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ETHICAL ISSUES IN REPRESENTING SENIORS, PERSONS WITH DISABILITIES AND THEIR FAMILIES

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I. INTRODUCTION[1]

The practice of Elder Law involves a holistic approach in which the attorney focuses on the needs of the client as a whole, rather than a particular area of the law, such as tax or contracts. This holistic approach is often at odds, however, with conventional attorney-client relationships.[2]

1. Portions of these materials (including the forms and checklists) are adapted from and/or reprinted with permission from Tax, Estate and Financial Planning for the Elderly: Forms & Practice by John J. Regan, Michael Gilfix, Rebecca C. Morgan and David M. English (Matthew Bender), hereafter *Forms & Practice* and California Guide to Tax Estate and Financial Planning for the Elderly by Stuart D. Zimring and Donna Bashaw (Matthew Bender), hereafter *California Guide,* copyright 2002-2007 by Matthew Bender & Co., Inc. All rights reserved.
2. For an excellent discussion of the breadth and practice of Elder Law see Charles P. Sabatino, *The Future of Elder Law - One Perspective*, The Elder Law Report, Volume X, No. 8 (March, 1999). *See also* Daniel G. Fish, *The 10 Myths of Elder Law*, NAELA Symposium Papers (1998).

A. Life Planning versus. Estate Planning

From the perspective of a "traditional" estate planner, one of the key distinctions between estate planning as it has generally been practiced over the last several decades and Elder Law is the Elder Law attorney's focus on "life planning" as opposed to "transfer by death" planning.

Most traditional estate planners would probably concur that the largest focus of their practices has been to move the greatest amount of wealth from one generation to the next at the least expense in court costs and taxes. Elder Law practitioners take a different view, although these traditional approaches certainly have their place. Elder Law attorneys tend to emphasize the issues arising out of today's longer life spans rather than on death-related transfers.

Using a holistic approach to the practice, Elder Law recognizes that what concerns today's aging population the most are health-related issues, the fear of isolation and financial problems. These concerns, arising out of our society's core cultural values of independence and autonomy, are at the very heart of the practice of Elder Law today.

The challenge then is to integrate not only these disparate approaches to the practice of law, but also to integrate other disciplines into the practice of law as reflected in the NAELA Aspirational Standard D-2, which provides:

> The Elder Law Attorney:...Approaches client matters in a holistic manner, recognizing that legal representation of clients often is enhanced by the involvement of other professionals, support groups, and aging network resources.[3]

Thus, the concepts, concerns and issues presented in the ongoing debate regarding the multidisciplinary practice of law are nothing new to the Elder Law attorney. Elder Law attorneys are in the forefront of expanding the definition of what constitutes a "law office" and how the practice of law is defined.[4]

B. The Ethical Challenges

Often, the attorney is approached by family members at a time of crisis. It is not uncommon for the contact person(s) (*i.e.*, the children of a disabled senior), to reside out of town, with the distance creating additional anxiety and stress. The tensions and anxieties of the moment frequently overshadow and overwhelm the attorney's objectivity and judgment—the very things the parties consulting the attorney are seeking.

As a result of this family involvement, the attorney often faces questions that have never been encountered before and often must provide answers to previously un-

3. NAELA Aspirational Standards for the Practice of Elder Law (hereafter "The NAELA Aspirational Standards") D-2. The NAELA Aspirational Standards can be found on the NAELA website, www.NAELA.org and in 2 NAELA Journal 5 (2006).

4. See *American Bar Association Commission on Multidisciplinary Practice Report to the House of Delegates* (1999) for a discussion of Multidisciplinary Practice issues and NAELA Aspirational Standard H.

asked questions_*before* the facts of the particular situation are fully explored and analyzed:

- Who is the client?
- If action must be taken, who has authority to act?
- If the issues involve someone in a medical crisis or suffering from a terminal condition, is there sufficient time to accomplish the tasks contemplated?
- Is sufficient information regarding the issues available to provide an informed opinion in a minimum amount of time?
- What resources are available to assist the attorney (and the client) in gathering this information?
- In dealing with multiple parties, what ethical issues must be dealt with?

C. Multi-Disciplinary Issues

These issues become even more difficult, confusing and often contradictory when the Elder Law attorney uses the services of other professionals in a multidisciplinary context. As will be discussed below, the ethical, statutory and regulatory environment in which other professionals operate often conflicts with the environment in which the Elder Law attorney operates.

In addition to the law, Elder Law attorneys need to have a certain degree of medical knowledge. Familiarity with the stages of Alzheimer's Disease, the effect of aphasia on a client's ability to consent to treatment, the impact of hemiparesis on a client's ability to execute documents (to name a few), are all part of the day-to-day requirements of practicing Elder Law.[5]

Recognizing this need, in November 2005, NAELA adopted the Aspirational Standards for the Practice of Elder Law. Simultaneously, Commentaries were adopted to explain and illustrate the meaning and purposes of the Standards. As stated in the Preamble to the Aspirational Standards:

Each state's professional responsibility rules mandate the minimum requirements of conduct for attorneys to maintain their licenses. These Aspirational Standards build upon and supplement those rules. Attorneys who aspire to and meet these standards will elevate their level of professionalism in the practice of Elder Law, and enhance the quality of service to their clients. As attorneys meet these Standards, the practice of Elder Law will be raised to a higher standard of professionalism. These Aspirational Standards do not define or establish a community standard. They are not intended nor should they be used to support a cause of action, create a presumption of a breach of legal duty, or form a basis for civil liability.[6]

5. See ABA Model Rules of Professional Conduct (hereafter MRPC) 1.1 and 1.2, NAELA Aspirational Standard D-1 and the ACTEC Commentaries regarding an attorney's obligation to have the requisite knowledge and skill reasonably necessary for the representation.
6. 2 NAELA Journal 5, 6 (2006). *See also* Hugh K. Webster, *Relevance of the NAELA Aspirational Standards to Malpractice Liability*, 2 NAELA Journal 143 (2006).

D. Setting the Stage

The phone rings. The caller identifies herself as the daughter of a couple in crises. Her father is in a hospital near your office, having just suffered a massive stroke. Her mother is unable to cope. The daughter lives on the east coast and will not be able to get there for the next several days. Her brother works for a multinational company and is currently on assignment in South America. He wants to be involved and can be available by cell phone for a conference call. Two other siblings live in the Midwest and North East. One wants to be involved (but not too much, unless money is involved), and the other wants nothing to do with his parents at all, at least until it is time to take his share of the inheritance.

Their mother is giving them conflicting, incoherent reports about what is happening. The hospital will not divulge any information regarding their father's condition. They have heard rumors that, if their father lives and has to be placed in a nursing home, all of the family's assets will be consumed in nursing home costs; the state will take the parents' home if they seek public assistance; and their mother will be tossed out on the street.

The family physician has told the mother that he expects the father to make a full recovery and will be able to come home "as long as there is full-time assistance in the home." However, he has also told the daughter that dad may never come out of intensive care and they should prepare for the worst. At best, the father, if he is able to come home, will require 24/7 care from this point forward and the doctor believes they should either start looking for a caregiver or a nursing home.

The daughter informs you that they (the children and mom) want to schedule an appointment to discuss their options. The daughter and mother will attend in person and the other children will participate by conference call. Parenthetically, the daughter shares with you that she is a bit concerned about her mother's driving skills since she has discovered that in the last six months the mother has had a number of "fender benders" and will not visit her husband in the hospital at night because she is scared to drive in the dark. The daughter wants to know what, if anything, she should do about this.

How should you respond?

E. Getting the Facts

When the information is conflicting and the stresses on the interested parties are magnified by the distances involved, one of the first goals should be to ascertain what is really going on. A Geriatric Care Manager (GCM) is invaluable in this regard. Whether the attorney retains the services of the GCM (or has a GCM on staff) or refers the family (note the absence of the use of the word "client" at this point), the professional insight, observations and recommendations that a GCM brings to the table are invaluable.

A GCM is a professional specializing in assisting older people and their families in meeting their long-term care arrangements. GCMs generally have a background in

gerontology, nursing, social work or counseling.[7] From the attorney's point of view, the GCM is an invaluable ally in obtaining, assessing, analyzing and presenting in coherent form all the relevant information needed for the attorney to properly give advice.

However, as will be discussed in more detail below, using the services of a GCM (or any other ancillary professional) raises a number of privilege and confidentiality issues, as well as some potential conflicts between the codes of conduct of the respective professions. The attorney must be aware of these and deal with them (which can mean deciding that they are not a problem in the specific case), before involving the GCM.[8]

II. ETHICAL ISSUES

A. Who is the Client?

When the attorney is faced with a room full of people, or parties at a distance via conference call, the first question that should be asked is "who is the client?" This question assumes, as do the ABA Model Rules of Professional Conduct (MRPC) and the NAELA Aspirational Standards,[9] that there must, ultimately, be a client; and in this context, that there is but one client.

But must there be a client? Must there be only one client? Can the family unit be viewed as "the client?" Can there be, for the purposes of this first informational meeting, "no client?"

B. The Communitarian Approach

Since this type of practice focuses on *counseling,* it is the author's opinion that it is possible *in certain situations*, within the ethical framework of the MRPC and the NAELA Aspirational Standards, for an attorney to initially function as a counselor or consultant to the family unit without (yet) having a specific individual identified as the client. That said, if it is the attorney's practice to generally represent the senior, that fact should be stated at the earliest possible opportunity.

Representing the family is potentially fraught with peril. While there is no question that, on an ongoing basis, attempting to represent a family unit is problematic, the truth is that, in many instances, it is the family unit's overall interests that are

7. For more information about professional geriatric care managers, visit the National Association of Geriatric Care Managers' website www.caremanager.org.

8. Any attorney working with GCMs should be familiar with The National Association of Professional Geriatric Care Managers' Pledge of Ethics and Standards of Practice which can be viewed at www.caremanager.org/gcm/Codeofethics.htm and www.caremanager.org/gcm/Standardsofpractice.htm, respectively.

9. See ABA Model Rules of Professional Conduct (MRPC) 1.1, 1.6, 1.7 and NAELA Aspirational Standard A and the commentaries to it.. *See also* ACTEC Commentaries to the Model Rules.

involved and at stake, and a communitarian approach (treating the family as a single, cohesive unit) works to everyone's benefit.[10]

Thus, in the context of an initial consultation, which may not (and probably should not) go any further than the initial meeting, it is this author's opinion that *counseling* the entire family is permissible. However, this *counseling* relationship with the entire family is only permissible when the attorney has not previously represented any individual member of the family unit. When there is a pre-existing relationship, the traditional rules covering disclosure and waiver of potential conflicts apply and NAELA Aspirational Standard B should be considered carefully.[11] Since NAELA Aspirational Standard B specifically does not endorse the concept of representation of the family as an entity[12]when the communitarian approach is used, the attorney should consider sending the group some form of disclosure indicating the nature and extent of the representation at this juncture. A sample form is attached as Appendix A.

C. Ongoing Relationships and Disclosure of Information

If an ongoing relationship is established, that relationship should be with one individual, preferably the non-incapacitated senior. At that point, the usual rules regarding retainer agreements with clients apply, and the attorney should proceed accordingly.[13] This representation can be done through an authorized agent of the senior, *i.e.*, a child who is the agent under a power of attorney. If the representation occurs in this manner, the attorney should stress that the client is the *senior*, not the *agent,* and appropriate disclosures should be made. The agent should be advised that she may well need to seek independent representation in her capacity as agent since the attorney is not representing *her* but rather is representing the principal.[14]

It is not uncommon for the client to want the other members of the family to be kept informed of what is happening. If the client authorizes such disclosures, it is perfectly appropriate (and helpful to the attorney) for the attorney to provide copies of correspondence and other relevant documents to other family members (or other professionals advising the family, such as their CPA or financial planner). An Authorization form is included at Appendix B.[15] Before accepting such authorizations,

10. For an excellent discussion of the communitarian approach, see A. Frank Johns, CELA, RG *The Communitarian Approach in the Elder Law Construct: Multiple Member Family Engagements Forecast an Embrace of Family Entity Representation*, NAELA Symposium 2000. *See also* Russell G. Pierce *Forward* to *Symposium: Should the Family Be Represented as an Entity?: Reexamining the Family Values of Legal Ethics*, 22 Seattle U. L. Rev. 1, 2 n. 5, 6 n. 33.

11. See Model Rules 1.6 and 1.7 and NAELA Aspirational Standard B and the comments thereto.

12. See footnote 3, 2 NAELA Journal 10 (2006).

13. See e.g. Cal. Bus. & Prof. Code § 6148(a). See also MRPC 1.5 and NAELA Aspirational Standard A-3.

14. See NAELA Aspirational Standard A-1.

15. This form is based on one originally created by Ruth Phelps, CELA, Pasadena, California.

the attorney should be satisfied that the client's request is being made freely and without undue influence or duress.[16]

D. Joint Representation[17]

1. Joint Representation of the Husband and Wife

It is common for one attorney to represent both a husband and wife in a conventional estate planning context, and there is no rule preventing such joint representation. In the "classic" joint representation paradigm, the attorney is retained to represent both spouses to achieve essentially common goals. In such cases, the attorney generally advises the clients in writing of the potential conflicts that may arise in such a dual representation and obtains their written consent thereto.[18]

So long as both spouses have contractual capacity and are appropriately advised of the potential conflicts, there is no reason that an attorney cannot represent a married couple. A sample Dual Representation Disclosure form can be found at Appendix C.

2. Representation of One Spouse

Another scenario is when one of the spouses is incapacitated, either temporarily or permanently, and the "well" spouse (who may in fact not be that well at all under the circumstances) wishes to retain the attorney's services. On the one hand, the issue of "who is the client" is made much easier in this context. There is only one client: the well spouse. However, depending on state law, that spouse may have certain fiduciary obligations to the ill spouse regarding the couple's property.[19]

Frequently, the issues involve the possibility that the ill spouse may go into a nursing home for an extended period of time while the well spouse/client is concerned about preserving the couple's assets for the well spouse's support and maintenance. The attorney needs to be mindful of the well spouse's fiduciary obligation to her spouse and advise her accordingly. The well spouse's concerns and needs may, theoretically, be inapposite to the institutionalized spouse's needs and concerns. The attorney's obligation to the well spouse is in *addition to* other ethical and legal obligations the attorney may have to the ill spouse as a third-party beneficiary of the representation.[20]

16. See NAELA Aspirational Standards B-3, C-1 and C-3.
17. In general, see MRPC 1.4, 1.6, 1.7, 1.8 and 1.9, NAELA Aspirational Standards A-1, B-1, B-2 and C-3 and ACTEC Commentaries regarding joint representation and conflict of interest issues.
18. See *ABA Special Probate and Trust Division Study Committee on Professional Responsibility,* 1993 Report regarding joint representation of husband and wife. *See also* NAELA Aspirational Standards B-1 and B-2.
19. See e.g. California Family Code §1100(e).
20. See e.g. *Lucas v Hamm*, 56 C.2d 583, 15 CP 821 (1961). *See also* NAELA Aspirational Standard E-5.

3. Joint Representation of Parent and Child

Another potential joint representation scenario is when the senior and another family member (often a child) seek to jointly retain the services of the attorney. Again, there is no prohibition on such representation. However, in this context, the practical implementation of the ethical requirements may be more difficult.[21] In such cases it is not unusual for one potential client to be significantly younger, more alert and/or possess greater business acumen than the other. Such relationships are fertile breeding grounds for issues of undue influence and duress. Further, if the senior is already exhibiting some signs of impairment (either physical or mental), obtaining a truly knowing waiver of the potential conflicts of interest common to a dual representation situation may be difficult, if not impossible.[22]

Thus, when asked to jointly represent such an unequal pairing, the attorney is well advised to ask why the *joint* representation is necessary. If the truly appropriate client is the senior, and it is suitable for the other party to be kept advised of the status of the matter, this can be accomplished without creating an attorney-client relationship with both (and may well be preferable). Likewise, if there is any question about whether the senior is capable of retaining the services of the attorney, joint representation will not solve the problem, it will only exacerbate it.

4. Retention by an Agent

If the senior has executed a Durable Power of Attorney that authorizes the power holder to employ counsel, can the power holder retain the services of the attorney on behalf of the principal? All other things being equal, the answer would appear to be "yes." However, in such an arrangement, the concurrent fiduciary responsibilities need to be clearly delineated. The agent under the Durable Power of Attorney owes a fiduciary duty to the principal (the senior). The attorney likewise owes a fiduciary duty to the client, in this case the senior. The parties must be clearly advised that the agent is exactly that: an agent, no more, no less.

If the agent is a spouse or child, there may well be inherent conflicts of interest (sometimes potential, often real) that the attorney needs to point out before undertaking the representation.[23] In fact, when the agent's interests are clearly at odds with the principal's (for example if a certain planning strategy may adversely affect the child/agent's potential inheritance), the attorney should advise the agent to seek independent counsel.

E. Capacity Issues

1. Existing Client Is of Questionable Capacity - Family Wants Conservatorship

Sometimes children or other family members of an existing client will come to the attorney requesting assistance with the existing client. They believe the client no

21. See NAELA Aspirational Standards B-1, B-2, B-3, C-2, E-1, E-4, E-5 and F-2.
22. See NAELA Aspirational Standard B-2, E-1, E-2 and E-4 and MRPC 1.14.
23. See NAELA Aspirational Standards B-1, B-2, E-5 and E-8.

longer has capacity and want information about her affairs or estate plan or may even want the attorney to commence conservatorship proceedings against the client.[24]

Whether an attorney may commence protective proceedings on behalf of the existing client in this situation is an extremely difficult ethical issue. The Model Rules permit it, as do the NAELA Aspirational Standards.[25] However, at least one state's Rules of Professional Conduct have been interpreted as specifically prohibiting it. The prohibition is premised upon the presumed "absolute" duty of confidentiality the attorney owes the client.[26]

2. New Client Is of Questionable Capacity - Wants Representation

Another ambiguous situation arises when the attorney is not sure whether the client or potential client has capacity. In these cases, the attorney needs to ask two threshold questions:

- Does the client/potential client have capacity to enter into the attorney-client relationship in the first place?
- If so, does the client/potential client have the capacity to do that which is requested?

How does one answer these questions? "Capacity" or "competency" is a legal conclusion supported and informed by medical information. In answering the questions, some attorneys use one or more of the standardized tests (such as the Folstein Mini Mental Status Exam) or their own checklists to determine their client's capacity. Caution must be exercised in using any standardized test or checklist since attorneys generally do not have the background or training to properly administer or interpret these tests. On the other hand, a very valuable tool specifically designed for attorneys is the *Assessment of Older Adults with Diminished Capacity: A Handbook for Lawyers* (2005), written and published by the ABA Commission on Law and Aging and American Psychological Association. Some attorneys refer clients to psychologists or psychiatrists for formal appraisal of their condition. There are pros and cons to all of these approaches. However, for better or worse, the ultimate threshold decision regarding capacity belongs to the attorney.

3. Family Wants Conservatorship for Dad

The simplest scenario would seem to be one in which the children (or other family members) come to the attorney seeking to commence conservatorship proceedings over the parent, and the attorney has not previously represented any of the parties. However, there are issues here too.

If the attorney is informed that the senior does not want a conservatorship and will contest the proceedings, does the attorney have a duty to independently investigate

24. MRPC 1.14 and NAELA Aspirational Standard E.

25. MRPC 1.14(a) and (b) and NAELA Aspirational Standard E-4. *See also* Formal Opinion 96-404, ABA Standing Committee on Ethics and Professional Responsibility and Oregon Opinion 1991-41.

26. Formal Opinion 1989-112, Standing Committee on Professional Responsibility and Conduct of the State Bar of California.

the "true" facts and determine if perhaps what is really going on is a case of greedy children attempting to accelerate the receipt of their inheritance at the expense of their parent? Probably not, but zealous advocacy on behalf of the client should not necessarily blind the attorney to the larger family dynamic that is going to be irretrievably affected by a contested conservatorship proceeding.[27]

F. Conflict Issues

1. The Basic Rules

MRPC 1.7 sets out the general rules governing the representation of conflicting interests. It should be noted at the outset that representing conflicting interests is not prohibited. MRPC 1.7 states in pertinent part:

> a) A lawyer shall not represent a client if the representation of that client will be directly adverse to another client, unless [emphasis added]:
>   1. the lawyer reasonably believes the representation will not adversely affect the relationship with the other client; and
>   2. each client consents after consultation.
>
> b) A lawyer shall not represent a client if the representation of that 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. When representation of multiple clients in a single matter is undertaken, the consultation shall include explanation of the implications of the common representation and the advantages and risks involved.[28]

2. Waiver of Potential Conflict Issues

When the conflict is potential and/or theoretical, the common practice is to advise the clients in writing of the potential conflict and obtain their written consent (usually referred to as "a conflict waiver") prior to the commencement of the representation.

Whenever possible, the better practice is for the attorney to advise the clients of the potential conflicts and obtain the conflict waiver prior to the first meeting, even if it is not certain at that point in time that the attorney is going to be retained beyond the initial meeting. An attorney-client relationship can be created even if no formal relationship is entered into and even if the attorney declines to perform further services.[29]

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27. See NAELA Aspirational Standards A-1, A-2, D-2, E-1, E-2, E-4, E-5, E-7 and F-3.
28. MRPC 1.7. *See also* NAELA Aspirational Standard B.
29. See MRPC 1.18.

G. Payment by Third Parties

Today, children are frequently more financially stable than their parents. Thus, the issue of allowing someone other than the senior/client to pay the legal fees incurred arises more often in this area than almost any other area of the law.

Third-party payment of fees is permissible under the MRPC and the NAELA Aspirational Standards and in a number of states.[30] Generally, the person paying the fees must understand that:

- The payor may not interfere with the attorney's independence or professional judgment;
- There can be no interference with the attorney-client relationship;
- The attorney-client privilege applies and the payor is not privy to such confidential information; and
- The client must give informed, written consent to the arrangement.

A form of third-party payor consent can be found at Appendix D.

III. MULTI-DISCIPLINARY ISSUES USING GERIATRIC CARE MANAGERS

A. Introduction

As noted above, using the services of a Geriatric Care Manager (GCM) or other professional raises a number of privilege and confidentiality issues as well as some potential conflicts between the codes of conduct of the respective professions. The attorney must be aware of these and deal with them (which can mean deciding that they are not a problem in the specific case), before involving the GCM. Some of these issues will be addressed below.

This section will explore the impact the attorney-client privilege can have on the relationship between the attorney and a GCM in three specific situations: (1) when the GCM is an employee of the attorney; (2) when the GCM is not employed by the attorney but is retained by the attorney to assist in meeting the needs of the client; and (3) when the GCM is employed by the client or another family member.

B. Defining the Attorney-Client Privilege

Rule 1.6 of the MRPC provides:

a) A lawyer shall not reveal information relating to representation of a client unless the client consents after consultation, except for disclosures that are impliedly authorized in order to carry out the representation, and except as stated in paragraph (b).

b) A lawyer may reveal such information to the extent the lawyer reasonably believes necessary:

   a. to prevent the client from committing a criminal act that the lawyer believes is likely to result in imminent death or substantial bodily harm; or

30. MRPC 1.5, NAELA Aspirational Standard B-4. See ABA Info. Opinion 86-1517 (1986). See also Cal. Rules of Prof'l Conduct § 4-200.

b. to establish a claim or defense on behalf of the lawyer in a controversy between the lawyer and the client, to establish a defense to a criminal charge or civil claim against the lawyer based upon conduct in which the client was involved, or to respond to allegations in any proceeding concerning the lawyer's representation of the client."[31]

C. Communications Covered by the Attorney-Client Privilege

California Evidence Code §952 is a typical example of the type of communication covered by the attorney-client privilege in the following manner:

As used in this article, 'confidential communication between client and lawyer' means information transmitted between a client and his or her lawyer in the course of that relationship and in confidence by a means which, so far as the client is aware, discloses the information to no third persons other than those who are present to further the interest of the client in the consultation or those to whom disclosure is reasonably necessary for the transmission of the information or the accomplishment of the purpose for which the lawyer is consulted, and includes a legal opinion formed and the advice given by the lawyer in the course of that relationship. A communication between a client and his or her lawyer is not deemed lacking in confidentiality solely because the communication is transmitted by facsimile, cellular telephone, or other electronic means between the client and his or her lawyer.[32]

D. Who Holds the Attorney-Client Privilege?

The holder of the attorney-client privilege is "the client." A "client" is a person who directly or through an "authorized representative," consults an attorney for the purpose of retaining the attorney or securing legal service or advice from the attorney in his or her professional capacity. The term includes an incompetent person who consults an attorney or whose guardian or conservator does so on the person's behalf. An "authorized representative" is a person who is authorized to obtain legal advice on the client's behalf.

If the client is deceased or incapacitated, the attorney-client privilege passes to the client's personal representative or conservator. It generally survives death.[33]

E. What is Privileged?

Generally speaking, the communications that are protected may be:

- Information transmitted between the client and his or her lawyer;
- Advice given by the lawyer to the client.

In both cases, the communication must have been intended to be confidential. As one court noted:

31. MRPC 1.6. *See also* NAELA Aspirational Standard C.
32. Calif. Ev. Code § 962.
33. See for example *HLC Properties v. Superior Court* (MCA Records, Real Party in Interest), 35 Cal. 4th 54, 105 P. 3d. 560 (2005) .

> [A]lmost any act, done by the client in the sight of the attorney and during the consultation, may conceivably be done by the client as the subject of a communication, and the only question will be whether, in the circumstances of the case, it was intended to be done as such. *S.F. v. Super. Ct.,* 37 C.2d 227, 235, 231 P.2d 26 (1951).

The advice must be given in the course of the attorney-client relationship for the attorney-client privilege to attach. However, the rule does not require that there be a formal retention of the attorney. The term "client" is usually defined broadly enough to include someone who "consults a lawyer for the purpose of retaining the lawyer or securing legal service or advice from him in his professional capacity."[34] Thus, a potential client may safely discuss a problem with an attorney for the purpose of obtaining advice or representation, and the matters discussed and statements made are privileged even if no subsequent representation results.

The presence of third parties while communications are occurring between the attorney and client is problematic. Traditionally, a communication might keep its confidential nature even though third parties are present if such parties are *necessary* for the purpose of the communication (e.g., an interpreter or the attorney's secretary or clerk). Other parties, even intimately associated with the client or the matter, are sufficient to render the communication non-confidential. See, for example, *Marshall v Marshall* 140 C.A.2d 475, 480, 295 P.2d 131 (1956), in which the client was held to have waived the privilege because the communication between herself and her attorney occurred in the presence of her son.

A more modern approach, exemplified by California Evidence Code §952, protects communications in which two classes of third parties are involved. The first includes those "to whom disclosure is *reasonably necessary* for the accomplishment of the purpose for which the lawyer is consulted." The second includes those "who are present to further the interest of the client in the consultation."

F. Exceptions Applicable to GCMs

When the GCM is a member of the attorney's staff and the attorney has determined it is "necessary" that the GCM be present during the consultation (or later in the collection of information), it would appear that even under the traditional rule the attorney-client privilege would still apply. However, as is often the case, the presence of other family members could destroy the privilege. On the other hand, in those jurisdictions where a more liberal interpretation is used, a GCM staff member should be treated no differently than any other staff member and there should be no problem. As one court noted:

[W]e construe section 952 to mean that attorney-client communications in the presence of, or disclosed to clerks, secretaries, interpreters, physicians, spouses, parents, business associates, or joint clients, when made to further the interest of the client or when reasonably necessary for transmission or accomplishment of the

34. Cal. Ev. Code § 951. See also MRPC 1.18 "Duties to Prospective Client" and NAELA Aspirational Standards A-1 and A-2.

purpose of the consultation, remain privileged. *Ins. Co. of N.A. v. Super. Ct.,* 108 C.A. 3d, 758, 771, 166 Cal. Rptr. 880 (1980).

When the GCM is not a member of the attorney's staff, a different issue presents itself. If the GCM is retained by the attorney, the GCM would, presumably, be considered the attorney's "employee" or "agent," and the rules set forth above would apply. On the other hand, if the GCM is retained by the client, a more difficult situation is created. Generally speaking, if the information provided has as its *dominant purpose* the transmission of information to the attorney in the course of a professional engagement with intent that it be confidential, the material may be held confidential. On the other hand, if the GCM is retained by the client to perform assessments or make recommendations for *the client*, and thereafter the materials are forwarded to the attorney, the dominant purpose is *not* the transmission of confidential information and the attorney-client privilege will not apply.

G. Ongoing Services and the Attorney-Client Privilege

Attorneys who have GCMs on their staff do so not just to provide initial intake and assessment services to assist the attorney and the client, but to provide ongoing geriatric care management services that are only tangentially related to the legal services provided by the attorney. In these cases, the attorney should clearly designate those portions of the reports, assessments, memos and other work product that are legally related and thus privileged from those that are care management based and therefore probably not privileged. The maintenance of separate files may well be appropriate under these circumstances.

IV. CONUNDRUMS CREATED BY CONFLICTS BETWEEN GCM AND ATTORNEY CODES

A. Introduction

The NAPGCM Code of Ethics and Standards and Practices differs from both the MRPC and the NAELA Aspirational Standards. These conflicts create conundrums for attorneys. The NAPGCM's definition of confidentiality and loyalty differs significantly from the duty of loyalty that exists between attorney and client.

The NAPGCM Pledge of Ethics with regard to confidentiality states:

> I will hold in trust any confidence you give me, disclosing information to others only with your permission, or *if I am compelled to do so by my belief that you will be seriously harmed by my silence, or if the laws of this State require me to do so.* (Emphasis added).

B. Standards of Practice

In addition to the Pledge of Ethics, different standards of practice apply to GCMs. Standard 1 of The Standards of Practice states:

> While the primary client usually is the older person whose care needs have instigated the referral to a professional geriatric care manager, all others affected by her/his needs should be considered part of the client system.

The rationale for this standard is stated as follows:

> In the area of professional geriatric care management, the care needs of the older persons often have significant consequences for others. The professional geriatric care manager's goal is to assist the individual members of the client system to understand fully the issues under consideration and arrive at a solution that allows maximum decision-making autonomy for the person receiving care and for the other persons involved with or affected by these care needs.

The Guidelines given for this standard provide:

1. The 'primary client' may not be the person who makes the initial contact or the person responsible for payment for services rendered.
2. Members of the 'client system' may include:
    a. the older person
    b. a family member within or outside the older person's household
    c. a paid caregiver
    d. friends, neighbors or community agencies
    e. a third party with fiduciary responsibilities
    f. other professionals, such as a physician, a nurse from a home health agency, an attorney, etc.
    g. the professional geriatric care manager.
3. In the event of conflicting needs within the client system, the goal of professional intervention should be to strive for resolution through a process of review and discussion among the parties, facilitated by the professional geriatric care manager.
4. The professional geriatric care manager should request assistance of appropriate peers, as needed, to help the client system find an acceptable solution to the conflicts it faces.

Finally, NAPGCM Guideline 5 to Standard 3, which deals with client confidentiality, specifically states:

5. Confidentiality is waived when the PGCM has good reason to believe life is threatened or the laws of the State, in which the PGCM practices, require the reporting of suspected abuse or neglect.[35]

C. Hypothetical

The simplest way to frame the issue is via the following hypothetical. Sadie Senior is represented by attorney and GCM. During a weekly visit, Sadie confides in GCM that Snivel Whiplash, her grandson, has taken her credit cards and jewelry, threatening her that if she tells anyone, he will inflict bodily harm on her cats, Munchkin and Misty, who are the loves of her life. The attorney calls Sadie and confirms the above, but she specifically instructs the attorney not to say anything to anyone.

35. See GCM Standards of Practice, www.caremanager.org/gcm/Standardsofpractice.htm (last visited September 15, 2008).

Based on the above, it would be fair to conclude that a conservatorship for Sadie may be appropriate because she is susceptible to undue influence and duress. However, in California it is considered unethical for an attorney to institute a conservatorship on a client's behalf without the client's consent[36] and further, the client has specifically prohibited the attorney from disclosing the information that would be necessary to obtain the conservatorship. Likewise, the attorney cannot report the acts of elder abuse because of the attorney-client privilege. As a result of the attorney-client privilege, attorneys are exempted from the "mandated reporter" requirements of California's elder abuse statutes.[37]

On the other hand, GCMs are mandated reporters and thus the GCM would be obligated to make a report.[38] Further, based on the NAPGCM Code of Ethics and Standards of Practice, the GCM presumably would feel impelled to disclose the situation to other members of the "client system."

But what if the GCM is employed by the attorney, either as a full-time staff member or as an outside resource? Would the information obtained by the GCM be considered "work product" or "privileged" under the attorney-client privilege? If so, what about the GCM's professional responsibilities to her/his own profession? The simple answer to the questions at this point in time is that we do not know.

V. HIPAA AND OTHER CONFIDENTIALITY ISSUES

Much has already been written about the impact of the Health Insurance Portability and Accountability Act of 1966 (HIPAA)[39] and the impact its privacy regulations are having on providers of health care and on those who interact with them. In terms of how GCMs and attorneys work together, HIPAA and other privacy-related statutes create additional challenges.

A. Disclosure of Protected Health Information

Because HIPAA was designed to cover the transmission of Protected Health Information (PHI), its focus is on the gatekeeper—the health care professional who has the information. Thus, if the information is transmitted properly, *i.e.,* disclosed in an appropriate manner, what happens to the information thereafter is, generally speaking, not the concern of HIPAA.

Thus, if a GCM or attorney obtains PHI in a proper manner, pursuant to an appropriate authorization for example, the sharing of that information between the GCM and the attorney would not violate any of the Privacy Provisions of HIPAA.[40]

36. Cal. State Bar Comm'n on Prof. Resp. & Conduct, Formal Op. No. 1989-112.
37. Cal. Welfare & Inst. Code § 15637.
38. Cal. Welfare & Inst. Code § 15630.
39. Pub. Law 104-191, 110 Stat 1936
40. For an excellent discussion of the HIPAA regulations see Ralph E. Hughs, "When Worlds Collide: The Privacy Challenge to Casual Use of Protected Medical Information in Probate Courts and Estate Planning", 24 Est. Planning & Calif. Probate Rptr 133 (June 2003).

However, other privacy statutes may impose different, more stringent requirements on the sharing of the information. For example, California's Confidentiality of Medical Information Act,[41] which is stricter in many respects than HIPAA, covers not only obtaining and disclosing PHI, but using the information as well.

GCMs and attorneys must carefully determine what information they need to adequately do their respective jobs and then obtain the appropriate authorizations (both federal and state) from the client/patient. Further, the authorization should, when appropriate, permit the respective professionals to share that information with each other. A form Authorization is included in this article as Appendix B. It is designed for use in California and may not be appropriate for other jurisdictions. Further, no one should use forms such as these without consulting with their own legal counsel first.

Finally, the federal Department of Health and Human Services maintains an excellent website on the HIPAA Privacy Regulations at www.hhs.gov/ocr/hipaa.

B. Other Confidentiality Issues

One of the marvelous attributes of GCMs is that they come with varied professional backgrounds and underlying licenses. However, these underlying licenses can impose differing responsibilities and ethical guidelines that also must be observed. For example, a GCM who is licensed as an LCSW may have different obligations and reporting requirements than a GCM who is licensed as a Marriage and Family Therapist or an RN. Each GCM must be familiar with the rules and regulations governing his or her particular professional licensure as must the attorneys who deal with them as outside contractors or employees.[42]

41. Cal. Civ. Code §§ 56-56.37.

42. See Bunni Dybnis, MA, MFT, CMC "Confidentiality, Privilege and Authorization for Release of Information: Challenges for the Care Manager", USC Law School 2002 Probate & Trust conference.

APPENDIX A

Fred Flintstone
12650 Riverside Drive
North Hollywood, CA 91607

Dear Mr. Flintstone:

This letter will confirm our appointment for June 1, 2007, at 10:00 a.m., to discuss various options and strategies available to you in connection with planning for long term institutionalized care, including Medi-Cal, for your aunt, Wilma. It will also confirm that our consulting fee for this appointment will be $XXX.00, payable at the time of our meeting.

In anticipation of the conference, I would appreciate your putting together **copies** of any of the documents listed in the attached **Document List** that may be applicable to this situation. We will be keeping the copies you bring with you, so please do not bring original documents.

Please give some thought as to the value of the various assets your aunt owns and, if possible, prepare a list of your aunt's assets showing the values. Additionally, please consider your aunt's present outstanding obligations, including your aunt's mortgage, personal loans and the like, and make a similar list of those items as well.

Most importantly, think about what you want to do. Do not be concerned about possible legal, tax or other considerations; just think about what you want to do.

At our conference, we will review all the above data, and discuss the various options available to you.

Since there will or may be multiple members of the family present at our meeting, each person who will be present must read and sign the enclosed Family Consultation Disclosure and Waiver Form and return it to us in the envelope provided.

As required by federal law, enclosed is a copy of our firm's Privacy Act Notice.

For directions to our offices, you can go to our website www.elderlawLA.com.

I thank you for selecting me to work with you on your aunt's Medi-Cal planning and look forward to seeing you on June 1, 2007.

Sincerely,

FAMILY CONSULTATION DISCLOSURE & WAIVER

You have indicated a desire to have other members of the family present at our meeting. You are more than welcome to do this, however, it is important that you understand the effect other people being present at our meeting may have.

The purpose of the meeting is to advise you regarding various aspects of Medi-Cal for long term care, other public benefit options, and estate planning in the context

of the possibility that a member of the family may require long term care in an institutional setting. At this meeting, we will be functioning not so much as advocates, but as counselors - counseling those present, providing information to you regarding the vagaries and intricacies of the California Medi-Cal program for Long Term Care, other public benefit programs, the opportunities that may be available to you and the costs involved. We have agreed do so on the basis set forth in the attached letter. You will subsequently decide whether you wish to retain us to do further work. Such work will be subject to a separate agreement between us.

We are happy to counsel and advise you and the other members of the family at this meeting. However, it is important that everyone understand and consent to the considerations involved.

Duty of Confidentiality and Loyalty; Conflicts of Interest

We owe you a duty to preserve any confidential information you share with us unless you authorize us to disclose such information. Similarly, we owe you a duty to act solely in your best interest, without being influenced by the conflicting interests of other clients or persons.

Ordinarily, matters we discuss with you during our meeting and information disclosed at that meeting are confidential and protected by the attorney-client privilege. The privilege prevents anyone else from inquiring into what was discussed at our meeting unless you consent to the disclosure of that information.

However, if other people are present, such as family members, the law generally provides that the expectation of privacy is absent and the attorney-client privilege may not apply.

Thus, it could be interpreted that your desire to have other members of the family present constitutes a waiver of the attorney-client privilege. I am not saying that this will happen, but it could happen. Since we will probably be discussing sensitive personal, medical and financial information, it is important that you consider this issue before authorizing other people to be present at our meeting.

Further, you need to consider the possibility that information may be disclosed at this meeting by you (or another member of the family) what you or that other member of the family might prefer to remain confidential. Again, you need to weigh that in determining whether or not you wanted members of the family present.

Although multiple parties will be present, we are presuming for this meeting that you will be our client and that if additional work needs to be performed, it will be performed on your behalf and you will continue to be our client.

Each member of the family who will be present at our meeting should sign this Disclosure and return it to us in the envelope provided. Our meeting cannot take place unless person present has read and signed a copy of this Disclosure and Waiver.

If you have any questions about anything discussed in this letter, please let us know. In addition, you should feel free to consult with another attorney about the effect of signing this document.

ENDORSEMENT

We have read the foregoing Family Consultation Disclosure & Waiver and understand its contents. We consent to the terms of the representation set forth above. We understand the discussion of the potential waiver of the attorney-client privilege and potential conflicts of interest in the letter and acknowledge that we wish to proceed. as indicated.

DATED: ____

____
____
~_______

DATED: ____

____
____
~_______

DOCUMENT LIST

1. The Deed to your aunt's home, or a copy of the Title Policy, together with a copy of the most recent property tax bill.
2. Deeds and/or Title Policies to other real estate your aunt owns, together with a copy of the most recent property tax bills.
3. Copies of the passbooks, certificates or statements showing the names and manner of holding title to all savings and checking accounts, certificates of deposit, etc. (joint tenants, co-tenants, etc.).
4. Copies of stock certificates, mutual fund share certificates, limited partnership investment certificates, monthly statements from stock brokers if your aunt maintains investments with a broker, and any other documents evidencing investments your aunt may have.
5. The declaration page of all life insurance policies on your aunt's life, as well as any other policies owned insuring the lives of other people.
6. The Beneficiary Statement of any qualified Pension, Profit Sharing Plan, IRA, HR-10 or other retirement plans in which your aunt has an interest.
7. Copies of any Partnership Agreements in which your aunt is a partner.
8. Copies of any Buy/Sell Agreements to which your aunt is a signatory.
9. Copies of any trust documents in which your aunt may have an interest (either as Beneficiary, Settlor or Trustee).
10. Copies of any papers showing that your aunt holds title as a "custodian" or "Trustee".
11. Copies of your aunt's most recent income tax returns.
12. Copies of your aunt's present Will or Trust and Powers of Attorney (for assets and/or health care), if any.
13. Names, addresses, telephone numbers, dates of birth and social security numbers of children.
14. Names, addresses and telephone numbers of persons to be designated as Trustee of Trust, Power Holders under Powers of Attorney and/or Executors under Will.

APPENDIX B

DISCLOSURE AUTHORIZATION

I have retained the services of the Law Offices of ~_____ as my attorneys. I understand that all communications between me and the Law Offices of ~_____ are confidential and that any facts or other information that I give to my attorneys will not be revealed to any person or persons without my express permission. With full knowledge of this right, I specifically authorize the Law Offices of ~_____ to take the following steps (check the appropriate boxes):

[]To answer questions presented by the person(s) listed below and to otherwise share any and all:

[]Information

[]Copies of correspondence

[]Documents requested by such person(s).

[]To answer questions presented by the person(s) listed below and to otherwise share any and all information, copies of correspondence and documents requested by such person(s) ONLY in the event that such person(s) indicates that there is, in such person's judgment, an emergency with regard to my financial and/or physical well-being.

I further understand that I will be billed for the time and costs incurred to respond to such questions, calls and other inquiries at the then prevailing rates.

Dated:______________________ ______________________________
~Client's Signature [Print name]

Authorized Person(s)

Name: ~	Name: ~
Address: ~	Address: ~
Phone: ~	Phone: ~

APPENDIX C

DUAL REPRESENTATION DISCLOSURE

It is customary for a husband and wife to employ the same law firm to assist them in planning their estate or in working on estate planning related matters. However, it is important that you understand that because we would be representing both of you, each of you would be our client. As a result, matters that one of you might discuss with us would not be protected by the attorney/client privilege from disclosure to the other. The Rules of Professional Conduct of the State Bar of California prohibit us from agreeing with either of you to withhold information from the other. Of course, anything either of you discuss with us is privileged from disclosure to third parties. If the two of you have a difference of opinion concerning your proposed estate plan, we can point out the pros and cons of such differing opinions, however, the Rules of Professional Conduct prohibit us, as the lawyer for both of you, from advocating one of your positions over the other.

Although I doubt it will happen, if conflicts do arise between the two of you of such nature that it is impossible in our judgment to perform our obligation to each of you in accordance with this letter, it would become necessary for us to withdraw as your joint attorneys and to advise one or both of you to obtain independent counsel.

Please read the following endorsement. If the terms are acceptable, please sign and return the enclosed copy of this letter in the envelope provided.

ENDORSEMENT

We have read the foregoing letter and understand its contents. We consent to having you represent both of us on the terms and conditions set forth. We understand the discussion of conflicts in the letter and agree that between the two of us, with respect to information either of us provides you, there shall be no confidential information.

DATED: ____________________ ____________________________
Client

DATED: ____________________ ____________________________
Client

APPENDIX D

Third Party Payor

Client has requested that the Firm accept payment for the services to be rendered to Client from ~________________________ who is the Client's ~_______________.

Client understands that the Client is primarily responsible for fees and costs incurred under the Agreement and will be liable for same if ~___________________ fails or refuses to pay.

Client acknowledges Client has been informed in writing of any potential conflicts that may exist in connection with the payment by ~___________________ and the Client has given his/her/their informed consent to payment by ~___________.

APPENDIX E

HIPAA AUTHORIZATION

HIPAA/CMIA AUTHORIZATION

Re: ________________________ ______________________________
Name of Client Social Security No./Date of Birth

I am either the Patient named above or the Patient's legally authorized representative.

This release authority applies to any information governed by the Health Insurance Portability and Accountability Act of 1996 ("HIPAA"), 42 USC 1320d and 45 CFR 160-164 and/or information governed by the California Confidentiality of Medical Information Act ("CMIA") Cal. Civ Code § 56.-56.37. Specifically, this release authority complies with the valid authorization requirements of 45 CFR 164.508(c).

Pursuant to HIPAA and/or CMIA, I authorize and direct: Any physician, healthcare professional, dentist, health plan, hospital, clinic, laboratory, pharmacy, or other covered health care provider, any insurance company, and the Medical Information Bureau, Inc., or other health care clearinghouse that has provided treatment or services to me or that has paid for or is seeking payment from me for such services, to give, disclose, and release, without restriction, all of my individually identifiable health information and medical records regarding any past, present, or future medical or mental health condition, to include all information relating the diagnosis and treatment of sexually transmitted diseases, mental illness, and drug or alcohol abuse to and to my attorney(s), __________.

The purpose of the use and disclosure shall include determinations regarding my capacity in conducting my legal representation and affairs, monitoring my health care to assure my maximum access to health care rights and government benefits and monitoring my health care to protect my legal rights where I reside.

I understand that, with certain exceptions, I have the right to revoke this Authorization at any time. If I want to revoke this Authorization, I must do so in writing. The procedure for how I may revoke this Authorization, as well as the exceptions to my right to revoke, will be performed in accordance with applicable federal law and any applicable policy of my health care provider.

I understand that I may refuse to sign this Authorization. I also understand that my health care provider cannot deny or refuse to provide treatment, payment,

enrollment in a health plan, or eligibility of benefits if I refuse to sign this Authorization.

I understand that, once information is disclosed pursuant to this Authorization, it is possible that it will no longer be protected by applicable federal medical privacy law and could be re-disclosed by the person or agency that receives it, however, I do not authorize such secondary disclosure.

The authority given to the persons and law firms named above shall supercede any prior agreement that I may have made with my health care providers to restrict access to or disclosure of my individually identifiable health information. The authority given has no expiration date and shall expire only in the event that I revoke the authority in writing and deliver it to my health care provider.

The Law Offices of Stuart D. Zimring has prepared this release and any questions regarding legal compliance and use may be directed to (818) 755-4848.

I have read and understand the information in this authorization form.

Signature of Patient: ____
Please print name: __________________________ Date: ___________________

OR

Signature of Authorized Representative:_________________________________
Please print name: __________________________ Date: ___________________

Please explain Representative's authority to act on behalf of the Patient: _______