

# Techniques for Navigating Third-Party Ethical Challenges

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- 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](mailto:NCLER@acl.hhs.gov).
- Written materials and a recording will be available at [NCLER.acl.gov](http://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.

# About ABA COLA

The ABA Commission on Law and Aging is a collaborative and interdisciplinary leader of the American Bar Association's work to strengthen and secure the legal rights, dignity, autonomy, quality of life, and quality of care of aging persons.

The Commission accomplishes its work through research, policy development, advocacy, education, training, and through assistance to lawyers, bar associations, and other groups working on issues of aging.

# Key Lessons

- There are four core reasons why it is important for lawyers and other advocates to leave 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.
- We will explore how all of these are supported by the ethical rules that guide lawyers and other advocates.

# A Family Matter

- Elder Law:
  - Public benefits applications
  - Advance Health Care Planning
  - Planning to Avoid Guardianship
  - Supporting Decision-Making
- These all tend to draw family and friends

# Client Identification

# Case Example 1

- Joyce has been in a nursing facility for 6 weeks following a fall that resulted in a broken leg. The nursing facility has notified everyone that she is ready for discharge.
- You meet with Joyce, her husband George, and their two sons Dale and David in a conference room at the nursing home. George is concerned about his ability to care for Joyce at home. Dale thinks she should never had been admitted to a nursing facility and offers to put her in his car and drive her home right now. David is obsessed with arranging home care services and durable medical equipment before she is sent home.



# What is Missing Here?

- What is the issue?
- Who is the ultimate client?
- What does the CLIENT want?
  - And yes, my family had this conversation.

# Case Example 2

- Homer, Marge, Bart, Lisa, Maggie, and Selma all arrive in your office to discuss what needs to be done to get Selma help with paying for inpatient treatment for smoking cessation. Everyone seems to talk at once. Homer thinks we just let her smoke, Marge is worried that Selma owns two cars, Bart wants to know why he is not allowed to smoke, Lisa has been to the library and read about available options in Canada, Maggie thinks this is funny, and Selma seems confused.

# Why is it Important to Identify the Client?

- To clarify the issue
- To determine what the Client wants
- Avoid conflicting issues, or conflicting solutions
- To bring some focus to the conversation

# Answering the Phone

- You are locking up to go home at the end of a long day and the phone rings. You answer it, and the person asks, “Can a will be written to deduct from the share of one of the kids the balance on a loan that has not been repaid?”
- You answer, “Well, yes that can be done.”
- To which the person says “Fine, we made an appointment using your online system, we will be in tomorrow afternoon” and hangs up.

# Answering the Phone (continued)

- The next afternoon Jimmy and his daughter Melody arrive for a 2:00 PM appointment.
- Melody starts out, “I talked with you late yesterday, we are here for Dad to change his will.”
  - What is the issue?
  - Do Jimmy and Melody want the same thing?
  - Who is the Client?
  - Have you already given Melody legal advice?

# Ethical Implications on Client Identity

- The Preamble and Scope of the Model Rules of Professional Conduct direct an attorney to be a zealous advocate for a Client
- Rule 1.6 Confidentiality
- Conflicts: When more than one person think the lawyer represents their ideas, conflicts can arise
  - Rules 1.7 through Rules 1.11 offer guidance to lawyers on avoiding conflicts.

# Practical Practices

- Avoid answering questions or offering advice until you have identified the Client
- Identify the Client early
- Make it clear to the Client and non-clients who the Client is
- Whenever possible use a written retainer agreement
- Consider non-representation notices to others who are present
- Meet with the Client privately

# Explanation to Non-Clients

- Ethically, a lawyer can only represent one side in or one position in a matter.
- A lawyer owes that Client special duties, including allowing the Client to determine the objective of the representation, confidentiality, and avoidance of conflict.
- To assure that our ethical obligations to our Client are fulfilled, it is important for the Client and lawyer to meet privately.



# Confidentiality

# Confidentiality

- Clients need to trust in confidentiality to lead to the level of disclosure that is essential to the lawyer being an effective advocate for the Client.
- Model Rule of Professional Conduct 1.6
  - (a) A lawyer shall not reveal information relating to the representation of a client unless the client gives informed consent, the disclosure is impliedly authorized in order to carry out the representation or the disclosure is permitted by paragraph (b).

# Comment 2 to Rule 1.6

- This contributes to the trust that is the hallmark of the client-lawyer relationship. The Client is thereby encouraged to seek legal assistance and to communicate fully and frankly with the lawyer even as to embarrassing or legally damaging subject matter.
- The lawyer needs this information to represent the Client effectively and, if necessary, to advise the client to refrain from wrongful conduct.
- Almost without exception, clients come to lawyers in order to determine their rights and what is, in the complex of laws and regulations, deemed to be legal and correct. Based upon experience, lawyers know that almost all clients follow the advice given, and the law is upheld.

# Comment 3 to Rule 1.6

- The confidentiality rule, for example, applies not only to matters communicated in confidence by the Client but also to all information relating to the representation, whatever its source.

# Case Example 3

- Clairice Client, accompanied by her three adult sons and her meddling sister, meet with you to discuss a denial notice from Medicaid. Clairice had done the application with help from her family. The reason for the denial was a withdrawal of \$15,000 that showed up on her bank statements. With everyone at the table, she kept saying it must be a mistake.
- When you meet with Clairice alone, and you assure her of confidentiality, she breaks down in tears and tells you:

# Case Example 3: What Clairice Tells You

- She met a man at a social event, he swept her off her feet, and treated her like a princess.
- He promised her he could double her money in 30 days, so she withdrew \$15,000 in cash, handed it to him, and he disappeared with the money. She had been scammed and she knew it, and she was so ashamed of what had happened. She later learned that two friends of hers had been scammed by the same person at the same time.
- She fears that her family will insist on seeking guardianship of her if they find out the truth.
- She is embarrassed by what she did.

# Clairice Explained

- She didn't explain this to her family because she feared their reaction.
- She didn't show the bank statements to anyone.
- She hoped Medicaid wouldn't notice.
- You explain that you will help her file a police report for the theft.
- And based on the report, you will file an appeal arguing that this was a loss to a scam, not a gift.
- You assure her this was not her fault, she was the target of a criminal
- You promise not to disclose to her family.

# Practices on Confidentiality

- Meet privately with the Client
- Explain your ethical commitment to confidentiality
- Explain to non-clients that to be most effective, you may need to keep secrets from them, and you or another advocate would do the same for them.
- Use examples to explain how and why confidentiality is important.



# Examples of Deep Secrets

- A child their family does not know about.
- A son or daughter who has been missing for 30 years
- A marriage and divorce that no one knows about
- Debt
- Scams/Frauds
- Abuse
- Gifts
- Past criminal history
- History of mental health treatment
- Literacy
- Illness
- Disability

# Conflicts

# Conflicts Challenge

- You have a conflicts challenge when more than one person thinks you are representing or advocating for what they want, in the same or a related matter.
- Family and friends may have different goals
- Many states hold that the ethical obligations attach when the Client has a reasonable expectation that the attorney is representing their interest.
- Even with non-representation, some obligations attach to anyone who considers themselves a prospective client.

# Conflicts (Continued)

- A lawyer can only be a zealous advocate for one goal or objective.
- Model Rule 1.2 instructs us the CLIENT determines the objective or goal of the representation.
- Multiple ethics rules provide guidance on conflicts.

# Model Rule 1.7

- (a) Except as provided in paragraph (b), a lawyer shall not represent a Client if the representation involves a concurrent conflict of interest. A concurrent conflict of interest exists if:
  1. the representation of one Client will be directly adverse to another Client; or
  2. there is a significant risk that the representation of one or more Clients will be materially limited by the lawyer's responsibilities to another Client, a former Client, or a third person or by a personal interest of the lawyer.

# Model Rule 1.7 (b)

- (b) Notwithstanding the existence of a concurrent conflict of interest under paragraph (a), a lawyer may represent a Client if:
  1. the lawyer reasonably believes that the lawyer will be able to provide competent and diligent representation to each affected Client;
  2. the representation is not prohibited by law;
  3. the representation does not involve the assertion of a claim by one client against another client represented by the lawyer in the same litigation or other proceeding before a tribunal; and
  4. each affected Client gives informed consent, confirmed in writing.

# We are Family: What Conflict?

- Selma wants to stay in her home and have her care needs met there.
- Her husband Andy is concerned about preserving assets for when he outlives Selma.
- Their daughter Roberta was promised Mom's car and wants to make sure it is not sold (a 1965 Mustang Convertible).
- Their son Kevin is convinced he can care for Selma at home.
- While the goals may be overlapping, the goals may also be in conflict

# Selma and Andy

- Public benefits often involve spouses, jointly owned assets, and individually owned assets.
- The lawyer is often working under 1.7(b) in trying to find a solution that works, and not presenting conflicting claims.
- If you jointly or concurrently represent them and you are unable to get them to agree, you may have to withdraw.



# Roberta and Kevin

- Roberta's promise of getting Mom's car may be impossible.
  - If she reasonably believes you represent her in trying to achieve her goal, and you don't pursue a plan that would have that result, you have an ethics issue.
- Kevin wanting to provide care for Selma at home, may align with the ultimate plan, or may not if it is decided that home care benefits will not provide sufficient care, and Selma compromises to consent to inpatient care.
  - If he reasonably believes you represent him to achieve a goal of in-home care, and you don't pursue a plan that would have that result, you have an ethics issue.

# Practices to Avoid Conflicts

- Decide who the Client is
- Avoid offering any advice on success of any objective until you have clearly identified the Client.
- In simultaneous or joint representation
  - There is a risk that if you can't reach agreement, you may need to withdraw
  - Let them know that up front
- Meet with the Client(s) privately to determine the goal or objective of the representation
- Decide with your Clients, if you want to tell non-clients what goal or objective is being pursued

# Choice

# The 4th C is Choice

- Ethics rule 1.0 (e) "Informed consent" denotes the agreement by a person to a proposed course of conduct after the lawyer has communicated adequate information and explanation about the material risks of and reasonably available alternatives to the proposed course of conduct.
- Rule 1.4 (b) A lawyer shall explain a matter to the extent reasonably necessary to permit the Client to make informed decisions regarding the representation.

# Rule 1.2

- (a) Subject to paragraphs (c) and (d), a lawyer shall abide by a client's decisions concerning the objectives of representation and, as required by Rule 1.4, shall consult with the Client as to the means by which they are to be pursued. A lawyer may take such action on behalf of the Client as is impliedly authorized to carry out the representation.

# Adding up to 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.
- Decision Supports/Supported Decision-Making
  - A lawyer is a decision supporter for every Client on the legal issue.
  - The way the information is communicated, will vary depending on what it takes to communicate the matter to the Client in a way that the Client can understand.

# Person-Directed Service

- The person directs the service, takes an active role, and determines the goals.
- Identify the person's strengths, preferences, priorities, service and support needs, and desired outcomes.
- Remind them that they have a voice, this is their case.

# Choice?

- Decisional capabilities or capacity are not defined or mentioned in the Model Rules of Professional Conduct.
- What is defined is the need to communicate in a way that allows the client to give informed consent.
- Rule 1.14 guides actions when a client has a diminished understanding and may not understand sufficiently for their consent to be informed consent.
- Avoid unconscious bias in determinations of how to provide services to a Client.



# Case Example 4

- Edna and Bill have been married for 62 years. They arrive for your meeting and Edna does the talking. Edna wants to be named as the agent in a power of attorney and as health care agent for Bill. For her power of attorney and health care surrogate, Edna wants to name their oldest son. You ask Bill what he wants, he says, “whatever Edna says will be fine.” You ask Bill the names of his children, and he responds, “ask Edna.” You ask him what bank their life savings is in, and he turns to Edna and says, “you know that don’t you?”

# What are the Red Flags?

- A. Edna's speaking for both of them
- B. Edna's choice for her agents
- C. Edna's choice for Bill's agents
- D. Bill's deferring to Edna
- E. Bill's inability to answer basic questions
- F. All of the above

# Group Dynamics

- In a group there is often an emergent leader that speaks for the group.
- People often defer to another person in the group.
- Often the idea to seek advice or help is led by one person who may have a stronger opinion or understanding.
- This makes it difficult to know if the person is knowingly making choices or not.

# Does the Person Understand the Choice They are Making?

- We assess understanding of choice by:
  - Asking questions
  - Listening to answers
  - Listening to what the Client has to say
  - Probing for understanding
- Does the person understand that they have options?
- Does the person understand the risks and benefits of those options?
- Is the person able to make a choice?
- Do you believe their consent, is informed consent to the choice?

# Why Am I Left in the Waiting Room?

- To allow the attorney to assure the 4Cs
- To minimize the risk of third-party challenges to the decisions that are made:
  - Make it clear who the Client is;
  - Avoid conflicts;
  - Assure full disclosure and confidentiality; and
  - Assure that the choice is the informed choice of the Client.

# Practice Pointers

- Have something in writing explaining what you do and why
- Have someplace comfortable for the non-clients to wait
  - Send them out for coffee
- On house calls, ask for someplace private
  - Ask family to take the dog for a walk
  - Or retrieve paperwork, or get you a cup of coffee
  - Something rational to allow you time alone with the Client.

# THANK YOU!

- Questions?
  - [ConsultNCLER@acl.hhs.gov](mailto:ConsultNCLER@acl.hhs.gov)
  - [David.Godfrey@Americanbar.org](mailto:David.Godfrey@Americanbar.org)

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