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# Everything You Ever Needed to Know About Good Lawyering, You Can Learn from Elder Law

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# EVERYTHING YOU EVER NEEDED TO KNOW ABOUT GOOD LAWYERING, YOU CAN LEARN FROM ELDER LAW

Linda S. Whitton\*

## I. INTRODUCTION

The academic territory we now know as Elder Law did not exist when most of us writing for this symposium were in law school. Something both daunting and liberating resonates about driving the first covered wagons over new territory. Lacking a map, we learned from one another and through trial and error. A discipline defined by the client rather than by a discreet body of law, Elder Law reminds the student that law practice should be, above all else, client-centered.<sup>1</sup>

But before we can “center” our practice on the Elder Law client, we must first discern who the Elder Law client might be. Is it someone we can identify by age? If so, what age?<sup>2</sup> Can the client instead be identified by legal needs? If so, what needs? Given the heterogeneity of people who are the same chronological age<sup>3</sup> and

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1. See e.g. Rebecca C. Morgan, *Elder Law in the United States: The Intersection of the Practice and Demographics*, 2 J. Intl. Aging L. & Policy 103, 105 (2007) (quoting the National Academy of Elder Law Attorneys for the proposition that “[r]ather than being defined by technical legal distinctions, elder law is defined by the client to be served”).

2. See e.g. Lawrence A. Frolik, *The Developing Field of Elder Law: A Historical Perspective*, 1 Elder L.J. 1, 2–3 (1993) (explaining that people disagree about what ages constitute elderly “[s]ome might apply the term to persons as young as age sixty, fifty-five, or even younger” and noting that “[i]n the end, the precise age is not important because the nature of the work an attorney performs defines an elder law practice rather than the chronological age of the client”).

3. See Linda S. Whitton, *Ageism: Paternalism & Prejudice*, 46 DePaul L. Rev. 453, 465–468 (1997) [hereinafter Whitton, *Ageism*] (reviewing gerontological research, which concludes that “both cognitive and physiological changes occur in varying degrees and at individuated rates”); see also William E. Adams & Rebecca C. Morgan, *Representing the Client Who is Older in the Law Office and in the Courtroom*, 2 Elder L.J. 1, 8–9 (1994) (explaining that stereotypes address the elderly as a whole, but wide variations exist among individuals).

the myriad legal needs that might arise in such a group, we who teach Elder Law begin each semester knowing an inconvenient truth—no “poster elder” exists who typifies what it means to be old or who embodies representative “elder” legal needs. In fact, we know that age stereotypes, and the personal biases they produce, often operate to the detriment of older adults and those in need of Elder Law services.<sup>4</sup>

So why recognize Elder Law as a discipline? The justifications include the following: a society that is getting proportionately older, physical changes and vulnerability that tend to occur with advanced age, and perhaps the most objectively verifiable reason—society distributes a number of benefits (e.g., Medicare, Social Security, and Medicaid) using chronological age as a condition for eligibility.<sup>5</sup> Thus, Elder Law exists both because of the increasing number of aging individuals who might have age-related legal needs and because chronological age triggers the availability of certain legal benefits.

Just as there are many justifications for recognizing the curricular territory of Elder Law, numerous reasons exist for a student to enroll in an Elder Law course. Some want a law practice that is aimed at helping people on a personal level, focused both on proactive advance planning and reactive crisis management. Others hope to represent service providers such as hospitals, skilled nursing facilities, and retirement communities. And yet others take the class for purely personal reasons—seeking information to assist an aging parent or grandparent.

In addition to these student objectives, what keeps me returning to the Elder Law podium is the belief that Elder Law provides a unique opportunity to teach all of the essential tenets of good lawyering in one course. In my opinion, these tenets can be summarized as follows:

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4. See generally Linda S. Whitton, *Re-examining Elder Law Practices: Reflections on Ageism*, 12 Prob. & Prop. 8, 8–12 (Jan.–Feb. 1998) [hereinafter Whitton, *Re-examining*] (examining the effects of ageism on Elder Law practices); Whitton, *Ageism*, *supra* n. 3, at 466–468 (discussing the negative effect of stereotypes on elder clients); see also Adams & Morgan, *supra* n. 3, at 8–9 (noting that low self-esteem may result from society’s view of the elderly).

5. But see Charles P. Sabatino, *Elder Law: A Perspective on the Present and Future*, 20 Experience 26, 28 (2010) (suggesting that with the advent of the aging boomer generation, a shift may occur away from purely age-based eligibility for benefits to more need-based criteria).

- Lawyers represent clients, not problems;
- Zealous representation demands undivided loyalty;
- Professional judgment transcends personal bias; and
- Optimum solutions often balance competing interests.

The remainder of this Article will address in greater detail the pedagogy of teaching these tenets through Elder Law course objectives.

## II. ELDER LAW AND THE TENETS OF GOOD LAWYERING

### A. Lawyers Represent Clients, Not Problems

Lawyers cannot fully undertake their professional roles without first realizing that clients are individuals, and individuals are more than the sum of their problems. Seeing the client as a multifaceted individual, whose relationships and objectives exist within broader family and social systems, promotes lawyering that is holistic rather than merely task driven.<sup>6</sup> What makes Elder Law a particularly effective vehicle for teaching holistic lawyering is that most Elder Law issues are inherently interdisciplinary and require the lawyer to appreciate the client in the full context of the client's life circumstances.<sup>7</sup> Furthermore, to address these issues, the lawyer typically must employ both legal and nonlegal resources.<sup>8</sup>

Consider the example of the client who wishes to receive long-term care at home rather than in an institutional setting. To help the client meet this objective, a lawyer may need to not only qualify the client for Medicaid and a Home and Community Based Services Waiver but also find necessary family and community supports such as transportation, home modifications, respite for

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6. See e.g. Morgan, *supra* n. 1, at 106–107; Paul Premack, *Elder Law Practice: An Overview*, 45 S.D. L. Rev. 461 (2000); Monte L. Schatz, *The Elder Law Attorney: Is Knowledge of the Law Enough?*, 45 S.D. L. Rev. 554, 556 (2000).

7. See e.g. Myra Gerson Gilfix, *The Future of Elder Law is in Our Hands*, 12 NAELA Q. 38 (Winter 1999); Joseph A. Rosenberg, *Adapting Unitary Principles of Professional Responsibility to Unique Practice Contexts: A Reflective Model for Resolving Ethical Dilemmas in Elder Law*, 31 Loy. U. Chi. L.J. 403, 464–466 (2000); Sabatino, *supra* n. 5, at 28; Schatz, *supra* n. 6, at 555.

8. Schatz, *supra* n. 6, at 555.

family caregivers, and home-delivered meals. Likewise, a client who is receiving substandard nursing home care may have a legal cause of action under contract or tort, but the most effective way to stop the neglect and improve the quality of care may be through nonlegal avenues, such as reporting the problem to the long-term care ombudsman or the state agency in charge of the nursing home's certification. Although the Elder Law attorney may not have personal expertise in all of the nonlegal resource areas needed to address a client's issues, the attorney must nonetheless have an awareness of how to access that expertise.<sup>9</sup> The following discussion sets out the course objectives and pedagogy that I have used to stimulate holistic problem solving in my students.

### 1. Course Objectives

Elder Law course objectives that reinforce holistic client representation encourage students to: (1) recognize a client as a multifaceted individual; (2) understand that clients and their legal issues are inherently connected to larger family and social systems; and (3) appreciate that competent client representation often involves interdisciplinary problem solving. The overarching objective that transcends the foregoing is the "ah-ha" moment when synthesis is seen between all three considerations—the individual client, the system in which the client lives and functions, and the resources (legal and nonlegal) that will be needed to create a plan for the client.

### 2. Pedagogy

Though achieving the foregoing objectives is an ongoing process throughout the Elder Law course, a number of teaching techniques can serve as a catalyst to the process. I have found the following techniques particularly effective to stimulate student interest in holistic client representation.

*Recognizing clients as multifaceted individuals inherently connected to larger family and social systems.* Helping law students gain an appreciation of the multidimensional qualities of

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9. Morgan, *supra* n. 1, at 107 (discussing the necessity of using nonlegal resources in elder care planning).

any client, let alone the older client, may be the most challenging objective of an Elder Law course.<sup>10</sup> For nearly twenty years, I have started my Elder Law class by asking students to engage in free association with the descriptor “old.” I quickly traverse the rows of class members so as to prevent them from having too much time to think about their responses. The typical responses include the following: frail, disabled, incapacitated, ill, isolated, nursing home, death, dementia, and depressing. Occasional bright spots in the responses include associations like “wise” and “experienced,” but the majority of responses are negative.

In today’s mobile society, it is not unusual for students to grow up without the benefit of interacting with older relatives. To compensate for what might be lacking in personal experience, I show the movie *Dad*.<sup>11</sup> This 1989 film starring Jack Lemmon, Olympia Dukakis, Ted Danson, and Ethan Hawke, begins with Lemmon portraying Jake, an aging father and husband, whose life has become marginalized by deference to his benevolent but dictatorial wife Bette (Dukakis).<sup>12</sup> When Bette is hospitalized after a heart attack, Jake and Bette’s son John (Danson) arrives to take care of Jake.<sup>13</sup> John, a New York investment banker who has not been home in two years, is shocked to see the changes in his father.<sup>14</sup> Unwilling to accept his father’s dependent state, John tries to empower Jake to live a more autonomous life.<sup>15</sup>

Complicated family dynamics emerge—Bette’s resentment of the “new” life brought about by Jake’s reclaimed sense of autonomy, tension between John and his estranged son (Hawke), and John’s conflicted desires to both empower and protect his aging father.<sup>16</sup> Before any of these conflicts can be resolved, Jake has a catastrophic health event that pushes family dynamics to the crisis point.<sup>17</sup>

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10. For a fresh perspective on the role that compassion should play in good lawyering, see Kristin B. Gerdy, *Clients, Empathy, and Compassion: Introducing First-Year Students to the “Heart” of Lawyering*, 87 Neb. L. Rev. 1 (2008) (explaining, among other things, the common issues faced by first year students when learning how to successfully meet a client’s needs).

11. *Dad*, Motion Picture (Amblin Ent. 1989).

12. *Id.*

13. *Id.*

14. *Id.*

15. *Id.*

16. *Id.*

17. *Id.*

Lemmon transports the viewer from a place of unreflective age stereotypes to a raw appreciation of the core emotions that transcend chronological age. Students generally leave the darkened classroom with moist eyes, somewhat unsettled by their participation in this unexpected journey. I am likewise often surprised by the film's ability to still touch my own emotions, even after repeated viewings. Having shared this common experience as a class, we are then ready to put a face and a name on what had previously been abstract concepts. The post-movie discussion also lays a foundation for later class conversations about personal age bias, ageism, and the inherent tension between policies that strive to promote autonomy and those that promote protection.

*Appreciating the need for interdisciplinary problem solving.* The movie *Dad* also introduces the inescapably interdisciplinary nature of planning for the elder client. In the movie, initial medical interventions leave Jake in an unexplained dementia-like state.<sup>18</sup> The attending physician casually attributes this phenomenon to Jake's age.<sup>19</sup> The family's frustration over the dramatic change in Jake's condition is then further exacerbated by the hospital's announcement that it plans to discharge Jake in his delusional state.<sup>20</sup> Describing him as "custodial," the hospital administrator tells the family that there is nothing the hospital can medically do for him.<sup>21</sup> John takes his father home but finds that Jake's needs in his condition exceed what John can safely handle.<sup>22</sup> After John readmits Jake to the hospital, the administrator remarks to John that he did not think his father could be cared for at home.<sup>23</sup> John responds, "Well he can't be at home and he can't be here, right? Maybe he can just hover overhead in a helicopter."<sup>24</sup>

The foregoing scene offers the perfect springboard for later class discussions about the impact of Medicare prospective payment systems on hospital discharge decisions, the significance of the acute care versus long-term care distinction, and how these

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18. *Id.*

19. *Id.*

20. *Id.*

21. *Id.*

22. *Id.*

23. *Id.*

24. *Id.*

factors affect senior care options.<sup>25</sup> The intertwined medical and legal nature of the strategies for helping elderly patients navigate the eldercare continuum raises student awareness of the need for holistic client representation.

To build students' understanding of the aging services network, I require that student teams do "field" interviews and give both written and oral presentations to the class. Reports are to include a discussion of relevant hot topics and recent developments, as well as citation to pertinent law. The list of field interview assignments that I use includes the following:

- Social Security Administration (obtain information about Medicare benefits, eligibility, and the application process);<sup>26</sup>
- Social Security Administration (obtain information about the application process for Social Security retirement benefits, including what factors influence the decision about when to begin the receipt of benefits);<sup>27</sup>
- VNAA Hospice Home Care (obtain information about home-care services and hospice services, including patient eligibility and payment options);<sup>28</sup>
- Area Agency on Aging (obtain information about Medicaid waived services, senior transportation, home-delivered meals, and other resources for aging in place, including eligibility criteria and the status of wait lists for services);<sup>29</sup>

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25. See e.g. Linda S. Whitton, *Navigating the Hazards of the Eldercare Continuum*, 6 J. of Mental Health & Aging 145 (2000) [hereinafter Whitton, *Navigating*]; See also Marshall B. Kapp, *Enhancing Autonomy and Choice in Selecting and Directing Long-Term Care Services*, 4 Elder L.J. 55 (1996) (examining the demand for long-term care systems).

26. U.S. Soc. Sec. Admin., *Social Security Online*, <http://www.ssa.gov> (last updated August 13, 2010) (providing hyperlinks to find the locations of local Social Security offices); see also Medicare.gov, *Home Page*, <http://www.medicare.gov> (accessed Dec. 23, 2010) (displaying information about Medicare coverage and benefits including enrollment, choice of plans, costs, appeals, and hyperlinks to state-specific resources).

27. U.S. Soc. Sec. Admin., *supra* n. 26.

28. Visiting Nurse Assns. of America (VNAA), *Home Page*, <http://www.vnaa.org> (accessed Dec. 23, 2010) (providing hyperlinks to local VNAA office locations).

29. Natl. Assn. of Area Agencies on Aging, *Home Page*, <http://www.n4a.org> (accessed Dec. 23, 2010) (providing hyperlinks to find local area agencies on aging).



- Skilled Nursing Facility (obtain information about the criteria and process for admission, levels of care offered, costs, and the admissions contract, including the role of Medicare and Medicaid reimbursement);
- Skilled Nursing Facility (obtain information about regulations for quality assurance and the state facility survey process, including identification of the issues that are most challenging for the nursing home industry);
- Long-term Care Ombudsman (obtain information about what types of complaints are most common, the investigation process, and how complaints are resolved);<sup>30</sup>
- Dementia Care Residential Program (obtain information about eligibility for such programs, payment options, and the challenge of providing these specialized services);
- Adult Day Care Center (obtain information about day care services, eligibility, and payment options);
- Assisted Living Facility (obtain information about criteria for acceptance, levels of services offered, costs, and the admissions contract);
- Adult Protective Services (obtain information about the types of complaints and cases handled, the process of investigation, as well as the typical interventions and services utilized).<sup>31</sup>

In addition to experiencing the aging services network, students learn how to synthesize this information in order to communicate it to their classmates. I continue to be impressed by innovative PowerPoint presentations, handouts, and even role play used during these presentations. An *esprit de corps* typically develops, which enhances the students' sense of ownership in the

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30. Natl. Long-Term Care Ombudsman Resource Ctr., *Home Page*, <http://www.ltombudsman.org> (accessed Dec. 23, 2010) (displaying hyperlinks to find local long-term care ombudsman offices).

31. Natl. Adult Protective Services, *Home Page*, <http://www.apsnetwork.org> (accessed Dec. 23, 2010) (providing information and resources for Adult Protective Services agencies and their staffs).

class—sometimes to the point of good-natured rivalry over which team’s methodology is most effective.

## B. Zealous Representation Demands Undivided Loyalty

After students learn to see the client as an individual and to appreciate the value of holistic problem solving, I ask them to consider what it means to engage in zealous representation on behalf of a client.<sup>32</sup> In the abstract, the importance of undivided loyalty to a lawyer’s duty of zealous representation seems almost a tautology.<sup>33</sup> But the variables that can muddy the boundaries of undivided loyalty are well demonstrated by typical Elder Law scenarios.<sup>34</sup> These include the interests of non-client family members,<sup>35</sup> the diminished capacity of the client,<sup>36</sup> and even a lawyer’s well-intentioned willingness to act as the client’s substitute decisionmaker.<sup>37</sup> The following course objectives and pedagogy are designed to encourage reflection on the importance of undivided loyalty, as well as an awareness of common dynamics that can undermine it.

### 1. Course Objectives

Elder Law course objectives that reinforce the importance of undivided loyalty encourage students to do the following: (1) distinguish their client from other individuals who may communicate with the lawyer about the representation; (2) evaluate whether their client has the requisite capacity to make decisions

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32. See Model R. Prof. Conduct Preamble 2 (ABA 2009) (“As advocate, a lawyer zealously asserts the client’s position under the rules of the adversary system.”); *Id.* at R. 1.3 cmt. 1 (“A lawyer must also act with commitment and dedication to the interests of the client and with zeal in advocacy upon the client’s behalf.”).

33. See *id.* at R. 1.7 cmt. 1 (noting that “[l]oyalty and independent judgment are essential elements in the lawyer’s relationship to a client”).

34. Adams & Morgan, *supra* n. 3, at 14; Premack, *supra* n. 6, at 462.

35. For a discussion of the interests of non-client family members, consult *infra* nn. 41–53 and accompanying text.

36. For a discussion of diminished capacity of the client, consult *infra* nn. 41–53 and accompanying text.

37. See generally Linda S. Whitton, *Durable Powers as a Hedge against Guardianship: Should the Attorney-at-Law Accept Appointment as Attorney-in-Fact?* 2 Elder L.J. 39 (1994) [hereinafter Whitton, *Durable Powers*] (examining the consequences of an attorney serving simultaneously as the client’s lawyer and as the client’s agent under a durable power of attorney).

necessary to the representation; and (3) recognize conflicts that could jeopardize the lawyer's undivided loyalty in the representation. Ultimately, students are encouraged to realize that a lawyer who fails to consider any one of the foregoing objectives may have difficulty zealously representing the client.

## 2. Pedagogy

*Distinguishing the client from other individuals who may communicate with the lawyer about the representation.* When teaching students about zealous representation and undivided loyalty, law professors often ask students to consider first the question, "Who is the client?"<sup>38</sup> I set the stage for this discussion by using examples such as the elderly client who needs a family member's help to get to the lawyer's office, or one who has hearing loss and needs family member assistance to communicate with the lawyer. Examples like these help the students appreciate the challenges of independently verifying a client's wishes<sup>39</sup> and the importance of achieving and maintaining lawyer-client confidentiality and privilege.<sup>40</sup> Scenarios that involve jointly owned family property or business interests can likewise provide the context for discussions about whether it is possible to ethically and competently represent "the family,"<sup>41</sup> and if not, how one can maintain zealous representation of the elderly client within the client's broader family and social system.

While identifying the client is the reference point for defining undivided loyalty, it is only that. Students must go beyond this initial question to anticipate how the consequences of their legal representation might create future threats to client loyalty. To engage students in this inquiry, I ask them to imagine that they are the attorney in the following scenario:

When you buy your daily latte at the local coffee shop, you often have casual conversation with Carla, the barista. Over the course of several months you learn that Carla, a widow, has a severely disabled ten year-old son. She lives in a small

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38. See e.g. Adams & Morgan, *supra* n. 3, at 14–15.

39. *Id.*

40. Model R. Prof. Conduct 1.6.

41. For a critique of the ethical conundrum posed by the family as client, see Rosenberg, *supra* n. 7, at 477–479.

apartment and works three jobs to make ends meet. You always tip her generously, both because the service is excellent and because you are sympathetic to her circumstances. One morning, Carla, with tears in her eyes, asks if you will visit her father in the hospital. She tells you that he has an inoperable heart condition and is not expected to leave the hospital. She further explains that he wants a durable power of attorney and a will. You respond that you would be happy to visit him, but you emphasize that if you do her father's legal work, your duties as his lawyer will preclude you from discussing his matters with her or anyone else without his permission. Carla indicates that she understands this and expresses her gratitude for your willingness to visit her father in the hospital.

You visit Carla's father, Mr. Matthews, alone and verify that he does indeed want a power of attorney and a will. He wants to leave his property—a small house and modest bank account—in equal shares to Carla and her brother. He would also like to designate them his co-agents under a power of attorney. After you prepare these documents and discuss them privately with Mr. Matthews, he asks to have his children present for the execution formalities. Your impression at the time he signs his will and power of attorney is that this is a loving family and that the interests of Mr. Matthews are harmoniously aligned with those of his adult children.

Then the unexpected happens. Mr. Matthews' condition improves enough that he can leave the hospital. After a month of post-hospital skilled nursing care and rehab, Mr. Matthews is ready to leave the nursing home; however, you learn from Carla that she and her son have moved into his house and that she intends for her father to live in her recently vacated apartment. She explains, as she makes your latte, that she does not want her father climbing stairs and doing home maintenance. You take the comment at face value until the day Carla asks for advice on how to take her father's drivers license away.

When you communicate this information to Mr. Matthews, you learn that he has moved to another town and wants to revoke his power of attorney and revise his will. He explains, "My children loved me until I had the audacity to recover."

Despite the lawyer's careful separation of his or her communication with Carla from the attorney-client communication with her father, he or she is still caught in an uncomfortable ethical dilemma. No longer are the client's interests clearly aligned with those of his family. Questions that I typically discuss with students include the following: How should you respond to Carla's request for advice about taking away her father's drivers license? Do you have a duty to inform Mr. Matthews about his daughter's inquiry? In other words, is this a continuing representation? What if Mr. Matthews later loses capacity and Carla is appointed his guardian?

These difficult ethical questions, which are not uncommon in Elder Law representation, could just as easily arise in other practice contexts, such as one in which the lawyer represents a closely held business and the individual owners' interests diverge. The discomfort that students feel in attempting to sort out these dilemmas solidifies what would otherwise be abstract notions about zealous representation and undivided loyalty.

*Determining whether the client has the requisite capacity to make decisions necessary to the representation.* To represent a client zealously, the lawyer must first understand what the client wants or needs. This is usually determined by interviewing the client and then counseling the client about viable options. A lawyer cannot represent a client zealously if the client lacks the capacity to appreciate his or her circumstances and to give informed consent to the representation strategy.<sup>42</sup> Discussing Model Rule 1.14—Client with Diminished Capacity<sup>43</sup>—is one of the means by which Elder Law students can gain a better understanding of the role of client-centered decisionmaking.

Model Rule 1.14 recognizes that instances may arise in which a client who once had capacity loses some degree of that capacity,<sup>44</sup> as well as instances in which a client initially presents with diminished capacity.<sup>45</sup> Model Rule 1.14 stresses the importance of

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42. Model R. Prof. Conduct 1.14 cmt. 1 (noting that "[t]he normal client-lawyer relationship is based on the assumption that the client, when properly advised and assisted, is capable of making decisions about important matters"); *see also id.* at R. 1.4 (requiring that the lawyer properly inform the client of anything that might require the client's informed consent).

43. *Id.* at R. 1.14.

44. *Id.* at R. 1.14(a).

45. *See id.* at R. 1.14 cmt. 9 (explaining that a lawyer may take legal action for a per-

maintaining a normal lawyer-client relationship even with a client whose capacity may be diminished.<sup>46</sup> The rule permits the lawyer to take reasonably necessary protective action when a client with diminished capacity is at risk of substantial harm<sup>47</sup> and acknowledges that such action may include revealing information about the client to the extent necessary to protect the client.<sup>48</sup> The comments to the rule suggest that even emergency legal assistance is permitted on behalf of someone who lacks the capacity to establish an attorney-client relationship if that person is threatened with imminent and irreparable harm.<sup>49</sup>

A number of Elder Law scenarios can help students distinguish between full capacity on one end of the spectrum and the need for protective action and appointment of a legal representative on the other. For example, a client with Alzheimer's disease may have lucid intervals during which the capacity exists to understand the nature of the decisions at hand, as well as the consequences that will likely flow from those decisions.<sup>50</sup> In such a situation, it may still be possible for the client to execute a power of attorney and avoid later imposition of a guardianship. In contrast, when a client has lost the ability to understand the nature of the decisions that must be made and the consequences that will likely follow, the appointment of a guardian may be unavoidable. Consider the difference between a client who understands that refusal of life prolonging treatment will hasten death—a rational decision—and the client with gangrenous limbs who refuses an amputation surgery but nonetheless wishes to live—an irrational decision.<sup>51</sup>

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son who suffers from seriously diminished capacity from the outset of the representation).

46. *Id.* at R. 1.14(a).

47. *Id.* at R. 1.14(b).

48. *Id.* at R. 1.14(c).

49. *Id.* at R. 1.14 cmt. 9.

50. See Jonathan Herring, *Entering the Fog: On the Borderlines of Mental Capacity*, 83 *Ind. L.J.* 1619, 1620 (2008) (explaining that it is possible to suffer from Alzheimer's Disease and retain capacity).

51. *Id.* at 1624. Herring distills the common principles of competence from among the various definitions:

- (1) A presumption exists in favor of a person having capacity;
- (2) Competence means one possesses an ability to understand one's current medical condition, the possible treatments, the risks associated with those treatments, and their consequences;
- (3) One must possess the ability to use relevant information in a rational way to reach a decision;

A discussion of Model Rule 1.14 also provides an opportunity for students to consider how their duties of zealous representation and undivided loyalty may be impacted when the client has lost capacity and the lawyer must deal with the client's legal representative—an agent under a power of attorney or a court-appointed guardian.<sup>52</sup> The comments to the rule teach students about the importance of maintaining communication with even an incapacitated client, when that is possible.<sup>53</sup> They also alert students to the duty to intervene if the client's agent or guardian is acting adversely to the client's interests.<sup>54</sup>

*Recognizing conflicts that could jeopardize the lawyer's undivided loyalty in the representation.* In addition to assessing the client's capacity for entering into an attorney-client relationship, Elder Law students have the opportunity to consider how conflicts on the lawyer's side of the relationship could jeopardize undivided loyalty and thus undermine zealous representation. These conflicts may arise because of duties the lawyer already owes to other clients,<sup>55</sup> because of other personal interests that could impair the lawyer's impartiality,<sup>56</sup> or because the contemplated representation would require the lawyer to perform dual roles such as lawyer and attorney-in-fact, or lawyer and de facto guardian.<sup>57</sup>

For example, performing legal work for the parent of an adult child who is already the lawyer's client or who is a close friend of the lawyer may strain the lawyer's ability to maintain undivided loyalty to the parent client. Even when no actual representation conflict exists, the pressure to do what others think is best for the aging parent may put the lawyer in an unresolvable quandary. A wise Elder Law attorney will contemplate such dilemmas and refer a potential client elsewhere when the likelihood is too great

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(4) One must be able to communicate one's decision.

*Id.* (citations omitted).

52. Model R. Prof. Conduct 1.14 cmt. 4.

53. *Id.* at R. 1.14 cmt. 2.

54. *Id.* at R. 1.14 cmt. 4.

55. *Id.* at R. 1.7(a).

56. *Id.* at R. 1.7 cmt. 10.

57. See Whitton, *Durable Powers*, *supra* n. 37, at 65–67 (arguing that lawyers should refrain from such dual roles because they necessarily compromise essential components of the attorney-client relationship such as undivided loyalty, client-centered decisionmaking, independent professional judgment, and accountability).

that undivided loyalty and zealous representation will be undermined.

Although ethical rules do not directly prohibit a lawyer from accepting an appointment as an agent under a client's durable power of attorney or, for that matter, accepting a court appointment as a client's guardian, considering the implications of such a dual role crystallizes for students the essential components of zealous representation. For example, at the point when a client loses capacity and the lawyer steps into the role of a substitute decisionmaker, the lawyer in effect loses a client.<sup>58</sup> The client's role as the decisionmaker—played to the lawyer's role as advisor—disappears.

I encourage my students to consider whether a lawyer who intends to serve as the client's agent under a power of attorney can impartially counsel the client about matters such as agent compensation,<sup>59</sup> standards of liability for the agent's conduct,<sup>60</sup> and mechanisms to monitor the agent.<sup>61</sup> The lawyer, whose theoretical role would ordinarily include monitoring the actions of the now incapacitated client's legal representative,<sup>62</sup> would in effect be accountable to only him or herself. Thus, the exercise demonstrates how even a well-intentioned lawyer serving in dual roles could jeopardize the zealousness of the representation.<sup>63</sup>

### C. Professional Judgment Transcends Personal Bias

In addition to external factors that can compromise a lawyer's ability to zealously represent a client, perhaps more serious are the internal ones—subjective biases about which the lawyer may have no conscious awareness. Such biases may be issue-oriented, such as strong personal attitudes about nursing home care versus home care, or the need to protect a client versus the goal of promoting that client's autonomy. Others may be more general, such as ageism—unreflective judgments about what is appropriate for

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58. *Id.* at 65.

59. *Id.* at 63.

60. *Id.* at 64.

61. *Id.*

62. Model R. Prof. Conduct 1.14 cmt. 4.

63. See Anita Bernstein & Ruth Colker, *The Disability Dilemma: A Skeptical Bench & Bar*, 69 U. Pitt. L. Rev. 637, 650 (2008) (stating that no profession can be totally unbiased on issues that affect its own income or status).



a client based on chronological age rather than the individual's actual abilities and desires.<sup>64</sup>

### 1. Course Objectives

Elder Law course objectives that reinforce the importance of developing bias-free professional judgment encourage students to do the following: (1) evaluate their personal attitudes and assumptions about old age and older clients; (2) listen carefully to their clients to ascertain the older client's true goals and objectives; and (3) consider whether their advice for an older client would be the same if the client were younger—in other words, whether their advice is unwittingly ageist.<sup>65</sup> The underlying premise of these objectives is that students cannot truly develop bias-free professional judgment unless they first evaluate their own attitudes about old age, elderly clients, and the typical strategies for assisting older clients.

### 2. Pedagogy

*Encouraging students to develop bias-free professional judgment.* In one of my early years of teaching Elder Law, I designed a comprehensive student project around the following fact pattern:

Betty Anderson is a seventy-year-old widow whose husband died two years ago leaving her financially well set with a three-hundred-thousand-dollar house and over one million dollars in investments. Several months ago Mrs. Anderson's children admitted her to Sunnyvale Retirement Center, and now she wants to return home. You have been contacted by Mrs. Anderson for legal advice.

You discover upon meeting Betty Anderson that she is a well-dressed, articulate woman. After initial pleasantries, she describes to you in narrative fashion her life of the past two years. Mrs. Anderson states that following her husband's death she was quite depressed, became prescription drug dependent, and often had a few too many cocktails in the afternoon. Her children, claiming they were having her

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64. Whitton, *Re-examining*, *supra* n. 4, at 10–11.

65. *Id.* at 12 (recommending these guidelines for practitioners as a way to re-examine common professional practices and avoid unintended ageism).

house repainted, took her to Sunnyvale to live “temporarily.” Now, she observes, they rarely visit, and when questioned about the status of her house, they respond with ever-changing excuses for why she cannot return home.

At the conclusion of your interview with Mrs. Anderson, you speak with Mr. Cory, the Social Services Director of Sunnyvale. Mr. Cory explains that Mrs. Anderson was admitted to Sunnyvale four months ago under authority granted to her son in a durable power of attorney. Attached to the power of attorney was a physician’s letter certifying that, in the physician’s opinion, Mrs. Anderson was incapacitated and unable to act in her own best interests. Mr. Cory also informs you that Mrs. Anderson’s son has filed a petition for guardianship over Mrs. Anderson. When asked whether he believes Mrs. Anderson would be capable of living independently in her own home, Mr. Cory replies that she has made remarkable progress at Sunnyvale. He attributes her state of well-being to proper diet and the cessation of her former substance abuse. He expresses concern that if Mrs. Anderson returns home she may get lonely and depressed again and fall back into her old pattern of living. Mr. Cory admits, though, that currently there is no apparent reason why Mrs. Anderson could not live on her own. Upon further investigation, you discover that Mrs. Anderson’s son has already sold her home and all of her furnishings, and that the guardianship hearing is only two weeks away.<sup>66</sup>

Students were asked to identify the issues raised by Mrs. Anderson’s circumstances and to develop a strategy for her legal representation. They were instructed to consider both the legal and nonlegal consequences of implementing a plan to achieve her wishes. In addition to opposing the pending guardianship action, Mrs. Anderson’s lawyer would also have the difficult task of informing her that her house had been sold and then identifying viable options for her future living arrangements.<sup>67</sup>

As expected, students discussed the validity and scope of the power of attorney as well as defense strategies for the guardianship proceeding. Unexpected were the students’ recommendations concerning Mrs. Anderson’s future living arrangements. As I

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66. Whitton, *Ageism*, *supra* n. 3, at 453–454.

67. *Id.* at 454.

reported in a *DePaul Law Review* article where this exercise was discussed:

A majority of the students did not even consider the purchase of another house to be a viable option for Mrs. Anderson. The most common suggestions focused on finding a “nice apartment” in a retirement community where Mrs. Anderson would be less likely to become “lonely and depressed” again. Some even suggested that it might be best not to object to the guardianship proceeding, but to negotiate instead for limited guardianship so that a supervisory mechanism would be in place should Mrs. Anderson “fall off the wagon.”<sup>68</sup>

Thus, despite general lecture coverage of ageism during the semester, students seemed quite comfortable dismissing Mrs. Anderson’s desire to return home and instead encouraging options that they felt were more protective and “appropriate.”

After listening to these recommendations, I asked my students to consider how their advice would change with one alteration in the initial fact pattern. What if Mrs. Anderson were thirty-five instead of seventy? Once students overcame the fear that they had “blown it” in their prepared analysis, a productive discussion ensued about the differences. Comments included the observation that Mrs. Anderson’s family probably would have encouraged her to enroll in a rehab program or to seek counseling, and that giving up her home because of grief-related depression would seem unthinkable.<sup>69</sup>

Ever since that semester, I have routinely used in-class scenarios to tease out entrenched stereotypes and biases. This has included having students consider ageist language in statutes and case opinions.<sup>70</sup> Raising student awareness of their own biases, as well as the biases they may encounter in others, is a starting place for developing the kind of professional judgment that will safeguard client interests against unreflective stereotypes.

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68. *Id.* at 454–455.

69. *Id.* at 455.

70. *Id.* at 477–480 (describing examples of ageism in statutes and case opinions).

#### D. Optimum Solutions Often Balance Competing Interests

In addition to an appreciation for client representation that is holistic, zealous, and untainted by personal bias, a good lawyer recognizes that most laws, as well as most legal strategies, accommodate or balance competing interests. The role of competing interests should not be confused with conflicting interests. Unlike conflicting interests, which jeopardize a lawyer's loyalty and zealous representation of a client,<sup>71</sup> competing interests form the context in which the representation takes place. The lawyer remains undivided in his or her loyalty to the client and the client's objectives, but realizes that the ability to achieve those objectives depends on the impact of other interests present in the circumstances.

Examples of the need to balance competing interests are myriad in the field of Elder Law. Perhaps the most prominent is the inverse relationship between autonomy and protection, a recurrent theme throughout Elder Law literature.<sup>72</sup> A policy or practice that promotes autonomy always does so at the expense of some degree of protection,<sup>73</sup> such as using a power of attorney rather than a guardianship to meet the need for a substitute decisionmaker. Creating a power of attorney before incapacitation affords the client more autonomy and privacy than institution of a guardianship after capacity is lost.<sup>74</sup> Yet this autonomy comes at

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71. See *supra* nn. 42–62 and accompanying text (explaining the hazards of conflicts of interest in the lawyer-client relationship); see also *Developments in the Law—Conflicts of Interest in the Legal Profession*, 94 Harv. L. Rev. 1244, 1292 (1981) (stating that a classic conflicting interest problem arises from simultaneous representation of different clients).

72. E.g. Leslie Salzman, *Rethinking Guardianship (Again): Substituted Decision Making as a Violation of the Integration Mandate of Title II of the Americans with Disabilities Act*, 81 U. Colo. L. Rev. 157, 178 (2010) (noting that autonomy and protection are interests that must be balanced against one another).

73. One of my favorite classroom exercises to demonstrate this principle comes from the Frolik & Barnes casebook, *Elder Law: Cases & Materials*. It asks students to consider how they would solve the problem of malnutrition among elderly members of their community. As we discuss the various options—cash assistance, food stamps, meals at community centers, home-delivered meals, and even nutrition delivered through artificial means such as nasogastric tubes—the students begin to see that the more protective the measure (e.g., home-delivered meals or tube feedings), the less autonomy or choice is left to the elder. The exercise is also an excellent way to examine the competing interests of the “state” in addressing the welfare of its citizenry and the interests of the elderly in having choice about when, where, and how they meet their needs. Lawrence A. Frolik & Alison McChrystal Barnes, *Elder Law: Cases & Materials* 22, 23 (4th ed., Matthew Bender 2007).

74. Linda S. Whitton, *The Uniform Power of Attorney Act: Striking a Balance between*

the expense of relinquishing the protection of a court-supervised, substitute decisionmaker.<sup>75</sup> The following discussion offers additional observations about course objectives and pedagogy that can help sensitize students to the role of competing interests when representing a client.

### 1. Course Objectives

Elder Law course objectives that reinforce the importance of balancing competing interests encourage students to do the following: (1) appreciate the diversity of interests that influence a policy or law; (2) understand that achieving a client's goals often requires accommodating competing interests; and (3) realize that accommodation of competing interests is the foundation of effective law reform.

### 2. Pedagogy

*Appreciating the diversity of interests that influence a policy or law.* The Elder Law policies and laws that accommodate diverse interests are too numerous for a complete inventory in this Article, but the following list provides a sampling:

- Healthcare advance directive statutes (balance the individual's interest in autonomous control over medical interventions, the state's interest in protecting incapacitated citizens, and the healthcare provider's interest in obtaining informed consent for treatment);
- Power of attorney statutes (balance the principal's interest in low-cost, flexible, and private substitute decisionmaking, the state's interest in protecting incapacitated persons, the agent's interest in clear guidelines for the agency, and third persons' interests in protection against liability for their dealings with agents);

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*Autonomy and Protection*, 1 Phoenix L. Rev. 343, 354 (2008) [hereinafter Whitton, *Striking a Balance*].

75. Of course, the true protective value of court-supervised guardianship may be questionable. See Erica F. Wood, *Guardianship Reform at the Crossroads*, 15 Experience 12 (Winter 2005) (finding that courts continue to exercise minimal oversight of guardians, in part, because most courts lack sufficient funding for oversight).

- Guardianship statutes (balance the incapacitated person's interest in the least restrictive alternative for substitute decisionmaking, the state's interest in protecting incapacitated persons, and the interests of the guardian and third persons in clarity with respect to the scope of the guardian's authority); and
- Skilled nursing facility regulations (balance the residents' interests in reasonably priced quality care, the facility's interest in clear guidelines for compliance, and the state's interest in protecting vulnerable citizens).

Student appreciation of the balance of interests represented by a law or policy is the first step toward awareness that most solutions to client problems require accommodation of competing interests at some level.

*Accommodating competing interests to achieve the client's goals.* It is rare in the law or any other area of life that a person gets everything he or she wants. To achieve a client's goals, law students must come to understand the competing interests that exist within the client's broader family and social systems. For example, I ask my students to consider the scenario of a client who wants to receive long-term care services at home rather than move to a nursing home. Although the client's medical needs can be met by weekly visits from the Visiting Nurse Association, the client has mild dementia and the client's doctor has recommended that she not be left alone for long periods. The client's daughter is willing to move into her mother's home and provide evening and weekend supervision, but she must work during the day.

Students soon realize that an optimum solution for the client is possible only by accommodating the daughter's schedule. As students grapple with this problem, they are forced to balance the competing interests to arrive at a recommendation. One option might be for the client to enroll in an adult day care program. Such an arrangement would accommodate the daughter's work schedule while still permitting the client to live at home, rather than in a nursing home. Although such an option allows the client to live at home, it comes at the concession of daytime supervised care away from home.

Consider another example. An elderly gentleman wants to remain in his own home but can no longer get to the grocery store,

prepare nutritious meals, or clean his house. After a concerned postal worker reports the situation to adult protective services, a lawyer is appointed to represent the elderly gentleman. To avoid imposition of guardianship, the lawyer recommends to the gentleman that he accept home-delivered meals and weekly light housekeeping services. Thus, the client's primary goal is met. He can remain in his own home, and the state's interest—protection of a vulnerable adult—is likewise satisfied.

*Accommodating competing interests is the foundation of effective law reform.* In addition to helping students become zealous advocates engaged in holistic client representation, Elder Law can show them how to use law reform for the purpose of meeting the emerging needs of their elder client base. Such reform is generally successful only when all stakeholders are identified and their various interests addressed. In class, I use the drafting and enactment process for the Uniform Power of Attorney Act (UPOAA)<sup>76</sup> as an exemplar for how competing interests must be accommodated to achieve successful law reform.

During the drafting process for the UPOAA, input was sought from the American College of Trust and Estate Counsel; the American Bar Association (ABA) Section of Real Property, Trust and Estate Law; the ABA Commission on Law and Aging; the Joint Editorial Board for Uniform Trust and Estate Acts; the National Conference of Lawyers and Corporate Fiduciaries; the American Bankers Association; AARP; state bar associations; and other elder advocacy organizations.<sup>77</sup> Three competing interests emerged in the course of this process—those who sought maximum drafting flexibility for wealthy, sophisticated clients; those who sought maximum protection for incapacitated principals; and those who wanted maximum protection for the entities who deal with agents acting under powers of attorney. Thus, the UPOAA had to be crafted to accommodate all of the foregoing competing interests.<sup>78</sup>

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76. Natl. Conf. of Commissioners. on Unif. St. Laws, *Uniform Power of Attorney Act* 1–2, [http://www.law.upenn.edu/bll/archives/ulc/dpoaa/2008\\_final.pdf](http://www.law.upenn.edu/bll/archives/ulc/dpoaa/2008_final.pdf) (accessed Dec. 23, 2010).

77. *Id.*

78. Linda S. Whitton, *The New Uniform Power of Attorney Act: Balancing Protection of the Principal, the Agent, and Third Persons*, 9-1 Proc. of the 41st Annual Heckerling Inst. on Est. Plan. 9-2 to 9-11 (Matthew Bender 2007).

Practically speaking, a proposed law that does not balance the competing interests at stake has little, if any, possibility of enactment. The UPOAA, as approved by the Uniform Law Commission, balances an inherent tension between keeping powers of attorney a low-cost,<sup>79</sup> flexible alternative to guardianship<sup>80</sup> and protecting incapacitated persons from financial abuse.<sup>81</sup> I ask students to consider what the results might have been if the balancing points had been struck differently. For example, if draconian measures had tipped the balance too far in favor of protecting the principal, those protections might have come at the expense of needed planning flexibility. Likewise, an inordinate increase in potential agent liability might have deterred needed agents from agreeing to serve under a power of attorney. Finally, increasing third party liability for accepting powers of attorney would simply have resulted in lobbied defeat of the Act. Helping students realistically view the process of law reform and the need to accommodate competing interests moves them from textbook theory to an understanding of what is required in the real world to get the job done.

### III. CONCLUSION

As a client-centered field of law, Elder Law offers rich opportunities to teach through example the basic tenets of good lawyering—that lawyers represent clients, not problems; that zealous representation demands undivided loyalty; that professional judgment must transcend personal bias; and that optimum solutions often balance competing interests. Both the “devil” and the “ah-ha” revelations of these tenets are in the details. By examining these details through specific course objectives and carefully crafted pedagogy, we who teach Elder Law can transform our students from mere passive observers into participating colleagues on the Elder Law journey.

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79. See Whitton, *Striking a Balance*, *supra* n. 74, at 364 (explaining that the “Act’s primary objective is preservation of the power of attorney as a low-cost, flexible tool for surrogate decision[making]”).

80. *Id.* at 345.

81. *Id.* at 355–360.