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# On Being Pleasant: Ethics in Estate Planning

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## CHAPTER 15

# On Being Pleasant: Ethics in Estate Planning

THOMAS L. SHAFFER\*

### Synopsis

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§ 1500 **Elwood P. Dowd's Moral Claim**

Elwood P. Dowd keeps company with a giant rabbit who is invisible to other people, and that fact sets Elwood apart. But Elwood copes with life better than most of the people he deals with, and manifestly better than the professional people who come into his life; on pragmatic grounds alone, Elwood makes a serious moral claim. In classical terms, he claims the virtues of friendship, prudence, and magnanimity.

This is about professional ethics in estate planning—about the morals, and the interesting moral questions, that come up in the lives of those who are paid to help other people work out the relationship between their things and the people they love, and to do that in reference to death.<sup>1</sup> I propose to match that agenda to the story of Elwood P. Dowd. I am arguing that the person to watch when you talk about ethics in the estate-planning practice is Elwood. I must first tell you who Elwood was; you will then remember him, if you don't already. He is much more important to us than Blackstone or Lord Coke.

Elwood Dowd was a close friend of the title character in Mary Chase's 1953 Pulitzer Prize play "Harvey."<sup>2</sup> The title character in the play was a pooka who was seven feet tall. Pookas are rabbit-like creatures. Elwood met Harvey on the street one night. It was late. Each of them had been drinking. Harvey was leaning against a lamp-post at 18th and Fairfax. They became inseparable companions.

It was not necessary for the producers of the play, or of the movie version of it, to employ an actor to be Harvey, since few in the cast and no one in the audience could see Harvey. That fact made it possible for Harvey to just be himself. Elwood P. Dowd was played by Jimmy Stewart in the movie, and by Art Carney on television. And it is Elwood, not Harvey, whom you want to watch when you talk about ethics in estate planning.

In the third act, Harvey was also seen by Elwood's psychiatrist, Dr. Chumley. Dr. Chumley tried to woo Harvey away from his relationship with Elwood. Dr. Chumley wanted Harvey to take him to Akron, Ohio, for a vacation. It was necessary to his melancholy purpose for Dr. Chumley to woo Elwood, too, and in doing that he revealed to Elwood that Veta, Elwood's sister,



had been moving heaven and earth to get Elwood committed, involuntarily, to the doctor's sanatorium, Chumley's Rest. Veta had sound reasons: Elwood insisted on introducing Harvey to her friends, who could not see Harvey, and to all potential suitors for her daughter's hand. This led to social isolation for Veta and Myrtle Mae, and they apparently couldn't get comfort from going to bars with Elwood and Harvey. They could not escape Elwood entirely, either—even if they wanted to—because Elwood's and Veta's mother had given the family fortune to Elwood.

Let me recall that scene for you. It is ethically significant:

"Mr. Dowd," the doctor said, "None of those people are your friends. I am your friend."

"And I'm yours," said Elwood.

"This sister of yours—she is at the bottom of this conspiracy against you. She's trying to persuade me to lock you up. Today she had commitment papers drawn up. She's got your power of attorney and the key to your safety box. . . ."

To which Elwood replied: "My sister did all that in one afternoon? Veta is certainly a whirlwind."

The doctor came to his feet, came around to the front of his desk, and said, "Haven't you any righteous indignation?"

At that point, Elwood makes his ethical claim; please listen carefully:

Dr. Chumley, my mother used to say to me, 'In this world, Elwood . . . you must be oh, so smart or oh, so pleasant.' For years I was smart. I recommend pleasant. You may quote me."

Elwood's ethic, being pleasant, was clear enough, I guess; but it was not simple. It brought him into considerable danger and—as any interesting ethic does—it caused suffering to other people. But, he said, being pleasant did more for him than being smart had done: It won him a host of friends; he introduced them to Harvey and invited them to come to his house for dinner with Veta, Myrtle Mae and himself. Being pleasant finally kept him from being committed to Chumley's Rest. It gave him peace and security: "I always have a wonderful time just where I am, whomever I'm with," he said. He should be the envy of accountants, bankers, and insurance underwriters. Even if you under-



stand professional ethics as a system for staying out of trouble, as lawyers tend to do, rather than as a system for being a good person, Elwood's ethic was successful; it kept him out of trouble. The movie version of the story ended with Elwood walking into the sunset, *away from* Chumley's Rest. He had his arm around his tall friend, who had left Dr. Chumley inside the rest home. And Elwood said to Harvey, "I prefer *you*, too."

Dr. Chumley did not have the consolations of Akron, after all, but only the consolations that all of us claim in professional life: "The function of a psychiatrist," he said—and we professionals all say this, I think—"is to tell the difference between those who are reasonable, and those who merely talk and act reasonably." The difference between Elwood and Dr. Chumley is that Elwood couldn't see a distinction between being reasonable and talking and acting reasonably.

In classical ethics you would say that Elwood P. Dowd's was an ethic of virtues.<sup>3</sup> He claimed, as Aristotle did, the central importance of the virtue of friendship; he understood, as Aristotle did, that social institutions rest on that virtue and on the virtue of prudence, what Aristotle called practical wisdom.<sup>4</sup> In order to function in his social institutions, Elwood also trained himself in the virtue of magnanimity—largeness of soul.<sup>5</sup> Judge Gaffney, who did the legal work on Elwood's commitment to Chumley's Rest, had known Elwood all of his life, and, the Judge said, "there was always something different about Elwood . . . . He was always so calm about any sudden change in plans. I used to admire it. I should have been suspicious. Take your average man looking up and seeing a big white rabbit. He'd do something about it. But not Elwood. He took that calmly, too." Which is to say that largeness of soul is not an easy virtue; you don't just *get* it; it's like jogging; you have to *train* for it.<sup>6</sup> The average person probably doesn't have it.

## § 1501 Those Who Dispute the Claim Talk About Getting the Job Done

Elwood's ethic is repugnant to many people who are solemn about their work in the world. They argue with Elwood. They often find it necessary to get Elwood out of sight, or, better, to give him something that will cause him to see things as they



do: They do this in practice *and* as a matter of sound professional education.

In the first act of the play, Dr. Sanderson, at Chumley's Rest, thinks that sister Veta is the crazy one. He has her captured and subjected to a warm bath. Veta thinks the people at Chumley's Rest are white slavers and directs her lawyer to sue them. Later Dr. Sanderson understands that Elwood is the crazy one, and he lets Veta out. He says, then, to Elwood, "The situation has changed since we met this afternoon. But I urge you to have no resentments. Dr. Chumley is your friend. He only wants to help you."

Elwood said, "That's very nice of him. I would like to help him, too."

Sanderson ignored that significant offer of help *from* Elwood—a point to which we must return—and said, "A cooperative attitude . . . [is] half the battle. We all have to face reality, Dowd—sooner or later."

Elwood replied, "Doctor, I wrestled with reality for forty years, and I am happy to state that I finally won out over it."

Dr. Sanderson didn't hear that, either. Professionals don't listen when the question is a question about reality. They are always ready to bring in the big guns—to win early and to win big—when there's a standoff on a question about reality. This is mainline, professional stuff. When professionals get ready to act, they don't need help from their clients: as Nurse Kelly says of Dr. Chumley, "He is a psychiatrist with a national reputation. Whenever people have mental breakdowns they at once think of Dr. Chumley."

In ethical terms, Dr. Sanderson is not interested in Elwood's claim to the virtues of friendship, prudence, and magnanimity. He is interested immediately in confining Elwood, so that he won't bother Veta and the Judge and Myrtle Mae, and then he is interested in giving Elwood a drug that will cause him to see the world realistically—no rabbit, no friends, no enjoyment in being where you are, no enjoyment in being with just anybody at all. Dr. Sanderson's patients don't see the world that way; they see it *realistically*. The ethical issue is clearly drawn in this scene. Dr. Sanderson claims that he understands reality; Elwood claims that he does, too, and that he has defeated reality.



The place I usually see this issue played out is, of course, in a law school, among those of us who claim to teach people how to serve clients who hope to save taxes and set up trusts and make their wills. Elwood's school of ethics concentrates on talking to such people. He would see clients as gifts rather than problems. He would tend to take the Internal Revenue Code with a sigh and a smile. He would maintain that appellate opinions are evidences of professional failure. Dr. Sanderson's school would be more solemn about the Internal Revenue Code; it would teach from appellate opinions because it believes that judges are especially important. The Sanderson school of legal education would talk a lot about traps for the unwary, pitfalls, improvident heirs, and spendthrift clauses. The Sanderson school of thought claims to face reality.

In fact, the Sanderson school faces a reality that people in the Elwood school—for all their rabbits—don't even see. There was an example of this in the play: Myrtle Mae asked her mother why her grandmother left all of the family's money to Elwood. Veta said, "Well, I suppose it was because she died in his arms. People are sentimental about things like that."

Myrtle Mae said that answer didn't make sense. "She couldn't make out her will after she died, could she?" Veta told her not to be didactic. "It's not becoming in a young girl, and men loathe it."

That is a familiar example of a Sanderson-like exchange, of an exchange that that goes on frequently in law schools. It has two layers. In one layer the elder says to the younger that the younger doesn't know what she's talking about. This layer is important in professional ethics because it is how professionals learn to treat their clients. The lawyers law students know best are law professors. There aren't any clients around for these lawyers to react with, so the students take the place of clients in the professor's world; they *are* the professor's clients. Students watch how professors treat students; that's how they learn to treat *their* clients. Often this treatment is the way Veta treated Myrtle Mae.

The other layer that is important here is a claim about what *realism* is. The persistent argument professionals have with Elwoodians is that friendship, prudence, and largeness of soul are



not realistic. Veta says that her mother favored Elwood in her will because Elwood was with her when she died. That would have to mean that, in this business of making wills, people somehow survive themselves: wills and trusts are a way not to die. That, say the old to the young, is realism. For all of their romantic softness, the Elwoodians never claim they know how not to die. Elwood said that Harvey could overcome time and space. He could stop the clock for you; "you can go away as long as you like with whomever you like and go as far as you like. And when you come back not one minute will have ticked by. . . . Einstein has overcome time and space. Harvey has overcome not only time and space—but any objections." But not even Harvey could overcome death. Only realists can do that.

### § 1502 The Issue, So Drawn, Is About Reality

The issue is the reality of professional life in estate planning; the reality of client life in estate planning; and the reality of life in families that are affected by estate planning. If you carefully contemplate all of that reality, there is something to be said for pookas.

### § 1502.1 The Reality of Professional Life

I think Dr. Sanderson has the ethical issue just right: we have to face reality. We Elwoodians concede that realism is the issue, and argue with the Sanderson party about what reality is. I suggest we do that in three steps:

- (1) the reality of who helps whom;
- (2) the reality of who corrupts whom; and
- (3) the reality of who serves his own selfish needs and who doesn't.

#### A. Who Helps Whom

In the play, Elwood helped the doctors: He turned Dr. Chumley's thoughts to a restful vacation, under a tree in Akron, with a pretty woman who would listen, and not talk, except to say to him, "Poor thing! Oh, you poor, poor thing." He got Dr. Sanderson to notice Nurse Kelly, and Nurse Kelly to get Dr. Sanderson's attention. He got Judge Gaffney, the lawyer, to look for



Harvey. The lesson of the story is that the client helped the professionals, just as he said he would—and I believe that is usually the story with us professionals. That *is* realism.

### **B. Who Corrupts Whom**

Some day, when you lawyers have an idle weekend afternoon, take the governing code of legal ethics for your jurisdiction—you can find it on your book shelf, right next to the Bible—and do an experiment in ethics: cross out all of the parts that warn you not to be corrupted by your clients—the parts that talk about clients who expect you to keep their dirty secrets; clients who want you to be on their side when it's not right; clients who want to cheat other people and lie to judges; clients who want to evade the imposition of justice, or of death, or of taxes. Cross those parts out; and see how much code you have left; see how much of our official ethic rests on the assumption that our really big moral problem in professional life is protecting ourselves from our vicious clients. I think you will conclude that our professional tradition teaches us that clients corrupt lawyers. I'm sure the same thing is true in the accounting profession and in banking. I'm not so sure about insurance; insurance people are, on the whole, Elwoodians—more comfortable with being pleasant than the rest of us are; and that means they see their clients as gifts rather than as threats.

### **C. Selfish Needs**

Now, take the part of the code that is left over from this experiment and notice how much of it has to do with *our* comfort, not our clients' comfort: the rules on confidentiality, with their exceptions for fee claims and charges against lawyers; the rules on conflict of interest, with their dependence on independent professional judgment; the rules on fees, on lawyer collaboration, and on appearances of impropriety. We professionals serve our own needs, whatever else we do. This is an awful moral situation, because it means we deceive ourselves about whose needs we serve. I think of what Joseph Conrad said about the profession of espionage: "When our appointed activities seem by a lucky accident to obey the particular earnestness of our temperament . . . we can taste the comfort of complete self-deception."<sup>7</sup>



Elwood set up against this professional self-deception a coherent, positive, classical ethic. He believed not only in having friends but in fostering friendship—in working at it, in making friendship a habit. A virtue, such as the virtue of friendship, is a skill. One has to learn it from someone, and then to practice it and keep it keen. This is true also of largeness of soul; it often seems a matter of ordinary generosity. We tend to suppose that some people are born generous and some are not. Elwood was not born generous; he said he had tried being smart and recommended being pleasant; he said he had wrestled with reality for forty years. I think he was generous because he had trained himself to be generous. And the same is true of Elwood's third virtue, prudence, or what Aristotle called practical wisdom. That virtue takes account of what is going on; prudent people look around; they are responsible—they are *able to respond*, without self-deception, to what is going on.

Iris Murdoch, the British novelist and philosopher, says of realism as a moral argument: "At the level of serious common sense and of ordinary nonphilosophical reflection about the nature of morals it is perfectly obvious that goodness is connected with knowledge . . . with a refined and honest perception of what is really the case, a patient and just discernment and exploration of what confronts one, which is the result not simply of opening one's eyes but of a certain perfectly familiar kind of moral discipline."<sup>8</sup>

Such a consideration of the virtue of prudence gets us back to the main moral argument here, which is whether the professional school of ethics that Dr. Sanderson proclaims is more in tune with reality than the Elwoodians are. I have argued that our professional ethics deceive us into supposing we serve clients more than they serve us, so that when we are being most selfish, we are able to tell ourselves that we are serving not ourselves but our clients.

## § 1502.2 The Reality of What Estate Planning Does for People

The second agenda for this examination of reality that Dr. Sanderson's school of ethics demands asks us what we *do* for our clients. The Elwoodians' claim is that we do for them what a Diet



Coke does for them: we make them feel better. Without calories. That's what we "estate planners" have to offer. Dead people don't pay taxes; if they did we wouldn't have a \$200 billion annual federal deficit. Dead people don't take it with them, or even come back to visit it. Elwood's mother is long gone. She had to leave it all behind, and now it belongs to somebody else.

Whatever Mother Dowd's motives were for leaving the family fortune to Elwood, they did not, as the realistic Veta supposed, include gratitude for the fact that Elwood was with her when she died. But her motives might have included the fact that she *knew* he *would be* with her when she died; that thought may have made her feel better. Professionals of Elwood's school would say that it's realistic to feel better when you believe that you need not die alone. I suspect that is part of what Elwood meant when he said that he had won out over reality.

The Elwoodian argument on the question of what we *do* is, first, an argument about reality: that is, the professional task we are paid to see to is making people feel better. And, then, second, Elwoodians say we can live with that. First: the dominant facts in estate planning are facts about feelings. And, second: service to feelings is worthwhile:

"The faces of the other people turn toward mine and smile," Elwood says. "Harvey and I warm ourselves in all these golden moments. We have entered as strangers—soon we have friends. . . . They talk to us. They tell about the big terrible things they have done. The big wonderful things they *will* do. Their hopes, their regrets, their loves, their hates. All very large because nobody ever brings anything small into a bar. . . . When they leave, they leave impressed. . . ." Elwoodians believe that such a role in the community is worthwhile. But, most of all, and before any argument about what's worthwhile, Elwoodian estate planners say: *that* is what we do.

If that is what we do, and if it is worthwhile—either or both—the result in terms of professional skill will be that we learn more about what we do. What we do concerns feelings, and especially feelings toward death, toward things, toward those our clients love. You don't get a lot of learning on those things from appellate opinions. Consider some random social-science information that will come to light for those who make learning about feelings important:<sup>9</sup>



—Most Americans think it is immoral to disinherit a child.

—At least a third of Americans think it is immoral even to give children unequal shares.

—It is likely that most married people think it is immoral to leave property to children when the spouse also survives.

Those are findings about *morals*; they run deep. I would say this: If you don't occasionally find your clients in tears over these issues—something's the matter with the way you do things; you're not being *realistic*! These findings result in decisions made in our offices, and they are *stressful*, particularly when the circumstances argue for resisting moral notions. The prevailing professional attitude is that the decisions are the client's, that the professional should remain detached from the emotional crisis—but we Elwoodians question that attitude. Why be detached? Would it make a difference to the prevailing professional attitude if we remembered that the only thing the client gets is that he gets to feel better? Would it make a difference if we remembered that professionals usually run their lives to serve their own needs?

In any case, Elwood's example is clear; what interested him was other people—what they felt, where they hurt, what they wanted to do. And he was happy to accept similar concern from the people he dealt with. What did *not* interest him was an abstract issue that did not involve either the other person's feelings, or Elwood's: he would not have been fascinated by appellate opinions or the Internal Revenue Code. Early in the play, when Nurse Kelly was trying to put him at ease in the office, she offered him a magazine to look at. "I would much rather look at you, Miss Kelly, if you don't mind," Elwood said. She tried again with ventilation. "Dr. Sanderson wants to know if he should open a window," she said. Elwood said, "That's entirely up to him. I wouldn't presume to live his life for him."

In Elwood's and Veta's story—and it was a story about *them*—the feelings they have for one another resolve the plot. Feelings are decisive. The feelings of persons in families are decisive in the stories we "estate planners" get to share in. Elwood first met Harvey after his mother died, when Veta and Myrtle Mae came from Des Moines to live with him. It is not clear whether Harvey came to Elwood in an emotional crisis, or whether, if that



is why Harvey came, the emotional crisis followed the death of Elwood's mother or the addition of Veta and Myrtle Mae to his daily life. But it is clear that Veta and Elwood loved one another. Because Elwood loved Veta he offered to take Dr. Chumley's serum, even though the result would have been Harvey's disappearance and a normal human life—"no fun—and no tips" as Elwood's taxi driver put it. (Elwood knew all along, I think, what Veta was up to.)

And because Veta loves Elwood, she stops the injection; she decides to live with Harvey after all, and to put up with Elwood, even though he "is the biggest heartache I have. Even if people do call him peculiar," she says, "he's still my brother." The truth about brothers and sisters is a fact; it is a reality; it is so important for all of us that our professional lives would be barren without it.

### § 1503 Conclusion

The tough, no doubt, have something to teach the tender; but Elwood's story is a reminder of the fact that the tender have something to teach the tough—something about reality.

The people in Elwood's story go around and around over the question of whether Harvey is real. The audience never gets to see Harvey. At least I never have, and I've seen the play on the stage and on television. I've seen the movie eight times. I've come to the point where I'm not sure but what Harvey's there. I remember when I saw Jimmy Stewart play Elwood on the stage in London. At the curtain call, they used the Chumley's Rest scene without a curtain; there was a set of swinging double doors at rear center stage. Mr. Stewart took his bow, then stepped aside and bowed to the doors; they swung slowly open, and Harvey took his bow. Perhaps the British saw him; I hope so. But, finally, that question about Harvey never gets answered.

What the tough have to teach the tender about Harvey, what Veta has to teach all of us—is that the *possibility* of Harvey is more important than the question about Harvey. When she and Myrtle Mae were talking about the injection, and the disappearance of Harvey from Elwood's life, Veta said, "Harvey always follows Elwood home. . . . If you give him the formula and



Elwood doesn't see Harvey, he won't let him in. Then when he comes to the door, I'll deal with him."

Myrtle Mae said, "Mother, won't you stop talking about Harvey as if there was such a thing."

And Veta said, "Myrtle Mae, you've got a lot to learn and I hope you never learn it."

What the tender have to teach the tough is what Dr. Chumley learned at the peak of his successful professional life. Myrtle Mae told the doctor that Elwood could predict the future. "Things always turn out the way Uncle Elwood says they will," she said. "Harvey knows everything." And Chumley is converted; in a moment he becomes an Elwoodian. "Fly specks," he said. "I've been spending my life among fly-specks while miracles have been leaning on lamp-posts."

\* \* \*

Elwood P. Dowd argues for the possibilities, in professional life, of friendship, of practical wisdom, and of largeness of soul. Harvey and I hope these arguments have been of some momentary interest to you. In any case, we leave you, as Elwood left Mrs. Chumley, saying, "Regards to you and anybody else you happen to run into."

## ANNOTATIONS

### ¶ 1500 Elwood P. Dowd's Moral Claim

<sup>1</sup> T Shaffer, "The Lawyer as Will Maker," *Family Systems and Inheritance Patterns* 87 (J Cates and M Sussman 1982).

<sup>2</sup> M Chase, *Harvey* (1953).

<sup>3</sup> A MacIntyre, *After Virtue* (1981).

<sup>4</sup> Aristotle, *Nicomachean Ethics*, Books 6 and 8 (M Ostwald trans 1962).

<sup>5</sup> VI *Oxford English Dictionary* 28 (1933) cites and quotes discussions ranging from Aristotle and Aquinas to Burke and Paley.

<sup>6</sup> S Hauerwas, *Vision and Virtue* Ch 3 (1974).

### ¶ 1502.1 The Reality of Professional Life

<sup>7</sup> J Conrad, *The Secret Agent* 101 (Anchor ed 1953).



<sup>8</sup> I Murdoch, *The Sovereignty of Good* (1970) quoted in O'Brien-Steinfelds, "Personal Perspective: Nice, The Enemy of the Good?" 44 *Christianity and Crisis* 101, 102 (1984).

## § 1502.2 The Reality of What Estate Planning Does for People

<sup>9</sup> N 1, *supra*.