Legal Ethics: Helplines & Hotlines (Part One)

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Justice in Aging and The Shely Firm

Justice in Aging is a national organization that uses the power of law to fight senior poverty by securing access to affordable health care, economic security, and the courts for older adults with limited resources.

The Shely Firm, PC, provides ethics advice on a variety of topics including conflicts of interest, fees and billing, trust account procedures, lawyers changing firms, ancillary businesses, and ethics requirements for law firm advertising/marketing.

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Introduction

Legal helplines provide valuable help and brief services to older adults. Legal helplines,[1] working together with legal aid organizations, the private bar, and limited scope projects assist in addressing the unmet legal needs of older adults with the greatest social and economic need. Legal helplines may perform brief services such as making phone calls, preparing documents, explaining court procedures, making referrals to other programs, or serving as the intake center for a full service program.[2] Many problems can be resolved by advice and brief legal intervention.

Because legal helplines typically provide some form of legal advice, attorneys operating helplines must follow their state's professional rules, even though the services are being provided by phone and in a limited scope setting. This issue brief will reference the American Bar Association's Model Rules of Professional Conduct (MRPC), but providers should look to their state's adopted professional rules. References will also be made to the American Bar Association's Standards for the Provision of Civil Legal Aid (SPCLA), which provides recommendations for effective and ethical legal aid work.

This Chapter Summary is the first part of upcoming NCLER resources on ethics and legal helplines. This issue brief will address the primary issues that helpline providers may face when working with older adults: scope of representation and services, third party callers and conflicts, and capacity concerns.

Scope of Representation and Services

The issue

Helplines must adequately communicate the scope of services that can be provided, and clearly explain the short-term role of the helpline, as well as the limitations of the type of advice and help that can be provided. By clearly establishing the parameters of the service early, the client will have a better understanding of what will happen if more intensive intervention is needed. This helps ensure the caller understands that the helpline

1 For purposes of this document, we will use the phrase helpline throughout for simplicity. However, programs may call themselves helplines, hotlines, advice lines, and other designations.

2 Center for Elder Rights Advocacy, "Legal Hotlines: A How to Manual," (2001), available at: legalhotlines.org/resource/legal-hotlines-a-how-to-manual.

provider may not be representing them in an ongoing matter. The key question a helpline provider determines during the initial phone call is: can this legal matter be competently resolved through brief telephone service, or does the client need assistance resolving a complex issue? In the later, the client likely requires full representation.

Rules to review

MRPC Rule 1.1 Competence: *A lawyer shall provide competent representation to a client. Competent representation requires the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation.*

MRPC Rule 1.2(c) Scope of Representation & Allocation of Authority between Client & Lawyer: *A lawyer may limit the scope of the representation if the limitation is reasonable under the circumstances and the client gives informed consent.*

SPCLA Standard 3.4 On Limited Representation: *A provider may limit its representation to specific tasks and activities undertaken on a client's behalf, if the limited representation is reasonable under the circumstances and the client knowingly consents to the limitation.*

Procedure examples

A helpline provider can face a difficult decision when the client needs a full range of legal services. In these situations, the helpline can best serve the caller by determining whether the helpline is the best source of legal assistance for a particular issue. If the issue is outside the scope of what can competently be addressed on a legal helpline, the caller will benefit from thoughtful referrals and warm handoffs for full representation or supportive services. To address this, helplines prepare robust referral networks to connect clients to full-representation services.

Examples of current helpline practices that clarify scope of representation

- Read a clear statement explaining the limited-scope of your services. Provide an opportunity for the caller to ask questions about the statement and document their consent to the scope of services that can be provided.
- Provide a written disclaimer (email or mail).
- If appropriate, provide a closing letter to the caller explaining the limited scope representation has ended.
- Define the case types or actions (including document preparation assistance) that go beyond the scope of services of the helpline and require referrals. This can be especially beneficial guidance for any pro bono attorneys who may be working on the helpline. Match referral options to the defined case types or actions.
- Develop direct contacts at potential referral sources to better facilitate warm handoffs and ensure quick responses in emergency cases.

Third Party Callers

The issue

Family, friends, and caretakers for older adults often reach out to legal helplines for advice on behalf of an older adult. The third-party caller may have a legal relationship to the older adult, as an agent under a power of attorney or an appointed guardian. When providing services by phone, the helpline provider cannot always

be sure who is on the other end of the line. Due to the prevalence of elder abuse, third party callers should be carefully screened to ensure that advice is not being provided to the perpetrator of abuse.[3] Third party caller situations can raise issues of both confidentiality and conflicts. Depending on the information, a helpline who provides information to the caller may no longer be able to assist the older adult in a subsequent call. **Everything an attorney learns from someone who reasonably believes they are contacting the attorney for legal advice must be treated as confidential information, including the fact that they called the attorney.**

Rules to review

MRPC Rule 1.6(a) Confidentiality of Information: *A lawyer shall not reveal information relating to the representation of a client unless the client gives informed consent, the disclosure is impliedly authorized in order to carry out the representation, or the disclosure is permitted by paragraph (b).*[4]

MRPC Rule 1.9(a) Duties to Former Clients: *A lawyer who has formerly represented a client in a matter shall not thereafter represent another person in the same or a substantially related matter in which that person's interests are materially adverse to the interests of the former client unless the former client gives informed consent, confirmed in writing.*

MRPC Rule 1.16(a)(1) Declining or Terminating Representation: *Except as stated in paragraph (c), a lawyer shall not represent a client or, where representation has commenced, shall withdraw from the representation of a client if:*

(1) the representation will result in violation of the rules of professional conduct or other law.[5]

Third party caller procedure examples

Screening for conflicts of interest is much easier when a helpline has clear protocols that comply with state-based rules. Helpline protocols may also include parameters for refusing to provide phone representation to third-party callers, including defining limited circumstances or refusing to provide advice to all third party callers.

Examples of current helpline third party caller procedures

- A process document with specific questions that must be asked when receiving a call from a third party, along with suggested courses of action. A visual guide or chart on third party ethics can be helpful.[6]
- Define "who the client is" by case types. For example, will the helpline only assist the older adult themselves in cases involving potential abuse or exploitation?
- Obtaining consent from the older adult to speak with the third party caller. Speaking with the older adult themselves, out of hearing range of the third party, is important if abuse or undue influence is suspected.

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3 See National Center on Law and Elder Rights, "Recognizing and Addressing Abuse on Senior Legal Hotlines," available here: ncler.acl.gov/Files/SLH-Elder-Abuse-Ch-Summary.aspx.

4 See full text of MRPC 1.6: americanbar.org/groups/professional_responsibility/publications/model_rules_of_professional_conduct/rule_1_6_confidentiality_of_information/

5 See full text of MRPC Rule 1.16: americanbar.org/groups/professional_responsibility/publications/model_rules_of_professional_conduct/rule_1_16_declining_or_terminating_representation/

6 The American Bar Association Commission on Law and Aging's "Why am I in the Waiting Room?" brochure is a helpful visual guide to help third parties understand the relationship between a lawyer and client: americanbar.org/products/inv/brochure/211008886.

- Running a conflict check in the case management system before providing any information or advice.
- Developing a script for advising a caller that the helpline cannot help when a conflict is discovered.

Capacity Concerns

The issue

When working with older adults through a legal helpline, helpline providers are likely to face the challenge of determining whether a client or a potential client has decision-making capacity.[7] Making this determination can be particularly challenging for helplines due to their limited time with the caller, lack of face-to-face communication, and not having a baseline for typical behavior for the individual.

Rules to review

MRPC Rule 1.14(a) Client with Diminished Capacity: *When a client's capacity to make adequately considered decisions in connection with a representation is diminished, whether because of minority, mental impairment, or for some other reason, the lawyer shall, as far as reasonably possible, maintain a normal client-lawyer relationship with the client.*

Suggested procedures

When time permits, helpline attorneys can go through the American Bar Association's Capacity Worksheet for Lawyers, excluding the factors that require visual observations. However, in most cases, helpline providers will not have the time to go through the worksheet. Protocols can help provide clarity when these situations arise.

Examples of current helpline capacity practices

- Establishing protocols for helpline attorneys to follow when they suspect that the caller may have diminished capacity that would prevent them from being able to enter into an attorney-client relationship.
- Creating a reference with capacity standards, as defined by state statute, available to all helpline attorneys. This helps when a helpline provider is trying to determine how to assist a caller with diminished capacity, based on the reason for their call.
- Asking the caller what time of day is best for them for phone calls. Some people with diminished capacity live with "sundowning," which can cause increased confusion, anxiety and agitation late in the day.
- Connecting the caller with a full-service legal services provider, who may have the ability to fully assess capacity and potentially assist the caller by having a face-to-face, in person meeting with the caller alone, following all recommended protocols.

Conclusion

Legal helplines are a valuable part of the delivery of legal services for older adults. Applying legal ethics rules to helpline practice and protocols can make a difference in the quality of services provided to older adults and

7 See National Center on Law and Elder Rights, "Understanding Legal Capacity and Ethics," available at: ncler.acl.gov/pdf/Capacity%20Ethics%20Practice%20Guide.pdf.

protect helpline providers.

Some tips to remember:

- Trust your instincts – if a situation does not feel right, there probably is an ethics issue that should be addressed.
- The lawyer must define who is the "client." Do not let prospective clients, their relatives or care givers unilaterally determine who is the client.
- Resist the temptation to be "helpful" to a third party caller before making a proper evaluation of who your client is and if there are any potential conflicts – giving just a bit of advice or answering a few questions over the phone for an adult child or other third party may preclude you from representing the older adult in a subsequent call.

Additional Resources:

- American Bar Association: Model Rules of Professional Conduct
- American Bar Association: Unbundling Resource Center

Case consultation assistance is available for attorneys and professionals seeking more information to help older adults. Contact NCLER at ConsultNCLER@acl.hhs.gov.

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