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The Practice of Elder Law

Stuart C. Bear

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THE PRACTICE OF ELDER LAW

Stuart C. Bear[†]

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*Cast me not off in the time of old age; when my strength faileth,
foresake me not.*

– Psalms 71:9

I. INTRODUCTION

It is Monday morning. I arrive at the office a little later than I would have liked because I have just dropped my children off at school. Already, my client voice message light is on. I pick up the message, and it is from a responsible daughter, calling on behalf of her mother. I note the quiver in her voice. Responsible Daughter reports that over the weekend, Mom, a widow, slipped and fell and was found unconscious in her home. She was rushed to the hospital where her condition has now stabilized. Mom broke her hip and will need convalescent care, most likely in a nursing home facility. Responsible Daughter posed myriad questions: What type of care is available? How much is it going to cost? How can Responsible Daughter be appointed Mom's legal authority to make financial and medical decisions? How soon can we meet? How much is it

[†] Stuart Bear is a 1985 graduate of William Mitchell College of Law (now known as Mitchell Hamline School of Law). He is a shareholder with the Twin Cities law firm, Chestnut Cambronne PA. At the time of this article's first publishing in 2002 in the *William Mitchell Law Review*, Mr. Bear was the Chair of the Elder Law Section of the Minnesota State Bar Association. Today, Mr. Bear remains a member of the Elder Law Section's Governing Council.

going to cost for my services?¹ Responsible Daughter informs me that this is the first time she has been confronted with anything like this type of situation. In fact, neither she nor her Mom have ever had any contact with a lawyer or the legal system.

I ask Responsible Daughter a number of questions, ranging from the prognosis for Mom's medical condition, to Responsible Daughter's knowledge of Mom's legal affairs—such as whether Mom has a will, a durable financial power of attorney or a health care directive—and Responsible Daughter's knowledge of Mom's assets, income, and expenses. Not surprisingly, Responsible Daughter has little direct knowledge of these matters. As for Mom's prognosis, it is too early to tell whether her care in a nursing home facility will be of a temporary or a permanent nature. Responsible Daughter confides that Mom has been “slipping” during the past few months, becoming somewhat forgetful of names and events. Responsible Daughter has also found spoiled food in Mom's refrigerator, and there has been a concern about whether Mom is eating an appropriate, balanced diet. As for the legal documents and Mom's finances, this subject has been taboo—off limits. For the past six months, Responsible Daughter has tried to bring up the issue of finances, but Mom has not been forthcoming with sharing any financial information. Responsible Daughter has not pushed the issue for fear that Mom would perceive her as greedy, money hungry, and only interested in an inheritance.

We ultimately decide to meet the next day, at Mom's bedside in the hospital. The meeting is attended by Mom, Responsible Daughter, two responsible sons, and the spouse of one son. Two other children are not at the meeting because one of the children, a daughter, lives out of state and the other child, a son, has been estranged from the family for a number of years. In all, the six of us meet in a semi-private room at the hospital around Mom's hospital

1. See MINN. R. PROF. C. 1.5(a) (stating that a lawyer's fees shall be reasonable, as determined by a number of factors, including “time and labor required”; “the fee customarily charged in the locality for similar legal services”; “the amount involved and the results obtained”; “the time limitations imposed by the client or by the circumstances”; “the nature and length of the professional relationship with the client”; and “the experience, reputation, and ability of the lawyer or lawyers performing the services”). Elder law lawyers typically charge for their services based upon the lawyer's usual and customary hourly rate. Some services, such as providing specific types of legal documents, like a durable financial power of attorney or a health care directive, are often billed on a fixed-fee basis.

bed to discuss issues of importance to Mom and the other family members.

Turning to Mom and looking directly at her, I ask her what she wants. What are her goals and objectives? She tells me and her children that she does not want to be a burden to anyone. She wants to remain as independent as possible. She wants her children, when the time comes, to be able to step in and handle her financial affairs and medical affairs without problems, and she does not want to outlive her money so that she becomes destitute. The children all nod in agreement, as if to say that this is what they want too.

How did I get here? Twenty years ago when I enrolled at William Mitchell College of Law, I envisioned in my mind's eye practicing law in the traditional fashion. The fashion that came to mind was from the attorneys I saw on TV, like Perry Mason; the attorneys I saw in the movies, like Paul Newman in *The Verdict*; or even the attorneys I knew when I was growing up in a small town in northern Wisconsin—the all-knowing, general practice attorneys with Ward Cleaver—like sound judgment and with an equally impressive booming, resonant voice. So what happened?

After graduating from William Mitchell in 1985, I was eager to learn about many different areas of the law. I joined a private law firm, and ultimately joined the firm where I practice today, Chestnut Cambronne PA, in 1988. As a new associate, I was exposed to many different areas of the law. But I realized that in order to build my practice, I needed to focus my efforts on a particular area of substantive law. The population demographics in the late 1980s suggested that the Depression Era/World War II generation was increasing in age, and was in need of age-specific legal services. No one at our law firm was focusing her or his practice on delivering elder law services. Moreover, in assessing my own personal strengths and weaknesses, as well as my own personal likes and dislikes as far as the cases I handled in private practice, I came to the conclusion that practicing elder law fit my particular set of skills. I enjoy the transactional nature of law. I enjoy attention to detail. I enjoy the interpersonal relationships that develop between me, my clients, and their extended family members. I like helping people, and from that I get a lot of personal satisfaction.

So here I am, in this hospital room, with an agenda full of legal matters that I want to discuss figuratively tucked away in my back pocket. I am trying, however, to promote the demeanor of a

counselor, not the demeanor of a lawyer in a traditional sense. I speak in a quiet, steady voice, helping this family sort through a variety of issues.

II. THE PRACTICE OF ELDER LAW

What does it mean to practice elder law? What are the issues that arise? The practice of elder law means different things to different people. Clearly, elder law, in some sense, involves helping “older” people—but who are “older people?” People over fifty?² Does it mean those eligible to receive Social Security retirement benefits, beginning at age sixty-two or age sixty-five? Or does it mean helping only those that are in the oldest segment of the population, the eighty-five-and-older age group?

There is no right answer. Elder law is not limited to a specific age group. Generally speaking, it would seem to be appropriate for those sixty-five years of age or older, who are most commonly referred to as “senior citizens.”

The issues that I had tucked away in my back pocket to discuss with Mom and the children were varied, but I knew that the issues present in any elder law matter may vary depending upon the situation. For some, estate planning is of primary importance. Estate planning generally involves estate tax minimization planning and probate avoidance. For others, disability planning is of primary importance. Disability planning involves having certain legal documents in place to ensure that others have the ability to handle financial matters and medical decisions, should the need arise, and also to establish one’s medical wishes, including post-mortem issues regarding organ donation and funeral and burial arrangements. The most common legal documents involved with disability planning are a durable financial power of attorney³ and a health care directive.⁴ A durable financial power of attorney serves to

2. The American Association of Retired Persons (AARP) opens membership to persons age fifty and older. *About AARP: What We Do*, AARP, <http://www.aarp.org/about-aarp/> (last visited Mar. 28, 2016).

3. See MINN. STAT. § 523.01 (2014) (“A person who is a competent adult may, as principal, designate another person or an authorized corporation as the person’s attorney-in-fact by a written power of attorney. The power of attorney is validly executed when it is dated and signed by the principal and, in the case of a signature on behalf of the principal, by another, or by a mark, acknowledged by a Notary Public.”).

4. See *id.* § 145C.01, subdiv. 5a (defining health care directive as a “written

appoint others to step in to handle financial matters if the person is unable to do so for himself. A health care directive serves to appoint others to step in to make medical decisions if the person is unable to do so for himself and it provides substantive information regarding the person's medical wishes. For others, who have not engaged in proper disability planning, it is necessary to initiate a guardianship or conservatorship proceeding so that a court may appoint a representative to handle financial matters or make medical decisions.

For other clients, Medical Assistance planning is the primary area of attention. Medical Assistance planning involves structuring one's assets to preserve them to the fullest extent possible in the event one is faced with the prospect of long-term care. In addition, there are myriad other issues of importance to seniors, ranging from housing concerns in an assisted living facility or a nursing care facility to issues related to vulnerability and susceptibility to abuse, particularly for frail and elderly persons.

Finally, there are many family interpersonal relationship issues that come to light when elder law issues arise for clients. These issues take a number of forms. Issues may arise between spouses. Issues may arise between parents and children, particularly estranged children. Issues may arise when there are no close family members, only distant relatives. Issues may also arise when there are second marriages and blended families.

instrument that complies with section 145C.03 and includes one or more health care instructions, a health care power of attorney, or both; or a durable power of attorney for health care executed under this chapter before August 1, 1998"). Section 145C.03 describes the legal sufficiency for a health care directive.

To be legally sufficient in [Minnesota], a health care directive must (1) be in writing; (2) be dated; (3) state the principal's name; (4) be executed by a principal with capacity to do so with the signature of the principal or with the signature of another person authorized by the principal to sign on behalf of the principal; (5) contain verification of the principal's signature or the signature of the person authorized by the principal to sign on behalf of the principal, either by a notary public or by witnesses [with certain limitations set forth in section 145C.03, subdivision 3]; and (6) include a health care instruction a health care power of attorney, or both.

Id. § 145C.03, subdiv. 1.

III. CONFLICT OF INTEREST

When I turned to Mom in the hospital room and asked her directly what *her* wishes were, my action was deliberate. When entering this type of situation, the practitioner needs to constantly be aware of who is the client. The Minnesota Rules of Professional Conduct provide insight into this determination. Rule 1.7 addresses the issue of conflict of interest, which provides in pertinent part that

a lawyer shall not represent a client if the representation involves a concurrent conflict of interest. A concurrent conflict of interest exists if: (1) the representation of one client will be directly adverse to another client; or (2) there is a significant risk that the representation of one or more clients will be materially limited by the lawyer's responsibilities to another client, a former client or a third person, or by a personal interest of the lawyer.⁵

The rule further states:

Notwithstanding the existence of a concurrent conflict of interest under paragraph (a), a lawyer may represent a client if: (1) the lawyer reasonably believes that the lawyer will be able to provide competent and diligent representation to each affected client; (2) the representation is not prohibited by law; (3) the representation does not involve the assertion of a claim by one client against another client represented by the lawyer in the same litigation or other proceeding before a tribunal; and (4) each affected client gives informed consent, confirmed in writing.⁶

This rule directed me to choose Mom as my client; it is she whom I serve and no other family member. I take my marching orders based upon Mom's goals and objectives, serving her sole interests.

Suppose, however, that Mom was not so definitive in articulating her goals and objectives. It may be possible for me to represent the entire family, in light of Rule 1.14 of the Minnesota Rules of Professional Conduct, which addresses clients with diminished capacity. A comment to the rule provides in pertinent part:

5. MINN. R. PROF. C. 1.7(a).

6. *Id.* 1.7(b).

The client may wish to have family members or other persons participate in discussions with the lawyer. When necessary to assist in the representation, the presence of such persons generally does not affect the applicability of the attorney-client evidentiary privilege. Nevertheless, the lawyer must keep the client's interests foremost and . . . must look to the client, and not family members, to make decisions on the client's behalf.⁷

In the situation involving Mom and Responsible Daughter, and reading the conflict of interest rule together with Rule 1.14, I may act as the lawyer for this situation, provided that no conflict of interest develops. Should a conflict of interest develop, I would need to determine, after disclosure and consent, whether I could adequately continue to provide representation, or whether the conflict is so deep that I must withdraw from providing representation to any party.

IV. LAWYER AS AMBASSADOR TO PRACTICE OF LAW AND LEGAL SYSTEM

For one faced with an elder law issue, it may well be the first time that the person, or family members, have had any contact with a lawyer. In fact, those coming in contact with the lawyer may have a bias, based upon some soap opera version of lawyers, that the lawyer is just an under-worked, over-paid, necessary evil to encounter when faced with any legal matter. It is, therefore, an opportunity for the lawyer to educate the client on the practice of law and our legal system. The lawyer's demeanor, hard work, attention to detail, communication skills, honesty, integrity, and all-around professionalism all work together to educate those coming in contact with the lawyer: that the lawyer is simply a helpful problem solver, able to provide peace of mind in trying to achieve the client's goals and objectives.

V. CONCLUSION

The practice of elder law draws upon a unique skill set. The lawyer is part psychologist, reality counselor, and legal practitioner. The practice is intensely detail oriented, often requiring immediate attention to a multitude of issues. The practice is also immensely

7. *Id.* 1.14 cmt. 3.

rewarding. At the conclusion of the legal matter, clients often express their deepest gratitude and appreciation for the help the lawyer provided to the client. It is very rewarding to realize that one's skills as a lawyer have served to improve the lives of others.