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ETHICS AND THE QUESTIONABLY COMPETENT CLIENT: WHAT THE MODEL RULES SAY AND DON'T SAY

Capacity is the black hole of legal ethics. Many questions find their way into the capacity category, but few answers ever emerge. [1]

Money can solve many of life's problems, but one problem it can only soften is the calamity of mental incapacity. Although recent medical research tells us that incapacity is not a normal part of the aging process, the older one gets, the greater the risk. With the aging of our population, it is statistically inevitable that more and more capacity problems will emerge.

The aging of our population increases the need to plan ahead for property management during the twenty to forty year post-retirement lifespans many now achieve. Unlike planning for disposition at death, life planning has lifetime effects on the property owner and others with potentially conflicting interests. These lifetime effects inject troublesome issues into the attorney-client relationship. Who is the client? Whose interests should life planning serve? Can the lawyer factor the views and interests of others into the planning process without violating duties of loyalty and confidentiality to the client? Does the client have sufficient capacity to make the decisions in question or to even form or continue a traditional lawyer-client relationship?

Life planning also holds the potential for conflict between the lawyer's values and goals and those of the client. For example, the kind of asset preservation and tax minimization we traditionally view as good planning may strip the client of power and resources at a time when many elders, experiencing loss of physical control, become more concerned with retaining power through control of their assets. Lifetime findings of incapacity are much more intrusive than post-mortem findings of lack of testamentary capacity.

Although we claim to value freedom of disposition, an older property owner who diverts money from family to so-called strangers invites challenges. Take, for example, the fabulously wealthy Seward Johnson of Johnson & Johnson. At age seventy-four, he started lavishing gifts and large sums of money on a pretty cook and maid, Basia, who at age thirty-one was forty-three years his junior. Before he died, he had given or bequeathed most of his enormous fortune to Basia and a young Shearman & Sterling associate, Nina Zagat, whom ***242** he employed to represent Basia's interests. Seward was crazy about Basia, but probably not mentally impaired or under undue influence. He really wanted this, but his wills were challenged nonetheless by children he did not even care for. [2] After protracted and ugly litigation, the case settled.

Deciding what to do when questions of client capacity arise is not for the fainthearted. There are no safe harbors for two primary reasons. First, the notion of capacity is an elusive, amorphous abstraction that, in practice, cannot be divorced from the complexities of the real life situation. Second, none of the rules and authorities give the lawyer adequate guidance for assessing capacity or deciding how to proceed if doubts exist. Some rules are Delphic at best. The Model Rules place burdens on lawyers, but neglect to say how the attorney can meet those burdens without violating other *mandatory* rules of professional conduct. They leave the following difficult questions:

1. What steps can the lawyer take to enhance existing client capacity by communicating most effectively with clients experiencing physical or mental decline?

2. Do the rules and authorities adequately explain the basis for an attorney-client relationship when the client is initially impaired or becomes impaired during the course of the representation?

3. Are the actions that are "ethically safe" under the rules helpful or harmful to the impaired client?

4. Can attorneys work effectively with social workers, counselors, and medical professionals without compromising their duties of confidentiality and loyal advocacy?

5. What protective actions are appropriate (albeit not completely safe) for an attorney with an incapacitated client to take? Under what circumstances, if any, can an attorney seek guardianship of his or her own client?

Several sources address these questions, [3] but this article focuses on the ABA Model Rules of Professional Conduct. After some preliminary observations about the capacity construct and the Model Rules' approach to the capacity dilemma, this article provides a critical analysis of Model Rule 1.14 and intersecting rules. It concludes with a discussion of options available to lawyers representing questionably competent clients and some suggestions for prevention and reform.

I. THE CAPACITY CONSTRUCT: UNDERLYING SOCIETAL ISSUES AND THE ROLE OF THE ATTORNEY

A starting definition of capacity is that "it involves the ability to understand and process information so that a decision can be made and communicated." [4] The problem with this general statement is its generality. A variety of tests and approaches leading to radically different conclusions and outcomes can be fit within it.

Capacity is a flexible, elusive, and ultimately, undefinable concept. Like beauty, capacity or incapacity may exist only in the eye of the beholder. No single test has succeeded in capturing the boundary between capacity and incapacity because capacity is not a reified concept. All of us are in varying states of incapacity at different times. There is always someone who could manage better and there are periods of our lives when we don't manage well at all. Yet, no one would place us under surrogate management.

Not only is each individual at some point on a capacity continuum, but an individual's capacity can vary over time and with the task or decision in question. Individuals can be capable of handling some tasks but not others. They can be fine in the morning but fuzzy by late afternoon. Most of us have a daily biological low point when we are not at our sharpest.

Furthermore, what looks like incapacity is often not mental incapacity at all, but simply a symptom of reversible or correctable medical and environmental interferences. [5] Completely reversible problems such as overmedication, inappropriate medication, adverse drug interactions, tumors, vitamin deficiency, metabolic problems, infections, depression, environmental deficiency, and sensory deprivation, may imitate mental incapacity. [6]

A. UNDERLYING SOCIETAL ISSUES

The question of how to deal with client incapacity is but a surface manifestation of profound societal issues bubbling just beneath the surface as we enter the twenty-first century. One of the most pressing problems for lawyers who have elderly clients will be finding a workable balance between individual choice and the needs of society. The focus on capacity can distract us from recognizing real life tensions between autonomy and responsibility. Should the capacity construct be used, as it often is, to curtail a senior's autonomy for the benefit of third parties or society as a whole? As our world becomes more crowded and complex, how much ***243** unfettered individualism can we afford? Will the common welfare reliably emerge from the clash of individual selfish decisions? If not, what, if anything, should we do about that?

Even when lawyers concern themselves solely with the individual client's interests, as attorneys have traditionally been called upon to do, there are tensions between that client's need for autonomy now and the need to preserve the resources the client will need to have autonomy in the future. "Senior citizens, like all of us, need freedom of action. Yet, they sometimes seem to act in ways that defeat their other needs, whether financial, medical, or legal." [7] Seeing the problem solely in terms of capacity can mask real problems that are not answered satisfactorily by capacity determinations.

People, whether impaired or not, need to feel in control. Scientific studies show that perceived loss of control causes people to suffer mental and physical decline. [8] On the other hand, unfettered autonomy now can destroy future autonomy. Consider the issues raised by the following hypothetical:

> Seven years ago you and your widowed client, Phil Dollar, put in place a sophisticated plan for lifetime giving and post-mortem dispositions designed to minimize taxes and to provide for Mr. Dollar's adult children and college age grandchildren. One of the grandchildren is disabled. The plan includes a revocable inter-vivos trust, a will setting up a testamentary supplemental needs trust for the disabled grandchild, a living will, and a health care durable power of attorney.
>
> Mr. Dollar makes an appointment with you to discuss revoking the entire plan [9] —except for gifts that have already been delivered—and implementing an alternative plan of lifetime giving to a religious group, the Church of Universal Life, with which his housekeeper is associated. The planned gifts would significantly deplete Phil's assets and income. Phil tells you that the church members are like family to him and that he rarely sees his children or grandchildren who live in other states and are too busy to visit. You silently wish you had entered another line of work and wonder what to do next.

If Dollar gives most of his assets away too soon, he will not have the resources to meet his future needs or to execute his future decisions. Should society allow people to destroy their future autonomy to achieve instant gratification or to satisfy short term interests? What is the attorney's proper role in all of this?

When a client's decisions are consistent with his lifelong values and commitments, it is tempting to say that the attorney should view his client's capacity in a more favorable light. [10]

Although this is helpful and generally works well, a client's values, or at least what he considers important, can change over time. Decisions which seem radically at odds with the client's lifelong values can make great sense from the client's current perspective.

In assessing decision-making, bear in mind that our society subjects senior citizens to a *de facto* double standard. Decisions that would not be challenged if made by a young or middle-aged individual are routinely challenged when made by a senior.

> Certain situations require special caution. Like many younger individuals, an elderly man or woman may choose to … spend money in ways others deem frivolous. For example, he or she may choose to buy companionship by lavishing funds on a companion whose friendship is motivated at least partly by avarice … However frivolous the expenditures or distasteful the motives of the companion, the individual may derive a great deal of pleasure from the arrangement. [11]

Large gifts from the client to his nurse, housekeeper, gardener, or church group, for example, are almost sure to trigger a capacity challenge from relatives, particularly if substantial money is involved. Such gift giving is often driven by loneliness rather than any mental impairment or incapacity. In our super-mobile society, many seniors live far away from their relatives and adult children. Even if they live nearby, relatives and adult children are apt to have hectic schedules that leave little time to spend with their parents. Lifetime friends may have died or moved away. It does not seem so unusual that a lonely senior would be willing to pay any price for companionship, knowing full well that the companion is motivated by money and taking advantage in certain ways.

B. STEPS THE LAWYER CAN TAKE TO ENHANCE EXISTING CAPACITY

Depending on the attorney's skill and sensitivity, a client may be competent with one lawyer and incompetent with another. Practitioners can enhance the existing capacity of their impaired elderly clients by paying attention to the environment they create for them. Specific examples of how to enhance a client's capacity ***244** by accommodating his or her special needs include (1) printing documents and communications in large, bold type with easy-to-read color background if eyesight is a problem; (2) sending materials for review before a meeting whenever possible; (3) keeping background noise and interruptions to a minimum for the hearing impaired and facing the client directly to facilitate lipreading or sitting on his or her better side for hearing; (4) eliminating glaring surfaces, glaring lights, and uncomfortable chairs; (5) speaking in plain language and avoiding legalese; (6) giving the client plenty of time and follow up communication to ensure mutual understanding; and (7) making house calls. [12]

The lawyer's goal should be to avoid snap judgments on capacity and do whatever can be done to increase the client's comfort level and ability to participate in the decision-making process. Not allowing sufficient time with an elderly client can silence the client's voice. Understanding a senior client's true voice, values, and motives requires patience, listening ability, and an ongoing dialogue. Professor Linda Smith describes this as "a process of gradual decision-making which will involve clarification, reflection, feedback, and further investigation." [13]

At times the lawyer should ask whether doubts about the client's capacity arise "because the client's values are different from her own." [14] Suppose, for example, a client who has always been active in directing what to do with his assets, when speaking with you alone, says, "Do whatever my children want me to do." Does that mean that the client has become incapable of deciding how to manage his assets, or does it simply mean that the client has reached a stage in life where he values his relationship with his children more than control over his assets and wants to keep the peace above all?

Pursuant to the recommendations of Professor Peter Margulies, [15] the Fordham Conference Capacity Working Group and the delegates to the conference adopted guidelines for use by attorneys who question client capacity. In questioning client capacity for any specific purpose, the lawyer should balance the following factors:

1. The client's ability to articulate reasoning behind his or her decision;

2. The variability of the client's state of mind;

3. The client's ability to appreciate the consequences of his or her decision;

4. The irreversibility of any decision;

5. The substantive fairness of any decision; and

6. The consistency of any decision with lifetime commitments of the client. [16]

The lawyer should also attempt to speak with the client alone, and to avail himself of educational opportunities to understand and address capacity issues. [17] I view these guidelines as adjuncts to rather than substitutes for a competent medical and psychological workup, and I suspect most of my conference colleagues would agree. These are excellent guidelines for focusing attention on the interests and values at stake. However I doubt that these guidelines can, or were intended to, resolve the many ethical dilemmas attorneys encounter (both before and after deciding the client is incapacitated) in trying to reconcile the conflicting duties imposed by the Model Rules.

II. THE MODEL RULES: TREATMENT OF CAPACITY ISSUES

Transactional lawyers working with the elderly may experience a sense of disorientation when they turn to the Model Rules for guidance. This is because the Rules were designed for representation in the litigation context. Moreover, some state bars that have adopted the Rules have included their own variations, so there is no uniformity. As noted by the ABA Commission on Legal Problems of the Elderly, "lawyers need more guidance than the Model Rules now provide on how to address delicate matters of ethics when dealing with an elderly client and others who may be incapable of making adequate decisions." [18]

Model Rule 1.14, read with the comments, places the burden of competency determination on the attorney at four junctures. [19]

> First, although the Rules do not state this explicitly, the lawyer must determine if the client has sufficient function or decisional ability even to form an attorney-client relationship. Second, if a transaction needs to be accomplished or a decision made, the lawyer must determine whether the client has the degree of competence needed to engage in the particular transaction or to make the particular decision. Neither Rule 1.14 nor its comment mention intermittent capacity, but presumably the lawyer would be called upon to determine the client's mental state at the relevant time were that an issue. Third, according to Comment 2 to Rule 1.14, if the client lacks a guardian or legal representative, the lawyer may be called upon to decide if her client is sufficiently incompetent or incapacitated to justify her taking over as *de facto* guardian. Finally, according to Rule ***245** 1.14(b), "when the lawyer reasonably believes that the client cannot adequately act in the client's own interests" (whatever that means), the lawyer "may seek the appointment of a guardian or take other protective action." Comment 3 advises the lawyer to "see to such an appointment where it would serve the client's best interests" (again, according to whom?). After noting that this course might prove "expensive or traumatic for the client," Comment 3 leaves the entire matter in the lawyer's lap by stating: "Evaluation of these considerations is a matter of professional judgment on the lawyer's part." [20]

Comment 1 says "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." [21] That's it. The Rules do not give a working definition of incapacity. They do not say which of the many tests for determining capacity the lawyer should use in exercising this judgment. [22] They offer no clue on how to assess task-specific, partial, or intermittent incapacity. This places an unrealistic burden on lawyers who are then left to their own devices. In Professor Jacqueline Alee's words, "[d] etermining capacity is difficult for medical and behavioral experts, much less for lawyers ...." [23] We know that incapacity is not to be confused with imprudence or eccentricity but that is easier to state than to apply. Where does all this leave the lawyer?

III. AN ANALYTICAL TOUR OF MODEL RULE 1.14 AND INTERSECTING RULES

A. SEEKING A BASIS OF THE ATTORNEY-CLIENT RELATIONSHIP

The most fundamental issue facing the attorney is whether a basis exists for forming or continuing an attorney-client relationship. A lawyer's authority to act is based on the theory that the client as principal directs his agent, the lawyer, to act on the client's behalf. This presupposes a principal who is capable of decision-making and directing the representation. An incompetent principal lacks authority to empower his agent. [24] The principal's incapacity generally terminates the agent's authority. [25] The attorney who continues the representation beyond this authority "may be subjected to personal liability." [26] Presumably the lawyer's choices here are to refuse to represent the client, to withdraw from the representation, or to seek the appointment of a guardian." [27] The guardian then becomes the principal. The first two options may let the lawyer of the hook, but are not helpful to the client. Although some guardianships are beneficial, this option often turns out to be disastrous, making the cure worse than the disease.

The Model Rules do not "define the circumstances required to create an attorney-client relationship." [28] To remain consistent with principal-agent theory, Rule 1.2(a) requires attorneys to "abide by a client's decisions concerning the objectives of the representation." Rule 1.14(a) says the attorney "shall, as far as reasonably possible, maintain a normal client-lawyer relationship with the client." This implicates the duty of loyalty (Rules 1.7, 1.8 and 1.9 on conflicts of interest), the duty to communicate with the client (Rule 1.4), and the duty to keep client confidences (Rule 1.6). However, as should be clear by now, ethically safe actions under the Rules are often inimical to the client's welfare, so concern for a client may force lawyers into the less comfortable terrain of improvisation.

1. The Problem

Somewhere between subsections (a) and (b) of Rule 1.14, "the assumptions make an unannounced turn that leaves the lawyer representing the client without any recognized basis for doing so." [29] How does this come about? As noted elsewhere, Rule 1.14(b) permits a lawyer to seek the appointment of a guardian or take other protective action when the lawyer questions his client's capacity to act in his or her own best interests. It does not require the lawyer to do so. This leaves the lawyer free to continue representation of a client who is unable to represent his interests. [30] Yet, Rule 1.14 provides no basis for representation in this situation. Comment 3 merely says that the attorney "*should* see to such an appointment where it would serve the client's best interests," but recognizing that appointment of a surrogate "may be expensive or traumatic for the client", leaves the decision to the attorney's "professional judgment." [31]

2. Attempted Explanations for Basis

Two explanations, both unpersuasive in my view, are offered to fill this basis gap just described. One relies on the "implied authority" language in Rule 1.14. The other relies on an abstract conception of the client.

In its interpretation of Rule 1.14, the American College of Trust and Estates Counsel (ACTEC) states that a lawyer may have implied authority to act on behalf of his client if the client's wishes were clearly stated when he was competent. If the client did not express his interests when competent, ACTEC states that "the lawyer may make disclosures and take such actions as the lawyer reasonably believes are in the client's best interests." [32]

***246** Professors Hazard and Hodes also suggest that a lawyer can determine the interests of his client. By analogy to Rule 1.13's entity representation, they suggest that the client (principal) is "an abstraction" called "the best interests" of her client. [33] While this explanation has some logic, I again doubt it is supported by the strict language of the rules.

It is a real stretch to find such extensive implied authority in the language of Rule 1.14. Moreover, the implied authority explanation can not convincingly apply when the client is vigorously expressing new and contrary wishes, like Mr. Dollar in the hypothetical above. However, if the implied authority explanation is Model Rule 1.14's true intent, it should be redrafted to so state.

> Any redraft of Rule 1.14 should explicitly state its theory of the basis for the lawyer's authority to act when the client cannot act as principal and no legal representative has been appointed. Anything less than an explicit statement unfairly leaves the lawyer without lawful authority to begin or continue the representation and exposes her to both disciplinary action and personal liability. [34]

On the merits, both the implied authority or best interests models are problematic. Many well-intentioned lawyers have paternalistic instincts even when dealing with capable clients. With such broad authority, there is a great temptation to simply take over. Some lawyers act with an awareness of their own prejudices and a sensitivity and respect for the client's values and wishes. [35] Others do not. Yet, there is no way to monitor lawyers' activities. Although clients have the right to discharge their lawyers, this may prove practically impossible for a weakened and impaired client.

The broad authority some assume exists under Rule 1.14(b) is also inconsistent with the spirit of Rule 1.14(a). Rule 1.14(a) mandates that a lawyer "as far as reasonably possible, maintain a normal client-lawyer relationship with the client." [36] A recent ABA opinion casts doubt upon ACTEC's assumption that Rule 1.14(b) implies authority for a lawyer to act when he reasonably believes it is in the best interests of a client who did not express wishes when his capacity was unquestioned:

> Rule 1.14(b) does not authorize the lawyer to take protective action because the client is not acting in what the lawyer believes to be the client's best interest, but only when the client "cannot adequately act in the client's own interest." A client who is making decisions that the lawyer considers to be ill-considered is not necessarily unable to act in his own interest, and the lawyer should not seek protective action merely to protect the client from what the law believes are errors in judgment. Rule 2.1 permits the lawyer to offer his candid assessment of the client's conduct and its possible consequences, and to suggest alternative courses, but he must always defer to the client's decisions. *Substituting the lawyer's own judgment for what is in the client's best interest robs the client of autonomy and is inconsistent with the principles of the "normal" relationship.* [37]

The ABA opinion also cautioned that the Rules, "cannot be construed to grant broad license for even the most well-intentioned lawyer to take control over every aspect of a disabled client's life, or to arrange to have such control vested in someone other than the client." [38]

3. The Emergency Exception

Fortunately, the ABA recently addressed one aspect of the authority to act problem—specifically the attorney's authority in emergency situations. The ABA House of Delegates added two comments at its February 1997 meeting, giving attorneys limited authority to act in the rare case of an emergency "where the health, safety or a financial interest of a person under a disability is threatened with imminent and irreparable harm." [39]

Comment 6 allows the lawyer to "take legal action on behalf of such person even though the person is unable to establish a client-lawyer relationship or to make or express considered judgments …, when the disabled person or another acting in good faith on … [his or her] behalf has consulted the lawyer." [40] Comment 7 forbids disclosure of any confidences revealed by the disabled person or his representative "except to the extent necessary to accomplish the intended protective action." [41]

These comments contain several safeguards. There must be an emergency; the lawyer must reasonably believe that the person is not represented by another lawyer or agent; the lawyer can act only during the emergency; the lawyer must act to stabilize the lawyer-client relationship as soon as possible; and ordinarily a lawyer should not seek compensation for … emergency actions taken on behalf of a disabled person. [42]

This careful and adamant restriction of the lawyer's authority, even in an emergency, reinforces my belief that the basic Model Rule 1.14 cannot be read to contemplate ACTEC's "implied authority" interpretation in planning or other non-emergency settings. [43] Where does this leave the lawyer in a non emergency situation?

> Suppose she manages somehow to determine that her client "cannot adequately act in [his] ***247** own interest." Presumably she must either seek imposition of a guardianship or conservatorship with all the human suffering and problems of loyalty and confidentiality that route may entail, "rely on next of kin as proxy decision-maker," or act as *de facto* guardian as Comment 2 suggests. Whatever the substantive merits or demerits of seeking proxy consent from a family member or acting as *de facto* guardian may be, I do not see any currently recognized basis for the representation in either case. "[I]n many jurisdictions the family has absolutely no lawful authority to give consent." With respect to *de facto* guardianship, if the client lacks the competence to make decisions in a given sphere, he cannot be a principal and his lawyer (the agent) lacks authority to act within that sphere. [44]

Again, if the emergency exception does not permit an attorney to act as *de facto* guardian beyond the emergency, it is difficult to see how Rule 1.14(b) can be read, Comment 2 notwithstanding, as contemplating *de facto* authority beyond a very limited time, if at all, in non-emergency situations. Instead, the Rules' litigation focus suggests that Comment 2's *de facto* authority was intended for short term, ad hoc decisions during litigation.

Rule 1.14 should be redrafted to give a coherent explanation of a lawyer's authority to act when a client "cannot adequately act" in his own interest.

B. CLASHES WITH RULE 1.6'S DUTY OF CONFIDENTIALITY AND RULE 1.7'S DUTY OF LOYALTY

1. The Problem

Comment 5 to Rule 1.14 acknowledges that disclosing the client's condition might raise the question of disability and trigger "proceedings for involuntary commitment." [45] It also says "[t]he lawyer may seek guidance … from an appropriate diagnostician." Facially, this permissive statement permits lawyers to enlist the aid of other professionals in deciding preliminarily whether the client is so incapacitated as to need a representative. However, the quest for diagnostic assistance puts the lawyer following Comment 5's *permissive* suggestion on a "collision course with the *mandatory* duties of confidentiality and loyalty" imposed by Rules 1.6 and 1.7. [46]

Neither the rule nor the comment say how the lawyer can get a diagnosis without violating his or her *mandatory duties of confidentiality and loyalty*. There are practical problems as well. First, the Rules do not say "who qualifies as a diagnostician, on whose behalf the diagnosis is sought [[[particularly if the client objects], [or] who should pay for the diagnosis ...." [47] Moreover, diagnosticians themselves may operate under medical ethics rules that forbid disclosure.

Second, Model Rule 1.6 forbids revealing information, regardless of its source, "relating to the representation … unless the client consents after consultation, except for disclosures that are impliedly authorized in order to carry out the representation …" [48] (Rule 1.8(b), which forbids using information harmful to the client, also has potential application.) [49] Model Rule 1.7(b) also requires special attention because it identifies potential conflict between the lawyer and his client. The rule specifically states:

> A lawyer shall not represent a client if the representation of the client may be materially limited by the lawyer's responsibilities to another client or to a third person, *or by the lawyer's own interests*, unless (1) the lawyer reasonably believes the representation will not be adversely affected; *and* (2) *the client consents after consultation* .... [50] [Emphasis added.]

When conflict exists, mandatory duties should logically trump permissive suggestions. As the following discussion suggests, resolving the consent dilemma is no easy task for the lawyer whose client's capacity is in doubt.

2. The Consent Requirement for Disclosures

As indicated, Rule 1.7(b) requires that all clients consent to representation that may be "materially limited … by the lawyer's own interests" or those of others. [51] Rule 1.8(b) forbids the use of information detrimental to the client without client consent. Rule 1.6(a) forbids disclosure without client consent except for "disclosures that are impliedly authorized …" [52] which will be discussed below.

Clients who fear that inquiries about their functional or cognitive abilities will lead directly or indirectly to involuntary imposition of guardianship may very well withhold consent to a diagnostic inquiry. This fear is well-founded. It is compounded by the fear that guardianship will inexorably pave the way for placement in a nursing home which seniors dread even more than guardianship. This fear is also well-founded. "[T]he imposition of guardianship removes a major impediment to the imposition of institutional care." [53] The dread of nursing homes among the elderly is great and also well ***248** founded. Even when care is adequate, loss of autonomy is almost total in a typical nursing home. "All too common is the image of residents whose days are spent parked in front of droning televisions, unable to participate in decisions about their own care and lacking in activities to keep them interested in daily life." [54] According to Time Magazine, "nearly a third of seriously ill patients in hospitals report they would rather die than wind up in [a nursing home] permanently." [55]

Even if the client facially consents to disclosure, a circularity problem exists. If the client's capacity is impaired, the validity of his consent is questionable. The hapless lawyer has no assurance the consent is valid because only the court can make an adjudication of competency. This is not a comfortable position "when doubts about the client's competency triggered the search for diagnostic assistance in the first place." [56] The same problem arises if the lawyer seeks consent to disclosure of confidential information under Rule 1.6.

3. Implied Consent to Disclosure Under Rule 1.14, Comment 5 & Rule 1.6

As noted, Rule 1.6(a) forbids disclosures without client consent unless they are impliedly authorized. Comment 5 to Rule 1.14 nevertheless purports to authorize the lawyer to "seek guidance from an appropriate diagnostician" even though "disclosure of the client's disability can adversely affect the client's interest." [57] In an attempt to reconcile Rule 1.6(a) with Comment 5 to

Rule 1.14, the ABA's most recent opinion, Formal Op.96-104 (1996), [58] relies on the impliedly authorized language of Rule 1.6(a), addressing the situation in which the lawyer is either unable to assess or doubts his clients capacity. Formal Opinion 96-104 urges that:

> [s]uch discussion of a client's condition with a diagnostician does not violate Rule 1.6 … insofar as it is necessary to carry out the representation … For instance, if the client is in the midst of litigation, the lawyer should be able to disclose such information as is necessary to obtain an assessment of the client's capacity in order to determine whether the representation can continue in its present fashion. [59]

Further positing that the lawyer may wish to enlist the aid of family members or others in assessing the client's capacity, the opinion concludes that:

> Limited disclosure of the lawyer's observations and conclusions about the client's behavior seems clearly to fall within the meaning of disclosures necessary to carry out the representation authorized by Rule 1.6. It is also implicitly authorized by Rule 1.14 as an adjunct to the permission to take protective action. [60]

The ABA opinion has two noteworthy features. First, it fails to mention Rule 1.7 which has no "implied authority" exception. Second, the only example it gives is a litigation example. This litigation focus reinforces my view that the Model Rules were not drafted with transactional lawyering in mind and are ill suited to guide attorneys in planning and other transactional practices.

Applications of the Rules should "not lose sight of the reason restrictions on the revelation of confidential information were enacted in the first place." [61] A client, particularly one who fears guardianship or nursing home placement, will be reluctant to communicate freely and candidly if he or she knows the lawyer may reveal that information in conferring with diagnosticians, family members, or other interested parties. Rule 1.6's Comment 4 recognizes that underlying policy, [62] but fails to offer a mechanism by which Rule 1.6's "implied authority" exception can be reconciled with it.

Concern for free communication apparently prevailed in a contrasting California ethics opinion, [63] decided under California's much less specific code of conduct. With respect to any information learned in the course of the attorney-client relationship, the California State Bar Committee concluded that "[a]n attorney is *absolutely prohibited* from divulging the client's secrets … and from acting in any manner whereby the attorney is forced to use such secrets to the client's disadvantage." [64] The Committee also prohibited disclosure of observations of the client's behavior. [65] Finally, in a non-binding opinion discussing conservatorship proceedings, the California Committee said it is unethical to initiate proceedings against the client's wishes even when the lawyer believes it is in the client's best interests, "since by doing so the attorney will be divulging the client's secrets and representing either conflicting or adverse interests." [66]

4. Potential Conflicts Between Client and Attorney's Values and Interests

Recall Rule 1.17(b), which requires client consent to representation that may be "materially limited … by the lawyers own interest." [67] Two hypotheticals illustrate how the lawyer's own values might interfere with an objective competency evaluation and how the lawyer's own interests might arguably adversely affect the representation. Hypothetical 1 involves a client who insists on keeping all ***249** his assets against estate planning advice. Conversely, Hypothetical 2 involves a client who refuses to claim a benefit and insists on transferring existing assets to others. This exploration has relevance to the disclosure/ confidentiality problem as we shall see.

> Hypothetical 1: Your wealthy longtime client, Herman Delgado, is in failing health. At age eighty, he is a widower with adult children and adult grandchildren. He has more than enough money to meet his lifetime needs in style so

> you advise him to distribute some to the children and grandchildren now to minimize estate taxes. Herman refuses to take your advice, saying no one will pay attention to him if he starts giving his money away before he dies.
>
> Hypothetical 2: Eight year-old Ann Smith, whose assets have declined during her retirement, is your longtime client. After fifteen years of marriage, her husband (whose will was drawn by another attorney) died, leaving his entire estate to his children by a prior marriage. Ann has no living relatives except for some nieces and nephews. Against your advice, Ann refuses to claim an elective share against her husband's will. She also insists on transferring some assets to Bert, a sixty-five year-old handyman who has befriended her, bringing her groceries, fixing things around the house, and generally looking out for her. Bert and Ann have dinner together several times a week and are occasionally seen out walking or at the movies. [68]

In both situations, the motives of the client may not be readily apparent. Herman's attorney may see "the decision as a purely mechanical one of good estate planning. Yet Herman's feelings about financial independence and about his relations with his children are also relevant. If it is very important to the client to retain … his assets, then 'poor' estate planning may be a competent decision for the client to make ...." even though the attorney sees it as harmful. [69]

An attorney may also wonder about Ann's competence. However, as Professor Smith notes, "if the particular client has a limited life expectancy, minimal need for assets, or an emotional focus upon internal or spiritual things, that client's decision may be quite reasonable." [70]

Suppose, however, you begin to understand Herman's and Ann's point of view after engaging them in the kind of ongoing dialogue recommended earlier. If you give them the benefit of the doubt on competency, you may decide to forego the planned giving for Herman, forego the elective share for Ann and maybe even arrange the transfer of some assets to Bert the handyman.

Here is where the lawyer's own interests may conflict with the client's. The clients' disappointed relatives, or even the client herself in Ann's case, might later challenge the lawyer's actions as ethically unsound and/or wastefully negligent. The relatives may file ethics complaints and/or a malpractice action to recover the increased estate taxes or the lost assets as the case may be. No lawyer wants that so the conflict between the lawyer's interests and the client's interests arises.

Since Rule 1.14 places the burden of determining capacity on the lawyer, it should protect the lawyer who defers to the client's express wishes after making a good faith, reasonable judgment that the client is competent. The ABA should add language stating that a lawyer's erroneous determination of competency shall not be grounds for discipline provided the lawyer acted in good faith after thoughtful consideration and without personal benefit from the transaction. [71] The Fordham Conference Working Group on Client Capacity proposed the addition of a Rule 1.14(e) which would read:

> The lawyer should not be subject to professional discipline for invoking or failing to invoke the permissive conduct authorized by 1.14(b) if the lawyer has a reasonable basis for his or her action or inaction. [72]

The intent was "[t]o encourage attorneys to 'stay with the situation' without fear of discipline." [73] Changes in the Model Rules might indirectly influence court decisions in lawsuits later brought by third parties or the client, but they could not insulate attorneys from such claims. Only changes in substantive malpractice rules would give fuller protection.

Returning to Rule 1.7(b)'s admonition that a lawyer not represent a client if the representation might conflict with the lawyer's own interests: When a lawyer who is nervous about the client's capacity consults a diagnostician, he or she arguably acts in his or her own interest to the extent that concerns about avoiding ethics or malpractice claims come into play. "It would be

natural for a lawyer to believe that the client's representation would not be adversely affected, and this belief might even be reasonable. But this belief itself does not suffice. Because of the conjunctive language of Rule 1.7(b)(1) and (2), the client must also consent after consultation." [74]

250** ***5. Proposals for Mediating Between the Need for Diagnostic Assistance and Well-Founded Client Fears re Disclosures

In an article prepared for the Fordham Conference, [75] I listed three possible solutions to the disclosure dilemma. Although imperfect, these approaches may help ease client fears that cooperation between the lawyer and medical professionals will lead to unwanted guardianship or institutionalization.

The first suggestion is to conceal the client's identity when revealing information. This is the least practical approach because of the difficulty of getting an accurate diagnosis without examining the patient or running tests. The second possibility would be to add a rule forbidding lawyers to use either the disclosed information or the diagnostician's findings "as a basis for, or evidence of, incompetency in any subsequent proceeding." [76] Implementation of this approach would require parallel changes in procedural and evidentiary rules regarding guardianship and conservatorship.

A third approach would be to add an exception for planners and elder law attorneys to those Model Rules which currently impede law firm diversification. [77] This limited exception to non-diversification would permit planners and elder law attorneys "to associate with physicians, psychiatrists, gerontologists, psychologists, social workers, nutritionists, and others in a multidisciplinary practice with the environment and services most needed by older individuals provided under one roof." [78]

This exception would permit efficient delivery of coordinated services. It would concede that a "one size fits all" framework cannot accommodate the special needs and problems of elderlaw and planning practices. Finally, because principals of the diversified practice and their assistants would be bound by confidentiality, it would allow a practical means of "getting diagnostic and therapeutic assistance" while keeping confidential information within the practice. [79]

The one drawback is that small firms and solo practitioners may be placed at a disadvantage vis-à-vis large diversified firms. Perhaps the best solution is one that no rule of professional conduct can provide. The solution that comes to mind is the establishment of expert panels to help lawyers assess capacity in the strictest confidence. Information received or disclosed by such a panel would be strictly off-limits to all except the attorney and the client. The fact of the inquiry itself would be kept confidential and beyond the reach of judicial proceedings.

IV. NAVIGATING BETWEEN SCYLLA AND CHARYBDIS: MODEL RULES OPTIONS WHEN THE CLIENT APPEARS INCAPACITATED

Once a lawyer decides a client is wholly incompetent or incapacitated within a given sphere, the Model Rules spell out three major options: withdraw, petition for guardianship or conservatorship, or act as *de facto* guardian. These are all unpalatable.

A. WITHDRAWAL UNDER RULE 1.16

The language of Model Rule 1.16 provides a less than clear directive for lawyers considering withdrawal. Withdrawal is required under Rule 1.16(a)(1) if representation will violate the rules of professional conduct. [80] Withdrawal is permitted under Rule 1.16(b) "*if*" it will not have a "materially adverse impact" on the client's interests, "*or if*" the "client insists upon pursuing an objective that the *lawyer considers repugnant or imprudent*;["or if"] … the representation will result in an unreasonable financial burden on the lawyer or has been rendered unreasonably difficult by the client ...." [81]

The "or if" language introducing the numbered subsections of Rule 1.16 appears to allow a lawyer to withdraw under subsections (3) or (5), even if withdrawal would adversely affect the client's interests. Nevertheless, without mentioning this "or if" language, ABA Formal Op. 96-104 [82] suggests that permissive withdrawal is not sanctioned if it will adversely affect the client's interests. Specifically, it says: "[T]he committee considers that withdrawal is *ethically permissible as long as it can be accomplished "without material adverse effect on the interests of the client*." [83]

In contrast, an interpretation of California Ethics Rules 3-700 (B) and (C) by California's Ethics Committee would permit withdrawal when a client's conduct makes it "*unreasonably difficult*" to "carry out" the representation effectively, *and* that *same conduct leads the attorney to the conclusion that the client needs a conservator* ...." [84] The same California opinion found it "unethical for an attorney to institute conservatorship proceedings contrary to the client's wishes ...." [85]

On the merits, withdrawal simply lets the lawyer off the hook without helping the client at all. An incapacitated client can hardly be expected to have the acumen, focus, and energy needed to find, or explain the situation to a competent new attorney. Deprived of representation at a time he or she most needs it, the incapacitated client is probably harmed by withdrawal in most cases. Adopting the recommendations of the Fordham Conference Capacity Working Group, [86] the conference recommendations included a proposal that the Comments to Rule 1.14 be amended to state:

> ***251** Where capacity comes into question, preference should be given to staying with the situation and taking protective action over withdrawal from the case. [87]

Apparently influenced by this recommendation, the ABA Ethics Opinion discussed earlier expressed the Committee's belief that "the better course of action … will often be for the lawyer to stay with the representation and seek appropriate protective action on behalf of the client." [88]

B. GUARDIANSHIP OR OTHER PROTECTIVE ACTION UNDER RULE 1.14(B)

Rule 1.14(b) permits a lawyer to "seek the appointment of a guardian or take other protective action … only when the lawyer reasonably believes that the client cannot adequately act in the client's own interest." [89] Comment 3 advises lawyers to "see to such an appointment where it would serve the client's best interests." [90] Again, the lure of convenience and protection against liability may subconsciously bias the attorney's judgment in deciding whether the client's best interests will be served by guardianship or conservatorship. A tension thus exists between the lawyer's own interests and the duty of loyalty.

1. Less Intrusive Actions

The Fordham Conference recommendations for practice guidelines, [91] based on the Capacity Working Group's proposals, [92] list the following examples of protective actions a lawyer may take short of guardianship in non-litigation settings:

1. Involve family members;

2. Use of durable Powers of Appointment;

3. Use of revocable trusts;

4. Use of a "time out" to allow for cooling off, clarification, or improvement of the situation, or improvement of circumstances;

5. Referral to private case management;

6. Referral to long-term care ombudsman;

7. Use of church or other care and support systems;

8. Referral to disability support groups;

9. Referral to social services or other governmental agencies, such as consumer protection agencies. [93]

Because referral to social services and other agencies often trigger involuntary interventions, the last recommendation cautions attorneys to "weigh the … risks of agency referrals" before taking that route.

2. Guardianship

The most drastic option for a lawyer is to seek appointment of a guardian. Recommendation C-4 of the Conference Recommendations says the lawyer should "refer or petition for guardianship … only if there are no appropriate alternatives," adding that "use of the guardianship system should be limited to the greatest extent possible." [94] Nevertheless, Rule 1.14(b) expressly permits a lawyer to seek guardianship provided the lawyer reasonably concludes "that the client cannot adequately act" in his or her own interest. [95]

a. Disclosure Revisited

Seeking guardianship requires disclosure of confidential information. ABA Ethics Committee Informal Opinion 1530 [96] acknowledged that seeking guardianship "inevitably requires some degree of disclosure of information relating to the representation ...." [97] The Committee, ignoring Rule 1.7, nevertheless concluded that "disclosure necessary … to serve the best interests of the client … is impliedly authorized within the meaning of Rule 1.6." [98] A 1996 ABA Ethics Opinion (Formal Op. 96-404) affirmed this view, citing Informal Opinion 1530. [99]

As indicated, most seniors dread guardianship and institutionalization. I assume that Rule 1.6's "impliedly authorized" exception presupposes that the client impliedly authorizes disclosures "needed to carry out the representation." [100] If my reading is correct, the notion that the client impliedly authorized attorney disclosure in order to seek guardianship amounts to wishful thinking.

In contrast to the ABA and consistent with the California bar's absolute prohibition against divulging information learned during the representation, the California Ethics Committee rejects the notion that an attorney can initiate conservatorship proceedings. Its opinion notes that "[b]y instituting conservatorship proceedings, the attorney will not only be disclosing such client secrets to the court, but also to any necessary third parties (including family members) called upon to act in the conservatorship role." [101] The opinion concludes that "[a]n attorney is *absolutely forbidden* from divulging the client's secrets gained during the attorney-client relationship, and from acting in any manner whereby the attorney is forced to use such secrets to the client's disadvantage ...." [102]

b. Loyalty Revisited—MRPC Rule 1.7

Equally troubling is the problem of loyalty. As Professor Paul Trembley points out, "[a] lawyer's decision to impose guardianship on a client without his ***252** consent or understanding is particularly difficult to justify given the lawyer's obligations of loyalty and zeal." [103] From the client's point of view, the process looks like this:

> The client hires the lawyer to serve as his loyal agent and confidante; the lawyer promises him that those expectations are warranted and will be fulfilled; the lawyer then uses her clients confidences to bring a court proceeding that will deprive him of all his rights, and will require him to obtain another lawyer to defend against it; and all the while the lawyer plans to resume representing him once this distraction is over. [104]

The representation just described is "chock full of direct ethical violations." [105] ABA Formal Opinion 96-404 apparently allows the attorney to seek guardianship notwithstanding the fundamental loyalty (and confidentiality) violations inherent in such action. [106] Moreover, the opinion's cautionary statement, that the lawyer "should not attempt to represent a third party petitioning for a guardianship over the … client," [107] does not prevent the lawyer from supporting a third party's petition for guardianship. [108]

In contrast to ABA Formal Opinion 96-404, the duty of loyalty prevails in California Ethics Opinion 1989-112. [109] If the client objects to guardianship, California apparently bars the lawyer from instituting a conservatorship [California term encompassing both guardianship and conservatorship]. [110] Pointing out that attorney-initiated conservatorship proceedings may create "a conflict that may not be waivable," [111] the California ethics opinion mandates that "[t]he attorney must maintain the client's confidence and trust, even though the attorney will be torn between a duty to pursue the client's desires (including protecting his secrets) and a duty to represent his interest, which may best be served by instituting a conservatorship." [112]

Members of the Fordham Capacity Working Group expressed great distaste for the guardianship option. [113] This distrust stemmed from a shared perception that, in practice, guardianship has, notwithstanding legislative attempts at reform, failed to provide humane, decent, and respectful care for many wards. It "often strips away decision-making power with little or no corresponding effort at positive therapy to restore lost capacity or preserve and enhance remaining capacity. As one probate judge put it, 'I don't know where the wards are, who's caring for them, what they're doing ...." [114]

C. DE FACTO GUARDIANSHIP

Where does this leave the lawyer who rejects the guardianship option? Rule 1.14's Comment 2 says: "If the person has no guardian or legal representative, the lawyer often must act as *de facto* guardian." [115] Facially this appears to authorize the attorney to continue representing the client even if the client is too incapacitated to be a principal in the matter.

As discussed earlier, if the new emergency exception forbids an attorney to act as *de facto* guardian beyond the emergency, it is difficult to see how an attorney could continue to act as *de facto* guardian indefinitely in non-emergency situations. [116] In this vein, the Fordham Conference, adopting the Capacity Working Group proposal, recommended adding the following comment to Rule 1.14:

> If the lawyer decides to act as *de facto* guardian, he or she, when appropriate, should seek to discontinue acting as such as soon as possible and to implement other protective solutions. [117]

On the merits, *de facto* guardianship has several advantages over guardianship. It permits an immediate response to prevent irreparable harm. It avoids the trauma and public humiliation associated with formal guardianship proceedings. It is less intrusive and does not directly pave the way to institutionalization. In a formal sense, *de facto* guardianship is less permanent.

Notwithstanding its practical benefits, "*de facto* guardianship is a perilous option for both lawyer and client." [118] Apart from the problem of finding a sound theoretical basis for broad and continuing *de facto* authority, the major objection is that there is no way to monitor what goes on within the attorney-client relationship. Some lawyers will handle the situation respectfully and humanely, with appropriate deference to the client's wishes. Others will not. Some may even abuse their trust. The fear that unmonitored attorneys acting as *de facto* guardians may abuse their trust is well founded. There are several verified reports of attorneys self-enriched to the tune of many millions worth of land, stock, and cash under wills and living trusts prepared for multiple clients with physical and mental impairments. [119] An impaired or feeble client may lack the capacity or energy needed to discharge the lawyer. [120] Were there some reliable way of bringing the *de facto* guardian's actions to light, these objections would not weigh so heavily. [121]

*253 V. WHERE DO WE GO FROM HERE?—PREVENTION & REFORM

Lawyers can take preventive measures before the issue of capacity arises. Through revocable living trusts and durable powers of attorney for property management, the trustee or agent can, without court proceedings, manage an incapacitated owner's property. In this way, the owner can, while still competent, choose who will take over and what the triggering mechanism will be. On a formal level, these are the best preventive devices currently available, but there are still dangers. Planning devices work well if the trustee or agent is trustworthy. "But abuse and outright theft by fiduciaries, armed with documents authorizing them to take any action the principal or trustor could personally, is widespread." [122]

Lawyers must also be aware that people change their minds as their perceived needs change. Most planning devices are revocable. In *Bookasta v. Swanson*, [123] a California appellate court held that two wards under conservatorship had sufficient capacity to revoke a trust. Evidence that the trust revocations were not the product of undue influence or detrimental to the conservatees' interests influenced the court's decision. The declaration of the attorney who helped with the revocations that the conservatees were "fully competent" to revoke the trusts, although perhaps self serving, did not hurt either. [124] If persons not yet under guardianship or conservatorship are given even more leeway, the client who wants to revoke the carefully conceived preventive lifeplan can put the lawyer back to square one, starting with the question of whether the client has the capacity to revoke.

In addition to formal planning, it may be helpful to discuss at the outset how the client wants the lawyer to proceed with representation in the event the client becomes incapacitated. The lawyer and client could discuss the options and memorialize the client's wishes in writing. This should be done with great care to ensure that the client is fully informed of the pros and cons of each option and to ensure that the client's true wishes are expressed.

On a personal level, lawyers might encourage friends and family to keep the client active and involved and to resist the temptation to do things for the client that the client, however haltingly, can still do for herself. Community services and support groups that facilitate independent living are vital ingredients in maintaining existing capacity. Lawyers should alert clients to services

that may help them manage property and personal needs, thus obviating the need for guardianship or *de facto* guardianship. Attorneys serving the elderly should also seek out seminars and educational materials on incapacitating conditions and ways to reverse or mitigate their impact on individuals.

On the reform front, I have suggested several revisions of the Model Rules and parallel rules of law in the course of the prior analysis. One reform, in particular, demands attention. We need a special exception permitting law firm diversification in practices serving the elderly. Most of the legal problems practitioners representing the elderly see start out as personal problems calling for multidisciplinary solutions. [125] Coordinated services under one roof will become a pressing need for seniors as their numbers and lifespans increase. Coordinated services are the wave of the future. Rather than impede this development, the legal profession should spearhead efforts to provide the necessary mechanisms for the convenient and comprehensive services our seniors will rightly demand. [126]

I have urged elsewhere that we search for solutions that do not require inquiry into the client's capacity. [127] Preventive planning and the use of community services fall into that category. Other possibilities include mediation when conflicts arise over the use of funds, [128] and direct action against unscrupulous businesses, predatory religious groups, and other predatory strangers, who strip trusting elders of their funds without offering corresponding benefits of assistance and companionship. My search for solutions beyond the competency construct did not, as some have reported, [129] contemplate eliminating concerns about capacity in appropriate cases. Rather, it was designed to promote augmentation of the repertoire of responses available to attorneys, especially when the problem stems more from competing interests and values, than from client incapacity.

If the only options available were triggering guardianship of my client or acting as *de facto* guardian, I suppose I would reluctantly, and with great trepidation, choose the latter. But I believe there are better options out there for many cases if only we gather the will, resources, and imagination to find them.

APPENDIX A: ABA MODEL RULES OF PROFESSIONAL CONDUCT, As amended through August 1997. Copyright (c) 1983, 1989-1997 by the American Bar Association. All rights reserved. Reprinted by permission of the American Bar Association. [130]

RULE 1.6 CONFIDENTIALITY OF INFORMATION

(a) A lawyer shall not reveal information relating to representation of a client unless the client consents after consultation, except for disclosures that are impliedly authorized in order to carry out the representation, and except as stated in paragraph (b).

(b) A lawyer may reveal such information to the extent the lawyer reasonably believes necessary:

***254** (1) to prevent the client from committing a criminal act that the lawyer believes is likely to result in imminent death or substantial bodily harm; or

(2) to establish a claim or defense on behalf of the lawyer in a controversy between the lawyer and the client, to establish a defense to a criminal charge or civil claim against the lawyer based upon conduct in which the client was involved, or to respond to allegations in any proceeding concerning the lawyer's representation of the client.

Comment

[1] The lawyer is part of a judicial system charged with upholding the law. One of the lawyer's functions is to advise clients so that they avoid any violation of the law in the proper exercise of their rights.

[2] The observance of the ethical obligation of a lawyer to hold inviolate confidential information of the client not only facilitates the full development of facts essential to proper representation of the client but also encourages people to seek early legal assistance.

[3] Almost without exception, clients come to lawyers in order to determine what their rights are and what is, in the maze of laws and regulations, deemed to be legal and correct. The common law recognizes that the client's confidences must be protected from disclosure. Based upon experience, lawyers know that almost all clients follow the advice given, and the law is upheld.

[4] A fundamental principle in the client-lawyer relationship is that the lawyer maintain confidentiality of information relating to the representation. The client is thereby encouraged to communicate fully and frankly with the lawyer even as to embarrassing or legally damaging subject matter.

[5] The principle of confidentiality is given effect in two related bodies of law, the attorney-client privilege (which includes the work product doctrine) in the law of evidence and the rule of confidentiality established in professional ethics. The attorney-client privilege applies in judicial and other proceedings in which a lawyer may be called as a witness or otherwise required to produce evidence concerning a client. The rule of client-lawyer confidentiality applies in situations other than those where evidence is sought from the lawyer through compulsion of law. The confidentiality rule applies not merely to matters communicated in confidence by the client but also to all information relating to the representation, whatever its source. A lawyer may not disclose such information except as authorized or required by the Rules of Professional Conduct or other law. See also Scope.

[6] The requirement of maintaining confidentiality of information relating to representation applies to government lawyers who may disagree with the policy goals that their representation is designed to advance.

Authorized Disclosure

[7] A lawyer is impliedly authorized to make disclosures about a client when appropriate in carrying out the representation, except to the extent that the client's instructions or special circumstances limit that authority. In litigation, for example, a lawyer may disclose information by admitting a fact that cannot properly be disputed, or in negotiation by making a disclosure that facilitates a satisfactory conclusion.

[8] Lawyers in a firm may, in the course of the firm's practice, disclose to each other information relating to a client of the firm, unless the client has instructed that particular information be confined to specified lawyers.

Disclosure Adverse to Client

[9] The confidentiality rule is subject to limited exceptions. In becoming privy to information about a client, a lawyer may foresee that the client intends serious harm to another person. However, to the extent a lawyer is required or permitted to disclose a client's purposes, the client will be inhibited from revealing facts which would enable the lawyer to counsel against a wrongful course of action. The public is better protected if full and open communication by the client is encouraged than if it is inhibited.

[10] Several situations must be distinguished. First, the lawyer may not counsel or assist a client in conduct that is criminal or fraudulent. See Rule 1.2(d). Similarly, a lawyer has a duty under Rule 3.3(a)(4) not to use false evidence. This duty is essentially a special instance of the duty prescribed in Rule 1.2(d) to avoid assisting a client in criminal or fraudulent conduct.

[11] Second, the lawyer may have been innocently involved in past conduct by the client that was criminal or fraudulent. In such a situation the lawyer has not violated Rule 1.2(d), because to “counsel or assist” criminal or fraudulent conduct requires knowing that the conduct is of that character.

[12] Third, the lawyer may learn that a client intends prospective conduct that is criminal and likely to result in imminent death or substantial bodily harm. As stated in paragraph (b)(1), the lawyer has professional discretion to reveal information in order to prevent such consequences. The lawyer may make a disclosure in order to prevent homicide or serious bodily injury which the lawyer reasonably believes is intended by a client. It is very difficult for a lawyer to "know" when such a heinous purpose will actually be carried out, for the client may have a change of mind.

[13] The lawyer's exercise of discretion requires consideration of such factors as the nature of the lawyer's ***255** relationship with the client and with those who might be injured by the client, the lawyer's own involvement in the transaction and factors that may extenuate the conduct in question. Where practical, the lawyer should seek to persuade the client to take suitable action. In any case, a disclosure adverse to the client's interest should be no greater than the lawyer reasonably believes necessary to the purpose. A lawyer's decision not to take preventive action permitted by paragraph (b)(1) does not violate this Rule.

Withdrawal

[14] If the lawyer's services will be used by the client in materially furthering a course of criminal or fraudulent conduct, the lawyer must withdraw, as stated in Rule 1.16(a)(1).

[15] After withdrawal the lawyer is required to refrain from making disclosure of the client's confidences, except as otherwise provided in Rule 1.6. Neither this rule nor Rule 1.8(b) nor Rule 1.16(d) prevents the lawyer from giving notice of the fact of withdrawal, and the lawyer may also withdraw or disaffirm any opinion, document, affirmation, or the like.

[16] Where the client is an organization, the lawyer may be in doubt whether contemplated conduct will actually be carried out by the organization. Where necessary to guide conduct in connection with this Rule, the lawyer may make inquiry within the organization as indicated in Rule 1.13(b).

Dispute Concerning a Lawyer's Conduct

[17] Where a legal claim or disciplinary charge alleges complicity of the lawyer in a client's conduct or other misconduct of the lawyer involving representation of the client, the lawyer may respond to the extent the lawyer reasonably believes necessary to establish a defense. The same is true with respect to a claim involving the conduct or representation of a former client. The lawyer's right to respond arises when an assertion of such complicity has been made. Paragraph (b)(2) does not require the lawyer to await the commencement of an action or proceeding that charges such complicity, so that the defense may be established by responding directly to a third party who has made such an assertion. The right to defend, of course, applies where a proceeding has been commenced. Where practicable and not prejudicial to the lawyer's ability to establish the defense, the lawyer should advise the client of the third party's assertion and request that the client respond appropriately. In any event, disclosure should be no greater than the lawyer reasonably believes is necessary to vindicate innocence, the disclosure should be made in a manner which limits access to the information to the tribunal or other persons having a need to know it, and appropriate protective orders or other arrangements should be sought by the lawyer to the fullest extent practicable.

[18] If the lawyer is charged with wrongdoing in which the client's conduct is implicated, the rule of confidentiality should not prevent the lawyer from defending against the charge. Such a charge can arise in a civil, criminal or professional disciplinary proceeding, and can be based on a wrong allegedly committed by the lawyer against the client, or on a wrong alleged by a third person; for example, a person claiming to have been defrauded by the lawyer and client acting together. A lawyer entitled to a fee is permitted by paragraph (b)(2) to prove the services rendered in an action to collect it. This aspect of the rule expresses the principle that the beneficiary of a fiduciary relationship may not exploit it to the detriment of the fiduciary. As stated above, the lawyer must make every effort practicable to avoid unnecessary disclosure of information relating to a representation, to limit disclosure to those having the need to know it, and to obtain protective orders or make other arrangements minimizing the risk of disclosure.

Disclosures Otherwise Required or Authorized

[19] The attorney-client privilege is differently defined in various jurisdictions. If a lawyer is called as a witness to give testimony concerning a client, absent waiver by the client, Rule 1.6(a) requires the lawyer to invoke the privilege when it is applicable. The lawyer must comply with the final orders of a court or other tribunal of competent jurisdiction requiring the lawyer to give information about the client.

[20] The Rules of Professional Conduct in various circumstances permit or require a lawyer to disclose information relating to the representation. See Rules 2.2, 2.3, 3.3 and 4.1. In addition to these provisions, a lawyer may be obligated or permitted by other provisions of law to give information about a client. Whether another provision of law supersedes Rule 1.6 is a matter of interpretation beyond the scope of these Rules, but a presumption should exist against such a supersession.

Former Client

[21] The duty of confidentiality continues after the client-lawyer relationship has terminated.

RULE 1.7 CONFLICT OF INTEREST: GENERAL RULE

(a) A lawyer shall not represent a client if the representation of that client will be directly adverse to another client, unless:
(1) the lawyer reasonably believes the representation will not adversely affect the relationship with the other client; and

(2) each client consents after consultation.

***256** (b) A lawyer shall not represent a client if the representation of that client may be materially limited by the lawyer's responsibilities to another client or to a third person, or by the lawyer's own interests, unless:
(1) the lawyer reasonably believes the representation will not be adversely affected; and

(2) the client consents after consultation. When representation of multiple clients in a single matter is undertaken, the consultation shall include explanation of the implications of the common representation and the advantages and risks involved.

Comment

Loyalty to a Client

[1] Loyalty is an essential element in the lawyer's relationship to a client. An impermissible conflict of interest may exist before representation is undertaken, in which event the representation should be declined. The lawyer should adopt reasonable procedures, appropriate for the size and type of firm and practice, to determine in both litigation and non-litigation matters the parties and issues involved and to determine whether there are actual or potential conflicts of interest.

[2] If such a conflict arises after representation has been undertaken, the lawyer should withdraw from the representation. See Rule 1.16. Where more than one client is involved and the lawyer withdraws because a conflict arises after representation,

whether the lawyer may continue to represent any of the clients is determined by Rule 1.9. See also Rule 2.2(c). As to whether a client-lawyer relationship exists or, having once been established, is continuing, see Comment to Rule 1.3 and Scope.

[3] As a general proposition, loyalty to a client prohibits undertaking representation directly adverse to that client without that client's consent. Paragraph (a) expresses that general rule. Thus, a lawyer ordinarily may not act as advocate against a person the lawyer represents in some other matter, even if it is wholly unrelated. On the other hand, simultaneous representation in unrelated matters of clients whose interests are only generally adverse, such as competing economic enterprises, does not require consent of the respective clients. Paragraph (a) applies only when the representation of one client would be directly adverse to the other.

[4] Loyalty to a client is also impaired when a lawyer cannot consider, recommend or carry out an appropriate course of action for the client because of the lawyer's other responsibilities or interests. The conflict in effect forecloses alternatives that would otherwise be available to the client. Paragraph (b) addresses such situations. A possible conflict does not itself preclude the representation. The critical questions are the likelihood that a conflict will eventuate and, if it does, whether it will materially interfere with the lawyer's independent professional judgment in considering alternatives or foreclose courses of action that reasonably should be pursued on behalf of the client. Consideration should be given to whether the client wishes to accommodate the other interest involved.

Consultation and Consent

[5] A client may consent to representation notwithstanding a conflict. However, as indicated in paragraph (a)(1) with respect to representation directly adverse to a client, and paragraph (b)(1) with respect to material limitations on representation of a client, when a disinterested lawyer would conclude that the client should not agree to the representation under the circumstances, the lawyer involved cannot properly ask for such agreement or provide representation on the basis of the client's consent. When more than one client is involved, the question of conflict must be resolved as to each client. Moreover, there may be circumstances where it is impossible to make the disclosure necessary to obtain consent. For example, when the lawyer represents different clients in related matters and one of the clients refuses to consent to the disclosure necessary to permit the other client to make an informed decision, the lawyer cannot properly ask the latter to consent.

Lawyer's Interests

[6] The lawyer's own interests should not be permitted to have an adverse effect on representation of a client. For example, a lawyer's need for income should not lead the lawyer to undertake matters that cannot be handled competently and at a reasonable fee. See Rules 1.1 and 1.5. If the probity of a lawyer's own conduct in a transaction is in serious question, it may be difficult or impossible for the lawyer to give a client detached advice. A lawyer may not allow related business interests to affect representation, for example, by referring clients to an enterprise in which the lawyer has an undisclosed interest.

Conflicts in Litigation

[7] Paragraph (a) prohibits representation of opposing parties in litigation. Simultaneous representation of parties whose interests in litigation may conflict, such as coplaintiffs or codefendants, is governed by paragraph (b). An impermissible conflict may exist by reason of substantial discrepancy in the parties' testimony, incompatibility in positions in relation to an opposing party or the fact that there are substantially ***257** different possibilities of settlement of the claims or liabilities in question. Such conflicts can arise in criminal cases as well as civil. The potential for conflict of interest in representing multiple defendants in a criminal case is so grave that ordinarily a lawyer should decline to represent more than one codefendant. On the other hand, common representation of persons having similar interests is proper if the risk of adverse effect is minimal and the requirements of paragraph (b) are met. Compare Rule 2.2 involving intermediation between clients.

[8] Ordinarily, a lawyer may not act as advocate against a client the lawyer represents in some other matter, even if the other matter is wholly unrelated. However, there are circumstances in which a lawyer may act as advocate against a client. For example, a lawyer representing an enterprise with diverse operations may accept employment as an advocate against the enterprise in an unrelated matter if doing so will not adversely affect the lawyer's relationship with the enterprise or conduct of the suit and if both clients consent upon consultation. By the same token, government lawyers in some circumstances may represent government employees in proceedings in which a government agency is the opposing party. The propriety of concurrent representation can depend on the nature of the litigation. For example, a suit charging fraud entails conflict to a degree not involved in a suit for a declaratory judgment concerning statutory interpretation.

[9] A lawyer may represent parties having antagonistic positions on a legal question that has arisen in different cases, unless representation of either client would be adversely affected. Thus, it is ordinarily not improper to assert such positions in cases pending in different trial courts, but it may be improper to do so in cases pending at the same time in an appellate court.

Interest of Person Paying for a Lawyer's Service

[10] A lawyer may be paid from a source other than the client, if the client is informed of that fact and consents and the arrangement does not compromise the lawyer's duty of loyalty to the client. See Rule 1.8(f). For example, when an insurer and its insured have conflicting interests in a matter arising from a liability insurance agreement, and the insurer is required to provide special counsel for the insured, the arrangement should assure the special counsel's professional independence. So also, when a corporation and its directors or employees are involved in a controversy in which they have conflicting interests, the corporation may provide funds for separate legal representation of the directors or employees, if the clients consent after consultation and the arrangement ensures the lawyer's professional independence.

Other Conflict Situations

[11] Conflicts of interest in contexts other than litigation sometimes may be difficult to assess. Relevant factors in determining whether there is potential for adverse effect include the duration and intimacy of the lawyer's relationship with the client or clients involved, the functions being performed by the lawyer, the likelihood that actual conflict will arise and the likely prejudice to the client from the conflict if it does arise. The question is often one of proximity and degree.

[12] For example, a lawyer may not represent multiple parties to a negotiation whose interests are fundamentally antagonistic to each other, but common representation is permissible where the clients are generally aligned in interest even though there is some difference of interest among them.

[13] Conflict questions may also arise in estate planning and estate administration. A lawyer may be called upon to prepare wills for several family members, such as husband and wife, and, depending upon the circumstances, a conflict of interest may arise. In estate administration the identity of the client may be unclear under the law of a particular jurisdiction. Under one view, the client is the fiduciary; under another view the client is the estate or trust, including its beneficiaries. The lawyer should make clear the relationship to the parties involved.

[14] A lawyer for a corporation or other organization who is also a member of its board of directors should determine whether the responsibilities of the two roles may conflict. The lawyer may be called on to advise the corporation in matters involving actions of the directors. Consideration should be given to the frequency with which such situations may arise, the potential intensity of the conflict, the effect of the lawyer's resignation from the board and the possibility of the corporation's obtaining legal advice from another lawyer in such situations. If there is material risk that the dual role will compromise the lawyer's independence of professional judgment, the lawyer should not serve as a director.

Conflict Charged by an Opposing Party

[15] Resolving questions of conflict of interest is primarily the responsibility of the lawyer undertaking the representation. In litigation, a court may raise the question when there is reason to infer that the lawyer has neglected the responsibility. In a criminal case, inquiry by the court is generally required when a lawyer represents multiple defendants. Where the conflict is such as clearly to call in question the fair or efficient administration of justice, opposing counsel may properly raise the question. Such an objection should be viewed with caution, however, for it ***258** can be misused as a technique of harassment. See Scope. RULE 1.8 CONFLICT OF INTEREST: PROHIBITED TRANSACTIONS

(a) A lawyer shall not enter into a business transaction with a client or knowingly acquire an ownership, possessory, security or other pecuniary interest adverse to a client unless:
(1) the transaction and terms on which the lawyer acquires the interest are fair and reasonable to the client and are fully disclosed and transmitted in writing to the client in a manner which can be reasonably understood by the client;

(2) the client is given a reasonable opportunity to seek the advice of independent counsel in the transaction; and

(3) the client consents in writing thereto.

(b) A lawyer shall not use information relating to representation of a client to the disadvantage of the client unless the client consents after consultation, except as permitted or required by Rule 1.6 or Rule 3.3.

(c) A lawyer shall not prepare an instrument giving the lawyer or a person related to the lawyer as parent, child, sibling, or spouse any substantial gift from a client, including a testamentary gift, except where the client is related to the donee.

(d) Prior to the conclusion of representation of a client, a lawyer shall not make or negotiate an agreement giving the lawyer literary or media rights to a portrayal or account based in substantial part on information relating to the representation.

(e) A lawyer shall not provide financial assistance to a client in connection with pending or contemplated litigation, except that:
(1) a lawyer may advance court costs and expenses of litigation, the repayment of which may be contingent on the outcome of the matter; and

(2) a lawyer representing an indigent client may pay court costs and expenses of litigation on behalf of the client.

(f) A lawyer shall not accept compensation for representing a client from one other than the client unless:
(1) the client consents after consultation;

(2) there is no interference with the lawyer's independence of professional judgment or with the client-lawyer relationship; and

(3) information relating to representation of a client is protected as required by Rule 1.6.

(g) A lawyer who represents two or more clients shall not participate in making an aggregate settlement of the claims of or against the clients, or in a criminal case an aggregated agreement as to guilty or nolo contendere pleas, unless each client consents after consultation, including disclosure of the existence and nature of all the claims or pleas involved and of the participation of each person in the settlement.

(h) A lawyer shall not make an agreement prospectively limiting the lawyer's liability to a client for malpractice unless permitted by law and the client is independently represented in making the agreement, or settle a claim for such liability with an

unrepresented client or former client without first advising that person in writing that independent representation is appropriate in connection therewith.

(i) A lawyer related to another lawyer as parent, child, sibling or spouse shall not represent a client in a representation directly adverse to a person whom the lawyer knows is represented by the other lawyer except upon consent by the client after consultation regarding the relationship.

(j) A lawyer shall not acquire a proprietary interest in the cause of action or subject matter of litigation the lawyer is conducting for a client, except that the lawyer may:
(1) acquire a lien granted by law to secure the lawyer's fee or expenses; and

(2) contract with a client for a reasonable contingent fee in a civil case.

Comment

Transactions Between Client and Lawyer

[1] As a general principle, all transactions between client and lawyer should be fair and reasonable to the client. In such transactions a review by independent counsel on behalf of the client is often advisable. Furthermore, a lawyer may not exploit information relating to the representation to the client's disadvantage. For example, a lawyer who has learned that the client is investing in specific real estate may not, without the client's consent, seek to acquire nearby property where doing so would adversely affect the client's plan for investment. Paragraph (a) does not, however, apply to standard commercial transactions between the lawyer and the client for products or services that the client generally markets to others, for example, banking or brokerage services, medical services, products manufactured or distributed by the client, and utilities' services. In such transactions, the lawyer has no advantage in dealing with the client, and the restrictions in paragraph (a) are unnecessary and impracticable.

[2] A lawyer may accept a gift from a client, if the transaction meets general standards of fairness. For example, a simple gift such as a present given at a holiday or as a token of appreciation is permitted. If effectuation of a substantial gift requires preparing a legal instrument such as a will or conveyance, however, the client should ***259** have the detached advice that another lawyer can provide. Paragraph (c) recognizes an exception where the client is a relative of the donee or the gift is not substantial.

Literary Rights

[3] An agreement by which a lawyer acquires literary or media rights concerning the conduct of the representation creates a conflict between the interests of the client and the personal interests of the lawyer. Measures suitable in the representation of the client may detract from the publication value of an account of the representation. Paragraph (d) does not prohibit a lawyer representing a client in a transaction concerning literary property from agreeing that the lawyer's fee shall consist of a share in ownership in the property, if the arrangement conforms to Rule 1.5 and paragraph (j).

Person Paying for a Lawyer's Services

[4] Rule 1.8(f) requires disclosure of the fact that the lawyer's services are being paid for by a third party. Such an arrangement must also conform to the requirements of Rule 1.6 concerning confidentiality and Rule 1.7 concerning conflict of interest. Where the client is a class, consent may be obtained on behalf of the class by court-supervised procedure.

Family Relationships Between Lawyers

[5] Rule 1.8(i) applies to related lawyers who are in different firms. Related lawyers in the same firm are governed by Rules 1.7, 1.9, and 1.10. The disqualification stated in paragraph (i) is personal and is not imputed to members of firms with whom the lawyers are associated.

Acquisition of Interest in Litigation

[6] Paragraph (j) states the traditional general rule that lawyers are prohibited from acquiring a proprietary interest in litigation. This general rule, which has its basis in common law champerty and maintenance, is subject to specific exceptions developed in decisional law and continued in these Rules, such as the exception for reasonable contingent fees set forth in Rule 1.5 and the exception for certain advances of the costs of litigation set forth in paragraph (e).

Limiting Liability

[7] Paragraph (h) is not intended to apply to customary qualifications and limitations in legal opinions and memoranda.

RULE 1.14 CLIENT UNDER A DISABILITY

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

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

Comment

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

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

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

[4] If the lawyer represents the guardian as distinct ***260** from the ward, and is aware that the guardian is acting adversely to the ward's interest, the lawyer may have an obligation to prevent or rectify the guardian's misconduct. See Rule 1.2(d).

Disclosure of the Client's Condition

[5] Rules of procedure in litigation generally provide that minors or persons suffering mental disability shall be represented by a guardian or next friend if they do not have a general guardian. However, disclosure of the client's disability can adversely affect the client's interests. For example, raising the question of disability could, in some circumstances, lead to proceedings for involuntary commitment. The lawyer's position in such cases is an unavoidably difficult one. The lawyer may seek guidance from an appropriate diagnostician.

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

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

RULE 1.16 DECLINING OR TERMINATING REPRESENTATION

(a) Except as stated in paragraph (c), a lawyer shall not represent a client or, where representation has commenced, shall withdraw from the representation of a client if:
(1) the representation will result in violation of the rules of professional conduct or other law;

(2) the lawyer's physical or mental condition materially impairs the lawyer's ability to represent the client; or

(3) the lawyer is discharged.

(b) except as stated in paragraph (c), a lawyer may withdraw from representing a client if withdrawal can be accomplished without material adverse effect on the interests of the client, or if:
(1) the client persists in a course of action involving the lawyer's services that the lawyer reasonably believes is criminal or fraudulent;

(2) the client has used the lawyer's services to perpetrate a crime or fraud;

(3) a client insists upon pursuing an objective that the lawyer considers repugnant or imprudent;

(4) the client fails substantially to fulfill an obligation to the lawyer regarding the lawyer's services and has been given reasonable warning that the lawyer will withdraw unless the obligation is fulfilled;

(5) the representation will result in an unreasonable financial burden on the lawyer or has been rendered unreasonably difficult by the client; or

(6) other good cause for withdrawal exists.

(c) When ordered to do so by a tribunal, a lawyer shall continue representation notwithstanding good cause for terminating the representation.

(d) Upon termination of representation, a lawyer shall take steps to the extent reasonably practicable to protect a client's interests, such as giving reasonable notice to the client, allowing time for employment of other counsel, surrendering papers and property to which the client is entitled and refunding any advance payment of fee that has not been earned. The lawyer may retain papers relating to the client to the extent permitted by other law.

Comment

[1] A lawyer should not accept representation in a matter unless it can be performed competently, promptly, without improper conflict of interest and to completion.

Mandatory Withdrawal

[2] A lawyer ordinarily must decline or withdraw from representation if the client demands that the lawyer engage in conduct that is illegal or violates the Rules of Professional Conduct or other law. The lawyer is not obliged to decline or withdraw simply because the client suggests such a course of conduct; a client may make such a suggestion in the hope that a lawyer will not be constrained by a professional obligation.

[3] When a lawyer has been appointed to represent ***261** a client, withdrawal ordinarily requires approval of the appointing authority. See also Rule 6.2. Difficulty may be encountered if withdrawal is based on the client's demand that the lawyer engage in unprofessional conduct. The court may wish an explanation for the withdrawal, while the lawyer may be bound to keep confidential the facts that would constitute such an explanation. The lawyer's statement that professional considerations require termination of the representation ordinarily should be accepted as sufficient.

Discharge

[4] A client has a right to discharge a lawyer at any time, with or without cause, subject to liability for payment for the lawyer's services. Where future dispute about the withdrawal may be anticipated, it may be advisable to prepare a written statement reciting the circumstances.

[5] Whether a client can discharge appointed counsel may depend on applicable law. A client seeking to do so should be given a full explanation of the consequences. These consequences may include a decision by the appointing authority that appointment of successor counsel is unjustified, thus requiring the client to represent himself.

[6] If the client is mentally incompetent, the client may lack the legal capacity to discharge the lawyer, and in any event the discharge may be seriously adverse to the client's interests. The lawyer should make special effort to help the client consider the consequences and, in an extreme case, may initiate proceedings for a conservatorship or similar protection of the client. See Rule 1.14.

Optional Withdrawal

[7] A lawyer may withdraw from representation in some circumstances. The lawyer has the option to withdraw if it can be accomplished without material adverse effect on the client's interests. Withdrawal is also justified if the client persists in a course of action that the lawyer reasonably believes is criminal or fraudulent, for a lawyer is not required to be associated with such conduct even if the lawyer does not further it. Withdrawal is also permitted if the lawyer's services were misused in the past even if that would materially prejudice the client. The lawyer also may withdraw where the client insists on a repugnant or imprudent objective.

[8] A lawyer may withdraw if the client refuses to abide by the terms of an agreement relating to the representation, such as an agreement concerning fees or court costs or an agreement limiting the objectives of the representation.

Assisting the Client upon Withdrawal

[9] Even if the lawyer has been unfairly discharged by the client, a lawyer must take all reasonable steps to mitigate the consequences to the client. The lawyer may retain papers as security for a fee only to the extent permitted by law.

[10] Whether or not a lawyer for an organization may under certain unusual circumstances have a legal obligation to the organization after withdrawing or being discharged by the organization's highest authority is beyond the scope of these Rules.

Footnotes

a1 *Jan Rein, Professor of Law at McGeorge School of a Law, is a nationally recognized authority in the fields of elder law and decedent's estates and trusts. She is a co-author of* Handbook of the Law of Wills, Estates and Trusts, *the leading hornbook on the subject. Professor Rein is a member of the American Law Institute and former chair of the Association of the American Law Schools' Section on Aging and the Law. As a member of the 1993 Fordham Conference on Ethical Issues in Representing Older Clients, she helped draft proposed changes to the* Model Rules of Professional Ethics *for representing clients with impaired capactity. She received her B.A. from Wellesley College, and her LL.B. from Georgetown University School of Law*.

1 Peter Margulies, *Access, Connection and Voice: A Contextual Approach to Representing Senior Citizens of Questionable Capacity*, 62 FORDHAM L. REV. 1073, 1082 (1994).

2 *See* DAVID MARGOLICK, UNDUE INFLUENCE: THE EPIC BATTLE FOR THE JOHNSON & JOHNSON FORTUNE (1993) (for an account of this saga in which the Shearman & Sterling law firm was supposed to be simultaneously looking after Seward's interests).

3 Formal rules and guidelines include: ABA MODEL RULES OF PROFESSIONAL CONDUCT (THE MODEL RULES); ABA MODEL CODE OF PROFESSIONAL RESPONSIBILITY (THE MODEL CODE); Interpretations and proposals for reform include: AMERICAN COLLEGE OF TRUST & ESTATE COUNSEL, COMMENTARIES ON THE MODEL RULES OF PROFESSIONAL CONDUCT (Oct. 18, 1993)(ACTEC COMMENTARIES); RESTATEMENT (THIRD) OF THE LAW, THE LAW GOVERNING LAWYERS (Tentative Draft No. 6, 1993); Special Issue, *Ethical Issues in Representing Older Clients*, 62 FORDHAM L. REV. (Mar. 1994) 989-1036, *Recommendations of the Conference*; 1037-1069, *Reports of the Working Groups*.

4 Baird B. Brown, *Determining Clients' Legal Capacity*, 4 ELDER LAW REP. 1 (Feb. 1993).

5 *See* Joan M. Krauskopf, *New Developments in Defending Committment of the Elderly*, 10 N.Y.U. REV. L. & SOC. CHANGE 367 (1980) (discussing problems involving treatable diseases or conditions that mimic symptoms of senile dementia or Alzheimer's).

6 *See generally* County of San Diego v. Viloria, 80 Cal. Rptr. 869 (1969); Department of Mental Hygiene v. Renel, 173 N.Y.S.2d 231 (1958).

7 Margulies, *supra* note 1, at 1073.

8 *See generally* Judith Rodin, *Aging & Health: Effects of the Sense of Control*, 23 SCI. 1271 (1986) (observing that the relationship between one's sense of control and one's health may increase as one ages).

9 Even persons already under conservatorship have been found of sufficient capacity to revoke a trust. *See In re* Conservatorship of Bookasta, Bookasta v. Swanson, 216 Cal. App. 3d, 445, 450 (1989) (finding "[t] he trial court abused its discretion in finding that the Bookastas lacked legal capacity to effectuate the trust revocations." In so holding the court noted "[t]he declaration of the attorney who assisted the Bookastas in their estate planning [executing new wills and revoking prior trust] … averred that they were 'fully competent' to undertake such planning." *Id.* at 451. Evidence that the trust revocations were not detrimental to the conservatees' interests or estate and that they were not the product of undue influence apparently influenced the court's decision as well.).

10 *See* Margulies, *supra* note 1, at 1095 (suggesting consistency is one of six factors attorneys should consider when assessing client capacity).

11 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, 1835 (1992) [[[hereinafter *Preserving Dignity*].

12 Impaired elderly clients function better in a familiar environment. A housecall can also give you valuable insight into the client's values and coping abilities and mechanisms. They also create an atmosphere of ease and trust because the client feels more control in her own environment.

13 Linda F. Smith, *Representing the Elderly Client and Addressing the Question of Competence*, 14 J. CONTEMP. L. 61, 90 (1988).

14 *Id.* at 91.

15 Margulies, *supra* note 1, at 1085-90.

16 *Report of the Working Group on Client Capacity*, 62 FORDHAM L. REV. 1003, 1007 (1994) [hereinafter *Report of Working Group]; Recommendations of the Conference*, 62 FORDHAM L. REV. 989, 991 (1994) [hereinafter *Conference Recommendations*].

17 *See Conference Recommendations, supra* note 16, at 991.

18 11(9) ABA/BNA LAWYER'S MANUAL ON PROFESSIONAL CONDUCT 149, 150 (May 31, 1995).

19 *See* MODEL RULES OF PROFESSIONAL CONDUCT RULE 1.14 (1998) [[[hereinafter MODEL RULES].

Rules that should be read in conjunction with Rule 1.14 include: 1.1-Competence; 1.2-Scope of Representation; 1.4-Communication; 1.6-Confidentiality of Information; 1.7-Conflict of Interest: General Rule; 1.8-Conflict of Interest: Prohibited Transactions; 1.9-Conflict of Interest: Former Client; 1.16-Declining or Terminating Representation; 2.1-Advisor.

20 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, 1119-20 (1994)[hereinafter *Clients with Destructive Choices*] (citations omitted or placed in text).

21 MODEL RULES, *supra* note 19, Rule 1.14, Cmt. 1 (1998).

22 For a lengthy footnote listing existing and proposed tests for capacity in various contexts see Rein, *Clients with Destructive Choices, supra* note 20, at 1121, n. 101. *See also* Margulies, *supra* note 1, at 1082-83.

23 Jacqueline Allee, *Representing Older Persons: Ethical Dilemmas*, PROB. & PROP., Jan.-Feb. 1988, at 36, 39.

24 *See* ABA Comm. on Ethics and Professional Responsibility, Formal Op. 96-404 1, 2 (Aug. 2, 1996) [hereinafter Formal Op. 96-404] ("Because the relationship of client and lawyer is one of principal and agent, principles of agency law might operate to suspend or terminate the lawyer's authority to act when a client becomes incompetent …"); RESTATEMENT (SECOND) OF AGENCY, § 20-21.

25 *See id.* § 122.

26 Allee, *supra* note 23, at 38.

27 *See* Rein, *Clients With Destructive Choices, supra* note 20, at 1137.

28 JOHN E. DONALDSON, ETHICAL CONSIDERATIONS IN ADVISING AND REPRESENTING THE ELDERLY, 10 (undated)(unpublished manuscript, on file with the author).

29 Rein, *Clients with Destructive Choices, supra* note 20, at 1138.

30 *See id.* at 1116.

31 MODEL RULES, *supra* note 19, Rule 1.14(b), Cmt. 3 (1998).

32 AMERICAN COLLEGE OF TRUST & ESTATE COUNSEL, Commentaries on the Model Rules of Professional Conduct (Oct. 18, 1993) hereinafter ACTEC COMMENTARIES] (emphasis added).

33 GEOFFREY C. HAZARD JR. & W. WILLIAM HODES, THE LAW OF LAWYERING: A HANDBOOK ON THE MODEL RULES OF PROFESSIONAL CONDUCT § 1.14:102, at 440 (2d ed. Supp., 1993).

34 Rein, *Clients with Destructive Choices, supra* note 20, at 1139.

35 *Cf.* MODEL RULE 1.16, Cmt 6 ("If the client is mentally incompetent, the client may lack the legal capacity to discharge the lawyer …").

36 MODEL RULES, *supra* note 19, Rule 1.14(a).

37 Formal Op. 96-404, *supra* note 24, at 1, 2 (emphasis added) (citing M. Silberfield & A. Fish, When the Mind Fails: A Guide to Dealing with Incompetency, University of Toronto Press, 1994) (["T]he client's capacity must be judged against the standard set by that person's own habitual or considered standards of behavior and values, rather than against conventional standards held by others.").

38 Formal Op. 96-404, *supra* note 24, at 1, 2.

39 MODEL RULES, *supra* note 19, Rule 1.14, Cmt 6 (1998).

40 *Id.*

41 MODEL RULES, *supra* note 19, Rule 1.14, Cmt 7 (1998).

42 *See* 13(2) ABA/BNA LAWYER'S MANUAL ON PROFESSIONAL CONDUCT 27, 28 (February 19, 1997) (quoting Philadelphia lawyer Lawrence J. Fox, then chair of the ABA's ethics committee).

43 ACTEC COMMENTARIES, *supra* note 32, and accompanying text.

44 *See* Rein, *Clients With Destructive Choices, supra* note 20 at 1138-39.

45 MODEL RULES, *supra* note 19, Rule 1.14, Cmt 5 (1998).

46 Rein, *Clients with Destructive Choices, supra* note 20, at 1148.

47 Rein, *Clients with Destructive Choices, supra* note 20, at 1147. *See also*, Allee, *supra* note 23, at 39; John R. Murphy, *Older Clients of Questionable Competency: Making Accurate Competency Determinations Through the Utilization of Medical Professionals*, 4 GEO. J. LEGAL ETHICS 899, 901, 911 (1991).

48 MODEL RULES, *supra* note 19, Rule 1.6(a) (1998).

49 MODEL RULES, *supra* note 19, Rule 1.8(b) (1998).

50 MODEL RULES, *supra* note 19, Rule 1.7 (1998).

51 MODEL RULES, *supra* note 19, Rule 1.7(b) (1998).

52 MODEL RULES, *supra* note 19, Rule 1.6 (1998).

53 Rein, *Clients with Destructive Choices, supra* note 20, at 1152.

54 Paula J. Biedenharn, MA, & Janice B. Normoyle, Ph.D., *Elderly Community Residents' Reactions to the Nursing Home: An Analysis of Nursing Home-Related Beliefs*, 31 GERONTOLOGIST 107 (1991). For a discussion of nursing home risks and conditions and their affect on public attitudes see, Rein, *Preserving Dignity, supra* note 11, at 1834, n.70, 1858-1861.

55 TIME, Aug. 18, 1997, at 16.

56 *See* Rein, *Clients with Destructive Choices, supra* note 20, at 1149 (citations omitted); *see also* Murphy, *supra* note 47, at 915. Professor Peter Margulies urges that client manifestations of consent should be honored even if capacity is in doubt. Margulies, *supra* note 1, at 1093. To do otherwise, he argues, diminishes the client's access to her lawyer and "compromises [the client's] … voice and connection." *Id.* at 1093. Great caution is required, however, lest honoring consent deteriorates into coaxing consent from a weakened, vulnerable and, perhaps, frightened client.

57 MODEL RULES, *supra* note 19, Rule 1.14, Cmt. 5 (1998).

58 Formal Op. 96-104, *supra* note 24.

59 Formal Op. 96-104, *supra* note 24 at 8.

60 *Id.* at 8 (emphasis added). The opinion added that the implied authority exception authorizes only disclosure relevant to the capacity assessment or protective action.

61 *See* Rein, *Clients with Destructive Choices, supra* note 20, at 1150.

62 MODEL RULES, *supra* note 19, Rule 1.6, Cmt. 4 (1998).

63 *See* California State Bar Standing Committee on Professional Responsibility and Conduct, Formal Op. 1989-112, 1989 WL 253260 1, [[[hereinafter Ca. Formal Op. 1989-112] (interpreting California State Bar Rules of Professional Conduct 3-110, 3-310, 3-700 and 5-210; Business and Professions Code, Section 6068(e)).

64 *Id.*

65 *See id.*

66 *Id.*

67 MODEL RULES, *supra* note 19, 1.7(b)(1998).

68 This hypothetical is loosely derived from a composite complaint *in* LAWRENCE A. FROLIK & ALISON P. BARNES, ELDERLAW: CASES AND MATERIALS 85 (1992). *See also* Rein, *Clients with Destructive Choices, supra* note 20, at 1143, n. 167.

The complaint, filed by the transferor's daughter, both individually and as the transferor's daughter, alleged, *inter alia*, that the attorney, "at a time when he knew or should have known that Annie Smith was incompetent, represented Annie Smith and assisted her in transferring her major assets to Ian Holmes [[[whom] the attorney also represented." *Id.* at 86. Although the attorney clearly fell into the conflict of interest [with another client] trap, even if he had assisted Annie in transferring her assets to persons the attorney did not also represent, it seems likely the daughter still would have sued him for arranging the transfers at the behest of an [allegedly] incompetent client.

69 Smith, *supra* note 13, at 91 (citations omitted).

70 *Id.*

71 For proposed language, *see* Rein, *Clients with Destructive* Choices, *supra* note 20, at 1143.

72 *Report of Working Group, supra* note 16, at 1007.

73 Rein, *supra* note 20, at 1143, n.166.

74 *Id.* at 1149. Rule 1.7(b) reads: "A lawyer shall not represent a client if the representation of that client may be materially limited … unless:

(1) the lawyer reasonably believes the representation will not be adversely affected; *and*

(2) the client consents after consultation...." (emphasis added).

MODEL RULES, *supra* note 19, Rule 1.7(b)(1998).

75 *See id.* at 1152-1154.

76 *Id.* at 1152-53. *See also* Margulies, *supra* note 1, at 1093.

77 Rules that impede law firm diversification include MRCP Rules 5.4 (professional independence of a lawyer), 5.5(b)(a lawyer may not assist another in the unauthorized practice of law), and Rule 7.3 (a lawyer may not compensate a person for recommending the lawyer's services). *See* Garu A. Munneke, *Dances with Nonlawyers: A New Perspective on Law Firm Diversification*, 61 FORDHAM L. REV. 559 (1992) (discussing of the diversification issue).

78 Rein, *supra* note 20, at 1153.

79 *See id.*

80 MODEL RULES, *supra* note 19, Rule 1.16(a) (emphasis added).

81 *Id.* Rule 1.16(b) (emphasis added).

82 Formal Op. 96-404, *supra* note 24, at 8.

83 *Id.* In footnote 7 of the opinion, the drafters also noted "a disability over which the client has no control is likely not the sort of 'difficulty' the drafters had in mind in crafting." *Id.* Rule 1.16(b)(5).

84 Cal. Formal Op. 1989-112, *supra* note 63, at 3.

85 *Id.* at 1.

86 *See Report of Working Group, supra* note 16, at 1007.

87 *Conference Recommendations, supra* note 16, at 990.

88 Formal Op. 96-404, *supra* note 24, and accompanying text.

89 MODEL RULES, *supra* note 19, Rule 1.14(b).

90 *Id.* Rule 1.14, Cmt 3.

91 *See Conference Recommendations, supra* note 16 at 991.

92 *See Report of Working Group, supra* note 16, at 1010.

93 *Conference Recommendations, supra* note 16, at 1010.

94 Formal Op. 96-404, *supra* note 24, at 1 ("appointment of a guardian is a serious deprivation of the client's rights and ought not be undertaken if other, less drastic, solutions are available").

95 MODEL RULES, *supra* note 19, Rule 1.14(b).(1998).

96 *See* A.B.A. Comm. on Ethics and Prof'l Responsibility, Informal Op. 89-1530 (Oct. 20, 1989).

97 *Id.* at 2.

98 *Id.* at 3.

99 Formal Op. 96-404, *supra* note 24, at 3.

100 MODEL RULES, *supra* note 19, Rule 1.6(a)(1998).

101 Cal. Formal Opinion 1989-112, *supra* note 63, at 1.

102 *Id.* at 1-2.

103 Paul R. Trembley, *On Persuasion and Paternalism: Lawyer Decisionmaking and the Questionably Competent Client*, 515 UTAH L. REV. 560-61 (1987).

104 *Id.*

105 *Id.*

106 Formal Op. 96-404, *supra* note 24, at 1.

107 *Id.*

108 *See id.* at 5, 6. The lawyer may recommend or support the appointment of a particular person or other entity as guardian, even if the person or entity will likely hire the lawyer to represent it in the guardianship, provided the lawyer has made reasonable inquiry as to the suggested guardian's fitness, discloses the self-interest in the matter and obtains the court's permission to proceed. In all aspects of the proceeding, the lawyer's duty of candor to the court requires disclosure of pertinent facts, including the client's view of the proceedings. *Id.* at 6.

109 Cal. Formal Op. 1989-112, *supra* note 63, at 1.

110 *See id.* at 3 (relying on California's Business and Professions Code, Section 6068 as well as California's Rules of Professional Conduct).

111 *Id.*

112 *Id.*

113 The lawyer should refer or petition for guardianship of the client only if there are no other appropriate alternatives. The lawyer should act as petitioner only if there is no one else available to act. The use of the guardianship system should be limited to the greatest extent possible. "*See Report of Working Group, supra* note 16, at 1009-10.

114 Rein, *Preserving* Dignity, *supra* note 11, at 1158 (citations omitted).

115 MODEL RULES, *supra* note 19, Rule 1.14, Cmt. 2 (1998).

116 *See supra* notes 40-42 and accompanying text.

117 *Conference Recommendations, supra* note 16, at 990.

118 Rein, *Clients with Destructive Choices, supra* note 20, at 1161.

119 *See generally* James D. Gunderson, *Lawyer Inherited Millions in Stock, Cash from Clients*, L.A. TIMES, Nov. 2, 1992 (reporting the case of an Orange County, CA lawyer who prepared wills making himself the recipient of cash, stock, and real estate); Dolores Ziegler, *Practitioner is Told to Relinquish Willed Items*, S.F. DAILY J., August 23, 1993, (reporting a San Fransisco Superior Court ruling ordering a probate attorney to return over $2 million in property and other assets for breach of fiduciary duty).

120 *See* MODEL RULES, *supra* note 19, Rule 1.16, cmt. 6 (1998).

121 One major problem is society's unwillingness to commit resources for the personnel needed to monitor those who are entrusted with the well-being of others. For example, reform guardianship statutes may require accountings and reports from guardians and conservators but typically there are no funds for enforcement. Absent funds for adequate staffing, there is no one to ensure that accountings are filed or to evaluate those that are.

122 Rein, *Clients with Destructive Choices, supra* note 20, at 1170 (citations omitted). *See, e.g.*, M. Bomba, *Abuse of the Elderly and Infirm*. ELDER L. ATT'Y, Fall 1996; D. English & K. Wolff, *Survey Results: Use of Durable Powers*, PROB. & PROP., Jan./Feb. 1996; J. Federman & M. Reed, *Abuse and the Durable Power of Attorney: Options for Reform* (Government Law Center of Albany Law School ed., 1994).

123 Bookasta, 216 Cal. App. 3d 445.

124 *See id.* at 450.

125 *See generally* Dianna M. Porter et al., *Legal Services Delivery Systems: An Overview of the Present and a Look at the Future, in* AGING AND THE LAW: LOOKING INTO THE NEXT CENTURY 89-112 (Patricia R. Powers et al. eds., USAA, 1990).

126 The Washington, D.C. Rules of Professional Conduct Rule 5.4(b)(1990) permits lawyers to associate professionallly with nonlawyers subject to limitations.

127 *See* Rein, *Client with Destructive Choices, supra* note 20.

128 *See* Susan N. Gary, *Mediation and the Elderly: Using Medation to Resolve Probate Disputes over Guardianship and Inheritance*, 32 WAKE FOREST L. REV. 397, 413-415 (Summer 1997) (discussing uses of mediation in guardianship and conservatorship disputes).

129 *See Report of Working Group, supra* note 16, at 1006 (describing my suggested approach as one "to eliminate incapacity as a justisfication for treating a client differently…").

130 Copies of this publication are available from Service Center, American Bar Association, 750 North Lake Shore Drive, Chicago, IL 60611, 1-800-285-2221.

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