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## Foreword Special Issue: Ethical Issues in Representing Older Clients

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# FOREWORD

BRUCE A. GREEN and NANCY COLEMAN\*

## INTRODUCTION

IN recent years, the legal profession has come to recognize that older persons have a unique set of legal problems and needs. Members of the profession whose practice is principally dedicated to serving older clients have, in turn, come to recognize that their clients' problems and needs have generated a unique set of recurring professional responsibility dilemmas. From December 3 to 5, 1993, Fordham University School of Law hosted a Conference to address some of these dilemmas. The Conference on Ethical Issues in Representing Older Clients was a collaborative effort of six organizations: (1) the American Association of Retired Persons (AARP), (2) the ABA Commission on Legal Problems of the Elderly, (3) the ABA Section on Real Property, Probate and Trust Law, (4) the American College of Trust and Estate Counsel (ACTEC), (5) the National Academy of Elder Law Attorneys (NAELA), and (6) Fordham Law School's Stein Center for Ethics and Public Interest Law. Although these groups came with different perspectives and approaches to the issues of professional responsibility facing lawyers for older clients, a keen interest in offering assistance to lawyers in dealing with these issues united them.

The Conference was important from two principal perspectives. First, the participants developed recommendations for professional practices that will enable lawyers to better serve older clients in a variety of contexts. Second, the Conference was a significant step toward developing better processes for resolving professional responsibility problems in general.

This book of the *Fordham Law Review* presents the Proceedings of the Conference together with other writings on ethical issues in representing older clients. The published Proceedings include the Recommendations of the Conference along with papers which describe the discussion and debate leading to the formulation of those Recommendations. It also includes eight articles written in advance of the Conference and subse-

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This Foreword adapts and expands upon the welcoming remarks given by Bruce Green on the first morning of the Conference on Ethical Issues in Representing Older Clients.

The authors are grateful to the many people who assisted in planning the Conference, who wrote articles in connection with the Conference, who attended and participated in the Conference, and who assisted in collecting the Proceedings of the Conference for publication in this book of the *Fordham Law Review*. We are especially grateful to Naomi Karp for her support throughout every stage of the process, and particularly for her work in editing the Recommendations of the Conference.

quently revised to varying degrees in light of the discussions that took place. The participants at the Conference had the opportunity to study drafts of these eight articles before the Conference commenced and to provide their practical insights and criticisms to the authors for their consideration during the course of the drafting process. Along with the Proceedings, this book includes four articles written by individual participants after the Conference in response to an open invitation to the participants to provide their individual reflections for publication together with the Proceedings of the Conference.<sup>1</sup> Finally, this book includes two student Notes on additional ethical issues that were not directly addressed at the Conference.<sup>2</sup>

This Foreword is intended to provide useful background to the Recommendations and other writings that follow so that its readers might better evaluate both the process undertaken at the Conference and the Recommendations and articles it generated. Part I describes the considerations leading up to the decision to conduct the Conference: the increasing concern about ethical issues facing lawyers for older clients and the limitations of conventional sources of guidance on those issues. Part II explains the process undertaken at the Conference. Part III addresses the Recommendations that emerged in an effort to highlight particular contributions and themes and to note the areas that occasioned strongest disagreement. It also brings together some of the participants' reflections about the Conference. Finally, Part IV briefly introduces the twelve articles prepared in connection with the Conference which, taken together, provide important guidance in defining and analyzing the relevant professional responsibility issues.

## I. CONSIDERATIONS LEADING UP TO THE CONFERENCE

In recent years, the number of older persons receiving legal services has increased dramatically. This has occurred for at least three reasons. First, the older population has itself increased.<sup>3</sup> Second, there is an ever increasing number of issues confronting older persons which call for the assistance of a lawyer.<sup>4</sup> Third, and perhaps most importantly, legal services are now available more widely to older clients who in the past could

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1. The authors who prepared articles subsequent to the Conference did not have the benefit of the participants' individual review and comment, although they did have the benefit of having attended the Conference and participated in its processes.

2. Needless to say, the articles and Notes collected in this book reflect the individual authors' views only. Those views have not been specifically endorsed or approved by either the organizations that co-sponsored this Conference or by the individuals who participated in the Conference. Indeed, in a number of instances, the Conference endorsed Recommendations which essentially rejected views expressed in the articles. Nonetheless, we consider the publication of all the articles in this book to be an integral aspect of the Conference. As we explain later, we believe that the answers to problems of legal ethics are best achieved through thoughtful public discourse. These articles make a significant contribution to such discourse.

3. See Peter J. Strauss, *Elder Law in the Nineties*, 1 Elder L.J. 19, 19-20 (1993).

4. Older clients may need assistance with respect to, among other things, Medicaid,

not otherwise afford lawyers.<sup>5</sup> This is true notwithstanding that there remains a great unmet need for legal services for older clients.

The expansion of the older client population in recent years has led to the identification of "elder law" as a discrete area of professional practice. Although elder law draws on many other areas of law, and although the particular legal problems confronting older clients generally are not unique to them, the recognition of elder law as an area of practice draws needed attention to the special challenge of adequately and ethically serving the legal needs of the older population. At the same time, a new breed of legal specialist has emerged: the elder law attorney. This is a lawyer who specializes in representing older clients in the range of legal issues they encounter.<sup>6</sup>

Over the years, a variety of individuals and groups have helped the legal profession to recognize that the legal problems of older clients are worthy of special attention.<sup>7</sup> Among them are two groups, both co-sponsors of this Conference, that have focused on the legal needs of older clients for more than a decade.

The first, the ABA Commission on Legal Problems of the Elderly, was established in 1979. It is an interdisciplinary body bringing together lawyers, physicians, social workers, gerontologists, advocates for older persons, and others for the purposes of educating the bar and conducting research regarding the legal needs of older clients. The Commission has been instrumental in sponsoring working conferences to explore issues ranging from guardianship reform, to social security and Medicare due process reform, to court-related needs of older persons and persons with disabilities. These efforts have often led to the formulation and implementation of specific American Bar Association policies regarding older people.

The second group is the American Association of Retired Persons. Founded in 1957, AARP is the foremost representative of older people in

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Social Security and pension benefits, housing, health care financing and decision-making, and trust and estate planning.

5. See Nancy Coleman, *The Delivery of Legal Assistance to the Elderly in the United States, in An Aging World: Dilemmas and Challenges for Law and Social Policy* 463, 464-79 (John Eekelaar & David Pearl eds., 1989) (describing, *inter alia*, legal programs funded by the Legal Services Corporation and the Older Americans Act, state and local support for projects providing legal assistance to older clients, and the contribution of the private bar through pro bono and reduced-fee programs).

6. See generally Lawrence A. Frolik, *The Developing Field of Elder Law: A Historical Perspective*, 1 Elder L.J. 1 (1993).

7. The important work that has led to the widespread recognition of older persons as an identifiable client population and elder law as a discrete area of practice goes back several decades. See, e.g., Howard B. Gelt, *Psychological Considerations in Representing the Aged Client*, 17 Ariz. L. Rev. 293 (1975); Paul S. Nathanson, *Legal Services for the Nation's Elderly*, 17 Ariz. L. Rev. 275 (1975). The importance of elder law as a discrete area of practice is reflected in the growing body of literature on the subject as well as the recent inauguration of a law journal devoted exclusively to it. See 1 Elder L.J. 1 (1993); Elder Law in the 1990s: A Selective Bibliography, 48 The Record of the Ass'n of the Bar of the City of N.Y. 392 (Apr. 1993).

this country, its membership numbering some 32 million. Its mission is to improve every aspect of living for older people, and one of its important concerns is enhancing the availability of legal services for older people. Through its Legal Counsel for the Elderly, AARP has been a pioneer in expanding the access of low-income older people to legal assistance.

Not only is the range of legal problems affecting older clients vast, but often older clients face multiple legal problems. Older people as a group are the greatest beneficiaries of administrative services and government programs, and often a lawyer's assistance is needed to enable an older client to understand and satisfy the various requirements and regulations governing the services and programs for which she or he may be eligible. A lawyer may also provide important assistance to an older client in planning for the possible problems of failing health and diminishing capacity; by addressing legal, financial, and health care problems in advance, older clients assisted by counsel may avoid having courts and administrative agencies intervene against their will through guardianship or commitment proceedings.

Another obvious example of older clients' need for legal advice is in the area of estate planning. While estate planning may be a concern for adults of any age, it is likely to be an area of particular concern for older clients. That is why two additional groups co-sponsoring the Conference were representatives of lawyers who practice in this area. The first group is the ABA Section on Real Property, Probate and Trust Law, which sponsors educational programs, produces publications, and engages in efforts to reform the law and to enhance professional practice, and which includes some 35,000 members. The second group is the American College of Trust and Estate Counsel, which was founded in 1949, and whose purpose is to improve and reform probate, trust, and tax laws, procedures, and professional responsibility.

Often, older clients' legal problems may be closely bound up with non-legal problems; therefore, there may be an important role for social workers, physicians, or other professionals to play, working together with a lawyer in assisting the older client. Recognition of the often interconnected nature of legal and non-legal problems facing older clients has helped contribute not simply to the recognition of elder law as a specialized area of practice, but also to the development of a particular philosophy of representation for older clients. This philosophy—the "holistic approach" to representing older clients—has been advocated particularly by the National Academy of Elder Law Attorneys. NAELA was founded in 1988 as a professional association of lawyers dedicated to improving the quality of legal services provided to older persons. It was another one of the six co-sponsors of the Conference.

The recognition of older persons as an identifiable client population, of elder law as a discrete area of practice, and of the elder law attorney as a legal specialist with an identifiable philosophy of practice, were all im-

portant factors leading up to this Conference. But there was another important factor growing out of these: the increasing concern about problems in counseling older clients—problems of the kind that lawyers typically think of as involving legal ethics or professional responsibility. These problems raise questions such as: To what extent is it proper to enter into an attorney-client relationship with more than one member of the same family? Who makes decisions in the course of the attorney-client relationship and how are they to be made? How should clients be counselled in the course of the professional relationship and, in particular, to what extent is it appropriate for the lawyer to interpose his or her own views about what is in the client's best interest? And, when is it appropriate to disclose information learned from the client to someone else?

Lawyers have expressed concern that although these questions may arise in the course of representing virtually any client, they may be particularly vexing in the context of serving older clients.<sup>8</sup> Representing older clients may be different or more difficult for any of several reasons. Older clients may be particularly vulnerable. Because of failing health, they may have difficulty making considered decisions, or may be completely unable to articulate decisions. The matters in which they seek representation typically touch them in the most personal ways. In many cases, these matters may affect the interests of close family members as well.

Consider, for example, the older client called "Martha" in Jan Rein's article on client competency.<sup>9</sup> This is a client who is on the verge of

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8. Not surprisingly, most of the writings devoted to ethical issues in representing older clients as a definable client group are of recent vintage. See, e.g., Jacqueline Allee, *Representing Older Persons: Ethical Dilemmas*, Prob. & Prop., Jan./Feb. 1988, at 36; Ralph M. Cagle, *The Legal Ethics of Elder Law Practice: 5 Key Issues*, Wis. Law., Aug. 1991, at 38; Maria M. Das Neves, *The Role of Counsel in Guardianship Proceedings of the Elderly*, 4 Geo. J. Legal Ethics 855 (1991); John E. Donaldson, *The Ethical Considerations of Representing the Elderly*, Tr. & Est., July 1991, at 18; Mark Falk, *Ethical Considerations in Representing the Elderly*, 36 S.D. L. Rev. 54 (1991); Marshall B. Kapp, *Representing Older Persons: Ethical Challenges*, Fla. B.J., June 1989, at 25; John R. Murphy, *Older Clients of Questionable Competence: Making Accurate Competency Determination Through the Utilization of Medical Professionals*, 4 Geo. J. Legal Ethics 899 (1991); Nancy C. Nawrocki, *Ethical Challenges in Serving the Elderly Client*, Mich. B.J., Jan. 1993, at 24; Sharon R. Rudy, *Practical and Ethical Aspects of Serving Elderly Clients*, 79 Ill. B.J. 410 (1991); Jay J. Sangerman, *Ethical Issues in Elder Law*, N.Y. St. B.J., Sept./Oct. 1993, at 35; Linda F. Smith, *Representing the Elderly Client and Addressing the Question of Competence*, 14 J. Contemp. L. 61 (1988).

9. See Jan E. Rein, *Client's with Destructive and Socially Harmful Choices—What's an Attorney to Do?: Within and Beyond the Competency Construct*, in *Ethical Issues in Representing Older Clients*, 62 Fordham L. Rev. 1101 (1994). The basic problem that Professor Rein raises has been considered in the past, yet defies easy solution. As Paul R. Tremblay notes in his article for this Conference, *Impromptu Lawyering and De Facto Guardians*, in *Ethical Issues in Representing Older Clients*, 62 Fordham L. Rev. 1429, 1430 n. 4 (1994), the hypothetical borrows in part from one he discussed several years earlier in his article, *On Persuasion and Paternalism: Lawyer Decisionmaking and the Questionably Competent Client*, 1987 Utah L. Rev. 515.

losing her home in litigation but who is confused and unsure about whether she even wants the lawyer's help. Legal Services lawyers say that this is not an unusual scenario. Yet it is a difficult one. A lawyer, respecting the client's autonomy, would feel uncomfortable making the decision for the client whether or not to proceed in litigation. At the same time, however, the client's autonomy might seem like an abstraction not worth preserving at the expense of a roof over her head. A lawyer who could protect the client against losing her home would feel very uncomfortable standing by and doing nothing.

Or consider the type of problem raised in Russell Pearce's article on representing spouses. When an older couple comes to the lawyer for help in estate planning or other financial planning, may the lawyer represent both spouses? Although they come to the lawyer's office as a couple, experience tells us that a husband and wife will often have different views about what is important to them. They may even hesitate to be completely open with each other about what they consider important. Can the lawyer represent the husband and wife at the same time, when they may have differing interests or desires? That they come to the lawyer together suggests they approach the matter as a family; it might seem strange to suggest that a husband and wife need separate lawyers, as if they were adversaries in litigation. Yet the tradition of the legal profession is that lawyers must represent individual clients with undivided loyalty; thus, it may seem contrary to this important tradition for lawyers to represent individuals whose interests differ—even if those individuals are husband and wife.

Furthermore, the very philosophy of serving older clients "holistically" may pose additional challenges from the perspective of one's responsibilities as a member of the legal profession. For example, is it appropriate for the lawyer to enlist the assistance of doctors, social workers, or other professionals—and in the process, to disclose confidences of the older client—when it seems to be in the client's interest to do so, but the client seems unwilling or unable to give assent? Would doing so breach the attorney's duty to preserve the client's confidences?

For lawyers seeking guidance about how to proceed in situations like these, the point of departure has generally been the prevailing professional standards. In most states, the governing standards are based on the ABA Model Rules of Professional Conduct,<sup>10</sup> which were adopted in 1983.<sup>11</sup> In other states, including New York, the governing standards

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10. California is one exception. California follows its own Rules of Professional Conduct, the first set of which was drafted in 1924. *See* California Rules of Professional Conduct (1992). California courts and ethics committees do, however, frequently turn to the ABA Model Code on questions about which the California Rules are "silent or obscure." *See* Charles W. Wolfram, *Modern Legal Ethics* 64 (1986).

11. The Model Rules were adopted by the ABA in 1983 and have been amended on several occasions since then. *See* Model Rules of Professional Conduct (1983) [hereinafter Model Rules]; Thomas M. Morgan & Ronald D. Rotunda, *Professional Responsibility: Problems and Materials* 12 (5th ed. 1992).

are based on the earlier ABA Model Code of Professional Responsibility,<sup>12</sup> which dates from 1969.<sup>13</sup> Not surprisingly, however, both sets of rules provide only limited assistance.

This is not surprising for several reasons. First, the principal purpose of these rules is to serve as disciplinary standards, the violation of which will justify professional sanction.<sup>14</sup> Thus, the rules "state the *minimum* level of conduct" for lawyers.<sup>15</sup> Well-intentioned lawyers, however, are concerned not simply with understanding the *least* that is expected, but also with finding the right thing to do in those areas in which disciplinary rules afford discretion.

Second, the lawyers' codes are of limited utility because of their narrow scope. They are not intended to give complete guidance and, concerning some of the hardest questions of professional responsibility, they do not do so. As explained at the outset of the ABA Model Rules: "The Rules do not . . . exhaust the moral and ethical considerations that should inform a lawyer, for no worthwhile human activity can be completely defined by legal rules. The Rules simply provide a *framework* for the ethical practice of law."<sup>16</sup>

And, finally, the guidance provided by the Model Code or the Model Rules is incomplete. Even though the legal profession is aware of the increasing diversity of the law, of modes of practice, and of legal needs,<sup>17</sup> its professional standards remain deeply rooted in the nineteenth-century mode of practice out of which they emerged: the representation of sophisticated individuals and businesses, on a retained basis, typically in business transactions or in litigation.<sup>18</sup> The result is that problems facing lawyers for older clients may not be addressed by the professional standards. Or, in the case of generally-worded standards that were drafted primarily with other situations in mind, it may be unclear how they should apply to these situations, or whether their application to any particular situation is in fact appropriate. Thus, as Edward Spurgeon and Mary Jane Ciccarello discuss in their article on the lawyer as fiduciary:

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12. See Model Code of Professional Responsibility (1981) [hereinafter Model Code].

13. The Model Code was adopted by the ABA in 1969 and amended on various occasions over the next decade, until it was superseded by the Model Rules. See Model Code of Professional Responsibility (1981). As of late 1992, only four states continued to follow an ethics code based on the Code of Professional Responsibility: North Carolina, New York, Oregon, and Virginia. See ABA/BNA Lawyers' Manual on Professional Conduct 01:3 (1992). Of these, both North Carolina and New York have borrowed heavily from the Model Rules of Professional Conduct. See *id.*

14. See, e.g., Model Rules, *supra* note 11, Scope, ¶ 10.

15. Model Code, *supra* note 12, Preliminary Statement.

16. Model Rules, *supra* note 11, Scope, ¶ 2.

17. See, e.g., ABA Section of Legal Education and Admissions to the Bar, *Legal Education and Professional Development—An Educational Continuum* 9-102 (1992).

18. Cf. Russell G. Pearce, *Rediscovering the Republican Origins of the Legal Ethics Codes*, 6 Geo. J. Legal Ethics 241, 260 (1992) (ethics codes are founded in part on nineteenth-century model of lawyer principally serving "the business men of the community, who have important lawsuits") (quoting George Sharswood, *An Essay on Professional Ethics*, 32 A.B.A. Rep. 1, 75 (5th ed. 1907)).



[I]n many areas of legal practice, and in particular those areas that most often affect the older client (such as domestic relations, estate planning, and life and health care planning), the lawyer may . . . act as counselor, intermediary, and fiduciary [rather than as a litigator]. In such roles the lawyer often must function without clear guidance from the profession's ethical standards.<sup>19</sup>

Lawyers have other places to look for guidance beyond the professional standards. These sources of guidance, like the professional standards themselves, are discussed in the articles prepared in connection with this Conference. But these other sources of guidance are also incomplete. For example, many bar associations have committees that advise lawyers how the professional standards apply to their particular problems. These committees typically publish some of their opinions, to provide guidance to other lawyers. But the opinions are few in number and they suffer from many of the same limitations as the rules that they are interpreting.<sup>20</sup>

Judicial decisions may also provide some guidance. But courts are typically more concerned with deciding the legal rights of the parties who appear before them than they are with elaborating upon the professional duties of the lawyers.<sup>21</sup> And, while the American Law Institute is now preparing the first Restatement of the Law Governing Lawyers, the

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19. Edward D. Spurgeon & Mary Jane Ciccarello, *The Lawyer in Other Fiduciary Roles: Policy and Ethical Considerations, in Ethical Issues in Representing Older Clients*, 62 *Fordham L. Rev.* 1357 (1994). Cf. Stanley Sporkin, *The Need for Separate Codes of Professional Conduct for the Various Specialties*, 7 *Geo. J. Legal Ethics* 149, 149 (1993) ("The [ ] existing ethics codes merely espouse certain general principles that apply to all lawyers, such as you don't co-mingle a client's funds with your own. They do not provide enough fact-specific provisions that apply directly to many of the various legal specialties.").

20. Bar association ethics opinions are typically designed to interpret provisions of the jurisdiction's rules of professional conduct as they may apply to situations about which lawyers inquire. They generally do not give advice about sound professional practice within areas of discretion afforded by the professional codes; nor do they opine about how the rules might be amended to encourage sounder practice. Even as a vehicle for interpreting ambiguous disciplinary professions, bar ethics opinions have met criticism from various quarters. See, e.g., Jorge L. Carro, *The Ethics Opinions of the Bar: A Valuable Contribution or an Exercise in Futility?*, 26 *Ind. L. Rev.* 1 (1992); Ted Finman & Theodore Schneyer, *The Role of Bar Association Ethics Opinions in Regulating Lawyer Conduct: A Critique of the Work of the ABA Committee on Ethics and Professional Responsibility*, 29 *U.C.L.A. L. Rev.* 67, 72 (1981); Charles W. Wolfram, *Legal Ethics and the Restatement Process—The Sometimes-Uncomfortable Fit*, 46 *Okla. L. Rev.* 13, 14 (1993); Committee on Criminal Law of the Ass'n of the Bar of the City of N.Y., *Establishing Ethical Standards for Prosecutors and Defense Lawyers*, Record of the Ass'n of the Bar of the City of N.Y., Jan./Feb. 1994, at 21, 27-28.

21. See, e.g., *United States v. Dennis*, 843 F.2d 652, 657 (2d Cir. 1988) ("The business of the court is to dispose of litigation and not to act as a general overseer of the ethics of those who practice here unless the questioned behavior taints the trial of the cause before it.") (quoting *W.T. Grant & Co. v. Haines*, 531 F.2d 671, 677 (2d Cir. 1976)); see generally, Bruce A. Green, *Doe v. Grievance Committee: On the Interpretation of Ethical Rules*, 55 *Brook. L. Rev.* 485, 540-41 n.95 (1989); Leonard E. Gross, *Suppression of Evidence as a Remedy for Attorney Misconduct: Shall the Sins of the Attorney Be Visited Upon the Client?*, 54 *Albany L. Rev.* 437 (1990).

subject of this important contribution will be limited to the law as it applies in, for example, malpractice and disqualification proceedings. The Restatement will not give guidance on "sound professional practice," and although it may to some extent "inform the interpretation of the lawyer codes," that also is not its purpose.<sup>22</sup>

How, then, should lawyers for older clients go about resolving the problems of professional responsibility that the professional standards do not answer clearly, do not answer to their satisfaction, or do not address at all? One possibility is for lawyers to resolve these problems for themselves. Many do. But it is common wisdom that in the area of legal ethics, as in ethics generally, the more viewpoints and the more discourse we hear, the more likely we are to arrive at satisfactory, balanced answers. Thus, to widen the range of viewpoints, professional associations of lawyers who face common problems sometimes try to provide more considered guidance to their members. Two groups represented at the conference have done so: ACTEC and the ABA Section on Real Property, Probate and Trust Law. Their works, which are discussed in several of the articles prepared for this Conference, reflect the thoughtful efforts of lawyers engaged in specialized areas of practice to interpret collectively existing professional standards. The work of these two groups in particular is an important step toward providing needed guidance to trust-and-estates lawyers. Yet these interpretations of the existing professional codes also have several limitations that naturally would lead the organizations that drafted them to collaborate with others as a further step toward developing the best answers to the ethical problems that their members face.

First, these collective efforts are mainly intended to interpret existing standards, and to do so against the background of existing doctrine or authority. That is because practitioners must adhere to the present standards, even if they require a lawyer to act in ways that seem inappropriate in a situation that was not adequately considered by the drafters of those standards. It is an important function to ask what the professional standards now require. But it is equally important to ask: if a lawyer were not bound by the existing standards, what would be the best thing to do in a given situation? In other words, what should the proper standards be? These are important questions because their answers suggest not only how the existing rules might be interpreted,<sup>23</sup> but also how they ought to be amended.

A second concern about the collective efforts of specialized groups is

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22. Wolfram, *supra* note 20, at 15.

23. This is especially true if one takes the view that ambiguous provisions of the professional codes should generally be interpreted and applied in the manner that best promotes the underlying interests of clients and the justice system meant to be served by these provisions, rather than in a "mechanical and didactic" fashion. See *J.P. Foley & Co. v. Vanderbilt*, 523 F.2d 1357, 1359-60 (2d Cir. 1975) (Gurfein, J., concurring); see generally Green, *supra* note 21, at 534-42.

that, if taken no farther, they may leave the conscientious practitioner more confused than when he or she began. The interpretations proposed by individual organizations are not authoritative. They provide just one more source of guidance—although obviously a very helpful one. These interpretations may be inconsistent with views rendered by others—including other specialized organizations. Imagine, for example, a lawyer whose general practice includes some work for older clients in the estate area. Should the lawyer look for guidance to the work of the ABA Section on Real Property, Probate and Trust Law? To the work of ACTEC, which might take a different approach? To the work of the National Academy of Elder Law Attorneys, which, as an organization committed to a “holistic” philosophy, might take yet another approach?

The existence of different groups with possibly different perspectives on the same set of issues suggests the third concern—that no single group has a sufficiently broad perspective on these professional responsibility issues. That is the premise on which the Stein Center for Ethics and Public Interest Law was founded two years ago at Fordham Law School, and it explains the Stein Center’s participation as a co-sponsor of this Conference. The Stein Center was established in part for the purpose of facilitating discussions about issues of legal ethics and public interest law. It hosts informal round-table discussions for the benefit of students in Fordham Law School’s Stein Scholars Program, as well as various formal programs that bring together practitioners, academics, and experts from other fields to address issues of common concern in the areas of public interest law and ethics.<sup>24</sup>

The co-sponsors of this Conference shared the view that the best way to achieve satisfactory resolutions of ethical issues is through open discourse among individuals with varied perspectives, and that shared view explains the Conference’s structure. The co-sponsors took as a given that no single group could claim to have all the right answers to the difficult questions of professional responsibility confronting lawyers for older cli-

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24. The Stein Scholars Program, now completing its second year, is a three-year program for selected law students who work in public interest law settings and undertake specialized academic work in public interest law and legal ethics. During all three years, the Stein Scholars attend roundtable discussions with faculty, other scholars, and practitioners devoted to current issues in ethics and public interest law. First year students intern in public interest settings during the summer and upperclass students take specialized courses and assist in organizing the Stein Center’s roundtable discussions and other programs.

The Stein Center’s programs include an annual symposium on contemporary urban problems co-sponsored by the *Fordham Urban Law Journal*. See Symposium, *Urban Criminal Justice: Is it Fair? Does it Appear Fair?*, 20 *Fordham Urb. L.J.* 375 (1993); Symposium, *Big Cities, Big Problems: Solutions for the 1990s*, 19 *Fordham Urb. L.J.* 563 (1992). The most recent symposium, presented on March 3, 1994, was titled “Urban Environmental Justice.” Articles prepared in connection with the symposium will be published in the Spring, 1994 book of the *Fordham Urban Law Journal*. Other programs recently presented by the Stein Center include a panel discussion co-sponsored with the Federal Bar Council entitled “Problems & Solutions: Addressing the Needs of New York’s Homeless Mentally Ill,” presented on January 27, 1994.

ents. The fact that individual groups tend to be defined by a similarity of interest or experience among their members would make any one group particularly hesitant to make such a claim.<sup>25</sup> In looking for answers to the hard questions facing lawyers, it is critical to consider the widest variety of perspectives—to seek the views of lawyers who represent older clients, lawyers who practice in other areas, non-lawyer representatives of older persons, academics, health-care professionals, and others with valuable insights. That is why this Conference was co-sponsored by six groups representing varying perspectives, and why the co-sponsors sought to bring together thoughtful individuals with a variety of backgrounds and experiences.

## II. THE CONFERENCE

The organizers of the Conference<sup>26</sup> began planning well over a year in advance.<sup>27</sup> We believed that, given the substantial time, energy, and funds<sup>28</sup> that were to be committed to it, the Conference should strive to make a genuine contribution to improving the quality of legal representation afforded to older clients. The Conference was meant to be far more than a vehicle for educating a limited number of individuals who would be invited to take part. It was to be a vehicle for developing the practic-

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25. Cf. Sissela Bok, *Lying: Moral Choice in Public and Private Life* 98 (1978) ("We now have little public discourse about moral choice. It is needed in classes, in professional organizations, in government. It should be *open*, not closed to all but special interest groups.").

26. Those individuals who played the leading role in organizing the Conference were: Michael Schuster on behalf of AARP, John Pickering and Nancy Coleman on behalf of the ABA Commission, John J. Lombard, Jr., on behalf of the ABA Section on Real Property, Probate and Trust Law, Judith W. McCue on behalf of ACTEC, Cynthia L. Barrett on behalf of NAELA, and Bruce Green on behalf of the Stein Center for Ethics and Public Interest Law. The references to "we" throughout this section of the Foreword refer to these eight individuals.

27. In some respects, the genesis of the Conference goes at least as far back as the early 1980s, when the ABA Commission on Legal Problems of the Elderly first expressed concern with the ethical problems encountered in dealing with older clients, particularly in the family setting. In 1987, Jacqueline Allee (then a Commissioner and recently Dean of the St. Thomas University Law School) published one of the first articles on the subject; later that year, the Commission sponsored a program on the subject as part of the Denver Conference on Professionalism. See Jacqueline Allee, *Representing Older Persons: Ethical Dilemmas*, BIFOCAL, Spring 1987, reprinted in ABA, *Exploring Ethical Issues in Meeting the Legal Needs of the Elderly* 7 (1987). That work convinced the Commission that more in-depth study was needed. In 1991 the Commission first sought permission from the ABA Board of Governors to sponsor a conference on the subject. Independently, at around the same time, the NAELA Board decided to sponsor a national conference on ethical issues facing elder law practitioners. The ABA Commission and NAELA agreed to join forces. Over the next two years, the additional sponsors came aboard.

28. The Conference benefitted from the generous financial support of the Borchard Foundation and the Marie Walsh Sharpe Endowment, as well as from contributions made by the co-sponsors. We are also grateful to the *Fordham Law Review* for bearing the full expense of publishing this book, including the Proceedings of the Conference.

ing bar's understanding about how best to serve older clients in the face of difficult questions of professional ethics.

With this ambition, the organizers undertook to achieve several goals that would explicitly or implicitly dictate the structure of the Conference. With respect to at least some of the difficult questions of professional conduct, we hoped that the participants would reach a strong consensus about the most appropriate responses. Moreover, we hoped that the recommended responses would be the product of a thorough discussion among a representative body of practitioners, academics, and non-legal professionals, so that the recommendations would have credibility for lawyers and bar groups in search of guidance. We also hoped that, insofar as the approaches strongly endorsed by the participants were not fully reflected in the Model Rules of Professional Conduct, the recommendations would encourage the ABA to consider additions or changes to the Model Rules.

With respect to other difficult questions, the organizers hoped simply to advance the profession's thinking. We assumed that the participants would not reach a strong consensus with respect to many questions. Some issues would be too complex to resolve fully, and as to others, there would be too many plausible approaches for any one to garner strong support from a body representing diverse interests and viewpoints. As to these questions, however, we thought the Conference would perform an important service by defining the issues with greater clarity and capturing the various possible approaches and their justifications, thereby facilitating future discussion and, eventually, sound resolution of these issues.

In light of these aspirations, the organizers soon determined that the Conference would be structured around the effort of several small but broadly representative groups to address different, discrete questions of professional practice. Thus, we began by identifying a limited number of subjects that might reasonably be addressed in the course of a two- or three-day conference. Towards that end, the ABA Commission and NAELA, with input from experienced practitioners, developed an outline of the issues that were considered particularly important in representing older clients. A Fordham law student<sup>29</sup> researched the relevant academic writings, judicial decisions, and ethics opinions. From the list of possible issues, we then selected six broad areas to address in working groups at the Conference: (1) the representation of clients who have diminished capacity to make decisions relevant to the representation; (2) the preservation and disclosure of client confidences; (3) the possible conflicts of interest that may arise when a lawyer represents multiple clients, including either spouses or family members of different generations; (4) problems relating to a lawyer representing a fiduciary; (5) problems faced by a lawyer serving in the role of fiduciary; and (6) counselling older

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29. This research assistance was provided by Steven Shackman as fellow of the law school's Stein Institute of Law and Ethics.

clients, particularly with regard to the possible divestiture of assets in order to take advantage of government-supported programs.<sup>30</sup>

The organizers also believed that, to achieve the most at the Conference, the participants would have to do a substantial amount of thinking in advance. To facilitate the participants' thinking, we enlisted different authors to prepare articles on the various subjects for publication in the *Fordham Law Review* and to distribute drafts to the participants in advance of the Conference. The articles proved enormously useful to the participants, who received drafts on each of the six issues<sup>31</sup> along with "issue statements" prepared by members of the ABA Commission's staff and DaCosta Mason of AARP. Participation in the Conference also proved useful to the authors, who had the opportunity to receive feedback from practitioners during the drafting stage as well as during and after the Conference.

The number of working groups was brought to seven when the organizers decided that two different groups would address the subject of conflicts of interest—one focusing on the representation of spouses and the other on the representation of different generations of family members.<sup>32</sup> We decided that the seven working groups would work best with approximately ten participants each—enough to ensure an adequate range of viewpoints but not so many that discussion would become unwieldy and thoughtful perspectives would be lost. Consequently, each of the six co-sponsors was asked to select ten representatives who, together with the various authors, would take part in the discussions. In designating their invited representatives, the co-sponsors were asked to keep in

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30. Among the important issues that we did not select to address at the Conference, but which deserve to be addressed in the future, are: interdisciplinary approaches to client services, restrictions on attorney advertising and referrals, and the establishment by law offices of ancillary businesses such as investment counseling, social work, and physician assessment. The two student Notes published in this book contribute to the discussion of issues that were not addressed by the Conference: problems of confidentiality that arise in the context of an interdisciplinary approach to representing older clients and the solicitation of older clients through educational seminars. See Heather A. Wydra, Note, *Keeping Secrets Within the Team: Maintaining Client Confidentiality While Offering Interdisciplinary Services to the Elderly Client*, in *Ethical Issues in Representing Older Clients*, 62 *Fordham L. Rev.* 1517 (1994); Nina Keilin, Note, *Client Outreach 101: Solicitation of Elderly Clients by Seminar Under the Model Rules of Professional Conduct*, in *Ethical Issues in Representing Older Clients*, 62 *Fordham L. Rev.* 1547 (1994).

31. Participants received drafts from Jan Rein, Peter Margulies and Robert Roca on client incapacity, from Ron Link and Burnele Powell as co-authors on client confidentiality, from Russell Pearce on conflicts of interest in spousal representation, from Jeffrey Pennell on representing fiduciaries, from Edward Spurgeon and Mary Jane Ciccarello as co-authors on the lawyer as fiduciary, and from Steve Hobbs and Fay Wilson Hobbs as co-authors on client counseling.

32. Although the participants did not have the benefit of an article on the latter subject prepared for purposes of the Conference, they did receive copies of a relevant student Note: Patricia M. Batt, *The Family Unit as Client: Means to Address the Ethical Dilemmas Confronting Elder Law Attorneys*, 6 *Geo. J. Legal Ethics* 319 (1992). In addition, Professor Teresa Collett, a participant in the Conference, graciously agreed afterwards to prepare the article on intergenerational representation that is included in this book.

mind that participants should reflect a broad variety of perspectives within the legal profession and should also include members of other key professions.<sup>33</sup> Thus, the participants at the Conference would ultimately include academic and ABA authorities on legal ethics, private elder law practitioners, attorneys providing public legal assistance to older persons, family law practitioners, litigators, corporate counsel, leaders in the trusts and estates bar, non-lawyer representatives of older persons, and professionals from other disciplines such as medicine, geriatric care management, and social work. From those invited, we selected individuals to lead the discussions and to work with the ABA Commission prior to the Conference in developing "issue statements" for the working groups.<sup>34</sup>

The organizers agreed that, over the course of the first two days of the Conference, the working groups should endeavor to develop recommendations, to the extent appropriate, concerning: (1) ways in which the Model Rules or the Commentary accompanying them should be changed or augmented, (2) guidelines to improve professional practice under the existing professional codes, (3) areas in which bar groups and others should educate practitioners, and (4) areas in which further study is needed. The organizers also agreed to propose to the discussion leaders and working groups the process by which these recommendations would be developed. In general, the groups were urged to proceed in sequence and to divide their time equally between four tasks: identifying the relevant problems to address, identifying possible responses to these problems, reaching a consensus on the most appropriate responses, and drafting recommendations reflecting that consensus. Notes would be taken of each working group's discussion and a summary would be prepared for the benefit of others who would take up the same problems in the future.<sup>35</sup> This process reflected the spirit of open inquiry to which we were committed.

Finally, the organizers agreed that on the final morning of the Conference, all the participants would come together to consider the various recommendations developed by the seven individual groups. After some

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33. The value of multidisciplinary participation had been demonstrated by the ABA Commission's previous experience in developing symposia that contributed significantly to the field of law and aging. These symposia included the Cleveland Conference on Social Security Due Process (1985), the Reno Conference on Guardianship Reforms (1986), the Conference at the Xerox Center on Medicare Due Process Issues (1987), the Wingspread Conference on additional guardianship reforms (1988), and the Reno Conference on Court-related Needs of the Elderly and Persons with Disabilities, co-sponsored by the State Justice Institute and the National Judicial College (1991).

34. The discussion leaders were Mary Daly, Bruce Green, Jack Guildroy, John Lombard, John Pickering, Bruce Ross, and Scott Severns.

35. The papers summarizing the working group discussions are published in this book. They were prepared by Nancy Coleman, Stephanie Edelstein, Naomi Karp, Charles Sabatino, Lori Stiegel and Erica Wood of the ABA Commission, and Laurie Adsit of NAELA. Their work was facilitated by the following volunteers who took contemporaneous notes of the working groups' discussions: Kate Bird, Kim Blake, Mary Jane Ciccarello, Meg Reed, Alison Rein, Jihane Rohrbacker, and Elana Stoom.

debate, we decided that the agreement of two-thirds of the participants would be necessary to adopt any recommendation on behalf of the Conference. Some of the organizers initially opposed this "supermajority" requirement, believing, erroneously as it turned out, that a simple majority would be hard enough to achieve. However, all were ultimately won over by the view that any recommendations that the Conference did adopt would be given more credence if they had garnered such strong support.

The Conference proceeded essentially as planned. Close to 80 participants arrived at Fordham Law School on the morning of Friday, December 3. They included representatives invited by the six co-sponsoring organizations, most of the authors of the background papers, members of the ABA Commission staff, and recorders for the working group sessions. After Fordham Law School Dean John D. Feerick welcomed the group, Alexander Forger, chair of the ABA Commission, presented the "charge" to the participants. The working groups then proceeded to meet over the course of two days to develop recommendations that participants received on Saturday night, December 4. All conferees met in a plenary session on December 5, ably chaired by Columbia Law School Dean Lance Liebman. Thirty minutes were allotted to discuss and vote on the recommendations of each working group. In the end, the Conference adopted the vast majority of the recommendations proposed by the working groups. The Conference then concluded and the participants drifted out of Fordham Law School early on the afternoon of December 5, 1993.

### III. THE RECOMMENDATIONS

The hard work leading up to the Conference was more than equalled by the hard work of the participants at the Conference itself. The product of this hard work was an array of Recommendations produced by the working groups and, with only a few exceptions, adopted by the full Conference by the requisite two-thirds or more during the plenary session on the final morning. At the conclusion of the Conference as well as in reflections shared afterwards, the participants were extremely positive about both the Recommendations themselves and the process that led to their adoption.

Among the Recommendations that participants considered most important were several urging additions or changes to the Model Rules of Professional Conduct or to the accompanying Commentary. Perhaps the most significant proposed changes were the complementary Recommendations, developed independently by two different working groups, concerning the representation of clients with diminished capacity,<sup>36</sup> a subject

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36. See Conference on Ethical Issues in Representing Older Clients, *Recommendations*, in *Ethical Issues in Representing Older Clients*, 62 *Fordham L. Rev.* 989, 989, 992-93 (1994) (Recommendations II.A., III.A.1).



addressed by Model Rule 1.14.<sup>37</sup> The Recommendations urge changes that are designed explicitly to afford attorneys discretion to act to protect individuals with diminished capacity from various types of harm. Under the proposed changes, an attorney would be authorized to take protective steps even when, in doing so, the attorney would reveal confidences without the individual's consent or would otherwise act on behalf of the individual without his or her permission. Clarifying and expanding the authority delegated by Model Rule 1.14, these proposed changes would permit lawyers to act not only for the protection of present clients, but also for the benefit of former clients and other individuals who (perhaps because of their lack of capacity to assent to be represented) had never become a client. In acting for the benefit of the person with diminished capacity under the Conference's proposal, attorneys would be guided by the goal of intruding into the client's autonomy to the least extent necessary to protect that person. The importance of this set of Recommendations is underscored by Paul Tremblay's commentary about them. In the article he prepared in the wake of the Conference, he notes that this is "the first time public support" has been given to the concept of "impromptu lawyering" discretion," and he identifies this as "an important and necessary" development.<sup>38</sup>

Two other recommended changes to the Model Rules, both related to the subject of client confidentiality, engendered some controversy but were nevertheless adopted. The first was directed at the attorney who represents spouses or other family members as joint clients.<sup>39</sup> The Conference recommended that the joint clients should be permitted to agree on whether the lawyer receiving confidences from one of the clients could share them with another joint client and that the clients' prior agreement would govern the lawyer's conduct.<sup>40</sup> The second Recommendation was

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37. See Model Rules, *supra* note 11, Rule 1.14(b) ("A lawyer may seek the appointment of a guardian or take other protective action . . . only when the lawyer reasonably believes the client cannot adequately act in the client's own interest.").

38. Paul R. Tremblay, *Impromptu Lawyering and De Facto Guardians*, in *Ethical Issues in Representing Older Clients*, 62 *Fordham L. Rev.* 1429, 1433 (1994). Another participant at the Conference, in his subsequent reflections, identified this as "the single most useful and inventive recommendation" produced by the Conference. Other participants also shared this view.

39. See Conference on Ethical Issues in Representing Older Clients, *Recommendations*, in *Ethical Issues in Representing Older Clients*, 62 *Fordham L. Rev.* 996 (1994) (Recommendation IV.A).

40. See Conference on Ethical Issues in Representing Older Clients, *Recommendations*, in *Ethical Issues in Representing Older Clients*, 62 *Fordham L. Rev.* 993 (1994) (Recommendation II.A.2). In proposing this Recommendation, the working group dealing with client confidentiality issues took no position on the question of whether a husband and wife or other family members could be jointly represented upon the understanding that confidences would not be shared among the joint clients. See Conference on Ethical Issues in Representing Older Clients, *Report of Working Group on Client Confidentiality*, in *Ethical Issues in Representing Older Clients*, 62 *Fordham L. Rev.* 1015 (1994). Participants in this group disagreed on the right answer to this question and ultimately determined that the question was better addressed by the two groups dealing with conflicts of interest or at a later time. See *id.*; Conference on Ethical Issues in Rep-

addressed to lawyers representing fiduciaries, such as trustees and executors.<sup>41</sup> This Recommendation responds to the problem, discussed in Jeffrey Pennell's article, of the lawyer who learns that the fiduciary is violating a duty owed to the court or to third parties.<sup>42</sup> In such circumstances, the proposal would afford the lawyer discretion to communicate otherwise confidential information to a court having jurisdiction in the matter or to parties, such as beneficiaries of an estate, to whom the represented fiduciary owes duties. Larry Fox, whose thoughtful opposition to both these Recommendations failed to carry the day, expands upon the concerns he expressed at the Conference in a commentary published in

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representing Older Clients, *Recommendations, in Ethical Issues in Representing Older Clients*, 62 Fordham L. Rev. 995 (1994) (Recommendation III.D).

The group dealing with intergenerational representation did in fact propose such a Recommendation that was adopted by the Conference. The group proposed a change in the Model Rules or Commentary to reflect that a lawyer may not jointly represent family members "unless there is an agreement to disclose relevant, adverse confidences related to the common purposes of such representation." Conference on Ethical Issues in Representing Older Clients, *Recommendations, in Ethical Issues in Representing Older Clients*, 62 Fordham L. Rev. 997 (1994) (Recommendation V.A.2). Taken together, the two proposed Model Rules would require joint clients to agree at the outset of the representation that the lawyer would disclose "relevant, adverse confidences," but would allow them to decide how other confidences would be handled—i.e., whether the lawyer would be required to reveal *all* confidences regardless of their nature, whether the lawyer would be required to preserve the confidentiality of irrelevant disclosures made by one of the joint clients, or whether the lawyer would have discretion to decide whether or not to preserve the confidentiality of such disclosures.

In addition, the group dealing with spousal representation proposed a recommended practice guideline, which was also adopted, to deal with the question of confidentiality between joint clients. They recommended that, before undertaking to represent spouses, the lawyer should discuss with them issues of confidentiality and conflicts of interest, and, "[s]pecifically in the estate planning context, the lawyer should convey that there must be no secrets between the husband and wife as to issues material to the estate plan . . . ." Conference on Ethical Issues in Representing Older Clients, *Recommendations, in Ethical Issues in Representing Older Clients*, 62 Fordham L. Rev. 996 (1994) (Recommendation IV.A.3.a). The lawyer was further urged to clarify the consequences if it was discovered that one spouse had violated the understanding that no secrets would be kept from the other. See Conference on Ethical Issues in Representing Older Clients, *Recommendations, in Ethical Issues in Representing Older Clients*, 62 Fordham L. Rev. 996 (1994) (Recommendation IV.A.3.b).

The Conference ultimately took no position on the related question of whether a lawyer would be required to withdraw from the representation in the event that one family member revealed relevant, adverse information to the lawyer and insisted that the information be kept in confidence from other jointly-represented family members. However, participants at the Conference who considered this question in their working group discussions apparently assumed that the lawyer would generally be required to withdraw from the representation because of the ensuing conflict of interest. See Conference on Ethical Issues in Representing Older Clients, *Report of Working Group on Client Confidentiality, in Ethical Issues in Representing Older Clients*, 62 Fordham L. Rev. 1015 (1994).

41. See Conference on Ethical Issues in Representing Older Clients, *Recommendations, in Ethical Issues in Representing Older Clients*, 62 Fordham L. Rev. 998 (1994) (Recommendation VI.A.1).

42. See Jeffrey N. Pennell, *Representations Involving Fiduciary Entities: Who Is the Client?*, in *Ethical Issues in Representing Older Clients*, 62 Fordham L. Rev. 1319 (1994).

this book of the *Fordham Law Review*.<sup>43</sup>

A far greater number of Recommendations, and perhaps the most useful ones at least in the short term, were related to professional practices within the existing framework of rules of professional conduct. These Recommendations reflected the participants' recognition that, in the overwhelming majority of cases, the practices that would best address the ethical problems confronting lawyers in representing older clients were fully consistent with the strictures of the Model Rules of Professional Conduct.<sup>44</sup>

Many of the proposed "practice guidelines" underscored the importance of full discussions with clients on the role of the attorney and the ways in which the attorney will handle particular situations, as well as the importance, whenever possible, of putting these understandings in writing. The Conference recommended, for example, that the lawyer for a fiduciary should discuss the respective roles of the fiduciary and the lawyer,<sup>45</sup> that the lawyer for a husband and wife should review the terms and implications of the representation with the husband and wife,<sup>46</sup> and that the lawyer for joint clients should reach a clear agreement with them on how to handle confidences.<sup>47</sup>

The Conference also developed a number of Recommendations on the education of the bar, the bench, and the public. For example, it urged that lawyers be trained in the social sciences relative to older persons, particularly in the area of incapacity.<sup>48</sup> This Recommendation reflected a perception that lawyers need to be more aware of aging and its effects in order to better serve older clients. It was also urged that educational materials on the duties and responsibilities of fiduciaries and their lawyers be developed for the bench, bar, fiduciaries, and the public.<sup>49</sup>

The Conference also identified a number of issues which merit further study. In some cases, these Recommendations reflected a working group's choice not to address the issue in the limited time available. In other cases, they reflected a group's inability to reach consensus on very

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43. See Lawrence J. Fox, *It's All in the Atmosphere*, in *Ethical Issues in Representing Older Clients*, 62 *Fordham L. Rev.* 1447 (1994).

44. John J. Lombard, Jr., one of the participants who played a central role in organizing the Conference, has cautioned, however, "that some of the general Recommendations do not meet the standards of practice in [particular] state[s], or, in some cases, are contrary to accepted practice or even legislative mandate, e.g., the new California legislation regarding lawyers serving as a fiduciary." For this reason, a lawyer seeking guidance in the Recommendations of the Conference would be well advised to consider how the Recommendations relate to the relevant laws and practices of the jurisdiction.

45. See Conference on Ethical Issues in Representing Older Clients, *Recommendations*, in *Ethical Issues in Representing Older Clients*, 62 *Fordham L. Rev.* 998 (1994) (Recommendation VI.B.1).

46. *Id.* at 996 (Recommendation IV.A.3).

47. *Id.* at 993 (Recommendation III.A.2).

48. See *id.* at 992, 1000 (Recommendations II.D, VII.C); see also *id.* at 1001 (Recommendation VIII.B).

49. See *id.* at 998 (Recommendation VI.C).

difficult questions. This was true, for example, in the case of various Recommendations for further study of problems in representing joint clients—either parents and children (or other multiple intergenerational clients) or spouses.<sup>50</sup>

In a few cases, Recommendations proposed by a working group failed to garner two-thirds support during the plenary session. These proposals are reflected in the summaries of the working group discussions contained in this book. One such proposal was that a lawyer acting as a fiduciary should be permitted to employ herself or her firm as counsel for the fiduciary.<sup>51</sup> Another rejected proposal dealt with emergency legal services provided for individuals who, because of their impaired capacity, are unable to enter into an attorney-client relationship and to authorize the lawyer to act. The proposed Recommendation, which would have forbidden the lawyer from seeking a fee for the services rendered,<sup>52</sup> is addressed in Professor Tremblay's commentary.<sup>53</sup> Another proposed Recommendation that failed to win adequate support was made from the floor during the plenary session. The proposal was that attorneys who counsel clients to transfer property solely to become eligible for Medicaid should consider the potential effect on limited Medicaid resources.<sup>54</sup>

Although the participants were very enthusiastic about the Conference and its results,<sup>55</sup> some possibilities for improving the process were noted. Many wished they had been given more time to review the articles in advance of the Conference. Those in the working group on intergenerational representation, who did not have the benefit of an article specifically addressing that issue, felt they were hampered as a result, particularly given the breadth and complexity of the issue they were addressing.<sup>56</sup> Many also wished to have had more time for discussion in

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50. See *id.* at 996, 997 (Recommendations IV.B, V.B).

51. See Conference on Ethical Considerations in Representing Older Clients, *Report of Working Group on Lawyer as Fiduciary*, in *Ethical Issues in Representing Older Clients*, 62 *Fordham L. Rev.* 1055 (1994).

52. See Conference on Ethical Considerations in Representing Older Clients, *Report of Working Group on Client Capacity*, in *Ethical Issues in Representing Older Clients*, 62 *Fordham L. Rev.* 1003 (1994).

53. See Paul R. Tremblay, *Impromptu Lawyering and De Facto Guardians*, in *Ethical Issues in Representing Older Clients*, 62 *Fordham L. Rev.* 1429 (1994).

54. This proposal failed on a close vote. For a discussion of opposing viewpoints on this issue, see Eleanor M. Crosby & Ira M. Leff, *Ethical Considerations in Medicaid Estate Planning: An Analysis of the ABA Model Rules of Professional Conduct*, in *Ethical Issues in Representing Older Clients*, 62 *Fordham L. Rev.* 1503 (1994).

55. For some, the principal success of the Conference resided in one or another of the Recommendations proposing changes to the Model Rules or guidelines for practice. For others, however, its most important contribution was to illustrate the need for future discussions of the ethical issues raised at the Conference and to develop materials helpful to such discussions.

56. One member of this group did note an important point which, he believed, had emerged from the group's discussion: it was "not that the current ethical rules need 'fixing,' but that practitioners of elder law need to be more sensitive to ethical norms and should attempt to conform their practice so as to avoid, rather than ignore, the inherent conflicts in intergenerational representation."

the working groups.

On the whole, these comments suggest that, while it could have been better implemented, the process that we developed was a sound one. In their subsequent reflections, different participants credited different aspects of the process for the success of the Conference. One, echoing comments made by many during the course of the Conference, observed that "delivery of the papers prior to the meeting was critical to the success of the program." Others stressed the importance of enlisting the participation of individuals representing varied backgrounds and experiences, as well as the importance of the participants' openness to others' viewpoints.<sup>57</sup> Finally, participants praised the structure that had been devised for working toward the development of concrete recommendations concerning real problems faced by lawyers for older clients. Scott Severns put it best in a letter he wrote following the Conference:

My experience in my sub-group was wholly positive and adds to my understanding of the power of this process that I would like to share with you. The process is an exercise in finding areas of common ground based on deeply held principles. It appeals to each individual's highest sense of purpose. When disagreements arise, the group simply raises its level of inquiry to the common principles that underlie the disagreeing parties' positions. From that view, new levels of reconciliation are achieved. By setting the focus in the beginning on practical implementation of the outcomes, we keep the process focused on real people with real needs.

At least from the participants' perspective, the Conference provided a model that could be used by the co-sponsors and others in the future when they seek to develop thoughtful responses to difficult questions of professional practice.

#### IV. THE ARTICLES

The eight articles included in the Proceedings of the Conference were written before the Conference to provide scholarly background on the issues. While the authors' views often failed to carry the day at the Conference, these articles contributed immeasurably to the quality of discus-

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57. One participant wrote: "I was impressed with the wide range of backgrounds of the members from the various constituent groups. I first thought that there were too many sponsors and too many participants in each of the sub-groups, but changed my mind about that." Another observed: "In the 'Confidentiality' group, we had a broad variety of lawyers: professors, private practitioners, public counsel and lobby advocates. By assembling this diverse group, you were able to obtain a wide exchange of views on the issues presented." A third noted: "The participants were thoughtful and concerned about these difficult issues and both open to and respectful toward new perspectives and approaches." Yet another, who participated in the group that discussed client capacity, noted: "[The participants'] different backgrounds covered as wide a spectrum as one can conceive in this area, placed most of the conclusions reached by our three authors in many different perspectives and were not only quite helpful to all of the participants in our practice, but also will cause a number of revisions in each of the articles to sharpen the focus on the issue."

sion. Four additional articles were drafted afterwards in light of the proceedings. The publication of all twelve in this book makes an important contribution to the aim of advancing the discourse about difficult ethical problems confronting lawyers for older clients. This brief overview cannot do them justice, but may provide some sense of their importance.

#### A. *Clients with Diminished Capacity*

Four articles offer insight into how to deal with clients who may lack adequate capacity to make decisions that are ordinarily made by a client. Peter Margulies, in his article, begins by addressing the problem of the client who can articulate a decision but whose decision may not be adequately considered.<sup>58</sup> How does a lawyer determine whether the client has adequate capacity to make decisions relevant to the representation? Professor Margulies describes various factors that he believes should go into the lawyer's determination, as well as steps that may be taken to better evaluate the client's capacity or to enhance the client's ability to make a considered decision. The article then addresses the equally important question of what a lawyer should do upon determining that the client *does* lack adequate decision-making capacity. He urges that lawyers themselves should be allowed to make decisions on behalf of the client in some situations where the Model Rules would seem to require the lawyer to seek the appointment of a legal guardian. As to the question of *how* a lawyer should make decisions that the incapacitated client cannot make, Professor Margulies urges an approach that accounts for both the client's lifetime commitments, where they can be determined, and the objective fairness of the various alternative decisions.

Jan Rein's article covers the same general subject—the problem of client capacity—but makes different contributions.<sup>59</sup> She focuses on the lawyer's dilemma in representing a client who is capable of expressing her wishes, but whose goals seem to the lawyer to be morally or socially irresponsible. She provides various examples—the client who decides to disinherit his son and donate his assets to a television evangelist, or, the example mentioned earlier, the woman who faces the loss of her home, but who will not or cannot authorize the lawyer to defend her in litigation. Professor Rein provides, to begin with, an excellent critique of the approach taken by the Model Rules. Her criticism underscores the importance of a Conference intended to help the legal profession develop clearer guidance for lawyers than the existing ethical standards afford. She goes on to advocate that lawyers generally respect the decisions ar-

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58. See Peter Margulies, *Access, Connection, and Voice: A Contextual Approach to Representing Senior Citizens of Questionable Capacity*, in *Ethical Issues in Representing Older Clients*, 62 *Fordham L. Rev.* 1073 (1994).

59. See Jan Ellen Rein, *Clients with Destructive and Socially Harmful Choices—What's an Attorney to Do?: Within and Beyond the Competency Construct*, in *Ethical Issues in Representing Older Clients*, 62 *Fordham L. Rev.* 1101 (1994).

ticated by their elderly clients, except where, for example, there are important countervailing third-party or societal interests. She also suggests that solutions that are less destructive of the human spirit should be devised as an alternative to finding people incompetent when moral and societal dilemmas emerge.

The third article on client capacity looks at this problem from a medical perspective, which complements the perspectives taken by Professors Margulies and Rein. Robert Roca describes how physicians determine whether an individual has a mental disorder that interferes with the ability to make a decision about medical care.<sup>60</sup> He describes psychiatric disorders that may compromise one's decision-making capacity. He outlines the kind of information sought by the physician, and how the physician obtains that information, to determine whether the patient has one of these disorders. He reminds us that the physician will not deny a patient the right to make a seemingly unwise choice, unless the patient in fact has a disabling psychiatric disorder. Moreover, the physician will not take a decision out of the hands of the patient with a mental disorder, unless that disorder compromises the patient's ability to make the particular decision. Finally, in determining whether the patient has a disorder that impairs the ability to make decisions, Dr. Roca suggests that it is appropriate to consider what is at stake. Individuals are assumed to be able to make their own decisions unless proven otherwise. But the greater the harm the patient faces, the more appropriate it is to resolve any genuine uncertainty by concluding that the client is *not* capable of making decisions.

Finally, in an article prepared after the Conference, Paul Tremblay comments favorably on the Recommendations for changes in the Model Rules dealing with the legal representation of clients with diminished capacity, while at the same time exploring possible problems that the Recommendations raise.<sup>61</sup> He observes that the proposal to permit lawyers to engage in "impromptu lawyering"—that is, emergency action to protect an individual who, because of diminished capacity, cannot enter into an attorney-client relationship—would properly allow lawyers to follow their ordinary impulse to assist those in need of emergency services. However, absent a corollary provision forbidding the lawyer from seeking compensation for such services, he suggests that the "unseemly specter" might be raised "of an attorney seeking payment from a person who, in many cases, may have expressly objected to the attorney's acting at all." Professor Tremblay also explains why, despite his prior public opposition, he has come to support the principle that lawyers should have discretion to act as "*de facto* guardians" for clients with diminished capacity, rather than seeking the judicial appointment of a guardian. Yet, at

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60. See Robert Roca, *Determining Decisional Capacity: A Medical Perspective*, in *Ethical Issues in Representing Older Clients*, 62 *Fordham L. Rev.* 1177 (1994).

61. See Paul R. Tremblay, *Impromptu Lawyering and De Facto Guardians*, in *Ethical Issues in Representing Older Clients*, 62 *Fordham L. Rev.* 1429 (1994).

the same time, he notes concerns that arise out of this "delegation of trust and responsibility."

### B. *Client Confidentiality*

Two other articles address an issue that runs through many of the others: the issue of client confidentiality. When may a lawyer reveal to a third party information learned in confidence from the client? This issue is central to the discussion of the lawyer who, while representing a trustee, learns information of significance to beneficiaries of the trust. It is also important to the lawyer representing husband and wife or parent and child, who may have to decide whether information confided by one client can be revealed to the other. And, it is no less important in the context of representing the incapacitated or potentially incapacitated client, particularly if such representation is to entail enlisting the support of social service agencies and others, as Professors Margulies and Rein suggest. All these questions are addressed in the paper prepared by Burnele Powell and Ronald Link on confidentiality issues in representing older clients.<sup>62</sup> The co-authors present a series of scenarios and address each one from two different perspectives which often point in different directions. The first, which they call the "empathic" perspective, seeks guidance in thoughts and feelings that may be attributed to the client often without being explicitly communicated. The second approach, the "autonomic" perspective, uses the client's self-directing freedom and moral independence as its compass point. The debate between these approaches helps explicate the tensions that are often present in these problems.

The second article is Larry Fox's critique of two Recommendations regarding client confidentiality.<sup>63</sup> First, he discusses a proposal that lawyers be afforded discretion to reveal certain confidences imparted by the fiduciaries whom they represent. Then, he critiques a proposal addressing how confidences should be treated by the lawyer representing spouses or other joint clients. He argues vigorously that these proposals are inappropriate from the perspective of either the clients or the legal profession.

### C. *Conflicts of Interest*

Two articles deal with conflicts of interest in the representation of joint clients. Russell Pearce examines the possible conflict of interest that may arise for an attorney who simultaneously represents a husband and wife.<sup>64</sup> This is a subject of particular concern for lawyers who provide advice to older clients regarding estate and long-term care planning. The

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62. See Burnele V. Powell & Ronald C. Link, *The Sense of a Client: Confidentiality Issues in Representing the Elderly*, in *Ethical Issues in Representing Older Clients*, 62 *Fordham L. Rev.* 1197 (1994).

63. See Lawrence J. Fox, *It's All in the Atmosphere*, in *Ethical Issues in Representing Older Clients*, 62 *Fordham L. Rev.* 1447 (1994).

64. See Russell G. Pearce, *Family Values and Legal Ethics: Competing Approaches to*



planning decisions made by one spouse will almost invariably impact on the interests of the other spouse. Consequently, the husband and wife will often want to make these decisions as a couple. As Professor Pearce discusses, however, this poses an ethical problem because, at different points in the representation, the interests of one spouse may conflict with those of the other. For example, the husband may want to achieve objectives that the wife objects to, or the wife may give the lawyer information that would be important to her husband, but that she does not want her husband to know. Because a lawyer is generally obligated to represent clients with undivided loyalty, in some cases it may be improper for the lawyer to represent both husband and wife. Or, the lawyer may be obligated to talk to the spouses about the possible risks in representing both at once, and to make sure that they give informed consent to accept those risks. Professor Pearce discusses how these problems are dealt with under the existing professional standards governing conflicts of interest, and how different authorities interpret those standards. In the end, he advocates an approach under which the husband and wife would be given an alternative. They can choose to be represented as individuals or as a family. He explains the implications of those different choices, as he sees them, with respect to the question of whether, and under what circumstances, a lawyer may represent both husband and wife.

The second article, written by Teresa Collett following the Conference, focuses on a related issue: the conflict of interest that may emerge when parents and children are represented by the same lawyer at the same time.<sup>65</sup> In counterpoint to Professor Pearce, Professor Collett argues that the representation of family members as a "family entity" poses threats to both family and individual autonomy, while offering few benefits over the three alternative modes of representation: representation of only a single family member, representation as intermediary between the family members, or joint representation of the multiple family members.

#### D. *Fiduciaries*

Two articles deal primarily with problems involving various kinds of fiduciaries, such as guardians appointed for incapacitated or disabled individuals, or trustees appointed to administer estates. The first, by Jeffrey Pennell, discusses the problem of a lawyer who represents a fiduciary.<sup>66</sup> He starts with an example of a lawyer for the administrator of an estate whose beneficiaries are the decedent's elderly surviving spouse and several children. What is the lawyer's proper response when

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*Conflicts in Representing Spouses*, in *Ethical Issues in Representing Older Clients*, 62 *Fordham L. Rev.* 1253 (1994).

65. See Teresa Stanton Collett, *The Ethics of Intergenerational Representation*, in *Ethical Issues in Representing Older Clients*, 62 *Fordham L. Rev.* 1453 (1994).

66. See Jeffrey N. Pennell, *Representations Involving Fiduciary Entities: Who Is the Client?*, in *Ethical Issues in Representing Older Clients*, 62 *Fordham L. Rev.* 1319 (1994).

the administrator of the estate engages in conduct that appears improper or unfair to a beneficiary—particularly when it is unfair to a vulnerable elderly beneficiary? To whom does the lawyer owe loyalty in this situation? If loyalty is owed to the administrator of the estate, not to the individual beneficiaries, may the lawyer, indeed *must* the lawyer, nevertheless make certain disclosures to the beneficiaries or otherwise act for the benefit of the beneficiaries whose interests are at risk? Professor Pennell's review of existing authority reveals that currently a great deal of confusion as to these questions exists. He identifies situations where a lawyer ought to be able to make disclosures to the beneficiaries and critiques various alternative ways to conceptualize the representation in order to permit this result.

The article co-authored by Edward Spurgeon and Mary Jane Ciccarello deals with different questions, particularly conflict-of-interest questions, that arise when the lawyer personally is the fiduciary.<sup>67</sup> First, the article discusses whether the lawyer may be named as fiduciary in a will or trust that the lawyer drafted. Second, it considers whether the lawyer may serve in the dual capacity of fiduciary and lawyer for herself as fiduciary. Finally, it looks at conflict-of-interest problems when the lawyer serves solely as fiduciary. With respect to each of these three issues, the authors discuss how ethical standards and various authorities approach the problem, and propose their own solutions. For example, they urge that a lawyer should not be named as fiduciary in an instrument the lawyer drafts except in limited circumstances, such as where there is a longstanding attorney-client relationship or the client has no one else to name. And, they suggest that, if a client is to appoint a lawyer to serve as both fiduciary and as counsel to herself as fiduciary, the client should first be well informed of the consequences of doing so.

#### E. *Counseling Regarding the Divestment of Assets*

The last two articles deal with a subject that brings together a variety of client counseling and ethical concerns: the ethical management of assets for older clients. The first, prepared by Steven Hobbs and Fay Wilson Hobbs, looks at the lawyer's task in counseling a client about the divestment or distribution of assets.<sup>68</sup> Adopting an interdisciplinary approach, their article incorporates a model used by social workers and mental health professionals. In addressing the older client's problems, they urge the lawyer to place himself or herself "in the context of a family travelling through the aging process," and they discuss some of the implications of this approach—which, they note, does not quite fit with

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67. See Edward D. Spurgeon & Mary Jane Ciccarello, *The Lawyer in Other Fiduciary Roles: Policy and Ethical Considerations*, in *Ethical Issues in Representing Older Clients*, 62 *Fordham L. Rev.* 1357 (1994).

68. See Steven H. Hobbs & Fay Wilson Hobbs, *The Ethical Management of Assets for Elder Clients: A Context, Role, and Law Approach*, in *Ethical Issues in Representing Older Clients*, 62 *Fordham L. Rev.* 1411 (1994).

traditional notions of representation. They urge lawyers to inquire into family relationships and to involve the resources of family members, to the extent possible, in making decisions and in assisting the older client to achieve his or her goals.

The second, by Eleanor Crosby and Ira Leff, was prepared following the Conference to provide another useful perspective on the practice of counseling clients to transfer assets in order to qualify for government benefits.<sup>69</sup> This article explores both the history of legal practice in this area and, in the context of a case study, some of the issues that arise under the Model Rules of Professional Conduct.

### CONCLUSION

This book focuses on a range of difficult problems of professional responsibility for lawyers who represent older clients. What makes these problems particularly difficult, and in some cases quite poignant, is that underlying many of them is a tension, not between the interests of an individual client and her lawyer, or between the interests of an individual client and third parties who are adversaries or for whom the client has little concern, but rather between the different interests of the older client herself, or between the interests of the client and those of other family members who are important to the client and whose interests and perspectives the client would ordinarily want to consider. That tension is captured by Professors Powell and Link when they discuss the empathic approach versus the autonomic approach. It is captured differently by Professor Steven Hobbs and Fay Wilson Hobbs when they contrast the traditional lawyering model and the social work model. However one conceptualizes the underlying tension, these professional responsibility problems present a challenge: How can well-meaning lawyers, devoted to serving the best interests of their older clients, well serve different client interests that seem to be inconsistent? And, if all of these seemingly inconsistent interests cannot be served, which ones should be given priority, and how? This book should make an important contribution to the legal profession and provide some guidance to individual lawyers as they grapple with these questions.

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69. See Eleanor M. Crosby & Ira M. Leff, *Ethical Considerations in Medicaid Estate Planning: An Analysis of the ABA Model Rules of Professional Conduct*, in *Ethical Issues in Representing Older Clients*, 62 *Fordham L. Rev.* 1503 (1994).

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