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REPRESENTING THE ELDERLY CLIENT: ETHICAL DISCUSSION QUESTIONS

Problem 1: Some years ago, you drafted a financial durable power of attorney for an elderly widow that appointed her adult daughter as attorney in fact. Under the terms of the DPOA, the daughter has full control of the client's finances and assets and is entitled to make gifts. Over the intervening years, the daughter has consulted with you sporadically, once with regard to establishing an annual gifting plan. At that time, you advised the daughter that her mother's estate, although sizeable, was probably not of sufficient magnitude to make either federal or Tennessee estate tax liability an issue, but that if gifts were desired, she should limit them to \$11,000 so as to avoid Tennessee gift tax.

Now daughter has appeared in your office, because she has been served with a complaint alleging that she has misused the DPOA and misappropriated her mother's funds. The lawsuit was filed by her three siblings, who state that ALL the gifts made thus far over the last seven years have gone to the attorney in fact's two children and have amounted to a figure in excess of \$100,000. The siblings have further filed a petition to appoint a conservator for the mother, who is now incapacitated. Daughter tells you she KNOWS what the fuss is all about - her siblings are jealous because all the gifts have gone to her children and not to theirs. She says this was just a temporary oversight and that she is more than willing to make things right by making distributions to her nieces and nephews to even things out. What should you do?

Questions for discussion: Should you accept employment in this situation? Is the daughter automatically your client since she is the attorney in fact under the DPOA you drafted for her mother, who is your client? Does the fact that you have already given the daughter advice affect the answer to this question? Is the mother still your client? Do you owe her any duties in this situation? Suppose the attorney for the siblings calls and threatens to sue you also? Would there be any basis for such a suit? Would such behavior be ethical on his part? What if the daughter is right and all the siblings want is to be sure that their children get their share of the gifts? Can you make all this go away with an amicable settlement by agreeing to make the

distributions from the mother's assets?

Problem 2: You are a real estate attorney and have been contacted by a young woman on behalf of her father, who, she says is becoming frail and will probably be moving into an assisted living facility soon. Daughter explains that her father wants to be sure the family home stays in the family and that he wants to give the house to her now so she can take care of things because his health is failing. You agree to draft a quitclaim deed giving all the father's interest in his home to the daughter, and set an appointment for the father and daughter to return to sign the deed. When the two of them arrive, the father, although elderly, appears very spry and alert. You hand him the quitclaim deed and advise him that it gives the house to his daughter and ask him if that is what he wants. Since daughter is there, she quickly says, "You know Daddy, it gives me the house in case something happens to you." He then nods, and says, "That's right, that's what I want." He then signs the quitclaim and they leave together, smiling.

Three months later, you receive a call from the father. He has tried to get a loan, using his house as collateral, and been informed that he no longer owns his home. When you explain that that is what he told you he wanted, he explodes and says that it was NEVER his intent to give his house away while he was still alive - that the transfer was only to take place "if something happened to him" - meaning for him AFTER his death. You find out then that he only has a third grade education, that the "daughter" is really a "step-daughter" and that she is pressuring him to move out of the house. He hangs up the phone with a demand that you "get the house back for him." The phone rings again, and this time it is the daughter. She tells you her father is getting out of control, that she needs to have him put in a nursing home, and that she is in a bit of financial trouble and needs to sell the house. What should you do?

Questions for discussion: Should you have declined employment in this situation in the first place? Who was your client? Should you have insisted to Daughter that you spend time alone with Dad in order to be sure that he really wanted to give his house away immediately? Also, is there some advice you should have given him concerning the effects of such an immediate transfer and the other options available in order to accomplish his stated goal? Do you owe him any duty now to get the house back for him? Can you get the house back for him? What duties do you owe to the daughter? If the daughter was your client, can you assist her now in evicting Dad from the house? Can you continue to represent either of these people?

Problem 3: You have represented Son as a business client for several years. When Son's mother died, he referred his Father to you for assistance with probate of her estate and you are currently advising Father concerning discharge of his duties as personal representative of the estate. Now Son has called you, saying that Father, who has been living in Son's home since Mother's death, is driving him crazy. Father is well off financially, and has been paying his share of the expenses, so there is no problem in that regard. However, Father is extremely bossy and opinionated. Son and Son's wife and teenage children have had about all they can take.

Son has therefore asked Father to consider moving to a "congregate care assisted living" facility, and says Father is willing to consider the proposal. Son has found two potentially suitable homes and has obtained sample leases from each, which he is asking you to review. One of the places costs a lot more than the other, but offers significantly superior services. Father can afford the most expensive place, but even the least expensive one costs more than he has to pay as room and board while living with Son. Son says he wants you to meet with him and Father next week to go over the leases together. He says Father has stated that he will be responsible for the fee associated with review of the lease agreements. He also tells you that Father may want you to prepare a durable power of attorney for health care and a will at some point in the near future. Son tells you confidentially that it is vital to the survival of his marriage for Father to be persuaded to move out of Son's house, regardless of the cost, but that Son would certainly be pleased if Father could be persuaded both to move out and to select the least expensive facility, since son is the only heir of Father's estate.

Questions for discussion: Suppose you set up the appointment and arrange to meet with Father and Son. Which of them is your client or are both of them your clients? Can you represent both? Is this representation at all, or are you acting as a mediator?

Problem 4: Husband and Wife are about 70 years old and have been your clients for years. Husband's health is declining and he is gradually losing his mental powers. Wife has come to your office expressing fears that she will not be able to continue to care for him much longer and that he will need to enter a nursing home. Their home is mortgaged (with a balance of approximately \$50,000.00 left owing) and titled in both names as tenants by the entirety. He also owns stock presently valued at \$45,000.00. His monthly pension income is not sufficient to cover the cost of

nursing home care. Wife is concerned that if he does go into the nursing home, she will be left destitute and the house will go into foreclosure. You explain to her the workings of the Tennessee Medically Needy (Medicaid) "spend down" program, and the circumstances under which Medicaid will pay the cost of nursing home care. You explain that the house will be an exempt resource for so long as she continues to live in it, but that the stocks in his name will be deemed available to meet the cost of his care, and would be so deemed regardless of whose name they were titled in. As a consequence, it would be advantageous for them to cash in the husband's stocks and use the funds to pay down the mortgage. To assist her in implementing this plan, you suggest that husband execute a durable power of attorney, making her his attorney in fact.

She discusses the matter with her husband and the two then meet with you. Husband is clearly confused and disoriented at the meeting, but is adamant that he does NOT want the stocks sold in order to pay off the mortgage. No matter how many times you go over it, he does not seem to understand what you are saying concerning Medicaid and exempt resources. However, he says that he knows he is having trouble writing checks and keeping up with the bills, that he knows what powers of attorney are and that he wants to execute one to give his wife authority to pay the bills for him. Wife is relieved, saying that once he has executed the power of attorney, she will "take care of everything else."

Questions for discussion: Can you proceed with the execution of the power of attorney under these circumstances? Do the husband and wife have adverse interests? Can you ethically pressure Husband to sign the power of attorney believing it to be in his and his wife's best interests? Should Husband have independent counsel?

Problem 5: You have been contacted by Rev. Jerry Pat Fallson, who saw your ad offering services that included the bold declaration that you would assist clients in "getting around the rules to take advantage of Medicaid paying for nursing home costs." During the appointment, the Reverend explained that he wanted to hire you as his lawyer to help the hundreds of his church members that he thought would need assistance. You are definitely interested in his offer. He explains that there is a lot of money that church members will be willing to give to the church if they receive proper advice and counsel. The Reverend says that he needs legal assistance from you to prepare the right legal documents so that he can be assured of the legality and

trust necessary to accomplish God's work in helping the members to make gifts and charitable contributions.

You and the Reverend worked out an arrangement where he would prepare powers of attorney for the Reverend to take back to the church members to execute with the Reverend as attorney in fact. There were even times when the Reverend would have congregational meetings so that you can teach and lecture about the law and the elderly. Once the church members executed the powers of attorney, the Reverend could develop a planned giving campaign of the church members' assets with you through the Reverend's bank. In addition to the hourly fee that the Reverend will pay you, he also agreed to pay a contingency fee of 15% of all the gifts given over \$500,000.00

After dozens of powers of attorney were executed and substantial gifts made, the Reverend mentions to you that getting the church members to sign was easy because most of them did what he told them to do - it was a matter of trust, mixed with a bit of faith, as well as a generous helping of loneliness and diminishing mental capacity among the older church members. After paying you as arranged, the Reverend then has all the funds transferred to his personal account, saying that the account represented the church's private foundation. A month or so later, you run into the Reverend, who says he is about to take a well-deserved European vacation, using the church foundation money. With a wink and grin, he admits to you that "after all, I am the church's foundation!"

[Example adapted from A. Frank Johns, CELA, *Revised ABA Model Rules of Professional Conduct Applied in Elder Law: The Basics Framed in Core Values Get Complicated Fast MRCP 1.0 - 1.6*, 1-SPG NAELA J. 59, 80-81 (2005).

Questions for discussion: Who is your client in all this? Is the Reverend your client or is the "church foundation" your client? If the "church foundation" is your client, what duties do you owe and to whom? If there is no "church foundation," what duties do you owe? Do you have any obligation to protect the church members? Have you committed any ethical violations by furthering the Reverend's scheme through your congregational seminars and furnishing of other services?

Problem 6: Five years ago, Husband, an elderly client you have been serving for years, remarried and came to your office with his new, much younger, wife for assistance in estate planning. Both have adult children from their prior marriages, and knowing this, you suggested that Wife needed separate counsel. Wife declined this suggestion, saying if you were "good

enough" to suit Husband, you must be "the best." Both Husband and Wife insisted that they wanted "mirror" wills, which would each leave the estate of the first to die to the survivor and then, on the survivor's death, pass one-half to the survivor's children and one-half to the children of the spouse that had died first.

In the intervening years, you have continued to represent Husband, but have had no further contact with Wife. Husband now comes to you, expressing concern that Wife will most certainly remarry if he should die first and this would lead her to execute a new will cutting his children out entirely. To keep this from happening, he instructs you to prepare a new will, leaving his wife one-half of the estate with the remainder going to his children. He tells you not to tell Wife about this and says further that if Wife dies first and he takes under her current will, he will do the "right" thing by her children.

Questions for discussion: Can you ethically assist Husband in preparing this new will? If you do not do so, what should you do? Can you ethically inform Wife of this request? Can you withdraw as attorney and then inform Wife that you can represent neither party with respect to estate planning for reasons that you cannot disclose? Are there steps that could have been taken at the outset that might have made your role and/or response clearer now?

Problem 7: Client is an elderly man who was hit by a car and suffered severe back injuries while walking across the street at an intersection. He lives with his sister, who is also elderly, and she came with him to your office when he first retained your services on a contingent fee basis. Although in pain, client was alert and able to describe in detail the events involved in the accident at the time of the initial consultation. He also seemed to fully understand the retainer and the fact that he would be responsible for costs but not for your fee unless the case was won.

At one or two later meetings, you have noticed that he seemed to be having trouble concentrating, but attributed it to his pain medication. Now negotiations with the opposing party seem to have broken down and you have come to Client's home to discuss the matter with him and to obtain authorization to proceed with filing suit. Client does not recognize you, irritably says he never has anything to do with lawyers, they're all crooked, and seems unable to recall anything concerning the accident and his injury. When you try to tell him that a lawsuit will need to be filed if the negotiations have in fact failed, he

tells you to leave the house and not to come back.

You leave as instructed, but call back later and Client's sister tells you that she is sure Client didn't know what he was saying and didn't mean it when he told you to leave and not come back. She says he has suffered a stroke and it seems to have altered his personality. She gives you the name of Client's physician, who confirms this information, and opines that Client has suffered irreversible brain damage as a consequence.

Questions for discussion: Can you continue to represent Client or have you been discharged? If you do continue in your representation, do you have authority to file suit or even to negotiate further? Can Sister make decisions for the Client? Can Sister be given power of attorney or be appointed conservator for client? Do you have a duty to inform opposing counsel that your client has suffered a loss of mental capacity or is this privileged information? Can Sister testify on behalf of Client concerning what he has told her about the accident before he had the stroke?

Problem 8: You have been asked by a friend to represent an elderly woman against whom a petition for conservatorship has been filed. You meet with Client at her home. Client is visibly upset with her Daughter, who filed the petition. The petition alleges that Client has a history of psychiatric episodes after failing to take her medications and that Client has been the subject of exploitation by "Young Friend," who she met last year at the grocery store. The petition seeks appointment of the Daughter as conservator over the person and finances of Client.

The report of the examining physician indicates that Client has had some short-term memory loss, but states that if she takes her medication she has only a very limited incapacity, and may just need assistance in managing her checkbook and financial affairs. When you try to discuss this with client, she states loudly several times that she does not need a conservator, that she can take care of herself, that she can and does handle her own personal and business affairs, and that Young Friend helps her if she needs help. She then tells you that she has stopped taking her medications, because they make her "feel like she's walking in a fog" and that if anyone is appointed a conservator, it needs to be Young Friend, because he is the only one who cares about her.

You appear in court for the hearing. What is your case and how will you present it?

Questions for discussion: Should you allow Client to testify at the hearing? What about the issue of compliance with medication? Do you have any duty to disclose this to the court if Client does not testify? If the court determines that a conservator is needed, are you required to advocate for appointment of Young Friend as the conservator if that is what your client wants, even if Young Friend has exploited the client? Do you have a duty to investigate the allegations of exploitation? If they appear to be founded, must you report the suspected financial abuse to Adult Protective Services? [Adapted from Christopher A. Likens, *The "Top Ten" Ethical Issues*, Fundamentals of Elder Law, Florida Bar CLE Presentation, 2/22/02]

Problem 9: You receive a call from a middle-aged divorced woman whose children have grown and moved away. She tells you she lives next door to an elderly widower and that she began looking out for him and helping him run errands, etc. four or five years ago. Now, she says, he wants to give her a power of attorney and has offered to leave her his house in his Will in return for her agreeing to take care of him for the rest of his life. You agree to set up an appointment to meet with him. The widower, who has had several strokes, is unable to drive, so the divorcee must bring him to your office for the appointment. You meet with the elderly widower and the divorcee together at first and she tells you that he owns his home, worth about \$200,000, has \$150,000 in CDs and receives Social Security of approximately \$1700 per month. His monthly expenses are about \$1100. You turn to the elderly widower to verify the information - he says he doesn't know, that the divorcee takes care of all his affairs for him. The divorcee interjects that she has been taking care of the finances, but wants the DPOA so that she will have legal authority if the widower's health declines further. The mini-strokes have already left him partially paralyzed and his short-term memory and ability to concentrate have been impaired. Finally, the divorcee again mentions the Will and the caretaker agreement.

You decide you need to speak to the widower alone and ask the divorcee to leave the room, which she does without protest. You then ask the widower if the divorcee is doing a good job of taking care of him. He says yes, that she does his grocery shopping, fixes his meals, cleans house, does the laundry and takes him everywhere he needs to go. You ask if he has any children. He says he has three adult children. All live out of town and have successful careers that keep them from being able to visit him very often. He can generally count on them all coming home for Christmas each year, and then he and the divorcee have agreed that she should stay away, because his kids don't like her. You ask the widower if he feels comfortable giving the

divorcee a DPOA rather than one of his kids. He says yes, he wants to appoint her because the kids just don't have time and are too far away. You ask him who he wants to leave his property to when he dies and he says he wants to divide it equally between his three children. You remind him of the promise he supposedly made to the divorcee - if the Will leaves everything to the kids, there will be nothing left for her. He tells you he only made the promise because he was afraid that she would no longer take care of him if he didn't, and then he would have to go to a nursing home.

Questions for discussion: Who is your client here? If the widower decides not to execute a Will at all or if he does one that benefits his children, do you owe it to the divorcee to tell her? Are there any problems if you don't tell her? What if you overhear the widower telling the divorcee that "everything is taken care of like we agreed." Are your duties different then? Can you at least tell the divorcee to get her own counsel? Is the widower at risk if he gives the divorcee a durable power of attorney? What is to stop her from transferring all his property to herself without waiting for his death? Knowing what you know, can you advise either of these parties at all? [Adapted from TIMOTHY TAKACS, ELDER LAW PRACTICE IN TENNESSEE, §2.01 *Ethical Problems in Elder Law Practice - Scenario Nine* (2005)]