

# ETHICS AND ELDER LAW: TEACHING STUDENTS TO ASK THE RIGHT QUESTIONS

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## I. INTRODUCTION

*Good teaching is more a giving of right questions than giving of right answers.*<sup>1</sup>

Nowhere in teaching is this quote truer than in the area in which ethics and Elder Law intersect. Teaching professional responsibility generally is not an easy task, but when it is combined with the sometimes-complicated issues in Elder Law, it poses obstacles, challenges, and great rewards. Many times the best way for practitioners to solve the ethical dilemmas they face is to know the right questions to ask. Teaching students that the applicable Model Rules of Professional Conduct (Model Rules) many times may not answer all of the questions they will have as practitioners<sup>2</sup> leaves them, at times, unsettled and unappreciative. The most important goal in teaching professional responsibility is to help the students understand that the Model Rules are in many cases the baseline, and the students will have to exercise discretion to decide difficult questions.<sup>3</sup>

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1. Robert D. Ramsey, *Inspirational Quotes, Notes, & Anecdotes That Honor Teachers and Teaching* 61 (Corwin Press 2007) (quoting Josef Albers).

2. One scholar noted that the American Bar Association “has offered no better answers than ‘vaporous platitudes called canons of ethics [that] have somewhat less usefulness as guides to lawyers in the predicaments of the real world than do valentine cards as guides to heart surgeons in the operating room.’” *TIME*, *Professional Ethics: Lies & Lawyers*, <http://www.time.com/time/magazine/article/0,9171,835524-1,00.html> (May 13, 1966) (quoting Anthony Amsterdam, then a professor at the University of Pennsylvania Law School).

3. I tell students that practitioners who just comply with the Model Rules are living their professional lives in the basement of the profession. Sure, they are still in the house, but it is not a particularly pleasant place to live. I describe professional attorneys as those

This Article will discuss how using Elder Law examples to illustrate ethical issues can accomplish the following three goals: (1) teaching the general rules of professional responsibility using the lens of Elder Law; (2) exploring the unique roles played by Elder Law attorneys in the lives of their clients and their clients' families; and (3) helping the students learn to identify the questions and concerns raised in this particular area of law.

## II. TEACHING THE MODEL RULES

Academics are beginning to recognize that students are more receptive to ethics classes "that situate ethics in particular substantive areas."<sup>4</sup> Many students are less than enthusiastic about taking a professional responsibility class. They resent being required to take a class on ethics and believe they know what is ethical. Students also may fail to see the need for such a class.<sup>5</sup> By combining the class with a substantive area of law, the students are more interested in how the Model Rules apply when dealing with a specific client population.<sup>6</sup>

Additionally, teaching the Model Rules is ineffective when teaching them in a vacuum. Students are more engaged with the Model Rules when they are tethered to specific, factual hypotheticals.<sup>7</sup> It is far better to focus on one substantive area of law, as doing so limits the scope of the factual hypotheticals and allows for a much deeper and more interesting discussion.<sup>8</sup> Additionally,

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who choose to live in the penthouse of the profession.

4. Deborah L. Rhode, *Teaching Legal Ethics*, 51 St. Louis U. L.J. 1043, 1052 (2007); Bruce A. Green, *Less is More: Teaching Legal Ethics in Context*, 39 Wm. & Mary L. Rev. 357, 370-372 (1998).

5. Stephen Gillers, "Eat Your Spinach?", 51 St. Louis U. L.J. 1215, 1219 (2007).

6. At Stetson University College of Law, I teach an LL.M course called Ethics and the Practice of Elder Law, and for the J.D. students, I teach a course called Ethics and the Practice of Criminal Law. See Stetson U. College of L., *Course Catalog*, <http://www.law.stetson.edu/registrar/coursedescriptions/> (accessed Sept. 19, 2010) [hereinafter *Stetson Course Catalog*] (providing a description of the Ethics and Practice of Criminal Law course); Stetson U. College of L., *Elder Law LL.M. Curriculum*, [http://www.law.stetson.edu/tmpl/academics/elder/llm/internal-1-sub.aspx?id=602&ekmense1=78e6e020\\_160\\_0\\_602\\_4](http://www.law.stetson.edu/tmpl/academics/elder/llm/internal-1-sub.aspx?id=602&ekmense1=78e6e020_160_0_602_4) (accessed Sept. 19, 2010) (describing the Ethics and the Practice of Elder Law course).

7. I have also found a greater level of student engagement with the material when teaching ethics programs in a Continuing Learning Education (CLE) format.

8. Green, *supra* n. 4, at 387.

by using only one substantive area of law, the professor can save time by not having to explain the context for each new issue.<sup>9</sup>

All of the Model Rules that are taught in a basic course on professional responsibility can be taught using the issues that occur in the practice of Elder Law. For example, conflicts are an important area of ethics law from both a practical perspective and from the perspective of the Multistate Professional Responsibility Examination (MPRE). Conflicts are particularly relevant in an Elder Law context. Students can be taught to apply the Model Rules regarding conflict for concurrent clients, former clients, and prospective clients through the use of the varied factual scenarios that arise in the Elder Law context.<sup>10</sup>

In the Stetson University College of Law (Stetson Law) LL.M courses, we review the concurrent conflict of interest rule by discussing a video of an attorney meeting with a married couple who want to hire the lawyer to draft their wills. As the conversation proceeds, the wife leaves the room momentarily. In her absence, the husband shares that he has a child by another woman for whom he wants to provide without his wife knowing. Using this factual hypothetical, the students discuss not only the issue with the continued concurrent representation but also the Model Rules regarding confidentiality and the issues with continuing to represent the husband alone.

### *III. EXPLORING THE UNIQUE ROLE OF THE ELDER LAW ATTORNEY*

In addition to teaching the Model Rules and the law surrounding ethical issues, an ethics course needs to teach the important roles played by attorneys. Students must understand the need to define who they are as attorneys and how those definitions will affect the discretionary decisions they will be called to make every day in practice. This understanding is not just the knowledge of the different roles, but it is also the need to explore the roles that students will undertake as attorneys.

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9. *Id.*

10. For a chart indicating factual scenarios in the Elder Law area that can be used to teach each of the Model Rules, see *infra* app.

A great resource to start this discussion is Professor Nathan Crystal's work on the philosophy of lawyering.<sup>11</sup> In his work, Professor Crystal encourages lawyers to think intentionally about and develop a philosophy of lawyering that can guide their discretionary decisionmaking throughout their careers.<sup>12</sup> He discusses three parts of a lawyer's philosophy: the personal, which involves the lawyer evaluating and determining his or her work and life balance; the practice, which requires the lawyer to determine what role he or she plays when representing clients; and finally, the professional, which includes the lawyer's belief about the role he or she should play in the legal profession as a whole.<sup>13</sup> In an Elder Law and Ethics course, it is vital to discuss all three, but it is paramount to discuss what role the Elder Law attorney should play in advocating for his or her client. Professor Crystal discusses three philosophies of practice.<sup>14</sup> Under the first philosophy, the client-centered advocate sees his or her role as representing what the client wants within the law.<sup>15</sup> Sometimes called the neutral partisan, this role sees the attorney taking his or her own personal morals out of the equation.<sup>16</sup> Under the second philosophy, the moral advocate believes his or her actions in representing the client must reflect his or her own moral compass.<sup>17</sup> Finally, under the third philosophy, the social-value-based advocate sees his or her role in representing clients as for the good of society as a whole.<sup>18</sup> Under the third philosophy, the advocate makes discretionary decisions for the good of his or her client and also with an eye for correcting or affecting public change.<sup>19</sup>

In teaching an ethics course in Elder Law, the professor should introduce these different roles and encourage students to begin to define for themselves their own philosophy. It is important to encourage students to talk with practitioners about these philosophies to understand how lawyers make discretionary deci-

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11. Nathan M. Crystal, *Using the Concept of "A Philosophy of Lawyering" in Teaching Professional Responsibility*, 51 St. Louis U. L.J. 1235 (2007).

12. *Id.* at 1235.

13. *Id.* at 1235–1236.

14. Nathan M. Crystal, *Developing a Philosophy of Lawyering*, 14 Notre Dame J.L. Ethics & Pub. Policy 75, 84 (2000).

15. *Id.* at 86.

16. *Id.*

17. *Id.* at 89.

18. *Id.* at 90–92.

19. *Id.*

sions each day—decisions ranging from whether to represent a client to whether to agree to a continuance for opposing counsel. The Elder Law attorney must wear many different hats with different people. Because an Elder Law attorney, many times, interacts with individuals other than just the client, it is important that the Elder Law lawyer understands the role to be played in each of these exchanges.

Additionally, the Elder Law practitioner must guard against certain roles that are harmful to the client. In teaching Elder Law ethics, the professor should explore with students the dangers of stepping into the role of paternalism and stereotyping. Because of the actual vulnerability and sometimes-perceived vulnerability of the elderly client population, a lawyer can at times begin to believe that he or she knows what is right for the client, preventing the competent client from making decisions with which the attorney may not agree.<sup>20</sup> Students must be exposed to the difficult issues and conflicts that occur when clients are making decisions that are not in their best interest but are within their right to make. This exposure is especially important because sometimes in our society elderly people are viewed as less capable merely because of their age.<sup>21</sup> Lawyers must always guard against snap judgments and stereotyping, and an Ethics and Elder Law class is a great vehicle to discuss these temptations.

Additionally, the role of the Elder Law attorney sometimes requires the attorney to make evaluations of the client's mental capacity. It is essential for the professor to introduce the issues—ethical and otherwise—that arise when dealing with clients who may have diminished capacity. But students must understand the limitations of the lawyer in making capacity evaluations.<sup>22</sup> Elder Law attorneys must understand that they have limited education, training, and skills in competency evaluation and must attempt to

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20. See Model R. Prof. Conduct 1.2(a) (ABA 2010) (prescribing the attorney to “abide by a client’s decisions concerning the objectives of representation”).

21. See generally Lawrence A. Frolik & Alison P. Barnes, *An Aging Population: A Challenge to the Law*, 42 *Hastings L.J.* 683, 701 (1991) (discussing American society’s common mischaracterization of the elderly).

22. ABA Commn. on Law and Aging and the Am. Psychiatric Assn., *Assessment of Older Adults with Diminished Capacity: A Handbook for Lawyers* (ABA Commn. on L. and Aging, Am. Psychol. Assn. 2005); A. Frank Johns, *What’s an Elder Law Attorney to Do? Clients with Diminished Capacity—Applying the ABA Model Rules of Professional Responsibility*, 15 *Experience* 14 (2005); Stuart D. Zimring, *Ethical Issues in Representing Seniors, Persons with Disabilities and Their Families*, 4 *NAELA J.* 125, 134 (2008).

consult with professional diagnosticians in the right circumstances.<sup>23</sup> Students must understand the need to seek help from nonlegal professionals to answer some of the questions they may encounter as lawyers. In exploring the different roles that attorneys should play, students begin to grasp the amazing service they can provide to their clients and also understand the dangers of overstepping their roles as attorneys.

#### IV. IDENTIFYING THE QUESTIONS AND CONCERNS

Finally, an Elder Law Ethics class needs to raise the questions that must be recognized, asked, and hopefully answered while in practice. Although the practice of Elder Law does not encapsulate thorny ethical issues exclusively, because of the nature of the practice, Elder Law attorneys are faced with complex ethical issues complicated by the client's health, economic situation, and family dynamics.

##### A. Who Is the Client?

In most cases outside the area of Elder Law, the question of, "Who is the client?" is answered easily, and it rarely needs to be asked at all. Conversely, in an Elder Law practice, this question arises in many cases and must be answered early in the representation. In numerous situations, the initial contact is made by a family member or caregiver for the elder individual who provides transportation and accompanies the elder client to the appointment, and in the more extreme situation, the caregiver is present during the interview.<sup>24</sup> The elder client may prefer or insist on the presence of the third party.<sup>25</sup> This insistence frequently occurs

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23. See Model R. Prof. Conduct 1.14 cmt. 6 (according to the Model Rules, "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.").

24. See ABA Commn. on Law & Aging, *Why Am I Left in the Waiting Room? Understanding the Four C's of Elder Law Ethics*, <http://www.abanet.org/aging/publications/pdfs/elderlawethics.pdf> (prepared November 2003) (providing a helpful resource on how to conduct an interview with a client who may have diminished capacity).

25. This situation raises issues of confidentiality, conflicts, and undue influence. *Id.*

when the elder client is frail or suffers from some degree of diminished capacity.

In teaching Ethics and Elder Law, students must focus on the fact that asking “*who is the client?*” is the first issue that must be addressed before the other ethical issues can be undertaken. Client identification is the first issue around which each subsequent topic must revolve. Without knowing who the client is, the issues of confidentiality, conflicts, and capacity cannot be discussed or analyzed. Again using hypothetical fact situations, including video reenactments of client interviews, students learn how to determine who the client is and understand the importance of the question. This topic can also allow students to learn the Model Rules governing the creation of an “accidental client”<sup>26</sup> or the impact of forming relationships with prospective clients that will eliminate the attorney’s ability to represent another client.<sup>27</sup>

### B. How Do I Deal with the Family?

In the Elder Law context, students must also be introduced to the important issues surrounding the attorney’s interaction with nonclient family members. The issues that arise around nonclients include: confidentiality,<sup>28</sup> the attorney-client privilege,<sup>29</sup> independent judgment,<sup>30</sup> dealing with unrepresented persons,<sup>31</sup> and conflicts of interest.<sup>32</sup> Students must understand the rules that surround these issues and the requirements that the attorney must follow. More importantly, however, they must understand the family dynamics and human elements of Elder Law that may push attorneys to think their actions are correct when in fact they violate the Model Rules. The human element of the practice of law is an essential part of a law student’s training

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26. See generally Model R. Prof. Conduct 1.18 (discussing the lawyer’s responsibilities to the prospective client); Susan R. Martyn, *Accidental Clients*, 33 Hofstra L. Rev. 913, 916–953 (2005) (providing a list of the most common “accidental clients,” including, among others, court-appointed clients and prospective clients).

27. Model R. Prof. Conduct 1.7, 1.9.

28. *Id.* at R. 1.6.

29. *Id.*

30. *Id.* at R. 1.7 cmt. 1.

31. *Id.* at R. 4.3.

32. *Id.* at R. 1.7, 1.9, 1.18.

and the Elder Law context is a great medium to explore those issues.<sup>33</sup>

I use a hypothetical involving a daughter who comes to the attorney to obtain healthcare surrogate paperwork, allegedly at the behest of her mother, the client. Her mother is in the hospital, and the daughter tells the attorney that her mother is worried she has not yet signed the documents. The question arises whether the attorney can or should give the paperwork to the daughter to take to the hospital. The hypothetical raises several questions regarding confidential information and dealing with nonclients. Students must learn to recognize the issues that surround interacting with children of clients but also the issues that surround the interrelationships between nonclients and clients.

### C. Is the Client Suffering from Diminished Capacity?

The issues of diminished capacity plague Elder Law, and students must understand the chief ethical concerns that are raised when dealing with clients with diminished capacity. Model Rule 1.14 is the starting point for discussing the complex issues that surround this area of Elder Law.<sup>34</sup> Students must be made aware, however, of all the other Model Rules and concerns that are invoked when the client is suffering from diminished capacity or

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33. See Kristin B. Gerdy, *Clients, Empathy, and Compassion: Introducing First-Year Students to the "Heart" of Lawyering*, 87 Neb. L. Rev. 1, 12 (discussing the human compassion necessary for effective lawyering).

34. Model Rule 1.14 provides the following:

- (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.

is actually incompetent to proceed.<sup>35</sup> Students must learn to ask the right questions when faced with the circumstance of a client who seems to have a problem focusing on the case or matter at hand. For example, students must recognize the questions used to determine if, in fact, the client has diminished capacity or some other physical or emotional circumstance that temporarily inhibits the client's mental abilities. Students also must realize that the substantive law requires a certain level of capacity to proceed, and different tasks may require different levels of capacity.

As attorneys, the students will have to decide whether to let a client sign a document if they have concerns about the client's level of capacity. Other questions students must learn to consider include the following: How diminished is the client's capacity? Is the client competent to proceed? Can I assist in helping the client understand the matter or maximize his or her capacity? Do I need to seek a protective order or remedy? What role can I play after I have sought a protective action? How do I communicate with the client?

An Ethics and Elder Law course can spend a great deal of time in the diminished capacity area and cover a lot of important topics for the students that can be applied in other areas of the law. Diminished capacity issues also challenge attorneys to consider what role to assume and how to interact with the diminished individual's family members. Teaching about dealing with a diminished-capacity client is also a wonderful vehicle for talking about service to clients and the willingness to look for nonlegal solutions that will help the client.

The professor can use ethics in an Elder Law course to encourage students to become counselors, regardless of their eventual practice area, and to be willing to explore solutions for their clients' problems that are beyond the obvious legal solutions. Students hopefully will come away with an appreciation for the lawyers who devote their time to finding solutions for their clients, not those who are merely paid by their clients.

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35. Others Model Rules that are implicated when dealing with a diminished-capacity client are Model R. Prof. Conduct 1.1, 1.4, 1.6, 1.7, 1.16, 2.1.

#### D. Should I Talk to Clients about the Emotional, Moral, and Social Aspects of Their Conduct?

Elder Law presents significant issues that are nonlegal. Because of the complexity of the cases, which many times entail very emotional issues and social implications, Elder Law is an exciting area in which to practice and teach. Elder Law also affords a wonderful opportunity to teach students about the delicate balance a lawyer strikes when he or she suggests or talks about the emotional and social impact of the client's decisions. Model Rule 2.1 clearly permits attorneys to discuss all aspects of a matter with the client including the "other considerations such as moral, economic, social[,] and political factors[] that may be relevant to the client's situation."<sup>36</sup> Although the Model Rule permits the attorney to consider and discuss with the client other considerations, when an attorney should do so is a matter of the attorney's philosophy of lawyering and the attorney's definition of his or her role as an attorney. The classroom is fertile ground for a discussion on the role of the Elder Law attorney in moral, economic, social, and political discussions.

#### V. METHODS OF TEACHING ETHICS IN AN ELDER LAW PRACTICE

In teaching any ethics class, the more involved and engaged the students are in the class, the better. I do not believe that ethics can be taught through lecture. Indeed, because the Model Rules cannot be taught as merely rules of construction, students must continue to ask themselves what they would do. The best way to get students involved in the material is to place them in a situation in which they play the role of the attorney.

The use of video depictions is a great way to engage this generation of students with the materials. Because this generation has been raised on television, using a video is a natural way to actively involve students. At Stetson Law, we created a series of

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36. Model R. Prof. Conduct 2.1 provides the following:

In representing a client, a lawyer shall exercise independent professional judgment and render candid advice. In rendering advice, a 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.

videos that depict a variety of ethical dilemmas faced by Elder Law attorneys. Videos are easy to make and very helpful in teaching ethics and the practice of Elder Law. I like to use a responder (or polling) system that allows the students to react to the video by posing multiple-choice questions that can be answered and then discussed. By requiring the students to commit to a course of conduct, they are more invested in the conversation. They also enjoy debating whether their answers are “correct.” Of course, many times there are no “correct” answers found in the Model Rules, so a discussion allows the instructor to engage the students in the issue of discretionary decisionmaking and how the attorney’s philosophy of lawyering can affect what discretionary decisions the attorney makes.

Role playing is another way to engage the students in the ethics of an Elder Law course. I like to have the students take on different roles in a hypothetical situation. For example, I may ask students to represent a lawyer who has been accused of misconduct by a state bar association. This allows students to understand the difference between looking at the Model Rules proactively or reactively. I want students to understand that the Model Rules serve two purposes.

First, the Model Rules can be used by a state bar association or other disciplinary agencies to define misconduct and to base enforcement on the language of the Model Rules. I call this look at the Model Rules “reactive.” The attorney is reacting to conduct by another attorney who is accused of an ethics violation and is attempting to defend the misconduct by interpreting the strict language of the Model Rules. By asking students to represent the attorney accused of misconduct, we consider statutory construction principles and how the Model Rules should be applied in a hearing. Students sometimes are also assigned the role of a state bar association’s counsel who is prosecuting the misconduct or a judge making the decision. The students are required not only to identify the Model Rules that have been violated, but also to analyze *how* those Model Rules have been violated.

Second, the Model Rules can be looked at “proactively.” That is, when attorneys consider their own future behavior, they may look to the Model Rules for guidance and direction. When attorneys look at the Model Rules in this way, they are much more

likely to view the Model Rules as aspirational<sup>37</sup> and do not attempt to read the words too narrowly, trying to read them more expansively. Professors should ask the students to consider what the students would do in certain situations based on the Model Rules. One idea that we are exploring at Stetson Law is attaching an Elder Law Ethics course to a skills course on interviewing and counseling.<sup>38</sup>

Finally, I think it is very important as part of an Ethics in Elder Law class for students to draft various work product. The drafting assignments may vary from semester to semester. In some semesters, the drafting assignment might involve drafting letters to clients that do the following: explain a conflict, serve as the notice in writing of the conflict, and serve as the clients' waiver. Drafting assignments require two skills on the part of the students. First, students need to understand the requirements of the writing under the applicable rule, and second, students must appreciate the skill required to write a letter that a layperson can read to understand the conflicts, the alternatives, and the risks of the representation. Conflict waivers are a great way to combine both of these skills and engage students in thinking about the importance of not using *legal terms* to explain *legal terms*.

In other semesters, the students write office policies that explain to the office staff what they must do in order to comply with the Model Rules.<sup>39</sup> Office policies about how to deal with

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37. Aspirational rules go beyond mandatory rules. See Ría A. Tabacco, Student Author, *Defensible Ethics: A Proposal to Revise the ABA Model Rules For Criminal Defense Lawyer-Authors*, 83 N.Y.U. L. Rev. 568, 575 n. 38 (2008) (discussing the aspirational character of Model Rule 1.8(d)).

38. Stetson Law has already experimented with combining a general professional responsibility course with a skills course on interviewing and counseling. *Stetson Course Catalog*, *supra* n. 6.

39. Model Rule 5.3 deals with the obligation of an attorney to ensure that his or her office staff members do not violate the Rules of Professional Conduct. It states:

With respect to a non-lawyer employed or retained by or associated with a lawyer:

- (a) a partner, and a lawyer who individually or together with other lawyers possesses comparable managerial authority in a law firm shall make reasonable efforts to ensure that the firm has in effect measures giving reasonable assurance that the person's conduct is compatible with the professional obligations of the lawyer;
- (b) a lawyer having direct supervisory authority over the non-lawyer shall make reasonable efforts to ensure that the person's conduct is compatible with the professional obligations of the lawyer; and
- (c) a lawyer shall be responsible for conduct of such a person that would be a violation of the Rules of Professional Conduct if engaged in by a lawyer if:

nonclients who accompany the client to the office are a great way to understand the issues involved in nonclient relationships in the Elder Law context. Again, it requires students to explain the reason for the policy and the policy itself in a way that nonlawyers can understand.

## VI. CONCLUSION

Teaching ethics in an Elder Law context is a challenging and exciting way to teach students the Model Rules. Doing so affords Students the opportunity to explore the roles of the Elder Law attorney and the need to recognize the questions and concerns in this area of law. Students take away a greater appreciation of both subjects, which demonstrates how well these areas of the law complement each other.

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- (1) the lawyer orders or, with the knowledge of the specific conduct, ratifies the conduct involved; or
  - (2) the lawyer is a partner or has comparable managerial authority in the law firm in which the person is employed, or has direct supervisory authority over the person, and knows of the conduct at a time when its consequences can be avoided or mitigated but fails to take reasonable remedial action.

Model R. Prof. Conduct 5.3.



# APPENDIX

## SAMPLE COMPARATIVE CHART FOR TEACHING ELDER LAW ETHICS

<b><u>Rule of Professional Conduct</u></b>	<b><u>Elder Law Context</u></b> <i>(Note: The following subjects are suggested examples of hypotheticals only and they are not an exclusive list of possible hypotheticals.)</i>
<b>Rule 1.0:</b> Terminology	Throughout semester when term is used in applicable rule
<b>Rule 1.1:</b> Competence	Throughout semester to talk about the special skills and knowledge needed when representing elderly clients
<b>Rule 1.2:</b> Scope of Representation and Allocation of Authority between Client and Lawyer	Client's wishes in disposing of wealth by will (client wishes to give entire estate to his or her dog)
<b>Rule 1.3:</b> Diligence	Client needs a will today because of surgery tomorrow
<b>Rule 1.4:</b> Communication	Limiting communications in some situations based on the effect on the emotional well-being of the elderly client
<b>Rule 1.5:</b> Fees	Fees
<b>Rule 1.6:</b> Confidentiality of Information	Presence of family members in interview room
<b>Rule 1.7:</b> Conflict of Interest: Current Clients	Husband and wife seeking wills
<b>Rule 1.8:</b> Conflict of Interest: Current Clients; Specific Rules	Child paying bill using parents' money in a case in which the child is seeking a petition for guardianship
<b>Rule 1.9:</b> Duties to Former Clients	Child requesting attorney to seek a guardianship for a former client
<b>Rule 1.10:</b> Imputation of Conflicts	Whether someone else in the firm

of Interest: General Rule	can handle the guardianship against a former client?
<b>Rule 1.11:</b> Special Conflicts of Interest for Former and Current Government Officers and Employees	Prosecutor who handled elder abuse cases for state moving into a private Elder Law firm
<b>Rule 1.12:</b> Former Judge, Arbitrator, Mediator, or Other Third-Party Neutral	Part-time probate judges acting simultaneously as lawyers
<b>Rule 1.13:</b> Organization as Client	Can the family be the client?
<b>Rule 1.14:</b> Client with Diminished Capacity	Dealing with elderly clients with diminished capacity
<b>Rule 1.15:</b> Safekeeping Property	Trust accounting regarding special needs trusts
<b>Rule 1.16:</b> Declining or Terminating Representation	Need to withdraw when husband wants to keep secrets from wife in a joint-representation situation
<b>Rule 1.17:</b> Sale of Law Practice	Sale of law practice
<b>Rule 1.18:</b> Duties to Prospective Client	Conversation with child who is seeking Medicaid planning involving his parents' assets
<b>Rule 2.1:</b> Advisor	Discussing the implications of Medicaid planning
<b>Rule 2.3:</b> Evaluation for Use by Third Persons	Family business succession issues—evaluating the business
<b>Rule 2.4:</b> Lawyer Serving as Third-Party Neutral	Guardianship mediation
<b>Rule 3.1:</b> Meritorious Claims and Contentions	Guardianship petitions—investigation necessary before filing
<b>Rule 3.2:</b> Expediting Litigation	Delay of trial in the hope that an elderly witness will become unavailable
<b>Rule 3.3:</b> Candor toward the Tribunal	Prosecuting elder abuse cases; defending elderly clients in criminal and civil cases
<b>Rule 3.4:</b> Fairness to Opposing Party and Counsel	Issues involving assets in probate cases
<b>Rule 3.5:</b> Impartiality and Decorum of the Tribunal	Litigating Elder Law cases

<b>Rule 3.6:</b> Trial Publicity	End-of-life cases
<b>Rule 3.7:</b> Lawyer as Witness	Waiver of attorney-client privilege when third party is present, leading to attorney as a witness
<b>Rule 3.8:</b> Special Responsibilities of a Prosecutor	Elder abuse, fraud, and prosecutor's role in pursuing cases
<b>Rule 3.9:</b> Advocate in Nonadjudicative Proceedings	Social Security hearings
<b>Rule 4.1:</b> Truthfulness in Statements to Others	Negotiations in guardianship cases
<b>Rule 4.2:</b> Communication with Person Represented by Counsel	Creating a special needs trust in which the beneficiary is represented by another attorney
<b>Rule 4.3:</b> Dealing with Unrepresented Person	Dealing with family members who are not clients
<b>Rule 4.4:</b> Respect for Rights of Third Persons	Representing a client who is acting as a fiduciary
<b>Rule 5.1:</b> Responsibilities of Partners, Managers, and Supervisory Lawyers <b>Rule 5.2:</b> Responsibilities of a Subordinate Lawyer <b>Rule 5.3:</b> Responsibilities Regarding Nonlawyer Assistants <b>Rule 5.6:</b> Restrictions on Right to Practice	Office management; office policy drafting
<b>Rule 5.4:</b> Professional Independence of a Lawyer	Dealing with nonclient family members
<b>Rule 5.5:</b> Unauthorized Practice of Law; Multijurisdictional Practice of Law	Wills online
<b>Rule 6.1:</b> Voluntary Pro Bono Publico Service <b>Rule 6.2:</b> Accepting Appointments <b>Rule 6.3:</b> Membership in Legal Services Organization <b>Rule 6.4:</b> Law Reform Activities Affecting Client Interests <b>Rule 6.5:</b> Nonprofit and Court-Annexed Limited Legal Services	Importance of pro bono work in serving the elderly population; NAELA Aspirational Standards I 1-3

Programs	
<p><b>Rule 7.1:</b> Communication Concerning a Lawyer's Services</p> <p><b>Rule 7.2:</b> Advertising</p> <p><b>Rule 7.3:</b> Direct Contact with Prospective Clients</p> <p><b>Rule 7.4:</b> Communication of Fields of Practice and Specialization</p> <p><b>Rule 7.5:</b> Firm Names and Letterhead</p> <p><b>Rule 7.6:</b> Political Contributions to Obtain Legal Engagements or Appointments by Judges</p>	<p>Advertising to a vulnerable population; NAELA Aspirational Standards G 1-9</p>
<p><b>Rule 8.1:</b> Bar Admission and Disciplinary Matters</p> <p><b>Rule 8.2:</b> Judicial and Legal Officials</p> <p><b>Rule 8.3:</b> Reporting Professional Misconduct</p> <p><b>Rule 8.4:</b> Misconduct</p> <p><b>Rule 8.5:</b> Disciplinary Authority; Choice of Law</p>	<p>Introduction to course and the regulation by the bar; various laws regulating lawyer conduct</p>