

PRESENTED AT

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Ethical Issues in Joint Representation

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I. Introduction:

- a. In the area of special needs planning, the possibility of multiple clients can be prevalent, whether working to create a first party SNT or a third party SNT. Regardless of the specialized area of law, the attorney is still bound by the Rules of Professional Conduct. As a result, the attorney must think about attorney competence, client identification, confidentiality, conflicts of interest, clients with diminished capacity, duties, third parties paying the attorney's bill, and more.
- b. Resources that help: Texas Disciplinary Rules of Professional Conduct (for ease of reference, hereinafter TDRPC or Rule); NAELA Aspirational Standards (attached as an Appendix and reprinted with permission); ACTEC Commentaries on the Model Rules of Professional Conduct; ACTEC Engagement Letters (2nd ed. 2007); Texas Center for Legal Ethics; Fundamentals of Special Needs Trusts, esp. Chapter 2 (LexisNexis) (attached as an Appendix and reprinted with permission, LexisNexis); Texas Ethics Opinions: <https://www.legalethics.texas.com/Ethics-Resources/Opinions/Opinion-158>.
- c. The topic ethical considerations for special needs planners:
 - i. Are you competent to handle the case?
 - ii. Who is your client?
 - iii. If your client has diminished capacity, what do you do?
 - iv. What information, if any, can (or should) be shared with others?
 - v. How do you handle multiple client potential conflicts of interest?

II. Competence:

- a. We are so used to thinking about a client's capacity (some states may still reference it as competency) but we need to think about *our* competency. An attorney who doesn't have competency in special needs planning can create situations that cause a beneficiary to lose public benefits.
- b. Rule 1.01 notes that if you aren't competent, you shouldn't take the case "unless ... another lawyer who is competent to handle the matter is, with the prior informed consent of the client, associated in the matter; or ... the advice or assistance of the lawyer is reasonably required in an emergency and the lawyer

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limits the advice and assistance to that which is reasonably necessary in the circumstances.” Rule 1.01(a).

- c. Competence in this context means “possession or the ability to timely acquire the legal knowledge, skill, and training reasonably necessary for the representation of the client.” TDRPC *Terminology*. See also Rule 1.01, comment 1.
- d. How do you know if you don’t have the competence? Comment 2 to Rule 1.01 offers these considerations: “relevant factors include the relative complexity and specialized nature of the matter, the lawyer's general experience in the field in question, the preparation and study the lawyer will be able to give the matter, and whether it is feasible either to refer the matter to or associate a lawyer of established competence in the field in question. The required attention and preparation are determined in part by what is at stake; major litigation and complex transactions ordinarily require more elaborate treatment than matters of lesser consequences.”
- e. If it’s beyond your competence, don’t take that case! See Comment 5 to Rule 1.01. But if you do take that case, remember your ethical obligations to the client, and act with “competence, commitment and dedication to the interest of the client and with zeal in advocacy upon the client's behalf. A lawyer should feel a moral or professional obligation to pursue a matter on behalf of a client with reasonable diligence and promptness despite opposition, obstruction or personal inconvenience to the lawyer.” Comment 6 to Rule 1.01 (competence and diligence).

III. Client Identification:

- a. Who is the client in special needs planning? Can the attorney represent multiple clients? Client identification is critical and if multiple representation is appropriate, the attorney must think about confidentiality and conflicts of interest. If a third party is paying the bill, then the attorney must comply with Rule 1.08(e).
- b. Consider what you must do when there are multiple parties in your office. For example, a husband and wife seek your representation for estate planning, and one of their children has special needs. A parent wants to establish a SNT for a child with special needs from a settlement for the child? An adult with special needs seeks your representation to create a first party SNT and brings with her the prospective trustee, her mother.
- c. How do you determine who is the client?
 - i. See, e.g., Sharon B. Gardner, *PROJECT Runaway--ONE DAY YOU'RE IN AS THE ATTORNEY AND THE NEXT DAY YOU'RE OUT!* 1 Est. Plan. & Community Prop. L.J. 111, 120-122 (Fall 2008).
 - ii. See also, TDRPC, Scope ¶ 12 “For purposes of determining the lawyer's authority and responsibility, individual circumstances and principles of substantive law external to these rules determine whether a client-lawyer relationship may be found to exist.”

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