Chapter 4

Ethics and Elders: Confidentiality and Conflicts

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I. WORKING EFFECTIVELY WITH ELDER LAW CLIENTS

Working effectively with elder law clients is an important skill for any elder law attorney. At a bare minimum, the attorney should comply with the Oregon Rules of Professional Conduct.

A. Be Competent

Competence means legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation.

> "Rule 1.1 Competence
>
> "A lawyer shall provide competent representation to a client. Competent representation requires the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation."

1. Skill and Knowledge. Attorneys should be careful to only accept those cases where the attorney has the competence to act. If any attorney lacks competence, then the attorney should seek assistance from competent attorneys and other sources in order to learn the matter.

a. Intellectual Skill and Knowledge. It is important to be competent with regard to what the law is and what the law requires. Intellectual skill and knowledge regarding the law is only half of the challenge to provide competent representation of a client.

b. Practical Skill and Knowledge. Many situations call for practical experience, an understanding of the day to day consequences of choices, and the impact those choices have on a client's life. It is difficult to have many of the answers in this area without time and experience. Lawyers have to be able to recognize and explore issues that may be different from what a client's expectations are.

2. Thoroughness and Preparation. If an attorney is too busy to be thorough or the attorney does not have the patience and time to properly prepare to help a client, the attorney should not represent the client.

B. Abide by Your Client's Decisions and Consult with Your Client

A lawyer is required to abide by a client's decisions concerning the objectives of representation and to consult with the client about how the client wants to accomplish those objectives.

> **"Rule 1.2 Scope of Representation and Allocation of Authority Between Client and Lawyer**
>
> "(a) Subject to paragraphs (b) and (c), 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.

"(b) A lawyer may limit the scope of the representation if the limitation is reasonable under the circumstances and the client gives informed consent.

"(c) A lawyer shall not counsel a client to engage, or assist a client, in conduct that the lawyer knows is illegal or fraudulent, but a lawyer may discuss the legal consequences of any proposed course of conduct with a client and may counsel or assist a client to make a good faith effort to determine the validity, scope, meaning or application of the law."

1. **Communicate in a Manner in which the Client Can Understand the Basics.** A lawyer should attempt to explain the issues in a manner which the client can understand the choices that a client has. Sometimes this means simplifying language or vocabulary, drawing pictures, outlining options with pros and cons in a column format, or giving the client examples which include real life scenarios are helpful. Try to explain things different ways and check in with the client to determine whether the client understood enough to explain it in their own words. Some clients may not be able to understand the basics. The goal is to attempt to provide the best possible explanation for the particular client. Each client will be different.

2. **Abide by the Client's Decisions.** Attorneys cannot substitute their own judgment for the judgment of the client.

3. **Recognizing and Avoiding Undue Influence.** Many clients have difficulty making decisions. Often clients need input from others whom they trust. It is a fine balance to allow the natural seeking of input from others to help a client make a decision. The use of ordinary influence from friends and family members is not prohibited, but you have to be able to recognize when ordinary or culturally appropriate influence becomes undue.

The focus on undue influence is the behavior of the influencer. Undue influence discussed in the terms of the testator's freedom of will are wrong because they invite consideration in terms of coercion or duress. The emphasis in undue influence cases is actually on the unfairness of the advantage which is reaped as a result of wrongful conduct by the influencer. The end accomplished is what determines the character of the influence. If the purpose of the influencer is self-motivated and what reasonable men consider improper, it is undue. The amount of concern about the motive of the influencer varies with who the infuencer is and what the influencer receives. For example, if the influencer is the testator's spouse of 50 years with children all of the same marriage, the amount of concern about influence is limited. If the influencer is the testator's care giver who has worked for him for less than a year, then the level of concern is greater.

Undue influence does not negate the consent of the donor. The challenge is abiding by client's decisions while at the same time protecting the client or the client's estate plan.

It is important for attorneys to establish office and practice procedures to prevent or reduce the opportunity for wrongful conduct by an influencer. It important because it may help prevent elder abuse or help protect the integrity of the client's decisions. It is also helpful to prevent a malpractice claim against the drafting attorney or an elder abuse bystander liability claim against the drafting attorney. Good practice procedures include:

- Respect and protect attorney client privilege.
- Communicate directly with your client.
- Remove the opportunity for an influencer to act.
- Ask clients direct questions about changes to dispositive plans.
- Engage in detailed, contemporary documentation of the file.
- Refuse to do the work if the client appears to be responding to the inappropriate influence of another.
- Meet with your client alone.
- Consider meeting your client at an independent location or with non-involved parties providing transportation.
- Meet with your client more than once.

C. Don't Neglect Your Client

It can be challenging to work with clients. The client's expectations and ability to predict what is reasonable may be impaired. The attorney may be the first attorney the client has ever worked with and the client is only used to TV role modeling. Set good boundaries at the beginning of the representation. Follow the boundaries that you establish, even if the client has difficulty doing so.

"**Rule 1.3 Diligence**

"A lawyer shall not neglect a legal matter entrusted to the lawyer."

D. Communicate with the Client

"**Rule 1.4 Communication**

"(a) A lawyer shall keep a client reasonably informed about the status of a matter and promptly comply with reasonable requests for information.

"(b) A lawyer shall explain a matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation."

1. **Information.** Inform the client of the status promptly.

2. **Requests.** If a client makes requests, comply with reasonable requests. If a client's request is unreasonable, don't mislead a client and tell the client you are doing something you do not intend to do. It is important to be direct and honest with the client.

3. **Give the Client the Best Opportunity to Make an Informed Choice/** Rule 1.4(b) requires a lawyer to explain a matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation. Be careful to only take direction from your client. Try to ensure that the client is the party making the decision and to the extent that a decision is made, help the client recognize the consequences. It may be that the client cannot recall the choices or the options. The goal is to give the client the best opportunity to make those choices.

E. The Client with Diminished Capacity Rule

"**Rule 1.14 Client with Diminished Capacity**

"(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."

1. **Maintain a Normal Client-Lawyer Relationship as Far as Reasonably Possible.** At the commencement of the attorney client relationship, it is up to the attorney to inquire about and establish the ground rules and the nature of the representation. The attorney must consider how did the client become the client? Does the client have capacity to contract? Would it be appropriate for the court to appoint counsel or a special representative if it is an ORS 125 or ORS 130 matter.

2. **Clients at Risk of Substantial Harm.** If the client is at risk of substantial harm, a lawyer *may* take reasonable necessary protective action, including seeking the

appointment of a guardian and reveal confidences only to the extent reasonably necessary to protect the client's interests. Protective action is not limited to a protective proceeding. It could include other less intrusive actions that are the most appropriate to protect the client from the substantial harm.

F. Render Independent, Candid Advice

"Rule 2.1 Advisor

"In representing a client, a lawyer shall exercise independent professional judgement 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."

1. Independent Advice. Be careful to avoid inappropriate influence to color your opinion or advice. Make sure that your advice is tailored to the client and not to what other want for the client or your desire to have your bill paid.

2. Candid Advice. Often it is important to be direct. Avoid patronizing the client. Avoid putting the client in a position where the client is trying to please the attorney. Be honest and frank. Describing consequences in an overly optimist or pessimistic manner can set the client up to be disappointed or confused.

3. Understand the Practical Consequences to the Client. In order to give good legal advice, a lawyer may need to have knowledge and experience with family dynamics, financial issues and a practical understanding about what happens in circumstances similar to the client's situation. The ability to appreciate and explain the practical consequences of a particular course of action to a client is intertwined with the rule requiring an attorney to be competent. If a lawyer is unfamiliar with practical issues, the lawyer needs to take the same actions that the lawyer would need to take if the lawyer was unfamiliar with the law.

G. Take Positions That Are Reasonable and in Good Faith

"Rule 3.1 Meritorious Claims and Contentions

"In representing a client or the lawyer's own interests, a lawyer shall not knowingly bring or defend a proceeding, assert a position therein, delay a trial or take other action on behalf of a client, unless there is a basis in law and fact for doing so that is not frivolous, which includes a good faith argument for an extension, modification or reversal of existing law, except that a lawyer for the defendant in a criminal proceeding, or the respondent in a proceeding that could result in incarceration may, nevertheless so defend the proceeding as to require that every element of the case be established."

1. Balancing Obligations to the Client with the Realities of the Situation. Clearly, the lawyer must abide by the client's decisions and objectives. However, many times in the practice of elder law it is obvious that a client's capacity is so impaired that

the client cannot effectively make decisions or has objectives that are unrealistic. It is important that the lawyer advise the client that the objectives may be unreasonable and unattainable. It is equally important that after the lawyer gives the client this advice and the client enough information to understand the advice to the best of the client's ability, that the lawyer then represents what the client's position is in an honest and reasonable way with as little posturing as possible. Oftentimes, an attorney cannot obtain the exact result the client wants. However, the lawyer may advocate to achieve some of the client's underlying goals.

2. Courteous and Professional Conduct. In a case where there is a difficulty with the client's position due to their diminished capacity or lack of capacity, it is crucial for the attorney to remain absolutely courteous and respectful to the other parties or the other attorneys. Counsel can indicate that counsel is aware of the evidence and simply explain that the client has been made aware of the evidence and wishes to proceed in the manner requested by the client in compliance with Rule 1.2 discussed above

II. SPOUSES AND CONFLICTS

A. Spouses as Current Clients

1. General Facts. A couple is consulting with the attorney in his/her office. Both are competent. What are the ethics of representing both the husband and the wife. That leads to simple questions: Who is the client? Husband? Wife? Can both be clients?

Does it matter who made the appointment? Who speaks more? Who appears to know more about finances and the ways of the world?

Does it matter if the couple is in a first marriage? A second? Whether they have separate children?

Does it matter that they are registered domestic partners under ORS 106.300 *et seq.* rather than married?

No, it does not matter. What does matter and will be covered below is:

- The individuals' articulated choices.
- If no choice is articulated, the individuals' articulated perception
- Whether the interests are mutual or directly adverse as regulated by the Oregon Rules of Professional Conduct.

2. Easy Situation: Client Decides He/She Is Client. The client informs the attorney who he/she will represent. "I would like you to represent me and do X. My husband has another attorney. He is just here to support me." I.e, do not worry about joint representation.

a. Potential problem: avoid the "accidental client" or "putative client" problem.

> If a lawyer acts in a way that leads a person to reasonably believe that a lawyer-client relationship exists between them, and the person relies on this conduct, then the law will generally impose one, even without any express agreement or mutual consent. Section 14 of the *Restatement of the Law Governing Lawyers* confirms this principle, as do many cases." Pera, Lucian T., *The Ethics of Joint Representation*, ABA Journal of the Section of Litigation, Vol. 40, No. 1, Fall 2013, at p. 3.
>
> The existence of the relationship is fact-specific. *In re Robertson,* 290 Or 639, 648, 624 P2d 603 (1981) ("Inception, existence and termination of the relationship are often implied only from all of the facts."). *See Bohn v. Cody,* 199 Wash2d 357, 832 P2d 71 (1992). Oregon State Bar Formal Opinion No. 2005-146 (formerly 1996-146)

b. Solution: "Careful, thoughtful, and complete communication is the key to reducing the risk of becoming a lawyer by accident." Pera, Lucian T., *Id.*

c. Example of the "accidental client" in other context: Son of husband and wife hires attorney for estate planning and Medicaid assistance for wife' long term care expenses. Son signed retainer agreement. Attorney opens file and sees himself as representing husband, the healthy spouse, not representing wife. Attorney does not communicate this to son. Among other matters attorney files a petition for spousal support under ORS 108.110 on behalf of husband. Son becomes *guardian ad litem* of wife. The details are unclear but the OSB does note that in the support petition the attorney " had the duty to contend for something for on behalf of [husband] that he had a duty to oppose on behalf of [wife]." *Complaint as to the Conduct of BEF*, Case No. 05-195 (2006).

3. Tactical Representation. Can the attorney and one spouse identify/pick the client based on strategic considerations such as who is more competent or who will be the 'healthy/community spouse' in a Medicaid application?

4. Tough Situation: Joint Representation. "We would like you to help us with X." Does joint representation occur? When can the attorney represent both?

a. Yes, there can be joint representation. Occurs in estate planning, elderlaw, tax and in other areas such as employment law, personal injury actions, wrongful death, business entity formation, etc. See Buchanan, Alison P., *Joint Representation: Ethical Implications and Challenges*, California Bar Journal, August 2014. ACTEC Commentary on MRPC 1.7.

> "[28] Whether a conflict is consentable depends on the circumstances. For example, a lawyer may not represent multiple parties to a negotiation

whose interests are fundamentally antagonistic to each other, but common representation is permissible where the clients are generally aligned in interest even though there is some difference in interest among them. Thus, a lawyer may seek to establish or adjust a relationship between clients on an amicable and mutually advantageous basis; for example, in helping to organize a business in which two or more clients are entrepreneurs, working out the financial reorganization of an enterprise in which two or more clients have an interest or arranging a property distribution in settlement of an estate. The lawyer seeks to resolve potentially adverse interests by developing the parties' mutual interests. Otherwise, each party might have to obtain separate representation, with the possibility of incurring additional cost, complication or even litigation. Given these and other relevant factors, the clients may prefer that the lawyer act for all of them." ABA Model Rules Comment to Rule 1.7

"It is often appropriate for a lawyer to represent more than one member of the same family in connection with their estate plans, ... In some instances the clients may actually be better served by such a representation, which can result in more economical and better coordinated estate plans prepared by counsel who has a better overall understanding of all of the relevant family and property considerations. The fact that the estate planning goals of the clients are not entirely consistent does not necessarily preclude the lawyer from representing them: Advising related clients who have somewhat differing goals may be consistent with their interests and the lawyer's traditional role as the lawyer for the "family". Multiple representation is also generally appropriate because the interests of the clients in cooperation, including obtaining cost effective representation and achieving common objectives, often clearly predominate over their limited inconsistent interests. Recognition should be given to the fact that estate planning is fundamentally nonadversarial in nature and estate administration is usually nonadversarial." ACTEC Commentary on MRPC 1.7.

"The impermissibility of such representations is generally self-evident, but not always. See, e.g., *In re McKee,* 316 Or 114 (1993) (representing co-petitioning spouses in divorce); *In re Wittemyer*, 328 Or 148 (1999) (representing lender and borrower in same transaction); *In re Jeffery,* 321 OR 260 (1995) (representing co-defendants with differing interests in same criminal proceeding). Lawyers may not seek the clients' consent to conflicts of this type." Stevens, Sylvia, *Conflicts of Interest, Part I,* OSB Bulletin, October 2009.

b. What is gained by joint representation?

   i. Efficiency and cost.

   ii. The advantages of a cooperative endeavor.

iii. Perception of the attorney as facilitator.

c. What is compromised by joint representation?

i. Duty to maintain confidentiality. Rule 1.6

ii. Duty to avoid conflict of interest. Rule 1.7 and 1.9

iii. Duty to not take payment from someone other than client. Rule 1.8(f)

iv. Duty to communicate information to the client. Rule 1.4

v. Potential for malpractice. That is, the annulment of testamentary or other documents which impact the clients or beneficiaries. The theory is that the attorney exercised undue influence over one of the parties.

d. Can the attorney represent husband and wife as *separate clients*? Yes in some situations, per the ACTECT Commentaries, "some experienced estate planners regularly represent husbands and wives as separate clients. They also undertake to represent other related clients separately with respect to related matters. Such representations should only be undertaken with the informed consent of each client, confirmed in writing." ACTEC Commentary on MRPC 1.6 and 1.7. http://www.actec.org/public/Commentaries1.7.asp

Further, ACTEC even supposes that there may be a *tolerable conflict*. "A lawyer who is asked to represent multiple clients regarding related matters must consider at the outset whether the representation involves or may involve impermissible conflicts, including ones that affect the interests of third parties or the lawyer's own interests. The lawyer must also bear this concern in mind as the representation progresses: What was a tolerable conflict at the outset may develop into one that precludes the lawyer from continuing to represent one or more of the clients." *Id.*

e. Must the attorney always *discuss* the potential conflict with every husband and wife client?

No. The Florida Bar Board of Governors approved Advisory Opinion 95-4 in 1997. Various questions were addressed regarding joint representation of a husband and wife in an estate planning setting. The Opinion concludes that where at the outset the spouses share interrelated goals and interest, the attorney is not required to conduct a consultation reviewing the conflict of interest concerns and informed consent to joint representation. Russell, Hollis F., *Joint Representation of Spouses in Estate Planning: The Saga of Advisory Opinion 95-4*, The Florida Bar Journal, Vol. 72, No. 3, March 1998.

5. Rules.

a. Is there a joint representation rule? No, the issue is primarily governed by the conflict rule, Rule 1.7.

b. Oregon Conflict Rules. (See end of outline for ORPC 1.7, Conflict of Interest: Current Clients. Based on ABA Model Rule 1.7) This is a *summary*:

Rule 1.7 (a) addresses a current or actual conflict of interest. It 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. (Emphasis added.)

Rule 1.7(b) allows an attorney to represent a client after mutual consent in writing even if there is a current conflict of interest but not if there is an actual conflict of interest, 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 obligate the lawyer to contend for something on behalf of one client that the lawyer has a duty to oppose on behalf of another client;* and
>
> (4) each affected client gives *informed consent, confirmed in writing.* Rule 1.7 (b) (emphasis added).

Note: Rule 1.7(b)(3) prevents representation of both husband and wife, even with mutual consent, if prohibited by Rule 1.7(a).

6. Informed Consent

a. What is informed consent? See Rule 1.0(g).

> "Informed consent" denotes the agreement by a person to a proposed course of conduct after the lawyer has communicated *adequate information and explanation about the material risks* of and reasonably available *alternatives* to the proposed course of conduct. When informed consent is required by these Rules to be confirmed in *writing* or to be given in a writing signed by the

client, the lawyer shall give and the writing shall reflect a *recommendation that the client seek independent legal advice* to determine if consent should be given. (Emphasis added.)

b. Disclosure Letter for Informed Consent

i. The Oregon State Bar has several sample letters. Here is one.

Dear Husband and Wife:

This letter confirms that you have asked me to represent you jointly with respect to [describe]. It also sets forth potential conflicts of interest that may arise in the course of a joint representation.

Under the legal ethics rules, a law firm may not represent clients jointly if their interests conflict. Based on our discussions, it does not appear that your interests currently conflict. In this regard, you have agreed that [list any limits on the scope of our representation that eliminate possible areas of conflict between the joint clients].

With any joint representation, however, it is possible that your interests may come into conflict later in ways that we cannot predict now. If they do, it may prevent us from continuing to represent you in this matter. In that situation, you would each then need to incur the expense of retaining separate lawyers to represent you.

You should also consider the potential impact of joint representation on the attorney-client privilege. In joint representation, anything you tell us in confidence is subject to the attorney-client privilege as it relates to others. But, if litigation arises later between you, there would be no attorney-client privilege in that litigation concerning anything that you shared with us. Further, by agreeing to this joint representation, you are authorizing us to share with each of you anything that you tell us separately relating to your joint representation.

Please consider this situation and decide whether or not you wish to consent to my representation of both of you. Oregon law requires me to recommend that each of you consult with separate counsel in deciding whether or not your consent should be given. Whether or not you consult separate counsel is, however, up to you.

> If you have questions that you would like me to answer before you make a decision, please let me know. If, after such review as you believe appropriate, you decide to consent to my representation of both of you in spite of the limitations discussed in this letter, please sign and date the enclosed extra copy of this letter in the spaces provided and return it to me. Signed Attorney

From *The Ethical Oregon Lawyer,* available in BarBooks™, the OSB online library of legal resources. To access *The Ethical Oregon Lawyer,* from www.osbar.org, select Member Login, log into your account, click on Enter BarBooks. From the BarBooks™ Menu, choose Explore Books and select The Ethical Oregon Lawyer (2006 rev.)

ii. Shorter Letter for Informed Consent.

> Dear Husband and Wife:
>
> I want to summarize our discussion about the potential conflict of interest in representing both of you. While your interests are in harmony, I can represent both of you and advise about the advantages/disadvantages of situations. This is in contrast with the usual role of a lawyer as an advocate to advise one person of his/her specific best interests. You must take into account that currently or later you may disagree about such things as your death beneficiaries, ownership of marital assets or financial management. You may want to divorce or gift assets. In any of those events, if the result is harm to the other of you, I could not keep information that was shared confidential, or continue to represent either or both of you. In order for me to represent both of you know you must be willing to accept these possibilities.
>
> The rules that govern joint representation also require me to note that you are best served by consultation with another attorney about joint representation. If, after careful consideration, you agree with joint representation, each of you please send me an email stating your agreement. Thank you for your patience with this issue. Signed Attorney.

Also See: "Waiving Discipline Away: The effective use of disclosure and consent letters," *Oregon State Bar Bulletin* (June 2002). Updated courtesy of Peter R. Jarvis, Mark J. Fucile, and Bradley F. Tellam (2013).

c. Will an email response suffice for "written consent"? Probably yes.

> "Writing" or "written" denotes a tangible or electronic record of a communication or representation, including handwriting, typewriting, printing, photostatting, photography, audio or videorecording and electronic communications. A "signed" writing includes an electronic sound, symbol or process attached to or logically associated with a writing and executed or adopted by a person with the intent to sign the writing. Rule 1.0(q).

7. Making Joint Representation Work

a. Verbalize the critical conflict issues. Make notes in your file. If there is a potential for a current/actual conflict, a writing that meets the requirement of informed consent.

b. Example of joint representation that did not work. Oregon attorney and firm represented husband and wife, trusts and entities. After wife died, attorney continued to represent trusts, husband, children and entities. Differences arose among the parties but attorney continued representation. The OSB reprimanded attorney for (1) representing the various parties without informed consent, (2) disclosing information about some parties to others, and (3) failing to inform a client about the nature and seriousness of the concerns made by other clients. In re JRD, 25 DB Rptr 56 (2011).

B. Specific Fact Situations: Spouses as Current Clients

Can the attorney represent the husband and wife jointly in the following specific fact situations?

1. Family Law

a. Dissolution.

- No. Directly adverse situation. OSB Formal Opinion 2005-86.

b. Pre-Nuptial/Ante-Nuptial Agreement.

- No. Directly adverse.
- Why not with mutual consent?

c. Post-Nuptial Agreement ?

- Probably no if about dissolution, support or custody.
- But what if the post nuptial agreement is about death beneficiaries rather than dissolution, support or custody? Really an estate planning issue. Probably yes with mutual consent.

2. Estate Planning

a. Reciprocal plan; only marriage; same children.

- Yes. No need to discuss conflict if clients have interrelated goals and interests. OSB Formal Opinion 2005-86
- What if the husband articulates worries about his death and wife marrying the 'Cabana Boy' and disinheriting all the children?

b. Blended family; second marriage; different children but to all of them ("to all our kids in equal shares.")

- Yes. Probably should discuss potential conflict and get waiver.

c. Blended family. Differing beneficiaries.

- Yes. Should discuss potential conflict and get waiver.
- Some lawyers deem the matter directly adverse.

d. Contract to make the estate plan irrevocable per ORS 112.270. I.e., not change the second death beneficiaries.

- On the one hand seems like a contract would cover matters where the parties are directly adverse to one another. On the other hand, it is typically the memorialization of an agreement that was established verbally over the course of the relationship
- Unknown if directly adverse. If the attorney will represent both, it would be clearly with informed consent.

e. Wife calls after appointment and tells the attorney that she wants to discuss something *new*, in full confidence and without disclosure to Husband.

- If *no negative information has been given*, best to stop the conversation and refer the client to the discussion or disclosure form requiring all information be shared between husband and wife. See Beasley, Teresa M., *Joint Representation of Spouses*, ABA Journal, Vol. 19, No. 5, July/August 2002.
- If *negative information has been stated*, for example, the existence of an extra-marital relationship and need to change beneficiary of the estate plan, the attorney has conflicting ethical duties: (1) duty to wife to keep the information confidential and (2) duty to husband to communicate information which is about the representation. This is an "insoluble … ethical dilemma". Russell, Hollis F., *Id.*

- Florida Advisory Opinion 95-4 gives most importance to the duty of confidentiality to the confiding client, wife. Thus, the attorney should (1) withdraw from representing both clients and (2) should not disclose the negative information to the other spouse. The opinion notes that the withdrawal without explanation will probably alert the non-confiding client that there is new information. Russell, Hollis F., *Id.*

- There is another approach which gives the attorney more discretion. The ACTEC Commentary to MRPC 1.6 states that the attorney may weigh the relevance and significance of the information and take appropriate actions which includes taking no action if the information is "irrelevant" or "trivial" (example, a past act of infidelity), encouraging the confiding client to inform the non-confiding client, and withdrawing if the information "reflects serious adversity between the clients." Under no condition should the attorney reveal the information to the non-confiding client without approval. Also see, Chartoff, Laura L., *The Duty of Confidentiality When Representing Co-Clients in Estate Planning*, Oregon Estate Planning and Administration Newsletter, July 2002.

3. Long Term Care and Medicaid

a. General discussion of care costs and Medicaid.

- Yes, if there is a common goal of understanding placement options, care payment options, etc.

- Probably yes even if completely different views of placement/home care, spend down, public benefit eligibility, etc., so long as discussion were general and no step taken.

- At what point do points of difference mandate written consent or become an actual conflict?

b. Transfer (gift) of assets between spouses.

- Yes, if in agreement. Is disclosure and consent necessary?

- One spouse's rights are being significantly impacted.

- What is the difference between making gifts and selling/buying requiring separate counsel? No money changes hands. However, are not rights equally – if not more – impacted?

c. Transfer (gift) assets to third parties (adult children).

- Yes, if in agreement. Is disclosure and consent necessary?
- Here the rights of both husband and wife are being significantly but equally impacted.

d. Spousal Elective Share Waiver. For example, husband has stage four cancer and limited time; wife is frail and needs placement. Couple asks for husband to waive his statutory spousal elective share.

- Probably if mutually agreed upon and there is full disclosure and consent.

e. Court proceeding such as petition for spousal support under ORS 108.110.

- No. A court proceeding is the unequivocal example of the manifestation of adverse interests.

C. Spouses as Current and Former Client

1. General Facts. It has been years since the attorney represented both spouses. The file has been closed. They are still married. Wife alone returns to attorney for consultation. She is competent. Her husband may or may not be. Can the attorney represent wife?

2. When Is a File Closed? In estate planning and elder law, does a file really get closed?

a. Yes, a file is closed if attorney wrote clients stating so. However, does writing a letter informing the client(s) that the file is being moved to "inactive status" sufficient to close the file?

b. What if the attorney keeps all clients apprised of estate and tax developments via a periodic newsletter?

OSB Formal Ethics Opinion 2005-146 (formerly 1996-146) gives some guidance. It stands for the proposition that (1) the sending of periodic notices may create the subjective belief that the lawyer-client relationship is a continuing one, (2) a formal agreement is not necessary for this belief and (3) it could be avoided by a notice that the communication states that there is no continuing relationship.

c. What if the attorney holds the clients original wills in his or her vault?

d. See above discussion of the "accidental client" or "putative client".

3. Current/Former Client Distinction. Is this husband and wife situation really one which is analyzed under the current/former client distinction?

a. Yes. Oregon State Bar Formal Opinion No. 2005-148 (formerly 1997-148) addresses whether the attorney can represent the wife in a dissolution after having represented both the husband and wife in estate planning. Without specifically addressing the question, it treats the matter as a current and former client issue.

b. The distinction between current and former clients matters because the conflict rules differentiate between them. If the file is not closed, the husband and wife are current clients and see Rule 1.7. If the file is closed, the husband is a former client and see Rule 1.9.

4. Conflict Rule. (See end of outline for ORPC 1.9, Duties to Former Clients. Based on ABA Model Rule 1.9.)

a. Summary of Text

> A lawyer who has formerly represented a client in a matter shall not thereafter represent another person in *the same or a substantially related matter* in which that person's interests are *materially adverse* to the interests of the former client *unless each affected client gives informed consent, confirmed in writing.* Rule 1.09 (a) (emphasis added).

Is the matter 'substantially related'?

> For purposes of this rule, matters are "substantially related" if (1) the lawyer's representation of the current client will *injure or damage* the former client in connection with the same transaction or legal dispute in which the lawyer previously represented the former client; or (2) there is a substantial risk that *confidential factual information* as would normally have been obtained in the prior representation of the former client would *materially advance the current client's position* in the subsequent matter. Rule 1.09 (d). (Emphasis added.) Oregon Rules of Professional Conduct (January 1, 2014)

b. Working Summary of Rule

- Yes, can represent if the new matter is not the same or substantially related. (Pay attention to what amounts to 'substantially related.') No need to get consent in writing.
- Yes, can represent if the new matter is the same or substantially related but the interests are not materially adverse. No need to get consent in writing.
- Yes, can represent if the new matter is the same or substantially related, the interests are materially adverse, both clients give informed consent and it is confirmed in writing.

- No, cannot represent if the new matter places the clients directly adverse to one another.

D. Specific Fact Situations: Spouses as Current and Former Clients

Can the attorney represent the one client, wife, after having represented both wife and husband, in the following specific fact situations?

1. Family Law

a. Dissolution. Oregon State Bar Formal Opinion No. 2005-148 (formerly 1997-148) addresses whether the attorney can represent the wife in a dissolution of marriage after having represented both the husband and wife in estate planning. This opinion has a valuable analysis on the current and former client issues.

- The conclusion is "maybe". The opinion turns on whether the current and former matters are *the same or substantially related* within the context of Rule 1.9(a) and that turns on whether there is a matter-specific conflict or an information-specific conflict. If so, then the attorney may only proceed with informed consent of *both* parties in writing. If the matters are not substantially related, the attorney may represent wife "without the consent of either Husband or Wife".

- The Opinion notes that in this instance (1) the *matters* were different enough -- estate planning and dissolution -- and that (2) it would appear that there was no *information* that would be known to the attorney that was not already known to wife, the current client. Thus, without further facts, the opinion notes that there was no conflict.

- However, there *could have been a conflict that required consent.* "The key question, then, is whether Lawyer's representation of Wife in the marital dissolution is a matter-specific conflict because it will work to Husband's injury or prejudice in connection with the estate planning that Lawyer did for him. Even though it may generally be true, pursuant to ORS 112.315, that a divorce revokes all provisions in a will in favor of the testator's former spouse, the revocation of wills in that manner is not sufficient to create a conflict of interest unless the parties are legally bound not to revoke or change their wills."

> "If, however, Wife and Husband had legally bound themselves not to change their wills or if Lawyer's representation of Wife would require Lawyer to try to wrest control away from Husband of business or estate planning entities that Lawyer had formed

while representing Wife and Husband, a matter-specific former client conflict would exist. *In re Brandsness*, *supra*. In this case, Lawyer could not represent Wife adversely to Husband in the marital dissolution without first obtaining informed consent from both Wife and Husband that is confirmed in writing."

- The difficulty with this opinion is that one can assume that during the joint representation the attorney learned information that would assist in advocating for wife against husband. That information might be subtle such as who is a stronger personality, who is a better witness, who is savvier about finances, etc.

- The opinion squares with ABA Formal Ethics Op No 05-434 and with the Comments to the ABA's MRPC 1.9.

- Question: If the matters are not substantially related, does this mean that the matter of conflict need not even be discussed?

b. Spousal Support under ORS 108.110. (Although the statute is in the domestic relations section of the code, the strategy tends to be used in the Medicaid elder law context.)

- Probably the same analysis as for dissolution, above.

- However, a different conclusion is arrived at by one author. That is, no, unless both husband and wife consent after full disclosure. This fact situation was discussed in Blake, Dady K., *Potential Conflict of Interests*, Elder Law Section Newsletter, OSB, Spring 2002. "Husband and wife are opposing parties in the matter before the court, that matter is substantially related to prior representation, and there is an actual or likely conflict of interest present."

2. Estate Planning

a. Wife wants to change her will/trust that has been previously prepared by attorney and leave her estate to a special needs trust for the benefit of her husband. I.e., he continues as beneficiary but through a trust.

- Unclear. The matter, estate planning, is the same or substantially related. Is it, however, materially adverse? Husband will be changed from outright beneficiary to beneficiary through a trust. If adverse, both husband and wife will have to consent. If not, no consent is necessary. One could argue that this is an improvement in husband's position in that his assets might not be quickly

depleted. One could also argue that this is adverse in that husband will not have outright control.

- What if there had been an earlier discussion about a spouse's incapacity and special needs trust planning and both spouses had verbally stated their desires for special needs planning?

b. Wife wants to change her will/trust to disinherit husband and leave assets to their joint children (there are no separate kids).

- Unclear. Again, the matter is the same or substantially related. Is it adverse?

- Again, what if there had been a discussion where both had opined that they supported this type of planning?

c. Wife wants to change her will/trust to disinherit husband and leave assets to her children, not his.

- No. This is clearly adverse. Probably could be solved with mutual written consent.

3. Long Term Care and Medicaid

a. General Discussion of Medicaid planning.

- Yes. May or may not be the same or substantially related matter. However, a general discussion is not likely to be materially adverse.

b. Income Cap Trust for husband

- Yes. Again, may or may not be the same or a substantially related matter but does not seem adverse.

c. Transfers (gifts) between spouses. Wife now wants attorney to help her, as fiduciary (power of attorney or trustee) transfer assets from joint name or his name to her name alone. Assume that the estate plan was reciprocal.

- Unclear. Probably the same or substantially related matter. But is it materially adverse?

- What if there had been a verbal discussion about the future potential of impoverishing the unhealthy spouse and protecting the healthy spouse?

- What if there had been a verbal discussion and the husband had signed a waiver of future conflicts?

d. Transfers (gifts) to third parties (adult children).

- This gifting is the equivalent of disinheriting a spouse, discussed above, but more immediate.
- Unclear. Probably both the same or substantially related matter and materially adverse, needing mutual consent.
- What if the potential donees are the same in both estate plans?
- If the potential donees are just the wife's choices and not in both estate plans?

E. Advance Waiver of Future Conflict

Can the spouses during the joint representation waive in advance the future potential conflict of interest, i.e., the need for a fully informed consent in writing to the subsequent representation of one of them?

1. The process of getting the waiver itself would have to meet the requirements of full disclosure, etc.

2. Example of a waiver clause in post-nuptial agreement

> This agreement is prepared by attorney acting for husband and wife. [Disclosure language] Husband and wife agree for themselves and their agents, if either of them is disabled and the non-disabled spouse seeks the legal counsel of Attorney for the purposes of public benefit planning for the disabled spouse, that each of the parties waives any conflict of interest with Attorney and consent to Attorney representing the non-disabled spouse in securing public benefit planning. The waiver and consent specifically applies to Attorney assisting with impoverishing the disabled spouse to protect the non-disabled spouse, changes in the estate planning of the healthy spouse, gifts, Medicaid planning and other related matters.

3. The answer is unclear but the future waiver appears allowed in some instances.

- Oregon Formal Opinion 2005-122 (formerly 1991-122) addressed an attorney that sought to have his State/county/municipal clients allow him to represent other clients against them by having a blanket waiver of future potential conflicts. The opinion is premised on the fact that the conflicts are waivable to begin with. It allows the waiver as long as it is based on full disclosure of all material facts and no actual conflict subsequently develops.
- "Whether a lawyer may properly request a client to waive conflicts that might arise in the future is subject to the test of paragraph (b). The effectiveness of such waivers is generally determined by the extent to

which the client reasonably understands the material risks that the waiver entails. The more comprehensive the explanation of the types of future representations that might arise and the actual and reasonably foreseeable adverse consequences of those representations, the greater the likelihood that the client will have the requisite understanding. Thus, if the client agrees to consent to a particular type of conflict with which the client is already familiar, then the consent ordinarily will be effective with regard to that type of conflict." Comment 22 to ABA Model Rules of Professional Conduct Rule 1.7.

- "Both the courts and the ethics rule makers have become more accepting of advance conflict waivers in recent years." See Zielinski, Richard M., *Advance Conflict Waivers*, Law Firm Partnership & Benefits Report, July 1, 2009.

F. Selected Oregon Rules of Professional Conduct (January 1, 2014)

Rule 1.7 Conflict of Interest: Current Clients

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

(a) the representation of one client will be directly adverse to another client;

(1) 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; or

(2) the lawyer is related to another lawyer, as parent, child, sibling, spouse or domestic partner, in a matter adverse to a person whom the lawyer knows is represented by the other lawyer in the same matter.

(3) Notwithstanding the existence of a current conflict of interest under paragraph (a), a lawyer may represent a client if:

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

(1) the representation is not prohibited by law;

(2) the representation does not obligate the lawyer to contend for something on behalf of one client that the lawyer has a duty to oppose on behalf of another client; and

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

Rule 1.9 Duties to Former Clients

(a) A lawyer who has formerly represented a client in a matter shall not thereafter represent another person in the same or a substantially related matter in which that person's interests are materially adverse to the interests of the former client unless each affected client gives informed consent, confirmed in writing.

(b) A lawyer shall not knowingly represent a person in the same or a substantially related matter in which a firm with which the lawyer formerly was associated had previously represented a client:

(1) whose interests are materially adverse to that person; and

(2) about whom the lawyer had acquired information protected by Rules 1.6 and 1.9(c) that is material to the matter, unless each affected client gives informed consent, confirmed in writing.

(c) A lawyer who has formerly represented a client in a matter or whose present or former firm has formerly represented a client in a matter shall not thereafter:

(1) use information relating to the representation to the disadvantage of the former client except as these Rules would permit or require with respect to a client, or when the information has become generally known; or

(2) reveal information relating to the representation except as these Rules would permit or require with respect to a client.

(d) For purposes of this rule, matters are "substantially related" if (1) the lawyer's representation of the current client will injure or damage the former client in connection with the same transaction or legal dispute in which the lawyer previously represented the former client; or (2) there is a substantial risk that confidential factual information as would normally have been obtained in the prior representation of the former client would materially advance the current client's position in the subsequent matter.

Oregon State Bar
Elder Law CLE
October 3, 2008

COMMUNICATING EFFECTIVELY WITH IMPAIRED CLIENTS AND BENEFICIARIES

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OREGON RULES OF PROFESSIONAL CONDUCT AND COMMUNICATION WITH IMPAIRED CLIENTS

Communicating effectively with impaired clients and beneficiaries is an important skill for any elder law attorney. At a bare minimum, the attorney should comply with the Oregon Rules of Professional Conduct. The attorney should also be aware of other skills and obligations when working with clients or beneficiaries that have diminished capacity.

I. Be Competent.

Competence means legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation.

> **"Rule 1.1 Competence**
>
> A Lawyer shall provide competent representation to a client. Competent representation requires the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation."

A. Skill and Knowledge. Attorneys should be careful to only accept those cases where the attorney has the competence to act. If any attorney lacks competence, then the attorney should seek assistance from competent attorneys and other sources in order to learn the matter.

B. Thoroughness and Preparation. If an attorney is too busy to be thorough with an impaired client, or the attorney does not have the patience and time to properly prepare to help an impaired client, the attorney should not represent the impaired client.

II. Abide by Your Client's Decisions and Consult with Your Client.

A lawyer is required to abide by a client's decisions concerning the objectives of representation and to consult with the client about how the client wants to accomplish those objectives.

> **"Rule 1.2 Scope of Representation and Allocation of Authority Between Client and Lawyer**
>
> (a) Subject to paragraphs (b) and (c), 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.

(b) A lawyer may limit the scope of the representation if the limitation is reasonable under the circumstances and the client gives informed consent.

(c) A lawyer shall not counsel a client to engage, or assist a client, in conduct that the lawyer knows is illegal or fraudulent, but a lawyer may discuss the legal consequences of any proposed course of conduct with a client and may counsel or assist a client to make a good faith effort to determine the validity, scope, meaning or application of the law. "

A. Communicate in a Manner in which the Client Can Understand the Basics.

If a client has diminished capacity, a lawyer should attempt to explain the issues in a manner which the client can understand. Sometimes this means simplifying language or vocabulary, drawing pictures, outlining options with pros and cons in a column format, or giving the client examples which include real life scenarios are helpful. Try explaining things different ways, and check in with the client to determine whether they have understood enough to explain it in their own words. Some clients may not be able to understand the basics. The goal is to attempt to provide the best possible explanation for the particular client that has the most likely potential to explain the issue to the client. Each client will be different.

B. Abide by the Client's Decisions.

Attorneys cannot substitute their own judgment for the judgment of the client.

III. Don't Neglect Your Client.

It can be challenging to work with a client with diminished capacity. The client's expectations and ability to predict what is reasonable may be impaired. Set good boundaries at the beginning of the representation. Follow the boundaries that you establish, even if the client has difficulty doing so.

"Rule 1.3 Diligence

A lawyer shall not neglect a legal matter entrusted to the lawyer."

IV. Communicate with the Client

"Rule 1.4 Communication

(a) A lawyer shall keep a client reasonably informed about the status of a matter and promptly comply with reasonable requests for information.

(b) A lawyer shall explain a matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation."

A. Information. Inform the client of the status promptly.

B. Requests. If a client makes requests, comply with reasonable requests. If a client's request is unreasonable, don't mislead a client and tell the client you are doing something you do not intend to do. It is important to be direct and honest with the client.

C. **Give the Client the Best Opportunity to Make an Informed Choice.** Rule 1.4(b) requires a lawyer to explain a matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation. Be careful to only take direction from your client. Try to ensure that the client is the party making the decision and to the extent that a decision is made, help the client recognize the consequences. It may be that the client cannot recall the choices or the options. The goal is to give the client the best opportunity to make those choices.

V. The Client with Diminished Capacity Rule.

"Rule 1.14 Client with Diminished Capacity

(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."

A. Maintain a Normal Client-Lawyer Relationship as Far as Reasonably Possible.

At the commencement of the attorney client relationship, it is up to the attorney to inquire about and establish the ground rules and the nature of the representation. The attorney must consider how did the client become the client? Does the client have capacity to contract?

B. Clients at Risk of Substantial Harm.

If the client is at risk of substantial harm, a lawyer *may* take reasonable necessary protective action, including seeking the appointment of a guardian and reveal confidences only to the extent reasonably necessary to protect the client's interests. Protective action is not limited to a protective proceeding. It could include other less intrusive actions that are the most appropriate to protect the client from the substantial harm.

VI. Render Independent, Candid Advice.

"Rule 2.1 Advisor

In representing a client, a lawyer shall exercise independent professional judgement 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."

A. Independent Advice.

Be careful to avoid inappropriate influence to color your opinion or advice. Make sure that your advice is tailored to the client and not to what other want for the client or your desire to have your bill paid.

B. Candid Advice.

Often it is important to be direct. Avoid patronizing the client. Avoid putting the client in a position where the client is trying to please the attorney. Be honest and frank. Describing consequences in an overly optimist or pessimistic manner can set the client up to be disappointed or confused.

C. Understand the Practical Consequences to the Client.

In order to give good legal advice, a lawyer may need to have knowledge and experience with family dynamics, financial issues and a practical understanding about what happens in circumstances similar to the client's situation. The ability to appreciate and explain the practical consequences of a particular course of action to a client is intertwined with the rule requiring an attorney to be competent. If a lawyer is unfamiliar with practical issues, the lawyer needs to take the same actions that the lawyer would need to take if the lawyer was unfamiliar with the law.

VII. Take Positions that Are Reasonable and In Good Faith.

"Rule 3.1 Meritorious Claims and Contentions

In representing a client or the lawyer's own interests, a lawyer shall not knowingly bring or defend a proceeding, assert a position therein, delay a trial or take other action on behalf of a client, unless there is a basis in law and fact for doing so that is not frivolous, which includes a good faith argument for an extension, modification or reversal of existing law, except that a lawyer for the defendant in a criminal proceeding, or the respondent in a proceeding that could result in incarceration may, nevertheless so defend the proceeding as to require that every element of the case be established."

A. Balancing Obligations to the Client with the Realities of the Situation.

Clearly, the lawyer must abide by the client's decisions and objectives. However, many times in the practice of elder law it is obvious that a client's capacity is so impaired that the client cannot effectively make decisions or has objectives that are unrealistic. It is important that the lawyer advise the client that the objectives may be unreasonable and unattainable. It is equally important that after the lawyer gives the client this advice and the client enough information to understand the advice to the best of the client's ability, that the lawyer then represents what the client's position is in an honest and reasonable way with as little posturing as possible. Oftentimes, an attorney cannot obtain the exact result the client wants. However, the lawyer may advocate to achieve some of the client's underlying goals.

B. Courteous and Professional Conduct.

In a case where there is a difficulty with the client's position due to their diminished capacity or lack of capacity, it is crucial for the attorney to remain absolutely courteous and respectful to the other parties or the other attorneys. Counsel can note that counsel is aware of the evidence and simply explain that the client has been made aware of the evidence and wishes to proceed in the manner requested by the client.

IS YOUR CLIENT LOSING IT: *How Know and What to Do*

Willamette Valley Estate Planning Council
April 20, 2010

Hon. Claudia Burton, Marion County Circuit Court Judge
Beth Nevue, BA, JD, Social Worker for Salem Hospital
Heather O. Gilmore, JD, Attorney

I. HOW DO YOU KNOW IF YOUR CLIENT IS INCAPACITATED?

A. Claudia Burton: Recognizing Incapacity

1. The Prevalence of Dementia: 20% at age 80; 33% at age 85; and 50% of those older than 85.

2. Executive Function: What is it? The ability to implement, monitor, follow through. This means balance checkbooks, understand investment choices, and contractual capacity

   a. Executive Function can be impaired before other deficits are obvious. Conversational speech is preserved longer. See slide p. 36. The fact that a client can sound perfectly normal discussing the weather, their kids, or the basketball game on TV last night does not mean the client understands that the vacuum cleaner salesman is not really his friend.

3. Anosognosia. Anosognosia is the lack of insight into deficits in functioning and/or the appreciation of significance of deficits. See slide p. 31. There are physical problems with prefrontal cortex or right parietal lobe which is also a feature of some mental illness. You are not going to be able to reason with this person. 38% -- full insight; 38% some cognitive deficits but denied that it affected them; 23% no insight that anything at all was wrong

4. Mini Mental Status Exam. MMSE are not helpful. The exam doesn't measure executive functioning. See slide p. 33.

5. Options. Use open-ended questions or ask people to paraphrase. See pp 39-42.

   a. Examples:
   -- now, remind me about how much you get from your pension?
   -- and where do we have your investment account? How are we doing on that CD, are we getting a good rate? ("Oh yes, it's fine" vs. "well, we're getting 2%")
   -- verify info [EG MSA/dog/vet]
   -- now, what is it you want to accomplish by changing your trust?

6. Legal Definitions of Incapacity

   a. "Incapacitated" for guardianship: "Incapacitated" means a condition in which a person's ability to receive and evaluate information effectively or to communicate decisions is impaired to such an extent that the person presently lacks the capacity to meet the essential requirements for the person's physical

health or safety. "Meeting the essential requirements for physical health and safety" means those actions necessary to provide the health care, food, shelter, clothing, personal hygiene and other care without which serious physical injury or illness is likely to occur. ORS 125.005(5).

b. "Financially incapable" for conservatorship: "Financially incapable" means a condition in which a person is unable to manage financial resources of the person effectively for reasons including, but not limited to, mental illness, mental retardation, physical illness or disability, chronic use of drugs or controlled substances, chronic intoxication, confinement, detention by a foreign power or disappearance. "Manage financial resources" means those actions necessary to obtain, administer and dispose of real and personal property, intangible property, business property, benefits and income. ORS 125.005(3).

c. Testamentary Capacity. Legal tests for determination of testamentary capacity are whether at time of making will testator comprehended the nature of the act in which he was engaged, whether he knew nature and extent of his property, whether he knew the persons who might be the objects of his bounty, and whether he was cognizant of scope and reach of provisions of will. This is the same capacity required for creating a trust or funding a trust under ORS 130.500(1).

d. Contractual Capacity. The ability to understand the natural consequences of a transaction. There is no Oregon authority on the mental capacity that a principal must have to execute a valid power of attorney. In other states, there have been cases that have defined what capacity is required to execute a power of attorney. In *Golleher v. Horton*, 715 P2d 1225, 1228 (Ariz App 1985), the court determined that the best test was whether the person is capable of understanding in a reasonable manner, the nature and effect of his act. Consider asking yourself whether the client is able to appreciate the natural consequences of the act.

B. Beth Nevue: Recognizing Incapacity

1. Assessment Tools.
   a. KELS - what it is and what it measures.

2. Who administers assessments?

3. Whom do you ask and how do you ask for assessments?
   a. Assessments in the hospital.
   b. Assessments coordinated through the primary physician.

c. Assessments through Home Health.
d. Assessments for Driving.

4. How are assessments paid for?

C. Heather Gilmore: Recognizing Incapacity

1. Red Flags that Assessment May Be Necessary.

a. Lack of ability to paraphrase.
b. Use of humor to cover deficits.
c. Lack of ability to predict natural consequences.
d. Change in level of scrutiny of work.
e. Change in quality of information provided from prior years.
f. Change in type of questions asked by client with regard to choices.
g. Problems in working with impaired clients who have good social skills.
h. Influence and the client with limited capacity or lack of capacity.

2. How to Get a Client or a Family to Participate in Assessment

a. Potential Loss of the Client
    i. Liability Issues
    ii. Potential that You Already Do Not Have a Client
    iii. Character of Relationship with the Client
    iv. Good Long Term Commitments to the Well-Being of Clients

b. Avoiding Embarrassment of Client

    i. Business Terms - explain what your professional rules require of you.
    ii. Appeal to Client's Frugality - if they spent the money to plan, they may as well use the plan.

c. Denial by the Client or the Client's Family.

    i. If the client doesn't think there are any problems, does the client think the client's family sees any problems.
    ii. If the family doesn't see any problems, where do you go. Consider agreeing, but let's just ask so we don't have any questions about this transaction we're doing.

d. Anosognosia - Inability to Recognize the Deficits.

i. What if the family wants the assessment and the doctor or client won't participate. HIPAA issues, insurance issues, description of incapacity in a trust.

ii. Getting the client's permission to seek help from others.

iii. Can You Get the Client to the Doctor and Coordinating with the Doctor.

e. What Could an Assessment Say and How Does that Apply to Your Practice.

i. Understand the terminology.
ii. Consider the natural progression of the deficit.
iii. If the client still has the ability to participate, put a plan in place with the client's cooperation identifying benchmarks to tell you when the client should no longer participate.

f. Follow Up with an Impaired Client.

II. WHAT TO DO IF YOUR CLIENT IS INCAPACITATED

A. Claudia Burton: What to Do If Your Client Is Incapacitated

1. Substitute decision maker for health care

a. Health Care Advance Directive (now includes ability to place person with dementia in gero psyche unit for limited period of time). Must be done before incapacity. Allows substitute decision-maker to authorize or decline medical treatment. Revocable. Attending Physician makes the determination of whether the person is incapable of making health care decisions. ORS 127.505(14).

b. Mental Health Advance Directive must be executed in advance by person with capacity at the time of execution. Revocable.

c. Guardian. The standard and findings the court has to make are found in ORS Chapter 125. There is a petition filed, a visitor must be appointed, there can be objections and a hearing may be required.

2. Substitute decision maker for finances

a. Power of Attorney. Powers of Attorney must be done ahead of time by competent principal. The agent only has the authority granted to the agent under the power of attorney.

   i. Not universally accepted because of issues with fraud and undue influence. Best practice is to clear the POA with relevant financial institutions ahead of time while principal has capacity. Often the institution will require the principal to complete the institution's own form of POA.
   ii. Issues with "Springing" Powers of Attorney. Does MD have to certify? Does the attorney hold the original in escrow in his or her office?

b. Trusts.

   i. Has to be done ahead of time by competent (testamentary capacity) principal.
   ii. Funding - need to make sure all relevant assets are transferred into the trust.
   iii. Trusts don't help with managing things like pension income (won't be payable to trustee), IRA's, Social Security, Credit Cards.

c. SS Rep Payee

   i. Limited Powers and Rights - only for Social Security income.
   ii. The person who wants to be the representative payee applies to & reports to Social Security Administration.

d. Conservator standard and findings court has to make are found in ORS Chapter 125.

B. Beth Nevue: What to do if your client is incapacitated.

a. Care and Safety Issues.
   i. Driving
   ii. Self-neglect and other safety issues in the home or in a facility
   iii. Adult Protective Services - Anonymous Reporting

b. Implementation of Substituted Judgment

   i. How does the baton get passed for health care decision making.
   ii. Guilt issues faced by substitute medical decision makers.

c. Obligations of substitute medical decision maker.

C. Heather Gilmore: What to Do If Your Client Is Incapacitated.

a. Communication issues
   i. Who can you talk to about what
   ii How do you get paid?
   iii Methods of Communication with Impaired Clients

b. Lack of Ability to Contract

   i. Engagement letters are meaningless, representations made by clients are meaningless. Consents or instructions given by clients are meaningless. Acceptance of Investment Risk is meaningless. Tax decisions/choices are meaningless.
   ii. Ability of Attorneys to Obtain Court Order Confirming Representation - may include the need to have the court review attorney fees

c. Potential for Financial Exploitation.

   i. Protecting Yourself - if your client didn't have the ability to contract and you are earning a fee, how can you justify the fee?
   ii. Protecting Your Client from Others.
   iii. Coordination with Estate Planning Team (get consent while the client has capacity.)
   iv. Documenting your File - Client clearly cannot fill out a tax planner and used to be able to, you complete it for them or you do the taxes without it. Client clearly does not know what you are talking about, you raise the question, client is in denial, you continue to represent client. Watch out for the double-edged sword. You can't have it both ways.

d. Start Now.

   i. Don't make inappropriate assumptions, client only writes down prescription and physician medical expenses. Consider whether client has a "housekeeper" necessary due to client's inability to get around.
   ii. Set up the file to ask questions while the client is still able. Don't rely on the tax planner note book. Don't rely on client questionnaire and past information you have about the client. Ask each year so the

questions aren't new when the client may be struggling and respond defensively.

iii. What should you do with the client who just came in?

f. Representing an Incapacitated Person
   i. Limit the Scope of Services
   ii. Consider requiring additional signatures
   iii. Try a team approach.

g. Working with the Substitute Decision Maker

   i. See the document giving them authority.
   ii. Consider whether the document authorizes the new client to act.
   iii. Confirm what the "new client" wants you to do when approached by the original client.
   iv. Obtain consent to let the other team members know about the change in client.
   v. Consider a pass the baton meeting with the team.

APPENDIX 1 - Client who has some insight to challenges and some ability to be involved with the passing of the baton.

Dear Client:

It was nice to visit with you on [date]. As we discussed, things have been changing for you. In the past, you gave me permission to talk to your attorney/accountant/financial planner about your affairs so that we can work as a team to provide you with the best service possible. I understand that I still have your permission to talk to _____.

I recall that in 1999, you did a [trust or power of attorney] with your attorney. It is so helpful to have a copy of that in my file. My file reflects that you paid [insert amount of fees or say a good amount of money] in attorney fees to create a plan to help you manage your affairs as you age. In our conversation, we talked about the potential to use some of the provisions of the plan that your attorney created for you and that you already paid for so that you get the benefit of all that planning.

I think it would be helpful if we set up a time to sit down together with your [insert name of trustee or agent] to make sure that we have everything in order and to discuss the benefits of using your plan. OPTIONAL LANGUAGE: If you'd like, we can also invite [name of attorney] so we can make sure to take advantage of any helpful suggestions he has. I encourage you to talk to [name of agent or trustee] and ask him/her what day and time would work, and then call my office to schedule

the appointment. I look forward to hearing from you. If you have any questions, please let me know.

APPENDIX 2 - For Clients with limited insight or ability to respond to issues.

Dear Client:

It was nice to hear from you on/It was nice to see you on [insert date]. As we discussed, it was difficult for you to [describe what the client had problems with]. It is important for you to be able to fully understand what your investment options/tax consequences/ planning choices are so that I can effectively help you. If you are not able to fully understand, my ability to help you is limited and I may need to resign. My preference would be to continue to help you with the assistance of [insert name of agent, successor trustee or attorney].

I have suggested that you consider resigning as trustee/ naming _____ as a co-trustee/ allow ____ to work with you to use your power of attorney so that your needs are met and you get the full benefit of my assistance. At this time, it is appropriate to use the back up plan you put in place in [insert year]. In the past, you have given me your permission to talk to this person about your affairs so that we could work together to help you in the best way possible.

I suggest that you share this letter with [insert name of attorney, agent, successor trustee or trusted person for client] so that you can consider what you would like to do. You previously signed a plan and gave us instructions on what to do. I want to make sure that I follow your instructions and respect your wishes as expressed in your plan. I am so glad that you have a plan in place so that we can continue to work for your benefit. If you have any questions, please call me or have [name of trusted person, agent under POA or successor trustee] call me.