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# THE STORY OF MR. G.: REFLECTIONS UPON THE QUESTIONABLY COMPETENT CLIENT

Mark Spiegel\*

This Article is partially the story of a case.<sup>1</sup> It is a case of mine that had a happy outcome (or at least appears to have had one for the client), but it took a troubling route to reach that outcome. The case raises questions about an area in which I have written extensively—lawyer-client decision-making.<sup>2</sup> In particular, this case raises questions about lawyer-client decision-making with, what my colleague Paul Tremblay has called, questionably competent clients.<sup>3</sup>

The Article contains three parts. First, in Part I, I will describe Mr. G.'s case. As with any description, mine presents certain problems. It is selective and presented through my eyes. Moreover, because I worked on the case several years ago and had no idea at the time that I would be writing about it, my description of the case is affected by data and memory problems. For some events I have no data other than summaries; for others I have had to rely upon my memory. Nevertheless, I do think it is a fair representation of the events depicted. Moreover, I have tried to err on the side of over-inclusiveness.

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1. Our instructions for this symposium were to present and discuss a case study. I prefer to use the phrase "story" not because what I relate is fiction, but because it is a version of reality presented through my lens and not necessarily a complete description of all that happened in this particular "case." By and large, the legal literature does not distinguish between case studies and "stories," although most of the controversy has been over the use of stories. *See infra* note 82.

2. *See generally* Mark Spiegel, *The Case of Mrs. Jones Revisited: Paternalism and Autonomy in Lawyer-Client Counseling*, 1997 *BYU L. Rev.* 307 [hereinafter Spiegel, *Mrs. Jones*]; Mark Spiegel, *Lawyers and Professional Autonomy: Reflections on Corporate Lawyering and the Doctrine of Informed Consent*, 9 *W. New Eng. L. Rev.* 139 (1987) [hereinafter Spiegel, *Corporate Lawyering*]; Mark Spiegel, *The New Model Rules of Professional Conduct: Lawyer-Client Decision Making and the Role of Rules in Structuring the Lawyer-Client Dialogue*, 1980 *Am. B. Found. Res. J.* 1003; Mark Spiegel, *Lawyering and Client Decisionmaking: Informed Consent and the Legal Profession*, 128 *U. Pa. L. Rev.* 41 (1979) [hereinafter Spiegel, *Lawyering*].

3. Paul R. Tremblay, *On Persuasion and Paternalism: Lawyer Decisionmaking and the Questionably Competent Client*, 1987 *Utah L. Rev.* 515 [hereinafter Tremblay, *Persuasion and Paternalism*].

Second, in Parts II and III, I will use Mr. G's case to comment about working with questionably competent clients. In particular, I will focus on two troubling aspects. Part II discusses the difficulty of making the judgment that somebody's decision-making capacity is impaired. In so doing, I will explore two different meanings of the term questionably competent. The term might refer to uncertainty as to whether somebody is competent or, alternatively, it could refer to the idea that "competence" is not an all or nothing concept, but one of degree. I believe that our case reflected the second meaning of the term.

Finally, Part III analyzes what to do if your client's competency is in question. I will address what, if any, tactics that influence the client are justified. In so doing, I will discuss the attempt to classify tactics as persuasion, manipulation, or threats, and ultimately conclude that this classification is not very helpful. Instead, I will look at some of the tactics we employed in the case of Mr. G. and reach some tentative conclusions about whether they were justified.

## I. THE STORY

At the time of this case, I was working as a clinical supervisor at Boston College Law School. The setting for the clinical work was the Boston College Legal Assistance Bureau. The Legal Assistance Bureau is primarily funded by Boston College Law School, but it is also a branch of legal services in the Boston area and, at the time of this case, received limited funding from Legal Services Corporation. Our dual source of funding evidenced our dual commitment—provide legal services and teach students. This story, however, is primarily a story about my lawyering and not my supervision of students. As such, the legal services identity and institutional setting is more relevant than the clinical education setting. The practice of delivering legal services to low-income persons provides the context for the events that I will describe.<sup>4</sup> Moreover, because I have chosen not to focus on issues related to supervision or clinical teaching, I frequently use the pronoun "we" in describing this case rather than attempting to separate my behavior from the actions of the students who worked on this case.

Marvin Gaynor<sup>5</sup> first called our office in the Fall of 1996. He had received a notice from the local housing authority ("LHA") notifying him that it was intending to evict him because he had interfered with

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4. For a discussion of issues related to delivering legal services to low income persons, see Special Issue, *Conference on the Delivery of Legal Services to Low Income Persons: Professional and Ethical Issues*, 67 Fordham L. Rev. 1713, 1713-2791 (1999).

5. The names in this narrative are changed in order to protect privacy and confidentiality.

the “quiet enjoyment” of other tenants.<sup>6</sup> The only other substantive information in the notice was a statement that “the source of the information we have received is correspondence” from another tenant, Jane O’Meara. The notice also stated that our client had a right to an informal conference.<sup>7</sup>

We scheduled an initial interview with Mr. Gaynor. At the interview we learned that he was living at Fair Gardens, an elderly/handicapped state subsidized housing complex. We also discovered that he was thirty-five years old and one of two handicapped individuals living at Fair Gardens. About eight years earlier he had been in a motorcycle accident. Eight months after the accident, Mr. Gaynor was discharged to a rehabilitation center in the Boston area. He remained there for about four years. He was then discharged to his current apartment at Fair Gardens.

The motorcycle accident was serious. Mr. Gaynor suffered multiple injuries, including a traumatic brain injury.<sup>8</sup> He also fractured his femur, an injury that eventually resulted in an amputation above the knee after the wound became infected. The post-operative reports and follow-up examinations stated that “as a result of the accident he experiences several serious cognitive and neuro-motor impairments.”<sup>9</sup>

That is what the reports said. What *we* experienced during that first meeting was somewhat different. It was true that Mr. Gaynor was in a wheelchair and exhibited slurred speech that made it very difficult to understand him. It is also true, however, that we found him to be a very likeable individual with a keen sense of humor. I was struck that, rather than feeling sorry for himself, Mr. Gaynor made jokes. Maybe that was a defense mechanism, but it made the situation easier for us. I wanted to help him.

At the interview Mr. Gaynor told us to read a letter he had written. A friend of his who accompanied him to the interview advised him that, in view of his speech difficulties, it would be a good idea to “write up his side of the story.” The letter stated that: “[p]erson named [Jane O’Meara] is barely known to me. We do not agree about the subject of smoking in the hall. I am anti-smoking. I was

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6. The notice stated he was in violation of Section 3A of his lease. Section 3A stated that the tenant was “to live in a peaceful manner respecting the rights of neighbors to privacy and quiet.” Clause 6B of the lease stated that management may terminate the lease at any time if the tenant interferes with the rights of other tenants.

7. The lease and State law imposed numerous procedural requirements before the LHA could proceed with the eviction. According to the lease, the tenant had a right to both a private conference and a hearing before the housing authority could proceed to court. The procedural requirements under state law are set out in 760 C.M.R. § 3.00 (1978).

8. The medical reports state that a CT scan showed frontal and orbital fractures, a subdermal hematoma, contusions to his frontal lobes, bilaterally, and to the left posterotemporal lobe.

9. Medical report.

told that Ms. O'Meara phoned the police to take care of an unsettled matter between me and [Noah Bridges]. . . ."<sup>10</sup>

The letter went on to state that Mr. Bridges, who we later learned was an elderly, partially deaf resident of Fair Gardens, had stolen money from Mr. Gaynor and had entered his apartment without permission. In addition, the letter stated that Mr. Bridges had peeped into our client's window several times. The letter concluded by telling us that at first Mr. Gaynor was friendly with the other tenants, but as his troubles with Mr. Bridges increased he started having difficulties with them as well. Moreover, although our client tried to report Mr. Bridges to the LHA a number of times, nothing was done.

After reading the letter, we realized it said very little about any incidents that might provide a basis for the claim that our client had interfered with the quiet enjoyment of other tenants. It told us that perhaps Ms. O'Meara had a motive for reporting our client and that somehow Mr. Bridges might be involved. Next, we tried to find out from our client what incident or incidents the notice from the LHA might be referring to. Mr. Gaynor did not want to talk about this; he wanted to talk about Mr. Bridges. At some point we told him that in order to evaluate what we could do for him, we needed to know more about what the LHA might say at the informal conference. We knew we could get Ms. O'Meara's letter from the LHA, but we wanted to get a sense of our client's perception of events without it being colored by "evidence" from the other side. Finally, he told us that there had been an incident the previous month in which he tried to pass by in his wheelchair, but had been obstructed by Ms. O'Meara and several other residents, including Mr. Bridges. When he could not get by, Mr. Gaynor had taken an alternate route around them. Ms. O'Meara and Mr. Bridges claimed that our client had become angry, removed the leg rest from his wheel chair, and threatened Mr. Bridges with it. Although the police had been called and had interviewed the parties, they had chosen to do nothing.

We now had an incident, but we were not sure what to make of it. Was this what provoked the eviction? Not knowing where to go next, we asked our client whether there were any witnesses to this incident. We also asked if he knew the names of the police officers involved. We further inquired as to whether there was anyone else we could talk to about events at Fair Gardens that he thought might be helpful. We concluded by asking him what he wanted us to do. On this point he was unequivocal: he wanted to stay in his apartment.

Our next step was to examine the file at the LHA. There we discovered a somewhat different story. There was a letter from Ms. O'Meara, dated June 6, 1996, that referred to an incident similar to

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10. Letter from Mr. Gaynor, to Mark Spiegel, Professor of Law, Boston College Law School (date) (on file with Professor Mark Spiegel).

what our client described, but this incident had occurred in May, not April. There was also a police report about this incident, dated May 15. The report stated that several residents had complained about our client threatening Mr. Bridges and that these residents said our client had removed a metal part from his wheelchair and threatened to hit him. Ms. O'Meara's letter also described a whole series of incidents ranging from spilling water in the common community room in June, to leaving garbage at the entrance to the apartment. Finally, the file revealed a history that provided support for both sides. There were a number of complaints by residents about Mr. Gaynor and a number of complaints by our client about Mr. Bridges.

With the informal conference about to occur in a few days, we needed a strategy. We developed two ideas. Our first strategy was to argue that nothing had occurred that justified eviction. To support this theory, we would present our client's testimony and an affidavit from one of the other tenants. As part of this argument we would try to establish bias on the part of Ms. O'Meara. Our second idea was to argue that the problems, if any, stemmed from difficulties between our client and Mr. Bridges and should have been dealt with by the LHA earlier. Moreover, there were measures that could be implemented to prevent these situations from occurring again. As part of this theory we would present testimony from a social worker at our client's cognitive rehabilitation program. In addition, we would contend that the LHA had to do more to educate the other residents about the issues and behavior of individuals who had suffered brain injury.<sup>11</sup> This strategy would demonstrate that misunderstandings about our client's differences were a significant part of the problem.

At the conference, the student who presented our case did an excellent job of pressing the two arguments outlined above. We left feeling that we would be successful, not as a result of persuading the LHA that the incidents had not occurred, but because we convinced the LHA that Mr. Gaynor should be given one more chance. Several weeks later we received the notice informing us that the housing authority would not proceed with the eviction. We phoned our client and informed him of the results and wished him luck. We then closed the file.

We had hoped that this first incident would be the end of Mr. Gaynor's difficulties with the LHA. Unfortunately, that proved not to be the case. Approximately one year later I received another call from him. He had received a new notice from the LHA, again stating its intention to evict him. The notice was similar to the previous one. It told our client that he had the right to an informal hearing, and that

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11. We were hoping to develop a legal argument based upon reasonable accommodation pursuant to the the Fair Housing Act of 1988, 42 U.S.C. § 3604 and the Americans With Disabilities Act, 42 U.S.C. § 12101 (1994) ("ADA").

he was being evicted because he had violated the terms of his lease by "interfering with the quiet enjoyment of the other tenants under Clause 3A."<sup>12</sup> There was, however, one significant difference. This notice stated that the information had been provided by the Old Town Police Department rather than another tenant.

We had only a few days to interview Mr. Gaynor and prepare for the informal conference. The first step was to call the LHA's attorney to request a continuance. He would only give us one week. He also stated that this time they were prepared to pursue this through to eviction. Next, we obtained copies of two police reports. One reported an incident where the police were called to the housing complex because our client was allegedly disturbing some of the elderly residents who were sitting outside talking. According to the police report, when the police arrived they asked Mr. Gaynor to move and he refused. A police officer reached down to move Mr. Gaynor's wheel chair and a minor scuffle occurred. During this scuffle the police officer was scratched. No charges were filed. A second incident occurred approximately one week later. The police were called because our client allegedly had a scuffle with Mr. Bridges in the community room in which he tore the pocket off Mr. Bridges' shirt. According to the police report, another resident, Martha Rossini, witnessed this "attack."

At the interview with our client, we had some of the same difficulties we had had during the previous interview. Mr. Gaynor's speech difficulties made him hard to understand. Again, he primarily wanted to talk about his past problems with Mr. Bridges and either found it difficult to, or was reluctant to, discuss what might be prompting the current eviction notice. Eventually he described an incident the previous month where the police were called to Fair Gardens. Mr. Gaynor, however, said he did not do anything wrong and that he did not have an altercation with the police. After some prompting, he also mentioned that the police came a second time at the instigation of Mr. Bridges, but again he stated that he had done nothing wrong. When we asked him if he could remember whether anything else happened either time he just responded that Mr. Bridges was out to get him. Because we could not obtain any more information, we ended the interview by confirming that he still wanted to remain at his apartment and telling him we would meet him again before the informal conference that was scheduled a few days later.

The informal conference began with a strong statement from the LHA about their obligation to the other tenants. The attorney then introduced the two police reports. We did not object to the introduction of the police reports because this was not an evidentiary hearing and, therefore, the rules of evidence did not apply. We asked

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12. See *supra* note 6.

questions about whether there were other witnesses and also tried to find out if the LHA had done anything to educate the other tenants regarding the behavioral patterns of somebody who suffered brain injuries. We had decided not to present testimony because we were not sure what happened. Our client's lack of factual detail at the interview may have indicated that nothing had actually happened, or was the result of a memory loss, or some other explanation. The LHA's attorney, however, asked our client several questions. First, he asked whether our client had hit Mr. Bridges and scratched the police officer. Our client said he had not done those things. Second, the LHA's attorney asked our client whether he would be willing to move if they found him another apartment. This "offer" was a surprise to us. We had assumed that at some point moving to another housing authority apartment would be a possible resolution, but we did not expect the possibility to be raised at the conference. Before we could intervene and say we would need to talk to our client before he answered that question, Mr. Gaynor shook his head from side to side vigorously, indicating no. At that point the conference ended.

We met with our client after the conference and explained that it was our assessment that we would lose the informal conference and have to go on to the next stage, a hearing before the Executive Director of the LHA. We also explained that if we lost at that hearing, we would then have an opportunity to request a grievance hearing before an individual who is appointed by the LHA, but who is not an employee of the authority. Finally, we explained to him that if we lost the grievance hearing the LHA would still have to initiate court proceedings to evict him. Next, we discussed the implicit offer of another apartment. We asked him why he rejected the offer out of hand. He replied, "I don't want to move." When we asked him why, our client just shrugged. We then asked him whether he would take another apartment if he had no choice because the LHA was successful in evicting him. He said yes. We then explained that it was our assessment that if the case went to eviction the LHA was not likely to offer another apartment. We asked him, "Does that make a difference?" He responded by saying, "No I am not going to lose." We then told him we could not make an assessment of the case because at that point we felt that we did not know enough about the case. We also asked his permission to call the lawyer for the LHA to discuss what he meant when he asked our client if he would take another apartment. He said, "We can do that, but I will not move." The meeting ended with us stating we would like to do more investigation and then meet with him again.

As expected, we lost the informal conference and then made our request for a hearing before the Executive Director of the LHA. In the interim, we conducted more investigation. We talked to the police officers. Their stories were consistent with the police reports. We did



learn, however, that the police officers did not witness any of the events between our client and other residents. They were adamant, however, that our client was trying to hit one of the officers when the officer was scratched. Charges were not filed because they felt sorry for our client.

We attempted to talk to other residents of Fair Gardens, but they would not talk to us, other than to say that Mr. Gaynor "scares" them. We also talked to the attorney for the LHA about whether the agency would offer our client another appropriate apartment. He responded that there was nothing to talk about because our client had rejected the idea of moving to another apartment. We then said, "Well if we had something concrete to show him, it might make a difference." The attorney replied, "There is nothing available and there is no sense in exploring options unless you can guarantee your client would consider moving." We told him we could not guarantee that, but we would speak to our client further about the matter.

At our next meeting with our client, we told him what we had discovered and that we were not optimistic about the results. We told him that we could win, but that it was far from a sure thing. We then returned to the discussion of accepting another apartment. He responded by flatly stating, "I don't want to move." We then asked him whether he would at least look at another apartment if one was available. He said he would look, but not move. We also asked if he would consider behavioral modification with a psychiatrist or medication. We had learned from our client's current social worker that these were measures that might ameliorate our client's problem with what the mental health professionals call impulse control, i.e. the tendency to lose control of one's temper. We thought that if he would do either of these things, it would strengthen a reasonable accommodation argument under the Fair Housing Act and the ADA.<sup>13</sup> Our client responded, "No, I am not crazy. I will not go to a psychiatrist. The medication will give me diarrhea. I have discussed it and will not take it." We then asked, "What if doing these things will help your case; would that matter?" He replied that his case did not need any help.

In December 1997, we had the first of three sessions before the Executive Director of the LHA. Our expectation, as with the informal conference, was that we would lose this hearing. Our major goal, therefore, was to use the hearing for discovery. Our secondary goal was to convince the LHA that we were serious about defending the eviction. At this first session the only testimony presented was from the police officers. Their testimony was consistent with what we knew from our conversations with them, and from the police reports. The student on the case questioned the officers about what training

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13. See *supra* note 11 and accompanying text.

they had in dealing with people suffering from disabilities, particularly brain injuries. We were hoping to develop an argument that the altercation with the police occurred because the police were not trained to deal with individuals with brain injuries.

Between the first part of the hearing before the Executive Director and the second part, several events occurred. The rehabilitation agency working with our client offered him housing located in an area about ninety miles from where he was living. Our client rejected this possibility of alternative housing because it was too far from the people he knew. He also stated again that he was going to win his case. The social worker from the agency was upset with his decision and mentioned filing papers to have our client declared incompetent based upon his refusal to accept the offer of housing. We attempted to dissuade him from taking any action, explaining that unwise decisions do not prove incompetence. We also told the social worker that if he attempted to proceed, we would fight it on our client's behalf. Privately we were outraged that he would consider this. We also heard from the LHA attorney who told us that if an appropriate handicapped-accessible apartment became available he would allow our client to look at it; but our client would have only a very short time to decide before the apartment was offered to the next person on the waiting list.

During the second and third sessions of the hearing we heard from the witnesses to the alleged events—the elderly residents of Fair Gardens. The results were mixed. The good news for our client was that many of the witnesses had obvious memory problems and said contradictory things. In addition, not all of them had witnessed the events. There were, however, two witnesses who did tell consistent, coherent stories; one witness for each incident. We felt that if believed, these witnesses could support an argument that our client had waved the metal part of his wheel chair at a group of residents in what they perceived to be a threatening manner, and pulled the buttons off Mr. Bridges' shirt. We could have argued that these incidents were not serious enough to constitute breaches of the lease. On the other hand, we were not confident about what would happen in court when two "little old ladies" testified. We decided to renew our efforts to discuss with our client the option of accepting another apartment in the same town.

We held a series of meetings with him over the next two months. In those meetings, we refused to accept his beginning statement that he would not move. The conversation proceeded as follows.

"Why?"

"Because this is the apartment they gave me when I left the rehab program. It was meant for me."

"We understand this apartment is important to you, that it means living independently, but any new apartment we would get for you

would mean living independently.”

“I like where I live—I want to be near my friends.”

“Any new apartment would be near your friends. We think there is a good chance you will lose your case.”

“I will win.”

“Do you want to be homeless.”

“I don’t care. I want to stay here.”

We kept each of these meetings going as long as we thought there was a chance that he might change his mind. The meetings always ended with Mr. Gaynor saying, “I don’t want to move.”

At the beginning of March 1998, the LHA attorney called and said that there was another apartment for our client. We met with our client again and asked if he would look at the apartment. At first he said no. We reminded him that several months earlier he said he would look at an apartment if one became available. He said: “Okay, but I will not move.” Our client looked at the apartment which was located in a handicapped housing complex located about one to two miles from his apartment. Afterwards, we met with him and asked if he would consider moving to the apartment.

“No.”

“Why?”

“I like my apartment, it’s the one I was sent to by the rehab people. The new one has too many handicapped people.”

We then rehashed much of the previous discussions regarding his chances of success and our concerns about him becoming homeless. The conversation ended with us asking if he would think about it and meet with us again later that week to discuss the matter further.

In the interim, several of Mr. Gaynor’s friends called. With his permission, we spoke to them about the case and told them that if they thought that it would be good for him to move, they should talk to him about it. We met with Mr. Gaynor for about ninety minutes later that week. At the end of the meeting our client finally said he would take the new apartment. Although we sensed we had worn him down, we accepted his statement as authority to negotiate a settlement agreement and told him we would come back with an agreement from the housing authority for his approval. We comforted ourselves with the thought that even if he felt coerced he could back out by not signing the agreement.

We negotiated an agreement that provided him with a new apartment and resolved the dispute. The agreement, however, also provided that if either side failed to perform, the eviction process would continue where it left off, with the parties awaiting the decision of the Executive Director. Under the agreement, our client would not lose his apartment until he actually moved. We presented this

agreement to him. He balked. We reminded him that he had already agreed. He eventually signed, but two weeks later he repudiated the agreement and refused to move. The LHA subsequently notified us that they would proceed with the eviction.

I left our office that spring with Mr. Gaynor's case still pending. My expectation was that the case would be litigated either over that Summer or the following Fall semester. What actually happened was that the LHA did not proceed and our client remained in his apartment. There was one further incident the following year, but Mr. Gaynor is still at Fair Gardens as of the writing of this article some two years later.

## II. COMPETENCE

What, if any, lessons can we draw from Mr. Gaynor's story? To some extent that depends upon what parts of the story we choose to emphasize.<sup>14</sup> The part of the story that I am interested in is the interaction between the attorneys, myself included, and Mr. Gaynor, the client, over the issue of whether he should have accepted the settlement offer of alternative housing. These interactions can be viewed as part of the larger issue of who controls decisions: the lawyer or the client. As previously noted, I have written extensively on this topic.<sup>15</sup> What made this case both different and problematic for me, was that Mr. Gaynor was questionably competent, at least from some perspectives.<sup>16</sup> Moreover, he was making what the students who worked on the case and I perceived to be an unwise choice by rejecting the offer of alternative housing.

The model of lawyer-client decision-making that has been advocated by academics such as myself, presupposes a lawyer who presents options to her client and a client who then chooses among

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14. The discussion of this case could have focused on issues such as our competence in representing Mr. Gaynor, including such questions as whether we were undervaluing the Fair Housing Act and the ADA defenses or whether we litigated aggressively enough at the informal hearing. I could have used it to discuss resource allocation questions, such as whether this was a case worth devoting considerable resources given our other obligations. It also raised questions about our obligations to third parties, such as the other elderly tenants, particularly if one believed that our client could be dangerous. Finally, we were convinced that part of our client's aversion to Mr. Bridges stemmed from our client's homophobia. Was this an issue we should have aggressively confronted him about?

15. See *supra* note 2 and accompanying text.

16. Similar issues have been discussed in the context of elderly and juvenile clients. See generally Martin Guggenheim, *A Paradigm for Determining the Role of Counsel for Children*, 64 Fordham L. Rev. 1399 (1996); Peter Margulies, *The Lawyer as Caregiver: Child Client's Competence in Context*, 64 Fordham L. Rev. 1473 (1996); Peter Margulies, *Access, Connection, and Voice: A Contextual Approach To Representing Senior Citizens Of Questionable Capacity*, 62 Fordham L. Rev. 1073 (1994) [hereinafter Margulies, *Access*]; Linda F. Smith, *Representing the Elderly Client and Addressing the Question Of Competence*, 14 J. Contemp. L. 61 (1988).

those options.<sup>17</sup> This model is not without its critics<sup>18</sup> or its complications. For example, one issue is to what extent clients get to choose the means by which the ends of representation are achieved. Moreover, even those who advocate an autonomy perspective recognize that there are important limits to a client's control over her lawyer. A client cannot force her lawyer to violate the law or professional codes and rules.<sup>19</sup> Where the client's actions might harm third parties, the lawyer may have latitude to refuse to participate.<sup>20</sup> The lawyer may also have an interest in her own workmanship or craftsmanship.<sup>21</sup> Finally, one might argue that corporate clients should be treated differently from individual clients because of both the corporate client's increased ability to harm others and because organizations, unlike individuals, do not have autonomy interests.<sup>22</sup> But by and large, the autonomy viewpoint rejects the idea that lawyers have the right to make decisions for clients, even for the clients' own benefit. Under this view, paternalism in order to protect the client from bad choices is not justified.

The one limited exception to this anti-paternalistic stance is when the client is incompetent.<sup>23</sup> This exception is easy to apply when a court has already made a finding of incompetency.<sup>24</sup> In those cases, the lawyer simply treats the guardian as the client's decision maker. If the court has not made a finding of incompetency, however, this

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17. See e.g., Douglas E. Rosenthal, *Lawyer and Client: Who's in Charge?* 8 (1974) (discussing the client participation model); Robert D. Dinerstein, *Client-Centered Counseling: Reappraisal and Refinement*, 32 *Ariz. L. Rev.* 501, 584-603 (1990) (proposing variations to the client-centered approach); Susan R. Martyn, *Informed Consent in the Practice of Law*, 48 *Geo. Wash. L. Rev.* 307, 310 (1980) (outlining informed consent as a standard for enforcing competency in the legal profession); Judith L. Maute, *Allocation of Decisionmaking Authority Under the Model Rules of Professional Conduct*, 17 *U.C. Davis L. Rev.* 1049, 1052 (1984) (examining the joint venture model of client-lawyer relationships); Marcy Strauss, *Toward a Revised Model of Attorney-Client Relationship: The Argument for Autonomy*, 65 *N.C. L. Rev.* 315, 317 (1987) (arguing for the adoption of informed consent); *supra* note 2 (listing articles advocating this model of lawyer-client decision-making).

18. See Spiegel, *Mrs. Jones*, *supra* note 2, at 308 (discussing some of the critiques).

19. Model Rules of Prof'l Conduct R. 1.16(a)(1) (1983) [hereinafter Model Rules]. See Spiegel, *Lawyering*, *supra* note 2, at 117-20.

20. See Model Rules, *supra* note 19, R. 1.16(6) (allowing withdrawal in certain situations).

21. See Spiegel, *Lawyering*, *supra* note 2, at 117.

22. See Spiegel, *Corporate Lawyering*, *supra* note 2, at 151-52.

23. See Margulies, *Access*, *supra* note 16, at 1075; Tremblay, *Persuasion and Paternalism*, *supra* note 3, at 570. Professor Rein dissents from this reliance on competence as a tool for deciding when a lawyer might intervene to override a client's decision. Jan Ellen Rein, *Clients with Destructive and Socially Harmful Choices—What's an Attorney to Do?: Within and Beyond the Competency Construct*, 62 *Fordham L. Rev.* 1101 (1994). Although I disagree with Professor Rein's conclusions, I believe she correctly notes that "[m]ost articles do not discuss why they focus solely on the competency question." *Id.* at 1105 n.11.

24. Cf. Smith, *supra* note 16, at 80 ("[T]he totally incompetent client . . . presents the lawyer with few dilemmas.").

exception presents difficult problems in practice. Mr. Gaynor's case illustrates these difficult problems.

Our first problem was assessing whether Mr. Gaynor was competent. What should a lawyer do when a lawyer believes that a client may be incompetent, but no court has made a finding to that effect? Model Rule 1.14(b) states that a lawyer may seek a guardian when the lawyer "reasonably believes the client cannot adequately act in the client's own interest."<sup>25</sup> Rule 1.14, however, does not help the lawyer very much in determining how to exercise the discretion the word "may" gives her.<sup>26</sup> The comments to Rule 1.14 suggest some reasons why one might not seek a guardian. The comments state that in many circumstances appointment of a legal representative may be expensive or traumatic for the client. The comments further note that evaluating the considerations of whether to seek the appointment of a guardian is "a matter of professional judgment on the lawyer's part."<sup>27</sup>

After reading Rule 1.14 our reaction was that it was not helpful. It was not just that it gave us discretion because the comments ultimately left the question of whether to seek a guardian to our professional judgment; but in our case, the considerations the comments suggested—expense and trauma—seemed unresponsive to our basic concerns. In relating the story of Mr. Gaynor's case I mentioned that at one point his social worker stated that his agency was considering seeking the appointment of a guardian and that we were outraged by this suggestion. But why? If we had doubts about his decision-making capacity and the decisions he was making, why should it bother us that others would have similar doubts and want to act on those doubts?

I think there were two reasons. First, the appointment of a guardian seemed to us the ultimate act of disloyalty.<sup>28</sup> Somebody came to us for help. That the request would result in our imposing significant limitations on his liberty seemed treacherous to us. Now, the fact that it *felt* treacherous does not mean that it *would* have been. Sometimes one has an obligation to tell another person what you perceive to be the truth even if they do not want to hear it. Moreover, that obligation seems strongest when that person lacks the capacity to make decisions for themselves. It is, however, one thing to "speak the truth" to loved ones, friends, or clients and another to take the additional step of taking action that might result in a significant curtailment of the client's ability to make choices for himself.

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25. Model Rules, *supra* note 19, R. 1.14(b).

26. *Id.* at R. 1.14. For discussions and critique of Rule 1.14, see generally James R. Devine, *The Ethics of Representing the Disabled Client: Does Model Rule 1.14 Adequately Resolve the Best Interests/Advocacy Dilemma?*, 49 Mo. L. Rev. 493 (1984); Tremblay, *Persuasion and Paternalism*, *supra* note 3, at 544-47.

27. Model Rules, *supra* note 19, R. 1.14 cmt. 3.

28. See Tremblay, *Persuasion and Paternalism*, *supra* note 3, at 559-61.

The second reason we were outraged by the social worker's attempt to appoint a guardian for Mr. Gaynor was that he did not seem to us to be a client who was incompetent, at least in the legal sense of the term. Also, he did not appear to be, to use the language of Rule 1.14, somebody who necessarily could not act adequately in his best interests. But we were not sure this was the case; he might fit those definitions. Hence the utility of the label "questionably competent."

In one sense, therefore, the problem we had was uncertainty. What degree of certitude did we need before we could seriously consider the guardianship option?<sup>29</sup> In theory, we could resolve our dilemma by submitting the issue to a court. But allowing a court to resolve our uncertainty is not satisfactory in a situation such as this where the very act of asking for a guardianship has consequences. Another possibility in a case of uncertainty is to consult outside experts.<sup>30</sup> We exercised this option in Mr. Gaynor's case. With his permission, we discussed his case with his current mental health providers and with a neuro-psychiatrist who had treated him in the past. We discovered, however, that this approach has limited utility.<sup>31</sup> First, we received inconsistent judgments. The current providers were most concerned with protecting him and, therefore, in our judgment, conflated what they perceived to be the harmful decision he was making with competence.<sup>32</sup> The neuro-psychiatrist focused on process factors to reach his conclusion that our client's capacity to make decisions, while impaired, did not constitute incapacity.<sup>33</sup> But it was not only the inconsistency that made consultation unhelpful; it was also the realization that the decision about what to do was ultimately ours. Regardless of what an expert would tell us, it was still only information that would assist us in exercising our professional judgment.

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29. For a discussion of this issue from a medical perspective, see Robert P. Roca, *Determining Decisional Capacity: A Medical Perspective*, 62 *Fordham L. Rev.* 1177 (1994).

30. See Model Rules, *supra* note 19, R 1.14 cmt. 5; see also *Introduction to Report of the Working Group on Determining the Child's Capacity to Make Decisions*, 64 *Fordham L. Rev.* 1339, 1340 (1996) ("In making the decision regarding capacity, the lawyer should seek guidance from appropriate professionals . . ."); Margulies, *Access*, *supra* note 16, at 1092-93.

31. See Smith, *supra* note 16, at 84-85 (discussing reasons why reliance on experts may not resolve the problems an attorney faces in determining a client's competence). Smith recommends utilizing experts to assist in the interviewing and counseling process. *Id.* at 85.

32. See Paul R. Tremblay, *Impromptu Lawyering and De Facto Guardians*, 62 *Fordham L. Rev.* 1429, 1439 n.41 (1994) [hereinafter Tremblay, *Impromptu Lawyering*] ("[L]iterature . . . tends to assert that the psychiatric profession comes to competence questions with certain biases . . . and thus would be more likely to conclude that a harmful decision by a person is not a competent one.").

33. See Margulies, *Access*, *supra* note 16, at 1083-84 (discussing the use of process factors to judge competency).

Mr. Gaynor's case confronted us with a deeper problem, however. This deeper problem exposed an ambiguity in the term questionably competent. At times the term seems to mean, as discussed above, that there is uncertainty or a question as to whether we have enough evidence to determine a client's competence. But the term took on a different meaning for us in representing Mr. Gaynor. Because, in this case, his competence was not a question of yes or no, but one of degree.

Viewing competence as a question of degree has been criticized by Professors Allen Buchanan and Dan Brock.<sup>34</sup> They state that it is important to reject the notion that competence can be regarded as a matter of degree because of the function of competence decisions within the area that they are analyzing—informed consent for health care decisions.<sup>35</sup> To Buchanan and Brock competence serves as a means to sort persons into two classes: (1) those whose voluntary decisions must be respected and accepted by others as binding; and (2) those whose decisions will be set aside and for whom others will act as surrogate decision-makers.<sup>36</sup>

I agree with them that competence decisions perform this sorting function. I disagree, however, that this sorting is the only function that competence plays. As stated above, we had resolved the question of whether we thought Mr. Gaynor was legally incompetent. That still, however, left the question of how to treat a client who we felt was somewhat impaired. Buchanan and Brock do acknowledge that "patients' degrees of decision-making capacities" may affect how physicians treat patients,<sup>37</sup> so perhaps our difference is only semantic. They would allow variation in treatment, but simply not use the language of competence.<sup>38</sup> Nevertheless, because it has been used previously in the literature, I will continue to use the language of competence and the phrase questionably competent for purposes of this Article.

Why, however, did we feel that Mr. Gaynor's competence was one of degree? There were two main reasons. First, there was no doubt in our mind that he was competent to make many decisions. Our doubts were with his ability to make this particular decision regarding his

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34. Allen E. Buchanan & Dan W. Brock, *Deciding for Others: The Ethics of Surrogate Decision Making* 27 (1989).

35. *Id.* at 28.

36. *Id.*

37. *Id.* at 28-29.

38. Buchanan and Brock's book does not discuss the issue of what they mean by physicians being able to take account of the degree of decision-making capability in determining how they treat patients. They do, however, state that if a patient is competent as they define it, the patient's decision must not be coerced or manipulated. *Id.* at 26. What that might mean and whether that is possible or even desirable in a case such as Mr. Gaynor's is discussed in Part III of this article.



housing because of his animosity/obsession with Mr. Bridges.<sup>39</sup> He frequently told us that moving meant Mr. Bridges would win.<sup>40</sup> Perhaps if Mr. Bridges was not involved, Mr. Gaynor's assessment of the situation would have been different. When a client seems competent in many domains, it is difficult to attribute incompetence to the client and even more difficult to attribute it to a particular decision. The assumption, of course, is that if somebody can think rationally sometimes, why not all the time.

The second reason why we viewed our client's competence as a question of degree was that even in making the decision to reject the offer of alternative housing, Mr. Gaynor was able to state coherent reasons for his decision. David Luban has argued that one way to assess a client's decision-making capacity is to see "if any process is going on in the person's head that can be called 'inference from real facts.'"<sup>41</sup> Mr. Gaynor easily met that test of capacity. He had good reasons for refusing to move: he liked where he lived, he did not want to live among only disabled people, and he had an understandable emotional attachment to his apartment. Even his feelings about Mr. Bridges would seem to meet Luban's test. Revenge or obsession may not be admirable motives, but they do not necessarily equate with lack of competence. Such feelings are certainly within the range of reasons that the legal system is designed to accommodate. Indeed, it is better to seek revenge within the legal system than resort to self-help.

There are, however, other aspects of decision-making.<sup>42</sup> In particular, Mr. Gaynor seemed to be ignoring the consequences of his decision by assuming that he would win his case no matter what. Luban's model correctly allows a client to trade-off the risk of losing against the gains to be achieved by adopting a risky course of action. So it would be acceptable (in my opinion)<sup>43</sup> for Mr. Gaynor to have

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39. Competence is increasingly viewed as "competence for some task—competence to do something." Buchanan & Brock, *supra* note 34, at 18. See also Model Rules, *supra* note 19, R. 1.14 cmt. 1 ("[S]ome persons . . . can be quite capable of handling routine financial matters while needing special legal protection concerning major transactions.").

40. When we stated that he would not be losing to Mr. Bridges by accepting the alternative housing since he was still going to have housing from the Old Town Housing Authority, it had no impact. Moving was losing.

41. David Luban, *Paternalism and the Legal Profession*, 1981 Wis. L. Rev. 454, 479. According to Luban it would be "too much to require that the inference be valid, or objective, or correct, for that is more than competent people can manage." *Id.*; see also Margulies, *Access*, *supra* note 16, at 1085 ("[A] client should be able to give reasons for her decision.").

42. Competence involves a number of different capacities. See Buchanan and Brock, *supra* note 34, at 23-25 (discussing various components of the capacity to make decisions such as understanding, the ability to appreciate the nature and meaning of potential alternatives, the capacity for reasoning and deliberation, and the weighing of values).

43. I say "in my opinion" because this case re-taught me that it is difficult to predict our own behavior until we are faced with a concrete situation.

said "I know I am likely to lose, but this apartment is so important to me that I am willing to run the risk of going homeless." What we perceived, however, was a client who simply refused to acknowledge the reality of his situation. To us he was like the elderly client who refuses to recognize that if he does not contest a foreclosure action he will be homeless.<sup>44</sup>

But was Mr. Gaynor like this? William Simon has stated that one reason lawyers retreat from paternalism and emphasize the autonomy viewpoint is that "it absolves them of the burdens of connection and the responsibilities of power."<sup>45</sup> If we retreated at all in this case, however, I think it was precisely in the opposite direction: toward paternalism and away from respecting our client's autonomy. We did not want to feel responsible for our client becoming homeless because of our failure to intervene or persuade him to accept the settlement offer. Given this feeling, the question that arises in retrospect is whether we were undervaluing Mr. Gaynor's case because we were afraid of the consequences? I do not think so. The ultimate results, however, suggest otherwise. Our client is still in his apartment. Perhaps he was right. As a colleague has pointed out to me, maybe Mr. Gaynor was better at predicting the ultimate actions of the LHA. Maybe he knew in a way we did not that the LHA did not want to be responsible for evicting a tenant who had a brain injury.

To recapitulate, we thought our client was competent because he was capable of making many decisions and he had good reasons for the decision he was making. In addition, maybe he had a better idea of the realistic consequences than we did. So why did we feel justified in treating him as an individual whose decision-making competence was impaired? One obvious reason was his head injury. Another reason was our belief that he never understood the reality of his situation—that if the LHA was persistent they could evict him. But I would be guilty of being less than candid if I did not acknowledge that it was also the substance of his decision that troubled us. Our doubts about his competency would have been set aside if he had made what we perceived to be the "safe" decision. Does this mean we were guilty of allowing our disagreement with our client's decision to be the ultimate deciding factor and, therefore, justifying paternalism through a circular process of allowing the "bad" decision to become the proof of lack of competency? Perhaps. I would like to think, however, that although to some extent we could not resist taking account of the consequences to our client,<sup>46</sup> it was justified because we did have

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44. The example is from Margulies, *Access*, *supra* note 16, at 1087.

45. William H. Simon, *Lawyer Advice and Client Autonomy: Mrs. Jones's Case*, 50 Md. L. Rev. 213, 225 (1991).

46. Robert Roca has written regarding doctors:

In practice, the examiner cannot resist taking into account the consequences of the decision the patient is making. If the patient's decision has little

independent evidence of impairment. Our approach was an attempt to consider both process and substance, an approach written about by Peter Margulies.<sup>47</sup> It is, of course, true that as soon as one introduces the "substance" of a decision into the question of whether to intervene in a client's decision, there is real danger of over inclusiveness. The lawyer may get it wrong. In this case we may have gotten it wrong. I will leave that to others to judge. Not to introduce substance, however, has its own dangers. Process, by itself, can only tell us so much. Moreover, if the introduction of substance is inevitable, it is better to acknowledge that fact and the dangers that accompany it rather than pretend otherwise.

### III. WHAT IS LEGITIMATE PERSUASION?

With clients whose decision-making is not impaired, the goal or ideal is that the decisions they make should be their own. As I have written elsewhere, however, lawyers inevitably influence their clients' choices. There is no completely neutral way to present the necessary information to a client and describe that information.<sup>48</sup> Nevertheless, the lawyer's intent can and should be to facilitate the client's autonomous choices.<sup>49</sup> The critical difference in Mr. Gaynor's case was that our intent was not to facilitate his choice, but to have him choose the option of accepting alternative housing. My justification for treating Mr. Gaynor differently is in the previous section. Even assuming that our justification for treating Mr. Gaynor differently is legitimate, that still leaves open the question of whether our methods of influencing Mr. Gaynor's choice were acceptable.<sup>50</sup>

Some literature suggests that in appropriate cases the lawyer can proceed as a de facto guardian when her clients suffer from some degree of impaired decision-making disability.<sup>51</sup> Regardless of the validity of that argument in situations where it has been advocated,<sup>52</sup> it

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potential for causing harm, then a moderate degree of uncertainty regarding capacity is tolerable. On the other hand, if the patient is likely to be seriously harmed or to lose out on substantial benefit by virtue of her decision, then the examiner will tolerate much less uncertainty regarding decisional capacity. . . . The consequences of the patient's choice thus enter into the process of determining decisional capacity . . . .

Roca, *supra* note 29, at 1189.

47. Margulies, *Access*, *supra* note 16, at 1075.

48. Spiegel, *Mrs. Jones*, *supra* note 2, at 325-26.

49. *Id.* at 332-36.

50. The Model Rules state "[t]he fact that a client suffers a disability does not diminish the lawyer's obligation to treat the client with attention and respect." Model Rules, *supra* note 19, R. 1.14 cmt. 2.

51. See Tremblay, *Impromptu Lawyering*, *supra* note 32, at 1435-38; Model Rules, *supra* note 19, R. 1.14 cmt. 2.

52. The hypothetical that spawned this suggestion was an emergency situation where the lawyer had to act immediately or the client would suffer. Tremblay, *Impromptu Lawyering*, *supra* note 32, at 1430 n.3.

was not a practical suggestion in our case.<sup>53</sup> Even if we assumed that somehow we had the authority to accept a settlement on behalf of our client, we had no way to carry out its terms. We could not physically move him into another apartment. The practical question we faced was what, if any, other tactics to influence our client's decision were justifiable?

One way of answering this question is to attempt to classify the behavior we engaged in as either persuasion, manipulation, or coercion. Under this approach, behavior that is manipulation or coercion is presumptively bad; persuasive tactics are more likely to be seen as justified.<sup>54</sup> This basic approach works reasonably well with coercion. Although coercion is difficult to define, the core meaning implies the use of threats.<sup>55</sup> In the lawyer-client context, the classic example of coercion is a lawyer threatening to withdraw if a client refuses to do what the lawyer feels is warranted.<sup>56</sup> As Stephen Ellmann has stated, however, coercion is usually not a problem in the lawyer-client context.<sup>57</sup>

This labeling approach does not work as well when we are analyzing behavior that might be called manipulative. Although we can give core examples of manipulation such as lying, distorting, or withholding information,<sup>58</sup> beyond these clear-cut examples the term is extremely difficult to define. Indeed, in their work on informed consent, Faden and Beauchamp avoid the question of definition by stipulating that manipulation involves tactics intended to change the behavior of another that do not fit the definition of persuasion or coercion.<sup>59</sup> In addition, the range of behaviors that arguably encompass manipulation covers a broad spectrum of behavior and occurs more frequently in the lawyer-client relationship.

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53. I also do not think it would have been justified given the degree of Mr. Gaynor's impairment.

54. Ruth R. Faden & Tom L. Beauchamp, *A History and Theory of Informed Consent* 337-46 (1986); see also Stephen Ellmann, *Lawyers and Clients*, 34 *UCLA L. Rev.* 717, 721 (1987) (arguing that coercion and manipulation require justification because they may breach the principles of client-centered lawyering); Tremblay, *Persuasion and Paternalism*, *supra* note 3, at 581-83 (accepting persuasion but condemning coercion or manipulation).

55. See Alan Wertheimer, *Coercion* 204 (1987) ("[T]he intuitive answer is threats are coercive while offers are not."). Ellmann defines coercion as the situation where "one person . . . in order to alter the other's behavior . . . threatens to bring about undesirable consequences for the other person, and the other person alters his behavior accordingly, at least in part as a result of the threat." Ellmann, *supra* note 54, at 723. What we mean by threat is not unproblematic. See Wertheimer, *supra*, at 205-21 (discussing the issue); see also Ellmann, *supra* note 54, at 724-25 (recognizing that the definition of "threat" may depend on the circumstances).

56. See Ellmann, *supra* note 54, at 724.

57. See *id.* at 726.

58. See *id.*

59. Faden & Beauchamp, *supra* note 54, at 261, 354.

Because the definitional approach to manipulation is so slippery, another way of approaching this question is to ask why we care. What is at stake in labeling behavior as manipulation or persuasion? To ask the question is to answer it. It is hard to defend manipulation. The very label is pejorative. Once we have labeled something as manipulation we have gone a long way toward condemning it.<sup>60</sup> But knowing we are condemning something does not explain why we might want to condemn it. To answer that question it might be helpful to look at the behaviors we are analyzing from two different perspectives: their effect upon the lawyer and their effect upon the client.

One possible reason for condemning manipulation is the effect on the manipulator. To the extent one presents a false self to another, lies, or distorts the truth, there is a harm caused to one's own integrity.<sup>61</sup> This lends support for the condemnation associated with what I called the core cases of manipulation—those involving lying, distorting, or withholding information.

If we look at the effect of the lawyer's behavior from the client's perspective, the reason we might care about or criticize various behaviors is that we are trying to limit the infringement on the client's autonomy. Consistent with this concern, some authors who discuss manipulation adopt the theory that manipulation is an influence that exerts some measure of control over another person's decision.<sup>62</sup> I agree that the degree of control is the central issue from the client's perspective.<sup>63</sup> The problem I have with the idea that control is the critical determinant is that it does not sufficiently distinguish manipulation from persuasion, unless one adopts a very specialized usage of each of these terms.<sup>64</sup> In both cases, the goal is to change the

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60. See John K. Morris, *Power and Responsibility Among Lawyers and Clients: Comment on Ellmann's Lawyers and Clients*, 34 UCLA L. Rev. 781, 800 n.78 (1987). But see Faden & Beauchamp, *supra* note 54, at 354 (attempting to discuss manipulation in a way that liberates it from "connotations of immorality or unfairness").

61. See Spiegel, *Mrs. Jones*, *supra* note 2, at 335; cf. Gary Bellow & Bea Moulton, *The Lawyering Process: Materials for Clinical Instruction in Advocacy* 404-07 (1978) (setting out and discussing the "transcript" of a conversation in a bar between an attorney representing a defendant in a narcotics case and the undercover agent who made the arrest). According to the transcript, the lawyer obtains information from the agent that results in dismissal of the charges against his client. *Id.* Bellow and Moulton ask a series of questions which allow one to consider the effect upon the lawyer treating somebody with respect and consideration where that posture is used solely to gain cooperation and results in harm to the other person. *Id.* at 406-07.

62. See Faden & Beauchamp, *supra* note 54, at 258; see also Ellmann, *supra* note 54, at 727-28 (discussing the extent to which manipulators can affect the choices made by their clients).

63. I am assuming that the behavior or alleged manipulation is not a case of the lawyer attempting to use the client for her own ends.

64. See Faden & Beauchamp, *supra* note 54, at 347-48 (acknowledging the differences between their definition of persuasion and that of other authors).

client's mind.<sup>65</sup> If this goal or intention is the problem, then persuasion cannot be distinguished from manipulation. Moreover, although it might be argued that manipulation is likely to be more successful at overcoming the client's will, I do not believe that is necessarily the case. Manipulation, if discovered, is more likely to be resisted than persuasive appeals.

The key distinction these authors offer appears to be that persuasive appeals still allow the client to make up her own mind while manipulation does not.<sup>66</sup> The reasons offered for drawing this distinction, however, are not very convincing. First, persuasion is claimed to be non-controlling because it involves appeals to reason rather than emotion. But this line of argument presents a number of difficulties. For one, it artificially separates reason from emotion. Such an argument also implies that emotional or psychological reasons are not valid reasons for doing something,<sup>67</sup> and it further assumes that we can never be seduced by reason.

Second, it is argued that clients can resist persuasion, but may not be able to resist manipulation. But if the manipulation does not involve deceit it would seem that the client can resist manipulation just as well as a client can resist persuasion. Indeed, it is not obvious to me that manipulation is inherently more likely to be successful than persuasion. On the other hand, if the manipulation is secretive and involves deceit the client may find it harder to resist because she does not know about it. To the extent tactics involve deceit, however, it is easy to condemn them without attempting to get into difficult evaluations as to what extent the tactic undercuts the client's decision-making capability.<sup>68</sup>

It is harder to make judgments about tactics that are not so easily classified as involving deceit or trickery. At what point does the degree of control or influence exercised become unwarranted? Mr. Gaynor's case presents some examples. I will discuss three tactics we used that present questions to me about whether we overstepped the line: (1) we constantly emphasized the dangers of litigating, including advising him that we thought he had greater than a fifty percent chance of losing; (2) we minimized the feelings he had that it was important not to allow Mr. Bridges to win; and (3) we did not accept at face value his statements that he did not want to move.<sup>69</sup>

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65. See Dinerstein, *supra* note 17, at 569 (discussing the use of persuasion as a control technique).

66. Faden & Beauchamp, *supra* note 54, at 259 (stating that when one is persuaded "one willingly acts or accepts a belief as one's own").

67. See Luban, *supra* note 41, at 475-76.

68. See *supra* notes 59-62 and accompanying text.

69. Other tactics we used that arguably crossed the line were: persuading him to look at the apartment that was offered even though he told us he was not interested; having him sign an agreement that he could back out of; and encouraging his friends to call him to give him advice where we knew the advice would be that he should

Was it wrong to constantly emphasize to Mr. Gaynor the dangers of litigating, including telling him that we thought he had less than a fifty percent chance of winning at the trial court level? One possible criticism of this tactic was that we incorrectly assessed his chance of winning. Mr. Gaynor had a better chance of prevailing than we thought because we either overvalued the risks to fulfill our own needs or did not accurately assess the housing authority's unwillingness to proceed.<sup>70</sup> If we incorrectly assessed his likelihood of success, our lawyering should be criticized. In that case, the ethical problem would be competence, however, not interfering with our client's decision-making authority. Also, if we knowingly distort or deceive our client about his chances of winning, even in order to achieve beneficial ends, we have acted unethically.<sup>71</sup> But assuming neither of these is the case, does providing accurate information to a client present ethical difficulties? I think not. Accurately telling a client that he has little chance of winning his case not only does not present ethical problems,<sup>72</sup> but would seem to be ethically required.

That, however, does not end the discussion. One can present accurate information or consequences in ways that are problematic.<sup>73</sup> For example, a physician could continually emphasize a small risk that she knew would distort a patient's decision-making process. Professor William Simon described a case in which a client had to choose whether to accept a plea bargain or go to court to get justice.<sup>74</sup> Simon tried to illustrate that the order in which negative effects were presented to a client plays a role in the client's ultimate decision.<sup>75</sup>

Our discussions with Mr. Gaynor raised both issues: ordering and emphasis. We tended to end our meetings with Mr. Gaynor by discussing the risk of litigating. Moreover, there was no doubt that we put significant emphasis on this risk. But did we go too far? Did the emphasis and ordering distort his decision-making? Unfortunately, it is difficult to answer this question without making a judgment about our client's competence or willingness to listen to negative information. It was our judgment that Mr. Gaynor would not listen to the negative parts of his case, and therefore, our emphasis was justified as a compensation for his unwillingness to listen. At the time, this seemed to be the right thing to do. In retrospect, I realize that our

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move.

70. See *supra* Part II.

71. See *supra* notes 57-60 and accompanying text.

72. See Ellmann, *supra* note 54, at 724 (accurately telling a client that the statute of limitations is about to expire is not coercion).

73. See e.g., Faden & Beauchamp, *supra* note 54, at 362-65 (discussing information manipulation).

74. Simon, *supra* note 45, at 215.

75. *Id.* at 215-16. See also Faden & Beauchamp, *supra* note 54, at 320 (evidencing different responses where information about outcomes was framed in terms of probability of surviving or probability of dying).

behavior raises several questions. One takes us back to the discussion in Part II. If we view Mr. Gaynor as being somewhat competent, but also somewhat incompetent, were we correct that he could not comprehend the consequences? Or were we simply disagreeing with his “bad” decision? Second, did Mr. Gaynor have a right not to listen to the risks? Even if one accepts our judgment that he did not have the right to be oblivious to the negative consequences, this case illustrates that it is very hard in the real world of practice to distinguish between a client’s unwillingness to listen to the risks and the client’s willingness to assume risks that the lawyer may think are unwarranted.<sup>76</sup>

In addition to emphasizing the risk of accepting the offer to our client, we also attempted to explain to him why the things he said he valued could be achieved by accepting the offer of alternative housing. He told us how much he valued his independence and how he did not want to give in to Mr. Bridges. We countered by explaining that he would live independently in the new housing and that moving was not the same as losing. He might not be victorious over Mr. Bridges, but he was not losing because he was still getting housing from the Old Town Housing Authority. Again, from one perspective, we were practicing good lawyering. Good lawyers explain to their clients how the clients’ goals can be achieved through other means.<sup>77</sup> But from another perspective, what we were doing was not so benign. We were hearing Mr. Gaynor’s words, but not necessarily being responsive to the feelings they signified. The current apartment had great symbolic value to our client. In addition, so did his battle with Mr. Bridges. As compared to the first example above, this tactic came much closer to trying to change our client’s value set rather than merely making sure he understood the consequences of his decision.<sup>78</sup> But, of course, it was not as simple as that. I do think that lawyers should not allow clients to assume that there is only one way to accomplish their goals and/or satisfy their values. In retrospect, the question that arises for me was whether we gave Mr. Gaynor’s concerns the respect they were due.<sup>79</sup> I would like to answer that in the affirmative, but candor

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76. As stated at *supra* notes 39-42 and accompanying text, we would have been more willing to tolerate his knowing acceptance of a risky action.

77. In addition, we were willing to exercise what I call reversibility. Once he told us that he was willing to move we reminded him of the reasons why he had told us he did not want to move and asked if he still wanted to move. See *supra* Part I.

78. In some sense we were doing what Stewart Macaulay has described as attempting to persuade our client that the case was about “adjustment between competing claims and interests, rather than as one warranting a fight for principle.” Stewart Macaulay, *Lawyers and Consumer Protection Laws*, 14 *Law & Soc’y Rev.* 115, 128 (1979).

79. See *supra* note 50 and accompanying text. Compare the comments of Howard Lesnick:

I honestly do not think it matters which position the attorney takes—to leave the final decision with the client or insist on keeping it— so much as I



compels me to say I am not sure. I suspect that our behavior at times may have seemed dismissive to him.

A third tactic we employed was not accepting at face value our client's statements that he did not want to move. We continued to schedule meetings with him to raise the possibility of accepting another apartment as a possible resolution. We did not take no for an answer. Moreover, to the extent he felt dependent on us or grateful for our help, our constant repetition made it clear what we thought the right answer was. Was our conduct unwarranted pressure or justifiable persuasion? Unfortunately, the answer to this question again depends upon one's judgments about Mr. Gaynor's competence. If you conclude he was not processing the information properly, then meeting with him to continue to discuss the issue seems warranted.<sup>80</sup> On the other hand, at some point, enough is enough, and continuing to meet with him seems analogous to locking somebody in a room and telling them they cannot leave until they do what you want. There is some evidence Mr. Gaynor felt this kind of pressure. He finally agreed with us most likely because we wore him down. The strongest evidence of this is that when he was away from us, he changed his mind. Of all the tactics we used, this one came closest to being unwarranted pressure because it was the one tactic that was not directed at providing "useful" information.

### CONCLUSION

My goal in this Article has not been to provide final answers to the question of how a lawyer should appropriately counsel the questionably competent client. What I have attempted to do is add detail and context to an ongoing dialogue begun by others.<sup>81</sup> If we are justified in treating the questionably competent client differently, we first have to understand what the term questionably competent means. I have suggested it has two plausible meanings: (1) uncertainty as to whether somebody is competent; and (2) the idea that competence is not an all or nothing concept, but one of degree. I have also tried to illustrate the difficulty of relying on terms such as manipulation or persuasion through discussion of a client's concrete behaviors.

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think it matters whether the attorney makes either decision in a way that respects the concerns of both attorney and client, and treats the client as an understanding independent person . . . .

Elizabeth Dvorkin et al., *Becoming a Lawyer: A Humanistic Perspective on Legal Education and Professionalism* 202 (1981) (containing Howard Lesnick's comment).

80. We were told one effect of his head injury was that things needed to be repeated for him to comprehend them.

81. See generally Margulies, *Access*, *supra* note 16; Tremblay, *Persuasion and Paternalism*, *supra* note 3.

My assessment is that we were most justified in emphasizing the risks of litigation to our client, and least justified for continuing to meet with him and not taking no for an answer until he agreed to accept the offer of alternative housing. Perhaps this tactic was the least justified because it seemed the least calculated to help the client reach his own decision. More significantly, upon reflecting on this case, I am struck that the description of these events and analyzing them in discrete categories has introduced its own difficulties. When we were working on this case, the issue of degree of competence and the various tactics we employed were not separate and discrete items or decisions, but rather inseparable. If we were sure he understood the risks, we would have been more willing to accept his value choices and we would have felt less compelled to meet with him continually to go over the same ground. If the decision did not have what we viewed to be such adverse consequences, then we would have been more willing to tolerate our doubts about our client's competence.

In raising such questions I realize that this Article ultimately is not only a meditation on a case, but also a meditation about stories or case studies. Why do we use them? What value are they? Does this story tell us anything about lawyers other than Mark Spiegel? To what extent are stories that illustrate questions of professional responsibility or ethics useful?<sup>82</sup> These two questions, in turn, present issues that extend beyond this Article. First, are stories prescriptive or helpful to individual lawyers faced with making choices? Second, I am interested in how stories help us, if at all, in drafting rules of conduct for lawyers. Is there some inherent conflict between the idea that context and detail is all important and, therefore, stories are necessary to provide that context and detail, and the idea that we need general rules to govern lawyers' behavior; or do we need both? My hunch is we need both, but that is another story.

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82. On the larger debate about the significance of stories, compare, Daniel A. Farber & Suzanna Sherry, *The 200,000 Cards of Dimitri Yurasov: Further Reflections on Scholarship and Truth*, 46 Stan. L. Rev. 647, 655-62 (1994) (concluding that storytelling can enhance our understanding of the law), and Daniel A. Farber & Suzanna Sherry, *Telling Stories Out of School: An Essay on Legal Narratives*, 45 Stan. L. Rev. 807, 819-30 (1993) (discussing how stories can make a legitimate contribution to legal scholarship), and Mark Tushnet, *The Degradation of Constitutional Discourse*, 81 Geo. L.J. 251, 258-76 (1992) (arguing that accurate use of a specific case leads to a general understanding of the law), with Kathryn Abrams, *Hearing the Call of Stories*, 79 Cal. L. Rev. 971, 973-82 (1991) (examining the pros and cons of feminist narratives as a form of legal discourse), and Jane B. Baron, *Resistance to Stories*, 67 S. Cal. L. Rev. 255, 256-60 (1994) (exploring criticism about the power and effectiveness of legal storytelling), and Richard Delgado, *On Telling Stories in School: A Reply to Farber and Sherry*, 46 Vand. L. Rev. 665, 666-67 (1993) (asserting that storytelling can be limited in its efficacy).

*Notes & Observations*