



Powers of Attorney in Elder Law

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Attorneys are frequently sought out by individuals acting under a power of attorney seeking legal guidance. When faced with such scenarios, attorneys are tasked with navigating various legal and ethical considerations, notably identifying who constitutes the client and understanding the corresponding legal and ethical duties towards the agent and principal. These considerations become especially crucial when the principal is a senior or otherwise vulnerable individual.

Determining Who Is the Client

Competent representation requires an inquiry into the factual and legal elements of a case.¹ Failure to ascertain the identity of the client can hinder the attorney's

fulfillment of their ethical responsibilities, such as communication, confidentiality, conflicts of interest, and duties to former clients, as stipulated by Nevada Rules of Civil Procedure (NRCP) 1.4, 1.6, 1.7, and 1.9 respectively. In addition, special duties are owed to clients with diminished capacity. NRCP 1.14.

The person who contacts or meets with the attorney may not necessarily be the client. Nevada Revised Statute (NRS) 49.045 defines a client as a "a person ... who is rendered professional legal services by a lawyer, or who consults a lawyer with a view to obtaining professional legal services from the lawyer." In this instance, the agent may be the client. However, the agent as a representative of the client may be the client. NRS 49.075 defines a representative of a client as "a person having authority to obtain professional legal services, or to act on advice rendered pursuant thereto, on behalf of the client." If the agent is seeking legal services on behalf of the principal, then the client is the principal.

Determining whether the principal or agent is the client often hinges on the scope of legal services sought. For example, if the agent is seeking advice regarding their duties and responsibilities as an agent or seeking guardianship over

the principal, then the agent is likely the client. Conversely, if the agent is seeking to take action *on behalf of* the principal, such as applying for Medicaid, preparing estate planning documents, or pursuing legal action on the principal's behalf, then the principal is likely the client.

The engagement letter should accurately describe the scope of representation and the attorney's duties and obligations towards the client. If the client is the principal, the agent should understand and acknowledge in writing that the attorney represents the principal and not the agent. The agent is merely the representative of the principal.

Validating the Power of Attorney

Irrespective of whether the client is the agent or principal, the attorney must ascertain the validity of the power of attorney and the extent of the agent's authority. The attorney should assess various factors when presented with a power of attorney:

1. Is the power of attorney signed by the principal and notarized?
2. Does or did the principal reside in a hospital, group home, or skilled nursing facility at the time the power of attorney was signed? If

so, is a certificate of competency of the principal signed by a medical professional attached to the power of attorney?

3. What is the relationship of the agent to the principal? If the principal resides in a facility, the agent cannot be associated with the facility unless the agent is a family member or appointed for the limited purpose of obtaining Medicaid.²
4. Is the power of attorney a springing power of attorney that is only effective upon incapacity? If so, is written proof provided to support incapacity?³
5. Has the power of attorney been terminated or revoked?⁴

Attorneys may, in good faith, rely on the agent's assertions regarding validity provided the attorney lacks actual knowledge of the power of attorney's nullity, invalidity, or termination.⁵ Furthermore, the attorney presented with a power of attorney may request the agent to sign an affidavit under penalty of perjury concerning factual matters concerning the principal, agent, or power of attorney.⁶

After determining whether a power of attorney is valid, the attorney must explain to the agent its fiduciary duties and the specific powers granted to the agent. The duties owed by an agent to the principal include the duty to act in good faith, the duty of loyalty, and the duty to act for the principal's benefit.⁷ The powers granted the agent are set forth in the power of attorney. While certain forms, like the Nevada statutory form, allow the principal to individually select broad or limited powers granted to the agent,⁸ forms from other states may be more complex and the attorney should carefully read the form to ascertain the powers granted.

Duties to the Client

If the agent is the client, the ethical and legal duties primarily extend to the agent, not the principal. NRS 162.310(1) states that "[a]n attorney who represents a fiduciary does not, solely as a result of such attorney-client relationship, assume a corresponding duty of care or other fiduciary duty to a principal." However, what are the obligations to the principal if the attorney believes the agent, serving as the client, is financially exploiting or breaching its fiduciary duty to a vulnerable principal?

Nevada law recognizes the importance of protecting vulnerable

populations. NRS 200.5099 criminalizes the abuse, neglect, or exploitation of individuals aged 60 or older. The Nevada Rules of Professional Responsibility recognize the lawyer's duty to protect a client with diminished capacity. NRPC 1.14 states:

Rule 1.14. Clients With Diminished Capacity.

- (a) 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.
- (b) When the lawyer reasonably believes that the client has diminished capacity, is at risk of substantial physical, financial or other 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 appointment of a guardian ad litem, conservator or guardian.
- (c) Information relating to the representation of a client with diminished capacity is protected by Rule 1.6. When taking protective action pursuant to paragraph (b), the lawyer is impliedly authorized under Rule 1.6(a) to reveal information about the client, but only to the extent reasonably necessary to protect the client's interests.

Other segments of the population, such as medical providers and care givers, are mandated by law to report suspected financial abuse.⁹ However, unless the attorney suspects the agent is using the attorney's services to commit a criminal act under NRS 200.5099 or the agent's actions do not include threats to the principal's physical well-being, the attorney has no obligation to report the agent's conduct and, in fact, may be prohibited from doing so under NRPC 1.6 (*disclosure only allowed with the client's informed consent or if necessary to prevent reasonably certain death or bodily harm, or commit a criminal act where the lawyer's services were used to commit*

the criminal or fraudulent act.). In such instances, the attorney's only recourse may be to advise the client to cease its actions and to withdraw as their counsel.

Navigating the legal landscape surrounding powers of attorney demands careful consideration of the intricate relationships between principals, agents, and attorneys. By diligently identifying the client, validating the power of attorney, advising the agent of its duties and obligations, and upholding ethical obligations, attorneys play a crucial role in safeguarding the interests of vulnerable individuals while ensuring the effective execution of delegated powers.

ENDNOTES:

1. See, Comment [5] to Model Rules of Professional Responsibility 1.1 - *Competence*
2. NRS 162A.220
3. NRS 162A.260(3)
4. NRS 162A.270
5. NRS 162A.360 (1)
6. NRS 162A.360 (2)
7. NRS 162A.310
8. NRS 162A.620
9. NRS 200.5093



LAURA STUBBERUD has been a member of the State Bar of Nevada for more than 30 years. For the past 25 years, she has practiced exclusively in the areas of estate planning, wills, trusts, planning for the disabled and elderly, and probate administration. She has published several articles on trusts for the disabled and particularly enjoys working with families, focusing on their future to provide a sense of security and peace of mind. She has lectured on estate elder and special needs planning to many groups in southern Nevada, including AzulBlue Autism Advocacy, FEAT of Southern Nevada, the City of North Las Vegas, People's Law School, Nevada PEP, and the Multiple Sclerosis Society.

She has earned an AV rating from Martindale Hubble and was selected to the 2024 Mountain States Super Lawyers. She is the co-chair of NV Women Conquer Alzheimer's, a steering committee supporting the Alzheimer's Association in Nevada.