Ethical Issues Surrounding Surrogate Health Care Decisions

I. Introduction: Consent and Competency

It is well understood by the public that a person has the right to consent to a medical treatment. The doctrine of consent stems from our concept of battery. "At common law, even the touching of one person by another without consent and without legal justification was a battery.[1] "This notion of bodily integrity has been embodied in the requirement that informed consent is generally required for medical treatment."[2] "Every human being of *adult years and sound mind* has a right to determine what shall be done with his own body; and a surgeon who performs an operation without his patient's consent commits an assault, for which he is liable in damages."[3] "The logical corollary of the doctrine of informed consent is that the patient generally possesses the right not to consent, that is, to refuse treatment."[4] In practice, a competent person will be asked to consent to medical treatment.

While it is clear that a competent person may consent to treatment, most state statutes provide that a person who is incompetent cannot consent to medical treatment.[5, 6] While every state's definition may differ, a good working definition of competent might be:

> the ability to understand and appreciate the nature and consequences of health care decisions, including the benefits and risks of and alternative to any proposed health care, and to reach an informed decision.[7]

A person may be incompetent due to a variety of reasons and circumstances. For example, the person may be under the age of 18, unable to understand the health care decision, or unable to communicate a health care decision. For whatever reason, if a person is incompetent, he or she cannot consent to medical treatment.

If a person is incompetent and not able to consent for him or herself, then the only way for the person to consent to medical treatment is through a surrogate. A surrogate is a person who speaks for the incompetent and could be a family member, friend, spouse or health care provider.

Although a surrogate is the only way for an incompetent person to consent, there are limits to the surrogate's decision-making authority. Due to advances in science and medicine, the range of health care decisions which might have to be made by a surrogate far exceed the legal guidance available, which brings the surrogate to the threshold of ethics.

II. The Law Regarding Surrogate Decision-Making: *What We Know*

Surrogate decision makers can look to the law for guidance regarding their authority, the standard that they base their decisions on, and the limits to their authority.

A. By What Authority?

Surrogate health care decision makers may derive their authority from statutes that create a health care proxy or from other sources when a proxy is not available.

1. Health Care Proxy Statutes. At this time, all 50 states have a statute which creates a durable power of attorney for health care or a health care proxy.[8] Such statutes outline the requirements for the creation of a surrogate's authority, the execution formalities and other details. Due to space constraints, this presentation will focus on the proxy statutes of Massachusetts, New York, California and Florida.[9]

Although it is common for estate planning professionals to draft a health care proxy for a client, less common is the circumstance when the proxy is actually used and there is conflict with other family members, or a health care professional or institution. In this situation, the professional may find himself or herself in an interesting ethical predicament illustrated by the following hypothetical:

> *An attorney drafts estate planning documents, including a proxy, for his client, A. The proxy names A's son, B, as the surrogate decision maker. A becomes incapacitated, and B comes to the attorney with the proxy in hand and asks the attorney for assistance and representation. Can the attorney, who represented A, now represent B as he exercises the authority given in the proxy?*

According to the American Bar Association's Model Rules for Professional Conduct, an attorney who has formerly represented a client cannot thereafter represent another person in the same or a substantially related matter in which that person's interests are materially adverse to the interests of the former client unless the former client gives informed consent, in writing.[10] Here, the attorney's former client, A, is not competent to give the written consent waiving the conflict. But is this representation materially adverse? The attorney may simply be carrying out the express wishes of his client, A, by assisting B in exercising the proxy power that A gave to him. This situation may be more analogous to representing a principal and then an agent in a business endeavor than it is to representing a ward and then the guardian in a proceeding to establish the guardianship.

2. Absence of a Health Care Proxy. In many circumstances, a health care proxy was never executed or could never have been executed. For example, the person in need of a surrogate may never have had the capacity to execute a proxy because that person has always been a child or has always been unable to understand health care decisions. When a proxy is not available to authorize a surrogate to act, the surrogate must look to other sources for authority.

One source of a surrogate's authority other than a proxy could be a statutory provision allowing a family member to make health care decisions for the incompetent person. For example, the Massachusetts statutes provide that if no health care proxy has been executed, the health care provider may rely on the informed consent given by responsible parties on behalf of the incompetent patient to the extent permitted by law.[11] In other states, a parent may have authority as a health care surrogate without statutory authority.

Another source of a surrogate's authority other than a proxy could be a formal guardianship. In the well-known Cruzan case, the patient did not execute a proxy while competent and her parents became the co-guardians of her person with the authority to make health care decisions, although with some limitations.[12]

In New York, a parent of a child may have authority to make decisions. In the Matter of AB involved a child who was in a persistent vegetative state.[13] The child never had the capacity to execute a health care proxy. The child's mother as parent and natural guardian petitioned the court to remove life support. The Supreme Court of New York held that, as parent and natural guardian, the mother had the authority to consent to the removal of life support.

B. By What Standard?

In general there are two standards by which a surrogate decision maker may make health care decisions: substituted judgment and best interest.

Substituted judgment focuses on the patient's viewpoint:

"If a patient, while competent, expressed clear wishes regarding treatment, the standard for surrogate decision-making is substituted judgment (i.e., what the patient would have wanted, if competent.) In other words, if the patient's wishes are known are knowable, they are to be respected. The surrogate decision maker must endeavor to faithfully reflect the patient's wishes in making health care decisions."[14]

Some of the factors that a court might consider include the patient's expressed preferences, the patient's religious convictions and their relation to refusal of treatment, the impact on the patient's family, the probability of adverse side effects and the prognosis with and without treatment.[15]

Best interest focuses on the decision maker's viewpoint:

"If an incompetent patient's prior wishes are not known or knowable, the standard for surrogate decision-making is best interest (i.e., what is best for the patient). The surrogate decision maker must carefully assess the benefits and harm of various treatment options (including the option of no treatment) and determine which of these options has the most favorable benefit-harm ratio."[16]

Some of the factors that a surrogate could consider include the patient's present levels of physical, sensory, emotional and cognitive functioning, the quality of life, life expectancy and the prognosis for recovery with and without treatment, the various treatment options, the degree of humiliation, dependence and loss of dignity resulting from the condition and treatment, the opinions of the family, the reasons behind those opinions and the motivations of the family in advocating a particular course of treatment.[17]

Many of the state's statutes require that surrogates make decisions based on a combination of the standards. For example, under the Massachusetts proxy statute, the agent makes health care decisions "(i) in accordance with the agent's assessment of the principal's wishes, including the principal's religious and moral beliefs, or (ii) if the principal's wishes are unknown, in accordance with the agent's assessment of the principal's best interests."[18] The laws of Florida and California similarly require the surrogate to first consider the patient's wishes before considering the patient's best interests.[19] Under New York's health care proxy statute, the surrogate must first consult with a licensed physician, registered nurse, licensed psychologist, licensed master social worker or a licensed clinical social worker.[20] Then, the surrogate must make health care decisions in accordance with the patient's wishes, including the patient's religious and moral beliefs or, if the patient's wishes are not reasonably known and cannot with reasonable diligence be ascertained, in accordance with the patient's best interests.[21]

C. What Limits?

Although it seems that a health care surrogate has broad powers, he or she may not have unlimited power and authority to make decisions regarding the patient's health. Generally, if a surrogate has authority based on a health care proxy statute, then the authority is quite broad. For example, the Massachusetts statute states that "an agent shall have the authority to make **any and all health care decisions** on the principal's behalf that the principal could make, including decisions about life-sustaining treatment, subject, however to any express limitations in the health care proxy."[22] The term, "all decisions" has been interpreted broadly, and includes decisions regarding mental health care and involuntary confinement, as well as the authority to consent to treatment and refuse treatment, and the related issue of pain management.[23]

Although health care proxy statutes seem to provide broad powers, many proxy statutes expressly limit the authority of the agent to "health care decisions." For example, under the Massachusetts statute, "health care" means "any treatment, service or procedure **to diagnose or treat** the physical or mental condition **of a patient**."[24] The New York statute specifically states that a surrogate acting by proxy has no authority to make end-of-life decisions, absent evidence of a patient's wishes.[25] Therefore, some health decisions that a surrogate could be called on to make (discussed below) may not come within the definition of "health care decisions," and the surrogate may lack the authority to speak for the patient.

When the surrogate's authority is based on qualification as a guardian, the surrogate may still encounter limits to his or her authority to make health care decisions. For example, in the Cruzan case, the patient was in a persistent vegetative state and her parents became co-guardians.[26] The guardians decided to refuse treatment (or decided not to consent to treatment) on the patient's behalf. The guardians found that their authority to refuse to consent as a

surrogate was limited by a Missouri law, upheld by the Supreme Court, which required the guardians to produce clear and convincing evidence of the patient's wishes regarding end-of-life decisions Absent that evidence, the guardians were not able to make a surrogate health care decision.

III. Ethical Considerations Regarding Surrogate Decision Making: *What We Don't Know*

Given the limits on the scope of a surrogate's authority, there are many situations in which a surrogate finds that existing law provides insufficient guidance. Until the law catches up to scientific advances, resolving new and previously untested questions in these cases requires interpretation and extrapolation of existing law, with guidance from the ethical principles that helped shape existing law.

A. What Happens if a Patient Objects?

In some cases, a patient might object to the decision made by his or her surrogate health care decision maker. In the case of Health Care Proxies, the authority of the surrogate decision maker is limited to circumstances when the principal either cannot make, or unable to communicate, medical decisions for him or herself. Many proxy statutes address the conflict between the surrogate decision maker and the patient. In Massachusetts and New York, if the patient objects to a decision made by a surrogate pursuant to a health care proxy, then the patient's decision will prevail unless there is a court order regarding incapacity.[27] Similarly, in California, an agent is not authorized to make a health care decision if the principal objects to the decision.[28]

In Cohen, the patient gave her surrogate a health care power of attorney.[29] The surrogate made a decision under that authority that the patient should be confined to a mental health facility. The patient objected to the confinement, revoked the proxy and filed a motion to dismiss the hospital's petition for involuntary commitment. The Massachusetts court held that although the broad language of the proxy includes mental health decisions, if the patient objects to a decision, then the decision is invalid unless a court determines that the patient is incapacitated. The patient's objection functioned as a revocation of the proxy. Without authority under the proxy, the surrogate was forced to seek authority from the courts to make any health care decisions.

In some cases, if the patient objects but is found to be incompetent, then the court will use the best interest standard when making a decision regarding health care. In In re Storar, the patient was an adult who had never had the mental competency to express his health case preferences and who suffered from terminal bladder cancer.[30] The health care facility determined that the patient needed regular blood transfusions; however, after several transfusions had already taken place, the patient expressed discomfort and emotional stress. The patient's guardian decided to refuse to consent to further transfusions. The health care facility petitioned the court to override the patient's objection and the guardian's decision. The court held under the best interest standard that the treatments could continue because, although they were

disagreeable to the patient, they allowed him to maintain his usual mental and physical activities such as feeding himself and taking walks.

In the case of a patient whose incompetence is solely due to age, there remains a question as to whether his or her objection would be more persuasive to the court. Parents are the legal decision makers with respect to health matters for their children, although their authority is not unlimited, and the State may challenge decisions made by the parent if not in the best interests of the child. Consider also, if the child were seventeen years old, just on the cusp of being competent to consent to treatment, and she objected to her parent's consent to a particular treatment, such as a certain medication. Would the court take into consideration that she is near competency, and consider her wishes? Would the court apply the same standards as if the parent had petitioned to be appointed the guardian of her person after reached age 18?

B. <u>What Happens if the Decision Benefits Someone Other than the Patient?</u>

A health care surrogate may be asked to make a health-related decision that benefits someone other than the patient. For example, the spouse of a patient in a persistent vegetative state might desire to have children with that person, which would require the surrogate health care decision maker to consent to the harvesting of gametic material from the patient, or consent to the use of previously stored gametic material. Arguably, this process would not benefit the patient's health (although, if the patient had previously expressly the wish and desire to procreate, there may be "benefit" to the patient, albeit not directly related to the patient's health); rather, in this example, it benefits the patient's partner). In another example, the surrogate may request experimental, aggressive treatment for the patient in lieu of conventional treatment, and the experimental treatment may have potentially severely debilitating side effects, or an increated likelihood of fatality. The surrogate decision make may wish to include the patient in an experimental study for research purposes in which some of the participants may receive placebos instead of treatment, and may require the disclosure of medical information unrelated to the particular illness. Participation in the experimental study may not benefit, and may actually harm, the patient, but may benefit society at large. In other situations, the surrogate may be asked to consent to the patient donating an organ, such as a kidney, or bone marrow, to a family member, or, in a more extreme case, to consent to the storage of tissue or cells that may possibly be used to treat a child in the future, but for which there is no current need. This decision may not benefit the patient's health at all, but most certainly will expose the patient to unnecessary medical risk. The question remains whether a surrogate decision maker has the authority to make a decision which the patient may have made if competent, but that does not benefit the patient.

Decisions that benefit someone other than the patient are not decisions that a surrogate can make under the authority of a health care proxy. Under the language of most health care proxy statutes, a surrogate may make "health care decisions", defined as decisions for the diagnosis or treatment of the patient.[31] Under the Uniform Anatomical Gift Act, adopted with variations in all states, there are designated individuals who may consent to organ donation, provided the purpose of the donation is for transplantation, therapy, education or research.[32] It is not clear whether the health care surrogate may consent to organ donation, particularly if he or she is not a decision maker under the state statute. Even if such a decision will benefit the patient in some way as well as another person, the surrogate may not have the authority to

consent to a procedure which does not diagnose or treat the patient, much less one that may result in harm to the patient, as in the case of an experimental study.[33]

Perhaps the most interesting ethical question in this area is the situation where parents deliberately conceive another child in order to create a match for organ donation for an ill child. There are a number of ethical questions raised. First, was the decision to conceive a child deliberately with the intention of donating an organ ethical, and second, whether the parents are the appropriate persons to consent to the procedure when and if it is determined that the two children are an appropriate match for organ donation.

Even if the surrogate has authority as a court-appointed guardian, the surrogate may still be restricted in his or her ability to consent to a medical procedure which benefits someone other than the patient. In the Strunk case, the patient was an incompetent adult who had never had the capability to sign a health care proxy.[34] The patient's brother suffered from kidney disease and required a transplant, and the only family member who matched was the incompetent patient. The patient's guardians, his parents, thought it best to consent to the patient having one of his kidneys removed and donated to his brother and petitioned the court for authority to force the health care facility to comply. The Kentucky Court of Appeals held that it was in the best interest of the patient to donate a kidney to his brother because the patient was close to his brother, emotionally and psychologically dependent on him, and because his well-being would suffer more from the loss of his only brother than from the loss of one of his kidneys.

In contrast to the holding in the Strunk case, the Wisconsin Supreme Court found that guardians could not consent to the removal of a kidney for the benefit of a sibling. In In re Guardianship of Pescinski, the patient was an incompetent adult who existed in a catatonic state.[35] The patient was the only family member who provided an appropriate match for donating a kidney to another family member who would die without it. The court held that it was not in the best interest of the patient for the guardian to consent to such a procedure, noting that the patient was without understanding or ability to acknowledge the emotional and psychological benefits of having that family member continue to live. Therefore, the patient gained nothing from the donation and the procedure was not in his best interest.

While the subject of consent to organ donation during the patient's life is still a matter of debate, once the patient dies, the state statute, and the priority of decision makers thereunder, should apply. Under common law, the patient's next of kin has the right to make decisions concerning burial or cremation, organ donation and autopsy, subject to the overriding authority of the state to regulate those matters for the public safety.[36]

Once impossible, science has progressed to the point where it is possible for an incompetent person in a persistent vegetative state to have children, and the question becomes who has the right to consent to the removal of gametic material on behalf of the incompetent person? In many cases, no express consent to the removal was provided by the patient, nor was direction given as to the permissible use of the sperm or ova. A surrogate acting under a health care proxy likely would not have the authority to consent because the removal of sperm or ova is not a procedure to diagnose or treat the patient,[37] but such retrieval is occurring with increasing frequency, particularly if the treating physician is presented with some evidence of the patient's

wishes, as is sometimes available in the case of an expected decline in health. The Uniform Anatomical Gift Act, although applicable to bodily fluids, does arguably also does not apply, unless specific provisions are included in the particular state statute. For example, the New York statute specifically includes ova. In fact, many institutions are working to create guidelines for evaluating such requests for patients in a persistent vegetative state or post death.[38] If the courts have the authority to consent, which standard would they use: substituted judgment or best interest? And, even if the retrieval is accomplished successfully, it is not clear who has the authority to store the gametic material, nor is it clear who has permission to authorize its use, during the patient's life or following his or her death.[39] The scant case law that exists does not address postmortem procurement of gametic material.

C. What Happens if Someone Other than the Principal/Patient Objects?

If a person other than the patient objects to the health care decision made by the surrogate, some state statutes allow for a proceeding to challenge the surrogate's decision. For example, in Massachusetts and New York, the health care proxy statutes provide that a health care provider, guardian family member, or friend has the right to commence a special suit in court to override the surrogate's decision.[40] The petitioner must show that the surrogate's decision was made in bad faith or was not made in accordance with the standard set by law.[41] This type of proceeding is not as extensive as a guardianship proceeding and would likely only override a particular decision of the surrogate; the burden would be extremely heavy in any action to remove the surrogate.

In other cases, a person who objects to a surrogate's decision could institute a temporary or permanent guardianship proceeding to completely supersede the surrogate's authority to make any health care decision. For example, in the Guardianship of Elma Mason, the surrogate with authority under a health care proxy (the patient's son) and the temporary guardian (the health care facility) disagreed as to whether to enter a "do not resuscitate" order on the patient's chart.[42] The Massachusetts Court of Appeals held that the surrogate's authority to make health care decisions was terminated when the temporary guardian was appointed, because the petition of the temporary guardian qualified as a proceeding under the Massachusetts statute described above.

In New York, the health care proxy statute specifically states that the guardian can override a decision made by a surrogate health care decision maker. "Every adult shall be presumed competent to appoint a health care agent unless ... a committee or guardian of the person has been appointed for the adult...."[43] The appointment of a guardian prevents the patient from executing a valid health care proxy and prevents any already-appointed surrogate from making any health care decisions.

In contrast, the Florida statute provides that the surrogate continue to make all health care decisions even after a guardian of the person has been appointed, unless the court has modified or revoked the power of the surrogate.[44]

For these reasons, many Health Care Powers of Attorney documents include a guardian nomination provision to name the designated agent to serve as guardian of the person of the principal, in the event a guardianship proceeding is required. However, even if the surrogate decision maker is the guardian of the incompetent person, if there is conflict among family members, then the authority of the guardian may be limited and the courts may get involved. For example, in the well-publicized Schiavo case, a woman in a persistent vegetative state had not executed a proxy while capable of doing so.[45] Her husband and legal guardian made the decision to remove her artificial life support; however, her parents, and eventually the State of Florida, objected to the decision. When the guardian prevailed in the courts, the Florida legislature passed a law giving Governor Bush the authority to issue a stay.[46] In theory, a validly executed health care proxy and a court-appointed guardian should eliminate uncertainty and the need to use judicial resources; however, in reality, if there is conflict among family members, and especially if the government becomes involved, the courts may make the final decision.

D. What Happens if the Surrogate and the Person Financially Responsible do Not Agree on the Health Care Decision?

In some circumstances, the surrogate decision maker and the person financially responsible for payment for the health care treatment may not be the same person, and the surrogate responsible for financial decisions may believe that a particular experimental treatment which is not covered by insurance is not a wise use of the patient's resources. The financially responsible person could be a conservator or guardian of the property, the heirs or spouse of the patient, or the health care facility. The bifurcation of decision making can make an already difficult decision even more so.

In a case arising in New York prior to the adoption of the health care proxy statute, the spouse of a patient consented to the removal of the patient's feeding tube to be removed.[47] The health care facility refused to honor the consent, and petitioned the court to determine whether the life support should be removed. The court initially held that the spouse had not shown clear and convincing evidence of the patient's wishes to be free from life support, which was the appropriate standard at that time. Therefore, the patient remained on life support with the feeding tube. After the patient's death, the health care facility sued the spouse for payment of services relating to the time after the spouse had consented to the removal of life support. The New York Court of Appeals held that the facility rightfully refused to discontinue treatment because the burden to show the patient's wishes was on the spouse. The spouse had not met the burden, the treatment was appropriate, and the spouse was not excused from payment. Had the patient remained alive, it is not clear that she (or indeed anyone else with financial decision making authority) could have argued that the financial resources were inadequate to support the treatment. On the other hand, if the particular treatment were elective, the outcome might be different.

IV. Conclusion

Health care proxy statutes and other sources of authority give a surrogate health care decision maker the power to make decisions, but statutes and case law precedents have not kept

pace with the advances in medicine and science, and new application of existing science that blurs the line between treatment of the patient and procedures that benefit others. Clients, surrogates, and the attorneys who advise them, must consider ethics, as well as the law, to resolve the tough questions that science presents.

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[1] Cruzan v. Director, Missouri Dept. of Health, 497 U.S. 261, 269 (1990).

[2] Id.

[3] Id (emphasis added).

[4] Id. at 270.

[5] Mass. Gen. Laws ch. 201D, § 1; N.Y. Pub. Health Law § 2980.

[6] Incompetent persons are referred to in this paper as either "patients" or "principals." Health care agents and/or proxies are referred to as either a "surrogate" or "decision maker."

[7] Mass. Gen. Laws ch. 201D § 1.

[8] For a list of the state statutes and further discussion, see T.P. Gallanis, Write and Wrong: Rethinking the Way We Communicate Health-Care Decisions, 31 Conn. L. Rev. 1015, n.113 (1999).

[9] See Mass. Gen. Laws ch. 201D, § 1; N.Y. Pub. Health Law § 2980; Cal. Prob. Code § 4701; Fla. Stat. ch. 765.201.

[10] Model Rules of Prof'l Conduct R. 1.9(a).

[11] Mass. Gen. Laws ch. 201D, §16.

[12] Cruzan, 497 U.S. at 265.

[13] In the Matter of AB, 768 N.Y.S.2d 256 (N.Y. App. Div. 2003).

[14] Francoise Baylis, Expert Testimony By Persons Trained in Ethical Reasoning: The Case of Andrew Sawatzky. Journal of Law, Medicine & Ethics 224 v.28 i3 (Fall 2000); Superintendent of Belchertown State School v. Saikewicz, 370 N.E.2d 417, 423 (Mass. 1977) (refusal of treatment by parent-guardian).

[15] Woods v. Commw. of Kentucky, 142 S.W.3d 24, 34 (Ky. 2004) (internal quotations omitted).

[16] Baylis, supra.

[17] Woods, 142 S.W.3d at 35.

[18] Mass. Gen. Laws ch. 201D, § 5.

[19] Fla. Stat. ch. 765.205(1)(b); Cal. Prob. Code § 4714.

[20] N.Y. Pub. Health Law § 2982(2).

[21] Id. Interestingly, the New York statute specifically states that the surrogate has no authority to decide to remove nutrition and hydration if the patient's wishes are not known. Id. In other words, an end-of-life decision may not be made based on the best interests standard.

[22] Mass. Gen. Laws ch. 201D, § 5 (emphasis added).

[23] See Cohen v. Bolduc, 760 N.E.2d 714 (Mass. 2002).

[24] Mass. Gen. Laws ch. 201D, § 1 (emphasis added); see also N.Y. Pub. Health Law §§ 2980, 2982; but see Cal. Prob. Code § 4617 which does not limit by definition.

[25] N.Y. Pub. Health Law § 2982(2).

[26] Cruzan, 497 U.S. 261 (1990).

[27] Mass. Gen. Laws ch. 201D, §6; N.Y. Pub. Health Law § 2983.

[28] Cal. Prob. Code § 4689.

[29] Cohen v. Bolduc, 760 N.E.2d 714 (Mass. 2002).

[30] In the Matter of Storar, 52 N.Y.2d 363 (N.Y. 1981).

[31] See the above discussion, with the exception of California.

[32] Uniform Anatomical Gift Act, 8A U.L.A. 4 (Supp. 1991). See also, for example, Mass. Gen. Laws ch. 113, §8; Ronald Chester, Double Trouble: Legal Solutions to the Medical Problems of Unconsented Sperm Harvesting and Drug-Induced Multiple Pregnancies, 44 St. Louis U. L.J. 451, 459, n.52 (Spring 2000).

[33] Sandra Carnahan, Promoting Medical Research Without Sacrificing Patient Autonomy: Legal and Ethical Issues Raised by the Waiver of Informed Consent for Emergency Research. 52 Okla. L. Rev. 565, 582 (Winter 1999); see also Michael J. Morley, Proxy Consent to Organ Donation by Incompetents, 111 Yale L.J. 1215, 1245 (March 2002) (in which the author opines that parent-guardians have both the constitutional right and moral duty to consider the best interest of the entire family).

[34] Strunk v. Strunk, 445 S.W.2d 145 (Ky. Ct. App. 1969).

[35] In re Guardianship of Pescinski, 67 Wis.2d 4 (1975).

[36] Carson Strong, Ethical and Legal Aspects of Sperm Retrieval After Death or Persistent Vegetative State, Journal of Law, Medicine & Ethics 347, v.27, i4 (Winter 1999).

[37] Id.; Carson Strong, Jeffrey R. Gingrich and William H. Kutteh, Ethics of Postmortem Sperm Retrieval, Human Reproduction 739-745 v.15, no.4 (2000).

[38] See New York Hospital Guidelines for Consideration of Request for Post-mortem Sperm Retrieval, reproduced on the Cornell University Department of Urology website at http://cornellurology.com/uro/cornell/guidelines.html.

[39] Hecht v. Superior Court, 16 Cal. App. 4th 836 (Ct. App. 1993), Davis v. Davis, 842 S.W.2d 588 (Tenn. 1992); see also Cheri L. Riedel, The Impact of Modern Reproductive Technology on the Law of Probate: "Frozen Pops" and Inheritance, American College of Trust and Estate Counsel (2003).

[40] Mass. Gen. Laws ch. 201D, § 17; Cal. Prob. Code § 2992.

[41] Id.

[42] Gardianship of Elma Mason, 669 N.E.2d 1081 (Mass. App. Ct. 1996).

[43] N.Y. Pub. Health Law § 2982(b)(1).

[44] Fla. Stat. ch. 765.205(3).

[45] Schiavo v. Schindler, 780 So.2d. 176 (Fl. Ct. App. 2001).

[46] Ultimately, this law was determined to be unconstitutional. See Bush v. Schiavo, 885 So.2d 321 (Fl. 2004), writ denied January 24, 2005.

[47] Grace Plaza of Great Neck, Inc. v. Elbaum, 82 N.Y.2d 10 (N.Y. 1993).

ETHICAL AND LIABILITY ISSUES IN REPRESENTING SURROGATE FINANCIAL DECISIONMAKERS

by Professor Karen E. Boxx
University of Washington
School of Law
316 William H. Gates Hall
Box 353020
Seattle, WA 98185-3020
206-616-3856
E-mail: kboxx@u.washington.edu

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Karen Boxx is an associate professor at the University of Washington School of Law, where she teaches in the areas of trusts and estates, estate planning, community property and professional responsibility. Before joining the Law School faculty in 1997, she was a partner in the Keller Rohrback firm, where her practice focused on estate planning, probate, non-profit organizations and family business planning. She is currently of counsel at Keller Rohrback LLP. She graduated from the University of Washington School of Law in 1983. She is a Fellow in the American College of Trust and Estate Counsel.

Many thanks to Professor Thomas R. Andrews, who allowed me to incorporate passages from his previous writings on representing fiduciaries into these materials

These materials address ethical and liability concerns as applied to the circumstance of representing a fiduciary. Because we are discussing various fiduciary relationships (such as attorney-in-fact/principal, trustee/beneficiary, personal representative/estate beneficiary, guardian/ward), for convenience the materials will, unless otherwise noted, use the terms fiduciary and beneficiary to refer to the parties in any of the various fiduciary relationships.

An extremely helpful resource on these and other ethical issues facing estate planning and probate lawyers is the American College of Trust and Estates Counsel (ACTEC) Commentaries on the Model Rules of Professional conduct (3d ed. 1999) and the accompanying Sample Engagement Letters. Both these documents are available in print form from ACTEC for a modest fee and are available (for free!) on the ACTEC website (www.actec.org) under Resources (scroll towards the bottom of the Resources page). An order form for the print versions is available on the ACTEC website. A fourth edition of the Commentaries is expected soon.

These materials make frequent reference to the ACTEC Commentaries.

I. CONFIDENTIALITY

ABA Model Rule 1.6 states:

"a) A lawyer shall not reveal information relating to the representation of a client unless the client gives informed consent, the disclosure is impliedly authorized in order to carry out the representation or the disclosure is permitted by paragraph (b).

(b) A lawyer may reveal information relating to the representation of a client to the extent the lawyer reasonably believes necessary:

(1) to prevent reasonably certain death or substantial bodily harm;

(2) to prevent the client from committing a crime or fraud that is reasonably certain to result in substantial injury to the financial interests or property of another and in furtherance of which the client has used or is using the lawyer's services;

(3) to prevent, mitigate or rectify substantial injury to the financial interests or property of another that is reasonably certain to result or has resulted from the

client's commission of a crime or fraud in furtherance of which the client has used the lawyer's services;

(4) to secure legal advice about the lawyer's compliance with these Rules;

(5) to establish a claim or defense on behalf of the lawyer in a controversy between the lawyer and the client, to establish a defense to a criminal charge or civil claim against the lawyer based upon conduct in which the client was involved, or to respond to allegations in any proceeding concerning the lawyer's representation of the client; or

(6) to comply with other law or a court order."

Confidentiality when representing a fiduciary presents a few unique difficulties. First is the issue of the confidential protection that the fiduciary's communication to the lawyer enjoys from disclosure to the beneficiaries. Second is the difficulties presented when the lawyer represents multiple parties. Third is the extent to which communications of the beneficiary to the lawyer are privileged, if the lawyer considers herself lawyer for the fiduciary.

A. Disclosures to Beneficiaries by the Lawyer for the Fiduciary.

The most significant concern here is where the lawyer who is representing a fiduciary learns that the client has committed misconduct in his or her fiduciary role.

In 1985, for example, a law firm sought advice from the Iowa bar ethics committee as to the appropriate course of action when it discovered that an executor represented by the firm had never opened an estate account as instructed and had commingled estate funds with her personal funds. The committee concluded that the past misconduct was protected by the attorney client privilege, but that failure to remedy the misconduct would constitute an unprivileged future violation of the law. If the executor refused to rectify the misconduct, the law firm would be required to disclose the matter to the court and seek to withdraw. Iowa Ethics Opinion 85-3 (Nov. 15, 1985), reprinted in I NATIONAL REPORTER ON LEGAL ETHICS AND PROFESSIONAL RESPONSIBILITY (1986)("NATIONAL REPORTER").

In a similar situation, the South Carolina bar was called upon to advise whether a lawyer was entitled to disclose the fraud of the son/executor of a deceased client where doing so might disclose confidences or secrets of the deceased client. The son/executor was not the lawyer's client. The committee concluded that the lawyer was obliged to reveal the fraud to the probate court: "It was never intended for the confidences of a client to enable a fraud to be worked upon the courts or other judicial or administrative tribunals." S.C. Ethics Opinion 87-02 (1987), reprinted in II NATIONAL REPORTER (1987).

The recent changes to 1.6, allowing a lawyer to disclose confidences to prevent a client from committing a crime or fraud that would cause substantial financial injury, and to

disclose confidences to prevent, mitigate or rectify harm from a client's past crime or fraud for which the client used the lawyer's services should allow an attorney to take steps where a fiduciary client has violated fiduciary duty.

Interestingly, in 1994, the ABA Special Study Committee on counseling fiduciaries came to a similar conclusion as to past fraud, despite different wording in the existing rule. Report of the Special Study Committee on Professional Responsibility, "Counseling the Fiduciary," 28 Real Prop., Prob. & Trust J. 763, 849 (1994). According to the Special Study Committee, while the lawyer for a fiduciary is clearly not permitted to disclose confidential information to a "third party",

> the lawyer should not be required to withhold such information from the beneficiaries. A fiduciary is a unique type of client, one who has special responsibilities to others and who has assumed this role with knowledge and acceptance of the fiduciary duties that define, and are crucial to, the role. The fiduciary's duty is to administer the estate or trust for the benefit of the beneficiaries. A lawyer whose assignment is to provide assistance to the fiduciary during administration is also working, in tandem with the fiduciary, for the benefit of the beneficiaries, and the lawyer has the discretion to reveal such information to the beneficiaries, if necessary to protect the trust estate. The interests of the beneficiaries should not be compromised by a barrier of confidentiality..... Where the lawyer's job is to assist fiduciary administration, in " (but not a duty) to disclose breaches of fiduciary duty during administration is implied." Id at 849-50.

The Special Study Committee pointed out that under some circumstances a beneficiary can compel discovery of communications between a fiduciary and its lawyer under the evidentiary attorney-client privilege. Id. at 850-51. In addition, under the laws of agency, the fiduciary (agent) owes a duty of loyalty to the beneficiaries (principal) that is inconsistent with withholding information from them. Id. at 851.

The fiduciary exception to attorney-client privilege (as opposed to the ethical duty of confidentiality) has a very long history. First adopted by the English courts in the 1800's (*see Wynne v. Humberston*, 27 Beav. 421 (ch. 1858), and *Talbot v. Mansfield*, 62 Eng. Rep. 728 (ch. 1865)), it has been accepted by courts in this country, although not universally. See, e.g., RESTATEMENT OF LAW GOVERNING LAWYERS ("RLGL") section 134A and comment; *United States v. Mett*, 178 F.3d 1058 (9th Cir. 1999) (containing an eloquent description and history of the exception, authored by Judge Betty Fletcher); *United States v. Evans*, 796 F.2d 264, 265-66 (9th Cir. 1986); *Washington-Baltimore Newspaper Guild, Local 35 v. Washington Star Co*., 543 F.Supp. 906, 908-10 (DDC 1982); *Riggs Nat'l Bank v. Zimmer*, 355 A.2d 709, 713-14 (Del.Ch. 1976), Wigmore 2286; *but see Wells Fargo Bank, N.A. v. Superior Court*, 22 Cal.4th 201 (2000)(court concluded that the California statute on privilege precluded the fiduciary exception). Geoffrey Hazard has commented:

> The attorney-client privilege ordinarily does not shield the fiduciary from disclosure in favor of the beneficiaries ... regardless of the identity of the client...Most probate lawyers ... view their relationship with the fiduciary as not only confidential but personal. However much they may wish that this is the law, it is not, any more than corporate counsel has a personal relationship with the CEO.

Letter from Geoffrey C. Hazard, Jr., to Jeffrey N. Pennell (Dec.2, 1992)(quoted in Pennell, *Representations Involving Fiduciary Entities: Who is the Client?,* 62 Ford.L.Rev. 1319, 1326 n.21 (1994).

In order for the fiduciary evidentiary exception to apply, the court looks at the purpose of the advice given and the source of payment of attorney fees for such advice. "On the one hand, where [a] … trustee seeks an attorney's advice on a matter of … administration and where the advice clearly does not implicate the trustee in any personal capacity, the trustee cannot invoke the attorney-client privilege against the … beneficiaries. On the other hand, where a … fiduciary retains counsel in order to defend herself against the … beneficiaries…, the attorney-client privilege remains intact. *Mett*, 178 F.3d at 1064. The seminal *Zimmer* case also asked the question of who paid the lawyer – if the fiduciary paid personally, the advice was protected, but if the trust (or other fiduciary estate) paid, then the advice given belonged to the fiduciary estate and the exception applied.

The rationale given for denying the protection of the privilege in this situation, is that the attorney-client relationship that an attorney has with a fiduciary is *supposed* to be for the benefit of the beneficiaries of the fiduciary's duties, so that it seems inappropriate to deny them access to the information that was exchanged if the beneficiaries come to believe that the fiduciary has breached his/her or its obligations sufficiently to justify a lawsuit against them. However, the ABA Special Study Committee concluded that the absence of the attorney-client privilege can be extended to the ethical duty of client confidentiality; in other words, that there is no ethical duty of confidentiality that prevents counsel for a fiduciary from disclosing information to beneficiaries as non-clients. That conclusion was quite controversial because it has long been recognized that the ethical duty of confidentiality is much broader than the attorney-client privilege and protects far more information.

The ACTEC Commentaries to MRPC 1.6 have several interesting things to add to the discussion of this issue. First, they say, that

> "the fiduciary's retention of the lawyer to represent the fiduciary generally in the administration of the fiduciary estate may impliedly authorize the lawyer to make disclosures in order to protect the interests of the beneficiaries. In addition, the lawyer's duties to the court may require the lawyer for a court-appointed fiduciary to disclose to the court certain acts of misconduct committed by the fiduciary. In any event, the lawyer may not knowingly provide the beneficiaries or the court with false or

misleading information." ACTEC Commentaries to MRPC 1.6 at 125-126.

The Commentaries also point out that the lawyer and the fiduciary client may agree between themselves at the outset of the representation that the lawyer may disclose to the beneficiaries or to an appropriate court any action or inaction on the part of the fiduciary that might constitute a breach of trust. Id. at 125. And they also point out that a lawyer drafting estate planning documents for a client may quite properly advise the client to condition appointment of a fiduciary upon the fiduciary's agreement that the lawyer retained by the fiduciary to represent the fiduciary with respect to the fiduciary estate may disclose breaches of trust to beneficiaries and/or an appropriate court. Id. at 127.

Finally, it should be noted that the ABA ethics committee issued a formal ethics opinion in 1994 on "Counseling a Fiduciary." ABA Form. Op. 94-380 (May 9, 1994). In general, the opinion identifies no right or duty on the part of the lawyer for a fiduciary to disclose wrongdoing by the fiduciary, whether prospective or past wrongdoing, and sticks strictly to the letter of the ABA Model Rules as written in 1994. See ABA Form. Op. 94-380 at fn.7: "[ABA] Rule 1.6 does not authorize the disclosure of information on the basis that the lawyer knows that the fiduciary is committing or will commit a criminal or fraudulent act."

There is, however, one narrow circumstance where the prior version of the ABA rules would warrant disclosure of a fiduciary's wrongdoing. Where the fiduciary has caused the lawyer to offer material evidence to a tribunal and the lawyer later learns the evidence was false (had he known in advance, the lawyer could not have offered it), the lawyer is instructed to take "reasonable remedial measures...even if compliance requires disclosure of information otherwise protected by Rule 1.6." ABA MRPC 3.3(a)(4) and (b). But the ABA ethics committee stopped short of pointing this out, preferring instead to say only that if the lawyer knows that the fiduciary client has breached his/her duties, the lawyer is precluded from presenting a false accounting to the court or to the beneficiaries, since this would be to assist the fiduciary in committing fraud. Id. at fn.6.

These discussions under prior ABA rules are helpful in jurisdictions that have not adopted the extensive exceptions to confidentiality now contained in Rule 1.6. In states that have adopted the revisions to Rule 1.6, a lawyer may now reveal confidences "to the extent reasonably necessary" when a fiduciary client is violating fiduciary duties in a manner that will cause or has caused substantial financial or bodily harm. The lawyer must still tread carefully to reveal only to the extent necessary. See *In re Schafer*, 149 Wn.2d 148, 66 P.3d 1036 (2003) (lawyer suspended for revealing client confidences to disclose breach of fiduciary duty of sitting judge while such judge was acting as executor of estate; lawyer had informed local papers and the IRS, among others). In the context of a trust or estate, the lawyer could use the authority of the rule to reveal fiduciary abuses to the beneficiaries, but the lawyer's position is more difficult where the fiduciary is an attorney-in-fact. If physical abuse or neglect is present, the lawyer could presumably notify another family member, and if that is not sufficient, the state agency charged with

protecting vulnerable adults. Financial harm would justify the same steps, but the lawyer's actions should be proportionate to the harm threatened.

B. Confidentiality After Death of Client

It is useful to remember that the duty of confidentiality continues after the death of the client. *Martin v. Shaen*, 22 Wn.2d 505, 156 P.2d 681 (1945); see also ABA Informal Opinion 1293 (June 17, 1974). The continuation of the attorney-client privilege after death has been reaffirmed by the U.S. Supreme Court, as a matter of federal evidentiary law, in *Swidler v. United States*, 66 U.S.L.W. 4538 (1998)(Vince Foster case). For an interesting case holding that the privilege held by "informal" business entities that managed Bing Crosby's "entertainment empire continued with the successor limited partnership formed to carry on the management of this empire after his death, see *HLC Properties Limited v. Superior Court*, 112 Cal. App. 4th 305 (2003) rev. granted 7 Cal. Rptr. 3d 779, 81 P.3d 223 (Cal. 2003). The party challenging the privilege claimed that while the privilege succeeded to Bing Crosby's executor, once the estate was closed, the privilege expired.

C. Confidentiality and Multiple Representation.

Where the lawyer is attempting to represent not only the fiduciary but also beneficiaries other than the fiduciary, the confidentiality problems are compounded. Suppose that a lawyer jointly representing the fiduciary and one of the beneficiaries learns that the fiduciary is misbehaving and it is quite clear that the fiduciary does not want the lawyer to disclose this to the beneficiaries. What is the lawyer required or permitted to do? Resolution of the issue is very complex and uncertain, illustrating the danger of multiple representation in such contexts. See ACTEC Commentaries to MRPC 1.6; R LGL §112, comment l; Kaplan, *Legal Ethics Forum, The Case of the Unwanted Will,* 65 ABA J. 484, 486 (1979); Shaffer, *The Legal Ethics of Radical Individualism*, 65 TEX. L.REV. 963 (1987); Husband and Wife, supra, 28 REAL PROP PROB. & TRUST J. at 765. Of course, under the new version of Rule 1.6, if substantial financial or bodily harm is threatened, disclosure is permitted. However, it is easy to contemplate circumstances where the lawyer is uncertain whether disclosure is permitted under such a standard.

If the confiding client refuses to allow disclosure to the nonconfiding client, then the lawyer is faced with the choice between breaching the duty of communication owed to the nonconfiding client under RPC 1.4 and breaching the duty of confidentiality owed the confiding client under RPC 1.6. If the lawyer chooses not to disclose, the lawyer is likely to compound the problem by actively assisting the confiding client in deceiving the nonconfiding client. Alternatively, if the lawyer withdraws from representing the nonconfiding client, it is likely that the withdrawal itself will have the effect of disclosing the confidence, or the existence of a problem at any rate, to the nonconfiding client. And even if withdrawal does not have that effect, it is not clear that the lawyer is entitled to withdraw from representing the nonconfiding client without fully informing that client of

the confidence so that the client can decide what to do. The information was received, after all, during the attorney/client relationship and the obligation under RPC 1.4 is to provide sufficient information to permit the "client to make informed decisions regarding the representation." Conversely, if the lawyer terminates the representation of the confiding client and continues to represent the nonconfiding client, he cannot do that ethically without disclosing to his (now) sole client the confidence, but that would be a breach of the continuing duty of confidentiality owed to the (now) former client. The lawyer could withdraw from representing both clients, but this approach has some of the same problems as just withdrawing from one representation.

The ACTEC Commentaries suggest in such a situation:

> If the communicating client continues to oppose disclosing the confidence to the other client, the lawyer faces an extremely difficult situation with respect to which there is often no clearly proper course of action. In such cases the lawyer should have a reasonable degree of discretion in determining how to respond to any particular case. In fashioning a response the lawyer should consider his or her duties of impartiality and loyalty to the clients; any express or implied agreement among the lawyer and the joint clients that information communicated by either client to the lawyer regarding the subject of the representation would be shared with the other client; the reasonable expectations of the clients; and the nature of the confidence and the harm that may result if the confidence is, or is not, disclosed.

ACTEC COMMENTARIES TO MRPC 1.6 at 122. The RESTATEMENT goes further and states that if the lawyer is forced to withdraw as a result of this irreconcilable conflict,

> In the course of withdrawal, the lawyer has discretion to warn the affected co-client that a matter seriously and adversely affecting that person's interests has come to light, which the other co-client refuses to permit the lawyer to disclose. Beyond such a limited warning, the lawyer, after consideration of all relevant circumstances, has the further discretion to inform the affected co-client of the specific communications if, in the lawyer's reasonable judgment, the immediacy and magnitude of the risk to the affected co-client outweigh the interest of the communicating client in continued secrecy. In making such a determination, the lawyer may take into account superior legal interests of the lawyer or of affected third persons, such as an interest implicated by a threat of physical harm to the lawyer or another person."

RLGL §112, comment 1. However, such disclosure would probably not be allowed.

There may certainly be some circumstances where joint representation of a fiduciary and some of the beneficiaries may be desirable, since fiduciaries and beneficiaries do have a number of common interests. The ABA Special Committee Report on "Counseling the Fiduciary" notes, for example, that "[n]ormally the fiduciary and the beneficiary are joined in the endeavor of putting the grantor's wishes into effect and preserving the fiduciary estate from outsiders. Unless there are specific indications to the contrary, the lawyer can assume that the goals of the fiduciary and the beneficiaries are in harmony." Counseling the Fiduciary, supra, 28 REAL PROP PROB & TRUST J. at 842. Usually, for example, the lawyer for the fiduciary would be entitled to advise the beneficiaries as to the nature of their beneficial interests and the duties of the fiduciary. Id. at 840-43. This kind of advice is very limited and might not even be considered the representation of the beneficiaries. For the fiduciary's lawyer to give the advice may be an important part of representing the fiduciary. It is when the fiduciary's lawyer is asked to go beyond this kind of advice giving to the beneficiary that potential conflicts can emerge. When, for example, the beneficiary asks the fiduciary's lawyer to advocate for the beneficiary with the fiduciary, or requests the lawyer to analyze critically the performance of the fiduciary, or assert claims against the fiduciary. Id. at 841. At that point, the beneficiaries' interests have become potentially adverse to those of the fiduciary, and the lawyer should decline to perform in the capacity requested and should, instead, advise the beneficiaries that he/she represents the fiduciary and not the beneficiaries. RPC 4.3; ACTEC COMMENTARIES to MRPC 4.3 at 259. At a minimum, before undertaking to represent both a fiduciary and beneficiaries, the lawyer should satisfy ensure that the requirements of RPC 1.7 and 2.2 are satisfied. He or she should also reach an understanding with all the clients, in advance, that confidential information may be freely shared among them. For further discussion of this issue, the reader is referred to the Special Committee's report on "Counseling the Fiduciary", 28 REAL PROP PROB & TRUST J. at 839-48.

The attorney for the fiduciary must always keep in mind, when dealing with beneficiaries, the duties under RPC 4.1 and 4.3. RPC 4.3 specifies that when a lawyer is dealing with an unrepresented person and "reasonably should know that the unrepresented person misunderstands the lawyer's role in the matter, the lawyer shall make reasonable efforts to correct the misunderstanding." RPC 4.1 prohibits a lawyer from "knowingly" failing to "disclose a material fact to a third person when disclosure is necessary to avoid assisting a criminal or fraudulent act by a client, unless disclosure is prohibited by rule 1.6." Rule 1.6 does not prohibit disclosure when reasonably necessary to prevent the client from committing a crime. The implications of this set of duties were illustrated by *Bohn v. Cody*, 119 Wn.2d 357 (1992) where Mr. Cody apparently gave incomplete advice to a non-client, the parent of a client, about the security she was getting as part of a loan transaction. "It was not enough in this case that Cody told Bohn that he was not acting as her attorney....if the attorney undertakes to tell part of the story to an unrepresented party with whom the attorney's client is doing business, the attorney must take reasonable steps to tell the whole story, not just the self-serving portions of it."

The following New Jersey case, while not a fiduciary representation case, is an interesting illustration of the problem of the confiding joint client refusing to allow disclosure to the nonconfiding client.

A v. B v. Hill Wallack, 158 N.J. 51, 726 A.2d 924 (NJ 1999).
Husband and Wife retained the Hill Wallack firm for estate planning purposes and signed a retention letter waiving any conflict of interest. The letter explained that information provided by one spouse "could become available to the other" and advised further that a testamentary transfer to one spouse would permit that spouse to dispose of the property as he/she desired. The firm drafted and the clients signed reciprocal wills leaving their respective residuary estates to one another. The contingent beneficiaries for the second spouse to die were the testator's "issue." Before the wills were signed, the firm was retained to represent a woman (the Mother) in a paternity action against the Husband for whom the firm was doing estate planning. The firm ran a conflicts check but did not show Husband as a current client because the surname had been misspelled due to a clerical error when the estate planning file was opened. When the Husband was contacted by the Hill Wallack lawyer representing the Mother, Husband did not reveal that he, too, was a client of Hill Wallack and did not object to the firm's representation of the Mother. He had retained another firm to represent him in the paternity action. That lawyer told Hill Wallack that the firm's estate planning department was doing legal work for the Husband. The firm immediately withdrew from representing the Mother in the paternity suit. It then wrote to the Husband that it felt it had an ethical duty to disclose to his Wife the existence, but not the identity, of his illegitimate child and that it would do so unless the Husband did so by a date certain. He joined Hill Wallack in the paternity action to enjoin the disclosure. The trial court refused to direct Hill Wallack not to disclose, but the intermediate appeals court reversed and ordered that an injunction be issued. In this posture, the New Jersey Supreme Court concluded that Hill Wallack was entitled to disclose this information to Wife. The opinion contains a thorough discussion of the rules, the Restatement of the Law Governing Lawyers and the leading commentary on this problem. The court gave the following grounds for concluding that the firm was entitled to disclose: (a) RPC 1.4(b) requires that a lawyer explain matters to a client (Wife) to the extent reasonably necessary to permit informed decisions; (b) New Jersey's RPC 1.6(c) permits disclosure of confidences "to rectify the consequences of a client's criminal, illegal or fraudulent act in furtherance of which the lawyer's services had been used," and (c) the Husband's deliberate failure to tell Wife of his illegitimate child constituted a fraud on the Wife. "When discussing their respective estates with the firm, the husband and wife reasonably could expect that each would disclose information material to the distribution of their estates, including the existence of children who are contingent residuary beneficiaries. The husband breached that duty." Interestingly, New Jersey's ethics code, in contrast to Washington's, requires a lawyer to disclose confidences if the lawyer reasonably believes it necessary to prevent a client from committing a "criminal, illegal or fraudulent act ...likely to result in death or substantial bodily harm or substantial injury to the financial interest or property of another." NJRPC 1.6(b)(1). But the Court held that this mandatory

duty had not been triggered in this case. Hill Wallack was permitted, but not required, to disclose to the Wife.

Finally, there is a fascinating Georgia case, *Bowen v. Hunter*, 525 S.E.2d 744 (1999), where the attorney for the personal representative, also the widow of the decedent, did not disclose to the other family members (surviving mother and sister) the existence of a prenuptial agreement that would have disinherited the widow, because he concluded it was invalid.

One can head off such problems by clarifying in advance, in the engagement letter, that there will be no confidences as between the various parties. See the ACTEC Sample Engagement letters for illustrative language.

The situation is exacerbated when the lawyer represents a principal under a power of attorney and then later the attorney-in-fact looks to the lawyer for assistance in carrying out that rule. This situation is discussed in more detail in the section on Conflicts of Interest.

B. Confidentiality of Communications with Beneficiary

Generally, confidentiality and privilege is waived by the client when a third party is present during the communication. What is the extent of confidentiality where there is three way communication among the attorney, the guardian and the ward, or the principal and attorney-in-fact? To some extent, this may depend on who the attorney identifies as the client, the guardian or the ward. California's statute, for example, allows the presence of a guardian ad litem during communications between a child client and lawyer, because the GAL is reasonably necessary for transmission of the information to the lawyer or the accomplishment of the purpose for which the attorney was consulted. Cal. Evid. Code 952. Similarly, in *De Los Santos v. Superior Court*, 27 Cal. 3d 677 (1980), a child was the plaintiff in a personal injury action, and his mother was appointed his guardian ad litem. The mother spoke with the child in order to assist the attorney in answering interrogatories, and the court held that those conversations were protected by the attorney-client privilege.

The ambiguous duty that the lawyer for a fiduciary owes to the beneficiaries, and the fiduciary exception to the attorney-client privilege, muddies the water concerning the extent to which communications among fiduciaries, beneficiaries and the lawyers remains confidential among that group.

II. CAPACITY

ABA Rule 1.14 STATES THAT

(a) When a client's capacity to make adequately considered decisions in connection with a representation is diminished, whether because of minority, mental impairment or for some other reason, the lawyer shall, as far as reasonably possible, maintain a normal client-lawyer relationship with the client.

(b) When the lawyer reasonably believes that the client has diminished capacity, is at risk of substantial physical, financial or other harm unless action is taken and cannot adequately act in the client's own interest, the lawyer may take reasonably necessary protective action, including consulting with individuals or entities that have the ability to take action to protect the client and, in appropriate cases, seeking the appointment of a guardian ad litem, conservator or guardian.

(c) Information relating to the representation of a client with diminished capacity is protected by Rule 1.6. When taking protective action pursuant to paragraph (b), the lawyer is impliedly authorized under Rule 1.6(a) to reveal information about the client, but only to the extent reasonably necessary to protect the client's interests.

See generally ACTEC COMMENTARIES to MRPC 1.14.

The RESTATEMENT includes language substantially equivalent to this, but goes further by stating that where no guardian or other representative exists, or is able to act, the lawyer "must ... pursue the lawyer's reasonable view of the client's objectives or interests as the client would define them if able to make adequately considered decisions on the matter, even if the client expresses no wishes or gives contrary instructions." RESTATEMENT OF THE LAW (THIRD): THE LAW GOVERNING LAWYERS §35(2). The ACTEC COMMENTARIES suggest that such authority to act in the best interests of a disabled client is perhaps implicit in the attorney-client relationship. ACTEC COMMENTARIES to MRPC 1.14 at 217. However, this is a dangerous power. If the lawyer guesses incorrectly about the client's capacity, the client may make a claim against the lawyer for revealing attorney-client confidences or other ethical offenses. For that reason the RESTATEMENT commentary counsels that ""[w]here practicable and reasonably available, independent professional evaluation of the client's capacity may be sought.... A lawyer may bring the client's lack of competence before a tribunal when doing so is reasonably calculated to advance the client's objectives or interests as the client would define them if able to do so rationally." RLGL §35, comment d.

See also ABA Formal Opinion 96-404.

The language added into the new ABA rule 1.14(c) may ease a lawyer's hesistance to take action in such circumstances.

This issue can be particularly problematic if the lawyer suspects incapacity of a fiduciary client. Failure on the part of the attorney to act could harm not only the fiduciary client but the beneficiaries as well.

Illustrative Cases: *Estate of Lint*, 135 Wn.2d 518, 957 P.2d 755 (1998). In the *Lint* case, the attorney took very clever action when faced with a client's evident incapacity and a third party's apparent undue influence. For another interesting example of a lawyer's unique approach in the face of a client's incapacity, see Katharine Graham's description of the actions of her husband's lawyer when dealing with a very powerful man (Phil Graham) requesting a Will where the lawyer had well-founded concerns about the client's capacity, at K. Graham, Personal History 334-35 (New York: Vintage Books 1998).

See also, Fleming and Morgan, *Lawyers' Ethical Dilemmas: a "Normal" Relationship When Representing Demented Clients and Their Families*, 35 Ga. L. Rev. 735 (2001).

III. CONFLICT OF INTEREST

ABA RULE 1.7 PROVIDES:

a) Except as provided in paragraph (b), a lawyer shall not represent a client if the representation involves a concurrent conflict of interest. A concurrent conflict of interest exists if:

(1) the representation of one client will be directly adverse to another client; or

(2) there is a significant risk that the representation of one or more clients will be materially limited by the lawyer's responsibilities to another client, a former client or a third person or by a personal interest of the lawyer.

(b) Notwithstanding the existence of a concurrent conflict of interest under paragraph (a), a lawyer may represent a client if:

(1) the lawyer reasonably believes that the lawyer will be able to provide competent and diligent representation to each affected client;

(2) the representation is not prohibited by law;

(3) the representation does not involve the assertion of a claim by one client against another client represented by the lawyer in the same litigation or other proceeding before a tribunal; and
(4) each affected client gives informed consent, confirmed in writing.

The potential for conflict of interest when representing a fiduciary is great. For example, the fiduciary could also be a beneficiary, and may want the attorney to assert positions that benefit her personal interests. Another potential conflict scenario is where the lawyer has represented an elderly client with estate planning matters and then an adult child calls, concerned about the client's failing capabilities and inquiring about the possibility of a guardianship. Even more complex is where the lawyer drafted a power of attorney for the principal and once the document is activated, the attorney-in-fact calls, looking for legal advice in carrying out her duties to the principal. In many instances, the principal would want the attorney to stay involved as the attorney for the agent. Conflicts are possible, however, and not just in the circumstance where the attorney-in-fact may be

acting improperly. The principal and the attorney-in-fact may disagree about the principal's capacity, for example. Another example of a conflict is when the principal becomes suspicious of the attorney-in-fact, perhaps due to undue influence from another person, and wants to revoke the power of attorney. To protect yourself, you should consider discussing the issue with the principal and obtaining written authorization from the principal to permit representation of the attorney-in-fact. If the principal wants limits on that authorization, or does not want you to represent the attorney-in-fact, that should also be noted in your file. That written authorization does not resolve actual conflicts, however. The ethical rule is a two part test of which written consent is only one part. The lawyer must also reasonably believe that the dual representation does not adversely affect the representation of each client.

A conflict may arise in even more ambiguous circumstances. For example, the lawyer who is hired by the attorney-in-fact to assist in carrying out those duties may be considered the lawyer for the principal for conflict of interest purposes. This was the costly result for a Maine attorney. In *Estate of Keatinge v. Biddle,* 789 A.2d 1271 (Me. 2002), a state's highest court addresses the critical question of a lawyer's loyalties when representing an attorney-in-fact. A federal district court certified the following (paraphrased) question to the Maine Supreme Court: when an attorney-in-fact hires a lawyer to help with activities as attorney-in-fact (such as selling the principal's property) can the lawyer ever be considered the lawyer for the principal? The court stated that "the mere retention of counsel by the holder [of the power] does not by itself create an attorney-client relationship between the attorney and the grantor [of the power]. To hold otherwise would leave the attorney hired to represent the holder … in the untenable position of being subject to ill-defined professional responsibilities and create the reality of conflicting loyalties." These are comforting words to lawyers. However, the court pointed out that it is possible for other surrounding circumstances to create an attorney-client relationship between the principal and the lawyer for the attorney-in-fact. Their answer to the certified question was therefore yes, it is possible. It should be noted that in holding that something more than the mere representation of an attorney in fact is needed to create a duty to the principal, the court pointed to its holding that beneficiaries of a will could not sue a drafting attorney for malpractice, because a contrary holding would create conflicting loyalties for the lawyer. The court declined to answer two other questions certified by the district court, one, whether the state's formulation of necessary evidence to prove an attorney client relationship was modified in this context, and two, whether the court would adopt the Restatement (Third) of Lawyers 14(1)(b) approach that a person claiming an attorney-client relationship in this context could prove the lawyer consented to the relationship by a showing that the lawyer knew or should have known the principal reasonably relied on the lawyer to provide the services.

As to the underlying facts of this case, the lawyer in question had represented the son/attorney-in-fact in selling some of the principal's real property. She had one conversation with the principal about her fees, and she signed some documents as attorney-in-fact for the principal because the son/attorney-in-fact authorized her to sign in his place as attorney-in-fact. Later, the son/attorney-in-fact sued the principal, his father, for breach of an agreement to set up a trust for the son. The lawyer represented the son in

this lawsuit. The suit was settled, the father/principal sued the lawyer and the jury awarded the father /principal $660,000 in his claim against the lawyer. It was at that point in the litigation that the district court asked the state court whether a finding of an attorney-client relationship between the principal and the son's lawyer was possible.

A North Carolina case hints at an interesting scenario where the identity of the lawyer's client may be unclear. In *Estate of Graham v. Morrison*, 2005 N.C. App. LEXIS 151, a niece was appointed attorney-in-fact and entered into several questionable transactions that were challenged by a daughter of the principal. One of the challenged actions was use of the principal's funds to pay the niece's legal expenses. However, the niece had used the funds to pay a lawyer she hired to represent "herself and [the principal]" in an incompetency hearing filed by the principal's daughter. The court allowed that expense since it was for the benefit of the principal. However, it raises an interesting dilemma for the lawyer being hired by the attorney-in-fact to represent the principal in an incompetency hearing, presumably to protect the attorney-in-fact's continued authority over the principal's assets.

IV. POTENTIAL LIABILITY FOR FIDUCIARY'S MALFEASANCE

The lawyer can be the target for blame when the fiduciary causes harm. One case that gives some comfort in this situation is *Persinger v. Holst,* 639 N.W.2d 594 (Mich. App. 2001). In that case, an attorney was contacted by a former client to draw up estate planning documents for an elderly widow. The documents named the former client as her sole beneficiary and named him as attorney-in-fact for the widow. The client abused the powers as attorney-in-fact and a guardian was appointed, who initiated proceedings against the attorney-in-fact as well as the drafting attorney. A conflict of interest claim against the attorney was not properly brought, but on appeal the court considered the issue of whether the attorney could be held liable for failing to dissuade the widow from a choice of proposed agent when the attorney knows the proposed agent is incapable of handling the client's affairs. The court refused to impose on the attorney the duty to ensure that the client choose an appropriate agent. Such a rule would impermissibly widen the scope of a lawyer's duty to "infinite proportions," such as holding an attorney liable for a client's choice of business partner. Additionally, the guardian claimed the lawyer should be liable for allowing the widow to sign the power of attorney at a time when she was allegedly incompetent. The court held that "an attorney cannot justifiably be deemed an insurer of a client's mental competency" and the attorney here made a reasonable inquiry into the widow's understanding of the documents and there was no overt evidence of incapacity at the time of signing.

A more troubling case is a recent unreported decision from California. In *Harris v. Heller*, 2004 Cal. App. Unpub. LEXIS 8797, in 1983 the law firm prepared a living trust for the client, a widow, that named her three children as co-trustees. All three children signed the document as co-trustees, but it was understood among the widow's children that brother Bart would be primarily responsible for handle their mother's financial affairs. The law firm later prepared a durable power of attorney naming Bart as attorney-in-fact. Bart turned out to be a poor choice for money manager and embezzled millions.

The other two children sued the law firm, alleging that the law firm represented the entire family, not just the widow when it prepared the trust agreement and power of attorney, that it failed to properly advise the other two children of their duties and powers as co-trustees, that the firm failed to tell them about the power of attorney and that the firm allowed the widow to sign the documents when she was mentally impaired. The law firm won a summary judgment on the grounds that the claims were time barred. The court of appeals affirmed, agreeing that the children had been put on notice of the law firm's alleged negligence back in 1983 when the documents were signed. The children attempted to avoid the time bar by arguing that the claims were tolled under a California statute that tolls malpractice cases for as long as the attorney continues to represent the client in the subject matter. Cal Code Civ. Proc. section 340.6(a)(2). The court held that there was no continuous representation of the plaintiff children, because the widow, not the family, was the client in 1983. To the extent the widow would have had a claim against the lawyers for the alleged malpractice, that claim would have been tolled under the statute until her death. The children, however, did not become clients of the law firm until the mother died and they consulted the law firm about terminating the trust. What is troubling about the case is the suggestion that the law firm was somehow responsible for Bart's malfeasance, because the negligence claim appeared to be based only on the fact that the law firm allowed one child to be put in charge and that child turned out to be dishonest. The law firm escaped litigating on that issue by the time bar, but that would not have been available had the children been able to successfully claim that the law firm was also representing them at the time the trust agreement was signed. In light of the general test that the attorney client relationship is formed if the purported client believes the lawyer is representing him or her, the case is a good warning that the lawyer in such situations must make clear to the children that only the parent is the client.

Two recent Washington state cases imposing liability on attorneys for guardians raise even more troubling issues. Previous to these two decisions, Washington had adopted a modified form of the California balancing test to determine an attorney's duty to a third party (*Lucas v. Hamm*, 364 P.2d 685(cal. 1983) and the simpler Illinois test, which just asks wheter the third party was "intended to benefit from the attorney-client relationship." *Pelham v. Griesheimer*, 440 N.E.2d 96, 99 (Ill. 1982). In *In re Karan*, 38 P.3d 396 (2002), a mother hired an attorney to set up a guardianship for her minor daughter, who was the beneficiary of her deceased father's life insurance policy. There was a statutory requirement that the guardian post a bond, or in the alternative, the guardian had to place liquid assets in blocked account. However, the order appointing the mother guardian required neither, and the mother took for her own use the majority of the funds. A successor guardian sued the attorney for the mother, alleging a breach of duty to the ward in failing to ensure compliance with the bonding and blocking requirements. The court of appeals held that each case depends on its own facts, and that there is no clear rule that the attorney for a guardian does or does not owe a duty to the ward. In this case, the attorney was held liable to the ward, applying the balancing test. Factors that led to this conclusion included the incompetency of the third party who was the subject of the representation (and therefore could not protect herself), the attorney had been hired for the sole

purpose of setting up a guardianship for the benefit of the ward, and the ward was in a nonadversarial relationship with the mother/client (and thus the attorney did not have divided loyalty issues). A Washington court of appeals again held a guardian's attorney liable for the guardian's malfeasance in *Estate of Treadwell v. Wright*, 61 P.3d 1214 (Wa. App. 2003). In that case, a woman hired a lawyer to have herself appointed guardian of her elderly aunt. The order required the guardian to post a $30,000 bond and required funds in excess of that amount be placed in blocked accounts. The lawyer had letters of guardianship issued and sent them to the guardian with a letter detailing her responsibilities, including the blocked account requirement. The guardian took control of the assets and spent them herself rather than putting them in blocked accounts. The court of appeals held that the applicable state statute required that blocked accounts and bonding be in place before the letters of guardianship are issued, and that the lawyer had breached the duty to the ward by failing to carry out that requirement. See also Bruce Ross, CONSERVATORSHIP LITIGATION AND LAWYER LIABILITY: A GUIDE THROUGH THE MAZE, 31 Stetson L. Rev. 757 (2002).

In *Albright v. Burns*, 503 A.2d 386 (N.J. App. 1986), a nephew holding a power of attorney for his uncle wanted to use his uncle's funds in his business, and obtained reluctant consent from his uncle, then in failing health. When the nephew went to his own attorney to set up the transaction as a loan, the lawyer at first advised against the transaction as a conflict of interest. The nephew did it anyway, and then delivered the funds, payable to the uncle, to the lawyer. The lawyer prepared a promissory note for his client, the nephew, to sign (unsecured of course) and disbursed the funds to the nephew. The lawyer never notified the uncle of the transaction. When the uncle died, the nephew was appointed executor and hired the lawyer to represent the estate, so the lawyer represented both the estate and the estate's principal debtor (the nephew). The nephew's sister, a 50% beneficiary of the estate, complained. The court of appeals reversed a summary judgment in the lawyer's favor, holding that the lawyer could be liable to the uncle's estate under a balancing test similar to the California test.

An interesting set of facts in *Barrett v. Freise*, 82 P.3d 1179 (Wa. App. 2003), illustrates the lawyer's dilemma when a conflict arises midstream. In that case, husband was severely injured by a drunk driver, and the wife, on behalf of herself, her husband and her minor children, hired an attorney to pursue the personal injury claim. Early in the case, the UIM settlement proceeds were received and disbursed to the wife, who now held a power of attorney for the disabled husband. As the case dragged on, the wife decided to obtain a divorce. The husband's brother took over, had a new set of lawyers take over the personal injury case, and sued the first lawyer. One accusation was that the lawyer had been negligent in disbursing the UIM funds to the soon to be ex-wife. The court held that payment to the wife was proper since there was no information that the wife was contemplating divorce at that time (and it did not hurt that the wife had spent the funds properly, on care for her husband and two small children).

V. CONCLUSION

Representing a fiduciary starts with the difficult question of who is your client and continues into other ambiguous territory regarding to whom can you talk, to whom do you owe a duty, and if so, what sort of duty. In other words, there are many shades of gray, and the lawyer must start with a presumption that he or she may be answerable for a fiduciary client's actions. The cases indicate that the best protection is disclosure, disclosure and more disclosure, and then proceeding with caution.

ARTICLES AND OTHER RESOURCES

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SURROGATE DECISION MAKING:
ETHICAL ISSUES WE NEVER THOUGHT ABOUT IN LAW SCHOOL
- Long Term Care, Medicaid and Special Needs Trust Issues -

Michael A. Kirtland, J.D., LL.M., CELA
Catherine Anne Seal, J.D., CELA
Kirtland & Seal L.L.C.
Colorado Springs, Colorado

Who's Your Client?

> Mary, a client for whom you've done estate planning in the past, comes to see you. She begins to talk about her elderly mother, whose assets are modest - a home, a $50,000 IRA, a $150,000 brokerage account. She lives on her Social Security payments and a modest pension from her days as a teacher, totaling just over $2,000 a month. Her husband died last year, but as a retired state employee, his pension stopped when he died. Mom's health is failing and she's having trouble with her memory.
>
> Mary says she and her sister, who lives in another state, have talked about how to care for Mom, and they're not sure she'll be able to live on her own much longer. She says their brother isn't much help. He's in the middle of a failing marriage, has tax problems and has been in and out of trouble with the law over the years. But, Mom loves him and trusts him. Her other brother is severely handicapped and receives state Medicaid assistance. He lives in a group home.
>
> Mary says Mom wants to make sure there is "something left for the kids" when she dies, but worries about the cost of her care. She's heard something about Medicare and long-term care insurance, but says she really doesn't understand it all, and couldn't Mary "just take care of things for her." Mary asks for your help.

"Who's your client" is the question typically asked to start the ethics portion of a CLE program. Often the response is "hey, how hard can that be?" Even in classic estate planning situations, where multiple representation of family members is often present, the issues are relatively straight forward. But in elder law and disability planning, the question regularly presents itself in ways that are quite complex.

While the Rules of Professional Conduct come into play in many representation situations, they are really written for the litigation situation, and often are of vague or minimal help when applied to the estate planning and elder law situation. The American Bar Association (Real Property, Probate and Trust Law Section), The American College of Trust and Estate Counsel (ACTEC), and the National Academy of Elder Law Attorneys (NAELA) have each recognized this deficiency. The American Bar Association's Commission on the Evaluation of the Rules of Professional Conduct (ABA E2K) attempted to deal with ethics in the new millennium, including issues of nonadversarial representation. ACTEC has published the ACTEC Commentaries on the Model Rules of Professional Conduct (3rd Edition, 1999, The ACTEC Foundation). NAELA has addressed the issue with its own Ethics and Professionalism Committee and comments on the Rules of Professional Conduct. (See *NAELA Quarterly*, Vol. 14, No. 1, Winter 2001). Rules 1.6 (Confidentiality of Information), 1.7 (Conflict of Interest: General Rule), and 1.14 (Client Under Disability), and their associated comments, each provide us some insight into the question, but must be interpreted within the elder law setting, as the above hypothetical shows.

It is important to determine early on whom the lawyer is to represent. The senior's competency plays an important part in this decision. It is not at all unusual (in fact, it may be the most common situation) for the adult child of the senior to be the first contact with the attorney. In many cases the adult child expects to have a plan essentially in place prior to communication with the parent, especially where the parent's mental condition is deteriorating. But, is this acceptable, given that the real purpose (the real client?) is planning for the senior?

Gifting Issues

Often the adult child who comes to the attorney has some vague knowledge that by making transfers of assets from the senior to the adult child(ren) the senior can qualify for Medicaid long term care assistance. If the attorney is fortunate, the adult child, with or without the help of a durable power of attorney, hasn't already begun to make these transfers on their own. Unfortunately, because Medicaid qualification and transfer planning are quite complex and subject to numerous administrative rules and regulations, such transfers often complicate the planning, rather than simplify it. Often the attorney will find him/herself unwinding transactions that the adult child has already made, in order to qualify the senior for Medicaid assistance.

But, it is not just the Medicaid planning client who has gifting issues. Most states have laws governing what amounts may be transferred through use of a power of attorney. Often state law will limit such transfers to the federal annual exclusion amount for gifting without tax consequences (currently $11,000 per person, per year). But some states, (see for example § 35-1-2, *Code of Alabama*) also have laws which prohibit such transfers by power of attorney if the end result is the impoverishment of the principal. Other states will limit transfers in other ways. (See for example, § 15-14-427, *Colorado Revised Statutes*). But, before the attorney even reaches the issue of the limits on transfers, the inherent conflicts that exist when the agent under the power of attorney or trustee in a revocable living trust situation comes into play.

While the issue of whether or not permitting gifting to the agent under a power of attorney to him/herself, or by the trustee under a revocable living trust to him/herself, actually constitutes a general power of appointment, has sometimes been raised in the

large estate situation, a more common problem exists. Does such a transfer from the agent to the agent (or trustee to the trustee) constitute a breach of fiduciary duty? Is the attorney subject to sanction for advising the client to make such gifts (or conversely, for not advising the client against such transfers) under Rule 1.2(d) of the Rules of Professional Conduct? While the answer to this is situation dependent, the attorney must become acutely aware of such a potential problem, especially where the agent/trustee makes such transfers in amounts that favor the agent/trustee over other potential heirs and beneficiaries of the same degree of kinship. Because the typical elder law/estate planning situation involves not just the client (whether that client is an adult child or the senior) but also the spouse and other children/siblings of the client, such transfers often come under significant scrutiny. Often, however, such scrutiny does not come until much later, and when the money is either spent or not traceable.

Even assuming a well written durable power of attorney, one which permits gifts to the agent/trustee and in amounts exceeding the annual exclusion amount, the advisability of making such transfers needs to be carefully considered. Where the senior is of very limited means and facing assisted living or nursing home care, a Medicaid qualifying transfer plan seems quite logical. Where the client has significant wealth, annual exclusion amount transfers make sense whether to eliminate the specter of estate taxes or simply as a way to benefit the next generation by transferring unneeded fund, annual gifts, and in very large estates, utilizing the gift tax exclusion may be advisable. But, what of the modest estate, which makes up so much of the typical client base.

What planning can be done with the estate of, for example, $200,000 to

$750,000? Multiple issues affect the advisability of making lifetime transfers to children, including the potential health problems of the senior, financial stability of the next generation, and even the geographical residence of the senior. The cost of medical care, especially nursing home care varies widely across the country, from less than $4,000 a month in some southern states to upwards of $10,000 a month in parts of the northeast and California. So, as in the hypothetical, understanding where the senior plans to spend their later years seriously impacts decision making concerning estate planning. A family oriented approach to estate planning becomes essential. What is the relationship between the senior and each of the children? What is the stability of the children's personal and financial situation? Where do the children live and what is the likelihood of the senior moving from his/her current location to that of a favorite child?

Significant time should be spent discussing these issues with the senior. Where geographical relocation is a potential issue, the attorney may need to consult with a qualified elder law attorney in other parts of the country to determine how costs and other legal issues might affect the senior. All of these issues need to be considered and information gathered prior to contemplating gifting. Simply providing a fill-in-the-blank estate planning questionnaire is insufficient.

Planning Issues

Looking back to our hypothetical, the competency of the senior is of vital importance in determining the appropriate course of action. Clearly, where the senior is competent, discussions need to be conducted with the senior directly. But, what does one do about the senior who insists on the presence of one or more of his/her adult

children at meetings? Typically, this might be considered a problem involving destruction of attorney client privilege. Nevertheless, it is the client's privilege and the client may feel more secure with the adult child present. Further, if the adult child is the agent under a durable power of attorney and/or is trustee under a revocable living trust, presence of the adult child might, in fact, enhance the quality of the estate planning process by placing the adult child agent/trustee "in the loop" as to the intent of the senior and the mental process used to arrive at certain estate planning decisions.

Key to successful family-based estate planning, however, is to remember who is the client. Do not let age stereotyping cloud your judgment or your communication with the senior. It is a very typical scenario in dealing with a senior, especially one who might have slowed down in response time or who has hearing difficulties, for the senior to look to the adult child prior to responding or providing input and decision making to the attorney. The attorney needs to be cognizant of this and avoid the natural tendency to begin speaking to the adult child rather than to the senior. Slowness in response and reliance upon input from the adult child does not mean the senior is not fully capable of making his/her own decisions, and the attorney must avoid deferring to the adult child for discussion of the senior's estate planning. On the other hand, the attorney must carefully judge the interaction between the senior and the adult child and determine whether or not the presence of the adult child is of benefit to the senior, or whether in fact the senior's decision making is being abdicated to the adult child.

What of the senior who has lost capacity or is losing capacity? Again, the first step the attorney must take is to avoid age stereotyping and presume the incompetency of the senior. The Rules of Professional Conduct require that where the competency of

the client is diminished the attorney, as much as possible, must attempt to maintain a normal attorney-client relationship (Rule 1.14). While Rule 1.14 has been modified from state to state, it does recognize that competency is not a black and white issue, but subject to degrees of competency. (See, for example, Comments to Rule 1.14, *Colorado Rules of Professional Conduct*).

Most estate planners think in terms of testamentary capacity rather than contractual capacity. Yet, in creating a robust estate plan for the client, contractual capacity may often enter the picture. Contractual capacity is generally viewed as a higher standard of capacity than testamentary capacity. It is the standard necessary for the client to be able to purchase life insurance and long-term care insurance, or to purchase real property, prepaid funeral and burial arrangements or any other type of contractual arrangement. In general, the client entering into a contract must be capable of understanding the nature of the contract being entered into, the obligations of the parties to the contract, the effects and consequences of entering into the contract, and must have the ability to exercise free will with respect to the decision to enter into the contract. An entire body of law exists with regard to the capacity to contract, and when a party is placed into an unfair bargaining position such that the contract should be void. For the estate planning attorney this may be the most difficult situation to face, as these contracts are routinely entered into outside of the presence of the attorney, and often prior to the beginning of the attorney's representation of the client.

For the estate planner, recognizing whether a client has mental capacity to execute the documents in the estate plan is essential. The client may come to the attorney individually, in which case the attorney's perceptions of the client in the initial

interview will dictate the path to follow. But, the attorney should not be lulled into accepting the initial perception as proof of mental capacity. Many clients with limited mental capacity are quite practiced at "keeping it together" for a limited period of time, especially when they believe it to be important to impress others of their mental capacity. Estate and elder law attorneys should always be alert to changes in the behavior, memory and actions of clients which might indicate either that the initial assessment as to mental capacity was faulty, or that the mental capacity of the client has begun to diminish.

A Sound Basic Estate Plan

For the senior client, developing a sound, overall, estate plan is essential. A will or revocable power of attorney may be the core document. A carefully considered medical powers of attorney, a living will (under whatever name it may exist in your state), and a durable power of attorney are essential to any basic estate plan. But, it is important to tailor these documents to the senior's situation. We must carefully avoid the tendency to provide a "canned" durable power of attorney for the senior. Depending on the financial situation of the senior, providing language in the document to authorize transfers for the purpose of Medicaid planning can be essential, especially in states which prohibit such transfers which result in impoverishment. The willingness of a court to permit such Medicaid planning transfers varies widely from state to state, ranging from outright prohibitions to statutory authority of a conservator to engage in such Medicaid planning. Often in durable powers of attorney language is included limiting the gifting authority to the annual exclusion amount. But, this can significantly hamper the Medicaid transfer planning process and separate language should be included in the

senior's durable power of attorney to permit larger transfers if the purpose is Medicaid planning. Some attorneys have objected to such language, worrying that larger gifts will impact the gift tax exemption amount of the senior. But, this is false logic. The senior who is doing Medicaid planning is extremely unlikely to has assets above the $1,000,000 gift tax exemption amount.

The experienced estate planning attorney may normally rely on his/her own experience and knowledge of gift and estate tax law as well as state probate law in crafting wills. But, with a senior with disabilities, or a senior who has children with disabilities, that experience may not be sufficient. Drafting special or supplemental needs trusts, either self settled or third party, is a different breed of estate planning than drafting a standard discretionary or support trust. Such special and supplemental needs trusts are subject to state specific and federal regulations which if not correctly followed can have a serious negative impact on long term care financial assistance. Again, the attorney with a senior with such special needs must be prepared to consult with an attorney who works in the area of special needs planning rather than drafting a "canned" discretionary trust. Where the trust is to be a self settled special needs trust, consultation with a Medicaid law and trust law knowledgeable attorney is essential. Where the trust is a third party supplemental needs trust, the attorney must be cognizant of the limiting language necessary to protect the trust against governmental attack. Third party supplemental needs trusts are very different in their requirements than the typical support trust created for the benefit of a non-disabled child.

The natural tendency of parents tends to be to want to divide their estate equally among their children. But, where one or more of those children has a disability, such a

path may not be wise. Gifting an equal share to a disabled child, especially one receiving governmental benefits may result in that child losing the medical and other benefits which were available to the adult disabled child prior to the death of the parent. Careful drafting of supplemental needs trusts can avoid this situation, and in so doing result in the disabled child receiving an enhanced quality of life through the combination of governmental assistance and the additional benefits provided through the supplemental needs trust. Again, consultation with a disability benefits knowledgeable attorney may be essential in the estate planning process. Providing an outright gift to the disabled child may be counterproductive, resulting in loss of governmental benefits and requiring the complete expenditure of the testamentary gift in the least possible time in order to reestablish such benefits, defeating the intent of the testator in providing the gift to the disabled child.

Picking the Trustee - Private vs. Professional Trustees

A major consideration for the senior creating a self settled or third party special/supplemental needs trust is the naming of the trustee. Typically the question of whether to name a family member or close family friend, or whether to select a professional trustee, revolves around the investment and financial management expertise of the trustee. Those who favor the professional trustee, individual or corporate, cite the time and knowledge necessary to effective manage a trust as the reason for professional trustee selection, while those favoring individual, family or family friend trustees cite the advantage of personal knowledge of the family situation and closeness to the beneficiary as the advantage of such a trustee, though cost is often

also cited. Where the beneficiary is disabled, careful selection of the trustee is especially important. It may be that in this situation having co-trustees, one professional and one family member is especially useful. But, in any event, selecting a trustee who is knowledgeable in governmental benefits, benefit planning, and social services programs is especially important. Standard professional trustee may not have the special expertise necessary to fully understand the difficulties of administering a disability trust, while a family/family friend trustee may simply be overwhelmed by the time involved in proper administration of such a trust and the intense involvement necessary to assist the disabled person.

The estate planner working with a senior who requires special needs planning (whether for the senior or a disabled child) must understand the entire range of social services skills necessary to properly assist the senior. Care planners outside the legal profession often must be brought into the planning process, to ensure proper care management for the senior. Selection of care facilities, whether assisted living or nursing home care, must be considered. Cost benefit analysis must often be done to determine which facility can provide the best care for the dollars available to pay for such care. All nursing homes are not alike. Depending on the condition of the senior, be it a physical ailment or a mental incapacity, will dictate which facility is appropriate for the senior's care. As with other areas of the estate planning, working with knowledgeable elder law attorneys in other locations where the senior may wish to reside may be essential. Comparison of available services in different geographical locations may be necessary to come up with the appropriate estate plan for the senior.

Conclusion

Estate planning is often as much art as it is law. This is especially so when the client is a senior with mental or physical impairments. The estate planning attorney needs to understand the multi-faceted nature of estate planning for seniors and seniors with physical and/or mental disabilities. Estate planning for seniors often requires a family oriented planning approach, rather than a traditional attorney-client privileged approach to clients. Determining who your client is, early on in the planning process, is an essential step, not an academic ethics discussion. Selecting and obtaining the assistance of individuals with specialized knowledge of seniors and disability planning, both inside and outside of the legal community is essential. We must never lose sight of the fact that proper and quality planning for the client is our purpose as attorneys.