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RESPONSES TO THE CONFERENCE

IMPROPTU LAWYERING AND DE FACTO
GUARDIANS

PAUL R. TREMBLAY*

INTRODUCTION

THE Standards developed by the Working Group on Client Capacity at the Fordham Law School Conference on Ethical Issues in Representing Older Clients evidence, in several respects, a plainly more accommodating acceptance of lawyer responsibility and lawyer discretion than might have been expected. This Commentary discusses two significant aspects of that phenomenon. First, it addresses, both substantively and in relation to the discretionary lawyering theme, the proposal in the Recommendations to add to the Model Rules a provision permitting an attorney to take unsolicited action in an emergency on behalf of an individual who is not the attorney's existing client. It then comments on the Recommendations' approval of de facto guardian roles for lawyers who do have such a relationship, and in particular on the implications of that stance on our view of attorney-client interaction. These comments by necessity will be short, and hence incomplete. Each of these topics, and in particular the former, deserves inquiry and discussion at length, but some remarks about the import of these two items need to be included in the record of this thoughtful and ambitious Conference.

I. "IMPROPTU" LAWYERING AND "PURPORTED" CLIENTS

Each of the seven Working Groups at the Conference was provided hypothetical fact patterns intended to raise complex and difficult ethical choices. I was assigned to the Working Group on Client Capacity—a group, comprised of practitioners, academics, and policy experts, intended to struggle with questions of the appropriate lawyer role when faced with clients possessing questionable mental competence. One of the hypotheticals involved Martha, whose home was subject to foreclosure resulting from a fraudulent home-improvement contract, and this case served as an exquisite example by which to test our theories and our practices in a setting where a person seemingly was not protecting her

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1. The Standards of each Working Group, as adopted by the Plenary Session of the Symposium, are published in this volume. See Conference on Ethical Issues in Representing Older Clients, Recommendations, in Ethical Issues in Representing Older Clients, 62 Fordham L. Rev. 989 (1994) [hereinafter Recommendations]. For the Recommendations of the Working Group on Client Capacity, see id., section VII.

The Working Group's recommendations largely focus on the typical dilemma—where a lawyer in an already existing attorney/client relationship feels that she must cease deferring to her client's express wishes because of a judgment that the client is not capable of making responsible decisions. Model Rule 1.14, for better or for worse, provides a source of guidance for that dilemma, and several of us have explored the limits upon and the triggers for attorney intervention in such instances. However, the beauty—as well as the difficulty—of the first part of the Martha hypothetical is that it examines an initial meeting between the lawyer and the prospective client. Although no express agreement is reached between them at that time, urgent steps (specifically, the filing of an answer in court) must be taken to protect Martha's rights. Thus, this is not the typical dilemma (even though it is far from atypical, especially among publicly-funded elderlaw attorneys), and

3. The hypothetical is reprinted below:

A neighbor of Martha L brings her into your office because she believes Martha L needs help. You learn from the neighbor that Martha L bought an over-priced, very poor quality roofing job; and roof began leaking soon after the "repairs." Martha L 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 which buys all the roofer's financing notes has sued Martha for the $8000. Attempting to talk directly to Martha L, you find that she is very upset, incoherent, distrustful of you, but obviously fearful that she will lose her home. The deadline for filing an answer is the next day. Can you accept her as a client?

Working Group on Client Capacity, Hypothetical 1A (on file at Fordham Law Review) [hereinafter Hypothetical].

The "Martha" story was borrowed from Professor Jan Rein's paper written for the Conference. See Jan E. Rein, Clients With Destructive and Socially Harmful Choices—What's An Attorney to Do?: Within and Beyond the Competency Construct, in Ethical Issues in Representing Older Clients, 62 Fordham L. Rev. 1101 (1994). Her use of a foreclosure example was based in part on a hypothetical from an earlier article of mine. See Paul R. Tremblay, On Persuasion and Paternalism: Lawyer Decisionmaking and the Questionably Competent Client, 1987 Utah L. Rev. 515, 530-32.


6. See Hypothetical, supra note 3. One might argue that this story is not truly urgent, for default judgments are subject to motions to vacate, and hence are not irrevocable. See, e.g., Fed. R. Civ. P. 60(b)(1) (excusable neglect as a basis for vacating a judgment or order). This objection might have some merit in the abstract, but it would miss the critical point of the hypothetical—that some decisions in law are of great significance, and the deadlines for invoking them are not always flexible ones.

7. It is not surprising that a publicly-funded lawyer would experience the "impromptu" demand more often than would a private lawyer, because the former serves as
Model Rule 1.14 does not seem to apply because the attorney is not Martha's lawyer and Martha cannot be called a client. She is, under conventional agency principles, something of a stranger.\footnote{Because Martha would not be a "client" under the proposed rule, its text opts for the phrase "purported client" as a more accurate term. See Recommendations, supra note 1.}

The proposed Model Rule 1.14(d) contained in the Recommendations is an initial slice at an express principle reflecting what each member of our group conceded he or she would do in the first Martha hypothetical—file an answer on her behalf to prevent irreparable loss of a home, notwithstanding the lack of any ostensible "permission" to do so. The proposed Model Rule 1.14(d) approves of \textit{impromptu lawyering} in exigent circumstances as a matter of professional ethics. Its intention is to approach the physician’s obligation to aid those who need emergency medical care.\footnote{I have opted for the term "impromptu" instead of "emergency" if only because the latter has already been applied to a different set of circumstances—when the "emergency" occurs either within an ongoing representation or with consenting clients. See Barbara A. Glesner, \textit{The Ethics of Emergency Lawiyering}, 5 Geo. L. Leg. Ethics 317, 330-37 (1991). Professor Glesner, in fact, emphasizes the importance of increased client participation in responses to legal emergencies. See \textit{id.} at 366-69. By comparison, impromptu lawyering, as the discussion in the text makes plain, applies to lawyering activity done when it is not apparent that any attorney/client relationship exists, and assumes that very little direction has come, or can come, from the client. See infra note 16.}

It is not a \textit{mandatory} provision; it would merely permit

the proverbial "last lawyer in town," see Murray L. Schwarcz, \textit{The Zeal of the Civil Advocate}, 1983 Am. B. Found. Res. J. 543, 562-63, and hence refusal to act cannot as easily be excused by a supposition that others might choose to become involved. But it is not the case that situations calling for impromptu lawyering will only be a public lawyer concern. Indeed, during the Plenary Session at the Conference, a private practitioner from a different Working Group described his desire for a rule such as this, as he frequently confronted this problem, particularly when former clients would bring "purported clients" to his office when a crisis had developed.

9. I have opted for the term "impromptu" instead of "emergency" if only because the latter has already been applied to a different set of circumstances—when the "emergency" occurs either within an ongoing representation or with consenting clients. See Barbara A. Glesner, \textit{The Ethics of Emergency Lawiyering}, 5 Geo. L. Leg. Ethics 317, 330-37 (1991). Professor Glesner, in fact, emphasizes the importance of increased client participation in responses to legal emergencies. See \textit{id.} at 366-69. By comparison, impromptu lawyering, as the discussion in the text makes plain, applies to lawyering activity done when it is not apparent that any attorney/client relationship exists, and assumes that very little direction has come, or can come, from the client. See infra note 16.

10. While it is apparent that physicians are permitted, and encouraged, to treat patients in an emergency, the question of their \textit{obligation} to do so is a complicated one. The conventional principle is that no such duty exists. See Chandler v. Hosp. Auth., 548 So. 2d 1384, 1386 (Ala. 1989) (a hospital has no affirmative duty to treat patients in an emergency unless it volunteers to do so); Harper v. Baptist Medical Ctr., 341 So. 2d 133, 134 (Ala. 1976) (no duty to treat a person not already a patient); Childs v. Weiss, 440 S.W.2d 104, 107 (Tex. Civ. App. 1969) (doctor has no duty to treat patient in emergency if no doctor-patient relationship exists); Paul S. Appelbaum & Thomas G. Gutheil, \textit{Clinical Handbook of Psychiatry and the Law} 39 (2d ed. 1991); Alexander M. Capron, \textit{Legal Setting of Emergency Medicine}, in Ethics in Emergency Medicine 13, 18 (Kenneth V. Iserson, et al. eds. 1986); Robert I. Simon, \textit{Clinical Psychiatry and the Law} 5-6 (2d ed. 1991).

In recent years, however, the conventional rule has evolved in ways which imply greater responsibilities for doctors and hospitals to treat patients in an emergency. See, e.g., Judith L. Dobbertin, Note, \textit{Eliminating Patient Dumping: A Proposal For Model Legislation}, 28 Val. U. L. Rev. 291, 297-307 (1993) (criticizing federal response to practice of "patient dumping" in emergency situations). For instance, in \textit{Wilmington General Hospital v. Manlove}, 174 A.2d 135, 139 (Del. 1961), the Delaware Supreme Court interpreted a hospital's operation of an emergency room as imposing a duty on the hospital to accept patients in an emergency. Other courts similarly have concluded that patients have a reasonable expectation of treatment in an emergency, and that expectation imposes an affirmative duty on the hospital to treat emergency patients. See, e.g., Guerrero
an attorney to take reasonably necessary actions to protect the interests of a "purported client" when maintenance of the status quo is needed to


This evolving common law duty has become a federally mandated obligation for hospitals operating emergency rooms under a recent federal statute, the Emergency Medical Treatment and Active Labor Act, 42 U.S.C. § 1395dd (1988 & Supp. IV 1992), sometimes known as "COBRA." The legislative history to COBRA indicates that when it enacted this legislation, Congress recognized a trend towards establishment of a duty of health care providers to treat patients in an emergency. That legislative history included the following comments:

In recent years there has been a growing concern about the provision of adequate emergency room medical services to individuals who seek care, particularly as to the indigent and uninsured. Although at least 22 states have enacted statutes or issued regulations requiring the provision of limited medical services whenever an emergency situation exists, and despite the fact that many state court rulings impose a common law duty on doctors and hospitals to provide necessary emergency care, some are convinced that the problem needs to be addressed by federal sanctions.


In terms of medical ethics, the American Medical Association has urged doctors to treat patients in an emergency. See American Medical Ass'n, Current Opinions of the Judicial Council § 8.11 (1992) ("The physician should . . . respond to the best of his or her ability in cases of emergency where first aid treatment is essential."). There is substantial case law holding that physicians who do act in an emergency and without the traditional informed consent will be free from liability for having acted unilaterally. See, e.g., Jackovach v. Yokom, 237 N.W. 444, 449 (Iowa 1931) (physician in an emergency must be permitted to exercise independent professional judgment); Estate of Leach v. Shapiro, 469 N.E.2d 1047, 1052 (Ohio Ct. App. 1984) (patient's consent is implied when "there exists some emergency requiring immediate action to preserve the life or health of the patient"); cf. Cunningham v. Yankton Clinic, P.A., 262 N.W.2d 508, 511 (S.D. 1978) (doctor could have obtained consent and no true emergency, so liability not excused). For a similar view from the perspective of medical ethics, see Paul S. Appelbaum, et al., Informed Consent: Legal Theory and Clinical Practice 67 (1987) (consent is implied in an emergency); President's Comm'n for the Study of Ethical Problems in Medicine and Biomedical and Behavioral Research, Making Health Care Decisions: A Report on the Ethical and Legal Implications of Informed Consent in the Patient-Practitioner Relationship 93-94 (1982); Alan Meisel, The "Exceptions" to the Informed Consent Doctrine: Striking a Balance Between Competing Values in Medical Decisionmaking, 1979 Wis. L. Rev. 413, 439 (1979) (exception to informed consent for incompetent persons). Doctors who act in an emergency are protected by the generally applicable "Good Samaritan" defense to torts, which protects rescuers in their gratuitous efforts. See Restatement (Second) Torts § 299 cmt. e (1965); 2 Stephen E. Pegalis & Harvey F. Wachman, American Law of Medical Malpractice 424-34 (2d ed. 1993). For an example of a state law version of this defense, see, e.g., Mass. Gen. L. ch. 112, § 12B (1991).
avoid irreparable injury. It is not at all surprising that such a provision would not be mandatory; elsewhere the Conference Recommendations fall short even of requiring lawyers to “take protective action” (which I understand to mean doing something different from what one would otherwise do in reliance on client consent and direction) when it would be appropriate, leaving the unfortunate impression that a choice of inappropriate action is not one of which the standards would disapprove.

Members of the Conference accepted the “impromptu lawyering” discretion, and in doing so expressed for the first time public support for such an interventionist stance. This development is an important and a necessary one, but one which is not at all free from complicated substantive concerns. Before addressing those concerns, however, I wish first to address a component of proposed Rule 1.14(d) which was not approved by the Plenary Session of the Conference—subsection (4), which reads: “A lawyer who acts pursuant to this section may not seek a fee for services rendered in this capacity.” This qualification deserves to be part of the rule, as a prophylactic as well as politic limit on lawyer discretion.

Properly understood, subsection (4) would preclude a lawyer from billing a person for the impromptu work done for that person without his consent. Its inclusion in the first proposed draft was at the behest of a private bar representative who feared that underemployed attorneys would exploit this invitation for unrequested employment. One need not share that perspective or that fear to accept this restriction, nor accept the proposition that its inclusion serves the additional benefit of encouraging pro bono work to support this restriction. While this limit indeed provides both of these benefits, its primary purpose is to avoid the unseemly specter of an attorney seeking payment from a person who, in many cases, may have expressly objected to the attorney’s acting at all.

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11. For a similar rejection of a mandatory duty to provide pro bono representation in a crisis, see Glesner, supra note 10, at 381-82.

12. See Recommendations, supra note 1, part I.D. I dissented from that recommendation. It seemed plain to me that if under the circumstances taking protective action is appropriate, and conversely not so acting is thus inappropriate under the circumstances, a lawyer ought not be left with the impression that either choice is equally acceptable.

13. Frequently commentators have discussed the conceptual problem of lawyers acting once their clients have lost capacity (however one might define that term), for such actions might cause a loss of actual authority under agency principles. See Jacqueline Allee, Representing Older Persons: Ethical Dilemmas, Prob. & Prop., Jan.-Feb. 1988, at 36, 38; Devine, supra note 5, at 514; Tremblay, supra note 3, at 517-18; see also Linsk v. Linsk, 449 P.2d 760, 764 (Cal. 1969) (express objection of client to attorney action rebuts presumption of lawyer authority); Restatement (Second) of Agency § 20 cmt. b (1957) (“principal must have capacity to give a legally operative consent”); id. § 122(1) (loss of capacity of principal has the same effect upon authority as death of principal); id. § 225 cmt. c (person acting gratuitously does not qualify as agent unless there exists consent by the person for whom service is performed). Never before, though, has any commentator suggested that lawyers act to protect otherwise vulnerable individuals notwithstanding such questionable authority.


15. See Glesner, supra note 10, at 381-85.

16. This sentence deserves explanation, for the concept of acting over the express
It also minimizes the clash of this rule with substantive contract and agency law, and, as described below, that benefit is a considerable one.

Before reaching the substantive law complication, I must emphasize the narrow scope of the limitation on billing, for the plenary session comments implied some understandable misconception on this point. The proposed 1.14(d) is a very restrictive grant of ethical authority—it approves of lawyers acting to avoid irreversible harm to vulnerable persons who appear to be unable to protect their interest "because of an impairment of decisionmaking capacity." It contemplates quick, status quo-maintaining acts intended to forestall irreparable injury. Conversely, it does not contemplate an extended relationship with the person unless in some manner—either through a surrogate, or some change in the "purported client's" viewpoint—a conventional contractual relationship is created. The limit on billing would apply only to those activities undertaken in the impromptu role, and not to any later consented-to services, and (as several members of the conference noted) it does not preclude a lawyer from being paid as long as she does not request such payment.

Finally, a few words about the substantive law implication of an impromptu lawyering rule. The rule, of course, is one governing lawyers, and does not alter substantive law principles about contract or agency. The bar's adoption of this rule would plainly imply support for such an alteration, but it does not accomplish it. Thus, the rule has less impact than one might suppose—it merely permits lawyers to take risks. It is instructive and important to note, however, that the absence of *ex ante* opposition of a purported client ought to be a little bit discomfiting. Consider, though, the example of Martha, contained in the hypothetical. *See supra* note 3 and accompanying text. In this story, Martha comes to the lawyer's office with a friend, and is in considerable distress and quite confused. She refuses to commit to the lawyer's representation of her, but at the same time she is extremely distraught at the thought of losing her home. She refuses to allow the lawyer to file an answer, for reasons which would not be honored if she were an ongoing client (this is the critical point). The proposed Rule 1.14(d) would permit this lawyer to act in a similar fashion as she would if Martha were her client, but only to take such steps as would preserve the status quo and avoid irreparable harm.


18. There is authority for the proposition that doctors should not bill the recipients of their emergency services for the treatment. *See* Simon, *supra* note 10, at 10 ("The Good Samaritan, acting in good faith, does not send the trauma victim a bill for services."). *But see* Restatement (Second) of Agency, *supra* note 13, § 225 (a volunteer qualifies as an agent if the principal accepts the arrangement). There is little available evidence of whether doctors in practice honor that moral principle. Dr. Robert Roca, a member of our Working Group, believed that physicians often do bill patients after unsolicited, emergency care.

19. One might argue for a prophylactic gloss on this already prophylactic subsection which would bar any payment, solicited or otherwise, to minimize overreaching. Consistent with the increasingly discretionary stance regarding lawyer/client interaction as described below, *see infra* notes 22-26 and accompanying text, and because many examples come to mind in which the purported client (by then a real client) or his (by then) duly-appointed surrogate might happily ratify the lawyer's prior "volunteer" work, I am comfortable with the interpretation described in the text.

authority in any formal sense does not mean that an attorney's actions are ineffective as a result. For instance, while existing agency principles might prevent a lawyer from binding a purported client to a settlement, this does not mean that a lawyer acting pursuant to proposed Rule 1.14(d) for a purported client is without a great deal of influence. The filing of an answer, for instance, will prevent a default in fact, even if the answer was not the purported client's chosen act. A request to opposing counsel for an extension of time, if granted, will indeed extend time for decisions to be made. The filing of a lawsuit will have very real consequences for a defendant, even if done without clear consent. Much good can be done—and, if our experiences are at all typical, has been done\textsuperscript{21}—by this kind of "vigilante" lawyering. All this rule does is to deny a lawyer one excuse against acting in appropriate emergencies.

II. \textit{De facto} Guardians Versus Real Guardians

One of the most obvious implications to be drawn from a proposed impromptu lawyering rule is its proponents' willingness to permit lawyers the discretion to act in circumstances which by their very nature will be amorphous and unconstrained by bright-line standards. Supporters of the impromptu lawyering concept no doubt recognize the potential for lawyer abuse of what is, by definition, unsupervised intervention into the life of another. They presumably would argue that the moral implications of not acting outweigh those of acting. This reasoning, which is nothing if not contextual\textsuperscript{22} and situational,\textsuperscript{23} can be contrasted with a more categorical reasoning\textsuperscript{24} in which one would prefer more fixed guidelines operating as restraints on lawyer interests. Another of the Recommendations of this Conference fits that picture as well, in its support for increased reliance upon the lawyer as "\textit{de facto} guardian" and less upon the formal guardianship process. In each case, it is less a commitment to a particular theory of decisionmaking or moral accountability which causes these members to support this discretionary approach, and more a question of logistics and discomfort with alternatives. I support both efforts and welcome what will at least appear as a resurgence in contextual and discretionary role description, but at the same time I do not want to overlook the hazards here, especially within the \textit{de facto}

\textsuperscript{21} As a reminder, all of the members of the Working Group on Client Capacity focusing on the Martha hypothetical indicated that they would file an answer if doing so could protect Martha's home. There was no indication that doing so would be an entirely novel experience of the lawyers within this group.


\textsuperscript{23} See Catharine Wells, \textit{Situated Decisionmaking, in Pragmatism, supra} note 22, at 275, 279-82.

\textsuperscript{24} See William H. Simon, Ethical Discretion in Lawyering, 101 Harv. L. Rev. 1083, 1086-87 (1988); Wells, \textit{supra} note 23, at 278-79.
A large part of the embrace of lawyer-as-de facto-guardian stems from its practical inevitability. There is, as some have noted, an important benefit in establishing ethical rules that are not harshly violative of or inconsistent with accepted practices. None of the elder law practitioners in the Working Group on Client Capacity had ever gone to court to establish a guardianship for her or his client, and indeed none knew of any lawyer who had. Nor did many have fond descriptions of the guardianship process. Consistent with virtually all of the professional literature, our group viewed the guardianship process with a fair amount of disdain and skepticism. Given a choice between acting for our clients informally and without obtaining permission to do so, and calling to the attention of some official authority our clients' frailty and confusion, we easily favored the former over the latter.

25. I have a particular interest in the de facto debate, because I publicly disapproved of the conception of lawyer as de facto guardian in an earlier article. See Tremblay, supra note 3, at 570-76. Whether it is a profession-wide evolution or merely my evolution, I indeed do share in this progression, and now believe that my earlier ultimate conclusion was incorrect.

26. See, e.g., Teresa S. Collett, And the Two Shall Become As One... Until the Lawyers Are Done, 7 Notre Dame J.L. Ethics & Pub. Pol'y 101, 139-41 (1993); Malcolm A. Moore & Jeffrey N. Pennell, Practicing What We Preach: Esoteric or Essential?, 27 U. Miami Philip E. Heckerling Inst. Est. Plan. ¶ 1203 (1993) (when 75 percent of practitioners accept a practice, a rule forbidding that practice is "not in tune with reality," and should be made to conform to prevailing views). I do not mean to argue that widespread behavior must equate to ethically acceptable behavior, see, e.g., Lisa G. Lerman, Lying to Clients, 138 U. Pa. L. Rev. 659, 705-20 (1990) (documenting the prevalence of lawyer padding of billing records), but legal ethics exist and develop within a tradition and a context, and the traditions are significant to any evaluation of moral conduct, see, e.g., Geoffrey C. Hazard, Jr., Personal Values and Professional Ethics, reprinted in The Legal Profession: Responsibility And Regulation 126, 127-28 (Geoffrey C. Hazard, Jr. & Deborah L. Rhode, eds.) (3d ed. 1994) (recounting the role of tradition).


28. I should include an important clarification here. In her paper written for our group, Professor Jan Rein expressed not only great disrespect for the guardianship process, but at the same time a substantial skepticism about lawyers' usurping for themselves the right to determine incompetency. See Rein, supra note 3. Nevertheless, I include her in my generalized description of support for lawyer discretion when contrasted with formal processes, for two related reasons. First, Professor Rein objected to guardianship in the strongest language possible, see id., and I feel comfortable concluding that she perceives that option as a last resort, less attractive even than the lawyer discretion model. Second, the model which she then offers as a replacement for Model Rule 1.14 (one in which a lawyer would act in an interventionist fashion not because of incapacity but because of harm to third parties or to social interests) is quite discretionary in its ap-
As previously noted, this is a wise shift. It has certain important implications, however, which one would not discern from a reading of the Recommendations, even with their practice suggestions. Those concerns are briefly highlighted here.

First, because de facto arrangements have the benefit of remaining unintrusive and nonpublic, they simultaneously escape scrutiny and oversight. If one accepts a standard rationale for informed consent, that it serves to overcome attorney conflicts of interests, acceptance of good faith lawyer intervention demands an accompanying insistence on a generous amount of that good faith. There are very few ways out of this box—a more formal restriction on attorney action brings with it the intrusive and revelatory consequences associated with the guardianship option, which, for the most part, have been rejected. At the same time, a lawyer need not see herself as alone in the process of conducting substitute decisionmaking. One of the more compelling arguments supporting the de facto preference is the recognition that lawyers are not necessarily any less able to perform surrogate decisionmaking than the agent approach, and is very reminiscent of the morally activist suggestions of David Luban and William Simon. See David Luban, Lawyers and Justice: An Ethical Study 170-76 (1988) (describing "moral activism"); David Luban, Partisanship, Betrayal and Autonomy in the Lawyer-Client Relationship: A Reply to Stephen Ellmann, 90 Colum. L. Rev. 1004, 1005 n.8 (1990) ("Moral activism is an unabashedly interventionist ideal that aims to make legal practice a positive moral force in society rather than—as in the standard conception of the lawyer's role—a mere conduit of the client's will."); Simon, supra note 24, at 1096-97 ("[T]he discretionary approach requires that the lawyer make her best effort to achieve the most appropriate resolution in each case . . . [and be] compatible with the conventional understanding of the role of judicial and administrative officials in law enforcement."); see also Naomi R. Cahn, Inconsistent Stories, 81 Geo. L.J. 2475, 2500-02 (1993) (describing "moral lawyering"). In fact, her willingness to permit lawyers to act upon moral judgments (one with which I in large part agree) appears somewhat inconsistent with her stated reluctance and skepticism about lawyers making judgments in the area of competence. She argues that in the former area lawyers have greater expertise than in the latter, see Rein, supra note 3, but I am not convinced that lawyers have as little ability to draw judgments about capacity as she is willing to grant to them, especially when compared to whoever else would be making the decision about capacity.

Peter Margulies, on the other hand, quite expressly supports a refined notion of de facto guardianship in his paper written for our group. See Peter Margulies, Access, Connection, and Voice: A Contextual Approach to Representing Senior Citizens of Questionable Capacity, in Conference on Ethical Issues in Representing Older Clients, 62 Fordham L. Rev. 1073 (1994).

29. For the suggested standards of practice developed by the Working Group on Client Capacity see Recommendations, supra note 1, part II.


31. Although the Recommendations do not bar an attorney's referring her client to a guardianship process, they do see that referral as a last resort, and discourage the lawyer from playing a part therein. For the reasons why the lawyer's involvement is inappropriate, see Tremblay, supra note 3, at 561-65. A bar is inappropriate because there are substantive limits on the extent of an attorney's authority under the confessedly "weasel" de facto arrangement. In cases of long term decisionmaking need and substantial irrevocable impairment, a formal guardianship seems preferable to a lawyer continuing to make decisions.
pointed after a court declaration of incapacity. In performing this role, a
lawyer must involve her client's "moral community," at least as much
as is appropriate given privacy needs and the lawyer's understanding of
which friends and family serve that community role. While members of
the Working Group told stories of unfaithful and preying kin, stories
born of their practice lives, it remains critical to remember that most
clients are situated and connected within a meaningful group, and a
lawyer who opts to make surrogate decisions cannot avoid the responsi-
bility for learning about those connections.

Far more complicated is the question of when to intervene. The dis-
couraged formal and categorical approach offers the pretense of safety
and coherence on this matter—a lawyer honors her client's instructions
until her presumed competency is overridden by a court, which "should
remain the arbiter of the decision to declare incompetency." This is, of
course, only a pretense of formal positivism, because in her private inter-
actions with her client a lawyer cannot rely on formal authority, such as
a court, unless she first invokes its procedures, which of course means
making decisions about capacity in order to decide when to reveal her
plight to that authority. The responsibility for the lawyer to make
judgments about capacity is thus inevitable.

That inevitability is the greatest cause for concern because, as the more
recent sophisticated literature states, resolving questions of capacity is

("Intimate association provides the firmest possible epistemological basis for appreciation
of individuality."); Michael J. Perry, Moral Knowledge, Moral Reasoning, Moral Relativ-
unity" as "a group of persons who are the present bearers of, and participants in, a
moral tradition"). For an argument that the relevant moral community in substituted
judgment decisionmaking is the family, see Lomasky, supra, at 168-69; Nancy K.

33. For another view of the risk of betrayal by family members, see Russell G.
Pearce, Family Values and Legal Ethics: Competing Approaches to Conflicts in Represent-
ing Spouses, in Conference on Ethical Issues in Representing Older Clients, 62 Fordham

34. See Cahn, supra note 22, at 1061-68; Stephen Ellmann, The Ethic of Care as an

35. See Margulies, supra note 28; Rhoden, supra note 32, at 438-39.

36. Robert M. Veatch, Limits of Guardian Treatment Refusal: A Reasonableness

1530 (1989) (interpreting Model Rule 1.14's license to refer a client for guardianship as
implicitly excepting that referral from ordinary constraints of confidentiality under Rule
1.6(a), and conceding that in such circumstances a lawyer will need to speak to a mental
health provider about her client). See also ABA Annotated Model Rules of Professional
Conduct Rule 1.14 legal background 240-41 (2d ed. 1992) (collecting citations to nine
state ethics opinions on this subject).

38. More has been written about the concept of capacity than one footnote could even
hope to do justice to, but for a helpful survey of the tests used in medical treatment
circles, see Elyn R. Saks, Competency to Refuse Psychotropic Medication: Three Alternati-
ves to the Law's Cognitive Standard, 47 U. Miami L. Rev. 689 (1993) [hereinafter Saks,
Alternatives]; Elyn R. Saks, Competency to Refuse Treatment, 69 N.C. L. Rev. 945
hard. I disagree somewhat with Professor Rein when she claims that the process is so confusing as to be essentially incomprehensible, but as Professor Elyn Saks has written recently, one's view about what factors enter into the equation can affect which decisions will be honored and which will be overridden. Again, lawyers generally are as sophisticated as most of the judges who would otherwise be called upon to make these judgments; therefore, a resigned view that leaves these matters for lawyer discretion, while far from perfect, may not be any worse than the available alternatives. It also is not clear that lawyers necessarily will make worse decisions on the question of capacity than would psychiatrists, who, according to many, view client symptoms through a distorted prism of mental health training.

To the extent that the profession wishes to offer direction to the practicing bar on this process, the analysis offered by Professor Margulies in his contribution to this Conference offers valuable insights. Professor Margulies's contextual approach to questions of substituted decisionmaking could be of great assistance to lawyers in practice, who are unlikely to be familiar with or to have the time to understand adequately the sophisticated medical/philosophical discourse of scholars such as Professor Saks. This is not meant to imply that Margulies's paper does not share that sophistication—in many ways his exceeds that of most writers in this area. The benefit of his contribution to this forum is that he combines an analysis grounded in republican and feminist theories with very practical suggestions and workable insights. His six factors to be


39. See Rein, supra note 5, at 1839.


41. The literature on guardianship and civil commitment tends to assert that the psychiatric profession comes to competence questions with certain biases in favor of intervention and treatment, and thus would be more likely to conclude that a harmful decision by a person is not a competent one. See Michael L. Perlin, *Pretexts and Mental Disability Law: The Case of Competency*, 47 U. Miami L. Rev. 625, 641-659 (1993); Rein, supra note 5; Saks, *Alternatives*, supra note 38, at 760-61.

42. For a discussion of this need for training, see, e.g., Rein, supra note 3 (cleverly referring to the "questionably competent lawyer").

43. See Margulies, supra note 28.

44. For a more explicit example of his republican thought, see Peter Margulies, *The Mother with Poor Judgment and Other Tales of the Unexpected: A Civic Republican View of Difference and Clinical Legal Education*, 88 Nw. U.L. Rev. 695 (1994).

45. Margulies in his symposium piece relies upon the contextual approach of many feminist writers. See Margulies, supra note 28, at 6; see also Naomi R. Cahn, *A Preliminary Feminist Critique of Legal Ethics*, 4 Geo. J. Legal Ethics 23, 35-43 (1990) (suggesting an alternative contextual approach to legal ethics compared to the traditional positivist approach of the Model Code or Model Rules); Phyllis Goldfarb, *A Theory-Practice Spiral: The Ethics of Feminism and Clinical Education*, 75 Minn. L. Rev. 1599,
considered in arriving at competency determinations were adopted in toto by the Conference,\textsuperscript{46} and serve as useful benchmarks for lawyers faced with making complicated judgments about their clients' mental health.

My last set of comments about the \textit{de facto} guardianship question relates to its stance within the longstanding paternalism/autonomy debate. I suggest that implicit in the Recommendations' approval of a larger role for independent lawyer decisionmaking on clients' behalf is a more generous tolerance for paternalism. This may not be entirely self-evident. One might argue that the Recommendations do not sanction any greater intervention by lawyers, but instead only direct lawyers how to intervene when doing so is otherwise appropriate.\textsuperscript{47} I think this is a plausible, but not persuasive, view. The Recommendations, as I have discussed, prefer informal rather than formal intervention strategies. A prominent purpose of a formal approach is to minimize overreaching and temptations.

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\textsuperscript{46} See \textit{Recommendations}, supra note 1. It is significant that Margulies offered suggestions grounded in stories and in practice suggestions, for the more complex and textured theories about lawyering have little \textit{direct} impact on the practices and ideas of those who earn a living representing clients. There are important and critical ethics discourse such as that contained in recent symposia, see Symposium, \textit{Critical Theories and Legal Ethics}, 81 Geo. L.J. 2457 (1993); Symposium, \textit{Speeches from the Emperor's Old Prose: Reexamining the Language of Law}, 77 Cornell L. Rev. 1233 (1992); Symposium, \textit{Theoretics of Practice: The Integration of Progressive Thought and Action}, 43 Hastings L.J. 717 (1992), but the insights developed on this critical edge do not easily become part of mainstream bar conversation or ideology. There are, however, likely indirect and subtle effects of this elite conversation. As noted above, the Recommendations developed at the Conference, while clearly driven by logistics, economics of law office management, and personal comfort, still reflect an acceptance of a discretionary and contextual view of the lawyer's role that the more critical thinkers have been describing and formulating over the past ten to fifteen years. For arguments in favor of discretionary norms, see Joel F. Handler, \textit{Discretion in Social Welfare: The Uneasy Position in the Rule of Law}, 92 Yale L.J. 1270 (1983); Simon, supra note 24; William H. Simon, \textit{Legality, Bureaucracy, and Class in the Welfare System}, 92 Yale L.J. 1198, 1240-45 (1983). For the contextual position, see Goldfarb, \textit{supra} note 45, at 1636-41.

\textsuperscript{47} One could find much within the Recommendations and the Capacity Working Group Summary to support this argument as well. See \textit{Recommendations}, supra note 1; Conference on Ethical Issues in Representing Older Clients, \textit{Report of Working Group on Client Capacity}, 62 Fordham L. Rev. 1003 (1994). For instance, the Summary notes that a lawyer shall be guided by "[t]he goal of intruding into the client's decisionmaking autonomy to the least extent possible," \textit{id.} at 12, and stressed that \textit{de facto} guardianships should be time limited—a lawyer acting as such "should seek to discontinue acting as such as soon as possible and implement other protective proceedings." \textit{Id.}

For the reasons outlined in the text, I do not see the first of these two statements as undermining my basic point. As to the second piece of advice, that a lawyer ought to replace the \textit{de facto} model with some other "protective proceedings," I have difficulty understanding how this deprives the lawyer of her \textit{de facto} guardian role. Unless the "other protective proceedings" are guardianships, which assuredly they are not intended to be, see \textit{id.} at 13, their presence does not assist the lawyer in her decisionmaking process. Any lawyering decisions that must be made, with or without any other referrals, are left to the attorney alone, since no formal surrogate exists. This, to me, is precisely the \textit{de facto} option, and it survives any of these referrals or other devices.
toward privileging beneficence. Requiring lawyers to seek external and scrutinized oversight before acting beneficently discourages that tendency, and encourages a greater reliance on the formal consent of the client.\textsuperscript{48} A stance against the use of such a visible and constraining process presumes a value judgment that the risks of overreaching are worth the benefit.

This tolerant attitude toward paternalism is premised, at least among practicing lawyers, not upon a developed moral philosophy which has evolved in its assessment of the relative weight to be given in the autonomy/beneficence tension,\textsuperscript{49} but instead, as I see it, on a practical world view which reflects the difficulty of representing clients without this permission to act when it is felt necessary. This ought to be troubling, for convenience is a chancy basis upon which to base an ethical construct.\textsuperscript{50} What blunts its problematic basis upon which to base an ethical construct.\textsuperscript{50} What blunts its problematic basis upon which to base an ethical construct.\textsuperscript{50}

The earlier scholarly treatment of paternalism among lawyers had a fair dose of visceral objection to the idea of powerful lawyers manipulating less powerful clients.\textsuperscript{51} From that blunt objection has developed a more sophisticated objection, but with the same story line: privileged lawyers have no right nor expertise to say what is best for clients, especially less-than-powerful ones.\textsuperscript{52} The premise was always clear: auton-

\textsuperscript{48} See Tremblay,\textsuperscript{ supra} note 3, at 573-75. As my earlier Article noted, in medical paternalism contexts these factors have caused courts to constrain psychiatrists in their efforts to allocate to themselves the discretion to override patient decisionmaking. See Rogers v. Okin, 478 F. Supp. 1342, 1361-64 (D. Mass. 1979) (concluding that psychiatrists' conflicted interests require that court oversight via guardianship process be used before patients may be medicated without consent except in emergency situations).

\textsuperscript{49} For a discussion of these two principles as accounting for one of the fundamental tensions in the field of bioethics, see Tom L. Beauchamp & James F. Childress, Principles of Biomedical Ethics 209-12 (3d ed. 1989).

\textsuperscript{50} Convenience also implies an interest of lawyers which may be dissonant with the interests of clients. While it is not at all surprising that a profession will seek ethical guidelines which favor its interests, it is hardly honorable to do so. For a critique of the legal profession's tendency to be self-serving in this regard, see Thomas D. Morgan, The Evolving Concept of Professional Responsibility, 90 Harv. L. Rev. 702, 733-39 (1977); Deborah L. Rhode, Why the ABA Bothers: A Functional Perspective on Professional Codes, 59 Tex. L. Rev. 689, 692-702 (1981).


\textsuperscript{52} See Stephen Ellmann, Lawyers and Clients, 34 UCLA L. Rev. 717, 758-61 (1987); Susan R. Martyn, Informed Consent in the Practice of Law, 48 Geo. Wash. L. Rev. 307, 311-12 (1980); Smith,\textsuperscript{ supra} note 5, at 102-03; Spiegel,\textsuperscript{ supra} note 30, at 73-77; Marcy
omy and client-centeredness trumped paternalism and best interests unless some emergency exception applied.\textsuperscript{53} That attractive premise has been subject to some substantial critique recently. Both critical theorists\textsuperscript{54} and "ethic of care" proponents\textsuperscript{55} have challenged the assumption of a fundamental difference between an "autonomy" perspective and a "paternalism" perspective, acknowledging both that the concepts are far more slippery and intertwined than the more categorical treatment has implied, and that relationships are far more complicated and contextual to allocate decisionmaking power easily in one camp or the other.\textsuperscript{56}

William Simon represents the best spokesperson for what I have termed the critical stance on paternalism. Professor Simon has argued that the conventional dedication to autonomy interests may shortchange clients, particularly those who are subordinated. He instead suggests that lawyers working with such clients "try to enhance the client's capacity to express her own interests[,] . . . under conditions in which the lawyer believes that the client's understanding is not affected by conditions of hierarchy."\textsuperscript{57} To accomplish this a lawyer ought not be bound by usual considerations of deference to client instruction, because that instruction may not be free from the influences of oppression. In a later

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\textsuperscript{53} This represents the general tenor of the model standards governing lawyers. As Professor McChrystal notes:

Not surprisingly, legal ethics rules generally prohibit the lawyer's paternalistic control over the representation, unless the client is under a disability of some sort, and even then the rules are ambiguous. Thus, ethics rules legislate a required response to the problem of paternalistic loyalty, but this does not make the problem go away. Rather, the rules simply direct lawyers to live with the guilt of harming their clients by acceding to their clients' self-destructive wishes.


\textsuperscript{55} See Ellmann, \textit{supra} note 34, at 2703.


\textsuperscript{57} Simon, \textit{Visions}, supra note 54, at 486.
Simon extends his critique of the traditional attachment to autonomy. In his view, a "refined" view of paternalism seeks to achieve a result a client would want if she were seeing her own values clearly; a "refined" view of autonomy, so often contrasted to that paternalist stance, seeks essentially the same result—respect for values of a client who is not impaired in her understanding and expression of them. Simon argues, then, that the two competing principles are "hard to distinguish."

One finds a similar revolt against conventional autonomy trumps in the literature developing an "ethic of care." With a traditional view of lawyer-client interaction which is individualized and categorical, the autonomy trump fits comfortably, as does a formal approach to intervention. In essence, these views require that a lawyer follow client direction unless some triggering considerations make that approach impractical, and only then is the lawyer to seek some formal permission to act in a different, non-client-directed way. The "ethic of care" literature rebels against such categorical reasoning. It recognizes that lawyers and clients are engaged in a complex relationship, with each affecting the other and with each connected to a larger world whose interests cannot be ignored.

As Stephen Ellmann writes in his recent exposition of the ethic of care as affecting legal ethics, "the ethic of care appears to authorize a significantly greater degree of intervention in client decisions than do the existing codes of ethics."

Professor Ellmann offers several reasons for this conclusion: the increased understanding of one's client that would result from the ethic of care may allow a lawyer to "understand[ ] more fully what the client desires and why;" "the concern for autonomy has much less force within the ethic of care, which emphasizes people's interconnection and responsibility rather than their independence and autonomy;" and caring lawyers, with their express sensitivity to interests of

58. See Simon, Mrs. Jones's Case, supra note 54.
59. See id. at 224. As Simon puts it:
   A genuine conflict between autonomy and paternalism would require a view that contained both a thick theory of the good that did not depend on individual choice and a notion of individual choice capable of envisioning choices that violate the good as autonomous. It is not hard to find examples of such views—for example, in most versions of Christianity and other scriptural religions—but they seem to have little direct influence within the legal profession.
   Id. at 225. For similar views, see Kennedy, supra note 54, at 624; Luban, supra note 5, at 467-74.
60. See Cahn, supra note 28, at 2500-01; Simon, supra note 24, at 1086-90.
62. Ellmann, supra note 34, at 2709.
63. Id. at 2703 (quoting Carrie Menkel-Meadow, Portia in A Different Voice: Speculations on a Women's Lawyering Process, 1 Berkeley Women's L.J. 39, 57 (1985)).
64. Id. at 2705.
third parties in addition to their clients, may intervene more often in order to protect such third party interests.65

I address these trends in critical thought and ethic of care scholarship to demonstrate that an emerging contextual view of the attorney/client relationship challenges the formerly-held commitment to strict respect for client autonomous decisionmaking. The Recommendations, with their greater tolerance for intervention, are thus consistent with that emerging view, even if for reasons seemingly unconnected to it.66 But this trend carries with it very real dangers as well, and those dangers are present in the Recommendations. There were good reasons for all of the worrying about lawyer overreaching, even if those worries were couched in excessively categorical terms. A recognition that refined autonomy may resemble refined paternalism does not rule out the crude versions of each, and especially of the latter. As Lucie White has elegantly written:

We must not discount the risks imposed by theories that make human connection too easy to attain. Such theories have typically sanctioned domination of the most insidious kind, by encouraging the privileged to name the feelings of less powerful others, without cautioning that to name others' feelings is also to silence their voice.67

Professor White's warning serves as a reminder to us all of the implications of an enhanced discretionary model. As Professor Rein argues with

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65. See id. at 2708-09. Of course, acting in this way is not "paternalism" in any real sense. Paternalism has been defined as follows: "[A] paternalistic act is one in which one person, A, interferes with another person, S, in order to promote S's own good." Donald VanDeVeer, Paternalistic Intervention 12 (1986). If a caring lawyer interferes with her client's choices not for the client's own good but for the benefit of third party interests, that intervention, while morally activist, cannot be labelled paternalist. It is such an approach, in fact, which undergirds Jan Rein's proposal to replace the usual method of lawyer intervention with a morally-grounded intervention justification. See Rein, supra note 3.

66. As noted above, the impact upon the bar of the increasingly more sophisticated academic critique of practice is questionable at best. See supra note 46 and accompanying text. The failure of the academy to connect in its scholarship to practicing lawyers has served as the subject of much criticism. See Robert D. Dinerstein, A Meditation on the Theoretics of Practice, 43 Hastings L.J. 971, 983-84; Harry T. Edwards, The Growing Disjunction Between Legal Education and the Legal Profession: A Postscript, 91 Mich. L. Rev. 2191 (1993); Harry T. Edwards, The Growing Disjunction Between Legal Education and the Legal Profession, 91 Mich. L. Rev. 34, 35 (1992) (criticizing "[t]he 'impractical' scholar"); Harry T. Edwards, The Role of Legal Education in Shaping the Profession, 38 J. Legal Educ. 285 (1988); see also Law & Society Meeting in Chicago—Legal Aid Attorneys Question Whether Lofty Theory Is of Practical Value, 4 Consorting (Interuniversity Consortium on Poverty Law), Nov. 1993, at 6 (reporting reactions of legal services lawyers who had attended a law professor-organized Law & Society conference; the attorneys described the presentations and discussions as "'a complete waste of time,'” and having "little, if any, relevance to their work”).

67. Lucie E. White, Seeking... The Faces of Otherness...": A Response to Professors Sarat, Felstiner, and Cahn, 77 Cornell L. Rev. 1499, 1506-07 (1992); see also Lucie White, Paradox, Piece-Work, and Patience, 43 Hastings L.J. 853, 859 (1992) ("[L]awyer-theorists... risk usurping from poor people and their advocates the power to name the very forms of violence that pose the most formidable barriers to their empowerment.").
passion in her contribution to this Conference, lawyers may still do great harm to their clients if their enhanced responsibility is not treated with the greatest respect and awe. We must ensure that the Recommendations, helpful and progressive as they might be, are viewed within this cautionary light.

CONCLUSION

The Conference’s Capacity recommendations entrust a lawyer with significant responsibility for the affairs of her most vulnerable clients. That delegation of trust and responsibility is accompanied by the most limited of guidance, although the practice guidelines in this issue offer some help. Lawyers who often find themselves in situations where questions of competence are likely to arise will need to continue to talk among themselves and to other thoughtful and principled policy and academic thinkers, to develop a set of stories and heuristics to inform their practices. Plainly, mistakes will occur, and one hopes that the profession will learn from those errors. There is no other way to make this process work.

68. See Rein, supra note 3.

69. For an example of a possible error in judgment in this area, see Lawrence A. Frolik & Alison P. Barnes, Elderlaw: Cases and Materials 85-88 (1992) (providing a hypothetical complaint filed by a disgruntled relative against an attorney who acted without adequate consent of a questionably competent client to perform estate planning services).