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Peter Margulies

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Associate Professor, St. Thomas University School of Law, B.A., 1978, Colgate University; J.D., 1981, Columbia University. I thank Cynthia Barrett, Nancy Coleman, Cliff Kruse, Michael Perlin, Jan Rein, Charlie Sabatino, and Ellen Saideman for their comments on a previous draft of this Article. Conversations with Jacqueline Allee, Margrit Bernstein, Bruce Green, and Jeff Watnick also have enriched my analysis.

ARTICLES

ACCESS, CONNECTION, AND VOICE: A CONTEXTUAL APPROACH TO REPRESENTING SENIOR CITIZENS OF QUESTIONABLE CAPACITY

*PETER MARGULIES**

INTRODUCTION

ELDER law attorneys enter an uncertain realm when they represent senior citizens of questionable capacity.[1] On this terrain, issues of professional responsibility are pervasive and basic issues about what it means to be a lawyer come to the forefront. Coping with these issues is challenging, even (or especially) for the conscientious practitioner. Unlike some other areas, such as avoiding the commingling of funds or refraining from communicating directly with represented adverse parties when their counsel is absent, no safe harbor exists. Indeed, along with the rewards of elder law practice, sensitive lawyers representing clients with questionable capacity will endure some lost sleep, no matter what course they choose. This Article will not erase the circles beneath a good lawyer's eyes. However, it may, if it succeeds in anything, provide a more organized way of thinking about problems that keep elder law attorneys awake at night.

On the surface, much of the conflict is between autonomy and welfare. Senior citizens need freedom of action. Yet, they sometimes seem to act in ways that defeat their other needs, whether financial, medical, or legal.

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* Associate Professor, St. Thomas University School of Law. B.A., 1978, Colgate University; J.D., 1981, Columbia University. I thank Cynthia Barrett, Nancy Coleman, Cliff Kruse, Michael Perlin, Jan Rein, Charlie Sabatino, and Ellen Saideman for their comments on a previous draft of this Article. Conversations with Jacqueline Allee, Margrit Bernstein, Bruce Green, and Jeff Watnick also have enriched my analysis.

1. For a pioneering analysis of the issues, see Jacqueline Allee, *Representing Older Persons: Ethical Dilemmas*, Prob. & Prop. Jan./Feb. 1988, at 37; *see also* David Luban, *Paternalism and the Legal Profession*, 1981 Wis. L. Rev. 454 (discussing the paternalistic role of attorneys in competence evaluations); Linda F. Smith, *Representing the Elderly Client and Addressing the Question of Competence*, 14 J. Contemp. L. 61 (1988) (arguing that a lawyer seeking to assess client's competence must engage in process of "gradual counseling" and, in certain circumstances, must exercise "substituted judgment" for a client); Paul R. Tremblay, *On Persuasion and Paternalism: Lawyer Decisionmaking and the Questionably Competent Client*, 1987 Utah L. Rev. 515 (discussing choices available to lawyer representing client with impaired competency). For a succinct summary of the problem, see Hon. Steven D. Pepe & Cecille Lindgren, *Ethical Dilemmas in Elder Law: Working with Questionably Competent Clients*, Elder L. Rep., May 1991, at 1-6. One common area of conflict is discussed in Margrit S. Bernstein, *Ethical Considerations in Estate Planning and Probate Practice*, *in* The Florida Bar Continuing Legal Education Committee and the Committee on the Elderly, *Ethical Issues in Representing the Elderly Client Seminar*, June 15, 1990, at 2.1.

At what point do we use concepts of capacity to curtail freedom of action in the interest of meeting needs? Thus stated, the question seems stark. However, a central argument of this Article is that there is an artificiality about this distinction between autonomy and welfare. Contrary to the above formulation, autonomy is also a need. Conversely, financial, medical, and legal welfare are essential elements of autonomy.

The dichotomy between autonomy and welfare influences how we view lawyering for senior citizens. Models of lawyering that do not seem obviously out of place when representing younger individuals seem strained when dealing with some issues involving seniors. The model of arm's length bargaining, which appears to make sense between two merchants, does not seem to capture the crosscurrents of relationships among family members, which often are the core of elder law practice. As a result, the elder law attorney feels awkward in the partisan role that might be completely appropriate for the merchant setting.

Seniors of questionable capacity exacerbate the strain.[2] Traditional Anglo-American conceptions of lawyering view lawyering as a principal-agent relationship in which the agent-lawyer acts under authority granted her freely and knowingly by her client-principal.[3] A client's questionable capacity compromises this authority and prompts the lawyer to question the nature of her role. Much of this questioning is healthy. The traditional conception of the lawyer's role is never as natural or inevitable as it may appear. In business, to use a well-developed example, parties may have relationships that transcend bargaining over short-term advantages. In addition, many clients who do not appear to have mental disabilities nonetheless will make foolish decisions, and change their minds with disconcerting regularity. Attorney-client dialogue and counseling round out the traditional conception and humanize the mechanical principal-agent model. Indeed, I have argued elsewhere for a broader view of the lawyer's role that takes into account the interests of third parties and defines a client's interests broadly to include, for instance, psychological in addition to strictly legal interests.[4] However, there is something invidious about too eagerly jettisoning the traditional model when it comes to challenged seniors. It is easy to think of elderly clients as persons who are *not* citizens—whose wishes do not really count. The demands of the future, of an impatient younger gener-

2. For discussions of representation of clients with mental disabilities, see Anthony V. Alfieri, *Disabled Clients, Disabling Lawyers*, 43 Hastings L.J. 769 (1992); Stanley S. Herr, *Representation of Clients with Disabilities: Issues of Ethics and Control*, 17 N.Y.U. Rev. L. & Soc. Change 609 (1989); Peter Margulies, *"Who Are You to Tell Me That?": Attorney-Client Deliberation Regarding Nonlegal Issues and the Interests of Nonclients*, 68 N.C. L. Rev. 213 (1990); Michael L. Perlin & Robert L. Sadoff, *Ethical Issues in the Representation of Individuals in the Commitment Process*, 45 Law & Contemp. Probs. 161 (Summer 1982).

3. *See* Geoffrey C. Hazard, Jr., *Triangular Lawyer Relationships: An Exploratory Analysis*, 1 Geo. J. Legal Ethics 15, 21-23 (1987).

4. *See* Margulies, *supra* note 2.

ation, can seem themselves natural and inevitable. The natural nearness of death also makes challenged seniors already seem spectral, people without substance.

The presence of mental disability only compounds this phenomenon. Many lawyers unduly defer to medical professionals when representing clients with mental disabilities. Public interest lawyers who litigated against paternalistic and oppressive mental health systems did not commit this error; sometimes, however, they consulted more heavily with their own conceptions of civil liberties and progressive mental health policy than with their clients.[5] A balance is needed to help lawyers retain what is empowering about the traditional conception, but transcend its fixation on merely legal interests, and to see clients as situated in a web of relationships. Balance is also needed in formulating the concept of capacity. The medical profession historically has adopted a paternalistic view of capacity based on the substance of decisions.[6] If the decisions appear "right," the individual possesses capacity. If the decisions are "wrong," the individual lacks capacity. Lawyers and others are wary of the latitude this substantive test leaves for second-guessing citizen decision-making. However, in reaction to the paternalism of the substantive view of capacity, lawyers have fallen back on what they know best: procedure. The result is an abstract view of capacity that purports to rely on an individual's decision-making processes. This process-based view suffers from the impossibility of considering process separate from substance, and from a lack of attention to human connection. A balanced, contextual view of capacity considers both process and substance, and situates the senior citizen in a network of family, care-givers, and peers.

A similar balance is needed on the issue of the role of rules versus discretion in the attorney's behavior. Rules and judgment are perversely distributed under the current ethical regime. In some situations, such as those where disclosure might be useful in determining capacity or where affiliations with treatment professionals or lay groups may facilitate capacity determinations and avoid guardianship, rules unnecessarily hem in attorneys. In other situations, such as those in which lawyers ask courts to impose guardianships on persons who are not present at the hearing or those in which lawyers offer legal advice to third parties, such

5. *See* Herr, *supra* note 2, at 611 (quoting one public interest lawyer as conceding that, "I played God. I never met [the named class action plaintiff] or his aunt. And I never needed to do so. I knew what needed to be done.").

6. *See* Jan Ellen Rein, *Clients with Destructive and Socially Harmful Choices—What's an Attorney to Do?: Within and Beyond the Competency Construct, in* Ethical Issues in Representing Older Clients, 63 Fordham L. Rev. 1101 (1994); Susan Stefan, *Silencing the Different Voice: Competence, Feminist Theory and the Law*, 47 U. Miami L. Rev. 763 (1993); Susan Stefan, *Leaving Civil Rights to the "Experts": From Deference to Abdication Under the Professional Judgment Standard*, 102 Yale L.J. 639 (1992). For an example of a more modest and discerning medical view, see Robert P. Roca, *Determining Decisional Capacity: A Medical Perspective, in* Ethical Issues in Representing Older Clients, 63 Fordham L. Rev. 1177 (1994).

as relatives, about structuring the affairs of a senior citizen of questionable capacity without the senior citizen present, current professional regulation is too lax and more definite strictures are needed.

This Article seeks to deal with these issues through a contextual approach[7] to lawyering for senior citizens of questionable capacity. This approach rejects adherence to either a paternalist or libertarian approach. Instead, it recognizes that, in the context of everyday lawyer-client interaction, concern for the senior citizen's welfare and her autonomy interact. One does not make sense without the other.

The Article analyzes this interaction by advancing three core values: access, connection, and voice.[8] It applies these values to some common problems of elder law practice: identifying the client,[9] defining capacity,[10] determining what course of action to take if capacity is lacking,[11] handling multiple representation,[12] and disclosing information to third parties,[13] including diagnosticians and peer groups.

I. CORE VALUES: ACCESS, CONNECTION, AND VOICE

Consideration of the situation of senior citizens and the role of attorneys suggests three core values: access, connection, and voice. The values sometimes overlap, and sometimes conflict. Using them as a basis for analysis, however, does clarify some of the difficult questions that lawyers face.

A. *Access*

Access is important both in the traditions and practices of the legal profession and in the lives of senior citizens. Bar codes of conduct proclaim that lawyers have a duty to maximize the availability of legal services, and provide pro bono services for those who cannot afford market rates.[14] While cynics might observe that the ideal of service has been honored mainly in the breach, recent efforts to create meaningful pro bono programs in law schools and the practicing bar suggest that the profession has the potential to live up to its own rhetoric.

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7. *See* Naomi R. Cahn, *A Preliminary Feminist Critique of Legal Ethics*, 4 Geo. J. Legal Ethics 23 (1990); Phyllis Goldfarb, *A Theory-Practice Spiral: The Ethics of Feminism and Clinical Education*, 75 Minn. L. Rev. 1599 (1991).

8. *See infra* part I.

9. *See infra* part II.

10. *See infra* part III.

11. *See infra* part V.

12. *See infra* part II.

13. *See infra* part IV.

14. The veneration of Louis Brandeis for his pro bono work is one manifestation of this tradition. *See* David Luban, Lawyers and Justice 169-74 (1988).

In February 1993, the American Bar Association House of Delegates adopted by a vote of 228-215 an "aspirational plea" for 50 hours of pro bono service from every lawyer. *See Fifty Hours for Pro Bono: ABA House Adopts Ethics Rule Specifying How Much Time Lawyers Should Donate*, A.B.A. J., Apr. 1993, at 32; Model Rules of Professional Conduct Rule 6.1 cmt. (1993) [hereinafter Model Rules].

Senior citizens with disabilities, whom I will call challenged seniors, are one group for whom enhanced access is vital. Seniors are often isolated from other seniors and possessed by insecurity. Seniors often live in poverty,[15] often on meager fixed incomes. Society treats challenged seniors as little better than old furniture. At family gatherings, a challenged senior is an object of condescension, or a problem to be ignored. Chronic illness, hearing and visual impairments, cognitive impediments, and variable functioning intensify isolation and frustrate empowerment. Yet, traditional legal rules make empowerment even more difficult by stressing representation of individuals.[16] This isolation of clients is a staple of the Anglo-American adversary system, which structures lawyers' duties along litigation lines and distrusts group representation. The Model Rules of Professional Conduct (the "Model Rules") partially undertake to correct this anti-group bias in legal ethics by permitting the lawyer to work as intermediary.[17] However, the collective representation sanctioned by the Model Rules creates its own problems of isolation, as it may in practice allow a lawyer subtly to take sides with one client against a challenged senior.

B. *Connection*

Many practitioners and commentators have recognized that the bar's stress on representation of individuals neglects elements of connection between persons that make all of us human.[18] No one stands alone; we all are part of a web of relationships that define us.[19] In addition, we have emotions and values that enter into everything we do. We make judgments about others based on these values and emotions, regardless of whether they are included in the job description of the roles we occupy at our desks.[20]

A key insight of much political and social theory is that it is meaningless to talk about autonomy solely of individuals. Apart from scientific curiosities, such as boys raised by wolves and hold-outs from World War II subsisting on remote Pacific Islands, people exist in groups. Our membership in groups, whether as family members, citizens, professionals, or

15. *See* Lawrence A. Frolik & Alison P. Barnes, Elderlaw 22 (1992).

16. For an insightful reinterpretation of the history of American legal ethics norms, see Russell G. Pearce, *Rediscovering the Republican Origins of the Legal Ethics Codes*, 6 Geo. J. Legal Ethics 241 (1992). *Cf.* Bruce A. Green, *"Through a Glass, Darkly": How the Court Sees Motions to Disqualify Criminal Defense Lawyers*, 89 Colum. L. Rev. 1201 (1989) (discussing judicial attitudes toward multiple representation in criminal defense). For a discussion of the limits of the traditional adversarial conception, see Margulies, *supra* note 2.

17. *See* Model Rules, *supra* note 14, Rule 2.2.

18. *See* William H. Simon, *Visions of Practice in Legal Thought*, 36 Stan. L. Rev. 469 (1984). Connection has been a special concern for feminist theorists. *See* Naomi R. Cahn, *Styles of Lawyering*, 43 Hastings L.J. 1039, 1061-68 (1992).

19. *See* Hannah Arendt, The Human Condition 22-23 (1958).

20. *See* Hannah Arendt, Between Past And Future: Eight Exercises in Political Thought (1954).

others, shapes our action in the world.[21] Evidence also exists that seniors place particular value on connection with others, including peers, family, and friends.[22] The experience of seeing friends and loved ones pass away, an experience undergone by seniors with increasing frequency as they age, places a premium on connections that survive. The isolation caused by physical and mental disability increases the value of connection.

The general tendency of legal representation is to compound isolation by paying insufficient attention to groups, such as the American Association of Retired Persons (the "AARP"), that offer senior citizens support.[23] A solitary person inspires little fear or respect. By contrast, people in groups have a greater ability to influence and to persuade others. Establishing connection with the client and promoting connection between the client and other seniors facilitates autonomy in the most meaningful sense.[24] While many senior citizens are part of such peer groups, others have few group involvements. Group involvements tend to decrease with age and to be fewer for men than for women.[25] For those with mental disabilities in particular, connection is vital. Mental illness is a disease of isolation that makes people withdraw into themselves. Coaxing people out of this isolation is therapeutic.[26] Lawyers perform a valuable professional service when they integrate challenged senior citizens into support networks.

Despite the benefits of connection, the profession always has sent mixed messages on the issue of the scope of a lawyer's relationship with clients. On the one hand, the Model Rules permit the attorney to offer advice in a variety of areas that may affect the client, even if those areas are not strictly legal. On the other hand, the Anglo-American vision of lawyering, with its somewhat mechanical principal-agent relation, seems to curtail non-legal conversation between lawyer and client. Yet, elder law attorneys and commentators have felt the need to address

21. Feminists have explored this point with eloquence. *See* Cahn, *supra* note 18.

22. *See* Smith, *supra* note 1, at 72.

23. For discussions of lawyers and groups, see Stephen Ellmann, *Client-Centeredness Multiplied: Individual Autonomy and Collective Mobilization in Public Interest Lawyers' Representation of Groups*, 78 Va. L. Rev. 1103 (1992); John Leubsdorf, *Pluralizing the Client-Lawyer Relationship*, 77 Cornell L. Rev. 825 (1992); Gerald P. López, Rebellious Lawyering: One Chicano's Vision of Progressive Law Practice (1992); Luban, *supra* note 14.

24. It is ironic that many individual senior citizens still are disempowered while elder law as a recognized specialty probably owes much to collective movements of senior citizens that go back almost half a century. *Cf.* Edwin Amenta & Yvonne Zylan, *It Happened Here: Political Opportunity, the New Institutionalism, and the Townsend Movement*, 56 Am. Soc. Rev. 250 (1991) (discussing dynamics of senior citizen activism in the New Deal-era).

25. *See* Lawrence A. Frolik & Alison P. Barnes, *An Aging Population: A Challenge to the Law*, 42 Hastings L.J. 683, 703 (1991).

26. *See* Margulies, *supra* note 4. *Cf.* David B. Wexler & Bruce J. Winick, *Therapeutic Jurisprudence as a New Approach to Mental Health Law Policy Analysis and Research*, 45 U. Miami L. Rev. 979, 981-84 (1991) (discussing "therapeutic jurisprudence" and its implications for legal practice).

interpersonal concerns of clients as part of their conception of competent representation. Elder law attorneys also recognize that their practice necessarily involves them with groups such as families, with all the richness and occasional ambiguity and argument that such work involves. Because much elder law involves transactional, not litigation, practice, this group dimension is enhanced.

C. *Voice*

While connection is important, sometimes involvement with others can become oppressive. A senior citizen may have a view of the world that her family or the state do not share. That difference alone is no reason to abridge the senior citizen's freedom of action.[27] Indeed, in a democracy, the efforts of subordinated groups, such as senior citizens, to make their voices heard should be cause for both attention and celebration.[28] Yet, paternalistic conceptions of capacity or more mundane motives of personal gain may spur attempts to control the senior citizen's decisions.[29] In these situations, the lawyer's traditional duty to let the client's voice be heard assumes center stage.[30] The attorney must side with the senior against a group, such as the family, that is suppressing

27. Later in this Article, I discuss circumstances under which a lawyer or others can intervene in a client's decisions. *See infra* notes 75-88 and accompanying text.

28. Scholars developing critical race and feminist theory argue that those who are vulnerable have special knowledge that society should absorb. *See* Deborah L. Rhode, *Feminist Critical Theories*, 42 Stan. L. Rev. 617 (1990); Patricia J. Williams, The Alchemy of Race and Rights 5-14 (1991). A similar analysis applies to people with disabilities. *See* Oliver Sacks, Seeing Voices: A Journey into the World of the Deaf xiii (1989); Joseph P. Shapiro, No Pity 3 (1993).

29. *See* Julia Spring, *Applying Due Process Safeguards*, Generations, Summer 1987, at 35.

30. For one pioneering analysis of voice compared with other approaches, see Albert O. Hirschman, Exit, Voice, and Loyalty 30-43 (1970). Recent commentators have emphasized the citizen's voice, even as they have warned that the overly legalistic perspective of attorneys can sometimes smother that voice. *See, e.g.*, Anthony V. Alfieri, *Stances*, 77 Cornell L. Rev. 1233 (1992) (discussing various modern and postmodern approaches to lawyering); Anthony V. Alfieri, *Reconstructive Poverty Law Practice: Learning Lessons of Client Narrative*, 100 Yale L.J. 2107 (1991) (examining the loss of client narratives in lawyer storytelling); Anthony V. Alfieri, *The Antinomies of Poverty Law and a Theory of Dialogic Empowerment*, 16 N.Y.U. Rev. L. & Soc. Change 659, 698-701 (1987-88) (discussing the importance of dialogue in empowering impoverished clients); Clark D. Cunningham, *The Lawyer as Translator, Representation as Text: Towards an Ethnography of Legal Discourse*, 77 Cornell L. Rev. 1298, 1331-39 (1992) (arguing that the practice of law involves translation and offering a model of mental activity composed of sensation, experience, and knowledge); Clark D. Cunningham, *A Tale of Two Clients: Thinking About Law As Language*, 87 Mich. L. Rev. 2459, 2460-61 (1989) (exploring the meaning of the phrase "representing a client"); Lucie E. White, *Subordination, Rhetorical Survival Skills, and Sunday Shoes: Notes on the Hearing of Mrs. G.*, 38 Buff. L. Rev. 1, 46-48 (1990) (discussing a client who outmaneuvered her lawyer by abandoning the lawyer's script that "fragment[ed] her voice"). *Cf.* Robert D. Dinerstein, *A Meditation on the Theoretics of Practice*, 43 Hastings L.J. 971, 981-84 (1992) (analyzing tensions in progressive lawyering literature); Paul R. Tremblay, *Rebellious Lawyering, Regnant Lawyering, and Street-Level Bureaucracy*, 43 Hastings L.J. 947, 954-59 (1992) (same).

her voice. In some cases, alliances with other groups may enhance the client's voice while coping with behavior that has caused the family's concern.[31]

II. WHO IS THE CLIENT?

The values of access, connection, and voice always provide an answer to the most widely asked question in elder law: who is the client? These values require that the client be the person who is most vulnerable in the situation. Frequently, therefore, a challenged senior will be the client, even if the attorney's services are being paid for by the senior's child and even if the child was the person who initially requested the attorney's services.[32]

Under this position, lawyers who, at the instruction of a senior's child, prepare documents for the senior's signature must speak with the senior as they would with any other client. This result upholds the access principle because it gives the senior an opportunity to consult with an attorney. It also enhances voice and connection because in this situation the challenged senior citizen may have no one else but the lawyer looking out for her interests, or even taking her seriously. The child in this case may also be a client. However, and here this Article and the Model Rules part company, the attorney's first loyalty is to the challenged senior citizen.[33]

In other situations, the lawyer may learn that family members on whom a challenged senior depends are overreaching by, for example, misappropriating the senior citizen's assets. In some of these cases, the lawyer also may represent other family members. The challenged senior citizen's voice, however, is the one in danger of being smothered. Consequently, the lawyer must treat her obligation to the challenged senior citizen as paramount.

Contrary to the Model Rules, because an attorney previously has represented both the senior and other members of the family, her representation should not create a mandate for the lawyer to withdraw. On the contrary, the lawyer has a special duty to the senior in such situations, particularly where the senior is dependent on family members for care and is therefore all the more vulnerable. Even if no formal guardi-

31. *See, e.g.*, Peter J. Strauss, *Before Guardianship: Abuse of Patient Rights Behind Closed Doors*, 41 Emory L.J. 761, 761-62 (1992) (discussing alliance with church group).

32. Margrit Bernstein has told me that she customarily tries to consider who is the most vulnerable person in a situation brought to her attention and then undertakes to represent that person.

33. A corollary of this principle is that the efficiency advantages of multiple representation, such as representation of both spouses, should be available to clients whose capacity may become questionable, if an attorney believes that they have the capacity to make particular decisions. Discriminating against persons with capacity, because of concerns about future capacity, may be a violation of the Americans with Disabilities Act, 42 U.S.C. §§ 12101-12213 (Supp. III 1991), which bars discrimination on the basis of disability.

anship has been created, the attorney should construe her duty to the challenged senior as she would construe her duty to a ward in a formal guardianship. She should view the dominant family members as constructive fiduciaries.[34] The attorney's obligation is to disclose the overreaching of the family to both the senior and, if necessary, other authorities.[35]

The Model Rules take a different approach.[36] Generally, they favor withdrawal over disclosure, except in cases where the lawyer represents a guardian who is breaching her fiduciary duty to a ward.[37] To require that the lawyer employ exit and not voice[38] when confronted with exploitation of a vulnerable client codifies professional irresponsibility. While withdrawal in other situations might tip the victimized client that something was amiss and prompt her to take corrective action, a challenged senior citizen dependent on her exploiter may be no better able to avail herself of this course than the ward of an abusive guardian. Withdrawal in this situation exacerbates the isolation that legal representation should endeavor to prevent.[39]

Moreover, the Model Rules approach leads to anomalous results. If a lawyer represents a guardian and becomes aware of malfeasance toward the ward, she may be required to disclose it, even though she does not represent the ward.[40] However, if she represents both the challenged senior and another family member, who exerts power over the senior but is not the legal guardian, the lawyer must withdraw and cannot disclose the malfeasance.[41] As a result, under the Model Rules, a lawyer must do less for a client than for a similarly situated person who is not a client. This is particularly odd because the more powerful relative in the multiple representation context is already less accountable to courts and other agencies because he is not a guardian. Hamstringing the lawyer merely

34. This same construction of fiduciary status independent of formal arrangements typifies the constructive trust.

35. For discussion of related issues, see Hazard, *supra* note 3.

36. For discussion of ethical issues involved in representing both spouses, see Teresa Stanton Collett, *And the Two Shall Become As One . . . Until the Lawyers Are Done*, 7 Notre Dame J. L. Ethics & Pub. Pol'y 101 (1993); Malcolm A. Moore & Anne K. Hilker, *Representing Both Spouses: The New Section Recommendations*, Prob. & Prop., July/August 1993, at 26.

37. *See* Model Rules, *supra* note 14, Rule 1.14 cmt. 4.

38. For the definitive analysis of these two alternatives, see Hirschman, *supra* note 30.

39. Similar disclosures have been required of lawyers in the savings and loan cases. *See, e.g., In re* American Continental Corp./Lincoln Sav. & Loan Sec. Litig., 794 F. Supp. 1424, 1452 (D. Ariz. 1992) (stating that attorneys must inform a client that its conduct violates the law and, if the client continues the wrongful activity, then the attorney must withdraw if further representation will violate the rules of professional conduct).

40. *See* Model Rules, *supra* note 14, Rule 1.14 cmt. 4.

41. *Cf.* State Bar of Michigan, Comm. on Professional & Judicial Ethics, Mich. Opinion CI-693 (Nov. 1981) (unpublished informal opinion) (attorney who learns that nephew of deceased client may have misappropriated funds may disclose this to other heirs, but may not represent any party to the transaction thereafter).

compounds this lack of accountability.[42]

III. DEFINING CAPACITY

The difficulty of the above questions is merely a warm-up for the rigors of our next issue: defining capacity. Capacity is the black hole of legal ethics. Many questions find their way into the capacity category, but few answers ever emerge. Nor has the collective wisdom of the bar shed much light on the issue. The sources generally looked to by the profession—the Model Code of Professional Responsibility (the "Model Code"), the Model Rules, and the draft Restatement of the Law Governing Lawyers (the "draft Restatement")—have been delphic at best in formulating tests for capacity. The Model Code says little to guide the lawyer in assessing a client's capacity, the Model Rules say only slightly more, while the draft Restatement refers only to what incapacity is *not*.

Both the Model Rules and the draft Restatement note that capacity is a flexible concept and that clients can be incapacitated for some purposes but not for others. The draft Restatement also cautions attorneys that they should not confuse incapacity with eccentricity or lack of prudence.[43] However, neither the Model Rules nor the draft Restatement offers a working definition of incapacity. Practitioners essentially are left to their own lights. Indeed, the amorphous nature of capacity, this reliance on professional discretion may be the better part of valor.

Compared to the efforts of the organized bar, other tests are more specific, but not necessarily more satisfying. Consider the status and outcome tests. The outcome test examines whether a client's decision is substantively correct. The status test focuses on attributes that it views as negating capacity—age, history of mental illness, or dependence on others. Few commentators today will admit to using either of these tests, which clearly suppress the senior citizen's voice. Unfortunately, the stereotypes behind these tests still exert a powerful influence.

One might hope that commentators wary of the starkly authoritarian and paternalistic tone of the outcome and status tests would develop a more nuanced alternative. Some commentators, however, have responded in kind by taking the other extreme. According to antipsychiatry commentators, who influenced the initial path of modern mental health law, the concept of incapacity is merely an excuse for impinging on te autonomy of persons and asserting the authority of the medical profession. Under this view, the client's expressed wishes control, even if the client is convinced that her husband is a grapefruit.[44]

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42. In cases of dominant family member malfeasance, the lawyer should be permitted not to disclose if the misfeasance is entirely rectified by the offending party. This gives the lawyer an opportunity to work informally with the client to improve the situation, rather than forcing an adversarial denouement that may be in no one's best interest.

43. *See* Restatement (Third) of the Law, The Law Governing Lawyers, § 35 cmt. c (Tentative Draft No. 6, 1993) [hereinafter Draft Restatement (Third)].

44. *Cf.* George J. Alexander, *Avoiding Guardianship, in* Protecting Judgment-Im-

Other commentators acknowledge that this test is an evasion of the lawyer's responsibility more than a meaningful critique of psychiatry.[45] They recognize that following the client's expressed wishes can up-end the client's lifetime commitments and sentence her to great hardship. These commentators are willing to concede the grapefruit case, but not necessarily much else.[46]

The same autonomy concerns that animate this school of thought have spurred development of the functional approach,[47] which is closest to the one adopted by the Model Rules and draft Restatement. This approach emphasizes that capacity varies over time and with the decision involved. Rather than relying on supposedly objective testing instruments, the functional approach asks how people cope in their regular environment. For example, instead of asking a senior to name the date, and viewing her as dangerously disoriented if she cannot, the functional view asks whether the senior has a newspaper, magazine, or video source available if she wishes to know the answer to this question. The functional approach, however, can create problems in its attempt to focus on the process[48] of senior citizen decision-making.

The process-based view is a valuable tonic to the paternalism of the status and outcome tests. Clearly, one does not wish to view a senior citizen as lacking capacity just because she reaches a particular decision with which one disagrees. The process-based standard, however, raises a new set of problems. The flight from substance leads to a denial of context—a quest for some pure kernel of capacity free of the ambiguity of concrete situations. We tend to reify capacity—to make it into a thing to be discovered. This view misconceives capacity. Rather than being a thing, capacity is a shifting network of values and circumstances.

Separating substance from process in decisions about capacity is both wrong and impossible.[49] This separation is difficult, even when dealing with the governmental decisions that courts try to analyze in administrative law, constitutional law, or civil procedure.[50] In dealing with the

paired Adults: Issues, Interventions and Policies 163 (Edmund F. Dejowski ed., 1990) (urging that a living will is a more promising alternative to guardianship).

45. *See, e.g.*, Tremblay, *supra* note 1 (rejecting extreme antipsychiatry view).

46. *See* Donald N. Bersoff, *Autonomy for Vulnerable Populations: The Supreme Court's Reckless Disregard for Self-Determination and Social Science*, 37 Vill. L. Rev. 1569 (1992); Elyn R. Saks, *Competency to Refuse Treatment*, 69 N.C. L. Rev. 945 (1991).

47. *See* Marshall B. Kapp, *Evaluating Decisionmaking Capacity in the Elderly: A Review of Recent Literature*, *in* Protecting Judgment-Impaired Adults, *supra* note 44, at 17 [hereinafter Kapp, *Decisionmaking*]; Marshall B. Kapp, *Representing Older Persons: Ethical Challenges*, Fla. B.J., June 1989, at 25 [hereinafter Kapp, *Ethical Challenges*].

48. *See* Kapp, *Ethical Challenges*, *supra* note 47, at 28.

49. *Cf.* Allen E. Buchanan & Dan W. Brock, Deciding for Others: The Ethics of Surrogate Decision Making 51-57 (1989) (opting for a more contextualized view of capacity); Michael R. Flick, *The Due Process of Dying*, 79 Cal. L. Rev. 1121 (1991) (casting doubt on whether the concept of autonomy has a stable meaning); William H. Simon, *Lawyer Advice and Client Autonomy: Mrs. Jones's Case*, 50 Md. L. Rev. 213 (1991) (same).

50. *See* Gary Minda, *Jurisprudence at Century's End*, 43 J. Legal Educ. 27, 32-34

more informal decisions made by private individuals, the distinction is untenable. The reasons are twofold. First, ignoring the substance of a client's wishes requires us to deny our connection to the people we represent. Human wishes have no existence outside the sphere of human connection. Connections between persons, including lawyer and senior citizen, shape those wishes. Moreover, wishes expressed one day may change the next. Challenged senior citizens experience the same conflict the rest of us do between short-term interests and long-term values.[51] Someone ruled entirely by either short-term or long-term concerns has no more autonomy than someone ruled by the wishes of another. Connections to others can enhance autonomy for people ruled by certain short-term concerns, as when people turn to Alcoholics Anonymous to help deal with their addiction. Focusing on process obscures these possibilities.

Second, any consideration of process inevitably involves some background assumptions about substance. When we look at arguably process-based concerns, such as whether a senior citizen appreciates the consequences of a decision or understands alternative courses of action, we bring to this inquiry some substantive conception of consequences and alternatives. Suppose that we inquire whether a senior citizen can state goals and describe how a given decision fits those goals. The attorney still must assess the fit between the goal and the decision that allegedly will serve that goal. Without some independent conception about what decisions serve what goals, this assessment cannot take place.[52]

Rather than standing in opposition to one another, substance and process engage in an overlapping dialogue.[53] A quick example will demonstrate how our intuitive judgments about capacity take into account both substantive and procedural components. Consider the case, discussed by Paul Tremblay in his excellent piece on representing questionably competent clients,[54] of a client who is the victim of a fraud that may cost him his house. The swindler who defrauded your client has a note from your client for $10,000, secured by your client's house and now wants to foreclose. Your client is living on Social Security. While you can go to court to stop the swindler, the client—here I depart somewhat from Paul Tremblay's scenario—does not want to go to court because then everyone will know he has been cheated. At the same time, the client is greatly concerned about losing his home. Concern about appearing to be

(1993); Daniel R. Ortiz, *Pursuing a Perfect Politics: The Allure and Failure of Process Theory*, 77 Va. L. Rev. 721, 724-45 (1991).

51. *See* Jon Elster, Nuts and Bolts for the Social Sciences 42-51 (1989).

52. Courts acknowledge this with their holdings and analysis, if not with their rhetoric. *See, e.g., In re* Boyer, 636 P.2d 1085, 1088-89 (Utah 1981) ("That the conclusion may follow in a logical sequence from the premise is not necessarily sufficient to compel the conclusion that a person has made a 'responsible decision.' ").

53. *See* Deborah Tannen, You Just Don't Understand (1990).

54. *See* Tremblay, *supra* note 1, at 530-32.

a fool is a short-term interest of the client, which will be replaced by regret if the client loses his house. Having a home, in contrast, is a long-term value. The lawyer has to consider both values and interests, regardless of the wishes a client may happen to articulate at a particular point, to best represent the client. In cases of emergency, the lawyer is justified in acting against wishes of the client that reflect short-term interest. The lawyer acts not only to save the client's home, but also to spare the client regret over the derogation of a value he holds dear.

This analysis will be strong medicine for many practitioners. To assess whether I am right about the dialogue of substance and process, consider a different scenario. Suppose that the senior citizen wants to go to court to save his house. His reason is that the house talks to him at night and he enjoys the conversation. The process of decision-making in this last instance is, if anything, far more flawed than in the previous example. Yet, we will almost certainly go to court as our client has requested. The fact that we agree with the substance of the client's decision plays an essential role. For outcomes that seem radically counter-intuitive or that do violence to a client's lifetime commitments, we naturally will impose at least a heavier burden of explanation. To pretend otherwise is a failure of candor that creates dilemmas where there are none and conceals dilemmas when we need most to grapple with them.

A solution to this problem is a model of contextual capacity,[55] which integrates substantive and procedural concerns. Rather than look at capacity formalistically, as determined either by some notion of procedure divorced from substance or some assessment of substance unalloyed with information about a senior citizens's process of decision-making, this approach recognizes the dialogue between substance and procedure. Each is part of the landscape of capacity determinations. Six factors are important: (1) ability to articulate reasoning behind decision; (2) variability of state of mind; (3) appreciation of consequences of decision; (4) irreversibility of decision; (5) substantive fairness of transaction; and (6) consistency with lifetime commitments.

A. *Ability to Articulate Reasoning Behind Decision*

Just as administrative agencies must articulate reasons for their decisions, a client should be able to give reasons for her decision. These reasons must be consistent with goals identified by the client. Consider a situation confronted by Edward Bennett Williams, one of the century's best-known American lawyers.[56] Philip Graham, then owner of *The Washington Post*, was suffering from a terminal illness. He told Williams that he wished to redraft his will to cut out his wife, Katherine Graham.

55. *See* Steven K. Hoge et al., *Attorney-Client Decision-Making in Criminal Cases: Client Competence and Participation as Perceived by their Attorneys*, 10 Behav. Sci. & L. 385, 386 (1992).

56. For a discussion of this issue, see Evan Thomas, The Man to See: Edward Bennett Williams, Ultimate Insider; Legendary Trial Lawyer 178-80 (1991).

He gave no reasons apart from general bitterness. Williams remonstrated with Philip about this decision over a period of time instead of immediately carrying out his instructions. Philip died before the will was changed. Catherine inherited the newspaper and became a pillar of the Washington establishment. Williams got Catherine's business. Under the traditional principal-agent approach, Williams's conduct was questionable. As long as the client is not mistaking his wife for a grapefruit, capacity is not at issue and the lawyer cannot decline to follow a client's instructions. Indeed, this case puts the traditional approach in a moderately favorable light. Williams's getting Katherine as a client suggests a conflict of interest. I would argue, however, that Williams acted consistently with the contextual approach to capacity outlined in this Article. Articulation of reasons is vital to capacity, especially when the client wishes to breach lifetime commitments like marriage.[57] If the couple has been married for a long time, the lawyer should not blithely accept the client's decision. Rather, he should seek to have the client articulate the basis for his decision. If no basis is forthcoming from the client, the lawyer should view the client as lacking the capacity to make this decision. Client comments like "Because I hate her," or "Because I feel like it," should not suffice.[58] These comments may be the result of passing anger that will later occasion regret.

One by-product of this insistence on reasons is that the lawyer must engage the client in a dialogue. The result is a richer awareness for both lawyer and client.

B. *Variability of State of Mind*

By variability of state of mind, I mean the extent to which the senior citizen's level of alertness fluctuates. How significant is variability? It should come as no surprise that the answer is: "It depends." So, for example, if a client cannot remember the date, consults a newspaper, and forgets the date a minute later, or if a client cannot remember that you are his lawyer, acknowledges you when you explain, and then forgets shortly thereafter, a more exacting inquiry into capacity is prudent.

Crucial factors in deciding the importance of variability are: (1) the regularity of changes in alertness and, (2) whether the decision in which the lawyer is advising the client involves a long-term course of performance or a one-shot deal. If variability is predictable—if, for example, it is a function of time of day, with the client being more alert in the morning, and less so later on— than it is less of a problem. The solution is simply to talk with the client when the client is most alert. However, if

57. For discussion of lifetime commitments and capacity, see *infra* notes 62-64 and accompanying text.

58. Of course, one spouse may have worthwhile reasons that are too private to be readily shared with an attorney for taking such a step. A lawyer must be sensitive to these concerns.

variability is less regular, then finding a window in which the client is alert will be more difficult.

The other factor is whether the decision involves a course of performance, which will require ongoing alertness on the part of the senior, such as a personal service contract. Where alertness is variable, a decision to go ahead with the transaction does not reflect capacity.

C. *Ability to Understand Consequences*

This criterion is related to the articulation of reasons criterion. One element of articulating reasons for doing something is articulating reasons why one does not want to do something else. Commentators troubled about this criterion stress its salience in areas such as bioethics, where consequences are a function of medical prognostication, more of an art than a science. Deeming citizens incompetent just because they disagree with their doctors goes back to the crude outcome-based capacity test that most modern commentators have rejected.[59] Yet, in cases where consequences are dire and the client does not confront them, concern is appropriate.

Two brief examples illustrate how this factor works. The classic case involves the patient with severely gangrenous feet who declines to recognize that, without amputation, she would die. In our hypothetical of the house foreclosure, a poor client who declined to recognize that, if he did not contest the foreclosure, he would be homeless also lacks the ability to understand consequences.

D. *Irreversibility of Decision*

Certain decisions can be reversed only with great difficulty or cannot be reversed at all. For example, once our client loses his house, getting it back will be a chore or may not be possible at all if the swindler turns it over quickly to another buyer. In this situation, preserving the status quo is important. It is appropriate to be less willing to defer to the client's wishes in this situation, particularly if the client also is variable in her alertness. Variability increases the chances that the client will come to regret her action. In any case, doing something that cannot be adjusted later calls for caution on the part of the attorney. When grouped with other factors, such as variability, it provides an occasion for declining to do what the client wishes.

The law historically has attached importance to protecting parties from irreversible events— the emphasis on irreparable injury in awarding injunctions, for example, reflects this concern. In the bioethics area, *Cruzan v. Director, Missouri Department of Health*[60] and other cases that limit the right to die are even closer to home. Given the variable nature of all human decisions and the human oscillation between short-term and

59. *See* Kapp, *Ethical Challenges*, *supra* note 47, at 28.
60. 497 U.S. 261 (1990).

long-term concerns, a special solicitude for avoiding occasions for regret is understandable and appropriate as one ingredient in assessing capacity.

E. *Substantive Fairness of Transaction*

Substantive fairness may be the most controversial criterion on our list. This criterion raises the specter of outcome-based decision-making. Yet, substantive unfairness is one factor that suggests that people are being taken advantage of or are being unduly influenced in ways that defeat the autonomy and voice rationale behind deferring to client decisions. Earlier commentators have claimed that substantive fairness is the only factor that courts really look at.[61] While this avowedly realist view gives courts too little credit, going to the other extreme and ignoring blatantly unfair transactions denies the connection that we owe to senior citizens. If people are exploited, we should care about that as one element in a contextual assessment of capacity.

F. *Consistency of Lifetime Commitments*

A client decision that may appear substantively unfair may not present a capacity problem if it is consistent with lifetime commitments. Suppose a senior citizen wants to deed her house over to her daughter and then continue to live there as a tenant. Even if the daughter pays only minimal consideration for the house, the commitment between mother and daughter legitimizes this transaction.[62] Consistency with lifetime commitments is a hallmark of substitute judgment analysis, a staple of bioethical inquiry. No conception of voice makes sense without considering how lifetime commitments to people, places, and things contribute to that voice. Similarly, a conception of connection must consider lifetime commitments that comprise the salient connections of the senior citizen.

For this reason, loss of a house is a special cause for concern. Similarly, disinheritance of a spouse also reflects violence to lifetime commitments. In another situation, consider the case, related to me by a legal services lawyer and not uncommon in its broad outlines, of a client living with one hundred cats. Neighbors complain about the smell and the family is concerned. Yet, taking care of animals may be the closest thing to meaning in the client's life. Without more, it is not grounds for a finding of lack of capacity. If the client declines to get rid of the cats, even in the face of threatened court action, the lawyer should help the

61. *See, e.g.*, Alexander M. Meiklejohn, *Contractual and Donative Capacity*, 39 Case W. Res. 307, 314-329 (1989) (discussing Dean Milton Green's theory of capacity).

62. Cynthia Barrett has brought to my attention a slightly more troubling hypothetical in which a relative who cares for the senior citizen takes small sums of money from the senior citizen's assets. The analysis here, despite the more troubling facts, is identical to that in the text. If the senior is aware of her relative's practice and does not object, the commitment present between these family members should prevail over the temptation for the lawyer to intervene on behalf of the senior citizen's best interests.

client fight. The lawyer should *not* do what a lawyer described to me did—take the client out for a movie and have a group of other lawyers get rid of the cats.

These six factors represent a dialogue of substance and process. The first three factors—ability to state reasons, variability of state of mind, and comprehension of consequences—have both a procedural and substantive character. In the last three factors—irreversibility of decisions, consistency with lifetime commitments, and substantive fairness—substance is the central concern. This interaction of substance and process presents a richer picture of capacity than any vain attempt to isolate either mode. An exclusively procedural view would provide only a mechanical view of autonomy that ignores the enabling role of connection, commitment, and freedom from exploitation. By the same token, an exclusively substantive focus would permit wholesale second-guessing of clients and therefore impede access and voice.

In contrast, the interaction of substantive and procedural factors serves the values of access, connection, and voice. The attention to process enhances access and voice because it requires the attorney to engage in serious dialogue with the client to consider if the client understands consequences, articulates reasons, and does not vary unduly in positions. In addition, the rejection of a test based on the client's status—whether the client is elderly or has a history of mental illness—broadens access by at least letting clients get in the lawyer's door.[63] Connection is served because the lawyer must assume some responsibility for what will happen to the client as a result of a given decision. Will the decision be irrevocable? Is the transaction fair? Is it consistent with lifetime commitments? The connection here is human, not mechanical.

Another hypothetical illustrates how this approach works. Consider a client who has executed a power of attorney for his son to be triggered by the father's incapacity.[64] The father has been sighted wandering around a park at night; his house is dirty. Father and son have argued about the father's living conditions and the father's drinking. The father tells the lawyer that he wants to prevent his son from getting one cent of his money. Here, a contextual view of capacity suggests that we break down the problem into two issues: (1) whether the power of attorney kicks because the father is displaying a general lack of capacity and (2) must the lawyer follow the father's instructions about cutting off the son?

The answer to the first question is no. The father has not demon-

63. For discussion of the pervasiveness of status-based capacity determinations, see Buchanan & Brock, *supra* note 49, at 282-83 (expert affidavit in conservatorship proceeding stated without analysis that " 'proposed conservatee is unable to manage her own affairs and is suffering from chronic brain syndrome associated with cerebral arteriosclerosis;' " countervailing evidence suggested that proposed conservatee was healthy and paid her bills regularly) (quoting *In re Quinlan*, 355 A.2d 647, *cert. denied*, 429 U.S. 922 (1976)).

64. *See* Bernstein, *supra* note 1, at 2.1 ("the attorney's first contact with a potential client may be with the client's adult child").

strated any general lack of capacity. A dirty house is not a sign of incapacity and may only be an indication that the client should have access to home care. Seeking a declaration of incapacity only may pave the way for the client's admission to a nursing home, which will in no way guarantee that the client does better with cleanliness than he is doing presently given the neglect that typifies many nursing homes. Considerations of voice direct that the lawyer not irrevocably cede to another the client's ability to speak for himself.

However, as to the second question, the capacity factors set out above suggest that the lawyer need not follow the client's instructions, at least without more facts. The client has given no reasons for his wish that his son receive none of his money. There is no indication that the client understands the consequences of his decision. These factors are especially important in light of the lifetime commitment between father and son. The client's drinking may be distorting his voice and thus render it a less than definitive guide for the lawyer.

This hypothetical demonstrates that capacity is not a unitary, all or nothing phenomenon. One can have capacity for some purposes, but not for others. The contextual approach best captures the dynamic nature of capacity determinations.

IV. Tools in Evaluating and Enhancing Capacity: A Proactive Role for Lawyers

The dynamic nature of capacity decisions requires that lawyers be flexible and proactive. Elder lawyering sensitive to contextual capacity features four elements treated in this section of the Article. These four elements are: (1) seeking services and benefits that strengthen senior citizen capacity; (2) using peer groups of senior citizens as a resource; (3) making practice environments accessible; and (4) seeking the advice of a mental health professional when necessary.

A. *Seeking Services and Benefits*

Often what we view as incapacity is simply the product of society allocating resources in a certain way. For example, intuitively, we view a senior citizen whose house is dirty and disheveled as a prime suspect for incapacity. Yet, the real problem may be the lack of funding for home assistance programs. Here, access may require that the lawyer seek home care services for the client and counsel the client to accept them if they can be arranged.

B. *Peer Groups*

De Tocqueville observed that residents of the United States are forever

forming associations.[65] The self-help revolution of the past fifteen years has accelerated this trend. Thousands of self-help groups have sprouted dealing with the spectrum of our discontents. More venerable groups, such as the AARP, are major players in Washington. Yet, as noted before, the many groups dealing with senior citizens do not necessarily have an impact on the daily work of elder law practitioners, even in the vital area of capacity determinations. These groups have a pragmatic perspective that can enrich elder law practice and help resolve difficult issues such as capacity.

Lawyers should look to senior citizen peer groups in a variety of situations. First, senior citizen groups can help gather data on the six factors central to contextual capacity determinations. A client may be more willing to talk to members of a senior citizen group than to the lawyer. Senior citizen groups can help fill gaps in the lawyer's knowledge of the client.

Second, senior citizen groups can help fill gaps in the lawyer's knowledge of senior citizens. For example, a lawyer may be frustrated by a client who declines to sign a trust agreement that takes away her control over her assets so that she can qualify for Medicaid. The lawyer may view her client as being irrational, and an ingrate to boot. After all, the attorney has gone to the trouble of drafting an artful, precise, and elegant trust agreement. The purpose of the agreement is benign and the reasoning is prudent. If the senior citizen does not sign the agreement, but at some point needs to enter a nursing home, long-term care will consume all of her assets. What's not to like?

A senior citizen group can explain to the puzzled attorney that many senior citizens prize control over assets even more as age erodes their control over other matters. For a younger person, relinquishing some control in the interest of long-term growth is often an attractive option. For the senior citizen, the long term is now.

In addition to providing insight and information, senior citizen groups can provide services. Take the case of the man with one hundred cats. The lawyer could act unilaterally to dispose of the cats, as the lawyer did in this case. As an alternative, the lawyer could do nothing and wait for neighbors, family, or the local authorities to go to court. The outcome of such litigation could be a guardianship and/or commitment to a nursing home or psychiatric hospital. The cats would be gone and the client's connection and voice would not be far behind.

A proactive attorney would find a group like "Seniors Who Love Cats Too Much."[66] Members of the group are other seniors with many cats, even if not one hundred of them. Group members can help the senior

65. *See* Alexis De Tocqueville, *Democracy in America* 198-202 (Richard D. Heffner ed. 1956).

66. I do not know if such a group exists. If it does not, it should. Elder law attorneys who frequently face such problems could be helpful in forming the group. It would be a worthwhile investment of their time.

ration his care-giving better. In addition, they can volunteer respite care for some of these pesky felines.[67] They also can tell the client about seniors in a nearby nursing home with their own needs for pet therapy. Some of the client's cats can meet this need. The client might feel that he has retained control, helped others, and effectively delegated to others the task of enhancing Little Friskies' price/earnings ratio.[68] Such problem-solving is possible, but only if lawyers reach out beyond their traditional roles.[69]

C. *Accessibility*

Lawyers also must reach out to make their offices accessible. In the elder law setting, this requires some accommodations.[70] First, offices should not have glare, which can cause discomfort and distraction for senior citizens. Second, offices should be accessible for people in wheelchairs or should be complemented by space that is accessible. Third, elder law attorneys must be prepared, despite the cost in time and money, to make house calls.[71] Seeing a senior citizen in the environment in which she lives provides indispensable information about how the citizen copes—information that may be distorted through the lens of more artificial interactions in the law office. Moreover, house calls breed trust, a scarce commodity in today's citizen-professional relationships. Particularly if capacity is at issue, an attorney should not make any decision that impinges on the client's freedom of action—such as seeking appointment of a guardian or taking action as a de facto guardian[72] — without first making a house call.

D. *Consultation with a Diagnostician*

Proactive lawyering often may obviate the need to consult a mental health professional. In some cases, however, consultation with a

67. Such groups also could confirm for the lawyer the therapeutic character of pets for the client.

68. Similar approaches would be beneficial for people with Collyer Syndrome. Collyer Syndrome is a clinical term for "pack rats" who obsessively keep everything and discard nothing. As a result, the houses of people with Collyer Syndrome are often cluttered with shopping bags, old newspapers, and sundry other items that are part of the fine print of a life. A peer group, the Collyer Syndrome Survivors, for example, could help the client store his belongings more efficiently, while keeping everything important to him.

69. For an example of lawyer-peer group collaboration in the context of a woman suing a psychiatrist who had sexually abused her, see Ruth Buchanan & Louise G. Trubek, *Resistances and Possibilities: A Critical and Practical Look at Public Interest Lawyering*, 19 N.Y.U. Rev. L. & Soc. Change 687, 698-99 (1992).

70. On the concept of accommodations generally, see the Americans with Disabilities Act, 42 U.S.C. §§ 12101-12213 (Supp. III 1991).

71. *See* Erika F. Wood, *Doing Well by Doing Good: Providing Legal Services to the Elderly in a Paying Private Practice*, ABA Commission on Legal Problems of the Elderly, pt.12 (1985), *reprinted in*, Frolik & Barnes, *supra* note 15, at 72.

72. *See infra* notes 75-80 and accompanying text.

clinician may be advisable, particularly where discussions with a group of the client's peers yield no definitive insights. Much of the literature ties itself into knots on this issue. The Model Rules and the draft Restatement recognize that consultation with a diagnostician may be appropriate,[73] but do not explain when or how. One concern is that the diagnostician's evaluation may be used for purposes, such as seeking a guardianship, that adversely affect the client's liberty. Another concern is that, in cases of questionable capacity, the client's consent to the lawyer to consult the client's clinician may itself be of dubious validity because consent *also* requires capacity.

We can deal with the first issue by prohibiting the lawyer from using the opinion of the clinician as a basis for, or evidence of, the need for guardianship. As for the second issue, the concept of contextual capacity suggests that clients consenting to attorney contact with their clinician simply assist the lawyer in doing her job. Viewed in this light, such consent serves the values of access, connection, and voice.

Prohibiting the client from consenting reduces her access to an attorney. It also compromises voice and connection. If a client does not even control her medical records, she has little voice left. If the client cannot authorize the disclosure of her medical records, she cannot express the trust in her lawyer that underlies her willingness to disclose.[74] If one argues that the proper route here is immediately to appoint a guardian, even *greater* curtailment of the client's independence results. The virtue of allowing the lawyer to seek an opinion from a clinician is that it can accomplish the same result as a guardianship, while being tailored more closely to the client's strengths.[75]

V. WHAT TO DO IF THE CLIENT LACKS CAPACITY: THE LAWYER'S ROLE

Practitioners exhausted from the inquiry into capacity might be tempted to relax once the determination is made. Unfortunately, as usual, there is no rest for the weary. Instead, other puzzles present themselves. Most importantly, a lawyer representing a client without capacity must decide whether to make decisions herself, on the client's behalf, and/or whether to seek appointment of a guardian.

In this situation, lawyers receive some greater assistance from the bar. The Model Code, the Model Rules, and the draft Restatement allow

73. *See* Model Rules, *supra* note 14, Rule 1.14 cmt. ¶ 5; Draft Restatement (Third), *supra* note 42, § 35 cmt. c.

74. One way of dealing with these issues is to relax the bar's restrictions on ownership of law practices by nonlawyers. Diversified service groups, owned and staffed by both lawyers and medical professionals, could represent senior citizens much more efficiently. *See* Gary A. Munneke, *Dances with Nonlawyers: A New Perspective on Law Firm Diversification*, 61 Fordham L. Rev. 559 (1992).

75. While courts have the authority to tailor guardianships in this way, in practice most guardianships are plenary since this is "easier" for all concerned—apart from the ward.

lawyers to make decisions for clients in some situations.[76] The Model Rules have absorbed much of the heat for this expansion of role because of their use of the loaded term "de facto guardian."[77] The draft Restatement avoids this loaded terminology and offers some guidance about when attorneys should make decisions for the client. In essence, the draft Restatement allows the lawyer to make decisions when emergencies exist.[78] In such situations, the benefits of a given decision are clear[79] and appointment of a guardian is too time-consuming to be helpful.[80] Our house foreclosure situation meets these criteria.[81] The concept of de facto guardianship, however, hardly has met universal approbation. Many thoughtful commentators are wary of the de facto guardian role, arguing that it gives too much power to lawyers, subjects them to the risk of substantial liability, and resists manageable standards.[82] This view favors the formalities of guardianship imposed after due process and with judicial monitoring for abuse of fiduciary duty. The problem with this approach is that it unduly promotes guardianship, an intrusive and often permanent and plenary course, over lawyer discretion, which can be temporary, informed by relevant opinion, such as the opinion of diagnosticians and peer groups, and less restrictive of the citizen's liberty. There is no question that there are profound risks that these commentators have exposed in the lawyer's assumption of a de facto guardianship role. However, the concern for lawyer overreaching and loss of legitimacy that animate this view coexist with other more prosaic factors. For example, as Professor Jacqueline Allee points out, the lawyer risks liability when she assumes such a role.[83] In contrast, waiting for a guardian or guardian ad litem offers the lawyer a safe harbor from litigation and liability. Given doubt about a client's capacity, waiting is the best alternative for the risk-averse attorney.

Some of the role morality that characterizes attorneys in litigation reappears in this view. Attorneys in the adversarial mode are fond of saying that it is not for them to judge the liability or guilt or innocence of their client—that is a job for judge and jury. Similarly, attorneys dealing with questionably competent clients argue that it is not their role to assess the capacity of a client or to ever make decisions for a client without

76. *See* Model Code of Professional Responsibility EC 7-12; Model Rules, *supra* note 14, Rule 1.14 cmt. ¶ 2; Draft Restatement (Third), *supra* note 43, § 35 cmt. d.

77. *See* Model Rules, *supra* note 14, Rule 1.14 cmt. ¶ 2.

78. *See* Draft Restatement (Third), *supra* note 43, § 35 cmt. d.

79. *See id.*

80. *See id.*

81. *See id.* Comment d states that

> a lawyer representing an elderly and disabled client in a landlord-tenant dispute may, without seeking appointment of a guardian, file a paper that will protect the client against eviction when the client is unable to understand the need to file the paper and it is clear that the client's interests will be served by retaining the client's present living arrangements.

82. *See* Allee, *supra* note 1, at 39; Tremblay, *supra* note 1, at 544-47.

83. *See* Allee, *supra* note 1, at 39-41.

capacity—instead this is a job for a guardian. The problem with this conception of role here, as in the adversarial context, is that it gives the attorney too easy an exit from tough problems. In an emergency, for example, there is no time to appoint a guardian. So the neat system of roles breaks down. At these moments, the role-based argument against de facto guardianship, advanced by many thoughtful advocates and commentators, begins to look more like the disease of bureaucracy and evasion of responsibility that the modern age has foisted upon us. Just as we need to reinvent government, so we need to make the legal profession more responsive.

The de facto guardianship approach has two cardinal virtues. First, as noted, it deals with problems where time is of the essence, such as the house foreclosure scenario. Second, de facto guardianship deals with the needs of impoverished seniors for whom guardianship is impractical because little money is involved. Under the anti-de facto guardian approach, a lawyer would be left with no resort in the loss of home scenario if the client did not respond to counseling. The deadline for responding to the foreclosure motion would pass, no guardian would have yet been appointed to act for the client, and the client would be out on the street.[84] In addition, given that capacity is variable with everyone, the senior who is more lucid tomorrow when he is out on the street may be more than a little angry with his attorney for not taking action to save his home. The client rightly may be more than a little puzzled if the lawyer explains that she was merely trying to preserve the client's autonomy. One can more readily exercise autonomy with a roof over one's head. At the very least therefore, there should be room for de facto guardianship when the alternative is violence to lifetime commitments—and necessities—such as a house, whose loss can occasion great regret.

The next inquiry concerns what the standard should be for the lawyer as de facto guardian. One possibility is the best interest standard, which simply allows the guardian to do what she feels is in the best interest of the ward. The problem with this approach is that, like the outcome test for capacity described above, it gives the lawyer too much discretion. Reacting to this problem, one thoughtful commentator has proposed that de facto guardians observe a variant of the substituted judgment test under which they seek to make decisions consistent with the lifetime commitments of the ward.[85] The draft Restatement in essence adopts this view.[86]

This approach is familiar from the bioethics literature and case law.

84. One could argue that this unfortunate case is merely the price one pays for a rule that prevents lawyer overreaching in other instances—few rules fit perfectly and a restrictive rule on de facto guardianship may work better in the majority of cases. The answer, however, is to constrain de facto guardianship with common sense criteria, not to prohibit it.

85. *See* Smith, *supra* note 1.

86. *See* Draft Restatement (Third), *supra* note 43, § 35 cmt. d.

The virtue of this approach is that it requires consultation with the client and her family instead of offering the lawyer carte blanche. The difficulty with this approach is that it often melds into the best interests test.[87] In any ambiguous situation, figuring out what the client would have wanted had she been competent necessarily requires some conception of what the client's best interests are, while discerning her best interests makes no sense unless one asks what decision would be consistent with the decisions made by the client over a lifetime.

The better approach is to avoid the meaningless distinctions between best interest and substituted judgment, just as we avoided the distinctions between a substantive and procedural view of capacity. The contextual approach works well here, with the added element of concern for the public interest. This approach accommodates both consideration of lifetime commitments and consideration of the substantive fairness of underlying transactions.

For example, in the house foreclosure situation, fighting the foreclosure will serve the public interest for two reasons. First, the failure to fight will permit a swindler to continue his depredations, targeting others in the future. Second, if the senior citizen is on the street, society will assume the burden of caring for her one way or the other. This consideration of the public interest fits with the connection value. Under a regime of connection, surgically separating public and individual interests is impossible. Instead, public and private overlap. Harms to the individual are harms to the community, and harms to the community are harms to the individual. A contextual approach recognizes this fact and allows the lawyer to act on it. In related areas of surrogate decisionmaking, courts have recognized that the public interest or the interest of third parties is a legitimate factor to be considered.[88]

VI. LEGAL ETHICS IN THE GUARDIANSHIP PROCESS

When representing clients who are the subject of guardianship or in-

87. *See* Flick, *supra* note 49, at 1147 & n.92.

88. *See* Cruzan v. Director, Missouri Dep't of Health, 497 U.S. 261, 279-287 (1990); Stanley S. Herr et al., *No Place to Go: Refusal of Life-Sustaining Treatment by Competent Persons with Physical Disabilities*, 8 Issues in L. & Med. 3, 30-34 (1992). In another area where a mechanical view of principal-agent relations has long prevailed, namely, the fiduciary duty of boards of directors to stockholders, commentators recently have argued for broader latitude for directors to consider the public interest. *See, e.g.*, Lawrence E. Mitchell, *The Fairness Rights of Corporate Bondholders*, 65 N.Y.U. L. Rev. 1165, 1229 (1990) (noting that "[c]orporate responsibility to employers, suppliers, customers, and the broader community is still an issue of hot debate and little action"); Daniel J. Morrissey, *Toward A New/Old Theory of Corporate Social Responsibility*, 40 Syracuse L. Rev. 1005, 1006-07 (1989) (arguing that the law should require corporations to undertake ethical and philanthropic activities); *see also* Fla. Stat. ch. 607.0830(3) (1993) ("In discharging his duties, a director may consider such factors as the director deems relevant, including . . . the social, economic, legal, or other effects of any action on the employees, suppliers, customers of the corporation . . ., the communities and society in which the corporation . . . operate, and the economy of the state and nation.")

voluntary commitment proceedings, the values of access, connection, and voice call for the vigorous adversarial approach familiar from the advocacy setting coupled with a willingness to counsel the client in appropriate situations. Here, the voice factor is uppermost. The attorney is the only person standing with the client against the power of the state. Access cuts the same way. In the community or as an independent person without a guardian, the client has access to a variety of services on her own. However, once in an institution—the inevitable end point of many guardianships as well as the result of commitment—the client is cut off from services and dependent on the good graces of institutional staff. With guardianship, too, the guardian is paid from the assets of the ward, thereby depleting those assets and further reducing the client's access to services. Connection tells the same tale. The institutionalization that often follows guardianship removes connections with others and isolates the client. Often for seniors the experience of being institutionalized is so alienating that the will to live is a casualty. Lawyers who take their clients seriously and respect their desire to live independently, while counseling them to accept help if it is needed, preserve their client's connection with the world.

Attorneys for respondents are not the only lawyers with obligations in the guardianship process. Many respondents in guardianship proceedings have no access to counsel, and indeed are not present at the proceedings themselves.[89] This sad situation suggests two duties for lawyers who represent families or other petitioners in guardianship proceedings. These lawyers should have a duty to seek counsel for the proposed ward and to insist on the proposed ward's attendance at the hearing. This deprivation makes a mockery of access, connection, and voice. Senior citizens are deprived of access to the decision-makers with control over their lives. They have no connection with these decision-makers, who, in turn, lack the opportunity to see the subject of their decisions.[90] Obviously, voice goes out the window as well since one who is not present cannot speak.

Attorneys for petitioners in guardianship proceedings may respond that this may well be true but that it is a matter for substantive law, not for legal ethics. This argument fails, however, for two reasons. First, it makes the same mistake repeatedly described in this Article. It separates perspectives on law—substance and process, best interests and substituted judgment, legal ethics and substantive law—that interact constantly. The savings and loan cases, which hold lawyers liable for fraud initiated by their clients, demonstrate the convergence of legal ethics and

89. *See* Lawrence Friedman & Mark Savage, *Taking Care: The Law of Conservatorship in California*, 61 S. Cal. L. Rev. 273, 281 (1988); Jan Ellen Rein, *Preserving Dignity and Self-Determination in the Face of Competing Interests and Grim Alternatives: A Proposal for Statutory Refocus and Reform*, 60 Geo. Wash. L. Rev. 1818, 1880 (1992).

90. This is true even though presence in court is constitutionally guaranteed in other situations, such as criminal proceedings, where a loss of liberty may result.

substantive law.[91] Courts simply have created new rules of legal ethics on their own, without waiting for the bar to catch up.

The second reason why this position is wrong is that it fails to consider the values that underlie even present ethical commands. In essence, if not in form, attorneys who seek guardianship without the presence of the proposed ward engage in ex parte communication with the decision-maker. This conduct is inappropriate when it occurs in other situations and its effective occurrence here should also be forbidden. Viewing this as ex parte communication means that a lawyer representing a party petitioning for guardianship cannot avoid responsibility for the respondent's absence by claiming that the judge approved the absence. Judges lack the power to approve certain glaring problems with proceedings before them—they cannot, for example, consent to ex parte contacts on the substance of a case even if they should wish to. This also should be a rule of substantive law on guardianships, but, as with the law of privileges and fiduciary duty, both substantive law and ethical standards are required.

With these safeguards, a hearing can be an educational and therapeutic experience for the senior, even if the outcome is not favorable. Hearing an attorney put forward the best arguments for the continued liberty of the client and hearing a court's reasoned discussion of those arguments can introduce a note of reality testing for a client.[92] It also can reduce the alienation that unfortunately typifies most senior citizen encounters with the legal system.

CONCLUSION

Representing senior citizens of questionable capacity requires all of the virtues of the good lawyer. The values of access, connection, and voice can help guide lawyer and client. These values shape a contextual view of representing clients with questionable capacity.

The contextual view rejects the mechanical principal-agent view of the lawyer-client relationship. It also rejects the paternalism that strips clients of voice to enhance their well-being. In striving for a third way, the contextual approach sheds light on difficult issues in elder law. For example, under a contextual approach, a lawyer who represents a challenged senior as well as other family members has an obligation to consider first the challenged senior's needs. Moreover, a contextual approach endorses the lawyer's role as de facto guardian in emergencies

91. *See, e.g., In re* American Continental Corp./Lincoln Sav. & Loan Sec. Litig., 794 F. Supp. 1424, 1452 (D. Ariz. 1992) (stating that an attorney must inform her client that the client's conduct violates the law and, if the client continues the wrongful activity, then the attorney must withdraw if further representation will violate the rules of professional conduct).

92. *See generally* Wexler & Winick, *supra* note 26, at 997-1001 (proposing to combine analysis of competency with defendant's participation in trial procedures and treatment programs).

where the lawyer's default would compromise the client's lifetime commitments. In addition, a contextual approach offers an alternative to looking at capacity solely as a function either of the wisdom of decisions or of some abstract decision-making process divorced from the substance of decisions in the world.

Viewing capacity as an overlapping dialogue between substance and process encourages lawyers to participate in the dialogue themselves and to bring in other parties to the conversation such as senior citizen peer groups. The lawyer's work, as well as the efforts of government, peer groups, and family, can influence the situations in which we assess capacity. The result is enhanced access, connection, and voice for citizens too often disempowered by the legal process.