"Elder Law" and Conflicts of Interest in the United States and Canada

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Abstract

This article considers the problem of conflicts of interest in elder law in the context of a larger discussion about elder law as a bounded legal subject. The problem of conflicts of interest is not particular to elder law. Conflicts, intentional and unintentional, have a special salience in this context, however. That salience is intensified by the expanded scope of "elder law" to include other classes of vulnerable clients, such as persons with disabilities. Despite the significance of conflicts as a real, perceived, or potential issue in this context, the issue has received relatively scant attention and discussion. This inattention to conflicts has distorted perceptions of elder law within the wider legal community, with unfortunate consequences for the development of elder law as a discrete field of practice and research. This article considers the issue of conflicts in the elder law discourse from both an American and Canadian perspective. Core practice areas for American elder law (areas not readily transportable to non-American jurisdictions) are areas in which the conflicts issue is especially prominent. From an international perspective, a perception may be created of elder law as a peculiarly American practice area, and one which is rife with real and potential conflicts that elder law practitioners—and those who would export the model—may prefer to ignore. This dynamic has frustrated the development of elder law as an international, multi-faceted, and interdisciplinary area of law. Confronting the issue of conflicts in elder law is an important first step in continuing the coherent development of elder law (perhaps within a rubric of law, policy and aging) as a bounded legal subject.

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Table of Contents

INTRODUCTION

This article will explore conflicts of interest sometimes confronted by "elder law" attorneys in the context of a larger discussion about the meaning of elder law as a legal subject in the United States and in non-American jurisdictions, focusing on Canada. The problem of conflicts, real and perceived, intentional and unintentional, is a significant issue in the practice and study of elder law. *Inattention* to this significant issue has had a role in shaping the development of elder law as a legal subject, and its future development both within the United States and internationally. The authors intend to start a conversation about conflicts that can contribute to the continuing development of this important area of the law, in the United States and abroad.

Since its inception, elder law has been defined primarily in terms of providing legal services with special relevance and applicability to older persons and their representatives.[3] The question of how to define

3. William H. Overman & William A. McCormick, *Elder Law and Alzheimer's Disease*, 104 AM. J. MED. 22S, 23S (1998). The authors define "elder law" as follows:

> Elder law is the legal practice of counseling and representing older persons and their representatives about the legal aspects of health and long-term care planning, public benefits, surrogate decision[]making, older persons' legal

"elder," "elderly," "older person," "senior citizen," "advanced age," and "old age" has been an important one within the elder law discourse.[4] From its earliest stages of development as a specialized area of legal practice, elder law has been defined as focused primarily on health law issues and the protection and preservation of older individuals' income and assets.[5] The National Academy of Elder Law Attorneys (NAELA)[6] has developed a more expansive definition of the concept of elder law practice, which now specifically includes the needs of disabled persons in addition to older persons.[7] Thus, as the field of elder law has developed

> capacity, the conservation, disposition and administration of older persons' estates, and the implementation of their decisions concerning such matters, giving due consideration to the applicable tax consequences of the action or the need for more sophisticated tax expertise.
>
> In addition, attorneys certified in elder law must be capable of recognizing issues of concern that arise during counseling and representation of older persons, or their representatives, with respect to abuse, neglect, or exploitation of the older persons, insurance, housing, long-term care, employment, and retirement. . . .

Id.

4. *See* MARSHALL B. KAPP, LEGAL ASPECTS OF ELDER CARE 6-10, 15 (2010) (providing additional insight regarding definitions of "old age" as well as insights into aging and legal issues pertaining to the elderly); *see also* HARRY MOODY, AGING CONCEPTS AND CONTROVERSIES 2, 81, 128 (6th ed. 2000) (same). This article will not attempt to resolve the question.

5. Lawrence A. Frolik, *The Developing Field of Elder Law: A Historical Perspective*, 1 ELDER L.J. 1, 3 (1993).

6. *What are Elder Law and Special Needs Law Attorneys?*, NAELA, http://bit.ly/WK2hif (last visited Jan. 14, 2013). NAELA describes elder law practice as the following:

> Elder and Special Needs Law are specialized areas of law that involve representing, counseling, and assisting seniors, people with disabilities, and their families in connection with a variety of legal issues, from estate planning to long-term care issues, with a primary emphasis on promoting the highest quality of life for the individuals. Typically, Elder and Special Needs Law attorneys address the client's perspective from a holistic viewpoint by addressing legal, medical, financial, social and family issues.

Id.

7. *See id.* NAELA discusses the breadth of modern elder law practice, stating the following:

> NAELA, Elder and Special Needs Law attorneys advise clients about what they should consider with regard to retirement income, long-term care, lifestyle and housing needs, and preferences. In addition, wills, living wills, durable powers of attorney for property and health and insurance coverage are issues that seniors should discuss with Elder Law attorneys.

Id. Elder and Special Needs Law attorneys are experts in 13 key areas including:

> Estate Planning and Probate
> Estate and Gift Tax Planning
> Guardianship/Conservatorship
> Medicaid
> Medicare
> Entitlement Programs

and become more specialized, the original clientele has also changed.[8] The extension of elder law to younger, vulnerable clients has arguably worked to make conflicts an ever more significant issue.

> Retirement Benefits
> Age Discrimination
> Elder Abuse/Neglect
> Housing
> Long Term Care Financing
> Medical Decision Making
> Disability Planning
> Insurance

Id.; *see also* ABA COMM'N ON LAW & AGING & AM. PSYCHOL. ASS'N, ASSESSMENT OF OLDER ADULTS WITH DIMINISHED CAPACITY: A HANDBOOK FOR LAWYERS ii (2008), *available at* http://bit.ly/tTyTYP. The ABA Commission on Law and Aging does not use the term "elder law" and has not morphed into the field of special needs or disability:

> The mission of the American Bar Association (ABA) Commission on Law and Aging is to strengthen and secure the legal rights, dignity, autonomy, quality of life, and quality of care of elders. It carries out this mission through research, policy development, technical assistance, advocacy, education, and training. The ABA Commission consists of a 15-member interdisciplinary body of experts in aging and law, including lawyers, judges, health and social services professionals, academics, and advocates. With its professional staff, the ABA Commission examines a wide range of law-related issues, including: legal services to older persons; health and long-term care; housing needs; professional ethical issues; Social Security, Medicare, Medicaid, and other public benefit programs; planning for incapacity; guardianship; elder abuse; health care decision-making; pain management and end-of-life care; dispute resolution; and court-related needs of older persons with disabilities.

Id.

8. The clientele in a traditional elder law practice may be changing as Congress closes loopholes in Medicaid. *See* The Deficit Reduction Act of 2005, Pub. L. No. 109-171, 120 Stat. 4 (2006). NAELA's continuing marketing into Special Needs Planning, which strives to address the needs of people with disabilities regardless of age, demonstrates this transition. For instance, former NAELA President Lawrence Davidow once stated: "NAELA [m]embers stand ready to help advise seniors and people with disabilities about how to contend with these changes and how to prepare for long-term care." Freddie Moohce, *Elders Legal Advocacy Group Denounces New Medicaid Restrictions*, BREAKING NEWS AGENCY (Feb. 2, 2006), http://bit.ly/15Borne. This evolution in clientele may also explain NAELA's more recent foray into the field of veterans benefits, which currently does not have as many income and asset restrictions as Medicaid. *See infra* notes 45-53 and accompanying text. For a less unsettling explanation, see Rebecca C. Morgan, *Elder Law in the United States: The Intersection of the Practice and Demographics*, 2 J. INT'L AGING L. & POL'Y 103, 124, 134 (2007), *available at* http://bit.ly/1668FmC. The author explains:

> Elder Law is at a crossroads of sorts, in part because of the enactment of the Deficit Reduction Act, in part because of the aging of the Boomers, in part because of the changes in pension and estate tax laws, and in part because of the number of attorneys who include people with disabilities in their elder law client base.

Id. at 124.

> Over the years, the number of attorneys holding themselves out as elder law attorneys has grown steadily. NAELA now has over [five thousand] members and the management of NAELA predicts continued growth. NAELA recently

Compared to other discrete areas of law, the traditional areas such as tort, contract, and criminal law, as well as even less traditional areas such as women and the law, environmental law and health law,[9] this nascent area of "law and aging" or "elder law" has developed without much exploration or critical discussion of underlying concepts. The distinctively practice-oriented development of elder law has contributed to its content and nature as a legal subject and (fairly or unfairly) to the perception of elder law in the wider legal and general communities. Many lawyers in the United States may think of "elder law" attorneys as "Medicaid planners," which is distasteful to many who believe this view marginalizes the field.[10] Similarly, many members of the legal community in Canada may think of "elder law" attorneys as lawyers who

> changed its mission statement, logo, and tag line to reflect the representation of people with special needs. In an interview with the executive director and managing director, they were confident that NAELA and concomitantly, the elder law practice, would continue to grow, because they expect an increasing emphasis on issues affecting seniors, and an increasing focus on the numbers and needs of seniors.

Id. at 134 (citations omitted).

9. Of course, health law may be considered more pertinent than elder law in that health law issues affect the entire population whereas elder law, albeit a more diverse subject area, specializes in assisting with a smaller subset of the population. Elder law courses have not yet attained the same stature or stability that health law courses have enjoyed in academia, as either teaching areas or research foci. Perhaps due to its lack of prominence, elder law has also failed to attract the attention of many research-funding entities. *Compare Health Law Courses: Six Core Curriculum Tracks in Health Law*, GA. ST. UNIV. COLL. L., http://law.gsu.edu/clhs/6454.html (last visited Mar. 22, 2013) (describing Georgia State College of Law's six core curriculum tracks in health law, each containing many courses that provide for in-depth exploration of different legal issues in health law, but with only one reference to elder law), *with Elder Law Course Survey*, STETSON UNIV. COLL. L., http://bit.ly/Zi4TjZ (last visited Jan. 14, 2013) (providing all law schools' available courses pertaining to elder law, including health law-related courses).

10. In a 2001 article, syndicated writer Jane Bryant Quinn set off a storm in her article "Well-to-do Weasel Way onto Medicaid Rolls," while simultaneously implicating elder law attorneys:

> Medicaid is supposedly for the poor. But increasingly, it's being exploited by the well-to-do. Instead of buying nursing-home insurance or using their personal savings, they're getting the government to cover their bills. . . . Here are some of the Medicaid-planning ideas promoted at a recent Elder Law Symposium in Vancouver, sponsored by the National Academy of Elder Law Attorneys: Cut your spouse loose. When one spouse enters a nursing home, assets can be moved into the name of the healthy spouse, says attorney Daniel Fish of Freedman and Fish in New York City. The healthy spouse signs a statement refusing to support the nursing-home spouse. That spouse then goes on welfare (Medicaid).

Jane Bryant Quinn, *Well-to-do Weasel Way onto Medicaid Rolls*, SUN SENTINEL (June 5, 2001), http://bit.ly/YKWoxQ; *see also* Timothy L. Takacs, *Is Medicaid Planning Ethical? The Elder Law Attorney's Ethical Dilemma*, ELDER LAW PRACTICE OF TIMOTHY L. TAKACS, http://bit.ly/100tACv (last visited Jan. 14, 2013).

sell unnecessary products to unwitting clients. Few practicing within or writing about the field of elder law have confronted this perception, or the issue of conflicts that underlies it.

Fear of being considered unethical and consequently marginalized creates resistance on the part of lawyers and legal scholars to bring their experience to the development of the field, and to situate elder law within related social justice movements. The characterization of elder law as a gimmicky marketing label has contributed to this marginalization. This characterization may also have marginalized the field from an academic perspective as fewer law schools, and especially "top" law schools, teach elder law topics in their curricula.[11] If law schools, particularly "top" law schools, stop teaching elder law, this will in turn exacerbate the negative perceptions and marginalization of elder law and elder law attorneys.

We contend that the unexamined problem of conflicts of interest is an important factor for the potential continuing development of elder law both in the United States and internationally. Real conflicts exist for lawyers representing older or disabled clients, or representing another person with an interest in the money or life of the older person or disabled client. Unfortunately, some attorneys take advantage of their older and disabled clients through outright greed, fraud, or overzealous marketing in some instances, and through representation of the interests of others who may want to take advantage of the older or disabled client in other instances. We do not want to indict all so-called "elder law" attorneys, especially because both authors are involved in the study and teaching of the practice field that involves older and disabled persons and the law. Indeed, most of our examples of lawyers behaving badly are not lawyers who call themselves "elder law" attorneys, much less members of "NAELA,"[12] the premier membership organization of attorneys who represent older persons and persons with special needs. We also do not wish to second-guess motives of lawyers who market their legal services to older populations because the demographics suggest a viable growth area for many professions, and there is a pressing need for health care and legal advocacy for older and disabled persons.[13] However, it is

11. *See, e.g.*, *Law School Elder Law Courses & Clinics Listed in On-line Course Catalogs: November 2009*, ABA COMM'N L. & AGING, http://bit.ly/1060gvF (last visited Jan. 14, 2013).

12. *See* NAELA, www.naela.org (last visited Feb. 23, 2013). On this website, NAELA's current motto is "Leading the way in Special Needs and Elder Law." *Id.* Co-author James Pietsch is a member of NAELA. In its membership directory, NAELA lists members in the United States, Canada, Australia, and the United Kingdom.

13. *See Aging into the 21st Century*, U.S. DEP'T HEALTH & HUM. SERVS., ADMIN. ON AGING, http://1.usa.gov/9ZvFAt (last modified Jan. 19, 2011, 8:43 AM). The Administration on Aging report demonstrates that, in the immediate future, the number of

indisputable that some people—including some lawyers—take advantage of individuals who may not retain the ability to protect themselves due to diminished mental or physical capacity and who may be more vulnerable due to their reliance on others for their care. Accordingly, conflicts of interest, and the potential for self-serving, will always be a heightened issue where the client group is by definition vulnerable, and where the core services involve financial management and access to public benefits. NAELA has formally recognized this heightened significance and the special responsibility it creates.[14] Accordingly, in demonstrating potential conflicts of interest attorneys face with clients, this article will appear to alternate between praising and questioning NAELA's role and influence in creating and resolving potential conflicts.[15]

disabled persons, at all levels of disability, will increase rapidly. The numbers of people with severe to moderate disabilities will more than triple between 1986 and 2040. The implications of long life expectancies and incidence of disability on society in general could be catastrophic. Perhaps the most salient point one may infer from this report is that, with longer life expectancies and increasing disability rates, society must determine how to care for people over a longer period. The frightening specter of Alzheimer's disease and related disorders of the brain clearly evidences such an inference. *See Projected Future Growth of the Older Population*, U.S. DEP'T HEALTH & HUM. SERVS., ADMIN ON AGING, http://1.usa.gov/aUWGdy (last visited June 23, 2010, 3:27 PM). The Administration on Aging report states:

> Among those included in the severely disabled category are those with clinically diagnosed Alzheimer's disease. A team of researchers (Evans et. at., 1992) [sic] has compiled a set of projections of persons with this condition. These analysts expect 10.2 million cases (middle series) at ages 65 and over by 2050, and possibly 14.3 million cases (high series) by 2040, as compared with about 3.8 million (both middle and high series) in 1990. There is the expected progression in numbers of cases with increasing age, a pattern that intensifies with the passage of time. By 2040, most of these cases, some 70 percent, occur among ages 85 and over. The number of cases at these ages will increase by over 300 percent, as compared with 25 to 50 percent for ages 65 to 74. This change reflects the entry of the baby-boom cohorts into the highest ages by 2040.

Aging into the 21st Century, *supra*.

14. *See Our Standards—Why Choose a NAELA Member Attorney*, NAELA, http://bit.ly/100DwM4 (last visited Jan. 14, 2013). According to former NAELA President Stuart D. Zimring:

> The clients served by Elder and Special Needs Law attorneys are among society's most vulnerable, often coming to us at times in their lives when they are most in need of wise counsel and advice. Because of this unfortunate reality, many of us believe that we, as Elder and Special Needs Law attorneys, should aspire to a higher level of professional practice standards than other attorneys.

Id.

15. Independently, NAELA has been launching several ambitious initiatives to address several areas of concern raised in this article, such as establishing committees to study areas ranging from "what we call ourselves," encouraging more members to provide pro bono legal services, supporting legal services providers who serve underserved populations, providing support to groups serving disabled veterans, and

I. EHTICAL CONFLICTS IN ELDER LAW IN THE UNITED STATES

Attorney bad behavior is bad behavior whether the client is young, old, disabled, or of "able" mind and body. Conflicts between attorneys and clients that rise to the level of theft or fraud are somewhat easy to handle within and outside the profession of law. A Hawaii case illustrates clear conflicts where an attorney is accused of arranging to have the attorney's companion serve as a fiduciary for a client in order to personally benefit from that arrangement while charging exorbitant fees to a client of questionable capacity.[16] A Florida case illustrates conflicts that may arise when an attorney seeks to gain a profit from a business transaction with a client.[17]

establishing a NAELA International Law Section that would look at cross-border and other international legal issues raised in providing legal services to older persons and individuals with disabilities. Co-author James Pietsch is a member of two of these sub-committees and, as part of these sub-committee efforts, has had telephone interviews with Gregory French, President, NAELA, and with Howard Krooks, President-elect, NAELA, about these subjects. Another encouraging development is that the Law Student Division of the ABA on the cover of its *Student Lawyer* magazine (Vol. 61, No. 6, Feb. 2013) put Elder Law on the top of its graphical pyramid under the title "Exploring Growing Areas of Law."

16. *See* Office of Disciplinary Counsel v. Smith, No. 26374, 2004 WL 1948420, at *1-2 (Haw. Aug. 30, 2004); *see also* Rick Daysong, *Isle Attorney Disbarred Over $1M Estate Actions*, HONOLULU STAR-BULLETIN (Sept. 6, 2004), http://bit.ly/WKeaER. Daysong recounts the details of the case:

> The state Supreme Court disbarred Kaneohe attorney Robert A. Smith for a number of ethical violations stemming from his representation of an elderly client and her $1 million estate.
>
> The high court said Smith had a conflict of interest when he made his longtime companion Paz Abastillas the trustee for the estate of Edith Kam.
>
> Kam, who died in 2000 at age 96, was in mental decline and subject to undue influence, and Smith took advantage of her condition by charging unusually high legal fees, the Supreme Court said.
>
> Smith billed Kam more than $152,000 for estate planning and other nonlegal services, according to the state Office of Disciplinary Counsel. . . .
>
> In a September 2003 report on the Kam matter, the Office of Disciplinary Counsel alleged Smith replaced Kam's son Cedric as the trustee of her assets, which were valued between $750,000 and $1.2 million. He eventually named Abastillas trustee of Kam's estate.
>
> The Office of Disciplinary Counsel also alleged that Smith improperly drafted a power of attorney document that allowed Abastillas to make gifts to herself with Kam's assets. . . .
>
> "(Smith) was aware that his conduct was unethical but . . . intentionally took advantage of a client in mental decline," according to the Office of Disciplinary Counsel.
>
> The Supreme Court said its decision to disbar Smith was based on several factors, including his refusal to acknowledge the wrongful nature of his conduct.

Id.

17. *See* Fla. Bar v. Doherty, 94 So. 3d 443 (Fla. 2012); *see also* Gregory Monday & John T. Brooks, *Attorney Disbarred After Trying to Sell Annuities to Elderly Client*,

As the number of elderly clients, as well as the number of clients with some form of diminished capacity increase,[18] lawyers need to be aware of the issues that accompany clients with diminished capacity. They also need to be aware of possible signs and protective measures that may be taken in addressing diminished capacity issues. Often when they are seeking counsel, clients may be in an emotional and vulnerable state. Clients may be looking for advice or counsel to address their immediate needs and many times do not have the luxury of being able to consult with an array of professionals. Likewise, these clients may need greater access to legal services in order to protect their own personal autonomy and to protect them from undue influence when planning for their future. Elder law attorneys are often the initial screeners of competency and capacity; therefore, it would seem logical that they have a special duty to protect vulnerable clients from harm.

A. Conflicts Regarding Exploitation via Undue Influence

The elderly are particularly attractive targets for financial exploitation because of their frailty, physical and mental impairments, increased dependence on caregivers, and isolation from friends and family.[19] Safeguards and protections are needed to prevent financial exploitation of the elderly and to ensure that legal actions accurately

WEALTH MANAGEMENT.COM (June 25, 2012), http://bit.ly/Qm9Qq4. Monday and Brooks recount the court's reasoning and holding:

> Rule 4-1.8 states that an attorney shall not 'enter into a business transaction with a client' unless the transaction is fair and reasonable to the client, the attorney discloses to the client in writing of the terms of the attorney's interest in the transaction and the desirability of the client seeking separate counsel in the matter and the client gives informed, written consent. The Florida Rule closely parallels rule 4-1.8(a) of The American Bar Association's Model Rules of Professional Conduct.
>
> In this defense, Doherty didn't assert that he gave the written disclosure or received the written consent required under Florida Rule 4-1.8. Rather, he argued that his role as a broker in the proposed annuity transaction didn't constitute engaging in a business transaction with the client, because Doherty wasn't a principal in the transaction—he wasn't selling anything to her or buying anything form her. The court, however, rejected Doherty's narrow interpretation of the rule.
>
> The court held that Rule 4-1.8 'encompasses a scope of dealing broader than simply those between a lawyer and his or her client as the principals to the transaction.' The court cited a number of examples in prior Florida cases, such as an attorney investing in a company that was in direct competition with his client's company, an attorney taking over his client's role as chairman and CEO and an attorney making a secured loan to a client.

Id.

18. *See Aging into the 21st Century*, *supra* note 13.

19. *See* Robert A. Polisky, *Criminalizing Physical and Emotional Elder Abuse*, 3 ELDER L.J. 377, 379-80 (1995); *see also* Black *infra* note 23, at 289-90.

reflect the desires and needs of the elder clients. Education on elder abuse, and how some individuals capitalize on the weaknesses of elderly victims, is essential to an elder law practice.

One common type of exploitation is undue influence. However, undue influence may be difficult to identify. Courts differ from jurisdiction to jurisdiction on tests for finding the presence of undue influence.[20] Many courts, including those in Hawaii, use the four-factor "SODR" test to identify undue influence.[21] The four pertinent factors are susceptibility of the testator, opportunity to exert undue influence, disposition to exert undue influence, and a result of such undue influence.[22]

Often, elderly victims fall prey to exploitation by their own relatives. Some sources suggest that, in cases of financial exploitation of the elderly, family members are actually the most likely to be the exploiters.[23] Though family members are often perpetrators in financial abuses against the elderly, third persons who are unrelated to the victim frequently come into the lives of vulnerable elderly, masquerading as a friend, confidante, or caretaker, only to betray and rob the victim. In a Mississippi case, 24-year-old Michael Cupit befriended 78-year-old Mary Reid,[24] and Reid eventually devised and deeded all of her property

20. *See* DUKEMINIER ET AL., WILLS, TRUSTS, AND ESTATES 184-85 (8th ed. 2009) ("[T]he contestant must establish the existence of a confidential relationship between the influencer and the testator plus, in most jurisdictions, one or more additional suspicious circumstances. . . . In some jurisdictions, this may be satisfied by showing that the influencer procured the will. In other jurisdictions, . . . the extra elements are that the person in the confidential relationship received the bulk of the estate and that the decedent had a weakened intellect.") (citations omitted).

21. *See In re* Estate of Herbert, 979 P.2d 39, 53 (Haw. 1999) ("It is sometimes said that the elements of undue influence are, susceptibility of [the] testator [or testatrix], opportunity for the exertion of undue influence, disposition to exert undue influence, and the result, in the will, of such undue influence.") (alteration in original) (citation omitted); *see also In re* Estate of Kamesar, 259 N.W.2d 733, 737 (Wis. 1977) (noting that the elements of undue influence "are: 1) susceptibility to undue influence, 2) opportunity to influence, 3) disposition to influence, and 4) coveted result.").

22. *See In re Estate of Herbert*, 979 P.2d at 53; *see also In re Estate of Kamesar*, 259 N.W.2d at 737.

23. *See* Jeff D. Opdyke, *Intimate Betrayal: When the Elderly Are Robbed by Their Family Members*, WALL ST. J., Aug. 20, 2006, at D1 ("Children, siblings, grandchildren, nieces and nephews, and even spouses are the people most likely to rob the elderly, according to elder-law advocates and attorneys."); *see also* Jane A. Black, Note, *The Not-So-Golden Years: Power of Attorney, Elder Abuse, and Why Our Laws are Failing a Vulnerable Population*, 82 ST. JOHN'S L. REV. 289, 289, 294 (2008) ("Abuse of the elderly is an escalating problem, due in part to the rising number of elderly people. . . . Children, grandchildren, siblings, nieces, and nephews are the people most likely to cheat the elderly.").

24. *In re* Estate of Reid, 825 So. 2d 1, 2 (Miss. 2002).

to him.[25] The Supreme Court of Mississippi held that the will was the result of undue influence and breach of fiduciary relationship between Cupit and Reid, and was thus invalid.[26] Some of the witnesses described the relationship between Reid and Cupit as "intimate," "beyond a mother[-]son relationship," and physically affectionate.[27] A presumption of undue influence arose because of the personal relationship between the two[28] and because Cupit acted as Reid's attorney on matters other than drafting her will.[29] Cupit exerted undue influence over the drafting of Reid's will by involving an attorney of his choosing and instructing him to draft a will that mirrored a holographic will that Cupit helped Reid write previously.[30] The court held that the will was invalid because of undue influence and bad faith on the part of Cupit, as well as the Court's finding that Reid did not receive adequate independent counsel in drafting the will.[31]

B. Attorney Conflicts Present in Medicaid Planning

What about conflicts an attorney may confront in addressing broader public policy issues—with or without a client's own initiative as the basis for the representation? This question is at the heart of the Medicaid planning issue in elder law.

Medicaid is a program developed by Congress in 1965 through which federal funding is provided for each state "to furnish medical assistance on behalf of families with dependent children and of aged, blind, or disabled individuals, whose income and resources are insufficient to meet the costs of necessary medical services."[32] It has become a controversial program, praised and attacked by many.[33] "At the time of enactment, Medicaid was considered to be 'first and foremost a program for the poor.'"[34] Medicaid is now the largest source of public funding for long-term care in the United States, and "[w]ithin state budgets, Medicaid is one of the largest categories of spending, second

25. *See id.* at 4.
26. *See id.* at 5.
27. *Id.* at 3.
28. *See id.* at 5.
29. *See id.*
30. *See In re Estate of Reid*, 825 So. 2d at 1, 4-5.
31. *See id.* at 8.
32. 42 U.S.C. § 1396 (2006).
33. *See* Joseph S. Karp & Sara I. Gershbein, *Poor on Paper: An Overview of the Ethics and Morality of Medicaid Planning*, 79 FLA. B.J. 61, 61 (2005).
34. *Id.* at 61 (citation omitted).

only to education."[35] Qualification for Medicaid for all but the most poor is a complicated matter.[36]

Medicaid planning is defined in many different ways, "sometimes euphemistically, sometimes pejoratively."[37] Attorneys who assist with Medicaid planning "help[] applicants preserve [their] assets, while [still] fitting within the financial criteria for Medicaid eligibility."[38] "[W]ith legal assistance, people who are not in fact poor can make themselves appear poor on paper by methods such as transferring assets. . . ."[39] There are many different reasons why people choose to engage in Medicaid planning, whether it be to "preserve an inheritance, to enhance an institutionalized person's quality of care, or to protect a community spouse from impoverishment."[40] There is an ongoing debate among those who believe this "asset 'rearranging' is ethical and moral, and those who say that it is unethical and takes resources away from those for whom Medicaid was intended to provide for."[41] "Medicaid planners are often accused of 'gaming the system' for their undeserving and overprivileged clients."[42] In the context of conflicts and the question of "who is your client?," irrevocable transfers of assets by a client pose special problems because such transfers can be to any party, ranging from family members, acquaintances, strangers, or even attorneys. Medicaid planning was once the bread and butter of many NAELA attorneys, but many of the loopholes that the attorneys helped clients and

35. Timothy L. Takacs & David L. McGuffey, *Medicaid Planning: Can it be Justified? Legal and Ethical Implications of Medicaid Planning*, 29 WM. MITCHELL L. REV. 111, 125 (2002). The authors further stated, "[Medicaid is] no longer just the safety net for the poor, [but] it is now the safety net for America's middle class seniors." *Id.* at 121.

36. *See, e.g.*, Bryn A. Poland, *Don't Plan on Aging: The Kansas Supreme Court Reaffirms Its Hostility Toward Medicaid Planning*, 45 WASHBURN L.J. 491, 494-95 (2006). Medicaid has transfer rules put into place governed by federal law. *Id.* at 501. Such transfers from Medicaid applicants have "limits on voluntary impoverishment for Medicaid eligibility." *Id.* There are numerous exceptions to the transfer rules. *Id.* at 502. There are also estate recovery rules in place requiring that, "[u]pon the death of any Medicaid recipient age fifty-five or older, states are required to seek recovery of Medicaid payments from the estate of the deceased recipient." *Id.* "Under an estate recovery program, each state is required to seek recovery for 'nursing facility services, home and community-based services, and related hospital and prescription drug services.'" *Id.* at 502-03 (citation omitted).

37. Karp & Gershbein, *supra* note 33, at 61.

38. Takacs & McGuffey, *supra* note 35, at 131.

39. Karp & Gershbein, *supra* note 33, at 61.

40. *Id.* at 62.

41. *Id.*

42. Takacs & McGuffey, *supra* note 35, at 134-35.

beneficiaries use to transfer assets have been tightened.[43] Thus, perhaps, the shift to addressing the special needs population.[44]

C. Conflicts Inherent in Helping a Client Obtain Veterans Benefits

Besides Medicaid, there is a new field emerging which could be the source of substantial legal fees for lawyers, namely U.S. Department of Veteran Affairs ("VA") benefits. As an example of VA benefits, the VA pension program[45] is designed to help needy wartime veterans; however, due to gaps in the regulations, individuals with considerable assets may also qualify. Because the VA pension program does not have a look-back period, individuals are able to transfer assets and immediately qualify for benefits. There is also nothing keeping an applicant from transferring these assets at a price well below market value. The U.S. Government Accountability Office (GAO) reported that "organizations that market financial and estate planning services" have "helped pension claimants with substantial assets, including millionaires, obtain VA's approval for benefits."[46] This result, understandably, created an unintended burden on the system and increased cost for the department and taxpayers. Although this result is not ideal considering the intent of the program, other problems arise because of the regulation gaps.

Due to gaps in the regulations, such as having no look-back period, there are organizations that profit from helping veterans transfer assets. "These organizations consist primarily of financial planners and attorneys who offer products such as annuities and trusts."[47] This is a large market with over 200 organizations providing services to help

43. *See* Deficit Reduction Act of 2005, Pub. L. No. 109-71, 120 Stat. 4 (2006).

44. *See supra* note 8.

45. *See VA Pension Benefits: Supplemental Income for Wartime Veterans*, U.S. DEP'T OF VETERANS AFFAIRS, http://benefits.va.gov/pension/ (last visited Jan. 14, 2013). The VA pension benefit web site states:

> VA offers two broad categories of Pension benefit programs:
>
> Veterans Pension: Tax-free monetary benefit payable to low-income wartime Veterans.
>
> Survivors' Pension: Tax-free monetary benefit payable to a low-income, un-remarried surviving spouse and/or unmarried child(ren) of a deceased Veteran with wartime service.
>
> Veterans and survivors who are eligible for Pension benefits and are housebound or require the aid and attendance of another person may be eligible to receive additional monetary amounts.

Id.

46. U.S. GOV'T ACCOUNTABILITY OFFICE, GAO-12-540, VETERAN'S PENSION BENEFITS: IMPROVEMENTS NEEDED TO ENSURE ONLY QUALIFIED VETERANS AND SURVIVORS RECEIVE BENEFITS (2012), *available at* http://1.usa.gov/10vP4Zm.

47. *Id.*

veterans qualify for benefits.[48] On the one hand, these products can help an individual qualify who may not be able to qualify without assistance; on the other hand, not all of these organizations are helping the veterans in the long run.

If a veteran transfers assets and then needs the assistance of Medicaid before the five-year look-back for Medicaid benefits expires, the person may be disqualified for a benefit that offers more than the VA pension. Another way these services can hurt veterans and their families is that not all products sold are in the best interest of the veteran or his or her family. "Some products and services provided, such as deferred annuities, may not be suitable for the elderly because they may not have access to all their funds for their care within their expected lifetime without facing high withdrawal fees."[49] Not only are some unsuitable products being sold, these products are being sold for a high cost "rang[ing] from a few hundred dollars for benefits counseling to up to $10,000 for the establishment of a trust."[50] NAELA has worked with the VA to help address fraud;[51] it has objected to changes to the look-back

48. *See id.*

49. *Id.*

50. *Id.* at 21.

51. *See National Academy of Elder Law Attorneys Commends Special Senate Committee on Aging and GAO on Veteran's Pension Hearing*, PRWEB.COM (June 18, 2012), http://bit.ly/MBQHQ9; *see also* NAELA, NAELA STAFF SUMMARY: SENATE SPECIAL COMMITTEE ON AGING HEARING (2012) [hereinafter NAELA STAFF SUMMARY].

> The GAO recommended that Congress "consider establishing a look-back and penalty period for pension claimants who transfer assets for less than fair market value prior to applying, similar to other federally supported means-tested programs. VA should (1) request information about asset transfers and other assets and income sources on application forms, (2) verify financial information during the initial claims process, (3) strengthen coordination with VA's fiduciary program, and (4) provide clearer guidance to claims processors assessing claimants' eligibility." In its comments on this report, VA concurred with three of GAO's recommendations and concurred in principle with one, citing concerns about the potential burden on claimants and recipients of verifying reported financial information. VA agreed to study the issue further. The NAELA Public Policy Committee has been and will continue to monitor both the legislative and regulatory process and involve the expertise of NAELA members in discussions with the VA and Congress in order to protect the interests of veterans. . . .
>
> NAELA commends the work of the Senate Special Committee on Aging and the Government Accountability Office (GAO) for its hearing and related report on veterans' pension benefits and their work to fight fraud, misinformation, and the use of inappropriate services and products that were uncovered in the investigations. The nation's veterans deserve generous and well-run benefits programs, particularly those who are older or disabled and have multiple chronic illnesses that need to be addressed. As the GAO report notes, Elder Law attorneys have assisted with this study and have reported their concerns regarding some current practices that put our nation's veterans at risk. . . .

NAELA STAFF SUMMARY, *supra*, at 1-2.

period the VA was seeking to implement,[52] and, in its monthly publication, NAELA has run advertisements touting new annuity products that would permit keeping Medicaid within arm's reach.[53]

II. ETHICAL RULES AND BEST PRACTICES AS APPLIED TO ELDER LAW CONFLICTS

How do we as a profession deal with the conflicts discussed above? The American Bar Association (ABA) has developed *Model Rules of Professional Conduct*,[54] which impose duties on attorneys in their practice of the law.[55] Some of the proscribed rules can be used to protect clients against elder abuse.

A. Strengthening the Lawyer's Obligation to the Client

Rule 1.6 imposes a duty of confidentiality on lawyers, allowing them to disclose information related to representation of a client only in very limited circumstances, such as when the client gives informed consent or the disclosure is "impliedly authorized in order to carry out the representation."[56] This rule allows lawyers to keep third parties out of their consultations with their clients, including family members of the client. Maintaining the confidentiality of lawyers' communication with their clients can help safeguard against outside parties unduly influencing their clients' legal decisions because, under this rule, lawyers cannot reveal what was discussed one-on-one with their clients or the particulars of the legal documents drafted for their clients.

Additionally, Rule 1.14 provides that, when a client has diminished capacity, the lawyer should maintain a normal relationship with them as much as possible, with caveats:

> (a) When a client's capacity to make adequately considered decisions in connection with a representation is diminished, whether because of minority, mental impairment or for some

52. *See* Dawn Weekly & Amos Goodall, *NAELA's Response to Proposed Changes to VA Aid and Attendance Eligibility*, MARSHAGOODMANATTORNEY.COM, http://bit.ly/ZhQN7j (last visited Feb. 23, 2013).

53. *See Veterans Aid & Attendance Benefits Planning*, KRAUSE FIN. SERVS., http://bit.ly/4uCBmS (last visited Feb. 23, 2013) ("[The New VA Annuity is] finally here. An annuity created specifically for the purpose of Veterans Benefits planning, while keeping future Medicaid eligibility within arm's reach. You can now provide your clients with unparalleled flexibility to meet their Veterans Benefits planning needs.").

54. *See generally* MODEL RULES OF PROF'L CONDUCT (1983).

55. *See Model Rules of Professional Conduct*, ABA CTR. PROF'L RESPONSIBILITY, http://bit.ly/dPaBGm (last visited Mar. 9, 2013). Rules of Professional Conduct vary among the states.

56. MODEL RULES OF PROF'L CONDUCT R. 1.6 (amended 2012).

> other reason, the lawyer shall, as far as reasonably possible, maintain a normal client-lawyer relationship with the client.
>
> (b) When the lawyer reasonably believes that the client has diminished capacity, is at risk of substantial physical, financial or other harm unless action is taken and cannot adequately act in the client's own interest, the lawyer may take reasonably necessary protective action, including consulting with individuals or entities that have the ability to take action to protect the client and, in appropriate cases, seeking the appointment of a guardian ad litem, conservator or guardian.
>
> (c) Information relating to the representation of a client with diminished capacity is protected by Rule 1.6. When taking protective action pursuant to paragraph (b), the lawyer is impliedly authorized under Rule 1.6(a) to reveal information about the client, but only to the extent reasonably necessary to protect the client's interests.[57]

This rule strengthens the lawyer's obligation to the client. As stated in section (a), "[T]he lawyer shall, as far as reasonably possible, maintain a normal client-lawyer relationship with the client."[58] Just because the client may have some kind of disability does not end the lawyer's obligation to the client. As mentioned in Comment three to Rule 1.14, the lawyer must keep the client's interest as his or her main priority at all times, even when family members or other persons participate in discussions with the lawyer.[59] This rule also gives the lawyer the option to take protective action if she believes that the client has diminished capacity and is at risk of substantial physical or financial harm. Some suggested actions listed in the commentary to this rule include the following: "consulting with family members, . . . using voluntary surrogate decision-making tools such as durable powers of attorney or consulting with support groups. . . ."[60] However, it is important to remember the "guiding principle for the lawyer should be to take the least restrictive action."[61] Furthermore, the language of Rule 1.14 explicitly states that the "lawyer may take reasonably necessary protective action. . . ."[62] The problem is that there is no definition of "reasonably necessary," leaving it up to the lawyer to define.[63]

57. *Id.* R. 1.14.
58. *Id.* R. 1.14(a).
59. *Id.* R. 1.14 cmt. 3.
60. *Id.*
61. Elizabeth Laffitte, Note, *Model Rule 1.14: The Well-Intended Rule Still Leaves Some Questions Unanswered*, 17 GEO. J. LEGAL ETHICS 313, 328 (2004).
62. MODEL RULES OF PROF'L CONDUCT R. 1.14(b) (amended 2002).
63. Laffitte, *supra* note 61, at 328.

Comment six to Rule 1.14 mentions factors in determining the extent of the client's diminished capacity. These factors include the following: "the client's ability to articulate reasoning leading to a decision, variability of state of mind and ability to appreciate consequences of a decision; the substantive fairness of a decision; and the consistency of a decision with the known long-term commitments and values of the client."[64] Thus, the comments help to give some insight for lawyers to determine if, and when, an elderly or disabled client has diminished capacity.

B. Assessing Capacity

Many times a lawyer will make a deal with a client who is rapidly declining in capacity. It may seem reasonable and prudent to ascertain what the client's wishes are before the client is no longer able to comprehend what the lawyer is saying.

In *Florida Bar v. Betts*,[65] an attorney was retained to prepare the will of his client. Two codicils were made during a time when the client was in a rapidly deteriorating physical and mental state.[66] In the first codicil, the client removed his daughter and son-in-law as beneficiaries. The lawyer tried to persuade the client to reinstate his daughter and, in response, he prepared a second codicil. However, when presented to the client, the client was in a comatose state. It was not read to the client, and the client made no verbal response when it was presented to him. Instead, the codicil was executed by an X that the lawyer marked on the document with a pen placed and guided in the client's hand. The lawyer was privately and publicly sanctioned for this conduct. The court held that "[i]mproperly coercing an apparently incompetent client into executing a codicil raises serious questions both of ethical and legal impropriety, and could potentially result in damage to the client or third parties."[67] This case shows that, even if the lawyer has the best intentions or they think they know what the client's wishes are, it is unethical and unprofessional to substitute his or her judgment for the client's.

The ABA Commission on Law and Aging, in collaboration with the American Psychological Association, have published a comprehensive guide to dealing with clients with diminished capacity entitled "*Assessment of Older Adults with Diminished Capacity: A Handbook for*

64. MODEL RULES OF PROF'L CONDUCT R. 1.14 cmt. 6 (amended 2002).
65. Florida Bar v. Betts, 530 So. 2d 928 (Fla. 1988).
66. *Id.* at 928.
67. *Id.* at 929.

Lawyers."[68] This handbook proposes a number of ways that attorneys can promote and maintain client capacity.

First, it is important for lawyers to be aware of signs of possible diminished capacity.[69] Some recommendations that the Handbook lays out are focusing on decisional abilities rather than cooperativeness or affability.[70] This helps to separate a client's possible decision-making relating to diminished capacity from her own personality style. Second, it is important for lawyers to pay attention and observe changes in their clients over time, including such signs of diminished capacity.[71] A lawyer should take advantage of a client's ability to make decisions at the early stages of diminished capacity by having the client portray exact wishes to the lawyer. Thereafter, if the problem worsens, at least the lawyer will have a better understanding of what the client's wishes are and how to protect the client's interests. Finally, lawyers should be aware of ageist stereotypes and consider whether mitigating factors could explain unusual or changed behavior.[72] It is important for a lawyer not to let preconceived notions of ageist stereotypes cloud his or her judgment in assessing a client's ability to make decisions. Awareness of extenuating circumstances, such as a client's poor mood on a particular day, can help assessing a client's capacity. Checking with the client on a regular basis can help the lawyer establish some kind of baseline as to his or her client's decision-making capacity on a regular basis.

By becoming familiar with these broad factors, a lawyer can be more attuned to specific categories, such as cognitive factors, emotional factors, and behavioral factors.[73] Cognitive factors include memory loss, and communication and comprehension problems, among others. If a client quickly forgets information discussed in the interview or can remember things or events that happened years ago, but not things a couple of days ago, this can be a sign that the client has a diminished capacity and, thus, a lawyer can take protective measures to help the client remember.

For example, the Handbook mentions that attorneys can "break the ice" by mentioning things like the weather and sports.[74] This strategy can help the attorney create a relationship with the client where the client

68. ABA COMM'N ON LAW & AGING & AM. PSYCHOL. ASS'N, ASSESSMENT OF OLDER ADULTS WITH DIMINISHED CAPACITY: A HANDBOOK FOR LAWYERS 13 (2005), *available at* http://bit.ly/cBslZm [hereinafter 2005 HANDBOOK].

69. *See id.* at 1.

70. *See id.* at 13.

71. *See id.*

72. *See id.*

73. *See id.*

74. *See* 2005 HANDBOOK, *supra* note 68, at 27.

and the attorney develop trust in one another. Asking such questions can also give the attorney a better sense of how the client would respond to questions that are more pertinent to representation. For example, if the client has a difficult time responding to a question such as the current weather, it may be an indication of potential difficulties in future conversations about more difficult legal subjects.

It is also important to interview the client alone. This strategy ensures confidentiality and trust.[75] Following such a protocol is very important because, at times, the person bringing the client to the attorney may want to speak on the client's behalf. Despite the third party's intentions, the lawyer's priority is the client and that is to whom the lawyer owes a duty. This is important for any profession, not just lawyers. Other professionals need to be mindful that their duty is to the client. Even though it might be easier and more convenient at times to talk to the person that has accompanied the client, one must always remember that it does not absolve their professional obligation to the client.

Attorneys can also help promote capacity by encouraging client participation.[76] Sometimes, it may be the case that their clients are accustomed to having people speak on their behalf and, thus, clients don't take advantage of the opportunity to participate in their own affairs. By having the client participate, it not only makes the client aware that they are being valued and heard but also gives attorneys or professionals the sense that they are helping to promote their client's capacity by fulfilling their intentions.

C. Recognizing Risk Factors for Financial Exploitation of the Elderly

Elder law justice organizations and elder law agency websites often have lists of tips to aid older Americans in protecting their finances and keeping vigilant against would-be abusers. For example, the National Committee for the Prevention of Elder Abuse (NCPEA) website lists risk factors that increase the susceptibility of an older person to exploitation.[77] The list includes isolation, loneliness, recent losses, physical or mental disabilities, lack of familiarity with financial matters, and having family members who are unemployed and/or have substance abuse problems.[78] Likewise, *Clinical Geriatrics Magazine* lists factors

75. *Id.*
76. *See id.*
77. *See Financial Abuse*, NAT'L COMM. FOR PREVENTION OF ELDER ABUSE, http://bit.ly/OmV0BK (last visited Mar. 22, 2013).
78. *Id.*

predisposing one to financial exploitation.[79] Their list includes advanced age (75 years old or more), being unmarried, widowed, or divorced, organic brain damage, cognitive impairment, depression, dependence on abuse, being estranged from children, frailty, taking multiple medications, and fearing a change of living situation.[80] By consulting lists like these and identifying when such risk factors are present, families, friends, and others concerned about older persons can watch for signs of abuse and protect against it.

The NCPEA website also lists indicators of exploitation of the elderly.[81] These indicators include withdrawals or transfers from bank accounts that the older person cannot explain; new "best friends"; legal documents that the older person did not understand at the time he or she signed them; a caregiver expressing excessive interest in the money being spent on the older person, missing belongings or property; absence of documentation about financial arrangements; and suspicious signatures on checks and other documents.[82] *Clinical Geriatrics Magazine* lists characteristics of exploiters of the elderly, including developing a caregiving role, instilling sense of helplessness and dependency, isolating the elderly person from family members and other social contacts, enhancing inadequacy and diminished self-worth in the victim, falsifying credentials, and having a predatory nature.[83] Communities can guard against elder abuse by using these characteristics to identify potential exploiters and by recognizing indicators of exploitation early so it can be stopped before significant harm is done.

D. Statutory Attempts to Protect Against Financial Exploitation of the Elderly

According to the ABA Commission on Law and Aging,[84] although there is no overall federal law on elder abuse, all 50 states, the District of Columbia, Guam, Puerto Rico, and the Virgin Islands have enacted some form of legislation providing for adult protective services. In most states, these laws apply to abused adults who have a disability, vulnerability, or physical or mental impairment. Some states have

79. *See* Ryan C. W. Hall et al., *Exploitation of the Elderly: Undue Influence as a Form of Elder Abuse*, 13 CLINICAL GERIATRICS 28, 30 (2005).

80. *See id*.

81. *See Financial Abuse*, *supra* note 77.

82. *See id*.

83. *See* Hall et al., *supra* note 79, at 30, 31.

84. *See* ABA COMM'N ON LAW & AGING, http://www.abanet.org/aging (last visited Jan. 14, 2013).

specific elder protective services laws or programs;[85] other states, like Hawaii, do not have such programs, although there are many laws and interventions that can provide protection of older adults.[86] A question may arise for practitioners whether attorneys should report abuse or may be subject to reporting for their own abuse.[87] In Hawaii, for example, the Adult Protective Service Act provides mandatory reporting for certain persons who, in the performance of their professional or official duties, know of or have reason to believe that a vulnerable adult has been abused and is threatened with imminent abuse.[88] Adult Protective Services is required to investigate all reports of abuse or potential abuse and has the authority to prevent any future abuse.[89] In Hawaii, financial exploitation comprises the third highest number of adult abuse investigations. A vast majority of the victims in those investigations were older adults. In 2009, the Hawaii legislature passed a law that requires financial institutions to report suspected financial abuse of persons over age 62.[90]

III. THE CANADIAN EXPERIENCE WITH ETHICAL CONFLICTS IN ELDER LAW

The question of what it means to be an "elder law" attorney remains an open question in Canada, despite significant efforts to foster an increased profile for "elder law" on the part of dedicated individuals and organizations.[91] The mainstream narrative goes something like this: elder law developed in the United States as a response to changing demographics and the pending "grey tsunami." A group of prescient lawyers in that country, recognizing the law's then current blindness to

85. *See* LORI STIEGEL & ELLEN KLEM, ABA COMM'N ON LAW & AGING, INFORMATION ABOUT LAWS RELATED TO ELDER ABUSE (2007), *available at* http://bit.ly/106h05M. Each of the 50 states, the District of Columbia, Guam, Puerto Rico, and the Virgin Islands have authorized adult protective services statutes. These statutes vary widely based on who may be eligible for services and the types of abuse that may be actionable. At the same time, federal laws, such as the Older Americans Act, do little more than authorize funds for local awareness and coordination endeavors. *See* 42 U.S.C. § 3002 (2006 & Supp. 2012). Unlike federal laws on child abuse and domestic violence, which fund services and shelters for victims, there is no comparable federal law on elder abuse.

86. *See, e.g.*, HAW. REV. STAT. § 346-223, § 412:3-114 (2012).

87. It is important for attorneys to be mindful of confidentiality requirements. *See* MODEL RULES OF PROF'L CONDUCT R. 1.6 (1983).

88. HAW. REV. STAT. § 346-223 (2012). The list does not include attorneys, but any person may report and the reports are confidential.

89. *See id*.

90. HAW. REV. STAT. § 412:3-114 (2012).

91. For example, the Canadian Bar Association recognized "Elder law" as a discrete practice area in 2000, with the formation of a national elder law section. A Canadian Elder Law Centre was established at the British Columbia Law Institute in 2002.

the needs of the older client, organized to serve this growing client group better. Other Western countries experiencing similar demographic trends are now following and catching up to the American lead. In this story, elder law developed among private lawyers as a response to a need for services in the areas of health law and income and asset protection planning.[92]

However, the identification of health law as a focus implies a universality and transportability of the elder law model, which is not exactly borne out upon closer observation. Health law issues for older adults in the United States are dominated by the structures and demands of Medicaid. This early emphasis on "Medicaid planning," according to Lawrence Frolick, first distinguished elder law as a separate identifiable practice subject apart from traditional wills and estates planning, and it remains a core element in American elder law practice, "probably the leading source of clients and revenues for almost all elder law attorneys."[93] As previously discussed, in the United States, the focus has been on maximizing access to public benefits. This focus has decisively shaped the development of elder law as a discrete legal subject, providing the focus for elder law organizations and conferences, and working to exclude elder law from the wider "law and society" discourse (although there are recent indications that connections are being established).[94]

What does this mean for the future of elder law in Canada (and in other non-American jurisdictions with similar social structures)? Canada does not, of course, have a Medicaid system analogous to the United States; "health care" is provided almost exclusively by the public sector, wiping out in one stroke this core and formative element of American elder law. The mainstream narrative described above continues to posit the existence of a definable subject called "elder law" which, having begun in the United States, has now spread and taken root in other aging nations. Spencer and Soden describe the "later start to the development of elder law as a special practice area in Canada" in terms of the "impetus" provided in the United States by the marketability of "assisting older clients with later life planning, Medicaid eligibility, and private guardianship/conservatorship services."[95] From another

92. Lawrence A. Frolick, *The Developing Field of Elder Law: A Historical Perspective*, 1 ELDER L.J. 1 (1993).

93. Lawrence A. Frolick, *The Developing Field of Elder Law Redux: Ten Years After*, 10 ELDER L.J. 1 (2002) [hereinafter Frolick, *Redux*].

94. In 2012, for example, a "Law, Ageing and Society" Collaborative Research Network was formed within the Law and Society Association.

95. Charmaine Spencer & Anne Soden, *A Softly Greying Nation: Law, Ageing and Policy in Canada*, 2 J. INT'L AGING L. & POL'Y 1, 8 (2007); *accord* Frolick, *Redux*, *supra*

perspective, however, these factors provided more than an impetus, but the very *raison d'etre* for the development of "elder law" as a subject distinct from wills, trusts and estates and the related fields of guardianship and substitute decision making. For this reason, we contend that "elder law" in Canada, as in the United States, has proven difficult to define in a way that avoids merely rebranding established practice areas such as wills, trusts and estates, on the one hand, or incoherently sweeping together all legal matter in which one of the parties is an "elder" or older adult on the other.

A. Attempting to Define the Canadian "Elder Law" Field

Indeed, the elder law discussion in Canada, despite the apparent appropriation of the American model through adoption of the term is dominated to a striking degree by issues of public law and policy. The assertion that, despite its slow start, something called "elder law" is now "quickly catching up" in Canada, is incorrect; a review of what is actually being discussed suggests a quite different legal subject.

Elder abuse and the question of appropriate public legal response has arisen as a key focus area, although several authors have questioned the elder abuse construct, arguing that elder abuse is more usefully situated within more general paradigms of domestic abuse and exploitation and criminal law. Other matters fitting within the "elder law" rubric, long-term care and assisted living, substitute decision making legislation, retirement policy, and so called end of life issues, are predominantly "public" in Canada. Non-profit elder law centres, such as Ontario's Advocacy Centre for the Elderly (ACE), have arisen primarily in response to the particular access to justice needs experienced by older adults, including the kinds of issues gathered under the American rubric of "planning for long term care." Planning for long-term care, identified by Frolick as a prominent non-Medicaid focused part of an elder law attorney's practice,[96] is not conceptualized or understood in Canada as an appropriate matter for private legal advice. Frolick's statement that "[a]ny elder law attorney can tell of numerous phone calls from adult children who related how mom or dad 'just can't live alone any more'" with the lawyer acting as "the guide who helps the family arrange an affordable, safe living arrangement for the older person . . . help[ing] the family select from an array of possible solutions including in-home assistance, a continuing-care community, assisted living, or nursing

note 93 (identifying this kind of private guardianship as a key practice area for identified "elder law" attorneys, and one that has broadened the scope of elder law practice, diffusing the Medicaid focus).

96. Frolick, *Redux*, *supra* note 93, at 6.

home, and . . . paying for [such care]"[97] is not the Canadian reality. It would be extremely unlikely, even extraordinary, that a private lawyer in Canada would be approached for this purpose. Elder law centres such as ACE are essential precisely because older individuals in need of this kind of assistance are unlikely to be able or, even if able, willing, to pay for them.

The awkward paradox of elder law in Canada has been the attempt to grow an American style model of elder law and elder law private bar, self-consciously drawing on the American experience and terminology, despite the public nature of elder law issues in our national context. In its current stage of development, Canadian elder law is, in a real sense, neither fish nor fowl, a continuous search for identity that, even if unfairly, conveys the impression of the made-up and the marketing gimmick.[98] If we take away Medicaid planning, private guardianship, and the kind of planning for long-term care Frolick describes, what remains of private elder law practice in Canada? The answer is the traditional practice area of wills, trusts and estates, together with related issues around guardianship and substitute decision making currently folded into many wills, trusts and estates practices.

One possible direction is the *development* in Canada of the kinds of private products and services that typify elder law in the American context: using legal planning, accessible to those able to afford private advice, to maximize public benefits; the development of private guardianship as an alternative to family guardianship or the kind of public guardians that exist in Canada when no family or friend is available or willing to take on the task; and the use of private lawyers to help families organize care arrangements for older relatives, work that is currently carried out, if imperfectly, with assistance from health authority and other public sector figures and organizations. Development of these kinds of services does not accord with traditional, and deeply held, Canadian cultural values around appropriate private-public sector involvement or with the regulatory context in which we currently operate. Importation of the American model and terminology has the effect of generating the impression that the elder law agenda in Canada is the importation of these private "for-pay" structures for the personal

97. *Id.*

98. *See* Lawrence Lessig, *The Law of the Horse: What Cyberlaw Might Teach*, 113 HARV. L. REV. 501, 501-02 (1999). The article references a comment made by Judge Frank Easterbrook that there was no more a "law of cyberspace" than there was a "Law of the Horse." *Id.* at 501. "Courses in law school, Easterbrook argued, should be limited to subjects that could illuminate the entire law. [T]he best way to learn the law applicable to specialized endeavors, he argued, is to study student general rules." *Id.* at 502 (internal citations omitted).

enrichment of private lawyers. These kinds of services are also, in the American context, potential trouble spots for financial exploitation by attorneys, as identified and discussed above. The impression of this kind of agenda for elder law has both marginalized elder law as a legitimate matter for legal study and disguised the real importance of aging as matter for *public* law, regulation, and policy, an issue involving fundamental moral, social, and even philosophical questions about autonomy and the nature of the self at its core.

Language carries accumulated meaning, and the historical development of elder law in the United States in connection with the particular kinds of private law services creates a level of association that is difficult to overcome, and perhaps should not be overcome in their context (as shorthand for describing these traditional "elder law" services). But as shorthand for the considerable public law dimensions of elder law both in Canada and also in the United States, the elder law shorthand is inadequate. Perhaps the time has come for "elder law" to be understood as a particular American subset of private practice concerns, subsumed within a wider rubric of "law, policy, and aging," which would be more inclusive of the range of issues involving the intersection between law and aging in the United States, and more transportable and relevant to countries like Canada and the European countries.

B. Expanding the Subject: Law and Aging

The enhanced (in contrast to the United States) public focus in elder law can play a lead role in developing law and aging as a subject area in its own right. The recently completed project of the Law Commission of Ontario on the Law and Older Adults is an example of this kind of work and this kind of focus.[99]

The value added for a Canadian *private* elder law lies in the *deepening* of knowledge in already existing areas of practice expertise, primarily through the deliberate cultivation of interdisciplinary or extra-legal knowledge and relationships, rather than a widening of new practice areas into a "grey tsunami" market.[100] Lawyers working predominantly with older adults should take responsibility for educating themselves about issues such as dementia, ageism, and health care systems, and involve themselves in ongoing discussions and

99. *See* LAW COMM'N OF ONTARIO, A FRAMEWORK FOR THE LAW AS IT AFFECTS OLDER ADULTS: ADVANCING SUBSTANTIVE EQUALITY FOR OLDER PERSONS THROUGH LAW, POLICY, AND PRACTICE (Apr. 2012), *available at* http://bit.ly/166sBpA.

100. *See* Israel Doron, *A Multi-Dimensional Model of Elder Law: An Israeli Example*, 28 AGEING INT'L. 242, 242 (2003) (evoking this kind of interdisciplinary elder law and describing elder law as a "[c]ombination of the fields of law and gerontology").

relationships with other professionals working with older adults. This extra-legal aspect to elder law work has been a facet or feature of American elder law since its inception. However, the elder law *subject* focus in the United States has tended to overshadow the significance of the extra-legal aspect.

Deepening of non-law specific aging-related knowledge among lawyers working in the traditional private law areas of wills, trusts, estates and guardianship is a more appropriate response to changing demographics in Canada than the importation of practices that are not allied with our current policy and regulatory structures, culture of legal services, or public expectations.[101] Developing knowledge about aging among lawyers dedicated to providing the highest quality of service to this client group is needed; inadequate knowledge in this area can be a source of inadequate service, through a lack of understanding about mental capacity, the effects and trajectory of dementia, the relationship between "undue influence" and patterns of family dynamics involving older family members in many cases, and the impact of ageism on older adults and the social relationship contexts which frame their lives. As my colleague has noted, straightforward "attorney bad behavior" in the form of theft or fraud are relatively straightforward in terms of legal response and control. This is as true in Canada as in the United States. The kind of non-intentional "bad practice" that can enable financial exploitation, for example, and that arises through a lack of knowledge about and familiarity with older clients and their needs can best be addressed through this kind of expanded knowledge base.

One additional, traditional practice area that is impacted by aging demographics, and where this kind of intentional development of deep extra-legal knowledge and professional relationships has potential benefit, is the area of family law. Later life marriages, multiple (sequential) marriages, the resulting blended families, and the possibility for exploitative late-life marriage, create a family law landscape that is different from and more complex than the normative paradigm of the nuclear family divorce. The most useful response to these changes in what "family law" looks like is not the hiving off of this sub-set into a separate subject or practice of "elder law," but an enrichment of family lawyers' knowledge base and expectations *generally* to include older adults and their needs.

101. In 2004, the CBC, Canada's public broadcaster, aired a television series, *The Greatest Canadian*, in the course of which Canadians were asked to vote on the greatest Canadian of all time. Coming in at number one was Tommy Douglas, the Premier of Saskatchewan who is acknowledged as the father of the Canadian public health care system. *See And the Greatest Canadian of All Time Is . . .*, CBC DIGITAL ARCHIVES, http://bit.ly/124jL9k (last updated Dec. 11, 2012).

Indeed, in the absence of the kind of subject-specific area of practice that has driven elder law in the United States, the private elder law or "law, policy and aging" project may be best described in terms of a recognition on multiple levels that older adults *exist* and that they are actors in the world, that their needs and concerns are different from the needs and concerns of younger adults, that physical and cognitive changes may create needs that are often very different from those of younger adults, thus requiring a different appropriate response, and that the context in which older adults live will very often be distinct. At the same time, sensitivity to the realities of age cannot tip over into generalizations or presumptions about "the old" and their needs/desires. This is a delicate walk and one that requires expertise and intentionality.

Elder law in Canada stands at a crossroads of identity. To date, we have defined ourselves largely with reference to the American "pioneers" who paved the way. The differences in the Canadian context, however, mean that we cannot "grow" the American model here unless we change our context in a way that is consistent with that model. Any suspicion of and resistance to elder law that exists in this country can be traced to a suspicion that this kind of change is precisely the elder law agenda associated with a current federal Conservative government agenda of privatization and the dismantling of our public health system. An alternative to this account is to embrace the significance of "law, policy and aging" as a multi-faceted public law issue, together with encouraging those practicing in areas traditionally serving older clients and in emerging areas such as family law to deepen knowledge and inter-professional conversation around the extra-legal aspects of aging.

What, if anything, does this conclusion have to offer the American reader? Of course, those areas where we see future, meaningful development for Canadian elder law (more accurately described, we have suggested, as law, policy and aging) are also part of a comprehensive definition of American elder law. Those aspects, however, have been somewhat, if not completely, overshadowed by the particular nature of the private practice focus in the United States. This focus has also worked to stunt legal academic interest in aging, cutting off a rich source of discussion, debate, and inter-disciplinary collaboration, which would then, in turn, inform the profession. Our hope is that a truly Canadian model of elder law, developed in its own right and in response to the needs of the Canadian context, can provide an alternative model of what it means to be, if not an elder lawyer *per se*, a lawyer knowledgeable about and responsive to the needs of older clients, while stimulating a meaningful level of understanding and interest about law and aging at the political, policy, and legislative level. Perhaps we can be the pioneers at

this stage of development, as our American friends pioneered elder law decades ago, and we can work to build this community of ideas together.

CONCLUSION

Conflicts and potential conflicts created by or affecting the lawyer representing the elderly client, or conflicts of the lawyer representing another person with an interest in the money or life of the older or disabled client exists on both sides of the Canada-U.S. border. Some of the problems that exist are almost certainly due to the "invention" of elder law. Elder law attorneys and other attorneys on both sides of the border who specialize in legal issues involving older and disabled persons should have a duty to understand the potential conflicts and to apply lessons learned from both countries.