

ETHICAL PRACTICE IN ELDER LAW AND SPECIAL NEEDS LAW: PREVENTING MISTAKES BEFORE THEY BECOME CLAIMS

"Malpractice in elder law isn't usually a bomb—it's a tripwire."

Ethical Tripwires: Rules 1.1, 1.2, 1.7, 1.14

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- ▶ **Identify common malpractice risks** in elder law and special needs practice, including those arising from diminished capacity, undue influence, and client confidentiality challenges.
- ▶ **Analyze ethical dilemmas** specific to representing aging clients and clients with disabilities, with reference to relevant professional conduct rules.
- ▶ **Recognize the warning signs** of potential liability, including conflicts of interest and inappropriate third-party involvement in client decision-making.
- ▶ **Apply risk-reduction strategies** and best practices using real-world scenarios to prevent ethical breaches and malpractice claims.
- ▶ **Enhance ethical decision-making** and client advocacy by developing a proactive approach to managing capacity, consent, and communication challenges.

OBJECTIVES

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- ▶ Failure to exercise the skill, prudence, and diligence that lawyers of ordinary skill would use.
- ▶ Can arise from negligence, breach of fiduciary duty, or violation of professional responsibility rules.
- ▶ Often tied to financial harm or loss of client rights.

WHAT IS LEGAL MALPRACTICE?



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- ▶ Duty: Attorney-client relationship established.
- ▶ Breach: Lawyer failed to meet standard of care (e.g., competence, loyalty).
- ▶ Causation: Breach caused harm to client.
- ▶ Damages: Client suffered actual financial or legal harm.

ELEMENTS OF A MALPRACTICE CLAIM



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- Doctrine of Privity traditionally blocked such actions
 - Interject undesirable self-protective reservations in to the attorney's counseling role.
 - Prevent attorney "from devoting entire energies to his client's interest."
 - "Undue Burden on the profession."
- Recent trend--Courts holding attorney responsible.
 - Foreseeable effect on a third party
 - Fiduciary/Agency principal
 - Third party beneficiary principle
 - Balancing test that considers the predictability and certainty of harm, the defendant's culpability and the extent of the third party's justified reliance on the defendant's conduct.
 - Consider Restatement (third) of Law Governing Lawyers §51

WHO CAN SUE FOR MALPRACTICE?

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- ▶ Complex interplay: Medicaid, tax, disability law
- ▶ Clients with diminished capacity
- ▶ Families with conflicting goals
- ▶ Stakes: financial security & benefit

WHY ELDER & SPECIAL PRACTICE IS HIGH-RISK



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- ▶ Keep current: Medicaid / SNT rules shift often
- ▶ Thoroughness: gather financial/medical data
- ▶ Example: "Simple trust" = benefits lost
- ▶ Malpractice risk: incompetence = client harm

Skills + Specialized Knowledge + Diligence =
Competency

RULE 1.1 – COMPETENCE

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- ▶ Who is the client? Senior? Child? Both?
- ▶ Define objectives & means clearly
- ▶ Avoid overreach—document client choices
- ▶ Communication
- ▶ Example: Child hires you, but mom's wishes ignored

RULE 1.2 – SCOPE OF REPRESENTATION

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- ▶ Families ≠ one happy unit—check conflicts!
- ▶ Parent v. child inheritance disputes
- ▶ Consent ≠ cure-all
- ▶ Conflict with Attorney
- ▶ Example: Planning for parents + child with disabilities → later disputes = liability

RULE 1.7 – CONFLICTS OF INTEREST

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- ▶ Maintain 'normal' relationship as far as possible
- ▶ Assess & document capacity
- ▶ Protective actions: only when necessary
- ▶ Example: Helping client w/ dementia sign trust = malpractice minefield

RULE 1.14 – DIMINISHED CAPACITY

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- ▶ Engagement letters: crystal clear
- ▶ Conflicts check = map family interests
- ▶ Document, document, document
- ▶ Collaborate with experts (finance, medical, social work)

PRACTICAL MALPRACTICE AVOIDANCE

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