

WHAT MOM WOULD HAVE WANTED: LESSONS LEARNED FROM AN ELDER LAW CLINIC ABOUT ACHIEVING CLIENTS' ESTATE- PLANNING GOALS

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In a practical "hands-on" approach, Professor Mitchell-Cichon identifies the difficult issues that arise when counseling elderly clients on estate planning and outlines specific strategies to address these problems. Her conclusions are based on years of experience, academic study, and client counseling at Cooley Law School's Sixty Plus Elderlaw Clinic, which the author describes as fertile ground for learning what clients really want and exploring creative solutions. The article outlines six no-nonsense "lessons" for practitioners to follow. The lessons are illustrated by useful examples from the elder law clinic and relate to client goals and decision making, the importance of the retainer agreement, and implementation of an estate plan. The author details techniques for interviewing the elderly client in a "client-centered" approach and discusses the role of the family in the representation. In addition, Professor Mitchell-Cichon notes some potential pitfalls for the practitioner, particularly, special problems related to the representation of elderly clients and possible ethical dilemmas. The article concludes that a client-centered and collaborative approach is more likely to result in a legal solution that best serves the client's goals and needs.

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I. Introduction

This is my first confrontation with actual clients, and I'm terrified. Though the prospects sitting out there are aged and infirm, they are staring at me as if I possess great wisdom. I am, after all, almost a lawyer, and I wear a dark suit, and I have this legal pad in front of me on which I'm drawing squares and circles, and my face is fixed in an intelligent frown, so I must be capable of helping them.¹

This excerpt from John Grisham's novel, *The Rainmaker*, depicts Rudy Baylor, who enrolls in "Legal Problems of the Elderly" just before meeting his very first client. As Rudy Baylor discovered, it can be a special and rewarding endeavor to represent an elderly client.

While I was an experienced lawyer and teacher when I began teaching in Cooley's elder law clinic, I was new to the practice of elder law.² Over the past seven years, I have had the opportunity to discover the challenges and rewards of representing the elderly. I have learned how difficult it sometimes is to identify the elderly client's goals and, in turn, successfully implement them. As one of my colleagues often says, it doesn't do the client any good to prepare a document if the document doesn't do what the client actually wants. Communication is the key in any practice setting, but particularly in elder law. How can we become better communicators with our elderly clients?³ How can we better identify our clients' goals? One way

1. JOHN GRISHAM, *THE RAINMAKER* 4 (1995).

2. As defined by the National Academy of Elder Law Attorneys the elder law attorney is a substantive expert who tracks legislation and informs clients of choices available to them, who assists clients in "sorting through their feelings and in dealing with family dynamics," and who is a counselor for the most intimate areas of life and death.

Mary Helen McNeal, *Redefining Attorney-Client Roles: Unbundling and Moderate-Income Elderly Clients*, 32 WAKE FOREST L. REV. 295, 300 (quoting the 1995 NAELA report); see also Lawrence A. Frolik, *The Developing Field of Elder Law: A Historical Perspective*, 1 ELDER L.J. 1, 4 (1993) ("Elder law, then, is a legal practice that combines something old (e.g., estate planning) with something new (e.g., Medicaid planning).").

3. See Robert Rubinson, *Constructions of Client Competence and Theories of Practice*, 31 ARIZ. ST. L.J. 121 (1999) (warning against stereotyping elderly clients and discussing the implications for both lawyer and client); see also Marjorie A. Silver, *Love, Hate, and Other Emotional Interference in the Lawyer/Client Relationship*, 6 CLINICAL L. REV. 259 (1999). For a thought-provoking discussion of intergenerational communication, see Steven Keith Berenson, *Can We Talk?: Impediments to Intergenerational Communication and Practice in Law School Elder Law Clinics*, 6 ELDER L.J. 185 (1998). I do not share Professor Berenson's pessimistic view of law school clinic students, nor do I agree with his characterization of the likely interactions between clinic students and their clients. For a more realistic picture of student

is to put yourself in the shoes of Rudy Baylor. “Enroll” in a law school clinic.

Estate planning is not unique to elder law, yet the elderly bring unique issues to estate planning. When someone over sixty seeks estate-planning services—either for the first time or to change an existing plan—she is likely to bring circumstances directly related to her age. Some of the common issues are the client’s physical and mental health, the involvement of family members or care providers, and questions of autonomy and personal dignity.⁴ These issues impact directly and strongly on the client’s goals and legal needs.

In this article, I begin with a brief overview of the clinic in which I teach, the Sixty Plus Elderlaw Clinic. I will share lessons learned from the clinic’s estate-planning clients, suggesting ways to ensure that “Mom’s goals” are met during her lifetime and beyond. Some lessons are unique to an elder law practice; others are not. My goal is to help lawyers accurately identify their client’s estate-planning goals and, in turn, design an estate plan that the client wants and understands. I also encourage practitioners to take a more active role in ensuring that the client’s estate plan is implemented successfully.

An elder law clinic is fertile ground for learning what clients *really* want and for exploring creative ways to accomplish client goals because each stage of the lawyering process is reviewed, dissected, and analyzed through classroom instruction and one-on-one teaching sessions, called supervisory sessions. As I have met with clinic interns each week to discuss their clients and cases, lessons have emerged related to our elderly clients and their goals. First, I will introduce you

and client interactions, compare Suzanne J. Levitt, *The Case of the Benevolent Fiduciary: A Primer for the Unwary*, 2 CLINICAL L. REV. 523 (1996), a wonderful essay on the hard work and insights of one clinical supervisor and her students, and Joan L. O’Sullivan et al., *Ethical Decisionmaking and Ethics Instruction in Clinical Law Practice*, 3 CLINICAL L. REV. 109 (1996), which is equally rich with examples of student initiative and insight.

4. See generally Peter Margulies, *Access, Connection and Voice: A Contextual Approach to Representing Senior Citizens of Questionable Capacity*, 62 FORDHAM L. REV. 1073 (1994); McNeal, *supra* note 2, at 299; Jan Ellen Rein, *Client with Destructive and Socially Harmful Choices—What’s an Attorney to Do: Within the Bounds and Beyond the Competency Construct*, 62 FORDHAM L. REV. 1101 (1994); John 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 (2000); Linda F. Smith, *Representing the Elderly Client and Addressing the Question of Competence*, 14 J. CONTEMP. L. 61 (1988); Symposium, *Joint Conference on Legal/Ethical Issues in the Progression of Dementia, Recommendations of the Joint Conference*, 35 GA. L. REV. 423 (2001) [hereinafter *Recommendations*].

to the place where these lessons were learned. Then, I will share the lessons.

II. The Sixty Plus Elderlaw Clinic

A. Clinic History

In 1979, Fred Baker,⁵ a Cooley faculty member at the time, established the clinic as a volunteer program for Cooley students. Mr. Baker and five other attorneys from the legal community supervised the first thirteen students, who became known as the “Baker’s Dozen.” Much like today, the clinic handled a variety of legal matters such as wills, guardianship proceedings, and consumer matters.⁶ The clinic was housed in what used to be the janitor’s closet of a local hospital: “It had a little room with a faucet and a drain where the janitor had filled and emptied his mop buckets, which we used as a file cabinet. It was unprepossessing, but sufficient.”⁷

The clinic was then incorporated as a 501(c)(3) organization and served the legal needs of the local community’s elderly population.⁸ That same year, the Young Lawyers Division of the American Bar Association awarded the clinic the Single Project Award for the best state bar project. In 1981, the clinic became an integral component of the law school,⁹ and students began to receive six hours of course credit over two terms of instruction.¹⁰ The clinic space expanded to an entire wing of the hospital.¹¹ The clinic is now housed at the law school.

5. I would like to thank Attorney Fred Baker for the historical information he provided about the clinic.

6. E-mail from Fred Baker, Sixty Plus Elderlaw Clinic Founder, to Marla Lyn Mitchell-Cichon, Professor and Clinical Supervisor, Sixty Plus, Inc., Elderlaw Clinic, Thomas M. Cooley Law School (Jan. 16, 2002) (on file with author).

7. *Id.*

8. Gary Bauer, *Sixty Plus Elderlaw Clinic: An Elder Law Teaching Model*, 82 MICH. B.J. 52, 52 (2002).

9. *Id.*

10. Sixty Plus, Inc. Elderlaw Clinic, at <http://www.cooleylaw.edu/clinics> (last visited Sept. 24, 2002).

11. E-mail from Fred Baker, Sixty Plus Elderlaw Clinic Founder, to Marla Lyn Mitchell-Cichon (Oct. 15, 2002) (on file with author); E-mail from Katherine Borden, Office Manager, Sixty Plus Elderlaw Clinic, to Marla Lyn Mitchell-Cichon (Oct. 15, 2002) (on file with author).

B. Clients and Cases

Most of the clinic's clients are middle- to low- income, and the bulk of the clinic's work is in the area of estate planning. Given the income levels of most of the clients, the clinic's estate-planning services typically include wills, durable powers of attorney, and medical directives. Although clients may be counseled about inter vivos trusts, more often than not a living trust is not a good estate-planning device for most of our clients.¹² However, planning for Medicaid eligibility is an integral part of our estate-planning services.¹³

A typical estate-planning case has several stages: fact gathering, case planning, counseling, drafting documents, finalizing documents, and what I call "implementation." Implementation can be as simple as ensuring that the appropriate persons have copies of the relevant documents or that the will is filed with the probate court. Implementation might also be something more complex, such as making sure that assets are transferred to meet Medicaid eligibility requirements.

C. Role of the Clinic Intern

The clinic students are licensed to practice law under Michigan's Student Practice Rule.¹⁴ They work in teams of two; each new intern is paired with a second-term intern.¹⁵ The interns, along with their

12. Most of the clinic's clients will become Medicaid eligible with proper planning. Because an inter vivos trust, with some exceptions, is considered a "countable asset" for Medicaid purposes, this type of trust typically does not serve the clinic's clients well. 42 U.S.C. § 1396p(d) (2002); JOHN J. REGAN, TAX, ESTATE & FINANCIAL PLANNING FOR THE ELDERLY § 10.13 (1985). See Am. Ass'n Retired Persons, *Senior Consumer Alert: A Special Bulletin for Complaint-Handlers, Living Trust or Living Nightmare?*, NATIONAL CONSUMER LAW CENTER, Winter 1993-94, at 1; Edwin G. Fee, Jr., *Shooting Down Living Trusts: Myths Regarding Taxes and Probate Lurk Behind Recent Hype*, A.B.A. J., Mar. 1997, at 82; Kathleen Lowry, *Battle of Wills, Spare Your Family the Estate Debate*, LANSING ST. J., Aug. 4, 2002, available at http://www.lsj.com/lifestyles/family/020804_estate_1d.html (explaining why trusts might not always be advisable).

13. See Bauer, *supra* note 8, at 53; M. Ann Miller, *Learning from Our Elders: Teaching Professional Responsibility in an Elder Law Setting*, 2 T.M. COOLEY J. PRAC. & CLINICAL L. 59 (1998) (discussing the Sixty Plus Elderlaw Clinic's services).

14. MICH. CT. R. 8.210 (2002). Throughout this paper, I will refer to the clinic students as legal interns. In keeping with the title, I will refer to the client as "she" and, for convenience, I will refer to the interns and lawyers as "he."

15. Interns make a two-term commitment to the clinic. Second-term students are paired with new students to form a senior-junior partnership. This partnership between students, developed by Fred Baker, is one of the strengths of our clinical program. "Student enthusiasm for the project was huge, and each term saw similarly huge numbers of applications to participate. I turned the selection process over to the interns, who chose their successors, and we established the pattern of

partners, interview and counsel clients, develop case plans, research, and draft legal documents, and perform other lawyering tasks. Issues of professional responsibility are paramount, and interns are taught to recognize and work through ethical issues presented by their case-work.

The clinic faculty teaches a client-centered approach to client interviewing by incorporating a number of the techniques proposed by Binder, Bergman, and Price.¹⁶ The clinic faculty also introduces interns to nonlegal issues related to representing elderly clients while at the same time cautioning against client stereotyping.¹⁷

The first few classes, the mock interview, and research and supervisory sessions with a clinical supervisor prepare the interns for their first interview. Clinic interns assist with or conduct an interview within the first couple of weeks of their internship. They are required to follow the interview protocol set forth below.¹⁸

D. Interview Protocol

The intern who will be lead counsel on the case is required to contact the client at least five days before the interview.¹⁹ The intern is required to introduce himself; confirm the appointment details; find out who, if anyone, will be bringing the client to the appointment; and find out generally what the client wants. The phone call serves as the first step in identifying the client's goals. Based on the information gathered, the intern is required to research the relevant areas of law in preparation for meeting the client and address the relevant ethical issues, such as conflict of interest.²⁰

The phone contact seeks to accomplish several things. First, the intern is no longer a "stranger." This introduction can make the client

pairing senior interns with incoming interns, so that each team included a 'veteran.'" E-mail from Fred Baker, *supra* note 6.

16. See DAVID A. BINDER ET AL., *LAWYERS AS COUNSELORS: A CLIENT-CENTERED APPROACH* (1991).

17. See Rubinson, *supra* note 3; see also McNeal, *supra* note 2, at 335.

18. The interview protocol is largely adaptable by the practitioner, as I elaborate below.

19. The office staff schedules the client appointments, obtains general information about who the client is and why the client has contacted the office. Typically, the staff will write a brief description of the client's problem or the services requested, such as "will" or "deed."

20. Conflict screening is an important component to any estate-planning practice. The clinic is always in the process of developing better conflict-screening tools.

feel more at ease when she arrives for the client interview. This personal touch may very well set the tone for the interview and the relationship. Second, the phone call gives the intern the opportunity to explore who will accompany the client to the interview. From this discussion, the intern will often learn about the client's physical or mental dependence on others, potential involvement by others in the case, and, possibly, family dynamics. If someone plans to accompany the client to the interview, the intern can also take time to prepare for confidentiality issues. By taking the time to personally contact the client, the intern shows the client his interest in the case and usually gains valuable information before the initial interview.

The practicing lawyer should also incorporate the introductory phone call into his practice. It is especially important to many elderly clients that attorneys convey warmth and trust, even before the client comes into the office. Moreover, the important benefits related to conflict screening and confidentiality issues are equally important to the practitioner. If the lawyer is inclined to delegate the phone call to staff, then ideally the caller should be someone who will directly assist with the representation of the client, such as a paralegal. Time permitting, another effective pre-interview technique is to send the client a questionnaire about the client's estate assets and goals. The client can complete the questionnaire and bring it to the interview.²¹

It may or may not be desirable or even feasible to have another lawyer or staff member sit in on the initial interview. Some lawyers prefer to interview solo. In order to build client rapport, however, it is helpful to have a colleague or paralegal participate in the interview if either one will be working on some aspect of the case. This benefits the client as well as the professional. There is always the concern that the client may feel less at ease with two professionals present. One lawyer can be intimidating enough, but the clinic's approach is worth considering.

Whether the lawyer conducts the interview solo or not, I strongly recommend videotaping the interview with the client's permission. The videotape serves as excellent documentation of the interview. The tape can be viewed later for a variety of purposes, such as to seek feedback from colleagues, to confirm facts, or to address competency questions.

21. The clinic has used these types of questionnaires with some success.

Now that you have stepped into the clinic's interview room, what lessons can be learned from the clinic's clients?

III. The Lessons

The clinic's estate-planning clients have taught the faculty and students valuable lessons on how to become better practitioners. The six lessons I will share relate to client goals and decision making, the importance of the retainer agreement, and the implementation of the estate plan.

Before I present the specific lessons learned, a few things should be noted about interviewing and counseling philosophies. As mentioned, the clinic teaches a client-centered approach to interviewing and counseling.²² A client-centered lawyer helps the client identify legal problems or issues from the client's perspective.²³ The lawyer actively involves the client in possible solutions by exploring with the client the legal and nonlegal consequences of the client's choices and provides advice based on the client's, rather than the lawyer's, values.²⁴ "[M]ost attorneys want their clients to feel comfortable, to feel free to speak and share confidential information, to express their needs and goals, to feel that they can trust the attorney and to offer complete and accurate information."²⁵ Client-centered interviewing seeks to achieve that relationship of trust.

The client-centered lawyer uses a variety of techniques when interviewing the client. Techniques that have proven to be effective include open-ended questioning, acknowledging the client's emotional state, and active listening, to name a few.²⁶ In the clinic, client-centered interviewing is particularly useful as it teaches interns to focus on the client's agenda and needs as opposed to the lawyer's. It has also allowed for the discovery of the lessons shared below.

Separate and apart from fact-gathering techniques, the lawyer "must choose how to discuss choices, strategies and tactics with the client."²⁷ The way in which the estate lawyer approaches the counseling of his elderly client is an important consideration. Again, the

22. See BINDER ET AL., *supra* note 16.

23. *Id.* at 19–20.

24. *Id.* at 20–21.

25. Kimberly E. O'Leary, *When Context Matters: How to Choose an Appropriate Counseling Model*, 4 T.M. COOLEY J. PRAC. & CLINICAL L. 103, 105 (2001).

26. *Id.* at 105–06 (citations omitted).

27. *Id.* at 106.

clinic focuses on the client-centered model, but I often discuss with students approaches to counseling that may not be purely client-centered but, rather, a blend of other approaches.²⁸ During the counseling process, it is important for the lawyer to choose his approach consciously and to vary his approach given the particular client and her needs. I will suggest specific strategies for counseling the client in the context of the lessons themselves.

A. Lesson Number One: Encourage Clients to Articulate Their Goals in Factual Terms

In an estate-planning practice, the client's goals relate to her fundamental values about life and death. No matter what the size of the estate, the client's goals can be multifaceted and complex. "An elder law practice should be holistic—one should be able to examine the broad needs of the client in an effort to find solutions."²⁹ A holistic approach to identifying the client's estate-planning goals requires the lawyer to delve much deeper into the client's legally articulated needs

28. See THOMAS L. SHAFFER ET AL., *LAWYERS, CLIENTS, AND MORAL RESPONSIBILITY* (1994) (outlining four approaches to decision making: (1) Lawyer as "godfather" decides what the client's interests are without consulting the client or who persuades the client to accept the lawyer's view about the client's interests. (2) Lawyer as "hired gun" pursues the client's interest without concern for the interests of others. The authors view this approach as the equivalent of a client-centered approach. However, this assumes that the client is clear in her every direction and that the client's values do not include considering the interests of others—both of which are unlikely. (3) Lawyer as "guru" makes moral choices for the client, based on the "common good." (4) Finally, lawyer as "friend" seeks to help the client be and become a better person, through a collaborative approach to the client's problem); see also ROBERT F. COCHRAN ET AL., *THE COUNSELOR-AT-LAW: A COLLABORATIVE APPROACH TO CLIENT INTERVIEWING AND COUNSELING* 6 (1999) (stating that "we believe that the authoritarian model provides too small a role for clients, the client-centered approach provides too small a role for lawyers, and that clients will best be served when lawyers and clients resolve problems in the law office through collaborative decision making. Under this model, the client would control decisions, but the lawyer would structure the process and provide advice in a manner that is likely to yield wise decisions."); Kimberly O'Leary, *Creating Partnership: Using Feminist Techniques to Enhance the Attorney-Client Relationship*, 16 *LEGAL STUD. F.* 207 (1992) (discussing reliance on feminist techniques to develop a trusting, working partnership with the client).

29. Paul Premack, *Elder Law Practice: An Overview*, 45 *S.D. L. REV.* 461, 461 (2000); see also Monte L. Schatz, *The Elder Law Attorney: Is Knowledge of the Law Enough?*, 45 *S.D. L. REV.* 554, 555 (2000) (referring to elder law as "cross-cutting, cross disciplinary and oriented toward the goal of achieving a holistic quality of life for the client"); Dennis Stolle, *Professional Responsibility in Elder Law: A Synthesis of Preventative Law and Therapeutic Jurisprudence*, 14 *BEHAV. SCI. & L.* 459 (1996); *Recommendations*, *supra* note 4, Preamble (discussing the need for a "holistic approach" to clients with diminished capacity).

to determine in concrete factual terms what the client wants to accomplish. Such an approach requires the lawyer to put aside the notion that he already knows what the client needs (i.e., will or medical power of attorney) and to encourage the client instead to share her goals in factual terms.

Clients articulate their goals in different ways. Some clients say "I want a will" without much knowledge about what a will can or cannot do, or whether a will is the best estate-planning tool for them. Others want to transfer ownership of property now "to avoid probate," with little knowledge of the probate process or the implications of transferring title. Some clients simply say, "I want my daughter to have everything when I die."

Clients may express their goals "factually" ("I want my daughter to have everything.") or "legally" ("I want a will."). Saying "I want a will" is much different than saying, "I want my daughter to have everything when I die." The lawyer must help the client articulate her goals in factual terms. In layperson's terms, what does the client want to accomplish? The lawyer's job is to identify what I call the client's factual goals and then to advise the client accordingly.³⁰ Consciously understanding the client's factual goals is the key. This sounds simple enough. What are the challenges?

Most clients come to the law office with some working knowledge of estate-planning terminology. The client's actual knowledge of these documents, however, is often outdated or incorrect.³¹ Add to the mix the elderly client who is influenced by family or sham-marketing schemes, and the importance of educating the client about the various estate-planning documents becomes clear. For example, clients often come to the clinic wanting a trust.³² Family, friends, or

30. MODEL RULES OF PROF'L CONDUCT R. 1.2, 1.4(b), 2.1 (2002). For helpful commentary on the Model Rules, see the American College of Trust and Estate Counsel Commentaries, at <http://actec.org/pubInfoArk/comm/toc.html>.

31. Michigan adopted the Estates and Protected Individuals Code (E.P.I.C.) in 1998, effective Apr. 1, 2000. MICH. COMP. LAWS §§ 700.1101–8102 (2002). Tax laws and Medicaid regulations change often. Am. Ass'n of Retired Persons, *Estate Taxes: 2001 Law Makes Financial Planning, Paying Taxes a Challenge for You and Your Heirs*, at http://www.aarp.org/estate_planning/Articles/a2002-08-12-EstateTaxes (last visited Oct. 27, 2002).

32. We will assume for discussion purposes that the client is seeking an inter vivos trust. Clients, however, are often unfamiliar with the differences between an inter vivos and a testamentary trust. A common client goal is "to avoid probate," which often triggers the request for a trust. In any case, the client's actual knowledge of how the document fits with their factual goals is where the lawyer's challenge lies.

marketing predators may have given the client the idea that a trust is the estate-planning tool for them. While an inter vivos trust might be appropriate for some clients, it is not always an appropriate estate-planning tool for the middle- to low-income client. To simply say to the client, “you do not need a trust” is not a thoughtful response to the client’s stated goal nor will most clients “buy” that response.”³³

In this situation, the lawyer must become teacher. First, the lawyer must elicit the client’s goals in factual terms. The client-centered interviewing techniques are useful for this purpose. I suggest incorporating the following questions or some variation of these questions into your initial interview:

- What do you want to accomplish?
- Why is that important to you?
- Can you tell me what is most important to you (within the context of the estate plan or perhaps more generally)? Why?
- Are you open to different legal alternatives to achieve your goals?
- What else should I know about you that would help me design your estate plan?

Finding out what the client wants to accomplish factually will set the stage for the lawyer to educate the client and to discuss whether a trust or another document can accomplish the client’s factual goals. The lawyer must be able to assist the client in identifying her factual goals before appropriate legal solutions are explored and implemented. As one elder law practitioner has noted, the “attorney must be willing to listen, sometimes for much longer than normal, in order to better understand his client’s needs and desires. Patience is not only a practical mandate; the Rules of Professional Conduct seem to demand it.”³⁴

In the “I want a trust” example, if the client’s factual goal is to provide for the minor grandchildren and to retain control over the assets after her death, then a testamentary trust might be appropriate. If

33. As a result of the lawyer’s indifference to the client’s request, the client may not return for legal services or may seek other counsel or both. In my experience, clients can always find a lawyer who will give them exactly what they ask for, whether it is appropriate for the client’s needs or not. Therefore, by failing to educate the client about the legal document requested, we do the client a great disservice.

34. Premack, *supra* note 29, at 464 (construing MODEL RULES OF PROF’L CONDUCT R. 1.14(b)).

there are other ways to accomplish the same factual goal, then the lawyer should explore those alternatives with the client as well.³⁵ If the client's goal, on the other hand, is to avoid probate, there may be better, simpler alternatives to a trust. Or, with better information, the client may decide probate is not a bad process.

During the course of the representation, the client's factual goals may become more concrete or even change.³⁶ Lawyers must be flexible enough to allow the client's case to evolve accordingly. It is important to keep in mind that even a "simple" estate plan requires careful fact gathering, research, and thoughtful advice.³⁷

A common example is the client who requests a deed transferring ownership of property to an adult child.³⁸ As mentioned, the first step is to get the client to articulate her goals in factual terms. Why does the client want to transfer ownership of her property? To avoid the probate process?³⁹ To ensure that the child will receive the property upon the client's death? To protect or safeguard assets from the government? Once the lawyer knows what the client wants to accomplish factually, he is ready to research and present the client with her legal options.

The client's factual goals might include avoiding probate, rewarding a child who has cared for the client, or keeping the property

35. For example, one option may be a gift under the Uniform Transfers to Minors Act (UTMA). The UTMA has been adopted by most states. BLACK'S LAW DICTIONARY 668, 1498 (6th ed. 1990). Two states that retain the Uniform Gifts to Minors Act (1966) predecessor to the UTMA, are South Carolina, under S.C. CODE ANN. §§ 20-7-140 to -240 (West 2001), and Vermont, under VT. STAT. ANN. tit. 14, §§ 3201-3209 (2001). If the gift is for educational purposes, an insurance policy payable to an educational trust or a tax free "qualified transfer" for tuition directly to the educational institution may be an option.

36. Jan Ellen Rein, *Ethics and the Questionably Competent Client: What the Model Rules Say and Don't Say*, 9 STAN. L. & POL'Y REV. 241, 253 (1998). "Lawyers must also be aware that people change their minds as their perceived needs change. Most planning devises are revocable." *Id.*

37. "[M]any attorneys still believe that anyone can draft a 'simple will' notwithstanding the reality, in the current estate-planning environment, that there are short wills and simple lawyers but probably no simple wills." Jeffrey N. Pennell, *Ethics, Professionalism, and Malpractice Issues in Estate Planning and Administration*, in ESTATE PLANNING IN DEPTH, SC 75 A.L.I.-A.B.A. 67 (1998).

38. Often the client simply talks in terms of transferring ownership without an understanding of the different types of ownership. Therefore, the implications of various transfer options need to be explored, i.e., fee simple transfer, joint ownership, life-estate, etc.

39. This is a common goal for clinic clients and often stems from the client's misunderstanding of the probate process. "Most elderly clients will tell their attorney that avoiding probate is a high priority to them. Yet elderly clients often fail to understand the fundamentals of probate." Premack, *supra* note 29, at 466.

in the family, among others. Before the client transfers property to her child, the client should be fully advised on the nature of the legal ownership, for example, sole or joint ownership options, issues of control, liabilities and debts, and Medicaid and tax implications. After being counseled about the legal implications of transferring her property, maintaining control of the property during life or avoiding tax implications for the child might become important to the client.⁴⁰

Unfortunately, some lawyers simply prepare the deed. The risk in this is that most clients do not know or do not fully appreciate the legal implications of transferring ownership of their property. The lawyer is hearing the client's legal goal, "title transfer," without exploring thoroughly what the client really wants to accomplish.

The lawyer needs to keep in mind that the client may have several factual goals and those goals may conflict. In the deed example, the lawyer may have to advise the client that not all of her goals can be achieved by transferring the property. However, if the lawyer understands the client's factual goals, then he can at least help the client prioritize what she wants to accomplish and perhaps suggest other planning options.

Finally, lawyers must be willing to recognize that not all clients are able to articulate their factual goals. This may be because the client is not ready to engage in the estate-planning process or the client is unsure or indecisive about her goals or aspects of the estate plan. It is this indecision by the client that may entice the lawyer to inject what he believes to be best for the client.⁴¹ However, it is essential that the client's factual goals come from the client.

B. Lesson Number Two: Some Clients May Not Be Ready for Legal Services

Some clients simply are not ready to make plans for their possible incapacity or death. They may not see themselves as vulnerable to either or may not want to consider a time when they may not be able to control certain aspects of their lives. Clients also may be concerned

40. The lawyer should also explore the nonlegal implications of the transfer, such as how the property transfer will affect the client or be viewed by other family members. These practical consequences are discussed in detail in Lesson Three, *infra* Part III.C.

41. This "godfather" approach to lawyering should be avoided in the context of goal setting specifically and decision making generally. See SHAFFER ET AL., *supra* note 28; Lesson Three discussion, *infra* Part III.C.

about how their families will view their estate plans. They may be afraid others will make decisions for them or simply “take over” their lives. These are just some of the possible dynamics at work when a client comes in for estate-planning services. Just because the client has made it to the law office does not necessarily mean she is ready for legal assistance. So the first question we must ask as estate-planning lawyers is: “Is the client ready for our services?” The experienced lawyer can often answer this question after the initial client interview. Sometimes the lawyer must counsel the client about estate-planning options before the client knows whether she is ready for legal assistance. Nevertheless, it is a fundamental question that needs to be answered at some point.

Determining whether the client truly wants legal services and is ready to engage those services must be an integral part of the elder lawyer’s practice. Exploring the following questions may help provide answers.

1. WHO SCHEDULED THE CLIENT INTERVIEW?

It is not unusual, particularly in an elder law practice, for someone other than the potential client to schedule the initial appointment.⁴² Adult children, caregivers, social services workers, or concerned friends may be the ones to call the law office. However, sometimes the caller, while well-meaning, has not even discussed the appointment with the “client.” Other times, the caller is the one who wants the elderly person to obtain legal services: “I want to be power of attorney for my mother.”⁴³ The clinic’s policy is to have the potential client make the appointment whenever possible, but this does not avoid the problem entirely. One of the first things the lawyer should explore with the client in the pre-interview phone call and the initial interview is what has motivated the client to schedule the appointment.

42. See Premack, *supra* note 29, at 462. “Often the elder law attorney will get his first call from the son or daughter of the elderly person.” *Id.* It is common for the clinic to be contacted by someone other than the potential client.

43. The caller’s erroneous use of the term “power of attorney” illustrates the layperson’s typical misunderstanding of what a power of attorney is and who the appropriate client is. Unfortunately, some attorneys also fail to understand this concept. See *Albright v. Burns*, 503 A.2d 386 (N.J. 1986); see also *Estate of Keatinge v. Biddle*, 789 A.2d 1271 (Me. 2002).

2. WHAT MOTIVATED THE CLIENT TO SCHEDULE THE APPOINTMENT?

Some clients are self-motivated to schedule an appointment, but are not actually ready to plan for incapacity or death. These clients may not have thought about their estate-planning goals or emotionally may not be ready to do so. Asking explicitly “why did you make this appointment?” or “what motivated you to come for these services now?” will give insight into the readiness or reluctance of the client. Keep in mind that sometimes clients are simply seeking information rather than representation on a particular matter. Estate lawyers should see themselves as information providers and educators and should not assume that the client necessarily wants legal work performed.

3. WHY IS THE POTENTIAL CLIENT RELUCTANT OR NOT READY?

This may be too pointed a question to ask the client directly, but it is an important question to keep in mind throughout the initial interview. If the lawyer senses that the client may be reluctant to engage in the interviewing process, share information, or articulate goals, then the interviewer should explore the reason for such reluctance. Sometimes the same reason motivates her to see the lawyer. For example, the death of a family member or close friend may motivate the client to seek legal advice, but at the same time may be the emotional impediment to her own estate planning.

Lawyers must thoughtfully reflect on the client’s willingness to engage in the estate-planning process. If there is reluctance on the part of the client, the lawyer should seek to gain a clear understanding as to why the client is not ready for legal services, noting that the client may be unwilling or unable to articulate why.

A clinic probate case illustrates the point. A named personal representative came to the clinic about probating a will prepared by the clinic. The potential client lived in Indiana, not Michigan. Throughout the client interview, the named personal representative expressed concern about living in another state and the fact that she did not receive anything of value from the decedent. She kept asking if she would be paid for her services as personal representative. The interns picked up on the potential client’s reluctance to serve as personal representative. They researched the role of the personal representative, the fees she could charge, and potential ethical issues raised if a conflict of interest arose. The interns counseled the client in a fol-

low-up session, and she decided not to serve as the personal representative. What the interns learned in the follow-up interview is that the prospective client did not understand that she was not legally obligated to serve as the personal representative. Once she knew this, her other concerns took precedence.

Another client sought the clinic's emergency services when she found herself unexpectedly hospitalized. The interns interviewed the client and obtained most of the relevant information to prepare a will, medical power of attorney, and durable power of attorney. Before the interns could finalize the documents, the client, apparently on the road to recovery, was released from the hospital. Despite several attempts by the interns to have the client come to the clinic to finalize her documents, she did not keep her appointments.⁴⁴ It was not until several months later when the client was hospitalized again that the interns were able to complete the legal work. She was ready for our services only when her health was seriously threatened.⁴⁵

The most common scenario, however, is the client who comes to the clinic truly wanting the legal services, but is unable to decide on the specifics for her estate plan.⁴⁶ This leads to Lesson Three.

C. Lesson Number Three: Do Not Make Factual Choices for the Client

The client comes to the clinic wanting a will, medical power of attorney, and durable power of attorney, but cannot decide who gets what or who should play the role of patient advocate or attorney-in-fact. During the debriefing of the initial interview, the intern will often say that the client does not know what she wants to give to whom,

44. Some clients may be reluctant to follow through with their estate plan because they consciously or unconsciously are having emotional difficulty dealing with the issues at hand. Others simply may have other priorities that may be very different from the lawyer's priorities. No matter what the reason, it is important that lawyers be mindful of what is going on with the client—related or unrelated to the legal representation. Lawyers often view the client's conduct as failure to cooperate. Do not be quick to judge clients who, in your view, fail to follow through when you would like. There are many reasons why clients may not meet with or respond to their lawyer. In the clinic's practice, common reasons are ill-health of the client or that of another family member, transportation problems, and bad weather conditions.

45. It makes perfect sense that this client's priority is more on the documents when hospitalized than when not hospitalized.

46. This client may also be having emotional difficulty dealing with the issues at hand.

or who she wants to serve and in what capacity. Even after follow-up phone calls or meetings, the client remains noncommittal. Legal counseling may assist the client in making a decision, but the client may simply not know what she wants and not be able to make a decision.

The tendency, even for experienced, well-meaning lawyers, might be to tell the client what to do. "Choose your oldest son." "Choose the daughter who lives in town." This can be a dangerous practice. What can the lawyer do to assist his client to make factual choices?

Look first to the applicable state ethics rules for guidance. Unfortunately, the Model Rules, and most state rules of professional conduct, are not particularly helpful in the planning context. Model Rule 1.2 gives the client the sole authority to accept or reject a settlement offer and to accept or reject a plea bargain in a criminal case.⁴⁷ Many decisions related to the client's estate plan do not fit neatly under Rule 1.2's litigation focus. The Rule gives the client the authority to decide the "objectives" of the representation, while the lawyer is free to determine the "means," after consultation with the client, to get there.⁴⁸ This often translates into substantive and procedural decisions. Substantive decisions go to the heart of the matter and fall clearly under the client's domain. Procedural decisions, usually "technical and legal tactical issues,"⁴⁹ are within the lawyer's purview.

The estate lawyer may fall into a false sense that the client's factual decisions about her estate plan are not substantive. There may be no immediate impact on the client or her case. As such, the lawyer may feel he can make the decision or should simply tell the client what to do. But what could be more important in an estate-planning case than determining who will serve in the respective decision-making roles? This is a substantive decision and, ethically, should be the client's decision.⁵⁰ The American College of Trust and Estate

47. MODEL RULES OF PROF'L CONDUCT R. 1.2 (2001).

48. *Id.*

49. *Id.* R. 1.2 cmt. 1; *see also* ACTEC Commentaries on the Model Rules of Professional Conduct, at <http://www.actec.org/pubInfoArk/comm/mrpc12.html> (last visited Oct. 27, 2002) ("One of the lawyer's goals should be to educate the client sufficiently about the process and the options to allow the client to make informed decisions regarding the representation.").

50. This said, I do not mean to underestimate or necessarily discourage the lawyer's influence on the client. What and how we present information to the cli-

Counsel supports this approach: “The lawyer for an estate-planning client should attempt to inform a client to the extent reasonably necessary to enable the client to make informed judgments regarding major issues involved in the representation.”⁵¹

Assuming then that the lawyer’s goal is to help the client make the decision, rather than make the decision for the client, how should the lawyer approach the client’s dilemma? It is not advisable to take a “godfather” or “guru” approach.⁵² Even if arguably there is no ethical concern, the client, not the lawyer, has more insight into the nonlegal implications of the decision. Consider the following client-centered and collaborative approaches:

- Recognize that factual decisions are uniquely within the client’s realm of expertise, not the lawyer’s. Looking to the client as the expert may be the impetus the client needs to make the decision.
- Do not assume the client is incompetent. Especially when working with an elderly client, the tendency may be to conclude the client is incapable, for a whole host of reasons, of making the decision. While client competency may be an issue, do not assume incompetence is responsible for the client’s inability to make choices.⁵³
- Explore the client’s values related to the decision. By exploring the client’s values about family, religion, and the like, the lawyer will gain insight into the client and the client may discover her answer.
- Probe the client’s choices through interactive techniques. For example, have the client write down the pros and cons of her possible choices, such as having the son versus the daughter serve as the personal representative.

ent has a significant impact on the decision-making process. Lawyers should use their legal expertise to assist clients in making informed decisions. When it comes to those matters better understood by the client, such as the family dynamic, however, it is the client who is in the best position to decide. See discussion *infra* Part III.D (Lesson Four).

51. ACTEC Commentaries on the Model Rules of Professional Conduct, at <http://www.actec.org/pubInfoArk/comm/mrpc14.html> (last visited Oct. 27, 2002).

52. See SHAFFER ET AL., *supra* note 28.

53. See, e.g., Rubinson, *supra* note 3, at 134–40 (cautioning against assuming mental incapacity in the decision-making context); Smith, *supra* note 4, at 61–73 (explaining a variety of factors that may affect a client’s decision-making ability).

Ask the client to articulate her priorities from the list she develops. Then discuss the client's list and priorities.

- Ask the client how she thinks her children will react to the various choices. Role-play a conversation between the client and each of her children based on the client's anticipated responses.⁵⁴ Let the client choose what role she wants to play first and then reverse roles. This will allow the client to get in her own shoes in a more active way and will also allow the client to get into the shoes of others. Similarly, the lawyer will learn from being in the "client's shoes," and from playing the role of those individuals for whom the client is concerned.⁵⁵
- Suggest to the client that she discuss the matter with her children, together or separately. Offer to participate in such a conversation, if you believe that will be helpful to the client, yet honor the client's decision to follow or not follow your advice.
- Explore with the client why she is having difficulty making a decision. What is motivating the client's indecisiveness? Is her physical or mental health a factor? Is it that she does not want to favor one child over the other? Is she afraid of hurting one of the children's feelings? Does she feel they are equally suited for the task? Is one of the children pressuring her?

The key is to discover *why* the client is indecisive. From there the lawyer may be able to assist the client in making a sound decision or accept that there is no good solution for the client.⁵⁶ By helping the

54. For an excellent article that explores role-play in the context of decision making, see Mary Marsh Zulack, *Rediscovering Client Decisionmaking: The Impact of Role-Playing*, 1 CLINICAL L. REV. 593 (1995). "The techniques I propose [role-play and modeling] are meant to encourage lawyers and clients to focus on the process of decision-making. To begin with, lawyers need to study their clients' situation very closely and nonjudgmentally . . . [A]s we will see, the techniques of client-centered interviewing can be too blunt and too explicit to elicit all that bears on a client's understanding, and other techniques may be needed to bring to the surface what clients themselves may be unable to put into words." *Id.* at 596.

55. "To role-play is to step out of the discussion taking place and assume a role. Doing so allows the lawyer to illustrate propositions that might be difficult to explain or justify simply through discussion and argument. It allows a client to demonstrate a past event, or to go through a possible future encounter safely. Role-play makes the points vivid, and brings both lawyer and client into the process of discovery." *Id.* at 596-97.

56. See discussion *infra* Part III.D (Lesson Four).

client make her own factual choices, the lawyer is more likely to prepare an estate plan that truly meets the client's needs.

Given the age and health concerns of some of the clinic's clients, there may be the added concern about *when* the client will make a decision. What if the client cannot make decisions related to specific provisions of her will? What if the client becomes incapacitated or dies before these decisions are made? This puts pressure on the lawyer to move the case along. It is the client's decision, however, and the lawyer's job may be simply to educate the client about what not making a decision means.

Model Rule 2.1 states: "In representing a client, the lawyer shall exercise independent professional judgment and render candid advice."⁵⁷ In practical terms, this means counseling the client about intestate succession or explaining what will happen if she has no will at the time of her death. Counsel the client about the pros and cons of court intervention if no medical directive or durable power of attorney is in place. When counseling the client, the lawyer "may refer not only to law but to other considerations such as moral, economic, social and political factors, that may be relevant to the client's situation."⁵⁸ Additionally, Model Rule 1.4 requires the lawyer to "explain a matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation."⁵⁹ Let the client know how not making a decision *is* a decision. Then let the client decide not to decide.⁶⁰

Two clinic cases illustrate the point. One client wanted a will to provide for someone who would not take under Michigan's intestacy statute. Despite frequent calls and letters, the client would cancel appointments and not respond to calls. A letter was sent to the client

57. MODEL RULES OF PROF'L CONDUCT R. 2.1 (2001).

58. *Id.*

59. *Id.* R. 1.4.

60. There is the practical problem of when to close the client's file. In the clinic there is no financial pressure to close a file, but we do have individuals waiting for our services. It is important to allow the client some time (within the context of the given facts) to make a decision about her estate-planning needs. It is also essential for the lawyer to document the case's progress throughout the representation and to confirm the case's progress, or lack thereof, through written correspondence to the client. The lawyer should be mindful of her duty to "act with reasonable diligence and promptness in representing a client." MODEL RULES OF PROF'L CONDUCT R. 1.3. The lawyer should use her best professional judgment as to when to close the file and document the reasons in the closing letter to the client, and if appropriate, encourage the client to return for legal services in the future.

explaining what would happen if she died intestate. She never came into the clinic to finalize her will and later died, presumably intestate. Another client has not finalized her will because she believes a family member will be upset about one of the will's provisions. On the one hand, the client wants to talk with the family member now to avoid causing the family member pain in the future. On the other hand, she does not want to upset the family member now either. The client goes back and forth between each concern and, as a result, continues to put off finalizing a will that is very important to the client.

Lawyers can assist clients who are having difficulty making decisions related to their estate plans by using the suggested approach or by developing one of their own. Sometimes the lawyer must simply respect the client's right not to make a decision. The lawyer should put the client in the position to make an informed choice. The decision itself is the client's.

D. Lesson Number Four: Assist Clients in Making Wise Decisions

A wise decision is informed and takes into account all of the legal and practical factors that affect the client. Helping clients make wise decisions about their estate plans may be the most important function of the estate-planning lawyer, particularly when the client is older. Because there are numerous contingencies with most estate plans, even the "right" legal decision may not be apparent. This makes the lawyer's role in counseling the client an especially important one.

Every legal decision has legal and nonlegal consequences.⁶¹ With a client-centered approach, the presumption is that the lawyer is the expert when it comes to the legal implications of a decision, and the client is the expert when it comes to the nonlegal implications of a decision. The dynamics of the attorney-client relationship, however, are such that the lawyer and client can assist each other in their respective roles. The client may have important insights into the legal implications, and the lawyer may have important insights into the nonlegal implications of a particular decision. Thus, when possible, adopt a collaborative approach when assisting a client with decision making. The techniques suggested in Lesson Three are useful. For example, exploring the client's values will inform the lawyer about

61. See, e.g., BINDER ET AL., *supra* note 16, at 293.

what to ask when identifying the nonlegal consequences of a particular decision. Asking the client to write down the nonlegal consequences as she sees them and to explain those consequences is one way to encourage the client to take the lead when considering the practical implications of her decisions. Engaging the client in role play makes the implications of the client's choices come alive and benefits both client and lawyer.

When counseling the client, the lawyer should consider the following questions:

- Do I have a clear understanding of the client's factual goals?
- How can I assist the client in articulating and exploring the nonlegal implications of her planning options? How can I assist the client in clarifying and prioritizing those options? How can I assist the client in resolving conflicts related to her choices?
- How do I give the client a complete and detailed picture of the legal consequences of her choices? Have I done so by using plain English and without legal jargon?
- What are the client's concerns and fears? How can I address those concerns and fears in ways that will be helpful to the client?

Once the lawyer understands what the client wants to accomplish, the lawyer can present the various legal options to the client. In turn, the lawyer and client can explore the legal and nonlegal implications of the client's various choices through the techniques suggested in Lesson Three. The lawyer should avoid using legal jargon and explain the meaning of legal terms.

In the context of estate-planning cases, there are some common client concerns and fears worthy of discussion. Clients, particularly elderly clients, may become susceptible to family pressure and undue influence. The aging client may be experiencing failing physical or mental health. Older clients also may find it more difficult to give authority to others or feel a loss of self-direction and power. Some clients misunderstand or fear the very documents that can assist them. It is the lawyer's job to address those concerns and fears.

For example, it is quite common for clinic clients to express concerns about what an attorney-in-fact can do under a durable power of

attorney.⁶² This concern often stems from the client's desire to maintain control over her affairs. The technical, legal response to the client might be that there is no need for concern if she trusts her agent. However, even assuming the agent is trustworthy, in the sense that he would not convert or steal the client's funds, the client may still have legitimate concerns. What if the agent is not capable of handling the responsibility for some reason? What if the agent does not understand how the durable power of attorney works? Unless both the client and agent are well-educated about how the document works, there is a good chance problems will be associated with it.

Sometimes clients' fears are misplaced; sometimes they are legitimate. It is important for the lawyer to probe the client's fears gently and deeply before proceeding with the case. It is as much of a disservice to the client to "force" the document on her as it is to not explore her concerns further. Providing the client with concrete examples of how the estate-planning document will work is one way to address the client's concerns. For example, a client is fearful she will lose the authority to manage her own affairs if she has a durable power of attorney. Telling the client she can retain her own checkbook, go to the bank, and pay her own bills if she so chooses illustrates to her how she will be able to retain control. Explaining to the client that the attorney-in-fact can only act under her direction—at least while the client is mentally competent—may also alleviate her fears. The lawyer should paint a simple but realistic picture of how each of the estate-planning documents will work.

A wise decision is not necessarily the decision the lawyer would make.

The professional's job is to advise the client of the options. If, after getting appropriate advice, the client chooses an option that the professional thinks is less than perfect, the attorney must realize that people are allowed to make their own mistakes, whatever their age. Money is not everything; saving taxes is not everything; investment return is not everything. The more expensive or less efficient plan may fit the client's values or family needs more closely.⁶³

What the lawyer sees as the "best" legal decision may not be viewed as the "best decision" by the client. One clinic case provides an excellent example.

62. Michigan's statutes pertaining to durable powers of attorney are found at MICH. COMP. LAWS ANN. §§ 700.5501–5512 (West 2002).

63. Peter J. Strauss, *Elder Law in the Nineties*, 1 ELDER L.J. 19, 25–26 (1993).

Mary came to the clinic when her husband was in the late stages of Alzheimer's disease. The spouse, with his diminishing capabilities, had become physically abusive toward Mary. This was a second marriage for both, and their assets had remained separate throughout the marriage. Mary wanted Medicaid planning for her spouse, but mentioned at the initial interview that she would consider divorce if it would preserve her assets. She described the marriage as one without much affection even before her husband was diagnosed with Alzheimer's. Mary, however, felt a deep moral obligation to care for her spouse. After researching and analyzing potential conflict of interest problems, the clinic accepted Mary as a client in her individual capacity and not as a representative of her husband. The intern counseled Mary about divorce and Medicaid planning. The client decided against the option of divorce. The intern then prepared a detailed Medicaid plan with three options for the client. To the intern's surprise, the client decided against each of the plans. The client wanted more flexibility and control over the assets than any of the plans would allow. Rejecting all three plans was arguably a "bad" legal decision. As it turned out, the spouse died shortly after entering the nursing home, and both the client and the spouse's other heirs benefited from the client's decision. By taking a client-centered and collaborative approach to client decision making, a lawyer is more likely to prepare an estate plan that serves the client's goals and needs.

E. Lesson Number Five: Define the Attorney-Client Relationship Clearly Through a Written Retainer Agreement⁶⁴

Commentators have written about the importance of a written retainer agreement between lawyer and client.⁶⁵ The concern has been primarily on the issue of fees, suggesting that lawyers best inform their clients and protect themselves by having a written fee agreement.⁶⁶ From an ethical and business perspective, this is a sound practice. In fact, in some estate-related matters the law requires that the retainer agreement be in writing. For example, in Michigan, the

64. By written retainer agreement, I mean a written agreement between lawyer and client. Some practitioners may prefer to address these matters in some other written format, such as an engagement letter. The point is to do it in writing and early in the representation.

65. See, e.g., Lawrence A. Dubin, *Client Beware: The Need for a Mandatory Written Fee Agreement Rule*, 51 OKLA. L. REV. 93 (1998).

66. *Id.*

agreement between the personal representative and her lawyer must be in writing and a copy of the agreement must be filed with the probate court.⁶⁷ While most estate-planning lawyers utilize a written retainer agreement, there are other aspects of the representation besides fees that the agreement should incorporate. The suggestions that follow stem from what I have observed to be common misunderstandings by clients (and sometimes interns) about the attorney-client relationship and related ethical issues.

1. DEFINE THE RELATIONSHIP BETWEEN LAWYER AND CLIENT

Clients seek assistance in different capacities. A married woman seeks Medicaid planning on behalf of her spouse. The attorney-in-fact has a dispute with the insurance company. The guardian needs assistance with filing an annual report. Estate-planning lawyers may represent clients in these various capacities.⁶⁸ As such, it is essential that the nature of the attorney-client relationship is well-defined.⁶⁹ When the spouse, attorney-in-fact, or guardian is a family member, rather than a professional, he may not be clear about his role and his relationship with the lawyer. The lawyer should make clear in what capacity he will represent the “representative,” and in turn, document the nature of the relationship in the retainer agreement or engagement letter.⁷⁰

The clinic’s retainer uses the following language when representing a personal representative of an estate:

67. MICH. CT. R. 5.313(D).

68. An important aspect of an elder law or estate practice is determining who the client is. E.g., A. Frank Johns, *Fickett’s Thicket: The Lawyer’s Expanding Fiduciary and Ethical Boundaries When Servicing Older Americans of Moderate Wealth*, 32 WAKE FOREST L. REV. 445, 498 (1997). “There is one point on which all writers and analysts agree regardless of which model of representation is taken by lawyers and their clients, the choice should be made early in the relationship. Furthermore, it should be reduced to writing, specifying who the client is, how confidences will be shared, and to whom those confidences may be shared.” *Id.*; Miller, *supra* note 13, at 65–66; Jeffrey N. Pennell, *Representations Involving Fiduciary Entities: Who Is The Client?*, 62 FORDHAM L. REV. 1319, 1319 (1994) (discussing the various approaches to client identity); Rosenberg, *supra* note 4, at 446–54.

69. MODEL RULES OF PROF’L CONDUCT R. 1.7 cmt. 13 (2002). “[T]he lawyer should make clear the relationship to the parties involved.” *Id.*

70. E.g., *Report of the Special Study Committee on Professional Responsibility: Counseling the Fiduciary*, 28 REAL PROP. PROB. & TR. J. 825, 860–63 (1994). “A written statement could provide the lawyer with an opportunity to establish the ground rules of the representation at the onset and also to define the lawyer’s duties to the fiduciary.” *Id.* at 860.

The Sixty Plus, Inc., Elderlaw Clinic agrees to represent me in my fiduciary capacity as the Personal Representative of the estate of John Doe. This means that Sixty Plus is responsible for representing the interests of the estate of John Doe, and Client as Personal Representative. As Personal Representative of the estate, I understand that I have statutory obligations to the estate and that Sixty Plus represents me in carrying out those obligations. As such, Sixty Plus does not represent my individual interests. I further understand that if at any time my individual interests conflict with my fiduciary obligations as Personal Representative I will need to employ separate counsel to represent my individual interests.⁷¹

In addition to the retainer agreement, a detailed letter outlining the duties of the personal representative and the role of the personal representative's counsel is sent to the client.⁷² Defining the relationship in the retainer agreement sets the stage for the working relationship between lawyer and client.

2. SPECIFICALLY STATE THE LEGAL WORK TO BE PERFORMED

After assessing the client's needs, the lawyer may engage in a variety of legal work on her behalf. "When a lawyer undertakes to prepare a will, trust, or other document and to plan an estate for a client, the lawyer owes a duty to his client to perform all the legal tasks incident to estate planning" absent an agreement to the contrary.⁷³ The retainer agreement provides an opportunity to specify or limit those tasks in writing. The written agreement should clearly state what the lawyer will do for the client, including giving legal advice on particular issues, preparing documents on the client's behalf, and any other services. The retainer agreement then serves as confirmation of

71. The language is modified slightly for purposes of this piece. The American College of Trust Estate Counsel is a good source for sample engagement letters. See Am. Coll. of Tr. Estate Counsel, *Engagement Letters: A Guide For Practitioners*, § V. Representation of Fiduciaries, (3d ed.), available at <http://www.actec.org/pubInfoArk/engltrch5.htm> (last visited Oct. 27, 2002).

72. For the importance of educating the fiduciary in the estate administration context, see Peter R. Brown, *Clarifying The Role of the Attorney, Executor, and Trustee in Estate and Trust Administration*, in REPRESENTING ESTATE AND TRUST BENEFICIARIES & FIDUCIARIES SC 85 A.L.I.-A.B.A. 149 (1998); see also Ronald C. Link, *Developments Regarding the Professional Responsibility of the Estate Administrative Lawyer: The Effect of the Model Rules of Professional Conduct*, 26 REAL PROP. PROB. & TR. J. 1 (1991); Rust E. Reid et al., *Privilege and Confidentiality Issues When A Lawyer Represents A Fiduciary*, 30 REAL PROP. PROB. & TR. J. 541 (1996).

73. A.B.A. Comm. on Role & Future of Estate Lawyer, *Report on the Committee on Role and Function of Estate Lawyer*, 12 REAL PROP. PROB. & TR. J. 223, 226 (1977) [hereinafter *Report on the Committee*] (noting that the attorney and client may agree as to what tasks will or will not be performed by the lawyer).

what the lawyer will do for the client and helps to avoid later misunderstandings. It also provides the client with an opportunity early in the representation to question or clarify what services the lawyer will provide. Changes or additions to services should be reflected in writing.

3. ADDRESS RELEVANT ETHICAL ISSUES IN THE RETAINER AGREEMENT

As mentioned, the rules of professional responsibility are not particularly helpful to the estate-planning lawyer. However, estate lawyers grapple with particular ethical issues every day. These issues should be addressed in the written retainer agreement.⁷⁴ For example, joint representation of husband and wife, involvement of other family members in the planning process, and representing a fiduciary client raise ethical issues common to the clinic's practice.⁷⁵ The retainer agreement should address these issues when appropriate.

Confidentiality can become a tricky issue in estate-planning and elder law practices.⁷⁶ By addressing the issue explicitly in the retainer agreement, the lawyer can lessen the potential ethical dilemmas.⁷⁷ One of the most common issues is confidentiality when representing both husband and wife.⁷⁸ Professors Powell and Link suggest not waiting to consider the issue when the "lawyer's duty of confidentiality" is on the table, but rather to "provide a comprehensive engagement letter, which, at a minimum, addresses concerns regarding the nature of joint representation of husband and wife, including the handling of after-acquired information which one party desires to be held

74. I do not mean to suggest that a well-crafted retainer agreement is a panacea for avoiding ethical dilemmas. Nevertheless, some ethical problems can be avoided by anticipating and addressing them early in the representation.

75. These examples raise issues of conflict of interest and confidentiality. The estate lawyer may want to address other ethical issues related to a particular case in the retainer agreement.

76. *E.g.*, April A. Fegyveresi, *Conflicts of Interests in Trust & Estate Practice*, 8 GEO. J. LEGAL ETHICS 987 (1995); Pennell, *supra* note 37, at 73–95.

77. *E.g.*, Burnele V. Powell & Ronald C. Link, *The Sense of the Client: Confidentiality Issues in Representing the Elderly Client*, 62 FORDHAM L. REV. 1197, 1201 (1994) (calling for lawyers to develop engagement letters that "explicitly detail the terms of the representation and clearly address confidentiality issues that may arise"); *see also*, Johns, *supra* note 68, at 498.

78. For a discussion of the various approaches to representing spouses, see Russell G. Pearce, *Report of Working Group on Spousal Conflict*, 62 FORDHAM L. REV. 1027, 1029–30 (1994).

in confidence.”⁷⁹ The waiver of confidentiality for spouses might read as follows:

Confidentiality and conflict of interest as it relates to my spouse has been explained to me. To the best of my knowledge, there is no conflict between my spouse and me, which would prevent Sixty Plus from representing both of us. I waive confidentiality as to my spouse. Throughout the representation, I agree that Sixty Plus may share the contents of my conversations and written correspondence with my spouse.

The retainer agreement could also address the parameters of confidentiality between husband and wife after the legal services are completed.

Elderly clients may want to involve others in the interview or some other aspect of their case. Similarly, the retainer agreement should address these issues. In the clinic, the general practice is not to include others in the initial interview with the client. Nevertheless, disclosure of information to others is often an issue when representing an elderly client. “The client deserves to choose whether to waive confidentiality rather than to simply lose the right by default because his attorney failed to properly inform.”⁸⁰ The lawyer should caution against waiver of confidentiality when the “other” is not a spouse or client.

Besides the concerns affiliated with the waiver itself, there is concern about claimed and actual undue influence, particularly if the “other” will benefit from the estate plan. The lawyer can suggest ways to elicit the help of others without the client waiving confidentiality. For example, one option is to allow the attorney to communicate with others for limited purposes, such as obtaining information, scheduling appointments, etc. When the client insists on another’s presence at any stage of the representation, a limited waiver is the best practice.

Whatever the parameters of these disclosures, they should be documented in the retainer agreement. For example, when the client wants to involve a child in the estate-planning process, the retainer agreement might state: “Confidentiality and undue influence have been explained to me. I am operating under my own free will and am not being pressured by my daughter in any way. For my own convenience, I request that my attorney share the following information

79. Powell & Link, *supra* note 77, at 1249.

80. Premack, *supra* note 29, at 463.

with my daughter [LIST INFORMATION OR PARAMETERS OF DISCLOSURE].”

Finally, the retainer agreement should address the issue of the client’s possible incapacity during the course of the representation. The elder law clinic at Wake Forest provides the client with a half page statement of its policy as an enclosure with the engagement letter.⁸¹ The letter simply states: “On occasion, our clients become ill while we are representing them. I am enclosing a page that explains how we would handle such a situation should that happen to you. Please let me know if you have questions about it.”⁸²

Explaining conflicts of interest, confidentiality, and their nuances based on the particular factual circumstances is essential in estate-planning cases and should be done in a patient and thoughtful manner. In turn, the client’s choices about these issues and how those choices may affect the client’s case should be explained and then documented in the retainer agreement.

When the lawyer represents a client in her fiduciary capacity, the lawyer is embarking on a unique attorney-client relationship. At the outset, the lawyer should explain to the client the difference between what it means to represent the client in a fiduciary capacity versus an

81. Wake Forest’s elder law clinic policy reads:

If concerns develop regarding your mental capacity and my representation of you has not been terminated by you or the Legal Clinic, I will continue to represent you and to protect your interests to the extent consistent with legal standards of practice and ethical responsibilities. North Carolina ethics rules provide that when a client is unable to act adequately in his own interest, the lawyer may take appropriate action in assessing the client’s capacity and considering protective action. This could include seeking appointment of a guardian.

To the extent I would continue to act on your behalf, I would only take actions that I reasonably believe to be in your best interests and consistent with your previously expressed wishes. Unless you direct me otherwise in writing, you authorize me in such representation: (1) to communicate with your family, your physicians and your other advisors and disclose to them such pertinent confidential information as I may determine to be reasonably appropriate under the circumstances, and (2) to represent one or more members of your family or other advisors acting in a fiduciary or like capacity for you or your property (excluding, however, any proceeding involving determination of your capacity).

Kate Mewhinney, Course Materials, Office Procedures, and Memos 14–14b (Spring 2002) (unpublished coursebook, Wake Forest University School of Law, Clinic for the Elderly) (on file with author).

82. *Id.*

individual capacity.⁸³ The lawyer should feel confident that the client understands the difference. The lawyer should then prepare a retainer agreement consistent with that understanding, explaining the client's role as fiduciary, and clearly defining the attorney-client relationship.

The attorney-client relationship is like other relationships: it evolves over time. Not every aspect of the attorney-client relationship and related ethical issues can be addressed by a written retainer agreement. Estate lawyers, however, can provide clients with a better understanding of what the parameters of the relationship are by having a written agreement that defines how and what the lawyer will do for the client. By addressing relevant ethical issues in the agreement, the lawyer will avoid potential ethical dilemmas during the course of the representation, and the client will have a better idea of what to expect should an ethical issue arise.⁸⁴ Finally, the lawyer should explain each aspect of the agreement to the client and reasonably ascertain that the client understands the agreement before she signs it. By defining the attorney-client relationship in writing, the client is more likely to understand the parameters of the relationship, and the lawyer is less likely to face ethical dilemmas.

F. Lesson Number Six: Ensure that the Client's Estate Plan Is Successfully Implemented

Recall my colleague's admonition—it doesn't do the client any good to prepare a document if the document doesn't do what the client actually wants. One troubling aspect of estate planning is that the lawyer may not know if what he prepared "worked." In other words, the lawyer may never know if the documents actually served the purposes for which they were intended. The Committee on Role and Function of Estate Lawyers recommends that lawyers (1) prepare the "documents necessary to implement the client's estate objectives," (2) ensure estate documents are "properly executed," (3) oversee appropriate asset transfers and required governmental reports, and (4) provide the client with instructions on establishing designation of

83. ACTEC Commentaries on the Model Rules of Professional Conduct, *supra* note 51; Randell W. Roth, *Avoiding Ethical Dilemma*, in *ADVANCED ESTATE PLANNING TECHNIQUES*, SG 062 ALI-ABA 191 (2002).

84. Fegyveresi, *supra* note 76, at 1011 (calling for mandatory standards for written disclosure and consent).

beneficiaries when appropriate.⁸⁵ Most estate lawyers follow these recommendations. I suggest that estate lawyers add to this list: educate the client, her agents, and surrogate decision makers about their roles and responsibilities under the estate plan. By educating the client and her respective surrogate decision makers,⁸⁶ lawyers can better ensure that the client's estate plan is successfully implemented.

First and foremost, the lawyer must educate the client about her responsibilities under the estate plan. Presumably, at the time the documents are formally executed, the client understands her estate documents and how they work. The clinic requires interns to thoroughly review each document with the client before the document is signed. The counseling technique of providing the client with concrete, factual examples to illustrate how each document works should be revisited at this stage. The goal is to confirm that the client understands the documents and her responsibilities under the estate plan.

The lawyer should give the client specific instructions about where to keep each estate document and confirm these instructions in writing.⁸⁷ Additionally, the lawyer should oversee the delivery of the documents, such as the durable power of attorney and advance directive, to the appropriate individuals. Following a set protocol is best, but allow room for modification if necessary. The clinic policy is to give the client the original documents and the appropriate number of copies at the time the documents are finalized. In turn, the client is responsible for delivering the documents to the relevant parties. Taking a different approach is warranted in an emergency situation or when the client is ill, bedridden, or marginally competent. Any time the lawyer has a concern about whether the documents will be properly delivered, he should take a more active role in delivering the documents.

Getting the documents in the hands of the right individuals does not guarantee that the plan will be properly implemented. One of the recommendations of the Joint Conference on Legal/Ethical Issues in the Progression of Dementia is better education for surrogate decision

85. *Report on the Committee, supra* note 73, at 231.

86. It may also be in the client's best interest to educate other relevant parties, such as doctors and banks.

87. Clients should be encouraged to file their wills with the local probate court when this is an option.

makers.⁸⁸ Estate-planning lawyers need to incorporate into their practices ways to educate these decision makers.

I will focus my discussion on two estate-planning documents: the advance directive and the durable power of attorney. I chose these documents because clients and their agents are often confused about how these documents work⁸⁹ and because these documents are included in most clients' estate plans. I will share some of the challenges associated with implementing these documents and suggest strategies to overcome these challenges, including ways to better educate the client and her decision makers.

1. ADVANCE DIRECTIVE OR MEDICAL POWER OF ATTORNEY

An advance directive "allows a person to exercise control and autonomy over his or her life decisions about health care decisions even after losing the ability to directly participate in the decision-making process."⁹⁰ It can also diminish "the anxiety and confusion surrounding choices to be made by family and friends of the incapacitated loved one when a clear indication of that loved one's wishes are expressed."⁹¹ Under Michigan law, the advance directive is known as a medical power of attorney or durable power of attorney for health care.⁹² The authority of the agent under a medical power of attorney is triggered when two physicians certify that the patient is unable to participate in her own medical decisions due to mental incapacity.⁹³ The agent is known as the "patient advocate."⁹⁴ The advocate must accept her responsibility in writing.⁹⁵

88. *Recommendations, supra* note 4, at 424. "Surrogate decision-makers need education about standards of personal decision-making and fiduciary obligation." *Id.*

89. "Not surprisingly, research into lay people's understanding of advance directives confirms that such expressions generate widespread confusion." Norman L. Cantor, *Advance Directive Instruments for End-of-Life and Health Care Decision Making: Making Advance Directives Meaningful*, 4 PSYCHOL. PUB. POL. & L. 629, 634 (1998). The problems identified include the surrogate decision maker being unable to act per the patient's instruction, physicians following "their own treatment preferences rather than those advocated by the patient's appointed agent or other surrogate," medical uncertainty, and, most importantly, poor drafting. *Id.* at 632.

90. Karen L. Shultz & Timothy D. Shultz, *Advance Directives: A Primer*, 63 TEX. B.J. 1034, 1036 (2000).

91. *Id.*

92. MICH. COMP. LAWS ANN. § 700.5501 (West 2002).

93. *Id.* § 700.5508(1).

94. *Id.* § 700.5506(1).

95. *Id.* § 700.5506(2).

Once the client chooses who she wants to appoint as patient advocate, the intern sends the proposed advocate a letter explaining the advocate's role, along with a copy of the patient acceptance form to be signed and returned to the clinic.⁹⁶ Before sending the letter to the proposed advocate, the intern asks the client to discuss her wishes with the proposed advocate and to ask the advocate to accept her role and responsibilities under the document. It is essential that the client speak personally with the proposed advocate. However, the client does not always talk with the proposed advocate as requested. In addition, if the client misunderstands the document or the advocate's role, that misunderstanding is conveyed to the prospective advocate. Despite these efforts, there is no real way for the intern to know that the prospective advocate understands her role, even if the client explains it correctly.

2. DURABLE POWER OF ATTORNEY

The durable power of attorney is an effective estate-planning tool to avoid guardianship or conservatorship proceedings⁹⁷ or to simply allow the client to delegate decision-making authority for limited or general purposes.⁹⁸ The "durable" nature of the power gives the agent authority beyond the principal's mental incapacity. The agent is known as the attorney-in-fact for the principal.

The document can be effective immediately or upon the principal's incapacity.⁹⁹ If immediately effective, the document works under general agency principles.¹⁰⁰ If, however, the client becomes mentally incapacitated, the agent must act as she believes the principal

96. See *infra* Appendix A, B (copy of sample letter and acceptance form under Michigan law).

97. See Daniel S. Brennan, *Durable Power of Attorney: An Ethical Option When Planning for Elderly Clients*, 3 GEO. J. LEGAL ETHICS 751, 754 (1990).

Many, if not all, of the problems inherent in the appointment of a guardian can be resolved through the use of the durable power of attorney. In the first instance, allowing another person to act on behalf of an elderly client avoids the stigma, disgrace and deprivation of rights that accompany the appointment of a guardian. Secondly, a durable power of attorney expedites the effective management of the client's affairs thus saving the time and expense of the guardianship proceeding.

98. *Id.* at 755. It should be noted that a durable power of attorney is not for every client. Sometimes the client simply has no one she trusts or no one willing to take on the responsibility. *Id.* at 756.

99. See *id.*

100. See *id.* at 758.

would have directed or in the principal's best interest.¹⁰¹ Unlike a medical power of attorney, there is no formal acceptance required by the attorney-in-fact.

As with the selection of the patient advocate, once the client decides whom she wants to appoint as attorney-in-fact, the intern will ask the client to discuss the appointment with the selected individual. The same concerns regarding the patient advocate's understanding of his role apply to the attorney-in-fact's understanding of his role. An additional concern is that the attorney-in-fact is not required to accept the appointment, leaving the intern with no firm indication that the named individual is willing to serve.

To respond to these concerns, I suggest the following strategies:

- Always follow-up with the client after instructing her to talk with the patient advocate or attorney-in-fact to ensure that the conversation has taken place and to get as many of the details of that conversation as possible. Document the information that you obtain for future reference.
- With the client's approval, send a letter explaining the role of the patient advocate, along with the acceptance, to the prospective patient advocate.¹⁰² Send a letter explaining the duties of attorney-in-fact to the prospective attorney-in-fact. In your letters, encourage the patient advocate and attorney-in-fact to contact you with concerns or questions.¹⁰³ Document any conversations you have with the patient advocate or attorney-in-fact.
- Offer to meet with the client and the prospective decision makers. This is strongly encouraged whenever you doubt that the decision makers understand their respective roles. Ideally, this meeting should take place before

101. See Rein, *supra* note 36, at 245. These are the two schools of thought on the agent's authority upon the principal's mental incapacity. *Id.* at 246. The lawyer should be familiar with the applicable state law in order to properly educate the client and her agents.

102. See *infra* Appendix A, B (sample letter to patient advocate and acceptance form under Michigan law); see also *infra* Appendix C (Duties of Patient Advocate, Questions and Answers Under Michigan Law, prepared by Sixty Plus, Inc., Elder-law staff attorney Josh Ard).

103. Keep in mind Model Rule 4.3 when talking with these individuals. Always make clear whose interests you represent and do not provide legal advice. See MODEL RULES OF PROF'L CONDUCT R. 4.3 (Dealing with Unrepresented Person) (2002).

the documents are finalized, but after the client has selected the decision makers.¹⁰⁴ However, it is often more practical for the client and decision makers to come to the office at the time of the signing of the documents.

The lawyer should always discuss the proposed meeting with the client first to obtain her approval. The lawyer should explain to the client the purpose of the meeting and the advantages such a meeting might have. If the client is reluctant, then the lawyer should explore why the client is reluctant, but ultimately should honor the client's decision.¹⁰⁵ Alternatively, the lawyer can suggest a phone conversation with the prospective decision makers or a conference call including the client.¹⁰⁶ Prior to the meeting or phone call, discuss confidentiality with the client and only share information that the client expressly authorizes.

If the client agrees to the meeting, ask her to assist you with arranging a convenient time for the meeting. In most instances, the prospective decision makers will be more likely to respond positively if the request comes from the client. Discuss with the client the best approach for her. Regardless of who arranges the meeting, send the prospective decision makers a letter confirming the meeting time and location, along with a brief explanation of what the meeting will entail.

Meeting with the prospective decision makers is an opportunity to explain and discuss their respective roles. Prepare a simple outline of each decision maker's responsibilities. Keep the explanations short and simple. If you have already sent the prospective decision makers written information, reviewing that information may be all that is needed. Answer questions, but do not give legal advice to the decision makers.¹⁰⁷ Always encourage them to seek legal advice if they are unsure of their rights.

While the meeting's focus is on educating the decision makers, it also can provide an opportunity for the client and her decision makers to discuss their expectations and concerns. It is important that the cli-

104. See discussion *infra* Part III.D. (Lesson Four) to determine when meeting with the family members or others may be appropriate at the counseling stage.

105. See discussion *infra* Part III.D. (Lesson Four) for ways to explore the client's reluctance.

106. This is also a useful suggestion when a face-to-face meeting is not feasible due to inconvenience, hardship, or an emergency situation.

107. MODEL RULES OF PROF'L CONDUCT R. 4.3.

ent and the decision maker have a meeting of the minds as to how the documents will work. Here again, using concrete, factual examples is helpful.

There is always the possibility that the lawyer will learn that a named decision maker is unable or unwilling to serve, or the client may change her mind about her choices. The lawyer needs to be flexible and revisit the client's choices as needed. Keep in mind that the meeting's goal is to ensure that the client's estate plan will work.

If all goes as planned, both the client and her decision makers will leave the meeting with a better understanding of their roles, and the client will have peace of mind, knowing that the plan is likely to be successful.

IV. Conclusion

Clients have much to teach us. The estate-planning clients of the Sixty Plus Elderlaw Clinic have taught faculty and students alike valuable lessons about what is important to them and their estate-planning goals. By heeding these lessons, estate lawyers will more clearly identify the client's estate-planning goals and, in turn, will design an estate plan that the client wants and understands. By taking a more active role in the implementation of the client's estate plan, lawyers help to ensure that the client's goals are achieved. In sharing these lessons with other lawyers, the hope is that what Mom would have wanted is what Mom gets.

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WHAT MOM WOULD HAVE WANTED 325

Appendix A

Cover Letter

Date
[pa]
[pa full address]
Dear [pa]:

You have been nominated by [name] to be [his/her] patient advocate in a Power of Attorney for Health Care. In order to serve you are required to sign a standard acceptance form, which we have enclosed in this letter. If for some reason you decline to serve, please let me know as soon as possible. We have also enclosed a document titled Rights and Duties of a Patient Advocate to help you understand what it means to act as a patient advocate. If you agree to serve, please sign and date the enclosed patient advocate acceptance form and mail it back to us in the enclosed stamped return envelope. You may keep the Rights and Duties of a Patient Advocate to help you in the future.

It is obviously impossible for any written instructions to explain a person's views on medical decision making fully. We urge you and our client to have a frank discussion. It might help to discuss situations you both know in which important medical decisions had to be made. Ask our client about what went well and where there were problems. This should help in discovering what is really important. We also want to remind you that your duty is to follow our client's instructions. This includes any instructions given to you orally after the document appointing you is signed.

Please call me if you have any questions.

Sincerely,
*Legal Intern
*.*Enclosures
cc: file

Appendix B

Acceptance of Designation as Patient Advocate

This designation shall not become effective unless the patient is unable to participate in medical treatment decisions.

A patient advocate shall not exercise powers concerning the patient's care, custody, and medical treatment that the patient, if the patient were able to participate in the decision, could not have exercised on his or her own behalf.

This designation cannot be used to make a medical treatment decision to withhold or withdraw treatment from a patient who is pregnant that would result in the pregnant patient's death.

A patient advocate may make a decision to withhold or withdraw treatment that would allow a patient to die only if the patient has expressed in a clear and convincing manner that the patient advocate is authorized to make such a decision, and that the patient acknowledges that such a decision could or would allow the patient's death.

A patient advocate shall not receive compensation for the performance of his or her authority, rights, and responsibilities, but a patient advocate may be reimbursed for actual and necessary expenses incurred in the performance of his or her authority, rights, and responsibilities.

A patient advocate shall act in accordance with the standards of care applicable to fiduciaries when acting for the patient and shall act consistent with the patient's best interests. The known desires of the patient expressed or evidenced while the patient is able to participate in medical treatment decisions are presumed to be in the patient's best interests.

A patient may revoke his or her designation at any time and in any manner sufficient to communicate an intent to revoke.

A patient advocate may revoke his or her acceptance to the designation at any time and in any manner sufficient to communicate an intent to revoke.

A patient admitted to a health facility or agency has the rights enumerated in Section 20201 of the public health code, Act No. 368 of the Public Acts of 1978, being Section 333.20201 of the Michigan Compiled Laws.

I understand the above conditions and I accept the designation as Patient Advocate for the Power of Attorney for Health Care Decisions of [name].
Dated: _____

[pa]

Patient Advocate

Appendix C

Rights and Duties of a Patient Advocate

Questions and Answers

Terminology

You have been nominated to serve as a patient advocate or successor patient advocate under a Power of Attorney for health care. The person who nominated you to make medical decisions is called a “**patient**” even though he or she may not be a medical patient at this time. Your title, should you agree to accept this responsibility, is “**patient advocate**.” If you have been nominated as “**successor patient advocate**”, this means that you are requested to serve if the primary patient advocate is unable or unwilling to serve.

Questions

1. What is a power of attorney for health care?

A Power of Attorney for Health Care is a written document in which a competent individual gives instructions about his/her health care, that another person, the patient advocate, can see is implemented at a later time should the patient lack the ability to make decisions for himself or herself. It is also known as an “advance directive” or “designation of patient advocate.” It is sometimes called incorrectly a “living will.”

2. When can a patient advocate act?

A patient advocate can only act (1) after the Power of Attorney for Health Care has been signed and witnessed and (2) when the patient is unable to participate in medical treatment decisions. As long as the patient can still participate, the choice is his or hers alone.

3. Who determines when the patient can no longer participate in medical treatment decisions?

The patient’s attending physician and one other physician or licensed psychologist will make that determination. If the patient’s religious beliefs prohibit an examination to make this determination, and this is stated in the Power of Attorney for Health Care, then the document itself will explain when a patient advocate can act.

4. What powers does a patient advocate have?

Basically, a patient advocate can make the same decisions a competent patient could, unless the Power of Attorney for Health Care limits the powers. Read Sections 3 and 4 of the Power of Attorney for Health Care carefully to see what powers the patient wants to grant to you.

5. Does a patient advocate have powers to withhold or withdraw life-sustaining treatment?

Yes, but only if the patient authorizes this. Please read Section 4 of the Power of Attorney for Health Care carefully.

6. What duties does a patient advocate have?

A patient advocate is required to follow the patient’s last wishes. The last wishes may be different from those in the Power of Attorney for Health Care. A patient is allowed to change his or her mind and the new wishes are binding if the patient advocate is aware of them. A patient advocate is not allowed to substitute his or her judgment in a decision unless the Power of Attorney for Health Care gives the patient advocate discretion to make that de-

cision. An important duty is to make sure that the doctor, hospital, or nursing home knows that the patient has appointed you under a Power of Attorney for Health Care. You should give them a copy if they do not have one on file. You have a continuing duty to make sure that the health care provider is following the decisions the patient has made and that you have made on his or her behalf.

7. When does my authority stop?

You continue to serve as patient advocate until (1) you resign, (2) you are removed by probate court, (3) the patient tells you to stop, or (4) the patient dies. If you become incapacitated, your authority is suspended while you are incapacitated.

8. What must I do if I agree to accept?

Sign and date an acceptance form and return it to the patient or to our office. You may be given more specific instructions about what to do with your signed acceptance. If you choose not to accept, please return the unsigned document to Sixty Plus and tell us that you do not wish to serve.

9. What if I have further questions?

Please feel free to call us at Sixty Plus (334-5760) if you have any further questions.

Drafted by:

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