

1994

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Recommended Citation

Reports of Working Groups on Intergenerational Conflicts, 62 Fordham L. Rev. 1037 (1994).

Available at: <https://ir.lawnet.fordham.edu/flr/vol62/iss5/6>

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REPORT OF WORKING GROUP ON INTERGENERATIONAL CONFLICTS*

INTRODUCTION

As there was no paper prepared on the subject of intergenerational conflicts, the issue statement prepared by Commission staffmember Lori Stiegel formed the basis of the group's discussion. That issue statement discussed pertinent Model Rules of Professional Conduct ("Model Rules"), cases, and articles.

I. HYPOTHETICALS AND QUESTIONS RAISED

A. *Hypotheticals*

The working group did not focus on the hypotheticals provided in the issue statement. The members did raise the following situations for discussion:

1. Hypothetical (1)

A parent and adult offspring visit a lawyer to make an estate planning document for the parent that is favorable to the descendant. Then either (a) the parent contacts the lawyer in confidence and orders that the plan be changed in a manner less favorable to the heir, or (b) the offspring, in confidence, advises the lawyer of something that would affect the parent's disposition plan if he or she was aware of it.

2. Hypothetical (2)

A hospital patient who is on a ventilator tells a family that he or she wants the ventilator turned off. After the family leaves, however, the patient tells the hospital staff that he or she does not want the ventilator turned off. The family seeks help from a lawyer to obtain a court order allowing cessation of the ventilator.

B. *Questions Raised*

The working group discussed, to varying degrees, all of the following questions raised. The members focused their discussion on intergenerational conflicts that arise in cases involving disposition of assets, provision of health care, particularly long-term care, and business relationships. The working group identified the following questions for discussion:

1. Who is the client?
2. What is the role of the lawyer in defining the attorney-client relationship?
 - a. What should a lawyer do during an initial interview of or about intergenerational family members?

* Group Leader: Mary Daly. Staffperson: Lori Stiegel. Recorder: Meg Reed. Participants: Sia Arnason, Jerry Cohen, Teresa Collett, Ayn Crawley, Wiley Dinsmore, Michael Gilfix, Hal Lieberman, Eugene Scoles, and Raymond Young.

- b. Is the lawyer's role that of an advocate, counselor, or arbitrator?
 - c. What role does the client have in determining the parameters of the attorney-client relationship?
 - d. Should the lawyer decide what is in the client's best interest?
 - e. Should the lawyer's treatment of an intergenerational situation that concerns disposition of assets or provision of care differ from his or her treatment of an intergenerational situation that addresses another issue?
3. Is there a conflict for a lawyer who positions himself or herself to represent the continuing assets or business of intergenerational clients, for example if the attorney generally focuses on continued representation of the younger generation?
- a. Is there a difference between the desires and expectations of intergenerational clients?
 - b. If so, how does the lawyer act on them?
 - c. Do client autonomy and expectation differ for long-standing clients?
 - d. Are there other differences between long-standing and new clients?
 - e. Under what circumstances does a lawyer owe a duty to third-party family members?
4. Should a lawyer treat an intergenerational conflict differently if all the family members are new clients than if there exists a long-standing relationship with one family member and other family members become clients over time before the conflict develops?
- a. What is a family and how does it make decisions?
 - b. Should a lawyer be able to represent a family as an entity?
 - c. Must everyone in the family consent to intergenerational representation or can the family member who is the most affected or vulnerable be the only one to consent?
 - d. How is it determined which family member is the most affected?
 - e. If all members must consent, must each have capacity at the time of agreement?
 - f. Must all members be present?
 - g. What if a member later loses capacity?
 - h. Must or should the family consent to multiple representation at the outset of the representation before any conflict develops?
5. What should a lawyer do to anticipate the likelihood of change in an intergenerational family situation?
- a. Can a lawyer continue to represent some members of the family after one or more of them splinter off?
 - b. If so, how can information gained during that representation be used?
 - c. Must consent to continued representation be given?
 - d. If so, by whom and when?
6. Is it sufficient to make changes to the commentary to the Model Rules rather than to the rules themselves even though most practicing attorneys do not take the time to read the commentaries?

II. DISCUSSION

After enunciating the issues, the group began by discussing confidentiality and the history of the ethical rules regarding confidences between lawyer and client. Noting that confidentiality must be considered before a lawyer can identify who the client is, the group discussed the variations of the first hypothetical.¹

Discussion of those hypotheticals led the group to conclude that representation of multiple generations can affect the lawyer's independent judgment and that discouragement or prohibition of intergenerational representation reflects concern about issues other than confidentiality. These other issues include conflicts, timing of disclosure, expectations of the client, viability of informed consent, and withholding of information or secrets by the lawyer.

One working group member argued that the desire to keep a paying client will always influence a lawyer's judgment and that the Model Rules should reflect this reality of practice. He asserted that he represents multigenerational family members every day and advises them that there is the potential for conflict, that they obtain separate counsel, and, if and when they refuse, that he will do the best job he can. He claimed that he makes this disclosure because he believes that his independent judgment is at risk. Group members included a social worker and consumer advocates who voiced their concern that when multiple clients come to see a lawyer, these individuals are concerned with finding the solution to their problems and not with identifying who among them is actually the client. Thus, these individuals are not likely to see the distinctions that must be made by the lawyer and also are not likely to concede the potential for conflict among them that the lawyer should consider.

The group discussed the theory proposed by Patricia Batt that a lawyer may represent a family unit as an entity.² Russell Pearce, in his article for this Conference, suggested refinements to her theory.³ Under this theory, a lawyer may represent the family unit as an entity and may decide what is in the best interest of the entity even if members withdraw from the representation. While Batt compared the family entity to a corporation, the group believed that a family is more like a partnership. Under current Model Rule 2.2, a lawyer who represents a partnership cannot continue the representation if a partner withdraws. The group noted that in Texas, however, the ethical rules allow a lawyer to continue representing the remaining persons in a group after one withdraws from the group.

1. See *supra* part I.A.1.

2. See Patricia M. Batt, Note, *The Family Unit As Client: A Means to Address the Ethical Dilemmas Confronting Elder Law Attorneys*, 6 Geo. J. Legal Ethics 319 (1992).

3. See Russell G. Pearce, *Family Values and Legal Ethics: Competing Approaches to Conflicts in Representing Spouses*, in *Ethical Issues in Representing Older Clients*, 62 Fordham L. Rev. 1253 (1994).

The lengthy discussion that followed addressed the definition of family, family decision-making mechanisms, a lawyer's ability to recognize those decision-making mechanisms, whether the family entity theory is best compared to a partnership or a corporation, a lawyer's duty to help preserve the family, what happens to the entity if one or more members splinter off from it, the duty of loyalty, and the use of information against a former member of the entity.

A discussion ensued about what to do when multiple clients come to a lawyer to talk about the admission of one family member into a nursing home. Some members of the working group opined that the lawyer should represent the person whose freedom is at risk because of the possibility of institutionalization. Other members argued that the lawyer should represent the individual who will bear, or continue to bear, the greatest burden of care-giving, usually a spouse or child who often provides 24-hour care if the individual does not enter the nursing home. All participants seemed to agree that a lawyer who has a long-standing relationship with a family member who does not want to enter a nursing home should not file a petition for guardianship on behalf of the other family members who seek nursing home placement. This issue is complicated, however, if the lawyer has been representing more than one of the family members for a long time or if the lawyer has not represented any of the family members previously.

The group next considered the second hypothetical, a scenario previously faced by one of the working group members.⁴ The group asked whether the lawyer has a derivative duty to the patient, whether the lawyer has an obligation to advise the court of the conflicting evidence, and whether the lawyer's responsibilities are determined in part by whether the patient has his own counsel.

Deliberation returned to the theory of representing the family as an entity. The group expressed qualms about that theory and questioned whether the lawyer or the family should decide if the family should be treated as an entity and, if the family decides, how that decision should be reached. The group expressed other concerns related to capacity and presence of the members involved, changes in capacity, disagreement within the group, and the type of decisions under consideration. Another disturbing issue raised by the group involved family dynamics and coercion or peer pressure. The group struggled to define the lawyer's duty if a family member says one thing when the family is all together but expresses a different opinion or desire when talking to the lawyer individually. The group questioned whether, under the entity theory, a dissenting family member is betrayed or the process is more akin to negotiation or arbitration. The group also addressed the need for lawyers to ascertain whether family members are being coerced by watching body

4. See *supra* part I.A.2.

language or noting that a son or daughter is speaking for a parent and whether consent is informed and independently granted.

The group outlined the four models for representing intergenerational clients: (1) representing the family unit as an entity; (2) representing multiple clients as a joint group of individuals; (3) representing multiple clients as an individual client; and (4) selecting an individual from among the group to represent. The group discussed the public's interest in having one family lawyer rather than one lawyer for each member of the family. Then the group also addressed the public's antagonism toward the legal profession when it is perceived that lawyers switch sides and use information against a former client following a split among the persons represented. The members expressed great concern about the ability of one family member to use the system to disqualify the lawyer from representing another family member who has been a client of the lawyer for a longer period of time. The group identified one solution as setting forth at the outset of multigenerational representation whom the lawyer will continue to represent if a split occurs within the family.⁵ Some members of the group, however, felt that this was not a practical solution to the problem.

The participants next discussed the situation where a lawyer represents a multigenerational family, one of whose members loses capacity. Most of the working group seemed to think that the lawyer can continue to represent the family as long as he or she does not use the information gained in the representation to the disadvantage of the now-incapacitated person. A few members of the group expressed their belief that, if the lawyer is convinced that the person has lost capacity, acting on information gained during the representation is actually protective, rather than adverse. This discussion, of course, raised the concern about how a lawyer determines whether a client has lost capacity. The group queried as to who should make that decision and what should be the triggering event. Members wondered whether a lawyer perhaps could plan for the decision about continued representation in the event of loss of capacity through a springing power of attorney or a trust.

In concluding the first discussion, the group continued to express disagreement about whether intergenerational representation should be allowed and, if so, how it should be structured. The next morning, the group resumed its discussion of the entity theory and raised concerns about the cultural differences of family decision-making, the effect of an elderly person's dependence on his or her family and others on family

5. In discussing the idea of prior consent to continued representation of one client in the event of a split among multiple clients, the group discussed a case in which the Second Circuit ruled that Ross Perot's partner had granted informed consent to Perot's lawyer's representation of the partnership and to his continued representation of Perot in the event of a split between the partners. Importantly, however, group members recalled that the court's ruling emphasized that Perot's partner was a sophisticated businessman. The group drew comparisons with the rules regarding prenuptial agreements.

decision-making, the potential for the lawyer to make a grievous error in assessing the family's dynamics including the amount of conflict, the reluctance of the public to pay for a "counselor-type legal practice," and the fact that, unlike a spousal relationship, the parent-child relationship never terminates. The group also related its concerns regarding the difficulty of getting true consent given that elderly clients may sign consent forms without reading or understanding them, may simply do whatever the lawyer suggests, or even may tell the lawyer to make all the decisions.

The working group raised another problem regarding Model Rule 2.2 which governs the lawyer acting as intermediary. Some members of the group opined that a lawyer should not have to stop representing a client after acting as an arbitrator. This led the group to a discussion of the need for the elder law practitioner or trusts and estates lawyer to be familiar with the gamut of services, both government-funded and privately-paid, available to older persons and their families. In response, one member suggested requiring a lawyer working with older clients to have a social worker as a partner. That, in turn, led to a discussion of the rules regarding fee splitting and ancillary businesses, and of client expectations and willingness to pay fees to a social worker.

The discussion of fees returned the group to the underlying issue of how the lawyer should handle a split among intergenerational clients, bearing in mind that it is expensive to a former client to begin a relationship with a new lawyer. The group asked whether demanding that dissenting members of the family seek new representation makes it more difficult for the family to resolve its problems. One participant felt that, due to reluctance to lose a client—particularly a younger client who may have deeper pockets than an older client—a lawyer will be hesitant to raise issues or give advice that might generate a conflict among the family members. That attitude, however, raised concerns about whether the lawyer is competently representing his or her clients.

The group continued to deliberate Model Rule 2.2, with disagreement among the members as to whether it covered intergenerational representation in the elder law context. Different members of the group posed the following solutions: (1) the lawyer should represent only one client, thereby avoiding all these problems; (2) multiple representation is proper as long as consent is given when representation is initiated; (3) multiple representation is proper until a split occurs, at which point the lawyer then represents only the older person whose assets or freedom are at risk; (4) multiple representation is proper until a split occurs, at which point the lawyer can choose whom he or she will continue to represent; or (5) multiple representation is proper even after a split occurs.

The working group first contemplated the viability of separate simultaneous representation. Although the American Bar Association and the American College of Trust and Estate Counsel support separate simultaneous representation, some members of the group had doubts about such a construct. These members argued that separate simultaneous represen-

tation was created to avoid liability but that "you can't build a 'Chinese Wall' in a lawyer's mind."

The group then considered a proposal made by one of the members.⁶ Some members of the group were concerned that the proposal created a hierarchy of clients and found that concept inappropriate and unnece-

6. The proposal follows:

Representation of Family

(a) Under this rule, a lawyer may represent a family (or other self-selected group of persons) if:

(1) the lawyer consults with each person seeking family consultation and advice and identifies the principal client with the consent and agreement of all clients. There shall be a presumption that the elder(s) shall be the principal client, without whose written informed consent no action shall be taken by the lawyer. All persons seeking family consultation and advice shall be considered clients for purposes of confidentiality.

(2) the lawyer consults with each client concerning the implications of the family representation, including the advantages and risks involved, and the effect on the attorney-client privileges, and obtains each client's consent to the family representation.

(3) the lawyer reasonably believes that the matter can be addressed and resolved on terms compatible with the client's best interests, that each client will be able to make adequately informed decisions in the matter and that there is little risk of material prejudice to the interests of any of the clients if the contemplated resolution is unsuccessful; and

(4) the lawyer reasonably believes that the family representation can be undertaken impartially and without improper effect on other responsibilities the lawyer has to any of the clients.

(b) While acting as lawyer for the family, the lawyer shall consult with each client concerning the decisions to be made and the considerations relevant in making them, so that each client can make adequately informed decisions.

(c) Continued Representation

(1) A lawyer may continue to represent the family if a client other than the principal client withdraws from the representation, provided that the attorney shall take no action that relies on confidential information obtained from such withdrawing client and which is materially adverse to the interests of the former client, unless the former client consents after consultation.

(2) A lawyer may continue to represent the principal client alone if the principal client determines that the principal client's interests are incompatible with those of the other clients, provided that the attorney shall take no action that relies on confidential information obtained from other client(s) and which is materially adverse to the interests of the other client(s) unless the other client(s) consent(s) after consultation.

(3) A lawyer may not continue to represent the family if the principal client withdraws, unless the withdrawing principal client consents after consultation or except as provided in subpart 4, below.

(4) If the principal client loses capacity, the lawyer may continue to represent other clients to whom representation has previously been provided as part of the family, provided that the attorney shall take no action that is materially adverse to the interests of the principal client.

(5) The lawyer may represent individual family members in matters that bear no substantial relationship to the matters about which the family sought the lawyer's representation.

(6) The elements of such continued representation shall be in a written retainer agreement or written engagement letter.

sary. In response to a suggestion that the proposed rule be modified and that language be added to its commentary regarding representation of the person most significantly affected, the group began a discussion of whether practicing lawyers read the commentary to the rules or only the actual rules. The members also considered how this proposed rule would interplay with existing Model Rules 1.9 and 2.2.

While some members continued discussing these issues, others turned to revise the language of the proposed Model Rule 2.4. A majority, if not all, of the group believed that Model Rule 2.2 was originally written to address litigation cases rather than the situations involving families in need of counseling and planning. The group agreed that either the last sentence of Model Rule 2.2(c) should be excised or a new rule should be enacted. While there was consensus that change was necessary, there remained division among the group as to how that change should be achieved. Some believed that a new rule was needed; others believed that only an ambiguity between Model Rules 1.9 and 2.2 needed clarification.

Some of the group members agreed to revisions to the proposed Model Rule 2.4. The working group rejected the family entity theory and concluded that it only protects the lawyer and not the lawyer's clients. The group did agree, however, that the theory of family representation proposed by Russell Pearce was harder to reject.⁷

7. For the full text of the Recommendations of this working group, see Conference on Ethical Issues in Representing Older Clients, *Recommendations, in* Ethical Issues in Representing Older Clients, 62 Fordham L. Rev. 989 (1994).