

Litigation and Ethical Minefields in the Interviewing of Older Clients

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1. Tips on handling the initial call.
2. When the client brings relatives (or vice-versa). Proper handling of the initial meeting between you and the client. Review of ABA brochure, "Why Am I Left in the Waiting Room?" at <http://www.abanet.org/aging/lawyerrelationship.pdf>.
3. When Mom "can't" come to interview, consider Mirandizing the adult child.
4. WWJD: What would the jury do, if there are claims of lack of capacity, undue influence or tortious interference with expected inheritance? Learn what presumptions and burdens of proof apply, and whether jury instructions consider:
 - Procuring a lawyer or paying the lawyer
 - Being present during the initial meeting or the document's execution
 - Storing the will or other estate planning document
 - The client was impaired
 - The alleged influencer secured the witnesses
5. Clarify what you will do if the client becomes incapacitated: you may assess the client's capacity and seek protective action, including a guardian. Check state rules.
6. Confirm to whom the client allows you to disclose confidences.
7. Handling the client's relative who wants to talk behind the client's back (or to whisper over his hard-of-hearing head).
8. Know what standard of capacity is required and learn the medical terminology.
 - Conduct the interview with an eye on the legal standards.
 - Assess when documents may be signed and when to say no
9. Document information about mental capacity, as standard procedure for older clients, and specific notes in "close cases" of testamentary capacity.
10. Protect the client by clarifying to family that you represent only the client, and also address the agents' roles and liabilities.