Ethical Issues in Communicating with Non-Clients

Red Flags and Best Practices

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In this Session, you will...

- **Understand red flags** for working with third parties on behalf of elderly clients
- **Apply ethical rules** and aspirational guidelines to examples
- **Work through a protocol** for addressing these concerns
- **Model conversations** with third parties
- **Review and evaluate disclosure forms**
- **Discuss best practices**
What we are NOT addressing

- Representation of multiple parties or interests
- Couples representation
- Representing fiduciaries
- Determining competency of a client
- Conflicts of Interest
Agenda
11:30-12:45

• Introduction of topic & scenarios (11:30-11:40)
• Break into small groups – apply protocols and ethics rules (11:40-12:05)
• Report small group ideas to larger group, and model conversations with third parties (12:05-12:25)
• Brainstorm ways to avoid ethics problems and develop best practices (12:25-12:40)
• Closing (12:40-12:45)
Examples involving third parties

• Discussing with client and agent what the agent can and cannot do in her role as agent

• Meeting with the client and a nursing home representative to discuss implementing the client’s choices about daily activities

• Meeting with the client and his or her financial planner to discuss an estate plan
Why this is important

- Seniors feeling that others plan for them without consultation
- Some other people DO assume that elderly people are unable to express their wishes, think rationally, and make clear decisions
- Physical ailments keep some older clients from being involved
- Some have diminishing capacity that makes communication challenging
- Some of those wishing to assist elderly clients are self-interested
Applicable Rules Guidelines

• Model Rules of Professional Conduct, available at abanet.org
• Your state ethics rules & ethics opinions
• NAELA Aspirational Standards available at naela.org
• ACTEC commentaries on the MRPC available at actec.org
Proposed process

- Identify the client
- Identify other parties who want to be involved, and their interests & potential conflicts of interest
- Identify any red flags of abuse or exploitation
- Identify others the client wants to involve and why
- Discuss with client involvement of any third parties and extent of involvement—either ongoing or after representation ends
- Document client’s choices
- Discuss authorizations with client and reach mutual understanding with client
Scenarios

- Ms. Brown and siblings working out trust issues
- Mr. Edwards and agent (nephew) under a DPOA
- Ms. Steele, granddaughter and doctor
- Ms. Gonzalez and daughter
- Mr. Leopold, hospital caseworker and APS
• Report back from each group: model conversations

• Disclosure forms

• Ideas for best practices

• Closing
Ethical Issues in Communicating with Non-Clients: Red Flags and Best Practices

Mary Helen McNeal and Kimberly O’Leary
National Aging and Law Institute, November 2013

Introduction

Elderlaw is a complex field, and the practice often involves interacting with numerous people who are not your client but may play critical roles in helping your client enforce her wishes. Therefore, it is worth considering best practices for consulting with third parties in these contexts. Such consultations begin with a clear understanding of who is the client and those with whom it is helpful to collaborate in assisting the client.

Examples of possible collaborations in an elderlaw practice include the following:

- discussing with the client and the client’s selected agent what the agent can and cannot do in her role as agent;
- meeting with the client and nursing home staff to discuss implementing the client’s choices about daily activities;
- meeting with the client and his or her financial planner to discuss an estate plan; and
- meeting with the client who is the personal representative of an estate and the heirs and beneficiaries of the estate to explain the process of probating an estate.

Engaging third parties to help an elderly client can be problematic for the following reasons:

- elderly clients may feel that people plan for them without adequate consultation;
- some attorneys and much of society DO assume that some elderly people are unable to express their wishes, think rationally, and make clear decisions;
- physical ailments keep some older clients from being as involved in the collaboration as the clients may want to be:
- some elderly clients have diminishing capacity that makes communication more challenging; and
• some of those wishing to assist elderly clients are self-interested.

Because of these concerns, it is important to be cognizant of the rules requiring lawyers to maintain their clients’ confidences and the exceptions to those rules.\(^1\) Because older people frequently rely upon others to help them, it is tempting for the lawyer to explain the clients’ choices to others who might help make those choices a reality. However, that is not appropriate if the client wants his or her legal work and decisions to remain private.

The best way to collaborate with third parties is to obtain your client’s consent before approaching other people for help. Make sure your client understands why you need to enlist the assistance of others and is comfortable with that approach.

Ensuring You Are Clear About Who Your Client Is

In an elderlaw practice, third parties can play a prominent role, sometimes appropriately assisting clients and sometimes interfering with the lawyer-client relationship. Clients may be transported to the law office by adult relatives, neighbors, close friends, caseworkers or others. Some third parties have official roles, having been designated attorneys in fact or appointed guardian. Most, however, are just relatives, friends or neighbors trying to help. A few are abusing or exploiting the older person. When the attorney is retained by one person, the practitioner must collaborate with third parties as much as necessary to help the elderly client, but be completely clear at all times that the elderly person is the only client and that person’s interests are paramount.

Sometimes two or more people seek advice and want to be represented together. Sometimes they are family members or close friends who share a common legal issue. These situations always create a potential conflict of interest that must be addressed. Sometimes an ethics analysis will allow the joint representation, and sometimes it will not.\(^2\) Some lawyers will be called upon to represent interests in an entity (a trust, an estate, or a conservatorship) where they will need to clarify whether they represent the entity itself or the personal interest of someone involved.

In all instances, the lawyer must make a clear decision about who the lawyer represents,\(^3\) prepare a clear retainer agreement or engagement letter\(^4\) and appropriate waivers, if necessary, and disclose who the client is to interested parties.\(^5\)

\(^1\) This document applies the ABA Model Rules of Professional Conduct.
\(^2\) A detailed analysis of conflict of interest issues in the elderlaw setting is beyond the scope of this session. It is a complex area requiring compliance with all applicable ethical rules, including Model Rules 1.7, 1.8, 1.9. 1.10 and 1.18, and consultation with other guidelines, such as the National Academy of Elder Law Attorneys’ (NAELA) “Aspirational Standards for the Practice of Elder Law with Commentaries,” available at http://www.naela.org/AppThemes/Public/PDF/Media/AspirationalStandards.pdf, and the National College of Estate and Trust Counsel’s (ACTEC) “Ethical Guidelines for the Estates and Trusts Lawyer,” available at http://www.actec.org/Documents/CLEMaterials/EthGuideRoss.pdf.
\(^3\) NAELA Standards (A)(1) and (2).
\(^4\) NAELA Standards (A)(1) and (2).
\(^5\) NAELA Standards (A)(1) and (2).
Client Consent to Collaborate with Third-Parties

Pursuant to Model Rule 1.6, “A lawyer shall not reveal information relating to the representation of a client unless the client gives informed consent, the disclosure is impliedly authorized by the representation or the disclosure is permitted by paragraph (b).” The Rules and Comments give little guidance to what “impliedly authorized by the representation” means.

In the course of an initial meeting with a client, the lawyer will often learn of third parties who are involved in the client’s life and that the client may want informed about the representation. It is advisable to have an explicit conversation with the client about: 1) the identity of these third parties; 2) what information the client agrees can be to disclosed to them; and 3) for what purpose the information will be disclosed. The lawyer should ask if the client wants you to share information and/or obtain information from someone else. Does the client want the other person involved in the details of the case? Does the client want you to contact someone else when you need to get in touch with the client? The client’s responses to these questions should be documented. See below “Protocol on Maintaining Confidentiality in an Elderlaw Practice” and attached “Client Authorized Disclosures During Representation” form.

In each instance, the attorney must make it very clear that she represents the client, and the client’s interests alone. The attorney must be careful NOT to give legal advice to the third parties and to explain to them up front that she is not able to give them any legal advice but if the client consents, will explain the choices the client has made. It is always preferable to have the client present in these meetings to emphasize that you represent the client and to enable the client to consult with you, if necessary.

An elderlaw attorney should also have a conversation with elderly clients about disclosure of documents and plans with other parties if the client becomes unable to grant consent in the future due to incapacity or death. The obligation to maintain client confidentiality continues if the client experiences diminished capacity, except in limited circumstances, and after the death of the client. If the client wants to permit you to discuss confidences with anyone after incapacity or death, the client should sign a waiver allowing such conversations, stating what he or she wishes to be shared and with whom. See attached “Client Authorized Disclosures After the Representation Ends” form.

Protocol on Maintaining Confidentiality in an Elderlaw Practice

This protocol is a step-by-step analysis for determining the identity of your client and the proper methods for maintaining confidentiality vis-à-vis third parties in an elderlaw practice.

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6 NAELA Standard (C).
7 See Model Rule 1.14 and comments for permissible disclosures when representing a client with diminished capacity.
8 ACTEC
Step 1: Identify the client.

In an elderlaw practice, you often have a prospective client and one or more third parties who are actively involved in a way that causes you to question who you will be working for and how the third party will be involved. You may have a third party who brought the senior to see you or who is paying the bill. Identify the person with the primary legal issue. You must meet with this person alone and determine whether he or she wants you to be his or her lawyer.

Note: If this person affirmatively does NOT want to engage you as a lawyer, you cannot represent him or her in those legal issues.

Step 2: Are there other people involved, other than a potential adversary, who also have legal issues?

If so, name them and identify their legal issues.

Step 3: Evaluate potential conflicts of interest.

Are the positions of the client and the people named in Step 2 adverse, the same, or just different from each other? If they are adverse, be careful NOT to obtain confidential information from both parties or you may be precluded from representing either party absent consent.9

Step 4: If the people have adverse interests, who can you choose to represent? How will you make that choice?

If one of them is a current or former client, you should choose to represent that person. If not, and if you are a Title III, legal services, pro bono or other public interest provider, you should look to representing the person over sixty who is the most at risk. If you are in private practice, you may want to represent the person who contacted you first. After you identify the client, you must NOT get confidential information from the other(s); you must keep private the information from the client, and you must make it clear to all parties who you represent and do NOT represent.

Step 5: Identify if there are other people involved who do not have their own legal issues, but who want to be involved in your representation of the client.

Who are they and what are their interests?

Note: The usual stance is that third parties are NOT involved. You may not disclose information to third parties without the client’s consent.

Step 6: Are there any red flags or indicators of abuse by any of these people against the client?

9 Model Rules 1.7 and 1.18(c).
Document any such indicators. Discuss any such concerns with the client in private.

**Step 7:** Are there other people the client wants you to involve in this case?

Who are they and why does the client want to involve them? Do they have information that is useful to the representation? If so, you may be able to gather information without sharing any of the client’s confidences.

**Step 8:** Determine whether persons named in Step 7 are persons the client wants involved in attorney-client discussions and why.

Explore whether involving these people might adversely affect the legal work you are doing. For example, if this involves estate planning, involving third parties can create claims of undue influence or incompetence and should be avoided. Explain to the client that allowing third party involvement might defeat attorney-client privilege\(^{10}\) and the third party could be compelled to disclose discussions to others.

**Step 9:** If the client wants you to explain something to the third party to assist in implementation of acts, explain that such discussions can take place in a limited format that will not require a waiver of confidentiality.\(^{11}\)

**Step 10:** If the client needs you to contact/update a third party to perform administrative handling of the case because the client is ill, frail, or for some other reason, tailor a limited waiver to allow such involvement. (See “Client Authorized Disclosures During Representation” form).

**Step 11:** Document any good reason to involve the person in attorney-client conversations.

**Step 13:** During representation, you and your client might agree that your client wants something that requires the assistance of a third party. Document what your client wants the third party to understand about the client’s decisions.

**Step 14:** Communicate with your client any concerns you might have about discussing this matter with a third party.

Discuss any risks to the client that might occur if you disclose information to a third party. If, after consideration of any risks, the client wants to involve a third party in implementing the client’s wishes, document how you intend to involve the third party. Determine any specific agreement or understanding you hope to obtain from the third party.

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\(^{10}\) But see Model Rule 1.14, Comment 3 (“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 does not affect the applicability of the attorney-client evidentiary privilege….“)

\(^{11}\) Model Rule 1.6(a) (information “impliedly authorized to carry out the representation”). See Comment 5 (“a lawyer is impliedly authorized to make disclosures about a client when appropriate in carrying out the representation.”) This includes information necessary to “advance the interests of the client.” ABA Formal Ethics Op. 01-241 (2001).
Step 15: Determine whether there are any documents, plans or other information the client wants you to share with anyone in case he or she becomes incapacitated and can no longer grant consent.

Are there any documents, plans or other information the client wants you to share with anyone if she becomes incapacitated? Is she passes away? If so, who and why? Have your client complete the “Client Authorized Disclosures During Representation” and the “Client Authorized Disclosures After Representation” forms.
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Disclosure Forms: When and How to Use Them

Many people who are not lawyers do not understand basic confidentiality principles, and it is good practice to go over those with a new client in the initial meeting. This is a good time to explain that it may be helpful for you to contact other people and reveal some information as part of the process of helping your client achieve her goals.

It is important to have a conversation with your client about how, when and what you might want to communicate to third parties about the client and her case. We recommend that you raise this topic in the first meeting with a client. Give the client some examples of how you might need to contact other people. Let the client know that if there are certain pieces of information she wishes to be kept private, to raise those with you. Let her know that she can always raise this topic later if she thinks of something that concerns her.

Sometimes a client asks you to consult with someone else while you are representing her. This could be because she is ill and feels unable to address the legal issues, because another person has most of the information you will need, or for some other reason. Sometimes another person wants to be involved but this is not the client’s idea. It is important to distinguish between these two scenarios. You should counsel the client that it is usually in the client’s best interests to meet with you alone and to make her own decisions.

If the client wants you to consult or inform another person or your think it would be helpful to do that, review the Client Consent to Disclosure During Representation form. Don’t just give it to your client to complete alone. Go over it with the client, discuss what it means, and make appropriate notes on it before the client signs it. If you are doing estate planning, be careful NOT to have your client authorize consultation, meetings and disclosure to a potential beneficiary or agent where allegations of undue influence might be raised later on.

When you are ready to close a client’s file, you should discuss with the client who, if anyone, the client wants you to share information with if the client becomes unable to communicate with you and after the client passes away. We recommend that you use the “Client Consent to Disclosure After Representation” form to discuss this topic with every client before you close her file. Again, you should use the form to have the discussion, not just ask the client to check off the boxes. Make sure your client understands what she is giving up if she authorizes disclosure. Make sure the client understands he or she can revoke the authorization at any time.
Client Authorized Disclosures During Representation

This law firm is representing you in the following matter:

________________________________________________________________________
________________________________________________________________________

The information you give us is confidential – we may not disclose private information without your permission.

Check any boxes you wish.

1. Communication with others. Check one box:

   a. ___During my case, I want you to share information with (name family or friends below) (We do NOT recommend that you check this box without discussing the reason with us first)

   b. ___ I do not want you to share information with any other person except in the ordinary course of representation consistent with rules of confidentiality.

2. Extent of communication. Check all that apply:

   a. ___Update the person listed above about the status of my case
   b. ___Contact the person listed above to schedule appointments or meetings
   c. ___Obtain information from the person listed above

3. Inability to make decisions. Check all that apply:

   If I become unable to make decisions during my case, I want you to:

   a. ___Make a decision on my behalf, if you have received enough information from me to know what I want
   b. ___Consult with my attorney in fact to make a decision
   c. ___Consult with the following person to determine what I want:_____________________________________________________
   d. ___Ask the court to name a Guardian ad Litem to make decisions for me
e. Refer me for a medical evaluation of my capacity; I understand that you will seek payment from my funds for this evaluation.

I reserve the right to revoke my consent to disclose my information at any time. I agree that this right is personal to me and that, during my lifetime, this right to revoke may not be exercised by the agent under my durable power of attorney or anyone I have named in this document.

_____________________________   __________________________
Client Signature      Date
Client Authorized Disclosures After Representation Ends

Unless you authorize us to release information, your files are confidential and may only be released in certain limited situations according to law.

This form tells us who you would like us to share information with if you are unable to give your consent. We would do this **only** if you are unable to communicate with us (due to illness or relocation) or because you have passed away. This form would apply if someone contacts our office asking for information about your case.

**Even if you check one of these boxes, you may always change your mind if you are able. You can change this document at any time. Whatever you tell us to do orally will always control our actions, even if your statements contradict this document. We will only use this document if you cannot tell us what to do.**

Check the boxes you wish.

1. **Attorney’s permitted response to requests**

I authorize my attorney to release file documents to, and discuss my case with, the following persons:

- [ ] My appointed agent under a power of attorney.
- [ ] My appointed representative under a trust or a Will.
- [ ] Any court having jurisdiction over me or my affairs.
- [ ] My health care providers.
- [ ] The following family or friends:

__________________________________________________________________
2. **Disclosures to prevent abuse or neglect when capacity declines**

If I am unable to communicate informed decisions to my attorney, I authorize my attorney to:

- Report suspected abuse, neglect or financial exploitation to appropriate agencies.
- Meet with me privately to assess my wishes, even if my appointed agent, family members, caregivers, custodians or friends disagree about the value of such a meeting.
- Represent my interests and protect my assets if anyone petitions for a guardianship or conservatorship over me.

3. **Permitted Actions After my Death**

I authorize my attorney to do the following after my death:

- Explain to my trustee or appointed personal representative what legal tasks need to be completed.
- Explain to my beneficiaries what I have provided to them in my will.
- Disclose my intent in making a Will, trust, property transfer or beneficiary designation, including offering testimony in any legal proceeding, except as to any matters I have instructed my attorney to keep confidential.

I understand that I may be compelled to testify in compliance with state law about any matters whether or not I have instructed my attorney to keep certain information confidential.

3. **Payment of Attorney**

I authorize payment of my attorney for time spent on any of the matters mentioned above at my attorney’s then-regular billing rate.
I reserve the right to revoke my consent at any time. I agree that this right is personal to me and that, during my lifetime, this right to revoke may not be exercised by my agent under a durable power of attorney.

______________________________   ____________________
Name         Date
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Applicable Rules and Commentaries


Rule 1.1 Competence
A lawyer shall provide competent representation to a client. Competent representation requires the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation.

NAELA Commentary on Competent Legal Representation
The Elder Law Attorney approaches matters in a holistic manner, recognizing that representation is enhanced by involving other professionals, support groups, and resources. They should improve their understanding of their clients’ special needs and the skills needed to serve them. Elder Law Attorneys should train their staff on the ethical considerations relevant to an elder law practice.

ACTEC Commentary on MR 1.1 (nothing addressing these issues)

Rule 1.2 Scope of Representation and Allocation of Authority Between Client and Lawyer
(a) …..A lawyer may take such action on behalf of a client as is impliedly authorized to carry out the representation….

Selected Comments to MR 1.2:
[3] At the outset of a representation, the client may authorize the lawyer to take specific action on the client’s behalf without further consultation. Absent a material change in circumstances and subject to Rule 1.4, a lawyer may rely on such an advance authorization. The client, may, however, revoke such authority at any time.
[4] In a case in which the client appears to be suffering diminished capacity, the lawyer’s duty to abide by the client’s decision is to be guided by reference to Rule 1.14.
NAELA Standard A.3

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

Summary of Relevant ACTEC Commentary on MR 1.2

In estate administration, “the lawyer should make clear the lawyer’s relationship to the parties involved.”

Express and Implied Authorization. A client may authorize a lawyer to pursue a particular course of action on the client’s behalf. By doing so the client may also impliedly authorize the lawyer to take additional, unspecified action to implement the particular course of action. Absent a material change in circumstances and subject to MRPC 1.4 (Communication), a lawyer may rely on a client’s express or implied authorization. In most circumstances, a client may revoke an express or implied authorization at any time.

Rule 1.4 Communication
(a) A lawyer shall:
   (1) promptly inform the client of any decision or circumstance with respect to which the client's informed consent, as defined in Rule 1.0(e), is required by these Rules;
   (2) reasonably consult with the client about the means by which the client's objectives are to be accomplished;
   (3) keep the client reasonably informed about the status of the matter;
   (4) promptly comply with reasonable requests for information; and
   (5) consult with the client about any relevant limitation on the lawyer's conduct when the lawyer knows that the client expects assistance not permitted by the Rules of Professional Conduct or other law.

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

Summary of Relevant NAELA Commentary on Communication and Advocacy

The attorney should maintain 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. In addition, even though communicating with third parties, the Elder Law...
Attorney must maintain the duties of loyalty and confidentiality to the client. 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.

…The attorney should maintain communication with the client, even if the client has authorized the attorney to communicate with a third party. The attorney should keep the client fully informed and explain matters so the client can make informed decisions.

**Standard B.3** - Treats family members who are not clients as unrepresented person but affords them involvement in the client’s representation as long as it is consistent with the client’s wishes and values, and client consents to their involvement.

Comment: This Standard addresses the common situation when the client’s family members who are not clients of the Elder Law Attorney are intimately involved in 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….becomes especially important.

**Summary of Relevant ACTEC Commentary on MR 1.4**

In order to obtain sufficient information and direction from a client, and to explain a matter to a client sufficiently for the client to make informed decisions, a lawyer should meet personally with the client at the outset of a representation. If circumstances prevent a lawyer from meeting personally with the client, the lawyer should communicate as directly as possible with the client. In either case the elements of the engagement should be confirmed in an engagement letter.

**Rule 1.6 Confidentiality of Information**

(a) A lawyer shall not reveal information relating to the representation of a client unless the client gives informed consent, the disclosure is impliedly authorized in order to carry out the representation or the disclosure is permitted by paragraph (b).

(b) A lawyer may reveal information relating to the representation of a client to the extent the lawyer reasonably believes necessary:

1. to prevent reasonably certain death or substantial bodily harm;
2. to prevent the client from committing a crime or fraud that is reasonably certain to result in substantial injury to the financial interests or property of another and in furtherance of which the client has used or is using the lawyer's services;
(3) to prevent, mitigate or rectify substantial injury to the financial interests or property of another that is reasonably certain to result or has resulted from the client's commission of a crime or fraud in furtherance of which the client has used the lawyer's services;
(4) to secure legal advice about the lawyer's compliance with these Rules;
(5) to establish a claim or defense on behalf of the lawyer in a controversy between the lawyer and the client, to establish a defense to a criminal charge or civil claim against the lawyer based upon conduct in which the client was involved, or to respond to allegations in any proceeding concerning the lawyer's representation of the client; or
(6) to comply with other law or a court order…

Selected Comments to MR 1.6: Authorized Disclosure
[5] Except to the extent that the client's instructions or special circumstances limit that authority, a lawyer is impliedly authorized to make disclosures about a client when appropriate in carrying out the representation. In some situations, for example, a lawyer may be impliedly authorized to admit a fact that cannot properly be disputed or to make a disclosure that facilitates a satisfactory conclusion to a matter. Lawyers in a firm may, in the course of the firm's practice, disclose to each other information relating to a client of the firm, unless the client has instructed that particular information be confined to specified lawyers.

Relevant NAELA Commentary on Confidentiality, Standard C
The Elder Law Attorney should carefully explain “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 omitted]

3. Strictly adheres to the obligation of client confidentiality, especially in representation that may involve frequent contacts with family members, caretakers, 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. When the client consents to and requests the presence of a family member, the family member’s presence may waive the attorney-client privilege, unless the family member’s presence is necessary to assist in representation.

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.

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
The Elder Law Attorney should determine from the client to whom the attorney can disclose financial information and the objectives of such disclosure. The attorney should help clients understand the risks and consequences of that disclosure. When the client wants to disclose information, the client should give written consent and specify the scope of that disclosure. The client should be informed that the consent is optional and may be revoked. If undertaking joint representation, the attorney should establish a clear understanding and agreement that attorney will keep no secrets from any other client in that joint representation. If representing clients with diminished capacity, disclosure to family members may assist in the representation of the client. This disclosure should be limited to what is necessary.

**Summary of Relevant ACTEC Commentary on MR 1.6**

*Implied Authorization to Disclose.* The lawyer is also impliedly authorized to disclose otherwise confidential information to the courts, administrative agencies, and other individuals and organizations as the lawyer believes is reasonably required by the representation.

*Express and Implied Authorization.* A client may authorize a lawyer to pursue a particular course of action on the client’s behalf. By doing so the client may also impliedly authorize the lawyer to take additional, unspecified action to implement the particular course of action. Absent a material change in circumstances and subject to MRPC 1.4 (Communication), a lawyer may rely on a client’s express or implied authorization. In most circumstances, a client may revoke an express or implied authorization at any time.

*Client Who Apparently Has Diminished Capacity.* As provided in MRPC 1.14 (Client with Diminished Capacity), a lawyer for a client who has, or reasonably appears to have, diminished capacity is authorized to take reasonable steps to protect the interests of the client, including the disclosure, where appropriate and not prohibited by state law or ethical rule, of otherwise confidential information. See ACTEC Commentary on MRPC 1.14 (Client with Diminished Capacity), ABA Inf. Op. 89-1530 (1989), and Restatement (Third) of the Law Governing Lawyers, §§24, 51 (2000). In such cases the lawyer may either initiate a guardianship or other protective proceeding or consult with diagnosticians and others regarding the client’s condition, or both. In disclosing confidential information under these circumstances, the lawyer may disclose only that information necessary to protect the client’s interests.

*Other Rules Affecting a Lawyer’s Duty of Confidentiality.* There are other rules that may impact the lawyer’s duties regarding a client’s confidential information. For example, see IRC Section 7525, Treasury Department Circular 230, SEC disclosure rules under Sarbanes-Oxley, and MRPC 1.6(b)(6) (right to disclose when required by other law). See also MRPC 1.6(b)(2).

*Obligation After Death of Client.* In general, the lawyer’s duty of confidentiality continues after the death of a client. Accordingly, a lawyer ordinarily should not disclose confidential information following a client’s death. However, if consent is given by the client’s personal representative, or if the decedent had expressly or impliedly authorized disclosure, the lawyer who represented the deceased client may provide an interested party, including a potential
litigant, with information regarding a deceased client’s dispositive instruments and intent, including prior instruments and communications relevant thereto. A lawyer may be impliedly authorized to make appropriate disclosure of client confidential information that would promote the client’s estate plan, forestall litigation, preserve assets, and further family understanding of the decedent’s intention. Disclosures should ordinarily be limited to information that the lawyer would be required to reveal as a witness.

Rule 1.14 Client With Diminished Capacity

(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.

Selected Comments To MR 1.14

[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. When the client is a minor or suffers from a diminished mental capacity, however, maintaining the ordinary client-lawyer relationship may not be possible in all respects. In particular, a severely incapacitated person may have no power to make legally binding decisions. 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. For example, children as young as five or six years of age, and certainly those of ten or twelve, are regarded as having opinions that are entitled to weight in legal proceedings concerning their custody. 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.

[2] 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.

[3] 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. Nevertheless, the lawyer must keep the client's interests foremost and, except for protective action authorized under paragraph (b), must to look to the client, and not family members, to make decisions on the client's behalf.

[4] If a legal representative has already been appointed for the client, the lawyer should ordinarily look to the representative for decisions on behalf of the client. 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).

**Taking Protective Action**

[5] If a lawyer reasonably believes that a client is at risk of substantial physical, financial or other harm unless action is taken, and that a normal client-lawyer relationship cannot be maintained as provided in paragraph (a) because the client lacks sufficient capacity to communicate or to make adequately considered decisions in connection with the representation, then paragraph (b) permits the lawyer to take protective measures deemed necessary. Such measures could include: consulting with family members, using a reconsideration period to permit clarification or improvement of circumstances, using voluntary surrogate decisionmaking 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 decisionmaking autonomy to the least extent feasible, maximizing client capacities and respecting the client's family and social connections.

[6] 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.

[7] 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.
Disclosure of the Client's Condition
[8] 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.

Emergency Legal Assistance
[9] In an emergency where the health, safety or a financial interest of a person with seriously diminished capacity is threatened with imminent and irreparable harm, a lawyer may take legal action on behalf of such a person even though the person is unable to establish a client-lawyer relationship or to make or express considered judgments about the matter, when the person or another acting in good faith on that person's behalf has consulted with the lawyer. Even in such an emergency, however, the lawyer should not act unless the lawyer reasonably believes that the person has no other lawyer, agent or other representative available. The lawyer should take legal action on behalf of the person only to the extent reasonably necessary to maintain the status quo or otherwise avoid imminent and irreparable harm. A lawyer who undertakes to represent a person in such an exigent situation has the same duties under these Rules as the lawyer would with respect to a client.

[10] 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. Normally, a lawyer would not seek compensation for such emergency actions taken.

Summary of Relevant NAELA Commentary on Client Capacity

Summary: The Elder Law Attorney:
1. Respects the client’s autonomy and rights to confidentiality;
2. Uses appropriate skills and processes for documenting preliminary assessments of client capacity for matter at hand;
3. Adapts environment and processes to maximize client’s capacities; and
4. Takes appropriate protective measures in certain circumstances, guided by client’s wishes and best interests; and
5. Discloses client confidences only when necessary.
Summary of Relevant ACTEC Commentary on MR 1.14

Preventive Measures for Competent Clients. As a matter of routine, the lawyer who represents a competent adult in estate planning matters should provide the client with information regarding the devices the client could employ to protect his or her interests in the event of diminished capacity, including ways the client could avoid the necessity of a guardianship or similar proceeding. Thus, as a service to a client, the lawyer should inform the client regarding the costs, advantages and disadvantages of durable powers of attorney, directives to physicians or living wills, health care proxies, and revocable trusts. A lawyer may properly suggest that a competent client consider executing a letter or other document that would authorize the lawyer to communicate to designated parties (e.g., family members, health care providers, a court) concerns that the lawyer might have regarding the client’s capacity. In addition, a lawyer may properly suggest that a durable power of attorney authorize the attorney-in-fact, on behalf of the principal, to give written authorization to one or more of the client’s health care providers and to disclose information for such purposes upon such terms as provided in such authorization, including health information regarding the principal, that might otherwise be protected against disclosure by the Health Insurance Portability and Accountability Act of 1996 (HIPAA). If the client wishes the durable power of attorney to become effective at a date when the client is unable to act for him- or herself, the lawyer should consider how to draft that power in light of the restrictions found in HIPAA.

Implied Authority to Disclose and Act. Based on the interaction of subsections (b) and (c) of MRPC 1.14, a lawyer has implied authority to make disclosures of otherwise confidential information and take protective actions when there is a risk of substantial harm to the client. Under those circumstances, the lawyer may consult with individuals or entities that may be able to assist the client, including family members, trusted friends and other advisors. However, in deciding whether others should be consulted, the lawyer should also consider the client’s wishes, the impact of the lawyer’s actions on potential challenges to the client’s estate plan, and the impact on the lawyer’s ability to maintain the client’s confidential information. In determining whether to act and in determining what action to take on behalf of a client, the lawyer should consider the impact a particular course of action could have on the client, including the client’s right to privacy and the client’s physical, mental and emotional well-being. In appropriate cases, the lawyer may seek the appointment of a guardian ad litem, conservator or guardian or take other protective action.

Risk and Substantiality of Harm. For the purposes of this rule, the risk of harm to a client and the amount of harm that a client might suffer should both be determined according to a different scale than if the client were fully capable. In particular, the client’s diminished capacity increases the risk of harm and the possibility that any particular harm would be substantial. If the risk and substantiality of potential harm to a client are uncertain, a lawyer may make reasonably appropriate disclosures of otherwise confidential information and take reasonably appropriate protective actions. In determining the risk and substantiality of harm and deciding what action to take, a lawyer should consider any wishes or directions that were clearly expressed by the client during his or her competency. Normally, a lawyer should be permitted to take actions on behalf of a client with apparently diminished capacity that the lawyer reasonably believes are in the best interests of the client.
Disclosure of Information. ABA Informal Opinion 89-1530 (1989) stated the authority of the attorney to disclose confidential and non-confidential information as follows: [T]he Committee concludes that the disclosure by the lawyer of information relating to the representation to the extent necessary to serve the best interests of the client reasonably believed to be disabled is impliedly authorized within the meaning of Model Rule 1.6 [Confidentiality of Information]. Thus, the inquirer may consult a physician concerning the suspected disability.” The 2002 amendments to MRPC 1.14 support this conclusion.

Determining Extent of Diminished Capacity. In determining whether a client’s capacity is diminished, a lawyer may consider the client’s overall circumstances and abilities, including the client’s ability to express the reasons leading to a decision, the ability to understand the consequences of a decision, the substantive appropriateness of a decision, and the extent to which a decision is consistent with the client’s values, long-term goals and commitments. In appropriate circumstances, the lawyer may seek the assistance of a qualified professional.

Lawyer Representing Client with Diminished Capacity May Consult with Client’s Family Members and Others as Appropriate. If a legal representative has been appointed for the client, the lawyer should ordinarily look to the representative to make decisions on behalf of the client. The lawyer, however, should as far as possible accord the represented person the status of client, particularly in maintaining communication with the represented person. In addition, the client who suffers from diminished capacity may wish to have family members or other persons participate in discussions with the lawyer. The lawyer must keep the client’s interests foremost. Except for disclosures and protective actions authorized under MRPC 1.14, the lawyer should rely on the client’s directions, rather than the contrary or inconsistent directions of family members, in fulfilling the lawyer’s duties to the client. In meeting with the client and others, the lawyer should consider the impact of a joint meeting on the attorney-client evidentiary privilege.

Person with Diminished Capacity Who Was a Client Prior to Suffering Diminished Capacity and Prior to the Appointment of a Fiduciary. A lawyer who represented a client before the client suffered diminished capacity may be considered to continue to represent the client after a fiduciary has been appointed for the person.

Although incapacity may prevent a person with diminished capacity from entering into a contract or other legal relationship, the lawyer who represented the person with diminished capacity at a time when the person was competent may appropriately continue to meet with and counsel him or her. Whether the person with diminished capacity is characterized as a client or a former client, the client’s lawyer acting as counsel for the fiduciary owes some continuing duties to him or her. See III. Advisory Opinion 91-24 (1991) (summarized in the Annotations following the ACTEC Commentary on MRPC 1.6 (Confidentiality of Information). If the lawyer represents the person with diminished capacity and not the fiduciary, and is aware that the fiduciary is improperly acting adversely to the person’s interests, the lawyer has an obligation to disclose, to prevent or to rectify the fiduciary’s misconduct.
Ethical Issues in Communicating with Non-Clients: Red Flags and Best Practices

Mary Helen McNeal and Kimberly O’Leary
National Aging and Law Institute, November 2013

Scenario One

Your client, Mr. James Edwards, asked you to complete a durable power of attorney naming his nephew, George Edwards, his agent. In your state, you are required to explain to the agent his responsibilities when acting in that capacity, and then the agent must sign a form stating he understands his role.

On the day of the signing, Mr. Edwards’ nephew brings him in. After the document is signed, you meet with both Mr. Edwards and his nephew. The nephew asks you the following questions:

1. How should he keep track of transactions he performs on behalf of his uncle?
2. If he and his uncle have a disagreement about how money should be spent, what should he do?
3. If he thinks his uncle lacks capacity but his uncle says he does not, what should he do?
4. He tells you his uncle bought him a car, and that he takes his uncle to all of his doctor appointments, grocery shopping and other errands. He also uses it for his own personal needs, including driving to and from his own employment. The car is 7 years old and they have been discussing buying a new one. If his uncle becomes unable to communicate with him, can he use his uncle’s money to buy a new car?

Alternatively, at the close of the meeting and before the nephew signs the form, the nephew asks you if he can ask you one question privately.

Questions:

a. Which, if any, of the above questions do you feel comfortable answering? Why or why not? What ethical rules are implicated?
b. What, if any, conversations do you want to have with your client before this meeting takes place? During the meeting, but in private? After the meeting?
c. Should you let the nephew ask you that one question in private? Which ethics rules are implicated?
d. What conclusions do you come to using the enclosed protocols?
e. How might the protocols we’ve included in the materials assist you?
f. Are there any changes you would recommend to the protocols?
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Scenario Two

Your client, Ms. Doris Steele, is 63 years old and seeking SSI based on disability. She lives alone. Her medical diagnoses are: 1) early stages Alzheimer’s and 2) arthritis treated with medication. She has a high school education and worked for many years as a clerk in a department store. She lost that job in 1984. She did housecleaning until about five years ago when she could no longer drive because of her poor vision and could not get to the houses. She was paid under the table. Ms. Steele’s husband died two years ago and she just used up the last of his insurance policy. She receives a tiny surviving spouse share of his pension and food stamps. She lives in her own house, which is paid for, It is a two story house with a laundry room in the basement.

Ms. Steele has one daughter who lives 500 miles away and visits a few times a year. Her granddaughter, who is 19, recently moved nearby, and Ms. Steele confided that her granddaughter only seems to stop by when she needs money. Her granddaughter sometimes raises her voice and makes her nervous, but has never threatened her.

Ms. Steele’s medical doctor has treated her for the past 20 years. You have sent him a letter asking for documentation of Ms. Steele’s medical conditions and what limits they place on her daily activities. You received a voice message from the doctor as follows: “I’m so glad you called. Of course I will help Ms. Steele any way I can. She is certainly too sick to be living by herself and she shouldn’t be using stairs at all. Do you know who to call and report a dangerous situation for an elderly person? Maybe you can help. Also, I was wondering if she has told you anything about her granddaughter, maybe she could move in? Call me after 5 today, I’m happy to talk.”

Questions:

1. What ethics rules are implicated by the doctor’s message?
2. What preparation should you make before you speak to the doctor?
3. What information can you share with the doctor?
4. Do the protocols included in the materials assist you?
5. What changes would you recommend to the protocols?
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Scenario Three

Alicia Svensky calls your office because she has questions about her mother’s eligibility for Medicaid for long-term care. Her mother, Lucille Gonzalez, is 81 and has been living in her own home for 54 years. On the phone, Alicia tells you that she and her mother have been discussing the possibility of her mother selling her house and moving in with Alicia and her family. Alicia wants to know if her mother would later be eligible for Medicaid for long-term care if she needed it.

They come to your office and after the customary introductions, you meet with Ms. Gonzalez alone. Gonzalez is eager to talk about where she should live, although not interested in talking about planning for Medicaid eligibility. She tells you that she has been very independent her entire life and how much she loves her home. She appears to be somewhat forgetful and her train of thought a little tangential, but you have no concerns that she has sufficient capacity to do Medicaid planning.

Ms. Gonzalez ultimately says she wants to live with her daughter Alicia and her family but does not want to be a burden. She mentions that she could do small chores and help with the cooking. After a lot of hesitation, she tells you she has some memory problems and has left the stove on several times, ruining several pans. She didn’t realize it until the smoke detector went off. Ms. Gonzalez tells you that she has not told her daughter about these incidents, and does not want Alicia to know about the pans; it would just cause Alicia to worry.

Eventually, you try to steer the conversation to the house, and how selling it would impact her Medicaid eligibility. You ask Ms. Gonzalez if she would like her daughter to join you for that part of the conversation, and she says she thinks that would be a good idea.

Questions:

1. Who is your client?
2. Assuming it is Ms. Gonzalez, do you tell the daughter about the pans Ms. Gonzalez has left on the stove? Can you? If so, how would you go about doing that? What rules apply?
3. Can you tell anyone else? If so, who? And how would you go about doing that? What rules apply?
4. Assume Ms. Gonzalez tells you that she was recently diagnosed with late stage melanoma and that she has not told Alicia because she does not want Alicia to worry. Ms. Gonzalez also said that she has decided that she does not want any treatment, and told her doctor that. He said that without treatment the disease will progress very rapidly and when pressured, said she has anywhere from 4-18 months. She admitted she has been losing weight and feeling weak lately. Do you share this information with the daughter? Can you? What rules apply?

5. Do the protocols assist you in resolving these questions?

6. What suggestions do you have for improving the protocols?
Ethical Issues in Communicating with Non-Clients: Red Flags and Best Practices

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Scenario Four

Kelly, a hospital social worker, calls your office to refer Aldo Leopold, aged 84. He is currently a patient at the hospital about to be discharged. She tells you that Mr. Leopold was admitted after his landlord called 911 when Mr. Leopold was wandering around the building lobby and seemed incoherent. Kelly said that with some medical treatment, his condition has improved dramatically, and now he has no cognitive issues. Kelly said that Mr. Leopold appears to have no family and friends and she does not know anything about his financial situation.

Kelly contacted the Department of Social Services, Adult Protective Services Division (APS), to see what services they could provide to Mr. Leopold upon discharge. The APS worker, Ansel Adams, was familiar with Mr. Leopold, and said that the landlord had also called her before Mr. Leopold went to the hospital. The social worker went to visit Mr. Leopold in the hospital and has since advised Kelly that APS is going to petition for guardianship. Kelly tells you that she does not think Mr. Leopold needs a guardian, and she wants to know if you can help him.

When you visit Mr. Leopold in the hospital, he is charming and coherent, but forgetful; he does not know how he ended up in the hospital or anything about his diagnosis. When you ask about his financial situation, he cannot tell you anything. You ultimately determine that Mr. Leopold has the capacity to engage you to represent him regarding the proposed guardianship. You talk with him about guardianship and alternative options. He says that he does not want DSS making decisions for him and acknowledges that having someone help him with decisions would be good. Ultimately, APS backs off of their position that Mr. Leopold needs a guardianship, and Mr. Leopold is discharged back to his apartment, where he wants to be.

You continue to talk and visit with Mr. Leopold regularly, hoping to assist him in appointing a power of attorney. Mr. Leopold tells you that he recently went to the bank, and showed you the cash he had withdrawn, which he was carrying in a plastic bag on the front of his walker.

The APS worker, Adams, calls to say she is concerned about Mr. Leopold’s safety. His phone has been shut off, he either does not answer the door or does not hear the visiting nurse when she comes by, and when the nurse does see him, he is looking increasingly unkempt and unhealthy.

You, too, are concerned that Mr. Leopold’s health is deteriorating again. You also think he is at risk for financial exploitation. Some days he remembers your previous conversations and some days he does not. Mr. Leopold seems unable to remember the status of his finances. Mr. Leopold is very independent and remains adamant that, with a small amount of help, he can live alone and handle things.
You also are concerned that APS is not providing sufficient services for him. They were supposed to assist getting his phone turned on and a new bed, but have not done so. There were discussions about Mr. Leopold participating in an adult day program and he was interested but APS has failed to explore these options as promised.

Questions:

1. What can you share about Mr. Leopold’s situation with the Adams, the APS worker?
2. What ethical rules apply?
3. What conclusions do you come to using the attached protocol?
4. What suggestions do you have for improving the protocol?
Ethical Issues in Communicating with Non-Clients: Red Flags and Best Practices

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National Aging and Law Institute, November 2013

Bibliography

Prepared by Staci Dennis Taylor, Syracuse University College of Law Student

I. GENERAL INFORMATION


b. Roberta K. Flowers & Rebecca C. Morgan, ETHICS IN THE PRACTICE OF ELDER LAW, American Bar Association (2013)

II. CONFIDENTIALITY & DISCLOSURES

a. Secondary Sources

   ii. Confidentiality and competence, 1 Elderlaw Advoc. Aging §2:2 (2d ed.)

   iii. Gaines B. Drake, Ethical Issues in Dealing with Families of Elderly Clients, 30 J. Legal Prof. 103 (2006)


   v. Stuart D. Zimring, Esq., Ethical Issues in Representing Seniors, Persons with Disabilities and Their Families, 4 NAELA J. 125 (2008)

b. Primary Sources

¹² This bibliography includes cases and secondary sources published after 2003. However, some of the citations will lead you to cases and materials published prior to 2003.
¹³ This book provides selected state variations of the applicable Model Rules.
i. ABA Formal Op. 11-459 (2011) (discussing duty to protect the confidentiality of e-mail communications with one’s client)

ii. ABA Formal Op. 08-450 (2008) (discussing confidentiality when lawyer represents multiple clients in the same or related matters)

iii. In re Disciplinary Proceeding Against Eugster, 209 P.3D 435 (Wash. 2009)(en banc) (holding that attorney committed misconduct by filing a petition for the appointment of client’s son as guardian without making a reasonable inquiry about her mental state and by disclosing confidential information to client’s son)

III. ATTORNEY-CLIENT PRIVILEGE

The attorney-client privilege varies state to state. Generally, the presence of a third party indicates that the communication is not intended to be confidential and should not be privileged. Accordingly, courts have held that the presence of spouses, family, or friends waive the attorney-client privilege. Further, even if a third party is paying the lawyer’s fees, that does not bring the payor under the attorney-client privilege.14

Having a third party present for moral support tends to waive the attorney-client privilege, as does the presence of a third party whose interests are adverse to the client’s interests. On the other hand, the presence of an agent of the attorney or client does not waive the privilege. To determine whether an agent’s presence waives the privilege, courts consider the function of the third party, whether the client has a reasonable expectation of privacy, and whether the person is necessary to the representation.

a. Secondary Sources


iii. Jay M. Zitter, J.D., Applicability of Attorney-Client Privilege to Communications Made in Presence of or Solely to or by Family Members or Companion, Confidant, or Friend of Attorneys or Client or Attesting Witnesses for Client Will, 67 A.L.R. 6th. 341 (2011)

14 Roberta K. Flowers, Esq., To Speak or Not to Speak: Effect of Third Party Presence on Attorney-Client Privilege to Communications Made in Presence of or Solely to or by Family Members or Companion, Confidant, or Friend of Attorneys or Client or Attesting Witnesses for Client Will, 67 A.L.R. 6th 341 (2011).
iv. Stuart D. Zimring, Esq., Ethical Issues in Representing Seniors, Persons with Disabilities and Their Families, 4 NAELA J. 125 (2008)

b. Primary Sources

i. Guardian – Entitled to Assert the Privilege
   a. Moss v. Davis, 794 A.2d 1288 (Del. Fam. Ct. 2001) (holding that the guardian of an elderly woman had standing to invoke the attorney-client privilege, preventing admission of conversations the elderly woman had with her attorneys prior to her marriage; communications were held privileged even though in the presence of a third party)

ii. Held Privileged
   a. Spouse
      a. In re Horowitz, 841 NY.S.2d 826 (Table) (Sur. Ct. 2007) (holding that conversations between attorney and client made in the presence of a client’s spouse privileged, and that the privilege depends on whether the client had a reasonable expectation of privacy under the circumstances.)

   b. Adult Children
      a. Green v. Beer, 2010 WL 3422723 (S.D.N.Y. 2010) (applying New York law) (holding that a husband and wife did not waive the attorney-client privilege with respect to emails received from their attorneys, through their son. The son provided necessary assistance to his “technologically unskilled” parents.)

      b. Stroh v. General Motors Corp., 623 N.Y.S.2d 873 (1st Dept. 1995)(holding that the client’s daughter’s presence did not waive the attorney-client privilege because the daughter transported her mother to the meeting, and put her mother “sufficiently at ease to communicate effectively with counsel”. Thus, the daughter acted as her mother’s agent.)

iii. Held Not Privileged
   a. Adult Children
a. *Lynch v. Hamrick*, 968 So.2d 11 (Ala. 2007) (holding that the client’s interests were not “sufficiently aligned” with her daughter’s to preserve the attorney-client privilege because the daughter’s interests in transferring the mother’s property were adverse to the mother’s interest in retaining the property)

b. *Hutton v. Hutton*, 337 P.2d 635 (Kan. 1959) (holding that the presence of the client's wife and three children during a conference with the client's attorney regarding grants of property to the client's family members waived the attorney-client privilege because the client’s conduct did not suggest that he intended the conversations to be private.)

c. *Farahmand v. Jamshidi*, 66 Fed. R. Evid. Serv. 556 (D.C. 2005) (holding notes privileged, even though the notes were discussed the day before by the client and his attorney, with the plaintiff's son-in-law present and serving as an interpreter. The court stressed the "reasonable necessity" exception to the confidentiality requirement, and taking into account the client's circumstances and the obstacles preventing direct communication with the attorney.)

IV. Conflicts

a. Secondary Sources


iii. James H. Pietsch and Margaret Hall, “*Elder Law” and Conflicts of Interest in the U.S. and Canada*, 117 Penn St. L. Rev. 1191 (2013)


b. Primary Sources

mortgage, the proceeds of which would be given to another client for the purpose of a nightclub investment).

ii. Matter of Brantley, 920 P.2d 433 (Kan. 1996) (holding that attorney is subject to public censure for violations of the Model Rules of Professional Conduct, including representing a bank and client’s stepson in matters adverse to his client’s interests without her consent).

iii. In re Guardianship of Lillian P., 617 N.W.2d 849 (Wis. Ct. App. 2000) (holding that a conflict of interest existed where attorney represented client and her son, and that client was not competent to waive the conflict)

iv. Dayton Bar Assn. v. Parisi, 965 N.E.2d 268 (Ohio 2012) (holding that attorney committed misconduct by representing client and niece that sought guardianship)

v. State ex rel. Oklahoma Bar Assn. v. Dodd, 895 P.2d 688 (Okla. 1994) (holding that attorney committed misconduct by seeking fee payment from client’s parents)

vi. In re Carnahan, 864 N.E.2d 1183 (Mass. 2007) (holding that attorney should be publicly sanctioned for representing two elderly clients with conflicting financial interests, and failing to notify second client of the potential conflict)