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Ethical Issues in Decision Making

By Peter J. Strauss & Nancy Neveloff Dubler

As our population ages, increasing emphasis is being placed on safeguarding the elderly client's right to participate in decision making. Because advancing age often is accompanied by declining health or diminished capacity, estate planning issues are complicated by several questions, particularly the question of who is the client and questions about client competence.

Competence

Lawyers are being asked to make ethical judgments about what constitutes competence and what factors contribute to incapacity. The Model Rules define the lawyer's duty to the client as follows:

(a) When a client's ability to make adequately considered decisions in connection with the representation is impaired, whether because of minority, mental disability or for some other reason, the lawyer shall, as far as reasonably possible, maintain a normal client-lawyer relationship with the client.

(b) A lawyer may seek the appointment of a guardian or take other protective action with respect to a client, only when the lawyer reasonably believes that the client cannot adequately act in the client's own interest.

ABA Model Rules of Professional Conduct, Rule 1.14 *Client Under a Disability*, adopted by the House of Delegates, August 1983.

But how can a lawyer determine when a client's ability to make "adequately considered decisions" is "impaired"? The President's Commission for the Study of Ethical Problems in Medicine and Biomedical and Behavioral Research has suggested the following guidelines for determining a basic level of competence.

Decision-making capacity requires, to a greater or lesser degree:

1. possession of a set of values and goals;
2. the ability to communicate and to understand information; and

3. the ability to reason and to deliberate about one's choices.

President's Commission for the Study of Ethical Problems in Medicine and Biomedical and Behavioral Research, *Making Health Care Decisions*, Vol. I, p. 57 (1981).

Although this definition was developed for use in determining patients' rights to provide informed consent to medical care, it applies equally well to situations in which a lawyer seeks to

ability diminishes, such as living trusts and durable powers of attorney. Some states specifically provide that these delegations of authority apply to health care decisions. California, for example, has enacted a statute authorizing durable powers of attorney for health care decisions, which provides specific form and language and offers enhanced future protection for the client. (Durable Power of Attorney for Health Care Decisions Act, Sections 2410-2443, California Civil Code.) But the effectiveness and form of these documents varies from state to state, and there is some question about enforceability outside the jurisdiction in which they are executed.

Capable clients who execute appropriate documents protect themselves, their families, medical care givers and legal representatives from the risks and discomforts of a future confrontation with legal and ethical ambiguity. The problem, however, is that the planning must be part of an ongoing process, which includes regular periodic re-assessments.

Who Is the Client?

When the relative of a disabled elderly patient seeks legal advice on behalf of the patient, the ethical question shifts from competence to who is the client? If the lawyer concludes that the patient's incapacity forces a family member to make decisions, a number of questions arise.

1. What is the attorney's obligation to assure adequate legal representation

Lawyers are being asked to make ethical judgments about what constitutes competence and what contributes to incapacity

assess a patient-client's decision-making ability.

How we define legal capacity, however, depends on which statutes and judicial opinions we use. In some states, one may be "competent" to execute a will but not to enter a complex contract. In another, one may execute a contract but still be judged legally incapable of caring for minor children. Likewise, in some jurisdictions, the elements required for testamentary capacity are more rigorous than those demanded by contractual capacity; in other states, the reverse may be true. (See Selected Readings on decision-making capacity and competence on the opposite page.)

If the client is decisionally capable, the lawyer may offer a range of options to help prepare for the day when that capa-

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for the disabled elderly patient?

2. Does the obligation to ensure legal representation exist only when the needs of patient and family clearly conflict?

3. Is it appropriate to transfer the patient's assets to a family member to create future Medicaid eligibility for the patient? Suppose the transfers would limit certain future care options for the patient, but would clearly protect the family from future poverty? Who should decide if there is a conflict, and who should resolve it?

4. In evaluating who is the client, should the lawyer's decision be affected by the patient's medical condition, such as the existence of fluctuating paranoid ideation symptoms or other transitory mental impairment?

The answers to these questions seem to be inextricably intertwined with the issue of client capacity. The more able the patient-client is to understand his or her plight, explain goals, and plan for the future, the less likely it is that the question of representation will arise.

Judicial Proceedings

In recent years, states have enacted a form of limited guardianship or conservatorship. These exist in addition to the more traditional guardianship actions that require a prior judicial finding of incompetence. The humiliation of being labeled incompetent, and the paucity of rights that this label destroys, has led to a statutory preference for less drastic and restrictive interventions.

Under a limited guardianship or conservatorship, a capable individual manages the affairs and property of a person who, because of advancing disease or disability, is functionally incapable of appropriate self-management. In theory, most limited guardianships and conservatorships do not grant jurisdiction over the person. In fact, however, most statutes provide that the fiduciary not only supervise financial management but oversee an approved personal care plan. Thus, in the real world, whoever controls the purse controls the power. (Mitchell, A., *The Objects of Our Wisdom and Our Coercion: Involuntary Guardianship for Incompetency*, 52 SO. CAL. L. REV. 1405 (1979); Sherman, R., *Guardianship: Time for a Reassessment*, 49 FORDHAM L. REV. 350 (1980).)

This is most evident and dramatic in cases involving nursing home place-

ment. If the guardian or conservator is empowered to spend money for patient care and the patient is incapable of objecting, what would prevent the conservator from institutionalizing the patient against his or her will? In most states there is no way to ensure that the representative is an effective advocate for the patient-client who can no longer communicate his or her wishes and who has not previously stated them.

Although statutes generally provide for the appointment of a guardian-ad-litem in a conservatorship or guardianship proceeding, they often fail to define the guardian's role. Should the guardian-ad-litem represent the present "spoken choice" of the patient, or should he or she act as an independent fact finder for the court? (The term "spoken choice" was coined by Connie Zuckerman, an attorney with the Department of Epidemiology and Social Medicine, Montefiore Medical Center in New York, to describe the speech of a demented but articulate patient.) And what affect does the introduction of a guardian-ad-litem have on the role of petitioning attorney? For example, does

the attorney for the petitioner have any obligation to protect the best interests of the patient? Likewise, what is the obligation of an attorney who is called on to represent the patient when he or she believes the patient's "spoken choice" clearly conflicts with the patient's best interest?

Intertwined with these questions is the issue of patient-physician privilege. In a judicial proceeding for the appointment of a guardian or a conservator, can the physician be compelled to testify about the condition of the proposed conservatee or incompetent? Can the testimony be compelled over his or her objection? Can the physician's records and testimony be subpoenaed? Can the physician informally assist the attorney who represents the petitioner? And does this collaboration interfere with the patient-physician privilege?

Institutions and Conflict

It is now settled in law and supported by bioethical theory that "every human being of adult years and sound mind has a right to determine what shall be done

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Selected Readings

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Firm Advice

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ing new client histories, or making appointments, employees are an extension of the firm. Frequent errors, poor judgment, or an abusive manner may tarnish the firm's image and lose clients. In many firms, quality control is not an issue until a crisis arises. One way to prevent a quality-control crisis is to give employees a clear understanding of expectations. However, an employee who lacks a commonsense approach to quality may be incapable of producing acceptable work.

15. Constant complaining. Complainers like to tell you what is wrong, where others have failed, and why solutions will not work. Their negative assessments rarely have a constructive basis, but if you listen carefully you may glean some implicit ideas for change. A regular diet of complaining can create a negative work environment and sour the attitudes of others. Chronic complainers are responding to a basic need to complain about life. They are not interested in solutions; complaints continue in spite of improvements in a situation. Test an employee who seems to be a chronic complainer by listening to a specific complaint and responding to it with change. Chronic complainers will tell you why the solution is worse than the problem.

16. Police-state mentality. Some employees will work diligently only if an office manager or senior partner is present. Once the cat is away, however, the employee will attend to personal business. Because law office supervisors tend not to be watchdogs and attorneys are often out of the office, employees must be motivated to work autonomously. One way to spot an employee with the police-state mentality is to return to the office periodically and ask if work assignments are completed or even begun.

17. Incomplete work. Although much legal work is not completed on time, deadlines are an important part of the practice. Delayed appeals, mailings, and crucial telephone calls can be catastrophic for the client and the firm. Missed deadlines may be a product of an employee's inability to prioritize tasks. Supervisors can help by clarifying priorities and setting reasonable and workable deadlines. If work assignments remain incomplete, look for other problems described above.

18. Negative attitude. An employee who has a chip on his or her shoulder may be a constant complainer who has difficulty interacting with clients. Often a negative attitude indicates that the employee is dissatisfied with the job or the firm. Sometimes one particular grievance, which is solvable, triggers the underlying feelings. But the problem also may indicate unfocused personal frustration, which

can be debilitating for other workers. The employer's ability to help may be limited.

19. Stealing. There are all kinds of valuables in a modern law office. Some employees are unable to resist the temptation to help themselves to office supplies, petty cash, expensive equipment, expense account vouchers, or to make personal long-distance telephone calls. Policies that clearly distinguish between acceptable use and abuse will prevent many problems and protect the firm from loss and liability.

20. Ongoing performance problems. Little or no performance progress after repeated assistance, evaluations, and notifications may indicate a need for more information. Supervisors should provide additional training, clarify instructions, or outline specific expectations. However, a series of unsatisfactory performance evaluations may indicate that the employee is either unwilling or incapable of improving performance.

Human interaction plays an important role in job performance. Although isolated behavior may not tell the whole story, this listing, reviewed in its entirety, should provide a framework from which to identify performance problems that need attention. It may be used as a basis for six-month and annual evaluations or to help trigger constructive criticism and suggestions for performance improvement or behavioral change. **CL**

Ethical Issues

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with his own body." *Schloendorff v. Society of New York Hospital*, 211 N.Y. 125, 105 N.E. 92 (1914). This concept of self-determination, the constitutional right to privacy, and expansion of the physician's duty to share information support patient rights to consent to or to refuse

treatment. In reality, however, treatment decisions are often driven by institutional self-interest. And the desire of society and the medical community to provide care often conflicts with the individual's right to refuse it.

Ethical issues dominate advocacy for elderly persons with questionable, compromised, diminished, or fluctuating ability to make adequately considered decisions. Unlike juveniles and the congenitally retarded, who are incapable of

making legally adequate and binding decisions, the elderly may not be disqualified from decision making on the basis of age alone. Each individual's evolving circumstances and capacity must dictate his or her role in planning for the future. In addition, lawyers and the courts must not only be sensitive to the client's physical and mental health, but to potential conflicts between the interests of the patient, his or her family, and health care professionals and institutions. **CL**

The Needy

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there seems to be no express prohibition against them. A supplemental trust

clause may be added to a discretionary spray trust by adding the following:

...Notwithstanding the above, the Trustee may make distributions to and for a child in addition to benefits the child receives from other sources only for extra and supple-

mental care and education of child. It is my express purpose that this Trust be used (a) for a child only for emergency and special needs and (b) for any other descendants after making such limited provisions for child, *and no distribution*