

Techniques for Navigating Third-Party Ethical Challenges

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ABA Commission on Law and Aging

The American Bar Association Commission on Law and Aging (ABA COLA) leads the ABA's efforts to secure the legal rights, dignity, and autonomy of adults as they age by doing research, training, policy development, and providing technical assistance to lawyers and other professionals. The views expressed in this chapter summary are those of the author and may not reflect the policy or opinion of the ABA.

Key Lessons

There are four core reasons why it is important for lawyers and other advocates to leave third parties, such as family and friends, in the waiting room and meet privately with the client. The Four C's of Elder Law are Client identification, Conflicts, Confidentiality, and Choice. All of these are supported by the ethical rules that guide lawyers and other advocates.

The Four C's

Client Identification

A starting point is to always clearly identify who the client is. Clients often are assisted or surrounded by family or friends when meeting with lawyers or other advocates. The client is owed ethical duties, and the lawyer or advocate represents the interests of that one client. The interests of family and friends may differ from those of the client, and if family and friends believe they are the client, they may be disappointed in the actions of the lawyer or advocate. If present, family members or friends may also influence the client's stated decisions.

Confidentiality

Lawyers and other advocates cannot do their best unless their client shares all the information relevant to their case and an assurance of confidentiality is essential to that level of disclosure.

Conflicts

Lawyers can only represent one side of an issue. Avoidance of conflicts of interest between clients and others is essential to being a zealous advocate for clients.

Choice

A lawyer needs to communicate the issue, the options, and the risks of those options in a way that enables the client to make a choice and give informed consent on the objective or goal of the representation. It is important to meet with the client alone to assure the informed consent is from the client, and not from family or friends.

The Model Rules of Professional Conduct guide interactions with clients and require that attorneys protect the four C's. Attorneys and advocates need to be able to explain to family and friends why they are left in the waiting room and how honoring the four C's will result in a better outcome.

The Importance of Client Identification

Elder law tends to be a family affair, with family and friends helping out by contacting lawyers and other advocates and often joining the client on calls or in meetings. This often leads to confusion about who is in the attorney-client relationship.

Lawyers can really only be a zealous advocate for one side or one point of view on an issue, and there often can only be one client. It is essential to identify who the client is early on, and to make it clear to all involved. The attorney represents the desires of the client. It is possible, with careful compliance with the ethics rules, to have joint or, in some cases, simultaneous representation. But those carry the risk that if one of the clients has material information that they do not wish to disclose to the others, or if at any point, the clients differ in the objective or goal of the representation, the lawyer is forced to withdraw and not help anyone in the matter.

The Ethical Principles

The Preamble and Scope of the [Model Rules of Professional Conduct](#) describe the role of the attorney as a zealous advocate for the client and having a special obligation to the quality of the justice system. Clearly identifying the client is essential to being a zealous advocate. Rule 1.6 describes the ethical duty of confidentiality as one of the core reasons that it is critical to identify the client. When more than one person thinks the lawyer represents their ideas, conflicts can arise (Rules 1.7 through Rules 1.11 offer guidance to lawyers on avoiding conflicts). All of these rules underlie the importance of client identification.

Everyone Needs to Know

The lawyer or other advocate needs to make client identification clear not just to the client, but also to the non-clients. This needs to happen up front, before other people think their interests are being advocated for. Even if it is not required in your area, it is a good practice to engage the client in writing and to notify those who you do not represent but who have been involved in the conversation that you do not represent them, and that if they have concerns, they should seek independent advice. Clearly identifying the client and asking others to allow the attorney to meet privately with the client makes it clear who they are advocating for and who they are not.

Confidentiality

People often do not reveal their secrets or sensitive information unless they trust that the information will be kept confidential. To be the most effective advocates, attorneys need clients to share their confidences. Model Rule 1.6 creates an ethical obligation for lawyers to protect client confidentiality. This assurance is the cornerstone of trust between lawyers and clients.

Meeting with the client alone is first and foremost important to assure clients of confidentiality and encourage them to fully disclose all of the facts and information that might impact advocacy in their case. The presence of even the closest of family members may inhibit the level of disclosure needed to be most effective. Confidentiality under Rule 1.6 covers everything a lawyer knows about their client or their client's issue, no matter how the lawyer learned about the information. It is important that lawyers explain to their client that they will not discuss or disclose without consent from the client anything beyond what is necessary to carry out the representation.

Evidentiary privilege under the [Federal Rules of Evidence 501-502](#) protects attorney-client confidentiality by preventing a lawyer from being compelled to disclose anything told to them by a client with a reasonable expectation of privacy or confidentiality. Because privilege requires a reasonable expectation of privacy on behalf of the client, the presence of a non-essential third party may lead to a determination that there was no expectation of privacy. Hence, it is important that an attorney meet in private with every client to offer the client the opportunity to share facts that are never to be disclosed but may have an impact on the advocacy. Some

states interchange the terms privilege and confidentiality.

It is also important to consider that confidentiality and privilege apply to a lawyer or other advocate working with a lawyer but not to third parties that are present. Family and friends are not bound by the ethical rules that guide lawyer behavior.

Avoiding Conflicts

Family and friends of clients do not always have the same goal or objective in mind that the client may have. Model Rule 1.2 clearly states that the client decides the objective or goal of the representation. When a lawyer has multiple clients (or persons who believe they are the lawyer's client) on the same or a related matter, if their ideas about the objective of the representation differ, the lawyer is forced into a conflict. One attorney cannot effectively advocate for competing outcomes, and the conflicts rules under Model Rules 1.7 through 1.11 will result in the lawyer being forced to withdraw from being an advocate for any side in the matter.

A client may not feel comfortable revealing their true feelings about the objective or goal of the representation when others with differing views are present. Peer pressure and undue influence should not determine the client's wishes. Hence, it is important to spend time alone with the client, discussing the possible objectives or goals of the representation and determining that the advocacy is leading to the ultimate outcome the client wants. Meeting with the client alone to determine the objective and avoid conflicts also makes it clear to others whose interest the attorney is advocating for.

Choice

Under Model Rule 1.4, a lawyer must communicate with a client in a manner that the client can understand and give informed consent. Communication of this type is interactive, with the lawyer verifying that the client understands to a level sufficient to make informed choices. When surrounded by others, the others will often speak for the client, prompt the client, or otherwise be a part of the communication process. Meeting with the client privately helps to assure that the client is understanding to the extent necessary to give informed consent.

Model Rule 1.14 guides a lawyer's interaction with clients with a range of decisional capabilities or limited ability to understand the issue. The Rule obligates the lawyer to continue a normal attorney-client relationship, including maintaining all of the ethical obligations owed to a client.

Once an attorney has established the identity of the client, assured the client of confidentiality, taken steps to avoid conflicts, and supported client choice, it is time for the client to decide if they want to invite family or friends to join them for the conversation. That is the client's choice. The attorney should make it clear to the client that the client can always talk in private with the attorney. Family and friends can provide important decision support for the client, but it is important to first establish who the client is and make it clear that the attorney will maintain confidentiality and avoid conflicts, always putting the client first.

Conclusion

It is important to meet privately with every client, to assure that the client is clearly identified, that confidentiality is established and maintained, that conflicts are avoided, and that clients are empowered to make choices in their case. The ethics rules provide a basis for these steps and provide an explanation of why it is essential. Attorneys should explain to the client why it is important to meet with them privately and to family

and friends why it is important to be “left in the waiting room.”

Additional Resources

- Ethics rules for lawyers and other advocates: [Model Rules of Professional Conduct](#)
- [Federal Rules of Evidence](#)
- [NCLER Trainings: Advance Planning and Decision-Making Supports](#)
- [NCLER Elder Justice Toolkit: Navigating Ethical Issues and Complex Situations](#)
- American Bar Association: “[Why am I left in the waiting room? Understanding the Four C’s of Elder Law Ethics](#)” and in Spanish: “[Entendiendo los Cuatro puntos de la Ética de Cuidados de Ancianos.](#)”

Case consultation assistance is available for attorneys and professionals seeking more information to help older adults. Contact NCLER at ConsultNCLER@acl.hhs.gov.

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