

This redacted sample was generously donated to the LWI Cooperation Committee as written by a student and edited by Elder Law Clinical Professor Kate Mewhinney. Her original comments were handwritten, so they have been reproduced here (and any mistakes are those made by the copyist, Miriam (Miki) Felsenburg). It was then commented on by Legal Writing Professor Felsenburg. The comments marked "LW" are hers. The goal is to foster shared vocabulary between clinical and legal writing professors.

MEMO

To File: [Redacted]
From: [Redacted]
Date: February 25, 20xx
Re: Ethical issue regarding representation

Because Mrs. [] is having some memory problems (her short term memory appears to be very impaired), we have an ethical issue in her representation. She is our client, not her son, [], meaning that we have to do as she says not do what he says.

Under the NC Ethical Rules governing the lawyer/client relationship regarding a client with diminished capacity we have an obligation to maintain as normal a relationship as possible. Specifically Rule 1.14 provides "when a client's capacity to make adequately considered decisions in connection with a representation is diminished, whether because of ...mental impairment..., the lawyer shall, as far as reasonably possible, maintain a normal client-lawyer relationship with the client."

Rule 1.14 further provides that "when the lawyer reasonably believes that the client has diminished capacity, is at risk of substantial...financial...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 appoint of a guardian ad litem or guardian.

This is tricky in this case for two reasons:

Comment [MF1]: LW: Including the client's name in the "re" line would help the reader.

Comment [MF2]: LW: probably not the correct word used here.

Comment [MF3]: LW: This is a run-on sentence. Separate for clarity by using a comma between the independent clauses, or end one sentence with a period, and begin another.

Comment [MF4]: LW: need comma here.

Comment [MF5]: LW: [W]

Comment [MF6]: LW: "appointment" is correct word.

Comment [MF7]: LW: Is there an end quote missing? What is the full cite?

Issue #1

The first reason is that we met with Mrs. [] son [] before we met with Mrs. []. While [] is his mother's agent under an existing DPOA, there initially was a question of who we represent. This was cleared up upon meeting Mrs. [] and determining that while there are mental capacity issues, that she is in fact our client. It appears that if she and her son cannot reach a compromise on the amount of money she can give her son [], that we will need to refer [] to another elder law attorney so that he can take further action if he deems it necessary. Representing [] in this capacity would be a conflict of interest as we represent his mother.

Issue #2

The second issue involves our representation of Mrs. []. This is tricky because while Mrs. [] does appear to have some severe mental capacity problems (because of her short term memory from what I observed) she is quite lucid upon first meeting and it is not until later that her memory issues are apparent. She was able to tell me what she wants and what she thinks about her financial situation, and we have to abide by those wishes although they may not be in her best interest.

This is also tricky because Mrs. [] can be quite defensive which makes it hard to advise her, as she does not seem to really want to listen to the advice we give her. To illustrate the previous point, Mrs. [] maintains that her financial situation is under her control and that she does not need anyone's help in handling her finances. She is bothered by her son []'s constant concern over the money Mrs. [] gives her other son []. Mrs. [] feels that because [] is disabled and receives SSI that he needs her help and she feels that she has the financial ability to give to him. This is an ethically tricky situation because [] has given us her bank records which so that in fact Mrs. [] is giving her son [] a good portion of her monthly income (the figure was \$600 last month according to []). Mrs. [] does not want to hear this information and when we showed her the bank statement she denied taking those funds from her bank account.

Our representation of Mrs. [] is further complicated by the fact that she does not appear to remember our discussions even 10 minutes after they take place. This is difficult because it makes me, as her advisor feel as if nothing has been accomplished by the meeting. This, combined with her defensiveness regarding her financial situation presents the big ethical dilemma: Is Mrs. [] making decisions that are at risk of substantial financial harm? At this time this is a question that I do not think I can answer in the affirmative meaning that I have to follow Mrs. []'s wishes although she may be damaging her financial health in her decisions.

Comment [MF8]: By Mewhinney: delete and insert "Because he"

Comment [MF9]: By Mewhinney: we were representing him in his capacity as her agent. However, upon meeting with her we determined that is a conflict of interest.

Comment [MF10]: LW: In case the reader does not know this abbreviation, it may be advisable to spell it out in full.

Comment [MF11]: By Mewhinney: delete

Comment [MF12]: By Mewhinney: delete "that" and insert "If their disagreement persists after I (rest is deleted)...."

Comment [MF13]: LW: This issue is unclear as indicated through Prof. Mewhinney's comments. The rule for "conflict of interest" appears to be missing, and using an IRAC or CRAC form would have made the issue more clear. A more precise statement of the issue would have helped the reader to see that the issue is not who they represent but rather what action should be taken when there is a conflict of interest between a client and a client's agent.

Comment [MF14]: LW: In general, the intended reader would likely find the second issue is much clearer and easier to understand than the first.

Comment [MF15]: LW: need a comma here.

Comment [MF16]: LW: need a comma here.

Comment [MF17]: LW: need a comma here.

Comment [MF18]: LW: "become" would be a better word choice.

Comment [MF19]: LW: "show" is the word intended.

Comment [MF20]: LW: need comma here.

Comment [MF21]: LW: need comma here.

Comment [MF22]: LW: "with" would be a better word choice.

Comment [MF23]: LW: This conclusion appears to need more support. How much of her total budget is "600"? This issue seems to be of paramount importance, so it appears to warrant a more detailed discussion of the facts and the inferences the reader would draw from it.

END NOTE: LW: In general, this appears to be a good “file” memorandum. The writer uses more “run-on” forms than is optimal, but that may be okay for this purpose. Also, more citation to authority would be helpful, and, the conclusion, as commented upon, really seems to demand more support. In addition, more substantive headings may help a reader focus on his/her interest more quickly when picking up this memo.