“Your lack of planning does not constitute an emergency in my book.”

An elder law attorney struggles over an ethical issue.
Where does he or she turn to find the answer?

PRACTICAL QUESTION CHECKLIST

1. How do I use this book to find answers?
2. Where do I find ethical guidelines?
3. Where do I look for guidance on professional conduct?

I. Overview

This book will examine some of the typical ethical issues encountered in an elder law practice. In the practice of elder law, ethical issues can occur at any point, in some instances taking the attorney by complete surprise. In rais-

1. Old English Proverb.
2. Everyone likely has his or her own definition of “elder law.” Since this is a book about ethics in an elder law practice rather than a treatise on elder law, we will not discuss “what is” elder law in this book. One short definition of “elder law” is provided in BLACK’S LAW DICTIONARY: “[t]he field of law dealing with the elderly, including such issues as estate planning, retirement benefits, social security, age discrimination, and healthcare.” BLACK’S LAW DICTIONARY (Bryan A. Garner, ed., 9th ed., West 2009) (available at Westlaw). The National Academy of Elder Law Attorneys (NAELA) defines “elder law” as:
ing questions and identifying the issues, our purpose is to help the elder law attorney be mindful of the potential for ethical dilemmas and provide guidelines for working through ethical issues. The focus of this book will be on the application of the ABA Model Rules of Professional Conduct to ethical issues confronted by an elder law attorney.

This book will not examine every state’s rules, opinions, and cases relevant to the ethics question. Some cases and opinions will be included as illustrations, but not as a definitive answer to the ethical question posed in the discussion. As regulation of ethical conduct varies from state to state, the reader should take care to consult the applicable state’s ethical rules, opinions of the state’s bar ethics committee, and substantive case law.

This book contains nine chapters covering common ethical issues faced by attorneys practicing elder law. Each chapter contains a checklist, a hypothetical, a discussion of the applicable Model Rules, and, where appropriate, the National Academy of Elder Law Attorneys (NAELA) Aspirational Standards³ and the American College of Trust and Estates Council (ACTEC) Commentaries.⁴ In addition, some of the more recent cases and state ethics opinions are included.⁵

a specialized area [] of law that involves representing, counseling and assisting seniors, people with disabilities and their families in connection with a variety of legal issues, from estate planning to long term care issues, with a primary emphasis on promoting the highest quality of life for the individuals. Typically, Elder . . . Law attorneys address the client’s perspective from a holistic viewpoint by addressing legal, medical, financial, social and family issues.

See NAELA, WHAT ARE ELDER LAW AND SPECIAL NEEDS LAW ATTORNEYS?, available at http://www.naela.org/Public/About/Media/What_is_an_Elder_Law_Attorney/Public/About_NAELA/Media/What_is_an_Elder_Law_Attorney_.aspx (last visted June 25, 2012).

³. NAELA ASPIRATIONAL STANDARDS FOR THE PRACTICE OF ELDER LAW WITH COMMENTARIES (Nov. 21, 2005), available at http://www.naela.org/app_themes/public/pdf/media/aspirationalstandards.pdf [hereinafter NAELA ASPIRATIONAL STANDARDS, included in Appendix 2]. The Aspirational Standards are being revised, so the reader should check the NAELA website for updates.


⁵. Because of the revisions to the Model Rules, our focus was on the more recent ethics opinions and cases, although we have included “older” cases and ethics opinions for illustration.
Although this book does not attempt to provide answers to all of the ethical questions that may arise, it examines many of the issues and provides a framework for analyzing the questions within the scope of the Model Rules and ancillary resources. Knowing the right question to ask is imperative in finding the answer to an ethical issue. This book will provide the reader with the knowledge to determine what question to ask.

Commentators and others refer to the “C’s” of ethics. Thus, in this book we will make reference to and discuss the 9 C’s of elder law ethics in the following order: Competency (where to find guidance), Client (who is the client), Confidentiality (keeping confidences), Conflicts of Interest (who can the elder law attorney represent), Capacity (representing clients who have diminished capacity), Control (representing guardians), Complex Fiduciary Representation (fiduciary representation), Consulting (litigation issues in an elder law practice), and Competition (ancillary practice and marketing).

Not every state has adopted the Model Rules, and those that have may not have adopted them verbatim. Thus, it is necessary for the elder law attorney to consult the applicable state’s ethical rules, ethical opinions, and substantive law in determining the appropriate course of action.

II. An Elder Law Attorney’s Duties

A. Competency

To some extent, this chapter, as well as the entire book, examines the attorney’s competency in the practice of elder law. As noted in Model Rule 1.1, “[a] lawyer shall provide competent representation to a client. Competent representation requires the legal knowledge, skill, thor-
oughness, and preparation reasonably necessary for the representa-

Comment 1 to Model Rule 1.1 sets out the “competency fac-
tors” that measure an attorney’s competency for a specific matter, such
as one arising in elder law. These competency factors (applied to elder
law) include the complex, specialized nature of the elder law case, the
attorney’s overall training, as well as his or her experiences in elder
law; the amount of time, preparation, and attention the attorney can
give to the case; and whether it is possible to either refer the case or
consult with an attorney who has an expertise in elder law. Although
competency may be acquired, there are times when an attorney needs
to be an expert in the area and not “learn on the job.”

Elder Law is a specialized practice area that requires a higher level
of competency because of the complexity of the issues faced by cli-

The Elder Law Attorney . . . [r]ecognizes the special range of
client needs and professional skills unique to the practice of
Elder Law and holds himself or herself out as an Elder Law
Attorney only after ensuring his or her professional compe-
tence in handling elder law and disability related matters.

B. Professionalism

Black’s Law Dictionary defines “professionalism” as “[t]he practice of
a learned art in a characteristically methodical, courteous, and ethical
manner.” Starting in the 1980s, a conversation began within the legal
profession about professionalism. The American Bar Association
(ABA), along with many state bars, formed committees to study the legal profession and what some perceived to be a lack of professionalism. The ABA created the ABA Commission on Professionalism, which issued a report that was considered the “blueprint for rekindling lawyer professionalism.”

The report provided definitions of professional and professionalism. As a professional, an attorney understands that clients place their trust in the attorney. That trust requires that the attorney’s self-interest be outweighed “by devotion to serving both the clients’ interest and the public good.” Certainly a client may not understand the law and its applications and thus must trust that her attorney is representing her best interest, as well as the best interest of the public.

Why discuss professionalism in a book about ethics? For one, as noted earlier, the definition from *Black’s Law Dictionary* identifies “ethics” as part and parcel of professionalism. Another reason is that the rules do not answer every ethics question that an attorney may have.

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12. *Id.*


15. *Id.,* quoting Eliot Freidson who defined the “profession” as follows:

   (1) [P]ractice requires substantial intellectual training and the use of complex judgments.
   (2) . . . [S]ince clients cannot adequately evaluate the quality of the service, they must trust those they consult.
   (3) . . . [C]lient’s trust presupposes that the practitioner’s self-interest is overbalanced by devotion to serving both the client’s interest and the public good, and
   (4) . . . [T]he occupation is self-regulating—that is, organized in such a way as to assure the public and the courts that its members are competent, do not violate their clients’ trust, and transcend their own self-interest. (Citations omitted.)

16. Professor Flowers has been known to say that the rules probably cannot answer three-fourths of the ethics questions. She quotes Professor Anthony Amsterdam, who reportedly once said, “The [Rules] of Professional [Conduct] give[ ] [about] as much guidance to a lawyer as a valentine gives to a heart surgeon.” Roy D. Simon, *Legal Ethics Advisors and the Interests of Justice: Is an Ethics Advisor a Conscience or Co-Conspirator?*, 70 FORDHAM L. REV. 1869, 1877 (2002), available at http://ir.lawnet.fordham.edu/flr/vol70/iss5/24.
Thus, professionalism provides a lawyer with a foundation and guidance to make appropriate discretionary decisions. Looked at another way, the Model Rules may be viewed as the “basement” of the legal profession. As long as an attorney complies with the Model Rules (the “basement”), he will stay in the profession, though his professionalism determines where (in the legal profession’s “house”) the attorney will reside. The truly professional lawyer resides in the “penthouse,” not in the “basement.” Of course there is another incentive to maintaining professional standards: the more professional the attorney, the better the attorney’s reputation, and thus a better reputation for the legal profession overall. As such, being a professional elder law attorney is a “win-win” situation. As described in the NAELA Aspirational Standards Preamble, “[a]ttorneys who aspire to and meet these Standards will elevate their level of professionalism in the practice of Elder Law, and enhance the quality of service to their clients. As attorneys meet these Standards, the practice of Elder Law will be raised to a higher standard of professionalism.”

III. Guidance—Ethical Resources for the Elder Law Practice

Legal ethics are defined in *Black’s Law Dictionary* as “[s]tandards of professional conduct applicable to members of the legal profession.” As the Model Rules are considered to be the code of ethics for the legal profession, this book will discuss both ethical and professional conduct. Accordingly, this chapter will discuss various resources

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17. NAELA Aspirational Standards at 6–7. The authors were part of the drafting committee for the Aspirational Standards.
18. *Black’s Law Dictionary*, supra note 2. The definition goes on:

In one sense, the term ‘legal ethics’ refers narrowly to the system of professional regulations governing the conduct of lawyers. In a broader sense, however, legal ethics is simply a special case of ethics in general, as ethics is understood in the central traditions of philosophy and religion. From this broader perspective, legal ethics cuts more deeply than legal regulation: it concerns the fundamentals of our moral lives as lawyers.”

*Id.* (quoting DAVID LUBAN & DEBORAH L. RHODE, LEGAL ETHICS 3 (1992)).
Where to Go for Guidance

for ethical and professional guidance, including the NAELA Aspirational Standards.

Numerous resources concerning potential ethical issues are available. These resources include:

- The ABA Model Rules of Professional Conduct (2012) (see Appendix 1)
- The National Academy of Elder Law Attorneys (NAELA) Aspirational Standards (see Appendix 2)
- State bar ethics rules, ethics opinions, and substantive law
- Ronald D. Rotunda and John S. Dzienkowski, Legal Ethics—The Lawyer’s Deskbook on Professional Responsibility (ABA 2011-2012 ed.)

A. ABA Model Rules of Professional Conduct

This book uses the ABA Model Rules of Professional Conduct for several reasons. First, space will not permit us to examine the varying rules of each state. Additionally, the Model Rules are widely used and have been adopted in some form in all the states except California. The Center for Professional Responsibility also compiles a chart that lists the adoption of the comments to the Model Rules. California rules differ substantially from the Model Rules. Thus, the Model Rules apply to

20. This is not an exhaustive list of sources that an elder law attorney may wish to consult. In addition to other books, many articles have been written that an elder law attorney may find helpful.


23. See Am. Bar Ass’n, ABA Model Rules of Prof’l Conduct, State Adoption of Model Rules, supra note 21.
the ethical regulations in almost every state. Therefore, by analyzing ethical issues under the Model Rules, the framework is established for evaluating the issues under the attorney’s own state ethics rules.

The Model Rules (in their current form) were adopted by the American Bar Association in 1983, after a six-year process of writing and rewriting. Over the next few years, many states adopted the ABA Model Rules of Professional Conduct in one form or another, some very close to the Model Rules, but with some revisions in wording, some with editorial changes, and important variations. The Model Rules provide essential guidelines, but they are only recommendations and cannot be the basis of a malpractice claim against an attorney. The next major development in the Model Rules occurred with the Ethics 2000 Commission (E2C). The E2C recommended some significant modifications to the latest version of the Model Rules. A number of states have adopted some or all of those revisions.

24. Model Rules of Prof’l Conduct, Preface (2010). The ABA has no authority to create rules that govern lawyers—they are just the model, so it is up to the individual states to adopt them.

25. See Model Rules of Prof’l Conduct, Scope 20 (“Violation of a Rule should not itself give rise to a cause of action against a lawyer nor should it create any presumption in such a case that a legal duty has been breached. In addition, violation of a Rule does not necessarily warrant any other nondisciplinary remedy, such as disqualification of a lawyer in pending litigation. . . .”) Although the rules cannot be the basis of a claim, they are used and cited by the courts routinely as evidence of the appropriate nature of the lawyer’s conduct. See, e.g., Evelyn B. Thomason, How Estate Planners Can Cope with the Increasing Risk of Malpractice Claims, 12 EST. PLAN. 130 (1985). See, e.g., Elliott v. Videan, 791 P.2d 639, 642 (Ariz. App. 1989) (quoting the lower court judge who said, “These rules are rules of professional conduct only, and a violation of these rules does not establish an act of malpractice. They are merely evidence. . . .”); Albright v. Burns, 503 A.2d 386, 390 (N.J. Sup. App. Div. 1986). (“Where an attorney fails to meet minimum standard of competence governing the profession, such failure can be considered evidence of malpractice.”); Woodruff v. Tomlin, 616 F. 2d 924 (6th Cir. 1980); cf. Jenkins v. Wheeler, 316 S.E. 2d 354 (N.C. App. 1984) (relying on rules regarding conflicts of interest to establish a duty giving rise to civil liability).


27. Id.

The Model Rules of Professional Conduct provide the basis upon which ethical guidelines are established. The Preamble to the Model Rules outlines the various roles of an attorney. The attorney is “a representative of [his] clients, an officer of the legal system and a public citizen having special responsibility for the quality of justice.” From the outset it is important that an attorney understand that in addition to representing his or her client, he or she must also act in accordance with the duties of an officer of the legal system, and also as a citizen responsible for the quality of justice. As the Preamble notes, these roles usually call for consistent behavior. However, sometimes responsibilities can conflict, and in those situations the Model Rules suggest that:

[v]irtually all difficult ethical problems arise from conflict between a lawyer’s responsibilities to clients, to the legal system and to the lawyer’s own interest in remaining an ethical person while earning a satisfactory living. The Rules of Professional Conduct often prescribe terms for resolving such conflicts. Within the framework of these Rules, however, many difficult issues of professional discretion can arise. Such issues must be resolved through the exercise of sensitive professional and moral judgment guided by the basic principles underlying the Rules. These principles include the lawyer’s obligation zealously to protect and pursue a client’s legitimate interests, within the bounds of the law, while maintaining a professional, courteous and civil attitude toward all persons involved in the legal system.

By applying the Model Rules, the NAELA Aspirational Standards, and, to some extent, the ACTEC Commentaries, this book will attempt to guide the elder law attorney in those areas where discretion is necessary. The Model Rules are divided into eight sections. Much of the guidance for the elder law attorney is contained in first section, “Client-Lawyer Relationship.” This section deals primarily with the ethical responsibilities of the attorney to her client. The second section, called “Counselor,” examines the responsibility of the attorney to act as an advisor. The third section deals with the attorney’s role as “Advocate” and provides guidance in the litigation arena. The fourth section fo-

30. *Id.* at Preamble 5, 6, and 8.
31. *Id.* at Preamble 9.
uses on relationships with non-clients. This important section (see Chapter 2) addresses the ethical responsibility of the elder law attorney to non-clients. The remaining sections examine the legal profession and the practice of law.\textsuperscript{32} Although this book will cover many of the provisions of the Model Rules, the bulk of the focus will be on the first section, as it is the most valuable to the elder law attorney. The terminology section that is found in Rule 1.0 is also important to review.\textsuperscript{33} The terminology used in the rules is essential to an attorney.\textsuperscript{34}

\textsuperscript{32} The fifth section deals with law firms, the sixth with public service, the seventh with legal services, and the last with maintaining the integrity of the profession.

\textsuperscript{33} \textsc{Model Rules of Prof’l Conduct} R. 1.0.

\textsuperscript{34} \textit{Id.} In particular, three sections of Rule 1.0 need to be considered in an elder law practice: “informed consent,” “confirmed in writing,” and “writing.” “Informed consent” is defined as:

\begin{quote}
the agreement by a person to a proposed course of conduct after the lawyer has communicated adequate information and explanation about the material risks of and reasonably available alternatives to the proposed course of conduct.
\end{quote}

\textit{Id.} at R. 1.0(e).

Note as well that in many instances the client’s informed consent must be “confirmed in writing,” which means:

\begin{quote}
when used in reference to the informed consent of a person, denotes informed consent that is given in writing by the person or a writing that a lawyer promptly transmits to the person confirming an oral informed consent. See paragraph (e) for the definition of “informed consent.” If it is not feasible to obtain or transmit the writing at the time the person gives informed consent, then the lawyer must obtain or transmit it within a reasonable time thereafter.
\end{quote}

\textit{Id.} at R. 1.0(b).

“Writing,” under the Rules, means:

\begin{quote}
a tangible or electronic record of a communication or representation, including handwriting, typewriting, printing, photostating, photography, audio or video recording and electronic communications. A “signed” writing includes an electronic sound, symbol or process attached to or logically associated with a writing and executed or adopted by a person with the intent to sign the writing.
\end{quote}

\textit{Id.} at R. 1.0(n).
B. The NAELA Aspirational Standards

The Aspirational Standards, written and published by the National Academy of Elder Law Attorneys (NAELA), provide an excellent foundation for professionalism in the practice of elder law. The NAELA Aspirational Standards are organized by section, with “Standards” followed by “Commentary.” It is important to recognize that these Aspirational Standards are merely guidelines. As the Preamble to the Standards notes:

Each state’s professional responsibility rules mandate the minimum requirements of conduct for attorneys to maintain their licenses. These Aspirational Standards build upon and supplement those rules. . . . These Aspirational Standards do not define or establish a community standard. They are not intended to, nor should they be used to support a cause of action, create a presumption of a breach of legal duty, or form a basis for civil liability.

Obviously, every area of law has its own unique ethical issues, but in elder law some very complicated ethical situations may arise. As further noted in the Preamble to the NAELA Aspirational Standards:

In the past 20 years, Elder Law has developed as a separate specialty area because of the unique and complex issues faced by older persons and persons with disabilities. Elder Law includes helping such persons and their families with planning for incapacity and long-term care, Medicaid and Medicare coverage (including coverage of nursing home and home care), health and long-term care insurance, and health care decision-making. It also includes the drafting of special needs and other trusts, the selection of long-term care providers, home care and nursing home problem solving, retiree health and income benefits, retirement housing, and fiduciary services or representation. In these and other areas, the Elder Law Attorney is often

35. NAELA Aspirational Standards, Preamble at 6.
36. Id., Preamble at 6 (“The following Guidelines set out Aspirational Standards of professionalism and ethical behavior for Elder Law Attorneys. They are the product of study and deliberation by NAELA members and, specifically, NAELA’s Professionalism and Ethics Committee.”).
37. Id., at Preamble at 6–7.
asked to advocate for clients with diminished capacity. Family members and persons with fiduciary responsibilities become involved. The traditional attorney-client relationship is not always clear. Issues such as substituted judgment, best interests, and “who is the client?” present problems not regularly faced by other lawyers.\textsuperscript{38}

As noted above, elder law attorneys may face ethical issues in dealing with family members (such as client identification, conflicts of interest, confidentiality and undue influence, non-clients, fiduciary representation, etc.), as well as problems posed by clients with health problems or diminished capacity.

Ethical dilemmas that arise in representing older people and their families are difficult for attorneys to resolve because they concern fundamental issues involving property, health care, family relationships, and mortality. Lawyers must apply norms of professional conduct within a murky landscape of human frailty and emotional turmoil in an atmosphere permeated with the dread of mental incapacity, the possible need for long-term care, and the inevitability of death. When a client’s legal problems are deeply intertwined with a family’s interpersonal, emotional, economic and social dimensions, it is common for family members to be involved.\textsuperscript{39}

The NAELA Aspirational Standards will be incorporated into the discussion of each chapter. Although many of the NAELA Aspirational Standards will be discussed in the following chapters, it is helpful to the reader to read all of the NAELA Aspirational Standards (see Appendix 2).

\textsuperscript{38} Id. at 6.

\textsuperscript{39} Joseph A. Rosenberg, \textit{Adapting Unitary Principles of Professional Responsibility to Unique Practice Contexts: A Reflective Model for Resolving Ethical Dilemmas in Elder Law}, 31 \textit{Loy. U. Chi. L.J.} 403, 405 (2000) (footnotes omitted). In two footnotes accompanying the quote, Professor Rosenberg notes the “ethical dilemmas” he refers to “are not limited to older clients and the practice of elder law. For example, family law involves complex family relationships and people of all ages have health-related concerns. Yet the prevalence of these circumstances among the elderly and their families poses singular challenges for elder law attorneys.” He “[uses] the term ‘family’ in its broadest sense, which includes unmarried life partners, unrelated groups of people who live together, and the full range of ‘blended’ families.” \textit{Id.} at 405 nn.1–2.
IV. Duties, Disciplinary Matters, and Liability

Every attorney needs to be cognizant of the potential for a grievance being filed and, with the erosion of the doctrine of privity in most states, suits for legal malpractice. This book is not about grievances or malpractice, but it is important for elder law attorneys to be aware of the potential for grievances being filed for violations of the applicable ethics rules.\textsuperscript{40} Discipline for a violation of the ethics rules is different from malpractice, and the ethics rules are not a basis for liability.\textsuperscript{41} As noted in the Scope, a

\begin{quote}
\textbf{violation of a Rule should not itself give rise to a cause of action against a lawyer nor should it create any presumption in such a case that a legal duty has been breached. In addition, violation of a Rule does not necessarily warrant any other nondisciplinary remedy, such as disqualification of a lawyer in pending litigation. The Rules are designed to provide guidance to lawyers and to provide a structure for regulating conduct through disciplinary agencies. They are not designed to be a basis for civil liability. Furthermore, the purpose of the Rules can be subverted when they are invoked by opposing parties as procedural weapons. The fact that a Rule is a just basis for a lawyer’s self-assessment, or for sanctioning a lawyer under the administration of a disciplinary authority, does not imply that an antagonist in a collateral proceeding or trans-}
\end{quote}

\textsuperscript{40} \textit{Model Rules of Prof’l Conduct}, Scope 19 provides:

Failure to comply with an obligation or prohibition imposed by a Rule is a basis for invoking the disciplinary process. The Rules presuppose that disciplinary assessment of a lawyer’s conduct will be made on the basis of the facts and circumstances as they existed at the time of the conduct in question and in recognition of the fact that a lawyer often has to act upon uncertain or incomplete evidence of the situation. Moreover, the Rules presuppose that whether or not discipline should be imposed for a violation, and the severity of a sanction, depend on all the circumstances, such as the willfulness and seriousness of the violation, extenuating factors and whether there have been previous violations.

\textsuperscript{41} \textit{Id.} at Scope 20. \textit{See also}, e.g., 1 \textsc{Geoffrey C. Hazard, Jr., W. William Hodes \\ & Peter R. Jarvis, The Law of Lawyering} at 4-21–4-22 (3d ed. 2011).
action has standing to seek enforcement of the Rule. Nevertheless, since the Rules do establish standards of conduct by lawyers, a lawyer’s violation of a Rule may be evidence of breach of the applicable standard of conduct.42

This is echoed in the NAELA Aspirational Standards, where the Preamble notes that those “[s]tandards do not define or establish a community standard. They are not intended to, nor should they be used to support a cause of action, create a presumption of a breach of legal duty, or form a basis for civil liability.”43

Every attorney should know the applicable state’s laws regarding the attorney’s responsibility to third parties, such as beneficiaries. This is especially important with the erosion of the requirement of privity, as it holds attorneys liable to non-clients.44 Although the recent trend is for courts to begin to look at holding attorneys responsible to non-party beneficiaries, the basis for liability and the results have not been consistent.45 First of all, the courts have looked at whether there was a foreseeable effect on the third party or on the non-client.46 Some courts have looked at whether the attorney was acting, arguably, negligently in a malpractice suit; the attorney could have foreseen the impact on this third party and therefore should be responsible for that.47 The courts have also looked at the idea of fiduciary and agency in regard to the relationship between the client and the non-client—did the client have some sort of fiduciary relationship with the non-client?—and therefore the attorney had a corresponding duty to consider the interests of the non-client principal also.48 Some courts have referred to third-party beneficiary principles in deciding whether the attorney’s actions were

42. MODEL RULES OF PROF’L CONDUCT Scope 20.
43. NAELA Aspirational Standards at 6–7.
44. See, e.g., HAZARD, HODES & JARVIS, supra note 41, at 4-15–4-21.
45. See, e.g., id.
46. One National Bank v. Antonellis, 80 F.3d 606, 609 (1st Cir. 1996) (“it must be shown that the attorney should reasonably foresee that the non-client will rely upon him for legal advice”), quoting DaRoza v. Arter, 622 N.E.2d 604, 608 n.7 (1993); Spinner v. Nutt, 631 N.E.2d 542 (1994). See also, e.g., HAZARD, HODES & JARVIS, supra note 41, at 4-16.
47. HAZARD, HODES & JARVIS, supra note 41, at 4-16.
48. See, e.g., Argoe v. Three Rivers Behavioral Center, 697 S.E.2d 551 (S.C. 2010) (finding that the attorney had no relationship with mother/principal when the
really for the benefit of a third party.\textsuperscript{49} Finally, some courts have applied a balancing test; balancing the predictability and certainty of the harm to a third person against the defendant’s culpability and the extent of the third party’s justified reliance on the defendant’s conduct.\textsuperscript{50}

The Restatement (3rd) of the Law Governing Lawyers (§ 51, Duty of Care to Certain Non-clients) discusses instances when an attorney has a duty to certain non-clients.\textsuperscript{51} There are four different situations that apply in § 51. Section one involves an attorney’s responsibility to

\begin{itemize}
  \item[(1)] to a prospective client, as stated in § 15;
  \item[(2)] to a nonclient when and to the extent that:
    \begin{itemize}
      \item[(a)] the lawyer or (with the lawyer’s acquiescence) the lawyer’s client invites the nonclient to rely on the lawyer’s opinion or provision of other legal services, and the nonclient so relies; and
      \item[(b)] the nonclient is not, under applicable tort law, too remote from the lawyer to be entitled to protection;
    \end{itemize}
  \item[(3)] to a nonclient when and to the extent that:
    \begin{itemize}
      \item[(a)] the lawyer knows that a client intends as one of the primary objectives of the representation that the lawyer’s services benefit the nonclient;
      \item[(b)] such a duty would not significantly impair the lawyer’s performance of obligations to the client; and
      \item[(c)] the absence of such a duty would make enforcement of those obligations to the client unlikely; and
  \end{itemize}
\end{itemize}
a prospective client,\(^5^2\) while the remaining three sections involve his or her responsibility to non-clients (section two focuses on reliance, section three explores the relationship with non-clients, and section four covers fiduciary relationships).\(^5^3\)

V. Conclusion

This book is the starting point for the elder law attorney who may be struggling with an ethics question. In considering a proposed course of conduct, the elder law attorney will also need to look to the applicable state’s ethics rules, opinions, and substantive law. We hope the information in this book will help the elder law attorney in framing the issue so the attorney can be confident that he or she is moving in the right direction.

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(4) to a nonclient when and to the extent that:

(a) the lawyer’s client is a trustee, guardian, executor, or fiduciary acting primarily to perform similar functions for the nonclient;
(b) the lawyer knows that appropriate action by the lawyer is necessary with respect to a matter within the scope of the representation to prevent or rectify the breach of a fiduciary duty owed by the client to the nonclient, where (i) the breach is a crime or fraud or (ii) the lawyer has assisted or is assisting the breach;
(c) the nonclient is not reasonably able to protect its rights; and
(d) such a duty would not significantly impair the performance of the lawyer’s obligations to the client.

52. \(\text{Id. at } \$ 51(1)\).
53. \(\text{Id. at } \$ 51(2)-(4)\).