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Linda S. Whitton

Valparaiso University School of Law, linda.whitton@valpo.edu

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Re-examining Elder Law Practices: Reflections on Ageism

By Linda S. Whitton

Although ageism is among the red flag “isms” headlining this era of political correctness, it has yet to receive the same intensity of remedial attention given to racism and sexism. For example, derogatory labels ranging from “the incompetent elderly” to “greedy geezers” are bandied about in the popular print media where analogous racist or sexist descriptions would be unthinkable. In this climate of unprecedented race and gender sensitivity, what underlies such public tolerance for negative age stereotypes? Does society hold collective beliefs or unconscious biases about age that fuel ageism, and if so, how might such beliefs and biases influence the treatment of older individuals by the legal profession?

This article examines the origins and validity of common age stereotypes and reports some rather surprising evidence of ageism in the legal profession. The article concludes with guidelines for re-evaluating whether common professional practices may be unintentionally ageist.

Digging for the Roots of Ageism

Perhaps one reason ageism escapes public disfavor more easily than racism and sexism is that a person’s “age identity” is not as distinct as racial or gender identity. The targets of racism and sexism are clearly defined by racial and gender identities, whereas ageism targets the “old,” a nebulous group that eventually claims as members all human beings who do not succumb to premature

death. Because aging is a dynamic process, however, no bright line tests when one must forfeit membership in the “young club” and accept status among the old.

The struggle with age identity is evident in the media as well as in gerontological literature. Advertisements and books abound that tout products and philosophies promising to keep individuals looking and feeling younger longer. Although age 65 traditionally triggered the classification “senior citizen,” the increasing number of persons who are living well into their eighties and nineties has prompted gerontologists to further stratify age categories into the “old” and the “old-old.” Although “old” may escape a universally accepted definition, the definition on a personal level appears to be “someone who is older than I am.”

Pervasive public aversion to old age and aging is based largely on the “decline and failure” model of aging generated by the medical community during the first half of the 20th century. This view of old age as a period of inevitable mental and physical decline was the result of both changing perceptions about death and early research on the physiology and psychology of aging. Before significant advancements in sanitation and disease control, death was a common occurrence in all age groups. When mortality rates began to fall and more people survived to old age, a stronger association developed between aging and death. Most research on aging was conducted with elderly populations in nursing homes and state

mental hospitals, leading to the conclusion that the illnesses of the elderly were the result of natural deterioration and thus untreatable.

One of the most sensational examples of negative age stereotypes in the medical community is the farewell lecture delivered by Sir William Osler on the occasion of his departure from Johns Hopkins University in 1905. He titled his address “The Fixed Period,” after a novel by Anthony Trollope in which all persons over age 67 1/2 years were euthanized. Osler suggested that creative work should be left to those under age 40 and that all those over age 60 are useless and should retire. Another classic example of this sentiment is the work of Dr. George M. Beard, titled *Legal Responsibility in Old Age: Based on Researches into the Relation of Age to Work* (1874), in which he argues that the most productive potential in a man’s life is between the ages of 30 and 45 and that young men are better at original work because it requires enthusiasm, whereas older men are better at routine work that relies more heavily on experience.

Weeding Fact from Fiction

Not until the second half of this century did psychological and gerontological research begin to question the accuracy of the decline and failure model of aging. Early cross-sectional studies of intelligence, performed at a single point in time with individuals of different ages, concluded that although intelligence increases until adulthood and remains stable for about a decade, it begins a steady



Photography by George Fulton

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decline in a person's forties. Later longitudinal studies, which followed particular groups of individuals over a 20 to 30 year period, however, have refuted these findings. These longitudinal studies have shown that no significant decline in cognitive functioning occurs with aging for most older people. Instead, support is growing for the "terminal decline or drop" theory that cognitive decline is a function of close proximity to death rather than an integral consequence of aging processes.

The traditional medical view on physical decline and chronic disability in old age was that actual life expectancy had increased but "active" life expectancy, or expectancy of life without disability, had not. The general belief was that the chronic, non-lethal disabling diseases of old age could not be significantly prevented or delayed.

Nevertheless, study results recently released by the National Academy of Sciences indicate that there have been statistically significant declines in chronic disability rates among the elderly since 1982. The rate of disability in the population over age 65 in 1982 was 24.9%, compared to a rate of 21.3% in 1994. The study found that, of this overall rate decline of 3.6%, there was a 1.9% decline between 1982 and 1989 and a 1.7% decline between 1989 and 1994, indicating that the per year decline in disability prevalence has steadily increased. 94 Proceedings of the Nat'l Academy of Sciences of the USA, at 2593-98 (Mar. 1997). Consequently, although it remains true that chronic disability continues to plague a certain percentage of the elderly population, such disability is far from inevitable and appears to affect a gradually decreasing percentage of that population.

In general, modern gerontological research has demonstrated that the elderly, when defined as a group chronologically, are more heterogeneous than homogeneous. This conclusion is based on well documented findings that the degree and rate of aging vary among individuals without regard to chronological age, and that even within the same person, physiological and cognitive changes tend to occur at very different rates. As Dr. Robert N. Butler wrote in his Pulitzer prize-winning book, *Why Survive? Being Old in America* (1975),

there are great differences in the rates of physiological, chronological, psychological and social aging within a person and from person to person. In fact, physiological indicators show a greater range from the mean in old age than in any other age group, and this is true of personality as well. Older people actually become more diverse rather than more similar with advancing years.

Id. at 7.

Despite the growing consensus in research circles that generalizations based on the decline and failure model of aging are inaccurate, ageist stereotypes persist. Several theories attempt to explain the tenacity of ageism. One is that society's deep-seated fears of aging and death motivate negative age stereotypes. In other words, the more we picture old people as inadequate and impaired, the less we need to associate ourselves with the aged.

Another theory is that advocates for the elderly "need" the failure model of aging to attract support and funding for elder programs. Gerontologist Richard Kalish observed in his

article, "The New Ageism and the Failure Models: A Polemic":

The obvious difficulty with this model is that as soon as the failures become successes, the incompetents become competent and in need of fewer services . . . the advocates will lose their jobs.

19 *Gerontologist* 398, 399 (1979). Professor John McKnight, author of the book, *The Careless Society: Community and Its Counterfeits* (1995), echoes this concern. He writes:

[T]he economic use of classifying "oldhood" as a problem serves two purposes. The first is that it produces more service jobs by classifying old people as problems. Second, by the very act of classification it also defines old people as less productive or non-productive and diminishes their capacity to compete for jobs.

Id. at 31.

Ageism in Our Own Backyard

What impact, if any, has the decline and failure model of aging had on the legal profession? Is there evidence that inaccurate age biased generalizations have affected legislation, judicial decisions or client representation? A review of adult protection, guardianship and conservatorship statutes, as well as a random sampling of guardianship and conservatorship cases, yields surprising results. The standard used for assessing whether statutes and judicial opinions reflected ageist bias was whether old age was used unreflectively to explain or predict other characteristics of individuals rather

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than merely to describe their chronological ages.

In adult protective legislation, 12 states presently list "age," "old age" or "advanced age" as an independent basis for considering a person to be impaired, incapacitated, disabled or vulnerable and in need of protection. Likewise, 10 states still list "advanced age" as an independent basis for imposition of guardianship or conservatorship. At least 14 other states only recently repealed or amended ageist language in their guardianship and conservatorship statutes.

A random sample of guardianship cases reveals opinions in which advanced age was the only basis reported for imposition of the guardianship. Perhaps even more telling is the age biased rhetoric contained in some opinions. For instance, one judge wrote in a conservatorship case: "As all of us grow older, we gradually lose our faculties, both physical and mental. The longer we live and the older we become, the more we lose." *In re Citizens State Bank & Trust Co. of Hiawatha*, 601 P.2d 1110, 1115 (Kan. 1979).

Similarly, in an appellate decision affirming the imposition of a guardianship, a judge commented:

The trial judge admitted evidence of appellant's physical condition, including his heart problems, lung problems and failing eyesight into evidence over appellant's objection, saying that he wanted to get a "complete" picture of appellant. Evidence of appellant's physical condition was relevant to the issue of whether the necessity for the guardianship still existed. As a matter of common experience, a person's physical condition

directly relates to that person's mental condition, especially in cases of advanced age.

In re Guardianship of Stiver, No. CA89-12-017, 1990 WL 94245, at *1, 4 (Ohio Ct. App. July 9, 1990).

In another appellate decision upholding a guardianship procured without notice to the intended ward, the judge wrote:

Quite understandably, Mrs.S. resented a guardian being appointed for her property. She particularly resented the manner in which it was accomplished in that she had no notice of it until after it had been accomplished. Mrs. S., being in remarkably good

health and active, was resentful of the implication that she is unable to handle her affairs and like most people her age probably does not accept the fact that at her age she does not have the same memory that she had at an earlier age. . . . After hearing all of the evidence, I am of the opinion that due to the infirmities of old age, particularly forgetfulness, Mrs. S. is in danger of losing or dissipating her property and it would be in the best interest of Mrs. S. that the guardianship of her property be continued. . . .

In the Matter of L.P.S., C.M. No. 3793, 1981 WL 15481, at *2 (Del. Ch. Mar. 26, 1981).

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Even when the language in guardianship and conservatorship opinions was not overtly ageist, the bases for imposition of a legal surrogate often indicate underlying covert ageism. In *In re Estate of Wagner*, 367 N.W.2d 736, 739-40 (Neb. 1985), for instance, the court vacated a conservatorship because the only grounds supporting the lower court’s decision were the appellant’s advanced age, grief over her husband’s death and subtle undue influence.

Similarly, the Alabama Supreme Court reversed a limited conservatorship when the only evidence supporting the lower court’s judgment was that the appellant had mild depression and her siblings were concerned that she might waste her money. *Buffler v. Buffler*, 577 So. 2d 904, 905-06 (Ala. 1991).

Finally, in *Cummings v. Stanford*, 388 S.E.2d 729 (Ga. Ct. App. 1989), the court affirmed a lower court’s grant of a daughter’s petition for guardianship over her mother’s property even though the mother’s psychologist testified that he did not consider the mother to be incompetent and the grounds in support of the guardianship consisted merely of the fact that the mother had spent considerable sums of money since her husband’s death, including buying another house and paying for a five week vacation to Florida with her sons.

In each of the foregoing cases, it would be interesting to see how the results might have differed if all the facts had been the same except for the proposed ward’s age. Ageism is a particularly insidious practice when it operates based on unspoken beliefs and assumptions. Whether motivated by prejudice or paternalism, actions based on erroneous, age biased

stereotypes reduce an older person from an individual with unique attributes and personal aspirations to a caricature undifferentiated from all of society’s notions about what it means to be old. Because so many of these beliefs and assumptions may operate at a subconscious level, it is particularly difficult to judge whether and to what extent they may affect the way lawyers treat and represent older clients.

Re-evaluating Elder Law Practices

The following guidelines, although not comprehensive, may provide some assistance for practitioners in re-examining common professional practices for unintentional ageism:

1. Evaluate your personal attitudes and assumptions about old age and older clients. What role, if any, does the decline and failure model of aging play in these attitudes and assumptions? How do you feel about your own aging? What are your personal goals and aspirations and how do you expect these to change as you age? If you were your own client, how would you want to be treated by a lawyer?

2. Listen carefully to ascertain the older client’s true goals and objectives before formulating a plan for representation. Has the older client directly communicated these objectives to you or have you been briefed by the client’s adult children or other relatives? If other family members are involved, have you provided opportunities for private consultation with the client to determine whether the client really desires the services proposed?

3. Before counseling an older client about his or her options, consider whether your advice would be the same if the client were 30 years

younger. If not, why not? Are there options you have excluded without the client’s consultation? Would you have excluded the same options for a younger client?

Conclusion

By thoughtfully re-evaluating their own attitudes about old age and elderly clients, lawyers can help assure that ageist stereotypes do not become rebuttable presumptions against which the elderly must defend themselves to maintain the same rights and privileges in society as the young. Recognizing that elderly clients, when defined as a group chronologically, are more diverse than similar, does not foreclose the need for heightened sensitivity to those who may require traditional disability planning. To the contrary, clients of any age may suffer from mental or physical impairments that necessitate special legal representation. The lawyer who can view all clients, regardless of age, as individuals with unique needs will be best equipped to provide the effective and zealous representation that each client deserves.

Linda S. Whitton is a professor of law at Valparaiso University School of Law in Valparaiso, Indiana and is chair of the Probate Division’s (E-6) on Law Reform for the Elder Law and Disability Planning Group (E-6) Study Committee.