

Ethics and Elder Abuse: An Attorney's Obligations— Part 1

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This article is part of an ongoing series brought to you by the Section's Elder Abuse Committee. It is based on a presentation given at the Fall 2014 Elder Law and Special Needs Section Meeting.

For attorneys, elder abuse is often inextricably linked with ethical dilemmas. Wherever a lawyer learns or suspects that elder abuse is present, that lawyer is faced with a host of difficult questions and possible responses. The way an attorney responds to such cases can have a significant impact on the relationship between the attorney and the client in question, the attorney's reputation and the life of the older adult client. It is not an overstatement to say that the way an attorney chooses to respond to cases of suspected elder abuse can define that attorney's career. Moreover, given that one out of every ten people aged 60 and older who lives at home suffers abuse, neglect or exploitation,¹ this issue is highly relevant to all attorneys serving the older adult population.



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These observations reflect the attitudes of elder law attorneys across the country. In a national study, elder law attorneys listed complex ethical issues and elder abuse as two of the most frequent issues that arise in their practices. These are also two of the areas where attorneys most feel that they need additional continuing legal education.² Taken together, these statistics seem to reflect elder law attorneys' perception that they are not sufficiently equipped to respond to the frequent scenarios in which they are presented with cases of potential elder abuse and the ethical quandaries that often accompany them. Difficult ethical situations are often much less difficult when attorneys prioritize educating themselves about the frameworks that should govern their conduct and structure their practices with an eye towards protecting themselves and their clients.

Ethical dilemmas can begin as soon as an older adult walks into an attorney's office. Consider the following scenario:

Chelsea brings in her mother, Hillary, to a local elder law attorney's office to change Hillary's will. Chelsea speaks for her mother during the intake and advises the attorney that she will become the sole beneficiary under the new will, and that it will effectively exclude her two brothers. Hillary, at age 72,

seems physically mobile and healthy, but seemed slightly confused or forgetful when the conversation turned to the specifics of her financial matters. She seemed to have a dependent but caring relationship with her daughter. The attorney agrees to make the changes to the will, and set up a time to review the documents with Hillary. But as they leave, the attorney overhears Chelsea tell an associate to send the bill to her. Should the attorney accept payment from Chelsea? More importantly, who is the client and who decides the terms of Hillary's will?



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Case Analysis

An attorney must first ascertain who the client is in this scenario. In this case, though Chelsea may have sought out the attorney's services, scheduled the appointment and given most of the direction regarding the matter, the will that is being created is still Hillary's and the provisions it makes affect her assets. Therefore, she is the client. All directives regarding the terms of Hillary's will must come from Hillary.

The New York Rules of Professional Conduct generally prohibit an attorney from accepting payment for legal services from a third party. If an attorney does accept payment from a third party, three conditions must be fulfilled.³ First, the attorney must obtain written consent from the client. In this case, the attorney never met with Hillary privately, and therefore had no opportunity to discuss the payment arrangement and obtain Hillary's consent. Second, the payment structure must not interfere with the "lawyer's independent professional judgment or with the client-lawyer relationship."⁴ In this case, Chelsea has taken control of the relationship by instructing the attorney. Finally, the attorney must protect the client's confidential information. Here, the attorney has not properly established attorney-client confidentiality by meeting with Hillary alone and giving her the opportunity to disclose any information she wants to share. Therefore, based on the facts above, the attorney may not accept payment from Chelsea.

Best Practices

There are several best practices that elder law attorneys can put in place as part of their initial client intake that will help prevent situations like the one described above. First, an attorney should have the universal practice of meeting with a new client alone. This practice can be explained in advance to relatives or friends who call on behalf of new clients. During this initial meeting, an attorney should discuss the fee structure and any other basics of the attorney-client relationship. This should include a discussion about any family members, friends or caregivers that the client would like to assist or advise them over the course of the representation. At times, a trusted family member or friend can be tremendously helpful in making the older adult comfortable and providing advice and support.⁵ However, it is also possible for an older adult to feel pressured to make legal decisions he or she is not comfortable with and are not in that person's best interest because of an overbearing third party. This can be particularly devastating when the transaction is actually part of a larger pattern of elder abuse intended to harm the older adult. The attorney can independently evaluate the client's description of the relationship and decide if it is appropriate to proceed.

This initial meeting is also an appropriate time to establish attorney-client confidentiality and to give the client the opportunity to share in confidence anything the client feels is relevant to the representation. This should include the basics of the matter for which the attorney is being retained and any reservations or mixed feelings that the client has about the matter. The client's disclosures, and even non-verbal cues when describing the work to be done or relationships with family members, may give the attorney valuable information about whether elder abuse may be present.

If an attorney does get an inkling from this conversation that the client may be a victim of elder abuse, the attorney must continue, gently but directly, to ask questions of the older adult in order to better understand the situation and to be able to advise the client appropriately. This may involve a change in the work the attorney will do or even a refusal by the attorney to complete the work. It also may be appropriate to provide the client with local non-legal resources that may be able to assist. A list of community elder abuse resources, organized by Section District, can be found on the Elder Law Section's website at <http://www.nysba.org/ElderAbuseResourceGuide/>.

Finally, an initial confidential meeting is an appropriate time for an attorney to take note of any possible

capacity issues that a client may exhibit. When a third party is present at an initial meeting and does a good deal of the talking, it is far easier for capacity issues to be concealed with social skills or cooperativeness. The opportunity to review the basics of the representation with the older adult alone will allow the lawyer to spot potential capacity issues much more easily. A scenario in which a third party brings an older adult with questionable capacity to see an attorney, and, as in Hillary's case, wants the attorney to do work that benefits the third party, contains a big red flag for elder abuse which should be further explored.

In Part II of Elder Abuse and Ethics we will discuss an attorney's ethical obligations related to capacity issues and assessment in more depth, and some best practices that will assist elder law attorneys in addressing elder abuse cases where a victim's capacity is at issue.

Endnotes

1. U.S. Dept. of Justice and Health and Human Services. Elder Justice Roadmap Project Report: Setting Priorities to Respond to an Emergent Public Health, Justice, Financial & Social Crisis, June 2014.
2. Nina A. Kohn & Edward D. Spurgeon, *A Call To Action On Elder Law Education: An Assessment and Recommendations Based On A National Survey*, 21 U. Ill. Elder L.J., 345 (2014).
3. 22 NYCRR 1200 Rule 1.8(f).
4. *Id.* at 1.8(f)(2). See also 22 NYCRR 1200 Rule 5.4(c).
5. See NY CPL Law §190.25(3)(h). This new law, enacted in September 2014, recognizes of the critical role that supportive caregivers provide. When a vulnerable elderly person testifies before a grand jury, the law allows a social worker or informal caregiver to accompany the older person throughout the proceedings.

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