

**ELDER CLIENTS WITH DIMINISHED CAPACITY: NAELA'S RESPONSE TO  
SPECIFIC CASE APPLICATIONS AND ITS DEVELOPMENT OF ASPIRATIONAL  
STANDARDS THAT MAY CROSS PROFESSIONAL ORGANIZATIONAL  
BOUNDARIES.**

By

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**I. INTRODUCTION**

NAELA members, elder law attorneys and trust and estate counsel have for some time dealt with the aging of our society; a highly visible demographic forecast of the early '80s. The reality of the forecast impacts financial services professionals, banking and trust professionals, accounting professionals, insurance professionals and legal professionals with striking similarity.<sup>2</sup> Regardless of whether or not they are specialists or not, lawyers are receiving an increasing number of older prospective clients<sup>3</sup> with diminished capacity, while at the same time being confronted with the dilemma of existing clients whose capacity has begun to diminish.<sup>4</sup> These new wrinkled faces of capacity come in countless variations, often hidden by cosmetic makeovers that project youthful visual images and well-scripted sound bites of single words and phrases that project informed verbal understanding. Many elderly clients are presenting illusions of mental

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<sup>1</sup> Copyright © 2005 All Rights Reserved by A. Frank Johns, JD, CELA R-G and Bernard A. Krooks, JD, CPA, LLM, CELA. Different versions of this article have been published under different titles. See A. Frank Johns and Bernard A. Krooks, *Alive, Kicking – and Incapable: Do You Know How to Deal with Incapacitated Clients?* 143 *Trusts & Estates Journal* 52 (November 2004); see also A. Frank Johns and Bernard A. Krooks, *The New Wrinkled Faces of Capacity: The Older client with Diminished capacity*, 30 *ACTEC Journal* 301 (Spring 2005).

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<sup>2</sup> Recent articles have pointed to the change in customer characteristics, advising readers on how to market to them. See for example *Older Consumers: Destroying Market Myths* (2005), [www.thematuremarket.com](http://www.thematuremarket.com); see also George P. Moschis, *Marketing to Older Adults – An Updated Overview of Present Knowledge and Practice*, *Journal of Consumer Marketing* 20(6), 516-525, The Georgia State University, Robinson College of Business, Center for Mature Consumer Studies, [www.cba.gsu.edu/marketing/centers/cmcs](http://www.cba.gsu.edu/marketing/centers/cmcs).

<sup>3</sup> See ABA 2004 MRPC 1.18 Duties to Prospective Client, *infra* note 14, at 69-71.

<sup>4</sup> For the sake of brevity, prospective and current client will be identified throughout the article as “client”.

competence sufficient to exercise informed consent in the execution of legal documents and in declaring client-lawyer representation. Banking, financial and accounting professionals often refer these elderly clients to lawyers. At the point of referral, it is usually not clear to the lawyers whether or not the capacity of the clients have been determined by the professionals making the referrals, or on what ethical basis an understanding of representation has been determined.

## II. WHAT CONFRONTS THE PROFESSIONAL

This article begins with a summary examination of the professional's position, and reviews where available the ethics and codes by which the professionals and their professional organizations respond to customers and clients. The article then reviews examples of how the National Academy of Elder Law Attorneys ("NAELA") and other legal organizations are addressing the diminished capacity issue, and an explanation of how future guidance available to lawyers should help those in other professions. Two tools being developed are worth reference: First, NAELA's development of Aspirational Standards. NAELA is asking its members to commit to its higher level of practice that has been published in recent months.<sup>5</sup>

Consider two illustrations:

### FIRST ILLUSTRATION - THE PROFESSIONAL

**Betty had an initial appointment with Professional regarding her current financial portfolio. She was accompanied by one of her three children, Debbie. Betty explained that she was a widow, needing to consider asset preservation and estate planning and asking to hear more about new financial products that might better fit her status and age.**

**After reviewing basic facts and information, Professional explained a variety of options and products. Betty quipped that Professional was talking way above her head. Professional replied that everything would be presented in writing for her to carefully consider and that there would be a period in which she could choose to reject the purchase of products.**

**As Professional followed with a series of other questions, Betty began contradicting herself, seeming somewhat confused. Debbie intervened each**

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<sup>5</sup> See NAELA Aspirational Standards in attachment "A" at the end of this article. At the time of the writing, of this article, the commentaries to the NAELA Aspirational Standards were still in development under the supervision of Gregg French, Chair of the NAELA Professionalism & Ethics Committee. French is scheduled to publish an article on the Aspirational Standards and the commentaries in a future issue of the NAELA Journal .

**time, answering for Betty. After Debbie answered several questions, Professional tried to redirect his questions to Betty, rephrasing them so that Betty only had to answer yes or no. However, when Debbie did not answer a question, Betty would answer incoherently.**

**Professional knew that Betty was struggling to understand just what she was doing.**

### **Analysis**

While the codes of ethics of many professional groups do not address issues of competence of customers or clients to make decisions based on informed consent<sup>6</sup>, at least one professional group indirectly guides its members through responsible inquiry of the customer or client to assure that there is an informed understanding of the services or products being purchased.<sup>7</sup> In the illustration above, Professional gathered enough information, and had sufficient specific dialogue with Betty to confirm that Betty may have diminished capacity such that she might not be able to exercise informed consent. Is this situation becoming an increasing occurrence? What should Professional do in this situation? Does the answer differ between professions? As the lack of capacity becomes starkly apparent, so obvious that it is without doubt, does Professional's ethical duty itself become apparent?

Without a doubt, the above illustration is occurring in increasing numbers, and these situations will compound in volume and complexity as the Baby Boomers finish being the "sandwich generation" and focus on their own retirement needs.<sup>8</sup> Each professional answers the question of what he or she should do based on weighing critical factors, and applying the organization's or profession's ethical rules. One response is shown here:

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<sup>6</sup> See for example Society of Financial Service Professionals, *Code of Professional Responsibility of the Society of Financial Service Professionals*, <http://www.financialpro.org/About/CodeOfProfResp.cfm> (SFSP 2004"); American Institute of Certified Public Accountants, *AICPA Code of Professional Conduct, ET Section 300 – Responsibilities to Clients*, <http://www.aicpa.org/about/code/sec300.htm> (AICPA 2004).

<sup>7</sup> *Id.*, SFSP CPR, at 2-3, Canon 1 Fairness, R 1.5.

<sup>8</sup> See Katherine K. Wallman, *Older Americans 2000: Key Indicators of Well-Being, Indicator 15 – Memory Impairment*, at 25 (Federal Interagency Forum on Aging – Office of Management and Budget 2000); *Beyond 50.02: A Report to the Nation on Trends in Health Security*, Section II Overview of Trends affecting population age groupings from 50 to 85 (AARP 2002).

## FIRST ILLUSTRATION - CONTINUED

**Because of Professional's observations during the meeting, he suggested that Betty make an appointment with her lawyer to be sure she had her financial and health care powers of attorney up-to-date.**

### Analysis

In the continuation of the first illustration above, Professional exercised a multidisciplinary approach, bringing a lawyer into the process of assessing Betty's legal competence to execute advance directives. If, however, Professional was confronted with the more difficult situation of Betty presenting with significant diminished capacity, Professional should consider bringing a medical, social work or healthcare professional into the process.<sup>9</sup> This could very well cost Professional the sale, or a commitment to a purchase of services. However, any action taken after the presumption of incompetence is raised crosses the ethical divide. If Professional has Betty execute documents when he believes she cannot provide informed consent, then such action may amount to fraud or unfair and deceptive trade practice. The real problem is that the ethical boundary is never so obvious; there is rarely a bright line. That is why there are countless professionals crossing that ethical divide all the time as they struggle under the pressure and stress to produce and meet goals. Consider the final installment of the first illustration; it may prove instructive.

## FIRST ILLUSTRATION – FINAL RESULT

**Because of Professional's observations during the meeting, he suggested that Betty make an appointment with her lawyer to be sure she had her financial and health care powers of attorney up-to-date. Debbie answered for Betty that she was attorney in fact and agent. Debbie then asked Betty if that was right, and Betty quickly agreed. Debbie turned to Professional and said that her brother and sister lived out of state, but were in complete agreement with what Betty wanted to do. Betty added that all of her children loved her and everything was just fine. Professional then had Betty and Debbie sign all documents for the purchase of the financial products.**

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<sup>9</sup> Expansion of the multidisciplinary professionals involved also expands the professions, expanding as well the different Codes and Ethics that may come into play. See The National Association of Social Workers Code of Ethics, <http://www.socialworkers.org/pubs/codenew/code.asp>; see also The American Medical Association's Code of Medical Ethics (2004-2005), [www.ama-assn.org/ama/pub/category](http://www.ama-assn.org/ama/pub/category); and see The American Psychological Association's Ethical Principles of Psychologists and Code of Conduct, <http://www.apa.org/ethics>.

Two days later, Professional received a phone call from Betty, declaring that she was “exercising her right of rescission” and canceling the purchase of the financial products. In the background, Professional could hear a voice yelling instructions to Betty. Professional then insisted that he would immediately come out to the house to discuss rescission and sign documents. At the house, Betty and her son, Tom, greeted Professional; Debbie was nowhere to be found. When Professional asked Debbie’s whereabouts, Tom took over the conversation and said that he was his mother’s attorney-in-fact as of that morning.

### III. THE LAWYER

An understanding of how the legal profession addresses the ethical dilemma of a client’s diminished capacity may guide other professional organizations as their members ask them what to do.<sup>10</sup> This has been the focus of NAELA and several organizations within the legal profession for several years.<sup>11</sup> Consider the second illustration:

#### SECOND ILLUSTRATION – THE LAWYER

As Professional suggested, Betty had a consultation appointment with Attorney regarding her current situation. Debbie again accompanied her. Betty explained her situation to Attorney as she had explained it to Professional. After reviewing the same basic facts and information, Attorney began by asking Betty who his client was. Further discussion between them produced an agreement that Betty was Attorney’s client for the consultation.

Further into the consultation, Attorney explained that advance directives were a necessary alternative to guardianship, clarified the risks involved and discussed other reasonable available alternatives. Betty responded, as she did previously to Professional, that Attorney was talking way above her head. Attorney replied that everything would be presented in writing for her to carefully consider and that he would give her written confirmation of any further engagement. When Attorney asked about sharing confidences with, and sending copies of all correspondence to the other children, Betty first looked at Debbie before directing him to only share confidential information with Debbie for the time being.

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<sup>10</sup> At the time this article was being written, the ABA Commission on Law and the Elderly (ABA-COLA) and the APA were about to publish their joint publication on assessing capacity. See Jennifer Moye, *Evaluating the Capacity of Older Adults: Psychological Models and Tools*, 17 NAELA Quarterly, 3 (Summer 2004) (“Moye – Capacity”).

<sup>11</sup> See the many published manuscripts, articles and symposium manuals of NAELA, [www.naela.org](http://www.naela.org); the National College of Probate Judges, [www.ncpj.org](http://www.ncpj.org); the American College of Trust and Estate Counsel, [www.actec.org](http://www.actec.org) and the ABA-Real Property Probate and Trust Section, <http://www.abanet.org/rppt/home.html>.

## Analysis

At the inception of the client-lawyer relationship, elder law and trust and estate attorneys must generally deal with issues including competence, communication, confidences and loyalty.<sup>12</sup> Initially, the ethical analysis of the client-lawyer relationship is not difficult as long as the lawyer knows to pose the question, “Who is the client?” to those making the initial appointment.<sup>13</sup> As shown in the illustration above, the answer should come from the client. The client is often the elderly person seeking legal advice regarding future long-term care issues and the balance between asset preservation and quality of life.<sup>14</sup> With other family members in the room, however, the initial contact becomes more complicated, especially when the older person seeking legal services has diminished capacity.<sup>15</sup> Inter-generational or family unit representation is not within the scope of this article;<sup>16</sup> however, what is within its scope is acknowledging and addressing the stress that presses the lawyer against the ethical boundaries of lawyering as the client-lawyer relationship begins.

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<sup>12</sup> See Geoffrey C. Hazard, Jr. and William Hodes, *The Law of Lawyering* (2 ed. Aspen Law & Business 1996) (Supp. 2004), Pt. 1, at 1, explaining that the four duties (competence, communication, confidentiality and loyalty) of the core principles of the law of lawyering run to the client, and noting that The Kutak Commission symbolized the primacy of client interests by reversing the common “lawyer-client” reference; see also ACTEC Commentaries on the Model Rules of Professional Conduct (3 ed. ACTEC Foundation 1999). The ACTEC Commentaries have as their themes (1) the relative freedom that lawyers and clients have to write their own charter with respect to a representation in the trusts and estates field; (2) the generally nonadversarial nature of the trusts and estates practice; (3) the utility and propriety, in this area of law, of representing multiple clients, whose interests may differ but are not necessarily adversarial; and (4) the opportunity, with full disclosure, to moderate or eliminate many problems that might otherwise arise under the Model Rules. *Id.*, John R. Price, Reporter’s Note, *ACTEC Commentaries*, at 1

<sup>13</sup> See generally Bruce A. Green and Nancy Coleman, eds., *Ethical Issues in Representing Older Clients*, 62 *Fordham L. Rev.* 961 (1994)(hereafter “Green – Ethical Issues”) ; see also Restatement of the Law Third, *The Law Governing Lawyers*. Vol. 1, Chp. 2, *The Client-Lawyer Relationship*, at 125 (Cumm. Supp. 2003).

<sup>14</sup> See A. Frank Johns, *Ethics Changes and Application to Tax, Estate and Elder Law Attorneys*, 63<sup>rd</sup> New York University Tax Law Institute (Fall 2004).

<sup>15</sup> See Peter Margulies, *Access, Connection, and Voice: A Contextual Approach to representing Senior Citizens of Questionable Capacity*, in Green – Ethical Issues, *supra* note 13, at 1073, 1080; Jan Ellen Rein, *Clients with Destructive and Socially Harmful choices – what’s an Attorney to Do? Within and Beyond the Competency Construct*, in Green – Ethical Issues, *supra* note 13, at 1101, 1154; Robert B. Fleming and Rebecca C. Morgan, *Lawyers’ Ethical Dilemmas: A “Normal” Relationship When Representing Demented Clients and Their Families*, in Joint Conference on Legal/Ethical Issues in the Progression of Dementia, 35 *Georgia L. Rev.* 735 (2001)(hereafter “Fleming and Morgan – Lawyers’ Ethical Dilemmas”).

<sup>16</sup> See Russell G. Pearce, *Family Values and Legal Approaches to Conflicts*, in Green – Ethical Issues, *supra* note 13, at 1253, 1258, n.17, citing Patricia M. Batt, Note, *The Family Unit As Client: A Means to Address the Ethical Dilemmas Confronting Elder Law Attorneys*, 6 *Geo. J. Legal Ethics* 319 (1992); see also Thomas L. Shaffer, *The Legal Ethics of Radical Individualism*, 65 *Tex. L. Rev.* 963 (1987).

Before representation is established, there should be confirmation that the prospective client has sufficient competence or capacity to enter into the client-lawyer engagement.<sup>17</sup> In the second illustration, Attorney took this first step. Once client identification is confirmed, the broader spectrum of an elder law engagement usually addresses quality of life and quality of available services to the elder.<sup>18</sup> Concomitant with a review of medical and health care needs, the engagement may also cover issues and strategies such as long term care insurance, estate and asset protection planning for tax or government benefits consideration, options that may lead to transition into assisted living or nursing home environments, or even change of residency, domicile and state citizenship.<sup>19</sup>

Elder law attorneys often assess the client's competency to engage counsel, ensuring that the client has sufficient cognitive function to exercise informed consent to enter into the engagement contract.<sup>20</sup> As a result, many elder law attorneys have included as an element within the scope of prospective representation a reasonable screen, assessment or calculation of client capacity.<sup>21</sup> Acting with sensitivity, reasonable legal competence and diligence, elder law attorneys assess client capacity, while honoring client confidences.<sup>22</sup>

At this initial stage of the second illustration, the client-attorney relationship presented is rather benign, if not typical. Attorney has taken appropriate steps to gain an initial understanding of the client, eliciting from Betty what seem to be her independent decisions with her informed consent. The recently revised Rules of Professional Conduct of the American Bar Association

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<sup>17</sup> See Fleming and Morgan - *Lawyers' Ethical Dilemmas*, *supra* note 15, at 750-751; see also Michael A. Stratton, *Hit Hard, Not Low*, TRIAL, 60 (September 2003).

<sup>18</sup> See William E. Adams and Rebecca C. Morgan, *Representing the client Who Is Older in the Law Office and in the Courtroom*, 2 Elder L. J. 1, 2 (Spring 1994).

<sup>19</sup> *Id.*

<sup>20</sup> See Green – Ethical Issues, *supra* note 13, at 18-21.

<sup>21</sup> See Fleming and Morgan - *Lawyers' Ethical Dilemmas*, *supra* note 15, at 750-751.

<sup>22</sup> See Jeffery N. Pennell, *Ethics, Professionalism and Malpractice Issues in Estate Planning and Administration*, 2 (ALI-ABA 2002).

("hereafter ABA Model Rule") set out new definitions and edited current rules addressing this area of client capacity.<sup>23</sup> Under new ABA Model Rule 1.0(e), defining informed consent, Attorney has made clear his obligations to Betty with respect to obtaining her consent, possible conflicts of interest and the scope of representation.<sup>24</sup> This is where the new rule definition is more practical. The new rule definition replaces the concept of "consent after consultation" with the somewhat more familiar concept of "informed consent." As defined, "informed consent" denotes agreement "after the lawyer has communicated adequate information and explanation about the material risks of and reasonably available alternatives to the proposed course of conduct."<sup>25</sup>

In the initial part of the consultation appointment, Attorney has followed this rule, going beyond that which is mandatory by offering a written contract that confirms Betty's consent.<sup>26</sup> Ordinarily, a client-lawyer situation such as this does not require the client to sign a written agreement. This remains the rule in spite of the ABA Ethics 2000 Commission's recommendation to the contrary.<sup>27</sup>

## **SECOND ILLUSTRATION – THE LAWYER CONTINUED As the Consult Proceeds, Everything Begins to Change**

**As Attorney followed with a series of other questions, Betty contradicted herself and seemed somewhat confused. Debbie intervened,**

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<sup>23</sup> See ABA Center for Professional Responsibility, *2004 Model Rules of Professional Conduct*, (hereafter ABA 2004 MRPC) [http://www.abanet.org/cpr/mrpc/mrpc\\_home.html](http://www.abanet.org/cpr/mrpc/mrpc_home.html). (ABA 2004). Adoption of the Model Rules in virtually every state, whether in whole or in part is the broadest disciplinary mandate that is uniform across the country ); see also Pennell, *Ethics, Professionalism and Malpractice Issues in Estate Planning and Administration*, *id.*, at 19.

<sup>24</sup> See ABA 2004 MRPC 1.0(e) Terminology – Informed Consent, *id.*, at 7.

<sup>25</sup> *Id.*, and Comments (6) and (7), at 9-10.

<sup>26</sup> This is adhering to the higher habit of practice of memorializing the engagement in a written document, such as a letter confirming engagement or a more formal retainer agreement signed by the client. See NAELA Aspirational Standards, *supra* note 5.

<sup>27</sup> This is one of the very few places where the ABA House of Delegates parted ways with the ABA Ethics 2000 Commission. The Commission believed that the time had come to upgrade the preference of a writing of the scope of the representation and the basis or rate of the fee and expenses to an across the board directive. Where one of the greatest areas of misunderstandings and disputes is found in lawyer fees, the Commission sought to maximize understanding by requiring a written agreement. A divided House of Delegates found the time had not come to require across the board writings. See [http://www.abanet.org/cpr/e2k-summary\\_2002.html](http://www.abanet.org/cpr/e2k-summary_2002.html).

**answering for Betty. After Debbie answered several questions, Attorney redirected his questions to Betty and rephrased them so that Betty only had to answer yes or no.**

**Toward the end of the conference, Attorney asked Betty who she wanted to be her agent on financial and health care powers of attorney. Debbie answered for Betty that she would be attorney in fact and agent. Debbie then asked Betty if that was right, and Betty quickly agreed. Debbie turned to Attorney and said that her brother and sister lived out of state, but were in complete agreement with what Betty wanted to do. Betty joined in saying how all of her children loved her and everything was just fine. Attorney then stood up, inviting Debbie to return to the reception area while he spoke with Betty separately. Debbie insisted that was not necessary, elevating her voice, and elevating Betty's agitation as well. Attorney asked Betty if she would talk to him separately. Debbie retorted that Betty could not talk to him without her being present.**

### **Analysis**

The analysis turns to Attorney's first impression of Betty's capacity. Obviously, he made the decision that Betty had sufficient capacity to engage him for the initial conference because he continued the conference believing that she was his client. After Betty showed greater confusion, Attorney could have conducted an informal screen, assessing from a legal position whether Betty's basic understanding was sufficient for her to make choices.

In the summer issue of the NAELA Quarterly, Jennifer Moye, in her article regarding diminished capacity and serving elderly clients. Moye's article, *Evaluating the Capacity of Older Adults: Psychological Models and Tools*,<sup>28</sup> reviews the "work in progress" of what she describes as the American Bar Association's and the American Psychological Association's examination of the graying of America, the increasing prevalence with age of diseases affecting cognition, the need for attorneys to do some sort of preliminary and informal assessments of capacity, and the dilemmas presented by revised ABA Model Rule 1.14 (Client with Diminished Capacity). This examination will soon be producing a handbook that provides guidance to non-medical, psychological or health care professionals when addressing client capacity.<sup>29</sup> Even though the

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<sup>28</sup> See Moye – Capacity, *supra* note 10, and accompanying text.

<sup>29</sup> *Id.*

handbook is not available, Attorneys, and other professionals as well, currently have guidance from other sources in making an informal assessment.

There are many informal assessments, screens and other instruments from which to choose.<sup>30</sup> Some author suggest that elder law attorneys use their own simple screening tool or tools For client capacity indicators, Professor Larry Frolik offers a one page, six section questionnaire that is a good beginning;<sup>31</sup> For mental ability assessment, functional assessment and safety assessment, in the Elder Law Forms Manual Harry Margolis has developed three simple assessment tools that construct questions regarding at mental ability, basic activities of daily living and self help determination, and concerns for physical safety of the client;<sup>32</sup> For client capacity assessment, Michael Gilfix offers a client capacity assessment form directed contextually, rather than globally, based on a general assessment of capacity. The form offered in his forms manual is developed within the context of estate planning. Gilfix suggests that for different issues or objectives, the elder law attorney should construct the questions relevant to the subject, and critical to development of a particular legal document, or accomplishment of a particular goal. It is interesting to note that at the bottom of the form, Gilfix suggests that the assessment should be given in a way that eliminates distractions, that the assessor speak loudly and clearly, and that the assessment be given based on the assumption “that you will have a competent client”.<sup>33</sup> Over the years, several, more sophisticated, instruments have been designed for non-medical, non-psychological, and non-health care professionals to screen or preliminarily assess

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<sup>30</sup> This portion of the article was part of a larger manuscript of author Johns. See A. Frank Johns, *Multiple and Intergenerational Relationship*, The Professional Lawyer, 7, 18-21 (ABA 2001).

<sup>31</sup> See Lawrence A. Frolik and Melissa C. Brown, *Advising the Elderly or Disabled Client*, App. 2-3 Client Capacity Indicators (Rosenfeld Launer Publications 1992)(Warren Gorham & Lamont 1999 & Cum. Supp. Rel. 10/04).

<sup>32</sup> See Harry Margolis, *Competency Evaluation*, Chp. 4, Elder Law Forms Manual, see specifically Form 4.2 Functional Assessment, Form 4.3 Safety Assessment, and Form 4.4 Mental Ability Assessment (Little Brown, 1994)(Supp Rel. 1999).

<sup>33</sup> See John Regan, Michael Gilfix, Rebecca Morgan and David English, *Tax, Estate and Financial Planning for the Elderly: Forms and Practice*, Part A - Managing the Elder Law Practice, Check Lists A:6.1 Possible Indicators of Incapacity; Undue Influence or Abuse; B:2.5 Planning for Incapacity, B:2.6 Incapacity Decisions; Form A:6.1 Client Capacity Assessment (Matthew Bender 1992 & Cum. Supp. Rel. 18, 4/04).

the ability of a client or family member to exercise informed consent. The instruments qualify in broad categories the client's ability to exercise sufficient cognitive function in order to maintain a threshold level of capacity necessary to access alternatives to guardianship or conservatorship.<sup>34</sup> These instruments include The Legal Capacity Questionnaire (LCQ),<sup>35</sup> The Mini-Mental State Examination (MMSE),<sup>36</sup> The Client Capacity Screen (CCS),<sup>37</sup> and The Behavioral Dyscontrol Scale (BDS).<sup>38</sup> Moye makes clear that while lawyers and other professionals are capable of screening or informally assessing the capacity of a client, they should never attempt full-blown psychological testing or evaluation.<sup>39</sup>

In the second illustration, the more conventional legal practice would be for Attorney to advise Betty to first see her doctor, or seek psychological, psychiatric or geriatric evaluation. This is also the point at which more experienced elder law attorneys would insist that Betty be interviewed in private, outside of Debbie's influence.<sup>40</sup>

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<sup>34</sup> There are those, however, who believe that such a screening process or preliminary assessment is outside the realm of the practice of law and should not be a part of the attorney's office practice. There has also been criticism of the instruments, specifically whether or not the screens and assessments sufficiently examine the ability of an individual or a client to function, or seek assistance to function in life. Regardless of the instrument used, attorneys may be too far out of their expertise to deal with such a complex area. It has been difficult even for psychiatrists and neurologists. See J. Aker, A. Walsh, J. Beam, *Mental Capacity - Medical and Legal Aspects of the Aging*, (Shepard's/McGraw Hill, Cum. Supp. 1993), Chp. 4, Diagnosis of Brain Damage; cf., Baird Brown, et al., *Mental Capacity - Legal and Medical Aspects of Assessment and Treatment*, Mental Capacity, § 7.06 Mental Status Exam: (2 ed. Shepard/McGraw Hill, 1994).

<sup>35</sup> See Baird Brown, *Determining Clients' Legal Capacity*, IV The ElderLaw Report, no. 7, at 1 (Little Brown 1993). (Brown provides a careful explanation of the LCQ, a guide for giving the LCQ and an answer sheet for scoring the LCQ); see also, Baird Brown, et al., *id.*, Mental Capacity, § 5 Assessment of Capacity. (This is the second edition of the Walsh text).

<sup>36</sup> See M. Folstein, S. Folstein, P. McQue, *Mini-Mental State: A Practical Method for Grading the Cognitive State of Patients for the Clinician*, 12 J. of Psychiatric Research, 189-198 (1975). The MMSE has been identified as the most widely used test with excellent test and retest reliability.

<sup>37</sup> See Steven Fox, Suzanne McNeely and Charles Ingman, *A Client Capacity Screen: A Tool for Evaluating Mental Capacity*, 4th NAELA Symposium, § 11 (1992). The authors note that the client capacity screen is not a replacement for the use of medical professionals, but provides a structure for assessment which assures relevant information, and provides the attorney with an easy and accessible method of documenting the file regarding such assessment.

<sup>38</sup> See Baird Brown, *Determining Client's Legal Capacity*, *supra* note 35, (Brown explains that the BDS is a standardized test designed to assess the integrity of the frontal lobes of the brain.)

<sup>39</sup> See Moye –Capacity, *supra* note 10, at 6.

Even without a screen, Attorney concluded that Betty had diminished capacity. Equally important, he further concluded that Debbie was exerting undue influence over Betty. Based on this set of facts, the ABA Model Rules allow Attorney certain discretion, especially in the context of disclosing confidential client information to prevent harm to Betty.<sup>41</sup>

What follows is the final addition to the illustration played out with Attorney taking a different action.

### **SECOND ILLUSTRATION – END OF THE STORY Attorney Action and Client Reaction**

**Attorney sensed that Debbie was influencing Betty’s decisions and that Betty’s capacity was diminished. He explained his conclusion that he could not adequately represent Betty and that it would be best if she sought other counsel.**

**No fee was paid. As Betty left with Debbie, Attorney saw what he thought were bruises on her arms. From his office window, Attorney could see the firm parking lot. There he saw Debbie arguing with Betty, shoving her into the car and recklessly racing down the street.**

**Two days later, Attorney received a call from Betty’s son, Bob. Bob wanted to know what happened at the meeting. Attorney told him everything; especially how Attorney saw what he suspected was Debbie’s abuse of Betty in the parking lot. Bob said he would hire Attorney to prepare the powers of attorney and that he would fly into the city to arrange for Betty to sign them. Attorney agreed, assuming that Betty had never been his client.**

### **Analysis**

To paraphrase prominent American figures early in the last century, now this is another fine mess Attorney has gotten himself into.<sup>42</sup> Experienced elder law practitioners, however, have been through this scenario and worse. These experienced attorneys would not necessarily respond as Attorney did, but parent-child problems, including elder abuse, are often present, and are always difficult..

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<sup>40</sup> See NAELA Aspirational Standards, *supra* note 5, Standards approved by the NAELA Board strongly advises NAELA members that this is a best practice to which all members should aspire.

<sup>41</sup> See ABA 2004 MRPC 1.6(b)(1) and 1.14(b) *supra* note 23, at 22.

<sup>42</sup> “Another Fine Mess” is a remake of one of Stan Laurel and Oliver Hardy’s first films together, “Duck Soup.” See <http://www.laurel-and-hardy.com>.

In this illustration, Attorney has made the wrong assumption. New ABA Model Rule 1.18 – Prospective Client<sup>43</sup> provides guidance relating to situations in which the lawyer has had sufficient contact with the prospective client and the prospective client has divulged enough information for confidentiality issues and conflicts of interest are in play. In this illustration, Betty has provided Attorney with important information that must be maintained as confidential client information and communication. She has also committed to a client-lawyer relationship, at least through the initial consultation appointment. If Bob and Attorney want to assume that Bob is Attorney’s client, then under ABA Model Rule 1.18, Attorney should have determined if there were material conflicts in Attorney’s representation of Bob with respect to Betty. If there were material conflicts, Attorney should first have informed Betty of those conflicts, and then asked her to sign a written authorization for Attorney to represent Bob.<sup>44</sup> If Bob will not be the client, but will pay the legal fee for Betty, then Attorney must comply with ABA Model Rule 1.8(f) that deals with such fee payments.<sup>45</sup> By telling Bob everything prior to receiving Betty’s informed consent, Attorney has violated Betty’s right to confidentiality.<sup>46</sup>

In the context of client representation and confidentiality, the illustration should be simple and the analysis easy because there is only one client - Betty. At the consultation appointment, Attorney and Betty were in agreement that Attorney was representing Betty, and not representing Debbie or the other children. No matter how much divulging the information would help Bob and Betty,, Attorney should have maintained Betty’s confidential client information.

In situations such as this, when a third party contacts the attorney on behalf of a prospective or current client, the attorney should inform such person of the attorney’s obligation

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<sup>43</sup> See ABA 2004 MRPC 1.18, Duties to a Prospective Client *supra* note 23, at 69-71.

<sup>44</sup> *Id.*

<sup>45</sup> See ABA 2004 MRPC 1.8 Conflict of Interest: Current Clients: Specific Rules, *supra* note 23, at 36.

<sup>46</sup> See ABA 2004 MRPC 1.6 Confidentiality of Information, *supra* note 23, at 22.

to hold inviolate the client's confidences and secrets. The attorney also needs to explain that in addition to his duty to preserve the confidentiality of the attorney-client communications, he owes his client his undivided loyalty, ensuring against conflicts of interest.<sup>47</sup>

The ABA Model Rules provide lawyers with discretion to reveal or disclose information in those situations specifically expressed in the black letter of the ABA Model Rules.<sup>48</sup> In this illustration, ABA Model Rule 1.6(b)(1) may be applicable insofar as Attorney may conclude that he must divulge confidential client information to Bob "...to prevent reasonably certain death or substantial bodily harm."<sup>49</sup> Comments 14 and 15 to Model Rule 1.6, impressing on Attorney the strong suggestion that diversionary measures be taken before exercising the discretionary exceptions, qualify Attorney's discretion.<sup>50</sup> Based on the qualifications suggested in the comments, Attorney spoke too fast and said too much to Bob, divulging Betty's confidential information based on the belief that discretionary disclosure would prevent Betty from suffering further financial and emotional abuse at Debbie's hands. Attorney should have called Betty and explained that Bob was there, asking for her authorization to divulge confidential information and to allow Bob to pay for her further representation in the form of new advance directives.

Additional support for Attorney's discretionary exercise of disclosure is found in revised ABA Model Rule 1.14 – Client with Diminished Capacity.<sup>51</sup> Because Attorney concluded that Betty's capacity was diminished, he could have disclosed the information to Bob after careful consideration of sections (b) and (c) of ABA Model Rule 1.14. Even under this part of the ABA Model Rules, Attorney must confine his disclosure to Bob to that which would be reasonably necessary to protect Betty's interests.

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<sup>47</sup> See ABA 2004 MRPC 1.7 Conflict of Interest: Current Clients: General Rules *supra* note 23, at 26.

<sup>48</sup> See ABA 2004 MRPC 1.6, *supra* note 23, at 37.

<sup>49</sup> *Id.*

<sup>50</sup> *Id.*

<sup>51</sup> See ABA 2004 MRPC 1.14 Client with Diminished Capacity, *supra* note 23, at 58-61.

#### **IV. CONCLUSION**

There is no question that the new wrinkles of diminished capacity will continue to be present, and will escalate in the years to come as the Baby Boomers become seniors. The professional organizations in the many disciplines that serve the elderly must address the ethical dilemmas that confront their members. Elder law attorneys can provide excellent examples of ways in which to address these ethical dilemmas because they practice on the front line of client-lawyer relationships when the clients have diminished capacity. The primary organization that serves this specialty, NAELA, has been reaching out to other disciplines, offering to co-sponsor training sessions and symposia by which members of other professional organizations learn how best to serve the new wrinkled faces of capacity. Contact NAELA at [www.naela.org](http://www.naela.org). The authors are both past presidents of NAELA.

**Attachment “A”**

**Aspirational Standards For the Practice of Elder Law**

**Adopted October 28, 2004**

**by**

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**PREAMBLE**

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In the past 20 years, Elder Law has developed as a separate specialty area because of the unique and complex issues faced by older persons and persons with disabilities. Elder Law includes helping older or disabled persons and their families with planning for incapacity and long-term care, Medicaid and Medicare coverage of nursing home and home care, health and long-term care insurance, and health care decision-making. It also includes the drafting of special needs and other trusts, the selection of long-term care providers, home care and nursing home problem solving, retiree health and income benefits, retirement housing, and fiduciary services or representation. In these and other areas, the elder law attorney is often asked to advocate for clients with diminished capacity. Family members and other persons with fiduciary responsibilities become involved. The traditional client-attorney relationship is not always clear. Issues such as substituted judgment, best interests, and “who is the client?” present problems not regularly faced by other lawyers. In recognizing Elder Law as a specialty practice area to meet the legal needs of aging and disabled clients and their families, the National Academy of Elder Law Attorneys (NAELA) was founded in 1987. Presently NAELA has more than 4,000 members practicing in all 50 states. In 1994, the American Bar Association accredited the National Elder

Law Foundation (NELF) to recognize experienced elder law practitioners as Certified Elder Law Attorneys and more than 300 attorneys have now earned the CELA designation. A majority of states have Elder Law Sections or Committees in their State Bar Associations, and 38 states recognize elder law as a specialty. Clearly “Elder Law” has come of age.

The following Guidelines set forth Aspirational Standards of professionalism and ethical behavior for elder law attorneys. They are the product of study and deliberation by NAELA members and, specifically, NAELA’s Professionalism and Ethics Committee. Each state’s Code of Professional Responsibility and rules determine the mandatory standards with which attorneys must comply. These Aspirational Standards build upon and supplement those rules and codes. Meeting these Standards will raise the level of professionalism in the practice of elder law and will enhance the quality of service to clients. These Standards are not intended, and should not be used, to support a cause of action, create a presumption of a legal duty, or form a basis for civil liability or disciplinary proceedings.

#### **A. CLIENT IDENTIFICATION**

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##### The Elder Law Attorney:

1. Gathers all information and takes all steps necessary to identify who the client is at the earliest possible stage and communicates that information to the persons immediately involved.
2. Meets with the identified prospective or actual client in private at the earliest possible stage so that the client’s capacity and voice can be
3. engaged unencumbered. If the attorney determines that it is clearly not in the best interest of the client for the attorney to meet privately with the client, the attorney takes other steps to ensure that the client’s wishes are identified and respected.
4. Utilizes an engagement agreement or letter or other writing(s):
  - identifies the client(s);
  - describes the scope and objectives of representation;
  - discloses relevant foreseeable conflicts among the clients;explains the lawyer’s obligation of confidentiality and confirms that the lawyer will share information and confidences among the joint clients;
  - sets out the fee arrangement (hourly, flat fee, or contingent); and
  - explains when and how the client-lawyer relationship may end.
5. Oversees the execution of documents that directly affect the interests of an individual only after establishing a client-lawyer relationship with the individual.

## **B. POTENTIAL CONFLICT OF INTEREST**

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**Elder Law Attorneys are frequently approached by families who seek counsel or representation on behalf of one or more persons. Where there is no apparent conflict of interest, joint representation may be a preferred form of representation that will further shared goals, common interests, family harmony, economic efficiency, consistency of action, and enhanced likelihood of serving the best interests of the clients. However, because the potential for conflicts always exists whenever two or more persons are represented, the Elder Law Attorney:**

1. In representing multiple generations, ensures that the family members understand who are the clients and whether the representation is Joint (i.e., confidences are shared) or Separate. Separate representation means representing persons in separate matters where confidences are not shared.
2. Undertakes joint representation, as permitted by state rules of professional conduct, only after obtaining the consent of the parties after having reviewed with them the advantages and disadvantages of such representation -- including the relevant foreseeable conflicts of interest and risks of such representation -- in a manner that will be best understood by each person to be represented. Joint representation (sometimes referred to as common representation) means representation of multiple clients in the same matter.
3. Treats family members who are not clients as unrepresented persons but accords them involvement in the client's representation so long as it is consistent with the client's wishes and values, and the client consents to the involvement.
4. Accepts payment of client fees by a third party only after determining that payment by the third party will not influence the attorney's independent professional judgment on behalf of the client, informing the client who consents to the payment by a third party, and ensuring that the parties understand and agree to the ethical ground rules for third party payment (i.e., non-interference by the payer, independence of judgment by the attorney on behalf of the client, and confidentiality).
5. When an attorney has an existing attorney/client relationship, the attorney may also serve as a fiduciary for the client, if it is in the client's best interest and if the client gives informed consent after full disclosure.
6. In representing a client who is a fiduciary under a power of attorney, trust, or conservatorship/guardianship, ensures that the client understands that the duties of both

the fiduciary and the attorney ultimately are governed by the known wishes and best interest of the principal.

**C. CONFIDENTIALITY**

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**The Elder Law Attorney:**

1. Carefully explains the obligation of confidentiality to the client and involved parties as early as possible in the representation to avoid misunderstanding, and to ascertain and respect the client's wishes regarding the disclosure of confidential information.
2. Establishes as a prerequisite to any joint representation a clear understanding and agreement that the attorney shall keep no client secrets from any other client in that joint representation.
3. Strictly adheres to the obligation of client confidentiality, especially in representation that may involve frequent contacts with family members, care takers, or other involved parties who are not clients.

**D. COMPETENT LEGAL REPRESENTATION**

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**The Elder Law Attorney:**

1. Recognizes the special range of client needs and professional skills unique to the practice of Elder Law and holds himself or herself out as an Elder Law Attorney only after ensuring his or her professional competence in handling elder law and disability related matters.
2. Approaches client matters in a holistic manner, recognizing that legal representation of clients often is enhanced by the involvement of other professionals, support groups, and aging network resources.
3. Regularly pursues continuing professional education and peer collaboration in Elder Law. Continuing education should include a broad range of Elder Law related subjects as well as an understanding of the physical, cognitive, and psycho-social challenges of aging and disability, and the skills needed to serve persons who are physically or mentally challenged.
4. Ensures adequate training and supervision of legal and non-legal staff with a corresponding emphasis on the knowledge and skills needed to best serve persons facing challenges of aging and disability.

## **E. CLIENT CAPACITY**

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### **The Elder Law Attorney:**

1. Respects the client's autonomy and right to confidentiality even with the onset of diminished capacity.
2. Develops and utilizes appropriate skills and processes for making and documenting preliminary assessments of client capacity to undertake the specific legal matters at hand.
3. Adapts the interview environment, timing of meetings, communications and decision-making processes to maximize the client's capacities.
4. Takes appropriate measures to protect the client when the attorney reasonably believes that the client: (1) has diminished capacity, (2) is at risk of substantial physical, financial or other harm unless action is taken, and (3) cannot adequately act in the client's own interest.
5. When taking appropriate measures to protect the client, the Elder Law Attorney:
  - is guided by the wishes and values of the client and the client's best interests;
  - seeks to minimize the intrusion into the client's decision-making autonomy and maximizes the client's capacity;
  - respects the client's family and social connections; and
  - considers a range of actions other than court proceedings and adult protective services.
6. Discloses client confidences only when essential to taking protective action and to the extent necessary to accomplish the intended protective action.
7. In representing a fiduciary for a person with diminished capacity, the Elder Law Attorney is guided by the known wishes and best interests of the person with diminished capacity; and in the event a conflict arises between the fiduciary and the person with diminished capacity, the fiduciary may disclose otherwise confidential information, if necessary to avoid substantial harm to the interests
8. Recommends guardianship or conservatorship only when all possible alternatives will not work.

## **F. COMMUNICATION AND ADVOCACY**

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### **The Elder Law Attorney:**

1. Works to minimize barriers to effective communication with and representation of elderly and special needs clients.
2. Maintains direct communication with the client, even when the client chooses to involve others in the process, and especially when significant decisions are to be made.
3. Your duty of loyalty to your client requires that she be kept well enough informed throughout the representation so that she can reassert her authority when important decisions need to be made.
4. Advises clients of their options, the practical and legal consequences of each option, and the likelihood of success in pursuing each option.
5. Strives to address clients, whether in person, on the telephone, or through correspondence, in ways they can readily understand.
6. Advocates within the law courses of action chosen by the client
7. Provides counsel and representation regarding critical life planning decisions, such as long term care planning which may involve repositioning of assets. In such cases the Elder Law Attorney should:
  - strive to ascertain the client's fundamental values in order to be responsive to the goals and objectives of the client;
  - endeavor to preserve and promote the client's dignity, self-determination, and quality of life in the face of competing interests and difficult alternatives;
  - counsel the client about the full range of long-term care issues, options, risks, consequences, and costs relevant to the client's circumstances;
  - counsel the client regarding asset preservation strategies as appropriate in light of the client's needs, personal values, and alternatives available; and
  - counsel the client about the estate planning and tax implications of such estate and asset preservation strategies.

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## **G. MARKETING**

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### **The Elder Law Attorney:**

1. Considers the potential for marketing to educate the public and to promote the profession of elder law.
2. Prepares or disseminates only marketing communications that are truthful and do not include statements that are false or misleading in any material respect.
3. Takes into consideration the intended audience for any marketing communication and, in particular, the potential vulnerability of that audience to undue influence.
4. Ensures that no materially false or misleading information is communicated in connection with a seminar, presentation, or similar activity.
5. Has a reasonable basis for any claim that suggests superiority to, or an advantage over, other attorneys.
6. Accurately describes legal concepts, procedures, programs or techniques in all marketing communications.
7. Employs client endorsements only if they reflect the honest opinion or experience of an actual client, and, if the client's experience is not typical, discloses that fact.
8. Uses organizational endorsements only if those endorsements truthfully reflect the collective judgment of the organization, and discloses any relationship between the organization and the attorney that might materially affect the weight or credibility of the endorsement.
9. Does not engage in uninvited in-person or telephone solicitation of prospective clients who may be vulnerable to undue influence or who may not be able to exercise reasonable, considered judgment in selecting an attorney.

## **H. ANCILLARY SERVICES**

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**The complex problems faced by elders and persons with special needs involve more than legal issues. Some elder law attorneys offer ancillary services such as insurance and annuity sales, care management, tax preparation, and fiduciary or investment services, as allowed by those states that have adopted a rule such as 5.7. Clients may find it convenient and reassuring to put their trust in one source to meet a variety of needs. In the provision of ancillary services the Elder Law Attorney:**

1. Is competent and appropriately licensed or credentialed in any ancillary service provided.
2. Ensures that any ancillary services recommended meet the needs of the client.
3. Fully discloses, in writing, all relevant matters to the client receiving ancillary services, including:
  - The terms of the service;
  - Any actual or reasonably foreseeable adverse consequences to the client;
  - Notice that the client may obtain the same services from an independent source, at perhaps a different price;
  - The desirability of seeking independent legal advice;
  - The non-legal nature of the ancillary service and what attorney-client protections apply;
  - The relationship between the attorney and any separate entity; including any financial interest of the attorney in any entity; and
  - The existence of any compensation arrangement for the attorney.
4. Obtains the client's informed written consent prior to the performance of any ancillary services permitted under the state's rules of professional conduct.
5. Ensures that all the protections that the client has as part of the client-attorney relationship (such as protecting against financial conflicts and maintaining client confidentiality) remain when the client is also receiving ancillary services.

**I. PUBLIC SERVICE**

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**The Elder Law Attorney:**

1. Recognizes the need for pro bono legal services and meets or exceeds the requirements of Model Rule of Professional Conduct 6:1 (“Voluntary Pro Bono Public Service”).
2. Utilizes the attorney's special skills and emphasizes service to elders and persons with special needs.
3. Provides ongoing leadership in improving the law to serve the changing needs of older persons and persons with disabilities.