

# CLIENT UNDER A DISABILITY: AN ETHICAL DILEMMA

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## **I. THE DILEMMA**

Should you prepare a will or other dispositive instrument for a client whom you reasonably believe lacks capacity?

Should you attempt to determine your client's mental capacity prior to assisting him with his estate plan?

Should you take steps to preserve evidence regarding your client's testamentary capacity?

If the testamentary capacity of your client is uncertain or borderline, are you subject to discipline by assisting your client in modifying his estate plan?

As a practical matter, don't you intuitively make an assessment of capacity at the initial client conference? Isn't that assessment more of a "gut" or "instinctive" test as opposed to a legal test?

Don't your clients expect you to be the "guarantor" of the enforceability of their estate planning documents after their death?

Rohan Kelley, in his article entitled *Drafting Questionable Testamentary Documents*, points out that if a duty exists to determine the capacity of a client prior to drawing the will, the attorney must make and subsequently defend that determination, and if negligently made, must respond in damage. Consider also that the duty to make the determination is not so much a duty to arrive at a conclusion of law, for which the lawyer has been trained, but rather, a duty to form a medical opinion, for which the lawyer has not been trained. Furthermore, we may be asked to make that critical determination in a very limited observation time; in effect, a snap judgment. How much "due diligence" is enough?

## **II. CAPACITY**

### **A. DEFINED**

Capacity is a legal term that refers to an individual's ability to make rational, informed decisions concerning oneself or one's property. All adults are presumed to have capacity and be competent. Only a court, after receiving testimony in an adversarial hearing, can declare a person incompetent. A medical opinion of capacity, regardless of the source, remains only an opinion until a judicial ruling on the evidence is given.

Incapacity can be caused by a wide array of physical and/or mental disorders. For example, incapacity can be caused by depression, brain tumors, nutritional deficiencies, head injuries, stress-related disorders, hydrocephalus, infections (AIDS, meningitis, and syphilis), drug reactions, and thyroid disorders. In the elderly, typical examples include: Alzheimer's Disease, Multi-Infart Dementia, Parkinson's Disease, Huntington's Disease, Creutzfeldt-Jakob Disease, Pick's Disease and Normal Pressure Hydrocephalus.

Capacity can be divided into two types: general and specific. The test of testamentary capacity requires a level of *specific capacity*, i.e., the ability to perform the specific task of executing a will that disposes of the testator's assets upon death. This may be contrasted with general capacity, i.e., the ability to handle the totality of a person's affairs. Generally, a guardianship is established because a person lacks general capacity; the ward is unable to either provide adequate personal care, management of property or manage his financial affairs. As a result, the ward poses a potential threat of harm to both himself and his property. On the other hand, testamentary capacity to make a will does *not* require that a client be able to transact day-to-day business or provide adequate personal care; it is only necessary that the client have the ability to mentally understand in a general way (1) the nature and extent of the property to be disposed of, (2) the testator's relation to those who would naturally claim a substantial benefit from his will, and (3) a general understanding of the practical effect of the will as executed.

It is important to remember that even though there is a tendency to focus on the specifics of an act, a determination of capacity should emphasize the *rational decision making process by the actor*, rather than the quality or nature of the decisions or whether the decision conform to the social norm. A person with legal capacity should be able to recognize the need for a decision and be able to make and execute or act on that decision. See Hamilton v. Morgan, 112 So. 80 (Fla. 1927), wherein the court stated:

It cannot be disputed that the will on its face is unnatural and unjust. It virtually disinherits the children of the testator and gives the major part of an estate to his brother-in-law and executor, Mr. A. J. Morgan, and his nephew, Dr. Harrell, but this, of itself, raises no presumption of mental incapacity. A testator of sound mind has a perfect right to make an unjust and unnatural will, and may disinherit his children or others having a just claim on his bounty. \*\*\*\*\*When a testator has reasonable grounds to dislike those nearest to him and has exercised his lawful right to disappoint them in the execution of his will, his conduct in doing so is not generally to be regarded as unreasonable in the sense of evidencing mental incapacity.

## **B. QUESTIONS TO ASK YOURSELF:**

1. Did the client **articulate the reasons** for his decision?  
\*Ask the client to explain his reasons.
2. Are the client's decisions **consistent** with his current estate planning?
3. Does the client understand the **consequences** of his decision?  
\*Review consequences/alternatives with client.
4. Are the client's decisions **irreversible**?
5. Are the client's decisions **substantially fair**?  
\* Did the client previously provide for lineal descendants who were subsequently excluded? Why?

6. Are the client's decisions **consistent** with his lifetime commitments?

\*Review the client's historical estate planning objectives.

## C. CAPACITY: LEGAL TEST

### a. WILLS

In Raimi v. Furlong, 702 So.2d 1273,1286 (Fla. 3<sup>rd</sup> DCA 1997), the appellate court stated:

To execute a valid will, the testator need only have testamentary capacity (i.e. be of "sound mind") which has been described as having the ability to mentally understand in a general way (1) the nature and extent of the property to be disposed of, (2) the testator's relation to those who would naturally claim a substantial benefit from his will, and (3) a general understanding of the practical effect of the will as executed.\*\*\* "A testator may still have testamentary capacity to execute a valid will even though he may frequently be intoxicated, use narcotics, have an enfeebled mind, failing memory, [or] vacillating judgment."\*\*\*\* Moreover, an insane individual or one who exhibits "queer conduct" may execute a valid will as long as it is done during a *lucid interval*. See *Id.* Indeed, it is only critical that the testator possess testamentary capacity at the time of the execution of the will.\*\*\* *Whether testator had the required testamentary capacity is determined solely by his mental state at the time he executed the instrument* \*\*\*\*.

### b. INTER VIVOS TRANSFERS (DEEDS & GIFTS)

To make a **gift** legal and binding, the donor must possess sufficient mental capacity and the test of mental capacity so required is said to be whether or not the donor has the mental ability to understand the nature and affect of the transaction. If it is shown that the donor has sufficient intelligence to know what he was doing at the time the gift or gifts were made, the same generally will be sustained. See Saliba v. James, 196 So. 832 (Fla. 1940).

In Gruber v. Cobey, 12 So.2d 461(Fla. 1943), the Florida Supreme court stated:

There is no law in this country to prohibit a man of sound mind from making a gift of what he has for a lawful purpose to any person of his choosing. There is no better consideration for a gift than gratitude. Mr. Cobey was unhappy where he was living but found happiness and tranquility in Miss Gruber's society. 'Tranquility is the old man's milk', said Thomas Jefferson. No other consideration actuated the gift in question. True, the donor was to have a room in the house and care from the donee who stands ready to meet this condition. The law is settled that a gift inter vivos, if completed, cannot be overthrown by the heirs or representatives of the donor except for fraud and undue influence. 24 American Jurisprudence 755, 758. Death or mental incapacity following the gift is not material. *Reaves v. Pierce*, Mo., 26 S.W.2d 611; *Harrigan v. Harrigan*, 135 Cal. 397, 67 P. 506, 87 Am.St.Rep. 118. No heirs or others directly interested are here complaining.

The cynic and the penny pincher who live within themselves look askance at such acts of benevolence, but there is no more natural way for a retired old man bereft of family and relatives and without a congenial place to lay his head, [152 Fla. 595] to dispense his substance than was done by Mr. Cobey. Our social structure is literally strewn with such acts of benevolence. One benefactor will send a boy or girl through college. Another will provide for a faithful servant, another will set up an employee in business, others will endow hospitals, colleges, churches, and charities. Others will set up foundations for educational, religious, and benevolent purposes and in hundreds of particular cases men and women have contributed their substance to persons and causes that met their fancy. We have a distinguished judge in Florida who sets aside a modest sum each year to do a kindness to someone from whom he expects nothing in return. These examples of voluntary leveling, uninduced by the dollar mark are the best evidence yet that America is sound at the heart despite the rotten spots constantly discovered on the surface.

In Travis v. Travis, 87 So.762 (Fla.1921), the object of the lawsuit was to set aside a **deed** of conveyance to certain land. The Florida Supreme Court ruled: "The presumption is that the grantor was sane, and the burden of proof upon the issue of her alleged mental incapacity to make a valid conveyance was upon complainants." "To avoid the conveyance it is necessary to prove that the powers of her mind were so affected as to render her *incapable of comprehending the nature and effect of the transaction.*"

Additionally, in Parks v. Harden, 130 So.2d 626,628-629 (Fla. 2<sup>nd</sup> DCA 1961) the appellate court held: "[I]t is the capacity of the grantor at the time the **deed** is executed and delivered that is controlling and his subsequent incapacity will not affect the deed. \*\*\*\* The instrument should not be voided unless proven that the mind of the grantor was so affected as to render him *incapable of comprehending the nature and effect of the transaction.*"

### **c. INTER VIVOS TRUSTS**

A person has capacity to create an inter vivos trust (revokable or irrevokable) to the extent that person has legal capacity to transfer title to property inter vivos, i.e., the settlor must be *capable of comprehending the nature and effect of the transaction.* Adams v. Saunders,191 So. 312(Fla. 1939).

## **III. FLORIDA'S ETHICAL RULE REGARDING REPRESENTING A CLIENT UNDER A DISABILITY**

### **A. RULE 4-1.14 CLIENT UNDER A DISABILITY**

(a) Maintenance of Normal Relationship. When a client's ability to make adequately considered decisions in connection with the representation is impaired, whether because of minority, mental disability, or for some other reason, the lawyer shall, as far as reasonably possible, maintain a normal client-lawyer relationship with the client.

(b) Appointment of Guardian. A lawyer may seek the appointment of a guardian or take other protective action with respect to a client only when the lawyer reasonably believes that the client cannot adequately act in the client's own interest.

### **Comment**

*The normal client-lawyer relationship is based on the assumption that the client, when properly advised and assisted, is capable of making decisions about important matters. When the client is a minor or suffers from a mental disorder or disability, however, maintaining the ordinary client-lawyer relationship may not be possible in all respects. In particular, an incapacitated person may have no power to make legally binding decisions. Nevertheless, a client lacking legal competence often has the ability to understand, deliberate upon, and reach conclusions about matters affecting the client's own well-being. Furthermore, to an increasing extent the law recognizes intermediate degrees of competence. For example, children as young as 5 or 6 years of age, and certainly those of 10 or 12, are regarded as having opinions that are entitled to weight in legal proceedings concerning their custody. So also, it is recognized that some persons of advanced age can be quite capable of handling routine financial matters while needing special legal protection concerning major transactions.*

The fact that a client suffers a disability does not diminish the lawyer's obligation to treat the client with attention and respect. If the person has no guardian or legal representative, the lawyer often must act as de facto guardian. Even if the person does have a legal representative, the lawyer should as far as possible accord the represented person the status of client, particularly in maintaining communication.

If a legal representative has already been appointed for the client, the lawyer should ordinarily look to the representative for decisions on behalf of the client. If a legal representative has not been appointed, the lawyer should see to such an appointment where it would serve the client's best interests. Thus, if a disabled client has substantial property that should be sold for the client's benefit, effective completion of the transaction ordinarily requires appointment of a legal representative. In many circumstances, however, appointment of a legal representative may be expensive or traumatic for the client. Evaluation of these considerations is a matter of professional judgment on the lawyer's part.

If the lawyer represents the guardian as distinct from the ward and is aware that the guardian is acting adversely to the ward's interest, the lawyer may have an obligation to prevent or rectify the guardian's misconduct. See rule 4-1.2(d). [Emphasis added].

### **Disclosure of client's condition**

Rules of procedure in litigation generally provide that minors or persons suffering mental disability shall be represented by a guardian or next friend if they do not have a general guardian. However, disclosure of the client's disability can adversely affect the client's interests. The lawyer may seek guidance from an appropriate diagnostician.

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DEFINITIONS:

"Belief" or "believes" denotes that the person involved actually supposed the fact in question to be true. A person's belief may be inferred from circumstances.

"Reasonable" or "reasonably" when used in relation to conduct by a lawyer denotes the conduct of a reasonably prudent and competent lawyer.

"Reasonable belief" or "reasonably believes" when used in reference to a lawyer denotes that the lawyer believes the matter in question and that the circumstances are such that the belief is reasonable.

"Reasonably should know" when used in reference to a lawyer denotes that a lawyer of reasonable prudence and competence would ascertain the matter in question.

**B. RELEVANT FLORIDA BAR OPINIONS:**

Florida Bar Opinion 73-25 (4/18/74)

Florida Bar Opinion 85-4 (10/1/85)

Florida Bar Staff Opinion 23137 (3/21/01)

Florida Bar Staff Opinion 23773 (1/7/02)

Florida Bar Staff Opinion 24066 (5/30/02)

**C. RELEVANT CASES:**

A lawyer preparing a will or other dispositive instrument for a client who the lawyer reasonably believes lacks the requisite capacity may have violated *numerous* ethical rules.

For example, in The Florida Bar v. Betts, 530 So.2d 928,929 (Fla. 1988), Mr. Betts was retained to prepare the will of his client, Claude Fairfield. Subsequently, two codicils were prepared during a time when Fairfield was in a rapidly deteriorating physical and mental state. In the first codicil, Fairfield removed his daughter and son-in-law as beneficiaries. Mr. Betts spoke with his client on several occasions in an effort to persuade him to reinstate his daughter.

Subsequently, Mr. Betts prepared the second codicil to reach this result. However, when the codicil was presented to Fairfield, he was in a comatose state. In his findings, the referee determined that the second codicil was not read to Fairfield, that Fairfield made no verbal response when Mr. Betts presented the codicil to him, and that the codicil was executed by an X that Mr. Betts marked on the document with a pen he placed and guided in Fairfield's hand.

The court reasoned: "Improperly coercing an apparently incompetent client into executing a codicil raises serious questions both of ethical and legal impropriety, and could potentially result in damage to the client or third parties. It is undisputed that respondent [Mr. Betts] did not benefit by his action and was merely acting out of his belief that the client's family should not be disinherited. Nevertheless, a lawyer's responsibility is to execute his client's wishes, not his own."

Mr. Betts was found guilty of violating Disciplinary Rule 1-102(A)(5) (engaging in conduct that is prejudicial to the administration of justice) and Disciplinary Rule 1-102(A)(6) (conduct that

adversely reflects on his fitness to practice law) of the Code of Professional Responsibility and was publically reprimanded.

See Also:

*The Florida Bar v. Kickliter*, 559 So.2d 1123 (Fla. 1990)

*The Florida Bar v. Roman*, 526 So.2d 60 (Fla. 1988)

*The Florida Bar v. Story*, 529 So.2d 1114 (Fla. 1988)

*Syna v. Lewen*, 549 So.2d 755 (Fla. 3<sup>rd</sup> DCA 1989)

*Vignes v. Weiskopf et al.*, 42 So.2d 84 (Fla. 1949)

#### **IV. A VIOLATION OF AN ETHICAL RULE DOES NOT GIVE RISE TO A CAUSE OF ACTION; NOR DOES IT CREATE A PRESUMPTION THAT A LEGAL DUTY HAS BEEN BREACHED**

CHAPTER 4. RULES REGULATING THE FLORIDA BAR. PREAMBLE: A LAWYER'S RESPONSIBILITIES: *\*\*Violation of a rule should not give rise to a cause of action nor should it create any presumption that a legal duty has been breached.* 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 transaction has standing to seek enforcement of the rule. Accordingly, nothing in the rules should be deemed to augment any substantive legal duty of lawyers or the extra-disciplinary consequences of violating such duty. [Emphasis added].

The ethics rules themselves preclude a private cause of action (including a cause of action for malpractice) arising from a violation of the rules. Lee v. Florida Dept. of Ins. and Treasurer, 586 So.2d 1185(Fla. 1<sup>st</sup> DCA 1991); Rios v. McDermott, Will & Emery, 613 So.2d 544 (Fla. 3<sup>rd</sup> DCA1993); Smith v. Bateman Graham, P.A.,680 So.2d 497 (Fla. 1<sup>st</sup> DCA 1996); and Tew v. Arky, Freed, Stearns, et al., 655 F.Supp.1571 (S.D. Fla.1987).

However, a violation of the Rule of Professional Conduct may be used as *some evidence of negligence*. Gomez v. Hawkins Concrete Construction, Inc., 623 F. Supp. 194 ( N.D. Fla. 1985); Oberon Investments, N.V. v. Angel, Cohen and Rogovin, 492 So. 2d 1113,1114 n.2 (Fla.3<sup>rd</sup> DCA 1986), quashed on other grounds, 512 So.2d 192 (Fla. 1987); and Pressley v. Farley, 579 So.2d 160(Fla. 1<sup>st</sup> DCA 1991).

#### **V. IN FLORIDA, THE LAWYER DOES NOT HAVE A LEGAL (AS OPPOSED TO AN ETHICAL) DUTY TO DETERMINE THE TESTAMENTARY CAPACITY OF THE CLIENT**

In Vignes v. Weiskopf, 42 So.2d 84-86 (Fla. 1949), the Florida Supreme Court stated:

...The testator in the last throes of a deadly disease entertained the thought that he should revise his original will, but there is abundant proof that he had no clear idea, when he had his secretary call his attorney, what he intended to do, and no

comprehension of what he had done when he had executed the codicil and ordered it sealed without being acquainted with its contents....

\* \* \* \*

Much has been said in the arguments and written in the briefs about the conduct of the attorney who drafted the codicil and who appears now as counsel for the appellees. The inference is left with us that he was guilty of some duplicity because he prepared the codicil for Daniel Weiskopf and now represents those who would have it declared invalid. We have seen what his activities were with reference to preparing the codicil, bringing it to the sickbed of the testator, and having it acknowledged and witnessed. When it was presented to the county judge for probate he joined the other two witnesses in an oath that they were present when the testator subscribed his name to the instrument; that the testator did not read it; that its contents were not read to him nor made known to him, although the attorney 'asked him to read it or have its contents made known to him but the testator replied, 'I will read it later"; that the codicil was immediately sealed; that the seal was not thereafter broken until its deposit with the court; that the attorney received no reply from the testator when he asked him if he wished three subscribing witnesses to attest his execution; that the witnesses thereupon signed the paper at the request of the attorney; 'that they verily [believed] that the testator did not know the contents of what he was signing nor did he at the time of the signing thereof have testamentary capacity.'

\* \* \* \*

When the attorney was interrogated about his securing the execution and attestation of the codicil, which he was later to state in the oath had been witnessed without a direct request of the testator, by one who at the time lacked testamentary capacity he gave an answer which seems to us to have been quite sensible. He said simply, 'I did the best I knew how.'

It occurs to us that he would have been unfaithful to an old client had he not done his best to comply with the request to prepare the codicil and bring it to him. It is true that the information was incomplete, but there is evidence that he tried diligently at the time to have it clarified. When he reached his client's bedside there was good reason to believe, from the atmosphere there, that the client had not long to live and that he was probably not mentally alert, but these circumstances did not make it necessary that the attorney constitute himself a court to pass on the medical and legal question whether he was in fact capable of executing a valid codicil. That the question is debatable is demonstrated by the procedure which has taken its course in the county judge's court, the circuit court, and this court.

We are convinced that the lawyer should have complied as nearly as he could with the testator's request, should have exposed the true situation to the court, which he did, and should have then left the matter to that tribunal to decide whether in view of all facts surrounding the execution of the codicil it should be admitted to probate. Had the attorney arrogated to himself the power and responsibility of determining the capacity of the testator, decided he was incapacitated, and departed, he would indeed have been subjected to severe criticism when, after the testator's death, it

was discovered that because of his presumptuousness the last-minute effort of a dying man to change his will had been thwarted. [Emphasis added].

## **VI. FLORIDA vs. ABA vs. ACTEC**

### **A. THE AMERICAN BAR ASSOCIATION (ABA) MODEL RULES OF PROFESSIONAL CONDUCT (2003 Edition)**

#### *CLIENT-LAWYER RELATIONSHIP* RULE 1.14 CLIENT WITH DIMINISHED CAPACITY

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(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.

#### Comment

[1] The normal client-lawyer relationship is based on the assumption that the client, when properly advised and assisted, is capable of making decisions about important matters. When the client is a minor or suffers from a diminished mental capacity, however, maintaining the ordinary client-lawyer relationship may not be possible in all respects. In particular, a severely incapacitated person may have no power to make legally binding decisions. Nevertheless, a client with diminished capacity often has the ability to understand, deliberate upon, and reach conclusions about matters affecting the client's own well-being. For example, children as young as five or six years of age, and certainly those of ten or twelve, are regarded as having opinions that are entitled to weight in legal proceedings concerning their custody. So also, it is recognized that some persons of advanced age can be quite capable of handling routine financial matters while needing special legal protection concerning major transactions.

[2] The fact that a client suffers a disability does not diminish the lawyer's obligation to treat the client with attention and respect. Even if the person has a legal representative, the lawyer should as far as possible accord the represented person the status of client, particularly in maintaining communication.

[3] The client may wish to have family members or other persons participate in discussions with the lawyer. When necessary to assist in the representation, the presence of such persons generally does not affect the applicability of the attorney-client evidentiary privilege. Nevertheless, the lawyer must keep the client's interests foremost and, except for protective action authorized under

paragraph (b), must to look to the client, and not family members, to make decisions on the client's behalf.

[4] If a legal representative has already been appointed for the client, the lawyer should ordinarily look to the representative for decisions on behalf of the client. In matters involving a minor, whether the lawyer should look to the parents as natural guardians may depend on the type of proceeding or matter in which the lawyer is representing the minor. If the lawyer represents the guardian as distinct from the ward, and is aware that the guardian is acting adversely to the ward's interest, the lawyer may have an obligation to prevent or rectify the guardian's misconduct. See Rule 1.2(d).

### **Taking Protective Action**

[5] If a lawyer reasonably believes that a client is at risk of substantial physical, financial or other harm unless action is taken, and that a normal client-lawyer relationship cannot be maintained as provided in paragraph (a) because the client lacks sufficient capacity to communicate or to make adequately considered decisions in connection with the representation, then paragraph (b) permits the lawyer to take protective measures deemed necessary. Such measures could include: consulting with family members, using a reconsideration period to permit clarification or improvement of circumstances, using voluntary surrogate decisionmaking tools such as durable powers of attorney or consulting with support groups, professional services, adult-protective agencies or other individuals or entities that have the ability to protect the client. In taking any protective action, the lawyer should be guided by such factors as the wishes and values of the client to the extent known, the client's best interests and the goals of intruding into the client's decisionmaking autonomy to the least extent feasible, maximizing client capacities and respecting the client's family and social connections.

[6] In determining the extent of the client's diminished capacity, the lawyer should consider and balance such factors as: the client's ability to articulate reasoning leading to a decision, variability of state of mind and ability to appreciate consequences of a decision; the substantive fairness of a decision; and the consistency of a decision with the known long-term commitments and values of the client. In appropriate circumstances, the lawyer may seek guidance from an appropriate diagnostician.

[7] If a legal representative has not been appointed, the lawyer should consider whether appointment of a guardian ad litem, conservator or guardian is necessary to protect the client's interests. Thus, if a client with diminished capacity has substantial property that should be sold for the client's benefit, effective completion of the transaction may require appointment of a legal representative. In addition, rules of procedure in litigation sometimes provide that minors or persons with diminished capacity must be represented by a guardian or next friend if they do not have a general guardian. In many circumstances, however, appointment of a legal representative may be more expensive or traumatic for the client than circumstances in fact require. Evaluation of such circumstances is a matter entrusted to the professional judgment of the lawyer. In considering alternatives, however, the lawyer should be aware of any law that requires the lawyer to advocate the least restrictive action on behalf of the client.

### **Disclosure of the Client's Condition**

[8] Disclosure of the client's diminished capacity could adversely affect the client's interests. For example, raising the question of diminished capacity could, in some circumstances, lead to proceedings for involuntary commitment. Information relating to the representation is protected by

Rule 1.6. Therefore, unless authorized to do so, the lawyer may not disclose such information. When taking protective action pursuant to paragraph (b), the lawyer is impliedly authorized to make the necessary disclosures, even when the client directs the lawyer to the contrary. Nevertheless, given the risks of disclosure, paragraph (c) limits what the lawyer may disclose in consulting with other individuals or entities or seeking the appointment of a legal representative. At the very least, the lawyer should determine whether it is likely that the person or entity consulted with will act adversely to the client's interests before discussing matters related to the client. The lawyer's position in such cases is an unavoidably difficult one.

### **Emergency Legal Assistance**

[9] In an emergency where the health, safety or a financial interest of a person with seriously diminished capacity is threatened with imminent and irreparable harm, a lawyer may take legal action on behalf of such a person even though the person is unable to establish a client-lawyer relationship or to make or express considered judgments about the matter, when the person or another acting in good faith on that person's behalf has consulted with the lawyer. Even in such an emergency, however, the lawyer should not act unless the lawyer reasonably believes that the person has no other lawyer, agent or other representative available. The lawyer should take legal action on behalf of the person only to the extent reasonably necessary to maintain the status quo or otherwise avoid imminent and irreparable harm. A lawyer who undertakes to represent a person in such an exigent situation has the same duties under these Rules as the lawyer would with respect to a client.

[10] A lawyer who acts on behalf of a person with seriously diminished capacity in an emergency should keep the confidences of the person as if dealing with a client, disclosing them only to the extent necessary to accomplish the intended protective action. The lawyer should disclose to any tribunal involved and to any other counsel involved the nature of his or her relationship with the person. The lawyer should take steps to regularize the relationship or implement other protective solutions as soon as possible. Normally, a lawyer would not seek compensation for such emergency actions taken.

## **B. THE AMERICAN COLLEGE OF TRUST AND ESTATE COUNSEL (ACTEC) COMMENTARIES ON THE MODEL RULES OF PROFESSIONAL CONDUCT**

### *Client under a Disability.*

(a) When a client's ability to make adequately considered decisions in connection with the representation is impaired, whether because of minority, mental disability or for some other reason, the lawyer shall, as far as reasonably possible, maintain a normal client-lawyer relationship with the client.

(b) A lawyer may seek the appointment of a guardian or take other protective action with respect to a client only when the lawyer reasonably believes that the client cannot adequately act in the client's own interest.

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### **ACTEC COMMENTARY ON MRPC 1.14**

*Preventive Measures for Competent Clients.* As a matter of routine, the lawyer who represents a competent adult in estate planning matters should provide the client with information regarding the devices the client could employ to protect his or her interests in the event of disability, including ways the client could avoid the necessity of a guardianship or similar proceeding. Thus, as a service to a client, the lawyer should inform the client in a general way regarding the costs, advantages and disadvantages of durable powers of attorney, directives to physicians or living wills, health care proxies, and revocable trusts. A lawyer may properly suggest that a competent client consider executing a letter or other document that would authorize the lawyer to communicate to designated parties (e.g., family members, health care providers, a court) concerns that the lawyer might have regarding the client's capacity. In addition, a lawyer may properly suggest that a durable power of attorney include authorization for the attorney-in-fact to waive, on behalf of the client, the lawyer-client and physician-patient duties of confidentiality in appropriate circumstances.

*Discretion to Seek Appointment of Guardian for Disabled or Apparently Disabled Clients.* A lawyer who reasonably believes that a client is unable to act on his or her own behalf may, but is ordinarily not required to, seek the appointment of a guardian or take other protective action with respect to the client's person and property. See MRPC 1.14(b). In such a case, for example, the lawyer may "seek guidance from an appropriate diagnostician." Comment, MRPC 1.14. In this connection note that as originally proposed MRPC 1.14(b) required the lawyer to take protective action with respect to a client when doing so "is necessary in the client's best interests". The rule was changed to allow lawyer discretion to act when the lawyer "reasonably believes that the client cannot adequately act in the client's own interest". See ABA, *Probate and Trust Subcouncil Responds to Kutak Commission*, 9 Prob. & Prop. 6, 9 (1981).

*Implied Authority to Act in Best Interests of Disabled Client.* The lawyer for a client who appears to be disabled may have implied authority to make disclosures and take actions that the lawyer reasonably believes are in accordance with the client's wishes that were clearly stated during his or her competency. If the client's wishes were not clearly expressed during competency, the lawyer may make disclosures and take such actions as the lawyer reasonably believes are in the client's best interests. It is not improper for the lawyer to take actions on behalf of an apparently disabled client that the lawyer reasonably believes are in the best interests of the client.

Note that the opinions of some ethics committees prohibit a lawyer from seeking the appointment of a guardian or conservator for an apparently disabled client or seeking the advice of a physician regarding the condition of such a client. The prohibition is premised on the lawyer's duty of confidentiality to the client. However, the preferable view is expressed in ABA Informal Opinion 89-1530 (1989):

[T]he Committee concludes that the disclosure by the lawyer of information relating to the representation to the extent necessary to serve the best interests of the client reasonably believed to be disabled is *impliedly authorized* within the meaning of Model Rule 1.6. Thus, the inquirer may consult a physician concerning the suspected disability. [Emphasis added.]

*Testamentary Capacity.* If the testamentary capacity of a client is uncertain, the lawyer should exercise particular caution in assisting the client to modify his or her estate plan. The lawyer generally should not prepare a will or other dispositive instrument for a client who the lawyer reasonably believes lacks the requisite capacity. On the other hand, because of the importance of testamentary freedom, the lawyer may properly assist clients whose testamentary capacity appears

to be borderline. In any such case the lawyer should take steps to preserve evidence regarding the client's testamentary capacity.

In cases involving clients of doubtful testamentary capacity, the lawyer should consider, if available, procedures for obtaining court supervision of the proposed estate plan, including so-called substituted judgment proceedings.

*Lawyer Retained by Guardian or Conservator for Disabled Person.* The lawyer retained by a fiduciary for a disabled person, including a guardian, conservator, or attorney-in-fact, stands in a lawyer-client relationship with respect to the fiduciary. A lawyer who is retained by a fiduciary for a disabled person, but who did not previously represent the disabled person, represents only the fiduciary. Nevertheless, in such a case the lawyer for the fiduciary owes some duties to the disabled person. See, ACTEC Commentary on MRPC 1.2 (Scope of Representation). This approach is reflected in the Comment to MRPC 1.14: "If the lawyer represents the guardian as distinct from the ward and is aware of the guardian acting adversely to the ward's interest, the lawyer may have an obligation to prevent or rectify the guardian's misconduct. See Rule 1.2(d)".

*Disabled Person Was Client Prior to Disability.* A lawyer who represented a now disabled person as a client prior to the appointment of a fiduciary may be considered to continue to represent the disabled person. Although incapacity may prevent a disabled person from entering into a contract or other legal relationship, the lawyer who represented the disabled person prior to incapacity may appropriately continue to meet with and counsel him or her. Whether the disabled person is characterized as a client or a former client, the lawyer for the fiduciary owes some continuing duties to him or her. See Ill. Advisory Opinion 91-24 (1991) (summarized in the Annotations following the ACTEC Commentary on MRPC 1.6 (Confidentiality of Information)).

*Wishes of Disabled Person.* A conflict of interest may arise if the lawyer for the fiduciary is asked by the fiduciary to take action that is contrary either to the previously expressed wishes of the disabled person or to the best interests of the disabled person, as the lawyer believes those interests to be. The lawyer should give appropriate consideration to the currently or previously expressed wishes of a disabled person.

*Lawyer May Take Action in Best Interests of Disabled Person.* If the lawyer believes that the best interests of the disabled person requires representation by an independent party, the lawyer may suggest to family members or to an appropriate tribunal that a guardian *ad litem* or another lawyer be appointed for the disabled person.