

There will be times when we conclude that a client does not have the legal capacity to complete a requested document, such as a power of attorney or a will. If that happens, we will not be able to assist with that particular task. We may, however, be able to explore other options.

If a client is unable to make decisions due to diminished capacity, and is at risk of serious physical, financial, or other harm, the ethics rules require us to consider actions to protect that client. This may include consulting with others to assess the client's situation or taking steps to preserve a legal or personal interest of the client.

As we decide what steps to take, we will be guided by our client's wishes and values and best interests, and we will do our best to intrude as little as possible on his or her right to make decisions.

We don't want our clients' choices, and the documents they sign, to be undone one day in the future because we allowed family members to be too involved in the matter.

That's probably the kind of court case you, too, would rather avoid.

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The Ethical Rules Make Practical Sense, Too.

Being clear about whom we represent, meeting alone with the client, respecting confidentiality, and assessing client capacity protect the family, as well as the client.

For example, you've probably heard of a will or power of attorney being challenged. It is not uncommon to find cases claiming that family members or others had "undue influence" over the older person, and that they benefited unjustly from decisions that were made.

Family and friends who maintain some distance from the legal counseling and document signings are less likely to be accused of undue influence.

Why am I left in the waiting room?

Understanding the Four C's of Elder Law Ethics

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Your parent or other relative is getting legal advice

Shouldn't you be included?

After all, you might be very involved in helping him or her with important matters. Perhaps you even arranged this appointment.

There are several reasons why lawyers need to meet with your family member or friend alone for at least part of the case evaluation process, so please don't be alarmed or offended.

Family involvement is very important, but to understand the way legal services are provided to elder or disabled clients, it may help first to understand the "Four C's" of elder law ethics that lawyers are required to follow.

We are happy to discuss these ethical guidelines or any other aspect of our legal services. Above all, we seek to promote the dignity, self-determination, and quality of life of your loved one.

Client Identification

First, all lawyers have an ethical obligation to make it very clear who their client is. The client is the person whose interests are most at stake in the legal planning or legal problem. The client is the one—the only one—to whom the lawyer has professional duties of competence, diligence, loyalty, and confidentiality. This is especially important in elder law, because family members may be very involved in the legal concerns of the older person, and may even have a stake in the outcome.

It is possible, in some circumstances, for more than one family member to be clients of the same lawyer. This is common with married couples. However, in most of our cases, we will identify the elder or disabled person as our client. We will do this regardless of who is paying the bill.

Conflicts of Interest

Second, lawyers have an ethical obligation to avoid conflicts of interest. This means that, in most situations, a lawyer may only represent one individual. For example, when legal planning involves property, such as a family home, in which several people have an interest, these interests are actually or potentially conflicting.

Sometimes joint representation is possible, even with potential conflicts of interest, but it is more likely that we will be representing only the older person whose interests are at stake. We find that we do the best job for the older person by representing only him or her. This is especially true when the older person wants to discuss a power of attorney, a will, or planning for long-term care.

Confidentiality

Third, lawyers have an obligation to keep information and communications between our client and us confidential. That means that we cannot share client information with other family members without the client's approval. Some clients want all information shared and family members involved in discussions. Some merely want family members to be given general updates. Some want complete confidentiality. It differs from person to person.

In all cases, we strive to keep our clients—and whomever they choose to involve—fully informed of the issues, options, consequences, and costs relevant to their concerns, and to be responsive to their goals and objectives.

Competency

Fourth, lawyers have special ethical responsibilities in working with clients whose capacity for making decisions may be diminished. Lawyers must treat the impaired person with the same attention and respect to which every client is entitled. This means meeting privately with the client and giving him or her enough time to explain what he or she wants. Meeting in private with the client helps the lawyer ensure that the client understands the issue and is making his or her own choices.

"But Mom's not going to be able to explain (or understand, or remember) everything!" you might say. We find that most people who come here are able to tell us what the problem is and how we can help. Sometimes we'll need to ask relatives for details such as addresses or dates or phone numbers, but even people in the early stages of Alzheimer's disease can usually communicate well enough to give us direction.

Assessing a client's capacity to make decisions is part of our getting to know the client. While most clients can explain a problem and what it is they want, there will be some clients who cannot. Speaking privately allows us to find this out. When family members answer all the questions, it makes it difficult for us to determine our client's level of understanding.