
The New Wrinkled Faces of Capacity: The Older Client with Diminishing Capacity

by A. Frank Johns, Greensboro, North Carolina*
and Bernard A. Krooks, New York, New York

I. Introduction

Well into the Third Millennium, professionals across multiple disciplines are experiencing the aging of our society that was the demographic forecast of the early '80s. The reality of the forecast impacts financial services professionals, banking and trust professionals, accounting professionals, insurance professionals and legal professionals in striking similarity.¹ Professionals across the multidisciplinary spectrum are receiving an increasing number of older prospective clients² with diminished capacity, while at the same time being confronted with dilemmas of existing clients whose capacity has begun to diminish.³ These new wrinkled faces of capacity come in countless variation, often hidden by cosmetic makeovers that project youthful visual images and well-scripted sound bites of single words and phrases that project informed verbal understanding. Older customers and clients are presenting an illusion of mental competence sufficient to exercise informed consent in the purchase of products and services. However, what professionals are seeing may not be what they are getting. Likewise, what professionals are hearing may not be what they are getting either.

II. What Confronts the Professional

This article briefly examines the professional's position, and then explains ways by which the professionals and their professional organizations might respond in the future. Guidance is offered in the form of experienced, seasoned elder law attorneys, and how their primary organization, the National Academy of Elder Law Attorneys (Hereafter NAELA⁴) and other legal organizations are addressing the issue, and how future guidance available to lawyers should help other professions as well.

Consider two illustrations:

First Illustration—The Professional

Betty had an initial appointment with Professional regarding her current

financial portfolio. She was accompanied by one of her three children, Debbie. Betty explained that she was a widow, needing to consider asset preservation and estate planning and asking to hear more about new financial products that might better fit her status and age.

After reviewing basic facts and information, Professional explained a variety of options and products. Betty quipped that Professional was talking way above her head. Professional replied that everything would be presented in writing for her to carefully consider and that there would be a period in which she could choose to reject the purchase of products.

As Professional followed with a series of other questions, Betty began contradicting herself, seeming somewhat confused. Debbie intervened each time, answering for Betty. After Debbie answered several questions, Professional tried to redirect his questions to Betty, rephrasing them so that Betty only had to answer yes or no. However, when Debbie did not answer a question, Betty would answer incoherently.

Professional knew that Betty was struggling to understand just what she was doing.

Analysis

While the codes of ethics of many professional groups do not address issues of competence of customers or clients to make decisions based on informed

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¹ Recent articles have pointed to the change in customer characteristics, advising readers on how to market to them. See for example ERGO/GERO *Designing Marketing and Displays for the Older Consumer* <http://www.ergogero.com/pages/agingmarket.html> (2004).

html (2004).

² See ABA 2004 MRPC 1.18 Duties to Prospective Client, *infra* note 14, at 69-71.

³ For the sake of brevity, prospective and current client will be identified throughout the article as "client".

consent,⁴ at least one indirectly guides its members through responsible inquiry of the customer or client to assure that there is an informed understanding of the services or products being purchased.⁵ In the illustration above, professional gathered enough information, and had sufficient specific dialogue with Betty to confirm for him that Betty may have diminished capacity such that she might not be able to exercise informed consent. Is this situation becoming an increasing occurrence? What should Professional do in this situation? Does the answer differ between professions? As the lack of capacity becomes starkly apparent, so obvious it is without doubt, does Professional's ethical duty itself become apparent?

Without a doubt, the illustration above is playing out in increasing numbers, and will compound in volume and complexity as the Boomers finish being the "sandwiched generation" and focus on their own retirement needs.⁶ Each professional answers the question of what he or she should do based on how critical factors are weighed, and how the organization's or profession's ethics are applied. Here's an illustration of one response:

First Illustration—Continued

After all that Professional observed during the meeting, he suggested that Betty make an appointment with her lawyer to be sure she had her financial and health care powers of attorney up-to-date.

Analysis

In the continued illustration above, Professional exercised a multidisciplinary approach, bringing a lawyer into the process of assessing Betty's legal competence to execute advance directives. However, if Professional were confronted with the more difficult situation of Betty presenting with significant diminished capacity, the Professional should then consider bringing a medical or healthcare professional into the process. This could very well lose the sale, or commitment to a purchase of services. However, any action after the presumption of incompetence is raised crosses the ethical divide. If Professional has Betty execute documents when he believes she does not have

informed consent, then such action may amount to fraud or unfair and deceptive trade practice. The real problem is that the ethical boundary is never so obvious; there is rarely a bright line. That is why there are countless professionals crossing that ethical divide all the time as they struggle under the pressure and stress to produce and meet quotas. The option discussed below is from the perspective of elder law attorney. However, first consider the final installment of the illustration; it may prove instructive.

First Illustration—Final Result

After all that Professional observed during the meeting, he suggested that Betty make an appointment with her lawyer to be sure she had her financial and health care powers of attorney up-to-date. Debbie answered for Betty that she was attorney in fact and agent. Debbie then asked Betty if that was right, and Betty quickly agreed. Debbie turned to Professional and offered that her brother and sister lived out of state, but were in complete agreement with what Betty wanted to do. Betty joined in saying how all of her children loved her and everything was just fine. Professional then had Betty and Debbie sign all documents for the purchase of the financial products.

Two days later, Professional received a phone call from Betty, declaring that she was "exercising her right of rescission" and canceling the purchase of the financial products. In the background, Professional could hear a voice yelling instructions to Betty. Professional then insisted that he would immediately come out to the house to discuss rescission and sign documents. At the house, Betty and her son, Tom, greeted Professional; Debbie was nowhere to be found. When Professional asked Debbie's

⁴ See for example Society of Financial Service Professionals, *Code of Professional Responsibility of the Society of Financial Service Professionals*, <http://www.financialpro.org/About/CodeOf-ProfResp.cfm> (SFSP 2004"); American Institute of Certified Public Accountants, *AICPA Code of Professional Conduct, ET Section 300—Responsibilities to Clients*, <http://www.aicpa.org/about/code/sec300.htm> (AICPA 2004).

⁵ *Id.*, SFSP CPR, at 2-3, Canon 1 Fairness, R 1.5.

⁶ See Katherine K. Wallman, *Older Americans 2000: Key Indicators of Well-Being, Indicator 15—Memory Impairment*, at 25 (Federal Interagency Forum on Aging—Office of Management and Budget 2000); *Beyond 50.02: A Report to the Nation on Trends in Health Security*, Section II Overview of Trends affecting population age groupings from 50 to 85 (AARP 2002).

whereabouts, Tom took over the conversation and said that he was his mother's attorney-in-fact as of that morning.

III. The Lawyer

An understanding of how the legal profession ethically addresses the dilemma of a client's diminished capacity may guide professional organizations as their members ask them what to do. This has been the focus of NAELA and several organizations within the legal profession for several years.⁷ Consider the second illustration:

Second Illustration—The Lawyer

As Professional suggested, Betty had a consult with Attorney regarding her current situation. Debbie again accompanied her. Betty explained her situation to Attorney as was told to Professional. After reviewing the same basic facts and information received by Professional, Attorney began by asking Betty who his client was. Further discussion between them produced an agreement that only she was his client for the consult.

Further into the consultation, Attorney explained advance directives as a necessary diversion against guardianship while clarifying what risks were

involved and if there were any reasonable available alternatives. As she had responded to Professional, Betty quipped that Attorney was talking way above her head. Attorney replied that everything would be presented in writing for her to carefully consider and give written confirmation of further engagement. When Attorney asked about sharing confidences with, and sending copies of all correspondence to the other children, Betty first looked at Debbie before directing him to only share confidential information with Debbie for the time being.

Analysis

At the inception of the client-lawyer relationship, elder law attorneys and trust and estate lawyers must generally deal with competence, communication, confidences and loyalty.⁸ Initially, the ethical analysis of the client-lawyer relationship is not difficult as long as the lawyer knows to pose the question, "Who is the client?" to those making the initial appointment.⁹ As shown in the illustration above, the answer should come from the client. The client is often the elderly person seeking legal engagement for developing ways by which asset preservation and quality of life issues might be addressed for future needs.¹⁰ However, with other family members in the room, initial contact becomes more complicated when the older person who is seeking legal services has diminished capacity.¹¹ While inter-generational or family unit representation

⁷ See the many published manuscripts, articles and symposium manuals of NAELA, www.naela.org; the National College of Probate Judges, www.ncpj.org; the American College of Trust and Estate Counsel, www.actec.org and the ABA-Real Property Probate and Trust Section, <http://www.abanet.org/rppt/home.html>.

⁸ See Geoffrey C. Hazard, Jr. and William Hodes, *The Law of Lawyering* (2 ed. Aspen Law & Business 1996) (Supp. 2004), Pt. 1, at 1, explaining that the four duties (competence, communication, confidentiality and loyalty) of the core principles of the law of lawyering run to the client, and noting that The Kutak Commission symbolized the primacy of client interests by reversing the common "lawyer-client" reference; see also *ACTEC Commentaries on the Model Rules of Professional Conduct* (3 ed. ACTEC Foundation 1999). The *ACTEC Commentaries* have as their themes (1) the relative freedom that lawyers and clients have to write their own charter with respect to a representation in the trusts and estates field; (2) the generally nonadversarial nature of the trusts and estates practice; (3) the utility and propriety, in this area of law, of representing multiple clients, whose interests may differ but are not necessarily adversarial; and (4) the opportunity, with full disclosure, to moderate or eliminate many problems that might otherwise arise under the Model Rules. *Id.*, John R. Price, Reporter's Note,

ACTEC Commentaries, at 1.

⁹ See generally Bruce A. Green and Nancy Coleman, eds., *Ethical Issues in Representing Older Clients*, 62 *Fordham L. Rev.* 961 (1994)(hereafter "Green—Ethical Issues"); see also Restatement of the Law Third, *The Law Governing Lawyers*. Vol. 1, Ch. 2, *The Client-Lawyer Relationship*, at 125 (Cum. Supp. 2003).

¹⁰ See A. Frank Johns, *Ethics Changes and Application to Tax, Estate and Elder Law Attorneys*, 63rd New York University Tax Law Institute (Fall 2004).

¹¹ See Peter Margulies, *Access, Connection, and Voice: A Contextual Approach to representing Senior Citizens of Questionable Capacity*, in Green—Ethical Issues, *supra* note 10, at 1073, 1080; Jan Ellen Rein, *Clients with Destructive and Socially Harmful choices—what's an Attorney to Do? Within and Beyond the Competency Construct*, in Green—Ethical Issues, *supra* note 10, at 1101, 1154; Robert B. Fleming and Rebecca C. Morgan, *Lawyers' Ethical Dilemmas: A "Normal" Relationship When Representing Demented Clients and Their Families*, in Joint Conference on Legal/Ethical Issues in the Progression of Dementia, 35 *Georgia L. Rev.* 735 (2001)(hereafter "Fleming and Morgan—Lawyers' Ethical Dilemmas").

is not within the scope of this article,¹² what is within its scope is the stress that presses against the ethical boundaries of lawyering as the lawyer begins the client-lawyer relationship. That is the reality of the consult in the first illustration where the attorney is gaining an understanding of the dynamics presented by client and her controlling daughter.

Attorney took the first step, as reasonable legal practice would dictate. Before representation is established, there should be confirmation that the prospective client has sufficient competence or capacity to enter into the client-lawyer engagement.¹³ Once client identification is confirmed, the broader spectrum of an elder law engagement usually addresses quality of life and quality of services to the elder in the family.¹⁴ Concomitant with medical and health care needs, the engagement may also delve into consideration of long term care insurance, estate and divestment planning for tax or governmental benefits consideration, asset exemptions and transfers and in-home options often leading to transition into assisted living or nursing home environments, or even transition of residency, domicile and state citizenship.¹⁵

However, because of the needs of many older clients, elder law attorneys often assess or have assessed the client's competence to engage counsel, having sufficient cognitive function to exercise informed consent to enter into a contractual relationship that delivers future legal services.¹⁶ Many elder law attorneys have included as an element within the scope of prospective representation a reasonable screen, assessment or calculation of client capacity.¹⁷ Acting with sensitivity, reasonable legal competence

and diligence, elder law attorneys assess client capacity, while honoring client confidences and protecting property.¹⁸

At this initial stage of the illustration, the client-attorney relationship presents as rather benign, if not typical. Attorney has taken appropriate steps to gain an initial understanding of the client, eliciting from Betty what seem to be her independent decisions based on informed consent. The recently revised Rules of Professional Conduct of the American Bar Association ("hereafter ABA Model Rule") set out new definitions and edited current rules addressing this area of client capacity.¹⁹ Under new ABA Model Rule 1.0(e), defining informed consent, Attorney has made clear his obligations to Betty in connection with obtaining her consent related to conflicts of interest and the scope of representation.²⁰ This is where the new rule definition is more practical and user friendly. The new rule definition replaces the concept of "consent after consultation" with the somewhat more familiar concept of "informed consent." As defined, "informed consent" denotes agreement "after the lawyer has communicated adequate information and explanation about the material risks of and reasonably available alternatives to the proposed course of conduct."²¹

In the initial part of the conference, Attorney has followed the rule, going beyond that which is mandatory by offering a written contract that confirms Betty's consent. Ordinarily, a client-lawyer situation such as this does not require the client to sign a written agreement. This remains the rule in spite of the ABA Ethics 2000 Commission's recommendation otherwise.²²

¹² See Russell G. Pearce, *Family Values and Legal Approaches to Conflicts*, in Green—Ethical Issues, *supra* note 10, at 1253, 1258, n.17, citing Patricia M. Batt, Note, *The Family Unit As Client: A Means to Address the Ethical Dilemmas Confronting Elder Law Attorneys*, 6 Geo. J. Legal Ethics 319 (1992); see also Thomas L. Shaffer, *The Legal Ethics of Radical Individualism*, 65 Tex. L. Rev. 963 (1987).

¹³ See Fleming and Morgan—*Lawyers' Ethical Dilemmas*, *supra* note 12, at 750-751; see also Michael A. Stratton, *Hit Hard, Not Low*, TRIAL, 60 (September 2003).

¹⁴ See William E. Adams and Rebecca C. Morgan, *Representing the client Who Is Older in the Law Office and in the Courtroom*, 2 Elder L. J. 1, 2 (Spring 1994).

¹⁵ *Id.*

¹⁶ See Green—Ethical Issues, *supra* note 10, at 18-21.

¹⁷ See Fleming and Morgan—*Lawyers' Ethical Dilemmas*, *supra* note 12, at 750-751.

¹⁸ See Jeffery N. Pennell, *Ethics, Professionalism and Malpractice Issues in Estate Planning and Administration*, 2 (ALI-ABA 2002).

¹⁹ See ABA Center for Professional Responsibility, 2004

Model Rules of Professional Conduct, (hereafter ABA 2004 MRPC) http://www.abanet.org/cpr/mrpc/mrpc_home.html. (ABA 2004). Adoption of the Model Rules in virtually every state, whether in whole or in part is the broadest disciplinary mandate that is uniform across the country); see also Pennell, *Ethics, Professionalism and Malpractice Issues in Estate Planning and Administration*, *id.*, at 19.

²⁰ See ABA 2004 MRPC 1.0(e) Terminology—Informed Consent, *id.*, at 7.

²¹ *Id.*, and Comments (6) and (7), at 9-10.

²² This is one of the very few places where the ABA House of Delegates parted ways with the ABA Ethics 2000 Commission. The Commission believed that the time had come to upgrade the preference of a writing of the scope of the representation and the basis or rate of the fee and expenses to an across the board directive. Where one of the greatest areas of misunderstandings and disputes is found in lawyer fees, the Commission sought to maximize understanding by requiring a written agreement. A divided House of Delegates found the time had not come to require across the board writings. See http://www.abanet.org/cpr/e2k-summary_2002.html.

Second Illustration—The Lawyer Continued As the Consult Proceeds, Everything Begins to Change

As Attorney followed with a series of other questions, Betty contradicted herself and seemed somewhat confused. Debbie intervened, answering for Betty. After Debbie answered several questions, Attorney redirected his questions to Betty and rephrased them so that Betty only had to answer yes or no.

Toward the end of the conference, Attorney asked Betty who she wanted to be her agent on financial and health care powers of attorney. Debbie answered for Betty that she would be attorney in fact and agent. Debbie then asked Betty if that was right, and Betty quickly agreed. Debbie turned to Attorney and offered that her brother and sister lived out of state, but were in complete agreement with what Betty wanted to do. Betty joined in saying how all of her children loved her and everything was just fine. Attorney then stood up, inviting Debbie to return to the reception area while he spoke with Betty separately. Debbie insisted that was not necessary, elevating her voice, and elevating Betty's agitation as well. Attorney asked Betty if she would talk to him separately. Debbie retorted that Betty could not talk to him without her being present.

The analysis turns to Attorney's first impression of Betty's capacity. Obviously, he made the decision that Betty had sufficient capacity to engage him for the initial conference because he continued the conference believing that she was his client. After Betty showed greater confusion, Attorney could have conducted an informal screen, assessing from a legal position Betty's

basic understanding sufficient to make choices.

A soon to be published issue of the NAELA Quarterly includes an article by Dr. Jennifer Moye focused on diminished capacity and serving elderly clients. Moye's article, *Evaluating the Capacity of Older Adults: Psychological Models and Tools*,²³ reviews the "work in progress" of what she describes as the American Bar Association and the American Psychological Association examination of the graying of America, the increasing prevalence with age of diseases affecting cognition, the need for attorneys to do some sort of preliminary and informal assessments of capacity, and the dilemmas presented by revised ABA Model Rule 1.14 (Client with Diminished Capacity). This examination will soon be producing a handbook that provides guidance to non-medical, psychological or health care professionals when addressing client capacity.²⁴ Even though the handbook is not available, Attorneys, and other professionals as well, have guidance from other sources in making an informal assessment.

As for informal assessments, screens and other instruments, there are many from which to choose.²⁵ Some writers suggest that elder law attorneys use their own simple screening tool or tools: (1) Client Capacity Indicators—Professor Larry Frolik offers a one page, six section questionnaire that is a good beginning;²⁶ (2) Mental Ability Assessment, Functional Assessment and Safety Assessment - Harry Margolis has developed in the Elder Law Forms Manual three simple assessment tools that construct questions that look at mental ability, basic activities of daily living and self help determination, and concerns for physical safety of the client;²⁷ (3) Client Capacity Assessment - Michael Gilfix offers a client capacity assessment form directed contextually, rather than globally, based on a general assessment of capacity. The form offered in his forms manual is developed within the context of estate planning. Gilfix suggests that for different issues, or objectives, the elder law attorney construct the questions relevant to the subject, and critical to development of a particular legal document, or accomplishment of a particular goal. It is interesting to note that at the bottom of the form, Gilfix suggests that the assessment should be given in a way that eliminates distractions, that the assessor speak loudly and clearly, and that the assessment be given based on the assump-

²³ See Jennifer Moye, *Evaluating the Capacity of Older Adults: Psychological Models and Tools*, 17 NAELA Quarterly, 3 (Summer 2004)(Hereafter "Moye—Capacity").

²⁴ *Id.*

²⁵ This portion of the article was part of a larger manuscript of author Johns. See A. Frank Johns, *Multiple and Intergenerational Relationship, The Professional Lawyer*, 7, 18-21 (ABA 2001).

²⁶ See Lawrence A. Frolik and Melissa C. Brown, *Advising the*

Elderly or Disabled Client, App. 2-3 Client Capacity Indicators (Rosenfeld Launer Publications 1992) (Warren Gorham & Lamont 1999 & Cum. Supp. Rel. 4/04).

²⁷ See Harry Margolis, *Competency Evaluation*, Ch. 4, Elder Law Forms Manual, see specifically Form 4.2 Functional Assessment, Form 4.3 Safety Assessment, and Form 4.4 Mental Ability Assessment (Little Brown, 1994) (Supp Rel. 1999).

tion “that you will have a competent client.”²⁸ (4) Over the years, several, more sophisticated, instruments have been designed for non-medical, non-psychological, and non-health care professionals in recent years to screen or preliminarily assess the ability of a client or family member to exercise informed consent. The instruments qualify in broad categories the client’s ability to exercise sufficient cognitive function in order to maintain a threshold level of capacity necessary to access alternatives to guardianship or conservatorship:²⁹ (a) The Legal Capacity Questionnaire (LCQ);³⁰ (b) The Mini-Mental State Examination (MMSE);³¹ (c) The Client Capacity Screen (CCS);³² (d) The Behavioral Dyscontrol Scale (BDS).³³ Moye makes clear that while lawyers, and other professionals as well, are capable of screening or informally assessing the capacity of a client, they should never attempt full-blown psychological testing or evaluation.³⁴

In the illustration, the more conventional legal practice would be for Attorney to advise Betty to first see her doctor, or seek psychological, psychiatric or geriatric evaluation. This is also where more experienced NAELA members would insist that Betty be interviewed in private, outside of Debbie’s influence.³⁵

Even without the screen, Attorney concluded that Betty had diminished capacity. As important, he further concluded that Debbie was exerting undue influence over Betty. Based on this set of facts, the ABA Model Rules allow Attorney certain discretion, especially in the context of disclosing confidential client

information to prevent harm to Betty.³⁶

What follows is the final addition to the illustration played out with Attorney taking a different action.

Second Illustration—End of the Story Attorney Action and Client Reaction

Attorney sensed that Debbie was influencing Betty’s decisions and that Betty’s capacity was diminished. He explained his conclusion that he could not adequately represent Betty and that it would be best if she sought other counsel.

No fee was paid. As Betty left with Debbie, Attorney saw what he thought were bruises on her arms. From his office window, Attorney could see the firm parking lot. There he saw Debbie arguing with Betty, shoving her into the car and recklessly racing down the street.

Two days later, Attorney received a call from Betty’s son, Bob. He wanted to know what happened at the meeting. Attorney told him everything; especially how Attorney saw what he suspected was Debbie’s abuse of

²⁸ See John Regan, Michael Gilfix, Rebecca Morgan and David English, *Tax, Estate and Financial Planning for the Elderly: Forms and Practice*, Part A—Managing the Elder Law Practice, Check Lists A:6.1 Possible Indicators of Incapacity; Undue Influence or Abuse; B:2.5 Planning for Incapacity, B:2.6 Incapacity Decisions; Form A:6.1 Client Capacity Assessment (Matthew Bender 1992 & Cum. Supp. Rel. 12/03).

²⁹ However, there are those who believe that such a screening process or preliminary assessment is outside the realm of the practice of law and should not be a part of the attorney’s office practice. There has also been criticism of the instruments, specifically whether or not the screens and assessments sufficiently examine the ability of an individual or a client to function, or seek assistance to function in life. Regardless of the instrument used, attorneys may be too far out of their expertise to deal with such a complex area. It has been difficult even for psychiatrists and neurologists. See J. Aker, A. Walsh, J. Beam, *Mental Capacity—Medical and Legal Aspects of the Aging*, (Shepard’s/McGraw Hill, Cum. Supp. 1993), Ch. 4, Diagnosis of Brain Damage; cf., Baird Brown, *et al.*, *Mental Capacity—Legal and Medical Aspects of Assessment and Treatment*, *Mental Capacity*, § 7.06 Mental Status Exam: (2 ed. Shepard/McGraw Hill, 1994).

³⁰ See Baird Brown, *Determining Clients’ Legal Capacity*, IV The Elder Law Report, no. 7, at 1 (Little Brown 1993). (Brown provides a careful explanation of the LCQ, a guide for giving the LCQ and an answer sheet for scoring the LCQ); see also, Baird

Brown, *et al.*, *id.*, *Mental Capacity*, § 5 Assessment of Capacity. (This is the second edition of the Walsh text).

³¹ See M. Folstein, S. Folstein, P. McQue, *Mini-Mental State: A Practical Method for Grading the Cognitive State of Patients for the Clinician*, 12 J. of Psychiatric Research, 189-198 (1975). The MMSE has been identified as the most widely used test with excellent test and retest reliability.

³² See Steven Fox, Suzanne McNeely and Charles Ingman, *A Client Capacity Screen: A Tool for Evaluating Mental Capacity*, 4th NAELA Symposium, § 11 (1992). The authors note that the client capacity screen is not a replacement for the use of medical professionals, but provides a structure for assessment which assures relevant information, and provides the attorney with an easy and accessible method of documenting the file regarding such assessment.

³³ See Baird Brown, *Determining Client’s Legal Capacity*, *supra* note 26, (Brown explains that the BDS is a standardized test designed to assess the integrity of the frontal lobes of the brain.)

³⁴ See Moye—Capacity, *supra* note 24, at 6.

³⁵ Goals recommended by the NAELA Professionalism & Ethics Committee to be published by the NAELA Board will strongly advise NAELA members that this is a best practice to which all members should aspire.

³⁶ See ABA 2004 MRPC 1.6(b)(1) and 1.14(b) *supra* note 20, at 22.

Betty in the parking lot. . Bob said he would hire Attorney to prepare the powers of attorney and that he would fly into the city to arrange for Betty to sign them. Attorney agreed, assuming that Betty had never been his client.

Analysis

To paraphrase prominent American figures early in the last century, now this is another fine mess Attorney has gotten himself into.³⁷ However, experienced elder law practitioners have been through worse. Not that they would respond as Attorney did, but parent-child problems, including elder abuse are often present, and always messy.

Attorney has made the wrong assumption. New ABA Model Rule 1.18—Prospective Client³⁸ provides guidance relating to those who have not actually become clients, but the lawyer has had sufficient contact and information divulged that confidentiality and conflicts are in play. Here, Betty has provided Attorney with important information that must be maintained as confidential client information and communication. She has also committed to a client-lawyer relationship, at least through the initial consult. If Bob and Attorney assume that Bob is Attorney's client, then under ABA Model Rule 1.18, Attorney should have determined if there were material conflicts in Attorney's representation of Bob in relation to Betty. If there were, Attorney should have informed Betty of them, asking her to sign written authorization for Attorney to represent Bob.³⁹ If Bob is not the client, but is paying the legal fee for Betty, then Attorney must comply with ABA Model Rule 1.8(f) that deals with such fee payments.⁴⁰ By telling the son everything before receiving Betty's informed consent, Attorney has violated Betty's right to confidentiality.⁴¹

In the context of client representation and confidentiality, the illustration is simple and the analysis easy because there is but one client—Betty. Attorney and Betty were in agreement that Attorney was not representing Debbie or the other children. No matter how much the information would help the two children, Attorney should have maintained Betty's confidential client information, honoring his duty of loyalty to her.

In situations like this one, when a third party contacts the attorney on behalf of a prospective or current

client, the attorney should inform such person of the attorney's obligation to hold inviolate the client's confidences and secrets. The attorney also needs to explain that in addition to his duty to preserve the confidentiality of attorney/client communications, he owes his client his undivided loyalty, assuring against conflicts of interest.⁴²

The ABA Model Rules provide lawyers with discretion to reveal or disclose information in those situations specifically expressed in the black letter of the ABA Model Rules.⁴³ In this illustration, ABA Model Rule 1.6(b)(1) may be applicable insofar as Attorney may conclude that he must divulge confidential client information to Bob "...to prevent reasonably certain death or substantial bodily harm."⁴⁴ Comments 14 and 15 to Model Rule 1.6, impressing on Attorney the strong suggestion that diversionary measures be taken before exercising the discretionary exceptions, qualify Attorney's discretion.⁴⁵ Based on the qualifications suggested in the comments, Attorney spoke too fast and said too much to Bob, divulging Betty's confidential information based on the belief that discretionary disclosure would prevent Betty from suffering further financial and emotional abuse at the hands of Debbie. Attorney should have called Betty and explained that Bob was there, asking for her authorization to divulge confidential information and to allow Bob to pay for her further representation in the form of new advance directives.

Additional support for Attorney's discretionary exercise of disclosure is found in revised ABA Model Rule 1.14—Client with Diminished Capacity.⁴⁶ Since Attorney concluded that Betty's capacity was diminished, then he could have disclosed after careful consideration of sections (b) and (c) of ABA Model Rule 1.14. Even under this part of the ABA Model Rules, Attorney must confine his disclosure to Bob to that which would be reasonably necessary to protect Betty's interests.

IV. Conclusion

There is no question that the new wrinkles of diminished capacity will be ever present, even escalating in the years to come as the Boomers hit old age. The organizations of professionals in the many disciplines that serve the elderly must address the ethical strains that confront their members.

³⁷ *Another Fine Mess* is a remake of one of Stan Laurel and Oliver Hardy's first films together, *Duck Soup*. See <http://www.laurel-and-hardy.com>.

³⁸ See ABA 2004 MRPC 1.18, *Duties to a Prospective Client* *supra* note 20, at 69-71.

³⁹ *Id.*

⁴⁰ See ABA 2004 MRPC 1.8 *Conflict of Interest: Current Clients: Specific Rules*, *supra* note 20, at 36.

⁴¹ See ABA 2004 MRPC 1.6 Confidentiality of Information,

supra note 20, at 22.

⁴² See ABA 2004 MRPC 1.7 *Conflict of Interest: Current Clients: General Rules* *supra* note 20, at 26.

⁴³ See ABA 2004 MRPC 1.6, *supra* note 20, at 37.

⁴⁴ *Id.*

⁴⁵ *Id.*

⁴⁶ See ABA 2004 MRPC 1.14 *Client with Diminished Capacity*, *supra* note 20, at 58-61.