

# Malpractice in Elder & Special Needs Law: Navigating the Ethics Rules

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## Introduction

Elder law and special needs planning demand legal precision and ethical vigilance. Because clients are often vulnerable and family dynamics are complex, malpractice claims frequently arise from blurred boundaries and overlooked duties. This handout examines how four key rules—1.1, 1.2, 1.7, and 1.14—intersect with malpractice risk, with the full text of each rule included for reference.

## What is Malpractice?

Legal malpractice occurs when an attorney fails to exercise the ordinary skill, prudence, and diligence that a reasonably competent lawyer would use under similar circumstances. It may arise from negligence, breach of fiduciary duty, or violation of professional rules. In elder law and special needs practice, malpractice often results in financial loss, loss of benefits, or improper curtailment of a client's rights.

## Rule 1.1 – Competence

### *ABA Model Rule 1.1:*

*A lawyer shall provide competent representation to a client. Competent representation requires the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation.*

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The competency of an attorney is not measured merely based on experience. A very experienced lawyer can lack competence, and a very inexperienced attorney can attain competence. Comment 2 to Rule 1.1 makes it clear that an attorney “need not necessarily have special training or prior experience to handle legal problems of a type with which the lawyer is unfamiliar. A newly admitted lawyer can be as competent as a practitioner with long experience.” Competence requires knowledge, skill, thoroughness, and preparation. In elder and special needs practice, failure here often leads directly to malpractice.

Competency goes hand in hand with Rule 1.3, which states that “a lawyer shall act with reasonable diligence and promptness in representing a client.” This rule is especially applicable when representing an older adult.

Cases:

Barefoot v. Jennings 8 Cal. 5<sup>th</sup> 822 (2020): disinherited beneficiary has standing to challenge a trust amendment based on incompetency, undue influence or fraud.

In Utah State Bar v. Jardine, 289 P.3d 516 (Utah 2012), the court recognized that when the attorney was asked to review the will and trust of a client who was elderly and in poor health, the matter could not be delayed.

In re Morse, 7 A.3d 1259 (N.H. 2010), an experienced attorney was disbarred in part because it took 5 years and 12 motions for extension to settle an estate.

## **Rule 1.2 – Scope of Representation & Authority**

*ABA Model Rule 1.2(a):*

*(a) Subject to paragraphs (c) and (d), a lawyer shall abide by a client's decisions concerning the objectives of representation and, as required by Rule 1.4, shall consult with the client as to the means by which they are to be pursued. A lawyer may take such action on behalf of the client as is impliedly authorized to carry out the representation. A lawyer shall abide by a client's decision whether to settle a matter. In a criminal case, the lawyer shall abide by the client's decision, after consultation with the lawyer, as to a plea to be entered, whether to waive jury trial and whether the client will testify.*

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Determining who is the client is crucial in elder law and special needs planning. The identity of the client may become an issue because in many situations, other people will be “present” in the representation. Other people can be “present” in a variety of ways even if the person is not physically in the room. The most obvious way is when another person makes the appointment to meet with the attorney, accompanies the older adult to meetings with the attorney, or pays for the representation. Other individuals may be “present” because they will be directly benefited by the decisions of the client, such as beneficiaries to a will. And still other

individuals may be “present” in the representation because they have a role in the client’s decision-making.

Attorneys may also face malpractice claims when they:

1. Relying solely on an agent’s instructions without confirming the principal’s intent or capacity.
2. Fail to verify the validity or scope of the POA document,
3. Ignore red flags such as family disputes, recent changes in estate plans, or signs of undue influence.

Attorneys can face liability when they stop communicating with the client. The ability and willingness to communicate with the client is an essential characteristic of an attorney. Model Rule 1.4 defines the communication duties of an attorney:

(a) A lawyer shall:

(1) promptly inform the client of any decision or circumstance with respect to which the client’s informed consent, as defined in Rule 1.0(e) is required by these Rules; 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) promptly comply with reasonable requests, and respond to requests from the client for information; and

(5) consult to the extent reasonably necessary to permit the client to make informed decisions regarding the representation.” Rule 1.14(b)

According to comment 1 to Rule 1.4, the duty of communication revolves around the information needed for the “client to effectively participate in the representation.” The need to communicate with older clients is especially crucial as some clients may have physical, mental, or emotional barriers to understanding the information from the attorney. The elder law attorney must be able to communicate effectively to provide that information. The Rules recognize that the amount and nature of the information provided may differ depending on the client. Comment 6 to Rule 1.4 recognizes that “[o]rdinarily, 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.” Additionally, comment 7 to Rule 1.4 notes that there may be circumstances when

the attorney may “be justified in delaying transmission of information when the client would be likely to react imprudently to an immediate communication.” It is clear under comment 7 that an attorney cannot delay transmission of information merely for the attorney’s own interest. Some would say that the most fundamental need of a client for effective communication is “time and talk.”

Cases:

Attorney Grievance Commission of Maryland v. Coppola, 19 A.3d 431 (Md App. 2011): Attorney violated ethics rules when he took direction from children that lead to the forgery of estate planning documents.

In re Disciplinary Proceedings Against Strasburg, 452 N.W.2d 152 (Wis. 1990): Attorney suspended for 2 years for permitting persons other than his clients to direct the work he performed on his clients’ behalf, neglecting clients’ legal matters and failing to communicate with them prior to taking action on their behalf, representing conflicting interests without fully disclosing the conflict and without obtaining client consent, charging clearly excessive fees, becoming verbally abusive and threatening legal action to collect a fee prior to completing a client’s legal work and billing and collecting costs from clients in excess of amounts actually incurred.

## **Rule 1.7 – Conflicts of Interest**

### ***ABA Model Rule 1.7:***

***a) Except as provided in paragraph (b), a lawyer shall not represent a client if the representation involves a concurrent conflict of interest. A concurrent conflict of interest exists if:***

***(1) the representation of one client will be directly adverse to another client; or***

***(2) there is a significant risk that the representation of one or more clients will be materially limited by the lawyer's responsibilities to another client, a former client or a third person or by a personal interest of the lawyer.***

***(b) Notwithstanding the existence of a concurrent conflict of interest under paragraph (a), a lawyer may represent a client if:***

*(1) the lawyer reasonably believes that the lawyer will be able to provide competent and diligent representation to each affected client;*

*(2) the representation is not prohibited by law;*

*(3) the representation does not involve the assertion of a claim by one client against another client represented by the lawyer in the same litigation or other proceeding before a tribunal; and*

*(4) each affected client gives informed consent, confirmed in writing.*

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Conflicts are pervasive in family-based planning. Representing multiple generations risks divided loyalties and claims of undue influence. Most conflicts in elder law are not directly adverse conflicts as defined in Model Rule 1.7(a)(1), but rather materially limiting conflicts as defined in Model Rule 1.7(a)(2). However, conflicts can arise in a variety of ways in elder law. First, the attorney may be called to undertake joint or common representation in an estate planning context. The elder law attorney should be alert to conflicts that may arise when she proceeds to take protective action. Elder law attorneys also must be circumspect when asked to take on additional roles in the representation, such as acting as the fiduciary, trustee, or guardian, or being named in the will as a beneficiary.

Cases:

In re Wyatt's Case, 982 A.2d 396 (N.H. 2009): Attorney disciplined based on representation of the fiduciary and beneficiary.

In the MATTER OF DISCIPLINARY PROCEEDINGS AGAINST Laura R. SCHWEFEL, 474 N.W.2d 456 (Wisc. 2022): Attorney discipline due to conflict with her personal interests.

## **Rule 1.14 – Clients with Diminished Capacity**

***ABA Model 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.*

*(b) When the lawyer reasonably believes that the client has diminished capacity, 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.*

*(c) Information relating to the representation of a client with diminished capacity is protected by Rule 1.6. When taking protective action pursuant to paragraph (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.*

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Clients may have diminished ability to make decisions, but the lawyer must still maintain as normal a relationship as possible. All attorneys regardless of their practice may on occasion encounter clients with diminished capacity. However, elder law attorneys, because of the nature of their practice and clients, routinely will encounter clients with diminished or diminishing capacity. Capacity issues can arise in three general ways: the capacity to retain the attorney, the capacity to give informed consent to the action that the client is undertaking, and the capacity of the client who is the subject of litigation, such as in a guardianship. A thorough understanding of Model Rule 1.14 (and the state-specific variations) is essential for an elder law and special needs planning attorney. The Rule can be broken down into two general issues: (1) maintaining a normal attorney-client relationship, and (2) when and how to take protective action.

Although Rule 1.14 addresses clients with diminished capacity, throughout the representation, an attorney must be assured that the client has capacity. Initially, the client must have contractual capacity (see additional discussion on contractual capacity in Chapter 3) to hire the attorney. If the attorney determines that the client lacks the capacity to retain the attorney, the attorney cannot proceed with the representation. However, the attorney can take emergency measures to protect the individual even though the attorney does not represent the individual. Comment 9 to Model Rule 1.14 suggests three important considerations:

- (1) Is the individual in danger of imminent and irreparable harm to his health, safety, or financial interests?
- (2) Is there no one else who can act on the individual's behalf?

- (3) Is the action only reasonably necessary to maintain the status quo and prevent the harm?

The test for capacity is a functional test. Comment 6 to Model Rule 1.14 states that in determining the client's capacity, the attorney should consider:

- [1] The client's ability to articulate reasoning leading to a decision;
- [2] Variability of the client's state of mind;
- [3] The client's ability to appreciate the consequences of their decision;
- [4] The substantive fairness of this decision; and
- [5] The consistency of this decision with the client's known long-term commitments and values.

The client's capacity is to be judged based on the client's ability to understand the issues surrounding the particular action the client wishes to take. So, for example, the capacity required to sign a will differs from the capacity to sign a contract. Therefore, a client may have capacity to sign a will but not the capacity to hire the attorney. The capacity requirements are defined by the substantive laws of the states regarding the validity of the document or decision made.

As suggested by Comment 1 to Rule 1.14, capacity is not an all or nothing proposition. The comment states: "In particular, a severely incapacitated person may have no power to make legally binding decisions. Nevertheless, a client with diminished capacity often has the ability to understand, deliberate upon, and reach conclusions about matters affecting the client's own well-being." Additionally, a client may fluctuate between capacity and incapacity based on a variety of factors.

An attorney may use a variety of methods of assessing capacity, keeping in mind that the attorney is not diagnosing the client's health or cognitive status. The attorney is merely determining whether the client has the capacity required by the substantive law. A must-have for every elder law attorney is *Assessment of Older Adults with Diminishing Capacities: A Handbook for Lawyers* (ABA Comm'n. on Law and Aging, and Am. Psychological Assn. 2nd ed. 2021). The handbook contains a checklist for assessing capacity for the different services that attorneys provide.

As Rule 1.14(a) provides, an attorney is required to maintain a normal client-attorney relationship as reasonably possible, for those clients with diminished capacity. This may mean that the attorney may need to vary the way the attorney typically conducts a client interview, the amount of time spent, the attorney's communication style, the time and length of the interview, and more.

Cases:

Carey v. Hartz, 256 N.E.3d 469 (Ill. App. 1 Dist. 2024): Legal malpractice case based on failure to assess client's mental capacity when the attorney observed signs of diminished capacity.

Wood v. Jamison, 167 Cal. App. 4<sup>th</sup> 156 (2008): Attorney held liable for assisting in a transaction that defrauded an elderly woman for failing to recognize client's vulnerability and lack of capacity.

### **Privity in Malpractice Claims**

Under some circumstances, a lawyer may be held liable to non-client, third-party beneficiaries. Liability to third parties in this context depends on whether the jurisdiction in which the lawyer rendered legal services adheres to the strict privity doctrine or whether it allows third parties to proceed against the lawyer under either a negligence theory, a third-party beneficiary contract claim or a combination of the two.

#### **Strict Privity Doctrine**

At one time the prevailing view was that of strict privity. Under the privity rule, a lawyer is held liable only to the client and not to beneficiaries or intended beneficiaries. The jurisdictions adhering to this doctrine have refused to grant standing to non-client beneficiaries under either a negligence or third-party beneficiary contract theory. The primary reasons given to justify this doctrine have been:

- Absent strict privity, clients would lose control over attorney-client relationships, and lawyers would be subject to almost unlimited liability.
- Allowing a broad cause of action against a lawyer would create a conflict of interest between the client and third-party beneficiaries during the estate planning process, thereby limiting the lawyer's ability zealously to represent his or her clients.
- Suits by disappointed beneficiaries could cast doubt on the deceased testator's intentions.

A few states still adhere to the strict privity rule, including Colorado, Nebraska, New York, Ohio and Alabama. *See, e.g., Baker v. Wood, Ris & Hames, P.C.*, 364 P.3d 872 (Col. 2016); *Swanson v. Ptak*, 682 N.W.2d 225 (Neb. 2004); *Robinson v. Benton*, 842 So.2d 631 (Ala. 2002); *Matter of Estate of Pascale*, 644 N.Y.S.2d 887 (1996); *Lewis v. Star Bank, N.A., Butler County*, 630 N.E.2d 418 (Ohio App. 1993); *Deeb v. Johnson*, 566 N.Y.S.2d 688 (1991); *Simon v. Zipperstein*, 512 N.E.2d 636 (Ohio 1987)

(but see below regarding third-party claims in trust and estate administration); see, also, *Golden v. Cook*, 293 F.Supp.2d 546 (W.D. Pa. 2003) (finding that a lawyer did not owe a duty to the beneficiaries under Pennsylvania law, notwithstanding the absence of the strict privity doctrine). Texas generally adheres to the strict privity doctrine, *Barcelo v. Elliott*, 923 S.W.2d 575 (Tex. 1996), but allows an executor to bring a malpractice claim against a decedent's estate planning lawyer on the estate's behalf. *Belt v. Oppenheimer, Blend, Harrison & Tate, Inc.*, 192 S.W.3d 780 (Tex. 2006).

### **Lack of Privity No Defense**

Courts in other states have held that the lack of privity between an estate or trust beneficiary and the lawyer for the fiduciary is generally not a defense to a legal malpractice claim against the fiduciary's lawyer. In Ohio, where privity is an effective defense in the estate planning context, it usually is not a defense in an action brought by an estate's beneficiaries against the fiduciary's lawyer. *Lewis v. Star Bank, N.A., Butler County*, 630 N.E.2d 418 (Ohio App. 1993); *Elam v. Hyatt Legal Services*, 541 N.E.2d 616 (Ohio 1989). Arizona, California, Florida, Illinois, Maryland, Michigan, Minnesota, Nevada, North Carolina, Oklahoma, Pennsylvania, Rhode Island and Washington are among the other states whose laws refuse to apply the privity defense in this circumstance. See, e.g., *Steinway v. Bolden*, 460 N.W.2d 306 (Mich. App. 1990); *In re Estate of Halas*, 568 N.E.2d 170 (Ill.App. 1991); cases cited *infra*; but see *Jewish Hosp. v. Boatman's Nat'l Bank*, 633 N.E.2d 1267 (Ill.App. 1994) (lawyer owes professional obligations to estate and not to the beneficiaries in handling probate administration due to the potentially adversarial relationship between the interests of the estate and the interests of the beneficiaries). Nevertheless, courts consistently find that no duty is owed by a fiduciary's lawyer to the beneficiaries of an estate or trust under these circumstances.

The most common tests used to determine whether a lawyer who renders services at the request of a fiduciary owes a duty to a non-client beneficiary are the "multi factor balancing" test and the "third-party beneficiary" test. Cases illustrating these tests are discussed below.

### **Multi-Factor Balancing Test**

In *Goldberger v. Kaplan, Strangis and Kaplan*, 534 N.W.2d 734 (Minn.App. 1995), the court applied the multi-factor balancing test to determine if the lawyer for the executor owed a duty to non-client beneficiaries. In this case the court concluded: (a) the appellants were merely incidental beneficiaries of the lawyer's services; (b) that, until an estate closes, injury to an estate beneficiary is uncertain; (c) an incentive to bring a malpractice suit against the lawyer rests with the executor; and

(d) allowing the beneficiaries' claim would place an undue burden on the legal profession because such claims could subject the lawyer to a conflict of interest. The conflict of interest would arise whenever the interests of the executor, acting on behalf of the estate, were to conflict with the interests of the suing beneficiary.

In *Goldberg v. Frye*, 266 Cal. Rptr. 483 (Cal.App. 1990), the court denied the estate beneficiaries' claim because the estate administrator and the lawyer did not enter their relationship intending to affect the estate beneficiaries. Furthermore, the court stated that "it would be very dangerous to conclude that the lawyer, through performance of his service to the administrator...subjects himself to claims of negligence from the beneficiaries." The court also stated that the beneficiaries are entitled to a fair administration by the fiduciary, but the fiduciary's lawyer does not owe them a duty.

In *Trask v. Butler*, 872 P.2d 1080 (Wash. en banc 1994), the court utilized a modified multi-factor balancing test to conclude that a lawyer representing a former executor did not owe a duty either to the estate or to the estate's beneficiaries. This modified approach initially determines whether the plaintiff is an "intended beneficiary of the transaction to which the advice pertained" and then analyzes the factors under the balancing test. The court found no duty existed for the following reasons: (a) the beneficiaries and the estate itself were not intended to benefit from the relationship between the executor and the lawyer but, rather, were incidental beneficiaries; (b) the heirs of the estate could institute an action against the executor for breach of fiduciary duty; and (c) the conflict of interest a lawyer would encounter in deciding whether to represent the executor, the estate or the beneficiaries would unduly burden the legal profession.

### Third Party Beneficiary Test

In *Ferguson v. Cramer*, 709 A.2d 1279 (Md. 1997), the court applied the third-party beneficiary test and held that no duty was owing by an estate's lawyer to the beneficiaries because the beneficiaries could not establish an attorney-client relationship. The court found that the benefit to the beneficiaries from the executor's lawyer was only incidental. The court concluded that, where the executor's conduct falls below the applicable standard of care, the beneficiaries might sue the executor but not the executor's lawyer. This remains true even where the executor hires a lawyer and relies on his or her advice. *See, also, Neal v. Baker*, 551 N.E.2d 704 (Ill.App. 1990) (dismissing an estate beneficiary's claim because the scope of the lawyer's representation involved matters that were adversarial as to the beneficiary in that she was contesting the lawyer's decision to require her to pay

inheritance taxes. Also, the contract between the executor and the lawyer was intended primarily to benefit the executor and the estate and not the beneficiaries).

### Willful Misconduct

The majority rule is different, however, when the lawyer has engaged in conduct that is more intentional than negligent. Thus, in *Pierce v. Lyman*, 1 Cal.App.4th 1093 (1991), superseded by statute on other grounds, 85 Cal.App.4th 382 (2000), the court held that trust beneficiaries may bring an action against the lawyers for the former trustees where the lawyers intentionally aided and abetted the trustees in the trustees' breach of their fiduciary duties. Such activities allegedly included "active concealment, misrepresentations to the court, and self-dealing for personal financial gain." See, also, *Weingarten v. Warren*, 753 F.Supp. 491 (S.D.N.Y. 1990) (applying New York law, the federal district court held that a trust's remainder beneficiaries stated a cause of action against the trustee's lawyer individually for breach of fiduciary duty and as executor of the trustee's estate for alleged conversion of trust assets. However, the court held that the beneficiaries could not assert a cause of action for malpractice against the lawyer). Sometimes, a negligent representation action is an alternative theory available to third parties. See, e.g., *Riggs Nat'l Bank v. Freeman*, 682 F.Supp. 519 (S.D. Fla. 1988).