

Professor Kim Dayton  
William Mitchell College of Law  
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Questions and Thoughts about Aging and Law

<http://www.youtube.com/watch?v=9yN-6PbqAPM>

1. How do we define the “older” or “elderly” client?
2. Does it matter that we even have a definition? When does “defining” end and “ageism” begin?
3. Are there special characteristics of the aging population that could affect their goals and objectives in planning and/or litigating?
4. Are there aspects of aging that affect the way an attorney interacts with her older client?
5. How can the elder law practitioner acknowledge the special characteristics of the aging population without engaging in ageism or paternalism?
6. How is the practice of elder law different than other legal specialties respecting ethical issues?

# Special Ethical Issues in Elder Law

## The Legal Framework

### A. Entities Responsible to Promulgate/ Enforce Rules of Professional Responsibility

1. State Supreme Court
2. Disciplinary Administrator and/or Committee
3. State Bar Association
4. Private (malpractice) litigation?

### B. Sources of Guidance on Ethical Principles Governing Lawyers

1. MRPC as adopted (43 states) or equivalent rules (e.g. CA, NY)
  - a. Text of Rule
  - b. Commentaries to Rule (and examples therein)
2. State Bar Association Advisory Opinions (formal and informal)
3. Judicial/Disciplinary Body Opinions
4. Advisory Opinions of ABA's Standing Committee on Ethics and PR

5. ABA EthicsSearch
6. ACTEC Commentaries
7. Scholarly Articles
8. Restatement, Third, The Law Governing Lawyers
9. Lawyer's Judgment (see Preamble, Rule 2.1)

# Model Rules of Professional Responsibility

## A. Nature of MRPC

1. Presuppose a single autonomous client who
  - has already identified the legal issue/problem
  - is capable of entering into an atty-client relationship
  - will define the objectives of the representation
  - will be responsible to pay fees and costs
  - meets individually with the attorney unaccompanied by others
  
2. Assume that client's goal is to maximize
  - her own legal rights and economic advantage
  - avoid legal duties and obligations at the expense of third persons
  
3. Address more clearly the adversarial aspects of legal system than planning aspects
  
4. Duties of confidentiality and loyalty are pre-eminent
  
5. Do not readily accommodate the realities of typical elder law practice

## B. Structure of MRPC

1. Preamble—generalities, “spirit”, goals of rules.
2. Rule 1.0—definitions
3. Rules 1:1 to 1:18: Nature of the Attorney-Client Relationship
4. Rules 2:1 to 2:4: lawyer as COUNSELOR
5. Rules 3:1 to 3:9: Lawyer as ADVOCATE
6. Remaining rules concerned with practice of law, pro bono obligations of lawyers, etc.

## C. Rules of Special Significance

- 1.2 (c): Scope of Representation and Allocation of Authority Between Client and Lawyer (limiting scope of representation)
- Rule 1.6 (a): Confidentiality of Information (general rule)
- Rule 1.7 Conflict of Interest: Current Clients (General)
- Rule 1.8: Conflict of Interest: Current Clients (Specific)
- Rule 1.9: Duty to Former Client
- Rule 1.14: Client with Diminished Capacity
- Rule 2.1: Lawyer as Advisor
- Rule 2.2: Lawyer as Intermediary [note: no longer in effect in MN]

## C. Examples of ethically problematic situations arising in elder law practice.

### Questions to ask:

- what are the potential ethical problems?
- who is the client?
- Who has the legal problem?
- Who benefits from the proposed course of action (not including remote third party beneficiaries)?
- Who needs (special) protection? --Who made the appointment?
- Who communicates with the lawyer, attends meetings, makes phone calls?
- Who perceives themselves as the clients?
- Who provides substantial information?
- Who pays the bill?
- Who is the focus of the proposed action?
- Who signed the retainer agreement?
- What rules of professional conduct may be relevant?
- How should lawyer resolve the dilemma?

## Problems

### 1. Joint/Multiple Representation

- Husband and Wife
- Parent(s) and Child(ren)
- Elder and Fiduciary (e.g. conservator or guardian)

ACTEC Commentaries: “A client who is adequately informed may waive some conflicts that might otherwise prevent the lawyer from representing another person in connection with the same or a related matter.”

ACTEC Commentaries: “Some conflicts of interest are so serious that the informed consent of the parties is insufficient to allow the lawyer to undertake or continue the representation. Thus, a lawyer may not represent clients whose interests actually conflict to such a degree that the lawyer cannot adequately represent their individual interests.”

### 2. Client Under a Disability

ACTEC Commentaries: “Implied Authority to Act in Best Interests of Disabled Client. The lawyer for a client who appears to be disabled may have implied authority to make disclosures and take actions that the lawyer reasonably believes are in accordance with the client's wishes that were clearly stated during his or her competency. If the client's wishes were not clearly expressed during

competency, the lawyer may make disclosures and take such actions as the lawyer reasonably believes are in the client's best interests. It is not improper for the lawyer to take actions on behalf of an apparently disabled client that the lawyer reasonably believes are in the best interests of the client.”

### 3. Duties to non-client third parties