ETHICAL PRACTICE IN
ELDER LAW AND
SPECIAL NEEDS LAW:
PREVENTING MISTAKES
BEFORE THEY BECOME
CLAIMS
"Malpractice in elder law isn't us vo ffy a bomb—it's a tripwire."
Ethical Tripwires: Rules 1.1, 12, 1.7, 1.14
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1

- 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

2

- $\,\blacktriangleright\,$ 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
- ▶ Often tied to financial harm or loss of client rights.

WHAT IS LEGAL MALPRACTICE?



3

 Duty: Attorney-client relationship establish
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- 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



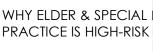
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- · Doctrine of Privity traditionally blocked such actions
 - Interject undesirable self-protective reservations in to the attorney's counseling role.
 - Prevent attorney "from devoting entire energies to his client's interest."
 - "Undue Burden on 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 Law §51

WHO CAN SUE FOR MALPRACTICE?

5

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





6

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

Skills + Specialized Knowledge + Diligence = Competency

RULE 1.1 – COMPETENCE

7

- ▶ 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



- ► 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



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

RULE 1.14 – DIMINISHED CAPACITY



10

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

PRACTICAL MALPRACTICE AVOIDANCE



11

