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Clients with Destructive and Socially Harmful Choices - What's an Attorney to Do?: Within and Beyond the Competency Construct

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Clients with Destructive and Socially Harmful Choices - What's an Attorney to Do?: Within and Beyond the Competency Construct

Cover Page Footnote

Professor of Law, University of the Pacific, McGeorge School of Law; Member, New York State Bar & Washington State Bar. B.A., 1962, Wellesley College; L.L.B., 1965, Georgetown University Law Center. The author prepared this Article for a December 3-5 Conference on Ethical Issues in Representing Older Clients co-sponsored by the Fordham University School of Law Stein Center for Ethics and Public Interest Law, the American Bar Association on Real Property, Probate and Trust Law, the American Association of Retired Persons, the American College of Trust and Estate Counsel, and the National Academy of Elder Law Attorneys. The author gratefully acknowledges the excellent research assistance provided by Lise M. Loeffler, McGeorge School of Law, Class of 1994; Grant Puleo and Cynthia Nilssen-Vargas, McGeorge School of Law, Class of 1995; and Adam Knowlton, McGeorge School of Law, Class of 1996, with special thanks to Ms. Loeffler for her extra work on this project. The author also wishes to acknowledge helpful comments on previous drafts of this Article by Cynthia L. Barrett, Esq., Portland, Or., and Lloyd Leva Plaine, Esq., Sutherland, Asbill & Brennan, Washington, D.C., James R. Wade, Esq., Wade Ash Woods Hill & Farley, P.C., Denver, Colo. and Associate Dean and Professor Kathleen Kelly, McGeorge School of Law. The views expressed in this Article are, of course, the author's, and do not necessarily reflect the views of those commentators herein acknowledged.

CLIENTS WITH DESTRUCTIVE AND SOCIALLY HARMFUL CHOICES—WHAT’S AN ATTORNEY TO DO?: WITHIN AND BEYOND THE COMPETENCY CONSTRUCT

*JAN ELLEN REIN**

TABLE OF CONTENTS

Introduction	1102
I. The Dilemma	1104
A. Hypothetical 1	1107
B. Hypothetical 2	1108
C. Hypothetical 3	1109
II. Working Premises About The Competency Construct	1118
III. Model Rule 1.14: Within The Competency Construct	1132
A. General Observations	1132
B. A Critical Tour of the Model Rules	1136
1. Rule 1.14’s Ambivalence About the Basis of the Attorney-Client Relationship	1136
2. How Should the Lawyer Go About Determining Competency?	1141
3. Preliminary Clashes with Rule 1.6’s Duty of Confidentiality, Rule 1.7’s Duty of Loyalty, and Other Problems	1147
4. What Can the Lawyer Do Within the Competency	

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Construct if She Believes Her Client Is Incompetent?	1154
IV. Beyond The Competency Construct	1162
A. General Guidelines for Interference Versus Noninterference	1164
B. A Search for Solutions that Are Less Destructive of the Human Spirit.....	1168
1. Hypothetical 1	1171
2. Hypothetical 2	1172
3. Hypothetical 3	1174
Conclusion	1175

While acknowledging that inquiries regarding capacity are sometimes unavoidable, this Article criticizes our legal system's exclusive reliance on the competency construct to determine when and how to interfere with individual choice. It posits that this narrow focus has impeded the development of guidelines for interference that are based on a balancing of legitimate competing individual and social interests. It also argues that exclusive focus on the competency question has produced an overreliance on dehumanizing guardianship and conservatorship proceedings and has retarded the development of more discriminating, less intrusive, and more helpful mechanisms for dealing with destructive and antisocial choices.

Although this Article suggests improvements to the ABA Model Rules and substantive law within the competency construct, it also proposes guidelines for intervention that do not revolve around the competency question. This approach, while assigning great weight to the value of preserving individual autonomy, considers other factors including: (1) the extent to which the choice seriously invades the rights, resources, and welfare of others; (2) the irreparability of the harm to self and others threatened by the proposed choice of action; (3) whether those whose interests are threatened by the proposed action will learn about the threat in time to take self-protective action; (4) the effect in the aggregate of such individual choices on the common weal; and, as a countervailing consideration, (5) how integral the choice in question is to the individual's most intimate life and values. The Article concludes with a search for solutions that do not require a finding of client incompetency for their implementation.

INTRODUCTION

WITH the increasing complexity and interdependence of our society, the increasing longevity of its members, and the increasing competition for its ever-scarcer resources (witness the budget deficit crisis at every level of state and local government), Americans have unspokenly begun to question a fundamental tenet of Western liberalism with its almost religious faith in the beneficence of unfettered individualism. In keeping with our Western liberal orientation, Americans have traditionally assumed that the greater good is usually best achieved by letting the

individual do what he, as the sole arbiter, believes is in his own selfish best interests. We have assumed that the common weal will emerge from this clash of individual selfish decisions.¹

But the nation's mood has sobered. Political developments during the last several years suggest that Americans are dimly entertaining the possibility that the aggregate of individual decisions is not necessarily for the general good—that, indeed, individual decisions in the aggregate often have serious adverse effects on the legitimate interests of others and devastating effects on society as a whole.² To see this, one need only read the daily newspapers. The decision whether or not to wear a motorcycle helmet is no longer left to the individual.³ Individual restaurant owners can no longer permit patrons to smoke on their premises in many parts of California.⁴ Both the recent flooding in the Midwest and the earthquake in southern California prompted talk to the effect that prospectively the taxpayer should not be called upon to bail out individuals who decline to carry disaster insurance.⁵ Whether individuals will be allowed to buy as

1. Cf. Monroe H. Freedman, *Professionalism in the American Adversary System*, 41 Emory L.J. 467, 471 (1992) (“[L]awyers enhance the rule of law by enhancing the autonomy of each individual.”); Richard A. Posner, *The Theory of Monopoly*, reprinted in Terry Calvani & John Siegfried, *Economic Analysis and Antitrust Law* 15-19 (2d ed. 1988) (discussing the role of voluntariness in the rational self-interested individual utility maximization as the underpinnings of an efficient economic system); Charles K. Rowley & Alan T. Peacock, *Welfare Economics: A Liberal Restatement* 7-10 (describing the conditions for welfare economics). But the appropriateness of orthodox welfare economic theory in analyzing collective or public decisions has been challenged. See Hal R. Varian, *Distributive Justice, Welfare Economics, and the Theory of Fairness* in *Philosophy and Economic Theory* (Frank Hahn & Martin Hollis eds., 1979). In assuming the emergence of the common weal, we have tended to ignore the role of power differentials, which warp this model.

2. Americans may also be experiencing dismay at the neo-individualistic behavior of special interest groups, but discussion of that phenomenon is beyond the scope of this Article.

3. See Dan Beyers, *Some Easy Riders Resent Md.'s New Helmet Law: Police to Start Writing Tickets Today*, Wash. Post, Oct. 1, 1992, at B6 (reporting that 25 states and the District of Columbia have helmet laws for all riders, another 22 states require younger riders to wear helmets, and only 3 states—Illinois, Iowa, and Colorado—have no helmet laws).

4. Julie Tamaki, *Smoke Out: Cities Try to Snuff Smokers*, L.A. Times, July 21, 1993, at B5 (stating that 56 cities and counties nationally have banned smoking in restaurants, 49 of which are in California).

5. See, e.g., William P. Cheshire, *Americans Have Forgotten the Lesson of the Three Little Pigs*, Ariz. Republic, Jan. 27, 1994, at B4 (“[S]o few Californians have earthquake protection that the insurance industry is expected to pay out only about \$1 billion in claims.”); Joseph Farah, *Contrarian Questions About Post-Quake Aid: Bailouts Remove the Incentive to Prepare; Americans' Generosity Is Abused When Assisting Victims Is Compulsory Through Taxes*, Los Angeles Times, Jan. 31, 1994, at B7 (arguing that when the federal government assumes the costs of earthquake damages, it removes incentive to insure property); John McCarron, *Next Time, Babe, Get Quake Coverage*, Chi. Trib., Jan. 30, 1994, at C3 (“If I have to buy antifreeze and storm windows, why is it that only 25 percent of Californians buy earthquake insurance?”); Marc Sandalow, *Capitol Hill Grumbling Over Earthquake Aid; Some in Congress Complain Too Few Have Insurance*, San Francisco Chronicle, Feb. 10, 1994, at A1 (“While most members of Congress have been far too politic to utter words that could be construed as insensitive to victims . . . , pri-

much health care as they want in all situations is one aspect of the current debate on the implementation of a national health care system.⁶ Viewed from this perspective, the problem examined here is but a microcosmic facet of a more fundamental dilemma now confronting society. How much unfettered individualism can we afford? And when is it appropriate, even essential, to mediate, to regulate, and occasionally to override individual decisions and activities, even if competently made?

I. THE DILEMMA

This Article addresses the lawyer's dilemma in representing a client whose expressed wishes regarding resolution of a problematic situation—indeed, the goals of the representation—are deeply at odds with what the attorney believes is the morally responsible response to the problem. The morally perplexing client can be any age and in any state of physical or mental health.⁷ This Conference and hence this Article, however, focus on the elderly, supposedly impaired or questionably competent client.⁸ This Article is not concerned with individuals who are “unable to enunciate a . . . choice”⁹ after receiving every possible encouragement to do so. It is concerned with those who make arguably self-destructive or antisocial decisions.¹⁰

Discussions in the elderlaw arena tend to approach the lawyer's dilemma by asking whether and to what extent the client's competency is

vately there is an undercurrent of frustration that less than one in four people who live in the earthquake-prone state bother to purchase earthquake insurance.”); *Protecting Taxpayers from Disasters*, Chi. Trib., Jan. 19, 1994, at N16 (“Though earthquake insurance . . . is widely available from private insurers in California, only 25 percent of the state's residents have it—only 40 percent in this [previous] quake's hard-hit San Fernando Valley.”). *But see* Mary McGrory, *We All Should Pay the Price*, Ariz. Republic, Jan. 28, 1994, at B7 (“[M]ost [Americans] take the ‘United’ in United States to heart and understand that we are all expensive in one way or another, and that states have their costly quirks just like people.”).

6. *See, e.g.*, Richard D. Lamm, *Health-Care Rationing is No Dirty Word*, *Newsday*, Sept. 30, 1993, at 102 (“How do we buy the most health care for our citizens at a price we can afford? It will force us to make hard choices we have been unwilling to make to date.”).

7. Professor David Luban's thought-provoking article, *Paternalism and the Legal Profession*, 1981 *Wis. L. Rev.* 454, 455-57, lists seven hypotheticals posing moral dilemmas, none of which involve a mentally incompetent client.

8. I use “supposedly impaired” to reflect my deep skepticism about the usefulness of the competency concept to resolve these kinds of moral dilemmas.

9. Linda F. Smith, *Representing the Elderly Client and Addressing the Question of Competence*, 14 *J. Contemp. L.* 61, 96 (1988). Such individuals may be indecisive, ambivalent, unwilling to take a permanent position between competing family members, or possibly unable to comprehend the matter. In such cases, barring an emergency, no decision need be made until the client settles on a position. In emergency situations, it may become necessary to appoint someone on a very time-limited and task-specific basis to make a decision for the client. While it may be, as Professor Smith suggests, that the decision-maker should “make a ‘substituted judgment’ based upon the client's values,” *id.*, I am not sure that the agency basis of the attorney-client relationship allows the lawyer herself to make the decision. *See infra* notes 134-52 and accompanying text.

10. What constitutes a “choice” could be the subject of extensive debate, but such a

impaired.¹¹ The question becomes, in the new jargon, whether and to what extent the client is "disabled,"¹² impaired, or incapacitated from making a particular decision or decisions generally.¹³

discussion would extend beyond the primary focus of this Article. A layperson's understanding of the word must suffice for now.

This dichotomy between individuals who are and are not able to enunciate a choice does not take into account persons who make choices that, for financial or other reasons, cannot be put into effect. Careful counseling can, in many cases, help a client arrive at more realistic choices. If this does not work, the client is in the same position as any individual who, competent or not, lacks the means to turn his wishes into reality. The private and public sector should, of course, do whatever can be done to provide decent options for all citizens, regardless of economic status.

11. See, e.g., Smith, *supra* note 9, at 74 ("If the client's competence is open to question, the attorney should interview and advise the client with the applicable legal standard in mind."); Paul R. Tremblay, *On Persuasion and Paternalism: Lawyer Decisionmaking and the Questionably Competent Client*, 1987 Utah L. Rev. 515, 533 ("Before deciding whether to intervene on behalf of Mr. H or Mr. M, a lawyer would need to consider the question of their competence, for it is only if they are incompetent that intervention could possibly be justified.").

Most articles do not discuss why they focus solely on the competency question. Some treat the competency question as self-evident when discussing incompetency determinations by attorneys, as opposed to judicial adjudications. See, e.g., Mark Falk, *Ethical Considerations in Representing the Elderly*, 36 S.D. L. Rev. 54 (1991) (stating how to substantiate a client's competence to perform a particular act); Marshall B. Kapp, *Representing Older Persons: Ethical Challenges*, Fla. B.J., June 1989, at 25, 28 (suggesting that standards of determining capacity for medical decision making offer a useful model for determination of capacity for legal decision making); Peter J. Strauss & Nancy N. Dubler, *Ethical Issues in Decision Making*, *Compleat Law.*, Fall 1986, at 14, 14 (also suggesting that lawyers use a standard developed for determining patients' ability to provide informed consent to medical care). But see *Health Care Options for the Elderly: NCPL Seminar Probes Attorney Dilemma in Determining Competency of Client*, *Preventive L. Rep.*, Dec. 1988, at 22, 24 (edited transcript) [hereinafter *Health Care Options*] (statement of Dr. Leonard Hellman) ("I can't imagine an attorney, no matter what his background is, in a legal office trying to determine competence."); Maria M. das Neves, Note, *The Role of Counsel in Guardianship Proceedings of the Elderly*, 4 *Geo. J. Legal Ethics* 855, 862 (1991) (opining that an attorney should not assess the client's abilities at all, but should instead advocate zealously for the client's wishes).

12. See Model Rules of Professional Conduct Rule 1.14 (1992) [hereinafter Model Rules]. Although the paragraphs within each comment to the Model Rules are not numbered, for ease of reference, I refer to each paragraph as if it were so numbered. Thus, for example, I refer to the fifth paragraph within a comment as Comment 5.

13. To some, the term "competence" has a more global ring than the term "capacity," as the following excerpt discussing the capacity to make health care decisions indicates:

While used in many contexts, "competence" refers most accurately to a judicial determination about a person's decision-making ability. Moreover, competence generally describes a status, the ability to make all or, conversely, no decisions for oneself. In contrast, "capacity" is a more limited and specific concept; it refers to a person's ability to make a particular decision as determined by health care professionals or others.

New York State Task Force on Life and the Law, *Life-Sustaining Treatment: Making Decisions and Appointing a Health Care Agent* 100 (July 1987). See also Lawrence A. Frolik & Alison P. Barnes, *Elderlaw Cases and Materials* 789 (1992) (discussing the terms in the context of guardianship and conservatorship statutes) ("[I]ncapacitated[, as compared to 'incompetent',] . . . is believed to suggest impairment which is limited, rather than global or complete."); Stephen J. Anderer, *Determining Competency in Guardian-*

Presumably, if the client is fully competent to make the decision in question and remains adamant even after sensitive client-centered counseling¹⁴ and gentle persuasion,¹⁵ the lawyer's only options are to advocate or otherwise comply with that client's expressed wishes, however repugnant, or to discontinue the representation.¹⁶ If, on the other hand, the lawyer finds that the client is disabled from making the kind of decision(s) required to resolve the problem, the door magically opens to some form of surrogate or substitute decision-making. For example, according to American Bar Association Model Rule 1.14(a), as fleshed out by the comment, if "a client suffers a disability" and "has no guardian or legal representative, the lawyer often must act as *de facto* guardian."¹⁷ Rule 1.14(b) authorizes a lawyer to "seek the appointment of a guardian or take other protective action with respect to a client . . . when the lawyer reasonably believes that the client cannot adequately act in the client's own interest."¹⁸ "Reasonably believes" . . . denotes that the lawyer believes the matter in question and that the circumstances are such that the belief is reasonable."¹⁹ This standard leaves much room for error. The phrase "in the client's own interest" is itself ambiguous. Does it refer to the client's own expressed statement of his²⁰ interest, to the client's "objective" (according to whom?) "best interests," to what the lawyer believes to be in the client's "best interests," or to what the lawyer guesses

ship Proceedings 3 (Nancy A. Coleman et al. eds., 1990) (discussing the terms in the context of guardianship statutes) ("[T]he term *incompetent* has an all-encompassing connotation, while terms such as *disabled* and *incapacitated* are more consistent with the trend toward limited findings of inability in specific areas."). Interestingly, Black's Law Dictionary makes no distinction between the two terms. See Black's Law Dictionary 986 (6th ed. 1990) (defining mental capacity and mental competence in a single entry); *id.* (defining mental incapacity and mental incompetency in a single entry).

14. For a description of what one commentator calls "gradual counseling," or "repeatedly refer[ring] to the client's goals and values in assessing each alternative and in discussing the pros and cons of an alternative," see Smith, *supra* note 9, at 92-96. See also *infra* notes 23-25 and accompanying text.

15. See Tremblay, *supra* note 11, at 579 (addressing the role of persuasion in the attorney-client relationship and suggesting that it is more appropriate "to use persuasive dialogue with a confused client than with a more coherent client").

16. Model Rules, *supra* note 12, Rule 1.16(b) permits the lawyer to withdraw from the representation "if withdrawal can be accomplished without material adverse effect on the interests of the client . . ." Further, the lawyer may withdraw even if there would be an adverse effect on the client's interest if the "client insists upon pursuing an objective that the lawyer considers repugnant or imprudent . . ." *Id.* Rule 1.16(b)(3) & cmt. 7. If the lawyer represents the client in litigation, she may need the court's permission before she may withdraw. Model Rule 1.16(c) makes clear that the lawyer may not ethically withdraw if the court has ordered her to continue the representation. See *id.* Rule 1.16(c). Therefore, under some circumstances, the lawyer may not even have the option to withdraw.

17. *Id.* Rule 1.14 cmt. 2.

18. *Id.* Rule 1.14(b). For an analysis and critique of Rule 1.14, see *infra* notes 111-249 and accompanying text.

19. Model Rules, *supra* note 12, Terminology.

20. For convenience, unless the facts require otherwise, I refer to male clients and female attorneys.

the client would deem best (based on the client's values and life history) if the client were fully competent to make the decision in question?

One can see already that all this is very confusing, presenting ample opportunities for individual lawyer error and paternalism in dealing with a client's autonomy and liberty interests.²¹ There are no guidelines regarding what standards the already harried lawyer should apply before seeking guardianship or other protective action. How the lawyer should go about acting as *de facto* guardian and what authorizes her to do so is seemingly anybody's guess. A careful redrafting of the Model Rules to answer questions like those already raised could reduce some of this confusion, and that may be a good place to start. Ultimately, however, and for reasons to be discussed anon, I am deeply skeptical about the competency concept's usefulness as a divining rod for determining whether or not a client's expressed wishes should be honored.

Three hypotheticals set the stage for this discussion.²²

A. *Hypothetical 1*

Arnold has sought your services in connection with his dispute with a mechanic who repaired Arnold's car after Arnold ran it into a ditch on a private road. The auto mechanic is holding the car until Arnold pays for his services, but Arnold refuses to pay because he contends the car was improperly repaired. He wishes to take it to another mechanic.

In the course of the representation, you learn that Arnold, who has a valid driver's license, has recently started suffering from seizures. In fact,

21. The terms "autonomy" and "liberty" are themselves imprecise. Autonomy and liberty are not synonymous with doing whatever one wants regardless of the consequences for others. See, e.g., Gerald Dworkin, *The Theory and Practice of Autonomy* 110 (1988) ("What makes an individual the particular person he is reflects his pursuit of autonomy, his construction of meaning in his life"); Immanuel Kant, *Foundations of the Metaphysics of Morals* 59 (K. Beck trans., 1959) (explaining that autonomy is a necessary precondition to morality); Robert Nozick, *Philosophical Explanations* 71-114 (1981) (connecting autonomy to the essence of being human); John B. Attanasio, *The Principle of Aggregate Autonomy and The Calabresian Approach to Products Liability*, 74 Va. L. Rev. 677, 679 (expressing autonomy as having value because it gives a person dignity). For an overview of this subject, see Thomas L. Shaffer, *The Practice of Law as Moral Discourse*, 55 Notre Dame L. Rev. 231 (1979).

In the field of American medical ethics, patient autonomy has long been the dominant rhetorical value. See Roger B. Dworkin, *Medical Law and Ethics in the Post-Autonomy Age*, 68 Ind. L.J. 727, 727 (1993). Personal autonomy, however, is sometimes subverted to the needs of society, as for example, with compulsory vaccination laws. See *id.* at 728. It is also sacrificed to other concerns. See *id.* For example, medical malpractice law imposes choices upon patients under the rubric of informed consent. See *id.* at 729. "The law of tort, not contract, determines the quality of medical care to which a person is entitled, and a patient may not contract away the right to receive reasonable care." *Id.* For further discussion, see *infra* note 101.

22. These hypotheticals, which are used as a reference for discussion of various points throughout this Article, present clients who are totally unresponsive to counseling and persuasion. They represent the extreme rather than the usual case. Most clients, young or old, can be persuaded to some degree. I use the extreme examples, however, to more sharply define the issues raised by this Article.

the ditch incident itself resulted from a seizure. You suggest that Arnold consult a doctor, pointing out that if he continues to drive without first finding a way to eliminate his seizures, he risks serious bodily harm or even death to himself and others, as well as extensive liability for negligence. Arnold angrily tells you to mind your own business. He refuses to see a doctor, give up his car, or give up driving. After you have engaged in extensive "gradual counseling"²³ and carefully measured persuasion, using "is statements" as opposed to "ought statements" or "outright threats,"²⁴ Arnold remains adamant that he will not give up driving, even temporarily.²⁵ Arnold lives alone and, to the best of your knowledge, has no living relatives. Apparently no one else knows about the seizures.

B. *Hypothetical 2*²⁶

Your client, Martha, bought an over-priced, very poor quality roofing job, and the roof began leaking soon after the "repairs." Martha unknowingly signed a deed to her house to secure an \$8000 note to pay for the roof, believing that it was a contract for the roofing job. A collection company that buys the roofer's financing notes has sued Martha for the \$8000. You have looked into this scam and have prepared an answer and counterclaim asserting fraud and seeking a judgment voiding the deed as well as statutory consumer protection remedies, including treble damages and attorney's fees.

The deadline for filing the answer is the next day. You stop by Martha's house to explain it, and you find her confused and in tears. She says no one loves her and she would be better off in a nursing home. "I've always paid my bills. If they say I owe this, they must be right or they would not go to court." Martha wants the debt paid and the lawsuit ended so no one will think she cheated anyone. She also states that her health will not survive the stress of litigation. Or suppose the triggering event is

an eviction notice from a real estate speculator who claims that he now owns [Martha's] home. [You] recognize[] the name of the speculator as an unscrupulous foreclosure sale operator who has obtained fraudulent title to many homes in recent years. The speculator claims title to

23. See Smith, *supra* note 9, at 92-96. For an explanation of "gradual counseling," see also *supra* note 14.

24. See Tremblay, *supra* note 11, at 577-79. Perhaps I should have said "after you have attempted to engage in gradual counseling and measured persuasion" because Arnold may not even let you get that far.

25. This hypothetical was inspired by a friend still grieving over the loss of his stepdaughter who, together with her fiance, was instantly killed when rear-ended at 80 miles per hour by an elderly woman. This woman had previously caused several accidents resulting in serious bodily harm but still had a driver's license and a car.

26. The first two paragraphs of this hypothetical are taken almost verbatim from Frolik & Barnes, *supra* note 13, at 96 (using a hypothetical proposed by the Center for Social Gerontology in Ann Arbor, Michigan).

the house based on a lien contract that may have been forged or [Martha] may have signed without understanding its nature.²⁷

Martha lives alone and has no relatives. You engage in extensive "gradual counseling" in which you carefully explore Martha's reasons for not wishing to file an answer, pointing out to her in a non-threatening way that she may lose the savings she had counted on to support herself, and possibly her lifelong home, if she does not file an answer.²⁸ You also explain that if she loses her home, she may have to rely on supplemental welfare for her housing and general support and may even become homeless or institutionalized. After all this, Martha remains adamant that she does not want you to submit an answer. In view of Martha's modest financial resources, you cannot spend many billable hours on this case. You also wonder whether you could later be sued for malpractice if you fail to file a timely answer.²⁹

C. Hypothetical 3³⁰

Paul, a widower with a married son and grandchildren, asks you to help him arrange some charitable gifts and to plan for his future, both economically and functionally. The mortgage on Paul's home is not yet retired and his economic resources are quite limited. You suggest some insurance options, financial strategies, and housing options. Halfway through your second meeting, Paul informs you that he wants to donate a substantial portion of his assets immediately to a television evangelist or to a religious cult. If Paul does this, barring some unexpected infusion of cash, Paul's remaining assets will not be sufficient to support him even at a modest level and he may even lose his house.

Paul's son, Jake, does not know about his father's donative plan but, from what you know of Jake's character, he would feel morally obligated to sacrifice his own assets, if necessary, to ensure his father's support. Or, alternatively, the state begins enforcing its family support obligation laws against children of destitute parents, as a very recent decision of the South Dakota Supreme Court has allowed.³¹ Jake has four teenage chil-

27. Tremblay, *supra* note 11, at 531.

28. For helpful suggestions on client counseling and persuasion techniques that will enhance the client's decisional abilities as well as the lawyer's ability to understand her client's point of view, see Smith, *supra* note 9, at 92-96, and Tremblay, *supra* note 11, at 577-83.

In structuring these hypotheticals to posit that client counseling and appropriate persuasion have not worked, I do not intend to suggest that such techniques infrequently solve the problem. Such techniques often lead to a satisfactory resolution of the problem, but that scenario is simply not the focal point of this Article.

29. For a discussion of potential malpractice liability, see *infra* notes 144-50 and accompanying text.

30. This hypothetical was inspired by a hypothetical posed in Frolik & Barnes, *supra* note 13, at 82, which I have substantially altered to suit my purposes.

31. See *Americana Healthcare Ctr. v. Randall*, No. 18186, 1994 WL 84169, at *1 (S.D. Mar. 16, 1994). The court observed that

[i]t is certainly reasonable to place a duty to support an indigent parent on that

dren who plan to attend college and Jake must save for their tuition. Once again, client counseling and gentle persuasion do nothing to change Paul's mind.

The client's decision in each hypothetical is explainable on the basis of both seemingly rational and seemingly irrational thought processes. Arnold, for example, might explain that he must drive to get to work and keep his job, or that driving gives him his last shred of independence.³² On the other hand, he might claim that God has told him that his

parent's adult child because they are direct lineal descendants who have received the support, care, comfort and guidance of that parent during their minority. . . . [N]o other person has received a greater benefit from a parent than that parent's child and it logically follows that the adult child should bear the burden of reciprocating on that benefit in the event a parent needs support in their later years.

Id. at *5.

Although the *Randall* decision might signal a new trend, currently, most states do not enforce their family support laws against adult children because the federal government conditions the receipt of federal funds on the state's agreement not to hold any relative responsible except as provided in the Medicaid and Social Security Insurance eligibility rules. Under these rules, the spouse is responsible but the next generation is not. *See* 42 C.F.R. § 435.602 (1992). I am indebted to Cynthia L. Barrett, Attorney at Law, for bringing this limitation to my attention.

A typical family support obligation law would provide that "[a]ll children shall be responsible for supplying necessary goods and services to their parents when their parents are unable to do so themselves." *See* E. Teitelbaum, *Intergenerational Responsibility and Family Obligation: On Sharing*, 1992 Utah L. Rev. 765, 784. This language is not taken from any particular statute but rather is borrowed from Professor Teitelbaum's description of how such a statute might read. *See id.* The South Dakota statute at issue in *Randall* provides, in part, that "[e]very adult child, having the financial ability so to do shall provide necessary food, clothing, shelter or medical attendance for a parent who is unable to provide for himself . . ." S.D. Codified Laws Ann. § 25-7-27 (1992). Another example of such a statute provides that "[i]t is the duty of the . . . child or children of any poor person who is unable to maintain himself or herself by work, to maintain such poor person to the extent of his or her ability." Idaho Code § 32-1002 (1983 & Supp. 1993).

For a recent analysis of current statutes that impose parental support obligations on adult children, *see* Ann Britton, *America's Best Kept Secret: An Adult Child's Duty to Support Aged Parents*, 26 Cal. W. L. Rev. 351 (1990). Professor Britton lists filial support statutes from 29 states, *see id.* at 358 n.76; however, the number of states that include such statutes is declining. *See id.* Even where the statutes exist, the trend is not to enforce them. *See id.* at 359-60; Teitelbaum, *supra*, at 765; *see also* Catherine D. Byrd, Commentary, *Relative Responsibility Extended: Requirement of Adult Children to Pay for Their Indigent Parent's Medical Needs*, 22 Fam. L.Q. 87, 90-91 (1988) (discussing the same phenomenon in the context of laws requiring adult children to pay their parents' medical needs). In 22 states, the statutes have either never been invoked or they have been invoked extremely rarely. Britton, *supra*, at 360.

There are, however, at least five states in addition to South Dakota in which the statutes have been used in recent years: Oregon, Louisiana, New Jersey, Ohio, and Pennsylvania. *See id.* at 360-63. In California, there is some evidence that attempts to enforce such a statute in accord with tables that determined the amount of the relatives' contribution led to the repeal of the tables. That no cases have reached the state appellate courts since then suggests that enforcement may have ceased. *See id.* at 359, 361.

32. In this instance, Arnold resembles Menlove in the famous torts case *Vaughan v. Menlove*, 132 Eng. Rep. 490 (C.P. 1837). Menlove, although mentally competent, did not apply the Hand formula, *see* *United States v. Carroll Towing Co.*, 159 F.2d 169 (2d Cir. 1947), the way the reasonably prudent person would have.

seizures are the mechanism God has chosen to eliminate sinners. Martha might quite reasonably claim that she has been taught from childhood to pay her bills and take the consequences for her mistakes, that it would go against her value system to resist paying what she agreed to pay, that the litigation would put her in the embarrassing role of a deadbeat, and that, at her age, she wants to avoid stress at all costs. On the other hand, Martha may claim that the unscrupulous roofer, collection agency, or land speculator is really the devil incarnate and that any attempt at resistance—even filing an answer—will cause the devil to unleash greater fury upon her.³³ Paul might reasonably explain that he is on a spiritual plain, that he no longer cares about worldly goods and wants to promote the religion he believes in by his donation. On the other hand, he may offer a bizarre explanation.

Professor Luban has suggested that “if any process is going on in the person’s head that can be called ‘inference from real facts,’ the person is competent. It is too much to require that the inference be valid, or objective, or correct, for that is more than competent people can manage.”³⁴ Assuming temporarily that most legal experts would accept this test for decisional competency, the rational explanations in each hypothetical clearly meet this test.³⁵ The explanation that Martha gives in the hypothetical clearly qualifies as competent under Professor Luban’s test. Upon further inquiry, even some bizarre explanations might reflect a competently made decision.³⁶ Moreover, all the foregoing explanations might qualify as competent under the “evidencing a choice” standard, which “focus[es] only on the presence or absence of a decision.”³⁷ A person who makes a decision, regardless of its content, is competent under that test.³⁸ Would the attorney’s moral anguish about these seemingly ill-advised decisions be alleviated if the client in each case gave a rational account of why he made that decision? In any of these cases, does or should it matter whether the client is age forty-five or seventy-

33. A hypothetical used in Tremblay, *supra* note 11, at 532, inspired the devil explanation.

34. Luban, *supra* note 7, at 479. See also *infra* note 101.

35. Although Professor Luban’s test may be one of the least circular and most appropriately neutral tests of the many tests put forth, a finding of competence under his test does not seem to advance resolution of the types of problems described in this Article.

36. See *infra* notes 159-62 and accompanying text.

Professor Smith cautions that an elderly client suffering from a dementia such as Alzheimer’s disease is not necessarily incompetent. See Smith, *supra* note 9, at 71. However, a client may *seem* less rational if he refuses to admit to himself that he has the disease. See *id.* For example, the client may attempt to mask memory gaps, one of the symptoms of his disease, by inventing stories to bridge them. See *id.* In doing this, the client may provide his attorney with bizarre explanations for his requested course of action; however, the goal itself may still represent the client’s true values and, significantly, “[d]epending upon the legal issue to be decided, [such a client] may nevertheless be able to state his goals and be competent.” *Id.*

37. Barbara Stanley et al., *The Functional Competency of Elderly at Risk*, 28 *Gerontologist* 53, 53 (Supp. 1988).

38. *Id.*

five?³⁹

Addressing the first question, I suspect that most lawyers, being human after all, are mainly bothered by the decision itself—not by how the client arrived at it. The probability that Arnold will kill or maim himself or someone else if he has a seizure while driving disturbs Arnold's lawyer. Martha's lawyer feels consternation at the thought of letting an unscrupulous speculator "rip off" Martha's assets, either throwing her out on the street or onto our already overburdened welfare rolls. Paul's lawyer cannot get rid of the nagging sense that if Paul's decision to give his assets to a television evangelist or religious cult will result in Jake having to pay for Paul's support at the expense of Jake's children's college education, the decision is perhaps not Paul's alone to make.⁴⁰

This is not to deny that the lawyer is also moved by a desire to protect her client from the consequences of a disastrous decision. In fact, many practitioners claim they "couldn't care less" about how a course of action might affect others, being mainly concerned with their own client's welfare.⁴¹ But in many cases, the client's long-term welfare may depend on the lawyer's ability to recognize and deal with the legitimate interests of others. For example, to stop Paul from impoverishing himself, Paul's lawyer would probably have to trigger the appointment of a conservator based on partial incompetency. If, on the other hand, the lawyer arranged the transfer pursuant to Paul's wishes without challenging his capacity, Paul's son Jake might well seek to place his father under conservatorship and to set aside the gift once he discovered it. Alternatively, if Paul's lawyer refused to execute Paul's spoken wishes and was fired or withdrew, Paul would either find another attorney to do his bidding or wind up with no representation at all. None of these results seems satisfactory. If our system permitted the lawyer to notify Jake⁴²

39. For a discussion of society's double standard in considering the elderly's decisions as contrasted with identical decisions made by younger individuals, see Jan E. Rein, *Preserving Dignity and Self-Determination of the Elderly in the Face of Competing Interests and Grim Alternatives: A Proposal for Statutory Refocus and Reform*, 60 Geo. Wash. L. Rev. 1818, 1844-46 (1992).

40. The attorney will feel more comfortable about the situation if Jake, the adversely affected third party, receives notice of the proposed decision in time to take steps to protect his own interests. Under our present system, if persuasion fails to move his father, Jake's only practical option will be to seek appointment of a conservator to manage Paul's assets. This will throw the dilemma into the competency construct when the real issue seems to be one of competing interests between Paul and Jake and Paul and his lawyer (who may face malpractice claims, among other problems, if she goes along with Paul's donative scheme). See *infra* notes 164-67 and accompanying text; discussion *infra* part IV.

41. Cf. Judith Areen, *Cases and Materials on Family Law* 361 (3d ed. 1992) ("When I take a case, I am not concerned with whether my client is right or wrong. As far as I am concerned, a client is always right. . . . To stand in judgment is too great a luxury.") (quoting Raoul Felder, *Divorce* 2-7 (1971)).

42. This could take the form of a simple informal communication to Jake; however, due to current confidentiality rules, specific authorization by the Model Rules or some

and then required mediation on these facts, Paul and Jake might reach a compromise, thus obviating the need for a conservatorship. They might, for example, agree that Paul should leave the property to the television evangelist by will rather than by lifetime gift.⁴³

Thus, the current structure of the attorney-client relationship, coupled with the either/or choice regarding the client's competency to make certain decisions, may create unnecessarily extreme positions and results. Moreover, the protective urge noted above often seduces the lawyer into deciding the client is incompetent and treating him as such when, in fact, the client is competent.⁴⁴ On the other hand, if the question is whether or not to seek a competency determination in court, a lawyer, aware of the disastrous effects the stigma and loss of control associated with guardianship can have on a client, may be reluctant to consider the issue at all.⁴⁵ In Paul's case, neither concern for Jake's family nor an urge to protect Paul would arise were Paul so wealthy that the gift to the evangelist left him with enough money for his support.⁴⁶ Would Paul be competent to make the decision in that case but not in the original hypothetical? If the gift were to a companion who took care of Paul, the reaction might also be different. The point here is that factors other than

other rule would be required. Informed consent principles may require the lawyer to inform the client, at the retainer stage, of the possibility of such disclosure in certain types of situations.

43. This is not to imply that mediation is the solution of choice in all or even most cases. Its use in this hypothetical is meant to be suggestive, not exhaustive. A whole panoply of options should be developed for lawyers to use as the situation warrants.

44. See *infra* notes 68-82 and accompanying text.

Other commentators have noted this circularity problem. See, e.g., Luban, *supra* note 7, at 466, 475 (discussing the role of circularity in paternalistic intervention); Lawrence A. Frolik, *Plenary Guardianship: An Analysis, a Critique and a Proposal for Reform*, 23 *Ariz. L. Rev.* 599, 604 (1981) ("The quality and effect of the individual's decision and behavior result in a determination of incapacity, which, in turn, leads to a finding of mental illness and the consequent need for a guardian") (footnote omitted); Kapp, *supra* note 11, at 28 (in medical context, determining client capacity under the "outcome approach" focuses on the person's decision). *But see* Tremblay, *supra* note 11, at 537 n.92 ("The 'outcome test' (whether the choice itself seems 'crazy') of determining competency is based on tautological reasoning and has been rejected by courts and commentators.").

For descriptions of cases illustrating this circularity problem, see Rein, *supra* note 39, at 1876 n.273; Luban, *supra* note 7, at 480-81.

45. *Accord* John R. Murphy, Note, *Older Clients of Questionable Competency: Making Accurate Competency Determinations Through the Utilization of Medical Professionals*, 4 *Geo. J. Legal Ethics* 899, 901-02 (1991).

46. *But see* *ENS et al. v. LDS*, 6 Penn. Fid. Rptr.2d 1 (C.P. 1985) (finding a member of a wealthy family, who had made large loans to the Lyndon LaRouche Society, incompetent to manage his affairs despite his abundant wealth). Regarding *ENS*, one suspects that the large gifts to the LaRouche Society by a weak-minded, but probably not mentally incompetent, person were just too much for the court to take. One also wonders if that person would have been deemed incompetent had he made similarly large gifts to a mainstream religious group like the Catholic or Mormon Church or even to Christian Science. See, e.g., *id.* at 4 ("We are reluctant to equate the importunings of the Lyndon LaRoach [sic] organization with the message of Christianity or of any of the other recognized religions."). For a suggestion of how the court might have achieved its goal with less damage to his autonomy and dignity, see *infra* notes 278-85 and accompanying text.

competency seem more relevant.⁴⁷ Thus, the issue needs clarification by removal, or at least deemphasis, of the competency question.

The lawyer faces formidable practical problems as well. "Many deficiencies that appear cognitive are actually caused by overmedication, inappropriate medication, poor diet, depression, environmental deficiency, sensory deprivation, poor eyesight, or impaired hearing."⁴⁸ Most lawyers in ordinary cases simply lack the time and resources to devote the care and attention even an informal inquiry into a client's task-specific competency warrants. Moreover, in many cases the lawyer will be haunted by the specter of potential malpractice liability if she honors her client's decision.⁴⁹

I believe this clash of values and interests between attorney and client creates an inherent conflict of interest that cannot be resolved by deciding the client is either competent or incompetent to make the decision in question. If the problem is the decision itself and its adverse effects on society, that problem should be addressed frontally. For at least two reasons, it seems systemically disingenuous and unfair⁵⁰ to override a client's decision under the guise of a determination, however made, that the client is incompetent to make the decision in question. First, an inquiry into a client's capacity, however limited that inquiry may be, provides a mechanism by which we can treat the individual client as a nonperson, thereby rationalizing away that person's privacy and autonomy interests. Second, returning to the question of whether it matters if the client is forty-five or seventy-five, the elder population is more vulnerable than the general population to inquiries about competency. There is a *de facto* presumption in American society that older people are incompetent until proven otherwise. Their decisions are more readily challenged.⁵¹ Thus, the competency construct inherently discriminates against older

47. All three hypotheticals were structured so as to make the client's family either nonexistent or ignorant of the situation. This was done to leave the problem in the lawyer's lap by removing anyone who might bring legitimate competing interests to the fore by independently challenging the client's decision.

48. Rein, *supra* note 39, at 1869.

49. See *infra* notes 163-67 and accompanying text. Obtaining some kind of hold-harmless agreement from the client would not help because it would not bind injured third parties and because the client's competency to make such an agreement could later be challenged by third parties or by the client himself. Moreover, such agreements are effectively prohibited by the Model Rules. See Model Rules, *supra* note 12, Rule 1.8(h) (prohibiting a lawyer from prospectively limiting her malpractice liability "unless permitted by law and the client is independently represented in making the agreement"). Seemingly, the best the lawyer can do is to keep detailed memoranda and records of what transpired between attorney and client and to hope for the best.

50. It also seems counterproductive because getting the right answer depends on asking the right question. See discussion *infra* part II.

51. For an elaboration of this *de facto* presumption, see Rein, *supra* note 39, at 1840-44 and authorities cited therein. The *de facto* presumption exists alongside of and prevails over the theoretical presumption of competency in probably more cases than we would care to admit.

Americans.⁵²

All this does not mean that there is no role for the competency construct. It does mean that the construct is not useful in situations involving the need to mediate between the client's spoken wishes and legitimate societal interests, which may include an interest in compromising or even restraining client choices, whether or not the client is competent. An equally important point is that whenever the competency model is useful or unavoidable, we must ensure that it is used competently and carefully with a view to correcting malfunctions when possible and preserving or enhancing remaining capacity when correction is impossible.⁵³

The foregoing has outlined the problem as I see it. Part II of this Article sets up some working premises about the competency model. Part III examines our present framework for resolving dilemmas like those raised in the hypotheticals, with primary reference to the relevant ABA Model Rules. A critique of the Model Rules will point out the seemingly insurmountable problems that arise from the Rules' ambivalence and ambiguity regarding the basis of the attorney-client relationship when the attorney suspects her client is operating under a disability.⁵⁴ Whenever possible, I will suggest specific amendments to the Model Rules and other changes in the law that might give the attorney more guidance, greater protection, and more options within the present structure.

Part IV suggests a different focus or approach to quandaries like those described—tentatively exploring ways by which we might resolve such dilemmas without unnecessarily questioning the client's competency or in-

52. Because women still tend to outlive men, one might also argue (although the point is not central to this Article) that the competency model discriminates against women.

53. See *infra* text accompanying notes 68-82 (discussing the complexity of competency determinations and who is and is not competent to make them).

54. In addition, many excellent articles explain and critique the Model Rules relevant to this subject. See, e.g., Jacqueline Allee, *Representing Older Persons: Ethical Dilemmas*, Prob. & Prop., Jan.-Feb. 1988, at 36, 41 (arguing that the Model Rules thrust attorneys into "a maelstrom of ethical complexities, conundra and contradictions"); James R. Devine, *The Ethics of Representing the Disabled Client: Does Model Rule 1.14 Adequately Resolve the Best Interests/Advocacy Dilemma?*, 49 Mo. L. Rev. 493 (1984) (claiming that Model Rule 1.14 forces a lawyer to assume and balance the roles of advocate and guardian); Falk, *supra* note 11 (arguing that "the attorney can find clear guidance from the Rules of Professional Conduct, case law, ethics opinions, and common sense" when confronted with an elderly client and the client's relative); Kapp, *supra* note 11 (opining that Model Rule 1.14 and its comments indicate that the attorney's duty to protect the elderly client's interests extend beyond the resolution of the immediate problem); Smith, *supra* note 9, at 78 (arguing that the Model Rules "are ultimately unsatisfying guides for the attorney representing a questionably competent client"); Strauss & Dubler, *supra* note 11 (arguing that the Model Rules fail to offer adequate guidance for the lawyer who represents a client whose competence is in doubt); Tremblay, *supra* note 11 (suggesting that a lawyer may seek guardianship for a client of questionable competence only in extreme cases and that reliance on persuasion and on family members may be appropriate); Murphy, *supra* note 45 (noting that the Model Rules "offer little advice regarding the method by which a lawyer can determine whether his client is mentally competent").

terfering with his autonomy any more than we would or should interfere with the autonomy of a competent adult who made the identical decision. One approach might be to develop devices by which outside agencies can mitigate the adverse effects of an antisocial decision without overriding it or enlisting the decision-maker's cooperation at all. When this approach is not feasible, some principled guidelines will be needed for determining when society's interest in honoring the decisions of adults, competent or not, is outweighed by other vital societal interests. The task of developing legal mechanisms by which competing interests can be alerted and weighed in the balance without demeaning the individual or gutting the lawyer's duty of loyalty is a daunting one, indeed.⁵⁵ But once society frankly recognizes a need, legal mechanisms to meet it usually follow, albeit slowly. If we place the debate on a sound footing, good minds will find the needed mechanisms and solutions.

All this may sound like heresy from a proponent of the rights of individuals to run their own lives.⁵⁶ But because interdependent human be-

55. I am aware of the common wisdom that lawyers within the attorney-client relationship, although they have obligations to the legal profession and its ideals of public service, see Model Rules, *supra* note 12, pmbl., do not owe a duty to society at large. They are not private attorneys general. This view has already been qualified in some instances involving class action, derivative, and civil rights suits. For more on this subject, see Bryant Garth et al., *The Institution of the Private Attorney General: Perspectives from an Empirical Study of Class Action Litigation*, 61 S. Cal. L. Rev. 353, 353-57 (1988); Jonathan R. Macy & Geoffrey P. Miller, *The Plaintiff's Attorney's Role in Class Action and Derivative Litigation: Economic Analysis and Recommendations for Reform*, 58 U. Chi. L. Rev. 1, 1 (1991). For a discussion of the range of modern class actions suits, see Stephen C. Yeazell, *From Medieval Group Litigation to the Modern Class Action* 239-44 (1987) (discussing racial discrimination, consumerism, and environmentalism).

Even assuming *arguendo* the inviolability and correctness of this view in all cases, use of the competency construct contradicts this principle. When a lawyer or guardian pursues her own or society's interests using a client's incapacity as a rationale, she is acting as an attorney for herself or as a private attorney general under the cloak of the competency construct.

56. Actually, the approach suggested here is consistent with the views I expressed in Rein, *supra* note 39, where I urged that "[b]efore a court interferes with . . . fundamental interests over the proposed ward's objections, the petitioner should be required . . . to prove by clear and convincing evidence that such a drastic step is absolutely necessary to protect third-party or societal interests of the highest magnitude." *Id.* at 1870. I also noted that

[m]y own weighing of . . . competing [economic] interests would lead me to say that if the only threat is to third-party expectations of inheritance or tax savings, the court should not override the proposed ward's objections. On the other hand, if the proposed ward's decisions threaten to impoverish a person or force that person to expend substantial amounts of his or her own funds for the proposed ward's support, some compromise may be warranted.

Id. at 1870 n.254. Even if an individual's decision or proposed course of action will impoverish only himself, it is arguable that his choice should be compromised or restrained, not because he is incompetent but because decisions like his, in the aggregate, put additional burdens on society's already scarce resources and are otherwise harmful to the social fabric. My own views on how to weigh the competing interests in cases like Hypothetical 2 are still quite preliminary and fraught with ambivalence. See discussion *infra* notes 272-80 and accompanying text.

On the one hand, the policy of allowing individuals to make their own choices is enti-

ings cannot exercise autonomy without nurturance from the community, autonomy cannot mean mere "freedom from restraint."⁵⁷ If a community and its members have a symbiotic relationship, individual autonomy cannot be uncoupled from a corresponding obligation to respect the legit-

tled to enormous weight. As Justice Kristen Glen observed in a case involving a proposed conservatorship,

The fact that someone else might, or could make better choices is not the point. In a constitutional system such as ours which prizes and protects individual liberties to make decisions, even bad ones, the right to make those decisions must be preserved.

....

The integrity of the elderly, no less than any other group of our citizens, should not be invaded, nor their freedom of choice taken from them by the state simply because we believe that decisions could be "better" made by someone else.

In re Fischer, 552 N.Y.S.2d 807, 813 n.17, 815 (N.Y. Sup. Ct. 1989). Similarly, as one recommendation of judicial practices in guardianship stated,

Individuals with disabilities should not be required to make decisions that are responsible in the eyes of a judge when the rest of the population is free to make its own decisions; like other citizens, they should be allowed to make mistakes or to make decisions that may not be socially acceptable or wise.

National Conference of the Judiciary on Guardianship Proceedings for the Elderly, Statement of Recommended Judicial Practices 35 (1986). Moreover, "studies by psychiatrists, psychologists, gerontologists, and environmental psychologists provide persuasive evidence that the mental health of many elderly individuals deteriorates greatly when they are denied the opportunity to make their own choices and exert control over their own lives." Rein, *supra* note 39, at 1836. Loss of control can produce serious depression. See Phillip W. Brickner, *Older People: Issues and Problems from a Medical Viewpoint*, in *Bioethics and Human Rights* 191, 193 (Elsie L. Bandman & Bertram Bandman eds., 1978). Even rats decline when they lose control of a situation. See Richard M. Restak, *The Mind* 76-79 (1988); see also Michael A. Fox, *The Case for Animal Experimentation* 100-02 (1986) (dealing with dogs); Martin E. P. Seligman, *Helplessness: On Depression, Development, and Death* 23-25 (1975) (describing research testing on learned helplessness in dogs); *id.* at 169-75 (discussing the sudden death of animals—including rats—that resulted from learned helplessness and hopelessness).

On the other hand, societal interests and the desire to protect Martha from making an irrevocable choice she may later regret seem at least equally weighty. Professor Tremblay observes that

intervention might be better viewed as protecting freedom and autonomy because it seeks to preserve options that are not being sacrificed consciously but that will be lost without intervention. This reasoning was applied by John Stuart Mill even to those who choose to give up future freedom and autonomy. For instance, Mill did not extend his radical antipaternalism to contracts for perpetual involuntary servitude. "The principle of freedom cannot require that he should be free not to be free. It is not freedom to be allowed to alienate his freedom."

Tremblay, *supra* note 11, at 555 n.168 (quoting J.S. Mill, *On Liberty* 104 (1947), quoted in Gerald Dworkin, *Paternalism in Morality and the Law* 107, 118 (S. Wasserstrom ed., 1976)). Analytically speaking, I part ways with Professor Tremblay (and, perhaps, John Stuart Mill) in that I would not confine this type of analysis to cases of unconscious sacrifice. Whether or not the choice is conscious, the question is whether there exists an overarching policy reason for interfering with it.

57. Philip Selznick, *The Idea of a Communitarian Morality*, 75 Cal. L. Rev. 445, 446 (1987).

imate interests and goals of the community and its other members.⁵⁸ An approach that frankly recognizes the issue as one of competing interests and the need for mediation between them will allow far fewer and less permanent incursions on an individual's dignity and far fewer instances of attorney disloyalty than the competency model, which allows so many forms of surrogate decision-making for the benefit of societal or other competing interests once the label "partly incompetent," "partly incapacitated," or "partly disabled" is affixed. Telling someone he cannot do exactly what he wants because it will unfairly harm someone else is far more humanizing and dignity-preserving than telling him that he cannot do it because he is incompetent to make that decision. The former dignifies the individual by making him work things out with others as we all must do; the latter degrades the individual by telling him he is no longer fit to play the game of life.

II. WORKING PREMISES ABOUT THE COMPETENCY CONSTRUCT

*You don't really want that. You just think you do because your decisionmaking mechanisms are impaired. How do I know? If they weren't impaired you wouldn't want that!*⁵⁹

58. There is a modern tendency to associate rationality with maximizing gains of one sort or another, whether they be profits, payloads, Nielsen ratings, or missiles. But anchored rationality has the effect of multiplying commitments. The pursuit of any given end is restrained by taking account of consequences for *other* ends whose fate we care about but that might be ignored or slighted. The language of maximization is or should be an early warning that rationality, detached from reason, is out of control.

.....
[R]eason connotes prudence or practical wisdom. In the governance of human affairs, reason is flexible, substantive, and circumstantial. It applies general principles in a spirit of restraint and with respect for the values at stake in particular situations. Reason recoils from mechanical, rule-bound, or ideological thinking. . . .

Prudence is not a call to expedience or opportunism; neither is it a narrowly technical assessment of how to reach a given end. Rather, prudence is the will and the capacity to make moral judgments in concrete settings, and to do so in ways that take account of what the *situation* requires, not what an abstraction demands. In prudential judgment, rules and principles are filtered through the fabric of social life. There is due regard for human shortsightedness and unintended effects, for alternative options, competing interests, and multiple values.

Id. at 459-60.

Whether, as an original matter, the community precedes the individual or vice versa, *cf.* Thomas L. Shaffer, *The Legal Ethics of Radical Individualism*, 65 *Tex. L. Rev.* 963, 965-66 (1987) ("Those in contemporary ethics . . . argue [that] . . . communities of persons are prior in life and in culture to individuals . . ."), the current reality is that all individuals are members of one or more communities. Whether they are good or bad communities largely depends on the extent to which the community and its members demonstrate mutual respect and support. Hence, when this Article proposes policy restraints on individual selfishness, it demands a corresponding showing of concern and respect from the community toward the individual so restrained. Whether the community can rightfully expect good citizenship from members it has excluded or failed to nourish is a fascinating question beyond the scope of this Article.

59. Luban, *supra* note 7, at 466 (emphasis added).

"The trick," says Professor Luban, "is to come up with a notion of incompetence that is not self-justifying and self-serving."⁶⁰ This Article posits that this cannot be done in any way that can be practically applied without unacceptable room for human error. This position proceeds from six working premises:

1. It is nearly impossible to develop a test for competency or capacity that is completely noncircular either in its reasoning or application.⁶¹

2. Even if a noncircular test could be developed, it could not be routinely applied in a noncircular manner. This is partly because most lawyers, judges, and doctors lack the time, expertise, and resources needed to apply any competency test with the rigor the seriousness of the question warrants. It is also (I suspect primarily) because of human nature. Human beings, by their very nature, tend to see things through the lens of their own values, life experiences, and perceptions. Many determinations, therefore, are the product of mere speculation.

3. The consequences of an erroneous determination of even partial incompetency can be so dire that it is dangerous and unfair to the potential objects of such inquiries to let unqualified lawyers (or unqualified doctors) loose with such a concept.

4. Even if a noncircular test could be devised and applied in a competent, neutral, and otherwise acceptable manner, the exercise would still not resolve the kinds of dilemmas discussed in Part I.

5. Efforts to cabin this elusive and unruly concept and to make it work for us in resolving such dilemmas have produced only greater confusion.

6. Because getting the right answer depends on asking the right question, it is time to entertain the possibility that we have been asking the wrong question.

Before elaborating on these working premises (which unavoidably overlap to some degree), some discussion of the lawyer's role in competency determinations under the Model Rules is warranted.

Model Rule 1.14, as expanded upon in the comments, places the responsibility of competency determination on the lawyer at four junctures. First, although the Rules do not state this explicitly, the lawyer must determine if the client has sufficient functional or decisional ability even to form an attorney-client relationship.⁶² Second, if a transaction needs to be accomplished or a decision made, the lawyer must determine whether the client has the degree of competence needed to engage in the particular transaction or to make the particular decision.⁶³ Neither Rule

60. *Id.*

61. *See infra* notes 83-103 and accompanying text.

62. The Model Rules' introductory Scope section explains that "for purposes of determining the lawyer's authority and responsibility, principles of substantive law external to these Rules determine whether a client-lawyer relationship exists." Model Rules, *supra* note 12, Scope, ¶ 3.

63. *See id.* Rule 1.14 cmt. 1.

1.14 nor its comment mention intermittent capacity, but presumably the lawyer would be called upon to determine the client's mental state at the relevant time were that an issue. Third, according to Comment 2 to Rule 1.14, if the client lacks a guardian or legal representative, the lawyer may be called upon to decide if her client is sufficiently incompetent or incapacitated to justify her taking over as *de facto* guardian.⁶⁴ Finally, according to Rule 1.14(b), "when the lawyer reasonably believes that the client cannot adequately act in the client's own interest" (whatever that means), the lawyer "may seek the appointment of a guardian or take other protective action."⁶⁵ Comment 3 advises the lawyer to "see to such an appointment where it would serve the client's best interests" (again, according to whom?).⁶⁶ After noting that this course might prove "expensive or traumatic for the client," Comment 3 leaves the entire matter in the lawyer's lap by stating: "Evaluation of these considerations is a matter of professional judgment on the lawyer's part."⁶⁷

Taking up my second working premise first, lawyers are not qualified to make competency determinations.⁶⁸ In fact, neither are most doctors. "Instances of misdiagnosis are commonplace."⁶⁹ Consider the following report.

The experts muffed Lela Caris's case

She was declared incompetent when psychiatrists said her mental confusion couldn't be treated. Today, Mrs. Caris is 92, plays the piano

64. *See id.* Rule 1.14 cmt. 2.

65. *Id.* Rule 1.14(b).

66. *Id.* Rule 1.14 cmt. 3.

67. *Id.*

68. *Accord* Murphy, *supra* note 45, at 907. As Mr. Murphy observes,

[l]awyers are not trained to recognize the differences between the natural effects of age and the effects of a mental impairment, the types of mental incompetency that may be temporary or reversible, and the subtle indications that a person's mental health may be in the process of declining and may soon leave him incapable of carrying out a legal transaction.

Id.

69. Rein, *supra* note 39, at 1869; *see generally* Chairman of Subcomm. on Health and Long-Term Care of the House Select Comm. on Aging, 100th Cong., 1st Sess., *Abuses in Guardianship of the Elderly and Infirm: A National Disgrace* 59, 67 (Comm. Print 1987) [hereinafter *Abuses*] (observing that misdiagnoses of incompetence are commonplace); Gerald K. Goodenough, *The Lack of Objectivity of Physician Evaluations in Geriatric Guardianship Cases*, 14 J. Contemp. L. 53 (1988) (discussing the unfairness that results from the absence of objective measures of mental capacity for determining competency of elderly subjects); Joan M. Krauskopf, *New Developments in Defending Commitment of the Elderly*, 10 N.Y.U. Rev. L. & Soc. Change 367 (1980) (discussing problems involving treatable conditions or diseases that mimic symptoms of Alzheimer's disease or senile dementia). Stephen J. Anderer observes:

Examinations . . . have been performed by plastic surgeons, urologists, gynecologists, and the petitioner, if performed at all. The testimony that is offered [at guardianship hearings] has been called conclusory by numerous commentators. In spite of these deficiencies, medical evaluations usually are dispositive: courts are unlikely to depart from the assessments of physicians.

Anderer, *supra* note 13, at 18 (footnotes omitted).

. . . , takes walks, enjoys bridge, attends two church circles and has regained her rights. . . .

And the experts were wrong about Mary, a 66-year-old . . . woman.

Mary was deemed senile and non-treatable. She was declared incompetent, but she recovered a few weeks later. . . . "It was just a brief emotional illness," she says.

. . . .

"There are no safeguards," says Dr. Theodore Machler Jr., a past president of the Pinellas County Psychiatric Association. "There are a lot of people in Pinellas County who are declared incompetent and have reversible conditions that are never discovered."⁷⁰

Consider also the following exchange between Dr. Leonard Hellman of the Mercy Senior Health Clinic of Denver, Colorado (who also is an attorney) and Mr. Daniel M. Taubman, Director, Colorado Coalition of Legal Services Programs, Denver, Colorado:

TAUBMAN: Is there anything that a lawyer can do to determine whether a client is competent, or should a lawyer always refer the situation to a doctor for a medical opinion?

HELLMAN: I think the courts rely on physician input. I am one of the few physicians who does not believe that physicians have the answer to this. I think that social workers and psychologists have a better handle on competency than most physicians, who don't even take the time to do some of the testing I am talking about. So I'm kind of a pariah in the field with my own colleagues. *But I can't imagine an attorney, no matter what his background is, in a legal office trying to determine competence. It should never get to that stage before having a full mental evaluation. This potentially can be a very serious deprivation of rights.*⁷¹

As indicated, "[m]any deficiencies that appear cognitive are actually caused by overmedication, inappropriate medication, poor diet, depression, environmental deficiency, sensory deprivation, poor eyesight, or impaired hearing."⁷² Many of these apparent deficiencies are reversible or correctable.⁷³ Although the test may be a legal one,⁷⁴ in fairness, no one should jump to the conclusion that the client is partially or totally incapacitated or a candidate for surrogate decisionmaking without "a careful

70. Jeffrey Good & Larry King, *Exams are Often Shallow*, reprinted in *Abuses*, *supra* note 69, at 66.

71. *Health Care Options*, *supra* note 11, at 24 (emphasis added).

72. Rein, *supra* note 39, at 1869 (citing Goodenough, *supra* note 69, at 55); see also Murphy, *supra* note 45, at 906-10 (discussing how ill-equipped lawyers are to distinguish mental impairment from age appropriate or temporary/correctable conditions); Smith, *supra* note 9, at 62-64, 68-71 (discussing the importance of a lawyer's ability to recognize age-related mental and physical disorders in order to effectively serve elderly clients).

73. See Goodenough, *supra* note 69, at 55.

74. See, e.g., ABA Comm'n on the Mentally Disabled & ABA Comm'n on Legal Problems of the Elderly, *Guardianship: An Agenda for Reform 15* (1989) [hereinafter *An Agenda for Reform*]; Anderer, *supra* note 13, at 22; Frolik & Barnes, *supra* note 13, at 965.

and competent determination regarding the causes of the . . . [apparent] decisional dysfunction or impairment."⁷⁵ But this is no small matter. Although Comment 5 to Rule 1.14 says "[t]he lawyer may seek guidance from an appropriate diagnostician,"⁷⁶ I cannot imagine a lawyer in the middle of an initially routine case (like Arnold's contract dispute or Martha's \$8000 roofing problem) obtaining the kind of full-fledged medical and psychiatric workup needed even to begin to accurately assess the client's true decisional abilities.⁷⁷ Who would authorize such an inquiry? Who would pay for it?⁷⁸

To bring home the magnitude of what may, depending on the client's

75. Rein, *supra* note 39, at 1868.

76. Model Rules, *supra* note 12, Rule 1.14 cmt. 5.

77. Indeed, to the great discredit of our current system, such a workup is rarely even done in connection with petitions for guardianship or conservatorship where the central issue is the proposed ward's competency or capacity. Consider, for example, the following newspaper article:

Court-ordered competency examinations can be quick and shallow. They involve guesswork. Diagnoses are often reached without medical records. Sometimes they are conflicting. A few are based on brief chats with hostile people through screen doors.

. . . .
Pinellas Circuit Judge Thomas E. Penick Jr. . . . is troubled by the system's shortcomings.

"I am concerned about . . . going up to the door, talking for five minutes and coming back and saying a person's incompetent," Penick says. "You've got to have a more in-depth examination up front."

Yet Pinellas judges have routinely accepted the psychiatrists' reports anyway.

. . . .
Sometimes the psychiatrists arrive unannounced at a person's home. Patients can get angry or flustered, affecting their appearance.

"It stinks. Some guy walks up to the door who they've never seen before and it upsets these old people." . . . "They don't know whether they're being held up or raped, and sometimes it's hard to tell the difference."

. . . .
Occasionally doctors reach conclusions about wary patients who won't even let them in the door.

. . . [F]or example, a 91-year old . . . woman wouldn't let Dr. Ricardo Maribena into her house. "Patient examined through screen door as she would not let me in," his report said. Despite the limits of the exam, he diagnosed an Alzheimer's related disease and recommended incompetency.

. . . .
The woman had a guardian appointed for her.

Good & King, *supra* note 70, at 66-67. See also Anderer, *supra* note 13, at 18 (noting that incapacity determinations have been made on conclusory testimony of plastic surgeons, urologists, and gynecologists); Abuses, *supra* note 69, at 15 (some competency examinations are performed by retired court clerks). It should be noted that a few recent reform statutes do now require a thorough workup. See, e.g., Fla. Stat. Ann. § 744.331(3)(c) (West 1994) (requiring a comprehensive examination including, if appropriate, a physical examination, a mental health examination, and a functional assessment); N.M. Stat. Ann. § 27-7-22B(3) (Michie 1992) ("The evaluation of an adult shall include at a minimum . . . an evaluation of the adult's present physical, mental and social conditions, including, as necessary, a medical, psychological, psychiatric or social evaluation and review . . .").

78. We shall return to this topic later. See *infra* notes 178-209 and accompanying text.

condition, be required to make a competent assessment, consider the following, extensively quoted geriatric psychiatrist's description of a model assessment:

There are four basic goals of the psychiatric evaluation. First it is important to determine whether the symptoms are a manifestation of psychiatric disorder, an underlying medical disease, or a normative phenomenon. . . .

Once it is determined that a pathological condition exists, the second goal is to discover any treatable or reversible causes for the condition. The geriatric psychiatrist must conduct a thorough medical evaluation, since older patients may have one or more medical conditions with symptoms that mimic psychiatric illness. Conversely, psychiatric symptoms may be a manifestation of an underlying medical disorder. The evaluation must detect the presence of cardiovascular disease, endocrine abnormalities, metabolic disturbances, vitamin deficiency, drugs and toxins, infectious diseases, tumors, immune diseases, trauma, and neurological conditions. Within each of these categories, there are many diseases which can cause or aggravate psychiatric disorders, and some of these are treatable and reversible. The third objective of the psychiatric evaluation is to assess the functional level of the patient and determine the degree of disability caused by disorder or disease. . . . This is where geriatric evaluation goes beyond traditional medical diagnostics. Fourth, the evaluation helps to ascertain what supports the patient already has and what additional resources the patient requires in order to function in the most optimal way possible.

. . . .

. . . For patients who have suspected dementia, [a comprehensive evaluation] begins with a complete history, in which the symptoms are fully described, medical conditions and their treatments reviewed, current medications listed, and family history and social history elicited.

Particular attention should be paid to a history of systemic diseases, head trauma, nutritional compromise, substance abuse, prescription medication use, and exposure to environmental toxins. This is crucial, because all of these factors may be associated with dementia and in many cases may aggravate or even cause the dementia.

The next component of the evaluation is the physical examination. Again, this is conducted to discover treatable causes of the dementia. A mental status examination is performed to assess the patient's mood, affect, thinking, behavior, and various aspects of cognitive function such as attention, concentration, memory, abstract thinking and judgment. . . .

The next part of the routine evaluation includes laboratory testing[,] neuropsychological [sic] testing, and brain imaging. Laboratory tests that are routine in the evaluation of dementia include a urinalysis; complete blood counts to screen for anemia, infection, and malignancies; a serologic test for syphilis; vitamin B₁₂ and folate levels; and blood chemistries to detect abnormal liver, kidney, and thyroid function. A CT scan of the head or magnetic resonance imaging (MRI) also are done routinely. These can be useful in visualizing strokes,

brain tumors, blood and trauma. Ideally, when resources permit, neuropsychological testing should be done, since this may be useful for distinguishing the types of dementia and the extent of cognitive impairment. The need to do other tests is determined on an individual basis, depending mostly on the findings from the history of the physical examination. These might include a spinal tap to examine the cerebral spinal fluid for signs of infection, bleeding, tumors or immune diseases; an electroencephalogram to detect seizures and abnormalities that may be present with metabolic disturbances or tumors; a toxicology screen looking for drugs or heavy metals; HIV testing when AIDS is suspected; and further serology when Lyme disease is a possibility.

Once the diagnosis is established and the underlying cause is determined, the evaluation turns to a functional assessment. This is because the diagnosis by itself doesn't tell us the extent of disability caused by the illness. . . . Once the patient's functional level has been assessed, the next step is to determine which needs are currently being met and which are not. Here social workers can be particularly helpful in discerning any mismatch between needs and resources. This part of the evaluation is critical, because in addition to medical treatment of conditions associated with dementia, the mainstay of management is coordination of needed support services.⁷⁹

As this description suggests, "modern science is beginning to teach us that mental deterioration, erroneously assumed to be the unavoidable product of aging, is not a natural or inevitable feature of the aging process."⁸⁰ As a study of California conservatorships points out, "[m]odern research is blowing away many stereotypes and misbeliefs about elderly people and the aging process."⁸¹ A "seat of the pants" approach to determining competency might have been understandable before modern medicine proved how much mind and body affect each other and how very complicated the question of competency really is. But now that we know better, it seems unforgivable to label or treat someone as partially or totally incompetent or incapacitated without first offering that individual the kind of sophisticated medical assessment needed to determine

79. J. Streim, M.D., *The Role of the Geriatric Psychiatrist in Evaluation of Mental Health Problems in Elderly Patients*, Address to the Training Conference on Mental Health and Aging sponsored by Philadelphia Bar Association Young Lawyers Section, Senior Citizens Judicare Project, and Elderly Law Project of Community Legal Services (Apr. 26, 1989), *reprinted in* Frolik & Barnes, *supra* note 13, at 878-80.

According to one geriatric physician, a basic diagnostic workup would cost approximately \$2000, representing the cost of CAT scans, laboratory fees, and physicians services. This figure would not cover any therapy. *See, e.g.*, Telephone Interview with Sandra Reynolds, Research Assistant to Professor Kate Wilbur of the University of Southern California, Andrus Gerontology Center (Nov. 4, 1993) (relaying information from Thomas X. Cuyegkeng, M.D., MSG). I am indebted to Ms. Reynolds, Professor Wilbur, and Dr. Cuyegkeng for gathering this data. Although this shows how complex and costly a proper determination of competency can be, it is not meant to suggest that every case merits such an extensive evaluation.

80. Rein, *supra* note 39, at 1841.

81. Lawrence Friedman & Mark Savage, *Taking Care: The Law of Conservatorship in California*, 61 S. Cal. L. Rev. 273, 284 (1988).

whether such a conclusion is justified.⁸²

Returning to my first working premise, apart from questions of qualifications and practicality, any test for competency is bound to be circular in its reasoning or application. Although this proposition cannot be proved definitively, circumstantial evidence suggests this conclusion.

First, there are the cases in which determinations have been arrived at in a circular manner. A Georgia court, for example, appointed an adult daughter "as guardian of her mother's property because the 65-year-old widow spent \$35,000 on a third home, took a vacation with two adult sons (leaving her petitioner-daughter at home), and spent money freely."⁸³ A trial court found

that, due to advanced age and perhaps mental disability, the mother lacked the ability to manage her property, [and this finding] was held to be supported by clear and convincing evidence. Yet, the evidence indicated only that the mother had maintained several households, had taken an extensive (and presumably expensive) vacation with two of her adult sons, and could not account for how she had spent several thousand dollars. The widow had plenty of money, but the court apparently did not consider that she was simply spending money on things that gave her pleasure.⁸⁴

In another guardianship case, a court

declared Mr. S. incompetent and placed him under the guardianship of his stepson because Mr. S. insisted on leaving his estate to friends instead of family. Mr. S.'s decision was cited as the primary evidence of incompetency in a report that stated:

It is evident that Mr. S. does have a great deal of understanding of what is going on around him. However, he does clearly suffer from a lack of judgment. As the head nurse, Mrs. J., indicated, he doesn't see why he shouldn't be allowed to give away all his money since it is his.⁸⁵

Similarly,

a guardian ad litem report on Mrs. F., a 76-year-old woman, inferred a lack of competency from Mrs. F.'s choice of a companion. The report sanctimoniously stated:

Unfortunately, Mrs. F. has not always used good judgment in handling her affairs and in making decisions as is attested to by the fact that during the past couple of years, she has kept company with Max

82. Some reform statutes attempt to rectify this problem by requiring more sophisticated competency evaluations in competency determinations. See, e.g., Fla. Stat. Ann. § 744.331 (West 1986 & Supp. 1994) (detailing the various components of the examination and the examining committee).

83. Rein, *supra* note 39, at 1876 n.274 (citing *Cummings v. Stanford*, 388 S.E. 2d 729 (Ga. Ct. App. 1989)).

84. Rein, *supra* note 39, at 1828 n.36 (footnotes omitted).

85. *Id.* at 1876 n.274 (quoting Kris Bulcroft et al., *Elderly Wards and Their Legal Guardians: Analysis of County Probate Records in Ohio and Washington*, 31 *Gerontologist* 156, 160 (1991)).

M., a man with an allegedly dubious character and an alcoholic.⁸⁶

Consider also the following example in the health care decision-making context:

Mrs. E., 82 years old, has been a resident in a nursing home for 4 years. An alert, relatively vigorous and active woman, she has recently undergone surgery for the removal of a malignant ovarian tumor. Her surgery and post-surgical convalescence prove to be more protracted, painful, and emotionally draining than she had anticipated. After surgery she begins a chemotherapy regimen, but she experiences extreme nausea and weakness from the first treatment. She refuses to continue with chemotherapy, telling her son[:] "First, the awful surgery, and now this. I've never been so sick. I don't want any more chemo. If the cancer comes back, I'll deal with it."

Her physician and others try to convince her to continue with the treatment, but she remains adamant. "It makes sense for younger people, but not for me." Mrs. E.'s son is very troubled by this decision. He tells the physician that he thinks his mother's decision is tragically unreasonable. He urges that everything possible be done to change her mind and even asks whether there is some way they can "press" his mother into continuing with chemotherapy. In response, the physician arranges a psychiatric consult for Mrs. E.⁸⁷

Here, what appears to be (under the circumstances) a completely rational decision to encounter a risk, was interpreted as evidence of incompetency or incapacity. As Dr. Collopy notes

[T]his case illustrates [that] refusal of care easily serves as the decisional gate for challenges to competency. But if the social, institutional, and professional canons [that] determine 'indicated' care are not checked by the principle of self-determination, competency can come to mean little more than obedience to the value system of caregiving institutions and professions. In such a situation, the elderly run the risk of being judged decisionally incapacitated simply by being sharply and singularly individual, by being decisionally irregular.⁸⁸

Other instances of such circular application abound but are not documented.⁸⁹

In addition to the circular application, there is the circular,⁹⁰ value-laden ambiguous, vague, and overinclusive language one finds in so many of the tests for and definitions of incompetency or incapacity.⁹¹

86. Rein, *supra* note 39, at 1876 n.274 (quoting Bulcroft, *supra* note 85, at 162).

87. Bart J. Collopy, *Autonomy in Long Term Care: Some Crucial Distinctions*, 28 *Gerontologist* 10, 13 (Supp. 1988) (citations omitted).

88. *Id.* (citations omitted).

89. For another interesting example of such circular application, see the discussion of *ENS et al. v. LDS*, *infra* nn.273-80 and accompanying text.

90. As an instance of circular language, "mental incompetency in the area of contracts and wills becomes defined as that type or degree of mental unsoundness sufficient to destroy the client's capacity to enter a contract or make a will." Murphy, *supra* note 45, at 909.

91. *Accord* Milton D. Green, *Judicial Tests of Mental Incompetency*, 6 *Mo. L. Rev.*

Although I believe that human nature (rather than the language of the tests and definitions) is primarily responsible for circular application in real life cases,⁹² unavoidably value-laden or overbroad language also encourages, even sanctions, such circular application. I say unavoidably because tests that are devoid of value-laden language tend to be meaningless, or not particularly helpful,⁹³ when it comes to real life application, while definitions that are refined tend to become treatises. Whatever the reasons, most of the tests and definitions are dangerously vague and "contain subjective, value-laden modifiers that invite the decisionmaker to impose society's values"⁹⁴ on those whose capacity is questioned.⁹⁵ The Model Rules' definition is no exception. Model Rule 1.14(a), for example, speaks of the ability *vel non* "to make *adequately considered* decisions,"⁹⁶ while Model Rule 1.14(b) speaks of the client's inability to act "*adequately . . . in [his] own interest.*"⁹⁷ Moreover, there is little consistency among the tests. In fact, they contradict each other⁹⁸ or are internally inconsistent.⁹⁹ As an early commentator said of the judicial tests alone

if one reads the cases critically it will be found that no verbal formulation of a test can be made which will fit the standards laid down by the courts. So diverse is the phraseology of the test by courts in different jurisdictions, and even by various opinions within the same jurisdiction, that no single statement of a rule can be constructed which, if it has meaning, will not exclude a majority of the cases.¹⁰⁰

Even if an attorney could make sense of all the tests, she could still apply whatever test she chose from the perspective of her own life experiences and values. If the primary burden of competency determination is placed on the lawyer (as under the Model Rules), the inevitable result is a near total lack of accountability and an absence of effective safeguards against unjustified paternalism.

At the other end of the spectrum, jumping ahead to my fourth working premise, the noncircular tests that have been promulgated do not seem useful for solving the kinds of problems addressed in this Article.

141, 165 (1941); Murphy, *supra* note 45, at 904, 906-10; Bobbe S. Nolan, R.N., *Functional Evaluation of the Elderly in Guardianship Proceedings*, 12 L. Med. & Health Care, 210, 210-11 (1984).

92. See *supra* note 61 and accompanying text.

93. See *infra* notes 102-09 and accompanying text.

94. Rein, *supra* note 39, at 1878.

95. For a discussion of guardianship statutes containing value-laden qualifiers, see *id.* 1878-80.

96. Model Rules, *supra* note 12, Rule 1.14(a) (emphasis added).

97. *Id.* Rule 1.14(b) (emphasis added).

98. See Arnold J. Rosoff & Gary L. Gottlieb, M.D., M.B.A., *Preserving Personal Autonomy for the Elderly: Competency, Guardianship, and Alzheimer's Disease*, 8 J. Legal Med. 1, 12-14 (1987).

99. For a summary description of the major medical, judicial, and statutory tests as well as those suggested by various academicians, see *infra* note 101.

100. Green, *supra* note 91, at 147 (citations omitted).

Many tests for and approaches to determining competency have been promulgated by legal experts, medical experts, and various commissions, with new recommendations, refinements, and prototypical statutes continually pouring forth.¹⁰¹ This phenomenon alone suggests that after de-

101. In the medical field, competency, along with disclosure of relevant information and freedom of choice, is one component of the doctrine of informed consent. See Barbara Stanley et al., *The Functional Competency of Elderly at Risk*, 28 *Gerontologist* 53, 53 (1988). Even in the medical field, the test for competency may vary from one jurisdiction to another. See John Parry, *Decision-making Rights Over Persons and Property*, in Samuel J. Brakel et al., *The Mentally Disabled and the Law* 435, 450 (3d ed. 1985); see also Stanley, *supra*, at 53-54 (delineating six standards of competency, including evidencing a choice, factual comprehension, quality of reasoning, appreciation of the nature of the situation, reasonable outcome of choice, and status); Kapp, *supra* note 11, at 28 (delineating three approaches including the outcome approach, the status test, and the functional approach).

In addition, there have been proposals for "new and improved" tests for determining decision-making capacity in the medical, informed consent context. See, e.g., President's Comm'n for the Study to Ethical Problems in Medicine and Biomedical and Behavioral Research, 1 *Making Health Care Decisions: The Ethical and Legal Implications of Informed Consent in the Patient-Practitioner Relationship* 57-62 (1982) quoted in Frolik & Barnes, *supra* note 13, at 90 ("Decision-making capacity requires, to a greater or lesser degree: (1) possession of a set of values and goals; (2) the ability to communicate and to understand information; and (3) the ability to reason and to deliberate about one's choices.") Further confusing this area in the medical field is what one commentator has coined "decisional incapacity," or a physician's medical determination based on functional considerations, which would "allow for more immediacy than the courts provide" yet would purportedly not involve any deprivation of rights. Dallas M. High, *Planning for Decisional Incapacity: A Neglected Area in Ethics and Aging*, 35 *Med. Ethics & Human.* 814, 814-15 (1987).

In the legal field, there are separate tests to determine the requisite level of competency to enter into contracts, to make wills, or to marry. For example, contract law traditionally states that the test for mental incompetency as a basis for avoiding a contract is "the capacity to understand the nature and consequences of the transaction in question," which is known as the cognitive test. E. Allan Farnsworth, *Contracts* § 4.6, at 240 (2d ed. 1990). However, some cases recognize that a person can satisfy the cognitive understanding test "but nevertheless lack[] effective control of [his actions], a situation characteristic of the manic-depressive," and suggest that a "volitional" test be applied" instead. *Id.* The Restatement (Second) of Contracts "add[s] to the traditional cognitive test a qualified volitional test: 'if by reason of mental illness or defect . . . he is unable to act in a reasonable manner in relation to the transaction and the other party has reason to know of his condition.'" *Id.* (quoting Restatement (Second) of Contracts § 15(1)) (alteration in original).

The formula for testamentary capacity is usually stated as the ability to "understand (1) the nature and extent of his property; (2) the persons who are the natural objects of his bounty; and (3) the disposition he is making of his property." William M. McGovern, Jr., Sheldon F. Kurtz, & Jan Ellen Rein, *Wills, Trusts and Estates* § 7.1 (1988).

There appears to be no clear consensus among states as to the test for mental competency to marry, largely because the courts are influenced by their states' individual statutory policies. See 1 Homer H. Clark, Jr., *The Law of Domestic Relations in the United States* § 2.16 (2d ed. 1987). The test is often stated as the "'capacity to understand the nature of the contract, and the duties and responsibilities which it creates,'" *id.* at 184 (quoting *Durham v. Durham*, 10 P.D. 80, 82 (1885)), although some cases acknowledge a softer standard: "the ability to consent to the marriage contract in general, without taking into account the particular duties and the nature of the marriage relation." *Id.*

In addition, various state statutes define when a person is incompetent and therefore in need of a guardian or conservator. These statutes generally fall into one of two catego-

ades of trying, the best minds have failed to come up with a single test

ries: the older, traditional statutes, which tend to focus on the individual's mental status, and the modern reform statutes, which take into account the individual's ability to function. The trend has been for legal incompetency determinations to be based on criteria used in clinical evaluations. See Parry, *supra*, at 371.

The Indiana statute exemplifies the traditional status test:

"Incapacitated person" means an individual who . . . is unable: (A) To manage in whole or in part the individual's property; (B) To provide self-care; or (C) Both; because of insanity, mental illness, mental deficiency, physical illness, infirmity, habitual drunkenness, excessive use of drugs, incarceration, confinement, detention, duress, fraud, undue influence of others on the individual, or other incapacity

Ind. Code Ann. § 29-3-1-7.5 (Burns 1989 & Supp. 1993). A guardian must be appointed for an incapacitated person if the court finds such appointment necessary to provide care and supervision over the incapacitated person or his or her property. See *id.* § 29-3-5-3.

The Florida statute exemplifies the ability-to-function test:

"Incapacitated person" means a person who has been judicially determined to lack the capacity to manage at least some of the property or to meet at least some of the essential health and safety requirement of the person. (a) To "manage property" means to take those actions necessary to obtain, administer, and dispose of real and personal property, intangible property, business property, benefits, and income. (b) To "meet essential requirements for health or safety" means to take those actions necessary to provide the health care, food, shelter, clothing, personal hygiene, or other care without which serious and imminent physical injury or illness is more likely than not to occur.

Fla. Stat. Ann. § 744.102(10) (West 1986 & Supp. 1993).

The Uniform Probate Code retains the status aspects of the traditional tests, yet also focuses on the person's functional abilities. It provides that an "incapacitated person" is "any person who is impaired by reason of mental illness, mental deficiency, physical illness or disability, chronic use of drugs, chronic intoxication, or other cause (except minority) to the extent of lacking sufficient understanding or capacity to make or communicate responsible decisions." Unif. Prob. Code § 5-103(7), 8 U.L.A. 276 (Supp. 1993).

Proposals for statutory legal standards for determining incompetency or incapacity have also been made. Professor Barnes suggests that

[a] person subject to the court should be one who, because of mental illness, developmental disability, addiction to drugs or alcohol, or other mental disorder, is incapable of understanding and evaluating information essential to making or communicating decisions necessary in order independently to secure food, clothing, shelter, or medical care, or to manage property or financial affairs.

Alison P. Barnes, *Beyond Guardianship Reform: A Reevaluation of Autonomy and Beneficence for a System of Principled Decision-Making in Long Term Care*, 41 Emory L.J. 633, 755 (1992). Stephen Anderer argues that for a proposed ward to be adjudged incapacitated, he or she must (1) be functionally unable, wholly or partially, to care for self or property, (2) be unable, wholly or partially, to make or communicate decisions regarding care for self or property, and (3) suffer from a demonstrated disorder or disability which causes the ability to make or communicate decisions to be impaired. See Stephen J. Anderer, *A Model for Determining Competency in Guardianship Proceedings*, Med. & Physical Disability Legal Res. Services & Databases, Mar.-Apr. 1990, at 107, 108. The ABA commissions on the Mentally Disabled and on Legal Problems of the Elderly suggest that

a finding of incapacity should be supported by evidence of functional impairment over time; . . . [and] include a determination that the person is likely to suffer substantial harm by reason of an inability to provide adequate personal care or management of property or financial affairs; . . . [but] age, eccentricity, poverty or medical diagnosis alone should not be sufficient

that seems both fair and workable to most of those concerned with the problem. If one considers this "test seeking" phenomenon—which some have dubbed the "search for [the] Holy Grail"¹⁰²—in light of the diagnostic complexity discussed in connection with the second premise, it is reasonable to conclude that, "[h]aving no fixed meaning, the term 'incompetency' is vague, inherently susceptible to misdiagnosis, and impossible to objectify so that the decisionmaker's views of appropriate behavior are utterly eliminated from the fact-finding process."¹⁰³

Although it may not be provable, the cumulative effect of the circumstantial evidence discussed in this phase of the Article, together with the test-seeking spectacle just described, suggests the supportability of my fifth working premise, *viz.*, that efforts to cabin the elusive and unruly competency concept and to make it work for us in solving real life problems have produced only greater confusion.

To summarize, an accurate determination of incompetency, partial or otherwise, involves much more than simply chatting with the client or patient for several minutes or even several hours. Determinations, however made, of partial or total incapacity with respect to older individuals, have not routinely been used to trigger remedial action to reverse, correct, arrest, or to compensate for the cause of the apparent deficiency. The tendency has been to simply take over the supposedly impaired person's decision-making function without also providing the kind of assistance that will help the individual function better.¹⁰⁴ Far too often, the various formal and informal methods of surrogate decision-making and management (conservatorship, guardianship, *de facto* guardianship, and decision-making by family members) have been used as mechanisms for extracting the imprimatur of consent from persons suspected of impairment for the convenience of others or for the benefit of governmental

An Agenda for Reform, *supra* note 74, at 15.

Professor Luban, speaking of incompetency generally, suggests that if a person "can give us an account of his reasons [for following an obviously disadvantageous path], then we should dismiss the hypothesis of incompetence . . ." Luban, *supra* note 7, at 477. However, he also explains that "a boundary [should] be drawn, separating unacceptable from acceptable *bad* reasons for a preference." *Id.* at 478 (emphasis added). If a reason "is accepted by a group and therefore more than the product of an individual's idiosyncrasy," it should be accepted. *Id.* at 479. But if the reason is "peculiar to the individual," we must ask whether there is "any process going on in the person's head that can be called 'inference from real facts,' [and if there is,] then the person is competent. It is too much to require that the inference be valid, or objective, or correct, for that is more than competent people can manage." *Id.*

102. Loren H. Roth, M.D., et al., *Tests of Competency to Consent to Treatment*, 134 *Am. J. Psychiatry* 279, 283 (1977).

103. Rein, *supra* note 39, at 1839. See generally Thomas G. Gutheil, M.D. & Paul S. Appelbaum, M.D., *Clinical Handbook of Psychiatry and the Law* 218-24 (2d ed. 1991) (discussing legal efforts to define competency in the context of guardianships and the resulting reliance on vague and overbroad descriptions); Alan Meisel, *The "Exceptions" to the Informed Consent Doctrine: Striking a Balance Between Competing Values in Medical Decisionmaking*, 1979 *Wis. L. Rev.* 413, 439-53 (discussing the incompetency exception to the requirement of informed consent for medical treatment).

104. See *infra* text accompanying note 109.

agencies, hospitals doctors, lawyers, miscellaneous institutions, family members, and other individuals.¹⁰⁵ For the competency construct to work fairly, society would have to commit whatever resources it takes: 1) to pay for state-of-the-art diagnoses and psychiatric workups before any decisions are made regarding partial or total incapacity;¹⁰⁶ and 2) to pay for whatever remedial action it takes (medical, environmental, nutritional, and psychiatric) to reverse, correct, arrest, or to compensate for the causes of the individual's malfunctioning if total or partial surrogate decision making is sanctioned (however that occurs). This would also require resources for follow-up procedures to ensure that informal or appointed surrogates arrange appropriate therapies.¹⁰⁷ Follow-up procedures should also be required as well as frequent reassessment and swift

105. See George J. Alexander, *Writing a Living Will: Using a Durable Power of Attorney* 12-13 (1988); Rein, *supra* note 39, at 1826-33.

106. Florida's reform limited guardianship statute, Fla. Stat. Ann. § 744.331 (West 1986 & Supp. 1994), is superior in this regard to most guardianship statutes in that it requires that state-of-the-art diagnoses and workups precede assessments of competency. As Professor Barnes reports,

Expert evidence of disability is provided [under Florida's statute] by a three member examining committee that must include a psychiatrist or other physician as well as other experts who can provide information necessary for an accurate determination. One member of the examining committee must have knowledge of the alleged area of disability.

....

In determining competency, the court must consider a report based on an examination by the committee members that includes results of a physical examination, a mental health examination, and a functional assessment. The report must provide a diagnosis, a prognosis, and a recommended course of treatment. It must also provide an evaluation of the person's ability to exercise rights such as the right to manage property, to determine residence, to consent to medical treatment, and to make decisions affecting the social environment. The report must also describe any matters in which the person lacks capacity, explain the extent of incapacity, and give the factual basis for the determination.

Barnes, *supra* note 101, at 654-55 (footnotes omitted).

Since "many elderly people are aware of the severe repercussions of any inquiries into their mental health, many older clients will be unwilling to . . . undergo a medical examination at the lawyer's request." Murphy, *supra* note 45, at 913. To obviate this concern, any such workup might have to be separated from the fact-finding process in competency determinations. This would involve enacting procedural and evidentiary rules to prohibit the use of information gained in connection with such diagnoses and workups as a basis for bringing a petition or as evidence of incompetency in any formal inquiry. See *infra* notes 187-209 and accompanying text.

107. A discussion of whether such programs should be means tested and what the appropriate threshold for assistance might be is beyond the scope of this Article. Since I do not see on the horizon the political will needed to enact such programs, this Article suggests a different approach along the lines suggested in parts I and IV.

It is interesting to note that Florida's reform statute seeks to accomplish these goals by requiring the petitioner to submit a guardianship plan which includes

- (a) The provision of medical, mental, or personal care services for the welfare of the ward;
- (b) The provision of social and personal services for the welfare of the ward;
- (c) The place and kind of residential setting best suited for the needs of the ward;
- (d) The application of health and accident insurance and any other private or governmental benefits to which the ward may be entitled to meet any part of the costs of medical, mental health, or related services provided to the

termination of surrogate decision-making upon a finding that the individual is again decisionally capable.¹⁰⁸

The point of requiring diagnoses, as suggested above,¹⁰⁹ would not be so much to obtain a physician's opinion regarding the client's competency as to see if the diagnosis can uncover correctable or reversible causes of the client's problem. I say this because relying on a physician's opinion regarding competency can sometimes be dangerous considering the tendency of some medical professionals to believe that anything that can be labelled, cured, or corrected is a disease or abnormal state. Doing it right would cost a great deal of money at a time when there is fierce competition for, and intergenerational conflict over, the nation's resources. If society is unable or unwilling to spend the money needed to make the *parens patriae* competency construct routinely and reliably work the right way, then perhaps society in general—and our legal system in particular—should, whenever possible, abandon or limit the construct and try a different approach.

III. MODEL RULE 1.14: WITHIN THE COMPETENCY CONSTRUCT

*Attention to the working, or the possible working, of any institution or principle may well give us insight into weaknesses which remain concealed so long as it is posed in sufficiently abstract terms.*¹¹⁰

A. General Observations

Model Rule 1.14 suffers from at least four fundamental and interrelated flaws. One flaw, already discussed,¹¹¹ is the Rule's excessive focus on the question of competency when the real problems in many cases involving elderly clients and their loved ones are likely to be issues of increased physical and emotional dependence and the need to find common ground, to compromise, and to accommodate competing interpersonal and societal interests.

ward; and (e) Any physical and mental examinations necessary to determine the ward's medical and mental health treatment needs.

Fla. Stat. Ann. § 744.363(1) (West 1986 & Supp. 1994). The statute also requires annual reporting by the guardian and judicial review of the report to determine the "appropriateness and extent" of the guardianship and whether a change of plan or restoration of certain powers is warranted by the current situation. *See id.* §§ 744.367-.372, 744.3735. Only time will tell whether the Florida judiciary has sufficient desire, staffing, and other resources to put teeth into these requirements.

108. *See id.* §§ 744.367-.372.

109. *See supra* text accompanying note 104.

110. Phillip Devine, *The Ethics of Homicide* 188 (1978). Although the quoted statement was made in the context of the law having "something to say to philosophers," *id.*, it seems equally apropos to practicing lawyers having something to say to the legal structure in general and the Model Rules of Professional Conduct in particular. I am indebted to Professor Yale Kamisar for bringing Professor Devine's comment to my attention. *See* Yale Kamisar, *Are Laws Against Assisted Suicide Unconstitutional?*, 23 *Hastings Center Rep.* 32, 38 (May-June 1993).

111. *See supra* text accompanying notes 62-67.

Second, Model Rule 1.14 fails to reveal its assumptions regarding the basis of the attorney-client relationship. As noted in a paper prepared by Professor John Donaldson, the Model Rules do not "define the circumstances required to create an attorney-client relationship."¹¹² Instead, the introductory Scope portion of the Rules "cryptically states that 'whether a client-attorney relationship exists for any specific purpose can depend on circumstances and may be a question of fact.'¹¹³ Absent any statement to the contrary, most commentators¹¹⁴ (including myself) have assumed that the rules must contemplate the principal-agent explanation of the attorney's authority to act. This usually presupposes that the attorney acts as agent for one individual or entity¹¹⁵ or that, in cases of consensual multiple representation, the lawyer will direct one or more clients to find another attorney when potential conflict between clients becomes a reality.¹¹⁶ A corollary assumption is that the lawyer, bound by her duty of loyalty to the specific client, advocates her client's rights to the exclusion of the rights or legitimate interests of others.¹¹⁷

112. John E. Donaldson, *Ethical Considerations in Advising and Representing the Elderly* 10 (undated) (unpublished manuscript, on file with the author).

113. *Id.*

114. *See, e.g.,* Allee, *supra* note 54, at 38 (arguing that the Model Rules are based on the "fundamental rule that the client, as principal, . . . makes all material decisions"); Devine, *supra* note 54, at 513 (describing the client-lawyer relationship as a "mutual agency, with both lawyer and client each serving as both principal and agent"); Smith, *supra* note 9, at 81-82 (observing that the Model Rules are consistent with "viewing the attorney as agent and the client as principal").

115. *See, e.g.,* Prate v. Freedman, 583 F.2d 42, 48 (1978) ("In our legal system, an attorney is [the] client's agent and representative . . ."); Allee, *supra* note 54, at 38 (assuming that "the client-lawyer relationship is basically one of a modified or expanded agency relationship"); *see also* Restatement (Second) of Agency §§ 20-21 (1957) (explaining that an incompetent principal lacks authority to empower his agent).

116. According to the Model Rules, the lawyer may not be able to continue representing *any* of the clients. Model Rule 1.7, which prohibits conflicts of interest, is implicated when a lawyer has been representing two clients whose interests have become conflicting. Model Rule 1.7(b) allows the lawyer to represent clients with potentially conflicting interests, but only so long as she "reasonably believes the representation will not be adversely affected." Model Rules, *supra* note 12, Rule 1.7(b)(1). Once the lawyer becomes aware of circumstances that result in the "material limitation" of her representation of a client, she must withdraw from that representation pursuant to Rule 1.16. "Whether the lawyer may continue to represent any of the clients is determined by Rule 1.9." *Id.* cmt. 2. If the lawyer had been representing the two clients in the "same or a substantially related matter" and the lawyer realizes the interests of the two have become "materially adverse," then she cannot continue to represent *any* of the clients. *Id.* Rule 1.9(a).

117. The lawyer is conventionally seen as a professional

devoted to his client's interests and is authorized, if not in fact required, to do some things (though not anything) for that client which he would *not* do for himself.

Charles Fried, *The Lawyer as Friend: The Moral Foundations of the Lawyer-Client Relation*, 85 Yale L. J. 1060, 1060 (1976) (emphasis added). The implications of this appear more fully from Lord Brougham's description of the lawyer's role in connection with his defense of Queen Caroline:

[A]n advocate, in the discharge of his duty, knows but one person in all the world, and that person is his client. To save that client by all means and expedients, and at all hazards and costs to other persons, and, among them, to

But not all jurists have universally subscribed to this assumption. On one occasion, for example, Justice Louis Brandeis "refused to identify an individual client. Instead, he identified his client as 'the situation.'"¹¹⁸ The assumptions behind the classical liberal agency theory of representation are facing increasing challenges from more contemporary commentators.¹¹⁹ In the context of representing seriously ill clients with families, Professor Watson sees the client as "the family."¹²⁰ He concludes that "as professionals, . . . we should not begin by analyzing conflicting rights and interests and pondering whose interests should trump whose. Rather, we need to rethink the deeper purpose of client representation."¹²¹ The whole mediation movement may be seen as representing another, perhaps unspoken, challenge to an individual rights approach to representation. Indeed, mediation mechanisms and techniques may ultimately provide a structure for dealing with the practical and ethical dilemmas addressed in this Article.

A third flaw is that the rule does not even acknowledge how complicated the ethical and practical problems confronting the attorney really are. Without acknowledgment, there can be no real guidance and there is none. The rule places additional burdens on the lawyer even though there are no mechanisms either within the Model Rules or within the

himself, is his first and only duty; and in performing this duty he must not regard the alarm, the torments, the destruction which he may bring upon others. Separating the duty of a patriot from that of an advocate, he must go on reckless of consequences, though it should be his unhappy fate to involve his country in confusion.

Id. (quoting 2 Trial of Queen Caroline 8 (J. Nightingale ed. 1821). See also Michael D. Bayles, Professional Ethics 95-96 (1981) (discussing the adversary system rationale for the traditional ethics of the legal profession and lawyers' failure to recognize obligations to third parties).

118. Sidney D. Watson, *When Parents Die: A Response to Before Guardianship: Abuse of Patient Rights Behind Closed Doors*, 41 Emory L.J. 863, 871 (1992) (citing Thomas L. Shaffer, *The Legal Ethics of Radical Individualism*, 65 Tex. L. Rev. 963, 980 (1987)). The context in which Professor Watson quotes this reference to Justice Brandeis appears below.

What I have offered here as the appropriate role for the lawyer may seem radical, but if it is, it is only because of our recent preoccupation as a profession with liberal assumptions. The role I propose is not new in our profession. It is, instead, more like a return to our recent past. For example, Justice Louis Brandeis suggested just such a role for lawyers. Brandeis considered the client to be the family and the role of the lawyer to search for the harmony of the family. Brandeis first used these terms during the Senate hearings on his nomination to the Supreme Court. He defended himself against a charge that his representation of a family business during a bankruptcy hearing demonstrated that he did not know who his client was because he had violated the norm that a lawyer represents only individuals, except in extraordinary situations. Brandeis refused to identify an individual client. Instead he identified his client as "the situation".

Id. at 870-71 (citations omitted).

119. See Watson, *supra* note 118.

120. *Id.* at 864.

121. *Id.* at 871.

general legal system's procedural or evidentiary rules to authorize, let alone support, the lawyer in meeting these burdens. For example, how can a lawyer seek appointment of a guardian, as permitted by Rule 1.14(b), without revealing information obtained in the course of the representation, in violation of Rule 1.6? Would this also implicate Rule 1.16, which requires a lawyer to "withdraw . . . if . . . the representation will result in violation of the rules of professional conduct . . ."?¹²² How can the attorney, saddled with the responsibility of determining competency at several junctures,¹²³ "seek guidance from an appropriate diagnostician"¹²⁴ under Comment 5 to Rule 1.14 without the authorization or funds to do so?

The fourth flaw, which clearly relates to the third, is that Rule 1.14 fails to explain exactly what authorizes the attorney to take certain actions expressly or impliedly permitted under the rule as fleshed out by the comments. What theory, for example, authorizes the attorney to act as *de facto* guardian as suggested by Comment 2? There is also no recognition that following the permissive directions of Rule 1.14 could potentially expose the hapless attorney to disciplinary sanctions under other rules with mandatory standards.¹²⁵ These deficiencies reflect a general unwillingness to confront the hard issues, relying instead on aspirational generalities. Although this denial instinct is understandable, given the number and complexity of the issues and the fact that our present legal system does not support other approaches, it only increases the confusion and leaves the lawyer without guidance and exposed to disciplinary sanctions or malpractice claims whichever way she turns.

Although I offer some specific suggestions in this Part, a mere tinkering with the Model Rules will not remove the basic problems. Because the concerns of the elderly require such an interdisciplinary approach and because the problems are so complex, no ethics code for representation of the elderly can work in a vacuum. The workability of some suggestions will therefore require corresponding changes in evidentiary rules, the rules of procedure, the ethics codes of other professional groups, and, perhaps, substantive rules regarding capacity to make contracts and gifts. Indeed, addressing the real issues in their full scope and

122. Model Rules, *supra* note 12, Rule 1.16(a).

123. See discussion *supra* notes 17-22.

124. Model Rules, *supra* note 12, Rule 1.14 cmt. 5.

125. See, e.g., *id.* Rule 1.2(a) (requiring consultation with the client as to the means used in attaining the objectives of the representation); *id.* Rule 1.4(a) (requiring the lawyer to "keep [her] client reasonably informed about the status of a matter"); *id.* Rule 1.4(b) (requiring the lawyer to "explain a matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation"); *id.* Rule 1.7(b) (prohibiting a lawyer from "represent[ing] a client if the representation . . . may be materially limited by . . . the lawyer's own interests," unless the client "consents after consultation"); *id.* Rule 1.6 (prohibiting revelation of information relating to the representation except under limited circumstances); *id.* 1.8(b) (prohibiting the lawyer from "us[ing] information relating to [the] representation . . . to the disadvantage of the client unless the client consents after consultation").

complexity will require nothing less than a total rethinking of our assumptions regarding the basis of the attorney-client relationship (at least in the nonlitigation context) and the benefits of individualism versus a more community-oriented approach of mediation and accommodation. As presently structured, the Model Rules are largely designed for representation in a litigation setting. This design and its underlying assumptions may be ill-suited for dealing with many of the problems practitioners face when representing the elderly client. This is not to say that there is no room for strict adversarial advocacy when appropriate or use of the competency construct when unavoidable, but only that other approaches and options should be made available to the attorney when the situation calls for them.

B. *A Critical Tour of the Model Rules*

Because the legal literature contains so many helpful treatments of the ethics rules and opinions governing the attorney's responsibilities vis-a-vis the questionably competent client,¹²⁶ no detailed analysis is attempted here. My goal is to identify the problem areas sufficiently to suggest avenues to explore for possible improvement within the present structure. Even as so confined, however, these suggestions will require corresponding changes that extend beyond the Model Rules themselves. Moreover, because of the complexity and intractability of the problems, most suggestions will necessarily be preliminary and imperfect.

1. Rule 1.14's Ambivalence About the Basis of the Attorney-Client Relationship

In line with the individualistic, principal-agent basis of the attorney-client relationship, Model Rule 1.2(a) requires the attorney to "abide by a client's decisions concerning the objectives of the representation"¹²⁷ within the limits of the Model Rules, provided no criminal or fraudulent conduct is involved. Comment 1 cautions the lawyer to "defer to the client regarding such questions as the expense to be incurred and concern for third persons who might be adversely affected."¹²⁸ This discourages the lawyer from concerning herself with, much less mediating between, the client and connected persons with legitimate competing concerns. Comment 2 refers the attorney for the questionably competent client to Model Rule 1.14 for guidance regarding her "duty to abide by the client's decisions"¹²⁹ Rule 1.14(a) says that the lawyer "shall, as far as reasonably possible, maintain a normal client-lawyer relationship with

126. See authorities cited *supra* note 11; Allee, *supra* note 54; Devine, *supra* note 54; 1 Geoffrey C. Hazard, Jr. & W. William Hodes, *The Law of Lawyering: A Handbook on the Model Rules of Professional Conduct* § 1.14:100-303 (2d ed. Supp. 1993); Murphy, *supra* note 45.

127. Model Rules, *supra* note 12, Rule 1.2(a).

128. *Id.* Rule 1.2(a) cmt. 1.

129. *Id.* Rule 1.14 cmt. 2.

the client,"¹³⁰ which thereby implicates the duty to communicate with the client,¹³¹ the duty of loyalty,¹³² and the duty to keep client confidences.¹³³

So far in the analysis, the attorney-client relationship is based on agency principles.¹³⁴ The client is the boss and the attorney carries out his stated wishes within limits already mentioned. This assumes "the client is a competent adult capable of *rational* [whatever that means] decision-making regarding those matters in connection with the representation . . ." ¹³⁵ Under the agency theory, if someone's mental impairment is so severe as to prevent "the formation or continuance of the client-lawyer relationship, a lawyer has no authority to act for the client, and the lawyer who continues [the representation] may be subjected to personal liability."¹³⁶ Presumably the lawyer's choices here are to refuse to represent the client, to withdraw from the representation or to seek the appointment of a guardian.¹³⁷ If appointed, the guardian essentially becomes the principal in the attorney-client relationship.¹³⁸ The lawyer may become duty bound, however, to "blow the whistle" on her principal if the guardian abuses its trust vis-a-vis the ward.¹³⁹

130. Rule 1.14 provides:

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

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

Id. Rule 1.14.

131. *Id.* Rule 1.4.

132. The Model Rules implicating the duty of loyalty include Rule 1.7 (general rule regarding conflict of interest), Rule 1.8 (prohibited transactions), Rule 1.9 (former client), and 1.10 (imputed disqualification).

133. Model Rules, *supra* note 12, Rule 1.6.

134. *See, e.g., Prate v. Freedman*, 583 F.2d 42, 48 (2d Cir. 1978) ("In our legal system, an attorney is [the] client's agent and representative . . .").

135. Allee, *supra* note 54, at 38 (emphasis and editorial comment added).

136. *Id.* *See also* Restatement (Second) of Agency § 122 (explaining that the incapacity of the principal generally terminates the agent's authority).

137. I do not consider refusal to represent or withdrawal as options here for reasons explored *infra* note 210-15 and accompanying text (discussing the withdrawal option).

138. Professors Hazard and Hodes suggest that

[i]t may be appropriate to think of the guardian as the primary client and the disabled person as the derivative client, rather than the other way around. In the guardian, the lawyer finds a person with whom she can communicate fully. More importantly, the position of the guardian is such that what she wants from the lawyer is normally deemed to be what the disabled person wants as well. The lawyer therefore can follow the guardian's instructions, secure in the knowledge that she is also being of service to the disabled person. The burden of determining what is in the best interests of the disabled person is lifted from the lawyer's shoulders, freeing her to perform more traditional lawyer tasks.

Hazard & Hodes, *supra* note 126, § 1.14:102, at 440.1.

139. But Professors Hazard and Hodes note that

[a]s in all cases of derivative clients, however, the lawyer must be alert to the

Between subsections (a) and (b) of Rule 1.14, however, the assumptions make an unannounced turn that leaves the lawyer representing the client without any recognized basis for doing so. Rule 1.14(b) says "a lawyer *may* seek the appointment of a guardian or take other protective action . . . only when the lawyer reasonably believes that the client cannot adequately act in the client's own interest."¹⁴⁰ It does not say she *must* do so. Presumably, then, the lawyer can continue to represent the client even though that client cannot adequately represent his own interests (whatever that means). On what basis does that representation continue if the client is incompetent to represent his own interests? Rule 1.14 doesn't say. For example, Comment 3 says "the lawyer *should* see to such an appointment where it would serve the client's best interests" but, recognizing that this course may prove "expensive or traumatic for the client," leaves the decision to "the professional judgment" of the lawyer.¹⁴¹

The rule does not state which of the many tests and medical models for determining competency¹⁴² the lawyer should use in exercising this judgment. It offers no clue about how to determine task-specific, partial, or intermittent incapacity, nor does it acknowledge what an unrealistic expectation it places on lawyers. As Professor Allee remarked, "[d]etermining competency is difficult for medical and behavioral experts, much less for lawyers . . ." ¹⁴³

Where does this leave the lawyer? Suppose she manages somehow to determine that her client "cannot adequately act in [his] own interest." Presumably she must either seek imposition of a guardianship or conservatorship with all the human suffering and problems of loyalty and confidentiality that route may entail,¹⁴⁴ "[r]ely on next of kin as proxy decisionmaker,"¹⁴⁵ or act as *de facto* guardian as Comment 2 suggests. Whatever the substantive merits or demerits of seeking proxy consent

possibility that the guardian is abusing her position. If the lawyer becomes convinced that the guardian is acting contrary to the ward's best interests (especially if the conduct is to the guardian's personal advantage), the lawyer may have a duty to refuse instructions from the guardian, and even to take interdicting action.

Id. at 440.1-41.

140. Model Rules, *supra* note 12, Rule 1.14(b) (emphasis added).

141. *Id.* Rule 1.14 cmt. 3 (emphasis added).

142. See *supra* note 101 (discussing the many tests which exist for determining competency).

143. Allee, *supra* note 54, at 39. See also discussion *supra* notes 68-82 and accompanying text. If Rule 1.14 puts this impossible burden on the attorney, it should at least suggest what tests and standards might be used in making the determination. In addition, any attempt to seek help from a diagnostician, as Comment 5 suggests, will clash with Rule 1.6's mandatory duty of confidentiality. See *infra* notes 178-209 and accompanying text.

144. See discussion *infra* notes 178-209 and accompanying text.

145. This is one of six lawyer responses to hypothetical situations listed by Professor Tremblay, *supra* note 11, at 553. This citation does not suggest that Professor Tremblay would approve of the response listed.

from a family member or acting as *de facto* guardian may be, I do not see any currently recognized basis for the representation in either case. "[I]n many jurisdictions the family has absolutely no lawful authority to give consent."¹⁴⁶ With respect to *de facto* guardianship, if the client lacks the competence to make decisions in a given sphere, he cannot be a principal and his lawyer (the agent) lacks authority to act within that sphere.¹⁴⁷ In this case, Professors Hazard and Hodes suggest, by analogy to Rule 1.13's entity representation, that the client (principal) is "an abstraction"¹⁴⁸ called "the best interests' of her client."¹⁴⁹ Although this explanation of the authority to act for a mentally disabled client may be a fruitful one to explore, it is not currently supported by the language of Rule 1.14 itself. Any redraft of Rule 1.14 should explicitly state its theory of the basis for the lawyer's authority to act when the client cannot act as principal and no legal representative has been appointed.¹⁵⁰ Anything less than an explicit statement unfairly leaves the lawyer without lawful authority to begin or continue the representation and exposes her to both disciplinary action and personal liability.

The American College of Trust and Estates Counsel (ACTEC) commentary on Model Rule 1.14 states:

The lawyer for a client who appears to be disabled may have implied

146. *Id.* at 569 (citing President's Comm'n for the Study of Ethical Problems in Medicine and Biomedical and Behavioral Research, 3 Making Health Care Decisions: The Ethical and Legal Implications of Informed Consent in the Patient Practitioner Relationship 206-45 (1982)); see also Susan K. Gauvey et al., *Informed and Substitute Consent to Health Care Procedures: A Proposal for State Legislation*, 15 Harv. J. on Legis. 431, 449 (1978) (observing that a substantial minority of states "allow certain relatives to provide consent in specified circumstances") (footnote omitted); Paul B. Solnick, M.D., *Proxy Consent for Incompetent Non-Terminally Ill Adult Patients*, 6 J. Legal Med. 1, 19-24 (1985) (opining that, although 19 states have statutes authorizing proxy decision making, none adequately solves the issues raised in substitute decision making); Mark Fowler, Note, *Appointing an Agent to Make Medical Treatment Choices*, 84 Colum. L. Rev. 985, 993-94 (1984) (family consent is not settled by statute or common law in at least 21 states).

147. *Accord* Tremblay, *supra* note 11, 574-75 (discussing the "broad version" of *de facto* guardianship); cf. Devine, *supra* note 54, at 513 ("One of the greatest weaknesses of the Model Code is its failure to consider that the entire basis of the attorney-client relationship may be flawed by the existence of a disability preventing the effective creation of an agency.").

148. Hazard & Hodes, *supra* note 126, § 1.14:102, at 440.

149. *Id.* § 1.14:301, at 447. The State Bar of Michigan, Committee on Professional and Judicial Ethics, appears to support the view of Professors Hazard and Hodes by stating that an attorney representing a workers' compensation claimant may refuse the client's request to withdraw the claim "if, in [the lawyer's] professional judgment, withdrawal would not advance the best interests of his client and the lawyer has serious doubts about the mental stability and competency of his client." State Bar of Mich., Comm. on Professional and Judicial Ethics, Op. CI-1055 (1984). Although this opinion may be defensible on normative grounds, it is difficult to find a basis in Rule 1.14's language for such continued representation against the client's stated wishes.

150. I have already mentioned several avenues to explore in searching for an alternative explanation for the attorney's authority to act, see *supra* notes 118-21 and accompanying text, and will return to the subject *infra* part IV.

authority to make disclosures and take actions that the lawyer reasonably believes are in accordance with the client's wishes that were clearly stated during his or her competency. If the client's wishes were not clearly expressed during competency, the lawyer may make disclosures and take such actions as the lawyer reasonably believes are in the client's best interests. It is not improper for the lawyer to take actions on behalf of an apparently disabled client that the lawyer reasonably believes are in the best interests of the client.¹⁵¹

Although there are obvious dangers inherent in giving one unsupervised attorney such broad and open-ended implied authority, if this is the true intent behind Model Rule 1.14, the Rule should be amended to so state.

Whatever the merits or demerits of ACTEC's implied authority concept, it does not work when the attorney has no preexisting relationship with an individual who clearly needs legal help but appears confused or seems otherwise unable to enter into an agency relationship with the attorney. By analogy to the emergency doctrine for medical consent, the Capacity Issues Working Group (hereafter "Working Group") of the Conference on the Ethical Issues in Representing Older Clients (hereafter "Conference") recommended that language allowing a lawyer to act in an emergency situation "without express or implied agreement from the purported client" be added as subsection (d) to Model Rule 1.14.¹⁵²

151. American College of Trust & Estate Counsel, Commentaries on the Model Rules of Professional Conduct (Oct. 18, 1993) [hereinafter ACTEC Commentaries].

152. The Conference Working Group adopted the following language:

1. A lawyer is an agent who acts upon the authority of a principal. In many cases, the lawyer will have a pre-existing relationship with a person or that person's family. In the absence of such a pre-existing relationship or a contractual agreement, express or implied, a lawyer generally may not act on behalf of a client.

2. In certain circumstances, a lawyer may act as lawyer for a purported client even without express or implied agreement from the purported client if:

a. An emergency situation exists in which the purported client's substantial health, safety, financial, or liability interests are at stake;

b. The purported client, in the lawyer's good faith judgment, lacks the ability to make or express considered judgments about action required to be taken because of an impairment of decision-making capacity;

c. Time is of the essence; and

d. The lawyer reasonably believes, in good faith, that no other lawyer is available or willing to act on behalf of the purported client.

The lawyer may take those actions necessary to maintain the status quo or to avoid irreversible harm even without express consent of the person.

3. A "purported client" is a person who has contact with a lawyer and who would be a client but for the inability to enter into an expressed agreement.

[4. A lawyer who acts pursuant to this rule may not seek a fee for services rendered in this capacity.]

Report of Working Group on Client Capacity, 62 Fordham L. Rev. 1003, 1011-12 (1994). Although adopted by the Working Group, paragraph 4 was voted down in the plenary session because most conferees believed that the appropriateness of a fee in such cases required further study. See *id.* at 1012.

2. How Should the Lawyer Go About Determining Competency?

A threshold inquiry concerns the questionably competent lawyer. Model Rule 1.1 states that “[a] lawyer shall provide competent representation[.]” which “requires the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation.”¹⁵³ A lawyer who is not qualified—by training or experience—to deal with the questionably competent client may, in some circumstances, have a duty to refer the client to an attorney who is so qualified. The various state bar associations might ameliorate this problem while promoting better legal services for the questionably competent elderly by requiring that lawyers who are likely to represent the elderly take a certain number of continuing legal education or other special training courses designed to assist them in providing such representation competently. These courses might cover such topics as geriatric psychology, common physical impediments to the ability to utilize existing mental capacity, the content and pitfalls of legal standards that address competence, and the nature and availability of community services to aid the elderly. Such training should also be mandatory for judges who preside at competency determinations. Lawyers could learn how to prepare papers (larger print) and to create office environments (soft lighting, placement of furniture, elimination of distracting noises) that enhance their clients’ ability to communicate.¹⁵⁴

As already noted,¹⁵⁵ Rule 1.14 offers no guidance regarding how the competent lawyer should go about determining her client’s competence or degrees of competence except to suggest in Comment 5 that she “may seek guidance from an appropriate diagnostician.”¹⁵⁶ Professor Smith suggests that “[w]henever doubts about the competence of a client’s decision arise, the lawyer should look behind the perceived ‘problem’ to see if the decision could be rational and informed.”¹⁵⁷ She recommends engaging the client in “a process of gradual decision-making which will involve clarification, reflection, feedback, and further investigation.”¹⁵⁸ During this process, says Smith, the attorney “will need to consider her understanding of the client’s values, the client’s unique life circumstances, and her own values and possible prejudices.”¹⁵⁹ The latter means the lawyer should ask whether her doubts about the client’s competence arise “because the client’s values are different from her own.”¹⁶⁰

In applying this process to cases in which “the client’s decision seems odd or even harmful,” Professor Smith advises the attorney to “consider

153. Model Rules, *supra* note 12, Rule 1.1.

154. For a discussion of these topics, see Smith, *supra* note 9, at 62-72; Frolik & Barnes, *supra* note 13.

155. See *supra* notes 76-78 and accompanying text.

156. Model Rules, *supra* note 12, Rule 1.14 cmt. 5.

157. Smith, *supra* note 9, at 90 (citations omitted).

158. *Id.*

159. *Id.*

160. *Id.* at 91.

what set of values could rationally lead to such a choice."¹⁶¹ Her illustrations are worth considering against the backdrop of current Rule 1.14, for example

a young attorney may begin to doubt the competence of her elderly client who does not wish to contest a right to income or benefits or does not wish to take a relatively simple legal action to preserve his assets. However, if the particular client has a limited life expectancy, minimal need for assets, or an emotional focus upon internal or spiritual things, that client's decision may be quite reasonable. Similarly, the elderly client who acquiesces in a guardianship in order to accommodate a favorite child's need to care for him, may appropriately and intelligently prefer this outcome to a dispute over his personal autonomy. At other times, the attorney may erroneously consider the client incompetent because the client wants to retain assets rather than to distribute them to his children in order to minimize estate taxes or to achieve [M]edicaid eligibility. The attorney sees the decision as a purely mechanical one of good estate planning. Yet the elderly client's feelings about financial independence and about his relations with his children are also relevant. If it is very important to the client to retain control over his assets, then "poor" estate planning may be a competent decision for the client to make. Such decisions may seem eccentric or harmful to the young ambitious attorney. However, she should not question this client's competence without also examining her own values and considering why those values may make certain client decisions difficult for her to accept.¹⁶²

Suppose the lawyer, using this approach, begins to understand her client's point of view and decides to give her client the benefit of the doubt on the competency question. If she decides the client's decision is a competent one under the totality of the circumstances, including the client's values, she will presumably forego the estate planning and perhaps even abide by Martha's decision in my Hypothetical 2¹⁶³ to refrain from resisting the lawsuit or eviction action. The attorney may even arrange the donation to the television evangelist or religious cult as Paul in my Hypothetical 3¹⁶⁴ desires. Should the client's relatives, or other parties including the client himself, later successfully claim that the client was not competent to make these decisions, the attorney could be subjected to disciplinary action under the Model Rules as well as a malpractice or other lawsuit seeking compensation for any losses incurred by the client or third parties.

If Rule 1.14 is really serious about letting the lawyer's course of action hinge entirely on the lawyer's answer to the competency question, then it should protect the lawyer if she reasonably and in good faith makes what

161. *Id.* (citations omitted).

162. *Id.*

163. *See supra* notes 26-29 and accompanying text.

164. *See supra* notes 30-33 and accompanying text.

turns out to be an erroneous determination of competency. Although the suggested language may need refinement, the rule might read:

An attorney who defers to the articulated wishes of her client after making a careful and reasonable determination that the client is competent to make the decision in question, and after fulfilling her role as advisor,¹⁶⁵ will not, if the client is later deemed incompetent, be subject to discipline, provided she acted in good faith and without personally benefiting from the adopted course of action.¹⁶⁶

This will not, however, protect the lawyer from malpractice and other claims by her client or third parties.¹⁶⁷ Thus, complete protection for the well-meaning lawyer who makes an honest and diligent judgment call in favor of her client's autonomy would require a similar refinement or clarification of substantive malpractice rules. The downside of this proposal

165. Model Rule 2.1 states:

In representing a client, a lawyer shall exercise independent professional judgment and render candid advice. In rendering advice, a lawyer may refer not only to law but to other considerations such as moral, economic, social and political factors, that may be relevant to the client's situation.

Model Rules, *supra* note 12, Rule 2.1. Comment 2 to Rule 2.1 states in part:

It is proper for a lawyer to refer to relevant moral and ethical considerations in giving advice. Although a lawyer is not a moral advisor as such, moral and ethical considerations impinge upon most legal questions and may decisively influence how the law will be applied.

Id. Rule 2.1 cmt. 2. Comment 5 states:

In general, a lawyer is not expected to give advice until asked by the client. However, when a lawyer knows that a client proposes a course of action that is likely to result in substantial adverse legal consequences to the client, duty to the client under Rule 1.4 [Communication] may require that the lawyer act if the client's course of action is related to the representation. A lawyer ordinarily has no duty to initiate investigation of a client's affairs or to give advice that the client has indicated is unwanted, but a lawyer may initiate advice to a client when doing so appears to be in the client's interest.

Id. Rule 2.1 cmt. 5.

166. To encourage lawyers to "stay with the situation" without fear of discipline, the Conference Working Group recommended that the following language be added as Model Rule 1.14(c):

The lawyer should not be subject to professional discipline for invoking or failing to invoke the permissive conduct authorized by 1.14(b) if the lawyer has a reasonable basis for his or her action or inaction.

See Report of Working Group, supra note 152, at 1007.

167. A composite complaint for malpractice written by Professors Frolik and Barnes and "derived from a number of cases filed in the 1980's . . . illustrates the confusion that reigns when conflicts within the family deteriorate into open hostility, and how hard ethical questions can become a trap for the incautious attorney." Frolik & Barnes, *supra* note 13, at 85.

The complaint, filed by the transferor's daughter, both individually and as the transferor's daughter, alleged, *inter alia*, that the attorney, "at a time when he knew or should have known that Annie Smith was incompetent, represented Annie Smith and assisted her in transferring her major assets to Ian Holmes, whom [the attorney] also represented." *Id.* at 86. Although the attorney clearly fell into the conflict of interest trap, even if he had assisted Annie in transferring her assets to persons the attorney did not also represent, it seems likely the daughter still would have sued him for arranging the transfers at the behest of an incompetent client.

is that the exculpatory rule suggested might allow an attorney to follow her client's wishes without engaging in gradual counseling or seriously considering the competency question, and then to claim protection under the rule when there is no one available to dispute the attorney's assertion of serious consideration and good faith. As stated earlier, there are no perfect answers, especially when one starts with an oversimplified question like whether or not the client was competent.

Another suggestion addresses the dilemma of the lawyer for a questionably competent client who faces a situation requiring immediate legal action. Hypothetical 2,¹⁶⁸ in which Martha refuses to sign an answer prepared for her, comes to mind as an example. A lawyer faced with a litigation deadline for taking defensive or offensive action needs "time out" to assess the situation and to consider what to do next. The Model Rules and corresponding procedural rules should provide some mechanism allowing the lawyer to obtain such respite without having to raise questions about her client's competency. She might, for example, request an extension of time on the ground that her client is not yet prepared to decide on a course of action. But a rule allowing lawyers to obtain extensions without specifically showing justification might invite abuse. Perhaps stiff sanctions for abuse might deter it, although abuse would be hard to determine in most cases. Although Model Rule 1.14 might incorporate a suggestion that the lawyer seek "time out" in such situations, making this option a reality would require changes in state procedural rules. The Model Rules might achieve the same result by authorizing attorneys to file temporary answers or complaints without specific client authorization. Presumably the lawyer would be forced to withdraw the temporary answer or complaint if, after extensive client consultation and gradual counseling, she determined that her client had made a competent decision to refrain from litigation.¹⁶⁹

Because of my deep skepticism¹⁷⁰ about the usefulness of the competency construct as a divining rod for determining whether a lawyer should abide by the client's articulated wishes, I hesitate to suggest which of the many tests or models the Rules should incorporate for making informal competency determinations. Lawyers are qualified to construct models for recognizing, weighing, and striking a balance between competing interests. They have been trained to do so since they first encountered the famous "Hand formula"¹⁷¹ in law school. But they are not in any way trained to make competency determinations. Moreover, whatever model or test for competency is used, each individual lawyer will apply it through the lens of her own life experiences and values.

168. See *supra* text accompanying notes 26-29.

169. For a discussion regarding how such a client-centered determination of competency might be formed and the possible consequences for the lawyer, see *supra* notes 157-64; see also *infra* note 263 (the Working Group listed a "time out" as a protective action).

170. See discussion *supra* note 21 and accompanying text.

171. See *United States v. Carroll Towing Co.*, 159 F.2d 169 (2d Cir. 1947).

Nothing in the current Model Rules or anywhere else ensures uniformity of application, predictability of outcome, or accountability. There is no process, other than fortuitous litigation, for scrutinizing the lawyer's individual determination of incompetency or competency and, in most instances, the adverse repercussions of such a determination are not discoverable until it is too late. It would, I suppose, be possible for each community to appoint a panel of experts (e.g., gerontologists, social workers, psychologists) to assist lawyers in making informal competency determinations, but the rules governing confidentiality and the professional independence of a lawyer would require modification to accommodate such practice.

While Professor Smith does not propose a substantive competency test, I have great sympathy for her respectful, autonomy-preserving approach to the problem. There are, however, some concerns and practical considerations not addressed by her approach. First, individuals, including lawyers, vary markedly in their ability to set aside their assumptions and perceptions of a situation and to entertain the possible validity of other perspectives. Not all lawyers are as perceptive or as sensitive as Professor Smith. Moreover, there are no objective factors in competency determinations like probability, gravity of harm, or burden by which a lawyer's application of law to the facts of his client's situation can be reviewed.¹⁷² Variations in temperament and lack of objective criteria combine to produce the lack of uniformity and lack of accountability mentioned above. This is one reason I suggest we offer lawyers alternative approaches that rely less on the competency construct and more on relatively objective criteria.

Second, the client may lack the funds or willingness to pay for the number of billable hours the gradual counseling process takes. Further, the lawyer may lack the time for such counseling, especially if the competency question arises in a routine matter like a contracts dispute involving a modest sum. This is not a criticism in the sense that I can offer a solution which avoids the problem, but it is, nevertheless, a problem worth thinking about. Finally, Professor Smith's approach does not take into account how the client's decision, even if competently made when viewed from the client's perspective and values, might adversely affect the community and the rights of others who are unable to object because they have no notice of the irreversible action. She does not address what happens if, after all this gradual counseling and gentle persuasion, her client insists on making an extremely selfish choice that forces others, without prior consultation or notice, to give up their rights and scarce resources to ensure the client's survival. This is no objection to those who value individual autonomy to the exclusion of any other value in our

172. This is not to say that probability and other factors identified in the "Hand formula" can be proved with anything approaching mathematical certainty, but such factors are arguably more understandable in the lay sense than criteria such as "ability to reason" or "factual comprehension."

society, or who assign such a disproportionately high value to autonomy that the effect is the same.¹⁷³ But not everyone would weigh the competing values this way.¹⁷⁴ Moreover, such a view can tend to confuse infantile caprice with autonomy.¹⁷⁵ Some proponents of this view may also fail to consider that a finding of incompetency under the competency construct involves a much more permanent, complete, and unreviewable stripping of autonomy than any attempt to ask an individual to adjust his action to take into account the rights and legitimate interests of others.¹⁷⁶

An approach that includes consideration of others' values and interests may be attacked on the ground that lawyers are not private attorneys general—that it is not their proper function to bring competing societal interests to bear on their clients' actions. This is undoubtedly the underlying premise of much of our system, including the Model Rules, so long as the individual is deemed competent. But this premise can be questioned on normative grounds.¹⁷⁷ For now, suffice it to say that whether we like it or not, lawyers serve as gatekeepers for society. If there is no mechanism by which the gatekeepers can bring other voices to bear on the problem, such voices will never be heard except in serpentine ways until the often irreparable damage to the client and others has already occurred. Moreover, when a lawyer or guardian pursues her own interests (*i.e.*, fear of disciplinary sanctions or a malpractice suit) or society's

173. I do not suggest that Professor Smith holds this view.

174. See discussion *supra* note 50 and accompanying text.

This would not be the view of all cultural groups in America today. Even if we were to assume, probably erroneously, that most Euro-Americans would hold this view, it is worth noting that by the year 2000, Americans who are not of European descent will account for 50% or more of California's population. See, e.g., Tony Bizjak, *Capital's Future? Growth Area Pegged As Decade's Population Hot Spot In State*, Sacramento Bee, Sept. 22, 1992, at B1 ("Eight out of 10 new Californians in the 1990s—both those born in the state and immigrating to it—will be ethnic minorities . . ."); Davan Maharaj, *Inter Ethnic Ills Loom, Leaders Say*, Los Angeles Times, June 2, 1993, at B1 ("There will be no ethnic majority group in California by the year 2000."); Jeannie Wong, *Latinos: Poverty and Strong Work Ethic*, Sacramento Bee, May 12, 1992, at A13 ("As California moves close to the 21st century, . . . Latinos will make up about 33 percent of the population by the year 2000."); Myrna Zambrano, *Middle Class Values, Underclass Sociological Standing Stereotypes: Leaders would do well to understand poverty-plagued Latinos, who could be California's largest minority by the year 2000*, Los Angeles Times, Nov. 29, 1992, at B1 ("In California, non-Anglos are projected to become the majority by the year 2000."); *State Job Outlook Called Healthy*, San Jose Mercury News, Sept. 22, 1992, at A1 ("Hispanic, Asian and African-American residents are expected to make up half of the state's population in the year 2000 . . ."); *Study Sees No Letup In Growth Rise*, Sacramento Bee, May 28, 1990, at A3 ("[E]thnic minorities will add up to 50 percent of the state's population by 2000 . . .").

175. Individuals must be allowed some degree of selfishness. I have no problem with a lawyer's supporting her client's infantile caprice as long as it does not seriously invade the rights, health, and welfare of others. To capriciously withhold a benefit like an inheritance is one thing; to invade someone else's rights and resources by demanding a benefit or acceptance of a detriment is quite another.

176. See discussion *supra* notes 21-22 and accompanying text; *infra* notes 256-59 and accompanying text.

177. See discussion *supra* notes 41-43 and accompanying text.

interests (*i.e.*, preventing unjust enrichment of the unscrupulous) using a client's supposed incapacity as a rationale, she acts as an attorney for herself or as a private attorney general under the cloak of the competency construct. The question then becomes whether we wish to act as private attorneys general indirectly via the competency construct or directly through some broader, more principled approach.

3. Preliminary Clashes with Rule 1.6's Duty of Confidentiality, Rule 1.7's Duty of Loyalty, and Other Problems

Rule 1.14's comment 5 notes that most procedural rules require that "persons suffering mental disability . . . be represented by a guardian or next friend if they do not have a general guardian."¹⁷⁸ It also notes that disclosing the client's condition might raise the question of disability and thus trigger "proceedings for involuntary commitment."¹⁷⁹ Comment 5 says "[t]he lawyer may seek guidance" in dealing with this "unavoidably difficult" situation "from an appropriate diagnostician."¹⁸⁰ Presumably the purpose of this permissive statement is to allow lawyers to get help from medical professionals in determining preliminarily whether or not the client is so disabled as to require a representative. Additionally, comment 2 states that "[i]f the [client] has no guardian or legal representative, the lawyer often must act as *de facto* guardian."¹⁸¹ If this concept of *de facto* guardianship is broad or vague enough to allow the lawyer to make major legal decisions for the client in both litigation and nonlitigation settings,¹⁸² a diagnostician's aid might also be sought in connection with the lawyer's decision whether to act as *de facto* guardian.

Regrettably, the Rules do not say who qualifies as a diagnostician, on whose behalf the diagnosis is sought, who should pay for the diagnosis, or how the diagnosis can be obtained without violating both the diagnostician's and the lawyer's duties of confidentiality.¹⁸³ A lawyer may wish to consult with a variety of experts including physicians, nurses, physical and speech therapists, gerontologists, psychiatrists, psychologists, and social workers. However,

the lawyer employing a member of one of these fields must know that, should a third party later charge the lawyer with improperly representing an incompetent client, he can support his representation on the basis that it followed a positive evaluation of the client's competency, and that this evaluation was conducted by someone in a profession recognized as qualified to make competency determinations.¹⁸⁴

178. Model Rules, *supra* note 12, Rule 1.14 cmt. 5.

179. *Id.*

180. *Id.*

181. *Id.* cmt. 2.

182. *Cf.* Tremblay, *supra* note 11, at 574 (discussing the broad and narrow views of *de facto* authority).

183. *Accord* Allee, *supra* note 54, at 39; Murphy, *supra* note 45, at 911.

184. Murphy, *supra* note 45, at 917-18.

The Model Rules' Terminology section should define who qualifies as a diagnostician for the purpose of helping the lawyer determine whether the client needs a formal representative and whether the lawyer should act as *de facto* guardian. While such definitions would not be binding on judicial application of malpractice rules, they might at least be indirectly influential. Unfortunately, "[e]xaminations [in connection with guardianship proceedings] reportedly have been performed by plastic surgeons, gynecologists, and the petitioner, if performed at all."¹⁸⁵ The Terminology section should therefore specify the credentials and experience required to qualify as a diagnostician within the contemplation of the Rules.¹⁸⁶ The Rules should also specify the circumstances under which the lawyer may charge the cost of such diagnostic assistance to the client.

The biggest problem is that the search for diagnostic assistance will likely put the attorney following Comment 5's permissive advice on a collision course with the mandatory duties of confidentiality and loyalty under Rules 1.6 and 1.7 respectively. Model Rule 1.6 forbids a lawyer from "reveal[ing] information relating to the representation of a client unless the client consents after consultation, except for disclosures that are impliedly authorized in order to carry out the representation . . ."¹⁸⁷ This duty of confidentiality applies to all information relating to the representation regardless of its source. Rule 1.8(b), which prohibits the use of information detrimental to the client, potentially applies as well.¹⁸⁸ Rule 1.6(b) permits disclosure without client authorization under limited circumstances that do not apply to the search for diagnostic assistance.¹⁸⁹

Model Rule 1.7(b) provides in part that

[a] lawyer shall not represent a client if the representation of the client may be materially limited by the lawyer's responsibilities to another client or to a third person, or *by the lawyer's own interests*, unless (1) the lawyer reasonably believes the representation will not be adversely affected; and (2) *the client consents after consultation* . . .¹⁹⁰

185. Anderer, *supra* note 13, at 18 (endnotes omitted); see also Arnold J. Rossoff & Gary L. Gottlieb, *Preserving Personal Autonomy for the Elderly: Competency, Guardianship and Alzheimer's Disease*, 8 J. Legal Med. 1, 16 (1987) (noting the perfunctory nature of mental capacity assessments performed by physicians).

186. The Florida Guardianship statute provides that, upon the filing of a petition for guardianship, a three-member committee is to be appointed to examine the proposed ward. The committee must be comprised of at least one psychiatrist or other physician. In addition, another member of the committee must be a psychologist, a gerontologist, a registered nurse, a nurse practitioner, a licensed social worker, or a second psychiatrist or other physician. See Fla. Stat. Ann. § 744.331(3)(a) (West 1994).

187. Model Rules, *supra* note 12, Rule 1.6(a).

188. See *id.* Rule 1.8(b).

189. Disclosure is authorized "(1) to prevent the client from committing a criminal act . . . likely to result in imminent death or substantial bodily harm; or (2) . . . to respond to allegations in any proceeding concerning the lawyer's representation of the client." *Id.* Rule 1.6(b).

190. *Id.* Rule 1.7(b) (emphasis added).

When a lawyer who wonders if her client is partially or wholly incompetent consults a diagnostician, the lawyer arguably acts in her own interest and on her own behalf to the extent that she seeks to avoid disciplinary action or malpractice claims. It would be natural for a lawyer to believe that the client's representation would not be adversely affected and this belief might even be deemed reasonable. But this belief itself does not suffice. Because of the conjunctive language of Rule 1.7(b)(1) and (2), the client must also consent after consultation. Fearing¹⁹¹ the connection between inquiries into his cognitive or functional abilities and loss of liberty, the client may very well refuse consent. In that case, technically speaking, the lawyer may be required to withdraw pursuant to Model Rule 1.16, which says that "a lawyer . . . shall withdraw from the representation of a client if . . . the representation will result in violation of the rules of professional conduct . . ."¹⁹² But even if the client provides an objective manifestation of consent, it is difficult to see how the lawyer can rest comfortably on any assumption of its validity when doubts about the client's competency triggered the search for diagnostic assistance in the first place. The same problem arises if the lawyer seeks consent to disclosure of confidential information under Rule 1.6.¹⁹³ A lawyer's search for diagnostic assistance may be further hampered by the fact that the physician, in turn, faces similar professional ethics restraints on her ability to disclose confidential information regarding a patient.¹⁹⁴ Cooperation between medical and legal professionals in making competency assessments

191. See *infra* notes 196-205 and accompanying text.

192. Model Rules, *supra* note 12, Rule 1.16(a)(1) (emphasis added).

193. Cf. Murphy, *supra* note 45, at 915 ("It is therefore unclear whether a waiver of confidentiality can be considered voluntary, competent and informed when the purpose of the waiver is to obtain information relating to a client's possible incompetency."). Mr. Murphy also writes:

If a lawyer requests that his client submit to a medical examination concerning his mental well-being or that he release medical records pertaining to his mental competency, all the elements of a valid waiver are in dispute. The lawyer who is requesting a waiver due to questions he has concerning the mental capacity of his client cannot, with any logical consistency, assert that the client was positively competent enough to abdicate a known right, since the lawyer's original suspicion as to the client's ability to understand the nature of a legal transaction motivated the waiver request. This very suspicion naturally brings into question the client's ability to understand the right abdicated or the consequences of the disclosure.

Id.

194. *Accord id.* at 913. Mr. Murphy writes:

Section 9 of the American Medical Association's *Principles of Medical Ethics* tells a physician that he cannot reveal confidential patient information unless required by law or when necessary to protect the interests of the community or the individual. However, state statutes change rapidly in this field, and the definition of what is "necessary to protect the interests of the community" changes as the case law evolves. Although the American Medical Records Association lists 12 categories and 24 instances in which patient information can be used outside of medical treatment, competency determinations other than those for involuntary commitments are not addressed.

Id. (footnotes omitted).

will ultimately depend on the extent to which the drafters of the ethics rules for each profession can themselves cooperate in developing an inter-disciplinary approach to the problem.

Suggestions about relaxing the confidentiality barrier to permit cooperation between lawyers and medical professionals must not lose sight of the reason restrictions on the revelation of confidential information were enacted in the first place. A client is unlikely to communicate fully and frankly with his attorney (or his doctor) if the lawyer is free to reveal information gained in the course of the representation.¹⁹⁵

To appreciate the seriousness of the confidentiality problem in this context, one must consider the frame of mind of the elderly client who fears that inquiries into his mental health or functional abilities will eventually lead to guardianship and institutionalization.¹⁹⁶ As indicated earlier, "[g]uardianship in many ways is the most severe form of civil deprivation which can be imposed on a citizen of the United States."¹⁹⁷ Further, "[c]onservatorship and guardianship . . . result in heavy, or even a total, loss of autonomy. Enormous hostility is created within a family if someone charges that a parent has become mentally incapacitated."¹⁹⁸ Although limited guardianship is theoretically a promising reform, it has not proved as promising in practice. This is because most judges do not tailor guardianships and conservatorships to the specific needs and capacities of proposed wards, even when limited guardianship is available. As Professor Barnes explains

The reform of guardianship statutes is failing in a number of jurisdictions and in a number of different ways. . . . Insufficient funding, as well as lack of understanding and resistance to change is a significant problem because limited guardianship requires more time and effort on the part of judges, court personnel, counsel, and parties.¹⁹⁹

Moreover, "even if guardianship reform were fully implemented for every mentally impaired elderly person, it would not create a system of decision-making and care that fulfills its own goal of providing the least restrictive form of assistance."²⁰⁰

195. See Model Rules, *supra* note 12, Rule 1.6 cmt. 4 ("A fundamental principle in the client-lawyer relationship is that the lawyer maintain confidentiality of information relating to the representation. The client is thereby encouraged to communicate fully and frankly with the lawyer even as to embarrassing or legally damaging subject matter.")

196. Although an adjudication of incompetency is not the equivalent of institutionalization, the two are frequently treated together because the former so greatly increases the risk of the latter.

197. Rein, *supra* note 39, at 1825 (quoting Abuses, *supra* note 69).

198. Peter J. Strauss, *Elderlaw in the Nineties*, 1 Elder L.J. 19, 22 (1993).

199. Barnes, *supra* note 101, at 648-49.

200. *Id.* at 649. As Professor Barnes explains:

Competency proceedings either result in the appointment of a plenary or limited guardian, or the impaired person receives no assistance or ongoing protection from authorities. Yet, permanent guardianship may not be the optimum form of care. For many elderly impaired persons, a period of stabilization followed by a reliable program of assistance from family and friends might provide

Finally, no matter how much we reform our guardianship laws and practices to ensure that the ward gets real help and that the guardian's powers are appropriately limited, there is simply no way to completely remove the stigmatization and loss of self worth caused by a finding of total or partial incompetency or incapacity. As one ward lamented,

I cannot tell you how much worse my mental condition is since I have been a "thing" of the court's without rights. I want to die. I pray to die. There is no happiness in life—my life is over. I would prefer death to living as a guardianship zombie the rest of my life.²⁰¹

Small wonder, then, that most older individuals fear the imposition of guardianship, especially a guardianship that gives the guardian the power to change the ward's place of residence.

Even greater than the fear of guardianship is the fear of institutionalization:

Our elders desperately want to remain in their own homes, stay out of the nursing home, and keep their independence. . . . They do not view the nursing home as a place to get better; they view it as a harbinger of death—a dismal way station from which there is no escape but death.²⁰²

Nursing homes are one of the most pervasive sources of later-life anxiety:²⁰³

Even when care is considered adequate, older individuals may still find little in the nursing home experience to reassure them: for example, all too common is the image of residents whose days are spent parked in front of droning televisions, unable to participate in decisions about their own care and lacking in activities to keep them interested in daily life.²⁰⁴

enough support to allow the individual to make decisions necessary for life in the community. Often, the principal need is a change of housing, regular meals, and companionship to effect a significant improvement in capabilities. In order to make such services available under protective supervision, guardianship must become part of a system of long term care decision-making options and supportive services. Otherwise, it is likely that guardianship will be overused through imposition on competent persons who come to the court's attention, but need only practical, not decision-making, assistance, and underused, in services appropriate to their condition and needs, because they have no competent proxy decision-maker. Guardianship reform, therefore, is a necessary step in correcting the effects of ageism and providing appropriate rights to the disabled elderly. Guardianship reform alone, however, is not sufficient.

Id. at 649-50.

201. Jeffrey Good & Larry King, 'I Am Not a Criminal . . .', St. Petersburg Times, reprinted in Abuses, *supra* note 69, at 75.

202. Rein, *supra* note 39, at 1860-61.

203. See Paula J. Biedenharn, MA, & Janice B. Normoyle, PhD, *Elderly Community Residents' Reactions to the Nursing Home: An Analysis of Nursing Home-Related Beliefs*, 31 Gerontologist 107 (1991).

204. *Id.* at 107 (citations omitted).

How many of us have seen senior citizens in a nursing home—even a “nice one”—waiting for someone, anyone, to visit them?

Although many things (including family and financial pressures on persons needing long-term care) coerce people into institutions,²⁰⁵ the imposition of guardianship removes a major impediment to the imposition of institutional care. Even if the guardian's powers are initially limited, guardianship is often the first step in a dreary march to the nursing home. Not surprisingly, there is a great psychological connection in an older person's mind between the institution of guardianship proceedings and the imposition of institutional care. Moreover, this fear is well founded because the candidate for guardianship does not know in advance whether and how the guardianship might be limited.

If confidentiality barriers are relaxed to permit interdisciplinary cooperation without installing safeguards to allay justified client fears, clients may simply refuse to reveal what ails them to doctors or lawyers. What can be done to allow the questionably competent client to get diagnostic and therapeutic help without having to worry that the information the lawyer gives to the doctor (or vice versa) will trigger unwanted intervention, including guardianship proceedings and eventual institutionalization? Three possible approaches, none of them perfect, suggest themselves.

One approach, is for the lawyer to refrain from revealing the client's identity. But a major drawback is that the expert's diagnosis will be limited by those facts the lawyer deems relevant and can disclose without revealing her client's identity. In most cases, the lawyer could do little more than describe her client's behavior, lifestyle, eating habits, and, perhaps, medications. Such a hypothetical diagnosis does not permit the diagnostician, through examination or further testing, to determine the possibly correctable causes of the client's behavior. The hypothetical diagnosis will not, therefore, provide a platform for obtaining medical treatment to reverse, correct, or compensate for the treatable causes of the client's dysfunction. Another drawback, common to all three approaches, is that the diagnostician's conclusions may inspire the lawyer herself to bring about the institution of guardianship proceedings. This, of course, is what the client probably feared in the first place. Whether the lawyer should ever take this extreme step will be discussed below.²⁰⁶

Another way to minimize the dangers inherent in any relaxation of confidentiality barriers might be to promulgate a rule prohibiting the use of any information about the client's condition gained by anyone as a result of lawyer-diagnostician cooperation from being used as a basis for,

205. Rein, *supra* note 39, at 1854-55. For example, “in the case of one spouse caring for another, the Medicaid eligibility rules create compelling financial incentives for the ‘well spouse’ or ‘community spouse’ to institutionalize the impaired spouse before institutionalization becomes necessary or even desirable in noneconomic terms.” *Id.* at 1855 (citations omitted).

206. *See infra* text accompanying notes 227-49.

or evidence of, incompetency in any subsequent proceeding. Again, although the Model Rules might suggest such an approach by expanding notions of privileged information, making the prohibition enforceable would require changes in the rules of procedure and evidence regarding proceedings for the imposition of conservatorship, guardianship, institutionalization, and similar interventions.

A third approach, usable in conjunction with the second, might be to promulgate a special ethics rule permitting elderlaw attorneys to associate with physicians, psychiatrists, gerontologists, psychologists, social workers, nutritionists, and others in a multidisciplinary practice with the environment and services most needed by older individuals provided under one roof. Such a rule would have several benefits. It would acknowledge that a monolithic, "one-size-fits-all" set of rules governing professional behavior cannot address the very real, special needs of certain types of legal practice. It would allow the older client to obtain a coordinated approach to his care and to receive many of the services he needs under one roof so that he need not exhaust himself and others by travelling here, there, and everywhere for help. It might also simplify paperwork and save money. Finally, it would address, in a practical way, the problem of getting diagnostic and therapeutic assistance to the client without triggering the ill effects of relaxing confidentiality rules. If all members of the diversified practice and their assistants were bound by the same rules of confidentiality, there would be no leakage of confidential information outside the practice. Confidentiality could be maintained the same way that medium and large law firms maintain confidentiality. More importantly, if diagnosis and therapy (*i.e.*, counseling, drug monitoring, social assistance, nutritional and physical therapy) were provided in a caring manner within the same practice, the need for conservatorship, guardianship, or *de facto* guardianship might be completely obviated in many cases.

The need for a multidisciplinary approach to elderlaw problems is gaining increased recognition. As Porter and Affeldt explain,

What is manifested as a legal problem often begins as a personal or family problem. Resolution of the legal aspects may not alleviate the psychological pain a client experiences. In addition, lawyers are not traditionally trained—nor should they be—to counsel clients with psychological problems. There are many other occupations that work with the elderly that complement the work of attorneys, such as social workers, psychologists, counselors and other therapists. Other professions are usually more experienced in dealing with the older person who needs assistance in applying for entitlement benefits, planning for disability or health care needs, or who is mourning the loss of a spouse. The attorney is the one who is trained to follow through with legal-related questions at administrative and judicial hearings, drawing up a durable power of attorney, and advising on crucial issues such as

spousal impoverishment.²⁰⁷

The current rules of professional conduct present many obstacles to law firm diversification.²⁰⁸ Any rule permitting diversification by elderlaw attorneys should be carefully drafted to address legitimate concerns about potentially conflicting loyalties, improper solicitation, and improper use of information. Law firm diversification as a general proposition has been the subject of heated debate with various proposals being alternately installed and rescinded.²⁰⁹ Whatever may be the pros and cons of law firm diversification generally (and I take no stand in that battle here), diversification in the elderlaw context deserves careful consideration.

4. What Can the Lawyer Do Within the Competency Construct if She Believes Her Client Is Incompetent?

As already noted,²¹⁰ a lawyer who is not qualified—by training or experience—to deal with the questionably competent client may sometimes have a duty to refer the client to an attorney who is so qualified. In situations that do not fall within this category, the lawyer may be tempted to refuse a case or to withdraw from an existing attorney-client relationship. Model Rule 1.16(a)(1) requires a lawyer to decline or terminate representation “if . . . the representation will result in violation of

207. Porter & Affeldt, *Legal Services Delivery Systems: An Overview of the Present and a Look at the Future*, in *Aging and the Law: Looking into the Next Century* (AARP 1990). I am indebted to Professors Frolik and Barnes for bringing this source to my attention.

The Washington, D.C. Rules of Professional Conduct currently permit lawyers to associate professionally with nonlawyers, albeit with restrictions. It provides:

A lawyer may practice law in a partnership or other form of organization in which a financial interest is held or managerial authority is exercised by an individual nonlawyer who performs professional services which assist the organization in providing legal services to clients, but only if:

- (1) The partnership or organization has as its sole purpose providing legal services to clients;
- (2) All persons having such managerial authority or holding a financial interest undertake to abide by these rules of professional conduct;
- (3) The lawyers who have a financial interest or managerial authority in the partnership or organization undertake to be responsible for the nonlawyer participants to the same extent as if nonlawyer participants were lawyers under Rule 5.1;
- (4) The foregoing conditions are set forth in writing.

Washington, D.C. Rules of Professional Conduct Rule 5.4(b) (1990).

208. For a discussion of the Model Rules which hinder law firm diversification, see Gary A. Munneke, *Dances with Nonlawyers: A New Perspective on Law Firm Diversification*, 61 *Fordham L. Rev.* 559, 565-67 (1992) (discussing Rule 5.4 (professional independence of a lawyer), Rule 5.5(b) (a lawyer may not assist another in the unauthorized practice of law), Rule 7.2(c) (a lawyer may not compensate a person for recommending the lawyer's services), and Rule 7.3 (a lawyer may not solicit, in person or via live telephone contact, prospective clients for pecuniary gain)).

209. For a thorough discussion of the debate and the history of various American Bar Association proposals, see *id.* at 579-84.

210. See *supra* notes 153-54.

the rules of professional conduct”²¹¹ Rule 1.16(b) permits a lawyer to withdraw if the “client insists upon pursuing an objective that the lawyer considers repugnant or imprudent”²¹² or if “the representation will result in an unreasonable financial burden on the lawyer or has been rendered unreasonably difficult by the client”²¹³ A reading of Rule 1.16(b) in its entirety indicates (because of the “or if” language immediately preceding the numbered subsections) that a lawyer may withdraw under subsections (3) and (5) even if this would adversely affect her client’s interests.

This license to get rid of a costly or difficult client may be appropriate for clients who are reasonably healthy and self-motivated. But an enfeebled or questionably competent client may have greater need for legal assistance yet lack the vigor or focus to pursue it. I have the utmost sympathy for a lawyer’s desire to rid herself of the headache of representing a questionably competent client with self-destructive or extremely selfish impulses. But, considering the needs of such a client, I cannot recommend that the lawyer decline or withdraw from representation. Such responses irresponsibly deny access to legal services to those who need them most and typically accomplish nothing other than getting the lawyer off the hook while possibly passing the problem on to another lawyer who may also pass the buck, eventually leaving the client without any lawyer at all. Ironically, however, a literal reading of Rule 1.16(a) may require withdrawal because attempts to represent clients under Rule 1.14 may, as noted earlier,²¹⁴ entail breaches of mandatory rules concerning loyalty and confidentiality.

The Conference Working Group on Capacity, addressing the issue of attorney withdrawal, recommended expanding the comment to Rule 1.14 to state that “where capacity comes into question, preference should be given to staying with the situation and taking protective action over withdrawal from the case.”²¹⁵

Apart from refusal to take the case or withdrawal, once the lawyer determines her client is either totally incompetent or incompetent within a given sphere, her major options under the Rules are to either act as *de facto* guardian or to seek a partial or total determination of incompetency via conservatorship or guardianship proceedings. Either option is fraught with impossible practical and ethical dilemmas, including potential breaches of the Rules concerning the duties of confidentiality and loyalty. As Professor Tremblay comments,

[The position of a] lawyer representing an incompetent client without a guardian . . . is plainly far more difficult and wrought with internal contradictions than either the Rule or the Comment is willing to rec-

211. Model Rules, *supra* note 12, Rule 1.16(a)(1).

212. *Id.* Rule 1.16(b)(3).

213. *Id.* Rule 1.16(b)(5).

214. *See supra* part III.B.3.

215. *Report of Working Group*, *supra* note 152, at 1007.

ognize. . . . It is in fact a classic moral dilemma—each option available to the lawyer has conflicting moral considerations. The Rule should assist in resolving this dilemma, but it fails. The Rule seems to sacrifice confidentiality and loyalty, as well as the concomitant “adverse [e]ffect” on the client’s interest, in favor of a principle of benign paternalism without explaining why or when the Rule is triggered.²¹⁶

The lawyer’s most drastic option is to seek the appointment of a guardian for her client, but “only when the lawyer reasonably believes that the client cannot adequately act in the client’s own interest.”²¹⁷ Comment 3 to Rule 1.14 encourages the lawyer to take this step “where it would serve the client’s best interests.”²¹⁸ Again, the problem of attorney bias in deciding what is in the client’s best interests arises. Even good-faith resort to the client’s lifetime commitments and values may prove illusory because individuals’ values (or, at least, value emphases) change as they age. A lawyer’s natural desire for convenience and protection against liability also raises concerns about potential breaches of the duty of loyalty. Moreover, when a lawyer exercises her discretion to seek appointment of a guardian, she clearly runs afoul of mandatory rules forbidding disclosure of confidential information.

The American Bar Association’s Committee on Ethics and Professional Responsibility addressed the confidentiality issue in an Informal Ethics Opinion.²¹⁹ The opinion recognized that it would be impossible to seek the appointment of a guardian without disclosing the facts leading to suspicion about the client’s competency. At a minimum, such facts would have to be disclosed to the court and to any expert witnesses needed to aid the court in making its determination.²²⁰ The drafters of the opinion finessed this problem by concluding that disclosure to a court or expert witness must be “impliedly authorized” within the meaning of Rule 1.6 in order to seek appointment of a guardian.²²¹ Considering client fears about guardianship and institutionalization,²²² I cannot believe that this conclusion amounts to anything more than wishful thinking.²²³ As Professor Tremblay bluntly observed,

216. Tremblay, *supra* note 11, at 547 (footnotes omitted).

217. Model Rules, *supra* note 12, Rule 1.14(b). When Rule 1.14(b) was first drafted, it was drafted as an *obligation* to seek appointment of a guardian. The permissive “may” language was adopted before the final draft version. See Devine, *supra* note 54, at 499.

218. Model Rules, *supra* note 12, Rule 1.14 cmt. 3.

219. See ABA Comm. on Ethics and Professional Responsibility, Informal Op. 1530 (1989).

220. *See id.*

221. *See id.*

222. *See supra* notes 196-205 and accompanying text.

223. To clarify this ambiguity in the Model Rules, the Conference Working Group recommended that the following language be added as Rule 1.14(c):

While it might be necessary to disclose information, the disclosure should be strictly limited to that which is necessary to accomplish the protective purpose.

Report of Working Group, supra note 152, at 1013. This amendment at least tells the attorney what she can do rather than forcing her, at great risk, to divine the meaning of the current delphic rules. But the question remains whether it is good policy, considering

A lawyer's decision to impose guardianship on a client without his consent or understanding is particularly difficult to justify given the lawyer's obligations of loyalty and zeal. . . . [V]iewed from its harshest perspective, the process looks like this: the client hires the lawyer to serve as his loyal agent and confidante; the lawyer promises him that those expectations are warranted and will be fulfilled; the lawyer then uses her client's confidences to bring a court proceeding that will deprive him of all his rights, and will require him to obtain another lawyer to defend against it; and all the while the lawyer plans to resume representing him once this distraction is over. This representation is obviously chock full of direct ethical violations.²²⁴

Two proposals designed to guide attorneys through this ethical quagmire emerged from the Conference Working Group deliberations. One is a recommended Practice Guideline, suggesting that the guardianship system be used only as a last resort.²²⁵ The other, entitled "Comments on Changes," states in relevant part:

2. If the lawyer takes protective action under Model Rule 1.14(b), the lawyer's action shall be guided by:
 - a. The wishes and values of the client to the extent known; otherwise according to the client's best interest.
 - b. The goal of intruding into client's decision-making autonomy to the least extent possible.
 - c. The goal of maximizing client capacities.
 - d. The goal of maximizing family and social connections and community resources.²²⁶

An often overlooked issue in the ethics debate is whether—even if the client's condition theoretically warrants guardianship—the treatment of wards under guardianship or conservatorship in practice is decent enough to make guardianship a morally permissible option. In principle, a "protected person's well-being is the sole modern justification of the state's power as *parens patriae* to appoint a guardian or conservator of that person."²²⁷ Yet, the imposition of guardianship or conservatorship

client fears of triggering questions regarding competency, to authorize even limited disclosures without providing safeguards along the lines discussed earlier.

224. Tremblay, *supra* note 11, at 560-61.

225. The recommended practice guideline states:

The lawyer should refer or petition for guardianship of the client only if there are no other appropriate alternatives. The lawyer should act as petitioner only if there is no one else available to act. The use of the guardianship system should be limited to the greatest extent possible.

Report of Working Group, supra note 152, at 1009-10.

226. *Id.* at 1009.

227. Rein, *supra* note 39, at 1870. Despite overlapping at times,

[t]he state's police power should be distinguished from its power, as *parens patriae*, to protect the well-being of individual citizens unable to care for themselves. While the police power may be exercised to the detriment of the individual if a substantial public benefit is to be achieved thereby, the individual's well-being is the sole justification for the exercise of the state's authority as *parens patriae*.

"often strips away decisionmaking power with little or no corresponding effort at positive therapy to restore lost capacity or preserve and enhance remaining capacity. As one probate judge put it: "I don't know where the wards are, who's caring for them, what they're doing . . ."228

Wards are frequently relegated to institutional settings where they suffer from overmedication, physical restraints, and sensory deprivation for the convenience of the staff and for the sake of minimizing costs. As one court noted in the context of a civil commitment proceeding, "[t]o deprive any citizen of his or her liberty upon the altruistic theory that the confinement is for humane and therapeutic reasons and then fail to provide adequate treatment violates the very fundamentals of due process."²²⁹

Another concern is that guardianships and conservatorships often serve the convenience and other interests of third parties rather than the interests of the ward or conservatee.²³⁰ For instance, hospitals, adult residential facilities, nursing homes, and other third parties sometimes "resort to conservatorships and committee proceedings primarily as vehicles for monetary collection of outstanding bills and/or to evict the elderly and disabled from their facilities."²³¹

Peter M. Horstman, *Protective Services for the Elderly: The Limits of Parens Patriae*, 40 Mo. L. Rev. 215, 221 (1975).

228. Rein, *supra* note 39, at 1871 (citing Abuses, *supra* note 69, at 14 (citing Fred Bayles & Scott McCartney, *Guardianship Systems Often Victimize Their Wards*, L.A. Daily J., Sept. 25, 1987, at 6)).

I have previously examined cases involving the stripping away of decision-making power.

In one case, guardians of 72 year-old Henry McIver allowed his return to his fire-damaged home. Mr. McIver was found two months later, delirious and still living in the house without edible food, running water, or electricity. In another case, 85-year-old Florence Peters was declared incompetent when her health problems overwhelmed her husband's ability to cope. She was institutionalized without visitation from her husband until her death despite winning back her civil rights. . . . [B]oth Peters' husband and her guardian were unable to attend her funeral because they were honeymooning together in upstate New York. In a third case, the guardian—and wife—of 62-year-old Donald cut him on the face and neck with a broken drinking glass because he refused to go to bed. The woman had a history of alcohol abuse and emotional problems.

Rein, *supra* note 39, at 1871-72 n.256 (citations omitted).

229. Horstman, *supra* note 227, at 268 (quoting Wyatt v. Stickney, 325 F. Supp. 781, 785 (M.D. Ala. 1971), *aff'd in part, remanded in part and decision reversed in part sub nom.* Wyatt v. Aderholt, 503 F.2d 1305 (5th Cir. 1974)). "Although this was a civil commitment case, the comment is equally apposite in the context of probate conservatorships." Rein, *supra* note 39, at 1872 n.25.

230. See Winsor C. Schmidt et al., *Public Guardianship and the Elderly* 12-13 (1981); George J. Alexander, *Who Benefits from Conservatorship?*, Trial, May 1977, at 30, 31-32; see also Horstman, *supra* note 227, at 221-22 (discussing the possibility that the system might consider the interest of the general public instead of the interest of the ward).

231. Georgina D. Vassiliou, *Another View of Conservatorships*, N.Y. L.J., Jan. 17, 1990, at 1, 1. Other commentators also have focused on monetary motivations behind the imposition of guardianships:

Kapp and Bigot identify two basic motives underlying a third-party petition for guardianship. The first is altruism, "a sincere desire to protect and benefit a

Relatives of the proposed ward constitute the largest group of third-party petitioners. These relatives sometimes have difficulty separating their own interests from those of the proposed ward. Adult children, for example, may fear that Mom or Grandma is slipping and that her assets, including the inheritance, are threatened by frivolous purchases, generous gifts, or mismanagement.²³²

In addition to the more obvious examples of conflicting interests based on business concerns or inheritance expectancies,²³³ one also suspects that many well-meaning petitioners seek ultimate decisionmaking power simply because guardianship provides a more convenient vehicle for helping another than does the more cumbersome procedure of having to obtain that person's consent every time a helpful action is planned. As Professor George Alexander put it, "avarice is hardly the only motivation leading to the imposition of conservatorships or guardianships that may not be in the ward's interest. Convenience is another and the state is not the only petitioner seeking it."²³⁴

These practices can result in "the imposition of conservatorships on persons whose disabilities are purely physical."²³⁵ This can in turn result in "inappropriate placement into nursing homes or other state institutions where some outside assistance at the residence might have forestalled the need for the eviction."²³⁶

helpless human being." The second is pragmatism; service providers may refuse to undertake the care of a person of questionable competence unless there is a legally recognized guardian who can give consent for treatment and *assure compensation for services rendered*.

Rosoff & Gottlieb, *supra* note 98, at 15 (citations omitted) (emphasis added).

232. Rein, *supra* note 39, at 1828. For a discussion of cases that arrived at determinations in a circular manner, see *supra* notes 83-89 and accompanying text.

233. See, e.g., *supra* notes 83-89 and accompanying text (describing cases involving conservatorship).

234. Alexander, *supra* note 105, at 13. Specific examples given by Professor Alexander are instructive:

Surrogate management is, however, much more convenient. By obtaining the right to sign for the ward, state agencies are relieved of many burdensome approvals. Competent persons must consent to many plans devised supposedly for their benefit. For example, they must consent to treatment, to being moved to another facility, to giving up rights to sue those who harm them. They must also acknowledge receipt of appropriate services. If competent, they might, for example, refuse to acknowledge having received medical treatment if they were hastily dismissed by the treating state-paid physician. Once the state obtains the legal right to sign for its patient, however, it can provide the missing consent and give the withheld acknowledgements [sic]. It can relieve itself of the safeguards that are supposed to guarantee proper service.

Id. at 12-13.

235. Rein, *supra* note 39, at 1829.

236. Vassiliou, *supra* note 231, at 1.

Convalescent homes, for example, often refuse admission to physically impaired persons unless they are represented by a guardian. Due to the high demand for, and the low availability of, space in convalescent homes, these homes have been able to extract guardianship as the price of admission, even though it is not legally required.

Once placed under guardianship or conservatorship, a ward may have scant protection against abuse by his own guardian or conservator, who is armed with the power to manage or to dispose of the ward's assets. It is true that some "[s]tatutes, particularly those enacted in the more progressive states, fairly bristle with so-called safeguards against self-dealing by guardians and conservators. Accounts, reports, and inventories must be filed, investigations must be made and court approvals obtained."²³⁷ "[B]ut the typical understaffed and overworked bureaucracy can hardly keep up with all of these tasks in a meaningful way."²³⁸ There is simply no guarantee that the fiduciary will not steal or dissipate the property before anyone catches up with him via accounting or removal procedures. "Most private guardians and conservators lack fiduciary experience, and some tend 'to act as if the money belonged to them. After all, they are often the heirs of the ward; they are waiting in the wings and see no harm in treating the money as if it were already theirs.'"²³⁹

Even if the fiduciary is honest and competent,

the ward may receive but scant attention from her guardian, who may conceive the guardian's role as providing for the ward in a technical sense rather than providing personal comfort and attention. The problem is particularly acute in public guardianship cases. Although one expert recommends that a guardian should not be responsible for more than [thirty] wards at a time, public guardians may have caseloads of 150 to 200 wards. The average caseload of public conservators in Sacramento County, California, is sixty-five. Even professional guardians who bill their wards up to [sixty-five] dollars an hour may supervise 300 to 400 cases at any given time.²⁴⁰

Rein, *supra* note 39, at 1829-30. Consider one telling illustration:

People familiar with the practice in San Mateo County describe the following situation: a person is no longer able to live alone, is unsupervised, has fallen, or has suffered injuries. A convalescent hospital is the proper placement, but some convalescent homes refuse to accept such people without a conservatorship. They want to deal with a representative who has legal authority. Conservatorship thus becomes part of the placement process. *In some cases, this may reflect a kind of prejudice (probably unconscious) against the elderly. It is unlikely that the hospital would think in terms of a conservatorship if the impaired person were 35, or perhaps even 50. A 30-year-old woman in a wheelchair is not seen with the same eyes as a frail 85-year-old sitting in the same wheelchair.*

Friedman & Savage, *supra* note 81, at 286-87 (footnote omitted) (emphasis added). "It is inappropriate to withdraw decisionmaking powers from persons who are mentally capable simply because they are too physically injured or impaired to personally execute their decisions." Rein, *supra* note 39, at 1829-30 (citing Friedman & Savage, *supra* note 81, at 283-84).

237. Rein, *supra* note 39, at 1839. See generally Sally B. Hurme, Steps to Enhance Guardianship Monitoring (1991) (recommending changes to current legal constraints on guardians); Penelope A. Hommel et al., *Trends in Guardianship Reform: Implications for the Medical and Legal Professions*, 18 Law, Med., & Health Care 213 (1990) (discussing current monitoring requirements and proposing ten steps to a new monitoring system).

238. Rein, *supra* note 39, at 1839.

239. *Id.* at 1839 (quoting Friedman & Savage, *supra* note 81, at 285-86).

240. *Id.* at 1881-82 (citations omitted).

If a client cannot communicate at all, even after every encouragement to do so, of course someone must be appointed to make decisions for him. But if the client is capable of communication and has shown no desire to have a guardian appointed, I cannot recommend that any lawyer seek guardianship unless and until guardianship reforms aimed at providing personalized help for, and real accountability to, the ward become universally effective, not only in the enactment but also in the real life implementation by caregivers, guardians, judges, and lawyers. Even then, guardianship should be the choice of last resort after all other options have been thoroughly explored.²⁴¹

If the only choices are between acting as *de facto* guardian or triggering formal guardianship proceedings against one's client, the former is the less drastic and more humanly appealing option. But neither option is satisfactory. "The Model Rules do not define '*de facto*' guardianship, but logically it means that the attorney makes decisions for her client, much as a guardian would."²⁴² The Model Rules' concept of *de facto* guardianship is potentially broad enough (or, at least, vague enough) to include authority to make major legal decisions.²⁴³

Compared to formal guardianship, *de facto* guardianship has several virtues. It permits the lawyer to take immediate action to prevent irreparable harm that may occur before a formal guardian can be appointed.²⁴⁴ Most importantly, *de facto* guardianship avoids the traumatization and public stigmatization produced by formal guardianship proceedings. It is less intrusive and, at least formalistically, less permanent. It also "deals with the needs of impoverished seniors for whom guardianship is impractical, since little money is involved."²⁴⁵

Notwithstanding its practical benefits, *de facto* guardianship remains a perilous option for both lawyer and client. As indicated earlier, the rules do not state any basis, recognized or otherwise, for the representation to continue without authorization by a competent client.²⁴⁶ This problem

241. In addressing this concern, the Conference Working Group on Capacity proposed adoption of the following practice guideline:

The lawyer should refer or petition for guardianship of the client only if there are no other appropriate alternatives. The lawyer should act as petitioner only if there is no one else available to act. The use of the guardianship system should be limited to the greatest extent possible.

Report of Working Group, supra note 152, at 1009-10.

242. Tremblay, *supra* note 11, at 570.

243. *See id.* at 574.

244. *See* Peter Margulies, *Access, Connection, and Voice: A Contextual Approach to Representing Senior Citizens of Questionable Capacity*, 62 *Fordham L. Rev.* 1073, 1087-88 (1993) (p.39 nn. 60-62 and accompanying text).

When feasible, however, I prefer my "time out" solution for emergency situations because this gives the client himself time to calm down and, perhaps, make a better decision after counseling and further reflection. *See supra* text accompanying notes 168-69.

245. Margulies, *supra* note 244, at 41. For a good summary of the benefits of *de facto* guardianship, see Tremblay, *supra* note 11, at 571-72. Note that Professor Tremblay ultimately rejects *de facto* guardianship as a responsible option.

246. *See* discussion *supra* notes 127-39 and accompanying text.

might be minimized if the rules did not focus so exclusively on the competency question, as if competence were some reified thing that the client either is or is not within a given sphere. Alternately, Rule 1.14 could explicitly state a different theory—be it an expanded notion of the lawyer's obligations as officer of the court or treating the situation as the client—for the lawyer's authority to act.²⁴⁷ But the lack of enforceable safeguards to protect the client's legitimate autonomy interests within the privacy of the attorney-client relationship would remain a problem. To be sure, most lawyers would act in good faith. But a well-meaning attorney can easily fail to recognize her own biases and conflicting interests, especially when she believes she is "helping" her client. As Professor Tremblay notes, there is a "tendency, especially of lawyers, to be paternalistic in dealing with less 'capable' persons."²⁴⁸ Some lawyers are very respectful of a challenged client's choices—even if they differ from what the lawyer would choose. Others are not. There is no reliable way of knowing what goes on within the privacy of the attorney-client relationship. Ensuring accountability, predictability and uniformity of treatment under these circumstances seems impossible. Some might object that the client can always discharge his lawyer. But Comment 6 to Rule 1.16 observes that "[i]f the client is mentally incompetent, the client may lack the legal capacity to discharge the lawyer" *De facto* guardianship might, therefore, turn out to be as permanent and irreversible as many formal guardianships.

In the final analysis, deciding between *de facto* guardianship in its present unrestricted form and formal guardianship is like choosing between Scylla and Charybdis.²⁴⁹ Therefore, I suggest new directions and mechanisms for avoiding the harm threatened by self-destructive or socially destructive client impulses.

IV. BEYOND THE COMPETENCY CONSTRUCT

*[A]ny process or form of representation must take account of both the individual and his or her ongoing relationships within a family and a community.*²⁵⁰

The overarching goal of this Article has been to direct our efforts away from finding people incompetent when moral and societal dilemmas arise and toward finding other solutions, while still offering real help. No matter how it is phrased or how it is sugar-coated, a determination of incom-

247. See *Report of Working Group*, *supra* note 152, at 1011-13.

248. Tremblay, *supra* note 11, at 576.

249. A Conference Working Group proposal entitled "Comments on Changes" seeks to restrict the scope of *de facto* guardianship by admonishing that:

If the lawyer decides to act as *de facto* guardian, he or she, when appropriate, should seek to discontinue acting as such as soon as possible and to implement other protective solutions.

Report of Working Group, *supra* note 152, at 1009.

250. Watson, *supra* note 118, at 864.

petency—even within a limited sphere—is the ultimate denial of autonomy and personal dignity. Once appointed, the guardian or *de facto* guardian, acting within her sphere of power, can do and consent to all sorts of things in her ward's name. Even if applicable law requires consultation, the surrogate decision-maker can still override the ward's wishes if she finds them unfeasible or "unreasonable."²⁵¹

My search is for solutions that do not require a finding of incompetency for their implementation. Such solutions leave the individual, even if interfered with on a particular occasion, with his rights still intact and with the ability to come back and fight another day if need be. This approach encourages more personal and higher quality care for our elders because individuals who are not declawed by incompetency determinations can demand greater solicitude and accountability from those who are supposed to be helping them.

This phase of the discussion invites those who struggle with the intractable issues explored so far to consider a different focus and approach, exploring possible ways to resolve moral and societal dilemmas without questioning the client's competency or interfering with his autonomy any more than we would or should interfere with the autonomy of a competent adult who made the identical decision. This inquiry revolves around two distinct but overlapping issues:

1. When is it appropriate, from a social policy viewpoint, to interfere with individual decisions and activities even if the decisionmaker is competent or minimally competent? What factors should we consider in deciding where to draw the line?

2. Can we develop mechanisms that do not require a finding of incompetency for their implementation but nevertheless mitigate or eliminate the harmful effects of a client's destructive choices without impairing the essence of his autonomy?

Our exclusive use of the competency construct to determine when and how to interfere with individual choice has prevented us from developing guidelines for interference that are based on social policy considerations. This exclusive focus has also deterred us from developing more discriminating and less intrusive mechanisms for dealing with destructive and antisocial choices.²⁵² Thus, in venturing beyond the competency con-

251. Fla. Stat. § 744.3215 (West 1986 & Supp. 1994) states, for example, that [a] person who has been determined to be incapacitated retains the right . . . [t]o remain as independent as possible, including having his preference as to place and standard of living honored, either as he expressed or demonstrated his preference prior to the determination of his incapacity or as he currently expresses his preference, *insofar as such request is reasonable*.

Id. (emphasis added).

252. Some reforms aim to make interventions less intrusive in a mechanical sense. But my premise here is that telling someone he or she is incompetent and cannot make certain decisions within a given sphere is the most intrusive thing—short of inflicting serious bodily injury—that one person can do to another. As I stated elsewhere,

[o]ne of the major substantive reforms has been the requirement that the court

struct, I find very little direct precedent to work with. Although some suggestions are an easy extension of existing precedent, others may appear to be made out of whole cloth. The discussion that follows assumes that client counseling has not produced the desired result.

A. *General Guidelines for Interference Versus Noninterference*

Notwithstanding some ambivalence about specific proposals, I offer the following guidelines for determining when society's interest in honoring the decisions of adults, competent or not, is outweighed by other vital societal interests. My starting premise is that interference with individual decisionmaking is warranted only to protect third party or societal interests when, in the particular situation, they are of higher social importance than untrammelled decision-making itself. In saying this, I am the first to acknowledge that in any weighing process, society's interest in allowing individuals to make their own decisions is, in and of itself, entitled to enormous weight. As a general proposition, individual autonomy is its own virtue.²⁵³

An additional and more concrete reason for respecting the wishes of our elders lies in the findings of psychiatrists, gerontologists, psychologists, and environmental psychologists to the effect that "the mental health of many elderly individuals deteriorates greatly when they are denied the opportunity to make their own choices and [to] exert control over their own lives."²⁵⁴

authorize only the least restrictive alternative in sanctioning various kinds of intervention. . . .

Although the least-restrictive-alternative approach seems facially reasonable . . . it is fundamentally flawed. One problem is that the least restrictive alternative requirement does not . . . insist that the intervenor better the [challenged individual's] situation by taking positive steps to improve [his] health, restore or enhance [his] mental powers, make [him] subjectively happier, or at least prevent further emotional deterioration. The least restrictive alternative may simply be the least restrictive of several existing choices, all of which may well be miserable and dehumanizing. Moreover, like the "best interests" model, what constitutes the least restrictive alternative can be determined by reference to the values of the decisionmaker or the so-called reasonable person rather than the subjective needs and values of the [challenged individual].

Rein, *supra* note 39, at 1882-83.

253. As one judge observed,

The fact that someone else might, or could make better choices is not the point. In a constitutional system such as ours which prizes and protects individual liberties to make decisions, even bad ones, the right to make those decisions must be preserved. . . .

. . . .
The integrity of the elderly, no less than any other group of our citizens, should not be invaded, nor their freedom of choice taken from them by the state simply because we believe that decisions could be "better" made by someone else.

In re Fischer, 552 N.Y.S.2d 807 at 813 n.17, 815 (N.Y. Sup. Ct. 1989).

254. Rein, *supra* note 39, at 1836. Loss of control can produce serious depression. See Brickner, *supra* note 56, at 193. Even rats decompensate when they lose control of a situation. See *supra* note 56.

Having acknowledged that one of our most cherished policies is that of preserving individual autonomy, I cannot blind myself to the fact that there are many other policy concerns of high magnitude in our galaxy of ideals. Were this not so, there would be no such thing as land use regulation, regulation of business practices, smoking bans in public areas, helmet laws, safety regulations, insurance requirements, and a host of other limitations on personal autonomy. Moreover, as resources become more scarce and our society more interdependent, policies promoting cooperation with and concern for others are assuming increasing importance by sheer necessity. This assortment of policies might be viewed as subparts of a broad policy of ensuring the health and very survival of our society. To say that this is a policy of the highest magnitude understates the obvious.

In deciding whether or not societal interference with a client's decision (regardless of competence) is warranted, the central inquiry should be whether or not the proposed decision is seriously unfair or detrimental to other individuals or society at large. Factors to consider include:

1. Does the client's chosen course of action threaten serious bodily injury to others?

If so, interference of some sort is probably warranted.

2. Will it seriously invade the rights, health, resources, and welfare of others?

Society has an interest in protecting the rights and well-being of its members. Therefore, protecting individuals against invasion of their rights and resources is, in and of itself, an important societal interest. Here, we must distinguish between client actions that merely withhold a benefit (e.g., an inheritance or gift) and actions that affirmatively invade another's rights and resources by demanding that they confer a benefit or accept a detriment as the price exacted to accommodate the actor's untrammelled autonomy. Actions that merely withhold a benefit do not warrant intervention on an individual basis unless, perhaps, they usurp some equitable ownership claim in the heir apparent. Even then, lifetime intervention is usually unnecessary because the surviving equitable owner or his estate can often assert a claim to part of the willmaker's estate. Moreover, society can seek improvement of forced share and family maintenance concepts by developing more sophisticated measures of general application aimed at protecting the legitimate needs and expectations of certain survivors.

3. Will those whose interests will be adversely affected learn about the threat in time to take self protective action?

If so, interference is probably unnecessary (although it may be desirable), at least when threatened third parties have the resources to protect their interests. If not, it may be necessary to at least alert those potentially

affected to the threatened action.²⁵⁵

4. Is the harm threatened by the client's action irreparable or extremely difficult to reverse?

As the risk of irreversibility increases, so does the case for interference with the client's decision.

5. Even if the threatened harm in a given case is relatively insubstantial, will similar decisions in the aggregate place such a serious strain on the public treasury that resources for important public needs will become unavailable?

The existence of this factor may not, in itself, warrant interference, but if there are other factors that suggest a need for action, this factor may tip the scales in favor of intervention.

By listing these factors, I do not suggest that intervention is warranted every time a client plans something that is distasteful or detrimental to other individuals or to society in general. Each case must be judged on its specific facts.

In the assessment process, a countervailing consideration of enormous importance is how integral the decision in question is to the client's most intimate life and values. The closer the decision is to the client's heart and privacy, the less we should be willing to interfere with it even if the client's decision imposes some hardship and consternation on others. Decisions about living arrangements and choice of friends should be the client's to make. Decisions of this nature require special caution and restraint by those who are tempted to interfere. Consider the following examples.

An elderly person may, like many younger individuals,

choose to gamble or to spend money in ways others deem frivolous. He or she may choose to buy companionship by lavishing funds on a companion whose friendship is motivated by avarice. Such practices should not provide grounds for intervention [unless the rights and resources of others are seriously invaded as a result]. However frivolous the expenditures or distasteful the motives of the companion, the individual may derive a great deal of pleasure, support, and care] from the arrangement.²⁵⁶

In such cases, there should be an extremely strong presumption against interference.

On the other hand, one cannot "ignore the reality that unscrupulous business organizations and individuals sometimes prey on trusting elders—particularly those with poor eyesight or impaired hearing—by employing fraud, misrepresentation, and half-truths to relieve them of their money without offering corresponding gratification."²⁵⁷ As Dr. Kapp

255. This could not be done without authorizing, in special circumstances, some departure from the current rules regarding confidentiality.

256. Rein, *supra* note 39, at 1874.

257. *Id.* at 1874.

put it, "The older person's right to choose should not be confused with 'the right to be ripped off.'"²⁵⁸ Business organizations and strangers who prey on vulnerable individuals are not close to the heart or intimate life of their victims. Intervention to prevent such strangers from profiting from their dishonest tactics seems more supportable than intervention that deprives the client of companionship even when the companion is no angel.

Although it is extremely difficult, if not impossible, to devise an approach that will distinguish in every situation between expenditures that bring substantive gratification—which should be allowed without interference—and expenditures that merely fleece the individual of his property with little or no compensatory benefit, the effort should be made.²⁵⁹

Taking another example, suppose that a client who has a tendency to fall or to wander prefers to remain at home unattended, notwithstanding the risk of a harmful or fatal accident, rather than to submit to the lack of privacy and stripping of individuality that occurs upon entering an institution. His lawyer should make every effort to ensure that this wish remains a reality even if the client's family suffers anxiety and inconven-

258. Marshall B. Kapp, *Medical Empowerment of the Elderly*, Hastings Center Rep., July-Aug. 1989, at 5.

259. Rein, *supra* note 39, at 1874. As I further explained,

[m]y approach is to limit intervention to situations calling for the protection of vital societal interests and even then, by regulating the unscrupulous third party rather than by placing the individual under guardianship or conservatorship. If, for example, a sales organization, insurance salesperson, or other stranger extracted money or property by criminal, tortious, or highly unscrupulous means, a court might appoint a guardian ad litem for the sole purpose of seeking rescission of the transaction or bringing a civil action in tort. Because a companion—even one motivated by greed—generally provides pleasure, similar regulation of an elder's companion should be limited to situations in which the companion employs imprisonment, physical abuse, or blatant and objectively verifiable fraud or mental abuse to gain control of the individual's assets. In neither instance should the statute authorize the court to appoint a general guardian or conservator. Instead, the statute should clearly limit the court's authority to the appointment of a special guardian ad litem and even then, only if the facts of the case demonstrate by clear and convincing evidence that a vital societal interest—i.e., the deterrence of unjust enrichment through criminal or tortious activity—justifies intervention over the so-called protected person's expressed wishes or objections.

Id. at 1874-75.

Currently the request for a guardian *ad litem* suggests some kind of mental disability if the client is an adult. Thus, "raising the question of disability could, in some circumstances, lead to proceedings for involuntary commitment." Model Rules, *supra* note 12, Rule 1.14 cmt. 5. Changes in evidentiary and procedural rules might be needed for this approach to work without raising questions regarding the client's competency. Procedural rules might, for example, allow the appointment of a special "agent" for reasons other than mental disability, and evidentiary rules might preclude use of the appointment as evidence of incompetency in any proceeding to determine competency. See Rein, *supra* note 39, at 1874.

I now prefer my injunctive relief approach, see *infra* text after note 279, to the guardian *ad litem* approach discussed above.

ience as a result. In either of these the types of cases, the client's very personal interests may very well outweigh admittedly important third-party and societal interests.

The primary focus so far has been on client decisions that threaten important rights and interests of other individuals. The most difficult cases, both morally and analytically, are those in which the client's decision does not threaten harm to any particular individual other than himself. Hypothetical 2²⁶⁰ concerning Martha and the unscrupulous roofer or real estate speculator falls into this category of cases. Nevertheless, although this is an admittedly slippery slope (albeit less slippery than using incompetency to justify interference), it can be argued that Martha's choice should be interfered with in some manner, not because Martha is incompetent to make the decision, but because decisions like hers, in the aggregate, put additional burdens on society's already scarce resources and are otherwise harmful to the social fabric by encouraging the continuance of unscrupulous behavior. It is also arguable that preventing a "rip off" of Martha's house actually preserves her autonomy by preserving the resources needed for her to exercise her autonomy. The factor of irrevocability of the harm also comes into play in this hypothetical. Suggestions for dealing with the threatened "rip off" of Martha's house will be made in the following subsection on solutions.²⁶¹ Ultimately, the supportability of interference when personal harm directly affects only the client will depend on the facts of each case and the nature of each decision. Were Martha's decision to continue to live with an abusive child for purely personal reasons, interference would probably not be warranted.

The foregoing suggestions and guidelines should not be taken as immutable conclusions of universal applicability. Decisions to interfere or not cannot be made in the abstract. They must, as noted, be made within the context of the facts and circumstances peculiar to each case. Such judgments will also depend on the moral decency and utility of the options available in any given case. This brings us to our second task of developing a repertoire of devices for dealing with destructive and antisocial client choices that do not depend on a finding of incompetency or incapacity for their implementation.

B. *A Search for Solutions that Are Less Destructive of the Human Spirit*

As noted earlier,²⁶² findings of incompetency or incapacity are profoundly depressing to the individuals so labelled. This search for alternatives proceeds on the assumption that using an incompetency finding to avoid a bad result is like, if the reader will excuse the hyperbole, using a

260. See *supra* text accompanying notes 26-29.

261. See *infra* text accompanying note 280. Regarding the point that intervention sometimes preserves autonomy, see my discussion of Professor Tremblay, *supra* note 56.

262. See *supra* text accompanying notes 196-205.

small nuclear device to destroy a dangerous building. In terms of preserving the human spirit, the best solutions bring practical help to the client in ways that solve the problem, thus obviating the need for any determination of incompetency.

In apparent concurrence, the Working Group recommended as a practice guideline that "the use of the guardianship system should be limited to the greatest extent possible" and by listing "protective actions" that do not involve the guardianship system.²⁶³ Although there is some overlap, existing solutions that do not require formal determinations of incompetency may be roughly divided into two categories: 1) planning options and 2) community services to facilitate independent living in the community.

Planning options include planning for post-capacity property management and for post-capacity health care decision-making. The latter include so-called living wills and durable powers of attorney for health care decisions. The major devices for post-capacity property management are revocable living trusts and durable powers of attorney for property management. The advantages of these devices are that they allow the trustee or successor trustee of the trust or agent under the durable power of attorney to step in for the beneficial owner upon a nonformal, private finding of incapacity in accordance with procedures dictated by the beneficial owner while he was competent. This avoids the trauma and stigmatization of formal guardianship or conservatorship proceedings and also enables the beneficial owner to designate who should act for him. As an alternative to these planning devices, the Uniform Custodial Trust Act,²⁶⁴ where enacted, would "facilitate the use of a statutory trust for the management of property for the support of adult persons, most likely

263. *Report of Working Group, supra* note 152, at 1010. This list included:

1. Involve family members;
2. Use of durable power of attorney;
3. Use of revocable trusts;
4. Use of a "time out" to allow cooling off, clarification, improvement of circumstances;
5. Referral to private case management;
6. Referral to long-term care ombudsman;
7. Use of church or other care and support systems;
8. Referral to disability support groups;
9. Referral to social services or other governmental agencies, such as consumer protection agencies. The lawyer should weigh the appropriateness and risk of agency referrals.

Id. In the litigation context, nonguardianship options included:

1. File for injunctive relief;
2. Request for appointment of a guardian *ad litem*;
3. File for continuance;
4. File petition for a protective order, or limited or plenary guardianship;
5. Invoke regulatory or administrative remedies, for example, file a separate consumer protection complaint).

Id.

264. 7A U.L.A. 7 (Supp. 1993).

elderly persons fearing incapacity."²⁶⁵

These planning devices may be the best options currently available and may work tolerably well if the chosen agent or trustee turns out to be trustworthy. But abuse and outright theft by fiduciaries, armed with documents authorizing them to take any action the principal or trustor could personally, is widespread. As I said in an earlier article,

Probate court officials, social workers, and others who work with the elderly have expressed growing concern that the durable power of attorney and other private management devices are increasingly employed as the least restrictive alternative. They argue that these . . . alternatives leave the frail elderly defenseless and actually invite abuse without any guarantee of compensating benefit. These objections have some merit. Although law enforcement officials, concerned private citizens, ombudsmen, and other officials seek redress against faithless fiduciaries when cases of abuse come to their attention, many instances of fiduciary abuse go unnoticed. Also, the fiduciary may squander the assets before anyone, including the settlor or principal, notices. Our currently available options provide no easy solution to the dilemma that, though guardianship and conservatorship may be too intrusive, the least restrictive alternative approach may leave our senior citizens without reliable assistance. As one of my colleagues on an elderlaw advisory panel quipped in discussing guardianships and conservatorships versus durable powers of attorney: "One is a license to kill, the other a license to steal." A program or referral service offering prescreened, trained and bonded *agents* might answer the need for reliable and competent assistance short of guardianship or conservatorship.²⁶⁶

Regarding community services to promote independent living, many lawyers, myself included, are unaware of all the services their communities offer to help senior citizens live independently. Their practices are not set up to orchestrate these services for their client. But if they were, a social worker or community counselor might be able to obtain the client's trust and voluntary acceptance of a host of services including homemaker/home health care services, transportation, shopping, billpayer services, "congregate and home delivered meals, senior centers, case management, day care facilities," and financial management services.²⁶⁷ Such a combination of services might enable the client "to care for self and property and thus relieve the need for an incapacity determination" or institutionalization.²⁶⁸ This community services approach might work well for the client who would prefer to remain home, notwithstanding the risk of falling down and incurring injury. For the client who tends to wander, a combination of community-based services and use of a track-

265. James R. Wade, *The Uniform Custodial Trust Act*, Prob. & Prop., Nov.-Dec. 1987, at 37, 37.

266. Rein, *supra* note 39, at 1884-85 (footnotes omitted).

267. Anderer, *supra* note 13, at 47 n.133.

268. *Id.*

ing device enabling relatives or authorities to track his movements might obviate the need for more serious intervention. Other options providing practical help are the suggestions made earlier about authorizing multidisciplinary practices²⁶⁹ and making lawyer-diagnostician cooperation possible while providing safeguards against use of the information gained in formal guardianship proceedings.²⁷⁰

The next best solutions would be those that rely on outside agencies to mitigate the adverse effects of an antisocial decision without overriding it or enlisting the decision-maker's cooperation at all. It would be ideal, for example, if Martha's lawyer in Hypothetical 2 could persuade the public prosecutor or attorney general to take action against the unscrupulous roofer or land speculator to enjoin them from pursuing Martha and other victims of their fraud. But given the scarcity of, and competition for, public resources, the availability of this option does not appear imminent.

Although community-based services might solve many problems, there will be times when more specific interventions are needed. Because these cannot be developed in the abstract, the following suggestions are made within the context of the three hypotheticals used to introduce the themes of this Article.

1. *Hypothetical 1*²⁷¹

Assume that the lawyer has succeeded in obtaining the release of Arnold's car. If Arnold continues to drive, notwithstanding his untreated seizures, his negligent, even willful, conduct threatens at any time to inflict death or serious bodily injury on unsuspecting members of the public. Since no one knows about Arnold's condition except Arnold and his lawyer, if the lawyer, bound by her duty of confidentiality, notifies no one, someone will likely be killed or maimed. Competent or not, Arnold should be stopped, but having Arnold determined incompetent seems an unnecessary and ineffectual way to go about stopping him.

Here, the lawyer would be justified in notifying public authorities so that they might revoke Arnold's driver's license *and* disable the car until Arnold accepts treatment. Current confidentiality rules would not permit Arnold's lawyer to notify others. But Model Rule 1.6(b) already permits a lawyer to disclose information if necessary "to prevent the client from committing a criminal act that . . . is likely to result in imminent death or substantial bodily harm." Expansion of Rule 1.6(b) to include an exception permitting disclosure in cases like Hypothetical 1 would not constitute a great extension of existing precedent. Deciding what conditions warrant disclosure requires caution. For example, an individual infected with the AIDS virus may fatally injure others with whom he has sexual relations. Yet disclosure of infectious conditions like AIDS is un-

269. See *supra* notes 207-09 and accompanying text.

270. See *supra* notes 183-200 and accompanying text.

271. See *supra* text accompanying notes 22-25.

derstandably forbidden because fear of disclosure would deter infected individuals from seeking treatment, thus spreading the disease even further. In any event, to the extent disclosure is authorized, informed consent principles and basic fairness would require that the lawyer inform prospective clients of any limitations on her duty of confidentiality.

2. *Hypothetical 2*²⁷²

Either a collection company representing the unscrupulous roofer or the unscrupulous real estate speculator closes in on Martha and her house with its fraudulently acquired deed in hand. The answer is due but Martha, for rational or irrational reasons, decides not to fight in court and refuses to sign the answer and complaint.

The lawyer's first response should be, if procedural rules permit, to get "time out" to assess the situation and to try to reason with Martha. If gradual counseling and gentle persuasion fail to convince Martha and it appears that she will lose her home unless something is done, intervention will be needed to save the house. But what kind of intervention is called for? My approach would be to interfere with the unscrupulous victimizers rather than the victim.

This approach utilizes my concept of the "predator donee" and "predator recipient." A large number of competency determinations are sought because the person whose competency is questioned has been victimized and cheated out of his assets by predator donees and other predator recipients. Thus, we seem to proceed against the victim rather than the victimizer. But interference with the predator is morally preferable because the predator is the one who, with premeditation, used unscrupulous, sometimes vicious, tactics to prey on competent but trusting and vulnerable individuals.

A 1985 case, *ENS et al. v. LDS*,²⁷³ provides an interesting example. The brothers and sisters of L.D.S. (apparently a relative of a wealthy family) petitioned the court to "adjudge him an incompetent and to appoint a guardian of his estate"²⁷⁴ worth approximately \$1.5 million. The fact that L.D.S. had, "within a period of less than two months," without much expectation of repayment, lent the Lyndon LaRouche organization \$212,000 and planned to lend it another \$75,000 triggered the petition.²⁷⁵ The court's first step after the filing of the petition was to enjoin the planned additional \$75,000 transfer. But the court went further and adjudicated L.D.S. an incompetent under a statute that defined an "incompetent" as "a person who, because of infirmities of old age, mental illness, mental deficiency or retardation, drug addiction or inebriety: (1) is unable to manage his property or is liable to dissipate it or become the

272. See *supra* text accompanying notes 26-29.

273. 6 Penn. Fid. Rptr.2d 1 (C.P. 1985).

274. *Id.*

275. *Id.*

victim of designing persons . . . ' ”²⁷⁶

The court saw the issue as whether L.D.S. was “likely to dissipate his estate or become the victim of designing persons because of a “mental illness.”²⁷⁷ Expert witnesses testified that L.D.S. had a “mixed personality disorder with inadequate and immature features” and that he was afflicted with “a schizoaffective disorder,” which “made him liable to become the victim of designing persons.”²⁷⁸ The court’s own assessment was that

he has a disorganized mind and compensates by setting up an oversimplified view of the world in which he is one of the good guys and “they” are conspirators bent on mischief. As such he would be and has been an easy target for anyone who pretends to support him in his efforts to combat the bad guys.²⁷⁹

This evaluation could describe many ordinary citizens! Nevertheless, the court adjudged him incompetent to manage his affairs.

A better approach would have been to enjoin the LaRouche organization from receiving L.D.S.’s funds, presently or in the future, without prior court approval and to notify all affected banking organizations of the permanent injunction. The court did not discuss the LaRouche organization’s tactics in obtaining L.D.S.’s allegiance and donative susceptibility. But that organization has been accused of deceptive and otherwise unsavory tactics.²⁸⁰ Assuming that the LaRouche organization employed unfair tactics to obtain the gift-like loans, the basis for injunctive relief should not be L.D.S.’s incompetence or even the LaRouche organization’s beliefs. It should be the brainwashing techniques and coercive tactics of the organization, the predator donee, itself.

This approach should solve the problem in cases in which the troubling transaction is a one-shot deal (as in the case of Martha in Hypothetical 2) or in which the transferor seems to be addicted to only one donee or recipient, as in the case of L.D.S. The advantage of this approach is that it avoids disarming the victim via a determination of incompetency. This leaves the victim transferor free to manage his property and to deal freely with and assert the right to decide *vis-a-vis* anyone in the world except the predator donee or recipient. I therefore recommend that our professional conduct, substantive, and procedural rules be modified to authorize attorneys representing victim transferors to bring “emergency” proceedings to enjoin predator donees without questioning their clients’ competency.

Returning to Hypothetical 2 and Martha, if intervention is warranted notwithstanding Martha’s stated wishes, injunctive relief against the

276. *Id.* at 2 (quoting 20 Pa. Cons. Stat. Ann. § 5501(1)).

277. *Id.* at 2.

278. *Id.*

279. *Id.*

280. For a recent book on the LaRouche organization, see Dennis King, Lyndon LaRouche and the New American Fascism (1989).

predator roofer or land speculator seems far preferable to treating Martha as incompetent to manage her affairs. Martha would remain in control of her life and free to withhold consent vis-a-vis anyone or any plan of action in the world except the action to restrain her victimizer from "ripping off" her house. Such actions in the aggregate would discourage the unscrupulous from preying on vulnerable individuals because the unscrupulous would have less assurance of profiting from their misdeeds. Thus, a social policy of deterring victimizers would be served. To be sure, a rule authorizing attorneys to seek injunctive relief without their client's consent would present practical problems. It may, for example, be difficult in some cases for a lawyer to make a case for injunctive relief without her client's cooperation. But information about the victimizer that is a matter of public record together with documentary evidence of unfair tactics might suffice in many cases. The rules might also authorize attorneys to report such incidents to the attorney general, the public prosecutor, the better business bureau, the agency that licensed the predator, and any other consumer organization whose intervention might prove useful.

3. *Hypothetical 3*²⁸¹

If Paul goes through with his plan to donate a substantial portion of his assets to a television evangelist or to a religious cult, he may strip himself of the resources necessary for his continuing support and may even eventually lose his house. Since Paul is retired, his chances of recouping the loss of resources through gainful employment are slim. Thus the threat of irrevocable loss is present as a factor.

Depending on the tactics used to trigger Paul's donative impulses, seeking injunctive relief against the television evangelist or religious cult might be an option. Suppose, however, that this option is not available. Here Paul's proposed donation will hurt not only himself and society at large but his son's family as well. If Paul impoverishes himself, his son Jake may be morally or even legally bound in some situations to support him at the expense of his own family's economic well-being and his college aged childrens' educational opportunities. Thus, Paul's proposed exercise of autonomy in this case harms not only Paul but also demands a benefit from Paul's unsuspecting family in a way that imposes serious harm on them. If the lawyer says and does nothing to prevent the donation (recall that we ruled out a determination of incompetency), Jake and his family will be irreparably harmed before they have a chance to talk Paul out of it or to take other action to protect their interests. Considering the alternatives, a relaxation of the confidentiality rules to permit the lawyer to alert Paul's family of his plan might be appropriate. But since, under our present system, Jake's only option would be to institute conservatorship proceedings if he could not dissuade his father from his don-

281. See *supra* text accompanying notes 30-33.

ative plan, some other mechanism for resolution of the dispute should be provided.

One approach might be to make transfers that impoverish the donor at the expense of his relatives or the community voidable at the option of the adversely affected individual or entity. The closest analogy here would be to the law of fraudulent transfers.²⁸² Another possibility might be to provide for mandatory mediation in such cases. Since mediation has worked well in other contexts, it may work here as well. The client and his family would, through this mechanism, be brought into contact with professionals who are specifically trained to gain the trust and cooperation of all parties concerned. A workable compromise, for example, might be to make the donation testamentary. Acts of cooperation and compromise are not dehumanizing. They are the acts of responsible human beings. In fact, individuals may be in their most human state when they are engaged in the process of negotiating with others. Negotiation and mediation promote connection and responsible action. The rules governing lawyers' behavior and the options provided them in representing their clients should be designed to promote the values of connection and cooperation. To deny the importance of these values by failing to provide rules and options that promote them is to deny the reality of the connectedness and interdependency of all human beings.²⁸³

CONCLUSION

The notion of untrammelled individual choice—provided the individual is mentally and functionally competent—may have been affordable when this nation still had a frontier, was primarily agricultural, relatively underpopulated, and socioeconomically less complex. But it is arguably unworkable, unaffordable, and unfair to the American community under modern demographic and socioeconomic conditions. Unspokenly, perhaps unconsciously, realizing the undesirability of untrammelled, perhaps irresponsible, individual choice under modern conditions, decision makers tend to interfere with destructive and socially harmful choices whenever they can find some basis to do so. Concepts like undue influence, testamentary capacity, and competency thus become covert but powerful weapons of social control. Hence, determinations of incompetency as a basis for interference with individual decisions regarding health care and activities of daily living are often more a product of social policy than of

282. Although time does not permit here, the full ramifications of such an expansion of the fraudulent conveyance doctrine should be carefully considered before such a step is undertaken. The voidable transfer concept, for example, should not be used in the Medicaid eligibility context because such a piecemeal addition would only further complicate a body of law which is already too confusing and complex.

283. See generally Stephen Ellman, *The Ethic of Care as an Ethic for Lawyers*, 81 *Geo. L.J.* 2665, 2668 (1993) (arguing that care "emphasizes people's mutual connections rather than their solitary autonomy").

objective assessment of decisional capacity or desire to help the individual.

This Article's overarching goal has been to inject a note of candor by shifting the focus of the debate from the question of client competency to the question of good social policy. In urging a new approach, I have tried to make my ideas concrete by suggesting solutions that combine good policy with practicality. These suggestions are by no means perfect. Some were made with great ambivalence and represent uneasy compromises between competing moral claims. Yet, they may prove fruitful by encouraging others to refine them and to develop new and better solutions beyond the competency construct.