ELDER LAW ACROSS THE CURRICULUM: PROFESSIONAL RESPONSIBILITY

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I. INTRODUCTION

In a professional responsibility course, students learn the basics about their ethical duties as lawyers. Most students take the course in their third year and, by this point, the students will have learned how to read appellate opinions and apply them and will be able to distinguish cases and make analogies. Unlike new law students, third-year students have little to gain from extended Socratic dialogue about reported cases. Indeed, because third-year students have mastered the basic skills of legal analysis, they often find such dialogue tiresome. Therefore, the teacher must find another way to engage these students.

There is a way. Third-year students are aware that they are not far from facing that first client. This prospect terrifies them, although most students keep that terror to themselves. The students fear the unknown and, perhaps most of all, not knowing what to do. Teachers of these students can put this understandable fear to use, and in so doing, the teacher may help to dispel the fear. By adopting a "problems" approach in the classroom, the teacher puts the students in roles that they will soon play in the "real world." By working with the students toward a "solution" to the problem, the teacher helps the students to acquire some of the skills and a little simulated experience that the students will need upon graduation. A leading professional responsibility casebook – the one I use – adopts this approach.[1]

Because a problem method works best with third-year students, the teacher needs to use realistic scenarios to challenge the students. Ethics problems from criminal law and civil litigation are

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1. Nathan M. Crystal, *Professional Responsibility: Problems of Practice and the Profession* (2d ed., Aspen L. & Bus. 2000).

common places to begin.[2] Elder law can be a fertile source for realistic problems and has one advantage over the more common approach. Few students have personal experiences with civil or criminal litigation. Almost all of the students have families and will be familiar with the legal issues and personal dynamics present in the practice of elder law. A familiar context like this can be an effective means of helping the students learn to confront and solve realistic ethical problems.

This Article provides some suggested problems, with discussion questions and analysis, for teaching professional responsibility in an elder law context. The problems revolve around issues of confidentiality and loyalty (grouped together in the first problem, "Who Is the Client?") and issues of the scope of representation (in the second problem, "Who Makes the Decisions?").

II. PROFESSIONAL RESPONSIBILITY PROBLEMS INVOLVING ELDER LAW

A. Problem One: "Who Is the Client?"

1. Version One: Family Representation

a. Hypothetical Fact Pattern

Suppose you are a junior associate at the law firm of Brooks & Dale. You receive a telephone call from Bill Watson, who tells you that he would like to make an appointment for his widowed mother, Mrs. Mary Watson, to see you about her will and advance health care directives. You make the appointment for the next day. Mr. Watson arrives at your office with his mother, his two sisters, his wife, and his two brothers-in-law. He tells your receptionist that this group has arrived for "our" appointment with you. What ethical issues do you face?

b. Discussion

Legal decisions by elderly clients often affect many people. The most obvious are the children who will inherit under a will. The spouses of those children, as in this example, have an indirect, but nevertheless real, interest in what the testator decides. The elderly

2. *See id.* at 7 (discussing the layout of the textbook and how each chapter contains problems of professional responsibility from the following different practice areas: criminal and civil litigation, office practice, and government and public interest practice).

client also might need to make decisions about future health care directives. Those instructions, such as an instruction not to resuscitate, might be ineffective unless the children know about them and are willing to see them carried out. Therefore, one might expect the "family" to come to the lawyer seeking collective assistance.

Students will recognize the basic problem immediately — that the interests of family members often diverge. The "functional" family, in which every member is concerned equally with the welfare of the others as with himself, is a rarity. The lawyer must analyze the particular situation to decide whether joint representation of the family is possible and, if it is, whether it is wise. This exercise of analyzing conflicts of interest is one that will be repeated throughout a professional responsibility course in many contexts; therefore, it is helpful for the situation to arise first in such a familiar one.

The Model Rules of Professional Conduct provide the following framework:

> A lawyer shall not represent a client if the representation of that client may be materially limited by the lawyer's responsibilities to another client . . . unless:
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> (1) the lawyer reasonably believes the representation will not be adversely affected; and
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> (2) the client consents after consultation. When representation of multiple clients in a single matter is undertaken, the consultation shall include explanation of the implications of the common representation and the advantages and risks involved.[3]

The first step through which the students must be guided is the lawyer's duty to make an independent assessment of the situation before seeking the client's consent. Students often come to law school with an assumption that, because conflicts of interest can be waived, client consultation and consent is the first step.[4] The students are wrong. The lawyer first must gather the information

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3. ABA Model R. Prof. Conduct 1.7(b) (2001).

4. This impression is reinforced in the particular context of the lawyer who acts as an intermediary. Rule 2.2, which tracks Rule 1.7 in many respects, lists three steps for the lawyer to undertake. ABA Model R. Prof. Conduct 2.2 (2001). Client consultation is the first step listed, and, as a result, students often conclude that it is the place to start. *Id.* R. 2.2(a)(1).

necessary to decide whether representation of the older person would be affected adversely by simultaneous representation of others. Interviewing the family members is one way the lawyer can learn whether the family members' interests diverge. The students should be asked to deal with a variety of factual circumstances to test their judgment of whether the joint representation can go forward. For example, an interview with the mother might reveal that she prefers one child over another or passionately dislikes the spouse of one child. An interview with one of her children might reveal discord amongst the children about what their mother's advance health care directives should be. In such situations, the students never should reach the issue of consent.

The students also should deal with the second step, informed consent,[5] by discussing a fact pattern in which the family members do not appear to have conflicts that would make joint representation impossible. Effective consent can follow only from a thorough discussion of the implications of joint representation and "the advantages and risks" of going forward on this basis.[6] The students should be asked to role-play the conversation. A key issue the students should raise with the clients is the risk that conflicts might develop in the future, causing the lawyer to have to withdraw entirely. Another issue is the effect on the attorney-client privilege if conflicts develop later. In a future conflict between these clients, the lawyer can be forced to testify about his or her conversations with each of the disputants.

These are the steps and concerns that any lawyer in any context would have to deal with before undertaking joint representation. The students can and probably should see the issues again in joint representation of criminal defendants and personal injury plaintiffs. Introducing the concepts in an elder law problem may help the students recall them, because the family context is likely to be a familiar one.

2. Version Two: The Child as Translator

a. Hypothetical Fact Pattern

You are a junior associate at the law firm of Brooks & Dale. You receive a telephone call from Bill Watson, who tells you that he

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5. *Id.*
6. *Id.*

would like to make an appointment for his widowed mother, Mrs. Mary Watson, to see you about her will and advance health care directives. You make the appointment for the next day. Mr. Watson arrives at your office with his mother. When you come to the reception area, it becomes clear that Mr. Watson intends and expects to accompany his mother into your office for the initial consultation. What ethical issues do you face?

b. Discussion

Sometimes elderly clients need the assistance, or at least the comforting presence, of a trusted child or other family member. The client is in unfamiliar and often intimidating surroundings. The discussion often centers on the client's death or disability. Furthermore, the elderly client may not be sophisticated in business or legal matters and may benefit from having someone present who knows her and knows how she communicates. Therefore, having the child in the room can be a good thing.

Sometimes it is better to exclude the child. For example, suppose that the client is the parent of five children, four of whom live in distant places and one of whom is bearing the burden of caring for the parent. The parent may have a firm conviction that all five children should share equally in the estate yet fear antagonizing the caregiver. If that child accompanies the parent into the conference with the lawyer, the instructions might be quite different than the parent would give if she were alone and therefore quite different from the client's true wishes.

There is another obvious problem: the client's statements to the lawyer in the presence of the child might not be protected by the attorney-client privilege, because they are not being made "in confidence."[7] In any future litigation, the lawyer might be compelled to disclose what the client said.

The students should be guided through how they could handle this situation. One good practical solution is to request a private meeting with the client to explain any concerns and give the client the chance to express in confidence any fears the client may have about conducting business in the presence of the child. In addition, the client is entitled to know about the potential problems with attorney-client privilege. If the client does not want the child present and cannot tell the child this, the lawyer can take it upon

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7. John Henry Wigmore, *A Treatise on the Anglo-American System of Evidence in Trials at Common Law* vol. V, § 2292, 21 (2d ed., Little, Brown & Co. 1923).

himself or herself to exclude the child and take the heat. If, in private, the client is comfortable with the child's presence, the lawyer can invite the child to join them.

This hypothetical also is useful for teaching the difference between the lawyer's duty of confidentiality and the evidentiary concept of attorney-client privilege. Under Model Rule 1.6, the attorney generally is required to keep confidential "information relating to representation" of a client.[8] Of course, this duty of confidentiality extends to information gathered in the presence of the child or anyone else. The principle of attorney-client privilege is much narrower[9] and is the one endangered by the presence of the child in the room.

3. Version Three: The Child Who Pays the Bill

a. Hypothetical Fact Pattern

You are a junior associate at the law firm of Brooks & Dale. You receive a telephone call from Bill Watson, who tells you that he would like to make an appointment for his widowed mother, Mrs. Mary Watson, to see you about her will and advance health care directives. You make the appointment for the next day. Mr. Watson arrives at your office with his mother. He waits in the reception area while his mother meets with you. When your meeting is over, he asks to speak with you privately for a moment. He tells you that he will be paying his mother's fees, because his mother would not understand why lawyers are so expensive. He also tells you that he expects you to keep him "in the loop" on the work you will be doing for his mother and that he will call you tomorrow morning.

b. Discussion

It is not unlikely that a child would offer to pay for the lawyer's services. The child might simply be altruistic and want to help his parent. Alternatively, the child might believe that the parent would balk at paying what competent legal services cost. In addition, the child may be seeking some role in or control over the relationship

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8. ABA Model R. Prof. Conduct 1.6(a) (2001).

9. *See Annotated Model Rules of Professional Conduct* 69 (4th ed., ABA 1999) (explaining how the duty of confidentiality "covers all information 'relating to the representation,'" whether the information was obtained from the client or other sources. *Id.* (quoting ABA Model R. Prof. Conduct 1.6(a)).).

between his parent and the lawyer. Whatever the motivation, the situation is familiar and unsurprising.

This problem, however, raises a conflict of interest for the lawyer. If the son is paying for the services, to what extent does he make decisions, and to what information is the son entitled? Does the lawyer owe first allegiance to the party who signs the checks?[10] Although this might be the students' first instinct, the Model Rules of Professional Conduct direct otherwise.

> A lawyer shall not accept compensation for representing a client from one other than the client unless:
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> (1) the client consents after consultation;
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> (2) there is no interference with the lawyer's independence of professional judgment or with the client-lawyer relationship; and
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> (3) information relating to representation of a client is protected as required by Rule 1.6.[11]

In light of Model Rule 1.8(f), the students should be asked what steps the young lawyer should take. The teacher might suggest, for example, that the lawyer explain to the son what the lawyer's ethical obligations will be, such as informing the parent, obtaining consent, maintaining independence, and keeping confidences. If the son balks at these conditions, the lawyer need not trouble the client with the suggestion, because the son already will have put away his checkbook. If the son is agreeable, the lawyer must have a conversation with the client explaining the son's desire to pay the bill and the lawyer's responsibilities. Ultimately, the client makes the decision on whether the son will pay the lawyer's bills.

B. Problem Two: "Who Makes the Decisions?"

1. Version One: The Impaired, but Not Incompetent, Client

a. Hypothetical Fact Pattern

You are still a young associate at Brooks & Dale. Around mid-morning, you receive a telephone call from Mr. Owen Lillard,

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10. In my home state of Texas, this is known as the principle of "dance with the one that brung ya." I do not recommend the use of this phrase outside of the Lone Star State.

11. ABA Model R. Prof. Conduct 1.8(f) (2001).

who identifies himself as a "temporary" resident of the Autumn Leaves Nursing Home. He tells you that he wants to talk to you about making a new will and selling his home. The next day, Mr. Lillard arrives at your office at 3:00 p.m., having been driven to the office by his elderly, but still independent, younger sister. During the meeting, he appears confused about why he is meeting with you and is unable to give you any clear instructions about his will or his house. You tell him to think over what he wants to do and call you back if you can help. The next day, around mid-morning, Mr. Lillard calls you and is able to give you clear instructions about how he wants to structure his will and dispose of his home. However, you know that you should discuss a few important details with him in person.

b. Discussion

Model Rule 1.2 may be by far the most often mentioned rule in a professional responsibility course. One reason this rule is frequently mentioned is because of what it says about the division of responsibilities between the lawyer and the client: "A lawyer shall abide by a client's decisions concerning the objectives of representation . . . and shall consult with the client as to the means by which they are to be pursued."[12] One way to introduce this general concept is to consider the situation where Mr. Lillard is a young man in complete control of his faculties and wishes to dispose of his property in a certain way, despite the lawyer's advice. A straightforward application of Model Rule 1.2(a) leaves this decision to the client. However, shifting the hypothetical in an elder law context inevitably will raise a series of related and important issues.

First, the students will have to confront their own attitudes and assumptions about the elderly. They may assume that the elderly client needs to be patronized and supervised. A role-play with an elderly client who is still in complete command of his or her faculties, despite outward appearances, may help the students realize that making assumptions about clients is dangerous. The students must be taught to be and remain on guard against stereotyping clients and against unconsciously allowing their prejudices to affect how they interact with clients. An elderly client may be the least inflammatory example to help the students remember the lesson.

12. ABA Model R. Prof. Conduct 1.2(a) (2001).

Second, the hypothetical will raise the special issues of capacity that arise when the client is operating under a disability:

> (a) When a client's ability to make adequately considered decisions in connection with the representation is impaired, whether because of minority, mental disability or for some other reason, the lawyer shall, as far as reasonably possible, maintain a normal client-lawyer relationship with the client.
>
> (b) A lawyer may seek the appointment of a guardian or take other protective action with respect to a client only when the lawyer reasonably believes that the client cannot adequately act in the client's own interest.[13]

Model Rule 1.14 casts the student into a gray and confusing area. The lawyer first must decide whether Mr. Lillard is merely impaired or actually incompetent.[14] A preliminary question is how the lawyer is supposed to make this assessment. The lawyer is not trained as a psychologist or a medical doctor. Can the lawyer reveal his client's conversations with a competent medical professional, despite the limits of Model Rule 1.6, to make this preliminary determination? The answer turns out to be "yes," because the disclosure is "impliedly authorized" by the representation.[15]

This first hypothetical is intended to force the student to deal with an impaired client and to confront the requirements of the rule — to maintain, as far as possible, a normal attorney-client relationship. What does this mean? The students should be guided to consider the need to communicate with Mr. Lillard in ways and at times that are chosen to help Mr. Lillard comprehend the lawyer's advice.

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13. ABA Model R. Prof. Conduct 1.14 (2001).

14. Model Rule 1.14 discusses two possibilities: (a) the client is able to participate in the attorney-client relationship, despite suffering from an impairment or diminished mental or physical capacity; and (b) the client is incompetent. Crystal, *supra* n. 1, at 140–141. Incompetence is defined generally as the inability to make decisions concerning one's person or property and the inability to communicate those decisions. Lawrence A. Frolik & Melissa C. Brown, *Advising the Elderly or Disabled Client* ¶ 22.01, 22-23 (2d ed., Warren, Gorham & Lamont 2000).

15. *See* ABA Model R. Prof. Conduct 1.6(a) (stating that a lawyer cannot reveal certain information regarding a client, but may disclose information "impliedly authorized in order to carry out the representation").

2. A Corollary Problem: Safekeeping Property

a. Hypothetical Fact Pattern

When Mr. Lillard contacts you about his affairs, he tells you that he just received a large check from the settlement of his brother's estate and wants you to take this check and use it to fund a trust for his grandchildren. He endorses the check to you and you bring the check back to your office. What are your duties with respect to these funds?

b. Discussion

The purpose of this "corollary" is to introduce the students to their duty to safeguard a client's property.[16] Under the Model Rules of Professional Conduct, the lawyer must keep the client's property separate from the lawyer's own property and keep and preserve complete records relating to the client's property.[17] This concept will seem basic and easy to the students.

Next, they should be asked what they would do if they were in a solo practice and, due to unforeseen circumstances, they did not have sufficient funds to meet their payroll and rent. The students should be told that a settlement check will be forthcoming "in a few days" and that the office manager suggests that the attorney "borrow" some funds from Mr. Lillard's trust account and then pay it back with interest. The students should quickly and resoundingly reject this idea. They should receive reinforcement of the correctness of that decision and also be informed about some of the cases in which good lawyers did not resist this temptation and ruined their professional lives.[18] The students should receive some basic instruction with this hypothetical. In addition, they will learn that sometimes it is easier to know an ethical duty than to fulfill it. That too is a valuable lesson.

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16. ABA Model R. Prof. Conduct 1.15 (2001) (discussing how a lawyer should hold property, such as funds, for a client or third person).

17. *Id.* R. 1.15(a).

18. Among the saddest of these cases may be that of N. David Korones, a distinguished lawyer who I had the occasion to meet once. Before his fall, his reputation was very high. *See* William R. Levesque, *Clearwater Lawyer Disbarred after Pleading Guilty to Theft*, 116 St. Pete. Times 3 (Feb. 26, 2000) (stating that Mr. Korones misappropriated money from his dead uncle's estate after being appointed executor and, as a result, was disbarred by the Florida Supreme Court).

3. Version Two: The Incompetent Client without a Guardian

a. Hypothetical Fact Pattern

You are a young associate at Brooks & Dale. Around mid-morning, you receive a telephone call from Mr. Owen Lillard, who identifies himself as a "temporary" resident of the Autumn Leaves Nursing Home. He tells you that he wants to talk to you about making a new will and selling his home. Mr. Lillard arrives at your office the next day, having been driven there by his elderly, but still independent, younger sister. During the meeting and in a follow-up telephone call the next morning, Mr. Lillard seems confused about who you are and where he lives. He refers to his late wife several times, as if he believes she is still alive. You also learn from Mr. Lillard's sister that his son moved into Mr. Lillard's house, because Mr. Lillard moved into the nursing home. She tells you that this was done without Mr. Lillard's permission.

b. Discussion

Unlike the previous hypothetical, this one requires the lawyer to do more than adjust his methods of communication. This client is unable to understand the decisions that need to be made and is incompetent to decide the objectives of the representation. The "client cannot adequately act in the client's own interest."[19] This conclusion, although inescapable, presents a delicate situation for the lawyer. Under Model Rule 1.14(b), the lawyer "may seek the appointment of a guardian or take other protective action."[20] What should the lawyer do?

A common reaction of law students is to suggest that the lawyer should seek to have a guardian appointed and then do as the guardian directs. At first, this choice seems to be the cleanest and best solution. However, if questioned about elderly members of their own families, students often will recall statements or incidents that reinforce how traumatic it is for an older person to lose control of parts of his or her life. The students may remember a grandmother who fought the decision to go to a nursing home or a grandfather whose car keys had to be taken away to save the neighborhood

19. ABA Model R. Prof. Conduct 1.14(b).
20. *Id.*

children. In the context of those memories, students begin to see that a guardian is and should be a last step. Their conclusion, as the American Bar Association (ABA) has concluded, should be that "[t]he appointment of a guardian is a serious deprivation of the client's rights and ought not to be undertaken if other, less drastic, solutions are available."[21] Having made that realization, the question remains: What "protective action" can the lawyer take?

The students' relative youth and inexperience may restrict their ability to come up with less dramatic steps than the appointment of a guardian. The ABA has suggested a number of options that are worthy of class discussion.[22] The ABA suggests, for example, that it may be possible to refer the client to social services, which would help to restore sufficient capacity so the client will be able to give the lawyer direction.[23] Another possibility the ABA recognizes is to ascertain whether the client still may be capable of understanding his affairs to this extent: although he cannot make competent decisions about his property, he is still lucid enough to recognize his incompetency and assign powers to others, such as through a durable power of attorney.[24]

Of course, as a last resort, the lawyer may need to seek the appointment of a guardian. The students should be asked to role-play a hearing before the court in which they talk about their client's need for protection. The exercise should stress to the students the difficult situation the lawyer faces, because, inevitably, the students will find themselves "testifying against" their client, albeit with the client's best interests in mind. Even though it is proper to disclose confidential information to support a guardianship proceeding[25] (and it is hard to imagine how the proceeding could be supported otherwise), disclosing confidential information is inherently uncomfortable for the lawyer. Another possibility is that another lawyer might be appointed to represent the elderly person. Thus, the first lawyer is in an even more uncomfortable position, at least on the face of things, of suing his own client. If nothing else, the students should realize that seeking the appoint-

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21. ABA Standing Comm. Ethics & Prof. Resp., Formal Op. 96-404 (1996) (emphasis omitted).

22. *Id.* (discussing "the [l]least [r]estrictive [m]easures [u]nder the [c]ircumstances" that should be considered by a lawyer before seeking a guardian).

23. *Id.*

24. *Id.* By analogy, my grandfather might not be capable of driving, but may be capable of turning the keys over to me.

25. ABA Standing Comm. Ethics & Prof. Resp., Informal Op. 89-1530 (1989).

ment of a guardian, which they probably thought of as the first resort, is properly the last resort and an uncomfortable one for the lawyer.

4. Version Three: The Incompetent Client with a Guardian

a. Hypothetical Fact Pattern

You are a young associate at Brooks & Dale. Around mid-morning, you receive a telephone call from Mr. Owen Lillard, who identifies himself as a "temporary" resident of the Autumn Leaves Nursing Home. He tells you that he wants to talk to you about making a new will and selling his home. Before you can meet with Mr. Lillard, you receive telephone calls from his son and his elderly, but still independent, sister. The son tells you that he learned of his father's call to you and that you should know that he, the son, has been appointed as guardian for his father. The son tells you that he would like to meet with you, without his father being present, because it has become necessary to sell some of his father's assets in light of the nursing home bills. During the phone call from Mr. Lillard's sister, you hear that the son has been "living it up" since Mr. Lillard went into the nursing home and has been selling pieces of Mr. Lillard's prized gun collection to pay for wild parties and, probably, for drugs as well.

b. Discussion

Taking this hypothetical step-by-step will help the students see how difficult the lawyer's position can become. First, the teacher should not mention the sister's phone call and instruct the students to assume that the son presented proper documentation that he has been appointed guardian. The son asks the lawyer to take certain actions on the father's behalf. The students usually will come to the correct answer — the lawyer should, under these circumstances, follow the directions of the guardian. After all, the guardian was appointed because the parent was unable to act for himself or to vest the power to act somewhere. In the absence of any apparent reason to do otherwise, the lawyer's duty is clear.[26]

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26. Generally, the attorney must abide by a guardian's decision unless the attorney believes that the guardian is not acting in the client/ward's best interest. *Annotated Model Rules of Professional Conduct*, *supra* n. 9, at 226.

Next, the teacher should complicate the hypothetical by adding the sister's phone call to the lawyer, which reveals the wild parties, the sale of the gun collection, and the rumors of drugs. The students will suspect that the lawyer should not follow the guardian's instructions blindly in this situation, but may hesitate to act against the guardian. To do so puts the lawyer in uncharted terrain. By definition, the elderly father is not competent to give the lawyer direction. From all appearances, taking direction from the son would be participating in the looting of his father's assets. This leaves the lawyer to act, if at all, as a lone ranger to protect the unsuspecting "client" from his own son. As untidy and difficult as that role may be, this is precisely what the lawyer should do.

The lawyer should take action to protect the ward, up to and including asking the appropriate court to remove the son as guardian and appoint someone else.[27] The students should be asked to describe precisely the steps that they would take in this case. Do they confront the son with the allegations? Do they subpoena the son's bank accounts or seek permission to inspect the father's house and possessions? Do they take the son's or sister's deposition? These details of implementing the decision to protect the father from his guardian will stress to the students the seriousness and the unpleasantness of their duty to protect the ward. They will see, perhaps for the first, but certainly not the last, time, that doing one's duty as a lawyer requires courage and the willingness to engage in distasteful tasks.

III. CONCLUSION

Elder law is a topic worthy of its own course of study. However, for the professional responsibility teacher, it is a means to an end. Elder law is a subject rich with ethical challenges, but it is a context that will be familiar to students. The problems I have described are only a few examples of the possibilities. For a problem-based approach to teaching professional responsibility, elder law provides just the type of problems that will isolate ethical issues and help students learn to deal with them before the problems are "real."

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27. *Id.* (mentioning that it is the lawyer's duty to take "protective action" when a guardian is not acting in the best interest of the ward).