The Specter of Exploitation: Special Concerns in Representing the Diminished Client

by Adam M. Fried

There is not much more drastic an estate planning event than a parent's decision to disinherit a child in favor of another. Often, there is a valid and legitimate reason. Few doubt that we are free to give our assets to whomever we please. When the parent is elderly, disabled, diminished or reliant upon others for care, the question as to whose decision is actually being put into effect is a real one.

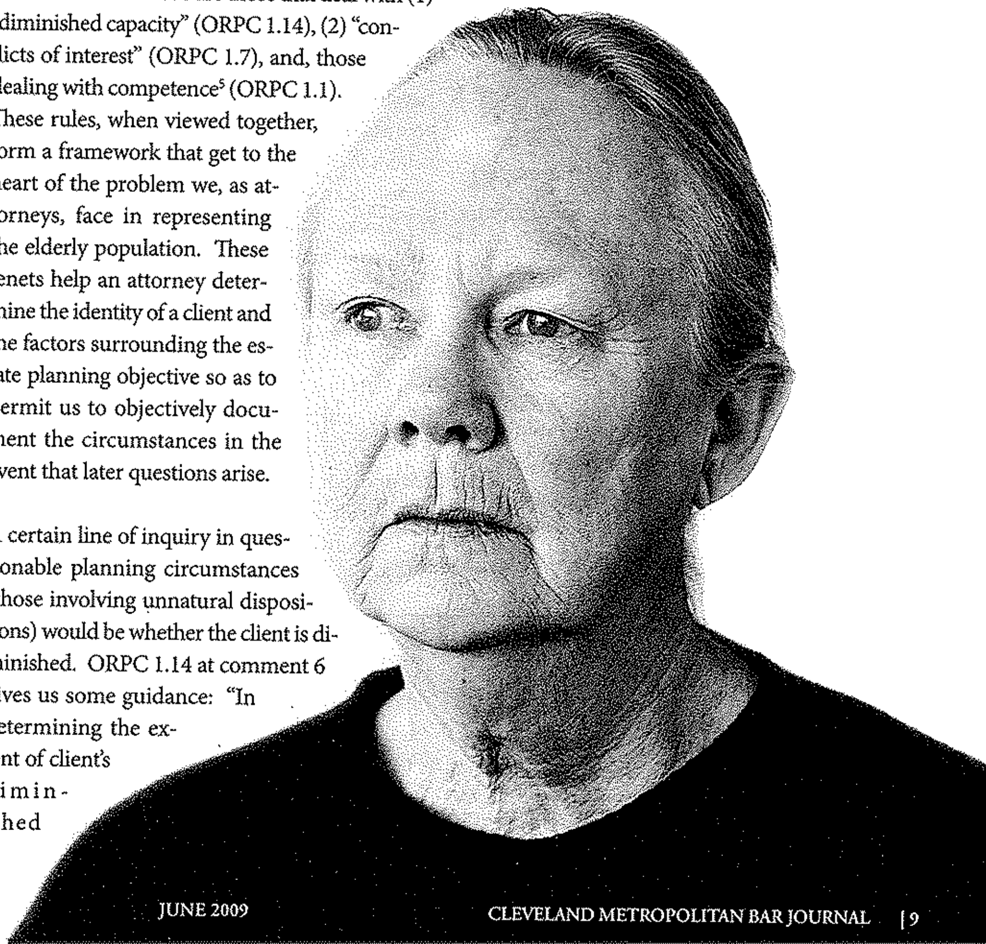
Financial exploitation of the elderly population is sadly too common. Studies have found the prevalence to range from 12% in one study to as much as 50% in another study.[1] Whatever the true rate of exploitation is amongst our susceptible population, we, as legal practitioners, face a practical struggle: are we supporting the manipulation of our susceptible clients, or are we simply assisting our clients to accomplish their legitimate, albeit quirky, estate planning objectives? Sometimes, only a lawsuit, post mortem, will test whether we chose the right path. If we are critical about the circumstances, document our procedures, and pay attention to the true identity of the client, lawsuit or not, justice should prevail.

Competing jurisprudence speaks of the complications we face when we represent a client with diminished capacity. For instance a Massachusetts Court stated that "An attorney owes to a client, or a potential client, for whom the drafting of a will is contemplated, a duty to be reasonably alert to indications that the client is incompetent or is subject to undue influence and, where indicated, to make reasonable inquiry and a reasonable determination in that regard. An attorney should not prepare or process a will unless the attorney believes the testator is competent and free from undue influence."[2] On the other hand, a Florida Court applauded an estate planner who supervised the execution of a death bed codicil under suspicious circumstances: "[w]e are convinced that the lawyer should have complied as nearly as he could with the testator's request, should have exposed the true situation to the court, which he did, and should have then left the matter to that tribunal to decide whether in view of all the facts surrounding the execution of the codicil it should be admitted to probate".[3]

Unfortunately, the phenomenon of financial exploitation is far too complicated to be easily solved by legislation. "It is widely recognized that it is difficult, even for experienced professionals, to distinguish an unwise but legitimate financial transaction from an exploitive transaction resulting from undue influence, duress, fraud or lack of informed consent".[4] Our Ohio Rules of Professional Conduct ("ORPC"), joined with a good dose of common sense, provide a reasonable guide in situations where we are representing the elderly or mentally diminished person. The most relevant sections are those that deal with (1) "diminished capacity" (ORPC 1.14), (2) "conflicts of interest" (ORPC 1.7), and, those dealing with competence[5] (ORPC 1.1). These rules, when viewed together, form a framework that get to the heart of the problem we, as attorneys, face in representing the elderly population. These tenets help an attorney determine the identity of a client and the factors surrounding the estate planning objective so as to permit us to objectively document the circumstances in the event that later questions arise.

A certain line of inquiry in questionable planning circumstances (those involving unnatural dispositions) would be whether the client is diminished. ORPC 1.14 at comment 6 gives us some guidance: "In determining the extent of client's diminished capacity, the lawyer should consider and balance such factors as: the client's ability to articulate reasoning leading to a decision; the substantive fairness of the decision; and the consistency of the decision with the known long-term commitments and values of the client. In appropriate circumstances, the lawyer may seek guidance from an appropriate diagnostician." While ORPC 1.14 requires the lawyer to maintain as normal a relationship with the client as possible, Ohio Courts have repeatedly admonished or sanctioned attorneys for not taking greater efforts to protect clients suffering from a diminished capacity.[6]

Having deposed a score of attorneys in estate planning related matters, one thing is certain: it is not so easy to incorporate these rules into daily practice. One lawyer in deposition described the



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limits of his ability to discern whether his client was suffering from a diminished capacity:

> "...I have come to learn that clients in my 23 years of practice don't often tell you everything that you would like to know about them, No. 1. No. 2, I'm not a medical doctor, I am not able to assess someone's medical condition all that well. I know often times medical doctors who have certain specialties in geriatric medicine sometimes differ as to a person's mental capacity. So, I'm not in a position, often times, as well as I'd like to be, to determine someone's mental capacity."

Persons suffering from medical conditions such as Alzheimer's or Dementia can sometimes mask their condition. Yet a deeper inquiry into their circumstances will demonstrate delusional beliefs or faulty memories. Therefore, we are required to be competent in our inquiry and assessment. We have to ask the hard questions of our client in a safe and independent setting.

We should (1) understand the nature of our client's relationships with family and beneficiaries, (2) understand the details of a preexisting estate plan and asset titling, (3) understand the reason for the new planning, (4) if we are new counsel, learn why old counsel is not being consulted, (5) be aware of our client's medical circumstances and living/care arrangements, and (6) focus on factors that make up the test for competence and "red flags" used to detect undue influence.

The inquiry is hard enough when our client is longstanding and is acting independently of potential beneficiaries. If, however, the client is being assisted in many areas of living, the ethical conundrum increases. ORPC 1.14 (b) allows us to consult with individuals, including family members, to protect a client and assist the client in completing legitimate objectives.[7] On the other hand, ORPC 1.7 at comment 1 speaks to the importance of loyalty and our independence of judgment: "[n]either the lawyer's personal interest, the interests of other clients, nor the desires of third persons should be permitted to dilute the lawyer's loyalty to the client". Therefore, a lawyer is prohibited from representing a client if "[t]here is a substantial risk that the lawyer's ability to consider, recommend, or carry out an appropriate course of action for that client will be materially limited by the lawyer's responsibilities to another client, a former client, or a third person or by the lawyer's own personal interests."[8]

These issues are very real. One lawyer whom I questioned eventually admitted he never spoke to his demented client about a change to her trust that he was drafting. The lawyer had a good and longstanding relationship with his client's son, and indeed, had previously represented his son on other matters. So, when the son approached him about a change to his mother's trust that reduced another child's inheritance, he did not consider it a problem. To compound the issue, the amendment was executed with the aid of the son, and outside the presence of the attorney, preventing reliable documentation to defend an undue influence challenge. If our job is to protect our clients, then we owe a duty to be independent and aware: "A disinterested attorney could be expected to pick up cues, even fairly subtle cues . . . If the attorney has developed an interest in the matter, financial, personal or otherwise, there is a risk that the attorney will not pick up those cues".[9]

Prudence would suggest that the more involved we, as estate planning lawyers are with the beneficiary of the client's financial plan, the more we risk failing to notice subtle cues of exploitation because of a subtle conflict. Sometimes, these ethical conundrums can not be avoided, but when they exist, the right course is to pay attention, document the objective circumstances, and use our common sense and experience to do that which we were trained: protect and put into effect our clients' legitimate planning objectives. ■

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[1] Ryan C.W. Hall, et al., Exploitation of the Elderly: Undue Influence as a Form of Elderly Abuse, Clinical Geriatrics, February 2005, at 28-36.

[2] *Logotheti, et al v. Gordon* (1993) 414 Mass. 308, 607 N.E.2d 1015 (Supreme Judicial Court of Massachusetts, Suffolk.).

[3] *Vignes v. Weiskopf* (1949) 42 So.2d 84, 86

[4] Elder Mistreatment: Abuse, Neglect, and Exploitation in an Aging America, p. 387, By Pannel to Review Risks and Prevalence of Elder Abuse and Neglect, National Research Counsel, Richard J. Bonnie (Editor), Robert B. Wallace (Editor), Published by the National Academies Press, 2003.

[5] "Competent handling of a particular matter includes inquiry into and analysis of the factual and legal elements of the problem, and use of methods and procedures meeting the standards of competent practitioners." ORPC 1.1 at comment 5.

[6] See *Cuyahoga County Bar Ass'n v. Newman*, 102 Ohio St. 3d 186, 2004-Ohio-2086; *Disciplinary Counsel v. Johnson* 113 Ohio St. 3d 344, 2007-Ohio-2074.

[7] See Official Comment 3 to Model Rule 1.14 which provides that 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 interest foremost and, except for protective action authorized under Division Rule (b) must look to the client, and not family members, to make decisions on the client's behalf."

[8] ORPC 1.7(a)(2).

[9] *Krischbaum v. Dillon* (1991), 58 Ohio St. 3d 58, 69.