Client Interview and Ethical Considerations

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I. Interviewing the Client

The client interview is the pivotal part of planning for your elder client. This text is written from the perspective that everything flows from that client meeting. It is not merely a data-collecting meeting. Rather, it is the beginning of a meaningful working relationship with your client, and an opportunity for you to demonstrate your technical expertise and your concern for your client’s situation. Efficiency should not be the focus of this meeting. The client meeting is a time to solidify your working relationship with your client. It may be a springboard for future work with this client, or for future referrals to you made by this client because of the client’s appreciation of your concern and expertise. Obviously, it is also the meeting in which you gather the important information you need to begin developing the estate plan for your
elder client. It is also a time to be aware of any ethical issues that may need to be addressed in the meeting. A helpful ABA publication in this regard is Carolyn L. Rosenblatt, Working with Aging Clients.

This chapter focuses on five issues. The first issue concerns basic drafting for the elder client. The second issue covers limited capacity considerations that arise due to diminished capacity of your client, your client’s children, and oftentimes your client’s parents. Third, a common issue, is living arrangements. Where will the client, the client’s disabled child, or the client’s elderly parent live? Everyone wants to live at home, but the question becomes how can that be handled with safety, and if that is no longer possible, what are the possible housing options? The fourth issue is how to pay for housing. For example, how will housing costs be paid if your client can no longer take care of his or her needs without assistance? Finally, are there ethical issues to address?

II. Basic Drafting

In the initial interview there is some basic information that is always needed no matter what the client’s unique situation is. The lawyer will find it helpful to have a good questionnaire to use to assist in data collection. See, for example, Appendix A, a family questionnaire, and Appendix B, an asset questionnaire. By addressing the issues raised in these two questionnaires, the lawyer should have good data with which to begin the planning process. Obviously, these questions and data can be supplemented as the lawyer deems appropriate. Sensitive matters, such as legal costs and ethical issues, should be addressed during the initial interview. Ethical issues are discussed later in the chapter (see Section VI). Appendix C is a sample engagement letter that deals with the ethical issues of dual representation for a single client, and Appendix D is an engagement letter for a married couple. The ABA, through its Commission on Law and Aging, offers an excellent brochure entitled Understanding the Four C’s of Elder Law Ethics. Lawyers may find this a convenient brochure to give to clients to help them understand the ethical dilemmas lawyers face when other family members want to sit in on or participate in meetings with elder clients.

Most lawyers are familiar with the basics of estate planning. Typically, the client will need several legal documents. First, a durable power of attorney is almost always needed (see Chapter 2, Section XII, for more information and a sample form). Second, advanced directives are almost always needed (see discussion on these documents in Chapter 2, Section VII; forms are provided in Sections VII.B, VIII, and IX). Be sure to notice the ABA resources that are cited in the overview of Chapter 2, as they will aid you in your practice. Third, of course, is the client’s will. A simple will form is provided in Chapter 2, Section XIV.

If more sophisticated will and trust instruments are needed, the author’s ABA publication Estate Planning Forms will be helpful.

You may find it helpful to provide your client with a checklist of items they need to have readily available for their family at the time of estate settlement or in the case of diminishing capacity or declining health. The ABA has three excellent books by Susan Balch Hurme that include invaluable

III. Limited Capacity Considerations

Diminishing or limited capacity is almost always one of the issues you must deal with. You will find the ABA publication by Kerry Peck and Rick L. Law, Don’t Let Dementia Steal Everything, helpful. In some cases, a client may be in the best of health but concerned about those issues in the long term. In that situation little is needed other than those documents that are part of basic drafting—powers of attorney and health care directives. In some situations, the client has an adult disabled child who may be receiving social security disability insurance benefits, or SSI benefits. The adult child will also be receiving Medicare in most situations and in other situations may also be receiving Medicaid to cover health care expenses. If the client’s child is receiving SSI and Medicaid benefits then any inheritance will result in disqualification from those benefits, thus those clients will be either electing to disinherit that child, trusting that the other estate beneficiaries will provide any supplemental needs the child has, or, more commonly, their will or trust will involve a third party special needs trust. The terms special needs trust and supplemental care trust are often used interchangeably. For purposes of this writing we will use the term special needs trust. A third party special needs trust is one in which the source of the money is not the adult disabled child but rather the parents. Drafting of this type of trust is discussed in Chapter 7, Section X, and sample forms are provided in Chapter 7, Appendix A, and Appendix B. Appendix A is a will providing a testamentary trust and Appendix B is simply an inter vivos trust. Either is sufficient, depending on the client’s needs and preferences.

In other situations, the child may have received an inheritance or in some situations a personal injury award. To avoid loss of the SSI and Medicaid benefits in these situations, a special needs trust is also needed; however, in this case it is more correctly termed a first party special needs trust. In other words the source of the funds is the adult disabled child (the first party) and not a third party. Special drafting is required for this type of trust. See Chapter 7, Section X, for a discussion on first party special needs trusts and Chapter 7, Appendix C for a sample form.

In some situations, the client in his or her elder years is concerned that the client’s long-term housing needs may include living in a nursing home or other long-term care facility. The cost of these facilities for most middle-income Americans who do not have long-term care insurance is devastating. The client’s life savings will often be consumed over a period of several years, leaving the client a pauper at death with nothing for their children or other loved ones to inherit, other than, hopefully, a lifetime of good memories. There are no simple solutions to this problem.

Some clients find that an income only trust is a preferred solution. This type of trust is referred to by different names, for example, Medicaid compliant
trust, Medicaid asset protection trust, and so on. This type of trust is discussed in Chapter 7, Section X.B, and a form is provided in Chapter 7, Appendix E. This type of trust requires the client to transfer all property the client wants to preserve to a trust in which the client receives only the income. No principal may be expended. Other variations of this trust have the client not even receiving income, but rather the income is distributed to the children.

Either approach requires an irrevocable trust to be established, the assets that are to be protected transferred to the trust, and the five-year look-back period being satisfied. After the five-year look-back period has expired then the assets in the trust are not considered resources for purposes of Medicaid eligibility. Only the income payable to the client is considered a resource, if the trust is drafted to permit the client to receive the income. Many clients who own real estate find this option a solution to their desire to maintain some assets for their children to inherit. Be certain of your state Medicaid regulations for this and any of these trusts.

**IV. Living Arrangements**

The client will often raise the issue of living arrangements, but, if not, the lawyer may choose to raise this issue. All clients want to believe they will continue to live in their homes throughout their lifetimes. No client wants to think about, talk about, or plan toward times of diminished capacity or limited physical ability. Other than the wealthy, your older clients should consider this issue. Unfortunately, most clients delay dealing with this issue until they are at the crisis stage of declining health and needing to move to a long-term care facility. Options are limited at that time. The lawyer should, when possible, talk to the client about living arrangements while the client is in good health. In addition to this book, two excellent ABA publications deal with housing (and all other issues of elder law): Lawrence A. Frolik, *Elder Law and Later Life Legal Planning*, and *The Law of Later Life Health Care Decision Making*, second edition.

Client meetings concerning housing are difficult. The costs of home care and nursing home care are high. There are options. Possibly, the client can continue to live in his home with supervision from one or more of the children. In this case, you may want to remind the client’s children of the need to be sure the home is safe for an elderly parent. Helpful checklists are in the earlier mentioned ABA publication *Checklist for Family Caregivers*. Other times, the solution is hiring caregivers to provide help during part of the day with the adult children helping during the remainder of the day. If the client is looking to employ caregivers, the checklists in the ABA publication *Checklist for Family Caregivers* will be helpful. If the lawyer knows of third party vendors who provide caregiver services, or knows of other individual caregivers in the community, providing that information to your client will be extremely helpful to them. Finally, if the only option is a long-term care facility, then the checklist in the ABA publication *Checklist for Family Caregivers* may be helpful to your client in considering which facility to use. Also, the aforementioned ABA publication *Working with Aging Clients* is helpful.
V. Paying for Housing

If your client is addressing housing issues for themselves and they are still in good health there are more options. The client may recognize that they have adequate financial resources. Otherwise, you need to acquaint your client with long-term care insurance. These policies are more broadly written than they were years ago. Most policies now include benefits in the event of an elderly client living in their home and are not restricted to nursing home care. See the ABA publication *Checklist for Family Caregivers* for a checklist that may prove helpful when shopping for long-term care insurance. For clients of limited financial means there may be VA benefits if the client is a war veteran or the spouse of a wartime veteran. Those qualifications are discussed in Chapter 4. Ideally, clients can pay privately or live at home with the help of family members or other caregivers. Some will be able to pay for their care with additional income from VA and Social Security benefits, or they may be able to supplement their financial needs with long-term care insurance. Otherwise, the only option is to spend one's assets until they qualify for Medicaid. The Medicaid eligibility rules are discussed in Chapter 7, Section II. Spend down options are discussed in Chapter 7, Section IX.A.

VI. Ethical Considerations

Attorneys representing elder clients often face ethical issues in determining competence, in properly representing the impaired or incapacitated client, and in determining who is actually the client. One of the first questions the attorney must ask is “who do I represent?” Is it the elderly person, is it the family member, or is it both? An excellent ABA resource is Roberta K. Flowers and Rebecca C. Morgan, *Ethics in Practice of Elder Law*.

The attorney must clearly understand who is represented, and must communicate that relationship to the other parties involved. If you represent the older family member, you must advise the other family members of your obligation of undivided loyalty to your client and the requirement of the confidentiality of lawyer-client communications. The professional judgment of a lawyer should be exercised, within the bounds of the law, solely for the benefit of the client and free of compromising influences and loyalties.

In this section we will look at the ABA Model Rules of Professional Conduct, focusing on Rule 1.5: Fees; Rule 1.6: Confidentiality of Information; Rule 1.7: Conflict of Interest: Current Clients; Rule 1.8: Conflict of Interest: Current Clients: Special Rules; and Rule 1.14: Client with Diminished Capacity.

A. Maintaining Confidentiality

A fundamental principle in the attorney-client relationship is the attorney’s duty to maintain the confidentiality of information relating to the representation. The client is thereby encouraged to communicate fully and frankly with the attorney even as to embarrassing or legally damaging subject matter. And it is important to remember the duty of confidentiality continues after the