



Aspirational Standards for the Practice of Elder Law and Special Needs Law

Second Edition, April 24, 2017

Preamble

The National Academy of Elder Law Attorneys (NAELA) was founded in 1987 to support attorneys in meeting the complex legal needs of elderly individuals and individuals with special needs. These Aspirational Standards for the Practice of Elder and Special Needs Law are core to NAELA's mission. NAELA requires all members to support these Standards. This condition of membership distinguishes NAELA from all other legal associations.

Given the dynamic and evolving nature of elder and special needs law, attorneys should and often must represent their clients "holistically," adapting and applying information and insight obtained from a wide range of legal and social disciplines. When assisting clients with planning or the implementation of plans, elder and special needs law attorneys often represent clients who have diminished or lack of capacity. Family members and other persons with fiduciary responsibilities also may be involved. The attorney-client relationship in elder and special needs law is not always as clear-cut and unambiguous as in other areas of law. Questions relating to end-of-life planning, self-determination, exploitation, abuse, long-term care planning, best interests, substituted judgment, and, fundamentally, "Who is the client?" present issues not regularly faced by attorneys in other fields. These Standards are designed to assist attorneys to provide high-quality counsel, advocacy, and guidance to clients in this unique and specialized area.

These Aspirational Standards:

- Assist attorneys to navigate the many difficult ethical issues that often arise when representing elderly individuals and individuals with special needs;
- Raise the level of professionalism in the practice of elder and special needs law; and
- Assist attorneys to effectively meet the needs of their clients.

This second edition of the Aspirational Standards is the product of 3 years of study and deliberation by NAELA's Professionalism and Ethics Committee. While each state's professional responsibility rules mandate the minimum requirements of conduct for attorneys to maintain their licenses, the Aspirational Standards build upon and supplement those rules.

These Standards do not define or establish a legal or community standard nor are they intended to be used to support a cause of action, create a presumption of a breach of a legal duty, or form a basis for civil liability. Those matters are governed by the statutes and rules of professional responsibility of the state in which the attorney practices.

Following these Aspirational Standards helps attorneys make the lives of clients better. As Clifton Kruse, NAELA Past President and member of the Professionalism and Ethics Committee at the time the Committee drafted the first edition of the Standards, so aptly said:

[C]lients are hesitant to share without invitation. There is a threshold that we must assure them that we want them to cross. And we do this with questions. And we do it as lawyers. We are the elders' lifeline. ... Our licenses make this possible. They give us status and credibility, and after meeting us — hopefully, trust. The legal answers are comparatively easy — the job we are called in to do is done — but along the way, the more important, the more valuable service occurs as well. We listen. We invite a monologue. We establish this by our demeanor and by our questions that invite unloading — and in the process we extend the joy that elders' memories bring. And on those days, we earn the accolade — professional — one who serves others. That is our privileged role as lawyers; we can make others' lives, if even for a few moments, better than they were before.

The following are the NAELA Aspirational Standards. If you are a NAELA member or prospective member, you can [access the full version with commentary here](#).

A. Holistic Approach

The elder and special needs law attorney:

1. In applying a holistic approach to legal problems, works to consider the larger context, both other legal consequences as well as the extra-legal context in which the problems exist and must be solved.
2. May consider using nonlegal services to accomplish the goals of the representation when appropriate and the client consents.
3. Encourages the use of family members and other third parties to support the client in the legal representation when appropriate and the client consents.
4. Explains to the client seeking estate planning services how conflicts among family members may develop and, if desired by the client, recommends harmony-enhancing measures consistent with the client's estate planning goals to minimize these conflicts.
5. When conflict between family members or other interested parties arise, evaluates whether nonjudicial conflict resolution is appropriate and encourages noncourt resolution when appropriate.
6. Takes actions to help prevent current and future financial exploitation, abuse, and neglect of the client.

B. Client Identification

The elder and special needs law attorney:

1. Identifies the client and the individuals who will assist the client at the earliest stage of the representation, obtains the client's agreement on these identifications, and communicates this information to the persons involved.
2. Recognizes the unique challenges of identifying the client when a fiduciary is acting on behalf of a protected individual.

3. Meets with the prospective client in private at the earliest practicable time to help the attorney identify the client and assess the prospective client's capacity and wishes as well as the presence of any undue influence.

C. Engagement Agreements and Document Drafting

The elder and special needs law attorney:

1. Uses an engagement agreement, letter, or other writing that will:
 - a) Identify the client;
 - b) Describe the scope and objectives of the representation;
 - c) Disclose potential material conflicts of interest between the attorney and client;
 - d) Explain the attorney's obligation of confidentiality;
 - e) Confirm, when there are joint clients, that the attorney will share information and confidences between them and may withdraw if one client requests that the attorney not disclose a secret to the other client or if the clients cannot agree on how to proceed;
 - f) Disclose potential material conflicts between joint clients;
 - g) Address (and possibly waive) nonmaterial conflicts of interest between joint clients;
 - h) Confirm, when representing a fiduciary, the fiduciary's obligations to the protected individual, clarify whether the attorney may speak directly to the protected individual, and state that the attorney may withdraw if the fiduciary violates a fiduciary or other duty to the protected individual and does not take timely corrective action;
 - i) Set out fee arrangements (hourly, fixed fee, or contingent); and
 - j) Explain when and how the attorney-client relationship may end.
2. Drafts documents reflecting the client's intentions and informed choices that:
 - a) An attorney-client relationship has been established (except in certain exigent circumstances described in Standard C. Engagement Agreements and Document Drafting, Section 4(a);
 - b) The client has sufficient capacity to sign the documents;
 - c) The documents reflect the client's intentions and informed choices as opposed to the choices of others; and
 - d) If the client is a fiduciary, the fiduciary appears to have authority and the proposed documents either reflect the choices of the protected individual if known or, if not known, are in the protected individual's best interests.
3. Recognizes the unique challenges in drafting documents at the request of a fiduciary.
4. Exercises caution when:
 - a) Drafting documents in exigent circumstances for a prospective client before the attorney-client relationship is established;
 - b) Drafting documents for a new client at the request of an existing or former client related to the new client;
 - c) Drafting a special needs trust for a person with special needs; and
 - d) Drafting documents to be signed by nonclients.

5. The elder and special needs law attorney ensures that documents are properly executed.

D. Conflicts of Interest

The elder and special needs law attorney:

1. In the initial meeting when multiple prospective clients are present, ensures that the prospective clients understand whether the representation will be individual, concurrent, or joint.
2. Undertakes joint or concurrent representation, as permitted by relevant state rules of professional conduct and these Aspirational Standards, only after obtaining the consent of the parties and having reviewed with them the advantages and disadvantages of such representation, including the relevant foreseeable conflicts of interest and risks of such representation, in a manner that will be best understood by each person to be represented.
3. Treats family members who are not clients as unrepresented persons and accords them involvement in the client's representation only to the extent that the client consents to their involvement with a signed waiver or, if the client no longer has the capacity to consent, to the extent that their involvement is consistent with the client's wishes and values if known and, if not known, the client's best interests.
4. Accepts payment of client fees by a third party only after:
 - a) Determining that payment by the third party will not influence the attorney's independent professional judgment on behalf of the client;
 - b) Securing the client's informed consent to the payment by the third party in writing; and
 - c) Ensuring that all the parties understand and agree to the ethical ground rules for third-party payment.
5. Subject to state regulations, may serve as a fiduciary for a client upon the request of a client who has capacity if it is in the client's best interests and if the client gives written informed consent after full disclosure.

E. Confidentiality

The elder and special needs law attorney:

1. Carefully explains to the client and others involved, as early in the representation as possible, the attorney's duty of confidentiality to the client in order to avoid misunderstandings and to ascertain and respect the client's wishes regarding the disclosure of confidential information.
2. Explains how the rules of confidentiality are applied to different forms of representation, including individual representation and joint representation.
3. Establishes as a prerequisite to joint representation a clear understanding and agreement that the attorney will keep no client secrets from any other client in that joint representation.
4. Strictly preserves client confidences, especially in situations that involve frequent contacts with family members, caregivers, or other trusted third parties who are not clients.

5. Ascertains the wishes of the client as to whom, if anyone, the attorney may disclose confidential information and explains the potential consequences of such disclosure.
6. Carefully maintains client confidentiality to the extent possible while also meeting the requirements of laws, regulations, or court orders imposing a duty to disclose.

F. Competent and Diligent Representation

The elder and special needs law attorney:

1. Has a wide range of professional skills unique to the practice of elder and special needs law and continually demonstrates a commitment to addressing the individual needs of each client.
2. Diligently and competently handles all client matters.
3. Regularly pursues continuing professional education and peer collaboration in elder and special needs law and related subjects, including the physical, cognitive, social, and psychological challenges of elderly individuals and individuals with special needs and the skills needed to serve individuals facing those challenges.
4. Adequately trains and supervises legal and nonlegal staff members to ensure that they have the knowledge and skills needed to best serve individuals facing the challenges associated with aging and having special needs.

G. Client Capacity

The elder and special needs law attorney:

1. Continues to respect the right to self-determination and confidentiality of a client with diminished capacity.
2. Develops and uses appropriate skills and processes for making and documenting preliminary assessments of client capacity to undertake the specific legal matters at hand.
3. Adapts the interview environment, timing of meetings, communications, and decision-making process to maximize the client's ability to understand and participate in light of the client's capacity and circumstances.
4. Takes appropriate measures to protect the client when the attorney reasonably believes that the client (a) has diminished capacity; (b) is at risk of substantial physical, financial, or other harm unless action is taken; and (c) cannot adequately act in his or her own interest.
5. Uses appropriate measures to protect the client, including (a) considering the wishes and values of the client if known or, if not known, the client's best interests; (b) minimizing intrusion into the client's decision-making autonomy; (c) respecting the client's family and social connections; and (d) considering a range of supportive actions other than court proceedings and adult protective services.
6. Preserves client confidences to the extent possible by only divulging that information necessary or appropriate for protective action.
7. Seeks guardianship or conservatorship only when no other viable alternatives exist.

H. Communication and Advocacy

The elder and special needs law attorney:

1. Works to minimize barriers to effective communication with clients.
2. Maintains direct communication with the client, whether in person, by telephone, or through correspondence, even when the client chooses to involve others (including an agent under a durable power of attorney).
3. In order to obtain informed consent, advises clients of their options, explaining the possible consequences of each option.
4. Advocates for the courses of action chosen by the client.
5. When developing a plan to secure and pay for long-term supports and services should:
 - a) Strive to determine the client's wishes and values in order to achieve the client's objectives concerning living options, health care, loved ones, and property;
 - b) Endeavor to preserve and promote the client's dignity, self-determination, and quality of life;
 - c) Counsel the client about the full range of long-term services options, risks, consequences, and relevant costs;
 - d) Counsel the client in light of the client's needs, personal values, wishes, best interests, and the alternatives available; and
 - e) Counsel the client on the estate planning and tax implications of the client's choices for long-term services on his or her property.

I. Marketing and Advertising

The elder and special needs law attorney:

1. Should consider marketing and advertising as an opportunity to educate the public and promote the profession of elder and special needs law.
2. Ensures that no materially false or misleading information is communicated in connection with a seminar, presentation, marketing, or advertising activity.
3. Should communicate in a manner that considers the intended audience's potential lack of sophistication or vulnerability to overly aggressive or fear-based marketing communications.
4. Communicates the attorney's education and experience to distinguish the attorney's practice and refrains from suggesting the attorney's superiority to or advantage over other attorneys.
5. Uses endorsements and testimonials in a truthful, nondeceptive, and transparent manner.

J. Nonlegal Services

The elder and special needs law attorney:

1. May consider using nonlegal services to accomplish the goals of the representation with the client's informed written consent and ensures that the client's rights and attorney's ethical duties are maintained.
2. Considers alternative ways to deliver nonlegal services.
3. Discloses in writing and obtains the client's informed written consent to any relationship between the provider of the nonlegal service and the attorney, the attorney's law firm, and the attorney's immediate family members.

4. Maintains appropriate licenses and complies with state bar ethics rules when selling insurance and investment products.

K. Pro Bono Legal Representation and Public Service

The elder and special needs law attorney:

1. Recognizes the need for pro bono legal representation, provides pro bono representation to elderly individuals and individuals with special needs who cannot afford to pay, and participates in and supports pro bono referral programs.
2. Financially supports organizations that meet the needs of elderly individuals and individuals with special needs.
3. Participates actively in, and provides ongoing leadership for, efforts to improve the law to meet the changing needs of elderly individuals and individuals with special needs.

About NAELA

Members of the National Academy of Elder Law Attorneys (NAELA) are attorneys who are experienced and trained in working with the legal problems of aging Americans and individuals of all ages with disabilities. Upon joining, NAELA member attorneys agree to adhere to the [NAELA Aspirational Standards](#). Established in 1987, NAELA is a non-profit association that assists lawyers, bar organizations, and others. [The mission of the National Academy of Elder Law Attorneys](#) is educate, inspire, serve, and provide community to attorneys with practices in elder and special needs law. NAELA currently has members across the United States, Canada, Australia, and the United Kingdom. For more information, visit [NAELA.org](#), or to locate a NAELA member in your area, please visit [NAELA.org/findlawyer](#).