

I Have Dementia, But I am Not Incapacitated:

Ethics in the Practice of Elder Law

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The practice of elder law presents a myriad of ethical dilemmas. Counseling clients who are potentially vulnerable due to age, disability, or incapacity requires attorneys practicing in elder law to keep strict ethical standards to ensure their client's needs are protected while appropriately maintaining the client's autonomy and independence as much as possible. Although there are numerous, conceivable ethical predicaments, this article will specifically address the attorney's ethical duty in: identifying who the attorney's client is and providing proper service to that client, appropriately handling any conflicts of interests that may arise in representation in the practice of elder law, and the representation of incapacitated clients.

Identifying Who Your Client Is

Aging, disability, and incapacity are a family affair. It is not uncommon for clients needing the assistance of an elder law attorney to have family members involved in the process as well. Sometimes these family members are even the ones setting appointments and driving the client to meet with the attorney. Even if there is no attorney-client relationship formed with certain parties involved in the initial client meeting, attorneys still owe a duty of confidentiality and avoidance of conflicts to every prospective client.¹ Although rule 1.18 of the Professional Rules of Conduct's definition of a prospective client as one "who discusses with an attorney the possibility of forming an attorney-client relationship with respect to a matter"² is fairly vague, courts have often said that the existence of an attorney-client relationship is determined by the reasonable belief of the client.³ Therefore, an attorney must assume that everyone sitting at the table believes the attorney is their attorney, making it crucial to identify who the actual client is early on and asserting to those involved who the client is.

Because of the familial nature of the practice of elder law, identifying the client begins with the initial scheduling of an appointment. When a person calls to set up an appointment, it is important to identify: who the caller is, who documents will be created for, who will be present at the initial meeting, and what the role each of those present at the initial meeting will be playing. Although one must ask the general nature of the legal help needed during the initial appointment scheduling, one should avoid talking about specific details of the representation and giving any legal advice—as the caller may not be the client.

At the initial meeting, it is important for the attorney to identify who the most likely client is. Although comments to Rule 1.7 of the Rules of Professional Conduct state "common

¹ Okla. Stat. tit. 5, Ch. 1, App. 3-A, R. 1.18 (2008).

² Okla. Stat. tit. 5, Ch. 1, App. 3-A, R. 1.18(a) (2008).

³ Grace Giesel, *The Attorney-Client Relationship in the Age of Technology*, 32 Miss. C. L. Rev. 319, 322 (2013).