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The Sense of a Client: Confidentiality Issues in Representing the Elderly

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THE SENSE OF A CLIENT: CONFIDENTIALITY
ISSUES IN REPRESENTING THE ELDERLY

BURNELE V. POWELL* and RONALD C. LINK**

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INTRODUCTION

SCENT of a Woman,1 the riveting movie that earned Al Pacino an Academy Award for best actor, provides an unexpected metaphor for the legal and ethical responsibilities of the lawyer who represents elderly clients. At a time when retired people are still inaccurately stereotyped

1. (City Lights Films 1992).
as weak, passive, doddering and dependent septuagenarians,² Pacino's portrayal of Lieutenant Colonel Frank Slade provides a striking counterexample. The retired army officer, though physically handicapped, is shown to have a powerful personality of depth and dimension, biting wit, penetrating perception, irreverence, and a subtle, though iconoclastic, charm.

To be sure, Slade is not very elderly, having been medically discharged from the army only a few years prior to the story's opening. But even though Slade enjoys relative youth, he suffers from a serious disability; he was blinded in the explosion that ended his military career. When first we meet him, Slade lives an increasingly isolated existence in the converted garage behind his niece's house, consumed by self-pity, alcohol, military bluster, and the memories of past glories.³

The movie begins when prep school student Charlie Simms⁴ responds to a job notice seeking care for a homebound relative over the Thanksgiving weekend. Charlie's expectation of a quiet holiday caring for a disabled retiree is shattered by Slade's plan to have a final weekend fling featuring the best of New York City: a suite at the Waldorf-Astoria, dinner at the Oak Room, and a search for the "scent of a woman" with whom he may dance a breathtaking tango.

From the beginning of the movie the audience can see that Slade longs to go beyond his solitary existence in his converted garage, and have a meaningful life in which he has an opportunity to have control over his environment. He feels that his weekend with Charlie will be his last chance to take risks and achieve any sort of personal success. Slade realizes that because of his blindness he must rely on his sighted helper Charlie in order to reach his goals. Each scene in the movie reveals just a little more about Slade and forces us to think, as does he, about what it means to be alive and aging, and about the relationship between dependence and independence.⁵

Slade is a person who realizes that his most significant individual accomplishments may well be behind him.⁶ Blind, aging, and facing a di-

³. Slade's demonstrates his frustration with his situation by his sarcastic commentary. For instance, at one point Slade says of his niece's family: "I can't believe they're my blood—I.Q. of sloths and the manners of Banshees. He's a mechanic; she's a homemaker. He knows as much about cars as a beauty queen and she bakes cookies—taste like wing nuts. As for the tarts, they're twits." Scent of a Woman, supra note 1.
⁴. Charlie is at the Baird School for Boys, the student body of which Slade describes as "a bunch of runny-nosed snots in tweed jackets, all studying to be George Bush." Id.
⁵. For a more general discussion of this point, see infra part III.
⁶. Of course, when dealing with elderly people, the emphasis must be on the speculative "may." Lawrence M. Friedman makes a powerful case against early retirement: "Aging is an enormously variable process, and fixing retirement at 70 is arbitrary. Mandatory retirement at 70, ... 'is uniform and nondiscriminatory.' The same could be said for shooting everybody over 70. It is no comfort to a vigorous teacher and researcher, deprived of career, job and position against his or her will, to be told that the
minishing capacity for control, he devises an elaborate scheme that essentially comes down to “let us eat and drink; for tomorrow we shall die.” Charlie Simms is the key to Slade’s plan, because he provides the physical extension—vision, support, and mobility—that Slade needs to be whole again. That wholeness, however, is also what Slade needs in order to effect the suicide that will obviate the need for further support.

Though Slade sees Charlie as merely the physical key to his plan, Charlie becomes much more than a passive supporter because he introduces youth, wonder, innocence, and most of all potential into Slade’s life. Slade does not realize that by making demands of Charlie, he is reaffirming his humanity by taking control of his own life. As the film progresses we witness the metaphorical union of two singular entities into one. Charlie becomes the means through which Slade can express his independence, but in achieving that independence he is drawn away from his goal of self-destruction by Charlie’s youth, vitality, and joy in life. Together, then, Slade and Charlie confront the Big Apple, and more than that, they confront the meaning of life and death.

In Charlie, then, we are presented with the ultimate fiduciary. Personifying accepted social constraints, he is there to confront Slade with a different view of life. By doing for Slade that which Slade cannot do for himself, Charlie hopes that Slade will accept his rationale for life, a sort of unexamined admonition to do the right thing. Charlie does recognize, nevertheless, that to be alive is not simply to have mobility; it is to have understanding, options, and a meaningful opportunity to exercise choices among those options. The question that remains, however, is over the issue of who should exercise those options—Frank Slade, or his helper, Charlie Simms.

This Article explores an analogous fiduciary relationship, that of lawyer and elderly client. In the following discussion we suggest some tentative responses to several hypotheticals that raise issues involving the duty of confidentiality. Each hypothetical is analyzed from two distinct perspectives. The first perspective approaches the hypotheticals from an “empathic” viewpoint. In a broad sense certain thoughts and feelings are attributed to the client based on societal assumptions as to what the client’s opinions would be, often without any explicit communication by the client. The second perspective approaches the hypotheticals from a different standpoint, that of client autonomy. The “autonomic” perspective seeks a consistent path through the hypotheticals using the client’s self-directing freedom and moral independence as its compass points.

Although we analyze each situation from two different perspectives, we acknowledge at the outset that the contrast between the two views is more symbolic than actual. In the real world, the perspective assumed

same dreadful thing is happening to everybody else born in the same year.” Lawrence M. Friedman, Mandatory Retirement Is Age Discrimination, N.Y. Times, Nov. 7, 1990, at 30.

7. Isaiah 22:13
by most lawyers is more likely to reflect a blend between the desire to express compassion and the desire to acknowledge independence. Accordingly, we urge recognition that both the empathic and the autonomic perspectives illuminate the lawyer/client relationship by providing orderly points from which to approach specific questions. Still, differences in factual interpretations, calculations of the weight to be given the nuances of various contexts, and impressions about demeanor will inevitably lead to differences even among consensus-seeking lawyers.

We suggest, therefore, that, rather than attempting to treat either approach as dispositive, lawyers faced with particular facts should view our perspectives as beginning points. Each example provides an opportunity to examine whether there is some overriding societal value to be vindicated (i.e., an empathic solution) or whether the lawyer is seeking to emphasize pursuit of the client's legally permitted wishes notwithstanding societal objectives (i.e., the autonomic solution). The hypotheticals discussed below, therefore, will be helpful in identifying appropriate issues and achieving reasonable solutions.

Part I of this Article briefly introduces the lawyer's duty of confidentiality. Part II presents a series of hypothetical situations involving confidentiality issues relating to a lawyer's representation of elderly clients, and analyzes each hypothetical from both empathic and autonomic perspectives. The Article concludes, in Part III, that both the empathic and the autonomic perspectives demonstrate that solutions to these ethical issues are advanced by greater lawyer disclosure at the beginning of the representation. We call, therefore, for lawyers to enhance their efforts at developing and using lawyer engagement letters that explicitly detail the terms of the representation and clearly address confidentiality issues that may arise.

I. THE LAWYER'S DUTY OF CONFIDENTIALITY

In considering the hypotheticals used in this Article, the view of confidentiality presented by the Model Rules of Professional Conduct has served as our point of departure. Although not yet adopted in all jurisdictions, the Model Rules have set the pace and direction of the develop-

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8. The Model Rules are the most commonly adopted set of ethical rules. In addition to the Model Rules, other relevant ethical codes include the 1908 Canons of Ethics and the 1969 Model Code of Professional Responsibility. Moreover, three recent projects provide useful perspectives. The first is the American Law Institute's proposed Restatement of the Law Governing Lawyers. See Restatement (Third) of the Law Governing Lawyers (Tentative Draft No. 2, 1989) [hereinafter Restatement]. The others are studies and commentaries prepared by probate and trust specialists under the aegis of the ABA Probate and Trust Division and the American College of Trust and Estate Counsel. See American College of Trust & Estate Counsel Commentaries On Model Rules of Professional Conduct 37-57 (Oct. 18, 1993) [hereinafter ACTEC Commentaries]; Anne K. Hilker, ABA Special Probate and Trust Division Study Committee on Professional Responsibility: Comments and Recommendations on the Lawyer's Duties in Representing Husband and Wife (Mar. 1993) (draft on file with the Fordham Law Review). The Hilker Report was approved by the Council of the ABA Real Property, Probate and Trust Law
ment of current ethical rules. Furthermore, as the principles of legal ethics develop, there is an increasing realization of the importance of the confidentiality principle. As new legal codes have developed, they "progress[ed] from passing reference to a lawyer's obligation of confidentiality to extensive and controversial involvement with it."9

The prevailing view of confidentiality is that it embodies two principles: the traditional attorney-client privilege derived from litigation;10 and what Professor Wolfram has called the "confidentiality principle."11 Both principles have been largely derived from fiduciary principles of agency law (i.e., the lawyer, as agent, owes a fiduciary duty of confidentiality to the client as the principal).12 Nevertheless, the confidentiality rules governing lawyers' standards of professional conduct extend beyond agency law doctrine; agent-principal theory, thus, is not the only basis for the confidentiality obligation. The theoretical foundation of lawyer/client confidentiality also reflects the need to encourage clients to share with their lawyers information for which they might otherwise foresee a strategic advantage in keeping from their lawyers.13


10. Rejecting the Advisory Committee's thirteen proposed rules for a uniform, specific law of privilege in the federal courts, Congress left most privilege questions up to state law. See Fed. R. Evid. 501 notes of Committee on the Judiciary, H.R. Rep. No. 93-650. Rule 501 reflects this decision:

Except as otherwise required by the Constitution of the United States or provided by Act of Congress or in rules prescribed by the Supreme Court pursuant to statutory authority, the privilege of a witness, person, government, State, or political subdivision thereof shall be governed by the principles of the common law as they may be interpreted by the courts of the United States in the light of reason and experience. However, in civil actions and proceedings with respect to an element of a claim or defense as to which State law supplies the rule of decision, the privilege of a witness, person, government, State, or political subdivision thereof shall be determined in accordance with State law.

Fed. R. Evid. 501; see also Restatement, supra note 8, § 118 cmt. c (setting out reasons supporting the common law attorney-client privilege); Wolfram, supra note 9, §§ 6.1.2, 6.1.3 (tracing history and policy behind privilege).

11. See Wolfram, supra note 9, § 6.1.1, at 242. The Restatement calls this the "confidentiality responsibilities of lawyers." See Restatement, supra note 8, § 111.

This broader basis for confidentiality is reflected in the usages of "confidences" and "secrets." In the professional responsibility jargon, a "confidence" is something covered by the attorney-client privilege, while a "secret" is something broader, covered by the general principle of confidentiality. According to Professor Wolfram, "[t]he professional rules cover much more than the testimonial privilege and to some extent may extend beyond the agency rules." Wolfram, supra note 9, § 6.1.1, at 242.

12. Restatement, supra note 8, § 112 cmt. b, Reporter's Note to cmt. c; Wolfram, supra note 9, § 6.1.1, at 242 & § 6.7.3, at 299.

13. DR 4-101(A) of the Model Code, for example, limits its protection to information "gained in the professional relationship" (i.e. "during the representation") while Model Rule 1.6, the counterpart, apparently extends protection to information acquired before, during, or after the representation. See Model Code of Professional Responsibility DR 4-101(A) (1969) [hereinafter Model Code]; Model Rules of Professional Conduct Rule 1.6 & cmt. (1983) [hereinafter Model Rules]. The latter states that the lawyer "shall not reveal information relating to representation of a client." Model Rule 1.6(a). As com-
Though the lawyer's duty of confidentiality is strong, it is not absolute. The Model Rules, Model Code, and Restatement each provide limited exceptions to the confidentiality rule in order to prevent crime. These exceptions are narrow; there is no broad exception, for example, that requires the lawyer to disclose an intention to commit an act that is "unlawful" or "criminal."\

In the examples that follow, the duty of confidentiality, and how that duty affects the lawyer's conduct, will be explored in the context of several different situations to which a lawyer representing elderly clients might be exposed. These situations include the representation of several members of the same family, and the representation of clients who may be under a legal disability.

II. SOME TYPICAL SCENARIOS INVOLVING CONFIDENTIALITY ISSUES AND POSSIBLE RESPONSES

Each of the four sections comprising this part consists of a series of hypothetical fact patterns followed by two contrasting analyses, the first from the empathic perspective and the second from the autonomic. The fact patterns considered in this part range from issues that may arise in...
representing a married couple to discussions involving the increasingly broader groups of people with whom an elderly client is likely to interact (e.g., children, step-children, guardians, and doctors). These relationships are likely to involve varied and sensitive kinds of information, all the way from revelations about paramours and children born out of wedlock to the intentions of an elderly client to disinherit the client’s children in favor of a newly favored charity.

Section A begins with the basic scenario of joint estate planning for husband and wife. What if, for example, one of the spouses later requests a new will to benefit a paramour or discloses an intent to divorce the other spouse? These scenarios move on to examine possible refinements depending on the source of the lawyer’s confidential knowledge, the lawyer’s attempt to style the relationship as one of separate representation of each spouse, the lawyer’s prior representation of one of the spouses, and the passage of a long period of time.

Section B examines hypothetical situations in which the concerns triggering the lawyer’s confidentiality quandary are intergenerational. Here we consider the parent’s and the child’s respective interests in the would-be testator’s competency to handle the testator’s assets, equality of treatment of siblings, the fairness of the probable dispositive plan, and the transfer of a family business. These issues necessarily raise concerns about sensitive documents, such as wills, codicils, accounting instruments, and powers of attorney.

Section C explores the duties of the lawyer to those outside the client’s typical circle of affection, as when the lawyer is representing a guardian or an attorney-in-fact. Here, mismanagement and outright fraud on the part of the fiduciary are of primary concern.

Finally, section D discusses confidentiality issues which may arise when the client is, or is thought to be, under a disability. In this context, the issues explored include the interaction between the confidentiality duties of physicians and lawyers, the lawyer’s duty to initiate protective action on behalf of the client, and the lawyer’s duties to the client’s family and the court.

In examining ways that courts and bar association ethics committees have responded to situations like those in the examples, it becomes apparent that most ethics opinions present their solutions in empathic terms. The opinions commonly describe fact patterns and respond to them by considering only general notions of ethical conduct. They do not typically respond to the interest that individual clients may have in defining the terms of their relationship with their lawyers. Courts and ethics committees apparently have been disinclined to get into the autonomic considerations of individual clients, perhaps for fear of turning each ethical contest into a protracted battle to determine what factors have influenced a client’s decisions about his or her representation.
A. Representation of Husband and Wife

The confidentiality issues arising out of representation of husband and wife often involve estate planning. Although such issues are not unique to the elderly, the elderly are more likely to encounter them, since they are more likely to seek estate planning advice than younger individuals. This section discusses confidentiality issues that arise from joint and separate representation of husband and wife.

1. Joint Representation of Husband and Wife

   a. Joint Representation; Wife's Request for Codicil

   Husband (H) and Wife (W) are an elderly couple. Neither has been previously married. They come to Lawyer (L) for estate planning advice. L has not previously represented either spouse. L advises them of potential conflicts of interest, and H and W consent to joint representation. Contrary to L's best judgment, they agree on mirror wills by which each leaves the bulk of his or her estate to the survivor and the survivor leaves the bulk of the pooled estates to their two children. Both H and W execute their respective wills. A few weeks later, W asks L to prepare a codicil to her will, making a substantial bequest to W's paramour. W directs L to hold this request in confidence, and indicates that H would probably change his will if he knew about W's request.15

   **Empathic Analysis**

   Although joint representation16 was established at the outset of the

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15. This example is similar to an example in Professor Pennell's ALI-ABA outline. See Jeffrey N. Pennell, Ethics, Professionalism, and Malpractice Issues in Estate Planning and Administration, available in WESTLAW ALI-ABA database, File No. C756 ALI-ABA 393, at *441 (1992). See also the white paper drafted by Anne Hilker for the ABA Special Study Committee on Professional Responsibility. Hilker, supra note 8, at 12.

16. Other possible modes of representation have been considered for estate planning and other "family" situations, namely mediation (Model Rule 2.2) and treating the family as an entity (Model Rule 1.13). See Model Rules, supra note 13, Rules 2.2, 1.13; see also Patricia M. Batt, The Family Unit as Client: A Means to Address the Ethical Dilemmas Confronting Elder Law Attorneys, 6 Geo. J. Legal Ethics 319 (1992) (comparing application of different Model Rules in elder law/estate planning situations). Neither mode of representation seems truly apposite to this situation, and neither rule offers much guidance in resolving disclosure problems. Treating the family as an entity may be more useful when there is, in fact, a family (as opposed to a couple) and a true "family" situation involved. Majority rule, one of the benefits of applying Model Rule 1.13, will not be much help when only two clients are involved. Nor is the marriage as an "entity" coextensive with the purpose of the representation, postmortem distribution of both shared and separate assets. Hilker, supra note 8, at n.4. Mediation does not involve true "representation" in that a certain degree of partisanship that may be expected will not be present. Furthermore, Model Rule 2.2 itself does not give clear direction as to possible disclosure problems, suggesting that balancing confidentiality and the duty to inform will be a "delicate" task. See Model Rules, supra note 13, Rule 2.2.

There is support for opting for joint representation in estate planning for spouses in at least one ethics opinion, although the opinion stresses the need to fully inform clients of potential hazards—and insists on full disclosure, regardless of whether the lawyer meets
planning stage, L's care in explaining potential conflicts will not make a disclosure decision any easier. L faces no difficulty in determining who the client is, or in determining what duties are owed to that client. Rather L's difficulty lies in making a choice between the conflicting obligations to his joint clients.

There is little in either ethics opinions or case law speaking directly to husband-wife joint representation, but similar conflicts between business partners have been more fully considered. The leading ethics opinion on the disclosure of confidences among partners is itself divided. The majority opted for protecting one partner's confidence and withdrawing from the representation, despite the nature of the disclosure and its potential for significant harm to the other partner. The minority made the opposite choice, viewing the lawyer's loyalty to the nondisclosing partner (and consequent duty to inform) as higher than any duty of confidentiality that the disclosing partner may have had the right to expect. Other ethics opinions tend to follow the majority, nondisclosure scenario, but the minority view has found a few followers.

In the absence of a clear rule, a balancing test has been suggested: L should weigh the known harm from nondisclosure (at least a partial defeat of H's testamentary intentions) against the uncertain harm flowing separately or jointly with his clients or of who actually pays the bills. See Professional Ethics Comm. of the Allegheny County (Pa.) Bar Ass'n, Op. 4 (1983), in ABA/BNA Lawyers' Manual on Professional Conduct Ethics Opinions 801:7401 (1986) [hereinafter ABA/BNA].


18. Were litigation between the partners to occur, such disclosures would not be covered by attorney-client privilege; this lack of coverage was a keystone in the minority's reasoning. But the mere fact that information would not be covered by the attorney-client privilege does not mean the lawyer has no duty to keep the information confidential until a tribunal actually asks for the information. Model Rules, supra note 13, Rule 1.6.


20. See Wortham & Van Liew v. Superior Court, 233 Cal. Rptr. 725, 728 (Cal. App. 1987) (holding that lawyer must disclose to third partner all information regarding the partnership, when lawyer represented a three-member partnership and had assisted two partners in diluting the value of the third partner's share; noting that "[i]n the context of the representation of a partnership, the attorney for the partnership represents all the partners as to matters of the partnership business."); see also Committee on Prof. Ethics of the Birmingham (Ala.) Bar Ass'n, Op. 87-7 (undated), in ABA/BNA, supra note 16, at 901:1202 (1989) (lawyer may disclose data on representation to any partner).


22. Or perhaps not. If the mirror wills had been preceded by some form of contract,
from disclosure—at the extreme, a possible marital rupture or divorce. The balancing test may be useful in situations where L knows his clients fairly well and may be able to gauge the possibility of marital rupture rather precisely. Here, however, L does not have any longstanding relationship with either H or W. Should L decide against disclosure, when deciding to withdraw L will also need to consider whether his inability to serve H loyally outweighs the possibility of disclosure inherent in an unexplained withdrawal.23

Assuming the representation has not ended,24 one commentator has concluded that the balance should tilt toward disclosure.25 In this situation, L advised his clients of possible problems in joint representation, presumptively including the need for openness and candor in achieving each party’s goals; W was free at the outset to request separate representation or a limit on confidentiality.26 Because L is not only H’s lawyer, but also represents W, who has duties to her spouse, L has two possible sources of fiduciary duty toward H.27 Thus, L should suggest that W make disclosure to H, and L should seriously consider disclosing the information on his own if W refuses.

Shifting the representation from joint to separate at this point would not solve L’s problem. Such a change would require consent from H, which would still involve a disclosure of possible conflicts.28

**Autonomic Analysis**

From an autonomic perspective, the desired rule is one that has the consequence of protecting H. An appropriate rule must aim to leave H in no worse position than would have been the case had W made the full disclosure, which H assumes and which his devise to her reflects (i.e. the

or, in some states, if the wills themselves contained appropriate language, the mirror wills would be presumed irrevocable. See, e.g., In re Cohen, 590 N.Y.S.2d 127 (App. Div. 1992) (holding that a contract between parties was enforceable in equity as a means of validating contractually expressed objectives of a husband and wife). L would then be faced with the difficulty of explaining this to W; exhibiting loyalty to W by assisting her in achieving her testamentary intent, would leave L in roughly the same position.

23. Moore & Hilker consider the “signal” in a withdrawal sufficiently dangerous to W’s confidentiality that they suggest in some cases, where the danger from disclosure is significantly great, L should neither disclose nor withdraw. But the likelihood that such a “signal” would be picked up and understood, especially by a layman, is debatable. See Moore & Hilker, supra note 8, at 29-30; Lonnie Kocontes, Client Confidentiality and the Crooked Client: Why Silence is not Golden, 6 Geo. J. Legal Ethics 283, 305 (1992) (noting that even a large Wall Street firm did not pick up the “hint of trouble” associated with its predecessor’s withdrawal).

24. See example A.5 infra for a clear-cut post-representation disclosure situation.


26. See Restatement, supra note 8, § 125(2) cmt. d (noting that jointly represented clients may reach own agreement regarding confidentiality).

27. In some cases, a statutory duty. See, e.g., Cal. Fam. Code § 5103 (West 1994).

28. See, e.g., ACTEC Commentaries, supra note 8, at 41-43 (discussing disclosures by lawyers for fiduciaries).
jointly agreed upon mirror wills). Any other outcome robs H of autonomy by placing H's destiny in W's hands. Moreover, if W succeeds in drafting her codicil, she is empowered beyond what is fair, because she is able to exercise her will with respect to her own physical, psychological, and social condition, as well as in substitution of the desires of H.\textsuperscript{29}

The concern, therefore, is that L, without authorization from H, is made a superseding instrument of W's will—both figuratively and literally—while simultaneously being deprived of the opportunity to assist H. Had H knowingly and intelligently waived his opportunity to act, L's dilemma would be eased, but in the absence of full disclosure, no such waiver was possible.

Still, it might be argued by L that no problem exists because what might be characterized as W's "double-cross" was precisely why H and W were warned.\textsuperscript{30} Under the limited facts presented, however, this is no answer. The facts do not indicate how thoroughly L advised H and W about potential conflicts. In context, it appears that the advice was transactional—about the consequences of utilizing mirror wills. Such advice-giving, however, should be contrasted with what might best be called \textit{marital transaction counseling}.\textsuperscript{31} In the latter, parties who are married are specifically advised about the risks and benefits of joint representation, with regard to both the transaction which is the focus of their legal representation and the implications for such transactions to the marital union.

In the hypothetical circumstance, for example, H and W would have been asked specifically about their wishes with respect to L's after-acquired knowledge from whatever source. In the absence of such marital transaction counseling, however, the presumption should be that each party to the joint representation has, by the very nature of that joint representation, waived confidentiality in favor of the other party regarding all information gained by the lawyer in the course of the representation. Thus, the lawyer who jointly represents a married couple should

\textsuperscript{29} These are essentially the same considerations at work in the context of a lawyer's representation of a partnership. Once an individual chooses to operate within a unit—here, the marital entity—the interests of individuals in information related to that representation should no longer be viewed as protectable from other members of that group. \textit{See supra} note 20. Moreover, viewing the lawyer's duty as arising in the context of a marital transaction makes it unnecessary to consider such concerns as the possibility of marital rupture or divorce. The very fact that the individuals are husband and wife and have sought representation in that capacity should mean that all claims of confidentiality are irrevocably waived. It is not for the lawyer to keep silent and withdraw, but for the would-be disclosing party to keep quiet and withdraw from both the marriage and the representation. \textit{Cf.} Pennell, \textit{supra} note 15, at *441-51 (discussing alternatives in this situation).

\textsuperscript{30} The facts state that, contrary to L's best judgment, L advised them of potential conflicts of interest, and they consented to joint representation despite the warning.

\textsuperscript{31} The term "marital transaction counseling" is introduced here as a term of art. It would apply only when a joint representation of individuals bound together by operation of law is involved.
only be permitted to withhold confidences and secrets from the marriage 
partner when the information is not reasonably related to the representa-
tion or when it is gained following mutual termination of the representa-
tion. Conversely, the lawyer must disclose any information to the 
uninformed party that the lawyer acquires which is reasonably related to 
the marital transaction regardless of the wishes of the other party. Fur-
thermore this obligation cannot be defeated except by the joint actions of 
the marriage partners. \(^\text{32}\)

b. **Joint Representation; Husband’s Intent to Divorce After Gift**

This example is the same as example A.1.a, except that the plan also 
involves a substantial lifetime gift from W to H to equalize the estates for 
more favorable estate tax treatment. Before the gift is made and the wills 
are executed, H confides in L that he plans to divorce W as soon as the 
gift is made. \(^\text{33}\)

**Empathic Analysis**

Unlike situation A.1.a, L is not being asked to undertake any action 
which is directly adverse to client W; however, he has been given inform-
information that may be of great value to W in the representation, \(^\text{34}\) which is 
clearly still continuing. Given the joint nature of the representation and 
the intent that information be shared openly to further the goals of the 
representation, L would seem justified either in disclosing the informa-
tion or requiring H to make the disclosure.

**Autonomic Analysis**

Here, as in example A.1.a, L is made the instrument of one party’s 
exploitation of the other. Whenever one party seeks self-enhancement by 
exploiting the ignorance of the other, the lawyer’s duty must be viewed in 
the context of the agreement initially to proceed with a joint representa-
tion. Accordingly, the solution to this hypothetical parallels the marital 
transaction counseling hypothetical. The missing element here is W’s 
agreement in the following form:

> “L, I know that the drafting of mirror wills has all of the risks and 
> consequences that you have outlined for me. Despite those risks, I 
> have decided that absolutely nothing that H has done or might do 
> should deter me. My intent here is to reward H for what we have had 
> together that has been positive; I will leave it to a higher being in the 
> after-life to address (or redress) any wrongs he might have committed 
> or will commit towards me.”

\(^\text{32}\) Of course, if in the context of representing husband and wife, the lawyer must 
disclose over the objections of either, the lawyer may afterwards be required to withdraw 
from the representation of both parties. 


\(^\text{34}\) See Moore & Hilker, *supra* note 8, at 29-30 for the different types of disclosure 
and their relative adversity.
In other words, the autonomy principle requires that individuals be allowed to define the objectives of their representation. This sometimes means that the objectives identified by a client will at times differ from those the lawyer advises, but in the absence of illegality or unforeseen circumstances, the lawyer's primary obligation must be to do for the client and not to the client. The lawyer is not, after all, the one who is blind to jural relationships.\textsuperscript{35}

Accordingly, because W's gift transaction is made in the context of L's representation of H and W in a marital context (and presumes the continuation of the marriage), H's disclosure to L is relevant to the subject of that transaction. Thus, the contemplated divorce must be disclosed. Although L may not disclose to W information which is irrelevant to the transaction, protection of W's autonomy requires that the disclosure agreement contemplated as the basis for the original joint representation must be held inviolate.\textsuperscript{36}

c. \textit{Joint Representation; Gift Completed; Husband's Intent to Divorce}

Same as example A.1.b, except that H confides in L after the gift is made and the wills are executed, but before H initiates divorce proceedings.

\textit{Empathic Analysis}

As in situation A.1.a, the uncertain status of the representation clouds the disclosure decision. If H and W are current clients, L may be justified in disclosing to W based on the nature of the joint representation.\textsuperscript{37} If the representation has terminated, however, L may not have any justification. Moreover, H's post-representation disclosure may be seen as a request for a new, but separate, representation. In that case, however, L's continuing duty of loyalty to W, a former client, would require L to decline any request to represent H against W without disclosure to and

\textsuperscript{35} See supra note 31 and accompanying text.

\textsuperscript{36} It is recognized that there are relevant precedents which would suggest another outcome. See Monroe County (N.Y.) Bar Ass'n Ethics Comm., Ethics Op. 87-2. In Monroe County Opinion 87-2 the committee held that the duty of a lawyer who acquires information that is relevant and injurious to a cohort, is to maintain the newly acquired information in confidence and to withdraw from representing any party, unless the lawyer receives permission to reveal the information. The rationale is that once the lawyer obtains the information from one cohort subject to a request to hold it in confidence from the other, a conflict arises. Thus, the lawyer must either persuade the withholding client to disclose or withdraw from the representation of either. This approach, however, insufficiently values the original agreement. When the basis of the joint representation is that no party may assert a privilege against any cohort, any subsequent attempt by a party to do so requires that the lawyer remonstrate with the withholding client, but failing that the client should be free to make a narrow disclosure of all information necessary to vindicate the original understanding on which the joint representation rests. See also Russell G. Pearce, \textit{Family Values & Legal Ethics}, in Legal Ethics in Representing Older Clients, 62 Fordham L. Rev. 1253, 1262 n.48 (1994).

\textsuperscript{37} See supra note 18 and accompanying text (discussing the minority view).
consent from W.\textsuperscript{38} Nor would L have grounds to make a disclosure to W without H’s consent.\textsuperscript{39}

\textit{Autonomic Analysis}

When L’s knowledge of H’s perfidy comes after the wills are drafted but before the divorce, the consequences to W are equally devastating, but L has not been the instrument of W’s undoing. More important, W has not participated in her own deception by misplaced reliance on L. To the extent that H had a strategy all along which he has now revealed, both W and L are victims.

Still, L has a responsibility to counsel H about the consequences of his actions and the means for avoiding negative results.\textsuperscript{40} L has no right, however, to betray H’s confidences to improve W’s position. Such a breach by L would deprive H of his autonomy by denying him the legal and moral right of divorce which, at least in the secular view, was contemplated as a legally permissible way of terminating the marital union. Accordingly, L’s recourse does not include divulging H’s confidences and secrets, but L may counsel H regarding the consequences of his proposed actions\textsuperscript{41} and withdraw from any future representation if he fails to persuade H not to go forward with the divorce.

\textsuperscript{38} See Model Rules, \textit{supra} note 13, Rule 1.9.

\textsuperscript{39} See Louisiana Comm. on Ethics & Prof. Resp., Op. 236 (1965), \textit{in} 12 La. B.J. 337 (1965) (prohibiting disclosure to client B without client A’s consent, when lawyer receives information from client A that would be beneficial to client B and not harmful to client A); ABA Comm. on Ethics and Professional Responsibility, Informal Op. 1300 (1974) (improper for lawyer to disclose detrimental information to client A when such information was disclosed to lawyer by client B); Michigan State Bar Ass’n, Op. CI-568, \textit{in} ABA/BNA, \textit{supra} note 16, at 801:4812 (1980) (holding that without the client’s consent, lawyer may not reveal a client’s confidences to the client’s spouse).

\textsuperscript{40} Ethical Consideration 7-8 of the Model Code provides that:

A lawyer should exert his best efforts to insure that decisions of his client are made only after the client has been informed of relevant considerations. A lawyer ought to initiate this decision-making process if the client does not do so. Advice of a lawyer to his client need not be confined to purely legal considerations.

Model Code, \textit{supra} note 13, EC 7-8.

\textsuperscript{41} At issue here for W are interrelated concerns with autonomy and dignity. The philosopher W.K. Clifford explained this duality in another context:

If I steal money from any person, there may be no harm done by the mere transfer of possession; he may not feel the loss, or it may even prevent him from using the money badly. But I cannot help doing this great wrong towards Man, that I make myself dishonest. What hurts society is not that it should lose its property, but that it should become a den of thieves; for then it must cease to be society. This is why we ought not to do evil that good may come; for at any rate this great evil has come, that we have done evil and are made wicked thereby.


H’s actions not only rob W of her autonomy—the right to use and misuse her possessions—but also serve to diminish society’s valuation of itself—a dignity concern—by turning society into a den of thieves, such that wickedness (and not humaneness) defines it.
d. Joint Representation; Lawyer Learns of Illegitimate Child

Same as example A.1.a, except that after the wills are executed L learns from a third party that H has an illegitimate child who would be included within the contingent gift to children in W's will. L knows that H would not want L to disclose the existence of the child to W.

Empathic Analysis

As in situation A.1.c, after the representation has commenced L learns information that may defeat one client's goal, but here L has not been asked to undertake any direct action (other than to protect the secret). Even if the representation of H has terminated, and H is only a former client, L has the same responsibility to maintain H's confidences and secrets, regardless of how L acquired the information; therefore, L would have no justification for revealing H's confidences to W. If the representation has not terminated, in addition to the factors discussed in A.1.a, L must consider how closely related this confidence is to the goal of the representation.

Autonomic Analysis

The existence of H's previously undisclosed child within the class of contingent beneficiaries does not change the result we want. That result remains consistent with that described above. W's agreement to provide a contingent class gift necessarily authorizes a gift to H's illegitimate child. Thus, the relevant question in such a situation does not go to the operation of the will, but to whether the meaning of the class gift was explained to W. If not, in the absence of justification, L is guilty of malpractice if and when the contingent claim by the illegitimate offspring becomes significant. Accordingly, L should counsel H about this secret, advise W of the effects of the will as drafted if H refuses to do so, and withdraw from future representation of either party if disclosure is required over H's objection.

e. Joint Representation; Husband Discloses Illegitimate Child

Same as example A.1.d, except H discloses the existence of the illegitimate child to L and requests confidentiality.

42. See Model Rules, supra note 13, Rule 1.9.; Restatement, supra note 8, § 112.
43. The no-confidence rule extends only to the goals of the representation, e.g., in the representation of a partnership, any information concerning the partnership itself. See Restatement, supra note 8, § 125 cmt. d. While the existence of an illegitimate child would appear to fit this definition of non-confidential, representation-related information, the connection is not so direct as in situations A.1.a and A.1.b, and this may further complicate L's decision.
44. See supra text accompanying notes 29-32.
45. See Hilker, supra note 8, at 13.
Empathic Analysis

The actual method by which L learns of the existence of the illegitimate child will not affect L’s decision to disclose. However, L learns of H’s confidences and secrets, he is no less bound to respect them. As in situation A.1.d, L will have to consider the status of the representation. If the representation has terminated, L has no justification for disclosing the existence of the illegitimate child to W. If the representation is continuing, L will have to consider the relation of the confidence to the representation.

Autonomic Analysis

When the variation provides that H has disclosed the existence of the illegitimate child and requested that the fact be held confidential from all (including W), L is faced with the dilemma of whether to protect the confidence of one client at the expense of the other. Absent the kind of above-noted “after-life” agreement, L has no right to choose between the interests of his clients. To do so raises the previously precluded possibilities of autonomy deprivation. Still, the controlling consideration is that identified in response to hypothetical A.1.a, the marital transaction counseling context. Accordingly, L must disclose to the uninformed party all information related to the transaction for which L was engaged to represent H and W.

2. Separate Representation of Husband and Wife

In the preceding examples, assume that L advised H and W of potential conflicts of interest, and they all agreed that L would represent each spouse separately.

Empathic Analysis

If H and W agree at the outset on separate representation, L will have no justification in making disclosures without consent in any of these situations. L’s decision becomes one of withdrawal rather than disclosure, assuming in each of the continuing-representation situations that the confiding spouse does not give consent for disclosure. No Model Rule or Model Code provision would give L the authority to disclose this information.

46. The facts do not specifically assume total confidentiality, meaning a private communication to L, but absent total confidentiality L has even less basis for withholding the information.
47. See supra example A.1.b.
48. See id.
49. See supra notes 29-32 and accompanying text (the presumption should be that each party to the joint representation has, by the very nature of the husband/wife joint representation, waived confidentiality in favor of the other in regards to all information gained by the lawyer in the course of the representation).
50. Under the Model Rules and the Model Code, L would be unable to continue representing both spouses in at least situations A.1.a, A.1.b, and A.1.c, if not all the situations, without full disclosure to, and consent from, the non-confiding spouse. See
information without consent; in the foregoing examples, L's authority comes from the nature of the representation itself.

**Autonomic Analysis**

We are asked to assume that L has, in fact, advised H and W of the potential conflicts of interest and that they have, nonetheless, agreed that he should represent their separate interests. It is unlikely, however, that such an arrangement could be satisfactorily concluded. The overriding obstacle is the autonomy principle. Once we assume that the lawyer's primary duty is to provide support for his or her client, any arrangement where it can reasonably be foreseen that irreconcilable obligations of support exist is prohibited to the lawyer.

Here, even assuming representation until the time of an actual conflict, the representation of each spouse separately could last only until confronted with the actual conflicts posed by any of the supposed revelations.


51. An exception might be made in states with more relaxed confidentiality rules, allowing for disclosure for fraud likely to cause serious injury to another's financial interests. Given H's and W's respective fiduciary duties, an argument might be made that some of these situations amount to constructive fraud. See New Jersey Advisory Comm. on Prof. Ethics, Op. 586, in 117 N.J. L.J. 533 (1986) (holding that when a new client has information showing fraud practiced on a former-client wife by her husband, the lawyer may disclose the information to the wife, despite potential harm to the new client).

For an opinion allowing disclosure to a separately-represented client, albeit under unusual circumstances, see New York County (N.Y.) Law. Ass'n, Op. 270 (1929), in Olavi Maru & Roger L. Clough, Digest of Bar Association Ethics Opinions 213 (1970) (holding that a lawyer was justified in informing client A of client B's past criminal record, when client A was preparing to marry client B, and when a morals charge which was public record was involved).

52. The circumstance of separate representation being requested by husband and wife differs in an important respect from the previous hypotheticals discussed—all instances in which a married couple sought joint representation. Previously the parties sought representation in support of their legally sanctioned unity (i.e., the marriage). Here the parties seek simultaneous representation which is in derogation of their legally sanctioned union. This circumstance should be discouraged.

53. "Except with the consent of his client after full disclosure, a lawyer shall not accept employment if the exercise of his professional judgment on behalf of his client will be or reasonably may be affected by his own financial, business, property, or personal interests." Model Code, *supra* note 13, DR 5-101(A).

DR 5-105(A) also applies:

A lawyer shall decline proffered employment if the exercise of his independent professional judgment in behalf of a client will be or is likely to be adversely affected by the acceptance of the proffered employment, or if it would be likely to involve him in representing differing interests, except to the extent permitted under DR 5-105(C).

Id. at DR 5-105(A).
3. Lawyer Has Previously Represented Husband

This situation is like that in example A.1.a, except that L had previously represented H for many years in his general business affairs.

*Empathic Analysis*

L’s longstanding representation of H in other affairs should not affect the analysis in situation A.1.a. When undertaking a joint representation, L owes equal duties to each party, regardless of relative wealth or past relations. In making any disclosure decisions, L must be careful not to let his past representation of H color his decisions. The same would be true if the estate planning representation were separate rather than joint.

*Autonomic Analysis*

The assumption that L has previously represented H in his business affairs, itself, fails to provide a basis for resolving any of the above problems. L’s previous representation of H does, however, add the consideration of when the taking on of a new client is prohibited. Thus, if L knows that W has interests adverse to H, L is prohibited from accepting her representation. L’s loyalty should be to his existing client. Furthermore, if L knows that W is relying on him for legal advice, he has an added duty to disabuse her regarding her reliance.

4. Second Marriage of Each Spouse

This hypothetical is the same as example A.1.a, except that it assumes that the marriage of H and W was a second marriage for each spouse, and that each had children from his or her first marriage.

*Empathic Analysis*

The fact that both H and W had been previously married and had children from those other marriages would not affect L’s disclosure decision. Such facts should, perhaps, have affected L’s willingness to take on a joint representation of H and W, although the presence of prior spouses and children from earlier marriages does not automatically imply adversity.

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55. See supra note 53 (acceptance of employment when exercise of judgment may be affected).

56. Moore & Hilker, supra note 8, at 28. H and W may still have financial considerations in opting for joint representation, despite the complications, and may have begun
Assuming that H and W each are involved in their second marriage and that each had children from the first marriage, the additional issue raised is what duty, if any, L ought to owe to the children. Of course, the autonomy obligation is owed to clients, rather than to beneficiaries, and even less so to potential beneficiaries. Accordingly, the lawyer must protect the interest of H and W as they have individually consented to be represented. To the extent that such representation is precluded because of lack of knowledge or conflicts of interest, one of the clients, if not both, will have to be dropped.

Similarly, even assuming that an obligation is due the potential remote beneficiaries, their interests would be subject to H's and W's knowing, knowledgeable, consensual, and capable handling of any potential or real conflicts of interest.

5. Request for Codicil After a Long Lapse of Time

This situation is like example A.1.a, but it assumes that W's request for a codicil is made several years after the execution of the original wills. In the intervening period, L has had no contact with H or W.

Empathic Analysis

Unlike situation A.1.a, here the representation seems safely terminated. Nonetheless, L continues to owe both H and W duties of confidentiality and loyalty. L should decline to represent W or to draft the codicil unless W consents to a disclosure to H. Beyond that, however, L would not seem to have any authority to disclose W's confidence to H, because W would seem to be asking for separate representation with no waiver of confidentiality by seeking representation alone, long after the earlier representation.

Autonomic Analysis

In the absence of contact between L and W or H over several years, L's obligations to either would remain fixed by the respective original understandings between L, H and W. Of course, to the extent that there are doubts about the nature of those understandings, pending clarification, the doubts ought to be resolved in favor of loyalty and client confidentiality.

B. Intergenerational Representation

This section discusses issues that arise when dealing with members of the same family in different generations. The matters discussed relate to

the representation without expectation of adversity (especially, for example, in situation A.1.b). See Pennell, supra note 25, ¶ 1803.1.
57. See Pennell, supra note 15, at 445.
both planning for the transfer of assets and the representation of a parent and a child on matters which may benefit the child at the expense of siblings.

1. Aging Parent; Child Asks To Be Made Joint Tenant

Lawyer (L) has previously prepared wills for both Son (S) and aged Father (F), who is a widower. S comes to L's office and reports that F has become increasingly absent-minded, occasionally misplaces valuable documents, and forgets to pay his bills with embarrassing frequency. F is aware that S is consulting L about this matter. S asks L to explain about joint bank accounts and L does so. L also volunteers information about durable powers of attorney and other arrangements for property management and succession. S thanks L for her clear explanation and says he will take F to the bank and add his (S's) name to F's accounts as joint tenant. L offers to explain the implications to F of creating joint accounts, but S declines her offer. S pays L's customary fee. May L, without S's consent, call F to explain the implications of creating joint accounts, including the rights of a surviving joint tenant on the death of a cotenant?58

Empathic Analysis

At first glance, L would seem to have no grounds for contacting F. S and F appear to be separate clients and the information given to S, including the fact that such information was given, is confidential.

At second glance, however, the situation is not so clear. Is S actually the client? Or is S merely acting as an agent for F? F's interests and property seem to be the true issue. If S were considered an agent for F, L could contact F, as the true confidential relation is between L and F; S would be only a communicating agent.

Autonomic Analysis

Where L has previously represented F, but now has been engaged to represent S (regarding F's affairs), the controlling issue is one of conflicting sequential representation. L is prohibited from undertaking any rep-

58. This example is taken from Situation 1 in Professor Donaldson's ALI-ABA outline. See John E. Donaldson, Ethical Considerations in Advising and Representing the Elderly (1991), available in WESTLAW, ALI-ABA database, File No. C658 ALI-ABA 1, *4. Compare Situation 2 in this outline. See id.

59. Payment alone is not enough to determine that S is in fact the client. It is equally unclear, however, whether S could be considered as F's agent. In favor of this theory would be S's statement that he is acting on F's behalf and his intent to use L's information on F's behalf.

60. L would not be required to contact F. Under an agency theory the duty of informing F would fall to S. Restatement (Second) of Agency § 381 (1958). But, given that S's position falls considerably short of judicial guardianship, L would not be faced with the same sort of disclosure problems posed in guardian-ward situations, where L clearly represents the guardian.
representation which conflicts with the interest of an existing client. Thus, if L is still F's attorney, L is precluded from representing S. Furthermore, it is by F's reasonable understanding that the existence of a representation is to be tested.\(^{61}\)

Put another way, what, if any, duty L owes to F is defined by their original representation, not by L's subsequent representation of S. Indeed, L's representation of S should not have been commenced if L harbored any suspicion that S's interests were likely to conflict with those of F. Accordingly, the question raised here—May L call F to explain?—is actually a tertiary one. The first question is the one designed to protect and promote F's autonomy: As a result of L's representation of F, is L facing a potential conflict of interest as regards representation of S? If the answer is yes, the next question should be: Has L advised F and S of the potential conflict so that each can decide whether to accept the risk of L's representation of both or either?\(^{62}\) Hence, L's duty to F was not met merely by L's knowledge that F was aware that S was consulting L. The autonomy principle requires that F be advised in a meaningful and timely manner of both consequences and options. The facts, moreover, are insufficient to find acquiescence or ratification.

Even assuming that the answer to the second question is affirmative and that both F and S desire that the separate representations proceed, L was obligated not to accept representation of S if L could not reasonably believe that both representations could proceed without an actual conflict arising.\(^{63}\)

Having failed in her initial obligations, however, L now owes conflicting duties to F and S. To serve one is to fail to serve the other. Under these circumstances, L should immediately tell S that L is obligated to inform F fully regarding the implications of the various personal finance options and then do so. If S objects, L should withdraw from the representation of both F and S\(^{64}\) while explaining that her mutual obligations pose conflicts which preclude representation of either, and urge them to seek other counsel. This result implicitly accepts that L's advice to F about purely legal issues (as opposed to the facts related to S) was never of concern to S, since S knew at the outset that F was receiving legal advice from L.

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\(^{61}\) Conversely, if L first represented S, L would be precluded from taking on the representation of F, without S's approval and the determination that no irreconcilable conflicts were foreseeable. See Model Rules, supra note 13, Rule 1.7(a); Model Code, supra note 13, DR 5-105(A).

\(^{62}\) See Model Rules, supra note 13, Rule 1.7(a); Model Code, supra note 13, DR 5-105(A).

\(^{63}\) See Model Rules, supra note 13, Rule 1.7(a)(1); Model Code, supra note 13, DR 5-105(C).

\(^{64}\) L's acceptance of the fee paid by S is assumed to be S's retainer, otherwise S is acting as L's agent. See supra note 53 and accompanying text.
2. Lawyer Prepares Power of Attorney for Daughter

Lawyer (L) has previously represented Daughter (D) and her aged Mother (M), a widow, on various matters of separate and joint interest to them. D comes to L’s office and reports that M is beginning to have “difficulties.” M is usually lucid but occasionally acts as if her deceased husband (D’s father) is still alive. D recalls that M had held a durable power of attorney from her husband that L had prepared. D states that she has discussed the matter with M and that M is willing to execute a durable power naming D as M’s attorney-in-fact. D requests that L prepare the power for M’s signature, which D will obtain. L expresses his willingness to explain more fully to M the implications of executing the instrument. D declines the offer, reminding L that M, having once served as an attorney-in-fact, knows all about powers of attorney. D pays L’s usual fee. Later L learns that D has exercised her powers under the instrument to benefit D as opposed to her siblings.65

Empathic Analysis

D is L’s client in this matter.66 L’s situation is somewhat analogous to that of an attorney representing a guardian, but not completely so.67 L’s previous (continuing?) representation of M and the uncertain legal status of powers of attorney make this problem more difficult than that of an attorney representing a guardian. A guardian acts as an officer of the court and property dispositions are to some extent monitored by the court. The guardian’s relationship with the court is the primary determinant of any disclosure authority possessed by a lawyer representing a guardian.68

Whether D is a present or former client, L has a responsibility to keep this information about D’s actions confidential.69 Given that L’s repres-
sentation of D may be completed and that D probably has no responsibil-
ity to report her activities to any tribunal, L has no authority to make
any disclosure regarding D's actions.\textsuperscript{70}

\textit{Autonomic Analysis}

The facts, which state that L has now learned that D has executed her
durable power of attorney in a way that benefits her at the expense of her
siblings, imply that L did, in fact, draft the power of attorney for D as
requested. It was, however, improper for L to draft this agreement. L's
decision to advise D directly undercuts M's autonomy, so that the very
person to whom M thought she could turn for support is now working
against her interest.\textsuperscript{71}

M, who was previously represented by L, had a right to continue to
rely upon L. Moreover, it is likely that the expectation of M's continued
reliance was what D counted upon in engaging L, rather than a stranger
attorney, to draft the power of attorney.

Without M's informed consent, L should not have accepted D as a
client in connection with a matter involving M, so L was necessarily pre-
cluded from accepting "the usual fee." Having now drafted the power of
attorney, L is in no position to challenge its exercise by D.\textsuperscript{72} Still, L may
counsel D and ask her to cooperate voluntarily with M and with her
siblings. Ultimately, however, L must withdraw from representing both
M and D.

3. Transfer of Family Business

For many years Lawyer (L) has represented Father (F) and his busi-
ness, performing a variety of family business and estate planning tasks.
As F's children have attained majority, L has prepared wills for them
and occasionally performed other tasks such as representing them in the
purchase of a house. One child, C, has become an active participant in
F's business, while another child, D, has chosen a different career. F and
C recently consulted L for preparation of a buy-sell agreement that even-
tually would transfer ownership of the business to C on terms favorable
to C. F also asked L to modify the gift in his will to D to compensate D

\textsuperscript{70} The Restatement specifically makes an exception for information that is generally known
and readily discoverable, such as public records. If L discovered D's misconduct from
such general information, disclosure would be permitted by the Restatement. \textit{See id.} cmt.
\textit{e}.

\textsuperscript{71} L's previous or continuing representation of M would not give L any disclosure
authority—unless in preparing the power of attorney L was representing both D and M,
in which case L would presumably be able to disclose to M his knowledge of D's self-
dealing. \textit{See supra} example A.1.a (dealing with joint representations and confidentiality).
If M is no longer competent, L would be faced with a different set of problems, namely,
whether or not to disclose M's situation. \textit{See infra} example D.2.e.

\textsuperscript{72} \textit{See supra} note 53 and accompanying text (DR 5-105(A)'s duty to decline employ-
ment involving a foreseeable conflict of interest).

\textsuperscript{72} \textit{See supra} note 66 and accompanying text.
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partially (but not, in L’s opinion, completely) for the favorable transfer to C. Independently, D recently consulted L for a review of D’s own estate plan. Must L disclose F’s recent decisions to D? May L disclose them? 73

Empathic Analysis

L would be under no obligation to disclose F’s changes to D, and even if L wished to disclose, it would be hard to find justification for that disclosure. While L represents each member of the family, the representation of D appears to be separate from any representation of either F or C. The transfer of the business interest seems to be a matter exclusively involving F and C, and while there might be no privilege of confidentiality between F and C in this matter, D is not a party and is not entitled to any confidential information stemming from the transfer. F’s testamentary changes clearly should not be disclosed to D without F’s consent. 74 If L believes the changes are sufficiently damaging to D, L should consider withdrawal. 75

Autonomic Analysis

The key to this “family” representation is the determination of whom L represents. Because L has represented F in his business and personal affairs, we can fairly conclude that L at least represents F. It is neither unusual nor forbidden for L also to represent F’s business interest, so long as F understands that a dual representation, reflective of the separate interests of F and the business, is what is involved. On the business side, it is also critical here that F have been advised that L represents the corporation (if that is what is involved) and not F, for the two are not the same. Assuming the aforesaid full disclosures, and assuming further that there are no objections or irreconcilable conflicts, L may proceed to represent F and his business. This approach protects and promotes the autonomy principle making it more, rather than less, likely that a client will

73. There is a brief reference to this kind of situation in Ronald C. Link et al., Developments Regarding the Professional Responsibility of the Estate Planning Lawyer: The Effect of the Model Rules of Professional Conduct, 22 Real Prop. Prob. & Tr. J. 1, 13 (1987).

74. 8 John H. Wigmore, Evidence in Trials at Common Law § 2314 (John T. McNaughton, rev. 1961). See infra examples D.1.a, D.1.b, and D.3.a for a more detailed treatment relating to the disclosure of wills and estate plans. See Committee on Ethics of the Md. State Bar Ass’n, Op. 85-18 (undated), in ABA/BNA, supra note 16, at 801:4351 (1986) (where lawyer represents two family members in the drafting of wills, lawyer may not disclose to either that the lawyer represents the other).

75. Although L has no ground for disclosure, L may be faced with difficulties from this representation later on, if in fact D’s interests have been significantly damaged. In acting as attorney for both F and the favored C, especially if L has failed to inform F and C of potential conflict of interest problems, L may have created a presumption of undue influence that will make a later will contest more likely and more successful, and perhaps expose L to disciplinary action. See, e.g., Haynes v. First Nat’l State Bank, 432 A.2d 890 (N.J. 1981) (holding that when attorney prepared estate plan and will for client’s parent which favored client more than earlier plans, only full disclosure and knowing waiver could remove presumption of undue influence).
be able to identify and select among the options most likely to advance his or her self-definition.

Assuming, therefore, that the representations of F and the business are at the center of L’s representation, the key is whether L has properly fostered that core representation, rather than what we might call the collateral representations—those involving each of the children as he or she reaches maturity and is thus able to assert his or her respective independent claim for self-actualizing autonomy. L must have satisfied himself that no conflict existed between any particular child and any current client (i.e., neither F nor the business); that if the potential for conflict reasonably existed, all present and potential clients were fully informed about it (so that they might make a knowing, timely, and knowledgeable waiver); and that any actual conflict that arose was remedied by withdrawal from the representation of one or all clients.\footnote{76. See supra notes 61-64 and accompanying text (accepting and continuing representation).}

Turning, therefore, to the ethics of L preparing a buy-sell agreement at the request of F and C, when C has become an active participant in F’s business, while D has chosen a different career, the autonomy analysis focuses sequentially on F, the business, C, and then D. Assuming that potential conflicts between F and the business have been resolved, the first question is whether L may jointly represent F and C. Again, if potential conflicts have been disclosed and waived, L may proceed with this representation.

The next question, therefore, is: What, if any, duty does L owe to D? Because D is a newer client than either C, the business, or F, if L’s representation is to be expanded to include D, it must be assumed that the appropriate new-client conflict analysis has been completed, a doubtful assumption given these facts.

If we assume, however, that L has properly discussed potential conflict matters with F, C, and D, L’s duty would be to disclose fully all relevant information to each. Assuming no waiver of potential conflicts, however, L has no duty to refrain from representing F and C in preparing a buy-sell agreement that disadvantages D. Furthermore, without F’s permission, L may not undertake for D a “review of D’s estate plan” which involves revelations about F’s estate plan.

C. Representations Involving a Fiduciary

This section addresses issues relating to the representation of parties involved in the fiduciary relationships of guardian and attorney-in-fact.

1. Representation of Guardian Found To Be Involved in Self-Dealing

a. Guardian Involved In Self-Dealing; No Fraud and No Loss

Lawyer (L) represents G, the guardian of the person and property of
E, an elderly person now a permanent resident of a nursing home. E is senile and capable of making only the most basic decisions concerning dress and the like, but he recognizes friends, carries on simple conversations, and is not otherwise in poor health. Prior to his representation of G, L had no relationship with G or E. L was retained by G to secure G’s appointment as guardian and to advise G regarding the administration of the guardianship.\textsuperscript{77}

L becomes aware that G has engaged in self-dealing with E’s funds. There has been no fraud and no depletion of E’s estate. (For example, G might have sold assets of E to himself privately for fair market value.) L plans to confront G and advise G to rescind the self-dealing transaction. If G complies, L does not intend to disclose the self-dealing to E or to the court. If G refuses to heed L’s advice, L plans to secure the removal of G, still without consulting E or disclosing G’s self-dealing to the court.\textsuperscript{78}

\textit{Empathic Analysis}

Protection of a client’s confidences is a basic premise of the attorney-client relationship; however, that premise may be weakened or overcome by an attorney’s other duties and responsibilities. Foremost, the attorney cannot allow a fraud to be committed upon a tribunal.\textsuperscript{79} That does not seem a danger here. G has made no attempt to conceal his self-dealing. Thus, L’s duty to maintain G’s confidences does not appear jeopardized by L’s duty of candor toward the court.

In addition to the duty toward the court, L owes some duty of care to E, the derivative client.\textsuperscript{80} His representation of G is in a fiduciary relation with E. L’s failure to adequately consider E’s interests could expose...


\textsuperscript{78} This example is based on illustration 1.14:303 in the Hazard & Hodes handbook on the Model Rules. See 1 Geoffrey C. Hazard, Jr. & W. William Hodes, The Law of Lawyering § 1.14:303 (2d ed. 1992).

\textsuperscript{79} See Model Rules, supra note 13, Rule 3.3; see also Restatement, supra note 8, § 132.

\textsuperscript{80} In certain types of representation, as when the attorney represents a fiduciary, a third-party must be recognized as constructively present, even though the third party is not actually a client. As beneficiary of the representation, the third-party does not stand at arm’s length from the attorney-client relationship. This “derivative client” requires the lawyer to be more attentive in seeing that the actual goals of the representation are being properly carried out. See Washington-Baltimore Newspaper Guild v. Washington Star Co., 543 F. Supp. 906, 909 (D.D.C. 1982) (attorney for the trustees of an employee benefit plan owed duty to beneficiaries equal to that owed the trustee-clients); Hazard & Hodes, supra note 78, at § 1.3:108.
L should consider several factors when deciding whether his duties toward both G and E can continue to be met. Have E's interests in fact been harmed? How blameworthy was G's conduct? Can such future conduct be prevented?^82

In this fairly simple situation, L may be able to maintain G's confidence without terminating the relationship.\(^83\) L should certainly consult with G, and remind G of the responsibilities and limitations of G's authority. L should also urge G to take any appropriate remedial action and to make no attempts to conceal this transgression. So long as G attempts no fraudulent action, L should be able to continue his representation.\(^84\) Nevertheless, L's ability to continue at this juncture rests on the assumption that there has been no fraud, rather than no harm.

**Autonomic Analysis**

L's representation of G, a guardian who is engaged in non-fraudulent self-dealing which has not depleted E's estate, raises an interesting quandary because of concerns regarding whom (i.e., the guardian or the ward) the lawyer represents. L was engaged by and is paid by G, but his work is ultimately for the benefit of E. Thus, a useful autonomy principle must be sensitive to the need to protect the interests of both G and E.\(^85\)

The ideal principle would recognize that L's duty is owed primarily to E and only derivatively to G.\(^86\) Although the immediate impact of such

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81. See Fickett v. Superior Court, 558 P.2d 988 (Ariz. Ct. App. 1976) (allowing successor conservator to bring action against former conservator's attorney, despite lack of privity; lawyer could be liable for former conservator's misconduct despite absence of fraud or collusion between conservator and lawyer).

82. See id. at 990. Any previous relation between L and E, especially if longstanding, also may be factored in; such a relationship may increase L's duty of loyalty to E and hasten L's decision to withdraw from representing G. See, e.g., Illinois State Bar Ass'n, Advisory Ops. on Prof. Conduct, Op. 91-24, in 80 Ill. B.J. 374, 374 (1992) (holding that guardian had no reasonable expectation of representation when disclosing to ward's long-time attorney); In re Fraser, 523 P.2d 921, 928 (Wash. 1974) (holding attorney correct in refusing to withdraw at guardian's request until appropriate replacement had been found; attorney had represented ward for extended period before appointment of current guardian).

83. See Hazard & Hodes, supra note 78, § 1.2:510 (agreeing that lawyer may assist client in undoing harm that is neither criminal nor fraudulent without disclosure).

84. Virtually all ethics opinions, regardless of what final action is recommended, advise this period of consultation and remonstration, giving the fiduciary an opportunity to rectify any wrongs. See, e.g., ABA Comm. on Ethics and Professional Responsibility, Informal Op. C-778 (1964) (self-dealing guardian); General Counsel of the Ala. State Bar, Op. 89-105, in ABA/BNA, supra note 16, at 901:1061 (holding lawyer should attempt to convince fiduciary client to repair wrongdoing before withdrawing).

The purpose of a guardianship is to preserve the ward's assets for the ward's own use and enjoyment. See, e.g., In re Michelson's Guardianship, 111 P.2d 1011, 1015 (Wash. 1941). L's representation of G is to assist G in that goal. While G is acting as a fiduciary, and not acting illegally, L's representation should continue.

85. See supra notes 80-81 and accompanying text.

86. This suggestion differs from the prevailing rule, where L's duty would be deemed to run to G, instead of E.
an analysis would be to subordinate G’s interest, in the long run it would have the effect of elevating the interests of both G and E. Holding L ultimately accountable to E, and thereby requiring that L disclose all relevant information, would impose on L the responsibility to act to carry out a fiduciary relationship of the highest order and at all times require L to justify any departure from G’s instruction. Thus, a decision by L which appears justified in the absence of a contrary recommendation by G may well look less reasonable in the face of a conflicting recommendation by G. More practically, should G have objections, G’s remedy should be a malpractice suit against L—a malpractice suit in which, on the facts, G will be hard-pressed to establish damages.

As regards our hypothetically self-dealing G, therefore, the duty that we posit L owes to E requires, at a minimum, that G be convinced to rescind the subject transaction, and ordinarily requires that, if G is recalcitrant, L tell E (or an appropriate regulatory official) about G’s transgression. L would, however, have leeway in some circumstances not to report the matter to E. If E is too weak physically or psychologically to receive the information, L need not report.

b. Guardian’s Self-Dealing Has Caused Loss; Guardian Has Promised To Make Good

Same as example C.1.a, except that G’s self-dealing has caused loss to E’s estate. G, however, has promised to make good the loss.

**Empathic Analysis**

Here, L’s dilemma sharpens considerably. E’s interests have been impaired, at least temporarily, and the repair of those interests may be in some doubt. Given the realities of the guardian role (which requires judicial approval for most transactions), G may already have entangled both himself and L in fraud.

Ethics opinions tend to regard such borderline situations as, at most, requiring the discretion of the attorney; one opinion goes so far as to recommend that no attorney be disciplined for the choice he makes in this difficult situation. L’s own knowledge and insight will be important. G remains a client and, as of yet, G may not have done any acts serious enough to justify disclosure or withdrawal by L. How trustworthy is G? Will G in fact make good? Can G be counted on to be candid regarding this and other transactions? Does G have some relationship with E that makes continuing the guardianship (and L’s facilitating that continuation) desirable?


88. A settlor can choose his trustees, a testatrix her executors, but a ward rarely has any input into the choice of a guardian. Nevertheless, given prevailing statutory provisions and the usual preference for choosing close relatives, the guardian is likely to be someone well known to the ward. Some states are experimenting with giving wards
L's duty of confidentiality toward G indicates some measure of temperance here. L should certainly confront G and urge G to make good the losses and to be candid in any dealings with the court. L should probably also give G some time to rectify the situation.  

Autonomic Analysis

G's promise to make restitution is irrelevant. Since the facts state that G's self-dealing has, in fact, caused harm to E's estate, L's duty is to report.

L's fiduciary duty requires that rescission and restitution be pursued, but L should not accept restitution based on an agreement to keep silent about G's acts. If G is not an attorney, L's silence saves G at the cost of putting other, if any, of G's wards at risk. If G is an attorney, the result would be compounded; a failure to report would, in addition, undermine the lawyer discipline process.

One interesting twist is that G may argue that the attorney-client privilege protects him from L's disclosure. Depending upon the timing of the disclosure, G is not privileged to communicate with L for purposes of carrying out a criminal enterprise.

c. Guardian's Self-Dealing Has Caused Loss; No Promise to Make Good; Express Request for Confidentiality

G's self-dealing has caused loss to E's estate. G has admitted the self-dealing to L. G has no plans to make good the loss, and G expressly requests L to treat the information as confidential.

greater input, such as allowing for pre-selection of guardians (along with pre-exclusion). See Gerry W. Beyer, Enhancing Self-Determination Through Guardian Self-Declaration, 23 Ind. L. Rev. 71 (1990). Regardless of local statutory provisions, L may wish to consider relations between G and E when considering any change in the representation of G. See Hazard & Hodes, supra note 78, at § 1.14:303.


90. "A lawyer having knowledge that another lawyer has committed a violation of the Rules of Professional Conduct that raises a substantial question as to that lawyer's honesty, trustworthiness or fitness as a lawyer in other respects, shall inform the appropriate professional authority." Model Rules, supra note 13, Rule 8.3(a); cf. Model Code, supra note 13, DR 1-103(A).

91. See Clark v. State, 261 S.W.2d 339 (Tex. Crim. App.), cert. denied, 346 U.S. 855 (1953) (holding that attorney's telephone inquiry of client regarding whether client had disposed of murder weapon was not privileged communication, because its goal was to further commission of crime).

92. Examples C.1.a and C.1.b did not specify how L learned of G's self-dealing. The method of transmission makes no difference when considering L's ethical responsibilities, unless G's actions were of such a public nature that no presumption of confidentiality would attach. L has an ethical responsibility to protect all of G's confidences and secrets relating to the representation, regardless of how L learned of them. See Model Rules, supra note 13, Rule 1.6; Restatement, supra note 8, § 112, cmt. c. L's method of learning of G's transgressions may affect his decision to continue, disclose, or withdraw; L may be justified in giving greater latitude to a fiduciary who readily admits misconduct.
Empathic Analysis

At this point L must take some action; a failure to act would expose L to a malpractice claim on E's behalf, in addition to raising ethical problems. L may choose to withdraw from the representation, to disclose G's transgressions, or both to withdraw and to disclose. Given that an attorney should withdraw when continuing the representation involves assisting the client in wrongdoing, withdrawal seems unavoidable.

Court decisions lean toward disclosure. Opinions stress the court's natural preference for more disclosure rather than less as necessary in the search for truth, and the attorney's responsibility to be candid and to prevent fraud. The candor toward tribunals exception to the otherwise stringent confidentiality requirement of Model Rule 1.6 is grounded primarily on the need to protect the integrity of the adversarial system; however, the duty extends to nonadversarial proceedings as well.

Ethics opinions tend to favor nondisclosure accompanied by withdrawal. A significant number of the collected state ethics opinions,

94. The lawyer cannot allow his services to be used to perpetrate or conceal a criminal or fraudulent act. Model Rules, supra note 13, Rule 3.3(a), (b), 8.4; Model Code, supra note 13, DR 7-102(A)(7); Restatement, supra note 8, § 44(2)(a) (Tentative Draft No. 5, 1992). The withdrawal and disclosure thresholds may not be the same; under the Model Rules, a lawyer could not assist in any criminal or fraudulent act, but could disclose only if the act were likely to cause imminent death or serious bodily injury or if a fraud were being committed on a tribunal.
96. "Even worse than the attorney's misappropriation of his client's funds was his fraudulent and contrived misrepresentation." Olguin v. State Bar of California, 616 P.2d 858, 861 (Cal. 1980).
97. See Model Rules, supra note 13, Rule 3.3 cmt. 1.
98. See, e.g., In re Estate of Minsky, 376 N.E.2d 647, 650 (Ill. App. Ct. 1978) (attorney for executor has obligation to inform probate court of suspected fraud by the executor).
however, were issued after 1980, and the trend against disclosure may be influenced by the appearance of the Model Rules and the primacy of Model Rule 1.6, whose exceptions to the confidentiality rule are not easily applicable to estate planning situations. Even where disclosure is recommended, ethics opinions stress that the recommendation is still subject to the attorney's discretion, and that any disclosure should be as limited as possible.

The split between court decisions and ethics opinions is difficult to explain. Ethics opinions rarely touch on the duty of candor to the court imposed by Model Rule 3.3; the assumption may be that the attorney can withdraw before actually being implicated in any fraud. As has


A primary/derivative client relationship is present in each of the foregoing opinions, but that relationship seems to have little influence on the outcome. Under Model Rule 1.6, with its limited disclosure exception (death or serious injury), withdrawal without disclosure would seem to be the recommended action for any attorney whose client was considering a fraudulent action. See Model Rules, supra note 13, Rule 1.6. A greater awareness of the primary/derivative client relationship may explain why Professors Hazard and Hodes reach a different conclusion when confronting this problem, recommending action to remove the primary client even before any fraudulent activity has occurred; their analysis places a greater emphasis on the best interests of the derivative client and less on the confidentiality owed the primary client. Hazard & Hodes, supra note 78, at § 1.14:303.

A combination of factors—Fickett-type liability, Hazard and Hodes's interpretation of Model Rule 1.14 duties, and more relaxed disclosure requirements under the Restatement—may suggest that in the future the withdrawal, no-disclosure rule will no longer be an appropriate response in the primary/derivative situation. Restatement, supra note 8, § 117B cmt. b (allowing disclosure for prospective fraud likely to cause serious injury to other's financial interests justified by consideration of "important rights of third parties"). See also Fickett v. Superior Court, 558 P.2d 988 (Ariz. Ct. App. 1976); ACTEC Commentaries, supra note 8, at 45; Christopher H. Gadsden, American Bar Ass'n Real Property Probate and Trust Law Section, Special Committee on Professional Responsibility: Counseling the Fiduciary 30-31 (Draft 6/10/93) (draft on file with the Fordham Law Review). The Gadsden Report, prepared for the same committee as the Hilker Report, see supra note 8, was approved by the Council of the ABA Real Property, Probate and Trust Law Section. See Section News, Prob. & Prop., Jan./Feb. 1994, at 4. Both the ACTEC Commentaries and Gadsden rely on the "impliedly authorized" language in Model Rule 1.6 to justify disclosures to derivative clients; Gadsden also draws a parallel between the primary/derivative situation and the representation of an entity (Model Rule 1.13), where the duty of confidentiality to a constituent may yield to protecting the interests of the entity.

100. See Pennell, supra note 15, at *441.


104. See supra note 23 and accompanying text.
been noted, a withdrawal itself, however quietly accomplished, may be a form of disclosure. Additionally, these ethics opinions are intended only as guidelines, while the cases deal with actual situations (and actual penalties). While the decision to withdraw seems clear-cut, L must weigh carefully the nature of G's infraction and how it is being committed, when determining whether disclosure to the court is necessary.105

Disclosure to E is another matter altogether. L has a duty to the court as well as an ethical responsibility to limit any disclosure as much as possible. L's duty to E in this situation is unclear, given that E is not the primary client.106 L's fiduciary-like duties to E may extend only so far as to prevent L from assisting G in damaging E's interests, but not so far as to disclose G's secrets.107

**Autonomic Analysis**

The answer here would be the same as for C.1.b, since restitution is irrelevant and confidentiality inapposite.

2. Representation of Guardian Who Has Improprudently Invested

Same as example C.1.a, except that G's conduct is not self-dealing but imprudent investment. G consults L regarding the consequences of investing E's estate in commodity futures. L advises G that local law does not allow the investment, even as to a portion of the estate. Contrary to L's advice, G invests a portion of E's estate in commodity futures. The investment suffers a substantial loss.

In preparing the annual accounting to the court for the guardianship, L discovers G's investment and subsequent loss. G asks L to prepare the accounting in a way that will disguise the investment and loss. Assume that L may not prepare the misleading accounting, and that L refuses to do so. G prepares a misleading accounting and directs L to keep G's actions in confidence. Must L disclose G's conduct to E or to E's family or to the court? May L disclose G's conduct? Must L resign from repre-

105. If L makes the decision to disclose, may he maintain a relation with E, even if that requires taking a position adverse to G? At least one ethics opinion holds that a lawyer, after representing a conservator, may represent the ward in a removal action if no confidential information will be used. This ethics opinion found that the prior representation of the conservator and the removal action were not "substantially related." Ethics Comm. of the Mississippi State Bar, Op. 90 (1984), ABA/BNA, supra note 16, at 801:5106 (1984).

106. But see Gadsden, supra note 99, at 39 (disclosure to beneficiaries is preferred and disclosure to court is a "last resort" when informing beneficiaries would not be effective (for example, beneficiary is a minor)).

107. Hazard & Hodes, supra note 78, at § 1.14:303, for example, leaves the question of disclosure to the ward to the attorney's discretion. The guardian/ward situation is somewhat different from other primary/derivative client situations, given that the derivative client is already under some form of handicap. L's decision to disclose to E would have to take into consideration how much or how little knowledge L has of E's mental and emotional capacities. See Gadsden, supra note 99, at 10 n.9 (describing the "negative" definition of duty owed to the derivative client).
senting G? May L resign? 108

Empathic Analysis

While this situation begins differently—G is imprudent, rather than calculating—the end will be indistinguishable from C.1.c. L cannot be a party to submitting the fraudulent accounting to the court. As in C.1.c, L should withdraw from the representation of G. If G has not yet perpetrated a fraud by presenting the misleading accounting, L may be absolved of any disclosure duties to the court or to E. 109

Autonomic Analysis

Where “G asks L to prepare the accounting in a way that will disguise the investment and loss,” the autonomy principle is directly implicated. Lawyers are forbidden from lying because deceit robs those who must rely on the representation of an appropriate opportunity to assess risk and to act accordingly. Moreover, when the purpose of a conversation is to counsel commission of a crime, it is not privileged. 110

Under the circumstances, L must disclose G’s conduct to the court. Ideally L would not disclose to E’s family, for that would undermine E’s autonomy.

3. Representation of Attorney-in-Fact
   a. Lawyer Retained by Attorney-in-Fact

In this example we assume that, instead of acting as a guardian, G is the attorney-in-fact for E under a durable power of attorney prepared by E’s former lawyer, M, who is now dead. L was retained by G to advise G regarding his powers and duties as attorney-in-fact.

Empathic Analysis

Disclosure of an attorney-in-fact’s misconduct is complicated by the nature of the power of attorney itself. In most states, the attorney-in-fact can operate without court supervision. 111 Thus L would be unable to

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108. This example is based on example 1.6-1(1) of the Commentaries on the Model Rules prepared by Professor Price for the American College of Trust and Estate Counsel. See ACTEC Commentaries, supra note 8, at 42.

109. See supra note 87 for some opinions suggesting withdrawal with no disclosure. But cf. Pierce v. Lyman, 3 Cal. Rptr. 2d 236 (Ct. App. 1991) (suggesting that L should have reported G’s imprudent investing to the court; distinguishable, however, because case involved both imprudence and self-dealing, along with serious misconduct by the attorney); Fickett v. Superior Court, 558 P.2d 988 (Ariz. Ct. App. 1976) (involving the attorney’s failure to discover the conservator’s misconduct; case does not reach the question of whether withdrawal would have protected the attorney from liability, or at what point the attorney’s special relation with the ward would have required the attorney to divulge the conservator’s confidences).

110. See supra note 91 and accompanying text (counseling to commit crime not privileged).

111. See infra example B.2.
justify any breach of confidence by referring to an attorney's duty of candor to a tribunal.112

**Autonomic Analysis**

L's involvement as counsel to the person with a fiduciary obligation to E, under whatever name (e.g., trustee, guardian, attorney-in-fact, special agent), ultimately must be reducible to a duty to E. Only such a description assures vindication of a public policy which views E's autonomy as the law's central theme. Accordingly, L's duty is in the first instance to advise G and in the second to assure that E is protected.113

b. *Attorney-in-Fact has Imprudently Invested*

This example is a variation on example C.2.a. L represents G as attorney-in-fact for E under a durable power of attorney prepared by E's former lawyer, M, who is now dead. In reviewing G's records as attorney-in-fact, L learns that G invested part of E's estate in commodity futures, contrary to local law, and that as a result E's estate suffered a substantial loss. L's investment advice to G had been proper. Assume that L had no duty to determine whether G made investments contrary to L's advice. Must L disclose G's conduct to E or to E's family or to the court? May L disclose G's conduct? Must L resign from representing G? May L resign?114

**Empathic Analysis**

At least one source suggests that L may at least recommend that E's family seek independent counsel.115 L's further course of action may depend on local rules. How would G's violation of local law be classified?

112. This situation, and the others dealing with powers of attorney, are perhaps the most difficult of the primary/derivative client situations. While lawyers representing other fiduciaries, such as trustees and guardians, will be able to justify at least some disclosures because of court supervision, the lawyer representing an attorney-in-fact will rarely have access to that justification. Instead, any decision to disclose will have to be based on a finding of affirmative obligations implicitly arising from the duty owed to the derivative client (even though that duty is generally expressed in negative, rather than affirmative, terms) or, alternatively, based on the "impliedly authorized" language in Model Rule 1.6.

If L were to decide that disclosure of G's actions was justified, to whom should L disclose? Professors Hazard and Hodes and Mr. Gadsden, while recommending disclosure of fiduciary misconduct, envision disclosure to a party already involved in the relationship—the court or the beneficiaries. Disclosure to a member of E's family is stepping outside the boundaries of the primary/derivative client situation. See Hazard & Hodes, *supra* note 78, at 1.3:108, 1.14:102, 1.14:301; Gadsden, *supra* note 99, at 30-39. 113. *See supra* notes 79-85 and accompanying text (L has duty to report client-fiduciary's misconduct, but is subject to a malpractice suit).

114. This example is based on example 1.6-1(2) of the ACTEC Commentaries. *See* ACTEC Commentaries, *supra* note 8, at 42.

115. *Id.* Such a suggestion may be especially valuable in those states where certain parties are allowed to request court supervision for powers of attorney, but it also comes at least as close to a disclosure as any withdrawal might. However, the hypothetical
Is it sufficiently serious to invoke some other disclosure exception? As to withdrawal, L is probably not obligated to withdraw, but may be well advised to do so.\footnote{116}

Autonomic Analysis

Consistent with the autonomy principle summarized in the preceding discussion, L must disclose G's conduct to someone; the only question is whether disclosure to the family or to the court would be most reasonable.

The analysis begins, however, with recognition that issues concerning E's autonomy run first to E, himself, and then to the court. Disclosures by L to E do not represent breaches of trust, since L stands in a fiduciary relation to E even while serving as G's attorney.\footnote{117} Except for E, the court more than any other source of oversight has the interest, power, and independence to frame solutions that will protect E's autonomy. Accordingly, next to E the court should be viewed as the primary source for referrals of wrongdoing. Disclosure to the family may well result in a referral to the court, but is also more likely to introduce pressures for negotiated settlements even when compromises may be inconsistent with the general public interest.

If matters reach a point where L must make disclosures, L must withdraw from the representation of G.

4. Representation of Guardian After Long Representation of Ward

In the preceding examples, assume that, instead of initially being re-involved a trustee, rather than an attorney-in-fact, and thus the beneficiaries would be derivative clients.

116. G's actions may not require withdrawal as per Model Rule 1.16, but, in representing a fiduciary, L's duties to the derivative client require that L take no part in assisting a fiduciary breach. \textit{See supra} note 94.

117. Despite the absence of an explicit derivative client relationship between L and G, in policy terms the situation is analogous to that faced by the court in \textit{Riggs National Bank v. Zimmer}, 355 A.2d 709 (Del. Ch. 1976). In \textit{Zimmer} beneficiaries of a trust sought a memorandum prepared by the trustee's lawyer over the lawyer's claim of privilege. In concluding that the memorandum should be released, the court's analysis was in classic autonomic terms:

\begin{quote}
This is not a simple case of a single client communicating with his attorney to obtain legal assistance but presents a situation which involves the rights of other parties as well. Thus, . . . whether or not disclosure of the document in question should be allowed . . . must be determined in light of the purpose for which it was prepared, and the party or parties for whose benefit it was procured, in relation to what litigation was then pending or threatened. If it is determined that the beneficiaries were ultimately the persons intended to benefit from the legal assistance requested and the memorandum . . . [then] the issue of the asserted right to inspect the document against the defensive claim of privileges comes into clearer focus.
\end{quote}

\textit{Id.} at 711. More briefly stated, therefore, such determinations should always be made in light of what is most likely to enhance the ultimate beneficiary's ability to exercise his or her options.
tained by G, L was for many years the lawyer for E, doing E's estate planning and other legal work. After E became incompetent, L was retained by G to advise G as guardian or attorney-in-fact.

**Empathic Analysis**

Here, there is a question as to whether E is still L’s client. Theoretically, L could continue to represent E and represent G as attorney-in-fact as well. Under such a joint representation, information relating to G’s actions as attorney-in-fact would not necessarily be protected from disclosure to E. Given L’s previous (perhaps continuing) relationship with E, L would seem justified in at least withdrawing from representing G, while still representing E.

**Autonomic Analysis**

Inclusion of the additional facts (i.e., that L was for many years the lawyer for E who was retained by G to advise G as guardian or attorney-in-fact) does not change the results announced in C.3.a. The new facts do, however, raise the question whether it was appropriate for L to represent G, when L was already representing E. Assuming that there were no existing unresolved conflicts, there is no reason why L ought not to join with G in serving the interest of E.

If, and when, a conflict between E and G arises (as in the case of impending or completed fraud or imprudent supervision by G), L must disclose to G and withdraw from the representation.

**D. Client Under a Possible Disability**

This section covers issues that arise when lawyers represent clients that may be under a physical, mental, or legal disability. The section includes hypotheticals dealing with the confidentiality of medical information relating to a possibly incompetent client, disclosure to guardians of clients.

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118. See Gadsden, supra note 99, at 21 (arguing that a lawyer may represent both a fiduciary and a beneficiary, since in most cases both parties will have a common goal—the fulfillment of the settlor’s wishes). It follows that a lawyer may represent both a principal and an attorney-in-fact, and especially a guardian and a ward, since their goals should be even closer—the maximizing of the ward’s estate for the ward’s own use and enjoyment.

119. If E were in fact incompetent, however, this would not be very meaningful. In each of the foregoing power of attorney representations, L may wish to consider instituting guardianship proceedings for E, and thus bring management of E’s estate under court supervision. Such action of itself poses disclosure problems. In C.3.a and C.3.b, L may simply not know enough about E’s condition, and thus petitioning for a guardian may itself be a disclosure, as would a withdrawal in some circumstances, of G’s confidences. In C.4, L, who has represented E in the past, is more likely to have the necessary information, but L may also know that E opted for a power of attorney just to avoid the cost and embarrassment of guardianship proceedings. See McGovern, supra note 67, at 18. See also infra example D.2.a et seq. (illustrating disclosure problems and incompetency).

120. See infra example D.2.

121. See supra notes 79-85 and accompanying text.
under a legal judgment of incompetency, representation of a client who
appears incompetent, and representation of a client who requests a rad-
cal change in his or her testamentary plans. 122

1. Disclosure of Medical Information

a. Disclosure of Recent Medical Exam; Client Refuses to Consent to
Disclosure

For many years, L represented E, who is now elderly. L did E's estate
planning and other legal work. E's recent behavior, as observed by L,
has seemed erratic and inconsistent with E's behavior as L has observed
it over the years. L is concerned that E may be incompetent and unable
to manage her affairs. In the course of his representation of E, L learns
that E has recently undergone a medical examination. L contacts E's
physician and requests her opinion of E's competency, based on the re-
cent medical examination. E instructs the physician not to disclose her
medical information to L. May E's physician disclose patient informa-
tion to L?

Empathic Analysis

Physicians, like attorneys, owe a duty of fiduciary confidentiality to
their patients. 123 Breach of that confidence can have legal con-
sequences. 124 As with the attorney-client privilege, the privilege belongs
to the professional but to the client-patient, and only the client-pa-
tient can waive the privilege. 125 If E refuses disclosure, L should expect

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122. One commentator offers the following options as the universe of choices available
to attorneys dealing with possibly incompetent clients:

(1) Follow the client's wishes as if the client were competent;
(2) Seek a guardian for the client, either directly or through referral;
(3) Rely on the next of kin as proxy decisionmaker, but without seeking prior court
approval of the decisionmaker;
(4) Act as de facto guardian (which the commentator notes is acting without actual
authority);
(5) Deviate from conventional interaction by seeking to persuade the client to permit
the attorney to do what he or she thinks a more "realistic" client would choose (which is
essentially a variation on the "substitution of judgment" option, where the attorney tries
to determine the "judgment" of a normal client, rather than determining what the actual
client would decide if more lucid); or
(6) Withdraw from the representation. See Paul R. Tremblay, On Persuasion and Pa-
ternalism: Lawyer Decisionmaking and the Questionably Competent Client, 1987 UTAH
L. REV. 515, 553.

("[M]odern public policy strongly favors the confidential and fiduciary relationship ex-
isting between a patient and his physician.").

124. See Humphers v. First Interstate Bank, 696 P.2d 527, 536 (Or. 1985) (holding
actionable a doctor's disclosure of confidential adoption information).

125. Physicians are required to disclose some information, for example to government
agencies. But it has been strenuously recommended that, where possible litigation is in-
volved, physicians respond only to court orders and only through formal discovery chan-
nels. See Petrillo, 499 N.E.2d at 968.
CONFIDENTIALITY ISSUES

the physician to honor that refusal.\textsuperscript{126}

\textit{Autonomic Analysis}

That the autonomy principle asserted here as the \textit{raison d’être} of the attorney-client relationship has its counterpart in other professional relationships\textsuperscript{127} lies behind L’s hypothetical request to E’s physician for disclosure of E’s medical condition. E’s consultation with her physician, like her consultation with L, must be understood as an act of empowerment by and for E that is personal and exclusive. Based on medical (or legal) advice, E may deem it in her self-interest to empower others with the information received, but any resulting dissemination of the information must also be viewed as an expression of E’s autonomy. It follows, therefore, that without E’s authorization, L is no more entitled to information from E’s physician about their consultations than the physician would be entitled to consultative information from L’s meetings with E.

\textbf{b. Disclosure of Recent Medical Exam; Client Consents to Disclosure}

Same as example D.1.a, except that E has consented to disclosure of her patient information. May E’s physician disclose patient information to L?

\textit{Empathic Analysis}

As noted, the waiver of the physician-patient privilege is at the patient’s discretion. As in D.1.a, L can expect the physician to honor E’s decision to disclose.\textsuperscript{128}

\textit{Autonomic Analysis}

Yes, E’s physician may disclose patient information to L. As in the case of the attorney-client privilege, when E has consented to disclosure by her physician to L, the confidentiality of patient information is waived for that narrow purpose. Accordingly a waiver by E would normally be sufficient to authorize L’s access to patient/doctor confidences. The instant hypothetical raises a limiting consideration, however: If E is, in

\textsuperscript{126} Medical ethics, and statutes that delineate the legal limits of the physician-patient privilege, allow a physician to disclose to protect the patient or society at large. If the physician felt that E was a danger to himself, the physician might feel that disclosure, leading to appropriate protective action, would be permissible. See Robert M. Gellman, \textit{Prescribing Privacy: The Uncertain Role of the Physician in the Protection of Patient Privacy}, 62 N.C. L. Rev. 255, 281-87 (1984).

\textsuperscript{127} See supra note 123 and accompanying text (physicians as fiduciaries).

\textsuperscript{128} A caveat: physicians, like attorneys, must consider the quality of E’s consent: has E been properly informed of the possible consequences and is E competent to consent? See John R. Murphy, \textit{Older Clients of Questionable Competency: Making Accurate Competency Determinations Through the Utilization of Medical Professionals}, 4 Geo. J. Legal Ethics 899, 914-16 (1991). The physician may be in a better position to judge E’s competency to consent, and the physician can also justify disclosure on the “best interests” grounds.
fact, *non compos mentis*, then her waiver in favor of L is not sufficient to constitute a waiver of the doctor/patient confidence.  

Ideally, the doctor would have taken pains to assure that E identified persons able to act during E's incapacity. Failure to do so may well constitute malpractice on the doctor's part. In the absence of such precautions, however, if E is incompetent the physician would violate the autonomy principle by releasing information to L. From the physician's standpoint, L is a stranger to E and strangers ought not to be allowed to interfere with a patient's use of a doctor to preserve autonomy. Moreover, as E's attorney, L had it within his authority to draft agreements authorizing him to act in E's behalf in designated situations. Here, too, the absence of such an agreement may well constitute malpractice.

c. *Medical Exam Taken at Lawyer's Request*

Same as example D.1.a, except that E has not had a recent medical examination. L suggests to E (and properly so) that she undergo an examination. E agrees to the examination. May E's physician disclose information about the examination to L?  

**Empathic Analysis**

If E goes to a new physician at L's request, the confidentiality of the exam is uncertain. Does a physician-patient relationship arise when the physician examines the patient solely for potential litigation? Does the sharing of the exam results render the information non-confidential?

**Autonomic Analysis**

Here, too, the governing consideration is whether E has competently authorized her physician to disclose her medical records. If so, E's physician may make such disclosures of E's medical records as would be consistent with E's authorization, including disclosure of the information to L. Although questions about the confidentiality of E's medical information might arise if E's medical exam were conducted in preparation

129. See id. at 915 (doctor must weigh patient's capacity to waive privilege).
131. See *City & County of San Francisco v. Superior Court*, 231 P.2d 26, 28 (Cal. 1951) (holding that when purpose is only examination, not treatment, no physician-patient relationship is created).
132. This may depend on local discovery rules and at what stage the exam occurs. *City & County of San Francisco* suggests that the physician is in fact a communicating agent between client and attorney, and all information is thus covered by attorney-client privilege, not physician-patient. See id. at 29-30. For the hazards of requesting medical records when litigation is brewing, see *Rea v. Pardo*, 522 N.Y.S.2d 393, 396-98 (App. Div. 1987) (holding that release was a sign that litigation was possible and that release of records to a potentially adverse party was not breach of confidence after lower court held that merely requesting release of records to lawyer, when litigation had not yet begun, did not waive confidentiality).
for trial, the facts here present the medical exam as overdue and, although with L's prompting, conducted in the regular course of medical care.

d. Client Consents to Physician Disclosure; Client Found To Be Incompetent

Same as example D.1.a, except that E has consented to her physician's disclosure of her medical information, and the physician discloses it to L. Based on the information, L concludes that E is incompetent. May L disclose the medical information to E's family? To the court?134

Empathic Analysis

An apparent prior relation between the physician and E distinguishes this scenario from D.1.c, where mere disclosure between the communicating agent and L would not render the information non-confidential. Even so, the physician's disclosure to L would not seem sufficient to remove this disclosure from the realm of confidential information.135 E's consent does not seem to extend to wider disclosure and, even if it did, E's competency to make that consent is now doubtful.136 Accordingly, L's authority to disclose must be based on some grounds other than E's consent or the fact of the physician's compliance with E's request.137

Autonomic Analysis

Assuming the authorized disclosure of information by E's physician to L,138 what further disclosure L may make of the information is problematic. The specific terms of that waiver will determine the scope of its use. Absent clearly articulated limits on the disclosure, the scope of L's use of the information must be deemed to be limited to purposes reasonably necessary to accomplish the legal representation for which L received the waiver.139 Whether L may disclose medical information to E's family or the court, therefore, requires a contextual determination. As a general rule, however, genuinely ambiguous issues ought always to be referable to a court (or an appropriate ethics advisory body) for resolution, since

133. See supra note 131.
135. The distinction might matter if attorney-client privilege alone were involved. But to meet ethical standards of non-confidentiality, the information would have to be readily attainable through public sources.
136. See supra note 119 (mental capacity to waive confidentiality).
137. For a fuller discussion of those possible grounds, see supra note 126.
138. L's belief that E is incompetent to authorize disclosure of her medical records may be dispositive, see supra note 128 and accompanying text, but need not necessarily be so. If notwithstanding L's medical diagnosis, E is, in fact, competent, that ought to govern. At that stage, the issue becomes one of the scope of the waiver.
139. See supra text accompanying notes 132-33 (scope of disclosure).
courts are neutral stakeholders. In contrast, disclosure to family members is prohibited in the absence of explicit authorization because of the risks to E's autonomy.  

2. Client Under Legal Judgment of Incompetency

a. Guardian Wants Lawyer to Disclose Estate Plan That Lawyer Prepared for Ward

For many years, L represented E (now elderly), did E's estate planning, and did other legal work for E. E became of doubtful competency and E's family sought an adjudication of incompetency and the appointment of a guardian for E's person and estate. At E's request, L opposed the family's petition. E was adjudicated an incompetent and G was appointed as guardian. L is in possession of E's estate planning records including E's will (which was executed while E was competent). E's family had previously been advised by E that E had made a will and that L was E's lawyer. G asks L to deliver E's estate planning records or at least to disclose the contents of E's will to G.

Empathic Analysis

Proper resolution may depend on the nature of the guardianship and of the plans involved. At least one ethics opinion counsels against turning over or revealing the contents of E's will to a guardian, although another opinion differentiates between the rights of a conservator and the rights of a guardian.  

In some jurisdictions a conservator—most often with a narrower scope of responsibility—may not have authority equivalent to a "general guardian" to waive the privilege that would normally protect work done on E's behalf. Generally, however, L should keep the contents of any will or estate plan confidential as far as possible; this covers disclosure both to E's family and to E's guardian. The case law has treated wills as uniquely requiring special protection. Disclosure of will contents to guardians, in particular, has been strongly discouraged.

With respect to E's estate plans, G has the power to manage E's prop-

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140. See supra text accompanying notes 106-07.
143. See Pond v. Faust, 155 P. 776 (Wash. 1916) (will is not an asset and need not be turned over to guardian). But see Airey v. Airey, 250 So. 2d 52 (La. Ct. App. 1971) (curator's duty is to preserve property, including will).
144. See In re Guardianship of York, 723 P.2d 448 (Wash. Ct. App. 1986) (denying disclosure of will to prove unfitness and undue influence of guardian); Bauman v. Willis, 721 S.W.2d 535 (Tex. Ct. App. 1986) (finding no cause to turn adequately safeguarded will over to guardian).
erty and may require access to such plans in order to manage effectively. L may justify such necessary disclosures under Model Rule 1.6's "impliedly authorized in order to carry out the representation" language, but any disclosure should be as limited as possible. L should not in any circumstances disclose the contents of E's will, and should counsel G against unnecessary disclosure of other estate planning details.

**Autonomic Analysis**

As the guardian of E, G succeeds to all of E's interests, tangible and intangible. G's obligation is to exercise for E the autonomy-preserving and promoting powers that E might reasonably have exercised. To do so, G must have access to all information reasonably necessary for informed decisionmaking on E's behalf. Therefore, subject to the possible need to protect E from a crime or significant bodily injury, L must provide for G's complete access to E's files including E's will. It is, after all, E's will that is to be protected; not L's will. As to abstract potentialities, as opposed to clear and present dangers, therefore, if L is concerned about the legitimacy of G's use of the will, that issue ought to be resolved at a later point, by judicial challenge.

b. Ward's Family is Unaware of the Type of Services Performed by Lawyer

Same as example D.2.a, except that E's family is not aware that L previously did estate planning for E. The family knows only that L did legal work of an unspecified nature for E.

**Empathic Analysis**

Ordinarily, the type of service performed might be regarded as a "fact" not properly covered by attorney-client privilege, but, again, wills are unlike other legal documents. If the fact of the execution of the will is not known, L should not disclose the information.

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145. Disclosure of E's plans to G may not seem necessary to L's representation of E, but in cases where an incapacitated client is involved, ethics opinions have tended to stretch "authorized in order to carry out the representation" to cover the client's best interest. Model Rules, supra note 13, Rule 1.6; ABA Comm. on Ethics and Professional Responsibility, Informal Op. 89-1530 (1989) (justifying disclosure of client's abuse of medication by this exception to Model Rule 1.6).

146. The ban on disclosing will contents is broad, covering not just the incompetent client situation, but also parent-child, etc. See, e.g., Committee on Ethics of the Maryland State Bar Ass'n, Op. 85-18, in ABA/BNA, supra note 16, at 801:4351 (undated) (attorney may not reveal fact that father is client for will preparation to son, and vice versa [even identity of client is confidential]); Committee on Prof. Ethics of the Bar Association of Nassau County (N.Y.), Op. 87-33, in ABA/BNA, supra note 16, at 901:6259 (1987) (forbidding disclosure of contents of will of now-incompetent client to relative who wishes to begin conservatorship proceedings).

147. See Model Rules, supra note 13, Rule 1.6(b)(1)

not to inform his family is an additional justification for L not to disclose
the nature of his services. As to other legal work, L would be justified in
making known to G information required for G’s proper management of
E’s estate.

_Autonomic Analysis_

Courts have viewed the central issue in cases of this type as turning on
the impliedly confidential nature of information concerning the existence
of a client’s will. Such an emphasis, however, too greatly focuses on the
supposedly inherent characteristics of will-making. From the autonomic
perspective, the issue ought to be seen more directly as focused on the
testator. As such, the issue is better stated as whether E has authorized
L’s disclosure of the existence of a will. In the absence, therefore, of E’s
affirmative instruction to disclose, L’s duty is to assert the client’s confi-
didentiality. Such an assertion of confidentiality is not simply a desire to
keep information from others. More positively stated, in Frank Slade-
like terms, it is an expression of one’s ability to control one’s life
which, if lost, is tantamount to the loss of life itself. Accordingly, L owes
no duty to E’s family to disclose information about the existence of a
will, because if such discussions are to take place, they must take place at
E’s instruction. L’s duty, if to anyone, is to E’s guardian or executor.

3. Representation of Client Who Is Apparently Incompetent

a. _Client Appears Incompetent After Lawyer Has Been Retained to
Pursue Potential Litigation_

E suffers a broken hip while being treated at a hospital and retains L to
represent him. Over the course of several weeks L meets with E a
number of times. E’s memory seems to be weakening, but L attributes it
to medication and pain relievers. At their last meeting, however, E does
not recognize L, and when L mentions the case and the need to file suit if
settlement negotiations fail, E tells L to leave and not come back. Ap-
parently E has suffered a stroke, and full recovery of mental powers is
unlikely. Must L communicate with the hospital or its representatives
concerning E’s condition? May L communicate with the hospital or its
representatives?

_Empathic Analysis_

L is not required to communicate with the hospital about E’s condition
in regard to the possible litigation. Whether L should continue with
the potential litigation is a difficult question. The Restatement suggests

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149. See _supra_ text accompanying notes 1-3.
150. See _supra_ notes 139-40 and accompanying text.
151. One ethics opinion went so far as to say that an attorney should not notify a
potentially adverse party of the ward’s death. Committee on Prof. Ethics of the Birm-
that, while E has no representative, L should continue to press E’s claim. The Model Rules, on the other hand, suggest that in such instances L may act as E’s de facto guardian. L must decide how much weight to give E’s apparent desire to discharge L or to terminate the potential litigation. These actions may appear irrational to L, and E’s incompetence may seem obvious, but L should also consider that E may have other motives (e.g., he may not wish to face the stress of a possible trial, or he may fear aggravating those upon whose care he currently relies).

An interim step may be available to L. In some jurisdictions, the appointment of a guardian ad litem does not require a finding of incompetence. L would not be alone in deciding whether to act on L’s understanding of E’s best interests or on L’s understanding of what E might want.

**Autonomic Analysis**

When, in the course of the representation, L is confronted with a hospitalized E who has apparently suffered a stroke during treatment, the question raised is whether L must communicate with the hospital about

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152. See Restatement, supra note 8, § 35(2) (Tentative Draft No. 5, 1992).

153. See Model Rules, supra note 13, Rule 1.14(b). While both the Restatement and the Model Rules give the lawyer some authority to act independently for an incapacitated client, L needs to keep in mind that in some areas L cannot act in E’s behalf; for example, L could not accept a settlement offer. See id.; Restatement, supra note 8, at § 33. Even if L decides at this juncture to continue without disclosing E’s possible incapacity, he may face the same dilemma later in the representation.


155. See Smith, supra note 134, at 72


E's condition. For purposes of this example, we assume that L's effort to have a guardian ad litem appointed on grounds other than incompetency is not involved. Accordingly, the answer depends both on the nature of the proposed communication and on the scope of the representation. Assuming, however, that the proposed communications are reasonably necessary to allow L to carry out the representation, L may communicate with all relevant persons; moreover, in circumstances threatening harm to the client or others, L will have a duty to do so.

By communicating with the hospital about E's condition, however, L does run the risks inherent in communicating with persons who, on the one hand, are not represented by counsel, or who, on the other hand, are known to be represented by counsel. Especially if the communication is about the circumstances of E's hip injury, the applicable considerations will include full disclosure obligations as to L's role and interest as well as the need to seek opposing counsel's permission prior to discussing a matter with opposing counsel's client.

b. Suit has Already Been Filed, Lawyer's Communication With Court

Same as example D.3.a, except that suit has already been filed against the hospital. Must L communicate with the court regarding E's condition? May L communicate with the court?

Empathic Analysis

Most jurisdictions provide but do not require that an incompetent may be represented by a guardian or some other party. Were L to continue with litigation without notifying the court, E's suit might be dismissed at

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158. See supra note 156 and accompanying text.
159. See infra example D.3.b.
160. See Tarasoff v. Regents of the University of California, 551 P.2d 334, 340 (Cal. 1976)(despite confidentiality duty, psychologist possessing first-hand knowledge of client's homicidal intention to harm an unaware third-party had duty to warn).
161. Model Rule 4.3 requires:
   In dealing on behalf of a client with a person who is not represented by counsel, a lawyer shall not state or imply that the lawyer is disinterested. When the lawyer knows or reasonably should know that the unrepresented person misunderstands the lawyer's role in the matter, the lawyer shall make reasonable efforts to correct the misunderstanding.
Model Rules, supra note 13, Rule 4.3; see also Model Code, supra note 13, DR 7-104(A)(2) (prohibiting a lawyer from giving advice to an unrepresented person, other than the advice to obtain counsel).
162. Model Rule 4.2 provides that: "In representing a client, a lawyer shall not communicate about the subject of the representation with a party the lawyer knows to be represented by another lawyer in the matter, unless the lawyer has the consent of the other lawyer or is authorized by law to do so." Model Rules, supra note 13, Rule 4.2; see Model Code, supra note 13, DR 7-104(A)(1) (substantially the same prohibition).
163. See Withers v. Tucker, 145 N.W.2d 665, 667 (Wis. 1966) (finding that client's interests were not prejudiced by not being represented by guardian ad litem when lawyer presumably knew of client's disability by time of trial, a statute required a minor to be represented by guardian ad litem, and incompetents did not need representation until court became aware of disability).
a later date if E's competency came into question. L's decision to notify the court may depend on local requirements for the representation of incompetents.

**Autonomic Analysis**

If E suffers his mental deterioration during the course of the hip injury lawsuit against the hospital, that development alone suggests no reason for advising the court. If L's representation had been more general, however, (for example as a guardian) then the changes in E's condition might well warrant court notification. On the facts, however, L need not advise the court—it is a matter of discretion absent a law or rule—but must take steps to assure that a guardian is appointed for E.

An appropriate guardian would be E's nearest kin. If unknown or unavailable, a motion to the court for appointment of E's closest friend as guardian would be appropriate. L's role in the appointment of a guardian for E should be minimal and at arm's length. If asked, L may advise interested good samaritans about their need to have legal counsel, but L should take care to assure that his advice does not suggest self-dealing. Beyond L's role as E's representative in the negligence matter, L has no general authority or responsibility for E's affairs.

If no one steps forward to assert E's interest, L may advise the court that E is now in need of guardianship. On the limited facts presented, it would not be inconsistent with L's role for him to be named as G's guardian.

c. Petition for Incompetency Filed; Lawyer's Testimony in Guardianship Proceedings

Same as example D.3.a, except that E's sister has filed a petition to have E adjudicated an incompetent and for the appointment of the sister as the guardian of the person and estate of E. Another attorney is repre-

164. See Bodnar v. Bodnar, 441 F.2d 1103, 1104 (5th Cir.), cert. denied, 404 U.S. 841 (1971) (dismissing suit without prejudice when plaintiff's mental capacity became an issue and plaintiff refused examination). *But see* Donnelly v. Parker, 486 F.2d 402, 407-09 (D.C. Cir. 1973) (holding that trial court's refusal to order examination of party when capacity was questioned was not clearly erroneous).

165. L should also keep in mind that some opinions have considered that a failure to prosecute E's case, given that at the outset of the representation E was clear in his objectives, might itself be an ethical breach. *See* Donnelly, 486 F.2d at 411 (Robb, J., concurring) ("Indeed, had counsel failed to carry out his client's instructions he might have been guilty of professional misconduct.") (footnote omitted); Florida State Bar Ass'n, Op. 73-25, *in* 1974 WL 20331 (1974) (continuing attorney's duty to protect incompetent client's rights until withdrawal permitted by court, and noting that petition for withdrawal should not mention competency).

senting the sister in the guardianship action. L is requested to testify in the action. Must L testify? May L testify?

Empathic Analysis

L probably should not testify at all; certainly he should not share the opinions he formed about E in the course of his representation of E. Ethics opinions agree that such information is confidential, and any disclosure should be as limited as possible, if at all. There is case law, however, that observations of dress and demeanor are not covered by the attorney-client privilege, but the line between non-privileged observations and privileged impressions is not clearly drawn. L would best be advised to invoke the attorney-client privilege and not testify against E. L's observations are based not only on dress and demeanor but also on E's reaction to the representation.

Autonomic Analysis

As a general matter, L may not testify against E's interest if E's sister files a petition to have him adjudicated an incompetent and herself appointed E's guardian. Because L is in a lawyer/client relationship with E, L must decline to testify as to matters learned in the course of his representation or as to matters which are confidential or secret. L should assert the privilege and, if subpoenaed, force the sister to establish the existence of limited, narrow, unprivileged information about which L might testify.

d. Concurrent Representation of Party Seeking Adjudication of Incompetence

Same as example D.3.c, except that E's sister has requested that L represent her in filing the petition for guardianship. May L represent the sister?


168. See United States v. Kendrick, 331 F.2d 110, 115 (4th Cir. 1964) (Sobeloff, C.J., concurring) (covering privileged and non-privileged impressions in this context, because impossible to separate). Scott followed Kendrick, although noting with approval the dissent. Both Scott and Bishop concerned competency hearings; the refusal to find attorney-client privilege also may have been influenced by finding that the competency hearings were not "adversarial."

169. See supra note 11 and accompanying text (attorney-client confidentiality).
**Empathic Analysis**

L may not represent E's sister. While some ethics opinions suggest that L could appropriately initiate competency hearings, the fact remains that a competency hearing poses a significant threat to E's autonomy. All ethical codes prevent an attorney from taking a position adverse to a present client (if L is still indeed E's attorney) or adverse to a former client if the matter is "substantially related" or involves confidential information relating to the former client. While L may believe that the appointment of a representative is in E's best interests and, thus, may decline to represent E, L certainly should not represent the adverse interest.

**Autonomic Analysis**

It is also impermissible for L to represent E's sister in an action to establish herself as E's guardian. Since the guardianship is contested, any participation by L on behalf of the sister would result in L being impermissibly on both sides of the case.

e. **Lawyer Initiating Petition for Guardianship**

Same as example D.3.c, except that no one has filed a petition for guardianship. L believes, however, that a guardianship for E may be warranted. May L file the petition for guardianship?

**Empathic Analysis**

Ethics opinions are split on this question. Some suggest that withdrawal, without disclosure, is the only appropriate response; others suggest that L may initiate a guardianship proceeding and still remain E's

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170. In some cases, competency hearings have been considered not adversarial. See Bishop, 724 P.2d at 26. But given the high stakes involved—a loss of autonomy and perhaps involuntary commitment for E, potentially self-interested family members—L should consider the action as an adversarial one. Murphy, supra note 128, at 904.

171. See Model Rules, supra note 13, Rule 1.7 cmt. The conflicts may be especially acute if L has represented other members of E's family, such as E's spouse; a finding of incompetency might be prejudicial to E, but a failure to adequately protect E may be prejudicial to E's spouse. Professional Ethics Comm. of the Bar Ass'n of Greater Cleveland, Op. 86-5, in Nat'l Rep., supra note 87, at OH:OPINIONS:25, 33 (1987).


174. Examples D.3.a to D.3.e are based in part on Situation 9 in Professor Donaldson's ALI-ABA outline. See Donaldson, supra note 58, at 16-17.
attorney.\textsuperscript{175} L's decision may also depend, however, on tangential considerations, such as whether the relevant statutes afford L standing to initiate such proceedings.

As a practical matter, L may in fact be the best person to initiate proceedings. By going directly to the court, L may be able to limit disclosure more significantly than by communicating with family members in hopes that they might initiate proceedings.\textsuperscript{176} L's initiation of guardianship proceedings may also have a salutary effect; since there would undoubtedly be lowered expectations by relatives that L is on "the family's side" in the proceedings, the action might save him from conflict of interest problems.

\textit{Autonomic Analysis}

Because L represents E, L may take no action against E which has not been, at least implicitly, directed by E. If, therefore, L concludes that E is in need of guardianship, L's proper recourse is simply to await E's sister's filing of a petition or to withdraw immediately. This approach would preserve E's autonomy while signalling the need for others, including the sister, to exercise the requisite oversight.

4. Client Requests Radical Change in Will

Several years ago L prepared a will for E, an aged client. The will made several modest bequests for charitable purposes and left the residue of E's substantial estate equally to his three children, all of whom live in a distant state.

E had always been a devoted family man, but has been somewhat reclusive since his wife died seven years ago. E now requests L to prepare a new will under which his entire estate would be left to a designated animal humane society. In trying to understand this radical change in plans, L learns that E has been spending a lot of time with a neighbor who is a volunteer worker at the humane society. L also learns that E has expressed doubts that he is the parent of the three children, although he refuses to explain the reasons for his doubts. Moreover, E rejects L's suggestion that blood tests may resolve the doubt. E says that it is a personal matter and of no business of L.

All that L is really sure about is that E's demeanor is strange and his capacity doubtful. May L communicate any of this information to the


\textsuperscript{176} See Committee on Prof. Ethics of the Ass'n of the Bar of the City of New York, Op. 1987-7, in ABA/BNA, supra note 16, at 901:6406 (1987) (allowing attorney to disclose to court for protective action, but should take all possible actions to protect client's confidences, including sealed proceedings if possible).
three children?  

Empathic Analysis

Few ethics opinions counsel going to a family member in this situation. Usually it is left to the attorney to seek guidance from a medical professional or to begin proceedings independently. Perhaps this reflects a recognition that the interests of family members, despite good intentions, may be unavoidably adverse. As in earlier situations, L should not reveal the contents of current or prior wills to E's children. L's decision about whether to reveal his opinion of E's mental state may depend on what L knows of E's overall family situation.

Autonomic Analysis

L may not communicate to E's children the fact that his client, E, has told him that he intends to disinherit them. Again, it is E's autonomy that L was engaged to preserve and promote. The children definitely have grounds to be concerned, but their potential future interest in E's estate does not measure up to E's actual interest in his own autonomy. If L believes that E is no longer competent to make decisions about his estate, L should simply withdraw from E's representation. From a practical standpoint, a motion to withdraw would alert the children to the need, if any, to help their father find new counsel.

III. Some Final Remarks

Given the myriad confidentiality issues to be found in the attorney-client relationship, a question asked by Frank Slade in Scent of a Woman comes to mind. Turning in response to Charlie Simms' grabbing of his arm to assist him in exiting a taxi, Slade asks: "Are you blind?" Charlie, confused by the absurdity of the question, replies that he is not. To which Slade replies, "Then don't grab me! I grab you! You don't grab me!"

The delicate balance which the lawyer must achieve in handling the

177. This example is based on Situation 10 in Professor Donaldson's ALI-ABA outline. See Donaldson, supra note 58, at 17-18.
179. See infra examples D.2.a and D.2.b.
180. See supra note 23 and accompanying text (concerning noisy withdrawals).
181. Supra note 1.
182. Id.
confidences inherent in legal representation lies somewhere between giving help and giving no help at all. The lawyer must choose between grabbing a client to do for the client what is best, and letting the client grab hold of the lawyer just enough so that the client feels safe in making his or her own way. The risk in the latter strategy is, of course, that a client may overestimate his or her capacity for self-reliance. Rather than life-affirming autonomy, exploitation at the hands of loved ones (or even the lawyer) may be the actual result. Equally daunting, however, are the risks inherent in the alternative approach. The further one moves in the empathic direction, the more necessary it is to assume the adequacy of one's knowledge of the client's true interests. Worse still, in the course of doing for the client what one supposes is best, the danger is heightened that a lawyer will in actuality be tempted to do even better for himself or herself.

The instant discussions, from the empathic and autonomic perspectives, underscore the different ways lawyers can view the needs and circumstances of their clients. Depending on the philosophical premises that are applied to the interpretation of accepted legal and ethical rules, reasonable lawyers will differ in the way they respond to particular situations. They will disagree not only about appropriate ultimate dispositions, but also about emphasis, timing, sequence and the values to be protected.

In discussing the joint representation of a husband and wife seeking mirror wills, for example, we noted that the majority rule favors the lawyer's withdrawal from the representation when one spouse discloses relevant information to the lawyer but asks that it be held in confidence from the other. We also noted, however, that some courts have begun to view the lawyer's loyalty to the nondisclosing partner as imposing a higher duty to disclose such information notwithstanding the request for confidentiality. Over and above legal doctrine, such disagreements say as much about evolving societal attitudes regarding the capacity and independence of the freely transacting individuals—largely elderly—who are likely to be engaged in such arrangement-making. They tell us, too, that the selection of the appropriate option on the empathic-autonomic continuum involves decisionmaking criteria which must be continually re-evaluated.

What is equally striking, however, is that over a broad range of situations there is more agreement than not on the appropriate ethical course to be taken, regardless of whether the analysis of the situation is empathic or autonomic. Both approaches agree that client attempts to manipulate the lawyer concerning relevant information in the joint representation context may well require the lawyer to demand that the client make a rectifying disclosure or that the lawyer, himself, make the disclosure. They agree too on an underlying principle: in the modern era, it must be recognized—especially given the joint nature of a marital representation and the intent that marital information be shared
openly—that after-acquired knowledge about the intentions of one or the other spouse (e.g., concerning divorce, children out of wedlock, or paramours) is information which must be disclosed when such disclosure can further the goals of the representation.

Similarly, in intergenerational situations, both the empathic and autonomic approaches counsel that particular regard be given to consideration of the sequence of the representation. When, as is most often likely to be the case, the older generation first engages the lawyer, the lawyer's duty of loyalty should be clear. Generally speaking, children and other potential beneficiaries ought not to look to the existing lawyer-client relationship for information or assistance to vindicate their aspirations. Instead, as in the situations where a child seeks access to a will, desires durable powers of attorney from a parent, or seeks appointment as the parent's guardian, both the empathic and autonomic approaches urge that the lawyer's duty be analyzed in terms of sequential representation considerations. The lawyer's duty is to the party he or she first represents.

Finally, in both the fiduciary-representation and client-under-disability contexts, the empathic and autonomic perspectives agree on the principle that loyalty to the ultimate beneficiary of the lawyer's services, on the one hand, and to the disabled client's wishes (as best they can be understood), on the other hand, are the relevant considerations. We recognize, however, that depending on the jurisdiction, these considerations will, perhaps, not be dispositive.

We urge, therefore, a middle ground: to the extent possible the lawyer must strive to assure that the fiduciary carries out his or her duties. The lawyer should do so by persuading when possible and threatening disclosure when permissible. In no instance, however, would we deem testifying against one's client, or otherwise challenging a client's interest, an appropriate outcome. When the lawyer deems it appropriate to affirmatively contest the interest of a client, withdrawal from the representation is required.

Ultimately, therefore, the effort to contrast the empathic and autonomic approach suggests a larger principle. Because the lawyer's representation of a client will inevitably involve both empathic and autonomic concerns, appropriate consideration of those concerns is not, first, to be undertaken at the stage when questions about the lawyer's duty of confidentiality are on the table. More appropriately, such concerns should be identified, discussed, and to the extent possible, resolved as part of an initial representation agreement. Accordingly, we urge that lawyers engaged in the representation of all clients (and elderly clients in particular) must perceive it to be their duty 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 in confidence.

An appropriate engagement letter should also address intergenera-
tional concerns (including potential disputes about access to the will, asset accountings, and issues of fairness among siblings). Furthermore, clients should be advised in detail about unforeseen exigencies, such as the lawyer's role in dealing with fiduciaries who might be named (e.g., guardians or attorneys in fact) or in dealing with the client himself or herself in the event the client becomes disabled. 183

We recognize that the assumption of such additional obligations will be viewed by some lawyers as additional burdens that many clients cannot understand and many lawyers are incapable of bearing administratively or financially. Weighed against the fast-moving transition in thinking that is reflected here in the empathic-autonomic dialogue, however, there is no alternative to lawyers moving in this manner to further empower their clients. As importantly, there is no alternative to lawyers fostering greater client information as a means of protecting their clients and themselves from second-guessing by disgruntled clients, collateral interests, and the courts.

The complexity and vitality involved in the relationship between

183. Certainly it is no great stretch from the present Model Rules to suggest that the lawyer at least consider raising these typical questions of confidentiality at the outset of the representation of an elderly client. If the basis or rate of the lawyer's fee should be communicated to the client, preferably in writing, See Model Rules, supra note 13, Rule 1.5, should not these more personal issues of what to do, for example, in the event of diminished capacity, also be aired and perhaps reduced to writing? The authors do not mean to suggest that at the current time it is malpractice to fail to use engagement letters, for it appears that many skilled trusts and estates practitioners are not yet routinely using them. Nevertheless, it appears that the trend is toward the more frequent use of engagement letters in this, an area of the law that was once thought too personal for such business documents.

In addition to confidentiality, a thoughtful listing of related issues for consideration by the lawyer is found in a questionnaire on ethics formulated for the American College of Trust and Estate Counsel by Messrs. Francis J. Collin, Jr., Martin Heckscher, and Professor Randall W. Roth. See Letter from Frank Collin, et al. to ACTEC Fellows (February 9, 1994) (on file with the Fordham Law Review) (transmitting results of questionnaire). Among other things, the questionnaire asked: Upon being retained by a new client do you routinely ask him or her to confirm that he or she knows of no existing or potential conflict of interest that exists or could arise because of your firm's representation of other clients? If a client has been referred to you by someone with whom you enjoy a special relationship, do you routinely disclose that relationship to the client? If someone other than the client has agreed to pay your fee for representing the client, do you routinely tell the client that someone else will pay your fee and who that person is? Do you routinely inform your clients what action you may be required to take if a conflict arises in the future between their interests and those of another client? When representing a married couple, do you routinely discuss with the clients the potential conflict that could arise from the representation? If you represent more than one member of a family (e.g. parent/child, brother/sister, grandparent/grandchild, etc.), do you routinely discuss with the clients the potential conflict that could arise from the representation? If you represent an estate or trust, do you routinely inform those who have an interest in the estate or trust (as fiduciaries or beneficiaries) which interests you represent and which you do not represent? If an estate planning client decides to appoint you as a fiduciary, do you routinely set forth in writing or require the client to set forth in writing how and why the appointment was made? At some point in time, do you routinely inform long-standing clients about any of the ethical concerns that you routinely inform new clients about? See id.
Frank Slade and Charlie Simms is not confined to the movie screen. In every interaction between people who rely on each other, there is some element of control that must be surrendered. The elderly, like everyone else, must confront their humanity and assert their own legal and moral condition. But they cannot do so without knowing more about themselves and their options—about what it means to be alive and elderly, and about the relationship between dependence and independence. Providing this knowledge is, after all, the lawyer’s role. And it is the lawyer’s desire to embrace and empower clients in the best sense of the attorney-client relationship that has always been the essence of the sense of a client.