GUARDIANSHIP ADJUDICATIONS EXAMINED WITHIN THE CONTEXT OF THE ABA MODEL RULES OF PROFESSIONAL CONDUCT

A. Frank Johns*

TABLE OF CONTENTS

 J.D., Florida State University College of Law, 1971; B.S., Florida State University, 1968. CELA, certified as an elder law attorney by the National Elder Law Foundation; Fellow and Past President of the National Academy of Elder Law Attorneys; Fellow in American College of Trust and Estate Counsel (ACTEC).

I. INTRODUCTION

There are many sides of guardianship adjudications.[1] Attorneys may find themselves on any one of those sides at any given time. This Article reviews the many sides of the guardianship-adjudication process and addresses the core ethical considerations that attorneys have regardless of which side is represented.[2] The analysis then turns to specific client-attorney situations framed in guardianship-adjudication case studies, offering ethical analysis in the context of the American Bar Association (ABA) Model Rules of Professional Conduct (Model Rules).[3] The Article also references the ethics analysis and commentary found in several other professional legal publications, including the newly published Aspirational Standards and Commentaries of the National Academy of Elder Law Attorneys (NAELA)[4] and the newly published fourth edition of the Commentaries of the American College of Trust and Estates Counsel (ACTEC).[5]

---

1. Like in many other notes, comments, and articles, the words "guardian" and "guardianship" in this Article include the broad spectrum of words and language used across the country to describe surrogate decisionmaking for another person through court appointment that transfers the power over an individual's rights, liberties, placement, and finances to another person or entity. These words and phrases include, but are not limited to the following: "conservatorship"; "interdiction"; "committee"; "curator"; "fiduciary"; "visitor"; "public trustee"; and "next friend."

2. Although alternatives to and diversions from guardianship are often part of guardianship analysis, this Article focuses on how attorneys are ethically engaged to begin the guardianship-adjudication process. The focus continues with an examination of the attorney's representation of various parties subject to and interested in the adjudication, and the focus concludes with the judge or jury's decision as to the competence of the alleged incompetent person (AIP). The Article does not reach the ethics of guardianship appointment, administration, restoration, or termination. This Article examines the threshold of attorney competence; the scope of the attorney-client relationship; diligence; the prospective, current, and former client; and the client with diminished capacity.

3. Model R. Prof. Conduct (ABA 2006) (available at http://abanet.org/cpr/mrpc/mrpc_toc.html).

4. These aspirational standards build on and supplement each state's rules of professional conduct or responsibility, elevating the level of professionalism and enhancing the quality of service provided to clients. Natl. Acad. Elder L. Attys., *Aspirational Standards for the Practice of Elder Law*, 1 Natl. Acad. Elder L. Attys. J. 211, 211–212 (Nov. 21, 2005); Natl. Acad. Elder L. Attys., *Aspirational Standards for the Practice of Elder Law with Commentaries*, http://www.naela.org; *select* Members, *select* Aspirational Standards (accessed Nov. 19, 2007) (access is subscription only; printout on file with *Stetson Law Review*) [hereinafter *Aspirational Standards Commentary*].

5. Am. College Trust & Est. Counsel Found., *ACTEC Commentaries on the Model Rules of Professional Conduct* 1 (4th ed., ACTEC Foundation 2006) [hereinafter *ACTEC Commentaries*]. The main themes of the commentaries are as follows:

II. CORE ETHICAL CONSIDERATIONS

A. Client Identity, Confidentiality, and Conflicts

There are several core ethical considerations that are present no matter which side the attorney represents throughout the guardianship-adjudication process. First, there must be a clear determination of whom the prospective client is.[6] The ABA has been slow to include client capacity in discussions regarding the prospective client,[7] whether denominated lawyer-client or client-lawyer.[8] Little has changed since Professor Rebecca Morgan, a preeminent elder law authority, wrote the following about the representation of older clients: "although the *Model Rules of Professional Responsibility* . . . recognize the non-litigation roles of attorneys more explicitly, . . . the Model Rules still fail to provide adequate practical guidance to the elder law practitioner."[9]

Once the attorney identifies the prospective client, there must be a conflict-of-interest determination.[10] At this point in the representation, with the attorney's core values of competence,

---

(1) the relative freedom that lawyers and clients have to write their own charter with respect to a representation in the trusts and estates field; (2) the generally non-adversarial nature of the trusts and estates practice; (3) the utility and propriety, in this area of law, of representing multiple clients, whose interests may differ but are not necessarily adversarial; and (4) the opportunity, with full disclosure, to moderate or eliminate many problems that might otherwise arise under the MRPC.

Id.

6. *See* Model R. Prof. Conduct 1.18 cmts. 3, 4 (discussing conflict of interest and the client-lawyer relationship); Bruce A. Green & Nancy Coleman, *Ethical Issues in Representing Older Clients*, 62 Fordham L. Rev. 961, 965 (1994) (highlighting special concerns with counseling older adults).

7. Geoffrey C. Hazard, Jr. & William Hodes, *The Law of Lawyering* 3-3 (3d ed. Supp., Aspen Publishers 2005). The four duties (competence, communication, confidentiality, and loyalty) are the core principals of the law of lawyering that run to the client. *Id*. The Kutak Commission symbolized the primacy of client interests by reversing the common "lawyer-client" reference. *Id*.

8. Green & Coleman, *supra* n. 6, at 981.

9. William E. Adams & Rebecca C. Morgan, *Representing the Client Who Is Older in the Law Office and in the Courtroom*, 2 Elder L.J. 1, 13 (1994) (citing Ronald C. Link et al., *Developments Regarding the Professional Responsibility of the Estate Planning Lawyer: The Effect of the Model Rules of Professional Conduct*, 22 Real Prop., Prob. & Trusts J. 1 (1987)); *see generally* Erica Wood & Audrey Straight, *Effective Counseling of Older Clients: The Attorney-Client Relationship*, Commn. Leg. Problems of the Elderly of the ABA (1995) (purporting that age myths that stereotype older people as senile, confused, disabled, and the like promote the dangers of ageism).

10. Model R. Prof. Conduct 1.18.

communication, confidences, and loyalty focused on the client,[11] the attorney should assess the capacity of the person for whom guardianship is being considered.[12]

As will be examined in a later section of this Article, the side that attorneys may find themselves on at the beginning of the guardianship-adjudication process will at times clearly dictate who the client is and how their representation will be handled.[13] However, in those situations and on those sides where representation will *not* be dictated, dialogue with those involved in the initial conference must address who the attorney will represent through the guardianship-adjudication process.[14]

While maintaining initial control of a conference, the attorney must gain from the conferees the identity of the client or clients.[15] If the conferees do not clarify the client's identity at the beginning of the first conference, any further direction may later be wrecked by the realization that the client is someone other than who the attorney assumed the client was at the beginning.[16] The client may, in fact, be several of the individual family members or all of the family members individually as the family.[17]

Once the client or clients are identified, the attorney must confirm client confidences.[18] This is often a sensitive situation. If

---

11. Hazard & Hodes, *supra* n. 7, at 3-3.

12. *See* ABA Commn. L. & Aging & Am. Psychol. Assn., *Assessment for Older Adults with Diminished Capacity: A Handbook for Lawyers* 1–2 (ABA & Am. Psychol. Assn. 2005) (discussing the importance of lawyer assessment of client capacity); Jennifer Moye, *Evaluating the Capacity of Older Adults: Psychological Models and Tools*, 17 Natl. Acad. Elder L. Attys. Q. 3, 3–5 (Summer 2004) (summarizing information about psychological models and instruments used in capacity evaluation).

13. For more on this point, see *infra* Part III.

14. This situation presents itself in many ways. The most important situation occurs when an attorney is deciding whether to file a guardianship petition for a current client. This situation may also occur when the attorney is acquiring information from the client petitioner that would establish clear, cogent, and convincing evidence of the respondent's incapacity.

15. *Aspirational Standards Commentary*, *supra* n. 4, at 7.

16. Russell G. Pearce, *Family Values and Legal Ethics: Competing Approaches to Conflicts in Representing Spouses*, 62 Fordham L. Rev. 1253, 1266 (1994).

17. *See generally* A. Frank Johns, *Multiple and Intergenerational Relationships*, 2001 Prof. Law. 7 (promoting "optional family entity representation as a limited form of legal representation"); *id.* at 7.

18. Green & Coleman, *supra* n. 6, at 1015–1026; *see also Aspirational Standards Commentary*, *supra* n. 4, at 15 (explaining that the prospective client is the only one who is authorized to waive this protection); *ACTEC Commentaries*, *supra* n. 5, at 72 (commenting on Model Rule 1.6).

the children are in the room, the attorney may need to ask that they be excused in order to discuss with a parent or both parents whether confidential client information should be shared with the children.[19] How this situation presents itself, depending upon who is with the parent or parents during the initial conference, will be more complicated when capacity is an issue and guardianship is a possible option.[20] Sometimes those who are meeting with the lawyer in the first conference declare that the client is not even present at the meeting.[21] Often the conference ends with joint or multiple representation involving the whole family.[22] However, understanding the interests of all persons involved is no easy process.[23] Initial dialogue may be sufficient to determine a threshold of informed consent of the older person and that there are no problems or difficulties between family members.[24] More lengthy questioning or screening may be needed as discussed later in the Article.[25]

While there may be differences between family members in what they want from the attorney, the differences may not rise to a level so strong that they are material.[26] The attorney should thoroughly discuss these differences, raising questions as to the depth and significance of those differences to determine if they might be considered material.[27] As a part of the engagement, multiple clients must waive in writing any differences and conflicts,

19. *See generally* Burnele V. Powell & Ronald C. Link, *The Sense of a Client: Confidentiality Issues in Representing the Elderly*, 62 Fordham L. Rev. 1197 (1994) (detailing the "progress[ion] from [a] passing reference to a lawyer's obligation of confidentiality to extensive and controversial involvement with it"). Professors Powell and Link cite Charles Wolfram as the source for characterizing the evolution of the confidentiality principle in the lawyer-ethics code. *Id*. at 1202.

20. Robert B. Fleming & Rebecca C. Morgan, *Lawyers' Ethical Dilemmas: A "Normal" Relationship When Representing Demented Clients and Their Families*, 35 Ga. L. Rev. 735, 741–755 (2001).

21. *Id*.

22. *See* Russell G. Pearce, Foreword, *Symposium: "Should the Family Be Represented as an Entity?": Reexamining the Family Values of Legal Ethics*, 22 Seattle U. L. Rev. 1, 1–2 (1998) (highlighting the tension between legal ethics and family representation).

23. Johns, *supra* n. 17, at 12–30.

24. *Id*.

25. *Infra* n. 117 and accompanying text.

26. Model R. Prof. Conduct 1.6, 1.18.

27. *Id*. at R. 1.7, 1.18.

authorizing the lawyer to represent each of them and all of them.[28]

B. Case Study Number One: Conflicts, Capacity, and Informed Consent Applied to the Prospective Client

Attorney had an initial conference with several members of a family, including Husband, Wife, and three children. Their discussion addressed Husband's diminished capacity (described as the middle stage of Alzheimer's disease), asset preservation, and transfers to gain eligibility for benefits that would cover placement in a nursing home. Husband and Wife had no advance directives.

Attorney directed the discussion to client identity. The children were adamant that their parents were the attorney's joint clients. Attorney met with Husband and Wife in private. The Attorney conducted an assessment of Husband's mental deficits, reviewed Husband's medical records brought by Wife, and gained important information from Wife related to Husband's recent paranoia, oppositional behavior, and extreme anxiety.

Attorney then met with the children, offering to identify Wife and the three of them as her clients, but not Husband. Attorney then gave them her opinion that Husband was not competent to execute advance directives and that Attorney should be retained by Wife and the children to initiate an adjudication of incompetence against Husband and pursue appointment of Wife as guardian. All agreed, except Husband, who declared that he was not crazy.

1. Formation of Client-Lawyer Relationship

Model Rule 1.18,[29] the relatively new rule regarding the prospective client, begins with a concise definition, addresses confidentiality, and examines possible materially adverse interests between the prospective client and the lawyer.[30] Currently, there

28. *ACTEC Commentaries*, *supra* n. 5, at 91–96 (discussing multiple client representation); *Aspirational Standards Commentary*, *supra* n. 4, at 10.

29. Model R. Prof. Conduct 1.18.

30. Model Rule of Professional Conduct 1.18 states the following:

(a) A person who discusses with a lawyer the possibility of forming a client-lawyer relationship with respect to a matter is a prospective client.

(b) Even when no client-lawyer relationship ensues, a lawyer who has had discussions with a prospective client shall not use or reveal information learned in the

is no connection between Model Rules 1.18 and 1.14, which addresses only the ongoing client-lawyer relationship;[31] however, there should be a connection between Rules 1.18 and 1.14 to guide lawyers dealing with prospective clients with diminished capacity.[32]

The legal profession first views the relationship of the client and lawyer based on the manifestation of the person's intent.[33] This relationship arises when a person manifests to a lawyer the person's intent to have legal services provided by the lawyer.[34] While capacity is the foundation of intent,[35] general legal texts address the client-lawyer relationship based on the client's fully informed consent[36] and on the lawyer's disclosures to the client

---

consultation, except as Rule 1.9 would permit with respect to information of a former client.

(c) A lawyer subject to paragraph (b) shall not represent a client with interests materially adverse to those of a prospective client in the same or a substantially related matter if the lawyer received information from the prospective client that could be significantly harmful to that person in the matter, except as provided in paragraph (d). If a lawyer is disqualified from representation under this paragraph, no lawyer in a firm with which that lawyer is associated may knowingly undertake or continue representation in such a matter, except as provided in paragraph (d).

(d) When the lawyer has received disqualifying information as defined in paragraph (c), representation is permissible if:

(1) both the affected client and the prospective client have given informed consent, confirmed in writing, or:

(2) the lawyer who received the information took reasonable measures to avoid exposure to more disqualifying information than was reasonably necessary to determine whether to represent the prospective client; and

(i) the disqualified lawyer is timely screened from any participation in the matter and is apportioned no part of the fee therefrom; and

(ii) written notice is promptly given to the prospective client.

Id.

31. *Id.* at R. 1.14.

32. Johns, *supra* n. 17, at 14–15.

33. *Id.*; Model R. Prof. Conduct 1.2.

34. *See Restatement (Third) of the Law Governing Lawyers* § 14 (2005) (defining formation of a client-lawyer relationship); Thomas D. Morgan & Ronald D. Rotunda, *2005 Selected Standards on Professional Responsibility* 369 (Found. Press 2005); *Reports of the Special Study Committee on Professional Responsibility, Comments and Recommendations on the Lawyer's Duties in Representing Husband and Wife*, 28 Real Prop., Prob. & Trust J. 763, pt. III (1994) (analyzing the ways a lawyer represents husband and wife in a pre-Model Rule 1.18 context).

35. Johns, *supra* n. 17, at 14–15.

36. Model Rule of Professional Conduct 1.0(e) provides that "[i]nformed consent de-

regarding both the benefits and advantages of the proposed representation[37] and the potential conflicts of interest.[38] General legal commentary on informed consent focuses only on legally incompetent clients who require representation for which they are personally incapable of giving consent.[39] The writings look at those already incompetent,[40] either represented by a guardian[41] or, if minors, represented by their parents.[42]

Until passage of Model Rule 1.18 regarding the prospective client, the legal profession looked at competence only in terms of the lawyer's ability to deliver legal services.[43] Consider Model Rules 1.2 and 1.16, bracketing the beginning and the ending of the client-lawyer relationship.[44] These Rules are more concerned with the lawyer's role, and whether what the lawyer is being asked to do is moral or ethical, than whether the client has capacity to consummate the engagement.[45]

Even if not engaged in a manifested lawyer-client relationship, attorneys have duties to prospective clients that include protecting confidential information and property and providing reasonable care.[46] This prospective-client relationship is where emphasis on the client's capacity, especially in the guardianship context, deserves attention. Client capacity is not currently examined in the legal profession until the client-attorney relationship has been established and is on-going.[47]

---

notes 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." Model Rule of Professional Conduct 1.0(e).

37. Morgan & Rotunda, *supra* n. 34, at 31, 32.

38. *Id*.

39. Johns, *supra* n. 17, at 14–15.

40. *Id*.; Morgan & Rotunda, *supra* n. 34, at 373.

41. Johns, *supra* n. 17, at 14–15.

42. *Id*.; Morgan & Rotunda, *supra* n. 34, at 373.

43. *See Restatement (Third) of Law Governing Lawyers* § 16(2) (finding that an attorney must "act with reasonable competence and diligence").

44. *See* Model R. Prof. Conduct 1.2, 1.16; *see also ACTEC Commentaries*, *supra* n. 5, at 32–50 (discussing the beginning and ending of the client-lawyer representation).

45. *See also Restatement (Third) of Law Governing Lawyers* § 16 (focusing on a lawyer's duties to a client).

46. *See* Model R. Prof. Conduct 1.18 (discussing conflicts, confidentiality, and the lawyer's duty to not use or reveal information learned in the consultation with a prospective client); *id.* at R. 1.15 (stating that the lawyer should hold the client's or third person's property separate from the lawyer's property).

47. *See id.* at R. 1.14 (showing that the issue of diminished capacity does not come up

While Rule 1.18 is expressly limited to a concern about confidentiality and conflicts,[48] attorneys should nevertheless apply the rule to the prospective client's capacity and informed consent when beginning the consultative process.[49]

2. The Consultative Process: Initial Appointment and First Conference[50]

The initial call-in starts the consultative process. During the initial call-in, the attorney's staff should be trained to impress upon the callers the need for certain information and to make certain inquiries to gather that information. Callers are often facing a crisis-situation to which staff must be sensitive. At this stage, the attorney's staff should also complete the internal conflict checks.

If the caller makes an appointment, he or she will receive a notice of appointment, including a one-page, pre-screen worksheet and the more lengthy legal- and data-information questionnaire. The questionnaire is often brought to the conference, while the pre-screen worksheet is usually returned beforehand.

Here, suppose the pre-screen worksheet raises issues of the competence or capacity of those involved in the conference. Too often, the conferees direct attorneys to what the conferees believe are the primary issues to be discussed, thereby circumventing or overlooking facts that impact the question of capacity. Therefore, attorneys should make every effort to control the initial conference to determine client identity, client confidences, and client capacity. In the case study above, Attorney has been driven by the conclusion that Husband is not capable of executing advance directives and that the only legal alternative to Wife gaining legal authority is through the guardianship process.[51]

The facts above present Attorney, who is receiving confidential information about Husband, with a situation that may create

---

until the person is the lawyer's client); *Restatement (Third) of Law Governing Lawyers* § 24; *see also ACTEC Commentaries*, *supra* n. 5, at 131.

48. Model R. Prof. Conduct 1.18.

49. *See* Johns, *supra* n. 17, at 13–14.

50. This Section relies heavily on the Author's previous works, cited at *supra* note 17 and *infra* note 95, to describe the consultative process.

51. *Supra* pt. II(B).

a material conflict of interest if Attorney represents Wife and Children in an adversarial action against Husband.[52] Does this bar Attorney from being the attorney in the guardianship adjudication against Husband? Does anything change since Husband will have his own counsel or *guardian ad litem* representing his interests? What if another attorney in Attorney's firm represents Wife in the guardianship proceeding and Attorney neither communicates with that attorney nor provides any of the documents or information that would be detrimental to Husband's defense? Would Attorney be able to construct a screen as described in Comment 7 to Rule 1.18?[53]

3. Ethical Considerations: Rule 1.18 and the 1990 ABA Ethics Opinion

The comments to Rule 1.18 expand on the black-letter rule, emphasizing that protections of confidentiality and conflicts attach regardless of how short the initial conference is.[54]

It would help if in Case Study Number One, Husband had signed a waiver for Attorney as described in Comments 5 and 6.[55]

---

52. *See* Model R. Prof. Conduct 1.18 (stating that a lawyer "shall not represent a client with interests materially adverse to those of a prospective client in the same or a substantially related matter if the lawyer received information from the prospective client that could be significantly harmful to that person . . . .").

53. Comments 7 and 8 to Model Rule of Professional Conduct 1.18 read as follows:

> [7] Under paragraph (c), the prohibition in this Rule is imputed to other lawyers as provided in Rule 1.10, but, under paragraph (d)(1), imputation may be avoided if the lawyer obtains the informed consent, confirmed in writing, of both the prospective and affected clients. In the alternative, imputation may be avoided if . . . all disqualified lawyers are timely screened and written notice is promptly given to the prospective client. *See* Rule 1.0(k) (requirements for screening procedures). Paragraph (d)(2)(i) does not prohibit the screened lawyer from receiving a salary or partnership share established by prior independent agreement, but that lawyer may not receive compensation directly related to the matter in which the lawyer is disqualified.
>
> [8] Notice, including a general description of the subject matter about which the lawyer was consulted, and of the screening procedures employed, generally should be given as soon as practicable after the need for screening becomes apparent.

Model R. Prof. Conduct 1.18 cmts. 7, 8.

54. *See id.* at R. 1.18 cmt. 3 (stating that the duty of an attorney to protect confidentiality "exists regardless of how brief the initial conference may be").

55. *Supra* pt. II(B). Comments 5 and 6 to Model Rule of Professional Conduct 1.18 read as follows:

Here, however, where Husband has diminished capacity, a waiver may be problematic since it is subject to attack that there was no informed consent.[56] In such a situation, a screening procedure may allow another attorney in the firm to proceed with representing the family through the adjudication process.[57]

Most attorneys involved with guardianship do not work in firms with formal screening procedures that would allow representation of Wife or Children against Husband.[58] Although fiduciary litigation, including guardianship, will likely increase as aging demographics increase,[59] small law firms and solo practitioners encountering situations similar to this case study will rarely handle them through a screening procedure. Instead, the practical response by an attorney should be to refer the family to other counsel. This may be a situation where Attorney is attempting to hold onto the case by jumping from a client-lawyer relationship with the person with diminished capacity to a client-lawyer relationship with the spouse, child, or children by filing the guardian-

---

> [5] A lawyer may condition conversations with a prospective client on the person's informed consent that no information disclosed during the consultation will prohibit the lawyer from representing a different client in the matter. *See* Rule 1.0(e) for the definition of informed consent. If the agreement expressly so provides, the prospective client may also consent to the lawyer's subsequent use of information received from the prospective client.
>
> [6] Even in the absence of an agreement, under paragraph (c), the lawyer is not prohibited from representing a client with interests adverse to those of the prospective client in the same or a substantially related matter unless the lawyer has received from the prospective client information that could be significantly harmful if used in the matter.

Model R. Prof. Conduct 1.18 cmts. 5, 6.

56. *See id.* at R. 1.0(e) (stating the definition of informed consent); *see also ACTEC Commentaries*, *supra* n. 5, at 13–14 (explaining the ways a client gives written consent to a conflict waiver).

57. Model Rule of Professional Conduct 1.0(k) states the following:

> "Screened" denotes the isolation of a lawyer from any participation in a matter through the timely imposition of procedures within a firm that are reasonably adequate under the circumstances to protect information that the isolated lawyer is obligated to protect under these Rules or other law.

Model R. Prof. Conduct 1.0(k).

58. Consider, for example, NAELA's membership and elder law sections of many state bars. Few NAELA members are part of large firms; the vast majority are sole practitioners, with the next largest group working in firms consisting of five or fewer attorneys. Telephone Interview with Jennifer Mowry, NAELA Membership Coord. (June 19, 2006).

59. *See generally* Bruce S. Ross, *Conservatorship Litigation and Lawyer Liability: A Guide through the Maze*, 31 Stetson L. Rev. 757 (2002) (discussing the issues arising in conservatorship litigation).

ship adjudication. Attorney might even assume that Husband was never actually represented by Attorney, leading to the opinion that Attorney could proceed on behalf of Wife and Children. With the passage of Model Rule 1.18, Attorney would be exposed to future problems if Attorney continues to represent others based on this premise.[60]

The real concern with Rule 1.18 may not be with its effect on the prospective client but with whether the information received during the initial interview is material to the representation of a current client.[61] As will be seen in the comments regarding a former client, emphasis on the prospective or former client to the detriment of a current client is at worst "overblown" and at best "awkward" because the one left in the dark is none other than a full-fledged existing client.[62] In this analysis, there is no obvious impact on the current client(s) that leaves them in the dark. However, Attorney has received confidential information about Husband during the course of the initial conference with which Attorney must carefully deal. Attorney learned from the initial conference that Husband was not mentally capable to execute advance directives. It is not overblown or awkward to, at a minimum, impose confidentiality and conflict-of-interest restraints on Attorney if Attorney proceeds forward with any action related to the family.

Citing a 1990 ABA ethics opinion,[63] Geoffrey C. Hazard and William Hodes restated the following advice for avoiding later disqualification:

(1) Ask the prospective client to waive confidentiality of the preliminary discussions;

(2) Limit initial discussions to matters required for a "conflicts check";

60. *See* Model R. Prof. Conduct 1.18 (stating that "[e]ven when no client-lawyer relationship ensues, a lawyer who has had discussions with a prospective client shall not use or reveal information learned in the consultation . . . .").

61. *See* Hazard & Hodes, *supra* n. 7, at 21A-7 (discussing the prospective client).

62. *Id.* at 21A-9.

63. Hazard & Hodes, *supra* n. 7, at 21A-7–21A-9 (citing ABA Formal Ethics Op. 90-358 (1990)).

(3) Make the conflicts check before [a] final decision on undertaking a representation; and,

(4) As soon as a decision is reached *not* to form a client-lawyer relationship, screen the lawyer who received the confidential information, so that disqualification may be easier to avoid if a conflict develops.[64]

4. Analysis of Case Study Number One

First, does the application of Rule 1.18 bar Attorney from serving as the attorney in the guardianship adjudication against Husband? Rule 1.18 by itself may not bar Attorney's action to represent other family members in adjudicating the capacity of Husband in the judicial adversarial forum;[65] however, if there is any application of Rule 1.14 to 1.18, then Attorney should not represent anyone in a guardianship adjudication against Husband. This scenario clearly applies to Wife and Children as well.[66] Additionally, the comments to Rule 1.0(e) acknowledge that there may be situations when Rule 1.0(e) applies to the prospective client.[67]

The analysis will not change and the result will be no different even if Husband has his own counsel or *guardian ad litem* representing his interests in the guardianship adjudication. Here, the primary focus is not on another attorney's representation of Husband, but on whether the information taken from Husband during the initial conference could be used against him.[68] What if another attorney in Attorney's firm represents Wife in the guardianship proceeding and Attorney neither communicates with that

64. *Id.* at 21A-12; *see also Restatement (Third) of Law Governing Lawyers* § 15 (requiring lawyers to be effectively screened from conflicts).

65. *See* Model R. Prof. Conduct 1.18 cmt. 7 (explaining that if attorneys are not disqualified under Rule 1.10, they may represent the client if they receive informed consent in writing from both the prospective and affected clients).

66. *See* ABA Formal Ethics Op. 96-404 (1996) (limiting the attorney's representation of other parties against a former client of the attorney in a guardianship proceeding). The origins of this opinion can be traced to the Fordham Conference on Ethics and the Elderly. *Id.*

67. The comment to Rule 1.0 acknowledges that several other rules require a lawyer to obtain informed consent from a client or sometimes even a prospective client before taking further action. Model R. Prof. Conduct 1.0 cmt. 6; *e.g. id.* at R. 1.2(c), 1.6(a), 1.7(b).

68. *Id.* at R. 1.18.

attorney nor provides any of the documents or information that would be detrimental to Husband's defense? Would Attorney be able to construct a screen as described in Comment 7 to Rule 1.18?[69] However, isn't this analysis missing the point that Husband cannot waive confidentiality and conflicts based on informed consent?[70]

C. Conflicts, Capacity, and Informed Consent Applied to the Former Client

The unclear boundaries in Rule 1.9 can be easily broken when applied to guardianship adjudication.[71] A matter that is substantially related and materially adverse to a former client must be examined against the facts and legal involvement of the former client-lawyer relationship.[72]

---

69. *Id.* at R. 1.18 cmt. 7.

70. *See ACTEC Commentaries*, *supra* n. 5, at 133 (stating that "[b]ecause of the client's . . . diminished capacity, the waiver option may be unavailable").

71. Model R. Prof. Conduct 1.9.

72. *See ACTEC Commentaries*, *supra* n. 5, at 124 (stating that "matters are 'substantially related' for purposes of the Rule [1.9] if they involve the same transaction or legal dispute . . ."). Additionally, Rule 1.9 states the following:

> (a) A lawyer who has formerly represented a client in a matter shall not thereafter represent another person in the same or 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.
>
> (b) A lawyer shall not knowingly represent a person in the same or a substantially related matter in which a firm with which the lawyer formerly was associated had previously represented a client:
>
> (1) whose interests are materially adverse to that person; and
>
> (2) about whom the lawyer had acquired information protected by Rules 1.6 and 1.9(c) that is material to the matter; unless the former client gives informed consent, confirmed in writing.
>
> (c) A lawyer who has formerly represented a client in a matter or whose present or former firm has formerly represented a client in a matter shall not thereafter:
>
> (1) use information relating to the representation to the disadvantage of the former client except as these Rules would permit or require with respect to a client, or when the information has become generally known; or
>
> (2) reveal information relating to the representation except as these Rules would permit or require with respect to a client.

Model R. Prof. Conduct 1.9.

In the guardianship context, it is difficult to determine when the client-lawyer relationship terminates.[73] Many legal services in elder law, estates, and trust specialties are driven by a broader holistic construct rather than by conventional transactional legal services that end with the execution of documents.[74] Additionally, many elder law and trust and estate attorneys do not end their client-lawyer relationship with a written letter of termination or disengagement.[75] However, as later examined, the duties of each rule have varying degrees of impact on the attorney's future legal services to others.[76]

Rule 1.9 focuses on continuing duties with respect to confidentiality and conflicts of interest, similar to the duties described when meeting with the prospective client under Rule 1.18 above.[77] Are the rules no different?

1. Case Study Number Two

Six months after his wife's death, Father, with children B, C, and D, went to Attorney to prepare his advance directives and will, both of which treated the children equally. Attorney knew that Father was suffering from dementia, but believed that Father had sufficient cognitive function to exercise informed consent to sign the documents. With all the children present, Attorney acknowledged their multiple client-lawyer relationship. At that time, Father instructed Attorney to prepare a durable power of attorney with all three children serving as attorneys-in-fact. Attorney also

73. *See id.* at R. 1.16 (discussing declining or terminating representation); *ACTEC Commentaries*, *supra* n. 5 at 140–142 (stating that in determining termination of the client-lawyer relationship special considerations apply to a lawyer's representation of a client who has become or may be mentally impaired or incapacitated).

74. *See Aspirational Standards Commentary*, *supra* n. 4, at 211–215 (outlining the many complex issues that an elder law attorney handles for a client); *see also ACTEC Commentaries*, *supra* n. 5, at 123 (stating that "[t]he execution of estate planning documents and implementation of the client's estate plan may, or may not, terminate the lawyer's representation of the client . . . the client typically remains an estate planning client of the lawyer, albeit the representation is dormant or inactive").

75. *See ACTEC Commentaries*, *supra* n. 5, at 123 (explaining that the execution of estate-planning documents and implementation of the client's estate plan may or may not terminate the lawyer's representation of the client with respect to estate-planning matters).

76. *Id.*

77. Model R. Prof. Conduct 1.18 (describing the duties of confidentiality and conflicts of interest with respect to prospective clients); *supra* pt. II(B) (discussing Rule 1.18).

provided estate-planning legal services for the children. All work was finished and the documents were executed within one month. However, Attorney left the case files open and did not send any letter confirming the end of the lawyer-client relationship. Father made continuing contacts with Attorney and staff in the office.

Eleven months later, Father showed up at Attorney's office with children B and C. Children B and C did all the talking, instructing Attorney to prepare a new power of attorney for Father that designated children B and C as the attorneys-in-fact. Attorney never spoke with Father in private to determine his competence to execute the new power of attorney and to determine whether or not he was being unduly influenced.

Unknown to Attorney, children B and C completely cut child D out of Father's life. However, Father's bank called and informed child D that something seemed suspicious in that Father was about to transfer over $400,000 out of Father's and all children's names (held as joint tenants with right of survivorship) and into children B's and C's names only.

Child D immediately contacted Attorney, asking if he knew this transfer was going to happen. Attorney told child D that the other children kept telling him that child D knew and agreed with what they were doing but was too busy to come to Attorney's office. Attorney told child D that she should simply write a check on the current account, deposit those funds into an account in her name only, and then initiate an adjudication of incompetence of Father. Attorney then agreed to represent child D in the guardianship adjudication of Father's competence.

2. Analysis of Case Study Number Two under Rules 1.9 and 1.2

For the purpose of this analysis, assume that Father and children B and C are treated as former clients. The comments to Rule 1.9 impose the same or similar duties as found in the duties relating to prospective clients;[78] however, the analysis differs de-

78. *See* Model R. Prof. Conduct 1.9 cmt. 5 (explaining that a lawyer is only disqualified when he has actual knowledge of information that is subject to the duty of confidentiality with respect to current or former clients); *id.* at R. 1.18(b) (noting that the duty of confidentiality with respect to prospective clients requires a lawyer to treat information learned in a consultation with a prospective client as if it were protected by the duty of confidenti-

pending on the nature of the relationship. Examine Comments 2 and 3 of Rule 1.9 against the same comments related to the prospective client.[79] Consider the example in Comment 3 changed to fit the facts of Case Study Number Two.[80] Suppose Attorney's previous representation of Father produced extensive private medical, healthcare, and psychological information about Father in the course of preparing his estate plan.[81] The attorney in the example in Comment 3 to Rule 1.9 cannot represent the client-businessperson's spouse in a divorce proceeding because the lawyer has learned of the businessperson's private financial information. Likewise, here, Attorney would be precluded from subsequently representing child D in seeking adjudication of Father's incompetence and appointment of a guardian because of Attorney's prior exposure to Father's private medical, healthcare, and psychological information.

Legal ethicists and academics distinguish an attorney's duties to current clients from an attorney's duties to former clients.[82] Should Attorney treat the children as current or former clients? Does it really matter? The answer is yes. Attorney has a problem with the multiple client designation that included the other two children. First, Attorney made the decision to accept all of the family members as multiple clients. The case study does not address whether Attorney explained confidences and conflicts among the multiple clients. Second, while the guardianship-

---

ality with respect to former clients).

79. *Compare id.* at R. 1.9 cmts. 2, 3 (noting that whether a lawyer's prior representation of a former client disqualifies him from subsequently representing a different client depends on the facts of the particular situation) *with id.* at R. 1.18 cmt. 6 (providing that whether a lawyer's duty of confidentiality with respect to prospective clients disqualifies him from subsequently representing a different client depends both on whether the subsequent client's interests are adverse to those of the prospective client and on whether the lawyer's use of information learned from the prospective client in the subsequent matter could be "significantly harmful").

80. "[A] lawyer who has represented a businessperson and learned extensive private financial information about that person may not then represent that person's spouse in seeking a divorce." *Id.* at R. 1.9 cmt. 3.

81. The extensive private medical, healthcare, and psychological information that Attorney learned about Father is analogous to the extensive private financial information that was deemed disqualifying in Model Rule of Professional Conduct 1.9 Comment 3.

82. *See* ABA, *Annotated Model Rules of Professional Conduct* 173 (ABA 2003) (noting that separate rules apply to both former and current clients); Hazard & Hodes, *supra* n. 7, at § 13-4 (recognizing that a lawyer's duties to former clients are distinct from the duties to current clients).

adjudication action is only against Father, Attorney's advice about the transfer of funds into child D's name created a material breach of confidence and conflict with the other two children.[83] This will exist even if Attorney instructs third child to place the funds in her name with Father.[84] Attorney must consider the other children as former clients.

Rule 1.2 clearly establishes the client-lawyer relationship between Attorney and Father.[85] Facts in Case Study Number Two imply that Attorney still currently represents Father and the children.[86] In the subsequent eleven months, Father is the only one who has continuing communication with Attorney and his staff. Attorney later sees the three children, although on separate occasions, to carry out certain other instructions. However, Attorney is not supposed to be the ultimate authority to determine the purposes to be served by legal representation as long as within the limits imposed by law and the lawyer's professional obligations.[87] Although possibly misled by children B and C, the information from child D surely gave Attorney notice that there were probable material conflicts of interest going forward in the representation of child D.[88]

---

83. *See* Model R. Prof. Conduct 1.9(c)(1) (prohibiting a lawyer from using information relating to the prior representation of a former client to the disadvantage of the former client).

84. Children B and C wanted to transfer the $400,000 into their names only, so if Attorney advised child D to transfer the funds into anyone other than children B and C's names, then the advice created a conflict of interest. Thus, advising child D to transfer the funds into her and Father's names created a conflict of interest. *See Restatement (Third) of the Law Governing Lawyers* § 132 cmt. e (providing that for purposes of determining whether a subsequent client's interests are "materially adverse" to the interests of a former client, the scope of the subsequent client's interests are defined by the scope of the prior representation).

85. *See* Model R. Prof. Conduct 1.2 (defining the scope of the client-lawyer relationship).

86. Attorney provided estate-planning legal services to all the children, separate from the preparation of the durable power of attorney. In addition, Father continued to contact Attorney and his staff after the execution of the durable power of attorney. Finally, all the files were left open, and Attorney sent no letter confirming the termination of the client-lawyer relationship. *Supra* pt. II(C)(2).

87. *See* Model R. Prof. Conduct 1.2(a) (providing that the client has the ultimate authority to determine the purposes to be served by legal representation within the limits imposed by law and the lawyer's professional obligations).

88. The fact that children B and C were using the new power of attorney to limit child D's control over funds to which child D previously had control suggested that children B and C's interests had become materially adverse to child D's interests. *Id.*; *see id.* at R. 1.7 cmt. 4 (requiring a lawyer to withdraw if a conflict arises after representation has com-

D. Assessing Capacity under New Definitions of "Informed Consent" and "Diminished Capacity"

No matter where the attorney is in the client-lawyer relationship related to guardianship, informed consent based on sufficient cognitive function is part of the analysis.[89] Consider the following definition of informed consent from the Model Rules:

> "Informed consent" denotes 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.[90]

This definition applies throughout the rules, providing consistency and continuity.[91] The reporter for the ABA Ethics 2000 Commission (Commission) explained that throughout the Model Rules, the phrase "consent after consultation" needed to be replaced with the phrase "gives informed consent."[92] The ABA House of Delegates agreed with the Commission's recommendation on the premise that "consultation" as a term was not well understood and did not sufficiently indicate the extent to which clients must receive adequate information and explanation in order to make reasonably informed decisions.[93] The Commission considered the term "informed consent" familiar enough to convey what is required under the Rules.[94]

---

menced); *Restatement (Third) of The Law Governing Lawyers* § 130 cmt. c (providing that when a conflict in multiple representation becomes "reasonably apparent or foreseeable," a lawyer may not continue the representation without the affected clients' informed consent).

89. *See* Model R. Prof. Conduct 1.0 cmt. 6 (noting that under certain circumstances, the Model Rules require a lawyer to obtain the informed consent of a current client, a former client, and even a prospective client).

90. *Id.* at R. 1.0(e).

91. *Id.* at R. 1.0 cmt. 6.

92. ABA Ctr. Prof. Resp., *Report of the Commission on Evaluation of the Rules of Professional Conduct* 134–135 (ABA 2000) [hereinafter *Report of Ethics 2000 Commission*]; A. Frank Johns, *Revised ABA Model Rules of Professional Conduct Applied in Elder Law: The Basics Framed in Core Values Get Complicated Fast: MRPC 1.0–1.6*, 1 Natl. Acad. Elder L. Attys. J. 59, 63 (Spring 2005).

93. *Report of Ethics 2000 Commission*, *supra* n. 92, at 135; Johns, *supra* n. 92, at 63; *see* Model R. Prof. Conduct 1.0(e) (adopting the Ethics 2000 Commission's proposed definition of "informed consent").

94. *Report of Ethics 2000 Commission*, *supra* n. 92, at 135; Johns, *supra* n. 92, at 63.

1. Defining Disability[95]

An important revision to Rule 1.14 reflects a continuity of language.[96] The old rule at times referred to a "client under a disability" and at other times used phrases such as "disabled client."[97] The Commission found that the phrase "client under disability" did not actually fit any of the vast number of clients being seen by lawyers.[98] The title phrase, "Client under Disability," created an assumption or inference that the client *had* to be disabled, possibly to the extent the disability met the criteria for being disabled based on definitions found in federal law.[99]

In practice, framing the limitation as a disability was too narrow in application.[100] Attorneys often see clients who have symptoms consistent with "Alzheimer's, memory loss, or first[-]phase dementia"[101] or otherwise exhibit short-term memory loss.[102] These examples were outside the language of the old rule.[103]

The Model Rules provide attorneys with guidance on how to handle clients with diminished capacity.[104] The revised version of

95. Much of the following text draws heavily from the Author's previous works at A. Frank Johns, *What's an Elder Law Attorney to Do? Clients with Diminished Capacity—Applying the ABA Model Rules of Professional Responsibility*, 15 Experience 14, 19–20 (Summer 2005), and A. Frank Johns, *Older Clients with Diminishing Capacity and Their Advance Directives*, 39 Real Prop., Prob. & Trust J. 107, 125–127 (2004) [hereinafter Johns, *Older Clients*].

96. *See Report of Ethics 2000 Commission*, *supra* n. 92, at 248 (recommending that the phrase "client with diminished capacity" replace any terminology in the Model Rules referencing a client's capacity); Johns, *Older Clients*, *supra* n. 95, at 125 (discussing the revisions to Rule 1.14 and the Rule's future application).

97. *Report of Ethics 2000 Commission*, *supra* n. 92, at 244–247.

98. *See id.* at 248 (explaining that the revision was intended to express the continuum of client capacity more accurately than the old references to "disability").

99. *See e.g.* 42 U.S.C. § 1382c(a)(3)(A) (describing a disabled person as one who is "unable to engage in any substantial gainful activity by reason of any medically determinable physical or mental impairment which can be expected to result in death or which has lasted or can be expected to last for a continuous period of not less than twelve months").

100. *See* Jan Ellen Rein, *Clients with Destructive and Socially Harmful Choices—What's an Attorney to Do?: Within and Beyond the Competency Construct*, 62 Fordham L. Rev. 1101, 1129 n. 101 (1994) (noting that the trend was for legal incompetency determinations to emphasize criteria used in clinical evaluations).

101. Johns, *Older Clients*, *supra* n. 95, at 125.

102. *Id.*

103. *Id.*

104. Model R. Prof. Conduct 1.14; *see e.g.* Green & Coleman, *supra* n. 6, at 965 (discussing professional practice recommendations to enable lawyers to better serve older clients in various contexts); ABA Formal Ethics Op. 96-404 (addressing a lawyer's professional responsibilities when he believes that his client no longer has the mental capacity to han-

Rule 1.14 describes a client with diminished capacity.[105] Under this language, lawyers are given guidance showing how the Rule would apply to the above examples.[106] However, diminished capacity does not simply mean a reduction in cognitive function.[107] Diminished capacity may include physical limitations and dysfunction such as incontinence, hearing loss, or vision impairment if coupled with mental loss to the extent that it places the client at risk.[108] The reporter's explanation clarifies that Comments 9 and 10 reflect the Rule's focus on degrees of client capacity.[109]

Two other revisions to the Model Rules address the concern voiced by the ABA Commission on Legal Problems of the Elderly by suggesting what action a lawyer may take during representation of a client with diminished capacity.[110] The revisions guide the lawyer in taking 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.[111] The Model Rules offer lawyers greater flexibility and general guidance when clients face substantial risk of harm or when emergency legal intervention becomes necessary as described in Comments 9 and 10.[112]

---

dle his legal affairs); *ACTEC Commentaries*, *supra* n. 5, at 131–139; *see generally* Clifton B. Kruse, Jr., *Model Rule 1.14—Lessons Learned from* Patch Adams*—Ethical Issues Necessarily Considered When Working with Clients under Disability*, 14 Natl. Acad. Elder L. Attys. Q. 34 (Winter 2001) (promoting the "Do No Harm" edict of the medical profession as a cornerstone of a lawyer's practice); Clifton B. Kruse, Jr., *Ethical Obligations of Counsel in Representing Clients Petitioning to be Appointed as Guardians of Others or of Their Estates, or Both*, 8 Natl. Acad. Elder L. Attys. Q. 13 (Spring 1995) (discussing how the interpretation of the Model Rules in the context of guardianship and conservatorship law affects a lawyer's representation of proposed fiduciaries).

105. Model R. Prof. Conduct 1.14(a).

106. *See id.* at R. 1.14 cmts. 1, 2 (noting that an elderly person "can be quite capable of handling routine financial matters," but may still require protection in major transactions).

107. *See id.* at R. 1.14 cmt. 1 (stating that a client with diminished mental capacity may still be able to make adequately considered decisions).

108. Johns, *Older Clients*, *supra* n. 95, at 126.

109. *Report of Ethics 2000 Commission*, *supra* n. 92, at 250.

110. Johns, *Older Clients*, *supra* n. 95, at 126 n. 68.

111. *See* Model R. Prof. Conduct 1.14 cmt. 5 (recommending that a lawyer consult with the client's family, support groups, and professional services, as well as consider using a voluntary surrogate-decisionmaking tool).

112. *See id.* at R. 1.14 cmts. 9, 10 (providing general guidance when a lawyer takes protective action because he believes that a person with diminished capacity is threatened

With an understanding of when clients fall under Rule 1.14, the Rule then offers guidance on how to protect clients with diminished capacity.[113] Protection in the form of guardianship intervention is appropriate only when the lawyer determines that such protection is necessary after exercising his or her professional judgment.[114] The reporter's explanation points out that "the modification was intended to clarify that while it 'may' be necessary to have a legal representative appointed to complete a transaction, it is not 'ordinarily' required to the extent that a client with some degree of capacity may be able to execute a power of attorney."[115] Comment 5 explicitly states that lawyers are to intrude into the client's decisionmaking autonomy to the least extent feasible, while maximizing client capacities and respecting the client's family and social connections.[116]

This Section reviewed the core ethical considerations that guide attorneys when beginning the client-lawyer relationship. It specifically examined the relationship in the context of prospective, current, and former clients. The next Section of this Article focuses on the different sides of representation when involved with guardianship adjudications.

III. THE DIFFERENT SIDES OF REPRESENTATION IN GUARDIANSHIP

What follows is a listing of the many possible petitioners in the guardianship-adjudication process. Where possible, when facts are shown in case studies, a category of representation will be noted. The following categories of representation are identified in the next Section: quasi-administrative; quasi-advocacy, and full-blown adversarial. Each side will also identify various ethics rules that come into play.

---

with imminent and irreparable harm).

113. *See id.* at R. 1.14 cmts. 5–7 (discussing lawyers' ability to take protective action).

114. *See id.* at R. 1.14 cmt. 7 (leaving the determination of whether to appoint a guardian to the lawyer's professional judgment); *Aspirational Standards Commentary*, *supra* n. 4, at 214 (providing that a lawyer should take protective measures when he "reasonably believes" that it is required); *ACTEC Commentaries*, *supra* n. 5, at 132 (noting that a lawyer may take such actions on behalf of a client with diminished capacity that the lawyer reasonably believes are in the client's best interests).

115. *Report of Ethics 2000 Commission*, *supra* n. 92, at 249.

116. Model R. Prof. Conduct 1.14 cmt. 5.

An attorney's representation of the petitioner in a guardianship-adjudication action may arise through involvement in the elder law and trust and estates practice areas. The attorney may become involved when implementing an estate plan for clients whose child or children are eighteen years old or older and have a disability that negatively impacts their life experiences.[117] Additionally, an increasing number of attorneys are representing petitioners pursuing guardianship adjudication of a spouse or parent.[118] Finally, at times the attorney or another interested party may petition for guardianship to protect the interests of a client with diminished capacity.[119]

A. Parent Petitioner

Many elder law attorneys represent elder clients who have adult children with developmental, mental, or physical disabilities. The attorney may have an ongoing or previous relationship with the parent, or representation may only be for the instant need of guardianship. The legal action taken may vary based on the type and severity of the child's disability.

When representing parents whose children have severe mental retardation or a severe, pervasive-developmental disorder impacting cognitive function, the category of representation will usually be quasi-administrative. Severe mental retardation, autism, and other pervasive-developmental disorders (PPDs) can cause children to function at a level below first grade.[120] Usually, the child's educational environment will have substantial evidence of the child's social and academic limitations. The greater the severity of the disability, the greater the direction towards informal process.[121]

---

117. *See* Unif. Prob. Code § 5-302 cmt. (2006) (providing that a parent may, by will or other writing, appoint a "standby" guardian for a child who is over the age of eighteen but who is incapacitated).

118. *Id.*

119. *Id.*

120. *See Diagnostic and Statistical Manual of Mental Disorders*, 41–68 (4th ed. 1994), *see also* DSM-IV™ Multiaxial System (Made Easy) http://psyweb.com/Mdisord/DSM_IV/jsp/dsm_iv.jsp (last accessed June 28, 2006).

121. *See* A. Frank Johns, *Guardianship Folly: The Misgovernment of* Parens Patriae *and the Forecast of Its Crumbling Linkage to Unprotected Older Americans in the Twenty-First Century*, 27 Stetson L. Rev. 1, 70–73 (1997).

Other mental disorders include mental illnesses, attention deficits, obsessive-compulsive disorders, social dysfunction, and addictions.[122] Moderate afflictions usually do not warrant the draconian intrusion of guardianship.[123] However, many parents are advised by teachers, principals, social workers, case managers, and other family members to "get guardianship" once the child is beyond the age of eighteen. Guardianship is warranted under certain factual conditions, especially if the child may be cycling through medical and healthcare environments, including involuntary-psychiatric commitment.[124] However, just affixing the label is problematic because if the attorney jumps to the conclusion that the label equals incompetence, there may be a rude awakening later in the process.[125]

As previously noted, the changes to Rule 1.14 were because of arcane language referencing "client under disability."[126] Even though the revised Rule 1.14 specifically addresses diminished capacity, there are those whose physical impairments are so severe that guardianship is a viable option.

1. Case Study Number Three: Adult Children with Severe Disabilities

Attorney has represented Husband and Wife for many years. She first met with Husband and Wife when their only child, C, was three years old and was diagnosed as severely mentally retarded. Over the years, as Attorney provided estate-planning services for Husband and Wife, child C went through school identified as a student with disability and was always placed in a separate self-contained classroom. Child C is now eighteen years old and Husband and Wife meet with Attorney to address legal issues of incompetence and the need for guardianship.

122. *See* DSM-IV™ Multiaxial System, *supra* n. 120, at 78.

123. *See* H. Rutherford Turnbull III, Ann P. Turnbull, G.J. Bronicki, Jean Ann Summers & Constance Roeder-Gordon, *Disability and the Family: A Guide to Decisions for Adulthood* 57–70 (Paul H. Brookes Publg. Co. 1989) (discussing the considerations one must make when deciding about guardianship).

124. *See* Michael L. Perlin, *Mental Disability Law* 278–282 (2d ed., Lexis 1998) (discussing involuntary civil commitment in a guardianship context).

125. *See* Turnbull et al., *supra* n. 123, at 45–57 (defining guardianship).

126. *Supra* nn. 96–99 and accompanying text.

Attorney meets with child C and concludes that guardianship is necessary. Attorney then explains to Husband and Wife that they should petition for guardianship without counsel and then pay for Attorney to represent child C in the adjudication hearing.

The probate judge has informally authorized attorneys to file a notice of appearance as counsel for the alleged-incompetent adult in cases where the parents were actually advocating the action for their child. Child C has no estate, and Husband and Wife agree to pay Attorney's fee for representing child C through the process.

2. Analysis of Case Study Number Three

Even with sophisticated statutory schemes in place, many probate judges and other adjudicators take the more informal, quasi-administrative approach by waiving the Rules of Civil Procedure and Rules of Evidence and asserting a best-interests standard rather than a zealous-advocacy standard.[127] This preference for informality is true especially when, as noted above, the disabilities are lifelong, severe, and well documented.

Regardless of the informality, the right to counsel has been clearly mandated by statutes and caselaw.[128] In representation for those with diminished capacity, there is widespread deliberation and "robust debate" in the legal profession over how the role of the attorney will be defined.[129] Those arguing for zealous advocacy have been supported by numerous proponents writing

127. *See* Lawrence A. Frolik, *Promoting Judicial Acceptance and Use of Limited Guardianship*, 31 Stetson L. Rev. 735, 736 (2002) (describing that judges want to make decisions and craft orders that promote the interests of the incapacitated person).

128. *See e.g. Wendland v. Sup. Ct. of San Joaquin Co.*, 56 Cal. Rptr. 2d 595 (Cal. App. 3d Dist. 1996) (ordering the right to appointed counsel under California Probate Code § 1471(b)); *see* Unif. Guardianship & Protective Procs. Act § 304(a) (available at http://www.nccusl.org/Update/ActSearchResults.aspx); *see also* Unif. Prob. Code § 5-303 (permitting appointed attorneys for respondent to be granted powers and duties of a *guardian ad litem*).

129. A. Frank Johns & Charles P. Sabatino, Introduction, *Wingspan—The Second National Guardianship Conference*, 31 Stetson L. Rev. 573, 584–586 (2002) (citations omitted). A. Frank Johns and Charles P. Sabatino noted the following:

> (1) whether appointment of counsel should always be mandatory, and (2) whether the lawyer for the alleged incapacitated person should be obligated to provide "zealous advocacy" . . . or "responsible and appropriate representation" on the other. Both issues arise out of a long history of debate, going back prior to the 1988 Wingspread Symposium, which endorsed both mandatory appointment and the obligation of zealous advocacy.

Id. at 585.

against any limitation on the appointment of counsel.[130] Also importantly, the obligation to provide the alleged incapacitated adult with zealous advocacy was also included in the final recommendations of Wingspan—the Second National Guardianship Conference.[131] In this case study, where will Attorney actually direct her loyalties? If guided and directed by Husband and Wife, then does child C really have representation by an attorney?

Assume from the facts above that the severity of child C's mental retardation leaves no doubt as to his incompetence. His level of function is somewhere around first grade. He has minimal daily living skills and no financial or social skills. Any other attorney involved would take a "best interests" approach and join in the adjudication of incompetence; it is a practical and inexpensive approach to assisting the parents in achieving legal authority for their son.[132] The ethical issues are more of a technical nature with a "no harm, no foul" view of the end result.[133]

The facts in the above case study present a person with significant dysfunction as an adult. When the alleged incompetent adult has more moderate abilities, as in the following case study, the guardianship-adjudication process becomes more complex.

---

130. *E.g.* Joan L. O'Sullivan, *Role of the Attorney for the Alleged Incapacitated Person*, 31 Stetson L. Rev. 687, 687 (2002); Jan Ellen Rein, *Preserving Dignity and Self-Determination of the Elderly in the Face of Competing Interests and Grim Alternatives: A Proposal for Statutory Refocus and Reform*, 60 Geo. Wash. L. Rev., 1818, 1844–1845 (1992); Jennifer L. Wright, *Protecting Who from What, and Why, and How?: A Proposal for an Integrative Approach to Adult Protective Proceedings*, 12 Elder L.J. 53, 53 (2004).

131. Johns & Sabatino, *supra* n. 129, at 601. A. Frank Johns and Charles P. Sabatino also noted the following:

> Wingspread Recommendation regarding the role of counsel as zealous advocate be amended and reaffirmed as follows: *Zealous Advocacy*—In order to assume the proper advocacy role, counsel for the respondent and the petitioner shall: (a) advise the client of all the options as well as the practical and legal consequences of those options and the probability of success in pursuing any one of those options; (b) give that advice in the language, mode of communication and terms that the client is most likely to understand; and (c) zealously advocate the course of actions chosen by the client.

Id. at 601 (footnote omitted).

132. Rick Berkobien, *The Arc, Future Planning: Guardianship and People with Mental Retardation*, http://www.thearc.org/faqs/guard.html (accessed June 29, 2006).

133. Turnbull et al., *supra* n. 123.

3. Case Study Number Four: Adult Child with Mild to Moderate Disabilities

Attorney has represented Husband and Wife for many years. She first met with Husband and Wife when their only child, C, was three years old and had been diagnosed as learning disabled with attention-deficit disorder. Over the years, as Attorney provided estate-planning services for Husband and Wife, child C went through school identified as a student with disability and was always provided accommodations for learning. Child C is now eighteen years old but is several years behind in social maturity and is easily misguided. Husband and Wife meet with Attorney to address legal issues regarding child C's individual rights, self-advocacy, possible execution of powers of attorney, and the possible need for guardianship or a special-needs trust.

Attorney meets with child C under the preconceived notion that guardianship will be in child C's best interest. Attorney then explains to Husband and Wife that they should petition for guardianship without counsel and then pay for Attorney to represent child C in the adjudication hearing.

In a later meeting with child C, Attorney is told by child C that he wants to fight for his rights because he intends to move into an apartment and to get married to his girlfriend. Child C has no estate, and Husband and Wife agree to pay Attorney's fee for representing child C through the process.

4. Analysis of Case Study Number Four

In this case study, where child C has a diminished capacity but still understands and can direct the legal proceedings, Attorney's ethical situation is more complex. Indeed, questions arise as to the conflict between Attorney's past client (the parents) and current client (the adult child), such as the following: Does Attorney have any ethical responsibility to inform the parents when child C plans major life changes? What if child C demands that Attorney fight for his independence and wants a jury trial but does not have the means to pay for it independent of his parents' support?

The answers to the questions above must be analyzed from the ethical context of the client-lawyer relationship, moving through Rules 1.2 through 1.5, 1.9, and 1.14 with the focus on

child C as the client. Attorney must not only be mindful of the legal ethics but also of the larger societal mandate for individual rights of people with mental disabilities.[134] The analysis earlier in the Article provides the reader with insight related to the application of Rules 1.2 and 1.9.[135] The following analysis considers Attorney's duties under Rules 1.4 and 1.5, especially when connected with the protections in Rule 1.14.

Rule 1.4 requires attorneys to communicate reasonably with current clients. For the purpose of this analysis, it is assumed that Husband and Wife understand their position as former clients of Attorney. Having paid Attorney to represent child C, it is further assumed that they have waived the present conflicts of interest with Attorney. With these assumptions, Attorney must communicate with child C under the guidance of Rule 1.4.[136] How much communication should Attorney have with child C? The comments to Rule 1.4 and the examination of the relationship in the cited treatises look to detail and delivery based on reasonableness and on the legal sophistication of the client. Geoffrey C. Hazard, Jr. and William Hodes further direct attention to the history of dealings between the lawyer and the particular client.[137] In this case, the historical relationship does include Husband and Wife, but only to the extent that Attorney gains an understanding of Attorney's role with child C. The black-letter mandate of Rule 1.4(a)(2) and (3) insists that Attorney communicate to child C how child C's objectives will be accomplished and then keep child C reasonably informed about the status of the guardianship adjudication.[138] Additionally, Attorney must arm child C with sufficient information from which child C is able to make informed "turning-point" decisions about his legal choices in the guardianship adjudication. These generic guidelines for ethical client-lawyer

134. *See generally* Robert L. Burgdorf, *The Legal Rights of Handicapped Persons* 48–52 (Paul H. Brooks Publg. Co. 1980) (discussing the legal-rights movement of handicapped people); Barbara S. Hughes, *Planning with High Functioning Special Needs Youth upon Reaching Age of Majority: Education and Other Powers of Attorney* (NAELA Advanced Practitioner's Invitational Pilot Program 2004) (discussing the individual rights of mentally disabled individuals).

135. *Supra* nn. 78–88 and accompanying text.

136. Model R. Prof. Conduct 1.4; *ACTEC Commentaries*, *supra* n. 5, at 56–60; Hazard & Hodes, *supra* n. 7, at 7-6.

137. Hazard & Hodes, *supra* n. 7, at 7-6.

138. Model R. Prof. Conduct 1.4(a)(2), (3).

communication provide a basis for further nuanced communication between an attorney and client with wider disabilities.

Guardianship comes in different forms, and as part of ethical communication, an attorney must inform a client of his options when faced with a petition for guardianship. In many statutory guardianship processes, there are requirements for mandatory mediation[139] and for careful consideration of limited guardianship.[140] Attorney has an opportunity to guide child C through options that would allow child C to maintain many of his individual rights and to mediate with Husband and Wife how other rights might be protected under guardianship and by whom. Attorney will still have to receive authorization from child C to divulge any confidences even in the face of negotiating and mediating the guardianship adjudication.

The real problem for Attorney arises if child C decides that he wants to keep all of his rights and neither wants to mediate or consider limited guardianship. Additionally, although Husband and Wife are paying Attorney to represent child C, Attorney may be in a quandary when it comes time to explain the greater guardianship-adjudication expense of full-blown trial. This cost may mean nothing to child C and everything to Husband and Wife, which illustrates the problem of Husband and Wife paying Attorney's fee under the mandate of Rule 1.5.

---

139. *See* Johns & Sabatino, *supra* n. 129, at 581 n. 27 (citing Mary F. Radford, *Is the Use of Mediation Appropriate in Adult Guardianship Cases?* 31 Stetson L. Rev. 611, 613 (2002) (citing Susan N. Gary, *Mediation and the Elderly: Using Mediation to Resolve Probate Disputes over Guardianship and Inheritance*, 32 Wake Forest L. Rev. 397, 434 (1997)); Erica F. Wood, *Dispute Resolution and Dementia: Seeking Solutions*, 35 Ga. L. Rev. 785, 805 (2001) (stating that "[t]he use of mediation and other forms of dispute resolution for the elderly and person with disabilities . . . is still in the initial stages"); Susan D. Hartman, *Adult Guardianship Mediation*, 7 Ctr. Soc. Gerontology Best Prac. Notes (Sept. 1996) (available at http://www.tcsg.org/bpnotes/sept96/adult/htm>) ("discussing possible reasons why mediation is not available to most adults who are facing pending guardianship proceedings")).

140. Unif. Guardianship Protective Procs. Act, *supra* n. 128, at § 2-206(b). For all practitioners (no matter what party represented), limited guardianship, which embraces ways by which individual rights of the respondent may be retained, is a great tool for negotiating and settling hotly contested cases. If carefully counseled, respondents who do have understanding and are capable of managing pertinent parts, but not all of their lives, and some, but not all of their finances and property, may consent to court-ordered limited guardianship. Such assistance may actually be welcomed if it is clear that the assistance shall only be in those narrowly directed areas of respondents' lives in which they agree they need help.

Payment of an attorney's fee by a third party is appropriate under certain conditions as described by Rule 1.5.[141] Those conditions applied in this case study do not allow Husband and Wife to direct Attorney in regards to the guardianship adjudication of child C. Attorney must instead be directed by child C and must not allow any interference with her independent, professional judgment. Hazard and Hodes' Illustration 12-11 provides an interesting comparison to this case study.[142] There, a father hires the lawyer to represent his adult son for a DUI proceeding.[143] The writers make clear that the son must be told about the risks of the attorney being paid by the father to represent him.[144] Further, as in this case study, if the father has had the lawyer handle other matters for the father, the risks are accentuated because the lawyer could have a continuing sense of loyalty to the father.[145]

In our case study, the reader is left with the feeling that Husband and Wife want Attorney to respond as they believe they need in order to protect and support child C. The case study never has Attorney make clear to Husband and Wife the limitations on their payment of Attorney's fee and that child C consents to it, that Attorney will act on the direction of child C to obtain child C's objectives, and that her professional judgment will remain independent.

B. The Spouse Petitioner

Just as a parent is a frequent petitioner in guardianship cases, a spouse may also seek to protect his or her spouse's interests by becoming a guardian. When a spouse seeks an adjudication of incompetence of his or her spouse, attorneys must be very careful to review how the client is represented. If there has been previous representation of both spouses, the attorney must assess

141. Model R. Prof. Conduct 1.5, 1.8.

142. Hazard & Hodes, *supra* n. 7, at 12-33, Illustration, 12-35–12-36. At about the same time, the lawyer was also retained by the father to represent the father's unemployed twenty-three-year-old son. *Id.*

143. *Id.*

144. *Id.*

145. *Id.*

the prior representation within the context of the ethical rules that will be in play.[146]

1. Case Study Number Five: Husband and Wife Facing Conflict

Husband and Wife were married many years and were heading into retirement. Husband was severely injured in an accident. After a year of intensive care and rehabilitation, Husband remained severely physically disabled and cognitively impaired from traumatic brain injury. Formal guardianship may be required to represent his interests in his personal-injury litigation, to assist him in his daily life, and to manage his affairs.

Attorney's firm had represented Husband and Wife jointly for several years, providing general estate and tax planning. Attorney's partner J will represent Husband and Wife in the personal-injury litigation as well as representing Wife through the guardianship process, ending in Wife's appointment as guardian for Husband.[147]

2. Analysis of Case Study Number Five

Unlike the prior rule, the revised Rule 1.7 contains a single standard of consentability and informed consent, applicable both

146. *See* Russell G. Pearce, *supra* n. 22, at 2 nn. 5, 6, 33 (discussing the "communitarian construction of legal ethics codes" and how the American Law Institute's modification of the *Restatement of Law Governing Lawyers* gives lawyers more flexibility in "limiting [the lawyers'] obligations to individual family members in joint representation"); *see also* Naomi Cahn & Robert Tuttle, *Dependency and Delegation: The Ethics of Marital Representation*, 22 Seattle U. L. Rev. 97, 106 (1998) (discussing a lawyer's ethical responsibilities when faced with a situation where one spouse wishes to cede decisionmaking authority to the other); Teresa Stanton Collett, *Love among the Ruins: The Ethics of Counseling Happily Married Couples*, 22 Seattle U. L. Rev. 139, 140 (1999) (discussing an attorney's role when clients embrace an ideal of marriage as "the two shall become as one" and disputes arise that cause clients to repudiate the previous sacrifice of individual interests); Steven H. Hobbs & Fay Wilson Hobbs, *The Ethical Management of Assets for Elder Clients: A Context, Role, and Law Approach*, 62 Fordham L. Rev. 1411, 1420–1427 (1994) (exploring the lawyer's ethical role in the aging process within the context of a family).

147. This Author used a similar case study with an ethics analysis to examine the primary conflicts in the practice of special-needs trusts involving spouses. A. Frank Johns, *Legal Ethics Applied to Initial Client-Lawyer Engagements in which Lawyers Develop Special Needs Pooled Trusts*, 29 Wm. Mitchell L. Rev. 47, 48–54 (2002). The difference here is the direct examination of the conflict related to spouses.

to direct-adversity and material-limitation conflicts.[148] In a separate paragraph, this standard reflects the following separate steps required in analyzing conflicts: First identify potentially impermissible conflicts, then determine if the representation is permissible with the client's consent. The Rule also highlights the fact that not all conflicts are consentable.[149]

In this case study, Attorney faces the common dilemma of conflict of interest as framed by Rules 1.7 and 1.18.[150] In identifying any potentially impermissible conflict between Attorney and Partner J relating to Husband and Wife, Attorney and Partner J must determine if the rules permit continued representation of Husband with the consent of Wife. Is there a reasonable belief that Partner J will be able to represent Wife as guardian, and Husband as plaintiff through Wife as guardian, while not adversely affecting the relationship that would be had with either one of them to the extent that a conflict exists? In this analysis, the operative words may be "concurrent conflict."[151] If Attorney and Partner J first represent Wife through the guardianship process, then the subsequent representation of Wife as guardian in the personal-injury litigation would not be concurrent.[152] However, the way by which elder law and estates and trust lawyers are initially involved in personal-injury cases such as this one is often not so carefully handled.[153]

A probable engagement will be similar to the one described in this case study—Attorney, representing Husband, subsequently finds a need to represent Wife or a family member through the guardianship process. If these are the facts of the engagement, then an additional requirement under Rule 1.7(b) mandates that Attorney or Partner J determine whether they can provide competent and diligent representation to each client.[154] If a potential conflict exists, either Attorney or Partner J must consult with Husband and Wife to give them notice of the possible conflict and

148. Model R. Prof. Conduct 1.7.
149. *Id.*
150. *Id.* at R. 1.7, 1.18.
151. *Id.* at R. 1.7.
152. *Id.*; *ACTEC Commentaries*, *supra* n. 5, at 152, 175.
153. *See* Model R. Prof. Conduct 1.18 cmts. 4, 5 (explaining duties to prospective clients in a manner to avoid concurrent conflicts of interest).
154. *Id.* at R. 1.7(b) cmt. 29; *ACTEC Commentaries*, *supra* n. 5, at 154.

allow them to make informed decisions about engagement.[155] If Husband and Wife choose to be represented, then their informed consent must be in writing.[156]

Husband, however, may have such diminished capacity that he cannot make an informed decision.[157] Additionally, if Partner J represents Husband and Wife, then the current practice in many states would bar him from representing Wife as petitioner in the guardianship process.[158] Since one of the clients may be incapable of giving consent,[159] the ability of the other to provide informed written consent to waive Attorney and Partner J's conflicts of interest relating to representation appears ethically wrong.[160]

---

155. Model R. Prof. Conduct 1.7 cmt. 2.

156. *Id.* at R. 1.7(b)(4); ACTEC, *Engagement Letters: A Guide for Practitioners* (1999) (available at http://www.actec.org/pubInfoArk/comm./engltrchl.htm) (accessed Mar. 14, 2007) [hereinafter *ACTEC*, *Engagement Letters*].

157. *ACTEC*, *Engagement Letters*, *supra* n. 156.

158. A. Frank Johns, *The Application of Recommended Changes to ABA Model Rule 1.14 when Initiating Guardianship Intervention for Clients*, 14 Natl. Acad. Elder L. Attys. Q. 16 (Fall 2001). Additionally, ABA Formal Ethics Opinion 96-404 stated the following:

> A lawyer who is petitioning for a guardianship for his incompetent client may wish to support the appointment of a particular person or entity as guardian. Provided the lawyer has made a reasonable assessment of the person or entity's fitness and qualifications, there is no reason why the lawyer should not support, or even recommend, such an appointment. Recommending or supporting the appointment of a particular guardian is to be distinguished from representing that person or entity's interest, and does not raise issues under Rule 1.7(a) or (b), because the lawyer has but one client in the matter, the putative ward.
>
> Once a person has been adjudged incompetent and a guardian has been appointed to act on his behalf, the lawyer is free to represent the guardian. However, prior to that time, any expectation the lawyer may have of future employment by the person he is recommending for appointment as guardian must be brought to the attention of the appointing court. This is because the lawyer's duty of candor to the tribunal, coupled with his special responsibilities to the disabled client, require that he make full disclosure of his potential pecuniary interest in having a particular person appointed as guardian. *See* Rules 3.3 and 1.7(b). The lawyer should also disclose any knowledge or belief he may have concerning the client's preference for a different guardian. The substantive law of the forum may require such disclosure.

ABA Formal Ethics Op. 96-404.

159. *See Restatement (Third) of the Law Governing Lawyers* § 122(1). However, as noted in ABA Formal Ethics Opinion 96-404, considering Comment (1), to Rule 1.14, lawyers are reminded that "'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.'" ABA Formal Ethics Op. 96-404 (quoting Model R. Prof. Conduct 1.14 cmt. 1). Does Husband have sufficient cognitive function to allow him to understand the conflict the disability specialist is disclosing and to sign a truly informed written consent?

160. *Restatement (Third) of the Law Governing Lawyers* § 122.

Representation of Husband by an independent special-needs trust lawyer outside Attorney and Partner J's firm may lessen the concern for possible conflicts.[161] However, those possible conflicts do not just go away.[162] The special-needs trust specialist must still give attention to Husband's spouse and how she (as a non-client) would feel about issues raised regarding Husband's personal-injury special-needs trust.[163]

In addition to the question of whether the conflict of interests is consentable, the rules also address whether loyalty and previous relationships bar attorneys at the same firm from representing clients in direct conflict, as clients often are represented in guardianship proceedings. Rule 1.10 addresses the relationship of lawyers in the same firm when serving conflicted clients.[164] Even though one lawyer knows nothing of the confidences of a client represented by another member of the firm, the duty to maintain those confidences and to prevent a conflict remains.[165]

Usual analysis begins with the premise that all lawyers in a firm are as one when examining the obligation of the core value of loyalty.[166] In this case study, if Attorney could represent both Husband and Wife as a sole practitioner,[167] then imputation rules bar Attorney as well as Partner J and all other lawyers in the

---

161. Under the privity doctrine, the plaintiff has no contractual relationship with a special-needs trust specialist. A. Frank Johns, *Fickett's Thicket: The Lawyer's Expanding Fiduciary and Ethical Boundaries when Serving Older Americans of Moderate Wealth*, 32 Wake Forest L. Rev. 445, 445 (1997); Jeffery N. Pennell, *Ethics, Professionalism and Malpractice Issues in Estate Planning and Administration* 2 ALI-ABA (2002); *Restatement (Third) of the Law Governing Lawyers* § 98.

162. Almost every state has adopted Rule 1.14 or a similar provision directing lawyers when finding it necessary to consider filing for guardianship for a client. A. Frank Johns, *Ten Years After: Where Is the Constitutional Crisis with Procedural Safeguards and Due Process in Guardianship Adjudication?* 7 Elder L.J. 33 (1999).

163. Bruce S. Ross, *supra* n. 59, at 757.

164. Model R. Prof. Conduct 1.10.

165. *Id.*

166. See Model Rule of Professional Conduct 1.10 stating the following:

> While lawyers are associated in a firm, none of them shall knowingly represent a client when any one of them practicing alone would be prohibited from doing so by Rules 1.7 or 1.9, unless the prohibition is based on a personal interest of the prohibited lawyer and does not present a significant risk of materially limiting the representation of the client by the remaining lawyers in the firm.

Id. at R. 1.10.

167. *Restatement (Third) of the Law Governing Lawyers* §§ 123–124; Hazard & Hodes, *supra* n. 7, at 14-9.

firm.[168] However, screening removes the risk of affiliated lawyers misusing confidential information.[169] The Restatement identifies the following three distinct potential conflicts when screening may or may not remove the risk: (1) a lawyer's minor involvement; (2) a lawyer's more substantial involvement, where screening may be appropriate; and (3) a lawyer's involvement with a client and the possession of confidential information that may not be cured by screening.[170]

Attorney and Partner J may be able to represent Husband and Wife if both Husband and Wife provide a waiver in writing based on their informed consent.[171] How would this work? Attorney represents Husband and Wife through the personal-injury litigation, while Partner J represents Wife through the guardianship adjudication of Husband. Wife would be the petitioner and adversary against Husband, as respondent, in a judicial forum. On the contrary, this situation may present a non-waivable material conflict of interest[172] where Partner J's withdrawal would be the only ethical course of action.

3. Case Study Number Six: Spouse with Alzheimer's Disease

Tom and Linda, his wife of forty years, often walked in the late afternoon, sometimes together, other times separately. Lately, Linda would not let Tom walk by himself. Tom's doctor diagnosed him with beginning-stage Alzheimer's disease. One day, Tom walked out of their home while Linda was busy. Three hours later, Linda found Tom wandering aimlessly in a nearby wooded area.

Linda took Tom to their elder law attorney of over ten years, where the Attorney prepared wills and other legal work for Tom and Linda as joint clients but not advance directives (Tom always said he would do advance directives when he was old). Linda and Tom had not seen Attorney for over two years.

At the time of the meeting with Attorney, Linda explained Tom's medical condition. Attorney focused on Tom by asking Tom

168. Hazard & Hodes, *supra* n. 7, at 14-9.
169. *Restatement (Third) of the Law Governing Lawyers* § 124.
170. *Id*.
171. Model R. Prof. Conduct 1.7.
172. *Id*. at R. 1.8.

if he knew who she (Attorney) was. Tom responded that Attorney was good-looking enough to be his girlfriend. Attorney pressed further by asking who Tom's lawyer was. Tom answered, "She's probably my lawyer" pointing to Linda. Attorney continued with her general assessment of Tom's capacity by questioning him in many areas, including which day, month, and year it was, his age, and the names of his children and siblings. Tom failed the assessment, answering most of the questions incorrectly. Tom also became agitated and angry with Linda and Attorney. He insisted that he knew what to do; they were not going to tell him what to do. He adamantly refused to sign any papers. Attorney determined that Tom lacked the cognitive capacity required for informed legal judgment. She advised Linda that Linda needed legal authority over Tom and that such authority could only be gained through the judicial process of guardianship. Linda engaged Attorney to initiate the petition to adjudicate incompetence.

4. Analysis of Case Study Number Six

The facts in this case study create ambiguity about whether Tom and Linda's status as former or current clients of Attorney reflects the reality in which most attorneys practice law. Even with the lapse of more than two years, the presumption is that Tom and Linda are current clients.[173] However, how many years will it take for the inference to be otherwise? What if they had not seen or communicated with Attorney for four or five years? What if Tom assumes that a current client-lawyer relationship exists and Attorney assumes otherwise? Refer to earlier discussion in the Article regarding Rule 1.9 and former clients.[174] Rule 1.16 (Declining or Terminating Representation)[175] gives Attorney a clearer answer. Applying the language in Comment 1 of Rule 1.16, Attorney should decline representation if there is an "improper conflict of interest."[176] Additionally, under Rule 1.16, At-

173. *See generally id.* at R. 1.9 (stating "[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 . . . unless the former client gives informed consent, confirmed in writing").

174. *Supra* n. 83 and accompanying text.

175. Model R. Prof. Conduct 1.16.

176. *See id.* at R. 1.16(a)(1) cmt. 1 (stating that "[a] lawyer should not accept representation in a matter unless it can be performed competently, promptly, without improper

torney should consider declining to represent Linda going forward in the adjudication of incompetence of Tom if "the representation will result in violation of [T]he [R]ules of [P]rofessional [C]onduct or other law."[177] Whether former or current clients, the rules about loyalty, confidentiality, and conflicts make it difficult for Attorney to be the attorney of record for Linda in the adjudication of Tom's competence.[178] Rule 1.2 instructs lawyers to abide by a client's decision concerning the objectives of representation.[179] Attorney follows Linda's direction but not Tom's. Should Attorney possibly have ended the conference and the client-lawyer relationship, declaring a material conflict of interest under Rule 1.7, and sent Linda to find another attorney to represent her? Does Rule 1.10 provide guidance? Perhaps so prior to the adoption of the revised rules, but the revised Rule 1.14 does not change the limitation on Attorney's representation.[180]

Attorney's conclusion that Linda pursue guardianship of Tom is reasonable under Rule 1.14.[181] Attorney reasonably believed that Tom could not adequately act in his own interest and that Attorney could not assist Tom by maintaining a normal client-lawyer relationship. But what about the questions raised in the analysis of Case Study Number One? If guided by the previous ethics analysis, the result would bar Attorney from being the attorney in the guardianship adjudication against Tom. The rules allow Attorney to file the guardianship action and to be the actual petitioner after making the requisite finding of Tom's inability to adequately act in the client's own interest.[182] Does anything change since Tom will have his own counsel or *guardian ad litem* representing his interests? What if another attorney in Attorney's firm represents Linda in the guardianship proceeding and Attorney neither communicates with that attorney nor provides any of the documents or information that would be detrimental to Tom's defense? Would Attorney be able to construct a screen as de-

conflict of interest and to completion. Ordinarily, a representation in a matter is completed when the agreed-upon assistance has been concluded").

177. *Id.*; *ACTEC Commentaries*, *supra* n. 5, at 140.

178. *Supra* n. 77 and accompanying text; Model R. Prof. Conduct 1.14 cmt. 8.

179. Model R. Prof. Conduct 1.14 cmt. 8.

180. Model R. Prof. Conduct 1.14; *supra* nn. 77, 104 and accompanying text.

181. *See Aspirational Standards Commentary*, *supra* n. 4, at 19–26 § E-7 (recommending guardianship or conservatorship only when all possible alternatives will not work).

182. *Supra* n. 77.

scribed in Comment 7?[183] If Tom cannot provide informed consent, or has already voiced his objection to such an action by Attorney, a screen would not be possible.[184] The better course would be for Attorney to refer Linda to another firm altogether.[185]

However, Rule 1.14 does not deny Attorney her professional judgment or even indicate that Attorney reached the wrong conclusion.[186] Has Attorney met the requirements of the Comment suggesting a more thorough examination in determining the extent of Tom's diminished capacity? While Attorney interviewed Linda and questioned Tom, nothing suggests Attorney went through the various factors raised in the Comment. Attorney's less thorough examination of Tom could easily be explained in light of Tom's outburst and opposition. Tom's response demonstrated his inability to articulate reasoning leading to a decision, showing variability of his state of mind and an inability to appreciate consequences of a decision. What happened enlightened Attorney on how Tom could not exercise substantive fairness of his decisions or make consistent decisions based on Tom's long-term commitments and values. Based on these facts, Rule 1.14 makes it possible for Attorney to seek guidance from an appropriate diagnostician.[187] However, Attorney cannot represent Linda in an action directly against Tom.[188]

A spouse as a petitioner presents unique conflicts that complicate an attorney's representation. Because a guardianship position places a husband and wife in direct conflict, both parties may be barred from using their previous attorney. Although the rules provide some ways to resolve these conflicts, in guardianship proceedings where a party may be unable to exercise informed consent to a conflict, these rules fail to provide guidance. It may be that an attorney with a previous relationship with both parties is unable to resolve these conflicts ethically and, therefore, must send the parties elsewhere for representation.

183. Model R. Prof. Conduct 1.14; *supra* n. 47 and accompanying text.
184. *Restatement (Third) of the Law Governing Lawyers* § 123.
185. Model R. Prof. Conduct 1.7 cmt. 4.
186. *Id.* at R. 1.14.
187. *Id.*
188. *Supra* n. 77 and accompanying text.

C. Child Petitioner

A large and growing part of the guardianship practice concerns representation of a child or children seeking legal authority and control over elderly parents. This increase in child petitioners presents varying degrees of potential conflicts of interest.

1. Conflict Probabilities

The likelihood of a conflict of interest varies depending on the circumstances. Although obvious, it must be emphasized that a high probability of a material conflict exists at the initial contact with the child if the parents are prospective, current, or former clients.[189]

2. Potential Conflicts of Interest

An obvious, although not as likely, material conflict exists when representing more than one child in the guardianship process and the other children begin disagreeing with the decision-maker. Material conflicts become more prevalent when all but one of the children reside out of state,[190] when there are blended families and one spouse's children do not want the assets of their parent paying for the health and long-term care expenses of the step-parent, and when the parent plays "love the one you're with," telling the child the parent is with at the time that the child is the most loved and for whom a new power of attorney is executed, having strewn across the deeds registry the so-called "dueling powers."[191] Not as obvious, but just as difficult, is the child as attorney-in-fact of a parent, seeking representation to gain guardianship of that parent.[192] The following scenarios illustrate the

189. *See supra* n. 28 and accompanying text (stating that as a part of engaging multiple clients, each must waive in writing any differences and conflicts that may arise so that the lawyer may represent the parties concurrently).

190. *See* Model R. Prof. Conduct 1.7 (stating "a lawyer shall not represent a client if the representation involves a concurrent conflict of interest. A concurrent conflict of interest exists if . . . the representation of one client will be directly adverse to another client").

191. "Dueling powers" are those numerous powers of attorney that surface relating to one grantor, but flipping over a short period of time from one family member to another, depending upon who the grantor was with last.

192. *See supra* n. 89 (providing that several Model Rules of Professional Conduct require an attorney to acquire the clients informed consent before accepting representation; thus, a child as attorney-in-fact seeking to represent a parent should obtain informed

potential conflicts of interest arising in situations involving child petitioners and the likelihood of their occurrence.

3. Only Child and Parent as Prospective Client

A conflict of interest may occur when a child seeks guardianship for a parent, who is the attorney's prospective client. Because the parent is a prospective client, this situation must be analyzed under Rule 1.18. The following case study illustrates the potential conflict with a parent as the prospective client.

a. Case Study Number Seven

Only Child and Mother meet with Attorney for the first time. Only Child does all the talking, instructing Attorney to prepare a durable financial power of attorney for Mother. Attorney confirms that Mother is the client and that Attorney needs to meet with Mother separately to confirm competence and no undue influence. After Attorney meets privately with Mother, Attorney tells Only Child that Mother does not have sufficient mental ability to exercise informed consent necessary to sign the power of attorney. Attorney then gets Only Child to agree that Mother was only a prospective client and that Attorney is going forward with Only Child as the client for whom a guardianship action will be filed against Mother. Attorney has Mother sign a waiver agreement as a prospective client, allowing Attorney to represent Only Child through the guardianship process. Mother agrees that she needs Only Child to help her with her affairs and does not object to guardianship.

b. Analysis of Case Study Number Seven

Attorneys are continually confronted by facts similar to this case study. Countless times, elder law and estates and trusts lawyers are contacted by children seeking guidance and crisis intervention for a parent or parents.[193] This case study blurs the understanding of what constitutes informed consent, especially

consent from that parent).

193. *See* Johns, *supra* n. 17, at 30–33 (discussing Case Study Number Two where a son consults his mother's attorney following his mother's declining physical and mental health).

whether Mother received reasonably adequate information about the risks of Attorney's representation of Only Child.[194] However, doesn't the case study present another non-consentable situation of current or prospective clients? The black-letter law of Rule 1.7(a) only focuses on the current client, which may only be Only Child.[195] Additionally, Rule 1.7(b) allows for a written waiver based on informed consent.[196] In this case study, Mother has been shown to be mentally insufficient to execute a power of attorney but to have sufficient cognition to sign a waiver allowing Attorney to represent Only Child against her. This discrepancy seems to be the classic example of a material limitation that has directly conflicting interests.[197] Here, the direct adversity occurs when Attorney initiates the petition for guardianship adjudication on behalf of one client, Only Child, against another client, Mother.[198]

4. Parent as Former Client, Power of Attorney, and Multiple Children

A conflict of interest may also arise in cases involving parents who are former clients. The attorney should examine these conflicts under Rule 1.9. The following case study analyzes the potential conflict of interest arising in a situation where the parent is a former client.[199]

a. Case Study Number Eight

Over the years, Attorney has provided legal representation for Mother and deceased Father; the most recent representation was the handling of deceased Father's estate seven years earlier. While neither party formally acknowledged the termination of the client-lawyer relationship in writing, Mother had no contact with Attorney since the estate administration. Second Child meets with Attorney, reminding Attorney of the following important facts:

194. Model R. Prof. Conduct 1.0(e).

195. *Id.* at R. 1.7(a); Hazard & Hodes, *supra* n. 7, at 11-6–11-9.

196. Model R. Prof. Conduct 1.7(b)(4).

197. *Id.* at R. 1.7(a)(1).

198. *Id.*; Hazard & Hodes, *supra* n. 7, at 11-9. Illustrations include representation of both parties in an amicable divorce; joint representation of co-defendants; and inadvertent representation of directly adverse parties.

199. *Supra* n. 52 and accompanying text.

(1) Mother made Second Child attorney-in-fact in Mother's current, active durable financial power of attorney; (2) until a few months ago, Mother lived with Second Child; and (3) First Child took Mother and placed her in a nursing home on the other side of the county near where First Child lives. First Child told Second Child that he was getting a new power of attorney and denied Second Child any access to Mother at the nursing home. Attorney tells Second Child that under the power of attorney, Second Child can hire Attorney to initiate a petition to adjudicate Mother's incompetence and allow Second Child to regain control. Knowing the size of Mother's estate, Attorney requires a non-refundable retainer of $40,000.00 plus his standard hourly rate. Second Child uses Mother's money to pay Attorney the retainer and executes the engagement contract as Mother's attorney-in-fact. Attorney subsequently acts as petitioner to adjudicate Mother's competence.

b. Analysis of Case Study Number Eight

Does the wrinkle about the power of attorney make any difference? Isn't Attorney still representing Mother, the grantor of the power of attorney, to file an action against Mother?[200] Shouldn't Attorney tell Second Child that Second Child must pay the money and later seek reimbursement if she prevails on Mother's behalf? What happens if First Child actually has another power of attorney, executed but not recorded, and under the power and authority of that instrument, retains counsel to appear as attorney of record for Mother in the proceeding, using Mother's money to pay the attorney? This scenario may be taking the often-described "dueling powers" to a new level.[201] The interplay of the options of powers of attorney and guardianship intervention is important for the attorney to consider, especially when the attorney is under the strong guidance to review all available less restrictive alternatives to the severe intrusion of guardianship.[202]

200. *See Aspirational Standards Commentary*, *supra* n. 4, at 7.

201. *Supra* n. 191 and accompanying text. This Author has had similar situations in guardianship litigation arise; the clerks of at least two counties have found no difficulty in allowing the attorney-in-fact to retain counsel to represent either the petitioner or the respondent; Case Study Number Eight poses the ultimate irony.

202. *See* Julia Calvo Bueno, *Reforming Durable Power of Attorney Statutes to Combat Financial Exploitation of the Elderly*, 16. Natl. Acad. Elder L. Attys. Q. 20, 24–26 (Fall 2003) (highlighting legislative responses to financial exploitation in the context of durable

The analysis must also take into account the application of Rule 1.14.[203]

5. Parent as Current Client

A situation involving a current client may also present a conflict of interest. It is not uncommon for a client an attorney has not seen for years to believe that he still has an active relationship with his attorney, especially in the trusts, estates, and elder law areas of practice. This concept is part of the dilemma in Case Study Number Eight above. Many practitioners have a habit of practice that requires written engagement letters or agreements and closing or termination letters.[204] Assume in either Case Study Number Seven or Eight, that Attorney actually has a current ongoing client-lawyer relationship. Does any of the analysis change the result regarding Attorney's representation of the child proceeding with an action against Mother? The answer is no. Regardless of a former- or current-client relationship, the attorney must be guided by Rules 1.7 and 1.14.[205] As in other case studies, Attorney is barred from pursuing guardianship of Mother with Second Child from Case Study Number Eight as petitioner and cli-

powers of attorney); Russell E. Haddleton, *The Durable Power of Attorney: An Evolving Tool*, 14 Prob. & Prop. 59, 62 (June 2000) (discussing durable powers as an alternative to guardianship); *see also* Karen E. Boxx, *The Durable Power of Attorney's Place in the Family of Fiduciary Relationships*, 36 Ga. L. Rev. 1, 42–46 (2001) (applying fiduciary principles to the durable power of attorney); David M. English, *The UPC and the New Durable Powers*, 27 Real Prop., Prob. & Trust J. 333, 338–343 (1992) (discussing durable powers of attorney in relation to healthcare powers and advance directives); Daniel A. Wentworth, *Durable Powers of Attorney: Considering the Financial Institution's Perspective*, 17 Prob. & Prop. 37, 38–42 (Dec. 2003) (discussing the risks facing a financial institution in acceptance of powers of attorney); Linda S. Whitton, *Durable Powers as a Hedge against Guardianship: Should the Attorney-at-Law Accept Appointment as Attorney-in-Fact?* 2 Elder L. J. 39, 43–48 (1994) (discussing the development of durable powers as a guardianship alternative).

203. Model R. Prof. Conduct 1.14.

204. *See ACTEC*, *Engagement Letters*, *supra* n. 156 (describing engagement letters for different clients such as spouses, multiple generations in families, multiple parties in business, clients under disabilities, and fiduciaries); *see also Aspirational Standards Commentary*, *supra* n. 4, at 3 (discussing elder law client-engagement letters).

205. *See* Model R. Prof. Conduct 1.7 (governing the actions of lawyers with respect to conflicts of interest); *id.* at 1.14 (governing the actions of lawyers with respect to clients with diminished capacity).

ent.[206] Regardless of the involvement by a spouse or child, the analysis is the same.[207]

D. Attorney Petitioner

An attorney may also find it necessary to intervene in certain circumstances and file a guardianship petition for a prospective, current, or former client. The following two elements of longevity drive this area of practice: The demographics of our aging society,[208] and lawyers with many years of practice experience.[209]

Attorneys will receive more prospective clients with diminished capacity; the baby boomers will see to it.[210] There will be times when the attorney is compelled to file the petition for intervention and protection of the prospective client as allowed under the ethical guidance of Rule 1.14 and the ancillary impact of Rules 1.6 and 1.18.[211]

More former or current clients with diminished capacity will also confront their elder law attorneys.[212] The longer elder law attorneys practice law, the older their clients will become. This situation also requires careful review of Rule 1.14 and the ancillary impact of Rules 1.6 and 1.9.[213]

---

206. *Id.* at R. 1.7.

207. *Supra* n. 84 and accompanying text.

208. Merck Inst. Aging & Health & Gerontological Socy. Am., *The State of Aging and Health in America* (Merck Inst. Aging & Health & Gerontological Socy. Am. 2004) (available at http://www.agingsociety.org/agingsociety/pdf/state_of_aging_report.pdf).

209. Am. B. Found., *New Approaches to Access Legal Services: Research, Practice, and Policy*, 16 Researching Law 1 (2005).

210. *See* Katherine K. Wallman, *Older Americans 2000: Key Indicators of Well-Being, Indicator 15-Memory Impairment* 25 (Federal Interagency Forum on Aging—Office on Management and Budget 2000) (describing the decline in capacity as adults age); *see generally Beyond 50.02: A Report to the Nation on Trends in Health Security* § II Overview of Trends Affecting Population Age Groupings from 50 to 85 (AARP 2002) (predicting the issues that will affect baby boomers as they age).

211. *See* N.C. B. 98 Formal Ethics Op. 16 (1999) (describing the circumstances under which a lawyer may represent a client who resists an incompetency petition); N.C. B. Formal Ethics Op. 157 (1993) (opining on the circumstances under which a lawyer may seek a guardian for a client against the client's will); *see also* ABA Formal Ethics Op. 96-404 (discussing capacity and the application of Rule 1.14).

212. *See* Model R. Prof. Conduct 1.14 (governing relationships with clients that have diminished capacity).

213. *See supra* n. 52 and accompanying text (describing the rule prohibiting lawyers from representing clients with materially adverse interests).

Consider as well the tension relating to fees where the attorney for the current client, suspecting risk of harm and the client's incompetence, initiates a guardianship action and seeks legal fees for the time taken as petitioner and for the attorney or member of the firm to be attorney to the petitioner. The attorney's actions and the fees sought should be examined under the requirements of Rule 1.4.[214]

1. Case Study Number Nine

Elder Law Attorney has had a client-lawyer relationship with Tom for many years. Since Tom's wife Irene died several years ago, Attorney has noticed Tom's increasing memory loss and mental confusion. In the most recent meetings, the new housekeeper accompanied Tom. Throughout the meetings, Housekeeper controlled the conversation. In the most recent meeting, while Tom was seemingly in another world, Housekeeper instructed Attorney to prepare a durable power of attorney with her as attorney-in-fact and to change Tom's will such that it substantially reduced the inheritance to Tom's church and distant nieces and nephews in favor of Housekeeper. Tom blurted out that Housekeeper had him transfer valuable personal property to Housekeeper for safekeeping. Housekeeper became angry and excused herself, taking Tom out into the reception area where Attorney's paralegal overheard Housekeeper threaten Tom that if he told Attorney any more, she would leave him with no one to take care of him at night. When Attorney spoke with Tom in private, Tom kept identifying Housekeeper as his dead wife, Irene; kept giggling that his loving wife had him taking lots of Viagra; and kept declaring how happy he was that his wife was now taking over all of his property and accounts. When Attorney mentioned that Irene was not alive, Tom became tearful and visibly anxious. Tom continued to be visibly shaken when Attorney brought Housekeeper back into the meeting. Attorney explained that the documents would be ready days later. Attorney also learned from third-party sources that Housekeeper took the property that Tom described and may have taken more. Attorney filed a petition to adjudicate Tom incompetent and moved for appointment as his interim guardian.

214. Model R. Prof. Conduct 1.4.

E. Non-Related Person Petitioner

A petition for adjudication of incompetence may be filed by "[a]n individual or a person interested in the individual's welfare."[215] The following case study illustrates the ethical considerations involved when a non-related person seeks guardianship appointment.

1. Case Study Number Ten

Everyone in the southern community of Biblebelt knew that Tom and John were best friends; they were friends from elementary school through high school. Each went his separate way to college, remaining apart through initial careers. Although apart, they maintained constant communication. After several trips together, they returned to Biblebelt and lived in a house that they purchased. What everyone did not know was that they were companions and lovers as well. For the twenty-eight years they were together, their families remained somewhat distant but not hostile. Recently, Tom had a massive stroke, leaving him physically and mentally diminished and with complications that kept him in serious condition that required intensive care in a hospital. Tom's family, well-known and politically powerful in Biblebelt, intervened at the hospital and took over control of medical and healthcare decisions for Tom, barring John from any access to or contact with Tom.

Years earlier, Tom and John had their Attorney assist in strategies that focused on joint accounts and title to the house. At the time, they did not want to do advance directives or wills.

John meets with Attorney, asking for legal advice. Attorney instructs John to immediately file a petition to adjudicate Tom incompetent and seek interim appointment of general guardian.

2. Analysis of Case Study Number Ten

Is the ethical analysis any different because of this unconventional relationship?[216] Does the concern for confidentiality and

215. Unif. Guardianship & Protective Procs. Act §§ 303(a), 304.

216. *See generally* Priscilla Camp, Paul Sturgul, Ellen Wade & Marc Williams, *Recent Development and Ethical Considerations in Counseling Same Sex Couples*, Natl. Acad.

conflicts apply here no differently than with married couples? Current tensions in America would lead to the practical result that the ethical analysis is different.[217] However, the only difference is that the immediate family of Tom has control of the medical environment. In this case study, Attorney can proceed with John on the presumption that Tom is a former client and that he did nothing at the time of providing legal services that produced confidential medical information relating to Tom's mental and physical status. Attorney is aware of the history between Tom and John and may be guided by the clear understanding that Tom would never want John excluded from his life at a time of great need. Careful examination must be made between the competing ethical rules.[218] The Comment to the NAELA Aspirational Standard E-5 explains that the attorney should use what is known about the client's values and wishes in order to choose the appropriate action.[219]

F. Service- or Institutional-Provider Petitioner, State- or Local-Human-Service-Agency Petitioner, or Corporate Petitioner

The statute and procedures only identify "[a]n individual or a person interested in the individual's welfare"[220] as petitioner, implicitly barring any other entity, including corporations, from being petitioner.[221] However, an individual from a provider, agency, or corporation may serve as petitioner in an action to adjudicate incompetence.[222]

Elder L. Attys. Symposium (2005) (providing information about legal ethics when counseling same sex couples).

217. *See generally id.* (describing the possible changes in the ethical analysis when counseling same sex couples).

218. *Compare* Model R. Prof. Conduct 1.7 (outlining the responsibilities of lawyers to avoid conflicts of interest) *with* Model R. Prof. Conduct 1.14 (describing the duties lawyers have to clients with diminished capacity).

219. *Aspirational Standards Commentary*, *supra* n. 4, at 24; *see also* Model R. Prof. Conduct 1.14 (describing the responsibilities of lawyers to clients with diminished capacity).

220. Unif. Guardianship & Protective Procs. Act § 303.

221. *Id.*

222. *Id.*

1. Case Study Number Eleven

Angie, combative, oppositional, and violent, went after her husband Tom with a butcher knife, yelling incoherently. Tom hit Angie, knocking her to the floor and to her senses. Tom called 911 and had Angie involuntarily committed to a private psychiatric hospital.

At the hospital, a DSS Adult Protective Services investigator, believing Angie was incompetent and at risk of harm, filed a petition to adjudicate Angie's incompetence.

Tom hired Elder Law Attorney for Angie with the understanding that Tom would have no influence in the client-attorney representation between Attorney and Angie.

Attorney met twice with Angie at the psychiatric hospital, taping the visits that confirmed his representation of Angie and what would happen at the merit hearing adjudicating her competency. Attorney filed a timely notice of representation and motions, including one for a multidisciplinary evaluation and one for a jury trial on all issues of fact. All of this was done days before the clerk, judge of guardianship, appointed the standing guardian ad litem *attorney to represent Angie.*

The clerk denied Attorney, as the attorney for Angie, the right to appear and barred him from the adjudication hearing. The adjudication was swift, ending with DSS being appointed Angie's guardian. The deputy county attorney (now the attorney for the DSS Director as guardian) hotly demanded that Attorney turn over all files and records of Angie, the ward, to the DSS Director, the guardian. When Attorney resisted, the deputy county attorney filed a formal grievance with the State Bar.[223]

223. This case study is similar to North Carolina's 98 Formal Ethics Opinion 16. The analysis is taken from the letters of opinion written by Larry Rocamora, NAELA member, for North Carolina's Fiduciary and Estates Section, Ethics Committee, and by Professor Kate Mewhinney, NAELA Fellow and CELA, for the Wake Forest College of Law Clinic for the Elderly.

2. Analysis of Case Study Number Eleven under Rule 1.7

What is the mental-capacity threshold necessary for an alleged incompetent person to retain counsel and defend against an adjudication of incompetence?

Attorney did not have a conflict of interest in representing Angie even though he was first contacted by Tom and paid by him. Based on the facts presented, Tom asked Attorney to represent his wife Angie. This arrangement gave no rise to an attorney-client relationship with Tom.[224] Even assuming there was an attorney-client relationship established with Tom when Angie asked Attorney to represent her, it was not clear that Tom and Angie's interests were adverse. Rule 1.7 regarding conflict of interest and Rule 1.16 regarding withdrawal permit continued representation of each client if the lawyer reasonably believes the representation will not adversely affect the interest of the other client and each client consents to representation after consultation, which shall include explanation of the implications of common representation and the advantages involved.[225] Attorney's scope of representation of Tom, if any, was limited to defending Angie in the adjudication of incompetence. Attorney could reasonably believe the representation of Angie in the incompetency proceeding would not be adversely affected by the payment of the retainer by Tom. Having consulted both Tom and Angie, Attorney inquires during his consultation with each person about any potential conflict, in an attempt to partially satisfy the requirement of the rules regarding conflicts of interest.[226] Further, Attorney made his own independent judgment of Angie's competence, reasonably believing that Angie had sufficient faculties to understand the engagement and the potential conflict issues and waive any such conflict.[227]

---

224. *See* Model. R. Prof. Conduct 1.18 cmt. 2 (advising that not all persons who communicate information to a lawyer form a subsequent attorney-client relationship).

225. *See id*. at R. 1.7, 1.16 (outlining the circumstances where continued representation of each party is permissible notwithstanding the existence of a concurrent conflict of interest); *see also id*. at R. 1.7 cmt. 18 (interpreting the requirements of "informed consent").

226. *See id*. at R. 1.7 (requiring that "each affected client gives informed consent, confirmed in writing"). For definitions of "informed consent" and "confirmed in writing," see Rule 1.0(e) and (b).

227. *Cf. In re Guardianship of Zaltman*, 843 N.E.2d 663 (Mass. App. 2006) (holding

The fact that Tom paid the retainer for Attorney does not create a conflict of interest. Rule 1.8(f) expressly permits a lawyer to accept compensation for representing a client from one other than the client if the following occur: (1) the client consents after consultation; (2) there is no interference with the lawyer's independence of professional judgment; and (3) information relating to the representation of the client is protected by the rules regarding confidentiality of information.[228] Attorney consented to Tom paying the retainer, and with the other requirements of Rule 1.8(f) met, Tom's paying the retainer created no conflict of interest.

3. Rule 1.2 Scope of Representation

Another ethical question deals with Attorney abiding by Angie's decision concerning the objectives of representation. Once retained, Attorney had an obligation to abide by Angie's decisions concerning her objectives of that representation,[229] which were to fight the incompetency proceeding and return home to live with Tom.

Comment 2 to Rule 1.2[230] states that in a case in which the client appears to have diminished capacity, the lawyer's duty to abide by the client's decisions is to be guided by reference to Rule 1.14. Even though mentally impaired, Angie demonstrated the ability to make adequately thoughtful decisions in connection with the representation. As far as was reasonably possible, Attorney maintained a normal client-lawyer relationship with Angie and abided by Angie's decisions concerning the representations.

The deputy county attorney's request for Attorney's confidential information regarding the representation also raises ethical concerns pertaining to the disclosure of confidential information under the attorney-client privilege and Rule 1.6. The deputy county attorney sought all of Attorney's records regarding his representation of Angie, asserting his misguided opinion that the DSS Director as guardian had a right to such information.[231] Rule

that a ward was entitled to evidentiary hearing as to her capacity to retain counsel).

228. Model R. Prof. Conduct 1.8(f).

229. *See id*. at R. 1.2 cmt. 1 (explaining that the client possesses the ultimate authority to determine the purposes to be served by legal representation within certain legal and professional limitations).

230. *Id*. at R. 1.2 cmt. 2.

231. *See generally* Roberta K. Flowers, *To Speak or Not to Speak: Effect of Third Party*

1.6 states that a lawyer shall not divulge confidential information except when permitted by Rule 1.6(f).[232] Since the goal of Attorney's original representation of Angie was to fight the incompetency proceeding, disclosure of any information obtained by Attorney in that representation would be clearly contrary to the goals of the original representation. Under the standard rationale, as reflected in North Carolina's Rule of Professional Conduct 206, Attorney is unable to disclose the information.[233]

IV. CONCLUSION

This Article applied ethics analysis to the many sides of guardianship representation at the beginning of the adjudication process. It began with core values that are present regardless of what side the attorney may be representing. It then addressed issues relating to the prospective, former, and current client is-

---

Presence on Attorney Client Privilege, 2 Natl. Acad. Elder L. Attys. J. 153 (2006) (discussing ways to protect the client's privilege); Model R. Prof. Conduct 1.14 (creating an affirmative duty on the attorney to keep confidential information relating to the representation of a client with diminished capacity except "to the extent reasonably necessary to protect the client's interests" when taking protective action).

232. Model R. Prof. Conduct 1.6. This case study is similar to North Carolina Rule of Professional Conduct 157. A lawyer who represented a person who the lawyer believed to be incompetent was permitted to seek to have the person declared incompetent, but could not disclose any information that the lawyer had obtained in his course of representation that would give rise to the attorney's belief that the client was incompetent. The rationale was that there was no exception to the disclosure of confidential information permitted under the rules. In this case there is no exception under Rule 1.6 to permit Elder Law Attorney to disclose any information regarding his representation of A to the guardian.

233. Compare this case study with North Carolina Rule of Professional Conduct 206 where the personal representative of a decedent sought to have a decedent's attorney disclose confidential information to the personal representative. North Carolina Rule of Professional Conduct 206 indicates that the duty of confidentiality continues after the death of a decedent and a lawyer may only reveal such confidential information of a deceased client if disclosure is permitted by an exception to the duty of confidentiality. *See also Swidler & Berlin v. U.S.*, 524 U.S. 399, 409–411 (1998) (holding the attorney-client privilege continues after the death of a client). In North Carolina Rule of Professional Conduct 206, it was assumed that the client impliedly authorized the release of confidential information to the person designated as personal representative in order that the estate might be properly and thoroughly administered. Rule 206 of Professional Conduct concludes the following:

> [That] [u]nless the disclosure of confidential information to the personal representative . . . would be clearly contrary to the goals of the original representation or would be contrary to express instructions given by the client to his lawyer prior to the client's death, the lawyer may reveal a client's confidential information to the personal representative. . . .

N.C. B. Formal Op. 206 (1995).

sues involving confidences and conflicts and followed with case studies that presented the attorney on many different sides.