Alzheimer's Disease to illustrate its impact on a person who is able to maintain a high level of functioning. The person is aware of memory problems, and after initially denying any problem with managing finances, remembers that he agreed to delegate certain tasks to his secretary.²⁰² The man also has difficulty describing what his books were about, but it is noteworthy that he had recently published.²⁰³ He also could not remember the year when the interviewer paused in the interview to assess the patient's orientation to time. The patient acknowledges that he "fumble[s] and stutter[s]" at times, but has developed "stratagems" to overcome this problem.²⁰⁴

200. See Joseph M. Foley, *The Experience of Being Demented*, in *DEMENTIA AND AGING: ETHICS, VALUES, AND POLICY CHOICES* 30, 37 (Robert H. Binstock et al. eds., 1992).

201. *Id.* at 30.

202. See *id.* at 34.

203. See *id.*

204. See *id.* at 35.

After this portion of the discussion, the patient could not remember the name of the president or vice-president.²⁰⁵ At the conclusion of the interview, the patient emphasizes his ability to maintain his level of activity, and responds to a question about what is “hard” about the disease by stating that “[t]he difficult thing is that it has a tail end to Alzheimer’s and I’m not too anxious to get to that point.”²⁰⁶

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

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

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

Foley also describes the main character in a Dutch novel whom he suggests is a model for understanding the impact of dementia on an individual. The seventy-one year old Dutchman, living in Massachusetts with his wife, articulates his feelings and thoughts about his dementia. As his mind falters, he struggles to cope with his limitations and the reactions of his wife and others. He finds himself doing strange things, such as watching for the children going to school on Sunday. When he wakes up in the middle of the night, can’t go back to sleep, gets dressed and reads, he cannot explain to his wife why he is

205. *See id.*

206. *Id.* at 36.

207. *See id.*

208. *Id.* at 37.

209. *See id.*

210. *Id.*

dressed.²¹¹ He speaks of “vanished memories” and years after retiring, fills up his briefcase and goes to an empty house for a meeting with his former co-workers. Foley notes that “Maarten still verbalizes the disorder of his thinking and feeling self—the misinterpretation of the actions of others, the frustrations of his own failures, the hallucinations, the delusions, the loss of the significance of places, the failure of sequences in time, the confusion about who other people really are.”²¹²

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

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

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

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

In an elder law practice, it is important, perhaps a professional obligation, to counsel clients about issues that are related either directly or indirectly to the “presenting problem.” For example, it is an article of professional faith that a client who wants to make a will should be counseled about other planning options, such as revocable trusts,

211. *See id.* at 38.

212. *Id.* at 39.

213. *Id.* at 41.

powers of attorney, health care proxies and living wills.²¹⁴ These options are tools of empowerment for clients to maintain their autonomy and independence by appointing agents and providing directions for decision-making after they become incapacitated.²¹⁵ The goals underlying this mantra of professional responsibility—client autonomy and independence—are emblematic of the values of mainstream American culture. Other cultures' attitudes toward planning for disability and death, however, illustrate the need for a culturally competent perspective toward client counseling and informed consent. When it comes to health care and end of life decision-making, the values of a client must be understood in order to know how (or if) to raise the issues, counsel the client, and draft an appropriate advance directive. The lawyer also needs to be aware of her own attitudes toward the right of self-determination, the medical profession, illness, and death. These issues engender very different responses from lawyers and clients, even among those who share a common culture. Some communities have values and moral perspectives that are very different than mainstream Western biomedicine and bioethics.²¹⁶

For example, in the traditional Navajo culture, it is believed that events are shaped by thought and language.²¹⁷ For a traditional Navajo patient, the standard client-centered approach of disclosing risks, sharing bad news, and counseling clients about planning for incapacity violates the Navajo value of thinking and speaking in the "positive way."²¹⁸ A health care provider or lawyer from mainstream Western culture typically views the client's interests as best served by counseling about options to facilitate an informed decision. The client who resists this discussion could be viewed as "difficult" and undermining her own

214. See ACTEC, COMMENTARIES, *supra* note 17, at 30.

215. The use of an advance directive such as a health care proxy or living will allows a client to direct the course of their medical treatment in the event of incapacity. A health care proxy is a document in which a person can appoint an agent to make decisions based on the expressed wishes of the person (written or oral) or alternatively, in the person's best interests. See, e.g., N.Y. PUB. HEALTH LAW § 2982 (McKinney 1993) (describing the rights and duties of the agent). A living will does not appoint an agent, but provides evidence of the person's wishes about medical treatment. See, e.g., *Matter of Westchester Medical Center*, 531 N.E.2d 607, 613 (N.Y. 1988) (describing a living will as the ideal means of conveying a patient's treatment wishes); *Matter of May v. Wartburg Health Center*, N.Y.L.J., May 8, 1997, p. 34, col. 4 (Sup. Ct. Westchester County).

216. See, e.g., Joseph A. Carrese & Lorna A. Rhodes, *Western Bioethics on the Navajo Reservation: Benefit or Harm?*, 274 JAMA 826, 826 (1995) (revealing the results of a study of the Navajo perspective on the discussion of "negative information," such as the disclosure of risk and "bad news").

217. See *id.*

218. See *id.* at 826, 828.

best interests. The professional may not even be aware of the extent to which her own (positive) attitudes toward the medical profession and mainstream health care influences her judgment about the client's attitudes.²¹⁹

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

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

C. Role Versatility and Adaptability

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

The context of a particular case will influence the extent to which one or more of these alternative models apply or are incorporated. Although a lawyer may fully embrace one conception of her role to the exclusion

219. See generally P.V. Caralis et al., *The Influence of Ethnicity and Race on Attitudes Toward Advance Directives, Life Prolonging Treatments, and Euthanasia*, 4 J. CLINICAL ETHICS 155 (1993) (describing a study of preferences of African-Americans, Hispanics, and non-Hispanic whites regarding end of life medical care and attitudes toward discussing these issues with family members and health care providers).

of others, it is more likely that the traditional conception and alternative models will form the raw materials from which lawyers construct their individual professional identities and chart their course of action in a particular case. The development of role versatility and adaptability is a process in which lawyers become aware of their multiple and nuanced roles, grow comfortable in various roles, and adapt them to the demands of individual cases.

1. The Zealous Advocate: Representing an Alleged Incapacitated Person

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

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

A lawyer adopting a traditional approach to confidentiality would not disclose any of these problems to the client's family. Under the Model

Rules, an attorney is permitted to seek a guardianship or take other protective action.²²⁰ Under the Code of Professional Responsibility, however, the duty to preserve the confidences and secrets of the client appears to preclude the attorney from making any kind of disclosure.²²¹ Under these circumstances, the duty to preserve confidentiality should yield to a more compelling obligation to disclose information to family members so that they can initiate appropriate protective action. Although the Model Rules permits such action, a lawyer must still decide if disclosure is appropriate.

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

2. Influencing Clients: Lawyer as Moral Agent

An alternative conception of the lawyer's role is the lawyer as professional who influences the client's moral and ethical sensibility.²²³ Regardless of the particular analogy (i.e., friend, spouse, moral agent), the common theme is that the lawyer should engage the client in a moral discourse and attempt to influence the client to be a better person and do the right thing (as viewed by the lawyer). This formulation creates a

220. See MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.14 (1983).

221. See MODEL CODE OF PROFESSIONAL RESPONSIBILITY Canon 4 (1980).

222. A "best interests" analysis is an objective standard that attempts to determine what the best course of action would be based on all the circumstances. In reality, it is difficult to fully separate the objective and subjective approaches. The factors that are used to determine a person's "best interests" vary according to the context. In a situation where a surrogate is making decisions about health care for an incapacitated person, the factors would relate to the diagnosis and prognosis of the person's physical and mental condition. Although the surrogate may only have bits of information about the person's wishes, there is usually sufficient knowledge to inform the best interests analysis. In New York, a guardian appointed to make a decision about transferring property is guided by a hybrid standard that follows the wishes of the incapacitated person within reason, but if those wishes are not known, an objective reasonableness standard is utilized to produce the best choice. See *In re Pflueger*, 693 N.Y.S.2d 419 (Sup. Ct. 1999).

223. See *supra* Part III (discussing alternatives to the traditional conception of the lawyer's role).

wholly different role for the lawyer and assumes that lawyers have a better understanding of the “right thing to do” than clients. It also runs the risk that lawyers will impart their own values on clients, rather than providing representation that allows the clients to realize their goals. Despite these limitations, there are potentially significant benefits to the quality of representation when lawyers consider the ethical and moral dimensions of their cases.

In the Allen case study, the student intern inferred the “goodness” of Mrs. Allen based on what he observed, his interpretation of the client’s words, and his assumptions about how she would treat her husband and exercise her newly acquired fiduciary powers.²²⁴ The student played a passive role and did not engage the client in the moral and ethical dimensions of the representation. Imagine that our assumptions about Mrs. Allen were completely wrong. Although at one time she was a loving spouse, wholly devoted to preserving her husband’s dignity, his Alzheimer’s Disease had taken its toll emotionally. She now wanted only to dump him in a nursing home and use the power of attorney to transfer the house to herself. Her ultimate goal was to make sure that he had adequate care and then to resume a new life on her own, leaving the destruction of Alzheimer’s Disease behind.

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

In reality, the results will be less dramatic than this kind of revelation. I overdramatize the lawyer’s ability to “save” the client to make the point that the quality of representation in the Allen case would have been improved with a more direct discussion with Mrs. Allen. The purpose would be to elicit her feelings about being a caretaker for her husband and explore the implications of those feelings for her future

224. See *supra* Part II (discussing an elderly wife’s endeavors to obtain a power of attorney for her husband, who has Alzheimer’s Disease).

actions related to his living arrangements, care, and ownership of their home.

3. Lawyer as Moral Activist and Social Justice Advocate

When the goal of representation includes promoting the public good²²⁵ and social justice²²⁶ the lawyer may take an approach that diminishes the role of client autonomy to accomplish what the lawyer believes is a just result or one that furthers the public interest. In the Allen case, the student's desire to help the clients avoid a guardianship proceeding was motivated by his desire to achieve a just result and one that promoted social justice concerns because it enabled the clients to bypass the court system, preserve their dignity and privacy, and save a significant percentage of their savings.

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

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

225. See LUBAN, *supra* note 77, at 173 (discussing "moral activism" as putting one's skills to work for the common good).

226. See Simon, *supra* note 15, at 1090 (arguing that the lawyer should take actions that are most likely to promote justice).

227. See, e.g., Paul R. Tremblay, *Practiced Moral Activism*, 8 ST. THOMAS L. REV. 9, 14-15 (1995) (comparing the application of David Luban's moral activism and William Simon's ethical discretion to an eviction case laden with ethical conflicts).

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

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

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

The problems of reconciling differing interests are magnified when the interests of each family member must be catalogued and meshed

228. See, e.g., Patricia M. Batt, *The Family Unit as Client: A Means to Address the Ethical Dilemmas Confronting Elder Law Attorneys*, 6 GEO. J. LEGAL ETHICS 319, 341-42 (1992) (proposing that family unit representation be implemented under Model Rule 2.2, with the proviso that the lawyer not have to withdraw as intermediary if one client so requests, but instead be permitted to represent the family without the consent of the alienated member until removed by a majority); Russell G. Pearce, *Family Values and Legal Ethics: Competing Approaches to Conflicts in Representing Spouses*, 62 FORDHAM L. REV. 1253, 1294-1318 (1994) (proposing “Optional Family Representation” as an alternative form of representation that honors the autonomy of individual clients by allowing them to withdraw, but also emphasizes the interests of the family as a group); Shaffer, *supra* note 185 (rejecting individualistic approach to legal representation and advocating a view of the family as an organic community that should be nurtured and preserved by the lawyer); *Symposium: Should the Family be Represented as an Entity?*, 22 SEATTLE U. L. REV. 1 (1998) (discussing whether lawyers can successfully represent an entire family as opposed to individual members).

229. Professor Pearce’s proposal for “optional family representation” allows for a disgruntled family member to withdraw from representation. See Pearce, *supra* note 228, at 1300.

together as a whole to define the interests of the family unit. How does a lawyer for a family chart a course of representation when there is no clear consensus or majority? Consider the following examples and imagine a lawyer has represented each family as a unit over a period of time during which all members had decision-making capacity:

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

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

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

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

The benefits that flow from representing the family group can often be attained by representing one or more individual members of the family, and shaping the terms of the representation to attain the family's

common goals.²³⁰ In the above examples, the lawyer may be able to achieve a more just result that comports with the wishes and interests of the vulnerable person through multiple representation of certain individual members of the family.

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

5. Guardianship and Multiple Representation: The Lee Family

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

A family friend who directed the local community center called our office and described how the Lee family had been struck by tragedy: Ralph, the father, died in October, 1996, and Alba, the mother, in her seventies, suffered from Alzheimer's Disease and resided in a local nursing home. Bert, an adult son, was gainfully employed and lived about twenty miles from the family home. Another adult son, Cal, had a neurological disorder that prevented him from working. Cal received Supplemental Security Income benefits due to his disability. Irene, the oldest child, was in her early forties and was slowly recovering from

230. Family representation has been compared to Brandeis's concept of the "lawyer for the situation." This infamous phrase provoked considerable controversy and almost jeopardized the Senate approval of Brandeis's nomination to the Supreme Court. *See, e.g.,* John P. Frank, *The Legal Ethics of Louis D. Brandeis*, 17 STAN. L. REV. 683, 702 (1965); Spillenger, *supra* note 96, at 1502-11. The common thread in this form of representation is that the lawyer's duty to the "entity" or "situation" is greater than to any of its members or constituent parts. Brandeis was representing members of a family business who sought his advice regarding creditors. Brandeis met with the parties and essentially imposed his own solution on the problem. This approach is different than the form of family representation proposed by Patricia Batt, because Brandeis solved the problem but did not follow the wishes of the majority. *See* Batt, *supra* note 228, at 340.

two strokes that had rendered her disabled. Irene was receiving Social Security Disability Insurance benefits based on her employment record.

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

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

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

To analyze the conflict of interest, we needed to identify the interests of the potential clients. Both Cal and Irene wanted to help Cal stay in the house because that was what their parents wanted. Therefore, the conflict of interest was only potential, and not actual. Irene understood

that the transfer to Cal would take away the possibility that she would inherit a share of the house upon her mother's death. This concern was mitigated by the possibility that without the transfer, Medicaid would assert its right to seek reimbursement against the mother's estate when she died for the cost of her care in the nursing home.²³¹

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

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

D. Anticipating Outcomes and Alternatives

The final element of the reflective model is oriented to outcomes and consequences. It factors in the actual consequences that flow from a lawyer's solutions to ethical dilemmas, such as preventing or triggering litigation. Non-adversarial legal processes such as preventive law planning, problem solving, counseling, negotiation, and alternative dispute resolution are often preferable to formal litigation. A preventive law orientation recognizes that lawyers play an important role as counselors and problem solvers to help clients avoid litigation.²³³ The

231. Because Alba, the mother, was receiving Medicaid over the age of 55, there would be a right of recovery against her estate. Cal, as a disabled child, has the right to continue living in the house, but upon his death, the Medicaid agency could enforce its right and recover its expenditures from the sale of the house. The transfer to Cal, however, is an exempt transfer and Medicaid would lose its right of recovery against Alba. See 42 U.S.C. § 1396p(b)(1) (West 1992), *amended by* Budget Reconciliation Act, Pub. L. No. 103-66, § 13612(a), 108 Stat. 627 (to be codified at 42 U.S.C.A. § 1392p).

232. Postscript: Prior to the hearing, Irene suffered another stroke and was hospitalized for several weeks before transferring to a nursing home. Bert, the brother who was in the background, agreed to substitute as the petitioner. Bert testified at the hearing and the court appointed him guardian for the limited purposes of transferring the family home outright to Cal. Despite Cal's neurological impairment, the judge was satisfied that Cal had the functional capacity to manage the house as the owner.

233. See, e.g., Hon. Edward D. Re, *The Lawyer as Counselor and the Prevention of Litigation*,

ability to resolve problems informally, or through alternative methods of dispute resolution, avoids the heavy financial and emotional cost of litigation. In the elder law context, solutions are explored from a “least restrictive alternative” perspective that is the foundation of progressive guardianship statutes. These statutes craft nuanced and individualized arrangements that preserve the autonomy and liberty of the incapacitated person.²³⁴

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

31 CATHOLIC U. L. REV. 685 (1982) (stressing that good lawyering minimizes litigation between parties by “stabilizing relationships and promoting understanding and cooperation”).

234. See, e.g., N.Y. MENTAL HYG. LAW § 81.01 (McKinney 1996) (articulating the legislative findings and purpose for the statute which is, in part, to make available to incapacitated persons the least restrictive method of intervention). The least restrictive approach seeks to utilize the form of intervention that will maintain the autonomy and liberty of the incapacitated person to the greatest extent possible. In New York, before appointing a guardian, a judge must consider whether there are available resources that would make the appointment of a guardian unnecessary. See *id.* § 81-02(a). These resources include visiting nurses, homemakers, home health aides, adult day care, powers of attorney, health care proxies, trusts, representative payees, and residential care facilities. See *id.* § 81-03(e). If the person is found to be incapacitated, the court will determine if the person’s needs can be met by authorizing a single or series of transactions of protective arrangements without appointing a guardian or with the assistance of a special guardian. See *id.* § 81-16(b). If a guardian needs to be appointed, the court will only grant the powers necessary to assist the person with personal needs and property management. See *id.* § 81-16(c); see also *In re Hammons* (Ehmke), 625 N.Y.S.2d 408 (Sup. Ct. 1995) (appointing a guardian with limited powers and only for a period of time necessary to make arrangements to provide for persons who were not cognitively impaired in the traditional sense, but based on functional approach were not able to understand the nature and consequences of their limitations).

235. These arrangements include health care proxies, which name an agent to make health care decisions in the case of incapacity; living wills, which provide directions about end of life health care treatment; powers of attorney, which name an agent to make decisions about property; and revocable trusts, which also provide a mechanism for managing property for an incapacitated person.

236. The appointment of a guardian for a person is a severe limitation or deprivation of fundamental rights. The person adjudicated to be incapacitated may lose control over finances, the right to decide where to live, and other decisions about property and personal care.

adversarial model tend to see clients as parties in a lawsuit and fail to explore alternatives with sufficient rigor.²³⁷

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

V. CONCLUSION

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

It is tempting to look to practice-specific codes of conduct as the answer to the troublesome ambiguity in professional responsibility. There is little doubt that more practice-sensitive codes could provide

237. The economic impact of these decisions is related to the litigation impact. Representing a client in court will often result in larger attorney’s fees than counseling that prevents litigation, negotiation that settles a controversy, or a recommendation that the dispute be mediated or resolved in an alternative fora.

238. This implies a flexibility to re-examine the effectiveness of a general approach to representation in a particular case and adjust it accordingly. See Simon, *supra* note 15, at 1098. Simon explains that his discretionary approach consists of a set of “weak presumptions” that may have to be revised if one of its underlying assumptions does not apply in a particular case. See *id.*

more relevant guidance across a broader spectrum of practice areas. It is impossible, however, and perhaps unwise, to completely eliminate the discretion that lawyers utilize when grappling with ethical quandaries. Conceptual models that make explicit the factors inherent in the decision-making process will help inform the quality of analysis and improve the quality of client representation.