

Vision and Voice – Creating Healthcare Advocacy Skills for the 21st Century
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“Legal Literacy For Non-Lawyer Professionals Serving Older Adults”¹

“The 3 C’s In Elder Law---Identify Your Client, Conflicts, and Competency”

I. Who Is Your Client?

A. Mom and Dad

Usually, in an elder law practice, the older adult is your client even if you, as the attorney, have been initially contacted by another individual such as an adult child. A disclosure of whom you are representing should be made at the earliest possible time or, at the latest, during the initial client conference.

An attorney-client engagement letter should set forth the scope of the services to be performed by the firm and any matters that may be excluded from the legal services. Most importantly, the responsibilities of the attorney and the client should be clearly established in writing, identifying who is represented by the attorney. Confidentiality and conflict-of-interest issues should be clearly explained.

B. Conflicts with Adult Children

When several generations are involved in the planning, a **Disclosure of Conflict of Interest and Release of Information** need to be signed by the client(s). In addition, the attorney should lay out the content of the relationship with family members that are not primarily represented. The attorney should address the issue about what kind of information that the attorney will accept to share. The attorney should establish his/her position in case the attorney subsequently acquires knowledge that the plan of one client may adversely affect the interest of another client.

The Secret to Avoiding Conflict Between Spouses’ Interests

The elder law attorney may have to represent spouses when there are children from a prior marriage or the spouses’ interests are conflicting. In certain situations, a divorce may be part of Medicaid planning. In this instance, the attorney will not be able to represent both spouses; usually other approaches are not viable.

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When representing a couple, the attorney should assess the duty of each spouse toward the other and the ability to carry out their instructions. Pre- and Post-marital agreements, contract to make wills, and rights under pension plans should be reviewed. In addition, duties toward third parties should be reviewed such as child support, parental support, obligations or rights to or from prior spouse and others by agreements, prior divorce decrees, or arising under compensation or retirement plans.

The attorney will need to explain the potential conflict of interest and how it can be resolved. If a joint representation fails, the attorney may reserve the right to continue to represent one client in the matter or related matters. The basis of longstanding relationship with one of the clients may impact the dual representation. The attorney needs to clearly stipulate whether it is a joint or separate representation or whether only one individual is represented. In the case of joint representation, the attorney needs to address the possibility of a future prohibition on the lawyer's representation of either one of the spouses. Finally, the attorney needs to inform the clients of the impact of gaining knowledge regarding either spouse, as well as the attorney's duty to inform each spouse on certain matters.

II. Competency

A. The Competency of the Client - Who Calls the Shots?

The prevalence of dementia in the older population requires that the elder law attorney be aware of the risk of incapacity and ready to deal with diminished capacity. Dementia is estimated to double every five years in the elderly. While this disorder affects only 1% of persons 60 years old, it affects approximately 30% to 45% of persons 85 years old.

The elder law attorney should refer to the **Model Rules of Professional Conduct (MRPC)** and the **Assessment of Older Adults with Diminished Capacity: Handbook for Lawyers**, published by the American Bar Association. Under **Model Rule 1.14**, the attorney should try to maintain a normal client-lawyer relationship and has the discretion to take protective action in the face of diminished capacity. Finally, the attorney has discretion to reveal confidential information to the extent necessary to protect the client's interests. The failure to assess a client's capacity is a ground for legal malpractice.

The attorney will first determine whether the prospective client has sufficient legal capacity to enter into a contract for the attorney's services, then whether the client has legal capacity to carry out the specific legal transaction(s) under consideration. The Comment to Model Rule 1.14 notes that "a client with diminished capacity often has the ability to understand, deliberate upon and reach conclusions about matters affecting the client's own well-being."

B. Levels of capacity.

For a **testamentary capacity**, the client should know the natural objects of his or her bounty, understand the nature and extent of his or her property, and interrelate these elements sufficiently to make a disposition of property according to a rational plan. Capacity is required only at the time the will was executed. For a donative capacity, the client shall understand the nature,

purpose and effect of the gift, nature and extent of the property given, and have a knowledge of the natural objects of the donor's bounty.

Because capacity is presumed, the attorney should be looking for “**red flags**” in the **cognitive, emotional, or behavioral anomalies** during the course of the interview that may reverse the presumption of capacity. The attorney may be aware of the red flag by reports of family members. The possible cognitive signs could be short-term memory loss or communication problems. For instance, the client may have difficulties finding a particular word or naming common items. Other cognitive signs could be comprehension problems, lack of mental flexibility, calculation problems, or disorientation. The possible emotional signs of incapacity could be a significant emotional distress or sign of an extremely wide range of emotions during an interview or highly inconsistent with what the client discusses. Finally, possible behavioral signs of incapacity could be delusions, hallucinations or poor grooming or hygiene. For instance, older adults suffering from dementia may wear multiple layers of clothing.

These cognitive factors should be mitigated with diminished capacity. A client may appear confused because of stress, grief, or depression. Signs of disorientation and confusion could be due to a host of medical conditions and medication factors that are reversible. Normal mental status may vary during the day depending on the energy of the senior. For instance, clinicians have learned to test older clients in mid-morning when the client is most alert, since fatigue could cause lower performance. In addition, losses in hearing and vision, that are normal with aging, diminish functioning but not mental capacity. Finally, the individual's education, life and job-related experience, and sometimes socio-economic background, may impair the mental ability of the individual.

What the attorney should look for is the client's ability to articulate reasoning leading to decisions, the consistency of these decisions, the client's ability to appreciate the consequences of a decision, and the substantive fairness of the decision.

The attorney should use caution as to videotaping the client or using cognitive screening instruments. Unless the attorney videotapes all clients, the videotaping may itself be used to raise the doubts of capacity. The most popular screening instrument is **the 30-item Mini-Mental Status Examination (MMSE)**. It provides quick but blunt assessment of overall cognitive mental status. Because lawyers generally do not have the education and training to administer and interpret cognitive screening tests, it is not appropriate for an attorney to use this test. The attorney may misinterpret the test or over-rely on it. Finally, the screening exams pose a risk of producing both false positives and false negatives in conclusions.

C. Maximize Capacity, When Possible

An elder law attorney should take steps to maximize the capacity of an older client as follows:

- Take the time to “break the ice” and maybe speak about areas of common interest
- Interview the client alone to ensure confidentiality and to build trust
- Address the confidentiality of the relationship

- If the client is more comfortable with a support person, this person may be included for a portion of the interview
- An older client should be encouraged to participate as much as possible, therefore the attorney should talk directly to the client rather than to the support person, and the client's feelings should be respected and valued
- Sometimes it will be necessary to spend more time with an older client or even to have multiple sessions

To enhance the communication with an individual suffering from hearing loss, the attorney should minimize background noise, look at the client when speaking, speak slowly and distinctly, use a lower pitch without over-articulating or shouting, and sit close to the client. Client will appreciate a written summary and follow-up materials.

To summarize, when the attorney notices mitigating factors of incapacity, the attorney needs to assess them and to perform a legal analysis regarding the capacity required for the transaction considered. When there are mild problems of capacity to more than mild or substantial concerns of capacity, the attorney may proceed to the transaction or consider a medical evaluation. However, when there are severe problems of capacity, the attorney should not proceed with the transaction. Please note that the final responsibility rests on the shoulders of the attorney to decide whether representation can proceed as requested, regardless of the clinical assessment.

D. Protection of Client

The Virginia State Bar, in its *Virginia Rules of Professional Conduct*, provides in, Rule 1.14, when an attorney finds not only that the elder client is incompetent but “reasonably believes that client is at risk of substantial physical, financial or other harm unless action is taken and cannot adequately act in the client’s own interest, the attorney may take reasonably necessary protective action.” In order to take action, the attorney may have to disclose information regarding the client. Rule 1.14 provides that the attorney is impliedly authorized to disclose relevant information about the client but only to the extent reasonably necessary to protect the client’s interest.

E. On-going Interaction with Client During Representation

An attorney should not start a representation without a signed engagement letter that carefully lays out the scope of the representation. Rule 1.3 of the *Virginia Rules of Professional Conduct* provides that a lawyer shall act with reasonable diligence and promptness in representing a client. Rule 1.4 stipulates that a lawyer shall keep a client reasonably informed about the status of a matter and promptly comply with reasonable requests for information. A lawyer shall explain a matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation. A lawyer shall inform the client of facts pertinent to the matter and of communications from another party that may significantly affect settlement or resolution of the matter.