

ASPIRATIONAL STANDARDS FOR THE PRACTICE OF ELDER LAW  
WITH COMMENTARIES

November 21, 2005

The Commentaries accompanying each Aspirational Standard explain and illustrate the meaning and purpose of the Standard. They are intended as guides to interpretation and are not part of the Standards themselves.

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## PREAMBLE

In the past 20 years, Elder Law has developed as a separate specialty area because of the unique and complex issues faced by older persons and persons with disabilities. Elder Law includes helping such persons and their families with planning for incapacity and long-term care, Medicaid and Medicare coverage (including coverage of nursing home and home care), health and long-term care insurance, and health care decision-making. It also includes the drafting of special needs and other trusts, the selection of long-term care providers, home care and nursing home problem solving, retiree health and income benefits, retirement housing, and fiduciary services or representation. In these and other areas, the Elder Law Attorney is often asked to advocate for clients with diminished capacity. Family members and persons with fiduciary responsibilities become involved. The traditional attorney-client relationship is not always clear. Issues such as substituted judgment, best interests, and “who is the client?” present problems not regularly faced by other lawyers.

In recognizing Elder Law as a specialty practice area to meet the legal needs of older persons and persons with disabilities and their families, the National Academy of Elder Law Attorneys (NAELA) was founded in 1987. Presently, NAELA has more than 5,000 members practicing in all 50 states. In 1994, the American Bar Association accredited the National Elder Law Foundation (NELF) to recognize experienced Elder Law practitioners as Certified Elder Law Attorneys, and more than 359 attorneys have now earned the CELA designation. A majority of states have Elder Law Sections or Committees in their State Bar Associations. Forty-one states recognize Elder Law as a specialty, and a majority of states have Elder Law sections or Committees in their State Bar Associations.

The following Guidelines set out Aspirational Standards of professionalism and ethical behavior for Elder Law Attorneys. They are the product of study and deliberation by NAELA members and, specifically, NAELA’s Professionalism and Ethics Committee.

Each state’s professional responsibility rules mandate the minimum requirements of conduct for attorneys to maintain their licenses. These Aspirational Standards build upon and supplement those rules. Attorneys who aspire to and meet these Standards

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will elevate their level of professionalism in the practice of Elder Law, and enhance the quality of service to their clients. As attorneys meet these Standards, the practice of Elder Law will be raised to a higher standard of professionalism. These Aspirational Standards do not define or establish a community standard. They are not intended to, nor should they be used to support a cause of action, create a presumption of a breach of legal duty, or form a basis for civil liability.

## A. CLIENT IDENTIFICATION

The Elder Law Attorney:

1. *Gathers all information and takes all steps necessary to identify who the client is at the earliest possible stage and communicates that information to the persons immediately involved.*

Comment:

It is to the client that the lawyer has professional duties of competence, diligence, loyalty and confidentiality. This is especially important in Elder Law, because family members may be very involved in the legal concerns of the older person or person with disabilities, and they may even have a stake in the outcome.

Identifying the Elder Law client is sometimes difficult, but is the first critical step in forming an attorney-client relationship. In some cases, the client will have an initial meeting with the Elder Law Attorney; but in other cases, a family member may have an initial meeting with the Elder Law Attorney to discuss matters pertaining to the client without the actual client being present. Other times, the family member may accompany the client to the initial meeting. Accordingly, the identity of the “client” must be clarified at the earliest stage 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 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. The attorney should take special care to make sure that each of these four objectives is met, especially in cases where the client may have diminished capacity.

Attorneys should use an intake form that facilitates identification of the actual client. This form may ask the person “Who is seeking legal advice and services?” or “For whom (or whose interests) are legal services requested?”

While the responses to the questions on the intake form do not always identify the client, they will reflect the person’s perception. The person named is presumptively the client, and the attorney ought to state this at the outset of the initial meeting. If the identified client is not present, see the Comments following Standard A-3. The attorney may determine that a different person is the client. In such case, the attorney

should identify the person or persons viewed as the client and explain the implications of this conclusion.

Information from the referral source or the staff member making the appointment may be helpful in identifying the client. Attorneys should confirm identification of the clients with the persons present during the initial consultation.

The Elder Law Attorney may face a situation in which an individual client has diminished capacity and the attorney must determine whether the individual has sufficient capacity to enter into the attorney-client relationship or to make certain decisions or execute certain documents. Because the state professional responsibility rules direct the attorney to maintain as normal an attorney-client relationship as possible, the attorney may be able to represent the elder with diminished capacity.<sup>1</sup> See also section 3.

2. *Meets with the identified prospective or actual client in private at the earliest possible stage so that the client's capacity and voice can be engaged unencumbered. If the attorney determines that it is clearly not in the best interest of the client for the attorney to meet privately with the client, the attorney takes other steps to ensure that the client's wishes are identified and respected.*

Comment:

When other family members bring or accompany a client to an attorney meeting, the attorney should carefully explain why a confidential meeting is important.<sup>2</sup> Ideally, the attorney should meet with the client or prospective client in private at the earliest possible stage. The attorney should take steps to ensure that the client's wishes are identified and respected. If the client objects to a private meeting, the attorney should explain that such a meeting is necessary because the attorney only represents the client and must have the client's input unencumbered and uninfluenced by others.

This is especially true when the family member bringing the client to the meeting is gaining any advantage over other similarly situated family members or when asset transfers are being considered. In the private consultation, the attorney should seek to ensure the absence of direct or indirect pressure on the client to make particular decisions.

If the attorney determines that it is clearly not in the client's best interest to meet privately with the attorney, the attorney may allow non-clients (including children) to be present at the initial meeting or throughout the representation. If a physically frail elder client insists that a younger family member be present for the entire meeting, the

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1. Model R. Professional Conduct 1.14 (ABA 2005). There may be distinctions in each state's version of Model Rule 1.14.
2. The American Bar Association has materials that can help the family understand the ethical rules that must be followed. *See generally* American Bar Association, *Understand the Four C's of Elder Law Ethics*, <http://www.abanet.org/aging/lawyerrelationship.pdf> (accessed January 18, 2006).

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attorney should make sure the client understands the benefits of a private, confidential meeting but nevertheless rejects the opportunity to meet privately. In addition, the attorney must be careful to note any indication of discomfort by the client or influence by the younger family member. The attorney should note the content and tenor of comments, how supportive or dominating the family member may be, and how consistent or inconsistent the client's stated objectives are with prior wishes evidenced by estate planning documents or other expressions of intent. Nevertheless, the attorney should meet at least once with the client alone before the representation is completed.

If, in the course of group meetings, the client consistently wants to do "whatever my kids want," the attorney should meet privately with the client to ascertain the client's level of understanding. The attorney should ask all appropriate questions to determine the client's goals and priorities in contrast to the children's wishes.

3. *Utilizes an engagement agreement, letter or other writing(s) that:*

- *identifies the client(s);*
- *describes the scope and objectives of representation;*
- *discloses any relevant foreseeable conflicts among the clients;*
- *explains the lawyer's obligation of confidentiality and confirms that the lawyer*
- *will share information and confidences among the joint clients;*
- *sets out the fee arrangement (hourly, flat fee, or contingent); and*
- *explains when and how the attorney-client relationship may end.*

Comment:

Elder Law Attorneys have an obligation to communicate and educate clients about these matters. Telling clients these things is not enough. A clear written engagement agreement is the best way to communicate these matters to the client and others involved.

When Elder Law and estate planning attorneys represent spouses or other joint clients, they should employ a joint representation letter or agreement that provides for the waiver of confidences between the attorney and each of the jointly represented clients. Then all information would be deemed available to all joint clients. Such agreements should also provide that, in the event of a conflict between joint clients, the attorney must resign and cannot represent any party because the attorney is privy to confidential information about all parties. A joint representation letter is especially important if the clients have blended families.

4. *Oversees the execution of documents that directly affect the interests of an individual only after establishing a attorney-client relationship with the individual.*

Comment:

The Elder Law Attorney should not draft wills, trusts, powers of attorney, or related unilateral documents for non-clients who will be executing the documents. Instead, the attorney must establish attorney-client representation of the senior prior to execution of any document.

The Elder Law Attorney is directly responsible to ensure that documents drafted for the client are properly executed. Ways to accomplish this may include direct oversight or oversight by trained staff or professionals.

#### B. POTENTIAL CONFLICT OF INTEREST

Elder Law Attorneys are frequently approached by families who seek counsel or representation on behalf of one or more persons. If there is no apparent conflict of interest, joint representation may be a preferred form of representation that will further shared goals, common interests, family harmony, economic efficiency, consistency of action, and enhanced likelihood of serving the best interests of the clients. However, because the potential for conflicts always exists whenever two or more persons are represented, the Elder Law Attorney:

1. *In representing multiple family members ensures that the family members understand who are the clients and whether the representation is Joint (i.e., confidences are shared) or Separate. As used in these Standards, separate representation means representing persons in separate matters where confidences are not shared; joint representation (sometimes referred to as common representation) means representation of multiple clients in the same matter.*

Comment:

This Standard addresses a common situation in Elder Law in which the attorney may be asked to represent multiple family members in either related or distinct matters.<sup>3</sup> Because these situations can easily produce misunderstandings among family members, this Standard emphasizes the need for an educational element that ensures client-family members understand the difference between separate and joint (or common) representation, especially with respect to the attorney's obligation to keep or share confidences.

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3. The Standard does not endorse the concept of representation of the family as an entity. This concept is not recognized as a matter of law or in the Model Rules. Rather, this Standard applies the conflict of interest rules applicable to joint or separate representation to determine whether and how representation can proceed.

For example, an attorney is asked by a husband and wife to prepare their mirror-image estate plans and simultaneously asked by their two adult children (and beneficiaries of their estates) to prepare their respective estate plans. The attorney must undertake the conflict-of-interest analysis that is required by state conflicts rules. Assuming multiple-representation is permissible and the clients consent, different arrangements of joint or separate representation may be appropriate. One arrangement may be that the attorney represents the husband and wife jointly, and represents each of the children separately but simultaneously. Another arrangement may be that all four are represented jointly, which is appropriate if the estate plan involves a closely held family business in which all four are principals. The attorney should take reasonable steps to ensure that all the clients understand how different types of representation impose different duties on the attorney and different consequences for the clients. The more complex the situation, the more important a well-drafted engagement agreement becomes. See Standard A-3.

2. *Undertakes joint representation, as permitted by state rules of professional conduct, only after obtaining the consent of the parties after having reviewed with them the advantages and disadvantages of such representation—including the relevant foreseeable conflicts of interest and risks of such representation—in a manner that will be best understood by each person to be represented.*

Comment:

This Standard presumes compliance with applicable state professional responsibility rules regarding requirements for consent as a prerequisite to joint representation. It emphasizes the special challenge that Elder Law Attorneys have in communicating information relevant to informed consent by clients who have greatly different decision-making abilities or styles. In carrying out this responsibility, the attorney should consider separate private, direct and personal communications, as set out in Standard A-1. This will allow each of them to be more candid and to more freely ask questions of the attorney regarding the implications of joint or separate representation. For example, separate meetings may be necessary in multi-generational representation or with clients with blended families. In cases of joint representation, the consent of the parties should be confirmed in writing.

3. *Treats family members who are not clients as unrepresented persons but accords them involvement in the client's representation so long as it is consistent with the client's wishes and values, and the client consents to the involvement.*

Comment:

This Standard addresses the common situation in which a client's family members who are not clients of the Elder Law Attorney are intimately involved with the client's affairs in a supportive and facilitating capacity. These situations invite

ethical lapses by attorneys, because family members may appear to be well intended and highly involved with the client.

The Elder Law Attorney should exercise care to observe signs of undue influence. When circumstances suggest undue influence, the attorney should take steps to ensure that the vulnerable person is protected. Meeting alone with the client or prospective client, as discussed in the Comment to Standard A-2, becomes especially important.

4. *Accepts payment of client fees by a third party only after determining that payment by the third party will not influence the attorney's independent professional judgment on behalf of the client, informing the client who consents to the payment by a third party, and ensuring that the parties understand and agree to the ethical ground rules for third party payment (i.e., non-interference by the payer, independence of judgment by the attorney on behalf of the client, and confidentiality).*

Comment:

This Standard essentially restates Model Rule 1.8(f) of the Model Rules of Professional Conduct (2005), regarding third-party payment for client work. Because the situation commonly arises in Elder Law representation, the Elder Law Attorney must fully communicate to the client and the non-client payor (usually a family member) the requirements of the Standard. The Elder Law Attorney should obtain the client's written consent to the third-party payment, and should give notice to the non-client of the client's identity and right to confidentiality of information.

Acceptance of payment from a third party does not create an attorney-client relationship, but may create a conflict of interest. For example, an adult child who is already the attorney's client brings in her mother who needs estate-planning advice. If the adult child proposes to pay for the services to her mother out of her own funds, a separate conflict of interest analysis is required. There may be times when the third party has lawful use of the client's money and uses the client's money at the client's direction to pay the attorney. Although it could be argued that the money is not coming from a third party, the Elder Law Attorney should still comply with the requirements of the state professional responsibility rules regarding payment by third parties.

A different issue occurs when the client is not acting as a fiduciary and is using the older person's or person with disabilities' money to pay the attorney's bill. In such cases, the Elder Law Attorney should not take the money from the client. If payment has already been accepted, the money should be returned upon discovery that the client is using the older person's or person with disabilities' money. If there is any ambiguity as to whether the client is acting as a fiduciary, the attorney should err on the side of not accepting payment. For example, the client hires the attorney to have her mother declared incapacitated and to be appointed her guardian. The client has signature authority on the checking account but has no ownership interest in the money in the account. The attorney should not accept payment on that account.

For situations involving payment by clients in a fiduciary relationship, see Standard B-6.

5. *May also serve as a fiduciary for the client, if it is in the client's best interest and if the client gives informed consent after full disclosure.*

Comment:

Clients are generally free to appoint whomever they want to serve as their fiduciaries under wills, powers of attorney, trusts or other documents. Often, the Elder Law Attorney preparing the document is asked to serve as the fiduciary. These requests may raise concerns about undue influence, overreaching, the attorney's financial self-interest, and the best interests of the client.<sup>4</sup>

Elder Law Attorneys should not promote their appointment as fiduciaries. The attorney must determine that the appointment is in the best interest of the client. Prior to obtaining the client's consent, the Elder Law Attorney has a burden of justifying how the attorney's appointment as fiduciary furthers the client's best interest. This requires explaining to the client the fiduciary role, any conflicts of interest, the options to the use of the attorney as fiduciary, and the pros and cons of alternatives before obtaining client consent. The client's decision should be made in light of all the facts and circumstances of the particular case.

If the dual role of attorney and fiduciary is ethically appropriate in a given case, another question that arises concerns the appropriateness of dual compensation as attorney and as fiduciary. While this Standard does not address this question directly, the issue was addressed in 2001 Wingspan – Second National Guardianship Conference, Recommendation 64.<sup>5</sup>

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4. The Model Rules do not specifically address these situations, except in Comment 8 to Model R. Professional Conduct 1.8(c) (ABA 2005), which prohibits substantial gifts to the lawyer. Comment 8 explains:

This Rule does not prohibit a lawyer from seeking to have the lawyer or a partner or associate of the lawyer named as executor of the client's estate or to another potentially lucrative fiduciary position. Nevertheless, such appointments will be subject to the general conflict of interest provision in Rule 1.7 when there is a significant risk that the lawyer's interest in obtaining the appointment will materially limit the lawyer's independent professional judgment in advising the client concerning the choice of an executor or other fiduciary. In obtaining the client's informed consent to the conflict, the lawyer should advise the client concerning the nature and extent of the lawyer's financial interest in the appointment, as well as the availability of alternative candidates for the position.

5. Wingspan—Second National Guardianship Conference, Recommendation 64, <http://www.naela.org/pdffiles/Recommendations.pdf> (December 2, 2001). The lawyer who serves in the dual roles of lawyer and court-appointed fiduciary ensures that the services and fees are differentiated, reasonable, and subject to court approval. This guideline for dual compensation is equally applicable to non-judicial fiduciary arrangements, with the modification that the client rather than the court approves of the arrangement after full disclosure.

6. *In representing a client who is a fiduciary under a power of attorney, trust, or conservatorship/guardianship, ensures that the client understands that the duties of both the fiduciary and the attorney ultimately are governed by the known wishes and best interest of the principal.*

Comment:

When the attorney represents a client who is a fiduciary, the attorney faces a special challenge because the client is legally required to act in the best interest of the principal.<sup>6</sup> Although the principal is a non-client, in some situations the attorney owes a duty of loyalty to the principal.<sup>7</sup>

Usually, the attorney will follow the instructions of the fiduciary without even consulting the principal, because normally those instructions can be assumed to be in the principal's best interests. However, the Elder Law Attorney may need to determine whether the fiduciary is not acting in the principal's best interest. For example, the attorney should investigate when the proposed transaction appears to benefit the fiduciary to the detriment of the principal. If the attorney determines that the fiduciary is acting to the detriment of the principal, the attorney should counsel the fiduciary to rectify that conduct. If the fiduciary refuses, the attorney should act to protect the principal. The attorney should disobey instructions that would substantially harm the principal. The attorney may even need to reveal confidential information, if necessary to avoid substantial harm.

There is well-reasoned authority for imposing a duty to the principal by the attorney who represents the fiduciary. However, existing state professional responsibility rules and opinions vary significantly in prescribing the extent of that duty, if any, to the principal.<sup>8</sup>

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6. The beneficiary may be the principal under a power of attorney, the ward under a guardianship, the beneficiary of a will or trust, or other third-party beneficiary for whom the client acts in a fiduciary capacity.
  7. The *Restatement (Third) of the Law Governing Lawyers* § 51 (ALI 2000) provides that an attorney owes a duty of care to a non-client when and to the extent that:
    - (a) the lawyer's client is a trustee, guardian, executor, or fiduciary acting primarily to perform similar functions for the non-client;
    - (b) the lawyer knows that appropriate action by the lawyer is necessary with respect to a matter within the scope of the representation to prevent or rectify the breach of a fiduciary duty owed by the client to the non-client, where (i) the breach is a crime or fraud, or (ii) the lawyer has assisted or is assisting the breach;
    - (c) the non-client is not reasonably able to protect its rights; and
    - (d) such a duty would not significantly impair the performance of the lawyer's obligations to the client.
  8. See Professor Jeffrey N. Pennell's overview of the issue, *Representations Involving Fiduciary Entities: Who is the Client?* 62 Fordham L. Rev. 1319 (March 1994).

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## C. CONFIDENTIALITY

The Elder Law Attorney:

1. *Carefully explains the obligation of confidentiality to the client and involved parties as early as possible in the representation to avoid misunderstanding, and to ascertain and respect the client's wishes regarding the disclosure of confidential information.*

Comment:

Although Elder Law Attorneys should have a complete understanding and diligently apply the rules of confidentiality, clients may have only a general understanding. While most people know what it means when told to keep something confidential, few really know how confidentiality is applied in attorney-client relationships. A vague or simplistic understanding could lead prospective clients to believe that attorneys may have discretion to disclose confidential client information even when instructed otherwise. Elder Law Attorneys should begin every initial conference with an explanation of the confidentiality rules. The explanation should make clear that the prospective client is the only one protected and authorized to waive the protection.

After educating clients about confidentiality, Elder Law Attorneys should determine to whom they can disclose confidential information in accordance with the clients' wishes, and the objectives of such disclosure. When clients request disclosure, Elder Law Attorneys should help clients understand the possible risks and consequences of disclosure. The waiver or release of confidentiality should be placed in writing, as more specifically detailed in Standard A-3.

For example, if the client indicates a desire for information to be disclosed to only one child, the attorney should explain that such disclosure will waive attorney-client privilege with respect to whatever is disclosed and could raise issues of undue influence or overreaching on the part of that child. The Elder Law Attorney may point out that the child has no duty of confidentiality and may make further disclosures.

2. *Establishes as a prerequisite to any joint representation a clear understanding and agreement that the attorney shall keep no client secrets from any other client in that joint representation.*

Comment:

Often Elder Law Attorneys will represent more than one client in a matter. See Standard B-2 on joint representation. This creates greater complexity when assessing the application of state professional responsibility rules relating to confidentiality of client information. Under this Standard, the confidential information known by the attorney and related to the representation must not be kept from any other client in the joint representation.

For example, an Elder Law Attorney is engaged to prepare estate-planning documents and provide an asset preservation plan for a husband and wife. The initial consultation and engagement agreement fails to address the sharing of confidential information between the spouses. During the course of representation, the wife tells the attorney that she has a child unknown to her husband, and directs the attorney not to disclose this to her husband. The attorney should tell the wife that she is required to disclose this information to the husband because it is relevant to the representation of the husband, or else withdraw.<sup>9</sup> This could have been avoided if the attorney had explained the sharing of confidential information at the beginning of the representation.

3. *Strictly adheres to the obligation of client confidentiality, especially in representation that may involve frequent contacts with family members, care takers, or other involved parties who are not clients.*

Comment:

When the client wants the Elder Law Attorney to share information with family members or others, the client should give the attorney written consent to do so, specifying the scope of the information to be disclosed. In all instances, the client should be told the consent is optional and revocable at any time. Before the consent has been signed, the attorney should advise the client about any ramifications regarding the disclosure of the information.

For example, a client may sign the consent because the client wants a child to be aware of the planning options being considered. The attorney should not answer questions from the child that go beyond the planning options, unless the client gives explicit permission.

There may be occasions when the attorney needs to communicate with non-client family members. In doing so, the attorney may not disclose confidential information without the client's consent, and must use care in communicating with the unrepresented family members.<sup>10</sup> When the client consents to and requests the presence of a family member, the family member's presence may waive the attorney-

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9. Michael G. Walsh, *Applicability of Attorney-Client Privilege to Communications made in Presence of or by Third Person*, 14 A.L.R.4th 594, 605 (1980-1992) (collection of cases dealing with the application of the attorney-client privilege to communications made in the presence of, solely to, or by a third person).

10. For example, Model R. of Professional Conduct 4.3 (ABA 2005) provides that:

In dealing on behalf of a client with a person who is not represented by counsel, a lawyer shall not state or imply that the lawyer is disinterested. When the lawyer knows or reasonably should know that the unrepresented person misunderstands the lawyer's role in the matter, the lawyer shall make reasonable efforts to correct the misunderstanding. The lawyer shall not give legal advice to an unrepresented person, other than the advice to secure counsel, if the lawyer knows or reasonably should know that the interests of such a person are or have a reasonable possibility of being in conflict with the interests of the client.

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client privilege, unless the family member's presence is necessary to assist in representation.<sup>11</sup>

For example, Mr. A and his daughter seek assistance to arrange his legal affairs prior to entry into an assisted living facility. After initial consultation, it is determined that Mr. A is the only client. In the process of formalizing the attorney-client relationship, the Attorney confirms that Mr. A wants the Attorney to communicate with Daughter. It is appropriate to incorporate this fact into the engagement letter. Since Daughter is *not* represented, the Attorney should explain to the daughter that: (1) the father is the client and the Attorney's ethical duty is to protect and pursue only the father's interests, (2) the Attorney can talk to Daughter regarding the tasks being undertaken only to the extent Mr. A gives permission, and (3) the Attorney does not represent the daughter and she may wish to consult her own legal counsel regarding the impact of her father's estate planning on her own affairs.<sup>12</sup>

When representing clients with diminished capacity, it may become necessary for the Elder Law Attorney to involve family members to aid in the representation of the client. In those circumstances, limited disclosure may be appropriate. See Standard E-4.

## D. COMPETENT LEGAL REPRESENTATION

The Elder Law Attorney:

1. *Recognizes the special range of client needs and professional skills unique to the practice of Elder Law and holds himself or herself out as an Elder Law Attorney only after ensuring his or her professional competence in handling elder law and disability related matters.*

Comment:

Elder Law Attorneys must be educated in the areas of elder and disability law<sup>13</sup> by attending professional education seminars, studying written materials or associating with an attorney who has established competence in the field.

Elder Law issues are often complex and may involve multiple areas of the law. The Elder Law Attorney must recognize and understand the non-Elder Law legal issues that affect the representation. For example, if a client wants to transfer his house

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11. Model R. Professional Conduct 1.14 comment 3 (ABA 2005) provides: "The client may wish to have family members or other persons participate in discussions with the lawyer. When necessary to assist in the representation, the presence of such persons generally does not affect the applicability of the attorney-client evidentiary privilege. . .".

12. See Standard B.2. (stating that the attorney could represent the daughter jointly).

13. See Rules and Regulations for Becoming a CELA, *Minimum Standards for Certification* § 5 (2003). The National Elder Law Foundation recognizes 13 areas of practice in which an Elder Law Attorney must have a certain level of expertise. The five main practice areas are: Health and Personal Care Planning, Pre-Mortem Legal Planning, Fiduciary Representation, Legal Capacity Counseling and Public Benefits Advice. At the very least, an Elder Law Attorney should become proficient in these areas.

to his children, this transaction requires the application of several areas of the law, including real property, tax, Medicaid and estate planning.

The Elder Law Attorney recognizes that forms must be customized to meet each client's individual circumstances. Improper use of standard forms may result in violations of state professional responsibility rules and may negatively affect a client's legal and financial interests.

2. *Approaches client matters in a holistic manner, recognizing that legal representation of clients often is enhanced by the involvement of other professionals, support groups, and aging network resources.*

Comment:

To better serve a client, Elder Law Attorneys should analyze and respond to the client's total circumstances: legal, medical, psycho-social, financial, and cultural. For example, an Elder Law Attorney should consider a client's deteriorating health and loss of independence as important factors when preparing an estate or Medicaid plan.

Elder Law Attorneys are not expected to develop expertise in matters other than law, but should collaborate with other professionals to best serve the client's legal needs. Elder Law Attorneys should establish formal or informal relationships with social workers, psychologists and other elder care professionals who may be of assistance to a client. Using the services of non-legal elder care professionals may enhance the representation of the client. For example, an attorney working on a guardianship matter may collaborate with a geriatric care manager to assess housing options for the ward.

3. *Regularly pursues continuing professional education and peer collaboration in Elder Law. Continuing education should include a broad range of Elder Law related subjects as well as an understanding of the physical, cognitive, and psycho-social challenges of aging and disability, and the skills needed to serve persons who are physically or mentally challenged.*

Comment:

Elder Law Attorneys should regularly seek opportunities for continuing education, not merely to increase their knowledge of the law, but to improve their understanding of the clients' special needs and the skills needed to serve them.<sup>14</sup>

For example, Elder Law Attorneys should attend professional continuing education seminars and study written materials on Elder Law topics as well as other topics affecting elders, such as health, social science and public policy. An Elder Law Attorney might take courses in gerontology or other aging issues. Networking with colleagues also aids in informal but essential continuing education.

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14. The National Elder Law Foundation requires participation in 45 hours of continuing legal education within three years preceding their application. See Rules and Regulations for becoming a CELA, *Minimum Standards for Certification* § 5 (2003).

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Attending seminars by a variety of elder care professionals can enhance the Elder Law Attorney's efforts in the holistic approach to an Elder Law practice. Programs given by legal and non-legal organizations will help Elder Law Attorneys broaden their understanding of aging issues and attain skills needed to serve clients.

4. *Ensures adequate training and supervision of legal and non-legal staff with a corresponding emphasis on the knowledge and skills needed to best serve persons facing the challenges of aging and disability.*

Comment:

Elder Law Attorneys must train and supervise all staff to ensure competent representation of the client. Beyond the required training and supervision, staff members should be educated, appropriately trained and exposed to the ethical considerations unique to an Elder Law practice, including these Standards. In addition to proficiency in elder and disability law, staff should be trained to understand the challenges and needs of these clients. Such training can be done by in-house staff, or through invited speakers or professional education seminars.

#### E. CLIENT CAPACITY

The Elder Law Attorney:

1. *Respects the client's autonomy and right to confidentiality even with the onset of diminished capacity.*

Comment:

Attorneys have special ethical responsibilities when representing clients whose capacity for making decisions may be diminished. Clients with diminished capacity are entitled to the same respect and attention as any other client.<sup>15</sup> Capacity exists on a

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15. Model R. Professional Conduct 1.14 (ABA 2005) provides:

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

continuum, and is normally not an all-or-nothing proposition. Clients may have the ability to make some decisions but not others. Certain strategies can improve the comprehension and decision-making ability of a person with diminished capacity. As described in the commentary to Standard E-3, if a third party is present (with the client's consent), the attorney should talk to the client to avoid any tendency of ignoring the client during the interview. Even if the client has authorized or instructed the attorney to communicate with a third party, such as the client's agent, the attorney should still keep the client informed by providing the client with copies of communications or by speaking directly with the client.<sup>16</sup>

2. *Develops and utilizes appropriate skills and processes for making and documenting preliminary assessments of client capacity to undertake the specific legal matters at hand.*

**Comment:**

Elder Law Attorneys often represent clients who have some degree of diminished capacity. Such clients may have sufficient capacity to handle some matters but not others. The law has different thresholds for capacity, depending on the act to be taken. For example, a higher threshold of capacity may be required to make a contract, especially a complex contract, than to make a will.

Attorneys should take direction from and represent the client's wishes as fully as the client's capacity permits. If the client's decision-making capacity is impaired, the attorney should maintain as normal a relationship with the client as possible.

For example, the attorney should develop strategies and skills to understand and communicate with such clients by using different interviewing techniques, varying the time and location of the interview, etc. See Standard E-3.

Depending on the degree of capacity, a client may have the ability to perform some tasks but not others.<sup>17</sup> The attorney should follow a consistent and deliberate

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16. For example, Model R. Professional Conduct 1.14 comment 2 (ABA 2005) states:

The fact that a client suffers a disability does not diminish the lawyer's obligation to treat the client with attention and respect. Even if the person has a legal representative, the lawyer should, as far as possible, accord the represented person the status of client, particularly in maintaining communication.

17. Rule 1.14(a) of the Model R. of Professional Conduct (ABA 2005) offers guidance to the attorney in recognizing whether the client has sufficient capacity to make decisions concerning a specified matter. Rule 1.14(a) provides:

When a client's capacity to make adequately considered decisions in connection with a representation is diminished, whether because of minority, mental impairment or for some other reason, the lawyer shall, as far as reasonably possible, maintain a normal client-lawyer relationship with the client.

Comment One to Rule 1.14 of the Model R. Professional Conduct (ABA 2005) recognizes that clients may have varying levels of capacity by stating the following:

process to preliminarily screen clients for capacity. The attorney should document the observations that support the attorney's conclusion that capacity is an issue. A number of different tests may be used to assess capacity. The attorney's process should be followed and documented in every file.<sup>18</sup>

The intelligence, experience, mental condition, and age of the client affect the attorney's responsibilities to the client. The attorney may evaluate client competency by either a legal or a medical standard, or even a combination of standards and methods. The law recognizes numerous legal standards of competency.<sup>19</sup> One legal standard is the capacity to enter into a contract. A different legal standard is the capacity to execute a will. A third legal standard is the lack of capacity that subjects one to commitment or guardianship. A number of factors should be considered, including the kind of decision to be made and the applicable legal standard.<sup>20</sup>

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[1] The normal client-lawyer relationship is based on the assumption that the client, when properly advised and assisted, is capable of making decisions about important matters...Nevertheless, a client with diminished capacity often has the ability to understand, deliberate upon, and reach conclusions about matters affecting the client's own well-being...So also, it is recognized that some persons of advanced age can be quite capable of handling routine financial matters while needing special legal protection concerning major transactions.

18. One source that may be used is the ABA Commn. on L. & Aging & Am. Psychological Assn., *Assessment of Older Adults with Diminished Capacity: A Handbook for Lawyers* (2005). The handbook offers a conceptual framework and practice tips for addressing problems of client capacity in the day-to-day practice of law and working with mental health professionals.
19. Comment 1 to Rule 1.14 of the Model R. Professional Conduct (ABA 2005) notes that, "When the client...suffers from a diminished mental capacity, however, maintaining the ordinary client-attorney relationship may not be possible in all respects." Comment 6 to Rule 1.14 of the Model R. Professional Conduct (ABA 2005) states:

In determining the extent of 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 known long-term commitments and values of the client. In appropriate circumstances, the lawyer may seek guidance from an appropriate diagnostician.

20. *The Fordham Conference*, 62 Fordham L. Rev. 989 (March 1994), recommendations for practice guidelines suggest:
- a. In questioning client capacity for any specific purpose, the lawyer should: Consider and balance factors including, but not limited to, the following:
    - i. The client's ability to articulate reasoning behind his or her decision;
    - ii. The variability of the client's state of mind;
    - iii. The client's ability to appreciate the consequences of his or her decision;
    - iv. The irreversibility of any decision;
    - v. The substantive fairness of any decision;
    - vi. The consistency of any decision with lifetime commitments of the client. These recommendations also note: It may be useful for the lawyer to consult with a mental professional to determine whether the client has a diagnosable mental disorder and whether the psychiatric condition disables the client's decision-making capacity.

The attorney should also distinguish between incapacity and the inability to remember. The fact that a client does not remember a decision does not mean that the client did not have the capacity to make the decision at the time it was made.

3. *Adapts the interview environment, timing of meetings, communications and decision-making processes to maximize the client's capacities.*

Comment:

Different interviewing techniques may be used to maximize client capacity. These include changing the time and location of meetings, shortening the length of the interview, breaking the interview into a series of short interviews conducted over a period of time, using a different communication style, using visual aids, changing the amount of information provided to the client,<sup>21</sup> and changing the process of reaching a decision, in order to maximize the client's ability to participate in the representation and to make decisions. Gradual counseling (a series of shorter interviews) may by itself overcome any deficiency in the client's decision-making capacity. Other techniques, such as conducting the interview in the client's home, or in the afternoon instead of the morning may be needed. The interview should be conducted in the client's primary language.<sup>22</sup> In order to maximize the client's autonomy, these interviewing techniques should be tried before concluding that the client lacks capacity or needs protective action. See Standard E-5.

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21. Model R. Professional Conduct 1.4 comment 7 (ABA 2005) provides:

If a legal representative has not been appointed, the lawyer should consider whether appointment of a guardian ad litem, conservator or guardian is necessary to protect the client's interests. Thus, if a client with diminished capacity has substantial property that should be sold for the client's benefit, effective completion of the transaction may require appointment of a legal representative. In addition, rules of procedure in litigation sometimes provide that minors or persons with diminished capacity must be represented by a guardian or next friend if they do not have a general guardian. In many circumstances, however, appointment of a legal representative may be more expensive or traumatic for the client than circumstances in fact require. Evaluation of such circumstances is a matter entrusted to the professional judgment of the lawyer. In considering alternatives, however, the lawyer should be aware of any law that requires the lawyer to advocate the least restrictive action on behalf of the client.

22. This brings up issues of who the interpreter is, the accuracy of interpretations, confidentiality, etc.

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4. *Takes appropriate measures to protect the client when the attorney reasonably believes that the client: (1) has diminished capacity, (2) is at risk of substantial physical, financial or other harm unless action is taken, and (3) cannot adequately act in the client's own interest.*

## Comment:

The above three factors are taken from the Model Rules of Professional Conduct R. 1.14(b) (2005).<sup>23</sup>

In appropriate situations, the attorney should take protective action when the client suffers from some degree of diminished capacity. If the client is incapacitated and does not have a legal representative, the attorney's ability to advocate the client's wishes depends on the attorney's success in obtaining an informed decision from the client. The client's impairment and the type of representation the attorney is providing determine the attorney's responsibility to advocate the client's wishes. See Standard E-5 for examples.

Capacity may be task-specific. The client may have the capacity to perform some tasks but not others. Hence, the attorney should determine whether the client has sufficient capacity to perform the task at hand. Any protective action should be tailored to the needs of the client, be the least restrictive possible, be in the client's best interest, and not harm the client or make the client's situation worse.<sup>24</sup>

For example, client visits Attorney to draft a new will and health care directive. During the interview, the Attorney notices that the client seems unfocused and wanders from topic to topic. Attorney believes that the client understands where he wants his property to go at his death, but seems confused about the meaning of the health care directive. The Elder Law Attorney should consider asking additional questions to form an opinion about the client's abilities, administering a mental

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23. Model R. Professional Conduct 1.14(b) (ABA 2005) provides:

When the lawyer reasonably believes that the client has diminished capacity, is at risk of substantial physical, financial or other harm unless action is taken and cannot adequately act in the client's own interest, the lawyer may take reasonably necessary protective action, including consulting with individuals or entities that have the ability to take action to protect the client and, in appropriate cases, seeking the appointment of a guardian ad litem, conservator or guardian.

24. Comment 6 to R. 1.14 of the Model R. Professional Conduct (ABA 2005) provides an illustrative list of the possible protective actions. As stated, such measures could include:

[C]onsulting with family members, using a reconsideration period to permit clarification or improvement of circumstances, using voluntary surrogate decision making tools such as durable powers of attorney or consulting with support groups, professional services, adult-protective agencies or other individuals or entities that have the ability to protect the client. In taking any protective action, the lawyer should be guided by such factors as the wishes and values of the client to the extent known, the client's best interests and the goals of intruding into the client's decision making autonomy to the least extent feasible, maximizing client capacities and respecting the client's family and social connections.

capacity test, or creating the documents and meeting with the client again to see if he is less confused after he sees the documents.

5. *When taking appropriate measures to protect the client:*

- (a) is guided by the wishes and values of the client and the client's best interests;*
- (b) seeks to minimize the intrusion into the client's decision-making autonomy and maximizes the client's capacity;*
- (c) respects the client's family and social connections; and*
- (d) considers a range of actions other than court proceedings and adult protective services.*

Comment:

Using what the attorney knows about the client's values and wishes helps the attorney to choose the appropriate action. The less evidence of the client's wishes and values, the more the attorney must advocate for the client's best interests. This responsibility to determine the client's best interests increases with the extent to which the client cannot determine his or her own best interests. Two principal factors determine what is in the client's best interest. First, are the client's rights, remedies, and economic interests. Second, is the extent to which the attorney knows what the client would decide if the client were capable of deciding.

Attorneys must be aware of the potential conflict between the attorney's "zealous advocacy" and the client's wishes. This conflict occurs when the attorney has concerns about the client's capacity, thus requiring the attorney to choose between advocating the client's wishes or the client's best interest. The attorney should consider several factors to resolve the conflict, including the type of representation sought by the client, the forum in which the attorney's services are to be provided, and the involvement of other parties in the matter. Ultimately, the attorney should balance the client's need for decision-making assistance with the client's other interests. These other interests include the client's autonomy, safety, independence, financial well-being, health care, and personal liberty.

If diminished capacity precludes the client from making decisions or taking action to protect himself or herself, the attorney should do no more than necessary to protect the client. Any protective action should be the least restrictive alternative and reflect the wishes and values of the client as well as the client's best interest.

Family and social connections may provide an alternative to protective action or be a source of information about the appropriate protective action. The client's physical proximity to a support network is important. Family and social connections that are geographically close to the client may provide a level of protection for the client and result in less intervention.

A number of protective actions may be more effective, less restrictive, and less intrusive than court proceedings or adult protective services. These actions include a cooling-off period, family involvement, the creation and use of planning documents. The action chosen should be tailored to the degree of the client's incapacity and be the

least restrictive available that provides the needed level of protection. Comment 5 to Rule 1.14 of the Model Rules of Professional Conduct contains an illustrative list of various protective actions.

For example, a 79 year-old client has begun to decline and appears somewhat confused. In their last several meetings, the attorney noticed fresh bruises, which the client said were from falling. The attorney concluded that some kind of protective action is needed. The client is estranged from her oldest son and has not notified him about her problems. She is very close to a group of women at her church, and her church may be able to provide support. To the extent possible, the attorney should discuss with the client different protective alternatives that would take into account her son, friends and church.

6. *Discloses client confidences only when essential to taking protective action and to the extent necessary to accomplish the intended protective action.*

Comment:

The linchpin of an effective attorney-client relationship is the duty of loyalty to the client. Implicit in loyalty is the concept of confidentiality. But when the client suffers from diminished capacity and needs protection, the attorney may need to disclose some confidential information to a third party. There is certainly authority for the attorney to make limited disclosure in such cases, but any disclosures must be made with care because of the potential harm to the client.<sup>25</sup> Even when the attorney is authorized to take protective action, the attorney may only disclose the least amount of information necessary.<sup>26</sup>

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25. Comment 8 to R. 1.14 of the Model R. Professional Conduct (ABA 2005) recognizes that disclosing the existence of the diminished capacity of the client could have a negative effect on the client's interest. Comment 8 provides that:

Disclosure of the client's diminished capacity could adversely affect the client's interests. For example, raising the question of diminished capacity could, in some circumstances, lead to proceedings for involuntary commitment. Information relating to the representation is protected by Rule 1.6. Therefore, unless authorized to do so, the lawyer may not disclose such information. When taking protective action pursuant to paragraph (b), the lawyer is impliedly authorized to make the necessary disclosures, even when the client directs the lawyer to the contrary. *Nevertheless, given the risks of disclosure, paragraph (c) limits what the lawyer may disclose in consulting with other individuals or entities or seeking the appointment of a legal representative. At the very least, the lawyer should determine whether it is likely that the person or entity consulted with will act adversely to the client's interests before discussing matters related to the client. The lawyer's position in such cases is an unavoidably difficult one* (emphasis added).

26. Comment 10 to R. 1.14 of the Model R. Professional Conduct (ABA 2005) reminds the attorney to operate within the disciplinary rules even when acting to protect a client with diminished capacity. Comment 10 provides that:

The most drastic protective action, seeking the appointment of a guardian or conservator, may be appropriate in certain cases. However, since such action truly undermines client confidentiality and may pose a direct conflict with the client, less restrictive alternatives should first be considered and pursued. Any disclosure, even limited, could have serious negative consequences for the client and should be taken only after other alternatives have been considered or tried without success.

For example, Attorney has represented Client for a number of years on various matters, including estate planning. Client has previously involved Son and Daughter in meetings with Attorney. Client brings in a recent bank statement to complain about an NSF check charge. Attorney notices large repetitive checks written to Client's housekeeper. Upon questioning by Attorney, Client seems confused and has no explanation. Among other actions, Attorney may call Son or Daughter to alert them to the problem.

*7. Recommends guardianship or conservatorship only when all possible alternatives will not work.*

Comment:

Guardianship is an action of last resort. The concept of least restrictive alternative permeates most state guardianship statutes. The concept of least restrictive alternative is echoed in state professional responsibility rules<sup>27</sup> as well as case law and should always govern protective action in order to safeguard the client's personal liberties and maximize the client's decision-making autonomy.

When guardianship is the last resort, the attorney should consider seeking a limited guardianship tailored to the client's needs. The attorney should ensure that guardianship is in the client's best interests and less restrictive alternatives are inadequate. Comment 5 to Model Rule 1.14 provides guidance to the attorney in taking protective action.<sup>28</sup>

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A lawyer who acts on behalf of a person with seriously diminished capacity in an emergency should keep the confidences of the person as if dealing with a client, disclosing them only to the extent necessary to accomplish the intended protective action. The lawyer should disclose to any tribunal involved and to any other counsel involved the nature of his or her relationship with the person. The lawyer should take steps to regularize the relationship or implement other protective solutions as soon as possible.

27. Comment 5 to R. 1.14 of the Model R. Professional Conduct (ABA 2005) provides that, "the goals of intruding into the client's decision making autonomy to the least extent feasible, maximizing client capacities and respecting the client's family and social connections." Further, comment 7 to R. 1.14 of the Model R. Professional Conduct (ABA 2005) provides that "...in considering alternatives, however, the lawyer should be aware of any law that requires the lawyer to advocate the least restrictive action on behalf of the client."
28. In taking any protective action, the lawyer should be guided by such factors as the wishes and values of the client to the extent known, the client's best interests and the goals of intruding into the client's decision-making autonomy to the least extent feasible, maximizing the client's capacities and respecting the client's family and social connections. Even with a guardianship, the attorney

8. *In representing a fiduciary for a person with diminished capacity:*
- *is guided by the known wishes and best interests of the person with diminished capacity, and*
  - *may disclose otherwise confidential information, in the event a conflict arises between the fiduciary and the person with diminished capacity, if necessary to avoid substantial harm to the interests of the person with diminished capacity.*

Comment:

This Standard addresses representation of a client who serves as a fiduciary for the principal, when the attorney does not represent the principal but owes a duty to the principal. See Standard B-6. The fiduciary is bound by the principal's wishes, values, and best interests. The attorney should ensure that the fiduciary understands that the attorney also is bound by the principal's wishes, values and best interests.<sup>29</sup> Hence, the attorney may assist the fiduciary to take only those actions consistent with those factors. Both the fiduciary and the attorney owe a duty to the principal.

One interest of the principal is that the wishes he or she had when competent be carried out. If the fiduciary requests the attorney to take any action contrary to the principal's previously expressed wishes, the attorney should determine whether the principal has any other interests that will be served by acting contrary to those previously expressed wishes. If no other interests are served, the attorney should refuse to take the action requested by the fiduciary and advise the fiduciary of the fiduciary obligations. If the fiduciary persists in action contrary to fiduciary obligations, the attorney should take action to protect the principal even if such protection requires the disclosure of confidential information.<sup>30</sup> Section 51 of

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should still give credence to the wishes and values of the ward and structure the guardianship to maximize the ward's capacities and liberties. For example, the ward should be restored to capacity (full or partial) when circumstances call for it.

29. Comment 4 to R. 1.14 of the Model R. Professional Conduct (ABA 2005) provides the following guidance in cases where the fiduciary is a guardian:

If the lawyer represents the guardian as distinct from the ward, and is aware that the guardian is acting adversely to the ward's interest, the lawyer may have an obligation to prevent or rectify the guardian's misconduct. See Rule 1.2(d).

Comment 11 to R. 1.2 of the Model R. Professional Conduct (ABA 2005) gives some limited direction to the attorney by stating "Where the client is a fiduciary, the lawyer may be charged with special obligations in dealings with a beneficiary."

30. If the lawyer represents the guardian as distinct from the ward, and is aware that the guardian is acting adversely to the ward's interest, *the lawyer may have an obligation to prevent or rectify the guardian's misconduct.* Model R. Professional Conduct 1.2(d) (ABA 2005) (emphasis added). *See also* Model R. Professional Conduct 1.4 comment 4 (ABA 2005). Further, R. 1.2(d) mandates that the attorney not "counsel a client to engage, or assist a client, in conduct that the lawyer knows is criminal or fraudulent. . .". In cases where the client is a fiduciary, and a conflict arises between the fiduciary and the person with diminished capacity, action may be needed because "[w]here the client is [the] fiduciary, the lawyer may be charged with special obligations in dealings with a

Restatement 3<sup>rd</sup> of the Law Governing Lawyers provides important guidance to the attorney.<sup>31</sup>

For example, Attorney represents the fiduciary for an elderly man who still lives in the home in which he grew up, with all his family's antiques. He has a full-time nurse and service providers who maintain the house. The fiduciary tells Attorney that she has decided to move the older person into a nursing home in another city. Attorney knows that the older person is very friendly with his neighbors. Attorney should discuss with the fiduciary other alternatives, pointing out the interest and value to the older person of remaining in his home.

If the fiduciary appears to be self-dealing to the principal's detriment, or if the fiduciary is disregarding the principal's known wishes or best interests, the attorney must take some action to protect the principal, even though such action may be contrary to the express direction of the attorney's client (the fiduciary.)

#### F. COMMUNICATION AND ADVOCACY

The Elder Law Attorney:

1. *Works to minimize barriers to effective communication with and representation of older persons or persons with disabilities.*

Comment:

Elder Law Attorneys must have effective communication with clients who are older persons or persons with disabilities. The issues affecting clients often cut across a range of legal, social and personal matters. While most older adults do not have serious functional limitations, the frequency of physical, sensory, and cognitive

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beneficiary.” R. 1.2 comment 11. This is true even in cases where the conduct doesn't rise to the level of a crime or fraud.

31. *Restatement (Third) of the Law Governing Lawyers* § 51 (ALI 2000) provides:

For purposes of liability under § 48, a lawyer owes a duty of care within the meaning of § 52 in each of the following circumstances. . .

(4) to a non-client when and to the extent that:

- (a) the lawyer's client is a trustee, guardian, executor, or fiduciary acting primarily to perform similar functions for the non-client;
- (b) the lawyer knows that appropriate action by the lawyer is necessary with respect to a matter within the scope of the representation to prevent or rectify the breach of a fiduciary duty owed by the client to the non-client, where (i) the breach is a crime of fraud or (ii) the lawyer has assisted or is assisting the breach;
- (c) the non-client is not reasonably able to protect its rights; and
- (d) such a duty would not significantly impair the performance of the lawyer's obligations to the client.

impairments increases with age, which may result in barriers to effective communication.<sup>32</sup>

Removing the barriers<sup>33</sup> to effective communication is essential to an Elder Law Attorney's practice and requires special knowledge, skill, and persistence on the part of the Elder Law Attorney. For example, if the client has visual impairments, then the Elder Law Attorney should ensure that any documents are readable by the client. This can be accomplished by using large fonts in the documents, having a magnifying glass available, using task lighting and glare-free lighting. Inexpensive hearing assist devices can be kept in the attorney's office, and seating can be arranged so that the attorney is closer to the client.

2. *Maintains direct communication with the client, even when the client chooses to involve others in the process, and especially when significant decisions are to be made.*

Comment:

Maintaining direct communication with the client is a critical component of effectively representing the elder client. It may become difficult when the client suffers from any physical or mental impairment, when significant decisions need to be made, or when the client has others involved in the process. Often the client will direct the Elder Law Attorney to communicate with a third party either in a formal agency relationship or informally through a family member. Even though the client may have authorized the Elder Law Attorney to communicate directly with a third party, the attorney should still include the client in communications.<sup>34</sup> In addition,

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32. Barriers to effective communication include the following:

- (1) Cognitive barriers: Clients of advanced age are sometimes confused, forgetful, or suffer from actual dementia.
- (2) Physical barriers: Clients of advanced age sometimes suffer from hearing or vision loss or face mobility problems.
- (3) Situational stress: Elder Law Attorneys commonly see clients who are in crisis. Someone has died; there has been a financial setback, or a medical crisis.
- (4) Complex issues: Medicaid rules, fiduciary responsibility, tax code intricacies, and documents in "legalese" can baffle even the sharpest clients.
- (5) Dependence on others: Many of our elderly and special needs clients are used to having someone else "take care of things" for them.
- (6) Concern about legal fees.

33. Useful information can be found in a pamphlet published by the AARP containing American Bar Association Commission on Legal Problems of the Elderly and Legal Counsel for the Elderly, *Effective Counseling of Older Clients: The Attorney-Client Relationship* 15 (1995). See also Rebecca Morgan, *Practice Aspects of Practicing Elder Law* ABA Family L. Q. (2004).

34. Comment 2 to Model R. Professional Conduct 1.14 (ABA 2005) provides: "Even if the person has a legal representative, the lawyer should as far as possible accord the represented person the status of client, particularly in maintaining communication."

even though communicating with third parties, the Elder Law Attorney must maintain the duties of loyalty and confidentiality to the client.<sup>35</sup>

For example, a client signs an authorization allowing the Elder Law Attorney to communicate directly with her child about the client's legal matter. Even though the attorney may communicate with the child, the attorney should still keep the client directly informed, including providing the client with copies of any documents.

3. *Advises clients of their options, the practical and legal consequences of each option, and the likelihood of success in pursuing each option.*

Comment:

Although all attorneys must advise clients about options, their consequences and likelihood of success, Elder Law Attorneys also must contend with a complex array of legal, social, medical and personal issues, and the clients' lack of familiarity in dealing with such issues. Clients may need guidance and assistance in identifying the issues before addressing the options. Clients may have concerns about the non-legal issues as well as the legal issues, and place emphasis on a non-legal issue. The Elder Law Attorney should identify the issues and assist clients in identifying and focusing priorities.

For example, Elder Law Attorneys frequently must discuss placement and housing options, medical issues, insurance matters, and personal issues such as grief over the death of a loved one.

In describing the options to the client, the attorney should give the client information about the practical and legal consequences of each reasonable option as well as the likelihood of success. Therefore, the Elder Law Attorney should consider explaining the consequences in a commonly understood framework, such as pros and cons, or advantages and disadvantages. In explaining the likelihood of success, the attorney should provide as much concrete information as possible in order for the client to make an informed choice, but should not make any promises about the outcome.

The attorney has an ethical obligation to keep the client informed and to sufficiently explain the matter so that the client can make an informed decision.<sup>36</sup> The

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35. The attorney-client privilege does not cover communications made in the presence of non-client third parties, subject to exceptions for persons necessary to the communications (e.g., translators) or agents of the client (e.g., power of attorney).

36. Model R. Professional Conduct 1.14 (ABA 2005) provides that the lawyer must:

- (a) . . .
  - (1) promptly inform the client of any decision or circumstance with respect to which the client's informed consent . . . is required by these Rules;
  - . . .
  - (3) keep the client reasonably informed about the status of the matter;
  - (4) promptly comply with reasonable requests for information; and . . .

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amount and the kind of information given to the client will be governed by a number of factors. These include the complexity of the matter, the client's ability to understand the information, and the impact of the information on the client. In fact, in some circumstances the attorney may not be required to fully inform the client if doing so would harm the client or cause the client to react inappropriately.<sup>37</sup>

*4. Strives to address clients, whether in person, on the telephone, or through correspondence, in ways they can readily understand.*

## Comment:

The Elder Law Attorney should make sure that all client communications are easily understood. This means not only removing any physical barriers to communication, but also explaining concepts and terms in a way that the client can understand. In order for the client to participate in the attorney-client relationship and to make informed decisions, the client must be able to understand and weigh the information from the attorney.

For example, in explaining an option to the client, the attorney should not use legalese or terms of art, but instead explain the option in plain language and use examples that the client can readily apply to real life situations. The amount of information and detail given are governed in part by the client's ability to comprehend it.<sup>38</sup>

*5. Advocates, within the law, courses of action chosen by the client.*

## Comment:

Elder Law Attorneys, like all attorneys, owe a duty of loyalty to their clients, and must zealously advocate for their clients<sup>39</sup> within the bounds of the law and consistent with state rules of professional responsibility.

(b) A lawyer shall explain a matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation.

37. See Model R. Professional Conduct 1.14 comment 507 (ABA 2005).

38. Model R. Professional Conduct 1.14 comment 6 (ABA 2005) provides in part:

Ordinarily, the information to be provided is that appropriate for a client who is a comprehending and responsible adult. However, fully informing the client according to this standard may be impracticable, for example, where the client . . . suffers from diminished capacity.

39. Model R. Professional Conduct 1.3 comment 1 (ABA 2005) notes that there are limits on zealous advocacy. Comment 1 states in part:

A lawyer should pursue a matter on behalf of a client . . . and take whatever lawful and ethical measures are required . . . A lawyer must also act with commitment and dedication to the interests of the client and with zeal in advocacy upon the client's behalf. A lawyer is not bound . . . to press for every advantage that might be realized for a client.

In the typical case, the client's chosen course of action will appear logical and appropriate to the attorney. However, a client may pursue a course of action that appears unusual or even contrary to the client's best interests. Normally, the attorney is bound by the decision of the client regarding the objectives of the representation.<sup>40</sup> But this does not mean that the attorney should fail to advise the client of the likely consequences of a particular course of action, or fail to counsel the client against such action. Furthermore, if the client suffers from diminished capacity, protective action may be indicated.

6. *Provides counsel and representation regarding critical life planning decisions, such as long term care planning that may involve repositioning of assets. In such cases, the Elder Law Attorney should:*

- strive to ascertain the client's fundamental values in order to be responsive to the goals and objectives of the client;
- endeavor to preserve and promote the client's dignity, self-determination, and quality of life in the face of competing interests and difficult alternatives;
- counsel the client about the full range of long-term care issues, options, risks, consequences, and costs relevant to the client's circumstances;
- counsel the client regarding asset preservation strategies as appropriate in light of the client's needs, personal values, and alternatives available; and
- counsel the client about the estate planning and tax implications of such estate and asset preservation strategies.

**Comment:**

Attorneys in general, and Elder Law Attorneys in particular, are often called upon to assist clients in times of crisis. In the Elder Law practice, such crises typically involve the death, disability, or long-term illness of a client or loved one. Counseling clients in times of crisis requires compassion and the ability to clearly analyze issues, present options, assess risks, and make recommendations. The client's goals must guide the outcome. If a solution to the client's problem is not consistent with the client's fundamental values, it is inappropriate.

The Elder Law Attorney should present all reasonable options, even though the attorney may personally disagree with one or more of those options, and assist the client to implement the course of action that will most nearly accomplish the client's goals. When structuring the options, the attorney should be guided by the client's goals and values, and whenever possible, structure a course of action that both preserves and promotes the client's dignity, quality of life, and self-determination.

The Elder Law Attorney should keep in mind Model Rule 2.1 of the Model Rules of Professional Conduct (2005), which states that the "lawyer may refer to not only

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40. See Model R. Professional Conduct 1.2(a) (ABA 2005).

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law, but to other considerations such as a moral, economic, social and political factors, that may be relevant to the client's situation.”

## G. MARKETING

The Elder Law Attorney:

1. *Considers the potential for marketing to educate the public and to promote the profession of Elder Law.*

Comment:

In addition to promoting one's practice, marketing should serve an educational function.

For example, advertising can make the public aware of potential problems. Marketing can also promote the Elder Law profession by accurately presenting Elder Law Attorneys as experts who can help to solve those problems. Similarly, to the extent that marketing materials make a positive impression on the public, this benefits the Elder Law profession as a whole.

2. *Prepares or disseminates only marketing communications that are truthful and do not include statements that are false or misleading in any material respect.*

Comment:

An attorney should be honest and truthful in all communications with the public and potential clients. Honesty and truthfulness in all communications, public or otherwise, to prospective clients is a fundamental obligation of all attorneys. The attorney should not make false or misleading statements or attempt to attract clients through guile and deceit. A statement is false if any part of it is not true, and a statement is misleading if it may not be literally false but nevertheless creates a false impression.

A “marketing communication” is any communication to any segment of the public or to prospective clients that promotes or offers the services of the attorney. It includes advertising, public relations and direct marketing, and covers all media, including print and electronic, and all methods of distribution, including mail, telephone, facsimile, and electronic. Law firm brochures and seminar or other event announcements are also marketing communications.

3. *Takes into consideration the intended audience for any marketing communication and, in particular, the potential vulnerability of that audience to undue influence.*

Comment:

Whether a communication is misleading will depend in part on the likely perception and vulnerabilities of the intended audience. The Elder Law Attorney should market appropriately to avoid unduly influencing vulnerable persons unable to exercise reasonable judgment in employing the attorney.

For example, marketing techniques designed to exert pressure on a potential client who is vulnerable, such as offering a “special discount” if the potential client engages the attorney immediately, are inappropriate. The attorney should never attempt to instill fear or panic in an individual or discourage an individual from consulting with a spouse or other third party prior to making a financial commitment.

4. *Ensures that no materially false or misleading information is communicated in connection with a seminar, presentation, or similar activity.*

Comment:

Seminars, presentations or similar activities are marketing. Attorneys who organize or speak at seminars and other forums should ensure that no false or misleading information is given.

For example, to state that a particular legal course of action is appropriate for everyone, i.e., “one size fits all,” or to exaggerate the benefits or minimize the detriments of a particular course of action or procedure is misleading.

5. *Has a reasonable basis for any claim that suggests superiority to, or an advantage over, other attorneys.*

Comment:

To avoid deceiving the public or potential clients, attorneys should only make comparative statements based on fact.

For example, claims that an attorney has more experience, a greater level of expertise, or a higher “success” rate than other attorneys requires empirical data for support. Other comparative statements, such as “friendlier service” or “more convenient hours,” are more difficult to verify.

6. *Accurately describes legal concepts, procedures, programs or techniques in all marketing communications.*

Comment:

Attorneys should use accurate adjectives to describe a legal concept, procedure, program, or technique.

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For example, advertisers often use words such as “new,” “unique,” or “secret” to stimulate interest in a product or service. Any procedure or technique commonly used by attorneys nationwide is not “secret” or “unique.”

7. *Employs client endorsements only if they reflect the honest opinion or experience of an actual client and, if the client’s experience is not typical, discloses that fact.*

Comment:

Endorsements must be made by actual clients, based on their actual experience with the attorney. An endorsement is any communication that the public is likely to believe reflects the opinions, beliefs, findings, or experience of someone other than the advertising attorney. These include verbal statements, demonstrations, or depictions of the name, signature, likeness or other identifying personal characteristic of an individual or the name or seal of an organization. Endorsements are often intended to serve, and are interpreted by potential clients, as a form of third-party verification of the capabilities of the attorney. They must be truthful and accurate.

8. *Uses organizational endorsements only if those endorsements truthfully reflect the collective judgment of the organization, and discloses any relationship between the organization and the attorney that might materially affect the weight or credibility of the endorsement.*

Comment:

Organizational endorsements are intended to serve, and are often interpreted by potential clients, as a form of third-party verification of the capabilities of the attorney. Such endorsements must be truthful, accurate, and represent the judgment of a group whose collective experience exceeds that of any individual member. When using organizational endorsements, the attorney must disclose any relationship to the organization.

9. *Does not engage in uninvited in-person or telephone solicitation of prospective clients who may be vulnerable to undue influence or who may not be able to exercise reasonable, considered judgment in selecting an attorney.*

Comment:

In-person and telephone solicitations to potential clients may violate state rules. These practices are generally prohibited because of the opportunity for overreaching, invasion of privacy, the exercise of undue influence, or outright fraud. Exacerbating the problem is the fact that such conduct is not visible or otherwise open to public scrutiny and therefore difficult to monitor.

Many vulnerable older persons and persons with disabilities are susceptible to undue influence, especially when confronted with in-person or telephone solicitations. Often those who need the services of an Elder Law Attorney are faced with

circumstances that make them unable to make a reasoned decision in selecting an attorney.

#### H. ANCILLARY SERVICES

The Elder Law Attorney:

1. *Is competent and appropriately licensed or credentialed in any ancillary service provided.*

Comment:

The complex problems faced by older persons and persons with disabilities involve more than legal issues and services. Some Elder Law Attorneys offer ancillary services such as insurance and annuity sales, care management, tax preparation, and fiduciary or investment services allowed by states that have adopted a rule such as Model

Rule 5.7.<sup>41</sup> Clients may find it convenient and reassuring to put their trust in one source to meet a variety of needs.

Elder Law Attorneys may choose to deliver non-legal services and products in accordance with their state professional responsibility rules. They may provide ancillary services or products<sup>42</sup> as dual-practitioners, by hiring non-lawyers as

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41. R. 5.7 pertaining to the Responsibilities Regarding Law-Related Services states:

- (a) A lawyer shall be subject to the Rules of Professional Conduct with respect to the provision of law-related services, as defined in paragraph (b), if the law-related services are provided:
  - (1) by the lawyer in circumstances that are not distinct from the lawyer's provision of legal services to clients; or
  - (2) in other circumstances by an entity controlled by the lawyer individually or with others if the lawyer fails to take reasonable measures to assure that a person obtaining the law-related services knows that the services are not legal services and that the protections of the client-lawyer relationship do not exist.
- (b) The term "law-related services" denotes services that might reasonably be performed in conjunction with and in substance are related to the provision of legal services, and that are not prohibited as unauthorized practice of law when provided by a non-lawyer.

Model R. Professional Conduct (ABA 2005).

42. It is helpful to distinguish law related from ancillary (non-law related) products and services. Law related services include, but are not limited to: (1) providing internet technology and access to law firms for legal research, (2) offering processes and forms for lawyers to integrate into their practices that help clients through federal and state fair hearings, (3) promoting a lawyer's trustee and guardianship expertise to be used by other firms for appointment to such positions, and (4) offering financial and tax analysis to lawyers for their clients. Non law-related products and services include, but are not limited to: (1) selling all forms of insurance products, especially long term care insurance; (2) offering many forms of psychological assessments, geriatric nursing and care management services; (3) delivering a wide array of finance, investment and money

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employees of their firms or by creating non-law related entities in which they work with non-lawyers.

This Standard and subsequent Standards in this section address the preferred situation in which the Elder Law Attorney provides ancillary services within the framework of the law office, i.e., the holistic model. These standards do not address alternative structures, which may be permissible under some state rules, in which a separate entity is created to provide ancillary services.

State professional responsibility rules allowing ancillary services require basic licensure. In addition, Elder Law Attorneys should obtain a certification or designation that educates them beyond the minimum and clearly establishes their competency in selling or providing the non-legal services.

For example, licensure for selling long-term care insurance simply requires passing a general test for selling insurance. However, the Elder Law Attorney acquiring long-term care insurance licensure should also acquire certification to increase awareness and understanding of the more complex facets of this specialized insurance product. This enables the Elder Law Attorney to find the best product for a client.

2. *Ensures that any ancillary services recommended meet the needs of the client.*

Comment:

Elder Law Attorneys should offer ancillary products and services individually directed at resolving the specific problems and needs of a client. Elder Law Attorneys should only offer products and services after an assessment of the client's needs. Elder Law Attorneys should not recommend ancillary products and services to all prospective and on-going clients, regardless of need.

For example, an Elder Law Attorney licensed to sell insurance should not send a solicitation letter to all former or current clients promoting one particular product as being exactly what each client needs.

3. *Fully discloses, in writing, all relevant matters to the client receiving ancillary services, including:*
  - *The terms of the service;*
  - *Any actual or reasonably foreseeable adverse consequences to the client;*
  - *Notice that the client may obtain the same services from an independent source, at perhaps a different price;*
  - *The desirability of seeking independent legal advice;*

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management products and services; (4) publishing advisory bulletins and reporter services that keep lawyers and consumers informed about the trends and hot topics in the area of elder law; (5) and mechanical and technical support and consultation to Elder Law Attorneys developing, designing and marketing to consumers, especially on the internet with links, lists, home pages and web visibility.

- *The non-legal nature of the ancillary service and the attorney-client protections that apply;*
- *The relationship between the attorney and any separate entity, including any financial interest of the attorney in any entity; and*
- *The existence of any compensation arrangement for the attorney.*

Comment:

This Standard requires full and timely disclosure of the ancillary products and services. Elder Law Attorneys should explain the product or service in plain language, making sure that the client has a grasp of the terms and understands the potential risks and benefits of the product or service. Elder Law Attorneys should routinely identify other sources and, where feasible, prices for the same service or product to enable the client to make an informed decision. Elder Law Attorneys should assure that clients are offered independent legal advice regardless of the consequences to the attorney's business.

Elder Law Attorneys should integrate their ancillary services into their practice of law so that it is clear that all protections usually afforded clients by attorneys remain, even though the attorneys are providing non-legal services. If the Elder Law Attorney has a financial interest in the entity selling the product or service, or is receiving compensation in addition to legal fees, there must be a clear explanation of what is covered by the legal fees and what by the commission or product price.

For example, an Elder Law Attorney who is also a licensed long-term care insurance agent should thoroughly explain that he or she is licensed and that as a licensed agent he or she receives a commission or fee on the sale of a policy.

4. *Obtains the client's informed written consent prior to the performance of any ancillary services permitted under the state's rules of professional conduct.*

Comment:

Because of the inherent potential for conflict of interest, an attorney's provision of ancillary services may at times appear to be improper. To protect the client and to minimize such an appearance, Elder Law Attorneys should have clients sign an acknowledgement that incorporates all notices and disclosures detailed in Standard H-3. This Standard applies when the attorney is involved in providing ancillary products and services through a law firm or a non-law related entity owned in part or in whole by the attorney or law firm.

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5. *Ensures that all the protections that the client has as part of the attorney-client relationship (such as protecting against financial conflicts and maintaining client confidentiality) remain when the client is also receiving ancillary services or products.*

## Comment:

Elder Law Attorneys should not sell or offer products and services that would in any way dilute the core values of loyalty, competence, or confidentiality. This applies to all non-legal professionals employed or independently contracted by the Elder Law Attorney. This Standard requires Elder Law Attorneys to apply the same core values and adhere to the same notice and disclosure requirements when delivering ancillary products or services, regardless of the entity used to deliver the products or services.

For example, an Elder Law Attorney who is also a stockbroker and is aware of two investment options that reasonably meet a client's goals should recommend the one that offers the best value to the client for the best price, even though the other investment would pay a larger commission. Such action is compelled by the attorney's duty of loyalty to the client's best interests. In contrast, a non-attorney stockbroker could recommend the purchase of the investment that pays the larger commission to the broker.

## I. PUBLIC SERVICE

## The Elder Law Attorney:

1. *Recognizes the need for pro bono legal services and meets or exceeds the requirements of Model Rule of Professional Conduct 6.1 ("Voluntary Pro Bono Public Service").*

## Comment:

Model Rule 6.1 reminds attorneys of their professional responsibility to provide pro bono and public services. Elder Law Attorneys should provide annually at least 50 hours of pro bono legal services, financially contribute to those organizations providing legal representation to clients of limited means, and assume leadership roles in improving the legal profession.<sup>43</sup>

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43. Model R. Professional Conduct 6.1 (ABA 2005) provides:

Every lawyer has a professional responsibility to provide legal services to those unable to pay. A lawyer should aspire to render at least (50) hours of pro bono public legal services per year. In fulfilling this responsibility, the lawyer should:

- (a) provide a substantial majority of the (50) hours of legal services without fee or expectation of fee to:
  - (1) persons of limited means or

2. *Utilizes the attorney's special skills and emphasizes service to older persons and persons with disabilities.*

Comment:

Because Elder Law Attorneys have the training and expertise to serve older persons and persons with disabilities, they should take the lead in meeting the pro bono needs of those clients. Elder Law Attorneys should direct a substantial portion of their public service efforts to those organizations that assist older persons and persons with disabilities. In addition, Elder Law Attorneys should make financial contributions to organizations that provide services to older persons and persons with disabilities.

3. *Provides ongoing leadership in improving the law to serve the changing needs of older persons and persons with disabilities.*

Comment:

Elder Law Attorneys possess unique knowledge of the laws affecting older persons and persons with disabilities, and firsthand insight into their needs. Therefore, they should use their knowledge and skills to assume a leadership role in advocating law reform to better the lives of such persons.

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- (2) charitable, religious, civic, community, governmental and educational organizations in matters that are designed primarily to address the needs of persons of limited means; and
  - (b) provide any additional services through:
    - (1) delivery of legal services at no fee or substantially reduced fee to individuals, groups or organizations seeking to secure or protect civil rights, civil liberties or public rights, or charitable, religious, civic, community, governmental and educational organizations in matters in furtherance of their organizational purposes, where the payment of standard legal fees would significantly deplete the organization's economic resources or would be otherwise inappropriate;
    - (2) delivery of legal services at a substantially reduced fee to persons of limited means; or
    - (3) participation in activities for improving the law, the legal system or the legal profession.