

Golden Oldies

The Graying of Professional Responsibility

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A popular book of a few years ago, Megatrends, was written by a man who collected newspaper articles for awhile and then identified ten major trends in society that he believed would change our lives. Everything he told us we already intuitively knew, but it was kind of interesting. In that same great literary tradition I note the legal services megatrend of an aging client base for those of you in general practice. This is not only good news for your clients who get to live longer, but for you as well. You can expect to serve these clients for many more years. Better than that, as older adults they figure to be responsible citizens who are in a position to pay your fees. A win--win situation, if I ever saw one.

Older adult clients, however, present a different context for meeting fiduciary obligations. The gravity of this context is heightened when the older adult is of questionable competence. Lawyers not conversant with developments in the new field of elder law and the related professional responsibility duties can suddenly find themselves in an ethics free fall and facing a claim of malpractice. The purpose of this article is to provide a snapshot of some of the ethical and risk management issues of older adult representation. The idea is to assist you in spotting problems and provide a start for more detailed analysis.

A Legal Services Strategy for Older Adults

Part of the problem in providing legal service to older adults is there is not a magic definition of when a client enters that status. Neither is there an automatic diminution of mental or physical capacity because a certain age is reached. In thinking about older adult clients it is important to recognize that older adults are not just a cross section or random sample of their age group. They are survivors who in some combination are likely to be more healthy, more intelligent, better educated, and better off financially than those who predeceased them.

There are, however, some predictable attitudes that go with aging which often concern money, religious feelings, retirement status, and anticipation of death. A decline in sight, hearing, and physical skills such as driving can also be expected in even the most vital older adults. The task is to inform yourself about the aging process to the degree necessary to adequately communicate with older adults in a responsive and sensitive way. Client counseling is a skill and one size does not fit all.

In addition to gaining a perspective on older adult feelings and attitudes look around your

office with a view to their convenience and comfort. Is your reception area designed appropriately? Do you use your computer's large print function to prepare documents easier to read? Do you schedule appointments at times best for their situation? If you can find time to read just one book on aging, read Judge Richard A. Posner's *Aging And Old Age* (U. of Chicago Press; 375 pages).

An Overview of Older Adult Professional Responsibility Issues

Lawyer Competence:

RPC 1.1 Competence requires that lawyers know what they are doing. Most older adult matters concern transactions rather than litigation. The obvious substantive law areas that require special attention are wills, estate planning, trusts, fiduciaries, and taxation. Divestment of assets is a particular problem if related to Medicaid eligibility. In certain circumstances current law criminalizes legal advice to divest assets to qualify for Medicaid. I was surprised to learn that more older adults are divorcing after lengthy marriages. This kicks in all sorts of property issues such as real estate, reverse mortgages, pensions, insurance, and long term care support.

If you balk at recognizing new areas of law such as elder law, it's time to overcome tradition and see the good in mandatory CLE. Competent representation and good risk management necessitate staying current on elder law developments across the spectrum of substantive law or declining the representation of older adults.

Client Competence:

The most difficult professional responsibility problems commence when representing an older adult with diminished mental capacity. A little eccentric behavior is not incompetence. Conversely, wildly self destructive behavior demands quick action to protect the client. Most of us know what to do in these situations. But what action do you take if the client appears to be partially competent or mentally unstable suggesting a condition of relative incompetence? One commentator lists these options:

- (1) withdraw;
- (2) seek a guardian for the client, with the lawyer either serving as the petitioner or recruiting a third party to do so;
- (3) seek unofficial consent from a family member or close friend;
- (4) seek to persuade the client to make different or "better" choices;
- (5) proceed as de facto guardian; or
- (6) continue to presume competence irrebuttably.¹

The pertinent authority in Kentucky is RPC 1.14 Client Under a Disability.² The overarching principle in the rule is "the lawyer shall, as far as reasonably possible, maintain a normal client-lawyer relationship with the client." I can find no Kentucky authority interpreting Rule 1.14, but there is a helpful recent ABA ethics opinion.³ It concludes:

When a client is unable to act adequately in his own interest, a lawyer may take appropriate protective action including seeking the appointment of a guardian. The lawyer may consult with diagnosticians and others, including family members, in assessing the client's capacity and for guidance about the appropriate protective action. The action taken should be the least restrictive of the client's autonomy that will yet adequately protect the client in connection with the representation. Withdrawal from representation of a client who becomes incompetent is disfavored, even if ethically permissible under the circumstances.

The lawyer may recommend or support the appointment of a particular person or other entity as guardian, even if the person or entity will likely hire the lawyer to represent it in the guardianship, provided the lawyer has made reasonable inquiry as to the suggested guardian's fitness, discloses the self-interest in the matter and obtains the court's permission to proceed. In all aspects of the proceeding, the lawyer's duty of candor to the court requires disclosure of pertinent facts, including the client's view of the proceedings.

The ABA recently adopted two new comments to Model Rule 1.14 covering emergency legal assistance when the health, safety, or financial interest of a person under a disability is threatened with imminent and irreparable harm.⁴ You can expect continuing developments to refine this sensitive issue. What is provided here is just the tip of the iceberg. A good start point for in-depth research is the ABA's Annotated Model Rules of Professional Conduct (3rd ed.) at pages 215-232.

Older Adult Client Relations and Communication:

The start point in older adult client relations is to be sure you know who your client is. Often lawyers are contacted on behalf of an older adult by one of their adult children or some other third party. It is easy to confuse the situation by treating the third party (who may be paying your fee) as a joint client when the older adult is the only client. It is crucial to use letters of engagement to clearly identify who the client is, the scope of the engagement, the fee agreement, and any special instructions. An example of a special instruction is consent to reveal confidential information if the circumstances indicate this is necessary to adequately represent the older adult.⁵ RPC 1.2 Scope of Engagement is helpful in thinking through how the older adult client and lawyer determine objectives, means, and limitations of the representation. RPC's 1.8(f) and 5.4(c) provide guidance for maintaining professional independence when fees are paid by a third party. Note that, unless the payment is in accordance with an agreement between the client and a third

party, the older adult must be consulted and give consent for the payment arrangement. Written consent is not required, but is the best practice.

Communicating with and advising competent older adults is no different than any other representation. RPC's 1.4 Communication and 2.1 Advisor provide the guidance. When there is concern that the older adult cannot make adequately considered decisions these rules are not quite so helpful. RPC 1.14 sets the tone for limited capacity situations by requiring the lawyer to maintain a normal client-lawyer relationship insofar as possible. RPC 2.1 gives a lawyer considerable latitude in the scope of advice offered. A lawyer may refer "not only to law but to other considerations such as moral, economic, social and political factors, that may be relevant to the client's situation." A comment to the rule is pertinent to advising older adults. It provides in part:

Family matters can involve problems within the professional competence of psychiatry, clinical psychology or social work; business matters can involve problems within the competence of the accounting profession or of financial specialists. Where consultation with a professional in another field is itself something a competent lawyer would recommend, the lawyer should make such a recommendation. At the same time, a lawyer's advice at its best often consists of recommending a course of action in the face of conflicting recommendations of experts.

RPC 1.4 Communication recognizes that fully informing a client is not always feasible. The comments to the rule include these qualifiers:

"Ordinarily, the information to be provided is that appropriate for a client who is a comprehending and responsible adult. However, fully informing the client according to this standard may be impracticable, for example, where the client is a child or suffers from mental disability. See Rule 1.14."

"Practical exigency may also require a lawyer to act for a client without prior consultation."

"In some very unusual circumstances, a lawyer may be justified in delaying transmission of information when the client would be likely to react imprudently to an immediate communication. Thus, a lawyer might withhold a psychiatric diagnosis of a client when the examining psychiatrist indicates that disclosure would harm the client. A lawyer may not withhold information to serve the lawyer's own interest or convenience."

Be especially careful when communicating with an older adult who is not your client. RPC's 4.3 Dealing with Unrepresented Person and 4.4 Respect for Rights of Third Persons are concerned with lawyers taking advantage of people who may misunderstand the situation, be unsophisticated, or be intimidated by a lawyer into acting against their own interest. These rules are tailor made for protecting older adults. RPC 4.3 affirmatively requires lawyers to correct any misunderstanding about their role. The comment to the rule provides that lawyers should not give advice to an unrepresented person other than to obtain counsel. Careful documentation of the file is good risk management when interviewing older adults, especially those with apparently diminished capacity. In some cases a witness to the interview may be appropriate.

Conflicts and Prohibited Transactions:

The risk of a conflict of interest in representing an older adult is high when compared to other representations. It is beyond the scope of this article to do more than flag the primary danger areas. They are intergenerational conflicts that typically center on preservation of assets; spousal conflicts in estate planning and divorce matters; and fiduciary conflicts when a lawyer represents a fiduciary or is a fiduciary.

RPC 1.8 Conflicts of Interest: Prohibited Transactions has three rules which have extra sensitivity when representing older adults:

- 1.8(a) concerns entering into a business transaction with a client. It contains strict disclosure requirements prior to consummating the transaction.
- 1.8(b) concerns using information relating to representation of a client to the disadvantage of the client.
- 1.8(c) prohibits a lawyer from preparing an instrument giving the lawyer a substantial gift under most circumstances. Conclusion Older adults represent a growing part of our society requiring legal service. They figure to be good clients who can pay their bills. Some, however, will not have adequate resources. Others will be of diminished capacity presenting lawyers with the most difficult professional responsibility issues they encounter. Bitter spousal and intergenerational conflicts over assets often put the lawyer in the middle of family feuds.

Conclusion

Older adults represent a growing part of our society requiring legal service. They figure to be good clients who can pay their bills. Some, however, will not have adequate resources. Others will be of diminished capacity presenting lawyers with the most difficult professional responsibility issues they encounter. Bitter spousal and intergenerational conflicts over assets often put the lawyer in the middle of family feuds.

In response to these circumstances you should develop a strategy for serving older adults and coping with the tough issues. Your strategy should include older adult counseling skills, elder law CLE, donated legal service, a good working knowledge of the Kentucky Rules of Professional Conduct, and risk management.

The key risk management tools are letters of engagement, nonengagement, and disengagement. A careful conflict of interest analysis must be conducted at the outset of the representation. Just as important is to be alert for the development of a conflict during the representation. Older adult representation carries a greater risk of conflicts developing well into the matter than do most other representations. Client communication must be emphasized. File documentation is essential and nowhere more important than when getting the older adult's consent to a settlement or when the older adult is making an important financial decision. Withdrawal from representing an impaired older adult is

discouraged. When withdrawal cannot be avoided, it must be done carefully and in strict compliance with the requirement to protect the client's interest.

Endnotes

1 See Tremblay, On Persuasion and Paternalism: Lawyer Decisionmaking and the Questionably Competent Client, 1987 Utah L. Rev. 515, 519-20.

2 Rule 1.14 Client Under a Disability

(a) When a client's ability to make adequately considered decisions in connection with the representation is impaired, whether because of [minority] age, 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.

Comment

(1) The normal client-lawyer relationship is based on the assumption that the client, when properly advised and assisted, is capable of making decisions about important matters. When the client is a minor or suffers from a mental disorder or disability, however, maintaining the ordinary client-lawyer relationship may not be possible in all respects. In particular, an incapacitated person may have no power to make legally binding decisions. Nevertheless, a client lacking legal competence often has the ability to understand, deliberate upon, and reach conclusions about matters affecting the client's own well-being. Furthermore, to an increasing extent the law recognizes intermediate degrees of competence. For example, children as young as five or six years of age, and certainly those of ten or twelve, are regarded as having opinions that are entitled to weight in legal proceedings concerning their custody. So also, it is recognized that some persons of advanced age can be quite capable of handling routine financial matters while needing special legal protection concerning major transactions.

(2) The fact that a client suffers a disability does not diminish the lawyer's obligation to treat the client with attention and respect. If the person has no guardian or legal representative, the lawyer often must act as de facto guardian. Even if the person does have a legal representative, the lawyer should as far as possible accord the represented person the status of client, particularly in maintaining communication.

(3) If a legal representative has already been appointed for the client, the lawyer should ordinarily look to the representative for decisions on behalf of the client. If a legal representative has not been appointed, the lawyer should see to such an appointment where it would serve the client's best interests. Thus, if a disabled client has substantial property that should be sold for the client's benefit, effective completion of the transaction ordinarily requires appointment of a legal representative. In many circumstances, however, appointment of a legal representative may be expensive or traumatic for the client. Evaluation of these considerations is a matter of professional judgment on the lawyer's part.

(4) If the lawyer represents the guardian as distinct from the ward, and is aware that the guardian is acting adversely to the ward's interest, the lawyer may have an obligation to prevent or rectify the guardian's misconduct. See Rule 1.2(d).

Emergency Legal Assistance

(6) In an emergency where the health, safety or a financial interest of a person under a disability is threatened with imminent and irreparable harm, a lawyer may take legal action on behalf of such a person even though the person is unable to establish a client-lawyer relationship or to make or express considered judgments about the matter, when the disabled person or another acting in good faith on that person's behalf has consulted the lawyer. Even in such an emergency, however, the lawyer should not act unless the lawyer reasonably believes that the person has no other lawyer, agent or other representative available. The lawyer should take legal action on behalf of the disabled person only to the extent reasonably necessary to maintain the status quo or otherwise avoid imminent and irreparable harm. A lawyer who undertakes to represent a person in such an exigent situation has the same duties under these Rules as the lawyer would with respect to a client.

(7) A lawyer who acts on behalf of a disabled person in an emergency should keep the confidences of the disabled person as if dealing with a client, disclosing them only to the extent necessary to accomplish the intended protective action. The lawyer should disclose to any tribunal involved and to any other counsel involved the nature of his or her relationship with the disabled person. The lawyer should take steps to regularize the relationship or implement other protective solutions as soon as possible. Normally, a lawyer would not seek compensation for such emergency actions taken on behalf of a disabled person.

Disclosure of the Client's Condition

(5) Rules of procedure in litigation generally provide that minors or persons suffering mental disability shall be represented by a guardian or next friend if they do not have a general guardian. However, disclosure of the client's disability can adversely affect the client's interests. For example, raising the question of disability could, in some circumstances, lead to proceedings for involuntary commitment. The lawyer's position in such cases is an unavoidably difficult one. The lawyer may seek guidance from an appropriate diagnostician.

3 ABA Standing Committee on Ethics and Professional Responsibility Formal Opinion 96-404, Client Under a Disability; August 2, 1996.

4 Amendment To ABA Model Rules Of Professional Conduct Rule 1.14 (Client Under a Disability)(1995 Edition).

5 ABA Standing Committee on Ethics and Professional Responsibility Informal Opinion 89-1530 (1989) found "implied authority" to disclose information to the extent necessary to serve the client's best interest when the lawyer believed the client incompetent. "Thus, the Lawyer in this position may properly consult a physician concerning suspected disability." See RPC 1.6 Confidentiality of Information.