

Legal Ethics: Helplines & Hotlines

Part One

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Housekeeping

- All on mute. Use Questions function for substantive questions and for technical concerns.
- Problems getting on the webinar? Send an e-mail to NCLER@acl.hhs.gov.
- Written materials and a recording will be available at NCLER.acl.gov. See also the chat box for this web address.

About NCLER

The National Center on Law and Elder Rights (NCLER) provides the legal services and aging and disability communities with the tools and resources they need to serve older adults with the greatest economic and social needs. A centralized, one-stop shop for legal assistance, NCLER provides Legal Training, Case Consultations, and Technical Assistance on Legal Systems Development. Justice in Aging administers the NCLER through a contract with the Administration for Community Living's Administration on Aging.

NCLER Training & Resources for Senior Legal Helplines

- Webinar Topics:
 - [Recognizing & Addressing Elder Abuse](#)
 - Legal Ethics (Part One)
 - Helpline & Call Center Technology
- Tip Sheets:
 - [Reverse Mortgages](#)
 - Medicare
 - Title Issues & Deed Transfers
- Technical Assistance & Consultations
 - ConsultNCLER@acl.hhs.gov

About Lynda Shely

- Lynda is an Ethics lawyer who advises over 1,500 law firms around the country about legal ethics issues.
- She serves on the ABA Standing Committee on Ethics and Professional Responsibility and the ABA House of Delegates.
- She previously was the Director of Ethics for the Arizona Bar and taught ethics at three law schools.



About Justice in Aging

Justice in Aging is a national organization that uses the power of law to fight senior poverty by securing access to affordable health care, economic security, and the courts for older adults with limited resources.

Since 1972 we've focused our efforts primarily on populations that have traditionally lacked legal protection such as women, people of color, LGBT individuals, and people with limited English proficiency.



Sarah Galvan

Key Ethics Lessons

- Limit the scope of the advice provided.
- Determine who is the “client.”
- Check for conflicts.
- Avoid engaging in the unauthorized practice of law.
- Know what to do if client lacks the ability to assist with a representation.

What Does Your Helpline Provide?

- Legal Information

- Not fact specific
- Definitions, not interpretations
- Examples of forms, but not choosing a form
- How court works, not how court will rule
- General referrals

- Legal Advice

- Fact specific
- Involves judgment or interpretation
- Includes recommendations about a legal course of action
- Answers questions of “what should I do?”

Helplines & Hotlines

- No single model or definition
- Any helpline or hotline providing legal advice is subject to legal ethical rules
 - [American Bar Association Model Rules of Professional Conduct \(MRPC\)](#)
 - Check your state's rules!
 - Practical guidance: [ABA Standards for the Provision of Civil Legal Aid – Delivery Structure & Methods \(SPCLA\)](#)

Conflicts & Communication

Case Study (Part 1)

Mary calls your helpline. As soon as you answer the phone, Mary tells you that she wants to change her power of attorney and begins to give you details of her current power of attorney arrangement.

Poll 1: What Should You Do First?

- A. Let Mary continue to share information with you- she could be providing useful facts.
- B. Ask Mary which attorney prepared her POA.
- C. Stop Mary from continuing to talk- you need information from her to run a conflicts check.
- D. Stop Mary from continuing to talk- you need to tell her who you are and what you can do.

The Rules on Conflicts

- Before answering the call, the help line should have written protocols for how conflicts are checked for each call.
 - MRPC Rules 1.7 & 1.9
- Volunteers must at least avoid giving advice to an opposing party that they “know” is an opposing party.
 - MRPC Rule 6.5

Performing Conflict Checks

- Every service must keep a record of every caller and their legal issue.
 - Include vendors and lists of volunteers in the system.
 - Include all former clients.
- Check the system for the name of the current caller and any related parties.
 - Important to have an efficient and accurate system.

Conflicts

- A conflict of interest may exist if anyone or anything could materially limit your independent professional judgment on behalf of the client.
 - MRPC Rules 1.7 and 1.9
- Prospective clients with whom a lawyer has had a substantive conversation ALSO must be included in the conflict-checking system.
 - MRPC Rule 1.18

Poll 2: If there is a conflict, how do you tell Mary?

- A. We cannot help you because we have a conflict.
- B. We cannot help you based on the information that you provided to us.
- C. We cannot help you with this issue. Here are some other places you can call.

Addressing Conflicts

- Remember – EVERYTHING you learn in a call with someone who reasonably believes they are contacting you for legal advice must be treated as CONFIDENTIAL information – everything – even the FACT that they called you!
 - MRPC Rule 1.6(a)

Case Study (Part 2)

After running a conflict check, you determine that you can talk to Mary about her POA. Mary tells you that she would like to change her POA, but is not sure if she is allowed to change it. If she is, she wants you to help her draft a new one. She offers to come to your office.

Poll 3: What can you do to help Mary?

- A. Provide her with information about revising POAs in your state, generally.
- B. Talk to her about her POA and specifically what steps she needs to take to change it.
- C. Ask her to email her POA document to you and tell her you will walk her through revising it.

Communicating the Scope of Services

- You are required to identify the scope of representation – even for pro bono limited assistance.
 - MRPC Rule 1.2
- Set expectations: Explain the scope of the services your specific helpline can provide.
 - SPCLA Standard 3.4-2

Scope of Services

- Depends on what your helpline can do based on your internal guidelines *and* what you can do to competently help someone over the phone.
- Do you:
 - Provide specific legal advice?
 - Assist with document preparation?
 - Allow callers to call back on the same issue?

Document Services

- Set expectations for what can be achieved
 - Some simple documents can be reviewed, discussed, or prepared over the phone, but others may be too complex for phone services.
- Some callers may need more assistance than others to prepare forms
 - Protocols and procedures should be in place to assist helpline attorneys to make these determinations.

Unauthorized Practice of Law

- When explaining scope of services, also explain who the client is speaking with:
 - Attorney, law student, or paralegal?
 - May assume legal helplines are only staffed with lawyers.
 - Have procedures or scripts for this to be communicated early in the conversation.
- Remind non-lawyer employees/volunteers that they cannot give “legal advice”:
 - MRPC Rule 5.5.
- Each caller should be asked if they are a resident of your state.
 - If not, be careful about giving legal advice in a jurisdiction where you are not admitted to practice law.

Recognize Limitations

- Legal helplines are a valuable resource, but cannot provide assistance in every issue or circumstance:
 - Ensure that the client is getting the best service.
 - With complex issues, a referral to full legal assistance could best help the client.
- Lawyers must provide competent representation:
 - MRPC Rule 1.1
 - SPCLA Standard 3.4 & 3.4-1

Referrals

- Maintain an updated referral list
 - Legal and non-legal resources.
 - Direct contacts for emergencies or for warm handoffs.
 - Avoid providing outdated information that can frustrate or confuse callers.
- Consider:
 - Set a calendar event to review referral list.
 - Have student volunteers check your list.

Poll 4: Do you have to enter into a fee agreement/retainer with Mary?

- A. Yes, I am required to in my state.
- B. No, I am not required to in my state.
- C. No, I am not required to because I am only providing brief services.
- D. I don't know.

Fee Agreements & Retainers

- Many states require that even pro bono clients receive a written engagement letter/email that identifies: a) who is the client; b) what is the scope of the representation; and c) what costs or fees will be charged.
 - MRPC Rule 1.5
- LSC regulations do not require retainers for brief service.
 - 45 CFR § 1611.9

Methods

- Even if a written fee agreement is not required, it is advisable to:
 - Read a statement explaining limited-scope services (“We can only give telephone advice and will not be providing you with any advice beyond this call.”)
 - Provide a written disclaimer (email or mail).
 - Provide a closing letter.

Third Party Callers: Who is Your Client?

Case Study (Part 3)

Two days later, you get a call from Darlene. She wants to know if her mother (Mary) can revise her power of attorney.

Poll 5: What should you do?

- A. Tell Darlene that you need to speak with her mother to get permission to speak with Darlene, unless she has a legal relationship to Mary.
- B. Tell Darlene that you cannot provide her with any information as a third-party caller.
- C. Talk to Darlene- it seems like she wants to do the same thing that Mary wants to do.

Ethics Warning:

- MRPC 1.4 requires communicating with a “client” – but be careful – an attorney/client relationship cannot be formed with someone a lawyer has never seen or spoken to – “clients” must speak with the lawyer.
- Identifying who you think is *and is not* the client is important from the very first call.
 - Ask to speak with Mary, if Darlene allegedly is calling for Mary.

Common Issues

- Caller says they are POA or guardian for the older adult.
- Caller says that the older adult is unavailable or prefers that you talk to them about the issue.
- Caller thinks the older adult is being abused or someone is taking advantage of them.
- Caller pretends to be the older adult.

Protocols & Procedures

- Require proof of legal relationships.
- Include questions in your initial script to cover:
 - who is calling?
 - what type of question?
 - is the advice/information for the caller or for someone else?
- Balance between facilitating connection to your services and avoiding conflicts and ethical issues.

Capacity Assessments

Case Study (Part 4)

- Mary calls back the following week, and this time she seems confused about what she wants and doesn't really remember talking to you the previous week. Again, she has questions for you about POAs and says she might want you to help her change it.

Quick Assessments

- Helpline attorneys do not have the visual cues or personality history for the callers.
- Can utilize Capacity Assessment Worksheet for Lawyers, in some part.

Maintaining a Normal Relationship

- Determine what Mary is asking you to do and whether her perceived level of capacity allows you to help her
 - You can assist if the client at least understands the nature of the legal matter.
- A lawyer for a client with diminished capacity is to continue to take directions from the client as much as is practical.
 - Comment 1, MRPC Rule 1.14.

Capacity Assessments

- Even though everything Mary tells you is “confidential,” you *may* disclose information in certain circumstances. ABA Model Rule 1.14(b) explains:

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

Helpline Protocols

- Develop procedures for helpline attorneys to follow when they suspect a caller has diminished capacity:
 - Consult with a supervisor.
 - Ask caller if you can call them during a different time of day.
 - Provide written legal resources
 - Connect to a legal services or private bar attorney for an in-person evaluation.

Takeaways

- Trust your instincts – if a situation does not feel right, there probably is an ethics issue that should be addressed.
- The lawyer must define who is the “client” – really – do not let prospective clients, their relatives or care givers unilaterally determine who is the client.
- Resist the temptation to be “helpful” to a third party caller before making a proper evaluation of who your client is and if there are any potential conflicts.

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