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Gregory T. Holtz

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Understanding the Ethics of Empowerment--An Elder Law Lawyer's Challenge or Obligation" considers the concept of empowerment and the obligation lawyers have as they advise and counsel their clients, especially the elderly, in the use of estate planning documents which empower others to undertake responsibility on the client's behalf. The article proposes the lawyer achieve the "good result" for the client as a means of fulfilling that responsibility, applying it in the use of the durable power of attorney, advance directive, and psychiatric advance directive.

I. INTRODUCTION

Instilling a sense of order and meaning in a world that often lacks the same has always comprised a fundamental challenge of the human condition. In reflecting on this, the poet wrote:

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1. Visiting Associate Clinical Professor of Law, Ave Maria School of Law, Naples, Florida. The idea of "empowerment" within the context of estate and elder law planning was first considered by the author during a presentation in which he participated during the Ave Maria School of Law 2015 Estate Planning Conference. The opportunity to transform that idea into an article was provided by Professor Rebecca Morgan, Boston Asset Management Chair in Elder Law, Center for Excellence in Elder Law, at Stetson College of Law for which the author is most grateful. The author also wishes to acknowledge and thank Professor Brian Scarnecchia, Ave Maria School of Law, who has reviewed subsequent drafts of this article and offered helpful insights.

Each mortal thing does one thing and the same:
Deals out that being indoors each one dwells;
Selves—goes itself; *myself* it speaks and spells,
Crying *What I do is me: for that I came*.

I say more: the just man justices;
Keeps grace: that keeps all goings graces;
Acts in God's eye what in God's eye he is—[2]

Such words suggest that individuals truly make a difference by being "a source of grace to others, a channel of charity, a spark of life, and a voice of truth and happiness. When man honors the moral law . . . he lives a life of justice."[3] Understanding that "the just man justices" offers a sense of shape and nuance, guiding individuals in the way in which they can and should interact with each other. Such realization and the practice of it offers a sense of empowerment, bringing meaning to the words "*What I do is me; for that I came*." We act not out of impulse or convenience but fortified by a sense of purpose.

The idea of empowerment in today's society and culture often has a very different meaning. It encourages individuals to assume overall and unfettered responsibility for managing their own destiny and future. Choice has become the watchword for the managing of almost every issue life presents. From choosing the way in which one takes morning coffee, manages investments, or shops for a new car, the real-time world encourages us to have it "our way."[4]

This process has been culturally transformative, developing a version of empowerment which focuses only on an assumed ability to control one's own destiny and make one's own choices, free from the "indoors" in which "each one dwells." We are told no one should have the ability to tell "us" what to do. We control our own destiny.[5]

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2. Gerard Manley Hopkins, *As Kingfishers Catch Fire*, POETRY FOUNDATION (1985), https://www.poetryfoundation.org/poems/44389/as-kingfishers-catch-fire [https://perma.cc/5PSQ-GCR5].

3. *See* Mitchell Kalpakgian, *Gerard Manley Hopkins' "As Kingfishers Catch Fire,"* CRISIS MAG. (Oct. 5, 2015), http://www.crisismagazine.com/2015/gerard-manley-hopkins-as-kingfishers-catch-fire [https://perma.cc/KRA9-KMSP].

4. Entrepreneur.com reports that "Have It Your Way" has been replaced by "Be Your Own" which is designed to remind customers they can and should have how they want anytime. Kate Taylor, *With Burger King's Slogan Swap, You Can't 'Have It Your Way' Anymore*, ENTREPRENEUR (May 19, 2014),ENTREPRENEUR, https://www.entrepreneur.com/article/234069 [https://perma.cc/V6PG-GPPS].

5. Kevin Daum observes,

It is in this environment that the lawyer must exist and co-exist, understanding the past but being prepared to confront the future. For example, the idea of "empowerment" has always been part of the estate planning vocabulary. Ways of providing an individual the ability to control or influence the outcome of property transfers have deep roots within our jurisprudential culture.[6] The processes which govern such transfer, however, have traditionally been strictly prescribed and controlled by legal precedent.[7] That has all changed.

The lure of contemporary empowerment has encouraged individuals to "avoid" probate,[8] adopt alternate methods of wealth transfer, and "secure" their own future.[9] Once a "spectator" in the estate and financial planning process, individuals are encouraged to manage their own destiny.[10] The legal system and its lawyers have thus become "adjuncts" as clients avail themselves of information and concepts previously unavailable to them.[11]

This empowerment phenomenon has transformed the essence and dynamic of every estate planning conversation a lawyer has with a client. For example, although relatively unknown a quarter century ago, most lawyers

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> We're defining *who* we want to be at 60, not *what* we want to be doing. The *who* centers on passion, core competencies, and core satisfaction, such as material requirements. If I know *who* I truly want to be, I can detail what to do, what to own, resources I need, etc. I can also determine what *not* to do, own, etc., focusing time and resources where required.

Kevin Daum, *7 Tips for Creating Your Own Destiny*, INC.COM (Aug. 17, 2012), https://www.inc.com/kevin-daum/7-tips-for-creating-your-own-destiny.html (emphasis in original).

6. *See* JOHN CRIBBET, PRINCIPLES OF THE LAW OF PROPERTY 27-38 (1975).

7. *See* THOMAS BERGIN & PAUL HASKELL, PREFACE TO ESTATES IN LAND AND FUTURE INTERESTS (1984). Early rules governing the transfer of property were designed to maintain a system of governance. *Id*.

8. NORMAN F. DACEY, HOW TO AVOID PROBATE (1965).

9. "Wealth management" is very straightforward from the affluent individual's perspective, wealth management is simply the science of solving/enhancing his or her personal financial situation. Russ Alan Prince, *What is Wealth Management?*, FORBES (May 16, 2014, 6:20 AM), https://www.forbes.com/sites/russalanprince/2014/05/16/what-is-wealth-management/#4b900fb4133e [https://perma.cc/XY8L-HHTJ].

10. *See* William Schifino Jr., *President's Video Message, June 2016 Alternative Text*, FLA. BAR, https://www.floridabar.org/about/bog/president-old/president007/ [https://perma.cc/PRJ5-L2CJ]./. The impact this on-line phenomenon has and will have on the traditional practice of law cannot be overstated. Clients need to understand and recognize the value lawyers provide during their representation goes beyond the on-line experience. This can only happen if lawyers offer themselves as teachers and counselors, offering advice and insight that simply cannot be acquired on line. From the elder law perspective, the advance directive offers a unique opportunity to provide such counsel and hence the "good result."

11. *See* Rob Graham, *Empty Cache: When Legal Forms Frustrate Testamentary Intent*, NEV. LAW., Jan. 2015, at 26.

usually include as part of their "standard" planning package, an advance directive and a durable power of attorney. Including these documents as part of a planning package provide the client an opportunity to vest individuals in whom they have trust and confidence with the responsibility to make both financial, critical care, and end of life decisions on their behalf. They also offer and provide clients the theoretical opportunity to manage and influence the outcomes of a variety of important life situations and issues.

These instruments also incorporate a powerful component that legal precedent and the common law deemed traditionally unavailable, namely the ability to delegate.[12] The documents that form the basis of this discussion, the durable power of attorney, the advance directive, and the psychiatric advance directive allow the client to delegate decision-making authority over fundamentally personal issues to a third person. It is empowerment with a "personality." The outcomes such delegation produce can be unique, wholly dependent upon the character and characteristics of the client, the attorney-in-fact, and a myriad of variables in which the new relationship created by these documents finds itself.

The elderly are particularly susceptible to the problems and issues of empowerment. Well-meaning children and friends are on the scene. Questions regarding what Mom or Dad might do with their estate often influences family conversations. The elderly client may, as a result, find himself or herself sitting in a lawyer's office having their current estate plan reviewed and critiqued without an apparent need or desire to do so—at least in the elder client's mind.[13] Further complicating matters is the fact that the marketplace teems with well-meaning advisors who are more than willing to offer their own solutions and version of empowerment to unsuspecting, often elderly individuals, who desire stability and solutions when the acceptance of such advice may have the opposite effect.[14]

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12. *See generally*, JESSE DUKEMINIER, ROBERT H. SITKOFF & JAMES LINDGREN, WILLS, TRUSTS AND ESTATES 721 (8th ed. 2009). Under the common law, most types of delegation were not allowed.

13. *See* THOMAS P. GALLANIS, A. KIMBERLEY DAYTON & MOLLY M. WOOD, ELDER LAW: STATUTES AND REGULATIONS 56-599 (2000).

14. *See 5 Reasons to Avoid a Reverse Mortgage*, U.S.US NEWS & WORLD REP.REPORT (Dec. 11, 2012), https://www.yahoo.com/news/5-reasons-avoid-reverse-mortgage-182406152.html [https://perma.cc/54PD-GRZR]; *Advantages and Disadvantages of Reverse Mortgages*, U. ILL. URBANA-CHAMPAIGN LONG-TERM CARE (2010), http://www.longtermcare.illinois.edu/documents/advantages_and_disadvantages.pdf [https://perma.cc/2QQN-47MH]. An example of this type of overreaching can be found in the use of the reverse mortgage. Reverse mortgages present significant drawbacks and disadvantages, especially for the elderly.

Through it all, perhaps imperceptibly at first, the elder client may begin to feel an imperative to act when there is no apparent need to do so.[15] This perceived pressure to act places the elder client in a potentially vulnerable position. Who oversees this process? Who ensures that the elderly client is offered the space and guidance necessary to make thoughtful and informed decisions?

This discussion will urge and argue that lawyers can and should oversee and play a significant role in this process, insuring that their clients reconnect with themselves as they consider the need for and meaning of empowerment.[16] This is an especially important consideration in representing elders who often need an advocate and perhaps, more importantly, a counselor, to help them understand the implications and impact of a variety of choices they are asked to make regarding their future well-being.[17]

Lawyers can only participate in this process if they understand the essence and implication of *empowerment* and the profound difference *choice* makes in enhancing the quality of a client's life. Clients who understand and then choose what this article will describe as "the good result" are more likely to utilize empowerment as a means rather than an end. They are more apt to understand and embrace their estate plans as a reflection of who they are and what their dreams and aspirations represent. Clients who simply choose choice for the sake of choice will almost always achieve a *directed* result which results may express values and beliefs of someone or something other than the client.

To help understand the implication of such difference, this discussion will first consider the current and evolving elder law landscape (and do so

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15. *See* Jane A. Black, *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 (2008). The "imperative to act" may be a telltale sign of elder abuse, a condition which is becoming epidemic in nature. *See Id*.

16. Kennedy F. Hedland and Robert B. Fleming state,

> What we want is someone who listens to our concerns and helps us sort through the tangle of data, emotion, and fear raised by serious illness. It takes more than ten minutes. We don't want someone hell-bent on forcing the routine cure, be it an operation or, in the case of law, perhaps a Living Trust replete with Latin phrases. In Nursing School, there is a marvelous saying, "We treat people, not diseases."

KENNEY F. HEDLAND & ROBERT B. FLEMING, NEW TIMES, NEW CHALLENGES: LAW AND ADVICE FOR SAVVY SENIORS AND THEIR FAMILIES 258-59 (2010).

17. 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, 113 (2002). An excellent example of the "counseling imperative" can be found in the area of Medicaid planning where lawyers are asked and perhaps challenged to wear an "adviser's hat" as they represent their clients. *Id*.

within the estate planning context); define the good result, and then apply its application when considering the use of the durable financial power of attorney, advance directive, and psychiatric advance directive[18] within the elder client's estate plan.

II. ELDER LAW'S EVOLVING LANDSCAPE AND CHALLENGE

Elder Law, its implication and its definition, has undergone a significant change over the past quarter century. Initially describing a practice of law affecting elderly clients[19] it has become popular with lawyers looking for a market niche.[20] Defining "market niche" depends on one's perspective.[21]

A reasoned perspective on elder law views it as a practice specialty, which is demanding and challenging, carrying with it great responsibility.[22] The goal of the skilled and caring elder law practitioner should be that of preserving and protecting the dignity, sanctity, and worth of the elder client's life. Elder law, in this context, should be viewed as more than just a niche specialty but a holistic practice area[23] that accepts and embraces a variety of strategies and services to help fulfill such a goal.[24] Aligning those

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18. Within the context of this discussion use of the term "client" will refer to the elderly client. Where that assumption requires emphasis the term "elderly client" will also be utilized.

19. Lionel Brazen, *A Brief History of Elder Law*, 84 ILL. B. J. 16 (1996).

20. *Id*. at 16-17. Brazen suggests why elder law may be viewed as a niche by some lawyers—namely the increase in the number of elderly persons. In 1970 individuals 65 years or older comprised 9.9 percent of the population. By 1990 that percentage had increased to 12 percent, with over 31 million out of a total population of 248 million. *Id*. At 16-17.

21. It can be reasonably argued that many lawyers practiced "elder law" before it was known as such. Pohl notes, "Many of us who now consider ourselves 'Elder Law' attorneys were practicing elder law long before it had a name. We were a group of attorneys concerned with problems unique to the elderly who worked as their advocates." Amelia E. Pohl, *Introduction: What is Elder Law Anyway*, 19 NOVA L. REV. 459, 459 (1995).

22. *See* Stuart D. Zimring, *Ethical Issues in Representing Seniors, Persons with Disabilities and Their Families*, 4 NAELA J. 125 (2008) (where the focus of elder law is described as having a life planning focus).

23. In the Preamble to its Aspirational Standards, The National Academy of Elder Law Attorneys (NAELA) identifies ten specific areas in which the elder client and his or her family might require help. Gregory S. French et al., ASPIRATIONAL STANDARDS FOR THE PRACTICE OF ELDER LAW AND SPECIAL NEEDS LAW WITH COMMENTARIES 6-7 (2005), https://www.naela.org/App_Themes/Public/PDF/Media/AspirationalStandards.pdf [https://perma.cc/EKT3-SGQC].

24. The NAELA Aspirational Standards require a four-objective test designed to help identify the client

> so that the attorney (a) understands and identifies whose interests are being addressed in the legal planning and legal representation process, (b) understands and clarifies to whom the attorney has professional duties of

opinions and views thoughtfully and perceptively represents one of the noblest enterprises the lawyer can undertake on behalf of the elderly client. It offers the help and assistance a client needs to find their own way and achieve a good result. It is achieved through time, patience, and perseverance, often the antithesis of the so-called "real time" culture.[25]

The need to provide elder clients this type of service is critical. It is estimated that by 2060, there will be approximately 98 million Americans 65 years or older.[26] Legal services buttressed by the trappings of the traditional law practice may no longer appropriately respond to those needs. Elder law clients (and their families and loved ones) are likely to want more from their lawyer. Whether it be advocacy or counseling, elder law practitioners must be continually ready and willing to provide their clients insight and guidance as they make a variety of life-impacting decisions. Such commitment goes beyond the transactional quick fix. Rather, it describes a willingness to serve that all who enter the practice area should and must aspire.[27]

Wood v. Jamison[28] offers helpful guidance as one considers the proactive and vigilant role an elder law attorney should embrace during client representation. In that case, an executor brought a cause of action against a lawyer for malpractice, breach of fiduciary duty, and financial abuse of an elder, Mrs. Peterson. An individual, McComb, met Mrs. Peterson shortly after her son's death and her husband's relocation to assisted care facility.[29] He represented to her that he was her nephew, which he was not, and convinced her to transfer approximately $174,000 to him in a series of transactions. He also had her obtain a $250,000 loan secured by her primary resi-

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> competence, diligence, loyalty, and confidentiality, (c) clarifies what steps can and cannot be taken after an initial consultation if the client is not present, and (d) arranges at the earliest possible time for private, direct and personal communication with the client, preferably face to face.

Id. at 7.

25. Elder law highlights the uncertainty and frailty of the human condition as Morgan notes "we have to recognize the role that human nature may play. Some people just do not plan for whatever reason, or as is often times the case, the clients are in crisis and need help." Rebecca C. Morgan, *The Future of Elder Law Practice©*,, 37 WM. MITCHELL L. REV. 1, 41 (2010).

26. Sandra L. Colby & Jennifer M. Ortman, PROJECTIONS OF THE SIZE AND COMPOSITION OF THE U.S. POPULATION: 2014 TO 2060 5 (2015), https://www.census.gov/content/dam/Census/library/publications/2015/demo/p25-1143.pdf [https://perma.cc/9CD6-UEJ5].

27. *See* Nina A. Kohn & Edward D. Spurgeon, *A Call to Action on Elder Law Education: An Assessment and Recommendation Based on a National Survey*, 21 ELDER L.J. 345, 359 (2014).

28. Wood v. Jamison, 83 Cal. Rptr. 3d 877 (Cal. Ct. App. 2008).

29. *Id*. at 880.

dence. McComb told Mrs. Peterson that the proceeds would be invested in a "night club joint venture."[30]

The lawyer who represented McComb in the joint venture also provided legal services for Mrs. Peterson.[31] The lawyer received a $4,000 referral fee from the mortgagee and an additional $10,000 from the loan proceeds as repayment of a loan he had made directly to McComb. The lawyer did not inform Mrs. Peterson, or any other party to the loan transaction, that he was representing her nor did he disclose the fee and loan repayment he received.[32]

Mrs. Peterson could not afford the loan and defaulted on the first payment. Foreclosure ensued. Upon her death, the successor trustee of the Peterson Trust and executor of Mrs. Peterson's estate brought suit against a variety of parties to the transaction, including the lawyer. The trial court found the lawyer committed malpractice, breached his fiduciary duty to Mrs. Peterson, and committed financial abuse of an elder. The lawyer appealed and the appellate court affirmed the trial court decision which found the lawyer "committed financial elder abuse when he took the undisclosed finder's fee . . . the $174,000 from [Mrs. Peterson's] bank account and the $250,000 loan proceeds and that [the lawyer] knowingly aided and abetted McComb's abusive scheme to take the $250,000."[33]

The *Wood* case invites one to consider and reflect on the basis upon which the lawyer acted.[34] These situations always seem to have a common cause, namely *interested persons* focusing only on the ad-hoc, real-time, rather than the implication of their actions and the effect those actions might have on achieving a good result.[35]

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30. *Id*.

31. The services included meeting with Mrs. Peterson and McComb in his office to discuss financing of the night club, locating the lender for Mrs. Peterson, advising Mrs. Peterson about various lenders, selecting the lender, gathering documents necessary to close the loan, completing the loan application, transmitting documents under cover of his letterhead, communicating with the lender and title company, reviewing loan documents, and attending the loan escrow closing with Mrs. Peterson. *Id*.

32. The record further shows that the lawyer was aware Mrs. Peterson was elderly and that her husband was apparently incompetent. He did not advise Mrs. Peterson of the risk of the night club business venture or that the loan terms were inappropriate for her. *Id*.

33. *Id*. at 885.

34. The lawyer's actions should be viewed in light of MRPC 1.7 and 1.14. MRPC Rule 1.7(b) provides, "[a] lawyer shall not represent a client if the representation . . . of one or more clients will be materially limited . . . by a personal interest of a lawyer." Comment (2) to MRPC 1.14 states, "[t]he fact that a client suffers a disability does not diminish the lawyer's obligation to treat the client with attention and respect." MODEL RULES OF PROF'L CONDUCT r. 1.7, 1.14 (AM. BAR ASS'N 2017).

35. Financial abuse of this nature is further defined and quantified in Engalla v. Permanente Med. Grp.,, Inc., 938 P.2d 903 (Cal. 1997).

In the case of lawyers, there seems to be a belief that the mere acknowledgment of the rules of professional responsibility without thoughtfully considering the impact such rules might have on the client is good enough for the lawyer's resulting actions to be considered ethical and in the client's best interests.[36] This approach is simply tethered in expediency, focusing on a lawyer's potential liability rather than the client's well-being.[37] It encourages rationalization of just how far one can go, the net result being elders often standing unprotected and at times victimized.[38]

Escaping a potential malpractice action does not necessarily imply competency.[39] Lawyers have a higher calling and must continually be mindful that their actions and counsel on behalf of a client be the result of responsible, moral, and ethical judgment.[40] Such concept, which should be viewed as immutable and a given, is often clouded by a value system that embraces the ad hoc and relativism.[41] Further complicating judgment and

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36. Peter P. Meringolo, *Catholic Moral Teaching and Natural Law: Changing the Way We Think About Teach Professional Ethics*, 44 LOY. U. CHI. L.J. 1067 (2013). Meringolo argues that simply following ethics rules is not enough to ensure lawyers act ethically. Being a good lawyer includes the calculation of responsible, moral judgment. *Id*. At 1069.

37. A sense of professional responsibility should influence the lawyer's thinking at this point. Case law has suggested an imperative to recognize elder abuse and act to protect those vulnerable to the whim and self-interest of others. *See* Huggins v. Randolph, 991 N.Y.S.2d 735 (N.Y. Civ. Ct. 2014).

38. As the *Wood* case suggests, lawyers and those representing the elderly should always be cognizant of the potential for elder abuse. K. L. Locatell reports that "approximately 4 percent of the elderly population experiences some form of physical abuse, sexual abuse, neglect or financial victimization." Kathryn L. Locatell, *Pain as a Factor in Elder Abuse Cases: Recognition and Treatment*, 9 No. 6 ANDREWS HEALTH L. LITIG. REP. 10 (2001).

39. This is especially true in the practice of elder law as there is a competency that must be achieved and applied. Flowers and Morgan note,

> Comment 1 to Model Rule 1.1 sets out the 'competency factors' that measure an attorney's competency for a specific matter such as one arising in elder law. These competency factors (applied to elder law) include the complex, specialized nature of the elder law case, the attorney's overall training, as well as his or her experiences in elder law; the amount of time, preparation, and attention the attorney can give to the case; and whether it is possible to either refer the case or consult with an attorney who has expertise in elder law. Although competency may be acquired, there are times when an attorney needs to be an expert in the area and not 'learn on the job.'

Roberta K. Flowers & Rebecca C. Morgan, ETHICS IN THE PRACTICE OF ELDER LAW 4 (2013).

40. *See* 1 JOAN M. KRAUSKOPF ET AL., ELDERLAW: ADVOCACY FOR THE AGING 33 (2d ed. 1993).

41. A client focused practice, one that seeks to achieve a truly good result for the client is the diametric opposite of relativism. Fradd notes,

analysis in this area is the undeniable view of the law and the legal practice these days as more business than profession. Such economic pressures can impact the amount of time and energy the lawyer is willing to allocate to a client who may have an issue the resolution of which requires time, attention and analysis.

How then can elder law lawyers feel confident that their counsel has made a difference as their clients make important estate planning choices? They can do so by ensuring that each and every choice a client makes is aimed at achieving the good result, a result that belongs to the client and recognizes the client's intrinsic worth as the just man. The next section will suggest how the good result might be achieved.

III. ACHIEVING THE "GOOD" RESULT

Lawyers make important choices, consciously or subconsciously, as they represent their clients. What strategy should be employed on the client's behalf? What risks and benefits should be considered? Does a lawyer frame his or her advice and counsel in a way focusing only on the client's assumptions and predispositions or does the lawyer work with the client to understand the overall ramifications of a course of conduct and how it might affect the common good? Does a lawyer adopt such an approach if it requires the client to accept a course of action the client may not have initially agreed with or considered?

Lawyers are only able to respond to those questions when they understand that in each client transaction or interaction there is a discoverable, objective good to be achieved.[42] Working with the elderly offers helpful insight.[43]

> Another example of . . . absolute relativism can be seen in the song "I Gave You All" by the band Mumford and Sons, which contains the lyric, "How can you say that your truth is better than ours?" By this, they almost certainly mean that it's arrogant and incorrect for a person or group to claim that what they know to be true is truer/better than what another person or group claims be to be true. If this is what they mean then the lyric is . . . self-refuting, for the question itself implies a claim to knowledge that they think to be "better" than others.

Matt Fradd, *How to Destroy a Relativist's Argument*, FOCUS BLOG (Aug. 19, 2013), https://focusoncampus.org/content/how-to-destroy-a-relativists-argument [https://perma.cc/C3ZS-NWN6].

42. *See generally* Robert J. Muise, *Professional Responsibility for Catholic Lawyers: The Judgement of Conscience*, 71 NOTRE DAME L. REV. 771, 782 (2014) (discussing the moral objective of eternal happiness with God through a discoverable, objective good).

43. *See generally* R. REGULATING FLA. B. REV. R. 4-2.1 (Fla. B. 2006) ("Legal advice often involves unpleasant facts and alternatives that a client may be disinclined to confront. In presenting advice, a lawyer endeavors to sustain the client's morale and may put

Consider first a conversation with an individual or a married couple who are seasoned by maturity and experience. Their lives, their families, and their accomplishments exemplify such maturity and experience. Clients such as these often bring with them a distinct and admirable life perspective. Collaborating with them results in the development of a plan that responds to the present and the future in a way that feels right. The lawyer in this scenario helps the clients achieve an estate plan that exemplifies the good result, expressing personal values and beliefs developed over a lifetime.

Next, consider the elderly client who, for whatever reason, is under some level of distress. Whether that distress is the result of disability, abuse, duress or neglect, the client often labors with his or her decision making.[44] The client does not exude a level of confidence and authority regarding the direction and future of her or her estate plan. A family member or caregiver may be present who believes that it might be "best" if the elderly client makes a particular choice or adopts a specific course of action.

This presents a much different scenario and challenge for the lawyer. The elder client may be prompted, or perhaps more accurately be forced, to choose a *directed* result—a result imposed upon the client and one that runs contrary to that client's personal values and preferences. Should the focus of the lawyer's representation change at this point? Or should the lawyer adopt a position that provides whatever the client believes he or she *wants*?

The above considerations, at least in this writer's view, crystallize the fundamental challenge facing lawyers as they represent their elderly clients. Notwithstanding the economic pressures inherent in the practice of law and the imperative of trying to satisfy a client's requests and directives, there has always been (and always will be) a calling and responsibility that elevates the law and its practice from business to profession.[45] Our legal sys-

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advice in as acceptable a form as honesty permits.");."). *See also Office of Disciplinary Counsel v*. *Hardesty* where it is noted,

> A lawyer should bring to bear upon this decision-making process the fullness of his experience as well as his objective viewpoint. In assisting his client to reach a proper decision, it is often desirable for a lawyer to point out those factors which may lead to a decision that is morally just as well as legally permissible.

Office of Disciplinary Counsel v. Hardesty, 687 N.E.2d 417, 419 (Ohio 1997) (internal citations omitted).

44. *See generally* Mack v. Soung, 95 Cal. Rptr. 2d 830 (Cal. Ct. App. 2000).

45. *See* TEX. DISCIPLINARY R. OF PROF. CONDUCT r. 1.01(b) (Tex. B. 2016);). *See also id*. at cmt. 6 ("A lawyer should feel a moral or professional obligation to pursue a matter on behalf of a client with reasonable diligence."). Moreover, the Henry Latimer Center

tem and the society it protects invites a lawyer to embrace a sense of "magis"[46] or calling, which challenges the lawyer to understand the "ripple effect" of personal decisions and how they affect the common good.

While lawyers have always been encouraged to utilize moral precepts in advising clients,[47] the meaning of "moral" is not always clearly defined.[48] Understanding and then applying *magis* and *moral* within the Thomistic context, where good is to be done and evil avoided, provides clarity and vision to the client-attorney relationship. It helps align the counseling process with Aquinas' five inclinations of man,[49] which highlight a human and intrinsic desire to do good and to seek community with others.

Accordingly, advising and then achieving a good result on behalf of the client requires that the lawyer ask and then answer the following questions throughout the client representation and engagement: (1) Will the contemplated result avoid evil and sustain, protect, and preserve the client or the client's interests? (2) Is the contemplated result a product of the client's true free will and intellect? If the answer to both questions is, "yes," then a good result has been achieved on behalf of the client. The practitioner can

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for Professionalism, "Ideals and Goals of Professionalism," Note 4 "Fair and Efficient Administration of Justice," observes "A lawyer should always conduct himself or herself to assure the just . . . resolution of every controversy." *Ideas & Goals of Professionalism*, HENRY LATIMER CTR. FOR PROFESSIONALISM (May 16, 1990), http://www4.floridabar.org/TFB/TFBResources.nsf/Attachments/ADF27B2CE137F89C85257D380064B488/$FILE/ideals_and_goals_of_professionalism_ada.pdf?OpenElement [https://perma.cc/LHK5-UPWC].

46. *See* Fr. Barton T. Geger, *What Magis Really Means and Why It Matters*, 1 JESUIT HIGHER EDUC.:. J. 16, 16-31, 26-27 (2012), ("The magis is a constant reminder that all decisions we make, no matter how personal or private they might seem at first glance, have implications for the wider community, and therefore the common good is a value to always hold before our eyes. In a U. S. culture where talk of 'rights' is everywhere, but talk of 'duties' is not, the magis can be powerfully counter-cultural.").

47. Fla. B., *supra* note 42, at cmt. ("It is proper for a lawyer to refer to relevant moral and ethical considerations in giving advice. Although a lawyer is not a moral adviser as such, moral and ethical considerations impinge upon most legal questions and may decisively influence how the law will be applied.").

48. *See* Richard J. Heafey, *Moral Attorneys; Moral People*, MARKKULA CTR. FOR APPLIED ETHICS (Nov. 12, 2015), https://www.scu.edu/ethics/focus-areas/more/resources/moral-attorneys-moral-people/ [https://perma.cc/W6S6-DKQH] ("The attorney's need to make a living and build a reputation adds even more complexity to the ethical equation. In an increasingly competitive business, attorneys don't always have the luxury of choosing their clients based on the righteousness of their causes. On the other hand, clients, who do have the luxury of choosing their attorneys, are looking for someone to represent their interests, not the advance the greater good.").

49. *See* Meringolo, *supra* note 35, at 1077 (Aquinas suggested that the five basic inclinations of man are 1. To seek good, including the highest good, which is eternal happiness with God; 2. To preserve himself in existence. 3.To preserve the species…4. To live in community with others. 5. To use his intellect and will—that is, to know truth and to make his own decisions).

move forward with the representation knowing it is consistent with the client's vision and deeply held beliefs. Consistency occurs because measured effort, beyond mere expediency, has been invested to ensure development of a planning product that is reasoned and coherent.

Achieving this goal is especially relevant and important in representing the elderly. Aging often alters the lens through which an individual views himself or herself and the surrounding world. As a result, lawyers may work with elderly clients who are apprehensive, saddened, or fearful of advancing age and, ultimately, their mortality. The client's perception may be that there is nothing left to look forward to, further clouding or impacting planning decisions. Helping the elderly client understand and achieve a *good result* not only counters such understandable apprehension but helps the elderly client focus on what is meaningful, thereby offering a source of peace and comfort.

Striving for the good result in this way helps the lawyer understand that merely doing what clients want and avoiding the imposition of a malpractice action is not enough. Rather, striving to achieve the "good" result on behalf of the client helps the lawyer understand what he or she does during the counseling process has lasting and immutable meaning and implication.

Under a natural law theory, the laws and practices of society exist not as a deterrent of behavior, but as a means to render its subjects virtuous. Such laws and practices must be structured and ordered according to some standard of "reasonableness, meaning, and value more comprehensive than the life of the individual." When done so, the law surely promotes virtuous acts—not by inspiring individual behavior, but rather "by sustaining the fundamental structures of meaning without which the virtues could not emerge." Indeed, "a community functioning in good order manifests distinctively human forms of perfection in a more complete way than any individual could do, and for that very reason, participation in communal life itself is a fundamental aim of human life."[50]

The "good" result thus seeks a sense of affirmation. It strives to assure that an individual has freely used his or her intellect and will, and that in doing so, he or she has made a decision that is intrinsically their own.[51] Participating with a client in this process truly places the lawyer in the role of a counselor, offering the client a framework for reasoning as to what is

50. *Id*. at 1079.

51. Muise, *supra* note 41, at 783 (Aquinas' five basic instructions of man, namely to preserve himself in existence; to use his intellect and will—that is to know the truth and make his own decision).

"good." It suggests a course of action that is consistent with the individual's core beliefs and perspective.[52]

There are those who would argue such approach as being idealistic and misguided, suggesting that because a lawyer principally serves the client, the lawyer should merely advocate and apply what the client wishes within the bounds of the law.[53] This approach, known as *role-differentiated morality*, argues that the role of the lawyer is to simply serve the client ahead of himself or herself.[54]

Role-differntiated morality equates a lawyer's acceptance and implementation of moral obligation as merely an attempt to substitute the individual lawyer's beliefs for individual autonomy and diversity.[55] One commentator offered the following justification for this approach:

> [A]bove the floor set by the law, the moral value of autonomy outweighs in the moral scales the moral wrong that may be done in the exercise of autonomy. He states that our system implicitly recognizes this. The exercise of autonomy in our complex and regulated society often requires access to the law, which is generally available only through a lawyer. It is wrong for the lawyer to interpose her moral judgment to prevent the exercise on the client's autonomy. If such interposition were generalized, it would establish a moral oligarchy of lawyers at the expense of client autonomy.[56]

Notwithstanding these views, role morality does little more than implicitly accept and encourage the creation of differing spheres and levels of conduct and accountability, thus undermining the very humanity inherent in the practice of law.[57] It can, if its goals and objectives control the attorney-

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52. Charles Fried, *The Lawyer as Friend: The Moral Foundations of the Lawyer-Client Relation*, 85 YALE L.J. 1060, 1066 (1976) ("I maintain that the traditional conception of the professional role expresses a morally valid conception of human conduct and human relationships, that one who acts according to that conception is to that extent a good person. Indeed, it is my view that, far from being a mere creature of positive law, the traditional conception is so far mandated by moral right that any advanced legal system which did not sanction this conception would be unjust.").

53. *See* Stephen L. Pepper, *The Lawyer's Amoral Ethical Role: A Defense, A Problem, and Some Possibilities*¸ 11 AM. B. FOUND. RES. J. 613, 613-15 (1986).

54. *See id*. at 617.

55. *See id*.

56. PAUL G. HASKELL, WHY LAWYERS BEHAVE AS THEY DO 39 (1998).

57. See John J. Coughlin, *Sacrifice, the Common Good and the Catholic Lawyer*, 3 U. ST. THOMAS L.J. 6, 16 (2005). I) t is observed:

client relationship, make expedience and efficiency the main focus of the client representation.[58] Individual choice within this framework will always be viewed as an objective greater than the underlying implications of the choice.[59] Results and success are rationalized by the thought that in the end, the lawyer has done what the client *wants* and has somehow afforded greater access to the legal system by doing so.[60] In contrast, the lawyer seeking to achieve a good result for a client will understand and acknowledge that a primary underpinning of the law must be based on conscience and the fun-

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> Pepper acknowledged that the amoral role of a lawyer could pose some difficulty in a situation when the client lacks moral direction. The amoral lawyer supplies the client with information about the legal consequences of various possible actions and then implements whatever decision he client reaches if it is lawful. The deficiency of the client's ethics in conjunction with the amoral function of the lawyer may well result in action that is lawful but unjust.

Id.

58. Muise, *supra* note 41, at 792.

59. Pepper argues,

> The lawyer should certainly convey to the client the law as objectively interpreted in a straightforward manner. . . and convey that this law is a reason or basis for action. The lawyers should also convey that the law, whatever it is merits respect. But for the client . . . the law is just *a* reason—often just one factor among many—and respect for the law means that it is a special or important factor but does not mean that it is exclusive, or that the most straightforward interpretation is determinative.

Stephen L. Pepper, *The Lawyer Knows More Than the Law*, 90 TEX. L. REV. 691, 705 (2012) (reviewing W. BRADLEY WENDEL, LAWYERS AND FIDELITY TO LAW (2010)).

60. It should be no surprise, therefore, that lawyers as a profession have alarmingly high incidents of alcoholism, depression, and substance abuse. *See* Elizabeth Olson, *High Rate of Problem Drinking Reported Among Lawyers*, N.Y. TIMES (Feb. 4, 2016), https://www.nytimes.com/2016/02/05/business/dealbook/high-rate-of-problem-drinking-reported-among-lawyers.html. An experience tethered by nothing more than visceral order taking cannot be expected to generate different results. Pope John Paul II said,

> Like the natural law itself and all practical knowledge, the judgment of conscience also has an imperative character: man must act in accordance with it. If man acts against this judgment or, in a case where he lacks certainty about the rightness and goodness of a determined act, still performs that act, he stands condemned by his own conscience, the proximate norm of personal morality. The dignity of this rational forum and the authority of its voice and judgments derive from the truth about moral good and evil, which it is called to listen to and to express.

POPE JOHN PAUL II, THE SPLENDOR OF TRUTH: VERITATIS SPLENDOR para. 60 (1993).

damental moral and ethical principles which drive the exercise of such conscience.[61]

Role morality potentially encourages results that may run contrary to the client's wishes and best interests. For example, adherence to role morality might justify a lawyer working with an elder to authorize significant ad hoc change to his or her estate plan without regard to that person's views and inclinations developed over a lifetime. It might encourage a child to advocate changes to a parent's estate plan because he or she is "sure" that is what Mom would want—even if that is not the case. And it might prompt the lawyer to simply follow such client directives, justifying and rationalizing the action by assuming that it represents the client's desires, and if the lawyer doesn't do the drafting or work, someone else will. Role morality encourages this thinking by compartmentalizing human outcomes, unnecessarily isolating good from what is legal.[62] The isolation of those terms and concepts when they should be synonymous and complementary is what makes role morality a troublesome theory in which to resolve client issues and concerns.

Taken to its logical conclusion, role morality mistakenly frees a lawyer from responsibility or *accountability* for assisting a client with his or her decision-making.[63] Unlike counseling which weighs and considers the implication of a decision aimed at achieving a good result, role morality relegates the law to a subservient, complementary decision-making resource when its precepts and basis should be fundamental to the decision-making process.[64] Elder law and the practice of it becomes a purely transactional enterprise.

Today's client, especially the elderly, expects more than simply a transactional experience from their lawyer. They want some assurance that their representation comprises a unique compact between themselves and

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61. Muise, *supra* note 41, at 794.
62. *Id*.
63. Muise, *supra* note 41, at 794. Haskell also observes:

> If conduct that is legal is sometimes more reprehensible than conduct that is illegal, Pepper's argument for the value of autonomy within the realm of the legal is weakened. Pepper recognizes that this may sometimes be the case but maintains that there is no justification for the interposition of the lawyer's moral judgment even in this instance. There is an implicit theme in Pepper's thinking of skepticism concerning moral judgment; who is to say what is moral and what is not? Why should the lawyer's judgment be substituted for that of the client, even in this circumstance? The less confidence there is in the objectivity of moral judgment, the greater the value that is placed on autonomy.

Haskell, *supra* note 55, at 44.

64. Pepper, *supra* note 58, at 705.

their lawyer. They want to feel that their needs and their situation form the basis of the recommendation and counsel that their lawyer imparts. The need to understand this critical distinction becomes apparent as one considers the use of documents often critical to the development of an elder's estate plan, namely the durable power of attorney, the advance directive, and the psychiatric advance directive. Utilizing such documents as part of simply a directed transactional representation can generate results which run contrary to a client's aspirations and beliefs. Such results can only be countered when a lawyer understands that every client representation presents a unique opportunity to affirm that the "just man justices," thereby, encouraging the good result makes a difference in the lives of clients and their families.

IV. ANALYSIS: APPLYING THE "GOOD" RESULT

A. Durable Power of Attorney

Durable power of attorney can offer elders valuable planning opportunities.[65] An elder can select a particular person to act on his or her behalf, and if utilized correctly, will allow them to protect their independence especially in the event of incapacity or illness.[66] Powers of attorney can provide a sense of "oversight" and assistance, reducing the likelihood clients will subsequently require court involvement or intervention to manage or oversee their personal and financial affairs.[67] In addition, powers of attorney can include broad language affecting real estate, homestead, public benefits, and the ability to make arrangements for medical care and attention.[68] These provisions can provide the elder valuable assistance, and may avoid imposition of a guardianship.[69]

The advantages that durable powers provide have not been lost on elders, their advisors, and their families:

> In recognition of these benefits, DPOA's have become increasingly prevalent among the senior population. A study released by AARP in 2000 found that 45% of Americans age fifty or older reported

65. See Daniel S. Brennan, *Durable Powers of Attorney: An Ethical Option When Planning for Elderly Clients*, 3 GEO. J. LEGAL ETHICS 751, 753 (1990).

66. *Id*.

67. *Id*.

68. *See* Kara Evans, *What's in Your DPOA? Clauses Every Elder Law Attorney Should Have in Their Document*, ELDER L. ADVOC., Fall 2015, at 26.

69. Carolyn L. Dessin, *Acting as Agent Under a Financial Durable Power of Attorney: An Unscripted Role*, 75 NEB. L. REV. 574, 584 (1996).

> having executed a DPOA. Not surprisingly, the study found that the prevalence of DPOAs tends to increase with age, with 64% of those age seventy to seventy-four have a DPOA, and 73% of those eighty or older having one. This appears to represent a large increase in the prevalence of DPOAs from a decade earlier.[70]

However, durable powers of attorney also have been the genesis of financial fraud and abuse perpetrated on scores of elders.[71] Fundamental in the creation of every power of attorney relationship is the level of trust the principal places in the attorney-in-fact, and the duty of continuing loyalty that the attorney-in-fact owes the principal. Such relationships should therefore be created only after careful thought and analysis.

Lawyers assisting clients in this process should be cognizant of the transgressions which can occur during the administration of a power of attorney. While it may be tempting to dismiss these transgressions as the result of *ad hoc* misconduct, reality suggests that they usually comprise a serious breach of overriding fundamental responsibilities the attorney-in-fact undertakes (whether he or she realizes it or not) on behalf of the principal.[72] Lawyers counseling elders in the selection of an attorney-in-fact bear a responsibility in this process, and should offer their clients candid feedback regarding the potential selection of an attorney-in-fact.[73] This is not the time to be transactional and simply do what the client *wants*, especially in the case of an elderly client when a choice may be influenced by obligation, guilt or misunderstanding. Considering an alternative to a power of attorney, fraught with defect, may be a better course of action than proceeding with its execution and simply hoping for the *best*.

DeBoer v. Senior Bridges of Sparks Family Hospital, Inc.[74] highlights the need to understand and embrace such responsibility, as the court adopt-

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70. Nina A. Kohn, *Elder Empowerment as a Strategy for Curbing the Hidden Abuses of a Durable Power of Attorney,* 59 RUTGERS L. REV. 1, 3 (2006).

71. *See, e.g*., Russ *ex rel*. Schwartz v. Russ, 734 N.W.2d 874 (Wis. 2007).

72. *See generally* Barry A. Nelson & Cassandra Nelson, *Attorneys Face Difficult Ethical Challenges In Trying To Protect Clients From Financial Elder Abuse/Exploitation,* ACTION-LINE, Spring 2017, at 13LINE13 (discussing such transgressions can easily morph into "adult exploitation" with serious consequences and implication for the principal, agent, and perhaps the principal's lawyer).

73. *Id*. at 16 (recommending several proactive strategies lawyers may wish to utilize during their planning discussions, among them completion of a financial data sheet; identification of Alzheimer's Disease or dementia within the family history; and creation of a panel of advisors and physicians).

74. DeBoer v. Senior Bridges of Sparks Family Hosp., 282 P.3d 727 (Nev. 2012) [hereinafter "Senior Bridges"].2012).

ed an expansive view of what is involved, when the exercise of a power of attorney creates a harmful and unfortunate result.In *DeBoer*, an elder was admitted to Senior Bridges of Sparks Family Hospital[75] after being found wandering in a neighbor's backyard. The elder was diagnosed with mild to severe dementia as a result of Alzheimer's Disease. Her doctors concluded that she needed a guardian to assist with medical and financial decisions.

A Senior Bridges social worker proceeded to meet with an individual, Peggy Six, who offered to care for the elder after her discharge from Senior Bridges, on the condition that the elder sign a general power of attorney designating Six as her appointee for financial matters. The elder was provided with a preprinted general power of attorney which the elder signed in the presence of a notary public. Presumably under authority granted by the power of attorney, Six proceeded to misappropriate the elder's money, real property, and other assets.

The Public Guardian, based upon Six's alleged exploitation, filed a complaint against Senior Bridges. The complaint alleged that Senior Bridges breached a duty of care by allowing the elder to sign a general power of attorney, when further investigation would have established that the elder "lacked the requisite mental competence to execute a power of attorney or to protect herself from exploitation."[76] Senior Bridges filed a motion to dismiss claiming it did not have a duty to protect the elder from financial exploitation. The district court granted the motion.

The Appellate Court disagreed:

> [W]e conclude the manner in which Senior Bridges effectuated Savage's discharge could lead a reasonable jury to find that her financial injuries were a foreseeable result of the facility's conduct. Because Senior Bridge specializes in elder care, a jury could reasonable determine the facility should be particularly aware of concerned related to financial abuse of older, cognitively impaired patients….Moreover, a jury could reasonably find that Senior Bridges was on notice that Savage was especially vulnerable to financial exploitation due to the fact that a Senior Bridges doctor had determined that Savage's dementia rendered her unable to make financial decisions for herself. A jury could further find that someone in Savage's psy-

75. *Id*. at 729 (explaining that Senior Bridges apparently specializes "in the evaluation, treatment and placement of elderly patients.")..")

76. *Id*. at 730.

> chological condition may lack the cognitive ability to manage his or her own financial affairs, including important monetary decisions surrounding the activation of the power of attorney.[77]

DeBoer highlights appropriate power of attorney administration, namely one that encourages the development of a *relationship* between the principal and the attorney-in-fact. Such relationships must be *bilateral* with each party understanding the responsibility they have to the other. There are challenges to achieving this result.

The typical attorney-in-fact is often the principal's spouse or adult child. These individuals may be elderly themselves, and lack the ability to understand what is expected of them as an attorney-in-fact. Regardless of perception or understanding, the attorney-in-fact is a fiduciary, bound by the duty of loyalty and the duty of care.[78] Being fiduciary, and then understanding that the exercise of fiduciary obligation is often situation specific,[79] it can become difficult to reconcile real-time challenges with the principal's goals and inclinations.[80]

It is not surprising then that a principal's expectations are often unmet and unfulfilled by the actions of an attorney-in-fact. The current cultural preference for autonomy and doing things one's own way offers fuel and then seeks to justify unevenness in an attorney-in-fact's fiduciary perfor-

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77. *Id*. at 732.

78. *See generally* Praefke v. Am. Enter. Life Ins. Co., 655 N.W.2d 456 (Wis. 2002).

79. *See* Kohn, *supra* note 69, at 26-27 (Unanticipated circumstances can develop as a direct consequence of the new principal-attorney-in-fact relationship). Kohn states:

> While the impact on the family structure can thus be exported to vary from one family to family and over the course of the principal's lifetime, the execution of a DPOA—by its very nature—gives the agent a new power and creates a situation in which the elder no longer has exclusive control over his or her affairs. In many cases, this may have a significant impact on an elders' physical and psychological well-being.

Kohn, *supra* note 69, at 26-27.

80. Kohn notes,

> [T]here are also times when whether a particular action can be said to be in an individual's best interest depends on what conceptualization of interest is used. For example, an individual while possessing full capacity, may have instructed the attorney-in-fact to take all measures to avoid a nursing home placement but may now appear to enjoy the socialization offered at the nursing home.

Kohn, *supra* note 69, at 15.

mance.[81] Unlike other instruments, which impart fiduciary discretion on third persons, a power of attorney often provides broad powers, but limited guidance on how to exercise those powers.[82] Few principals are counseled to develop *decision-making* standards within their documents. As such, administration of durable powers of attorney without such a road map can be an *ad hoc* experience with consequences often unintended and sometimes disastrous for the principals who create them.

A multitude of reasons, some easily correctable, others not, contribute to this situation. For example, well-meaning attorneys-in-fact may not have sufficient understanding of their responsibilities in critical situations involving the principal's well-being.[83] In addition, remedies available to the elder as principal are often ineffective. Accountings, depending upon the parties and the circumstances, may only be marginally effective, presuming, of course, they are even accurate. Petitioning the court for relief can be cumbersome and slow. In addition, utilizing such remedies may be unattractive to a principal who is reluctant to pursue such options against a family member for fear of hurt feelings or potential retaliation. Revocation of the power of attorney is also counterproductive for many of the same reasons.[84]

How then, might a lawyer be proactive in the development of a durable power of attorney thereby achieving a *good result*?

Initially, clients, especially elders, must have full and complete capacity to develop and then execute a power of attorney.[85] Clients contemplating use of a power of attorney must also understand the relational nature of a power of attorney. The principal should create, ideally with the help of the lawyer, an operations manual within their document providing clear situation-specific guidance, or at least a mechanism so that important decisions are made consistent with the principal's views and preferences.[86] The client must understand that a power of attorney is not merely a form that plays

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81. Kohn, *supra* note 69, at 52.

82. See Linda S. Whitton, *Durable Powers as an Alternative to Guardianship: Lessons We Have Learned,* 37 STETSON L. REV. 7, 11 (2007).

83. *See* Deborah A. DeMott, *Beyond Metaphor: An Analysis of Fiduciary Obligation,* 37 DUKE L.J. 879 (1988) (commentators have suggested that identifying fiduciary obligations is a very different thing from applying them; t. heir application must be applied in different contexts and different types of parties and relationships)..)

84. *See generally,* Whitton, *supra* note 81, at 29-30. It may, for example, be difficult for the principal to find a substitute agent. Application of a "duty standard" can make this process more troublesome. *See generally,* Whitton, *supra* note 81, at 29-30.

85. *See* ABA COMM'N ON L. & AGING & AM. PSYCHOLOGICAL ASS'N, ASSESSMENT OF OLDER ADULTS WITH DIMINISHED CAPACITY: A HANDBOOK FOR LAWYERS (2005), http://www.apa.org/pi/aging/resources/guides/diminished-capacity.pdf [https://perma.cc/LF49-ZG8Q]. .To view a helpful "Capacity Worksheet for Lawyers," see *id*. at 23.

86. Kohn, *supra* note 69.

completion but a document that invites the client to embrace an important role in the estate planning process.[87]

Time should also be spent in determining whether the proposed power of attorney is being prepared for future, general use, or whether it will be immediately utilized. In both cases, the lawyer must understand family dynamics, potential uses for the power, and the proposed attorney in fact. Additionally, the lawyer should consider whether the inclusion of so-called *super powers* allowed in certain jurisdictions serves the client's best interests.[88] Such super powers empower the attorney-in-fact with broad discretion to effect or perpetuate gifting or estate planning strategies, which for some clients may prove useful and others potentially dangerous. A lawyer seeking to achieve a good result should evaluate the need or use for such language and convey those thoughts to the client so the resulting document offers protection against misuse or misappropriation of the client's assets.

Finally, thoughtful consideration should be given to whether the elder even needs a financial power of attorney. The use of alternate estate planning documents, which may protect the client's interests, offer greater assurance that his or her wishes and preferences are preserved, and achieve a result similar to a power of attorney should be considered. For example, use of a revocable living trust with a *facility of payment clause* can provide results and protection superior to that offered by a power of attorney.[89] In addition, a trust may provide a more efficient forum for the elder to set forth a statement of purpose or philosophy offering the trustee guidance and comfort as to the manner in which principal is to be used and distributed for the elder's benefit. The resulting standard of conduct trustees must observe and remedies available in the event they abuse their fiduciary responsibilities are clearer and more defined than those applied to attorneys-in-fact.[90]

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87. For example, a power of attorney can influence and control the exercise of fundamental transactions which Kohn argues can significantly alter the principal's lifestyle. Such transactions might include the sale of the primary homestead or the decision to liquidate more than a certain percentage of the principal's assets. *Id*. at 49.

88. *See* FLA. STAT. § 709.2202 (2017).

89. A typical facility of payment clause reads as follows:

> If the Settlor becomes incapacitated . . . the Trustee shall distribute such amounts of the income and principal of the Trust for the comfort, health, support maintenance or other needs of the Settlor as the Trustee shall determine in the Trustee's discretion, to be necessary or appropriate to maintain the Settlor in accordance with the Settlor's accustomed standard of living at the time of the execution of this Trust Agreement.

THOMSON REUTERS, PRACTICAL LAW TRUSTS & ESTATES, REVOCABLE TRUST FOR INDIVIDUAL WITH SPOUSE OR PARTNER: BASIC (FL) (2017).

90. Gail E. Mautner & Heidi L. G. Orr, *A Brave New World: Nonjudicial Dispute Resolution Procedures Under the Uniform Trust Code and Washington's and Idaho's Trust*

A power of attorney that achieves a "good" result is the product of measured client interaction and involvement. It is hardly an "off the shelf product," but one in which the lawyer collaboratively helps the client understand the concepts of diligence and disclosure as those concepts relate to the client's unique and specific circumstances.

"*What I do* is me: for that I came."

B. Advance Directive

An *advance directive* vests in another person, frequently referred to as a Surrogate, the authority to make medical decisions on behalf of the principal,[91] if the principal is unable to do so.[92] Empowerment and patient autonomy is an essential characteristic and goal of the advance directive, as it acknowledges "the ultimate right to direct medical treatment rests . . . with the . . . patient . . . [and] not . . . the physician or the patient's family."[93]

The genesis of the advance directive can be found in the Patient Self-Determination Act of 1990,[94] which required medical institutions, hospice, or HMOs receiving Medicare or Medicaid payments to inform patients about durable powers of attorney and living wills, or lose Medicare/Medicaid payments.[95] Specifically, the Act required that health care facilities develop a program discussing advance directives available under state law to patients who would be receiving treatment and services on an inpatient basis. Many states implemented legislation that created statutory regulations clarifying the use of living wills and advance directives.[96]

From the outset, an advance directive can appear relatively straightforward on its face, as its statutory requirements are generally uniform from

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and Estate Dispute Resolution Acts, 35 ACTEC J. 159 (2009) (offers an overview of nonjudicial dispute mechanisms available under the Uniform Trust Code).

91. *See generally*, Jon P. Beyrer, *How Do I Make Sure I Have the Legal Authority to Make Decisions on Mom's Behalf if the Need Arises*, AGINGCARE.COM, https://www.agingcare.com/Articles/How-do-I-ensure-that-I-have-legal-authority-to-act-on-the-behalf-of-my-elderly-parent-should-the-96689.htm [https://perma.cc/GK3P-VTNA].]

92. Edward J. Larson & Thomas A. Eaton, *The Limits of Advance Directives: A History and Assessment of the Patient Self Determination Act,* 32 WAKE FOREST L. REV. 249 (1997).

93. *Id*.

94. 42 U.S.C. § 1395(a)(1)(Q) (2012); 42 U.S.C. §), 1395mm(c)(8) (2012); 42 U.S.C. §), 1395cc(f) (2012); 42 U.S.C. §), 1396a(a)(57)-(58) (2012); 42 U.S.C. §), 1396a(w) (2012).

95. Charles P. Sabatino, *Health Care Advance Directives*, FAM. ADVOC., Summer 1993, at 61.

96. *See* Jean M. Hillman, Note, *Senate Bill 1, Ohio's Advance Directives Law: Where We Have Been . . . Where Are We Going?*, 7 J.L. & HEALTH 295 (1992/1993).

jurisdiction to jurisdiction.[97] In addition, the legislative intent of many advance directive statutes can also appear rather benign and noncontroversial. For example, the Florida legislature inserted the following preamble in the state's advance directive statute:

> The Legislature finds that every competent adult has the fundamental right of self-determination regarding decisions pertaining to his or her own health, including the right to choose or refuse medical treatment. This right is subject to certain interests of society, such as the protection of human life and the preservation of ethical standards in the medical profession.[98]

However, implementation of such language can be complex and complicated. Similar terms, and in some cases, identical words, can have profoundly different meaning depending upon variables such as mindset, perspective, and opinion.[99] And notwithstanding these variables, the advance directive must reflect and articulate reasoned individual choice and self-determination.[100]

While most individuals would agree that achieving a sense of choice and self-determination in the use and operation of the advance directive to be a self-evident goal, the manner, and process in achieving that goal is crucial. This is particularly the case in representing the elderly. Utilizing "off the shelf forms" or those championed by others will not guarantee that the elder's best interests and "good result" will be achieved. Only a process that weighs and considers the meaning, implication, and import of the choices inherent in advance directive utilization will achieve such result.

Accomplishing that result requires the lawyer adopt and encourage a subtle change in his or her relations with their client. Normally, the lawyer is most comfortable in situations where the client receives and then accepts the lawyer's counsel and advice. However, in matters involving the devel-

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97. *See generally* Fla. Stat. § 765.101(1) (2017) (refers simply to "a witnessed written document . . . in which instructions are given by a principal [or in which instructions are given by a principal] or in which the principal's desires are expressed concerning any aspect of the principal's health care or health information, and includes, but is not limited to, the designation of a health care surrogate, a living will, or an anatomical gift made pursuant to part V of this chapter.").

98. Fla. Stat. § 765.102(1) (2017).

99. Compare the Advance Directives that can be found on the Holy Apostles College and Seminary website with those found on the Caring 7 COMPASSION WEBSITE.

100. This principle was generally set forth in Cruzan *ex rel*. Cruzan v. Dir., Mo.*Missouri* Dep*t*. of Health, as the Court held that "[a] competent person has a liberty interest under the Due Process Clause in refusing unwanted medical treatment." Cruzan *ex rel*. Cruzan v. Dir., Mo. Dept. of Health, 497 U.S. 261, 262 (1990)

opment of an advance directive, the lawyer should allow the focus of the conversation to shift to the client.

Listening and understanding matters, as the client begins to grapple with the gravity of the advance directive he or she is about to sign. Perceptions, questions, and fears should be allowed expression and evaluation. The lawyer must take the time and have the compassion and knowledge to assist the client confront those emotions and begin to understand how a thoughtful and *thought-through* advance directive promotes the good result. This process requires commitment on the part of both lawyer and client as education, understanding, and reflection become key components in evaluating issues relating to health care delegation.

From the outset, there is probably little doubt that the document that most resonates with clients in this process is the "living will" (although they very often misuse the term and misunderstand its nature and meaning). There is, in the mind of most clients, an apparent benign simplicity to the document, its purpose simply being that of allowing individuals an opportunity to "state [their] wishes regarding the withholding and withdrawing of life sustaining treatments." [101] While those terms may seem entirely reasonable and understandable in the law office, they may seem less so in a hospital room when an attending physician, lacking an understanding of the client's personal and medical history, interprets the meaning and implication of those terms.[102] The likely result is delegation without boundaries.

There is another approach for clients to consider, one that finds expression in the durable power of attorney for health care. The durable power for health care represents more than a document which states health care *wishes*. It is a personal health care statement where the client empowers someone to apply and implement its directives in specific medical situations. Proper use of this document presupposes that the client has reviewed and considered the implications of such appointment, making sure that the

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101. *See, e.g.*, NATIONAL HOSPICE AND PALLIATIVE CARE ORGANIZATION, NEVADA ADVANCE DIRECTIVE (2005).

102. D. Brian Scarnecchia noted:

> [T]he person who is given *prima facia* authority to interpret a living will is the patient's attending physician, not their next of kin. An attending physician in the hospital setting is not usually a patient's family doctor, but instead whoever is on duty in the emergency room or on call during that shift at the health care facility, who is usually a complete stranger to the patient. Of course, the next of kin may challenge the attending physician's interpretation in court. *But most patients would not choose this arrangement if it were properly explained to them*.

D. BRIAN SCARNECCHIA, BIOETHICS, LAW AND HUMAN LIFE ISSUES 388 (2010) (emphasis added).

surrogate, the client's future spokesperson, understands the client's wishes and beliefs before the onset of serious illness.[103]

If one accepts the premise that the good result is achieved through exercise of a client's true free will and intellect, the lawyer seeking to achieve the good result on the client's behalf may well decide that use of the durable power of attorney for health care, and not the living will, offers the client greater assurance that his or her health care wishes and views are acknowledged and respected:

> By all accounts a DPOAHC [durable power of attorney for health care] is better able to secure a patient's best interests by making clear his intentions regarding health decisions should he become incompetent later. The DPOAHC allows one to name the person one wants to represent them . . . and express their wishes to doctors and hospital administration should one become incompetent or incapacitated. One should inform this person . . . just what one would like to see happen under various medical and end of life scenarios.[104]

The durable power of attorney for health care, more so than the living will, protects the interests of the individual by serving as a testament to that person's beliefs regarding human life and the role health care plays or should play in the preservation of that life. This can be especially important when representing an elder who may be more likely to appreciate the potential immediacy of the advance directive. In this setting, the advance directive can provide an almost cathartic forum which clearly articulates intention and vision regarding the delivery of healthcare and end of life decision-making. It confirms the individual's view of the worth and sanctity of life, memorializing a delegation which is the result of reason and understanding, not duress, expedience, or fabricated urgency.

Developing such a document can be laborious and at times emotional, and some commentators suggest that advance directives are virtually ineffective because so few clients use them.[105] The MOLST (Medical Orders

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103. *See* NOW AND AT THE HOUR OF OUR DEATH: CATHOLIC GUIDANCE FOR END-OF-LIFE DECISION MAKING, https://www.catholicendoflife.org [perma.cc/K2JP-YX8].

104. SCARNECCHIA, *supra* note 101, at 388.

105. *See* O'Neill, Note, "End of Life Care in Connecticut: Whose Decision Is It and When Does the Conversation Begin?",?" 27 QUINNIPIAC PROB. L. J. 317 (2014); BASIC INFORMATION ABOUT MOLST, MASS. MED. ORDS. FOR LIFE-SUSTAINING TREATMENT, http://www.molst-ma.org/basic-informaton-about-molst-0 [https://perma.cc/2TEG-4VPM] (Defines a MOLST as follows: "MOLST is a medical order form (similar to a prescription) that relays instructions between health professionals about a patient's care. MOLST is based on an individual's right to accept or refuse medical treatment, including treatments that

for Life-Sustaining Treatment) is offered as an alternative.[106] The argument often suggested in favor of their use rests with the efficiency and certainty in which they establish a patient's health care preferences and goals.[107] Approximately twenty states have enacted MOLST legislation, with others considering their own versions.[108] Clients, it is suggested, are "more conscientious" in executing a MOLST than they might be when signing an advance directive and, in any event, health care providers often do not follow the provisions of an advance directive.[109] Further supporting the MOLST argument is the fact that conflicts between advance directives and the MOLST can be decided by the most recently signed document, which usually will be the MOLST.[110]

There are several problems with MOLST usage and clients should be provided an opportunity to carefully and thoughtfully consider them. Interestingly, one of the fundamental characteristics of the MOLST--namely, removing medical decision-making from the client and placing it in the hands of a third person--has been viewed both as its most telling advantage and disadvantage.[111] Notwithstanding the alleged efficiency that MOLSTs

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might extend life…. The signed MOLST form stays with the patient and is to be honored by health professionals in any clinical case situation.")."

106. Such forms, depending upon jurisdiction, are also referred to as a POLST (Physician Orders for Life Sustaining Treatment) or a POST (Physician Orders for Scope of Treatment). *See POLST (MOST, MOLST, POST)*, ETHICAL CURRENTS 11 (2009), https://www.chausa.org/docs/default-source/general-files/polst---most-molst-post-pdf.pdf?sfvrsn=0 [https://perma.cc/B2BH-8W5Q]..

107. O'Neill, *supra* note 104 argues, "The patient's goals are established through informed conversations between the treating physician, the patient, family members, and the surrogate. MOLST translates the patient's goals regarding end-of-life treatment and care into medical orders, which 'are easily understood by healthcare professionals and can be acted upon immediately.'" O'Neill, *supra* note 104, at 319 (quoting *New Study Shows Impact of Program Allowing Patients To Document Wishes for End-of-Life Treatment*, COMPASSION & SUPPORT AT THE END OF LIFE, http://www.compassionandsupport.org/pdfs/homepage/07.22_.2010_MOLST__news_release_concerning_new_study_7_.01_.10_.pdf). ."

108. *See* Horacio Sosa, *POLST—Physician Orders for Life-Sustaining Treatment—will likely become law in Florida in 2017*, ELDER L. ADVOC.,. Spring 2017, at 1, 5, http://www.eldersection.org/wp-content/uploads/2017/04/Elder-2017_Spring_Final.pdf. *C*; *ontra* Marshall B. Kapp, *Letter to the Editor*, ELDER L. ADVOC.,. Summer 2017, at 1, 3 ().reportingreports SB 228 as "not advancing.");."; *See also,* S.B. 228, 2017 Leg., (Fla. 2017), https://www.flsenate.gov/Session/Bill/2017/228/ByVersion. The*also*The Florida Senate "SB 228: Physician Orders for Life Sustaining Treatment" advises that Florida SB 228 Physician Orders for Life Sustaining Treatment had "died" in Judiciary and was "indefinitely postponed and withdrawn from consideration." S.B. 228, 2017 Leg., (Fla. 2017), https://www.flsenate.gov/Session/Bill/2017/228/ByVersion.

109. Sosa, *supra* note 107, at 5.

110. Sosa, *supra* note 107, at 6.

111. Marshall B. Kapp, *Overcoming Legal Impediments to Physician Orders for Life Sustaining Treatment*, 18 AMA J. Ethics 861, 862 (2016). Notwithstanding the assertion that

may bring to the planning process, their use may result in a patient/client making critical care decisions in what may be a stressful environment, such as a hospital room. It is difficult to perceive this result as an advantage to the patient/client. Additionally, while the MOLST may indeed promote the quick and efficient delegation of health care decision making, the nuance and implication of that delegation is uncertain.[112] MOLSTs, in the name of efficiency, encourage "complete independence from present circumstances," resulting in the client losing control over arguably the most significant delegation that client will ever make during his or her lifetime.[113]

For example, particular facts or circumstances can make a medical procedure morally *obligatory* or morally *optional*.[114] The MOLST removes the need for critical analysis of the procedure, heightening the potential that such procedure may, in and of itself, encourage unintended results such as euthanasia.[115] Whether clients understand such implications, especially when it is their life that is held in balance, can be open to question. The elder law attorney must understand this critical reality and make certain the client understands the power and impact of delegation when dealing with health care delegation, as the remedies available to the elder if the delegation goes awry range from uncertain to nonexistent.

In re Zornow highlights many of these issues.[116] In *Zornow*, several MOLSTs were executed on behalf of Mrs. Carole Zornow, then a 93-year-old suffering from advanced Alzheimer's. At primary issue was the applica-

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"frail elderly patients or those with chronic advanced illness" are "properly eligible for physicians' writing of a POLST" maintains that the POLST allows for "precision" in end of life care. *Id*.

112. Jeffery A. Cramer, *Physician Orders for Life-Sustaining Treatment (POLST)*, CRAMER LAW CENTER (Oct. 10, 2017), http://cramerlawcenter.com/areas-of-practice/estate-planning/physician-orders-for-life-sustaining-treatment-polst/ [https://perma.cc/KN9U-NWQC]./. Cramer observes,

> A concern with the POLST form is that it typically would be signed when the client is neither healthy nor in a clear state of mind…. In my…opinion, advice about preparing and signing legal forms is better given by lawyers than by physicians. A[n]…advance directive is better designed in the context of meeting with an estate planning attorney, when the client is proactive and clear headed. Just because physicians and hospitals prefer "their" forms is no reason to enact a law which has the very real potential of overriding a carefully crafted estate plan.

Id.

113. Daniel A. Gannon, *POLST and Moral Human Acts*, Ethics & Meds., Feb. 2013, at 1, 1, http://www.sgmgnew.com/files/NCBQ_EthicsMedics_Feb2013.pdf [https://perma.cc/U596-FMLT]..

114. *Id*.

115. *Id*.

116. *In re* Zornow, 919 N.Y.S.2d 273 (N.Y. App. Div. 2010).

tion of a blanket directive that would have denied Mrs. Zornow food and water if they could not be administered orally.[117] The record and facts suggested the application of the MOLST to be contrary to the patient's wishes.[118] The court held that authorizations by co-guardians of a MOLST depriving the petitioner of artificially administered food and water violated the Family Health Care Decisions Act and the use of blanket MOLSTs was impermissible unless particularized.FN In so holding, the court acknowledged and respected the patient's Roman Catholic belief and heritage, and applied those principles to determine their applicability to "the particular area of dispute, viz., under what conditions should artificial feeding continue and when should it terminate…."[119]

Zornow emphasizes the importance of preserving genuine client choice and the misunderstanding of what choice means, especially in the area of health care planning. The fundamental advantage of advance care planning--the execution of an advance directive-- rests in the principal's absolute "right" to decide his or her destiny. Within this context, choice, and its real meaning, becomes an important concept.[120]

Choice is seldom the result of a unilateral personal action, but the sum total of one's experience within his or her community. Community within this context represents a lifelong pastiche of experience, belief, and interaction. It is not an expression made in a vacuum, but one that acknowledges the effect of the life well lived, the hallmark of what the poet surely meant when he observed "the just man justices."[121] Recognizing and valuing choice within this context is what distinguishes the health care power of attorney from the living will or the MOLST. By placing the evaluation and interpretation of terms like "terminal condition" in the hands of a third party, the principal forgoes the critical opportunity to create and then articulate a framework which provides a personal perspective on how those issues are

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117. *Id*. at 275.

118. *Id*. at 275. The court noted "The [P]etitioner . . . stated that her mother had indicated the contrary by affirmatively requesting artificial feeding, and further, while lucid, her mother had also repeated such direction to her nurse, who recorded it in the nursing home health care records." *Id*.

119. *Id*. at 276.

120. Pope John Paul II notes,

> On a more general level, there exists in contemporary culture a certain Promethean attitude which leads people to think that they can control life and death by taking the decisions about them into their own hands. What really happens in this case is that the individual is overcome and crushed by a death deprived of any prospect of meaning or hope.

POPE JOHN PAUL II, THE GOSPEL OF LIFE: EVANGELIUM VITAE 27 (1995).

121. Kalpakgian, *supra* note 3.

to be resolved. In a time when the principal is apt to be most vulnerable, a well thought advance directive represents an expression which challenges and rejects expediency and misguided societal norms.[122] Clients, especially the elderly, should never be denied or deprived that significant opportunity.

The imperative and importance of offering the client such opportunity are clearly underscored in the case *In re University Hosp. of State University of New York*[123] Mrs. Yvette Casimiro signed a Health Care Proxy. Two years later, as part of the preparation of her estate planning documents, Mrs. Casimiro signed a Living Will/Power of Attorney in which she designated her great aunt by marriage and husband, the Karschners, as attorneys-in-fact. The Karschners both later testified that shortly after her appointment with the attorney, Mrs. Casimiro confided "that she did not realize the implications of this instrument (Living Will/Power of Attorney)."[124] Mrs. Casimiro further stated that had she understood the consequences of disconnecting of any life support equipment and the discontinuance of any medical treatment—she probably would not have signed the document.[125]

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122. Pope John Paul II notes,

> At another level, the roots of the contradiction between the solemn affirmation of human rights and then tragic denial in practice lies in the notion of freedom which exalts the isolated individual in an absolute way, and gives no place to solidarity, to openness to others and service of them. While it is true that the taking of life not yet born or in its final stages is sometimes marked by a mistake sense of altruism and human compassion, it cannot be denied that such a culture of death, taken as a whole, betrays a completely individualistic concept of freedom, which ends up by becoming the freedom of 'the strong' against the weak who have no choice but to submit.

PAUL II, *supra* note 119117, at 35.

123. *In re* Univ. Hosp. of State Univ.University of N.Y.York, 754 N.Y.S.2d 153 (2002).

124. *Id*.

125. The court noted,

> Yvette Casimiro, according to respondents' testimony, is a devout Roman Catholic and believes that only God can take a life. It was the respondents' testimony that MRS. CASIMIRO expressed this sentiment to them on many occasions. It was for this reason and Mrs. Casimiro's expressed intent to revoke the Living Will/Power of Attorney that Respondents refused to execute a Do Not Resuscitate (DNR) authorization despite being asked to do so by the Ethics Committee of University Hospital.

Id. at 156.

In 2002, Mrs. Casimiro was admitted to University Hospital with advanced dementia, and Alzheimer's, heart failure, respiratory failure, and Parkinson's disease. She was receiving life-sustaining treatments and from time to time was placed on a ventilator. It was her doctor's medical opinion that she was "unable to communicate and interact with her environment, and cannot assist in her own care and feeding."[126]

The court framed the ultimate issue of the case, and in many ways, the ultimate issue inherent in the use of advance directives when it observed:

> The positions of the respective parties are extremely polarized in this proceeding. Petitioner contends that Yvette Casimiro's medical and mental condition is such that she cannot competently make life sustaining decisions and cannot survive without the life sustaining systems now in place. Petitioner argues, therefore, that the provisions of the valid and intact health care proxy executed by Mrs. Casimiro in 1995, and the living will/power of attorney executed in 1997 should be followed by her designated agents, the Karschners or that they should be removed.
>
> Respondents, on the other hand, maintain that their great aunt, through words and actions, meant to revoke the living will/power of attorney due to a lack of understanding of its implications and due to her strongly expressed religious beliefs concerned who can take a life. Respondents maintain that Mrs. Casimiro's wishes are to remain alive and, therefore, they are acting in accordance with those wishes in not authorizing a DNR under the health care proxy.[127]

The Court considered the evidence in the record and found that Mrs. Casimiro's words and actions indicated a desire to remain alive. Accordingly, both the Health Care Power and the Living Will were stricken in their entirety.[128]

The *University Hospital* case illustrates the need for lawyers to ensure that elderly clients clearly understand the terms and implications of advance

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126. *Id*.

127. *Id*. at 157.

128. The Court utilized slightly different approaches in striking both documents. It found that with respect to the living will there was little doubt that Mrs. Casimiro's actions revoked said document. In contrast, the health care proxy is controlled by statute. The court referred to the state which allowed revocation by specific intent. The court, therefore, found that the health care proxy was revoked by implication by virtue of Mrs. Casimiro's actions and statements revoking the living will. *In re* Univ. Hosp. of State Univ. of N.Y., 754 N.Y.S.2d 153, 157 (2002).

directives and how the concept of choice can be utilized during the preparation of the advance directive. The prospect of illness and mortality take on additional significance as one ages, making it critically important that the elder understand the full meaning and implication of any document signed in connection with end of life decision-making.[129] Acting on the sole advice of another, acting to please a child or caregiver, or acting out of fear of being a burden on someone must never be the driver of decision-making in this area.

Employing a bit of empathy and common sense may prove helpful to practitioners especially as they counsel elderly clients. The will to live, preserve the quality of life, and avoid undue pain and discomfort are all goals which most people would agree are aspirational as it relates to their healthcare and the healthcare of others. Such goals also describe a reasonable moral and ethical objective inherent in health care and its delivery.[130] So while circumstances may change during the delivery of health care, the aforesaid overriding goals do not and cannot.[131]

Reasoned choice and thus the good result can only be achieved when the elder law attorney assists his or her client focus on those aspirations and understand that the selection of a health care surrogate does not revolve

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129. It is interesting that overall agreement exists regarding the need for the elderly client to understand the implications of signing an advance directive even when the overall intent in insuring the elderly person does so is diametrically opposite. For example, Alfred F. Conard discusses the "health care tragedies of elders." As a solution to the addressing the tragedies he advocates use of advance directives with language that provides "I want to receive" or "I want to forego" regarding resuscitation, ventilation, and tube feeding. Does the execution of such documents produce a good or directed result? Alfred F. Conard, *Elder Choice*, 19 AM. J.L. & MED. 233, 283 (1993).

130. Lawyers often hear the admonition from clients that the plug should be pulled in the event of that client's serious illness. It is an open question what such admonition really means. It is easy to offer such observations when one is healthy and life is not in the balance but not as easy when the opposite is the case. These realities bear a heightened sense of importance and emotion when dealing with elderly clients.

131. Benedict M. Ashley notes,

> Getting sick and getting well are both parts of this continuous, struggling process of living development. Thus defining human personhood as 'embodied intelligent freedom' presupposes a life process the goes on at many levels of activity, but that is more clearly manifest and definable by its maximum, its high point of integration. Medical ethics must always take into account that the person who needs help in a particular crisis illness is a being who not merely exists here and now but also has a history and a future, and for all worldviews, except the materialistic ones, a future beyond bodily death.

BENEDICT M. ASHLEY ET AL., HEALTH CARE ETHICS: A CATHOLIC THEOLOGICAL ANALYSIS 39 (5th ed. 2006).

around the designation of someone who is appointed to do something. Rather, it is an act of selecting a companion, an individual the elder knows will be there to ensure the client's end of life journey progresses in a way that protects the elder's life's importance and dignity. It provides the elder the comfort and assurance that he or she will never be alone or abandoned.[132]

So, how can lawyers ensure that their clients develop advance directives that memorialize reasoned choice and achieve the good result? Conversations leading to that result will almost always consider and evaluate the following topics.[133]

First, great care and attention must be provided in selecting a surrogate.[134] The lawyer offers the client—especially the elder—meaningful service in helping identify who might be an appropriate health care surrogate. This is not the time to create a popularity contest, worry about hurt feelings, or simply do what the client wants. The lawyer must assist the client in acknowledging the gravity of this selection, making certain the surrogate has the temperament and availability, both temporally and philosophically, to articulate and represent the client's wishes and needs when it

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132. *See* A. Frank Johns, *Three Rights Make Strong Advocacy for the Elderly in Guardianship: Right to Counsel, Right to Plan, and Right to Die*, 45 S.D. L. REV. 492 (2000).

133. M. Garey Eakes and Alex Moschella suggest,

> When an attorney becomes involved in health care decision-making cases, the attorney must seek to understand and cement the wishes of the person for whom health care decisions may be made. After all, the attorney may enter the case in the planning stages to discuss and establish advance directives or health care proxies. When a client had not thought through their wishes, or labors under an apparent misconception about the basis for their stated choice, it is the time for the attorney-counselor to explore the basis of the of the client's wishes, without leading the client to any conclusion but the client's own, thus helping the client clarify their wishes and putting in place a document that reflects their true wishes.

M. Garey Eakes & Alex Moschella, *Two Cases That Never Should Have Happened: The Misuse of Religious Doctrine in Cases Concerning the Withdrawal of Artificial Life Prolonging Medical Treatment*, 12 NAT'L ACAD. ELDER L. ATT'YS Q. 4 (1999).

134. The Court in *In Re* Carl R.P., Jr. noted,

> While most attorneys focus on the capacity of the grantor when drafting advance directives . . . selecting a responsible and trustworthy individual to serve as an agent pursuant to a power of attorney or health care proxy is just as important as assuring that the documents are executed during a period of time when capacity is not an issue.

In Re Carl R.P., Jr., 2014 WL 3871204, at *1 (N.Y. App. Div. Aug. 6, 2014).

matters most. To assist the client, and later the surrogate, appreciate the underpinnings which support the advance directive, a general statement of intent, empowering the surrogate to make decisions that will provide for the administration of ordinary care and treatment that preserves life and health is essential.[135]

Second, lawyers must ensure that their clients have a clear understanding of the way in which any proposed advance directive deals with three significant issues: human life (or the right to die), imminent death, and ordinary versus extraordinary medical care. While the term and concept has different meaning to different people or different constituencies,[136] "right to die" must always mean the right to die peacefully and with dignity and not by someone else's hand.[137] It must never be construed as an invitation to hasten or influence the end of life prompted by misunderstanding or the urgings of others and documents which allow such result.

Third, advance directives must acknowledge the fundamental human will to live and therefore vest in the surrogate the ability to afford the client *ordinary care* and *proportionate means* in the delivery of health care and health care assistance. The client must understand the difference between ordinary care and extraordinary care:[138]

> One is obligated to use all "ordinary care" or "proportionate means" to preserve one's health. One is conversely, not obligated to use "extraordinary care" or "disproportionate means." These can be distinguished "by studying the type of treatment used, its degree of complexity of risk, its cost and the possibilities of using it, and comparing these elements with the result that can be expected, taking into ac-

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135. *See generally* Elizabeth Andreoli, *Consent to Medical Treatment: The Right to Have Peace of Mind*, ARK. LAW., Spring 2000, at 24.

136. *See generally* Beth Eisendrath, *A Natural Right to Die: Twenty-Three Centuries of Debate*, MARQ. ELDER'S ADVISOR, Fall 2002, at 80.

137. Scarnecchia, *supra* note 101.

138. The court stated,

> There is always a moral obligation to choose what is ordinary care or ordinary medical care. Health care protocol or discretionary policies then would force the weak to submit to the will of the powerful through policies that would deny access to ordinary care or ordinary medical care is a serious breach of public good and violates the common good of society.

Id. at 375.

> count the state of the sick person and his or her physical and moral resources.[139]

Offering clarity in this area advances the goal of true—empowerment—so that the client has comfort knowing that his or her advance directive will accommodate the delivery of ordinary care while still potentially allowing introduction of advanced and experimental treatments if those are consistent with the wishes of the principal, sound medical advice, and the overriding imperative of preserving and protecting the dignity of human life.

Finally, as they run contrary to the very essence of the good result, procedures that permit assisted suicide or euthanasia must clearly be forbidden and prohibited in the instrument.[140] Terms such as "imminent death" and "final state of a terminal condition" should be clearly defined.[141] The surrogate should only be authorized to refuse or withdraw treatment that is extraordinary or disproportionate and once again those terms should be clearly defined. Finally, the document should vest only in the surrogate the ability to make a determination of whether a Do Not Resuscitate (DNR) Order is appropriate.[142]

Taking the time to incorporate the provisions identified in this section into an advance directive transforms the document from one that is pulled off the shelf or the internet to one that is the product of thought and reflection and ultimately an affirmation of an individual's belief and hopes. Creating this type of advance directive is not automatic. It requires a lawyer be willing to act as a counselor and a teacher and a client ready to think about himself or herself in ways that may be uncomfortable. But in the end, it gives meaning to—choice and empowerment—offering benefit and comfort in ways that may be new and unanticipated.

"the just man…Acts in God's eye what in God's eye he is."

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139. *Id*. at 370.

140. This is an area where the lawyer must act as a teacher and counselor, mindful that "one materially cooperates in another's wrongdoing when one's acts help make that wrongdoing possible, although one does not intend that wrongdoing." Muise, *supra* note 41, at 786.

141. Holy Apostles College and Seminary maintains the St. John Paul II Bioethics Resource Center; The Resource Center contains information and forms which may assist the lawyer when drafting and preparing an advance directive which achieve the "good result" on behalf of his or her client. HOLY APOSTLES COLLEGE AND SEMINARY, http://www.holyapostles.edu [https://perma.cc/EMV7-HW5M]. Other helpful resources are available in this area, among them is Reverend Gerald D. Coleman, *Now and at the Hour of Our Death: A Catholic Guide to End-of-Life's Critical Decisions*, DAUGHTERS OF CHARITY HEALTH SYS.,SYSTEM http://www.rcda.org/offices/pastoral_care_ministry/pdf/end%20of%20life%20decision%20making.pdf?searchunitkeywords=end,of,life,decisions [https://perma.cc/NR4H-A32J].

142. Muise, *supra* note 41, at 786.

C. Psychiatric Advance Directive

The Psychiatric Advance Directive, which documents "a competent person's specific instructions or preferences regarding future mental health treatment,"[143] (hereinafter "PAD") is a relatively new document.[144] Twenty-five states have enacted specific PAD statutes.[145] Other jurisdictions such as Florida, while not having specific PAD statutes, allow instructions regarding psychiatric medications or hospitalization within a client's advance directive.[146]

PADs turn our attention to client empowerment and choice in a way that differs from the durable power of attorney or the advance directive. The previous two documents challenge the attorney and the client to gaze into the future and make—best guess—determinations as to what events might affect and impact that particular client. PADs embrace a different, almost retrospective, approach addressing the so-called psycholegal soft spot, namely "the way in which certain legal issues, procedures, or interventions may produce (or reduce) anxiety, distress, anger, depression . . . and other dimensions of law-related psychological well-being."[147] PADs thus allow an individual the unique opportunity during a period of capacity to make choices regarding their mental health care, utilizing lessons learned in the past to impact the future positively.[148]

Within this context, the concept of choice can be viewed in a new and unique manner. If one accepts the view that choice and freedom are concepts that find meaning only within the context of community,[149] then

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143. National Resource Center on Psychiatric Advance Directives, http://nrc-pad.org/ [https://perma.cc/FB3N-RL3S].

144. "PAD" (Psychiatric Advance Directive) and "MHAD" (Mental Health Advance Directive) are generally synonymous terms. *See, e.g.*, *Advance Directives for Mental Health Care*, ST. OF N.J. DEP'T OF HUM. SERVS., www.nj.gov/humanservices/dmhas/forms/Advance%20Directives/Advance_Directives_Hosp_Training.pdf [https://perma.cc/27QJ-MGJR]. For purposes of this discussion, PAD will also mean MHAD.

145. National Resource Center on Psychiatric Advance Directives, *FAQs*, www.nrc-pad.org/faqs/do-all-states-specifically-have-pad-statutes [https://perma.cc/2CYY-A8N6].

146. FLA. STAT. § 765.306 (2017),) http://www.leg.state.fl.us/statutes/index.cfm?mode=View%20Statutes&SubMenu=1&App_mode=Display_Statute&Search_String=advance+directive&URL=0700-0799/0765/Sections/0765.306.html [https://perma.cc/SZ5V-WZ9S].

147. Bruce J. Winick, *Client Denial and Resistance in the Advance Directive Context: Reflections on How Attorneys Can Identify and Deal with a Psycholegal Soft Spot*, 4 PSYCHOL. PUB. POL'Y & L. 901, 903 (1998).

148. Breanne M. Sheetz, *The Choice to Limit Choice: Using Psyciatric Advance Directives to Manage the Effects of Mental Illness and Support Self-Responsibility,* 40 U. MICH. J. L. REFORM 401 (2007).

149. Pope John Paul II, EVANGELIUM VITAE 19 (1995).

PADs represent a truly unique expression of that choice and freedom. They acknowledge the unique nature of every human being and encourage individuals to express and defend that uniqueness without worry of submitting to societal norms that may seem concerned with little more than offering expedient solutions to complex problems."[150] PADs thus offer an example of the strength of individual advocacy in the face of what may seem to be presupposition and convention.

PADs provide a useful example of planning, which is the result of reasoned individual choice and freedom. When allowing a person the ability to influence future treatments and outcomes, the individual is likely making such decisions based on previous experience and knowledge. It is choice based, not on unfettered introspection, but one that weighs the impact of actions previously tried and taken. The choices may encompass and include, for example, the effect a particular treatment protocol had on the client/patient and how that choice impacted the client, the client's family, and the client's ability to live and interact with his or her community. Carefully crafted PADs are thus the result of careful and measured reflection and retrospection.

A significant expression of such reflection and retrospection is the *Ulysses Clause*[151] which records the competent patient's "consent to [the] treatment and cannot be revoked by the patient during [his or] her incompetence[,]"[152] providing those individuals with a personal and unique means of empowerment. By their very nature, PADs generally, and Ulysses clauses, specifically present the estate planner with an array of new challenges and considerations. Should PAD planning be allowed to prospectively influence health care related decisions, some of which are irrevocable in nature, which some may construe as posing a challenge to the state's power to protect its citizens?[153]

A preliminary answer to that question can be found by considering Jane's story. Jane was diagnosed with a bipolar disorder and obtained treatment.[154] Her story continues:

> After recovering from the episode, declaring bankruptcy, rebuilding relationships with family and friends, finishing

150. *Id*. (St. John Paul describes this struggle as one between those perceived to hold positions of power, imposing their will on the weak and defenseless.).

151. *Authorizing Treatment Over Your Objection "The Ulysses Clause",* VA. ADVANCE DIRECTIVESDIRECTIVE, http://www.virginiaadvancedirectives.org/ulysses-clause.html [https://perma.cc/KUU3-PE2J].

152. Roberto Cuca, Note, *Ulysses in Minnesota: First Steps Toward a Self-Binding Psychiatric Advance Directive Statute,* 78 CORNELL L. REV. 1152, 1153 (1993).

153. *See generally* Douglas S. Diekema, *Parental Refusals of Medical Treatment: The Harm Principle as Threshold for State Intervention*, 25 THEORETICAL MED. 243 (2004).

154. Sheetz, *supra* note 147, at 401.

> college, and returning to work, Jane decided that she never again wanted the illness to control her life. Unfortunately, she knew it was likely that, if she became manic again, she would experience the same loss of judgment and insight that had prevented her from seeing the truth about her condition the first time. Jane strictly adhered to her treatment plan, taking her medication and visiting her psychiatrist regularly. However, she still had a nagging fear that it would happen again. To allay her concern, she executed a psychiatric advance directive, a legal document that enabled her to plan her mental health treatment in advance. In Jane's case, she gave prospective consent to hospitalization and medication for future manic episodes.[155]

A PAD offered Jane the opportunity to use advance planning as a means to avoid a recurrence of an existing disability or condition.[156] Through its use, Jane was able to *choose* and gain some certainty over the impact of her future treatment. Jane's story thus becomes a useful example of empowerment leading to the good result.

Notwithstanding the foregoing, it may be difficult for the elder law attorney to appreciate how the PAD bears relevance to the day-to-day law practice. Such perception must be tempered by identifying who might benefit from PAD planning.[157] Understanding and accepting a broader based definition of disability[158] makes it easier to understand how PADs might achieve a "good result" on behalf of a greater portion of the population.

Consider the lawyer who meets with the elderly client who has been diagnosed as having Alzheimer's disease. In these cases, PADs can offer the individual a unique sense of empowerment, helping create a sense of shape and order over a future that seems laden with fear of the unexpected:[159]

> There are a number of predictable future decisions that Alzheimer's disease patients and their families can antici-

155. Sheetz, *supra* note 147, at 402.

156. Sheetz, *supra* note 147, at 405.

157. *See* Bruce J. Winick, *Advance Directives Instruments for Those with Mental Illness*, 51 U. MIAMI L. REV. 57 (1996).

158. The National Alliance on Mental Illness website defines a mental health condition as one "that affects a person's thinking, feeling or mood. Such conditions may affect someone's ability to relate to others and function each day." *Mental Health Conditions,* NAT'LNATIONAL ALLIANCE ON MENTAL ILLNESS, https://www.nami.org/Learn-More/Mental-Health-Conditions [https://perma.cc/7DDF-PTFM].

159. Lisa Brodoff, *Planning for Alzheimer's Disease with Mental Health Advance Directives,* 17 ELDER L.J. 239, 242 (2010).

> pate and make either while the person with the disease is at an early stage or even when no diagnosis has yet been made. By advising clients on these decision points and helping them draft these anticipatable decisions into MHADs, attorneys working with other care providers *can go a long way towards empowering both people with Alzheimer's disease and their families and caregivers to retain control over their future, even at the most out of control point of this illness*.[160]

These goals comprise the essence of *PAD planning*: (1) assist clients facing the challenges of mental disability to obtain treatment, (2) manage their future, and (3) participate in thoughtful decision-making when they can do so and not currently in need of such treatment.[161]

Such concerns invite us to recall the goal and impact of the good result. In seeking to achieve the good result on behalf of a client, the lawyer seeks to ensure that his or her representation protects the client's right to exercise reasoned choice and free will. Those goals are often difficult to achieve. Practitioners may be tempted just to retrieve their state's approved PAD form and work through the process of filling in the blanks with their client. While that process may alleviate concern about individual treatment choices and offer protocols for providers, it may not address concerns that such choices pose potential harm to the client. Accordingly, in almost all cases, the preparation of a PAD that achieves "the good result" will be the result of client-specific analysis and drafting. Adopting that approach and mindset may prove helpful should bedrock enforceability ever be questioned.

Enforceability is an issue that both client and lawyer must consider.[162] When operating as designed, PADs evaluate past decisions, questioning the

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160. *Id*. at 242. (emphasis added).

161. Appropriately empowering an individual who may require specific psychotropic treatment or therapy at some point in the future to designate a surrogate to help with that decision-making when the principal client cannot serve a useful and important purpose. It certainly may prohibit the administration of controversial treatments or the adoption of courses of action the principal might not choose, for good reason, if he or she had capacity.

162. Perling notes,

> At its core, the right to refuse psychiatric treatment is based on the same values of autonomy and self-determination as the right to refuse treatment generally. But the right to refuse psychiatric treatment generates greater controversy. For example, although the right to die gets more attention, the right to refuse psychiatric drugs is more contentious. Both concern a right to refuse highly intrusive interventions. The right to die, however, is ironically less regulated than the right to control one's mind.

extent they should be allowed to influence decisions yet to be made. This concept is somewhat unique to traditional estate planning. For example, so long as an estate plan complies with jurisdictional requirements regarding design, execution, and capacity, lawyers can be fairly sure that the documents they prepare will be ambulatory and effective at the client's death.[163] It is not even necessary that beneficiaries agree with the result of the plan. The testator's intent receives paramount deference and respect.

Such assurance does not always exist in PAD planning.[164] Issues may exist concerning enforceability and to what extent the state, whether through the police or *parens patriae* power, should, or ought to be able to, influence the effect and effectiveness of the PAD.[165] Even more challenging

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> This may be due, at least in part, to judges' attitudes toward mental health patients, to the extent their attitudes reflect society's.

Lester J. Perling, Comment, *Health Care Advance Directives: Implications for Florida Mental Health Patients,* 48 U. MIAMI L. REV. 193, 198 (1993).

163. For example, FLA. STAT. § 732.503 provides that a will "may be made self-proved at the time of its execution," making a will execution challenge very difficult, and increasing the likelihood that the will will attain admission during the Probate administration process. FLA. STAT. § 732.503 (2017).

164. Some commentators have suggested that PADs achieve results diametrically opposed to the "good result:" Sheetz notes,

> [S]ome critics argue that psychiatric advance directives enable coercion of individuals with mental illness by various actors, including healthcare providers, proxy decision-makers and the state. Rather than encouraging individuals with mental illness to make their own decisions, advance directives could be used to force them to submit to treatments that they do not want.

Supra note 147, at 406-07 (footnote omitted).

165. This concern highlights an unsettled and developing issue, namely to what extent should individuals have the right to refuse psychiatric treatment. The genesis of this issue rests with the belief that the state, through its parens patriae power has been found to have an interest in overseeing the parameters and effects of the principal's delegation. Elizabeth M. Gallagher notes,

> [N]otwithstanding the 'massive curtailment of liberty' inherent in an order of civil commitment, an involuntarily committed psychiatric patient retains a fundamental albeit qualified right, based on the due process clause of the Fourteenth Amendment, to avoid unwanted treatment with antipsychotic drugs. Although the court indicated that this right may be overridden in situations where the state's interests in providing treatment are sufficiently compelling, it strongly suggested that the state's interests would prevail only where the failure to mediate would result in an immediate danger to the patient or to others. Furthermore, the court held that even where the state's interests are deemed to prevail, the involun-

is the fundamental question considering the extent to which the patient/client should have the right to influence such future treatment decisions.[166]

While such analysis often concerns itself with involuntary commitment (issues which will not impact every client), the tension between individual choice and a third party's perceived interest in offering *protection* exists to some extent in every client interaction which results in the creation of a PAD.[167] The elder law attorney must be mindful of these issues in striving to attain a good result for the client.

> tary administration of antipsychotics must constitute the 'least intrusive means' of achieving the state's lawful objective.

Elizabeth M. Gallagher, *Advance Directives for Psychiatric Care: A Theoretical and Practical Overview for Legal Professionals*, 4 PSYCHOL., PUB. POL'Y & LAW 746, 759 (1998) (underscore added) (citations omitted).

166. Elizabeth M. Gallagher writes,

> Almost invariably, the legislative response urged by providers and family advocacy organizations has been to further tighten the coercive rein on individuals in need of mental health treatment. In contrast, the alternative approach of enhancing the quality and availability of noncoercive treatment options has rarely received serious consideration. This is a rather curious finding in view of the significant number of mentally ill persons generally regarded as "treatment resistant" who express not so much their opposition to treatment *per se* but rather their aversion to the depersonalization and total loss off control that frequently accompanies the treatment process. Implementation of an alternative service model based on individual choice traditionally has been regarded as impossibly idealistic because acute episodes of mental illness are so frequently characterized by a loss of competent decision-making ability.

Id. at 747 (citations omitted).

167. The effect of existing statutory authority or local practice which could thwart client intent and perhaps, best interests must be evaluated. The possibility, given the nature of treatment prohibition or directive, that such wishes may not be honored, should also be considered. Engaging in such analysis is crucially important because some PAD statutes allow doctors to override treatment request that they deem inappropriate. *See* Jeffrey W. Swanson, S. Van McCrary, Marvin S. Swartz, Eric. B. Elbogen, & Richard A. Van Dorn, *Superseding Psychiatric Advance Directives: Ethical and Legal Considerations*, 34 J. AM. ACAD. PSYCHIATRY L. 385 (2006). Moreover, the Washington Involuntary Treatment Act

> requires a 'compelling state interest' to justify the nonconsensual administration of ECT or antipsychotic medication, even in the case of an incompetent patient. However, the statute significantly expands the inventory of 'compelling' state interests that will override an individual's right to choice: In the case of treatment with antipsychotics, such an interest purports to be found where the failure to medicate 'may result in a likelihood of serious harm or substantial deterioration or substantially prolong the length of involuntary commitment . . . '

Several scenarios have been suggested where health care providers might consider overriding a medical advance directive:

> (1) when there are good reasons to doubt that the advance directive accurately reflects what the patient would have wanted; (2) when the moral authority of the advance directive is questionable due to conflict with important current interests of the patient and/or changes in the patient's personal identity; and (3) when the interests of persons other than the patient warrant overriding the directive.[168]

The possibility that provisions in an appropriately executed PAD could be overridden is troubling, and the case which joins many of those issues is *Hargrave v. Vermont*.[169] *Hargrave* considered the plaintiff's challenge of Vermont's "Act 114," which established an additional procedure for overriding durable powers of health care for individuals who had been committed or imprisoned.[170]

Hargrave had been hospitalized several times for treatment of paranoid schizophrenia. "[S]he was twice the subject of proceedings for involuntary medication,"[171] having been administered such medication over her objection in a non-emergency situation.[172] Subsequently, Hargrave executed a durable power designating a guardian in the case of incapacity and refusing

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Id. at 768.

168. Swanson, *supra* note 166164, at 387.

169. Hargrave v. Vermont, 340 F.3d 27 (2d Cir. 2003).

170. The court stated,

> Under Act 114, health care professionals may petition in family court for authority to medicate involuntarily individuals who have been civilly committed or prisoners who have been judged mentally ill. When the proposed involuntary medication would contravene patient's validly executed DPOA, Act 114 requires the court to suspend judgment until the patient has been treated (or not treated) in accordance with his DPOA for a period of 45 days. If the court concludes that, after 45 days, the patient "has not experienced a significant clinical improvement in his or her mental state, and remains incompetent," the court may proceed to determine whether he should be involuntarily medicated according to the factors otherwise relevant under Act 114, with no further regard for his DPOA. (citations omitted).

Id. at 31.

171. *Id*.

172. *Id*.

the administration of a variety of treatments.[173] She then sued the state of Vermont, the Vermont Department of Developmental and Mental Health Services, and its Commissioner.

The appellate court ultimately upheld the district court's finding that the plaintiff class suffered injury.[174] In so ruling, the court considered the definition of a "qualified individual" under the Americans with Disabilities Act and the Act's provision of "qualification standards," which analyzes whether an employee or potential employee poses a direct threat to the health or safety of others in the workplace.[175] In offering such analysis, the court acknowledged the need for an *individualized and objective* determination of the extent to which an individual poses a danger to himself or herself.[176]

Hargrave offers unique and helpful insight as lawyers attempt to achieve the good result during PAD planning. Documents reflecting a client's reasoned free will are crucial components in the development of every estate plan. Throughout the planning process, the lawyer must have continuing and demonstrable confidence that he or she has achieved the necessary *connection* with the client so as to ensure that the lawyer's work product clearly reflects the client's goals and wishes. While the ease of achieving that connection will vary client by client, the lawyer must always be certain it exists before concluding the representation. It is only then that the lawyer can be confident the client's voice has been incorporated into the plan.

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173. Specifically, Hargrave refused the administration of "any and all anti-psychotic, neuroleptic, psychotropic, or psychoactive medications." *Id*. at 32.

174. The court had subsequently certified a class to consider the issues raised by the *Hargrave* litigation. *Hargrave*, 340 F.3d at 39.

175. *Id*.

176. The court noted,

> It is unclear whether the "direct threat" defense applies outside the employment context. Even if it does, however, we agree with the district court that the defendants have not met their burden of demonstrating that each and every patient subject to Act 114 necessarily poses "a direct threat to the health and safety of others" sufficient to exclude them from the protection of the ADA. First, the state court's legal determination of dangerousness can be based on a finding that the individual merely poses a danger of harm to "himself," whereas the "direct threat" defense requires the person to pose a risk of harm to *others*. Further, the state does not make an individualized and objective determination of the danger posed by a particular patient at the time it *abrogates* her DPOA. Between the time a patient's commitment order is entered and the time her DPOA may be abrogated . . . many factors may affect the level of danger the patient poses, including, most notably, the fact of commitment itself.

Id. at 36 (citations omitted).

Identifying free will and capturing the client's voice becomes even more crucial during PAD planning. Understanding as precisely as possible the reasons and rationale for the client's treatment choices and care preferences will help create a PAD that offers a voice that must be heard, considered, and respected, not one that offers a direct threat. Evidence of thought and reflection is what differentiates the document from being an accurate reflection of one's *psychological soft spot* to one that conceivably could be construed as masking or ignoring a *direct threat*.[177] PADs, which display a reasoned understanding of the basis upon which treatment choices and decisions are made, seem less likely to generate the suggestion of *serious harm*.[178] Lawyers should work with their clients to ensure that desired result is achieved.

Continuing our comparison of a PAD with traditional estate planning identifies relevant benchmarks that the lawyer may use when offering the client counsel and guidance. A will seeks to transfer property following a client's free will and desire. The testator's intent is honored throughout the will preparation process so long as the document is properly executed and not the product of duress or undue influence.[179] In the same way, a client's wishes and desires outlined in a PAD should be viewed as a legitimate ex-

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177. Wessles articulates the constitutional issue inherent in enforcement when she notes,

> It is recognized however, that where an agent is exercising an individual's right to direct health care, 'safeguards' may be effectuated by states in light of the states' interests, such as the preservation of human life and guarding against abuse by surrogates. At the same time, the delineation between an appropriate 'safeguard' and an illegal restriction of a patient's autonomy is a boundary that warrants close examination when the decisions of an agent, or the authority of the principal to delegate decisions to the agent, are restricted by state statute.

Carol J. Wessels, *Treated with Respect: Enforcing Patient Autonomy by Defending Advance Directives*, 6 MARQ. ELDER'S ADVISOR 217, 222 (2005) (footnotes omitted).

178. Brodoff notes however, that clients without history of

> schizophrenia, bipolar disorder, or severe depression, will be much less likely to have had a history of refusing to take medications or seek treatment, delusional behavior, criminal conduct, fractured family relationships, homelessness, or flagrant spending. Because of this, family and provider relationships will likely still be intact at the time of the making of MHAD decisions, thus resulting in a more trusted, well-thoughts-out document and a higher likelihood that the decisions made will be respected and followed.

Brodoff, *supra* note 158, at 255-56.

179. *See generally* STEWART STERK & MELANIE LESLIE, ESTATES AND TRUSTS: CASES AND MATERIALS 213-14 (5th ed. 2015).

pression of intent and honored as long as the proposed document does not advocate procedures or treatments that are inappropriate or the result of duress or undue influence.

In the Matter of Rosa M., a Patient at Manhattan Psychiatric Center[180] offers helpful guidance as a practitioner reflects on these issues. In this decision, the Manhattan Psychiatric Center (MPC) sought an order authorizing the administration of electroconvulsive therapy (ECT) to Rosa M. Rosa had been involuntarily hospitalized at MPC and had undergone three courses of ECT. At the time the order was sought, Rosa lacked the capacity to make a reasoned treatment decision.[181]

Rosa previously authorized the delivery of ECT treatment. Her consent was in writing and countersigned by a doctor who reportedly explained the nature and purpose of ECT. Approximately thirty days later, Rosa signed a writing wherein she withdrew her consent to ECT and in fact indicated that she was "refusing any more treatments with this procedure."[182] On the same day, she signed another writing which stated, "I do not wish to be approached regarding consent to electroshock therapy without my attorney from Mental Hygiene Legal Services being present."[183]

The court found no evidence to suggest Rosa's capacity diminished between her election and subsequent withdrawal of the consent form. Rosa's right to refuse treatment was therefore upheld, the court noting:

> The fundamental right of individuals to have final say in respect to decisions regarding their medical treatment extends equally to mentally ill persons who are not to be treated as persons of lesser status or dignity because of their illness. Absent an overriding State interest, a hospital or medical facility must give continued respect to a pa-

180. *In re* Rosa M., 597 N.Y.S.2d 544 (N.Y. App. Div. 1991).

181. The court noted,

> Regulations of the Department of Mental Hygiene permit authorized facilities to administer ECT to a patient only upon the informed consent of the patient or a person authorized to act on the patient's behalf after a full and comprehensive disclosure of potential benefits and the potential of harm. . . . Authorization for ECT is needed from a spouse, parent, adult child or court of competent jurisdiction in the case of an adult patient who . . . lacks sufficient capacity to given consent.

Id. at 104.

182. *Id*. at 105.

183. *Id*.

> tient's competent rejection of certain medical procedures even after the patient loses competence.[184]

Rosa did not pose a direct threat to others. To the contrary, she was empowered to make treatment choices responsive and relevant to her own condition and situation.

Rosa's decision highlights a quandary lawyers practicing in this field will almost certainly encounter at some point during their practice. What is an appropriate response to the client who wishes or explicitly condones treatment protocols (or the withdrawal of same) which will result in measures likely to cause grave and irreparable physical or psychological harm? What if these actions condone euthanasia or assisted suicide contrary to the lawyer's moral, ethical, and religious beliefs?

Resolution of this issue has been the subject of spirited academic debate and discussion, the substance of which will not be repeated here.[185] However, by advocating a Thomistic based decision-making process as clients work through the issues presented in this area of estate planning, this essay adopts and supports the view that lawyers must commit themselves to assisting their clients find and then achieve the good result. The lawyer plays a crucial role in this planning process, and must shoulder responsibility for the ultimate effect of the planning documents he or she brings into existence.[186] And if such documents lead to an evil result, the lawyer must understand that he or she may have materially or formally cooperated in the

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184. *Id*. at 104-05. (underscore added) (citations omitted).

185. *See* Teresa Stanton Collett, *Speak No Evil, Seek No Evil, Do No Evil: Client Selection and Cooperation with Evil*, 66 FORDHAM L. REV. 1339 (1998).

186. The "business justification" for types of representation that might give the lawyer some "pause" is dealt head on by Collett when she states:

> The argument of 'if I don't, somebody else will' is also unavailing under the Christian conception of lawyering. This argument substitutes unknown (and unknowable) actions of others for the difficult moral analysis of reasonably foreseeable effects of accepting the representation. Such reasoning unrealistically minimizes the inherent danger to the lawyer's spiritual well-being from representation of those with evil intent or objects and maximizes the potential good to be achieved through the lawyer's influence on the client. While it is permissible to consider both the possible consequence that the Christian lawyer will influence the client to abandon the evil intention or objects, and the possibility that another lawyer will not seek to exert such moral persuasion, the analysis of double effect does not begin or end there. The error inherent in the statement 'if I don't, somebody else will' is that it is offered as both the beginning and ending of moral analysis.

Id. at 1361.

creation of such evil effect.[187] That is why striving to achieve the good result, on behalf of the client, is critical and essential.

Responsibly representing a client, in whom the lawyer has disagreement, requires that the lawyer make a series of decisions that ultimately affect the scope of his or her representation. From the outset, it is important to understand that uniform and consistent agreement with a client is not a necessary prerequisite to representation.[188] That is why the lawyer often must assume the role of counselor and teacher. And when the lawyer perceives client thought and action that may lead to impermissible or evil results, the lawyer cannot and must not cooperate with such thinking, but offer the client ways and alternatives designed to achieve *the good result*.[189]

As has already been demonstrated in this discussion, achieving the good result (and thus avoiding evil), on behalf of a client, requires the lawyer's significant and focused effort. This effort must begin by assuring that the client has sufficient capacity to absorb and ultimately accept the lawyer's recommendations and counsel.[190] While the issue of client capacity is

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187. Collett provides the underpinning for such action by noting,

> In considering whether to accept representation, the lawyer must identify actions that representation would require, and determine that the acts required of the lawyer are good, or at least morally neutral. Representation that requires the lawyer to advocate the performance of evil acts, or the total disregard of religious obligations, or the irrelevance of religious beliefs, results in evil acts by the lawyer.

Collett, *supra* note 183181, at 1359.

188. "Legal advice often involves unpleasant facts and alternatives that a client may be disinclined to confront. In presenting advice, a lawyer endeavors to sustain the client's morale and may put advice in as acceptable a form as honesty permits." R. REGULATING FLA. BAR r . 4-2.1 cmt. (2017).

189. Coughlin provides justification for this approach noting,

> When a lawyer's perspective is limited to realism alone, however, there is little hope that the ideas of sacrifice and the common good will be honored. Standing apart from moral value, legal realism widens the gap between law and justice. It threatens to reduce the rule of law to a set of arbitrary legal commands that have no basis in justice. Such a reduction is not consistent with the common good. In light of the Aristotelian-Thomistic claims about human nature, a lawyer who limits his or her legal analysis to the realist approach detracts not only from the common good, but poses a danger to self.

Coughlin, *supra* note 56, at 17.

190. Flowers and Morgan observe,

> The client capacity determination should be made while considering whether the client has capacity to retain the attorney and make sound le-

more traditionally applied to situations involving individuals, who as a result of cognitive or physical challenges may pose a danger to themselves, a capacity assessment should be part of *every* client interaction.[191] The lawyer has a responsibility to ensure that the decision the client makes is reasoned and the result of free will. While that determination is helpful when introducing clients to tax planning or asset protection strategies, it is crucial when considering end of life decision-making.

But, what if the client insists on placing provisions in his or her PAD (or advance directive), which if followed would ultimately result in deprivation of or elimination of personal liberty, euthanasia, or assisted suicide? The lawyer in those cases must anticipate the likely result of those provisions, clearly identify and explain the inherent evil to the client, and attempt responsive and perhaps even protective action on the client's behalf.[192] The

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> gal decisions. Thus, the attorney must understand capacity issues to effectively represent the client, and be knowledgeable enough to fulfill her obligation to the client in strict accordance to the rules and standards set forth in Model Rule 1.14.

Flowers & Morgan, *supra* note 38, at 130-31.

191. Comment 6 to Model Rule 1.14 seems to suggest a protocol every lawyer should adopt during client interaction when it observes:

> In determining the extent to the client's diminished capacity, *the lawyer should consider and balance such factors as: 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 know long-term commitments and values of the client*.

MODEL RULES OF PROF'L CONDUCT r. 1.15 cmt. (AM. BAR ASS'N 1983) (emphasis added).

192. Muise explains such imperative by noting,

> [M]orality has three sources: (1) the object chosen; (2) the end in view or the intention; and (3) the circumstances of the action. The object chosen is the "matter of the human act . . . the act of the will. Some objects are intrinsically evil. In comparison to the object, the intention resides in the acting subject . . . . The intention is a movement of the will toward the end: it is concerned with the goal of the activity. However, ends do not justify means; '[a] good intention . . . does not make behavior that is intrinsically disordered, such as lying and calumny, good or just. And finally, the circumstances are 'secondary elements a moral act.' The circumstances can increase or diminish the moral goodness of an act . . . or the responsibility of the actor. However, circumstances cannot change an evil act into as good act. *Thus, a 'morally good act requires goodness of the object, of the end, and of the circumstances together.' An objectively evil act, such as adultery or murder, cannot be spared by good intentions. When faced with an ethical decision, Catholic lawyers must seek to find the true, objective good."*

specific parameters of such action will vary in each client interaction but may include additional attempts at counseling, and with the client's consent and authorization, involvement of other professionals (and perhaps even family). Regardless of approach or strategy, the ultimate goal must be that of persuading the client to change his or her original intent and adopt a good result.[193]

Is taking such action interjecting the lawyer's moral or religious beliefs? Assuredly so, and some commentators would disagree with such action or approach.[194] But to act in any other way implicitly relegates the law and its inherent goal of identifying and then defending actual, objective good, to an optional pastime. That cannot and must not be the aim of a society that seeks to achieve justice and avoid evil, or the lawyers who take an oath to achieve that result.[195]

Suppose, however, the client persists, notwithstanding the lawyer's sincere attempts to the contrary, in pursuing an approach within his or her medical treatment or estate plan that has consequences to which the lawyer cannot subscribe? In those instances, the lawyer is faced with no other option but to withdraw representation.[196] It is simply not possible to rationalize that the lawyer is simply doing what the client *wants*. Ultimately, the lawyer must be faithful to his or her oath and the objective, good result.

Consider for example an elder who has received an Alzheimer's diagnosis. Development of a PAD that *empowers* will provide the elder comfort that future, prospective treatment, and care decisions will be consistent with that elder's life experience and future expectations. To achieve such level of empowerment, the lawyer should encourage a focus on matters that rein-

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Muise, *supra* note 41, at 779 (emphasis added).

193. The lawyer in this situation has a responsibility to counsel and teach. Lawry notes,

> It is in the lawyer's office that the fullest integration of good lawyer and good person occurs. Here, the lawyer is called upon to help another person or persons accomplish something; to avoid trouble, extricate themselves, exercise the rights of free persons. The lawyer explains, expands, cajoles, debates. This is the place for the moral dialogue between and among autonomous persons to occur.

See generally Robert P. Lawry, The Central Moral Tradition of Lawyering, 19 HOFSTRA L. REV. 311, 353 (19901991).

194. Bruce A. Green, *The Role of Personal Values in Professional Decisionmaking*, 11 GEO. J. LEGAL ETHICS 19, 56 (1997) (that personal conscience plays only "a supporting role" in the decision-making process).

195. Meringolo, *supra* note 35, at 1090 (arguing for the need to place "an emphasis on character and the common good, into dialogue with the rules of professional conduct.").

196. Collett, *supra* note 183, at 1353.

force the elder's lifelong values and express a sense of community and legacy. For example, the elder should be afforded the opportunity to express his or her views and values concerning home placement, caregivers, and use of assets necessary to manage and pay medical and nursing costs.[197] Such decisions will transform the PAD, just as the will, into an *instruction directive,*[198] a critical distinction for elders striving to retain some degree of control over circumstances that appear frightening and unavoidable. Lawyers can influence these outcomes by rethinking concepts that currently reside in their estate planning toolbox, and by preserving the client's interests thereby ensuring that decisions made reflect free will and intellect.[199] Bias and supposition which suggests or argues someone or something *better* will serve the client should be avoided, and if necessary, opposed.

Suggesting the elder client focus on developing a *Personal History and Care Values Statement* within a PAD may prove helpful.[200] The process involved in creating such statement may assist the elder understand the

197. For example, a PAD form, which can be found on the website of the Bazelon Center for Mental Health Law provides an extensive instructions list in which the client can set forth a wide variety of preferences regarding care, treatment, and emergency intervention. *Physiatric Advance Directives Template*, BAZELON CTR. FOR MENTAL HEALTH L.LAW, http://www.bazelon.org/wp-content/uploads/2017/04/PAD-Template.pdf [https://perma.cc/N3FW-SZ5J].

198. Kohn makes the following distinction between the instruction directive and the health care proxy by noting "An individual may exercise his or her liberty interest in making healthcare decisions through either mechanism. In the instruction directive, the individual specifies what should be done, whereas in the health care proxy, the individual delegate this authority to another." Kohn, *supra* note 69, at 75.

199. Clients, especially the elderly, present their lawyers with facts that are often "puzzling." The job of the elder law practitioner is to help the client "put the puzzle together within the bounds of the law." *See generally*, Salvatore Di Costanzo, *To Properly Advise Your Clients, You Need a Bucket List*, *in* INSIDE THE MINDS: ELDER LAW STRATEGIES IN NEW YORK 111-29 (2014).

200. Brodoff notes,

> Given what we know about current practices for care, this Article suggests that all MHADs have an introductory section that sets out who the client is, his or her work history, important past and present relationships, interests and values. This allows clients the opportunity to express who they are and what is important to them for a future time when they know that will be unable to do just that. This section of the MHAD will give future care providers more information about the person they are serving, allowing for better and quicker responses to needs. By knowing and understanding the person before them, caregivers can more easily develop a relationship with their patient by connecting on a more person level. Better relationships result in higher quality of care—the more individuals like the people with whom they work, the more attentive those individuals are to the patient's needs.

Brodoff, *supra* note 158, at 260-61.

worth and value of the good result thereby preserving and expressing the fundamentals of a life well lived.[201] A Personal History Statement crafted in this way may also seamlessly offer insight into the client's preferences and views in other critical areas, such as: in -home care, placements, and who might act as an appropriate surrogate.[202]

The nature and root of the client's preferences and views should be explored and understood. They may reveal sources of potential trouble (undue influence, asset interference) that can be proactively addressed while the client has the capacity and inclination to do so;[203] they may even encourage consideration of topics the client may not otherwise have considered, such as, a reasoned response to the possibility of potentially aggressive or inappropriate behavior.[204]

This is Jane's story revisited—an acknowledgment that situations clients may face will vary and evolve. Incorporating those issues into a PAD planning discussion with the good result, an overriding goal, may be challenging and emotional. Achieving same for a client may offer a sense of unanticipated peace and willingness to fight the good fight—a worthy goal of every estate plan.

the just man…keeps grace:

that keeps all goings graces;[205]

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201. This discussion has continually argued the importance of creating an environment where the elderly client is empowered to achieve a "good result." That result can only occur if the individual believes the estate plan is their own.

202. Brodoff, *supra* note 158.

203. *Id*.

204. Brodoff notes,

> The ability to plan in advance to avoid the use of sudden and involuntary commitment to receive care is one of the great advantages of a MHAD for people with up and down mental illness, and it has real potential for use for people with Alzheimer's disease . . . . A small percentage of Alzheimer's disease clients do become "predatorily aggressive," that is, they will, without provocation or reasoning, and despite good care protocols, hit or attack patients or providers. Alzheimer's disease clients can be advised of this unlikely possibility and decide in advance if they would like to plan for this if it does happen. For example, a person diagnosed early with Alzheimer's disease could be educated about the possibility of future combative or aggressive behavior and the types of care and treatment that tend to work best in that situation.

Brodoff, *supra* note 158, at 269.

V. CONCLUSION

Empathy and compassion, when understood and accepted, help develop a keen sense of perspective. Views, perceptions, and opinions can change, being influenced by experience and seasoning. The law and lawyering offer perhaps the greatest example of this process. Justice and equity, tempered by sound public policy, work in unison to alter, overhaul, or improve that which must be corrected. Great and transformational lawyers, regardless of their practice area, understand this process, adopting their counsel to meet the changing needs of their clients.

A clear example of this process occurs when one understands and then embraces empowerment especially as it relates to probate, estate planning, and elder law. This discussion has focused on the concept of *empowerment* and the ways in which lawyers can help and inspire a client to achieve a *good result* during the planning process. The meaning embedded in the words *"What I do is me: for that I came*," comes alive during such process, nurturing the bond that develops during the client-lawyer relationship. The challenge thus rests in connecting both portions of that sentence as the estate planning process continues.

What I do is me, emphasizes the uniqueness and humanity of every client. The challenges of every interaction in this area rests with an understanding that offering a client the opportunity to embrace empowerment and, thus, the exercise of reasoned choice truly provides entry into the human heart and its unbounded and continual desire to achieve the good result.

Achieving this process requires work and effort on the part of both client and lawyer, and this article has visited and revisited some of the challenges and opportunities inherent in incorporating the durable power of attorney, advance directive, and psychiatric advance directive into an estate plan. By thoughtfully considering these documents the planning process becomes collaborative as the lawyer assists the client develop an estate plan that allows the client to affirm at its conclusion *What I do is me*. By assisting his or her client understand and accept that affirmation, the lawyer has fulfilled his or her obligation to the client knowing that at some point in the future the effect and impact of the estate plan will allow the client and those who come after to affirm the sincerity and profundity embedded in the words *for that I came*.

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205. Gerard Manley Hopkins, As Kingfishers Catch Fire, Poetry FOUND.Foundation (1985), https://www.poetryfoundation.org/poems/44389/as-kingfishers-catch-fire [https://perma.cc/5PSQ-GCR5].

Helping the client complete the poet's sentence should be the goal of every representation that deals with empowerment. Achieving that goal will make all the difference now and for generations yet to come.