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**Practical Answers to Ethical Questions Arising in Elder and Special
Needs Law: A Quick Reference Guide**

By Gregory S. French, CELA, CAP, Fellow

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NAELA's mission is to educate, inspire, serve, and provide community to attorneys with practices in elder and special needs law.

Elder and special needs law topics range over many areas and include: preservation of assets, Medicaid, Medicare, Social Security, disability, health insurance, tax planning, conservatorships, guardianships, living trusts and wills, estate planning, probate and administration of estates, trusts, long-term care placement, housing and nursing home issues, elder abuse, fraud recovery, age discrimination, retirement, health law, and mental health law.

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Practical Answers to Ethical Questions Arising in Elder and Special Needs Law: A Quick Reference Guide

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I. Introduction

The commitment of the National Academy of Elder Law Attorneys (NAELA) to the development of Aspirational Standards for the Practice of Elder Law began in September 2003 when the NAELA Board of Directors adopted NAELA's 2004–2007 Long-Range Plan. This plan mandated that NAELA “develop minimum standards of professional conduct consistent with NAELA's mission statement.”¹ NAELA's mission statement at that time proclaimed, “The mission of the National Academy of Elder Law Attorneys is to establish NAELA members as the premier providers of legal advocacy, guidance, and services to enhance the lives of people with special needs and people as they age.” The NAELA Board subsequently updated NAELA's mission statement as follows: “The mission of the

National Academy of Elder Law Attorneys is to educate, inspire, serve, and provide community to attorneys with practices in elder and special needs law.”²

NAELA's Professionalism and Ethics Committee commenced development of the first edition of the Aspirational Standards in June 2004. Membership comments received at NAELA's May 2004 Symposium and responses to emails of draft Aspirational Standards to all members in April and September 2004 guided the Committee's development of the Aspirational Standards. On October 28, 2004, the NAELA Board of Directors adopted the NAELA Professionalism and Ethics Committee's final draft of the NAELA Aspirational Standards for the Practice of Elder Law.

1 NAELA's 2004–2007 Long-Range Plan (NAELA 2003).

2 NAELA, *Mission Statement*, [https://www.naela.org/Web/About Tab/About Tab Main Land ing/NAELA%20Mission.aspx](https://www.naela.org/Web/About%20Tab/About%20Main%20Land%20ing/NAELA%20Mission.aspx) (accessed Oct. 28, 2018).

Beginning in November 2004, NAELA's Professionalism and Ethics Committee began development of Commentaries on the Aspirational Standards. The Committee developed these Commentaries to guide attorneys engaged in an elder law practice for a similar reason the American College of Trust and Estate Counsel (ACTEC) developed the ACTEC Commentaries on the American Bar Association (ABA) Model Rules of Professional Conduct. The ACTEC Commentaries note that professional responsibility rules and their comments do not "provide sufficiently explicit guidance regarding the professional responsibilities of lawyers engaged in a trusts and estates practice."³

Similarly, NAELA's Professionalism and Ethics Committee developed the Commentaries on the Aspirational Standards to help attorneys understand the Standards. The Commentaries on the first edition of the Standards showed attorneys how to apply NAELA's Aspirational Standards to the practice of elder law and how to handle issues that arise in elder law.

Membership comments received at NAELA's May 2005 Symposium and responses to emails of draft Commentaries to all members in May and August 2005 guided the drafting of the Commentaries. NAELA's Professionalism and Ethics Committee completed and gave final approval of the Commentaries to the Aspirational Standards on November 21, 2005. Along with NAELA's Aspirational Standards, they described best practices which, when applied in conjunction with independent professional judgment and

state disciplinary rules, raised the level of professionalism and enhanced the quality of service to clients.

Beginning in June 2013, NAELA's Professionalism and Ethics Committee began to draft the second edition of the Aspirational Standards, the Aspirational Standards for the Practice of Elder and Special Needs Law With Commentaries. The second edition expands the Standards into special needs law. It also begins with a new Standard, Holistic Approach (Standard A). The Standard addresses the holistic approach to legal problems that elder and special needs law attorneys take. The second edition also adds numerous examples throughout the Commentaries on the Aspirational Standards and delves deeper into engagement agreements, document drafting, nonlegal services, client identification, conflicts of interest, confidentiality, and other matters addressed in the first edition.

The NAELA Professionalism and Ethics Committee submitted its draft of the second edition of the Aspirational Standards With Commentaries to NAELA's Board in May 2016. Board members submitted their comments on the draft to the Professionalism and Ethics Committee by August 2016. The Committee carefully considered these comments as it finalized the second edition for Board approval. The NAELA Board unanimously adopted the second edition of the Aspirational Standards for the Practice of Elder and Special Needs Law With Commentaries on April 26, 2017.

At the state level, the Supreme Court of Ohio adopted the Ohio Rules of Professional Conduct effective February 1, 2007. These Rules are based on and similar to the ABA Model Rules of Professional Conduct, which all 50 states and the District of Columbia use as the basis for their professional ethics codes. These Rules replaced

3 Am. College of Trust & Est. Counsel, *ACTEC Commentaries on the Model Rules of Professional Conduct* (5th ed., ACTEC 2016), https://www.actec.org/assets/1/6/ACTEC_Commentaries_5th_rev_06_29.pdf (accessed Oct. 28, 2018).

Ohio's Code of Professional Responsibility, which was adopted in 1970.

The materials that follow answer ethical questions that frequently arise in the practice of elder and special needs law. Correctly answering these questions concerning client identification, confidentiality, potential conflict of interest, client capacity, fiduciary issues, and long-term care planning is critical to an ethical practice.

The answers to the questions are quoted from the Ohio Rules of Professional Conduct, the Comments on those Rules, and the second edition of the Aspirational Standards for the Practice of Elder and Special Needs Law With Commentaries. For a comparison of the ACTEC Commentaries with the NAELA Aspirational Standards, see Professor Mary F. Radford's article in this issue, *A Comparison of the 2016 American College of Trust and Estate Counsel Commentaries With the 2017 NAELA Aspirational Standards*.

The professional responsibility rules of the state in which an attorney practices determine whether the attorney is subject to discipline and whether the attorney's license is at risk for certain behavior. NAELA's Aspirational Standards build upon and supplement those rules. They do not define a standard of care, establish ethical or disciplinary breaches, or create a cause of action for civil liability or other purposes. Rather, they go beyond what disciplinary rules require or prohibit, articulating what professionalism in elder and special needs law means.

II. Client Identification

A. When Should the Identity of the Client Be Determined?

1. Standard B, Section 1, of the second edition of the Aspirational Standards for the Practice of Elder and Special Needs Law With Commentaries:

The elder and special needs law attorney: Identifies the client and the individuals who will assist the client at the earliest stage of the representation, obtains the client's agreement on these identifications, and communicates this information to the persons involved.

2. Comment on Aspirational Standard B, Section 1:

It is the client to whom the attorney owes the professional duties of competence, communication, diligence, loyalty, and confidentiality. ... The identity of the client should be resolved at the earliest stage so that the client, the attorney, and other involved persons understand:

- Whose interests are to be protected in the legal planning and representation process;
- To whom the attorney owes the professional duties of competence, communication, diligence, loyalty, and confidentiality;
- The steps that may or may not be taken after the initial consultation if the client or protected individual is not present at that meeting; and
- That the attorney will arrange at the earliest practicable time to communicate privately with the person who is expected to be the client.

The attorney should ensure that all involved persons understand which individual is the client and that the others are not clients. The attorney also should determine whether the client authorizes the attorney to communicate with another person, such as a fiduciary or family member, and obtain the client's written consent to such authorized involvement.

3. Ohio Rule 1.18(a):

A person who consults with a lawyer the possibility of forming a client-law-

yer relationship with respect to a matter is a prospective client.

4. Ohio Rule 1.18, Comment 4:

In order to avoid acquiring disqualifying information from a prospective client, a lawyer considering whether or not to undertake a new matter should limit the initial interview to only such information as reasonably appears necessary for that purpose. Where the information indicates that a conflict of interest or other reason for nonrepresentation exists, the lawyer should so inform the prospective client or decline the representation.

B. Should Multiple Generations Be Represented Jointly or Severally?

1. Aspirational Standard D, Section 1: The elder and special needs law attorney: In the initial meeting when multiple prospective clients are present, ensures that the prospective clients understand whether the representation will be individual, concurrent, or joint.

2. Comment on Aspirational Standard D, Section 1, and Example:

a. Comment:

This Standard addresses a common situation when prospective clients ask the attorney to represent multiple family members in either related or distinct matters. Because these situations may easily lead to misunderstandings among family members, the attorney should ensure that prospective clients are educated about the differences among individual, concurrent, and joint representation.

b. Example:

The attorney should take reasonable steps to ensure that all the clients understand how different types of representation impose different duties on the attorney with different conse-

quences for the client and confirm this understanding in well-drafted engagement agreements and written waivers.

3. Ohio Rule 1.7(a):

A lawyer's acceptance or continuation of representation of a client creates a conflict of interest if either of the following applies:

- (1) the representation of that client will be directly adverse to another current client;
- (2) there is a substantial risk that the lawyer's ability to consider, recommend, or carry out an appropriate course of action for that client will be materially limited by the lawyer's responsibilities to another client, a former client, or a third person or by the lawyer's own personal interests.

"Substantial" when used in reference to degree or extent denotes a matter of real importance or great consequence. Rule 1.0(m).

4. Ohio Rule 1.7, Comment 25:

In considering whether to represent multiple clients in the same matter, a lawyer should be mindful that if the common representation fails because the potentially adverse interests cannot be reconciled, the result can be additional cost, embarrassment, and recrimination. Ordinarily, the lawyer will be forced to withdraw from representing all of the clients if the common representation fails. Generally, if the relationship between the parties is antagonistic, the possibility that the clients' interests can be adequately served by common representation is low.

C. What Should the Attorney Do Before Undertaking Joint Representation?

1. Aspirational Standard D, Section 2: The elder and special needs law attor-

ney: Undertakes joint or concurrent representation, as permitted by relevant state rules of professional conduct and these Aspirational Standards, only after obtaining the consent of the parties and 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.

2. Comment on Aspirational Standard D, Section 2:

In carrying out this responsibility, the attorney should consider private, direct, and personal communications with the prospective clients separately, because this may allow each of them to be more candid and to more freely ask questions of the attorney regarding the implications of joint, concurrent, and individual representation. For example, separate meetings may be advisable in multigenerational representation or with clients who have blended families. In cases of joint or concurrent representation, the consent of the parties should be confirmed in writing with signed waivers.

3. Ohio Rule 1.7(b):

A lawyer shall not accept or continue the representation of a client if a conflict of interest would be created pursuant to division (a) of this rule, unless all of the following apply:

- (1) the lawyer will be able to provide competent and diligent representation to each affected client;
- (2) each affected client gives *informed consent, confirmed in writing*; (“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 1.0(f). “Confirmed in writing,” when used in reference to the informed consent of a person, denotes informed consent that is given in writing by the person or a writing that a lawyer promptly transmits to the person confirming an oral informed consent. If it is not feasible to obtain or transmit the writing at the time the person gives informed consent, then the lawyer must obtain or transmit it within a reasonable time thereafter. Rule 1.0(b)).

- (3) the representation is not precluded by division (c) of this rule.

4. Ohio Rule 1.7, Comment 2:

In order to analyze and resolve a conflict of interest problem under this rule, a lawyer must:

- (1) clearly identify the client or clients;
- (2) determine whether a conflict of interest exists;
- (3) decide whether the representation is barred by either criteria of division (c);
- (4) evaluate, under division (b)(1), where the lawyer can competently and diligently represent all clients affected by the conflict of interest; and
- (5) if representation is otherwise permissible, consult with the clients affected by the conflict and obtain the informed consent of each of them, confirmed in writing.

III. Attorney Fees and Trust Accounts

A. *Should an Engagement Agreement Be Used?*

1. Aspirational Standard C, Section 1:
The elder and special needs law attor-

ney: Uses an engagement agreement, letter, or other writing that will:

- (a) Identify the client;
- (b) Describe the scope and objectives of the representation;
- (c) Disclose potential material conflicts of interest between the attorney and client;
- (d) Explain the lawyer's obligation of confidentiality;
- (e) Confirm, when there are joint clients, that the lawyer will share information and confidences between them and may withdraw if one client requests that the attorney not disclose a secret to the other client or if the clients cannot agree on how to proceed;
- (f) Disclose potential material conflicts between joint clients;
- (g) Address (and possibly waive) non-material conflicts of interest between joint clients;
- (h) Confirm, when representing a fiduciary, the fiduciary's obligations to the protected individual, clarify whether the attorney may speak directly to the protected individual, and state that the attorney may withdraw if the fiduciary violates a fiduciary or other duty to the protected individual and does not take timely corrective action;
- (i) Set out fee arrangements (hourly, fixed fee, or contingent); and
- (j) Explain when and how the attorney-client relationship may end.

2. Comment on Aspirational Standard C, Section 1:

The attorney should inform his or her client about confidentiality and other components of the engagement. A clear written engagement agreement is the best way to communicate these

matters to the client and others involved. It is imperative that the client and any involved others understand this agreement.

When an attorney represents both spouses or other joint clients, a joint representation letter or agreement should be used. This is especially important if the clients have blended families. Such agreements should provide for the waiver of confidences between the attorney and each jointly represented client, clarify that all information is available to all joint clients, and address actions the attorney should take if a material conflict arises between joint clients.

3. Ohio Rule 1.5(b):

The nature and scope of the representation and the basis or rate of the fee and expenses for which the client will be responsible shall be communicated to the client, preferably in *writing*, before or within a *reasonable* time after commencing the representation, unless the lawyer will charge a client whom the lawyer has regularly represented on the same basis as previously charged. Any change in the basis or rate of the fee or expenses is subject to division (a) of this rule and shall promptly be communicated to the client, preferably in *writing*.

"Writing" or "written" denotes a tangible or electronic record of a communication or representation, including handwriting, typewriting, printing, photostating, photography, audio or videorecording, and electronic communications. A "signed" writing includes an electronic sound, symbol, or process attached to or logically associated with a writing and executed or adopted by a person with the intent to sign the writing. Rule 1.0(p).

4. Ohio Rule 1.5, Comment 2:

A writing that confirms the nature and scope of the client-lawyer relationship and the fees to be charged is the preferred means of communicating this information to the client and can clarify the relationship and reduce the possibility of a misunderstanding.... In a new client-lawyer relationship, however, an understanding as to fees and expenses must be established promptly. Unless the situation involves a regularly represented client, the lawyer should furnish the client with at least a simple memorandum or copy of the lawyer's customary fee arrangements that states the general nature of the legal services to be provided, the basis, rate or total amount of the fee, and whether and to what extent the client will be responsible for any costs, expenses, or disbursements in the course of the representation.

B. May a Lawyer Limit the Scope of the Representation?

1. Ohio Rule 1.2(c):

A lawyer may limit the scope of a new or existing representation if the limitation is reasonable under the circumstances and communicated to the client, preferably in writing.

"Writing" or "written" denotes a tangible or electronic record of a communication or representation, including handwriting, typewriting, printing, photostating, photography, audio or videorecording, and electronic communications. A "signed" writing includes an electronic sound, symbol, or process attached to or logically associated with a writing and executed or adopted by a person with the intent to sign the writing. Rule 1.0(p).

2. Ohio Rule 1.2, Comment 7:

If, for example, a client's objective is

limited to securing general information about the law that the client needs in order to handle a common and typically uncomplicated legal problem, the lawyer and client may agree that the lawyer's services will be limited to a brief telephone consultation. Such a limitation would not be reasonable if the time allotted was not sufficient to yield advice upon which the client could rely. In addition, the terms upon which representation is undertaken may exclude specific means that might otherwise be used to accomplish the client's objectives.

3. Ohio Rule 1.2, Comment 7A:

Written confirmation of a limitation of a new or existing representation is preferred and may be any writing that is presented to the client that reflects the limitation, such as a letter or electronic transmission addressed to the client or a court order. A lawyer may create a form or checklist that specifies the scope of the client-lawyer relationship and the fees to be charged. An order of a court appointing a lawyer to represent a client is sufficient to confirm the scope of that representation.

C. What Criteria Apply to Determining Whether a Fee Is Excessive?

1. Ohio Rule 1.5(a):

A lawyer shall not make an agreement for, charge, or collect an *illegal* or clearly excessive fee. A fee is clearly excessive when, after a review of the facts, a lawyer of ordinary prudence would be left with a definite and firm conviction that the fee is in excess of a *reasonable* fee. The factors to be considered in determining the reasonableness of a fee include the following:

- (1) the time and labor required, the novelty and difficulty of the ques-

- tions involved, and the skill requisite to perform the legal service properly;
- (2) the likelihood, if apparent to the client, that the acceptance of the particular employment will preclude other employment by the lawyer;
 - (3) the fee customarily charged in the locality for similar legal services;
 - (4) the amount involved and the results obtained;
 - (5) the time limitations imposed by the client or by the circumstances;
 - (6) the nature and length of the professional relationship with the client;
 - (7) the experience, reputation, and ability of the lawyer or lawyers performing the services;
 - (8) whether the fee is fixed or contingent.
2. Ohio Rule, Comment 1:
Division (a) requires that lawyers charge fees that are reasonable under the circumstances. The factors specified in divisions (a)(1) through (8) are not exclusive. Nor will each factor be relevant in each instance.
- D. What Requirements Apply to "Earned Upon Receipt" Fees?*
1. Ohio Rule 1.5(d)(3):
A lawyer shall not enter into an arrangement for, charge, or collect any of the following: (3) A fee denominated as "earned upon receipt," "nonrefundable," or in any similar terms, unless the client is simultaneously advised in *writing* that if the lawyer does not complete the representation for any reason, the client may be entitled to a refund of all or part of the fee based upon the value of the representation pursuant to division (a) of this rule.
 2. Ohio Rule 1.5, Comment 6A:
The reasonableness requirement and the application of the factors in division (a) may mean that a client is entitled to a refund of an advance fee payment even though it has been denominated "nonrefundable," "earned upon receipt," or in similar terms that imply the client would never receive a refund.... This does not mean the client will always be entitled to a refund upon early termination of the representation [*e.g.*, factor (a)(2) might justify the entire fee], nor does it determine how any refund should be calculated (*e.g.*, hours worked times a reasonable hourly rate, quantum meruit, percentage of the work completed, etc.), but merely requires that the client be advised of the possibility of a refund based upon application of the factors set forth in division (a). In order to be able to demonstrate the reasonableness of the fee in the event of early termination of the representation, it is advisable that lawyers maintain contemporaneous time records for any representation undertaken on a flat fee basis.
- E. What Requirements Apply to Attorney Trust Accounts?*
1. Ohio Rule 1.15(a):
A lawyer shall hold property of clients or third persons that is in a lawyer's possession in connection with a representation separate from the lawyer's own property. Funds shall be kept in a separate interest-bearing account in a financial institution authorized to do business in Ohio and maintained in the state where the lawyer's office is situated Records of such account funds and other property shall be kept by the lawyer and shall be preserved for a period

of seven years after termination of the representation or the appropriate disbursement of such funds or property, whichever comes first For funds, the lawyer shall do all of the following:

- (1) maintain a copy of any fee agreement with each client;
 - (2) maintain a record for each client on whose behalf funds are held that sets forth all of the following:
 - (i) the name of the client;
 - (ii) the date, amount, and source of all funds received on behalf of such client;
 - (iii) the date, amount, payee, and purpose of each disbursement made on behalf of such client;
 - (iv) the current balance for such client.
 - (3) maintain a record for each bank account that sets forth all of the following:
 - (i) the name of such account;
 - (ii) the date, amount, and client affected by each credit and debit;
 - (iii) the balance in the account.
 - (4) maintain all bank statements, deposit slips, and cancelled checks, if provided by the bank, for each bank account;
 - (5) perform and retain a monthly reconciliation of the items contained in divisions (a)(2), (3), and (4) of this rule.
2. Ohio Rule 1.15, Comment 1:
- All property that is the property of clients or third persons, including prospective clients, must be kept separate from the lawyer's business and personal property and, if moneys, in one or more trust accounts. A lawyer should maintain separate trust accounts when administering estate moneys. A lawyer must maintain the records listed in division (a)(1) to (5)

of this rule to effectively safeguard client funds and fulfill the role of professional fiduciary.

F. What Must the Attorney Do With Fees Paid in Advance?

1. Ohio Rule 1.15(c):

A lawyer shall deposit into a client trust account legal fees and expenses that have been paid in advance, to be withdrawn by the lawyer only as fees are earned or expenses incurred.

2. Ohio Rule, Comment 3:

The lawyer is not required to remit to the client funds that the lawyer reasonably believes represent fees owed.... The disputed portion of the funds must be kept in a trust account and the lawyer should suggest means for prompt resolution of the dispute, such as arbitration. The undisputed portion of the funds shall be promptly distributed.

G. When May Attorneys in Different Firms Divide Fees?

1. Ohio Rule 1.5(e):

Lawyers who are not in the same *firm* may divide fees only if all of the following apply:

- (1) the division of fees is in proportion to the services performed by each lawyer or each lawyer assumes joint responsibility for the representation and agrees to be available for consultation with the client;
- (2) the client has given *written* consent after full disclosure of the identity of each lawyer, that the fees will be divided, and that the division of fees will be in proportion to the services to be performed by each lawyer or that each lawyer will assume joint responsibility for the representation;

- (3) except where court approval of the fee division is obtained, the *written* closing statement in a case involving a contingent fee shall be signed by the client and each lawyer and shall comply with the terms of division (c)(2) of this rule;
- (4) the total fee is *reasonable*.
- 2. Ohio Rule 1.5, Comment 7:
A division of fee is a single billing to a client covering the fee of two or more lawyers who are not in the same firm. ... Within a reasonable time after disclosure of the identity of each lawyer, the client must give written approval that the fee will be divided and that the division of fees is in proportion to the services performed by each lawyer or that each lawyer assumes joint responsibility for the representation. ... Joint responsibility for the representation entails financial and ethical responsibility for the representation as if the lawyers were associated in a partnership.

IV. Confidentiality

A. May Secrets Be Kept From Clients Being Jointly Represented?

- 1. Aspirational Standard E, Section 3:
The elder and special needs law attorney: Establishes as a prerequisite to joint representation a clear understanding and agreement that the attorney will keep no client secrets from any other client in that joint representation.
- 2. Comment on Aspirational Standard E, Section 3:
Before undertaking joint representation of clients, the attorney should ensure that the clients understand the attorney's ethical obligation to disclose information learned from one joint client to the other joint client and the consequences of such disclosure. The engagement agreement should make clear the attorney's obligation to keep no secrets. If the attorney obtains information from one joint client that is unknown to the other client and the attorney fails to persuade the client to share the information with the other joint client, the attorney should share the information with the joint client and/or withdraw from the representation pursuant to state professional responsibility rules.
- 3. Ohio Rule 1.8(g):
A lawyer who represents two or more clients shall not participate in making an aggregate settlement of the claims of or against the clients, or in a criminal case an aggregated agreement as to guilty or *nolo contendere* pleas, unless the settlement or agreement is subject to court approval or each client gives *informed consent*, in a *writing* signed by the client. The lawyer's disclosure shall include the existence and nature of all the claims or pleas involved and of the participation of each person in the settlement or agreement.
- 4. Ohio Rule 1.7, Comment 27:
As to the duty of confidentiality, continued common representation will almost certainly be inadequate if one client asks the lawyer not to disclose to the other client information relevant to the common representation. This is so because the lawyer has an equal duty of loyalty to each client, and each client has the right to be informed of anything bearing on the representation that might affect the client's interests and the right to expect that the lawyer will use that information to that client's benefit. See Rule 1.4. The lawyer should, at the outset of the common representation

and as part of the process of obtaining each client's informed consent, advise each client that information will be shared and that the lawyer will have to withdraw if one client decides that some matter material to the representation should be kept from the other.

B. Does Client Confidentiality Apply to Family Members and Caregivers?

1. Aspirational Standard E, Section 4: The elder and special needs law attorney: Strictly preserves client confidences, especially in situations that involve frequent contacts with family members, caregivers, or other trusted third parties who are not clients.

2. Comment on Aspirational Standard E, Section 4:

In cases in which an individual needs assistance from others, the individuals providing the assistance may believe that they, too, are clients of the attorney. In some cases, these nonclients will be involved consistently and extensively on a day-to-day basis. ... In such cases, there may be an initial expectation that the attorney represents both the client and the others involved. It is the attorney's duty to ensure that individuals who are unrepresented understand that they are not clients of the attorney.

There may be occasions when the attorney needs to communicate with nonclients who are trusted third parties working closely with the client. In doing so, the attorney must use care in communicating with the unrepresented individuals and may not disclose confidential information without the client's consent.

3. Ohio Rule 1.6(a):

A lawyer shall not reveal information relating to the representation of a cli-

ent, including information protected by the attorney-client privilege under applicable law, unless the client gives *informed consent*, the disclosure is impliedly authorized in order to carry out the representation, or the disclosure is permitted by division (b) or required by division (d) of this Rule.

4. Ohio Rule 1.9(c):

A lawyer who has formerly represented a client in a matter or whose present or former *firm* has formerly represented a client in a matter shall not thereafter do either of the following ("Firm" or "law firm" denotes a lawyer or lawyers in a law partnership, professional corporation, sole proprietorship, or other association authorized to practice law; or lawyers employed in a private or public legal aid or public defender organization, a legal services organization, or the legal department of a corporation or other organization. Rule 1.0(c)):

- (1) use information relating to the representation to the disadvantage of the former client except as these rules would permit or require with respect to a client or when the information has become generally *known* ("Knowingly," "known," or "knows" denotes actual knowledge of the fact in question. A person's knowledge may be inferred from circumstances. Rule 1.0(g));
- (2) reveal information relating to the representation except as these rules would permit or require with respect to a client.

C. When Should the Attorney's Obligation of Confidentiality Be Discussed?

1. Aspirational Standard E, Section 1: The elder and special needs law attor-

ney: Carefully explains to the client and others involved, as early in the representation as possible, the attorney's duty of confidentiality to the client in order to avoid misunderstandings and to ascertain and respect the client's wishes regarding the disclosure of confidential information.

2. Comment on Aspirational Standard E, Section 1:

The attorney should begin every initial conference with an explanation of the confidentiality rules and, if possible, address confidentiality before the initial meeting so the client can decide who should attend. The explanation should make clear that the client is the only one protected and authorized to waive the protection.

The confidentiality rules apply not only to matters that the client communicates through the attorney in confidence but also to all information that the attorney acquires through other sources, such as the client's family members, health care providers, tax preparer, or assigned case worker employed by a government agency.

3. Ohio Rule 1.18(b):

Even when no client-lawyer relationship ensues, a lawyer who has learned information from a prospective client shall not use or reveal that information, except as Rule 1.9 would permit with respect to information of a former client.

4. Ohio Rule 1.18, Comment 3:

It is often necessary for a prospective client to reveal information to the lawyer during an initial consultation prior to the decision about formation of a client-lawyer relationship. The lawyer often must learn such information to determine whether there is a conflict of interest with an existing client and whether the matter is one that the law-

yer is willing to undertake. Division (b) prohibits the lawyer from using or revealing that information, except as permitted by Rule 1.9, even if the client or lawyer decides not to proceed with the representation.

D. Should the Attorney Meet With the Client in Private?

1. Aspirational Standard B, Section 3:

The elder and special needs law attorney: Meets with the prospective client in private at the earliest practicable time to help the attorney identify the client and assess the prospective client's capacity and wishes as well as the presence of any undue influence.

2. Comment on Aspirational Standard B, Section 3:

A private meeting with the prospective client helps the attorney identify the client, assess the prospective client's capacity, and understand his or her wishes, unencumbered and uninfluenced by others. This Standard addresses three common situations confronted by the attorney: (1) the prospective client does not have an involved fiduciary; (2) an agent under a power of attorney assists a principal; and (3) a guardian or conservator assists a ward.

3. Ohio Rule 1.4(a):

A lawyer shall do all of the following:

- (1) promptly inform the client of any decision or circumstance with respect to which the client's *informed consent* is required by these Rules;
- (2) *reasonably* consult with the client about the means by which the client's objectives are to be accomplished;
- (3) keep the client *reasonably* informed about the status of the matter;
- (4) comply as soon as practicable with *reasonable* requests for information from the client;

- (5) consult with the client about any relevant limitation on the lawyer's conduct when the lawyer *knows* that the client expects assistance not permitted by the Ohio Rules of Professional Conduct or other law.
4. Ohio Rule 1.7, Comment 26:
Particularly important factors in determining the appropriateness of common representation are the effect on client-lawyer confidentiality and the attorney-client privilege. With regard to the attorney-client privilege, the prevailing rule is that, as between commonly represented clients, the privilege does not attach. Hence, it must be assumed that if litigation does later occur between the clients, the privilege will not protect communications made on the subject of the joint representation, while it is in effect, and the clients should be so advised.

E. Should the Attorney Prepare Documents for a Nonclient?

1. Aspirational Standard C, Section 4:
The elder and special needs law attorney: Exercises caution when:
 - (a) Drafting documents in exigent circumstances for a prospective client before the attorney-client relationship is established;
 - (b) Drafting documents for a new client at the request of an existing or former client related to the new client;
 - (c) Drafting a special needs trust for a person with special needs; and
 - (d) Drafting documents to be signed by nonclients.
2. Comment on Aspirational Standard C, Section 4:
The attorney will draft documents differently depending on the identity of the client and the circumstances, including challenging situations such as the following:
 - (a) Drafting documents in exigent circumstances for a prospective client before the attorney-client relationship is established. ...
When drafting documents before establishing an attorney-client relationship, the attorney should consider the following:
 - Whether the prospective client has sufficient capacity to understand and execute the documents;
 - Whether the prospective client is terminally ill, at risk of an imminent decline in health, or in potential need of protective action due to diminished capacity;
 - Whether the prospective client is a possible victim of financial or physical abuse;
 - Whether the prospective client is homebound or institutionalized in a hospital or nursing home;
 - Whether there are family conflicts that may require urgency;
 - Whether the document is a medical directive, living will, or power of attorney, which requires less explanation than a will or living trust; and
 - Whether the attorney has the ability to make more than one visit during a short time period.
 - (b) Drafting documents for a new client at the request of an existing or former client related to the new client.
The attorney may be asked by an existing or former client to draft documents for a family member, a new client. Because of the potential for a conflict of interest, the attorney should proceed with caution. The attorney should meet privately with the new client, assess capacity, establish a client-attorney relationship with the new cli-

ent, confirm that there is no material conflict between the two clients, and inform the referring client that the attorney's relationship with the new client is a separate representation that excludes the referring family member.

(c) Drafting a special needs trust for a person with special needs.

In drafting a special needs trust for a person with special needs, that person may or may not have the capacity to engage the attorney and sign the trust agreement. If the person with special needs lacks capacity to take these actions, the attorney should only draft such a trust at the request of a fiduciary who has the authority to engage the attorney.

(d) Drafting documents to be signed by nonclients.

In elder and special needs law, it sometimes is appropriate to draft documents to be signed by a family member of the client or another third party in order to further the legal representation. An example is an agreement to be signed by the client's agent under power of attorney in which the agent agrees not to act against the client's best interests. Another example is an asset protection trust to be signed by the client's child as trustee. When drafting such documents, the attorney should resolve whether the person being asked to sign the document is the attorney's client and, if not, advise that person to seek independent legal counsel before signing the document.

3. Ohio 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.

4. Ohio Rule 1.4, Comment 2:

If these rules require that a particular decision about the representation be

made by the client, division (a)(1) requires that the lawyer promptly consult with and secure the client's consent prior to taking action unless prior discussions with the client have resolved what action the client wants the lawyer to take. For example, a lawyer who receives from opposing counsel an offer of settlement in a civil controversy or a proffered plea bargain in a criminal case must promptly inform the client of its substance unless the client has previously indicated that the proposal will be acceptable or unacceptable or has authorized the lawyer to accept or to reject the offer. See Rule 1.2(a).

V. Potential Conflict of Interest

A. When Nonclients Are Involved, With Whom Should Communication Occur?

1. Aspirational Standard H, Section 2:

The elder and special needs law attorney: Maintains direct communication with the client, whether in person, by telephone, or through correspondence, even when the client chooses to involve others (including an agent under a durable power of attorney).

2. Comment on Aspirational Standard H, Section 2:

Maintaining direct communication with the client is a critical component of effective representation, particularly when the client is making major life decisions that may alter the client's options for long-term services and supports. ... Often the client will direct the attorney to communicate with a third party, either in a formal agency relationship or informally through a family member. Even though the client may have authorized the attorney to communicate directly with the third party, the attorney still should include the client in communications.

3. Ohio Rule 1.4(a):

A lawyer shall do all of the following:

- (1) promptly inform the client of any decision or circumstance with respect to which the client's *informed consent* is required by these rules;
- (2) *reasonably* consult with the client about the means by which the client's objectives are to be accomplished;
- (3) keep the client *reasonably* informed about the status of the matter;
- (4) comply as soon as practicable with *reasonable* requests for information from the client;
- (5) consult with the client about any relevant limitation on the lawyer's conduct when the lawyer *knows* that the client expects assistance not permitted by the Ohio Rules of Professional Conduct or other law.

4. Ohio Rule 1.4, Comment 3:

Division (a)(2) requires the lawyer to reasonably consult with the client about the means to be used to accomplish the client's objectives.

B. What About Dealing With Family Members Who Are Nonclients?

1. Aspirational Standard D, Section 3:

The elder and special needs law attorney: Treats family members who are not clients as unrepresented persons and accords them involvement in the client's representation only to the extent that the client consents to their involvement with a signed waiver or, if the client no longer has the capacity to consent, to the extent that their involvement is consistent with the client's wishes and values if known and, if not known, the client's best interests.

2. Comment on Aspirational Standard D, Section 3:

The attorney should exercise care to

observe signs of undue influence. When circumstances suggest undue influence, the attorney should take steps to ensure that the vulnerable person is protected. Meeting alone with the client or prospective client (as discussed in the Comment on Standard B, Client Identification, Section 3) becomes especially important to protect against undue influence.

3. Ohio Rule 4.3:

In dealing on behalf of a client with a person who is not represented by counsel, a lawyer shall not state or imply that the lawyer is disinterested. When the lawyer *knows* or *reasonably should know* that the unrepresented person misunderstands the lawyer's role in the matter, the lawyer shall make *reasonable* efforts to correct the misunderstanding. The lawyer shall not give legal advice to an unrepresented person, other than the advice to secure counsel, if the lawyer *knows* or *reasonably should know* that the interests of such a person are or have a *reasonable* possibility of being in conflict with the interests of the client.

"Reasonably should know" when used in reference to a lawyer denotes that a lawyer of reasonable prudence and competence would ascertain the matter in question. Rule 1.0(k).

4. Ohio Rule 1.14, Comment 3:

The client may wish to have family members or other persons participate in discussions with the lawyer. When necessary to assist in the representation, the presence of such persons generally does not affect the applicability of the attorney-client evidentiary privilege. Nevertheless, the lawyer must keep the client's interests foremost and, except for protective action authorized under division (b), must look to the client,

and not family members, to make decisions on the client's behalf.

C. When Can Payment by a Third Party Be Accepted?

1. Aspirational Standard D, Section 4: The elder and special needs law attorney: Accepts payment of client fees by a third party only after:

- (a) Determining that payment by the third party will not influence the attorney's independent professional judgment on behalf of the client;
- (b) Securing the client's informed consent to the payment by the third party in writing; and
- (c) Ensuring that all the parties understand and agree to the ethical ground rules for third-party payment.

2. Comment on Aspirational Standard D, Section 4:

The attorney must fully communicate to both the client and the third-party payer the requirements of this Standard, which include that the payer will not interfere with the representation of the client and that the payer is not entitled to any confidential information of the client. The attorney should obtain the client's written consent to the third-party payment and confirm in writing with the third-party payer the ground rules relating to confidentiality of information and representation of the client.

When a party who is paying the fees for client services is actually using the client's own money to pay the fees, the attorney should ensure that the third-party understands the need for lawful authority to use the client's money to do so.

3. Ohio Rule 1.8(f):

A lawyer shall not accept compensation for representing a client from someone other than the client unless divisions

(f)(1) to (3) and, if applicable, division (f)(4) apply:

- (1) the client gives *informed consent*;
- (2) there is no interference with the lawyer's independence or professional judgment or with the client-lawyer relationship;
- (3) information relating to representation of a client is protected as required by Rule 1.6;
- (4) if the lawyer is compensated by an insurer to represent an insured, the lawyer delivers a copy of the following Statement of Insured Client's Rights to the client in person at the first meeting or by mail within ten days after the lawyer receives notice of retention by the insurer.

4. Ohio Rule 1.8, Comment 12:

Under Rule 1.7(a) a conflict of interest exists if there is substantial risk that the lawyer's representation of the client will be materially limited by the lawyer's own interest in the fee arrangement or by the lawyer's responsibilities to the third-party payer (for example, when the third-party payer is a co-client). Under Rule 1.7(b), the lawyer may accept or continue the representation with the informed consent of each affected client, unless the conflict is nonconsentable under that paragraph. Under Rule 1.7(b), the informed consent must be confirmed in writing.

VI. Client Capacity

A. How Is Client Capacity Assessed and Documented?

1. Aspirational Standard G, Section 2: The elder and special needs law attorney: Develops and uses appropriate skills and processes for making and documenting preliminary assessments of client capacity to undertake the specific legal matters at hand.

2. Example in Comment on Aspirational Standard G, Section 2:

Although the attorney should consider any medical opinions regarding the client's capacity, the attorney should evaluate client capacity by a legal standard, considering factors such as:

- The variability of the client's state of mind;
- The client's ability to appreciate the consequences of his or her decision;
- The irreversibility of the decision;
- The substantive fairness of the decision;
- The consistency of the decision with lifetime commitments of the client;
- The type of decisions to be made by the client and the applicable legal standard and;
- The client's ability to articulate reasoning behind his or her decision.

The attorney also should distinguish between incapacity and the inability to remember. The fact that a client does not remember a decision does not mean that the client did not have the capacity to make the decision at the time it was made.

3. Ohio Rule 1.14(a):

When a client's capacity to make adequately considered decisions in connection with a representation is diminished, whether because of minority, mental impairment or for some other reason, the lawyer shall, as far as reasonably possible, maintain a normal client-lawyer relationship with the client. "Reasonable" or "reasonably" when used in relation to conduct by a lawyer denotes the conduct of a reasonably prudent and competent lawyer. Rule 1.0(i).

4. Ohio Rule 1.14, Comment 6:

In determining the extent of the client's diminished capacity, the lawyer should

consider and balance such factors as: the client's ability to articulate reasoning leading to a decision, variability of state of mind and ability to appreciate consequences of a decision; the substantive fairness of a decision; and the consistency of a decision with the known long-term commitments and values of the client. In appropriate circumstances, the lawyer may seek guidance from an appropriate diagnostician.

B. Under What Circumstances Should the Attorney Take Protective Action?

1. Aspirational Standard G, Section 4: The elder and special needs law attorney: Takes appropriate measures to protect the client when the attorney reasonably believes that the client: (a) has diminished capacity; (b) is at risk of substantial physical, financial, or other harm unless action is taken; and (c) cannot adequately act in his or her own interest.

2. Comment on Aspirational Standard G, Section 4:

The attorney must determine whether the attorney's ability to continue to advocate for the client and the client's wishes and values has become impossible because of the client's impairment and whether the client is at serious risk of harm. ...

In appropriate situations, and when permitted or mandated by state law, the attorney should take protective action. However, the attorney should carefully consider the impact of protective action on the attorney-client relationship, the client's autonomy and well-being, and the client's relationship with third parties.

3. Ohio Rule 1.14(b):

When the lawyer *reasonably believes* that the client has diminished capac-

ity, 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.

"Reasonable belief" or "reasonably believes" when used in reference to a lawyer denotes that the lawyer believes the matter in question and that the circumstances are such that the belief is reasonable. Rule 1.0(j).

4. Ohio Rule 1.14, Comment 5:

If a lawyer reasonably believes that a client is at risk of substantial physical, financial or other harm unless action is taken, and that a normal client-lawyer relationship cannot be maintained as provided in division (a) because the client lacks sufficient capacity to communicate or to make adequately considered decisions in connection with the representation, then division (b) permits the lawyer to take protective measures deemed necessary. Such measures could include: consulting with family members; using a reconsideration period to permit clarification or improvement of circumstances; using voluntary surrogate decision making tools such as durable powers of attorney; or consulting with support groups, professional services, adult-protective agencies or other individuals or entities that have the ability to protect the client.

C. What Determines the Scope of Any Protective Action Undertaken?

1. Aspirational Standard G, Section 5:
The elder and special needs law attor-

ney: Uses appropriate measures to protect the client, including (a) considering the wishes and values of the client if known or, if not known, the client's best interests; (b) minimizing intrusion into the client's decision-making autonomy; (c) respecting the client's family and social connections; and (d) considering a range of supportive actions other than court proceedings and adult protective services.

2. Comment on Aspirational Standard G, Section 5:

Attorneys should be aware of the potential conflict between the client's best interests and the attorney's duty to advocate for the client's wishes (e.g., when the client wishes to age in place and it is in the client's best interests to be placed in long-term care). This conflict often occurs when the client has diminished capacity and needs protection, thus requiring the attorney to choose between advocating for the client's wishes or acting against those wishes in order to protect the client. ...

When taking protective action, the attorney should do no more than necessary to protect the client.

3. Ohio Rule 1.14, Comment 5:

In taking any protective action, the lawyer should be guided by such factors as the wishes and values of the client to the extent known, the client's best interests, and the goals of intruding into the client's decision making autonomy to the least extent feasible, maximizing client capacities and respecting the client's family and social connections.

4. Ohio Rule 1.14, Comment 7:

Thus, if a client with diminished capacity has substantial property that should be sold for the client's benefit, effective completion of the transaction may require appointment of a

legal representative. In addition, rules of procedure in litigation sometimes provide that minors or persons with diminished capacity must be represented by a guardian or next friend if they do not have a general guardian In considering alternatives, however, the lawyer should be aware of any law that requires the lawyer to advocate the least restrictive action on behalf of the client.

D. Can Client Confidences Be Disclosed When Taking Protective Action?

1. Aspirational Standard G, Section 6: The elder and special needs law attorney: Preserves client confidences to the extent possible by only divulging that information necessary or appropriate for protective action.
2. Comment on Aspirational Standard G, Section 6:
Yet if the client suffers from diminished capacity and needs protection, the attorney may need to disclose confidential information to a third party. Many state bar rules provide for limited disclosure; however, such disclosures must be made with care because of the potential of harm to the client. ... Even if the attorney is authorized to divulge confidential information to take protective action, the attorney may disclose only that information necessary for the protective action.
3. Ohio Rule 1.14(c):
Information relating to the representation of a client with diminished capacity is protected by Rule 1.6. When taking protective action pursuant to division (b), the lawyer is impliedly authorized under Rule 1.6(a) to reveal information about the client, but only to the extent reasonably necessary to protect the client's interests.

4. Ohio Rule 1.14, Comment 8:

When taking protective action pursuant to division (b), the lawyer is impliedly authorized to make the necessary disclosures, even when the client directs the lawyer to the contrary. Nevertheless, given the risks of disclosure, division (c) limits what the lawyer may disclose in consulting with other individuals or entities or seeking the appointment of a legal representative. At the very least, the lawyer should determine whether it is likely that the person or entity consulted with will act adversely to the client's interests before discussing matters related to the client.

E. Can the Attorney Recommend Guardianship Proceedings for the Client?

1. Aspirational Standard G, Section 7: The elder and special needs law attorney: Seeks guardianship or conservatorship only when no other viable alternatives exist.
2. Comment on Aspirational Standard G, Section 7:
Guardianship and conservatorship are actions of last resort. If guardianship or conservatorship becomes necessary to protect the client's safety, well-being, or finances, the attorney still should pursue the least restrictive alternative within the protective proceedings. Prior to choosing a course of action, consideration should be given to the client's wishes and values to the extent known; the consequences of intruding into the client's decision-making autonomy; and the potential impact on the client's family and social relationships.
3. Ohio Rule 1.14, Comment 7:
If a legal representative has not been appointed, the lawyer should consider

whether appointment of a guardian *ad litem*, conservator, or guardian is necessary to protect the client's interests In many circumstances, however, appointment of a legal representative may be more expensive or traumatic for the client than circumstances in fact require. Evaluation of such circumstances is a matter entrusted to the professional judgment of the lawyer.

4. Ohio Rule 1.14, Comment 8:
Disclosure of the client's diminished capacity could adversely affect the client's interests. For example, raising the question of diminished capacity could, in some circumstances, lead to proceedings for involuntary commitment Therefore, unless authorized to do so, the lawyer may not disclose such information.

VII. Fiduciary Issues

A. What Governs the Attorney's Responsibilities When Representing a Fiduciary?

1. Aspirational Standard C, Section 3:
The elder and special needs law attorney: Recognizes the unique challenges in drafting documents at the request of a fiduciary.
2. Comment on Aspirational Standard C, Section 3:
Before acting on the fiduciary's request, the attorney should:
 - Confirm that the fiduciary has the authority to act under a valid durable power of attorney, court-ordered letters of authority, or state law.
 - Confirm that the proposed action is consistent with the protected individual's past estate planning documents or, if there are none, with the individual's known goals, wishes, and best interests.
 - Consider meeting privately with the

protected individual to ensure that the individual desires the proposed action, especially if the proposed action personally benefits the fiduciary.

- Refuse to act on the fiduciary's request if the proposed action represents a change in the individual's existing documents that is inconsistent with the individual's best interests.
3. Ohio Rule 1.14, Comment 2:
The fact that a client suffers a disability does not diminish the lawyer's obligation to treat the client with attention and respect. Even if the person has a legal representative, the lawyer should as far as possible accord the represented person the status of client, particularly in maintaining communication.
 4. Ohio Rule 1.14, Comment 4:
If a legal representative has already been appointed for the client, the lawyer should ordinarily look to the representative for decisions on behalf of the client. In matters involving a minor, whether the lawyer should look to the parents as natural guardians may depend on the type of proceeding or matter in which the lawyer is representing the minor. If the lawyer represents the guardian as distinct from the ward, and is aware that the guardian is acting adversely to the ward's interest, the lawyer may have an obligation to prevent or rectify the guardian's misconduct. See Rule 1.2(d).

B. May the Attorney Disclose Confidences in Fiduciary/Principal Conflicts?

1. Aspirational Standard E, Section 6:
The elder and special needs law attorney: Carefully maintains client confidentiality to the extent possible while also meeting the requirements of laws, regulations, or court-orders imposing a duty to disclose.

2. Comment on Aspirational Standard E, Section 6:

The professional responsibility rules permit an attorney to disclose a client's confidential information without the client's express consent when disclosure is reasonably necessary to comply with a law, court order, or other professional responsibility rule. In making such a disclosure without the client's express consent, the attorney should be cautious to disclose only enough information that is required to comply with the law, court order, or other professional responsibility rule that requires disclosure.

An example of a state law that may require an attorney or a health care professional employed by the attorney to make disclosures without the client's express consent is a law regarding mandatory reporting of abuse.

3. Ohio Rule 1.6(b):

A lawyer may reveal information relating to the representation of a client, including information protected by the attorney-client privilege under applicable law, to the extent the lawyer *reasonably believes* necessary for any of the following purposes:

- (1) to prevent reasonably certain death or substantial bodily harm;
- (2) to prevent the commission of a crime by the client or other person;
- (3) to mitigate *substantial* injury to the financial interests or property of another that has resulted from the client's commission of an *illegal* or *fraudulent* act, in furtherance of which the client has used the lawyer's services; ("Illegal" denotes criminal conduct or a violation of an applicable statute or administrative regulation. Rule 1.0(e). "Fraud" or "fraudulent" denotes

conduct that has an intent to deceive and is either of the following:

- (1) an actual or implied misrepresentation of a material fact that is made either with knowledge of its falsity or with such utter disregard and recklessness about its falsity that knowledge may be inferred;
- (2) a knowing concealment of a material fact where there is a duty to disclose the material fact. Rule 1.0(d)).

- (4) to secure legal advice about the lawyer's compliance with these rules;
- (5) to establish a claim or defense on behalf of the lawyer in a controversy between the lawyer and the client, to establish a defense to a criminal charge or civil claim against the lawyer based upon conduct in which the client was involved, or to respond to allegations in any proceeding, including any disciplinary matter, concerning the lawyer's representation of the client;
- (6) to comply with other law or a court order.

4. Ohio Rule 1.6, Comment 6:

Although the public interest is usually best served by a strict rule requiring lawyers to preserve the confidentiality of information relating to the representation of their clients, the confidentiality rule is subject to limited exceptions. Division (b)(1) recognizes the overriding value of life and physical integrity and permits disclosure reasonably necessary to prevent reasonably certain death or substantial bodily harm. Such harm is reasonably certain to occur if it will be suffered imminently or if there is a present and substantial threat that a person will suffer such harm at a later

date if the lawyer fails to take action necessary to eliminate the threat.

C. May the Attorney Serve as Fiduciary for the Client?

1. Aspirational Standard D, Section 5: The elder and special needs law attorney: Subject to state regulations, may serve as a fiduciary for a client upon the request of a client who has capacity if it is in the client's best interests and if the client gives written informed consent after full disclosure.
2. Comment on Aspirational Standard D, Section 5:
These requests may raise concerns about undue influence, overreaching, the attorney's financial self-interest, and the best interests of the client. ... The attorney must determine that the appointment is in the best interests of the client and justify how his or her appointment furthers the client's best interests. Before obtaining client consent, the attorney should explain to the client the fiduciary role, any conflicts of interest, the options to using the attorney as fiduciary, and the pros and cons of alternatives.
3. Ohio Rule 1.8(c):
A lawyer shall not solicit any *substantial* gift from a client. A lawyer shall not prepare on behalf of a client an instrument giving the lawyer, the lawyer's partner, associate, paralegal, law clerk, or other employee of the lawyer's *firm*, a lawyer acting "of counsel" in the lawyer's *firm*, or a person related to the lawyer any gift unless the lawyer or other recipient of the gift is related to the client. For purposes of division (c) of this Rule:
 - (1) "person related to the lawyer" includes a spouse, child, grandchild, parent, grandparent, sibling, or

other relative or individual with whom the lawyer or the client maintains a close, familial relationship;

- (2) "gift" includes a testamentary gift. "Partner" denotes a member of a partnership, a shareholder in a law firm organized as a professional corporation, or a member of an association authorized to practice law. Rule 1.0(h).
4. Ohio Rule 1.8, Comment 8:
This Rule does not prohibit a lawyer from seeking to have the lawyer or a partner or associate of the lawyer named as executor of the client's estate or to another potentially lucrative fiduciary position. Nevertheless, such appointments will be subject to the general conflict of interest provision in Rule 1.7 when there is a significant risk that the lawyer's interest in obtaining the appointment will materially limit the lawyer's independent professional judgment in advising the client concerning the choice of an executor or other fiduciary. In obtaining the client's informed consent to the conflict, the lawyer should advise the client concerning the nature and extent of the lawyer's financial interest in the appointment, as well as the availability of alternative candidates for the position.

VIII. Long-Term Care Planning

A. Should Medicaid Planning Be Undertaken if Long-Term Care Is Foreseeable?

1. Aspirational Standard A, Section 1: The elder and special needs law attorney: In applying a holistic approach to legal problems, works to consider the larger context, both other legal consequences as well as the extra-legal context in which the problems exist and must be solved.

2. Comment on Aspirational Standard A, Section 1, and Example:

a. Comment:

[T]he attorney recognizes that the client may not be knowledgeable of the variety of issues the client is facing or will be facing as he or she ages. Therefore, the attorney should be prepared to address with the client issues the client may not even be aware of that are related to the representation.

b. Example:

In addition to preparing the legal documents requested by the client, the attorney should offer advice on the issues of how to arrange for home care services, an assisted living facility, or a nursing home. The attorney also should offer advice on how to pay for such services and living arrangements and what measures the client may wish to consider to prevent financial exploitation.

3. Ohio 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.

4. Ohio Rule 1.1, Comment 1:

In determining whether a lawyer employs the requisite knowledge and skill in a particular matter, relevant factors include the relative complexity and specialized nature of the matter, the lawyer's general experience, the lawyer's training and experience in the field in question, the preparation and study the lawyer is able to give the matter and whether it is feasible to refer the matter to, or associate or consult with, a lawyer of established competence in the field in question. In many instances, the required proficiency is that of a general practitioner. Expertise in a particular field of law may be required in some circumstances.

B. What Should the Attorney Consider When Undertaking Medicaid Planning?

1. Aspirational Standard H, Section 5:

The elder and special needs law attorney: When developing a plan to secure and pay for long-term supports and services should:

- (a) Strive to determine the client's wishes and values in order to achieve the client's objectives concerning living options, health care, loved ones, and property;
- (b) Endeavor to preserve and promote the client's dignity, self-determination, and quality of life;
- (c) Counsel the client about the full range of long-term services options, risks, consequences, and relevant costs;
- (d) Counsel the client in light of the client's needs, personal values, wishes, best interests, and the alternatives available; and
- (e) Counsel the client on the estate planning and tax implications of the client's choices for long-term services on his or her property.

2. Comment on Aspirational Standard H, Section 5:

At all times during the representation, the attorney should be mindful of Model Rule 2.1: Advisor, which states that the "lawyer may refer not only to law but to other considerations such as moral, economic, social and political factors, that may be relevant to the client's situation." ... The attorney should be mindful that the client's goals should guide the actions of the attorney. Offering a solution to the client's problem is inappropriate when the steps and objectives conflict with the client's values.

3. Ohio Rule 1.4, Comment 5:

The client should have sufficient information to participate intelligently in decisions concerning the objectives of the representation and the means by which they are to be pursued, to the extent the client is willing and able to do so. Adequacy of communication depends in part on the kind of advice or assistance that is involved The guiding principle is that the lawyer should fulfill reasonable client expectations for information consistent with the duty to act in the client's best interests, and the client's overall requirements as to the character of representation.

4. Ohio Rule 1.4, Comment 6:

Ordinarily, the information to be provided is that appropriate for a client who is a comprehending and responsible adult. However, fully informing the client according to this standard may be impracticable, for example, where the client is a child or suffers from diminished capacity. *See* Rule 1.14 Where many routine matters are involved, a system of limited or occasional reporting may be arranged with the client.

C. What Responsibilities Does the Attorney Have Concerning Possible Fraudulent Conduct?

1. Ohio Rule 1.2(d)(1):

A lawyer shall not counsel a client to engage, or assist a client, in conduct that the lawyer *knows is illegal or fraudulent*. A lawyer may discuss the legal consequences of any proposed course of conduct with a client and may counsel or assist a client in making a good faith effort to determine the validity, scope, meaning, or application of the law.

2. Ohio Rule 1.2, Comment 9:

This prohibition, however, does not preclude the lawyer from giving an honest opinion about the actual consequences that appear likely to result from a client's conduct. Nor does the fact that a client uses advice in a course of action that is illegal or fraudulent of itself make a lawyer a party to the course of action. There is a critical distinction between presenting an analysis of legal aspects of questionable conduct and recommending the means by which an illegal act or fraud might be committed with impunity.

3. Ohio Rule 1.2, Comment 10:

When the client's course of action has already begun and is continuing, the lawyer's responsibility is especially delicate. The lawyer is required to avoid assisting the client, for example, by drafting or delivering documents that the lawyer knows are fraudulent or by suggesting how the wrongdoing might be concealed. A lawyer may not continue assisting a client in conduct that the lawyer originally supposed was legally permissible but then discovers is improper. *See* Rules 3.3(b) and 4.1(b).

4. Ohio Rule 1.2, Comment 12:

Division (d)(1) applies whether or not the defrauded party is a party to the transaction. Hence, a lawyer must not participate in a transaction to effectuate illegal or fraudulent avoidance of tax liability The last clause of division (d)(1) recognizes that determining the validity or interpretation of a statute or regulation may require a course of action involving disobedience of the statute or regulation or of the interpretation placed upon it by governmental authorities.

