Aspirational Standards for the Practice of Elder Law and Special Needs Law with Commentaries

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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.

Developed by the Professionalism and Ethics Committee of the National Academy of Elder Law Attorneys

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Contents

PREAMBLE

The National Academy of Elder Law Attorneys (NAELA) was founded in 1987 to support attorneys in meeting the complex legal needs of elderly individuals and individuals with disabilities. These Aspirational Standards for the Practice of Elder Law and Special Needs Law are core to NAELA's mission. NAELA requires all members to support these Standards. This condition of membership distinguishes NAELA from all other legal associations.

Given the dynamic and evolving nature of elder law and special needs law, attorneys should and often must represent their clients "holistically," adapting and applying information and insight obtained from a wide range of legal and social disciplines. When assisting clients with planning or the implementation of plans, elder law and special needs law attorneys often will represent clients who have diminished or lack of capacity. Family members and other persons with fiduciary responsibilities also may be involved. The client-attorney relationship in elder law and special needs law is not always as clear-cut and unambiguous as in other areas of law. Questions relating to end-of-life planning, self-determination, exploitation, abuse, long-term care planning, best interests, substituted judgment, and, fundamentally, "who is the client?" present issues not regularly faced by attorneys in other fields. These Standards are designed to assist attorneys to provide high quality counsel, advocacy, and guidance to clients in this unique and specialized area.

These Aspirational Standards:

- Assist attorneys to navigate the many difficult ethical issues that often arise when representing elderly individuals and individuals with disabilities;
- Raise the level of professionalism in the practice of elder law and special needs law; and
- Assist attorneys to effectively meet the needs of their clients.

This second edition of the Aspirational Standards is the product of three years of study and deliberation by NAELA's Professionalism and Ethics Committee. While each state's professional responsibility rules mandate the minimum requirements of conduct for attorneys to maintain their licenses, the Aspirational Standards build upon and supplement those rules.

These Standards do not define or establish a legal or community standard nor are they intended to be used to support a cause of action, create a presumption of a breach of a legal duty, or form a basis for civil liability. Those matters are governed by the statutes and rules of professional responsibility of the state in which the attorney practices.

Following these Aspirational Standards helps attorneys to make the lives of clients better. As Clifton Kruse, Past NAELA President and member of the Professionalism and Ethics Committee at the time the Committee drafted the first edition of the Standards, so aptly said:

…clients are hesitant to share without invitation. There is a threshold that we must assure them that we want them to cross. And we do this with questions. And we do it as lawyers. We are the elders' lifeline…. Our licenses make this possible. They give us status and credibility, and after meeting us- hopefully, trust. The legal answers are comparatively easy- the job we are called in to do is done- but along the way, the more important, the more valuable service occurs as well. We listen. We invite a monologue. We establish this by our demeanor and by our questions that invite unloading- and in the process we extend the joy that elders' memories bring. And on those days, we earn the accolade- professional- one who serves others. That is our privileged role as lawyers; we can make others' lives, if even for a few moments, better than they were before. (For further reading on the legacy of Clifton Kruse NAELA News December 2009/January 2010)

A. HOLISTIC APPROACH

The Elder Law and Special Needs Law Attorney:

1. In applying a holistic approach to legal problems, the elder law and special needs planning attorney works to consider the larger context, both other legal consequences, as well as the extra-legal context in which the problems exist and must be solved.

Comment:

The elder law and special needs law practice is unique. It often involves individuals with a health or mental condition requiring special care, attention and protection because the client may have a memory, mobility or other disabling impairment, chronic condition or other illness. While elder law and special needs law include traditional estate planning, many times the focus of an elder law or special needs representation is the "life needs" of the person whose interests are being promoted in the legal representation. The principal "life needs" may include, but are not limited to, the following present or future needs:

- Access to high quality healthcare
- Access to high quality long-term care services and supports in the least restrictive housing setting that is safe for the client
- Advocacy to promote independence and autonomy
- Advocacy for accessibility to accommodate disabilities
- Advocacy in promoting freedom from discrimination due to age or disability
- Access to education and training for those with disabilities
- Access to public benefits
- Access to insurance solutions for health and long-term care
- Planning to promote family harmony and minimize conflicts
- Protection from exploitation, abuse and neglect
- Planning for end-of-life care and life support decision-making
- Tax planning

The holistic approach requires the attorney, when appropriate, to address these and other issues in the legal representation. An attorney who practices holistically however still follows the client's wishes and discusses with the client the multitude of ways to accomplish the client's wishes. Additionally, the attorney recognizes that the client may not be knowledgeable in the variety of issues the client is facing or will be facing as they age. Therefore, the attorney is prepared to address with the client issues the client may not even be aware of that are related to the representation.

Example: An attorney is engaged to prepare powers of attorney and an estate plan for a home-bound client who has suffered a significant decline in vision and lost the ability to walk. In addition to preparing the legal documents requested by the client, the attorney should offer advice on the issues of how to arrange for home care services, assisted living or nursing home and pay for such services

and living arrangements, and what measures the client may wish to consider to prevent financial exploitation

2. May consider using non-legal services to accomplish the goals of the representation where appropriate and the client consents.

Comment:

Since the holistic approach may go beyond traditional legal services, the guidance of non-legal professionals may be useful in accomplishing the holistic approach. Examples of non-legal services (other common names for non-legal services are "ancillary services" or "law-related services" (as described in MRPC 5.7) may include advocacy by a healthcare professional, capacity screening by a psychologist or neurologist, residential placement by a social worker, medication management by a nurse, tax preparation and asset organization by an accounting professional, investment advice by a financial planner, and real property appraisal services by a licensed appraiser.

A lawyer, consistent with the state ethics rules, may provide non-legal services through (1) an employee of the attorney's law firm; (2) an independent contractor; (3) a separate entity not affiliated with the lawyer; or (4) a separate entity owned by the lawyer or law firm. Regardless of how the attorney provides these non-legal services, the attorney should exercise caution to comply with the attorney's duties of confidentiality, loyalty, independent judgment, and state bar rules of professional responsibility (see Section J Non-Legal Services)

3. Encourages the use of family members and other third parties to support the client in the legal representation where appropriate and the client consents.

Comment:

In the elder law and special needs law practice, the assistance of non-client family members and other third parties is often appropriate and useful, especially when the capacity of the person being served in the legal representation is diminished. The attorney needs to confirm that (1) non-clients who are involved in the legal representation understand who the attorney's client is and are not unduly influencing the client and (2) the client has authorized the involvement of the non-client in the process, preferably in writing. (See Standard #3 Section B Client Identification, and Section E Confidentiality Standard #6 Section G Client Capacity).

4. Explains to the client seeking estate planning services how conflicts among family members may develop and, if desired by the client, recommends harmony-enhancing measures consistent

with the client's estate planning goals to minimize these conflicts.

Comment:

Family harmony is often an important goal for clients in implementing an estate plan, and should not be neglected in the estate planning process. The attorney should assess the importance of family harmony to the client, dynamics of the client's family and the risk of disharmony when the client will experience a decline in capacity and later death.

Subsequent family conflicts may frustrate the client's estate planning goals, significantly increase legal fees and other costs of administering an estate or trust, and, if the conflicts occur during the client's lifetime, will cause the client unnecessary stress. For example, an attorney should point out to the client the risk of disharmony in the client's selection of healthcare and financial fiduciaries. The attorney should suggest proactive planning measures to minimize the risk of disharmony, such as incorporating conflict resolution provisions in advance directives, wills, trusts which are consistent with other important client goals. Additionally, the attorney should document the client's specific goal of family harmony.

5. When conflict between family members or other interested parties arise, the attorney evaluates if non-judicial conflict resolution is appropriate, and encourages non-court resolution where appropriate.

Comment:

Conflicts among a client's family members or other interested parties may occur even if preventative measures are taken. For example, a client may have more than one family member or other trusted person to choose from when selecting a healthcare or financial fiduciary. The client's selection of one person as a fiduciary may create resentment among the other persons not selected. This resentment may later fuel or create conflicts, and can potentially lead to a probate guardianship proceeding to remove the appointed fiduciary, or, after the client's death, to a court challenge by the client's family members out-of-power to the client's appointed trustee or executor. In order to help preserve the client's stated goal of family harmony, the attorney may recommend that the disputing parties resolve their conflicts by non-court mediation or other collaborative settlement process, if available and practical (see the ABA Standing Committee on Ethics and Professional Responsibility in ABA Formal Opinion 07-447 (2007).

In recommending conflict resolution solutions, the attorney should be careful not to violate ethical obligations to the client or former client if he or she has died,

such as whether the proposed action creates a conflict of interest, whether the attorney has authorization from the client to take the proposed action and whether such an action results in a disclosure of the client's confidential information. When recommending non-court mediation or collaborative settlement, it is helpful to have the client's instructions permitting the attorney's role in making such recommendations to non-clients (See Standard #3 Section D Conflicts of Interest)

6. Takes actions to help prevent current or future financial exploitation, abuse or neglect of the client.

Comment:

The elder law and special needs law attorney is often confronted with issues of financial exploitation, physical and emotional abuse and neglect when the person whose interests are served in the legal representation has diminished capacity or has a disability. Attorneys should make an effort to be educated and trained in detecting and preventing exploitation, abuse and neglect. Attorneys should recommend to the client the use of planning measures into the representation that will minimize the risk of exploitation, abuse and neglect, including but not limited to the education of the client and family members on the risks. Attorneys might consider encouraging clients to: 1) sign a written pre-consent form authorizing the attorney to take protective action if the attorney discovers exploitation, abuse or neglect; 2) encourage the client to place the client's assets into a living trust; 3) give a trustworthy family member access to the client's bank account in order for such trusted party to be able to act as a protector by checking on expenditures (see sample authorized disclosure form below) (also see Standard #4-#7 Section G Capacity) which discusses the obligations of an attorney to take protective action when a client has diminished capacity.)

Clients Authorized Disclosures12.6.13.pd

Resource 1Client's Authorized Disclosures Sample Form

B. CLIENT IDENTIFICATION

The Elder Law and Special Needs Law Attorney:

1. Identifies the client and the individuals who will assist the client at the earliest stage of the representation, obtains the client's agreement to these identifications, and communicates this information to the persons involved.

Comment:

It is to the client that attorneys owe the professional duties of competence, communication, diligence, loyalty, and confidentiality. In order to determine to whom the attorney owes these duties, the first step is to answer the question: "Who is the client?"

In elder law and special needs law, identifying the client is challenging because the individual whose welfare and interests are to be protected in the proposed representation may not be present or may be accompanied by family members, appointed fiduciaries, or other trusted third parties. Usually, the client is the individual whose property and interests are to be protected. Alternatively, a family member, fiduciary, or other person seeking to protect or assist another person can be the client.

In a traditional client-attorney relationship, a prospective client who has capacity engages the attorney after an initial private consultation, and thus identifying the client is straightforward.

This Standard provides guidance on the foundational issue of client identification. In following this guidance, different attorneys with the same set of facts may identify different individuals as the client, and each result is equally appropriate. One thing is certain: regardless of who the client is, the attorney should be vigilant in protecting the individual.

Throughout these Standards, the term "protected individual" refers to the individual whose personal and property interests are the subject of the representation.

The attorney should establish methods for when and how to determine the identity of the client. Intake forms can help determine the identity of the client. The form may ask: "Who is seeking legal advice and services?" or "For whom or for whose interests are legal services requested?" When several people are present at the initial client meeting, the attorney may ask: "Who is my client?" Where more than one person at the meeting believes the attorney to be representing him or her, the attorney should take additional steps to clarify the identity of the client. The identity of the client should be resolved at the earliest stage so that the client, the attorney, and other involved persons understand:

- Whose interests are to be protected in the legal planning and representation process;
- To whom the attorney owes the professional duties of competence, communication, diligence, loyalty, and confidentiality;
- The steps that may or may not be taken after the initial consultation if the client or protected individual is not present at that meeting; and
- That the attorney will arrange at the earliest practicable time to communicate privately with the person who is expected to be the client.

The attorney should ensure that all involved persons understand which individual is the client and that the others are not clients. The attorney also should determine whether the client authorizes the attorney to communicate with another person, such as a fiduciary or family member, and obtain the client's written consent to such authorized involvement.

2. Recognizes the unique challenges of identifying the client when a fiduciary is acting on behalf of a protected individual

Comment:

In identifying the client, when a fiduciary will actively represent the protected individual, the attorney will face these and other questions such as:

May the protected individual be the client, even though they may lack the capacity to act as a traditional client and a fiduciary actively represents the principal?

May the fiduciary be the client when the protected individual is not able to act as a traditional client?

May both the protected individual and the fiduciary be joint clients?

When an individual has appointed an agent through a power of attorney to act as his or her fiduciary, the attorney may identify the protected person, even though incapacitated, as the client even though the fiduciary retains the attorney. Alternatively, the attorney may treat the fiduciary as the client. Some state statutes, cases and bar opinions state that an attorney hired by a fiduciary represents and owes a duty only to the fiduciary. When a fiduciary is involved, client identification should be clarified in the engagement agreement between the attorney and party with the authority to enter into the engagement agreement. (see Section C-Engagement Agreements and Document Drafting).

The attorney should specify this election in the engagement agreement.

IMPORTANT NOTE: See, e.g., New Hampshire Rev. Stat. Ann. §§ 564-B:2-205 (trusts) and 556:31 (wills) (attorney-client privilege applies to communications between the fiduciary and the lawyer for the fiduciary); Ohio Rev. Code §

5815.16 (2007); Nev. Rev. Stat. Ann. § 162.310 (2015) ("An attorney who represents a fiduciary does not, solely as a result of such attorney-client relationship, assume a corresponding duty of care or other fiduciary duty to a principal." "Principal" is "any person to whom a fiduciary as such owes an obligation."); ABA Formal Opinion 94-380; Goldberg v. Frey, 217 Cal. App. 3d 1258 (Cal. Ct. App. 1990), Linth v. Gay, 190 Wn. App. 331, 360 P.3d 844 (2015) (citing Trask v. Butler, 872 P.2d 1080 (1994)): "[A] duty is not owed from an attorney hired by the personal representative of an estate to the estate or the estate beneficiaries."); Roberts v. Feary, 986 P.2d 690 (Ore. 1999).

Example 1: Prospective clients, husband 88 and wife 87 years of age, have been married for 60 years. The husband is incapacitated, needs long term care, and has appointed his wife as agent under his POA. The wife meets with the attorney for Medicaid advice. It may be appropriate for the attorney to represent only the wife. Alternatively, the attorney may represent both spouses as joint clients, if the attorney determines that they share the same goals and have no apparent conflict of interest between them. A conflict of interest may arise when there are children from prior marriages, the spouses have kept their assets separate, or their estate planning goals differ significantly. If a conflict exists, it may be appropriate to represent only one party and the attorney may suggest that the other party obtain separate legal counsel.

Example 2: Prospective clients are a widow, 90 years of age, and her son who has been appointed as agent under her POA. The mother has lost capacity and the son would like to admit her to a nursing home. The son meets with the attorney for Medicaid advice. The attorney learns that when she had capacity, the mother expressed a preference to stay at home if she needed long-term care. Here, the son's preference to admit his mother to a nursing home conflicts with the mother's stated preference to stay at home. It may be appropriate for the attorney to represent either the son or the mother separately but not to represent the son and the mother jointly due to the conflict of interest between them on the issue of placement.

3. Meets with the prospective client in private at the earliest practicable time to help the attorney identify the client and assess the prospective client's capacity and wishes as well as the presence of any undue influence.

Comment:

A private meeting with the prospective client helps the attorney identify the client and assess the prospective client's capacity and understand his or her wishes, unencumbered and uninfluenced by others. This Standard addresses three common situations confronted by the attorney: a) when the prospective client does not have an involved fiduciary, b) when an agent under a power of attorney (POA) assists a principal and c) when a guardian or conservator assists a ward.

When the prospective client does not have an involved fiduciary. If the prospective client does not have a fiduciary actively assisting the prospective

client, such as an agent under POA or a guardian, the attorney should endeavor to meet with the prospective client privately before commencing the representation. The attorney should carefully explain to the prospective client and other parties involved, including family, a future agent under POA, and other parties why a private meeting is important. (See *Understanding the Four C's of Elder Law Ethics)*

If the attorney requests a private meeting with the prospective client and the prospective client expresses reservations about meeting privately, the attorney should reemphasize how important it is for the attorney to understand the prospective client's wishes in a confidential setting. The attorney should clarify who the client is and that other persons who assist the client are not clients. If the prospective client turns down the request to meet privately and insists that one or more persons be present, the attorney should honor the prospective client's decision unless the attorney determines that doing so could jeopardize the attorney's ability to protect the prospective client's interests. The attorney should consider and explain to the prospective client the potential effect that the presence of other non-clients may have on waiving the attorney-client evidentiary privilege.

When an agent under POA assists the principal. When an agent under POA actively assists the principal, the attorney may be asked to represent the principal, the principal and the agent jointly, or the agent only in the agent's role as a fiduciary. Depending on the circumstances in the case, the attorney may determine whether a private meeting with the principal is warranted. If the agent opposes such a private meeting, the attorney should consider declining the representation or withdrawing from the representation. When meeting with the principal the attorney should clarify who the client is.

When a guardian or conservator assists the ward. If the attorney is asked to represent the guardian or conservator in a court-supervised guardianship or conservatorship for a ward, the attorney will not usually privately meet with the ward.

Assessing the Presence of Undue Influence. As part of the client identification process, the attorney should carefully assess the level of influence other involved persons have on a prospective client and whether such influence may be considered undue. The attorney should document any indication of discomfort on the part of the prospective client, the content and tenor of comments, how supportive or dominating the family members or other persons appear to be, and how consistent or inconsistent the prospective client's stated objectives are with his or her estate planning documents or other expressions of intent. Based on the attorney's assessment of these factors, the attorney may decide to limit or decline representation.

For example, the attorney's vigilance should be heightened if a prospective client states, "I want to do whatever my son wants." The attorney should be especially cautious when an asset transfer is proposed and even more cautious when the recipient of the transfer is the person requesting the transfer, or when the

transfer benefits one family member over others. If the attorney determines that undue influence is present, the attorney should decline representation unless the attorney determines that the prospective client will be able to, perhaps with assistance from the attorney, overcome the impact of such undue influence. Under some circumstance the attorney may decide to take further protective action, and in some states, the attorney may be required to do so.

C. ENGAGEMENT AGREEMENTS AND DOCUMENT DRAFTING

The Elder Law and Special Needs Law Attorney:

1. Utilizes an engagement agreement, letter, or other writing(s) that will:

- **a) Identify the client(s);**
- **b) Describe the scope and objectives of the representation;**
- **c) Disclose potential material conflicts between the attorney and client;**
- **d) Explain the lawyer's obligation of confidentiality;**
- **e) Confirm, when there are joint clients, that the lawyer will share information and confidences among them and may withdraw if one client requests that the attorney not disclose a secret to the other client or if the clients cannot agree how to proceed;**
- **f) Disclose potential material conflicts among joint clients;**
- **g) Address (and possibly waive) non-material conflicts between joint clients;**
- **h) Confirm, when representing a fiduciary, the fiduciary's obligations to the protected individual, clarify whether the attorney may speak directly to the protected individual, and state that the attorney may withdraw if the fiduciary violates a fiduciary or other duty to the protected individual and does not timely take corrective action;**
- **i) Set out fee arrangements (hourly, fixed fee, or contingent); and**
- **j) Explain when and how the attorney-client relationship may end.**

The attorney should inform their clients about confidentiality and other components of the engagement. A clear written engagement agreement is the best way to communicate these matters to the client and others involved. It is imperative that the client and any involved others understand this agreement.

When an attorney represents both spouses or other joint clients, a joint representation letter or agreement should be utilized. This is especially important if the clients have blended families. Such agreements should provide for the waiver of confidences between the attorney and each jointly represented client, clarify that all information is available to all joint clients, and address actions the attorney should take if a material conflict arises between joint clients.

2. Drafts documents reflecting the client's intentions and informed choices that:

a) A client-attorney relationship already has been established (except in certain exigent circumstances described below in Standard #4(a);
b) The client has sufficient capacity to sign the documents;
c) The documents reflect the client's intentions and informed choices as opposed to the choices of others; and
d) If the client is a fiduciary, the fiduciary appears to have authority and that the proposed documents either reflect the choices of the protected individual if known or, if not known, are in the protected individual's best interests."

3. Recognizes the unique challenges in drafting documents at the request of a fiduciary.

Comment:

A fiduciary, such as the agent under a power of attorney or a guardian/conservator, may request the attorney to draft documents to be signed by the fiduciary on behalf of the protected individual or to assist the fiduciary or others, under carefully limited circumstances, with the transfer of the protected individual's assets. Before acting on the fiduciary's request, the attorney should:

(i) Confirm that the fiduciary has the authority to act under a valid durable power of attorney, court-ordered letters of authority, or state law.
(ii) Confirm that the proposed action is consistent with the protected individual's past estate planning documents or, if there are none, then with the individual's known goals, wishes, and best interests.
(iii) Consider meeting privately with the protected individual to ensure that the individual desires the proposed action, especially if the proposed action personally benefits the fiduciary.
(iv) Refuse to act on the fiduciary's request, if the proposed action represents a change in the individual's existing documents that is inconsistent with the individual's best interests

Example. A protected individual who lacks capacity has an agent under a durable power of attorney and a will. The agent requests the attorney to draft a revocable trust to avoid probate. The proposed trust names the same beneficiaries as the will. The attorney can draft the trust.

4. Exercises caution when drafting documents a) in exigent circumstances, b) at the request of a third party client, c) to be signed by non-clients, and d) when drafting a special needs trust.

Comment:

The attorney will draft documents differently depending on the identity of the client and the circumstances, including challenging situations such as the following:

a) Drafting documents in exigent circumstances for a prospective client before the client-attorney relationship is established.

The attorney usually should not draft documents before the client-attorney relationship is established. However, in certain limited exigent circumstances, it may be appropriate to prepare documents prior to the client-attorney relationship being established. An example of such exigent circumstances is when a client who has a terminal illness and is homebound or hospitalized needs documents. In such a case, it may be appropriate for the attorney to bring certain documents, such as medical directives and powers of attorney, to the first meeting with the terminally ill prospective client.

When drafting documents before establishing a client-attorney relationship, the attorney should consider the following:

(i) Whether the potential client has sufficient capacity to understand and execute the documents;
(ii) Whether the potential client is terminally ill, at risk of an imminent decline in health, or in potential need of protective action due to diminished capacity;
(iii) Whether the potential client is a possible victim of financial or physical abuse;
(iv) Whether the potential client is homebound or institutionalized in a hospital or nursing home;
(v) Whether there are family conflicts that may require urgency;
(vi) Whether the document is a medical directive, living will, or power of attorney, which requires less explanation than a will or living trust; and
(vii) Whether the attorney has the ability to make more than one visit within a short time period.

b) Drafting documents for a new client at the request of an existing or former client related to the new client.

The attorney may be asked by an existing or former client to draft documents for a family member, a new client. Because of the potential for a conflict of interest, the attorney should proceed with caution. The attorney should meet privately with the new client, assess capacity, establish a client-attorney relationship with the new client, confirm that there is no material conflict between the two clients and inform the referring client that the attorney's relationship with the new client is a separate representation which excludes the referring family member. The attorney should consider obtaining a waiver of any non-material conflict between the two clients before proceeding with document drafting for the new client.

c) Drafting a special needs trust for a person with a disability.

In drafting a special needs trust for a person with a disability, that person may or may not have the capacity to engage the attorney and sign the trust agreement. If the person with a disability lacks capacity to take these actions, the attorney should only draft such a trust at the request of a fiduciary who has the authority to engage the attorney. In drafting such trusts, the attorney should ensure that anyone involved with the special needs trust understands whom the attorney represents.

d) Drafting documents to be signed by non-clients.

In elder law and special needs law, it sometimes is appropriate to draft documents to be signed by a family member of the client or

other third-party in order to further the legal representation. An example is an agreement to be signed by the client's agent under POA in which the agent agrees not to act against the client's best interest. Another example is an asset protection trust to be signed by the client's child as trustee. When drafting such documents, the attorney should resolve whether the person being asked to sign the document is the attorney's client and, if not, advise that person to seek independent legal counsel before signing the document.

5. Ensure(s) that documents are executed properly.

Comment:

The attorney is responsible for ensuring that documents are properly executed. The attorney or trained staff should personally oversee and supervise the execution of documents. Only if it is not feasible for the attorney or a staff member to personally oversee and supervise the execution of the documents, should the attorney furnish the client with detailed explicit instructions to ensure that documents are properly executed. The attorney should confirm in the attorney's file the proper execution of the documents and the capacity of the person signing the documents and should note the contact information for the persons who witnessed or notarized the signing.

D. CONFLICTS OF INTEREST

The Elder Law and Special Needs Law Attorney:

1. In the initial meeting when multiple prospective clients are present, ensures that the prospective clients understand whether the representation will be *individual, concurrent or joint*.

Comment:

Attorneys are frequently approached by families seeking counsel or representation on behalf of one or more family members. As used in these Standards, an individual representation is one in which the attorney represents one person. When more than one person is represented, the representation is either concurrent or joint. A concurrent representation means representing two or more persons in related matters where confidences are not shared whereas in a joint representation of two or more persons confidences among the parties are fully shared.

While an individual representation of one person is preferred, a joint representation may be appropriate when there is no material conflict of interest between the parties, they have shared goals and a common interest, and joint representation will further family harmony, economic efficiency, consistency of action and serve the best interest of the client(s). Concurrent representation should only be undertaken with great care as the disclosure by one client of confidences may interfere with the attorney's duties of loyalty and impartiality towards the other client.

This Standard addresses a common situation when prospective clients request the attorney to represent multiple family members in either related or distinct matters. Because these situations may easily lead to misunderstandings among family members, the attorney should ensure that prospective clients are educated about the differences among individual, concurrent, and joint representation.

Example 1: Husband and Wife have been married for twenty years but they each have two children from prior marriages. All their assets are jointly owned, they have good relations with all four children and want each of their four children to share equally in the estate plan. Since Husband and Wife have no apparent conflict goals, it may be appropriate for them to select an attorney to represent them in a joint representation. The attorney should prepare a detailed joint representation agreement that provides for full disclosure of communicated information and that the attorney may be required to withdraw if a conflict between Husband and Wife develops (See Representing Both Spouses: The New Section Recommendations, 7 Probate & Property 26 (July/August 1993) by Malcolm A. Moore & Anne K. Hilker)

Example 2: An attorney is asked by Husband and Wife to prepare their mirror-image estate plans and simultaneously asked by their two adult children (who are the beneficiaries of their estates) to prepare their respective estate

plans. The attorney must undertake the conflict-of-interest analysis that is required by his or her state conflicts rules. Assuming multiple-representation is permissible, different arrangements of joint, concurrent or individual representation may be appropriate with the client's consent. For example, one arrangement may be that the attorney represents Husband and Wife jointly and, additionally, represents each of the children concurrently. Another may be that all four are represented jointly, as might be appropriate if the estate plan involved a closely held family business in which all four were 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 with different consequences for the clients and confirm this understanding in well-drafted engagement agreements and written waivers. (See Standard #1 Section C Engagement Agreements and Document Drafting)

2. Undertakes joint or concurrent representation, as permitted by relevant state rules of professional conduct and these Aspirational Standards, only after obtaining the consent of the parties and 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 communicating adequate information in order to obtain clients' informed consent as a prerequisite to joint or concurrent representation. The attorney's approach in communicating this information should reflect the fact that clients in elder law and special needs planning matters may have widely differing strengths and limitations in decision-making abilities or styles.

In carrying out this responsibility, the attorney should consider private, direct and personal communications with the potential clients separately, as this may allow each of them to be more candid and to more freely ask questions of the attorney regarding the implications of joint, concurrent or individual representation (See Standard #3 Section B Client Identification). For example, separate meetings may be advisable in multi-generational representation or with clients who have blended families. In cases of joint or concurrent representation, the consent of the parties should be confirmed in writing with signed waivers.

In the event a conflict arises between or among joint or concurrent clients, the attorney should consider ceasing representation of all the parties because the attorney possesses confidential information about all the parties. Although some state ethics rules may allow for continued representation based on written consent of the parties, such continued representation is risky and should be carefully considered before proceeding.

3. Treats family members who are not clients as unrepresented persons and accords them involvement in the client's representation only to the extent the client consents to their involvement with a signed waiver or, if the client no longer has the capacity to consent, to the extent their involvement is consistent with the client's wishes and values, if known, and if not known, then the client's best interests.

Comment:

This Standard addresses the common situation where a client's family members or trusted third parties, who themselves are not clients of the attorney, are intimately involved with the client's affairs, often in a supportive and facilitating capacity. Even though these non-clients may appear to have the client's wishes, values and best interests in mind and be highly involved with the client, the attorney should be aware of the ethical challenges presented by these situations. The attorney should not give legal advice to any non-clients.

The attorney should exercise care to observe signs of undue influence. Where 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 #3 Section B Client Identification), becomes especially important to protect against undue influence.

4. Accepts payment of client fees by a third party only after:

a) Determining that payment by the third party will not influence the attorney's independent professional judgment on behalf of the client;
b) Securing the client's informed consent to the payment by the third party in writing; and
c) Ensuring that all the parties understand and agree to the ethical ground rules for third-party payment.

Comment:

Third-party payment for client work occurs frequently in elder law and special needs law representation. The third-party payer is often a family member who may or may not also be one of the attorney's clients. The attorney must not agree to accept payment from any third party unless the attorney has determined that this arrangement will not interfere with the attorney's exercise of independent professional judgment on behalf of the client. Additionally, if the third-party payer is also a client, the attorney must be satisfied that the representation of one of the clients will not be materially limited by the attorney's responsibility to the other client. The attorney must fully communicate to both

the client and the third-party payer the requirements of this Standard, which include that the payer will not interfere with the representation of the client and that the payer is not entitled to any confidential information of the client. The attorney should obtain the client's written consent to the third-party payment and confirm in writing with the third-party payer the ground rules relating to confidentiality of information and representation of the client.

Acceptance of payment from a third party does not create a client-attorney relationship between the attorney and the payer. When a party who is paying the fees for client services is actually using the client's own money to pay the fees, the attorney should ensure that the third party understands the need for lawful authority to use the client's money to do so.

Example 1: An adult son, who is the attorney's client, arranges for his mother to consult with the attorney about her estate planning needs. The son tells the attorney that he will pay for the attorney's services to his mother. The attorney must engage in a conflict of interest analysis to ensure that representation of the mother will not be materially limited by responsibilities to the son and vice versa. The attorney must explain to the son that for the purposes of the mother's estate planning services, the attorney's client is the mother even though the son is paying the attorney's fee. The attorney should also ensure that the mother understands the ramifications of this arrangement and obtain the mother's informed consent in writing. The son should not be allowed to participate in the attorney's representation of the mother or be entitled to any confidential information gained in the course of representing the mother unless the mother consents in writing to the son's involvement and sharing of information.

Example 2: A daughter is her mother's agent under a power of attorney and thus is authorized to use her mother's money for her mother's benefit. The daughter arranges for the mother to consult with the attorney about her estate planning needs. The daughter uses the mother's money to pay for estate planning services for the mother. Because the daughter is authorized to use the mother's money to benefit the mother and because the client is the mother, the daughter's payment of the attorney's fee is appropriate. This is not a situation in which the attorney's fee is being paid by a third party.

Example 3: A daughter hires the attorney to have her mother declared incapacitated and to have herself appointed as her mother's guardian. The daughter has signature authority on the mother's checking account but has no ownership interest in the funds that are in the account. The daughter is not the mother's agent under a power of attorney, nor does she stand in any other fiduciary relationship with the mother. The daughter tells the attorney that she plans to pay the attorney's fees for preparing the guardianship petition from the mother's checking account. This may not be a typical third-party payment, but rather is a situation in which the daughter is attempting to use her mother's money to pay for an action that is potentially adverse to her mother's wishes. Absent a state statute or rule that allows a proposed ward's funds to be used

without court order to pay for the filing of a guardianship petition, the attorney should not accept payment from the mother's account.

5. Subject to state regulations, may serve as a fiduciary for a client upon the request of a client who has capacity, if it is in the client's best interest and if the client gives written informed consent after full disclosure.

Comment:

Clients with capacity are free to appoint whomever they choose to serve as their fiduciaries under wills, powers of attorney, trusts or other documents. Sometimes, the 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.

The attorney should not promote his/her appointment as fiduciary. The attorney must determine that the appointment is in the best interest of the client and justify how his/her appointment furthers the client's best interest. Before obtaining client consent, the attorney should explain to the client the fiduciary role, any conflicts of interest, the options to using the attorney as fiduciary, and the pros and cons of alternatives. 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 propriety 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, Recommendations #64.

> *"The attorney should be mindful of the potential for conflict of interest where the client requests the attorney serve as a fiduciary in any capacity and where appropriate refer the client to independent counsel with regard to this particular transaction. Upon the request of a court or other party with authority, the attorney may also serve as a fiduciary for a client who does not have capacity, if it is in the client's best interest and if this does not present a significant risk of a conflict of interest."*

There may be situations in which a court or other appropriate authority appoints the attorney as fiduciary for a client who does not have capacity. Before accepting such appointment, the attorney should ensure that the appointment is in the client's best interest and that the appointment will not result in a conflict of interest in which the attorney's duties to others materially limit the attorney's responsibilities to the client. For example, the attorney who is appointed successor trustee of a trust established by the client while she had capacity may

find that the fiduciary duty as trustee to the beneficiaries of the trust may interfere with the duty as the settlor's attorney to protect the settlor's interests.

E. CONFIDENTIALITY

The Elder Law and Special Needs Law Attorney:

1. Carefully explains to the client and others involved, as early in the representation as possible, the attorney's duty of confidentiality to the client in order to avoid misunderstandings and to ascertain and respect the client's wishes regarding the disclosure of confidential information.

Comment:

Confidentiality of client information is a core, fundamental principle of the client-attorney relationship and the attorney must guard against the disclosure of the client's protected confidential information.

The attorney should begin every initial conference with an explanation of the confidentiality rules and, if possible, address confidentiality before the initial meeting, so the client can decide who should attend. The explanation should make clear that the client is the only one protected and authorized to waive the protection.

The confidentiality rules apply not only to matters that the client communicates to the attorney in confidence but also to all information that the attorney acquires from other sources, such as the client's family members, health care providers, tax preparer or assigned case worker employed by a government agency.

The attorney should keep in mind that clients and others involved in the representation generally will have a vague and limited understanding of the special role that confidentiality plays in legal representation. Such a vague and limited understanding may lead individuals to believe that the attorney has discretion to disclose confidential client information even when instructed otherwise.

Example: Wife retains attorney. At the time, wife was alone and declared to attorney that she was to represent her only. Wife further instructed attorney to say nothing to her husband or their children. Attorney agrees to the client/attorney representation, and executes with wife a written legal services agreement. Wife goes on to explain that her husband had been diagnosed with Alzheimer's disease several years earlier and had declined drastically in the last year. Wife discloses to attorney that she and her husband already saw another attorney a year earlier, executing advance directives and mirror- wills. Wife states that while acting as her husband's attorney-in-fact she transferred all assets out of her husband's name into hers. She further acknowledges that she has placed him in an assisted living facility over his objection.

Wife instructs attorney to create a new will for her, deleting husband as a devisee, leaving their children, and adding her non-marital child unknown to her husband. Wife also informs attorney that she has engaged yet another attorney to initiate a divorce action against her husband.

Attorney begins providing the legal services as wife has instructed.

Attorney has known wife and her husband for many years, and has attended church with their children. Because of gossip in the community, wife's children approach attorney, begging for information about what is going on with their mother, Attorney despairs over the children's anguish and concern, knowing that the information she received from wife, her client, could ease their troubles and anxieties and bring them a degree of comfort.

Analysis: Client identification is not at issue; neither is joint client representation. The example, focused on confidentiality, is simple and the analysis easy because there is but one client. Attorney has a duty of loyalty only to wife. Attorney has no duty to wife's husband or her children. These facts do not rise to any level that would warrant attorney's exercise of discretion under Rule 1.6 (b). In fact, she has been specifically instructed otherwise by her client. No matter how much the information would help husband and the children, attorney must maintain wife's secrets, honoring his duty of confidentiality to his only client.

However, following that which elder law and special needs attorneys aspire to do, attorney should counsel wife, inviting her to consider ways by which she might develop a person-centered plan for her husband; and involve her children in ways that would calm their fears while still reaching her goals. Attorney might suggest that the situation could turn adversarial if the children engage their own attorney to intervene, and wife could be immersed in litigation that would take significant amounts of time and money, and overwhelm her emotionally.

2. Explains how the rules of confidentiality are applied to different forms of representation, including individual representation and joint representation.

Comment:

Due to the nature of elder law and special needs law, the attorney often is involved with several individuals, including clients and non-clients. When there are multiple individuals involved in the representation, the identity of the client and consequent duty of confidentiality may not initially be clear to everyone. Before the client decides which form of representation to use, the attorney should ensure the client understands how the confidentiality rules apply to each form of representation (See Standard #1 Section B Client Identification).

When the attorney represents more than one client in a matter, there is greater complexity when applying state professional responsibility rules of confidentiality. Similar complexity arises when the client chooses to involve and share

information with trusted third parties who are not joint clients in the representation. The attorney should ensure that all persons involved understand how confidentiality applies in each representation.

Example: Mr. A's daughter contacts the attorney seeking assistance for her father to arrange his legal affairs before he enters an assisted living facility. At the initial consultation, the attorney and Mr. A agree that Mr. A is the client. In the process of formalizing the client-attorney relationship, the attorney confirms that Mr. A wants the attorney to communicate with his daughter. The engagement agreement should make clear that only Mr. A is the client and that the attorney is authorized to communicate with Mr. A's daughter.

Since the daughter is *not* represented, the attorney should communicate that: (1) Mr. A is the client and the attorney's ethical duty is to protect Mr. A's interests only, (2) the attorney is authorized to provide information to daughter regarding tasks undertaken only to the extent that Mr. A either authorizes such disclosure, or such disclosure is impliedly authorized in order to carry out the representation, and (3) daughter should consult her own legal counsel regarding the impact of her father's estate planning on her own affairs.

3. Establishes as a prerequisite to joint representation, a clear understanding and agreement that the attorney will keep no client secrets from any other client in that joint representation.

Comment:

Often attorneys will represent more than one client in a matter such as representing a married couple in an estate plan. (See Standard #2 Section D Conflicts of Interest).

Before undertaking joint representation of clients, the attorney should ensure that the clients understand the attorney's ethical obligation to disclose information learned from one joint client to the other joint client and the consequences of such disclosure. The engagement agreement should make clear the attorney's obligation to keep no secrets. If the attorney obtains information from one joint client that is unknown to the other joint client(s) and the attorney fails to persuade the client to share the information with the other joint client(s), the attorney should share the information with the joint client(s) and/or withdraw from the representation pursuant to state professional responsibility rules. In some states, the attorney need not explain the reason for the withdrawal. State professional responsibility rules vary widely on confidentiality among joint clients, and the attorney should act in accordance with those state rules.

Example 1: An attorney is engaged to prepare estate planning documents and develop an asset preservation plan for a husband and wife. The initial consultation and engagement agreement fails to provide for sharing confidential information between the spouses. During the representation, the wife tells the

attorney that she has a child unknown to her husband to whom she plans to divert a portion of the couple's assets and directs the attorney to not disclose this to her husband. Because the information is relevant to the representation of the husband, the attorney should tell the wife that this information must be disclosed to the husband or the attorney must withdraw. The attorney may have avoided this situation had the sharing of confidential information been explained at the beginning of the representation.

Example 2: The lawyer who represents a husband and wife in estate planning matters might conclude that information imparted by one spouse (for example, a past act of marital infidelity) need not be communicated to the other spouse. On the other hand, the lawyer might conclude that some action must be taken with respect to a confidential communication concerning a matter that threatens the interests of the other client or could impair the lawyer's ability to represent the other client effectively (e.g., "After she signs the trust agreement I intend to leave her"; or, "All the insurance policies on my life that name her as beneficiary have lapsed"). Without the informed consent of the other client, the lawyer should not take any action on behalf of the communicating client, such as drafting a codicil or new will, that might damage the other client's interests or otherwise violate the lawyer's duty of loyalty to the other client (see ACTEC Commentary on MRPC 1.6 (Fifth Edition 2016)).

4. Strictly preserves client confidences, especially in situations that involve frequent contacts with family members, caregivers, or other trusted third parties who are not clients.

Comment:

Many elder law and special needs law matters are non-adversarial, and these matters may involve the help of family members and other trusted third parties. In cases where an individual needs assistance from others, the individuals providing the assistance may believe that they, too, are clients of the attorney. In some cases, these non-clients will be involved consistently and extensively on a day-to-day basis. The client and non-client may even have shared goals or combined property interests. In such cases, there may be an initial expectation that the attorney represents both the client and the others involved. It is the attorney's duty to ensure that individuals who are unrepresented understand that they are not clients of the attorney.

There may be occasions when the attorney needs to communicate with non-clients who are trusted third parties working closely with the client. In doing so, the attorney must use care in communicating with the unrepresented individuals, and may not disclose confidential information without the client's consent.

Example: Father makes an appointment with an attorney on behalf of Son who has serious physical disabilities and other challenges but does not lack capacity. Son comes to the appointment accompanied by Mother and Father. Son's mother and father manage Son's finances and provide personal care to

him. Many aspects of their lives are intertwined, but Son is the sole client unless the parties enter into a joint representation engagement. If Son is the sole client, the attorney may not disclose Son's confidential information to his parents without Son's consent, unless otherwise authorized. (See Standard #4 Section D Conflicts of Interest)

5. Ascertains the wishes of the client as to whom, if anyone, the attorney may disclose confidential information, and explains the potential consequences of such disclosure.

Comment:

In situations when the client requests disclosure, the attorney should be mindful of the consequences and ensure that the client understands the possible risks and implications of such disclosure (See NAELA Journal Volume 4, Number 2, *Ethical Issues in Representing Seniors, Persons With Disabilities and Their Families, by Stuart D. Zimring, Appendix A*). The attorney should explain to the client the options regarding the type of information to be disclosed, the method of disclosure, and to whom the information is disclosed. The attorney should also explain that the non-client's presence may waive the client-attorney privilege (See NAELA Journal Volume 2, No. 1, *To Speak or Not to Speak: Effect of Third Party Presence on Attorney Client Privilege, , by Roberta K. Flowers, Esq*), unless such individual's presence is necessary to assist in the representation (See United States v. Kovel, 296 F.2d 918, 922 (1961)). The same steps should be taken if the attorney or others ask the client to approve disclosure. A client who decides to waive confidentiality and direct the release of confidential information should do so with a written waiver specifying the scope of information to be disclosed, and to whom (See Standard #1 Section B Client Identification).

Example: Mr. A signs a waiver because he wants his daughter to be aware of the planning options that he may consider. The attorney should also explain to Mr. A that the disclosure of confidential information to his daughter will waive his client-attorney privilege with respect to the disclosed information, and may cause additional issues regarding his client-attorney privilege.

The attorney should recognize that there may be changes in the client's circumstances during the representation and that the client's disclosure preferences may change. The attorney should ensure the client knows that there is authority to change disclosure preferences throughout the representation. In all instances, the client should be informed that the consent is optional and also revocable by the client at any time.

The attorney's duty of confidentiality continues after termination of the client-attorney relationship, and any disclosure of confidential information must be in accordance with a signed waiver or court order. In some cases, it is beneficial for the attorney to discuss with the client the option of signing a waiver that authorizes the attorney to disclose specific confidential information after the

termination of the relationship. This waiver may ensure the client's estate planning wishes and intent are upheld.

6. Carefully maintains client confidentiality to the extent possible while also meeting the requirements of laws, regulations or court orders imposing a duty to disclose.

Comment:

The professional responsibility rules permit an attorney to disclose a client's confidential information without the client's express consent when disclosure is reasonably necessary to comply with a law, court order or another professional responsibility rule. In making such a disclosure without the client's express consent, the attorney should be cautious to disclose only enough information that is required to comply with the law, court order or other professional responsibility rule that requires disclosure.

An example of a state laws that may require an attorney or a health care professional employed by the attorney to make disclosures without the client's express consent are the mandatory reporting of abuse laws of many states. For this reason, the attorney should discuss with the client how such reporting laws may affect the attorney's duty to maintain the client's confidences. The client may wish to sign an agreement to disclose future suspected abuse without the client's express consent in order to protect the client from abuse. (See Standard #6 Section A Holistic Approach).

Another example of laws that may affect the attorney's duty to maintain a client's confidences is the transparency provision from the Uniform Trust Code, provisions of the Uniform Probate Code and other state trust laws that protect the rights of trust beneficiaries to receive trust records and financial reports. However, when an attorney is retained by a trustee to assist with trust administration, the attorney's client is the trustee rather than the trust's beneficiaries (See Standard #2 Section B Client Identification). It is the attorney's duty to make sure that the trustee understands the trustee's duties as a fiduciary including the trustee's duty to disclose all trust information that is required by law and the trust agreement. If the trustee refuses to make disclosures to the beneficiaries as directed by the attorney, the attorney should consider withdrawing from the representation, and if ordered by a court, the attorney must disclose information that may evidence the trustee's breach of duties without the trustee's consent.

When drafting trusts that are subject to disclosure laws, the attorney should ensure the grantor client understands the implications of such laws, and should advise the grantor to consider carefully the competing interests of primary and remainder beneficiaries, and to analyze ways in which to protect the privacy interests of beneficiaries while meeting the disclosure duties owed to beneficiaries. Similar considerations apply when the client is establishing joint

accounts or preparing beneficiary designation forms for assets such as retirement accounts, life insurance policies, transfer on death account, etc.

Where a grantor requests, the attorney may be able to draft provisions in trusts to reduce the disclosure dilemmas that trustees may face. The attorney should determine whether clients are concerned about a trust beneficiary's confidentiality, not only with respect to the primary beneficiary but also remainder beneficiaries. When the trust has already been created, the attorney should inform the client of the rights of and duties to remainder beneficiaries so the client can determine the impact on their objectives for the primary beneficiary.

For example, medical expense records may address personal matters that a trust beneficiary considers confidential. The trustee may need detailed information in order to determine whether to pay certain bills. This information becomes part of the trust's records. Such access could result in exposure of an individual trust beneficiary's private information. When advising trustee clients or grantors, or when acting as trustee, the attorney must balance these competing duties, especially when the primary beneficiary is a vulnerable person who has significant care and other personal needs. Trust provisions may authorize trustees to develop systems for balancing confidentiality and disclosure duties, with the goal of avoiding future costly disputes. MRPC Rule 1.14(c) provides a limited implied exception to the confidentiality rule when a client's capacity is diminished and protective action is needed in order to prevent physical, financial or other harm to the client (See Standard 4 Section G Client Capacity). In those circumstances, the attorney should take the least restrictive action possible, and only disclose the confidential information that is reasonably necessary to protect the client.

In some narrow instances, the attorney may reveal confidential information, without first obtaining the informed consent of the client, if the disclosure of such information is impliedly authorized to carry out the representation.

F. COMPETENT AND DILIGENT REPRESENTATION

The Elder Law and Special Needs Law Attorney:

1. Has a wide range of professional skills unique to the practice of Elder and Special Needs Law and continually demonstrates a commitment to addressing the individual needs of each client.

Comment:

The elder law and special needs law attorney must be educated in the practice areas of elder and special needs law by attending professional education seminars, studying written materials or associating with an attorney who has established competence in the field, and the attorney must continually ensure that he or she has the legal knowledge, skill, thoroughness and preparation necessary to practice in this area of law and to hold himself or herself out as an elder law and special needs planning attorney.

Elder law and special needs law issues are often complex and may involve multiple areas of the law. The elder law and special needs law attorney must recognize and understand these various legal issues that often impact the representation. For example, if a client wishes to transfer his house to his children, the attorney should recognize that this transaction may require the application of several areas of the law, including real property, tax, Medicaid and estate planning.

The attorney should be candid with the client regarding the attorney's level of competence and any need for additional research and preparation in order to ensure the attorney can accomplish the agreed-upon representation. If there is an area of law in which the attorney lacks the requisite knowledge and skill, the attorney should associate with, co-counsel, or refer the client to an attorney of established competence in that area.

The elder law and special needs law attorney recognizes that there is no "one size fits all" approach to this area of practice and, as a result, when using forms, customizes them as needed to meet each client's individual circumstances. Improper use of standard forms may result in violations of the state professional responsibility rules and may harm the client's legal and financial interests. The elder law and special needs law attorney identifies the unique needs of each client and prepares documents and plans tailored to those specific needs. Many elder law and special needs law issues require expertise in technical and complex areas of law, such as special needs trusts, public benefits, taxation and the like.

Example: "A" has practiced law for eight years, and elder law for the last two. In the last two years, he prepared special needs trusts (SNT) for four different clients, and left three other SNTs unfinished for more than eight months although his flat fees were paid in advance.

While "A" kept up with CLE courses, none of them were on SNTs. He learned about SNTs through searching the Internet and found an SNT form in a trust book in the local court law library, therefore saw no need to call one of the well-known SNT experts in his area. The form that "A" used to write SNTs was titled, "The John Doe Irrevocable Special Needs Trust with d4A language, including mandatory payback".

"A" used the form in two SNTs that were included in wills as testamentary trusts, in one SNT that was a third-party intervivos trust and in one SNT that had a beneficiary over the age of sixty-five. In each case, "A" required that another attorney in the firm be named trustee, contending that no family members or individuals were qualified to be trustee and that banking and financial trustees would be too expensive.

After the documents were signed, neither "A" nor the attorney acting as trustee provided the clients with further instruction or informed the state Medicaid office or the Social Security Administration where necessary.

Elder law and special needs law attorneys often move beyond basic services and documents that serve their clients. An example is the beneficial and sometimes integral use of the special needs trust for many of those clients. Before any lawyer attempts to draft a complex special needs trust, he or she must possess the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation. While standards of practice setting a threshold of competence for those holding themselves out as SNT practitioners have yet to be developed, lawyers should measure their ability to be SNT practitioners against such basic criteria (see NAELA Journal, Volume 1 No. 1, at 65-66 *Revised ABA Model Rules of Professional Conduct Applied in Elder Law: The Basics Framed in Core Values Get Complicated Fast – MRCP 1.0 – 1.6 by A. Frank Johns, CELA*).

2. Diligently and competently handles all client matters.

Comment:

The elder law and special needs law attorney manages his or her caseload to ensure all clients are assisted in a timely manner. This includes promptly addressing the issues of each case as well as only undertaking new cases the attorney knows he or she has the time to handle.

The age and disability issues inherent in many elder law and special needs law cases make reasonable diligence an especially important consideration for the elder law and special needs law attorney. For example, if the attorney is approached by a potential client who wishes to immediately change his or her estate plan because death is imminent, the attorney should take the case only if the attorney knows he or she can expediently assist the client without affecting the attorney's other cases. The elder law and special needs law attorney is

mindful that the client's interests often can be adversely affected by the passage of time or the change of conditions. Similarly, the elder law and special needs law attorney must be ready to respond quickly when requested to assist with the drafting of a First Party Trust to receive a settlement from another action when the money is already in the PI attorney's client trust (IOLTA) Account.

3. Regularly pursues continuing professional education and peer collaboration in Elder Law and Special Needs Law and related subjects, including the physical, cognitive, social and psychological challenges of aging and special needs and the skills needed to serve individuals facing those challenges.

Comment:

The elder law and special needs law attorney should maintain competence by keeping up-to-date with changes in the laws and practices that affect the attorney's clients and should regularly seek opportunities for continuing education. The attorney should aspire to not merely grow in knowledge of the law but also to improve and enhance his or her understanding of the client's unique needs and the skills needed to meet them.

For example, the elder law and special needs law attorney should consider attending continuing education seminars, studying online, and reading written materials on subjects affecting elders and individuals with special needs such as health, social science, gerontology and public policy or disability advocacy. Networking with colleagues also offers informal but essential continuing education.

Attending seminars conducted by a variety of aging and special needs professionals will enhance the holistic approach to the practice of elder law and special needs law. (See Section A Holistic Approach). Programs given by legal and non-legal organizations will help the elder law and special needs law attorney to better understand the issues faced by aging clients and clients with special needs and to attain the skills needed to serve those clients.

To stay current, the attorney should incorporate relevant technology into his or her practice. Appropriate safeguards should be instituted to protect against disclosure of confidential information.

4. Adequately trains and supervises legal and non-legal staff to ensure they have the knowledge and skills needed to best serve individuals facing the challenges associated with aging and special needs.

Comment:

The elder law and special needs law attorney must train and supervise all staff to ensure the client receives competent and diligent representation at all times. The staff members should be educated and appropriately trained to assist clients facing the challenges and needs unique to an elder law and special needs law practice. The attorney should provide staff with appropriate instruction and supervision concerning ethical aspects of their work and the application of these Standards. Such training can be done by in-house staff or through invited speakers or professional education seminars. In all instances, the attorney should supervise and retain responsibility for the work of the attorney's staff. The procedures to supervise non-lawyers should take into account the fact that they do not have legal training and are not subject to professional discipline.

G. CLIENT CAPACITY

The Elder Law and Special Needs Law Attorney:

1. Continues to respect the right to self-determination and confidentiality of a client with 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 respect and attention throughout their representation. It is therefore important that attorneys understand that capacity exists on a continuum, and is normally not an all-or-nothing proposition. If the client's diminishing or changing capacity results in the need for increasing levels of assistance, preservation of the client's right to self-determination and confidentiality remain. The attorney should provide the client a clear explanation of the risks and consequences of the involvement of other parties. Throughout the representation, the attorney should adopt strategies to improve and preserve the comprehension and decision-making ability of the client with diminished capacity. For example, if a third party is present for support, the attorney should continue to communicate directly with the client, including the third party only as the client authorizes (See Standard #4 Section E Confidentiality). Moreover, even if the client has authorized or instructed the attorney to communicate with a third party, the attorney still should keep the client informed by providing the client with copies either of communications or by speaking directly with the client.

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:

Attorneys often represent clients who have some degree of diminished capacity. The attorney should develop strategies and skills to understand and communicate with such clients by using a variety of interviewing techniques. (See Standard#3 for specific suggestions).

The law recognizes different thresholds for capacity depending on the act to be undertaken. Capacity is task-specific and as different tasks require different degrees of capacity, the client may have sufficient capacity to perform some tasks, but not others. For example, a higher threshold of capacity may be required to make a contract, especially a complex contract, than to make a will. Hence, the attorney needs to determine whether the client has sufficient capacity to perform the task.

Example: Client visits Attorney to draft a new will and health care directive. During the interview, Attorney notices that Client seems unfocused and wanders from topic to topic. Attorney believes that Client understands to whom he wants his property to go at his death, but seems confused about the meaning of the health care directive. Attorney should ask additional questions to determine whether Client understands the health care directive. If Attorney has concerns about Client's capacity, Attorney may still decide to draft both documents and resolve prior to their execution whether Client understands the documents at the time Client signs them.

Attorneys should presume capacity until the facts and circumstances override that presumption. Where capacity is questionable, the attorney should follow a consistent and deliberate process to preliminarily screen clients for capacity. The attorney should document the observations that support the attorney's conclusion that the client does or does not have capacity. A number of different methods may be used to evaluate the client's decision-making abilities. The attorney's screening and evaluation process should be followed and documented in every file. (See *Assessment of Older Adults with Diminished Capacity: A Handbook for Lawyers* by ABA Commission on Law and Aging and the American Psychological Association (2005)).

Although the attorney should consider any medical opinions regarding the client's capacity, the attorney should evaluate client capacity by a legal standard, considering factors, such as

- The variability of the client's state of mind;
- The client's ability to appreciate the consequences of his or her decision;
- The irreversibility of any decision;
- The substantive fairness of any decision;
- The consistency of any decision with lifetime commitments of the client.
- The kind of decisions to be made by the client and the applicable legal standard.
- The client's ability to articulate reasoning behind his or her decision;

(See *Special Issue Ethical Issues in Representing Older Clients,* Foreword by Bruce A. Green and Nancy Coleman, Fordham Law Review, Volume LXII Number 5, March 1994 and MRPC 1.14 comment 6 (2014))

The attorney should ask the client questions specific to the task to be undertaken to evaluate the above factors with regard to that task. For example, if the client is seeking a durable power of attorney, then the attorney should ask questions about the person the client has selected as attorney-in-fact and why such selection was made. The attorney could ask the client to talk about his/her relationship to that person, including how long the client has known that person and what the client knows about that person's financial situation. The attorney also might ask hypothetical questions about specific decisions the attorney-in-

fact might make for the client and whether the client wants that person to have that decision-making power.

The attorney also should 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 process to maximize the client's ability to understand and participate in light of the client's capacity and circumstances.

Comment:

Elder law and special needs law attorneys should develop strategies and skills to understand and communicate with their clients by using different interview techniques and strategies. The attorney should be proactive and creative, utilizing strategies and techniques that suit the client's current physical, emotional, and mental abilities. The following is a nonexclusive list of interviewing techniques and strategies:

- Changing the time and location of the meetings;
- Conducting the interview in the client's home or at a time of day the client is most alert;
- Gradual counseling (a series of shorter interviews to be conducted over a period of time);
- Varying communication styles;
- Using appropriate visual aids and hearing enhancements;
- Conducting the interview in the client's primary language or with an interpreter of that language; and
- Providing other reasonable accommodations requested by the client.

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 model rules, (see MRPC 1.14) however, state laws vary significantly regarding permitted protective actions (see attached chart below). Attorneys must have a clear and thorough understanding of the responsibilities and restrictions placed on them by the state law and rules in their jurisdiction. For example, some states place a mandatory reporting requirement on attorneys who learn of elder abuse or exploitation.

The mere fact that a client has diminished capacity does not warrant protective action. The client also must be at substantial risk if the attorney does not act and be incapable of protecting herself. The attorney must determine whether the attorney's ability to continue to advocate for the client and the client's wishes and values has become impossible because of the impairment and if the client is at serious risk of harm. If possible, the attorney initially should attempt to support the client to make decisions that protect the client from the perceived harm. For example, if the client is in need of support to handle finances, the attorney should help the client implement a mechanism, such as a trust or power of attorney arrangement, by which to handle finances before the attorney takes protective action without the knowledge or consent of the client.

In appropriate situations, and when permitted or mandated by state law, the attorney should take protective action. However, the attorney should carefully consider the impact of protective action on the client-attorney relationship, the client's autonomy and well-being, and the client's relationship to third parties.

5. Appropriate measures to protect the client should: 1) be guided by the wishes and values of the client if known or, if not known, the client's best interests; 2) minimize intrusion into the client's decision-making autonomy; 3) respect the client's family and social connections; and 4) consider a range of supportive actions other than court proceedings and adult protective services.

Comment:

When the attorney is aware of the client's expressed wishes, any protective action should be consistent with those expressed wishes. However, when a client has diminished capacity and the attorney does not know the client's wishes, the attorney should act in accordance with the client's known values.

When the attorney is representing a client with diminished capacity and is unable to determine the client's particular wishes and values, then the attorney must advocate for the client's best interests. (See *UPC Substituted Judgment/Best Interest Standard for Guardian Decisions: A Proposal for Reform, The* by Lawrence A. Frolik University of Pittsburgh School of Law and Linda S. Whitton Valparaiso University School of Law University of Michigan Journal of Law Volume 45, Issue 4)

In determining what is in the client's best interest, the attorney should consider the client's rights, remedies, economic interests and extent to which the attorney can preserve the client's self-determination while still protecting the client.

Attorneys should be aware of the potential conflict between the client's best interests and the attorney's duty to advocate for the client's wishes (for example, when the client wishes to age in place and it is in the client's best interest to be placed in long-term care). This conflict often occurs when the client has diminished capacity and needs protection, thus requiring the attorney to choose between advocating for the client's wishes or acting against those wishes in order to protect the client. Determining the appropriate protective action for the client is very fact specific and requires the balancing of a number of factors and the use of sound legal judgment. Attorneys may consider including as part of the engagement process an acknowledgment or consent provision allowing the attorney to take protective action under specified circumstances allowed or required by state law.

The attorney should consider several factors, 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. 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. The decision should not be merely what the attorney thinks is best or would do herself. There is no bright line rule and, as MRPC Rule 1.14 acknowledges, the "lawyer's position in such cases is an unavoidably difficult one."

The client's family, social, and community networks may contribute information about alternatives to protective action. Having support networks that are geographically close to the client may also provide a level of protection for the client and result in a lesser intervention.

When taking protective action, the attorney should do no more than necessary to protect the client. Any protective action should be the least restrictive alternative, tailored to the degree of the client's incapacity and, if possible, reflect the wishes and values of the client as well as the client's best interests. A number of protective actions may be more effective, less restrictive, and less intrusive than court proceedings or adult protective services. Protective actions may include a cooling-off period, family involvement, and the creation and utilization of planning documents. (See Comment 5 to MRPC *Rule 1.14*.)

Example 1: A 79-year-old client has begun to decline and appears somewhat confused. In their last several meetings, the attorney noticed that she had fresh bruises, which the client said were from falling. The attorney concludes that some kind of protective action is needed. The client is estranged from her 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 take into account her son, friends and church. Any additional protective action without the consent of the client must be consistent with the attorney's state law and rules.

Example 2: An attorney is approached by a 22-year-old client to discuss his special needs trust, which was created five years ago by another attorney, with funds derived from a personal injury judgment. The client now desires to control money himself and "play the market." He asks the attorney to help him dissolve the trust. The attorney is concerned about the impact such a decision would have on the client's eligibility for continuing and future public benefits. In addition, as the attorney discusses this matter, it becomes clear that the client has diminished capacity and could be at risk of substantial financial harm if the trust is dissolved. In this situation, the attorney should consider ways to help the client achieve independence without incurring financial harm. For example, if the attorney determines that the client has capacity, the attorney might suggest meeting with the trustee and, if one has been appointed, investment advisor. The meeting would allow the client to discuss any concerns he has with the trust's investment policy. Concurrently, the attorney should review the trust and consider potential strategies to appoint a successor trustee. Finally, the attorney should assess the possible need for a guardian ad litem if court action becomes appropriate.

6. Preserves client confidences to the extent possible by only divulging that information necessary or appropriate for protective action

Comment:

The core principles of the client-attorney relationship are the duties of loyalty and confidentiality. Yet, where the client suffers from diminished capacity and needs protection, the attorney may need to disclose confidential information to a third party. Many state bar rules provide for limited disclosure; however, such disclosures must be made with care because of the potential of harm to the client (see MRPC 1.6 and 1.14(c). The attorney must seriously consider whether the individuals or entities to whom confidential information is disclosed will use that information against the client's interests. Even where the attorney is authorized to divulge confidential information to take protective action, the attorney may disclose only that information necessary for the protective action. The type of protective action will dictate the nature and amount of information that needs to be disclosed (See Standard #6 Section E Confidentiality)

The most drastic protective action, seeking the appointment of a guardian or conservator, may be appropriate in certain cases. However, since such action undermines client confidentiality and may pose a direct conflict with the client, lesser restrictive alternatives should be considered and pursued first. Any disclosure, even limited, can have serious negative consequences for the client

and should be taken only after other alternatives have been considered or tried without success.

Example 1. An attorney has represented a client for a number of years on various matters, including estate planning. The client has previously involved her son and daughter in meetings with the attorney. The client brings in a recent bank statement to complain about non-sufficient funds (NSF) check charges. The attorney notices large repetitive checks written to the client's housekeeper. Upon questioning by the attorney, the client seems confused and has no explanation. The attorney may call the son or daughter to alert them to the problem, if the client has previously consented or if state law or rule permits protective action. Another protective action permitted in some states allows the attorney to file a request for an investigation with the local Adult Protective Services (APS) office. An APS inquiry should be considered only if all less restrictive protective actions have been considered.

Example 2: In a situation similar to **Example 1**, the son is appointed as the client's financial agent under a durable power of attorney (POA) and the repetitive checks are written to the son with the son signing as agent. The attorney may request the client's consent to discuss these checks with the son to determine whether there is a reasonable explanation and, if not, alert the client's daughter and/or file an inquiry with APS. (See discussion under Standard #3 Section E Confidentiality concerning the benefit to include in the retainer agreement the names of people to whom the attorney may disclose information under circumstances specified in the agreement).

Example 3: Prior to the client in **Example 1** contacting the attorney, the attorney receives a call from the son who states that the client may call complaining about NSF checks. The son says that, acting as his mother's agent under the financial POA, he is instructing the attorney to disregard the complaint because the mother is "just imagining" things. If the attorney doubts the son's honesty and truthfulness, the attorney should contact the client and may request documentation from the son to support the son's claim. If the son fails to provide adequate documentation, or the attorney continues to be concerned after speaking with the client, the attorney may alert the client's daughter and/or file an inquiry with APS.

7. Seeks guardianship or conservatorship only when no other viable alternatives exist.

Comment:

Guardianship and conservatorship are actions of last resort. If guardianship or conservatorship becomes necessary to protect the client's safety, well-being, or finances, the attorney still should pursue the least restrictive alternative within the protective proceedings (see Comment 5 to MRPC 1.14). Prior to choosing a course of action, consideration should be given to the client's wishes and values

(to the extent known); the consequences of intruding into the client's decision-making autonomy; and the potential impact on the client's family and social relationships.

H. COMMUNICATION AND ADVOCACY

The Elder Law and Special Needs Law Attorney:

1. Works to minimize barriers to effective communication with clients.

Comment:

Elder law and special needs law attorneys must facilitate effective communication with their clients. The issues affecting elderly individuals and individuals with disabilities span a broad range of legal, social and personal matters. While most clients do not have serious functional limitations, some clients will experience physical, sensory, and cognitive impairments that may result in barriers to effective communication. Barriers to effective communication may include cognitive barriers, physical barriers, situational stress, complex family and financial issues, dependence on others, and concern about legal fees.

Removing barriers to effective communication is essential to the practice of the elder law and special needs law attorney. Enhancing communication requires knowledge, skill, and persistence on the part of the attorney. The attorney should be mindful of the requirements of the Americans with Disabilities Act and comply with its requirements to maximize communication with clients who need or request accommodations.

Example 1: If the client has visual impairments, the attorney should ensure that all documents are readable by the client. This may be accomplished by using large fonts in the documents, having magnifying glasses available, and using task lighting or glare-free lighting.

Example 2: If the client has an auditory disability, the attorney may use hearing-assistive technology; many devices are inexpensive. Also, the attorney may arrange seating so that the attorney is closer to the client.

Example 3: In explaining options to the client, the attorney should avoid "legalese" and terms of art, instead, using plain language and employing examples to which the client is able to relate in real life situations.

2. Maintains direct communication with the client(s), whether in person by telephone or through correspondence, even when the client chooses to involve others (including an agent under a durable power of attorney).

Comment:

Maintaining direct communication with the client is a critical component of effective representation, particularly when the client is making major life decisions that may alter the client's options for long term services and supports. Direct communication may be difficult when the client has a physical or mental impairment. The attorney may also face challenges when the client has others involved. Often the client will direct the 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 attorney to communicate directly with the third party, the attorney still should include the client in communications. In addition, the attorney still must maintain the duties of loyalty and confidentiality to the client. Subject to exceptions for persons necessary to communication with the client, such as a translator or an attorney-in-fact, client-attorney privilege may not protect communications made in the presence of non-client third parties (See Standard #5 Section E Confidentiality).

Example: The client signs an authorization allowing the attorney to communicate directly with her son about the client's legal matter. Even though the attorney may communicate primarily with the son, the attorney still should keep the client informed, where practical and appropriate, through means such as providing the client with copies of correspondence or documents. At the client's direction, the attorney may retain confidential documents or send them to a third party if the client is unable to secure the documents.

3. In order to obtain informed consent, advises clients of their options, explaining the possible consequences of each option.

Comment:

The attorney has an ethical obligation to keep clients informed and to explain matters in a manner that enables clients to make informed decisions. A number of factors, including the complexity of the matter, clients' ability to understand, and the expected impact of the information on clients, should govern how the attorney provides information to clients.

In describing possible courses of action and options to clients, the attorney should explain the consequences plainly and succinctly; outlining the advantages and disadvantages of each option. When explaining possible outcomes, the attorney should provide as much relevant information as possible in order for the client to make an informed choice.

However, in certain limited 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 (see MRPC 1.14 comments (2005)).

All attorneys advise clients about their options and each client brings a different set of circumstances and challenges. Elder law and special needs law attorneys may, however, encounter especially complex combinations of factors. Elder law and special needs cases may include a complex array of legal, social, medical,

and personal dilemmas. Clients may be unfamiliar with the choices they face and further, be in crisis. Clients may need guidance and assistance to identify problems as well as options, both with the non-legal and the legal aspects of their cases. Attorneys should strive to assist clients facing complex problems during emotional and/or medical crises by identifying and prioritizing the problems as well as by developing and comparing the relevant options.

Example: At the attorney's request, the client undergoes a capacity assessment from a Geriatric Psychiatrist to determine whether or not the client has testamentary capacity. The Psychiatrist sends the assessment to the attorney. In the assessment the Psychiatrist states that the client lacks contractual capacity but has testamentary capacity. She further states that because the client suffers from severe depression the negative assessment regarding contractual capacity should not be disclosed to the client at this time. Under these circumstances the attorney may withhold the negative assessment since it is not directly relevant to the matter at hand (i.e. testamentary capacity), but should consider counseling the client about seeking further psychological or psychiatric treatment."

4. Advocates for the courses of action chosen by the client.

Comment:

Elder law and special needs law attorneys, like all attorneys, owe a duty of loyalty to their clients and must zealously advocate for their clients, consistent with state rules of professional responsibility (see MRPC 1.3 (2005)).

Where the client's chosen course of action is logical and appropriate, the attorney is bound by the client's decisions setting the objectives of the representation (see MRPC 1.2(a) (2005)).

However, where the client decides to pursue an unusual course of action that appears contrary to the client's best interests, the attorney should inquire into the client's decision making process and, if appropriate, counsel the client against such action. If the client suffers from diminished capacity, protective action may be indicated. Attorneys should consult with their state rules to determine the next steps possible, advisable, and/or required.

5. When developing a plan to secure and pay for long term supports and services should:

a) Strive to determine the client's wishes and values in order to achieve the client's objectives concerning living options, health care, loved ones, and property;

endeavor to preserve and promote the client's dignity, self- determination, and quality of life.

b) Counsel the client about the full range of long-term service options, risks, consequences, and relevant costs;

c) Counsel the client as appropriate in light of the client's needs, personal values, wishes, best interests, and the alternatives available; and

d) Counsel the client as to the estate planning and tax implications that the client's choices for long term service options will have on his or her property.

Comment:

At all times during the representation, the attorney should be mindful of MRPC 2.1 which states the *"lawyer may refer not only to the law but to other considerations such as moral, economic, social and political factors, that may be relevant to the client's situation*." Attorneys in general, and elder law and special needs law attorneys in particular, often are called upon to assist clients in times of crisis. In elder law and special needs law practices, such crises often involve the death, disability, or the long-term illness of, or transitions in living arrangements for, a client or loved one. Counseling clients in these times of crisis requires compassion and the ability to clearly analyze the client's circumstances and options, assess risks, present options, and make recommendations. The attorney should be mindful that the client's goals should guide the actions of the attorney. Offering a solution to the client's problem is inappropriate when the steps and objectives conflict with the client's values.

I. MARKETING AND ADVERTISING

The Elder Law and Special Needs Law Attorney:

1. Should consider marketing and advertising as an opportunity to educate the public and promote the profession of elder law and special needs planning.

Comment:

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

While it is important to let the public know the types of services being offered by the firm, it is more important to do so in a manner that educates the public about substantive areas of law without using fear or high pressure communications to do so.

2. Ensures that no materially false or misleading information is communicated in connection with a seminar, presentation, marketing or any advertising activity.

Comment:

Truthfulness in all communications to the public is a fundamental obligation of all attorneys. The attorney is prohibited from making false or misleading statements in an attempt to attract clients. A statement is false if any part of it is not true, and a statement is misleading if it creates a false impression.

A "marketing communication" is any communication to any segment of the public that promotes or offers the services of the attorney. It includes advertising, public relations, direct marketing, websites, blogs, online profiles, and other forms of social media. Law firm brochures, seminars, and event announcements are marketing communications. Marketing communications should include clear and understandable disclaimers (See MRPC 7.3(c)).

Seminars, presentations, and similar activities may constitute marketing. Attorneys who organize or speak at seminars and other forums should ensure that no false or misleading information is given and no pressure is exerted (including pressure to make an appointment with the attorney).
For example, to state that a particular 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.

Attorneys should use accurate adjectives to describe a legal concept, procedure, program, or technique. 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 is not "secret" or "unique," and attorneys should not use these or similar terms.

3. Should communicate in a manner that considers the target audience's potential lack of sophistication or vulnerability to overly aggressive or fear-based marketing communications.

Comment:

Whether a communication is misleading depends, in part, on the likely perceptions and vulnerabilities of the intended audience.

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

4. Communicates the attorney's education and experience to distinguish the attorney's practice and refrains from suggesting the attorney's superiority to or advantage over other attorneys.

Comment:

To avoid deceiving the public and potential clients, attorneys should make comparative statements based only on fact. Fact-based statements may result from third-party certification, licensing or evaluation, as permitted by state rules

For example, claims that an attorney has more experience, a greater level of expertise, or a higher "success" rate than other attorneys require supporting empirical data.

5. Uses endorsements and testimonials in a truthful, non-deceptive, and transparent manner.

Comment:

When the opinion of a current or former client is used in a marketing communication, that opinion should be based on actual experience. Atypical results should be identified as such.

If the attorney requests a person to directly communicate a testimonial or other expression of approval through a website, blog, or other media, the relationship

between the attorney and that person should be disclosed in the communication.

Suggested Reading:

https://lawyerist.com/3299/legal-marketing-ethics-web-2-0/

http://www.attorneyatwork.com/lawyer-advertising-and-marketing-ethics-today-an-overview/

http://www.americanbar.org/content/dam/aba/publications/law_practice_today/navigating-the-uncharted-waters-of-social-media-marketing-and-ethics.authcheckdam.pdf

http://blogs.findlaw.com/strategist/2015/04/top-5-ethical-issues-with-attorney-advertising.html

J. NON-LEGAL SERVICES

The Elder Law and Special Needs Law Attorney:

1. May consider using non-legal services to accomplish the goals of the representation with the client's informed written consent and ensures that the client's rights and attorney's ethical duties are maintained.

Comment:

In addition to the need for legal services, the elder law and special needs law attorney often is confronted with a client experiencing non-legal issues requiring medical care, long-term care services and supports, public benefits, insurance coverage, protection from exploitation and neglect, and end-of-life care planning.

The attorney embracing the holistic approach (discussed in Section A) is encouraged, but not required, to provide assistance through non-legal services if the attorney has the experience and expertise to do so. Alternatively, the attorney may utilize non-attorneys to provide such non-legal services (also known as ancillary services).

Common examples of professionals who provide non-legal services in elder law and special needs law include a professional care manager, nurse, life care planner, social worker, physician, psychologist, tax preparer, appraiser, or investment advisor.

The attorney who provides non-legal services must ensure that the client's rights derived from the client-attorney relationship, such as confidentiality, loyalty, communication, competent representation, diligence and avoidance of conflicts of interests, are maintained. When implementing non-legal services, the attorney should develop procedures with the selected non-attorneys that preserve the client's rights. Such procedures may include training non-attorneys on the attorney's duties to the client and having the non-attorney agree in writing to maintain client confidences and disclose any potential conflicts of interest. The attorney also should ensure that any non-legal services are specifically tailored to the client's individual needs.

Before involving a non-attorney in a client representation, the attorney should fully disclose to the client why the proposed service is recommended, the additional cost, if any, and how the attorney will ensure that the client's rights will be preserved. The attorney also should obtain the client's written informed consent to the non-legal services and should be advised if the non-legal service provider has any licensing or other obligations which could conflict with the attorney's duties. For example, a nurse could be a mandatory reporter of abuse, and exercise of this obligation could conflict with the attorney's duty of confidentiality in some states.

2. Considers alternative ways to deliver non-legal services.

Comment:

Non-attorneys often provide valuable services which are non-legal in nature. When a non-attorney is needed to assist with the legal representation, the attorney may:

- Utilize a non-attorney in-house employee; or
- Refer the non-legal services to an independent contractor.

Before providing a non-legal service, especially through an in-house employee, the attorney should consider seeking the approval of the attorney's state bar ethics counsel and disclosing such service to the attorney's malpractice carrier.

3. Discloses in writing and obtains the client's informed written consent to any relationship between the provider of the non-legal service and the attorney, the attorney's law firm and the attorney's immediate family members.

Comment:

The attorney may provide non-legal services through a separate entity related to the attorney or the attorney's law firm provided the attorney complies with the attorney's state bar ethics rules.

These rules typically require that the attorney:

- Ensure that the client's rights be preserved throughout the provision of the non-legal service;
- Disclose to the client any relationship and any financial interest the attorney may have with the non-legal service;
- Advise the client of the availability of similar non-legal services in the locality;
- Advise the client of the client's right to seek independent legal advice; and
- Obtain the client's written informed consent to the non-legal services.

Example: The attorney's client who has advanced dementia could benefit from a geriatric care manager in order to live in the least restrictive setting. The attorney owns a 25% interest in a local geriatric care management company which could provide the services the client needs. Before referring the client to this company, the attorney should comply with the disclosure and consent requirements of the attorney's state bar ethics rules.

4. Maintains appropriate licenses and complies with state bar ethics rules when selling insurance and investment products.

Comment:

The attorney may practice law and simultaneously engage in another occupation, including the selling of insurance or investment products, provided the attorney exercises adequate caution and complies with state bar ethics rules.

As a result of the client-attorney relationship, the client trusts the attorney. This trust permits the attorney to influence the client. The attorney may not pressure the client to buy an insurance or investment product.

Most state bar ethics rules consider the attorney selling an insurance or investment product to a client to be a business transaction with a client that imposes certain requirements on the attorney.

State bar rules typically require that: (1) the proposed sale be fair and reasonable to the client, (2) the terms of the sale be fully disclosed to the client in writing, (3) the client consent in writing thereto, and (4) the client have a reasonable opportunity to seek the advice of independent legal counsel. Some state bar rules impose greater requirements on the attorney and some lesser.

Example: The attorney is asked to provide estate and asset protection planning for the client. The client is in good health and has a $400,000 IRA that the client wants to protect if nursing home admission occurs. Long-term insurance may be appropriate to protect the client's IRA. The attorney is licensed to sell long-term care insurance. Provided that the attorney's state bar ethics rules permit, the attorney fully complies with those rules, and the attorney is not pressuring the client, the attorney may sell the client long-term care insurance.

K. PRO BONO LEGAL REPRESENTATION AND PUBLIC SERVICE

The Elder Law and Special Needs Law Attorney:

1. Recognizes the need for pro bono legal representation, provides pro bono representation to elderly individuals and individuals with disabilities who cannot afford to pay, and participates in and supports pro bono referral programs.

Comment:

Many elderly individuals and individuals with disabilities cannot afford essential legal representation. Because of their specific training and expertise, elder law and special needs law attorneys should take the lead in providing pro bono representation to those individuals, and should provide on average at least fifty hours of pro bono legal representation per year to individuals of limited means.

2. Financially supports organizations that meet the needs of elderly individuals and individuals with disabilities.

Comment:

In addition to providing direct legal representation to clients of limited means, elder law and special needs law attorneys should contribute financially to organizations that provide direct legal representation to elderly individuals or individuals with disabilities who have limited means and to organizations that meet the needs of such individuals.

3. Participates actively in, and provides ongoing leadership for, efforts to improve the law to meet the changing needs of elderly individuals and individuals with disabilities.

Comment:

Elder law and special needs law attorneys possess unique knowledge of the laws affecting elderly individuals and individuals with disabilities and have firsthand insight into the needs of these individuals. Therefore, elder law and special needs law attorneys should continually assess trends and factors that affect these needs and support efforts to improve these laws. They should use their knowledge and skills to lead these efforts to better the lives of elderly individuals and individuals with disabilities, consistent with employment obligations.