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SUPREME COURT OF TEXAS
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No. 17-0634

Supreme Court of Texas

IN RE VERNA FRANCIS COLEY THETFORD,
Relator

From the Second Court of Appeals at Fort Worth, Texas
Case No. 02-17-00182-CV

RELATOR'S BRIEF ON THE MERITS

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ORAL ARGUMENT REQUESTED

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STATEMENT OF THE CASE

Real Party in Interest, Jamie Kay Rogers, Thetford's niece, represented by Alfred G. Allen, III, filed this guardianship case on April 10, 2017 in which Rogers sought to be appointed guardian of the person of Thetford and to establish a Management Trust. R. 1. In the course of the proceedings, Thetford filed a motion to disqualify Allen from representing Rogers. R. 47, 49. On May 10, 2017, the Honorable Stephen Bristow, presiding Judge of the 90th District Court of Young County, Texas, denied Thetford's Motion to Disqualify Allen. R. 169. Thetford submitted her Petition for Writ of Mandamus to the Second Court of Appeals, which was denied on June 15, 2017, and reconsideration of which was denied, en banc, on July 27, 2017. App. Ex. 2 & 3.

STATEMENT OF JURISDICTION

This Court has jurisdiction to issue a writ of mandamus under Article V, section 6 of the Texas Constitution and Texas Government Code section 22.221.

The trial court's error in permitting Thetford's attorney to represent her niece in filing guardianship proceedings against Thetford is of such importance to the jurisprudence of this State because of the need to protect the rights of the elderly in guardianship proceedings and the related ethical issues. Therefore, review by the Texas Supreme Court is warranted.

ISSUE PRESENTED

Did the trial court abuse its discretion in refusing to disqualify Rogers' counsel, Allen, in this 2017 guardianship case adverse to Thetford when (1) the rules of professional conduct prevent Allen from representing a third party, Rogers, in an adversarial guardianship proceeding against his client; (2) Allen's representation of Thetford is substantially related to the guardianship proceeding, and (3) Rogers was admittedly indebted to Thetford and employed by Allen at the time the guardianship proceedings were filed?

STATEMENT OF FACTS

The following facts are undisputed. Thetford is an 86-year-old woman who resides in an assisted living facility. R. 1, 10. On March 15, 2012, Thetford loaned her niece and Real Party, Jamie Rogers, $350,000 to purchase real property. R. 47-48, 51, 120. In turn, Rogers signed a deed of trust to secure the note with the underlying real property. R. 47-48, 51, 86, 120. The note and deed of trust were prepared by Thetford's lawyer at the time, Allen, who was also the long time employer of Rogers. R. 47-48, 51, 120; Supp. R. Vol. 3 at 77:4-24. The note was set to mature on March 15, 2017, and the deed of trust named Allen as Trustee for the benefit of Thetford. R. 48, 53, 86, 120.

Three years later in 2015, Allen prepared a will for Thetford as well as a power of attorney, which appointed Rogers as Thetford's attorney-in-fact.[1] R. 48, 59, 75, 120. When Thetford revoked the 2015 power of attorney on March 27, 2017, Rogers reacted by filing a guardianship application. R. 4-5, 136. This application for guardianship – critically – occurred more than two weeks after Rogers defaulted on

[1] Notably, Allen prepared the power of attorney that appointed Rogers as Thetford's attorney-in-fact while Rogers was still deriving a substantial financial benefit from the March 2012 loan transaction (that Allen facilitated). R. 48, 120, 125. In this regard, Allen knowingly instituted a fiduciary relationship between Rogers and Thetford that was, from its onset, subject to heightened scrutiny under Texas law. *See* TEX. EST. CODE ANN. § 751.101 (West 2017) ("An attorney in fact or agent is a fiduciary and has a duty to inform and to account for actions taken under the power of attorney"); *Lee v. Hasson*, 286 S.W.3d 1, 21 (Tex. App.—Houston [14th Dist.] 2007, pet denied) (noting that "Texas courts apply a presumption of unfairness to transactions between a[n attorney-in-fact] and a party to whom he owes a duty of disclosure.").

the 2012 real property loan. R. 4-5, 48, 53, 86, 120, 136. Allen – Thetford's attorney – filed the application at Rogers' behest. R. 1, 11; Supp. R. Vol. 3 at 77:4-24. Allen has employed Rogers for over twenty-five years and she continued to work at Allen's law firm when the guardianship application was filed. R. 1, 11; Supp. R. Vol. 3 at 77:4-24.

Rogers, represented by Allen, sought to be appointed temporary guardian of the person of Thetford. R. 1, 11. Rogers still remained indebted to Thetford pursuant to the 2012 note when she directed Allen to file the application. . R. 48, 51, 86, 125.

Thetford filed a motion to disqualify Allen as Rogers' counsel because: (1) Allen's representation of Rogers was adverse to Thetford, (2) Allen's representation adverse to Thetford in this guardianship matter is substantially related to his prior representation of Thetford, and (3) Allen obtained confidential information from Thetford during the course of his representation that could be used against Thetford in the guardianship proceeding. R. 48-49. After a hearing, the trial court denied Thetford's motion to disqualify Allen, but did note:

> I do think, Mr. Allen, it is a thin line on your obligation to file this based on what your former client showed and what was brought to your attention. So your obligation to file this guardianship and the possible conflict under 1.06, I think that is an issue.
>
> . . . .
>
> If there's something brought under the disciplinary rules, someone else besides me is going to make a decision on whether or not you violated that rule.

R. 156:2-8, 10-12.

The trial court signed its order denying Thetford's motion to disqualify Allen on May 10, 2017. R. 169, App. Ex. 1.

Thetford contested the guardianship application, and offered evidence in support of her capacity from a clinical neuropsychologist as well as retired Judge Stephen Crawford, who assisted Thetford in revoking the power of attorney. R. 79, 112-18. Ultimately, the trial court signed an order appointing Rogers as temporary guardian and establishing a management trust. R. 160. The temporary guardianship order is the subject of an interlocutory appeal, which has now been stayed. Supp. App. Ex. E.

In contest to the trial court's denial of the motion to disqualify Allen, Thetford filed a petition for writ of mandamus with the Second Court of Appeals. App. Ex. 2. The petition was denied on June 15, 2017. App. Ex. 2. Thetford filed a motion for en banc reconsideration with the Second Court of Appeals, which was denied on July 27, 2017. App. Ex. 3. Thetford now seeks relief from this Court.

SUMMARY OF THE ARGUMENT

The trial court abused its discretion in failing to disqualify Allen because (1) Rogers' interests were adverse to Thetford at the time the guardianship proceedings were filed because Rogers was indebted to Thetford; (2) Allen's representation of Rogers was improper based on his responsibilities to Thetford; (3) Allen's prior representation of Thetford was substantially related to the facts and issues involved in the guardianship proceeding; and (4) Rule 1.02(g) does not permit Allen's representation of a third party with adverse interests to his client.

If the same attorney an elderly person engages to draft her will and estate planning documents is permitted to represent a third party—who is indebted to the elderly person and also stands to inherit under her will—in adversarial guardianship proceedings, the attorney-client relationship is severely undermined. If this Court adopts Real Parties' overly broad interpretation of the ethical rules, which is contrary to substantial national authority, it will undoubtedly result in a chilling effect upon parties who seek legal advice. As set forth below, the trial court's decision to permit Allen to remain as counsel under these circumstances runs afoul of the Texas Disciplinary Rules, the American Bar Association's ethics opinion directly on point, and substantial national authority. This Court should issue mandamus to protect Thetford and dissuade lawyers from suing their own clients under the veil of Rule 1.02(g).

ARGUMENT

I. Rogers' interests are adverse to Thetford's and therefore Rule 1.06 applies.

A guardianship proceeding brought against a client[2] by a third party indebted to that client/proposed ward constitutes an adversarial proceeding. Accordingly, the general rule applicable to conflicts of interest should apply.

A. The general conflict of interest rule precludes Allen's representation of Rogers.

Rule 1.06(a) precludes a lawyer from representing opposing parties to the same litigation. TEX. DISCIPLINARY RULES PROF'L CONDUCT R. 1.06(a). If, as Allen contends, his duty to initiate the guardianship proceedings arises from his duty to Thetford as his client, he is in violation of Rule 1.06(a).

Under Rule 1.06(b), a lawyer is prohibited from representing a person if the representation of that person: (1) involves a substantially related matter in which that person's interests are materially and directly adverse to the interests of another client of the lawyer; ***or*** (2) reasonably appears to be or become adversely limited by the lawyer's or law firm's responsibilities to another client or to a third person or by the lawyer's or law firm's own interests. TEX. DISCIPLINARY RULES PROF'L CONDUCT

[2] Allen claims he initiated the guardianship proceedings as a result of his duty to Thetford under Rule 1.02(g), thereby making Thetford his current, rather than former, client. R. 1-6, 120-21, 143-45; Response Brief at 4.

R. 1.06(b) (emphasis added). If a lawyer accepts a representation in violation of Rule 1.06, the lawyer is required to promptly withdraw from representation. TEX. DISCIPLINARY RULES PROF'L CONDUCT 1.06(e).

Representation of one client is directly adverse to another client when "the lawyer's . . . ability or willingness to consider, recommend, or carry out a course of action will be or is reasonably likely to be adversely affected by representing both clients." *In re Seven-O Corp.*, 289 S.W.3d 384, 390 (Tex. App.—Waco 2009, orig. proceeding). When two clients' interests are directly adverse in the same litigation, the lawyer should be disqualified. *Id.*

B. <u>Rogers' interests are adverse to Thetford in this case.</u>

There is no question that a guardianship proceeding can be an "adverse" proceeding, giving rise to the application of Rule 1.06. When the ward opposes a guardianship, as in this case, the proceeding is adversarial. *See Allison v. Walvoord*, 819 S.W.2d 624, 626 (Tex. App.—El Paso 1991, no writ). By its very nature, a guardianship seeks to strip the ward of her most fundamental rights to liberty and property. *In re Guardianship of Hahn*, 276 S.W.3d 515, 517-18 (Tex. App. 2008—San Antonio 2008, orig. proceeding). A guardian is entitled to virtually unfettered control of the most principle of its ward's rights, including the right to maintain physical control over the ward and to establish the ward's legal domicile. *See* TEX. EST. CODE ANN. § 1151.051 (West 2017).

Rogers' application and interests are statutorily recognized as adverse to Thetford. Section 1055.001(b)(1) provides that a person who has an interest adverse to a proposed ward ***may not file*** an application to create a guardianship for that person. TEX. ESTATES CODE ANN. § 1055.001(b)(1) (West 2017) (emphasis added). Among the statutorily recognized ways in which a person's interests can be adverse to the ward include indebtedness to the ward. TEX. ESTATES CODE ANN. § 1104.354 (West 2017). In fact, the Amarillo Court of Appeals has specifically held that a proposed guardian has an interest adverse to the ward when the proposed guardian is indebted to the ward. *See In re Guardianship of Olivares*, No. 07-07-0275, 2008 WL 5206169, at *1 (Tex. App.—Amarillo, Dec. 12, 2008, pet. denied) (mem. op.).

Here, the proposed guardian, Rogers, was admittedly indebted to Thetford at the time the guardianship proceedings were filed and Thetford opposed the guardianship. R. 47-48, 51, 120, 125. Allen's guardianship application sought to remove practically all of Thetford's rights, including Thetford's power to execute a power of attorney, directive to physicians, and any and all legal documents and contracts. R. 10, 160-64. In addition, Allen's representation of Rogers would reasonably limit or adversely impact his ability or willingness to consider foreclosure on the promissory note of which Rogers was admittedly in default at the time Allen filed the guardianship application. R. 48, 53, 86, 120. Allen's representation of Rogers here is prohibited by Rule 1.06.

To excuse this adversarial relationship, Real Parties have pointed to some evidence introduced after the disqualification hearing that the debt was paid on April 28, 2017—over one month after the note's maturity date and well after the guardianship application had been filed. Supp. R. Vol. 5, Ex. A-9.

At the outset, the alleged payment of the debt well after the application was filed does not cure the fact that Rogers' interest was adverse to Thetford *at the time Allen undertook the representation.* The existence of the debt alone disqualified Allen from representing Rogers in the guardianship case.

Moreover, the testimony and evidence presented at the temporary guardianship hearing occurred after the disqualification hearing and should not be considered in this mandamus proceeding. *See Methodist Home v. Marshall*, 830 S.W.2d 220, 232 (Tex. App.—Dallas 1992, no pet.) (holding that a reviewing court in a mandamus proceeding should only consider what was before the trial court when it made the complained-of ruling). Even if such evidence is properly considered, however, the evidence is hardly conclusive that the note was, in fact, paid in full with interest.

At best, it is unclear whether Rogers' debt to Thetford was fully paid before Rogers was appointed temporary guardian. Rogers testified that she made payments for four years; however, the note required a balloon payment at the end of the fifth year. Supp. R. Vol. 3 at 53. Rogers failed to make the balloon payment and Thetford

was forced to ask Rogers about her delinquency. Supp. R. Vol. 4 at 165:5-11. Rogers testified that the note was eventually paid on April 28, 2017. Supp. R Vol. 3 at 56:2-10. Yet, the only exhibit offered to prove such payoff was a customer's copy of a cashier's check—no deposit slip or bank statement evidenced that the payment was deposited into Thetford's account. Supp. R. Vol. 5, Exhibit A-9.

No written evidence was introduced to support any agreement to refinance the note or calculation of interest and there was no proof provided that any check was deposited and cleared in Thetford's bank account. Moreover, if Thetford were truly incapacitated, as Real Parties contend,[3] how could any alleged agreement be valid?

Based on the foregoing, Allen's representation of Rogers in this guardianship proceeding is adverse to Thetford, Allen's former client, in violation of the Texas Disciplinary Rules of Professional Conduct, and the trial court abused its discretion in refusing to disqualify Allen.

II. <u>This guardianship proceeding is substantially related to Allen's prior work for Thetford.</u>

The trial court abused its discretion in refusing to disqualify Allen because the undisputed evidence shows that Allen's prior representation of Thetford in the loan

[3] Real Parties also contend that Thetford's alleged legal incapacity prevents her from retaining counsel of her choice to challenge this guardianship. Based on this argument, Real Parties have challenged Thetford's counsel's application for payment of appellate fees associated with this mandamus all the while seeking, and obtaining payment of, their own appellate fees from Thetford's estate. *See, e.g.*, Supp. App. Exs. A, B, C, D.

transaction between Rogers and Thetford, and the drafting of Thetford's will, is substantially related to the issues in this guardianship proceeding in violation of Rules 1.05, 1.06, and 1.09(a)(1)-(3) .

A. <u>Disqualification of counsel.</u>

The trial court has the duty, as part of its role in the internal regulation of the legal profession, to disqualify counsel from further representation in the pending litigation where counsel is representing a party adverse to a former client involving a substantially related matter in which that person's interests are materially and directly adverse to the lawyer's client. *In re Houston County ex rel Session*, 515 S.W.3d 334, 339 (Tex. App.—Tyler 2015, orig. proceeding).

An attorney who has previously represented a client may not represent another person in a matter adverse to the former client if the matters are the same or substantially related. *In re Columbia Valley Healthcare Sys., L.P.*, 320 S.W.3d 819, 824 (Tex. 2010) (orig. proceeding); TEX. DISCIPLINARY RULES PROF'L CONDUCT RR. 1.05, 1.06, 1.09(a)(1)-(3). If an attorney works on a matter, there is an irrebuttable presumption that the lawyer obtained confidential information during the representation. *In re Columbia Valley Healthcare Sys., L.P.*, 320 S.W.3d at 824.

Although the terms "substantially related" are not defined within the rules, this Court has held that two matters are substantially related when a genuine threat exists that a lawyer may divulge in one matter confidential information obtained in

the other because the facts and issues involved in both are so similar. *In re EPIC Holdings, Inc.*, 985 S.W.2d 41, 51 (Tex. 1998) (orig. proceeding). The moving party must offer evidence of specific similarities between the prior representation and the pending litigation. *NCNB Texas Nat. Bank v. Coker*, 765 S.W.2d 398, 399-400 (Tex. 1989).

A substantial relationship most commonly occurs *where the second action arises from the subject matter of the prior representation*. *See Troutman v. Ramsay*, 960 S.W.2d 176, 178 (Tex. App.—Austin 1997, orig. proceeding) (per curium) (emphasis added). The two representations need not involve identical circumstances to be substantially related. *See Texaco, Inc. v. Garcia*, 891 S.W.2d 255, 256-57 (Tex. 1995). By proving the substantial relationship test, the moving party is entitled to a conclusive, irrebuttable presumption that confidences and secrets were imparted to the former attorney. *Coker*, 765 S.W.2d at 400. As a result of this irrebuttable presumption, any evidence that the attorney took steps to try to protect the confidences of his former client is irrelevant and will not insulate him from disqualification. *See Grant v. Thirteenth Ct. of App.*, 888 S.W.2d 466, 467-68 (Tex. 1994).

A movant is not forced to reveal the very confidences she wishes to protect to demonstrate that such confidences exist. *Coker*, 765 S.W.2d at 400; *In re Houston County ex rel Session*, 515 S.W.3d at 342; *Troutman*, 960 S.W.2d at 178. Once the

movant meets the burden to show a substantial relationship between the two representations, the trial court should perform its role in the internal regulation of the legal profession and grant the motion to disqualify. *Coker*, 765 S.W.2d at 400; *In re Houston County ex rel Session*, 515 S.W.3d at 342.

In *In re Houston County ex rel Session*, the court of appeals held that a proceeding in which the county attorney's office represented a motion in obtaining a protective order against her child's father was "substantially related" to a proceeding in which the county attorney's office represented the Department of Family and Protective Services to terminate the mother's and fathers' parental rights. 515 S.W.3d at 342. The two matters were "substantially related" because the father's family violence is an issue in both matters; the evidence used in the protective order proceeding would be used in the termination proceeding; and the mother's failure to follow certain safety plan protocols as a result of the protective order proceeding formed the basis for the termination of the mother's parental rights. *Id.* at 343.

B. Allen's representation of Rogers is substantially related to his prior—or concurrent[4]—representation of Thetford.

Allen's representation of Rogers in this guardianship proceeding is substantially related to Allen's representation of Thetford because it was Thetford's revocation of the power of attorney – drafted by Allen in favor of Rogers – that formed the basis of the guardianship case. Moreover, in drafting a client's will and other estate planning documents, as Allen did here for Thetford, confidential information is revealed by the client to the attorney regarding the nature of the estate and the client's intention with regard to her estate's disposition. R. 136:4-14.

Rogers claims there is no harm in Allen's conflicting representation because Rogers was Thetford's attorney in fact and because Thetford made her will an exhibit during the disqualification proceedings. R. 75. This trivializes the issue. A client naturally discloses confidential information during the course of communications with her lawyer that goes beyond the four corners of her will. A client seeks counsel, not just dictation. More importantly, if Thetford wants to remove Rogers as a beneficiary under her will, the subject matter of Allen's prior representation is at issue here.

[4] Rogers seeks to justify Allen's representation under Rule 1.02(g), which sets forth a duty to one's own client to take reasonable action to secure the appointment of a guardian or other legal representative whenever the lawyer reasonably believes that the client lacks legal competence.

The 2015 estate planning work is also substantially related to the issues in this guardianship because during his 2015 work for Thetford, Allen was a witness to Thetford's legal capacity – an issue central to the 2017 guardianship proceedings. Thus, the subject matter of Allen's prior representation—the appropriate guardian, if any, of Thetford; Thetford's mental capacity; and the disposition and management of Thetford's affairs—are at issue in this proceeding. *See Troutman*, 960 S.W.2d at 178.

Finally, Rogers asserts Allen should not be disqualified because Thetford has not shown that Allen's conflict resulted in "actual prejudice." But of course this is untrue: Thetford's own attorney was instrumental in the court's decision to appoint an adverse party, whom Thetford objected to, as her temporary guardian. Further, the cases relied upon by Rogers can be easily distinguished from the facts in this case. Both *Nitla* and *Users Systems* involved isolated incidents—document review or a meeting with an opposing party—rather than an ongoing estate planning and business relationship as in this case. *See In re Nitla S.A. de C.V.*, 92 S.W.3d 419, 422 (Tex. 2002) (orig. proceeding) (reviewing an order disqualifying counsel based on a review of privileged documents); *In re Users Sys. Servs., Inc.*, 22 S.W.3d 331, 336 (Tex. 1999) (orig. proceeding) (examining whether a lawyer should be disqualified from representation for meeting with an opposing party). In addition, the *Spears* case cited by Real Parties turned on an examination of Rule 1.10

applicable to government lawyers rather than the substantial relationship test set forth in Rule 1.09. *See Spears v. Fourth Court of Appeals*, 797 S.W.2d 654, 655 (Tex. 1990) (orig. proceeding) (determining whether a government attorney is disqualified from later representing a party against the governmental entity she previously served and applying Rule 1.10, rather than Rule 1.09).

Accordingly, Allen's representation of Rogers in this guardianship proceeding is substantially related to Allen's ongoing estate planning, business representation of Thetford involving Rogers' debt, and Thetford's will in which Rogers is a potential beneficiary. Thetford is entitled to the irrebuttable presumption that confidences and secrets were imparted to Allen and there is a genuine threat of disclosure if his representation continues. *See Coker*, 765 S.W.2d at 400. This Court should issue mandamus to prevent any further disclosure of confidences and violation of ethical rules.

III. Rule 1.02(g) does not permit representation of a third party adverse to a suspected incapacitated client.

Rogers argues that Rule 1.02(g) justified Allen's representation here. Rule 1.02 provides generally that, subject to certain exceptions, "a lawyer shall abide by a client's decisions: (1) concerning the objectives and general methods of representation; (2) whether to accept an offer of settlement of a matter, except as otherwise authorized by law." TEX. DISCIPLINARY RULES PROF'L CONDUCT R. 1.02. Subsection (g) provides that "[a] lawyer shall take reasonable action to secure the

appointment of a guardian or other legal representative for, or seek other protective orders with respect to, a client whenever the lawyer reasonably believes that the client lacks legal competence and that such action should be taken to protect the client." *Id.* Even assuming Rule 1.02(g) could permit Allen to initiate a guardianship against his client, such an action arises as a result of Allen's duties to Thetford and Allen's actions ran afoul of this rule when he represented a new party—Rogers, who had interests adverse to Thetford—in an adversarial guardianship proceeding.

A. The duties set forth in Rule 1.02(g) are breached when a lawyer represents a new party with interests adverse to the suspected incapacitated client.

Rule 1.02(g) requires that "[a] lawyer shall take ***reasonable action***" to secure the appointment of a guardian or other protective orders regarding a client when the lawyer reasonably believes the client lacks legal competence. TEX. DISCIPLINARY RULES PROF'L CONDUCT R. 1.02(g) (emphasis added). Rule 1.02(g) does not permit an attorney to represent another party against his own client. The purpose of this rule is to protect the client. *Id.*

"Reasonable action" by Allen here could have included filing his own application for guardianship or notifying another attorney or court investigator of the need for a guardianship, among other things. When Allen undertook

representation of Rogers, whose interest was adverse to Thetford, in an action to remove Thetford's legal rights, he ran afoul of Rule 1.02(g)'s purpose.

Real Parties' interpretation of Rule 1.02(g) permits the exception to swallow the Rule, and would shield attorneys from all conflict-of-interest rules under *any* circumstance merely by initiating a guardianship proceeding.

In addition, in order to fall under Rule 1.02)(g), Allen had to be pursuing guardianship out of his continued duty to his client, Thetford. When Allen took on representation of Rogers, his duty of loyalty transferred to Rogers. Accordingly, Rule 1.02)(g) does not justify Allen's actions in this case.

B. Opinions from the ABA and substantial out-of-state authorities preclude representation of a third party adverse to a suspected incapacitated client in a guardianship proceeding.

The formal opinion from the ABA Committee on Ethics and Professional Responsibility, as well as the Ohio Supreme Court's opinion in *Dayton Bar Assn. v. Parisi,* 965 N.E.2d 268, 274-75 (Ohio 2012), previously cited by Thetford in her Petition at pp. 12-15 and contained in Exhibits 4 and 5 to the Petition, are instructive on this issue. The ABA Committee analyzed ABA's Rule 1.14 and found that the exceptions to the conflicts rule contained therein were very narrow and under no circumstances authorize a lawyer to represent a third party, *much less an adverse third party*, in seeking to have a court appoint a guardian for his client. ABA Comm.

on Ethics & Prof'l Responsibility, Formal Op. No. 96-404, at 1 (1996), App. Ex. 4, at pp. 7-8.

As the ABA observed, in practice "it is not uncommon for the lawyer to be approached by a family member or other third party with a request that the lawyer represent that third party in pursuing the petition." *Id*. at p. 7. However, "after considerable analysis, the Committee conclude[d] that a lawyer with a disabled client should not attempt to represent a third party petitioning for a guardianship over the lawyer's client [because] [s]uch representation would necessarily have to be regarded as 'adverse' to the client. . . ." *Id*. at pp. 7-8. "In short, if the lawyer decides to file a guardianship petition, it must be on his own authority . . . and not on behalf of a third party, however well intentioned." *Id*. at p. 8.

Numerous out-of-state authorities have adopted the ABA opinion in full. [5] Two state supreme courts have endorsed ABA Formal Opinion 96-404 and held an

[5] Utah Eth. Op. 08-02 (Utah St. Bar.), 2008 WL 2110963, Supp. App. Ex. F ("[I]f a third party initiates the guardianship proceeding, the attorney should not represent the third party, nor should the attorney seek to be appointed guardian of a client with diminished capacity."); *Attorney Grievance Commission of Maryland v. Framm*, 449 Md. 620, 655-56, 144 A.3d 827 (2016), Supp. App. Ex. G (citing ABA 96-404 in holding that a lawyer is not authorized "to represent a third party in seeking to have a court appoint a guardian for his client."); *In re Discipline of Laprath*, 2003 SD 114, 670 N.W.2d 41 (S.D. 2003), Supp. App. Ex. H (quoting extensively from ABA 96-404 to reject attorney seeking appointment as guardian of her ex-husband and son); *In re Wyatt's Case*, 159 N.H. 285 (2009), Supp. App. Ex. I (citing ABA 96-404 to reject actions of attorney who provided legal services to third party pursuing guardianship over lawyer's client); Va. Legal Eth. Op. 1769, 2002 WL 31999376, Supp. App. Ex. J (Neither an attorney nor anyone else in the attorney's office may represent a daughter petitioning for guardianship of her mother, who is also a client of that attorney's office, because such an action is by its very nature adverse to the mother); S.C. Adv. Op. 05-11 (S.C. Bar. Eth. Adv. Comm.), 2005 WL 1704509, Supp. App. Ex. K ("If the attorney seeks the appointment of a guardian, this action must be on attorney's own authority under

attorney may not represent a third party in a guardianship proceeding against the attorney's current or former client. *See Attorney Grievance Commission of Maryland v. Framm*, 449 Md. 620, 655-56, 144 A.3d 827 (2016), Supp. App. Ex. G (citing ABA 96-404 in holding that a lawyer is not authorized "to represent a third party in seeking to have a court appoint a guardian for his client."); *In re Discipline of Laprath*, 2003 SD 114, 670 N.W.2d 41 (S.D. 2003), Supp. App. Ex. H (quoting extensively from ABA 96-404 to reject attorney seeking appointment as guardian of her ex-husband and son).

The Ohio Supreme Court has held that an attorney violated the Ohio Code of Professional Responsibility and Rules of Professional Conduct by representing both a proposed guardian and a proposed ward in a guardianship proceeding. *See Dayton Bar Assn.*, 965 N.E.2d at 274-75. There, an attorney undertook to represent an elderly women who claimed that she was being held in an assisted living facility against her will. *Id.* at 271. After noticing that her client exhibited several symptoms commonly associated with Alzheimer's disease, the attorney applied for guardianship of her client. *Id*. Thereafter, the client executed a power of attorney

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Rule 1.14 and not on behalf of a third party, which would be prohibited under Rule 1.7(a)"); Colo. Formal Op. 126, (May 6, 2015), Supp. App. Ex. L ("[T]he lawyer should not represent a third party petitioning for the appointment of a guardian for the lawyer's client."); Vt. Eth. Op. 2006-1, Supp. App. Ex. M ("ABA Formal Opinon (sic) 96-404. . . is directly on point to this situation and is reproduced at length. . . .").

that served to appoint her attorney as her attorney-in-fact. *Id.* at 272. The attorney then withdrew her initial guardianship application and filed a separate application that sought to appoint her client's niece as guardian. *Id.* at 272. The Ohio Supreme Court adopted the reasoning in ABA Formal Opinion 96-404, and concluded that the attorney's representation of the client's niece was, "no matter how well-intentioned, [ ] necessarily adverse to the [client]." *Id*. at 274. The court went on to hold that the rules do "not . . . authorize the attorney to represent third parties in guardianship proceedings against a client . . . ." *Id.* at 274.

The New Hampshire Supreme Court likewise adopted the analysis in ABA Formal Opinion 96-404. *In re Wyatt's Case*, 159 N.H. 285, 302 (2009), Supp. App. Ex. I. There, a lawyer represented a client on a variety of personal matters, including his relations with trustees of trusts previously established for his benefit. *Id.* at 289. To continue funding of the trusts, the client agreed to enter into a voluntary conservatorship. *Id*. at 290. Sometime later, the conservator became concerned about the client's mental health and sought guidance from the attorney. *Id*. at 291. The attorney recommended the conservator obtain a limited guardianship for the client but never discussed the matter with his client. *Id*. at 291-92. Although the conservator engaged separate counsel, the attorney continued to provide legal services to the conservator in pursuit of the guardianship. *Id*. at 292. The New Hampshire Supreme Court determined such dual representation was impermissible.

Id. at 298. "[N]othing in the rule suggests that the lawyer may represent a third party in taking such action. If the lawyer decides to file a guardianship petition, it must be on his own authority under Rule 1.14 and not on behalf of a third party, however well intentioned." *Id*. at 302 (citing ABA Comm. on Ethics & Prof'l Responsibility, Formal Op. No. 96–404 (1996)).

Even without the ABA's guidance, a national consensus has formed on the impropriety of representing a third party in a guardianship proceeding against one's own client. Multiple out-of-state authorities that considered the matter before the ABA issued Formal Opinion 96-404 reached the exact same conclusion.[6]

Similarly, opinions by out-of-state authorities that do not rely on ABA Formal Opinion 96-404, independently arrive at the same conclusion.[7] In fact, several states

[6] Mich. Eth. Op RI-176 (1993), Supp. App. Ex. P ("A lawyer may not undertake representation of both a mother and daughter in proceedings to establish a guardian for the mother when the lawyer knows the mother's and daughter's interest in establishing the guardianship are adverse."); Vt. Bar Ass'n Adv. Eth. Op. 87-14, Supp. App. Ex. Q. (An attorney who temporarily represented a husband and wife in a probate court proceeding may not thereafter represent only the wife in a related probate guardianship proceeding since "public confidence and the avoidance of even the appearance of impropriety mandate the attorney refusing to represent the wife."); Wash. Bar Eth. Op. 980 (1986), Supp. App. Ex. R (A lawyer who represented both husband and wife should likely not represent the wife in a petition for guardianship of the husband since "the guardianship proceeding [is] an adversarial one which would create a conflict in seeking the appointment of the wife as the guardian, [and] if the lawyer were aware of an actual conflict of interest or the use of confidences or secrets, [then] the lawyer could not represent the wife in seeking the guardianship.").

[7] Mass. Bar Ass'n Comm. on Prof'l Ethics, Opinion 05-05 (2005), Supp. App. Ex. S ("It would be inappropriate for a lawyer for a long-time client to represent a son seeking to have a guardian appointed for the client when it seems likely that the lawyer will be opposing the client's wishes and the lawyer would not be able to comply with the consent and reasonableness tests that would permit such Representation"); Conn. Bar Ass'n Comm. on Prof'l Ethics, Conn. Eth. Op. 97-21, 1997 WL 700699, Supp. App. Ex. T. ("[T]he Committee concludes that a lawyer with a disabled

go even further than the ABA in an effort to avert potential conflicts of interest, and bar an attorney from representing himself in a petition for guardianship of their client or even serving as guardian at all. For example, the New York State Bar has opined that an attorney representing a client he or she believes is no longer competent to handle her own affairs cannot represent "him-or herself (or anyone else) as petitioner in a [guardianship] proceeding…. Doing so would place the lawyer in a position where he or she is advocating on behalf of one client (the petitioner) in opposition to another current client, thereby creating an impermissible conflict of interest. . . ." N.Y. State Bar Ass'n Comm. on Prof'l Eth., N.Y. Eth. Opinion 746, at *6, 2001 WL 901079, Supp. App. Ex. N.

In addition, the Kentucky Bar Association opined that "[i]n no event should the attorney initiating [judicial proceedings] serve as the guardian or conservator for purposes of exercising decision-making power relating to the discharge." Ky. Bar Association, Eth. Op. KBA E-314, at p. 2 (1986), Supp. App. Ex. O.

In sum, there is substantial national authority in support of Thetford's argument.[8] Even if Allen's suspicions regarding Thetford's capacity were well-

client should not attempt to represent a third party petitioning for a guardianship over the lawyer's client."); N.Y. State Bar Ass'n Comm. on Prof'l Ethics, N.Y. Eth. Op. 986, 2013 WL 11324019, Supp. App. Ex. U ("It is a conflict of interest for a lawyer who represents a mentally incapacitated client…to also represent [a third party] in seeking to petition for a guardianship" where the client's stated wishes are contrary to the third-party's).

[8] *See* footnotes 5-7 *supra*; *see also* Cal. Eth. Op. 1989-112, at para. 2, 1989 WL 253260, Supp. App. Ex. V ("[A]n attorney cannot represent conflicting interests, absent the informed written

founded, an attorney in Allen's position possesses a number of options short of representing an adverse third-party in a guardianship proceeding against his own client.

The ABA, as well as multiple out-of-state authorities, recommend an attorney first try less drastic alternatives in an attempt to respect the client's autonomy and preferences to the maximum extent possible. ABA Comm. on Ethics & Prof'l Responsibility, Formal Op. No. 96-404, at 6 (1996); *cf.* TEX. EST. CODE ANN. § 1104.002 (West 2017) ("Before appointing a guardian, the court shall make a reasonable effort to consider the incapacitated person's preference of the person to be appointed guardian and. . . shall give due consideration to the preference. . . .). Most importantly, Texas law contemplates such alternatives as well. *See* TEX. EST. CODE ANN. § 1357.003, *et seq*, (West 2017) ("Supported Decision–Making Agreement Act"). To take just a few examples, an attorney may seek:

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consent of all parties concerned"); Sup. Ct. Comment. Rules of the Sup. Ct. of Ky., SCR 3.130 (2009), Supp. App. Ex. W "[T]he lawyer must keep the client's interests foremost and, except for protective action authorized under paragraph (b), must look to the client, and not family members, to make decisions on the client's behalf."); *Bd. of Overseers of the Bar v. Carton*, Grievance Comm'n File No. 14-316 (Me. 2015), Supp. App. Ex. X (Holding that an attorney failed to identify her fiduciary obligations to an elderly client for whom she held a power of attorney when taking on representation of the elderly client's daughter in a guardianship proceeding, creating a conflict of interest that the attorney failed to timely rectify, resulting in a warning from the Grievance Commission).

- the court appointment of a guardian *ad litem* under different representation. TEX. EST. CODE ANN. § 1054.051 (West 2017) ("The judge may appoint a guardian ad litem to represent the interests of an incapacitated person in a guardianship proceeding.").
- consult with persons or professional services who may take action to protect the client or support her decision-making. TEX. EST. CODE ANN. § 1357.002(3) (West 2017) (Supported decision-making means "a process of supporting and accommodating an adult with a disability to enable the adult to make life decisions . . . without impeding the self-determination of the adult."); TEX. EST. CODE ANN. § 1101.001(b)(3-a) (West 2017) (An applicant for the appointment of guardianship must swear to and state "whether alternatives to guardianship and available supports and services to avoid guardianship were considered"); TEX. EST. CODE ANN. § 1002.0015(3) (West 2017) ("Alternatives to Guardianship"); TEX. EST. CODE ANN. § 1002.031 (West 2017) ("Supports and Services").
- An attorney may even ask the client for her preference on a guardian – in fact, Rule 1.03 states an attorney *must* "explain the matter to the extent reasonably necessary to permit the client to make informed

decisions regarding the representation." TEX. DISCIPLINARY RULES PROF'L CONDUCT R. 1.03 (emphasis added).

Allen's failure to consider or attempt any one of these alternatives in light of the adversarial relationship between Thetford and Rogers supports Allen's disqualification.

C. *Franks v. Roades* is not applicable.

Franks v. Roades—the only case Rogers and Allen have offered to justify Allen's representation of Rogers in this guardianship proceeding—is wholly inapplicable to Thetford's motion to disqualify. R. 123-125. In *Franks*, Franks sued her attorney after the attorney, on his own behalf, instituted adversarial guardianship proceedings against Franks. *Franks v. Roades*, 310 S.W.3d 615, 620 (Tex. App.—Corpus Christi 2010, no pet.). Franks alleged that her attorney's actions, in relevant part, constituted: (1) professional negligence and/or (2) a breach of fiduciary duty. *Id.* at 620-21. The trial court disagreed and granted summary judgment on Franks' claims. *Id.* at 620. Franks never sought to disqualify her attorney during the guardianship proceeding. *Id.*

In reviewing the summary judgment, the Corpus Christi Court of Appeals was never asked to determine whether an attorney should be disqualified from participating in adversarial guardianship proceedings against his client; instead, the court was only called to address whether doing so would subject an attorney to *civil*

liability. *Id.* The standard applicable when seeking to hold an attorney liable for professional negligence and/or a breach of fiduciary duty dwarfs the simple standard to merely disqualify an attorney. *Compare Cosgrove v. Grimes*, 774 S.W.2d 662, 664-65 (Tex. 1989) (professional negligence) & *Graham Mortg. Corp. v. Hall*, 307 S.W.3d 472, 479 (Tex. App.—Dallas 2010, no pet) (breach of fiduciary duty), with *Coker*, 765 S.W.2d at 399-400 (disqualification). Accordingly, an opinion holding that an attorney could not be held civilly liable for instituting guardianship proceedings against his client is simply not applicable to any analysis regarding whether an attorney should be *disqualified* from representing a third party in an adversarial proceeding against his client.

Here, Thetford has not claimed that Allen is civilly liable for his representation of Rogers in the guardianship proceeding. Instead, Thetford merely sought to disqualify Allen. R. 47-49. *Franks* is also factually distinguishable in that neither she nor her privately-retained counsel contested or opposed the guardianship. *Franks*, 310 S.W.3d at 626. In her deposition, Franks did not remember the guardianship application being filed or that any doctors testified that she was incompetent. *Id.* In addition, Franks' attorney initiated the guardianship proceeding himself rather than on behalf of a third party who was indebted to Franks as is the case here. *Id.* at 627.

The *Franks* case can be read in harmony with the ABA Committee opinion, Ohio Supreme Court's opinion, and other authorities cited above to support disqualification of Allen in this case. Accordingly, Thetford's petition should be granted.

IV. Mandamus should issue because trial counsel should be disqualified.

Mandamus relief is proper when the trial court has committed a clear abuse of discretion and there is no adequate remedy by appeal. *In re Prudential Ins. Co. of Am.*, 148 S.W.3d 124, 135-36 (Tex. 2004) (orig. proceeding). Mandamus is appropriate to correct an erroneous order disqualifying counsel because there is no adequate remedy by appeal. *In re RSR Corp.*, 475 S.W.3d 775, 778 (Tex. 2015) (orig. proceeding); *In re Sanders*, 153 S.W.3d 54, 56 (Tex. 2004) (orig. proceeding).

CONCLUSION AND PRAYER

The trial court's order constitutes an abuse of discretion because Allen's representation of Rogers in this guardianship proceeding is adverse to Thetford and substantially related to Allen's prior representation of Thetford. Because Thetford has no adequate remedy at law to address the trial court's abuse of discretion, mandamus should issue to vacate the trial court's May 10, 2017 Order.

Respectfully submitted,

/s/ Mary H. Barkley

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ATTORNEYS FOR RELATOR
VERNA FRANCIS COLEY THETFORD

CERTIFICATE OF COMPLIANCE

Pursuant to TEX. R. APP. P. 9.4, I certify that this Brief, in relevant part, does not exceed 6,789 words. This is a computer-generated document created in Microsoft Word, using 14-point typeface for all text, except for footnotes, which are in 12-point typeface.

/s/ *Mary H. Barkley*
MARY H. BARKLEY

CERTIFICATION

I certify that I have read this Brief and have concluded that every factual statement in the Brief is supported by competent evidence included in the appendix or record.

/s/ *Mary H. Barkley*
MARY H. BARKLEY

CERTIFICATE OF SERVICE

This is to certify that a true and correct copy of Relator's Brief on the Merits has been served upon all counsel of record as noted on this the 7th day of February, 2018, addressed as follows:

Via Electronic Service:
Alfred G. Allen, III
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Attorneys for Real Parties in Interest
Jamie Kay Rogers and
Ciera Bank of Graham, Texas

Via Electronic Service:
Judge Stephen Bristow
districtjudge@youngcounty.org
Presiding Judge, 90th District Court
Young County
516 Fourth Street
Graham, Texas, 76450

/s/ *Mary H. Barkley*
MARY H. BARKLEY

TAB A

VERIFICATION

THE STATE OF TEXAS §
§
COUNTY OF TARRANT §

Before me, the undersigned Notary Public, on this day, personally appeared Mary H. Barkley, a person whose identity is known to me. After I administered an oath to her, upon her oath, she said the following:

"My name is Mary H. Barkley and I am capable of making this affidavit, and the facts in this affidavit are true to my personal knowledge.

"I am one of the attorneys of record for Relator. A true and correct copy of the Application for Attorneys' Fees, Order Approving Attorneys' Fees, Brief in Support of Application for Attorneys' Fees, Notice of Opposition to Application for Attorney's Fees, and the Order Granting Motion to Stay Proceedings is attached hereto, respectively, as Exhibits A, B, C, D, and E."

MHB

MARY H. BARKLEY

SUBSCRIBED AND SWORN TO BEFORE ME by on February 7, 2018.

KELLIE A. GUINN NOTARY PUBLIC STATE OF TEXAS ID 10734413 EXP. 03/29/21

Notary Public for the State of Texas

No. 17-0634

Supreme Court of Texas

IN RE VERNA FRANCIS COLEY THETFORD,
Relator

From the Second Court of Appeals at Fort Worth, Texas
Case No. 02-17-00182-CV

INDEX TO SUPPLEMENTAL APPENDIX TO RELATOR'S BRIEF ON THE MERITS

A. Application for Attorneys' Fees

B. Order Approving Attorneys' Fees

C. Brief in Support of Application for Attorneys' Fees

D. Notice of Opposition to Application for Attorney's Fees

E. Order Granting Motion to Stay Proceedings

F. Utah Eth. Op. 08-02 (Utah St. Bar.), 2008 WL 2110963

G. *Attorney Grievance Commission of Maryland v. Framm*, 449 Md. 620, 655-56, 144 A.3d 827 (2016)

H. *In re Discipline of Laprath*, 2003 SD 114, 670 N.W.2d 41 (S.D. 2003)

I. *In re Wyatt's Case*, 159 N.H. 285 (2009)

J. Va. Legal Eth. Op. 1769, 2002 WL 31999376

K. S.C. Adv. Op. 05-11 (S.C. Bar. Eth. Adv. Comm.), 2005 WL 1704509

L. Colo. Formal Op. 126, (May 6, 2015)

M. Vt. Eth. Op. 2006-1

N. N.Y. State Bar Ass'n Comm. on Prof'l Ethics, N.Y. Eth. Op. 746, 2001 WL 901079

O. Ky. Bar Ass'n, Eth. Op. KBA E-314 (1986)

P. Mich. Eth. Op RI-176 (1993)

Q. Vt. Bar Ass'n Adv. Eth. Op. 87-14

R. Wash. Bar Eth. Op. 980 (1986)

S. Mass. Bar Ass'n Comm. on Prof'l Ethics, Opinion 05-05 (2005)

T Conn. Bar Ass'n Comm. on Prof'l Ethics, Conn. Eth. Op. 97-21, 1997 WL 700699

U. N.Y. State Bar Ass'n Comm. on Prof'l Ethics, N.Y. Eth. Op. 986, 2013 WL 11324019

V. Cal. Eth. Op. 1989-112, 1989 WL 253260

W. Sup. Ct. Comment. Rules of the Sup. Ct. of Ky., SCR 3.130 (2009)

X. *Bd. of Overseers of the Bar v. Carton*, Grievance Comm'n File No. 14-316 (Me. 2015)

EXHIBIT A

No. 33,186

GUARDIANSHIP OF	§	**IN THE DISTRICT COURT**
	§	
VERNA FRANCIS COLEY THETFORD,	§	**90th JUDICIAL DISTRICT**
	§	
AN INCAPACITATED PERSON	§	**YOUNG COUNTY, TEXAS**

APPLICATION FOR ATTORNEYS' FEES

TO THE HONORABLE JUDGE OF SAID COURT:

NOW COME Jamie Kay Rogers ("Rogers"), Temporary Guardian of the Person of Verna Francis Coley Thetford, and Ciera Bank, Graham Texas, Trustee of a Management Trust over the Estate of Verna Francis Coley Thetford ("Mrs. Thetford"), and pursuant to Section 1251.013, Texas Estates Code, requests the payment of all court costs, including attorney's fees, incurred. In support of such motion, applicants would respectfully show the Court as follows:

I.

On April 10, 2017, Rogers filed an Application seeking: (1) her appointment as Temporary Guardian of the person of Mrs. Thetford; and (2) the creation of a management trust for the benefit of the Estate of Mrs. Thetford, with Ciera Bank, Graham, Texas, serving as trustee thereof.

II.

By Order signed May 10, 2017, Rogers was appointed Temporary Guardian of the Person of Mrs. Thetford, and Ciera Bank, Graham Texas, was appointed Trustee of a Management Trust over the Estate of Mrs. Thetford. In seeking the appointment of a Temporary Guardian of the person of Mrs. Thetford and the creation of a management trust for her benefit, Rogers and Ciera Bank incurred court costs and attorneys' fees. Also, by Order signed May 10, 2017, the Motion to

Disqualify Alfred G. Allen, III from representing the applicant in the temporary guardianship proceeding was denied.

III.

Subsequent to May 10, 2017, Thetford has: (1) sought mandamus relief from the Fort Worth Court of Appeals regarding the disqualification of Rogers' and Ciera's attorney, and the reconsideration and appeal of the denial of such relief, which was also denied, and has now filed a Petition for Writ of Mandamus in the Texas Supreme Court to disqualify Roger's and Ciera's attorney; and (2) filed an interlocutory appeal in the Fort Worth Court of Appeals regarding the appointment of the Temporary Guardian and the creation of the management trust. As a result, Rogers and Ciera have continued to incur attorneys' fees related to the temporary guardianship, not only with their original attorney, but also with Donald E. Herrmann, David E. Keltner, and Joe Greenhill, of Kelly Hart & Hallman LLP, Fort Worth, Texas, who were retained to assist with appellate issues.[1]

IV.

Section 1251.013, Texas Estates Code, provides:

"If the court appoints a temporary guardian after the hearing required by Section 1251.006(b), all court costs, including attorney's fees, may be assessed as provided by Sections 1155.054 and 1155.151."

V.

Sections 1155.054 and 1155.151, Texas Estates Code, further provide that the Court may

---

[1]The Court should note that when Mrs. Thetford's attorney first sought extraordinary relief in the Fort Worth Court of Appeals, he unilaterally hired additional Fort Worth counsel from Cantey Hanger LLP "on her behalf".

authorize the payment of reasonable and necessary attorney's fees, as determined by the Court, in amounts the Court considers equitable and just, if the Court finds that the applicant acted in good faith and for just cause in the filing and prosecution of the application, from available funds of the ward's estate or management trust, if created, to an attorney who represents the person who filed an application for guardianship.

VI.

The Court's appointment of Rogers as Temporary Guardian of the Person of Mrs. Thetford and the creation of a management trust for the benefit of Mrs. Thetford establishes that Rogers acted in good faith and for just cause in the filing and prosecution of the application for the appointment of a temporary guardian and the creation of a management trust, as well as the appellate services in upholding the rulings of this Court and the Court of Appeals.

VII.

Attached hereto as Exhibit A is the affidavit of Alfred G. Allen, III, that includes an itemized statement of attorneys' fees and expenses incurred by Rogers and Ciera with the law firm of Turner & Allen, P. C. in connection with the temporary guardianship and the management trust and the appeals thereof from September 1, 2017, through October 31, 2017.

Attached hereto as Exhibit B is the affidavit of Don Herrmann that includes an itemized statement of attorneys' fees and expenses incurred by Rogers and Ciera with the law firm of Kelly Hart & Hallman LLP in connection with the temporary guardianship and the management trust and the appeals thereof from September 1, 2017, through October 31, 2017.

WHEREFORE, PREMISES CONSIDERED, Rogers and Ciera request that the Court enter an Order directing Ciera Bank, Graham Texas, Trustee of a Management Trust over the Estate

of Verna Francis Coley Thetford, to pay the sum of $11,973.00 to Turner & Allen, P. C., and the sum of $19,567.00 to Kelly Hart & Hallman LLP within five (5) business days of the entry of this order.

Respectfully submitted,

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A Professional Corporation
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(940) 549-3456
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By: */s/ Alfred G. Allen, III*
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and

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VERIFICATION

Before me, the undersigned Notary Public, on this day personally appeared Jamie Rogers, who, after being duly sworn, stated under oath that she is the Temporary Guardian of the Person of Verna Francis Coley Thetford in this action; that she is over the age of eighteen years; that she is of sound mind; that she suffers from no legal disabilities; that she is fully competent to make this verification; that she has read the above and foregoing Application for Attorneys' Fees; that she has personal knowledge of the facts set forth therein; and that every fact contained therein is true and correct.

Jamie Rogers

SUBSCRIBED AND SWORN TO BEFORE ME on the 9th day of November, 2017.

MARSHA SLOAN
Notary Public, State of Texas
Expires 03/19/2021
I.D.# 205880-0

Notary Public, State of Texas

VERIFICATION

Before me, the undersigned Notary Public, on this day personally appeared Kyle Peavy, who, after being duly sworn, stated under oath that he is Executive Vice President and Senior Trust Officer for Ciera Bank, which was appointed Trustee of the Management Trust for the Estate of Verna Francis Coley Thetford in this action; that he is over the age of eighteen years; that he is of sound mind; that he suffers from no legal disabilities; that he is fully competent to make this verification on behalf of Ciera Bank; that he has read the above and foregoing Application for Attorneys' Fees; that he has personal knowledge of the facts set forth therein; and that every fact contained therein is true and correct.

Kyle Peavy

SUBSCRIBED AND SWORN TO BEFORE ME on the 9th day of November, 2017.

MARSHA SLOAN
Notary Public, State of Texas
Expires 03/19/2021
I.D.# 205880-0

Notary Public, State of Texas

CERTIFICATE OF CONFERENCE

This is to certify that the undersigned counsel of record has conferred with Robert E. Aldrich, Jr., counsel for Verna Francis Coley Thetford, by email on November 9, 2017, concerning the merits of this Application. Mr. Aldrich opposes this application.

/s/ Alfred G. Allen, III

CERTIFICATE OF SERVICE

This is to certify that on the 9 day of November, 2017, this document was properly served on all parties in compliance with Texas Rule of Civil Procedure 21a.(a)(1) by serving such document, through the electronic file manager, on the counsel of record for all parties.

/s/ Alfred G. Allen, III

No. 33,186

GUARDIANSHIP OF	§	**IN THE DISTRICT COURT**
	§	
VERNA FRANCIS COLEY THETFORD,	§	**90th JUDICIAL DISTRICT**
	§	
AN INCAPACITATED PERSON	§	**YOUNG COUNTY, TEXAS**

EXHIBIT A TO APPLICATION FOR ATTORNEYS' FEES – AFFIDAVIT OF ALFRED G. ALLEN, III

The STATE OF TEXAS	§
	§
COUNTY OF YOUNG	§

BEFORE ME, the undersigned authority, on this day personally appeared Alfred G. Allen, III, and after being duly sworn according to law, upon his oath, deposed and stated as follows:

1. My name is Alfred G. Allen, III. I am over the age of eighteen years, am of sound mind, suffer from no legal disabilities and am fully competent to make this Affidavit. I have personal knowledge of the facts set forth hereinbelow, such facts are true and correct, and I am fully competent to testify to each and all such facts. I am an attorney at law admitted to practice in the State of Texas and the United States District Courts for the Northern and Southern Districts of Texas. I am competent to give this Affidavit and have personal knowledge of all matters set forth herein.

2. By an Order signed in this cause of action on May 10, 2017, Jamie Kay Rogers ("Rogers") was appointed Temporary Guardian of the Person of Verna Francis Coley Thetford ("Mrs. Thetford"), and Ciera Bank, Graham, Texas ("Ciera"), was appointed Trustee of a Management Trust over the Estate of Mrs. Thetford.

3. I was retained to represent Rogers and Ciera in this matter on February 27, 2017. The fees for the services that Turner & Allen, P. C., and I have provided and are continuing to provide to Rogers and Ciera in this matter have been and are being calculated on an hourly-rate basis. The rates charged for the attorney and paralegal services being rendered to Rogers and Ciera in this matter are as follows:

   a. Alfred G. Allen, III, attorney / partner, $300.00 per hour.
   b. Jess Turner, attorney / partner, $300.00 per hour.

4. I am familiar with rates charged by attorneys and law firms of similar experience, reputation and ability. The forgoing rates charged to and to be paid by Rogers and Ciera for the services rendered by Turner & Allen, P. C., and me in this case are reasonable and customary.

5. Attorney's Fees for services through August 31, 2017, have been previously paid. From August 28, 2017, through October 31, 2017, my law firm and I have expended no fewer than 39.91 hours representing Rogers and Ciera in this matter. Attached hereto as Exhibit A-1 are true and correct copies of the billing statements generated by my law firm to Rogers and Ciera in this matter. These statements contain the accurate and contemporaneously-produced time and billing records for Turner & Allen, P. C. These statements were created using information transmitted by the individual timekeeper shown/identified in the billing statements. Each of the timekeepers had personal knowledge of the activities they recorded in their respective time entries and made accurate and detailed recordings of such activities at or near the time the activities occurred. These statements, as well as the supporting documentation, were kept in the regular course of regularly conducted activity of Turner & Allen, P. C., that activity being the creation and maintenance of accurate records of the amount of time spent performing billable activities in connection with the representation of clients in matters where Turner & Allen, P. C., is or may be compensated on an hourly basis.

6. With regard to Exhibit A-1, it is my opinion that the activities set forth in such billing statements were reasonable and necessary in the representation of Rogers and Ciera in this action from August 28, 2017, through October 31, 2017. It is also my opinion that the described activities and the amount of time spent on such activities were reasonable and necessary. As reflected in Exhibit A-1, the total time incurred by Turner & Allen, P. C., between August 28, 2017, and October 31, 2017, in representing Rogers and Ciera in this matter is 39.91 hours.

7. Multiplying the reasonable number of hours reflected in Exhibit A-1 times the reasonable hourly rates charged to Rogers and Ciera, as shown above, results in a total attorneys' fees award of **$11,973.00** for the services rendered to Rogers and Ciera from August 28, 2017, through October 31, 2017.

Further, Affiant sayeth not.

Alfred G. Allen, III

SUBSCRIBED AND SWORN TO BEFORE ME by the said Alfred G. Allen, III, on the 9th day of November, 2017, to certify which witness my hand and seal of office.

MARSHA SLOAN
Notary Public, State of Texas
Expires 03/19/2021
I.D.# 205880-0

Notary Public, State of Texas

EXHIBIT A -1

Turner & Allen, P.C.

Graham, TX 76450
(940) 549-3456

Invoice

Date	Invoice #
11/1/2017	4986

Bill To

Jamie Rogers, Guardian for
Verna Therford
1206 Cherry St.
Graham, TX 76450

Reference:
Guardianship

Date	Description	Hours	Expenses	Amount
	Professional Services Rendered by Alfred G. Allen, III and Jess N. Turner, III			
8/28/2017	JNT - Review of Response and Opposition to Application for Attorney's Fees	0.08		24.00
9/1/2017	AGA - Research regarding fee forfeiture	3		900.00
9/6/2017	AGA - Review information; Email to S. Crawford; Finalize Supplemental Attorney Fees Application	1.25		375.00
9/8/2017	AGA - Prepare for hearing	1.5		450.00
9/11/2017	AGA - Conferennce with D. Hermann; Prepare exhibit for hearing; Work on summary of Aldrich fees for hearing	1.75		525.00
9/12/2017	AGA - Prepare for and attend hearing on attorneys fees; Research regarding Rule 12; Work on Letter Brief in response to Trail Brief	7.5		2,250.00
9/13/2017	AGA - Work on Letter Brief	4.5		1,350.00
9/14/2017	JNT - Review of letter brief; Interoffice conference with Rusty	0.58		174.00

	Total
	Payments/Credits
	Balance Due

Turner & Allen, P.C.

Graham, TX 76450
(940) 549-3456

Invoice

Date	Invoice #
11/1/2017	4986

Bill To

Jamie Rogers, Guardian for
Verna Therford
1206 Cherry St.
Graham, TX 76450

Reference:
Guardianship

Date	Description	Hours	Expenses	Amount
9/15/2017	AGA - Finalize letter brief to Judge Bristow; Transmit brief	1.75		525.00
9/19/2017	AGA - Review letter brief	1		300.00
10/2/2017	AGA - Review files; Send copies of trial testimony to D. Cullum	0.5		150.00
10/3/2017	AGA - Work on Response to Petition for Mandamus; Teleconference with D. Herrmann	3		900.00
10/4/2017	AGA - Work on Response to Petition for Mandamus	2.5		750.00
10/5/2017	AGA - Work on Response to Petition for Mandamus	1		300.00
10/10/2017	AGA - Conference with Dr. Cullum; Work on Response to Petition for Mandamus	3.5		1,050.00
10/11/2017	AGA - Work on Motion and Order regarding approcal to settle L. D.'s Estate	1		300.00
10/12/2017	AGA - Review and revise response to Petition for Mandamus	1		300.00

Total	
Payments/Credits	
Balance Due	

Turner & Allen, P.C.

Graham, TX 76450
(940) 549-3456

Invoice

Date	Invoice #
11/1/2017	4986

Bill To
Jamie Rogers, Guardian for Verna Therford 1206 Cherry St. Graham, TX 76450

Reference:
Guardianship

Date	Description	Hours	Expenses	Amount
10/13/2017	AGA - Final review of Response to Petition for Mandamus	1.5		450.00
10/16/2017	AGA - Review and finalize Response to Petition for Mandamus	1		300.00
10/19/2017	AGA - Teleconfernece with D. Hermann; Conference call with Dr. Cullum	1		300.00
10/20/2017	AGA - Teleconference with D. Hermann; Teleconference with Dr. Cullum	1		300.00

Total	$11,973.00
Payments/Credits	$0.00
Balance Due	$11,973.00

No. 33,186

GUARDIANSHIP OF	§	**IN THE DISTRICT COURT**
	§	
VERNA FRANCIS COLEY THETFORD,	§	**90th JUDICIAL DISTRICT**
	§	
AN INCAPACITATED PERSON	§	**YOUNG COUNTY, TEXAS**

SUPPLEMENTAL EXHIBIT TO APPLICATION FOR ATTORNEYS' FEES
AFFIDAVIT OF DONALD E. HERRMANN

STATE OF TEXAS §
§
COUNTY OF TARRANT §

BEFORE ME, the undersigned authority, on this day personally appeared Donald E. Herrmann, and after being duly sworn according to law, upon his oath, deposed and stated as follows:

1. My name is Donald E. Herrmann. I am over the age of eighteen years, am of sound mind, suffer from no legal disabilities and am fully competent to make this Affidavit. I have personal knowledge of the facts set forth herein below, such facts are true and correct, and I am fully competent to testify to each and all such facts. I am an attorney at law admitted to practice in the State of Texas and the United States District Courts for the Northern, Western, Eastern, and Southern Districts of Texas. I am competent to give this Affidavit and have personal knowledge of all matters set forth herein.

2. By an Order signed in this cause of action on May 10, 2017, Jamie Kay Rogers ("Rogers") was appointed Temporary Guardian of the Person of Verna Francis Coley Thetford ("Mrs. Thetford"), and Ciera Bank, Graham, Texas ("Ciera"), was appointed Trustee of a Management Trust over the Estate of Mrs. Thetford.

3. Kelly Hart & Hallman LLP and I were retained to represent Rogers and Ciera in this matter on or about May 23, 2017. The fees for the services that Kelly Hart & Hallman LLP and I have provided and are continuing to provide to Rogers and Ciera in this matter have been and are being calculated on an hourly rate basis. The rates charged for the attorney and paralegal services being rendered to Rogers and Ciera in this matter are as follows:

   a. Donald E. Herrmann, attorney / partner, $465.00 per hour.
   b. David E. Keltner, attorney / partner, $600.00 per hour.
   c. Joe Greenhill, attorney / associate, $265.00 per hour.
   d. Stacy Blanchette, paralegal, $225.00 per hour.

4. I am familiar with rates charged by attorneys and law firms of similar experience, reputation and ability. The forgoing rates charged to and to be paid by Rogers and Ciera for the services rendered by Kelly Hart & Hallman LLP in this case are reasonable and customary.

5. During the period of September 1, 2017, through September 30, 2017, my law firm and I expended no fewer than 33.6 hours representing Rogers and Ciera in this matter. Attached hereto is a true and correct copy of the billing statement issued by my law firm to Rogers and Ciera in this matter for that time period. The statement contains the accurate and contemporaneously-produced time and billing records for Kelly Hart & Hallman LLP. The statement was created using information transmitted by the individual timekeeper shown/identified in the billing statement. Each of the timekeepers had personal knowledge of the activities they recorded in their respective time entries and made accurate and detailed recordings of such activities at or near the time the activities occurred. The statement, as well as the supporting documentation, were kept in the regular course of regularly conducted activity of Kelly Hart & Hallman LLP, that activity being the creation and maintenance of accurate records of the amount of time spent performing billable activities in connection with the representation of clients in matters where Kelly Hart & Hallman LLP is or may be compensated on an hourly basis.

6. During the period of October 1, 2017, through October 31, 2017, my law firm and I expended no fewer than 28.1 hours representing Rogers and Ciera in this matter. Attached hereto is a true and correct copy of the billing statement issued by my law firm to Rogers and Ciera in this matter for that time period. The statement contains the accurate and contemporaneously-produced time and billing records for Kelly Hart & Hallman LLP. The statement was created using information transmitted by the individual timekeeper shown/identified in the billing statement. Each of the timekeepers had personal knowledge of the activities they recorded in their respective time entries and made accurate and detailed recordings of such activities at or near the time the activities occurred. The statement, as well as the supporting documentation, were kept in the regular course of regularly conducted activity of Kelly Hart & Hallman LLP, that activity being the creation and maintenance of accurate records of the amount of time spent performing billable activities in connection with the representation of clients in matters where Kelly Hart & Hallman LLP is or may be compensated on an hourly basis.

6. With regard to the attached Exhibits, it is my opinion that the activities set forth in such billing statements were reasonable and necessary in the representation of Rogers and Ciera in this action from September 1, 2017, through October 31, 2017. It is also my opinion that the described activities and the amount of time spent on such activities were reasonable and necessary.

6. Multiplying the reasonable number of hours reflected in the attached Exhibits times the reasonable hourly rates charged to Rogers and Ciera, as shown above, results in total attorneys' fees charges of **$19,567.00** for the services rendered to Rogers and Ciera in September and October 2017.

Further, Affiant sayeth not.

Donald E. Herrmann

SUBSCRIBED AND SWORN TO BEFORE ME by the said Donald E. Herrmann on the 9th day of November 2017, to certify which witness my hand and seal of office.

Notary Public, State of Texas

JAMIE K. ROGERS
Notary Public, State of Texas
Expires MARCH 21, 2020
I.D.# 587841-9

Kelly Hart & Hallman LLP
201 Main, Suite 2500
Fort Worth, TX 76102
(817) 332-2500
Taxpayer ID# 20-3856550

Jamie Kay Rogers
c/o Turner & Allen, P.C.
Attn: Alfred G. Allen, III
PO Box 930 / 455 Elm Street, Ste. 100
Graham, TX 76450

November 7, 2017
Invoice #495582

Client # 12956
Matter # 12956.0100
Guardianship of Verna Thetford

Legal services rendered through October 31, 2017

10/02/17	D. Herrmann	Begin review of Mandamus Petition and draft response.	1.00	$465.00
10/03/17	J. Greenhill	Attention to response to mandamus petition; conference with Don Herrmann to discuss the response; incorporate Mr. Herrmann's edits.	1.50	$397.50
10/03/17	D. Herrmann	Continue review of draft response to Mandamus Petition; research; conference with Joe Greenhill regarding revisions to draft response.	1.50	$697.50
10/04/17	D. Herrmann	Review revisions to Response to Mandamus; review Rusty Allen's proposed revisions; telephone conference with Joe Greenhill regarding same.	1.00	$465.00
10/05/17	J. Greenhill	Work on response to mandamus petition.	1.40	$371.00
10/05/17	D. Herrmann	Review Response with Rusty Allen comments incorporated; telephone conference with Joe Greenhill regarding same.	.50	$232.50
10/06/17	D. Herrmann	Review revisions to Response to Mandamus.	.50	$232.50
10/06/17	S. Blanchette	Receive David Keltner's edits and review; conferences with Joe Greenhill regarding additional team edits.	.40	$90.00
10/09/17	S. Blanchette	Make team edits to response and continue working on word limit matters.	1.00	$225.00

10/10/17	D. Herrmann	Telephone conference with Rusty Allen regarding strategy on Dr. Cullum testimony.	.20	$93.00
10/12/17	J. Greenhill	Prepare response to mandamus petition for filing; conference call with Mary Barkley.	.90	$238.50
10/12/17	S. Blanchette	Begin review and edits to response to mandamus, including legal cites.	2.80	$630.00
10/13/17	J. Greenhill	Work on response to petition for writ of mandamus.	3.80	$1,007.00
10/13/17	S. Blanchette	Continue review and edits to response; prepare draft tables; conferences with Joe Greenhill regarding additional edits and word limit issues; make additional edits and forward to Mr. Greenhill; prepare appendix.	2.20	$495.00
10/16/17	J. Greenhill	Attention to response to petition for writ of mandamus.	5.50	$1,457.50
10/16/17	D. Herrmann	Review final revisions to mandamus response.	.50	$232.50
10/16/17	S. Blanchette	Continue with team edits to mandamus response; prepare brief for filing, including bookmarks and hyperlinks; efile with court.	1.80	$405.00
10/17/17	S. Blanchette	Receive court's notice filing our response to mandamus; update case list.	.20	$45.00
10/18/17	D. Herrmann	Telephone conference and e-correspondence with Marti Barclay regarding Motions to Stay; telephone conference with Rusty Allen regarding same; conference call with Rusty Allen and Dr. Cullum.	1.00	$465.00
10/19/17	S. Blanchette	Receive appellant's motion for stay and review; update case list.	.20	$45.00
10/24/17	S. Blanchette	Receive court's notice filing motion to stay and order staying case; update case list and docket.	.20	$45.00
		Total	28.10	$8,334.50

Disbursements

Total Disbursements	$.00

Total This Invoice	$8,334.50
Previous Balance	$11,232.50
TOTAL AMOUNT DUE	$19,567.00

Kelly Hart & Hallman LLP
201 Main, Suite 2500
Fort Worth, TX 76102
(817) 332-2500
Taxpayer ID# 20-3856550

Jamie Kay Rogers
c/o Turner & Allen, P.C.
Attn: Alfred G. Allen, III
PO Box 930 / 455 Elm Street, Ste. 100
Graham, TX 76450

October 10, 2017
Invoice #493812

Client # 12956
Matter # 12956.0100
Guardianship of Verna Thetford

Legal services rendered through September 30, 2017

09/07/17	D. Herrmann	E-correspondence and telephone conference with Rusty Allen.	.50	$232.50
09/11/17	D. Herrmann	Prepare for hearing on attorney fees applications.	3.00	$1,395.00
09/12/17	D. Herrmann	Travel to Graham; meeting with Rusty Allen; attend hearing on attorney fees issues.	5.00	$2,325.00
09/13/17	D. Herrmann	Two telephone conferences with Rusty Allen regarding post-submission brief; review Price v. Golden.	.50	$232.50
09/14/17	D. Herrmann	Review post-submission brief (letter); confer with Rusty Allen regarding same.	.50	$232.50
09/15/17	D. Keltner	Receive notice from the Texas Supreme Court regarding request for a response; notify Joe Greenhill and Don Herman; e-mails with Joe Greenhill where we discuss supplementation of the record.	.30	$180.00
09/16/17	S. Blanchette	Receive court's notice requesting a response to mandamus; update case list and docket.	.20	$45.00
09/18/17	J. Greenhill	Attention to response to petition for writ of mandamus; conduct related research.	5.80	$1,537.00
09/18/17	D. Herrmann	Review original mandamus in Supreme Court; conference with Joe Greenhill regarding same; telephone conference with Rusty Allen.	1.00	$465.00

09/18/17	S. Blanchette	Prepare response to mandamus shell and forward to Joe Greenhill; prepare supplemental mandamus record and forward to Mr. Greenhill for his review; prepare record for filing, including bookmarks, and efile with court.	1.20	$270.00
09/19/17	J. Greenhill	Attention to response to petition for writ of mandamus.	6.30	$1,669.50
09/20/17	J. Greenhill	Attention to response to petition for writ of mandamus.	3.40	$901.00
09/20/17	D. Herrmann	Review Aldrich letter to Court; re-read Allen letter to Court; telephone conference with Rusty Allen.	1.00	$465.00
09/20/17	S. Blanchette	Receive court's notice filing our supplemental mandamus record; update case list; assist with edits to mandamus response.	.40	$90.00
09/21/17	J. Greenhill	Work on response to mandamus petition.	1.10	$291.50
09/25/17	J. Greenhill	Attention to response to mandamus petition.	.30	$79.50
09/27/17	J. Greenhill	Attention to response to mandamus petition.	.40	$106.00
09/28/17	J. Greenhill	Continued work on response to mandamus petition.	2.00	$530.00
09/29/17	J. Greenhill	Work on response to mandamus petition.	.70	$185.50
		Total	33.60	$11,232.50

Disbursements

Total Disbursements	$.00
Total This Invoice	$11,232.50
TOTAL AMOUNT DUE	$11,232.50

EXHIBIT B

Filed: 1/26/2018 2:15 PM
Jamie Freeze Land
District Clerk
Young County, Texas
Karina Huerta

No. 33,186

GUARDIANSHIP OF	§	**IN THE DISTRICT COURT**
	§	
VERNA FRANCIS COLEY THETFORD,	§	**90th JUDICIAL DISTRICT**
	§	
AN INCAPACITATED PERSON	§	**YOUNG COUNTY, TEXAS**

ORDER FOR THE PAYMENT OF ATTORNEYS' FEES

On January 26, 2018, this Court considered the Applications for Attorneys' Fees filed by Jamie Kay Rogers ("Rogers"), Temporary Guardian of the Person of Verna Francis Coley Thetford, and Ciera Bank, Graham Texas, Trustee of a Management Trust over the Estate of Verna Francis Coley Thetford ("Mrs. Thetford"). After considering the pleadings, the facts set forth in the Applications, the affidavits, and the arguments of counsel, the Court holds that the Applications is granted.

The Court finds that Rogers acted in good faith and for just cause in the filing and prosecution of the application for the appointment of a temporary guardian of the person of Mrs. Thetford and the creation of a management trust over Mrs. Thetford's estate.

The Court further finds that the attorneys' fees reflected in the Affidavits of Alfred G. Allen, III, and Donald Herrmann, which affidavits are attached to the Applications for Attorneys' Fees, were reasonable and necessary.

IT IS, THEREFORE, ORDERED that Ciera Bank, Graham, Texas, Trustee of the Management Trust over the Estate of Verna Francis Coley Thetford, pay to Turner & Allen, P. C., the sum of $11,973.00.

IT IS FURTHER ORDERED that Ciera Bank, Graham, Texas, Trustee of the Management Trust over the Estate of Verna Francis Coley Thetford, pay to Kelly Hart & Hallman LLP the sum of $ 19,567.00 .

IT IS FURTHER ORDERED that such sums are to be paid within five (5) business days of the date of the signing of this Order.

SIGNED this 26 day of January, 2018.

JUDGE PRESIDING

EXHIBIT C

Filed: 9/12/2017 11:40 AM
Jamie Freeze Land
District Clerk
Young County, Texas
Jamie Land

NO. 33,186

GUARDIANSHIP OF	§	IN THE DISTRICT COURT
	§	
VERNA FRANCIS COLEY THETFORD	§	90th JUDICAL DSITRICT
	§	
AN INCAPACITATED PERSON	§	YOUNG COUNTY, TEXAS

BRIEF IN SUPPORT OF PAYMENT OF ATTORNEYS' FEES TO COUNSEL FOR THETFORD

TO THE HONORABLE JUDGE OF SAID COURT:

NOW COMES Verna Francis Coley Thetford and files this brief in support of the application for the payment of attorney's fees incurred by counsel retained to represent her interest.

I.

This Court is authorized by the Texas Estates Code and applicable case law to order Thetford's attorneys' fees to be paid because (1) the attorneys had a good faith belief that Ms. Thetford had the capacity to engage them; (2) Thetford is entitled to select counsel of her choice to oppose this guardianship to defend the removal of her most basic freedoms and otherwise protect her interests; and (3) Mr. Redell has approved the retention of litigation and appellate counsel in this unique case.

II.

Section 1202.103 of the Texas Estates Code provides that the Court may order compensation for services provided by an attorney retained to represent a purported ward's interests from funds in the ward's estate if the attorney had a good faith belief that the ward had the capacity necessary to retain the attorney's services. TEX. EST. CODE § 1202.103. Because Thetford is contesting the Court's finding of incapacity, the foregoing statute is relevant to this proceeding. Thetford's attorneys' good faith belief is supported by the Neurocognitive Consultation of Thetford by Dr. Scott Hilborn, Clinical Neuropsychologist with UNT Health

Science Center, the testimony of Retired Judge Stephen Crawford, friend of Thetford, Eddie Dalton, and counsel's interviews of Thetford.

III.

In *Oldham v. Calderon*, 1998 WL 104819, No. 14-95-01426-CV (Tex. App.—Houston [14th Dist.] 1998, pet. denied), after the trial court appointed an attorney ad litem for the ward, the ward retained new counsel to represent her. The trial court found that the ward had the right to be represented by counsel of her choice. *Id.* at *2. After a trial, the jury found that the ward was not incapacitated as to her person but was partially incapacitated as to her estate. *Id.* The trial court awarded attorneys' fees to the ward's attorneys, which award was challenged on appeal. *Id.* In affirming the trial court's decision, the 14th Court of Appeals stated:

> Nor do we believe that opposition to appointment of a guardianship, even if unsuccessful, can be considered antithetical to the interests of the proposed ward's estate. A guardianship proceeding threatens the personal and financial freedoms of a proposed ward, and those freedoms must be ably defended. Moreover, a trial court can make the most rational decision concerning appointment of a guardian only where the interests of the proposed ward are vigorously represented. Therefore, to the extent appellees could work more effectively with [the ward] in this case than an attorney selected by the court, her estate was benefitted, not harmed, by their involvement. *Id.* at *3.

IV.

Similarly, in *In re Guardianship of Glasser*, 297 S.W.3d 369, 375-76 (Tex. App.—San Antonio 2009, no pet.), the San Antonio Court of Appeals addressed whether the trial court properly paid attorneys' fees to special litigation counsel engaged by the attorney ad litem after a preliminary finding of incapacity. In that case, the attorney ad litem asked the court to approve the retention of special litigation counsel to protect the best interest of the ward in the lengthy litigation and the trial court approved. After two years of litigation and a 34-day jury trial, the trial court authorized payment of fees to the ad litem and litigation counsel and then discharged them from further duty. On appeal, the guardian challenged the court's ability to appoint litigation

counsel and the payment of fees to both the litigation counsel and the attorney ad litem. In affirming the trial court's judgment, the court of appeals reasoned:

> Nothing in the probate code suggests that the court is constrained to appoint only one person to represent the proposed ward without regard to the nature or complexity of the proceeding. Several courts have construed the probate court's statutory obligation to appoint counsel for the proposed ward to encompass the authority to authorize the number and caliber of counsel appropriate to the case. As such, the court has the discretion to authorize an attorney ad litem to enlist the assistance of additional counsel to represent the proposed ward when warranted by the circumstances. *Id.* at 376.

The court of appeals did decline to award appellate attorneys' fees to the ward's counsel. However, this portion of the decision is distinguishable from this case because the court found that appellees' appellate work was not in furtherance of protecting the ward's interests (rather, in furtherance of recovering their own fees), and the trial court expressly discharged the attorneys from service upon the final order prior to the appeal. *Id.* at 378.

V.

Here, Thetford's appellate fees have been incurred to protect the best interests of Thetford in her opposition to the guardianship in general and to Allen's role as counsel in this adversarial guardianship proceeding. Thetford's counsel's representation is based on a good faith belief that Thetford had the ability to hire them and has been done with the permission of Thetford's attorney ad litem. Accordingly, there is ample legal support for this Court to order the payment of Thetford's counsel's fees.

WHERFORE, PREMISES CONSIDERED, Verna Francis Coley Thetford respectfully requests that the Court enter an Order directing Cierra Bank, Graham Texas, Trustee of a Management Trust over the Estate of Verna Francis Coley Thetford, to pay the sum of $49,925.22 to the law firm of Cantey Hanger LLP, $25,000 to Cantey Hanger's IOLTA account, and $2,573.81 to the law firm of Aldrich PLLC within five (5) business days of the entry of this Order.

Respectfully submitted,

/s/ *Robert E. Aldrich*

ROBERT E. ALDRICH, JR.
State Bar No. 00984100
raldrich@canteyhanger.com
MARY H. BARKLEY
State Bar No. 24050737
mbarkley@canteyhanger.com
STEPHEN J. HUSCHKA
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Cantey Hanger Plaza
600 West 6th Street, Suite 300
Fort Worth, TX 76102-3685
(817) 877-2800
(817) 877-2807 – FAX

ATTORNEYS FOR RELATOR
VERNA FRANCIS COLEY THETFORD

CERTIFICATE OF SERVICE

I certify that on the 12th day of September, 2017, the foregoing was served on all parties via E-File Service in accordance with Rule 21a of the Texas Rules of Civil Procedure.

/s/ *Robert E. Aldrich*
Robert E. Aldrich

EXHIBIT D

Filed: 8/18/2017 4:30 PM
Jamie Freeze Land
District Clerk
Young County, Texas
Jamie Land

No. 33,186

GUARDIANSHIP OF	§	**IN THE DISTRICT COURT**
	§	
VERNA FRANCIS COLEY THETFORD,	§	**90th JUDICIAL DISTRICT**
	§	
AN INCAPACITATED PERSON	§	**YOUNG COUNTY, TEXAS**

NOTICE OF OPPOSITION TO APPLICATION FOR ATTORNEYS' FEES

TO THE HONORABLE JUDGE OF SAID COURT:

NOW COME Jamie Kay Rogers ("Rogers"), in her capacity as Temporary Guardian of the Person of Verna Francis Coley Thetford, and Ciera Bank, Graham Texas, ("Ciera") in its capacity as Trustee of a Management Trust over the Estate of Verna Francis Coley Thetford ("Mrs. Thetford"), and file their Opposition to Application for Attorneys' Fees. For such, Rogers and Ciera would respectfully show the Court as follows:

I.

On August 18, 2017, the alleged attorneys for Mrs. Thetford filed an Application for Attorneys' Fees, seeking compensation for the law firm of Aldrich PLLC, and the law firm of Cantey Hanger LLP.

II.

Rogers and Ciera oppose this application.

WHEREFORE, PREMISES CONSIDERED, Rogers and Ciera respectfully request that the Court set this Application for Attorneys' Fees for hearing.

Rogers and Ciera further request such other and further relief to which they may show themselves justly entitled.

Respectfully submitted,

TURNER & ALLEN
A Professional Corporation
P. O. Drawer 930
Graham, Texas 75450
(940) 549-3456
(940) 549-5691 (Telecopier)

By: */s/ Alfred G. Allen, III*
Alfred G. Allen, III
State Bar No. 01018300
aga@turnerandallen.com

and

Donald E. Herrmann
State Bar No. 09541300
don.herrmann@kellyhart.com
David E. Keltner
State Bar No. 11249500
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Joe Greenhill
State Bar No. 24084523
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KELLY HART & HALLMAN LLP
201 Main Street, Suite 2500
Fort Worth, Texas 76102
Telephone: (817) 878-3560
Telecopier: (817) 878-9760

CERTIFICATE OF SERVICE

This is to certify that on the 18th day of August, 2017, this document was properly served on all parties in compliance with Texas Rule of Civil Procedure 21a.(a)(1) by serving such document, through the electronic file manager, on the counsel of record for all parties.

/s/ Alfred G. Allen, III

EXHIBIT E

FILE COPY

COURT OF APPEALS
SECOND DISTRICT OF TEXAS
FORT WORTH

NO. 02-17-00195-CV

GUARDIANSHIP OF VERNA
FRANCIS COLEY THETFORD, AN
INCAPACITATED PERSON

FROM THE 90TH DISTRICT COURT OF YOUNG COUNTY
TRIAL COURT NO. 33186

ORDER

We have considered appellant's "Unopposed Motion to Stay Proceedings."

The motion is **GRANTED**. This appeal is stayed until a final ruling is issued in the related mandamus proceedings by the Texas Supreme Court in Case No. 17-0634.

The clerk of this court is directed to transmit a copy of this order to the attorneys of record, the trial court judge, and the trial court clerk.

DATED October 24, 2017.

PER CURIAM

PANEL: SUDDERTH, C.J.; MEIER and PITTMAN, JJ.

EXHIBIT F

UT Eth. Op. 08-02 (Utah St.Bar.), 2008 WL 2110963

Utah State Bar
Ethics Advisory Opinion Committee
Opinion Number 08-02
Issued March 11, 2008

***1** ¶ 1. **Issue**: Under what circumstances may an attorney who has represented a party in conjunction with a proceeding to appoint a guardian for an adult incapacitated person represent the guardian that is subsequently appointed as a result of that proceeding?

¶ 2. **Conclusion**: The representation of a court-appointed guardian by an attorney who has also represented one of the parties to the proceeding for the appointment of the guardian must be analyzed under Rules of Professional Conduct, Rules 1.7 and 1.9, the same way an attorney would analyze any conflict of interest between two current clients or between a current and former client. If the facts and circumstances of the case raise the specter of a direct or material adversity, or if the representation of another client creates a material limitation on the lawyer's ability to represent the guardian effectively in light of the fiduciary, statutory and court imposed obligations on the guardian, the attorney should either avoid the joint representation or exercise great care in obtaining the informed written consent of both affected clients. If there is an on-going proceeding involving both the former client and the prospective new client (the guardian), the conflict may not be waived and the representation of the guardian must be avoided.

¶ 3. **Background**: The issue addressed by this opinion arises in the context of a request under Utah Code Ann. § 75-5-303 (1988) for the appointment of a guardian of an incapacitated person. Under that section, the incapacitated person herself or "... any person interested in the incapacitated person's welfare may petition for a finding of incapacity and appointment of a guardian. [1] Once the guardian is appointed, he or she may retain counsel to advise with respect to the conduct of the guardian's duties.

¶ 4. The nature of the proceedings leading to the appointment of a guardian involve several parties, including the person (usually a relative) requesting the appointment. This person is frequently represented by counsel. The person for whom guardianship is required to be represented by counsel. The proceedings seeking the appointment may be largely consensual or they may be contested. Conflicts in the proceedings will primarily arise in two different contexts:
a) the party to the guardianship wishes to be appointed guardian, and other parties in interest object in favor of an unrelated third party guardianship or

b) the person for whom the guardianship is sought objects to the appointment.

Additional conflicts other may arise, depending on the nature of the guardianship proceeding and the identity of the parties to it, but should nonetheless be resolved as set forth below.

¶ 5. **Analysis**: If an attorney who has represented one of the parties in a contentious guardianship proceeding wishes to subsequently represent the person appointed as guardian, he or she must determine whether there is an impermissible conflict of interest in the subsequent representation. Resolution of the question is dependent on the facts of each given situation.

***2** ¶ 6. The conflict scenarios set forth above raise an issue under Utah Rule of Professional Conduct Rule 1.7 (Conflict of Interest: Current Clients) and Utah Rule of Professional Conduct Rule 1.9 (Duties to Former Clients), depending on whether the attorney continues to represent the party his or her previous client or whether the attorney withdraws from the prior representation.

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¶ 7. Rule 1.7(a) provides:
... that a lawyer shall not represent a client if the representation involves a concurrent conflict of interest. A concurrent conflict of interest exists if:

(1) the representation of one client will be directly adverse to another client; or

(2) there is a significant risk that the representation of one or more clients will be materially limited by a lawyer's responsibilities to another client, a former client or a third person or by a personal interest of the lawyer.

¶ 8. Notwithstanding the provisions of Rule 1.17 (a), Rule 1.7(b) provides:
A lawyer may represent the second client if:

(1) the lawyer reasonably believes that the lawyer will be able to provide competent and diligent representation to each affected client;

(2) the representation is not prohibited by law;

(3) the representation does not involve the assertion of a claim by one client against another client represented by the lawyer in the same litigation or in other proceedings before a tribunal; and

(4) each affected client gives informed consent, confirmed in writing.

¶ 9. Rule 1.9(a) provides that an attorney may not represent "another person in the same or a substantially related matter in which that person's interests are materially adverse to the interests of the former client, unless the former client gives informed consent, confirmed in writing." Rule 1.9(b), the ongoing duty of confidentiality, prohibits the use of confidential information obtained during the representation of the former client, unless the former client gives informed consent, confirmed in writing; Rule 1.9(c), the ongoing duty of loyalty, prohibits the use of any information obtained during the former representation to the disadvantage of the former client.

¶ 10. In the case where there has been no dispute over the necessity for, or the identity of the appointed guardian, analysis of these rules will likely result in the conclusion that the subsequent representation of the guardian - whether concurrent with a continued representation of the former client or not - presents no conflict of interest that would preclude representation.

¶ 11. In a contested proceeding in which the attorney has represented the person for whom the guardian was appointed, the application of the conflict of interest rules may well lead to the conclusion that the attorney may not represent the guardian following his or her appointment. In fact, the attorney may actually be disqualified from such representation; see, e.g., In the *Matter of the Guardianship of Tamara L.P.*,[2] discussing the conflict of interest issue in the context of the appointment of a guardian ad litem for a minor child, which discussion is equally applicable to the representation of an adult of allegedly diminished capacity.

***3** ¶ 12. Application of these rules to representation of the appointed guardian following a contentious guardianship proceeding might also lead to the conclusion that representation of the appointed guardian must be declined, depending on the nature of the conflict and the interests of the party to the guardianship proceeding weighed against the responsibilities of the guardian and his legal representative.

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¶ 13. The duties of the guardian are set forth in Utah Code Ann. § 75-5-312. These duties of the guardian are not *necessarily* adverse to the interests of any party to a contentious guardianship proceeding. If analysis of the facts and circumstances leads to the conclusion that, taking into account these duties, representation of the guardian will neither be "directly adverse" to, nor materially limited by, the lawyer's obligations to his other client, then there would be no ethical impediment to representing the subsequently appointed guardian.

¶ 14. However, the guardian is a fiduciary for the incapacitated person, and is further constrained in the exercise of his duties by statutory and court imposed obligations, all of which must be carried out in the best interests of the incapacitated person. This being the case, it is not difficult to imagine a scenario in which there is substantial potential for conflict between the views of the client or former client and the statutory obligations of the guardian For example, there could be a difference of opinion regarding the best use of the ward's money and property, or as to the appropriate medical care or living conditions of the ward. [3]

¶ 15 The Comments to the Utah Rules of Professional Conduct give guidance as to how to identify and address conflict of interests that arise in a non-litigation context and should be carefully reviewed by any attorney in determining whether there is a conflict of interest under Rule 1.7 or Rule 1.9, arising out of either direct adversity or material limitation on the attorney's ability to represent the guardian. Comments [8], [4] [26] [5] and [32] [6] to Rule 1.7 are particularly helpful in that regard.

¶ 16. If the attorney determines that there is either a direct adversity of interest or a significant risk that his representation of the guardian may be materially limited by his obligations to the protected person, Rule 1.7 requires that the attorney may only continue to represent both clients if he has determined that he will be able to provide competent and diligent representation notwithstanding the adversity or limitation, the representation is not prohibited by law, [7] and it does not involve the assertion of a claim by one client against the other client in litigation. In that event, Rule 1.7(b)(4) provides that the conflict may be waived by the informed consent, confirmed in writing, of *both* affected parties. Rule 1.9(a) requires the informed consent of the former client only, again confirmed in writing. Of course, if the representation of the guardian is "directly adverse" to the interests of a former client and there is an on-going proceeding in which both the old and new clients continue as parties, the conflict is non-consentable. Rule 1.9 (b).

***4** ¶ 17. There is no issue with respect to the informed consent of the existing client, who can freely give such consent if he so wishes. The guardian, however, has statutory and court-imposed obligations with respect to the ward and may be constrained thereby from waiving the conflict; whether this an issue in a given case would require analysis of the facts and circumstances of that particular situation. It may be desirable under this circumstance, if possible, to petition the court that appointed the guardian for additional guidance on this point.

¶ 18 Additional ethical issues are raised if the attorney who wishes to represent the guardian has previously represented the person for whom the guardianship was sought. These issues are governed by Utah Rule of Professional Conduct 1.14, which together with the comments to Rule 1.14, sets forth the considerations governing representation of parties with diminished capacity. As set forth in Comment [4] to Rule 1.14, if a guardian is appointed, the lawyer who formerly represented the client with diminished capacity should "... ordinarily look to the representative for decisions on behalf of the client." Although this Rule speaks to the issue of being appointed guardian and does not directly address the issue of being appointed counsel to the guardian, an attorney who has formerly represented the client with diminished capacity should carefully consider representation of the appointed guardian, as well.

¶ 19. The comments to the ABA Model Rules point out that the seeking of a guardian is a "serious deprivation of the client's rights" and a lawyer representing the person of alleged diminished capacity should only initiate such a proceeding if there are no other, less drastic, solutions available. Moreover, if a third party initiates the guardianship proceeding, the attorney should not represent the third party, nor should the attorney seek to be appointed guardian of a client with

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diminished capacity. *See* ABA Formal Ethics Opinion 96-404 (1996) (lawyer who files guardianship proceeding under Rule 1.14(b) should not act or seek to be appointed as guardian, except in the most exigent of circumstances; that is, when immediate and irreparable harm will result from the slightest delay).

¶ 20. **Conclusion**: The representation of a court-appointed guardian by an attorney who has also represented one of the parties to the proceeding for the appointment of the guardian must be analyzed under Utah's Rules of Professional Conduct, Rules 1.7 and 1.9 the same way the attorney would analyze any conflict of interest between two current clients or between a current and former client. If the facts and circumstances of the case raise the specter of a direct or material adversity, or if responsibilities to the client impose a material limitation on the attorney's ability to represent the guardian effectively in light of the fiduciary, statutory, and court imposed obligations on the guardianship, the attorney should either avoid the joint representation or exercise great care in obtaining the informed written consent of both affected clients.

Footnotes

1 Utah Code Ann. § 75-5-303(1) (1988).

2 503 N.W. 2d 333, 336, 177 Wis. 2d 770, 779 (Wis.Ct.App. 1993).

3 See, e.g., *Guardianship of Nelson*, 663 P.2d 316, 204 Mont. 90 (Mont. 1983).

4 Comment [8] to Rule 1.7 describes the danger of the "material limitation" type of conflict, observing that "The conflict in effect forecloses alternatives that would otherwise be available to the client ... The critical questions are the likelihood that a difference in interests will eventuate and, if it does, whether it will materially interfere with the lawyer's independent judgment in considering alternatives or foreclose courses of action that reasonably should be pursued on behalf of the client."

5 Comment [26] to Rule 1.7 describes the relevant factors to be considered as: "... 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 disagreements will arise and the likely prejudice to the client from the conflict. The question is often one of proximity and degree."

6 Comment [29] to Rule 1.7 provides:
Moreover, because the lawyer is required to be impartial between commonly represented clients, representation of multiple clients is improper when it is unlikely that impartiality can be maintained. Generally, if the relationship between parties has already assumed antagonism, the possibility that a client's interests can be adequately served by common representation is not very good. Other relevant factors are whether the lawyer will subsequently represent both parties on a continuing basis and whether the situation involves creating or terminating a relationship between the parties.

7 There does not appear to be any provision of Utah law that would prohibit the attorney for one of the parties to the guardianship proceeding from representing the subsequently appointed guardian.

UT Eth. Op. 08-02 (Utah St.Bar.), 2008 WL 2110963

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EXHIBIT G

449 Md. 620
Court of Appeals of Maryland.

ATTORNEY GRIEVANCE
COMMISSION OF MARYLAND
v.
Rhonda I. FRAMM

Misc. Docket AG No. 73, Sept. Term, 2014
|
August 24, 2016

Synopsis

Background: Attorney Grievance Commission filed petition for disciplinary action against attorney, alleging that attorney failed to represent her client with diminished capacity competently, diligently, honestly, and with adequate communication in violation of the rules of professional conduct. The Circuit Court, Baltimore County, John J. Nagle, III, J., conducted evidentiary hearing and determined that attorney's conduct violated rules of professional conduct. Commission and attorney filed exceptions.

Holdings: The Court of Appeals, Barbera, C.J., held that:

[1] attorney violated rule of professional conduct requiring attorneys to provide competent representation by failing to advise her client that the cost of continuing to pursue litigation could vitiate any benefit he could receive and by abusing discovery;

[2] attorney violated rule of professional conduct requiring attorneys to abide by client's decisions concerning the objectives of the representation by opposing client's answer in guardianship proceeding and arguing that client's cousin should be appointed as client's guardian;

[3] attorney's failure to put her advice to client in writing violated rule of professional conduct requiring attorneys to communicate with clients to the extent reasonably necessary to permit clients to make informed decisions;

[4] attorney's failure to take action commensurate with the fees she charged client in divorce action violated rule of professional conduct prohibiting attorneys from charging and collecting unreasonable fees;

[5] attorney's representation of both client and client's cousin in guardianship proceeding created conflict of interest that could not be waived in violation of rules of professional conduct;

[6] attorney violated rule of professional conduct requiring candor toward tribunals by intentionally misrepresenting her client's capacity to judge in action seeking fees in connection with her representation of client; and

[7] disbarment was appropriate sanction for attorney's misconduct.

Disbarment ordered.

****832** Circuit Court for Baltimore County, 03-C-14-013918

Attorneys and Law Firms

Lydia E. Lawless, Asst. Bar Counsel (Glenn M. Grossman, Bar Counsel, Atty. Grievance Commission of Maryland), for Petitioner

Alvin I. Frederick, Esq. of Eccleston & Wolf in Hanover, MD (Richard J. Berwanger, Esq. of Eccleston & Wolf in Hanover), for Respondent

ARGUED BEFORE: Barbera, C.J., Battaglia, * Greene, Adkins, McDonald, Watts and Hotten, JJ.

Opinion

Barbera, C.J.

***629** Petitioner, the Attorney Grievance Commission of Maryland ("Commission"), filed in this Court on December 15, 2014, a Petition for Disciplinary or Remedial Action against Respondent, Rhonda I. ****833** Framm. The Commission charged Respondent with violating Maryland Lawyers' Rules of Professional Conduct ("MLRPC") 1.1 (competence); 1.2 (scope of representation); 1.3 (diligence); 1.4 (communication); 1.5 (fees); 1.7 (conflict of interest); 1.15 (safekeeping property); 3.3 (candor toward the tribunal); 8.4(a), (c), and (d) (misconduct), and Maryland Rule 16–606.1 (attorney trust account record-keeping) [1] . Those charges arise from

Respondent's representation of Robert L. Wilson and her subsequent suit against Mr. Wilson for attorney's fees. On December 16, 2014, this Court transmitted the matter to the Circuit Court for Baltimore County and designated the Honorable John J. Nagle, III ("the hearing judge") to conduct an evidentiary hearing and make findings of fact and conclusions of law.

The hearing judge presided over a hearing on June 1, 2, and 3, 2015, at which Respondent testified and presented evidence. On September 1, 2015, the hearing judge issued written findings of fact and conclusions of law, concluding that Respondent violated MLRPC 1.4, 1.7, 1.15, 3.3, 8.4(a) and (c), and Maryland Rule 16–606.1(a), but did not violate MLRPC 1.1, 1.2, 1.3, or 1.5. The hearing judge drew no conclusion on the charged violation of MLRPC 8.4(d).

Both Petitioner and Respondent filed exceptions. Bar Counsel, on behalf of Petitioner, excepted to the hearing judge's failure to make certain findings of fact and render a conclusion as to MLRPC 8.4(d). Petitioner also excepted to the hearing ***630** judge's conclusion that Respondent did not violate MLRPC 1.1, 1.2, 1.3, and 1.5 and the hearing judge's failure to find the presence of certain aggravating factors. Respondent challenged the hearing judge's conclusions that she violated any of the charged rules of professional conduct, aside from MLRPC 1.15 and Maryland Rule 16–606.1(a).

Following oral argument on February 4, 2016, we issued an Order of Remand instructing the hearing judge to make additional findings of fact and clarify his conclusions of law regarding MLRPC 3.3(a)(1), 8.4(c), and 8.4(d). Thereafter, the hearing judge issued Supplemental Findings and Conclusions of Law ("supplemental findings"), finding additional facts as set forth in Petitioner's exceptions, finding that Respondent's actions that constituted violations of MLRPC 3.3(a)(1) and 8.4(c) were done intentionally, and concluding that Respondent violated MLRPC 8.4(d).

Petitioner and Respondent each filed responses to the supplemental findings. Petitioner withdrew its exception to the hearing judge's failure to make findings of fact and render a conclusion as to MLRPC 8.4(d) and renewed its remaining exceptions. Respondent renewed her previously filed exceptions and excepted to all of the additional findings and conclusions made in the supplemental findings.

For reasons we shall explain, we agree with the hearing judge that Respondent violated MLRPC 1.4; 1.7; 1.15; 3.3; and 8.4(a), (c), and (d); as well as Maryland Rule 16–606.1(a), but did not violate MLRPC 1.3. Moreover, we agree with Petitioner that Respondent's misconduct also violated MLRPC 1.1, 1.2, and 1.5.

I.

The hearing judge made the following findings of fact by clear and convincing ****834** evidence.[2] Respondent was admitted to ***631** the Bar of the Court of Appeals of Maryland on December 1, 1981, and maintains a solo law practice in Baltimore County. Respondent's interaction with Robert L. Wilson began subsequent to a then-recently entered judgment of divorce in the Circuit Court for Baltimore County before the Honorable Sherrie R. Bailey ("the divorce case"). On June 17, 2010, Mr. and Mrs. Wilson, through their respective counsel, had negotiated the terms of a settlement agreement in the divorce case, in which, relevant here, Mr. Wilson would pay Mrs. Wilson $55,000 plus interest over the next five years or $50,000 within sixty days. Judge Bailey accepted the settlement agreement and entered accordingly a judgment of absolute divorce.

Mr. Wilson first met Respondent for an initial consultation on June 23, 2010, to assist him in vacating the divorce judgment because he did not understand the settlement agreement and was dissatisfied with its terms. He retained Respondent on June 24, 2010. Mr. Wilson signed a retainer agreement providing that he would pay an initial retainer of $10,000 and Respondent would bill at an hourly rate of $425. On June 25, 2010, Mr. Wilson paid Respondent $10,125. Respondent admitted that she failed to create and maintain records of Mr. Wilson's payments and consequently conceded that she violated Maryland Rule 16–606.1(a).

Mr. Wilson typically sought and received help from his friend, Sandra McLean-Stewart ("Ms. Stewart"), and his cousin, Kevin Griggs, in understanding complex information, including legal documents. As described by Mr. Griggs, Mr. Wilson was able to understand "not too complicated matters" if they were broken down and

explained slowly. Ms. Stewart accompanied Mr. Wilson to one of the three initial meetings with Respondent, but not the meeting at which he signed the retainer agreement.

*632 *Divorce Case: Psychological Evaluation and Motion to Vacate*

After consulting with Mr. Wilson, Respondent concluded that Mr. Wilson had significant claims to a portion of Mrs. Wilson's marital property. Respondent also recognized that Mr. Wilson had a diminished capacity to understand information and explained to him that, although vacating the settlement agreement underlying the divorce judgment would be difficult, he might be successful if he could prove that he was incapacitated. Respondent referred Mr. Wilson to a psychologist, Morris S. Lasson, Ph.D., P.A., to determine whether there were sufficient grounds for Mr. Wilson to file a motion to vacate the settlement agreement on the ground of incapacity.

On June 28, 2010, Dr. Lasson conducted an initial evaluation of Mr. Wilson and concluded in a written report that Mr. Wilson had a neuro-cognitive disorder that impaired his ability to comprehend complex information. Dr. Lasson noted that Mr. Wilson suffered a stroke around 1964 that affected his speech and memory. Dr. Lasson explained in his report:

> [Mr. Wilson]'s physical appearance was satisfactory. At the same time, his orientation to time, person and place was ****835** erratic. He had difficulty absorbing details and showed lapses of attention. He was unable to maintain concentration explaining, "I need time to think it out." Mr. Wilson recited the alphabet incorrectly on his fingers. He did not know the name of the U.S. president nor was he aware of today's date. He showed both expressive and receptive aphasia and speech stammering. His memory was flawed. He showed difficulty with encoding, retrieval and focusing skills. This man cannot process information fluidly and has sensory integration problems.
>
> With reasonable psychological certainty, Robert Wilson has a neuro-cognitive disorder and cannot be held responsible to fully understand complex information and details.

On July 1, 2010, Respondent, on behalf of Mr. Wilson, filed a motion to vacate the divorce judgment and attached Dr. ***633** Lasson's report. In the motion, Respondent argued that Mr. Wilson lacked the capacity to understand the settlement agreement and consequently could not consent to it. Respondent further requested an extension of time for a complete psychological evaluation of Mr. Wilson to determine whether he required a guardian. Mrs. Wilson, through her attorney, Diana Denrich, filed a response in opposition to the motion to vacate the judgment.

Dr. Lasson conducted a complete evaluation of Mr. Wilson and issued a report, dated August 9, 2010, in which he opined that Mr. Wilson should have a legal guardian. In the August 2010 report, Dr. Lasson explained that Mr. Wilson has a cognitive impairment that affects "his ability to understand and comprehend both the written and spoken word. He should be counseled constantly not to sign any documents and, even in a verbal encounter, he should have guidance and direction to be absolutely certain that he understands to the best of his ability[.]" Dr. Lasson also stated that, "[w]hen asked to count from 20 to 0 backwards, [Mr. Wilson] forgot specific numbers." On August 16, 2010, Respondent wrote to Ms. Denrich to explain that she was in the process of having a guardian appointed for Mr. Wilson. Respondent attached to that correspondence Dr. Lasson's August 2010 report.

Guardianship Case: The First Petition

On April 20, 2011, Respondent filed a Petition for Appointment of Guardian of the Property of Robert Wilson in the Circuit Court for Baltimore County ("the guardianship case"). In that petition, Respondent listed Mr. Wilson as the Petitioner and named Mr. Griggs as the person Mr. Wilson wished to be appointed as his guardian. Respondent attached certificates from Dr. Lasson and Mr. Wilson's treating physician, Beth Marcus, M.D., to show that Mr. Wilson had capacity to consent to a guardian. Those certificates were not verified and did not include the doctors' full names, qualifications, history with Mr. Wilson, or opinions as to the cause and extent of his disability.

***634** Two days later, the Circuit Court rejected the petition because it did not comply with Maryland Rule 10-301 and the certificates did not comply with Maryland Rule 10-202. Before the hearing judge, Respondent testified that she did not receive the court's rejection until

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it was produced in the disciplinary investigation. Yet, by August 4, 2011, Respondent had known that the petition ("the first petition") had been rejected, as she drafted a new petition for guardianship naming Mr. Griggs as the Petitioner. Mr. Griggs signed and returned the new petition to Respondent on August 10, 2011. Respondent, however, did not file that petition ("the second petition") until November 2011.

****836** *Divorce Case: Petition for Civil Constructive Contempt*

Meanwhile, on October 26, 2011, Mrs. Wilson, having received no communication from Respondent for more than a year after the filing of the motion to vacate the judgment of divorce, filed, through her counsel, Ms. Denrich, a Petition for Civil Constructive Contempt seeking to advance the case and obtain a hearing before Judge Bailey on the motion to vacate.

On November 2, 2011, the Circuit Court issued a Show Cause Order why Mr. Wilson should not be found in contempt. Respondent mailed Mr. Wilson a copy of the Order on November 8, 2011, and stated in a cover letter that Mr. Wilson had to pay her $7,500 to answer the petition and defend him at the hearing. Mr. Wilson paid the requested amount. Later that month, Respondent filed a motion to strike the petition for contempt and, insofar as the record reflects, there was no further action taken on the petition and Mr. Wilson ultimately was not held in contempt.

Guardianship Case: The Second Petition

On November 18, 2011, Respondent filed the second petition for guardianship, this time naming Mr. Griggs as the Petitioner. A few days later, the Circuit Court rejected the second petition because once again the physicians' certificates failed to comply with the applicable rules. On January 10, 2012, ***635** Respondent filed amended certificates. The court thereafter accepted that petition.

On January 17, 2012, the court appointed Katherine Linzer, Esq. to represent Mr. Wilson in the guardianship proceeding. On March 14, 2012, Ms. Linzer, on behalf of Mr. Wilson, filed an answer in opposition to the petition. In the answer, Mr. Wilson denied that he was disabled and requested that the petition be dismissed. Attached to the answer was a certificate from Mr. Wilson's treating physician, Dr. Marcus, attesting to his capacity to understand certain legal documents.

On April 10, 2012, Respondent, on behalf of Mr. Griggs, filed an opposition to the answer arguing that Mr. Wilson is incapable of making decisions on his own and requires a guardian to act on his behalf. Respondent asserted that, "contrary to the assertions made by attorney Katherine Linzer on Mr. Wilson's behalf, Mr. Wilson suffers from a mental disability that his psychologist states causes cognitive and processing deficiencies that render Mr. Wilson incapable of both comprehending and making decisions on his own." Respondent also argued that "Mr. Wilson presently cannot sufficiently process nor make decisions concerning the management of his property and investments when [the] same involve holding several facts in [his] mind," nor is it "clear that Mr. Wilson would even have sufficient capacity to designate a power of attorney."

The Circuit Court issued a writ of summons to Mr. Wilson and scheduled trial for June 26, 2012. Respondent sent Mr. Griggs a letter dated May 16, 2012, informing him of the guardianship trial and attaching the writ of summons.

Mr. Griggs and Mr. Wilson received conflicting advice from Ms. Linzer and Respondent. Ms. Linzer advised them that, if a guardian were appointed, Mr. Wilson would lose his ability to make financial decisions. In contrast, Respondent advised that Mr. Wilson would retain some of his rights even if Mr. Griggs became his guardian. Mr. Griggs and Mr. Wilson decided that they no longer wanted to pursue the guardianship. On June 1, 2012, Mr. Griggs faxed Respondent a hand- ***636** written letter notifying her that he wanted ****837** to withdraw the guardianship petition immediately. Upon receiving Mr. Griggs's letter, on June 19, 2012, Respondent filed a motion to withdraw the guardianship petition, which was granted. Respondent never told Mr. Griggs or Mr. Wilson that there was a potential for a conflict of interest.

Ms. Linzer subsequently filed a request for attorney's fees, which Respondent did not oppose. On October 19, 2012, the court ordered Mr. Wilson to pay Ms. Linzer $1,120.06 in attorney's fees. Respondent took no further action to pursue the guardianship.

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Divorce Case: Dr. Lasson's Deposition

Meanwhile, in December 2011, Judge Bailey scheduled a hearing on the motion to vacate the settlement agreement and judgment of divorce to be held on February 24, 2012. On January 5, 2012, Respondent informed Mrs. Wilson's counsel, Ms. Denrich, that she intended to introduce Dr. Lasson's reports at that hearing. Ms. Denrich objected to the introduction of Dr. Lasson's reports without his testimony. Respondent then unilaterally scheduled Dr. Lasson's deposition for February 7, 2012. On January 13, 2012, Respondent's paralegal sent an email to Ms. Denrich, informing her of the scheduled deposition and asking her to provide other dates if she was unavailable.

Ms. Denrich responded on January 16, 2012, advising that she was not available on February 7, 2012, and proposing six alternate dates prior to the hearing. Respondent refused to reschedule the deposition because Dr. Lasson was only available on February 7, 2012. On January 24, 2012, Ms. Denrich served by first-class mail a motion for a protective order seeking to stop Dr. Lasson's deposition and a motion to shorten time to respond. On February 2, 2012, Respondent opposed the motion for a protective order, but the court had no opportunity to rule on it prior to the scheduled deposition because the motion had not been docketed.

***637** On February 7, 2012, Respondent took Dr. Lasson's *de bene esse* deposition in Ms. Denrich's absence. Dr. Lasson testified that Mr. Wilson lacks the cognitive capacity to understand basic information. Dr. Lasson emphasized that Mr. Wilson had difficulty processing "basic information much less complicated ones." He explained that:

> [I]f you said, sign here, he would be able to do it. But if you tell him, now, before you sign here, I just want to explain to you what this is, and you get involved in some type of detailed explanation, I believe he would lose you and not understand. He may even be embarrassed to say that he doesn't understand at times. ... But he would not be able to retain basic information that you have given him and just not understand what he has to do.

As to legal matters, Dr. Lasson said that, "if something is involved either legally or any other way with a lot of different facts and information, [Mr. Wilson] would have extreme difficulty processing that and understanding it."

At the hearing on February 24, 2012, Judge Bailey granted the motion for a protective order, prohibiting Respondent from using Dr. Lasson's deposition and postponing the matter to allow the parties to retake the deposition. The court did not enter a written order to that effect at that time. Between February 2012 and May 2012, Respondent did not reschedule Dr. Lasson's deposition, as she did not believe that she was obligated to do so because that responsibility was borne by Ms. Denrich at Mrs. Wilson's expense.

On May 4, 2012, upon Ms. Denrich's request, Judge Bailey entered an order that prohibited the use of Dr. Lasson's deposition, ordered Dr. Lasson to be deposed within sixty days at Ms. Denrich's convenience, required Mr. Wilson to pay ****838** the costs of the deposition, and ordered that the failure to comply with the order would result in Dr. Lasson's being precluded from testifying at trial.

Mr. Wilson asked Respondent for clarification regarding that order. By letter dated May 31, 2012, Respondent wrote to Mr. Wilson: "As Dr. Lasson has to be paid before the deposition ***638** is to occur, and as Ms. Denrich was given at least one month's notice of [Dr. Lasson's] deposition (with no objection ever noted from her), I took Dr. Lasson's deposition as planned and sent her a copy of my questioning and Dr. Lasson's responses." The hearing judge found that this was an intentional misrepresentation to Mr. Wilson.

On May 30, 2012, Ms. Denrich and Respondent agreed to reschedule Dr. Lasson's deposition for August 8, 2012, despite being outside of the court's sixty-day timeframe. Yet, on June 18, 2012, Respondent noted Dr. Lasson's deposition by written questions. [3]

On July 3, 2012, Ms. Denrich filed a motion to strike the deposition by written questions. Respondent filed an opposition to the motion to strike, in which she claimed that she had tried to schedule a date for Dr. Lasson's second deposition after the court's May 4, 2012, order

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but "Ms. Denrich again would not supply dates on which she would commit to being available for [Dr. Lasson's] deposition." The hearing judge found that this statement was an intentional misrepresentation to the court because Ms. Denrich responded to Respondent and the parties agreed upon a new date. On July 24, 2012, Judge Bailey granted the motion to strike, ordered that Mr. Wilson was prohibited from using Dr. Lasson's deposition or calling Dr. Lasson at trial, and awarded Mrs. Wilson $600 in attorney's fees, for which Respondent and Mr. Wilson were jointly and severally liable. On August 2, 2012, Respondent filed a motion to vacate and reconsider the court's order prohibiting Dr. Lasson's testimony and issuing sanctions.

Divorce Case: Motion to Withdraw and Court Psychiatrist

On August 21, 2012, Mr. Wilson discharged Respondent. In response, Respondent sent Mr. Wilson a letter informing him ***639** of her intent to withdraw as counsel in the divorce case. Respondent mailed to the court a motion to withdraw, but neither the court nor Ms. Denrich received the motion.

On September 14, 2012, Judge Bailey held a hearing on Respondent's motion to vacate the divorce judgment and her motion to vacate and reconsider Judge Bailey's order dated May 4, 2012.[4] At the outset of the hearing, Respondent gave Judge Bailey a copy of her motion to withdraw. In support of that motion, Respondent explained that Mr. Wilson has a diminished capacity and that, pursuant to MLRPC 1.14,[5] she had obtained a medical ****839** report stating that Mr. Wilson requires a guardian, and she had attempted to have one appointed. Respondent further argued, "I cannot represent Mr. Wilson because I do not have any source of competent explanation of what he wants and if he has even understood what it is that he wants me to do for him." Respondent called Ms. Stewart and Mr. Griggs to testify that Mr. Wilson lacks capacity to handle his medical and financial decisions. Mr. Wilson, evidently changing his mind, testified that he still wanted Respondent to represent him. Judge Bailey stayed ruling on the motion to withdraw and ordered Mr. Wilson to be evaluated by a court psychiatrist within the Office of the Court Psychiatrist, Stephen W. Siebert, M.D., M.P.H.

On January 4, 2013, Dr. Siebert filed his evaluation with the court and reported that Mr. Wilson was not competent to enter into the settlement agreement. Dr. Siebert explained that Mr. Wilson has cognitive and memory impairments that ***640** affect his short-term memory and that Mr. Wilson "is unable to explain, in lay terms, the nature of the current legal dispute." Dr. Siebert further opined that,

> Mr. Wilson cannot retain verbal information and then repeat the content of the information after several minutes. My opinion is that this impairs his competency to understand and sign an agreement, even after this has been discussed or explained to him. My opinion is that he is not competent, at this time, to sign a settlement agreement regarding his property or alimony.

On February 13, 2013, at a hearing before Judge Bailey, Respondent renewed her motion to withdraw from the representation. Respondent stated: "I can't work with Mr. Wilson because there is no consistent strategy nor understanding of a strategy nor a continued ability to remember what decisions were made even five minutes ago[.]" Judge Bailey accepted Dr. Siebert's report and found that "Mr. Wilson is incompetent to enter into a legal agreement, a contractual agreement, or to enter into a settlement agreement or to even file a petition for divorce." Consequently, Judge Bailey granted Respondent's motion to withdraw as well as the motion Respondent had filed on Mr. Wilson's behalf to vacate the judgment of absolute divorce. Judge Bailey, recognizing Mr. Wilson's incapacity, reconsidered and vacated her earlier award of sanctions against him.

The Fee Case

On July 30, 2013, after the divorce and guardianship cases had concluded, Respondent filed suit against Mr. Wilson for attorney's fees in the District Court of Maryland, sitting in Baltimore County ("the fee case"). Respondent testified before the District Court that Mr. Wilson owed her $30,000 plus pre-judgment interest—an amount reduced by $10,261.27, allegedly to satisfy Mr. Wilson's

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complaints about the guardianship case and to comply with the jurisdictional limit of the District Court.

From June 2010 to February 2013, Respondent had billed Mr. Wilson for a total of $58,748.77 in attorney's fees. And, ***641** from June 2010 to November 2011, Mr. Wilson paid Respondent $19,125. Although Respondent presented all of her invoices to the District Court, she claimed that she was not seeking payment of her fees from the guardianship case as a conciliatory gesture to Mr. Wilson given his complaints about her handling of that matter.

****840** On August 8, 2013, Mr. Wilson, representing himself, filed a Notice of Intention to Defend. On August 20, 2013, Respondent asked Mr. Wilson to sign a Consent Judgment, which represented that Mr. Wilson was "of sound mind." Mr. Wilson refused.

Ms. Stewart and Mr. Griggs assisted Mr. Wilson in his defense. In response to an interrogatory question propounded by Respondent, Mr. Wilson answered that, in the divorce case, "Judge Bailey ruled that Mr. Wilson is incompetent to enter into a legal agreement, a contractual agreement, or to enter into a settlement agreement or even file a petition for divorce."

The Honorable Marsha L. Russell presided over the trial concerning Respondent's claim for attorney's fees, which occurred on October 22, 2013. After hearing testimony, Judge Russell entered judgment in favor of Respondent for $30,000 with prejudgment interest of $5,029.93. To satisfy that judgment, Respondent garnished Mr. Wilson's accounts.

The hearing judge accepted Respondent's testimony at the disciplinary hearing concerning the reasonableness of her fees and expenses because Petitioner had not offered any evidence to the contrary. He found, though, that Respondent, who had testified at the trial before Judge Russell, had misrepresented Dr. Lasson's opinion of Mr. Wilson's mental capacity by testifying in the fee case that Dr. Lasson had concluded that Mr. Wilson "can certainly deal with his day-to-day events and simple contracts," and that Dr. Lasson's "report didn't indicate he couldn't understand normal contracts he entered into." Respondent also misrepresented that she "was aware that not only does Mr. Wilson have a fairly good capacity to understand agreements ... but he has people who have resources[.]" ***642** The hearing judge found that Respondent in her testimony in the fee case, at best, "continually understated the extent to which Wilson had a serious and permanent cognitive disorder." The hearing judge found that Respondent's failure to testify specifically that Judge Bailey had found Mr. Wilson incompetent further contributed to her misrepresentation as to Mr. Wilson's capacity. The hearing judge rejected Respondent's argument that Judge Russell was made fully aware of Judge Bailey's finding because Mr. Wilson had informed Judge Russell of this fact in his interrogatory answer.

The hearing judge also found that Respondent intentionally misrepresented to Judge Russell the circumstances surrounding Dr. Lasson's deposition. Respondent had testified in the fee case that she

> told the opposing counsel that since she didn't show up, if she wants to ask any questions, she certainly can and we'll be glad to reschedule. Opposing counsel then filed a motion for protective order asking not only that it not be included but that Mr. Wilson and I be sanctioned for going ahead with the deposition when she was not available. The court ordered that we retake the deposition with her present, and that we do that before the hearing occur[ed].

Respondent further misrepresented to Judge Russell that she usually provided Mr. Wilson with advice both orally and in writing to allow him to confer with Ms. Stewart or Mr. Griggs, and that Ms. Stewart was present when Mr. Wilson signed the retainer agreement, when she in fact was not.

The hearing judge found that "Respondent intentionally misrepresented to Judge Russell that she filed various 'motions in supporting the fairness of a court psychiatrist' and motions and pleadings regarding the records to be produced to Dr. Siebert in the Divorce Case," because, in fact, no ****841** such documents had been filed. Further, "Respondent intentionally misrepresented to Judge Russell that 'there was a hearing scheduled October 19, 2012, which was cancelled the day before the hearing, so we had to prepare for that and get everyone geared up

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for that[.]' " In fact the hearing on October ***643** 19, 2012, was cancelled no later than October 8, 2012. Respondent admitted to the hearing judge that her statement to Judge Russell was false.

The hearing judge found, in addition, that Respondent intentionally misrepresented Dr. Siebert's opinion. Respondent had testified in the fee case that "Dr. Siebert thankfully agreed with us, and he said, 'this is way too complicated of an issue for this gentleman to be able to work through without assistance.' " The hearing judge found that, because Respondent knew the details of Dr. Siebert's report, she should have relayed his findings accurately. The hearing judge found as well that Respondent made misrepresentations by omitting relevant medical information, including Dr. Lasson's and Dr. Siebert's reports and Dr. Lasson's deposition testimony. Respondent had also failed to inform Judge Russell that she had filed an opposition to Mr. Wilson's answer to the second petition for guardianship.

Based upon those findings, the hearing judge concluded that Respondent violated MLRPC 1.4; 1.7; 1.15; 3.3; and 8.4(a), (c), and (d); and Maryland Rule 16-606.1(a), but did not violate MLRPC 1.1, 1.2, 1.3, or 1.5.

II.

[1] [2] [3] [4] [5] "In attorney discipline proceedings, this Court has original and complete jurisdiction and conducts an independent review of the record." *Attorney Grievance Comm'n v. Good*, 445 Md. 490, 512, 128 A.3d 54 (2015) (internal quotation marks omitted). We accept the hearing judge's findings of fact unless those findings are clearly erroneous. *Id.* "That deference is appropriate because the hearing judge is in a position to assess the demeanor-based credibility of the witnesses." *Attorney Grievance Comm'n v. Tanko*, 427 Md. 15, 27, 45 A.3d 281 (2012). "The hearing judge is permitted to 'pick and choose which evidence to rely upon' from a conflicting array when determining findings of fact." *Id.* (alteration omitted) (quoting *Attorney Grievance Comm'n v. Guida*, 391 Md. 33, 50, 891 A.2d 1085 (2006)). We review the hearing judge's legal ***644** conclusions *de novo* and thus render the ultimate decision as to an attorney's alleged misconduct. *Good*, 445 Md. at 512, 128 A.3d 54. We must therefore determine independently whether sufficient evidence in the record exists to support the hearing judge's conclusions of law under a " 'clear and convincing' standard of proof." *Tanko*, 427 Md. at 27, 45 A.3d 281.

Both Petitioner and Respondent have filed exceptions to the hearing judge's findings of fact and conclusions of law. Given the number of exceptions presented, we address each exception as it relates to our *de novo* review of the hearing judge's conclusions of law.

MLRPC 1.1

MLRPC 1.1 provides that "[a] lawyer shall provide competent representation to a client. Competent representation requires the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation." The hearing judge concluded that Petitioner failed to prove a violation of MLRPC 1.1 by clear and convincing evidence. The hearing judge recognized that "there had to be a point in time ... where Respondent should have advised Wilson, and documented such advice, that the costs of all of the respective litigation had reached a point where it was not ****842** feasible to continue." The hearing judge nevertheless rejected Petitioner's contention that Respondent was required to perform a cost-benefit analysis, and he concluded that Respondent did not violate MLRPC 1.1 by failing to do so. The hearing judge also concluded that Respondent's conduct in the divorce case, while aggressive, was sufficiently competent because she ultimately was successful in getting the divorce judgment vacated for Mr. Wilson. Likewise, the hearing judge rejected Petitioner's contention that Respondent's deficient filings in the guardianship case rose to the level of a violation of MLRPC 1.1.

Petitioner takes exception to the hearing judge's conclusion that Respondent did not violate MLRPC 1.1. Petitioner points out that Respondent, among other failures, never conducted a cost-benefit analysis for Mr. Wilson and that Respondent's ***645** guardianship petitions were twice rejected by the court. Petitioner also asserts that Respondent's failure to identify a conflict of interest in the guardianship case and to advise Messrs. Wilson and Griggs to that effect "does not meet the bare minimum required of competent representation."

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[6] **[7]** We sustain Petitioner's exception. The essence of competent representation under MLRPC 1.1 is adequate preparation and thoroughness in pursuing the matter. *Attorney Grievance Comm'n v. Blair*, 440 Md. 387, 401, 102 A.3d 786 (2014). Consequently, "[a]ttorneys remain potentially susceptible to violating MLRPC 1.1 notwithstanding they possess the requisite skill or knowledge to represent a client." *Attorney Grievance Comm'n v. Adams*, 441 Md. 590, 610, 109 A.3d 114 (2015). We agree with Petitioner that Respondent's mistakes and errors in judgment demonstrate a lack of competence, in violation of MLRPC 1.1. Respondent's failure to advise Mr. Wilson at any time during the representation that the cost of continuing to pursue litigation might vitiate any benefit he may receive ultimately does not reflect thorough and competent representation. *Cf. Attorney Grievance Comm'n v. Sutton*, 394 Md. 311, 323, 906 A.2d 335 (2006) (concluding that the respondent violated MLRPC 1.1 "by undertaking representation of [his client's] claim although respondent recognized from the beginning that the likelihood of success with [his client's] claim was limited" (internal quotation marks omitted)). Respondent's abuses of discovery, which delayed the divorce proceedings and caused Dr. Lasson's testimony to be excluded entirely from the case, also demonstrate Respondent's failure to provide Mr. Wilson competent representation.

[8] Similarly lacking in competence was Respondent's representation of Mr. Wilson and Mr. Griggs in the guardianship case. Respondent filed a petition for guardianship that wholly failed to comply with the Maryland Rules and only in her third attempt were the physicians' certificates accepted by the court. Respondent's evident failure to conduct even minimal research, which would have revealed the defects in her submissions and avoided multiple filings, violates MLRPC 1.1. *See* ***646** *Attorney Grievance Comm'n v. Davy*, 435 Md. 674, 698, 80 A.3d 322 (2013) (concluding that the respondent violated MLRPC 1.1 when "the bankruptcy court sent Davy three deficiency notices regarding the bankruptcy filing" because the respondent did not adequately research her case).

Further, Respondent's failure to recognize the inherent conflict of interest in representing Mr. Griggs in the guardianship case while remaining counsel to Mr. Wilson in the divorce case falls below the minimum standard of competence. *See Attorney Grievance Comm'n v. Olszewski*, 441 Md. 248, 266, 107 A.3d 1159 (2015) ****843** ("We agree with the hearing judge that, on the facts of this case, 'a minimal threshold of competent representation was breached when [Respondent] agreed to represent one client against another[.]' " (alteration in original)).

In sum, we conclude that the facts found by the hearing judge present clear and convincing evidence that Respondent violated MLRPC 1.1.

MLRPC 1.2

[9] MLRPC 1.2(a) provides that "a lawyer shall abide by a client's decisions concerning the objectives of the representation and, when appropriate, shall consult with the client as to the means by which they are to be pursued." The hearing judge noted that "what happened in the Guardianship Case could potentially have been avoided through better and more detailed communication between Respondent and Wilson." Evidently for this reason, the hearing judge concluded that Petitioner failed to prove that Respondent violated MLRPC 1.2(a) because Respondent, in filing the guardianship petition on behalf of Mr. Griggs, was "still ultimately attempting to advance Wilson's position in the Divorce Case."

Petitioner excepts to this conclusion. We agree with Petitioner that, by opposing Mr. Wilson's answer in the guardianship case, Respondent took a position that was directly contrary to that of her client. By definition, Respondent did not "abide by [her] client's decisions concerning the objectives of ***647** the representation." *See Attorney Grievance Comm'n v. Haley*, 443 Md. 657, 669, 118 A.3d 816 (2015) (concluding that the respondent violated MLRPC 1.2(a) by seeking primary physical custody of his client's children despite the client's instruction for shared physical custody). We disagree with the hearing judge that Respondent did not violate MLRPC 1.2(a) simply because the issues in the guardianship case might have been resolved through better communication. That Respondent's misconduct with respect to MLRPC 1.2(a) might overlap with another one of our rules of professional conduct does not remove that misconduct from its scope. We conclude that Petitioner proved a violation of MLRPC 1.2(a) by clear and convincing evidence.

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MLRPC 1.3

[10] MLRPC 1.3 provides that "[a] lawyer shall act with reasonable diligence and promptness in representing a client." The hearing judge concluded that Respondent did not violate MLRPC 1.3. The hearing judge determined that the seven-month delay between the filing of the first and second petitions for guardianship did not establish a lack of diligence because proceedings in the divorce case were ongoing. Similarly, the hearing judge declined to conclude that Respondent violated MLRPC 1.3 in failing to file timely physicians' certificates because the Maryland Rules impose a "narrow timeframe" of twenty-one days from the time of the evaluation to the filing of the certificate.

Petitioner excepts to the hearing judge's conclusion. Petitioner argues that Respondent violated MLRPC 1.3 by failing both to advance the divorce case for almost one year after filing the motion to vacate and to file diligently petitions for guardianship that complied with the Maryland Rules. Petitioner also argues that Respondent's failure to communicate adequately, conduct a cost-benefit analysis, perform any research on Mr. Wilson's claims for Mrs. Wilson's marital property, and abide by the Maryland Rules and court orders with respect to Dr. Lasson's deposition violates MLRPC 1.3. Petitioner states, in sum, that "two years after [Respondent] was retained to ***648** represent Mr. Wilson, no guardian ****844** had been appointed and the only evidence in support of Mr. Wilson's motion to vacate the divorce judgment, namely Dr. Lasson's testimony, had been excluded due to the Respondent's misconduct."

We overrule Petitioner's exception. We are not persuaded that the time elapsed between the filing of the motion to vacate and Respondent's next advancement of Mr. Wilson's claims in the guardianship case, in itself, violates MLRPC 1.3. The remainder of Petitioner's arguments in support of its charge speak more to Respondent's violations of other rules of professional conduct than a lack of diligence in violation of MLRPC 1.3.

MLRPC 1.4

MLRPC 1.4 provides:

(a) A lawyer shall:

(1) promptly inform the client of any decision or circumstance with respect to which the client's informed consent, as defined in Rule 1.0(f), is required by these Rules;

(2) keep the client reasonably informed about the status of the matter;

(3) promptly comply with reasonable requests for information; and

(4) consult with the client about any relevant limitation on the lawyer's conduct when the lawyer knows that the client expects assistance not permitted by the Maryland Lawyers' Rules of Professional Conduct or other law.

(b) A lawyer shall explain a matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation.

The hearing judge rendered conclusions of law on MLRPC 1.4 with respect to Respondent's overall representation of Mr. Wilson as well as her representation of Mr. Griggs in the guardianship case.

***649** With respect to Respondent's representation of Mr. Wilson, the hearing judge concluded that Respondent violated MLRPC 1.4(b) but not MLRPC 1.4(a). The hearing judge determined that Respondent did not violate MLRPC 1.4(a) because she orally communicated with Mr. Wilson regarding the divorce and guardianship cases. In concluding that Respondent's representation of Mr. Wilson violated MLRPC 1.4(b), the hearing judge took judicial notice of Judge Bailey's determination that Mr. Wilson was "incompetent to enter into a legal agreement" and found that Mr. Wilson was a vulnerable adult. The hearing judge concluded consequently that Respondent violated MLRPC 1.4(b) by failing to communicate major events to Mr. Wilson in writing, which was necessary for him to be able to understand and later recall that information.

With respect to Respondent's representation of Mr. Griggs, the hearing judge concluded that Respondent violated MLRPC 1.4(a) and (b). The hearing judge noted that Respondent did not explain her role as Mr. Griggs's attorney or the existence or appearance

of a conflict of interest between Mr. Griggs and Mr. Wilson in the guardianship case. The hearing judge concluded that Respondent's failure to explain adequately the guardianship case deprived Mr. Griggs of the ability to make informed decisions.

Respondent takes exception to the hearing judge's conclusion that she violated MLRPC 1.4 in any respect in representing both Mr. Wilson and Mr. Griggs. Respondent asserts that she adequately communicated all facets of the guardianship case to Mr. Griggs and Mr. Wilson. As to Respondent's representation of Mr. Wilson, Respondent argues that the hearing judge erred in concluding that Mr. Wilson was a ****845** vulnerable adult because there was no competency hearing or expert testimony opining that Mr. Wilson was incompetent. She also contends that she was under no legal obligation to memorialize her advice in writing and therefore did not violate MLRPC 1.4(b).

[11] ***650** We disagree with Respondent and overrule her exceptions. The hearing judge, having credited Mr. Griggs's testimony, found that Respondent never explained to Mr. Griggs that she was representing him and that a conflict of interest existed. Respondent has offered no basis for concluding that these findings are clearly erroneous. We reject, moreover, Respondent's contention that the hearing judge erred in concluding that Mr. Wilson was a vulnerable adult. Respondent improperly equates vulnerability with a judicial determination of incompetence. The hearing judge's finding of vulnerability was related to the level of communication required to satisfy MLRPC 1.4, and that finding was not clearly erroneous.

[12] We also agree with the hearing judge that Respondent violated MLRPC 1.4 by failing to put her advice to Mr. Wilson in writing. MLRPC 1.4(b) requires an attorney to communicate with a client "to the extent reasonably necessary to permit the client to make informed decisions." Consequently, to comply with MLRPC 1.4, an attorney may be required to alter the way he or she communicates with a client to ensure that the client is adequately informed. Respondent was aware of Mr. Wilson's difficulty understanding and retaining information and his reliance upon Ms. Stewart and Mr. Griggs to assist him. Given those circumstances, Respondent violated MLRPC 1.4 by failing to take reasonably necessary steps to ensure that Mr. Wilson would be able to understand her advice by memorializing it in writing.

Petitioner does not except to the hearing judge's conclusion that Respondent's representation of Mr. Wilson did not violate MLRPC 1.4(a). Based on our independent review of the judge's findings, we disagree with the hearing judge's conclusion. *See Attorney Grievance Comm'n v. Landeo*, 446 Md. 294, 330–31, 132 A.3d 196 (2016) (reversing the hearing judge's conclusion that the respondent did not violate MLRPC 1.5(a) in two client matters notwithstanding that Bar Counsel only took exception to that conclusion with respect to a third matter). The hearing judge's conclusion that Respondent violated MLRPC 1.4(a) by failing to inform Mr. Griggs of a ***651** potential conflict of interest equally violates MLRPC 1.4(a) with respect to Mr. Wilson. *See Olszewski*, 441 Md. at 267, 107 A.3d 1159 ("We agree with the hearing judge that Respondent clearly violated Rule 1.4(a)(1) by failing to explain the potential conflict of interest when he undertook joint representation of Mr. and Mrs. Ware.").

[13] Respondent likewise violated MLRPC 1.4(a) in her representation of Mr. Wilson by intentionally misrepresenting to him that Ms. Denrich failed to object timely to Dr. Lasson's initial deposition.[6] *See Attorney Grievance Comm'n v. Shapiro*, 441 Md. 367, 385, 108 A.3d 394 (2015) ("The misrepresentation of the status of a case to a client constitutes a violation of MLRPC 1.4(a)."). That Respondent "at least orally communicated ****846** with Wilson" does not remedy her failure to communicate fully and honestly.

In sum, Respondent violated MLRPC 1.4(a) and (b) in connection with her representation of Mr. Wilson as well as her representation of Mr. Griggs.

MLRPC 1.5

MLRPC 1.5(a) prohibits a lawyer from charging or collecting "an unreasonable fee or an unreasonable amount for expenses."[7] The hearing judge found that Petitioner failed to submit any evidence, particularly any expert testimony, proving that Respondent's fees were unreasonable. The hearing judge concluded that, although the Respondent's bills to Mr. Wilson were high, her bills were not unreasonable given the ***652** amount of time and effort Respondent expended to litigate the divorce

and guardianship actions. The hearing judge further concluded that, even though Mr. Wilson should not have been charged for Respondent's errors, her conduct did not rise to the level of a violation of MLRPC 1.5(a).

Petitioner excepts to the hearing judge's factual finding and to the conclusion that Respondent did not violate MLRPC 1.5(a). Petitioner argues that Respondent's testimony sufficiently shows that her fees were unreasonable because Respondent admitted that she billed Mr. Wilson for her representation of Mr. Griggs, defective filings, and time spent on obtaining Dr. Lasson's deposition. Petitioner argues that, although Mr. Wilson ultimately obtained the result he wanted, that outcome "was not because of the Respondent's efforts, but rather despite the Respondent's misconduct." Petitioner argues that, aside from timely filing the motion to vacate, "Respondent failed to take any meaningful action to advance Mr. Wilson's claims."

Respondent counters that, based upon our decision in *Attorney Grievance Commission v. MacDougall*, 384 Md. 271, 863 A.2d 312 (2004), the reasonableness of her fees is established as a matter of law because the District Court entered judgment in her favor. We disagree. In *MacDougall*, we held that the respondent did not violate MLRPC 1.5(a) because a court had approved his attorney's fees and "[t]he parties agree[d] that the Respondent comported himself properly insofar as his taking of a fee for his services." *Id.* at 276, 280, 863 A.2d 312 (internal quotation marks omitted). We do not have that situation here, given the hearing judge's finding that Respondent eventually misled the District Court in her pursuit of those fees.

We sustain Petitioner's exception. Respondent charged Mr. Wilson $58,748.77 and collected over $54,000 to vacate a $55,000 divorce judgment. [8] The hearing judge found that ***653** Respondent's fees were reasonable in light of "the immense scope of the time and effort that were ultimately incurred as a result of Respondent's representation." The record does not reasonably support that finding. Despite the sizeable fee and length of representation, the time and effort Respondent expended was due largely to her own misconduct in connection with both the divorce case and the guardianship action. *See Attorney Grievance Comm'n v. Brady*, 422 Md. 441, 459, 30 A.3d 902 (2011) (concluding that fees that are "wholly disproportionate, and unreasonable, ****847** in relation to the services" violate MLRPC 1.5(a)).

[14] In the divorce case, Respondent charged Mr. Wilson for her work in procuring Dr. Lasson's testimony despite the fact that her discovery misconduct caused his testimony to be excluded. *See Attorney Grievance Comm'n v. Culver*, 381 Md. 241, 277, 849 A.2d 423 (2004) (concluding that the respondent violated MLRPC 1.5(a) for charging a client "to respond to discovery motions" and court sanctions that resulted from the respondent's own misconduct). Other than timely filing the motion to vacate, Respondent's efforts in the divorce case focused largely on her motion to withdraw and her discovery misconduct. Indeed, it was not Respondent's actions that led to the outcome her client sought. Rather, the record demonstrates that Judge Bailey, on her own initiative, ordered a court psychiatrist to evaluate Mr. Wilson, and her analysis of that psychiatric report, in the absence of any argument by Respondent on the merits, led Judge Bailey to find that Mr. Wilson lacked capacity to enter into the settlement agreement. In short, Respondent failed to take action commensurate with the fees she charged and accordingly violated MLRPC 1.5(a). *See Attorney Grievance Comm'n v. Hamilton*, 444 Md. 163, 187, 118 A.3d 958 (2015) (explaining that when an attorney fails "to perform to any meaningful degree the legal services for which the fee was set initially, the fee becomes unreasonable with the benefit of hindsight").

[15] Respondent further violated MLRPC 1.5(a) in connection with the fees she sought and obtained from Mr. Wilson in ***654** the guardianship action. She billed him for her representation of his legal adversary, Mr. Griggs. We cannot accept Respondent's position that her bills were fair and reasonable when she billed Mr. Wilson for filing a pleading that was in direct opposition of his position. *See Attorney Grievance Comm'n v. Manger*, 396 Md. 134, 143, 913 A.2d 1 (2006) (concluding that the respondent violated MLRPC 1.5(a) because he billed the client for conduct that did not advance the client's interests and for his failure to act competently). Respondent also violated MLRPC 1.5(a) by charging Mr. Wilson for her numerous defective filings in the guardianship action. *See Davy*, 435 Md. at 702, 80 A.3d 322 (concluding that the respondent violated MLRPC 1.5 by charging and collecting $10,000 to prepare a defective complaint). We agree with Petitioner that it was not necessary for an expert to testify that it was unreasonable for Respondent

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to charge and collect fees for filing defective pleadings, representing an adverse party, or violating the Rules and court orders. We accordingly conclude that Respondent violated MLRPC 1.5(a).

MLRPC 1.7

[16] MLRPC 1.7 prohibits a lawyer from representing a client "if the representation involves a conflict of interest." MLRPC 1.7(a)(1) states that a conflict of interest exists when "the representation of one client will be directly adverse to another client[.]" The hearing judge concluded that Respondent violated MLRPC 1.7 because she represented Mr. Griggs in the second petition in the guardianship case in opposition to her current client, Mr. Wilson, whom she was representing in the divorce case. The hearing judge further noted that, even though it was arguably true that Mr. Griggs's and Mr. Wilson's interests were aligned at the outset, a clear conflict existed when Respondent filed an opposition against Mr. Wilson. The hearing judge determined that this conflict could not be waived.

Respondent takes exception to this conclusion. Respondent argues that no conflict ****848** of interest existed because, "[w]hile Respondent technically represented Mr. Griggs" in the second ***655** petition, "Mr. Griggs was an incidental beneficiary of Respondent's services, and Mr. Griggs' and Mr. Wilson's interests in that matter were at all times aligned." Respondent argues further that her client at all times was Mr. Wilson, not Mr. Griggs.

We overrule Respondent's exception. We agree with the hearing judge that Respondent's representation of Mr. Griggs in the guardianship case created a conflict of interest that could not be waived because Mr. Griggs and Mr. Wilson were in a directly adverse relationship. We do not subscribe to the contention that Mr. Griggs was a mere "incidental beneficiary" because his and Mr. Wilson's interests were in fact aligned. We have explained that the formation of an attorney-client relationship "does not require an explicit agreement," but rather may arise from the conduct of the parties. *See Attorney Grievance Comm'n v. Brooke*, 374 Md. 155, 175, 821 A.2d 414 (2003). The record reflects that Respondent represented Mr. Griggs, and Respondent concedes that she "technically" represented him in the second petition for guardianship. Respondent should have become aware that a conflict existed when the court appointed counsel to represent Mr. Wilson and, certainly so, at the latest, when she filed an opposition to Mr. Wilson's answer to the petition. *See Olszewski*, 441 Md. at 267, 107 A.3d 1159 (concluding "that Respondent's joint representation of Mr. and Mrs. Ware became a conflict of interest, at the very latest, when Respondent filed suit on behalf of Mr. Ware against Mrs. Ware").

[17] Before the hearing judge and at oral argument before this Court, Respondent argued that there was no conflict because she was acting pursuant to MLRPC 1.14 (client with a diminished capacity) when she filed the second petition for guardianship to help secure a guardian to protect Mr. Wilson's interests. We recognize the difficult position an attorney may be in when representing a client with diminished capacity. For this reason, MLRPC 1.14 permits a lawyer to protect a client by "seeking the appointment of a guardian." But, in doing so, the lawyer may not represent the petitioner while continuing ***656** to represent the alleged disabled person because "the representation of one client will be directly adverse to another client." MLRPC 1.7(a)(1); *see Dayton Bar Ass'n v. Parisi*, 131 Ohio St.3d 345, 965 N.E.2d 268 (2012) ("[Rule 1.14] does not authorize a lawyer to represent a third party in seeking to have a court appoint a guardian for his client. Such a representation would necessarily have to be regarded as 'adverse' to the client and prohibited by Rule 1.7(a), even if the lawyer sincerely and reasonably believes that such representation would be in the client's best interests [.]" (quoting ABA Comm. Ethics & Prof'l Responsibility, *Client Under a Disability*, Formal Op. 96-404 (1996))). Respondent's representation of both Mr. Griggs and Mr. Wilson created a conflict of interest in violation of MLRPC 1.7(a).

MLRPC 1.15 and Maryland Rule 16.606.1

MLRPC 1.15(a) requires that all "[f]unds shall be kept in a separate account maintained pursuant to Title 16, Chapter 600 of the Maryland Rules, and records shall be created and maintained in accordance with the Rules in that Chapter." Maryland Rule 16–606.1(a) requires an attorney to create and maintain records of certain information regarding the receipt and disbursement of client funds. The hearing judge concluded, and Respondent conceded, that she violated MLRPC ****849**

1.15(a) by failing to create and maintain records of her fees collected and disbursed in accordance with Maryland Rule 16–606.1(a). We agree. *See Attorney Grievance Comm'n v. Kobin*, 432 Md. 565, 582, 69 A.3d 1053 (2013) (concluding that an attorney violated MLRPC 1.15(a) when he admitted his failure to comply with Maryland Rule 16–606.1).

MLRPC 3.3

[18] MLRPC 3.3(a)(1) provides that a lawyer shall not intentionally "make a false statement of fact or law to a tribunal or fail to correct a false statement of material fact or law previously made to the tribunal by the lawyer." This Rule "is based on the idea that every court has the right to rely upon an attorney to assist it in ascertaining the truth of the ***657** case before it." *Attorney Grievance Comm'n v. Smith*, 442 Md. 14, 34, 109 A.3d 1184 (2015) (alteration and internal quotation marks omitted). Comment three to MLRPC 3.3 states that a lawyer's statement to the court "may properly be made only when the lawyer knows the assertion is true or believes it to be true on the basis of a reasonably diligent inquiry. There are circumstances where failure to make a disclosure is the equivalent of an affirmative misrepresentation." *See also Attorney Grievance Comm'n v. Pak*, 400 Md. 567, 602, 929 A.2d 546 (2007) (concluding that an attorney's intentional failure to disclose material information violated MLRPC 3.3).

[19] The hearing judge made a number of factual findings in connection with this charged violation and concluded that Respondent in several ways violated MLRPC 3.3 in her testimony in the fee case. Respondent excepts to every one of the hearing judge's findings of fact and conclusions of law in connection with that charge. She contends that her testimony before Judge Russell was truthful and, to the extent that any of her statements were false, Petitioner failed to prove that those misstatements were intentional or material.

The hearing judge found that Respondent made material misrepresentations and omissions to Judge Russell in the fee case. The most significant of those relate to her characterization of Mr. Wilson's mental capacity. Respondent misrepresented to Judge Russell that Mr. Wilson could "certainly deal with his day-to-day events and simple contracts," and implied that Mr. Wilson's only limitation concerned complex matters. The hearing judge found that Respondent intentionally omitted Dr. Lasson's findings that Mr. Wilson was unable to recall and understand basic information. The hearing judge found that Respondent's misrepresentation was made knowingly because she had personal knowledge of the extent of Mr. Wilson's diminished capacity and her position in the fee case was directly contrary to the position she advanced before the court in the divorce and guardianship cases. As a result, the hearing judge concluded that Respondent's conduct violated MLRPC 3.3.

***658** Respondent excepts to this conclusion, maintaining that her testimony before Judge Russell regarding Mr. Wilson's capacity was accurate. We disagree. Respondent's testimony that Mr. Wilson "can certainly deal with his day-to-day events and simple contracts" and "is very able to understand anything that one would tell him, and make an appropriate response" is entirely inconsistent with Dr. Lasson's opinion, of which Respondent had full knowledge, that Mr. Wilson was unable to recite the alphabet, count backwards from twenty, name the U.S. President, or recall "basic information" that "even a child would know." Respondent's testimony is also inconsistent with her argument before Judge Bailey in the divorce case in support of her motion to withdraw, namely that Respondent ****850** was unable to maintain a consistent strategy or discern what Mr. Wilson wanted because he could not remember her advice from one moment to the next.

Moreover, Respondent failed to submit as evidence in the fee case Dr. Siebert's report and Dr. Lasson's reports and testimony, and she omitted any reference to Judge Bailey's finding that Mr. Wilson was incompetent to enter into any legal agreement. Respondent instead submitted a report of Mr. Wilson's prior physician who opined that Mr. Wilson suffered from no mental disability. Those omissions, in tandem with her testimony of the substance of Dr. Lasson's and Dr. Siebert's reports, constituted a misrepresentation of Mr. Wilson's incapacity to Judge Russell.

We accept the hearing judge's finding that Respondent's misrepresentations were made intentionally, given that Respondent had personal knowledge of the extent of Mr. Wilson's diminished capacity and took a position in the fee case that was directly contrary to the position she advanced before the court in the divorce and guardianship

cases. Respondent cherry-picked the information that benefited her and bolstered her position that she was entitled to her fees, to the exclusion of all previous arguments she had made to the contrary. She did so knowing that her adversary was a former client with diminished capacity who was representing himself in that ***659** litigation. Such misconduct is a lack of candor that violates MLRPC 3.3.

Respondent contends that she did not violate MLRPC 3.3 because any misrepresentation was not of a material fact. Respondent points to Judge Russell's finding that Mr. Wilson was competent to enter into, and later ratify, the retainer agreement. We disagree. It defies reason to assume that Judge Russell concluded that Mr. Wilson was competent to enter into the retainer agreement based upon her own observations of him, without also taking into account Respondent's misleading testimony suggesting that he was generally capable of retaining and understanding information presented to him. Respondent's intentional misrepresentations, then, were material. Petitioner proved, by clear and convincing evidence, that Respondent violated MLRPC 3.3 in connection with her representation of Mr. Wilson's capacity in the fee case.

We further reject Respondent's argument that she "had no duty to take over Mr. Wilson's advocacy against herself" by "assert[ing] Mr. Wilson's defenses for him" or submitting evidence to support his defense. She relies for this proposition on *Winkler Construction Co. v. Jerome*, 355 Md. 231, 734 A.2d 212 (1999), in which we stated:

> We agree with the general statement that a party may not couch a pleading in a manner that is likely to mislead the court, and there is no doubt that attorneys have clear duties and constraints under Rule 3.3. Neither precept, however, requires a party or an attorney to assert an adverse party's defense, much less to produce evidence in support of it, when the party disputes that defense.

Id. at 245–46, 734 A.2d 212. Respondent's reliance on *Jerome* is misplaced. Respondent violated MLRPC 3.3 not because she failed to present evidence in the fee case in support of Mr. Wilson's defense, but because she made intentional misrepresentations to the court designed specifically to lead to a judgment in her favor. We agree with Petitioner that, "[o]nce the Respondent presented the issue of Mr. Wilson's mental competency to the District Court, her obligation under the ***660** MLRPC was to refrain from misleading the court about the issue or misrepresenting the evidence." Respondent altogether ignored this obligation ****851** and, in doing so, she violated MLRPC 3.3.

[20] The hearing judge also found that Respondent made intentional misrepresentations to Judge Russell regarding the scheduling of Dr. Lasson's deposition in the divorce case. The hearing judge found that Respondent misrepresented the timing of Ms. Denrich's motion for protective order by testifying that Respondent had offered to reschedule the deposition after it had already taken place "since [Ms. Denrich] didn't show up," and only then did Ms. Denrich file the motion for protective order. The hearing judge found that Respondent's testimony was intentionally false because she had personal knowledge of when she received the motion for protective order, as evidenced by her response to it before the deposition on February 7, 2012. Based upon those misrepresentations, the hearing judge concluded that Respondent violated MLRPC 3.3.

Although Respondent concedes that she "undoubtedly misspoke" in her testimony on this point, she excepts to the hearing judge's conclusion nevertheless because, in her view, Petitioner failed to prove by clear and convincing evidence that she "knowingly misled the District Court." We overrule this exception. We do not accept that Respondent's misrepresentations were mere "unintentional misspeaks" when she made statements to Judge Russell having personal knowledge of facts establishing that the opposite of those statements were true. The hearing judge's finding that Respondent's misrepresentations were intentional is supported by sufficient evidence and therefore is not erroneous, much less clearly so.

The hearing judge further found that Respondent testified falsely before Judge Russell that Ms. Stewart was present when Mr. Wilson signed the retainer agreement. The hearing judge found that testimony to be false, having credited Ms. Stewart's testimony to the contrary, and accordingly concluded that such testimony violated MLRPC 3.3. Respondent ***661** contends that she

made no intentional misrepresentation because it is her recollection that Ms. Stewart was present at that meeting. We overrule Respondent's exception because the hearing judge expressly discredited her testimony in favor of Ms. Stewart's. "As we have stated, a hearing judge is free to disregard the testimony of respondent if the judge believed the evidence was not credible." *Attorney Grievance Comm'n v. Hodes*, 441 Md. 136, 182, 105 A.3d 533 (2014) (internal quotation marks omitted). We defer to the hearing judge's credibility determination.

[21] The hearing judge found, too, that Respondent failed to inform Judge Russell that she had opposed Mr. Wilson in the guardianship action and that Judge Bailey found Mr. Wilson incompetent. The hearing judge also found that Respondent failed to summarize sufficiently the "voluminous amount of material" before Judge Russell, who relied on Respondent as an officer of the court. In doing so, the hearing judge concluded that Respondent violated MLRPC 3.3.

Respondent admits that she did not explain to Judge Russell that she had filed an opposition in the guardianship or that Judge Bailey had found Mr. Wilson incompetent. She argues, however, that she did not violate MLRPC 3.3 in that respect because she was under no obligation to submit to Judge Russell every pleading she filed over the course of the representation or to summarize all of those pleadings. We overrule this exception because the information Respondent chose to omit was designed to persuade Judge Russell that Respondent's fees were reasonable. Respondent similarly contends that she did ****852** not have to summarize every filing because she presumed that Judge Russell reviewed all of Respondent's exhibits. We disagree. Respondent violated MLRPC 3.3 not because she did not summarize every exhibit submitted to Judge Russell, but rather because her summaries were inaccurate and were designed to mislead the District Court.

In sum, having accepted the hearing judge's findings of fact, we conclude that Respondent violated MLRPC 3.3 in several ***662** respects. [9]

MLRPC 8.4(c)

[22] MLRPC 8.4(c) provides that "[i]t is professional misconduct for a lawyer to ... engage in conduct involving fraud, deceit or misrepresentation." Similar to MLRPC 3.3(a)(1), this Rule prohibits a lawyer from making false statements. *Attorney Grievance Comm'n v. Dore*, 433 Md. 685, 707, 73 A.3d 161 (2013). "We have found a Rule 8.4(c) violation when a misrepresentation is overt or based upon a concealment of material facts." *Attorney Grievance Comm'n v. Barton*, 442 Md. 91, 142, 110 A.3d 668 (2015).

[23] The hearing judge concluded that Respondent's intentional misrepresentations that violated MLRPC 3.3(a)(1) likewise violated MLRPC 8.4(c). In addition, the hearing judge found in connection with the divorce case that Respondent intentionally misrepresented to Mr. Wilson that Mrs. Wilson's attorney, Ms. Denrich, never objected to Dr. Lasson's deposition because Respondent admitted that Ms. Denrich in fact did object. Respondent also intentionally misrepresented to Judge Bailey in her opposition to Ms. Denrich's motion to strike that "Ms. Denrich again would not supply dates on which she would commit to being available for [Dr. Lasson's] deposition" because Respondent and Ms. Denrich had agreed upon a date for retaking the deposition. Finally, the hearing judge found that Respondent intentionally misrepresented to Judge Russell in the fee case that she filed motions regarding Dr. Siebert, the cancellation date of a hearing, and the substance of Dr. Siebert's opinion. Respondent takes exception to each of these factual findings, as well as the hearing judge's legal conclusion that she violated MLRPC 8.4(c). She asserts that ***663** her statements, even if false, were not proven by Petitioner to have been intentional.

[24] Respondent has not persuaded us that any of these findings of fact or conclusions of law are erroneous, and we therefore overrule her exceptions. As with Respondent's violation of MLRPC 3.3, whether Respondent violated MLRPC 8.4(c) turns on whether her conceded misrepresentations were made intentionally. *See Smith*, 442 Md. at 33, 109 A.3d 1184. Resolution of that question is largely a matter of credibility. We defer to the hearing judge's determination in that respect, particularly "when it comes to assessing an attorney's state of mind as to an intent to deceive." *Id.* at 35, 109 A.3d 1184. The hearing judge found that Respondent's misrepresentations were made intentionally. The hearing judge's findings in this regard are supported by the evidence that Respondent had personal knowledge of information that contradicted entirely her misrepresentations. Respondent's intentional

misrepresentations ****853** to Mr. Wilson and Judge Bailey violated MLRPC 8.4(c).

MLRPC 8.4(d)

[25] MLRPC 8.4(d) provides that "[i]t is professional misconduct for a lawyer to ... engage in conduct that is prejudicial to the administration of justice[.]" The hearing judge concluded that Respondent's conduct that underlay her many violations of the MLRPC, including, most notably, her intentional misrepresentations to Judge Russell during the fee case, were prejudicial to the administration of justice.

Respondent excepts to that conclusion. She argues that the hearing judge "did not explain how Respondent prejudiced the administration of justice by attempting to collect a reasonable fee that she indisputably earned in accord with MLRPC 1.5."

[26] We overrule Respondent's exception. A lawyer violates MLRPC 8.4(d) "when his or her conduct impacts negatively the public's perception or efficacy of the courts or legal profession." *Attorney Grievance Comm'n v. Reno*, 436 Md. 504, 509, 83 A.3d 781 (2014) (internal quotation marks omitted). ***664** Before Judge Russell, Respondent mischaracterized the mental capacity of her client, who represented himself in the fee case, in order to collect unreasonable fees. That some accurate information was buried in the exhibits before Judge Russell cannot remedy Respondent's oral misrepresentations before the court. Respondent took a position before Judge Russell that directly contradicted her position regarding her client's diminished capacity before different tribunals in this State. Respondent, among other professional misconduct, engaged in representation that created a conflict of interest, charged and collected unreasonable fees, and made numerous intentional misrepresentations to her client and the courts. Respondent's conduct erodes the public's confidence in the legal profession and is prejudicial to the administration of justice in violation of MLRPC 8.4(d). *See Attorney Grievance Comm'n v. Williams*, 446 Md. 355, 375, 132 A.3d 232 (2016) (concluding that the respondent violated MLRPC 8.4(d) by "failing to comply with numerous court orders and then making misrepresentations to excuse his misconduct" (internal quotation marks omitted)).

MLRPC 8.4(a)

MLRPC 8.4(a) provides that "[i]t is professional misconduct for a lawyer to ... violate or attempt to violate the Maryland Lawyers' Rules of Professional Conduct, knowingly assist or induce another to do so, or do so through the acts of another[.]" The hearing judge concluded that Respondent violated Rule 8.4(a) because of her above-described violations of the Rules. "We have held that, when an attorney violates a rule of professional conduct, the attorney also violates MLRPC 8.4(a)." *Attorney Grievance Comm'n v. Young*, 445 Md. 93, 106, 124 A.3d 210 (2015) (internal quotation marks omitted). Respondent's violations of MLRPC 1.1, 1.2, 1.4, 1.5, 1.15, 1.7, 3.3, and 8.4(c) and (d) result in a violation of MLRPC 8.4(a).

III.

[27] **[28]** **[29]** It remains for us to decide the proper sanction for Respondent's misconduct. Mindful that "the purpose of attorney ***665** discipline is to protect the public, not punish the attorney," *Attorney Grievance Comm'n v. Mixter*, 441 Md. 416, 527, 109 A.3d 1 (2015), we aim to impose a sanction "commensurate with the nature and gravity of the violations and the intent with which they were committed," *Good*, 445 Md. at 513, 128 A.3d 54 (internal quotation marks omitted). "We protect the public through sanctions against offending attorneys in two ways: through deterrence of ****854** the type of conduct which will not be tolerated, and by removing those unfit to continue in the practice of law from the rolls of those authorized to practice in this State." *Attorney Grievance Comm'n v. Steinberg*, 395 Md. 337, 372, 910 A.2d 429 (2006) (citations and internal quotation marks omitted). In determining the appropriate sanction, we likewise weigh the attorney's misconduct against any existing mitigating and aggravating factors. *Attorney Grievance Comm'n v. Coppola*, 419 Md. 370, 405, 19 A.3d 431 (2011).

[30] The hearing judge found one aggravating factor: Mr. Wilson "is a vulnerable person, suffering from significant, ongoing cognitive and memory problems, resulting in diminished capacity." [10] The hearing judge also found in mitigation that Respondent has no prior disciplinary record; did not display a selfish motive; provided full

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and free disclosure during the disciplinary proceedings; cooperated during the disciplinary proceedings; provided character and reputation evidence; and expressed remorse for her conduct towards Ms. Denrich and for "relying too heavily on her memory during the Fee Case."

Petitioner excepts to the hearing judge's finding that Respondent did not display a selfish motive and to the hearing judge's failure to address five other aggravating factors: that Respondent engaged in a pattern of misconduct, committed multiple offenses, has refused to recognize wrongful nature of ***666** her conduct, has substantial experience in the practice of law, and has displayed indifference to making restitution.

We sustain each of Petitioner's exceptions. *See Landeo*, 446 Md. at 350, 132 A.3d 196 (finding the presence of additional aggravating factors, not found by the hearing judge, based on the Court's own review of the record); *Coppola*, 419 Md. at 406, 19 A.3d 431 (sustaining Bar Counsel's exceptions regarding two aggravating factors). Respondent displayed a selfish motive by attempting to persuade Mr. Wilson to attest to his "sound mind" in writing. She further displayed a selfish motive by misleading the District Court in order to collect her fees. We agree with Petitioner that there "is no plausible motivation for making the misrepresentations and misleading statements to the court other than the Respondent's motivation to further her financial gain." Respondent displayed a pattern of misconduct from June 2010 to October 2013 by failing to act competently, acting contrary to her client's direction, charging unreasonable fees, and making intentional misrepresentations to her client and the tribunal. Respondent's pattern of misconduct resulted in multiple violations of the Rules. Respondent continues to refuse to recognize the wrongful nature of her actions and has shown indifference to refunding Mr. Wilson any money. Respondent has substantial experience in the practice of the law, having been admitted to the Bar in 1981.

We also disagree with the hearing judge that Respondent's "remorse" is a mitigating factor. Respondent's remorse for her conduct towards Ms. Denrich is irrelevant because Respondent has not demonstrated remorse for her actions in representing Mr. Wilson, the party whom she harmed through her misconduct. Moreover, that Respondent regrets relying on her memory does not demonstrate remorse because, again, it reflects her failure to acknowledge that she engaged in any intentional misconduct. Although Respondent cooperated with Bar Counsel during these proceedings ****855** and submitted evidence of her good character, the aggravating factors in this case outweigh any facts in mitigation.

[31] **[32]** ***667** Upon our assessment of Respondent's misconduct and in light of substantial aggravating factors, we hold that disbarment is the appropriate sanction to be imposed in this case. Our cases have long established that, when an attorney's misconduct is characterized by "repeated material misrepresentations that constitute a pattern of deceitful conduct, as opposed to an isolated instance," disbarment follows as a matter of course. *See Attorney Grievance Comm'n v. Lane*, 367 Md. 633, 647, 790 A.2d 621 (2002). This rule is not limited to cases involving misappropriation or criminal conduct. When a pattern of intentional misrepresentations is involved, particularly those misrepresentations that attempt to conceal other misconduct by the attorney, disbarment will ordinarily be the appropriate sanction. In *Lane*, we disbarred an attorney who "failed to diligently act on his clients' behalf" and "compounded this failure by engaging in a pattern of deceitful and lying conduct designed to conceal his lack of diligence." *Id.* Similarly, in *Steinberg*, the respondent engaged in discovery tactics that resulted in sanctions being imposed on his client; made numerous misrepresentations to his clients, opposing counsel, and the court; and failed to put a contingency fee arrangement in writing, file a petition on behalf of a client, and communicate with his client and opposing counsel. 395 Md. at 374, 910 A.2d 429. We held that "[s]uch a pattern of neglectful and deceitful conduct, coupled with the deceitful attempts to conceal Respondent's lack of diligence, merits disbarment." *Id.*; *see also Williams*, 446 Md. at 376, 132 A.3d 232 ("Respondent's actions to conceal his incompetence and lack of diligence from his client in an attempt to lead her and the courts to believe that he was acting in the best interests of the client cannot be tolerated.").

Respondent's actions in this case are marred by similar misconduct. Respondent failed to act competently and communicate adequately with her client. She engaged in unreasonably aggressive discovery tactics that resulted in sanctions imposed on Mr. Wilson, which were lifted only after a judge later determined that her client was incompetent. Respondent made a misrepresentation to Mr. Wilson to conceal the fact ***668** that her misconduct

excluded the only available medical evidence that would have been required to support his claims. Finally, and most egregiously, Respondent lied to and deceived the court to the detriment of her former client for her own monetary gain.

[33] We impose a sanction less severe than disbarment in cases of intentional misrepresentations only upon a showing of "compelling extenuating circumstances." *Steinberg*, 395 Md. at 375, 910 A.2d 429. Respondent has not offered, nor do we find, the presence of any extenuating circumstances, much less the compelling circumstances we require. Accordingly, we hold that Respondent's misconduct is deserving of the ultimate sanction.

IT IS SO ORDERED; RESPONDENT SHALL PAY ALL COSTS AS TAXED BY THE CLERK OF THIS COURT, INCLUDING COSTS OF ALL TRANSCRIPTS, PURSUANT TO MARYLAND RULE 19-709, FOR WHICH SUM JUDGMENT IS ENTERED IN FAVOR OF THE ATTORNEY GRIEVANCE COMMISSION AGAINST RHONDA I. FRAMM.

All Citations

449 Md. 620, 144 A.3d 827

Footnotes

* Battaglia, J., now retired, participated in the initial hearing and conference of the case while an active member of this Court; after being recalled pursuant to the Constitution, Article IV, Section 3A, she also participated in the rehearing, decision, and adoption of this opinion.

1 The Maryland Lawyers' Rules of Professional Conduct were revised and re-codified on July 1, 2016. In that process Maryland Rule 16–606.1 was renumbered, without substantive change, as Maryland Rule 19-407. Because we judge Petitioner's conduct against the extant law at the time of her actions, we refer to the now re-codified Maryland Rule 16–606.1 throughout.

2 We have combined the hearing judge's initial findings and supplemental findings in this discussion. In some instances the hearing judge's findings are based on his having discredited Respondent's version of events over that of other witnesses whose testimony the judge credited. We have also included additional information based upon the undisputed evidence in the record. *See Attorney Grievance Comm'n v. Gray*, 436 Md. 513, 517 n. 3, 83 A.3d 786 (2014) (supplementing the hearing judge's findings of fact with undisputed information adduced at the disciplinary hearing).

3 The deposition by written questions posed only two questions to Dr. Lasson. The first question asked whether the exhibits from the February 7, 2012, deposition were true and correct. The second question asked whether the opinions Dr. Lasson expressed during his deposition on February 7, 2012, were held to a reasonable degree of medical certainty.

4 The record before the hearing judge included the transcripts of all of the hearings in the divorce case and, as we later discuss, a trial conducted on Respondent's subsequent suit against Mr. Wilson for attorney's fees. The record reflects that the guardianship proceeded and concluded on the papers.

5 MLRPC 1.14 governs the attorney-client relationship when the client has a diminished capacity. MLRPC 1.14 provides in pertinent part that "the lawyer may take reasonably necessary protective action, including consulting with individuals or entities that have the ability to take action to protect the client and, in appropriate cases, seeking the appointment of a guardian ad litem, conservator, or guardian."

6 The hearing judge found in connection with his conclusions of law regarding MLRPC 8.4(c) that Respondent had intentionally misrepresented that fact to Mr. Wilson, but the hearing judge did not refer to that finding in the judge's discussion of MLRPC 1.4. The hearing judge's finding that Respondent made that intentional misrepresentation to her client equally establishes a failure of communication in violation of MLRPC 1.4(a).

7 MLRPC 1.5(a) details several factors to be considered when evaluating the reasonableness of an attorney's fee such as the time and labor required, the difficulty of the issues, and the skill necessary to resolve the client's problem.

8 We arrive at that figure by taking together the $19,125 Mr. Wilson had paid Respondent by November 2011 and the judgment entered in favor of Respondent in the fee case.

9 Respondent claims error in certain of other factual findings made by the hearing judge in connection with the MLRPC 3.3 violation. It is unnecessary to address those claims because, even if we were to do so and determine that any one or more of the judge's additional findings were clearly erroneous, that determination would have no bearing on our conclusion that Respondent otherwise committed multiple violations of MLRPC 3.3.

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10 The hearing judge referred to the aggravating and mitigating factors as set forth in *Attorney Grievance Commission v. Sperling*, 434 Md. 658, 676–77, 76 A.3d 1172 (2013).

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EXHIBIT H

670 N.W.2d 41
Supreme Court of South Dakota.

In the Matter DISCIPLINE OF Gwendolyn L. LAPRATH as an Attorney at Law.

No. 22356.
|
Argued Aug. 28, 2003.
|
Decided Sept. 17, 2003.

Synopsis

In an attorney disciplinary proceeding, the Disciplinary Board of the State Bar of South Dakota recommended disbarment, and Jack R. Von Wald, J., sitting as referee, also recommended disbarment. The Supreme Court, Gilbertson, C.J., held that attorney's incompetence and misconduct, as demonstrated by her failure to manage her office adequately, to comply with the rules governing trust accounts, to honor the obligations of a fiduciary, to represent her clients competently and independently of her own interests, to know or understand substantive or procedural law, and to take responsibility for her own actions warranted disbarment.

Attorney disbarred.

Attorneys and Law Firms

***45** Robert B. Frieberg, Beresford, South Dakota, Attorney for Disciplinary Board.

Gwendolyn L. Laprath, Gregory, South Dakota, Pro se.

Opinion

GILBERTSON, Chief Justice.

[¶ 1.] This is a disciplinary proceeding against Gwendolyn Laprath, [Laprath] a member of the State Bar of South Dakota. The Disciplinary Board of the State Bar of South Dakota has recommended disbarment. The Referee also recommended disbarment. Laprath, who has acted pro se throughout these proceedings, asks that there be no sanction against her and that she be allowed to retain her license to practice law.

GENERAL BACKGROUND

[¶ 2.] Laprath is fifty-three years old. She and Tom Laprath were married in 1971 and divorced in 1990. Their son Ben is a police officer in Sioux City, Iowa. Their son Sam is fifteen years old and lives with Laprath.

[¶ 3.] Laprath received a B.S. degree in home economics with an emphasis in child development and psychology from Colorado State University in 1973. Two years later she received an M.A. in elementary ***46** education from the University of Northern Colorado. After working for the Cheyenne River Sioux Tribe writing health grants and taking time off to spend with her first child, Laprath began law school at Hamline University in 1980. She completed her second and third years of law school at the University of South Dakota School of Law. She was admitted to practice law in South Dakota on diploma privilege on May 17, 1983.

[¶ 4.] Since then Laprath has been engaged in the practice of law in central South Dakota except for the two year period following her divorce when she lived in Colorado and worked for a law firm there. She currently is a solo practitioner engaged in the general practice of law in Gregory, South Dakota. She currently has twenty open files. Her practice primarily consists of criminal, probate, wills, divorce, family law and business matters. She does not practice in the areas of malpractice, medical injury and bankruptcy and recently quit doing trust work.

[¶ 5.] Laprath is buying the building that serves as her office and home. She has no regularly employed support staff. She does her own document drafting on a computer. However, she does not do her accounting on the computer. Rather, she does it manually.

[¶ 6.] Laprath's office law library consists of outdated sets of SDCL, AmJur2d and federal statutes. She accesses the South Dakota Code and Supreme Court decisions through the Internet. She travels to the law library in Winner to use current sets of the federal statutes, SDCL, AmJur2d, North Western Reporter 2d and their indices.

[¶ 7.] Laprath has one checking account. She uses it for her law office business as well as personal expenses. She has judgments against her stemming from matters relating to her divorce. She has unpaid hospital bills

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from surgeries she required over the past several years. Laprath does not maintain malpractice insurance and has not since 1998. However, she has never been sued for legal malpractice. In compliance with Rule 1.4(c)(2) of the Rules of Professional Conduct, her letterhead does indicate that "This firm is not covered by professional liability insurance."

[1] **[2]** [¶ 8.] Laprath has been the subject of six previous disciplinary complaints. The first, in 1987, was dismissed. The second, in 1988, resulted in the imposition of a private reprimand. The third in 1990, resulted in an admonition. The fourth, in 1991, resulted in a private reprimand. The fifth, in 1997, resulted in an admonition and the sixth, in 2001, was dismissed. The sanction of a private reprimand is a finding of a serious rule violation resulting in harm to a client, or a serious rule violation that was intentional. An admonition is a finding of a rule violation that does not result in harm to a client greater than de minimus. Additional complaints are pending in this disciplinary proceeding.

I.

JOHNSON COMPLAINT

A.

[¶ 9.] On June 10, 1998 Laprath's former husband, Tom, was disabled in a plane crash. Laprath cared for his personal needs. She also represented him in proceedings before the Social Security Administration.

[¶ 10.] Following a second application Tom was found eligible for social security benefits. Laprath assumed the role of Tom's representative payee. She was charged with the duty of managing his benefits and using them for his best interests. ***47** Tom received a lump sum award of $11,304 in December 2000. Although she had no attorney fee agreement with or approval from Tom, nor any order from the Social Security Administration regarding attorney fees, Laprath paid herself twenty-five percent of the lump sum award as attorney fees. The $2,826 check, dated December 11, 2000 was made payable to Laprath, as attorney, and signed by Laprath, as personal payee.

[¶ 11.] On January 21, 2001 Laprath, who still had no written fee agreement with Tom, paid herself $1,590 attorney's fees for guardianship proceedings from Tom's social security funds that she controlled as representative payee. In a letter on January 25, 2001 Laprath billed Tom $2,811.21 for attorney fees for the guardianship and conservatorship as well as her personal services. A memo to Tom, dated January 29, 2001 billed him for $2,385 as "an advancement on attorney fees to draft a Guardianship/conservatorship petition and Motion for Temporary Appointment, with affidavits, notices, and Sam's guardianship to achieve service upon Sam, a minor child[.]"

[¶ 12.] On January 29, 2001 Laprath, as client and representative payee for Tom and Sam Laprath entered into what was denominated as a "Contingent Fee Agreement" with Laprath, attorney at law. In this agreement Laprath, as client, retained Laprath, as attorney, to "file and prosecute a guardianship/ conservatorship for Tom J. Laprath and guard/conserve on Sam Laprath, a minor."

[¶ 13.] On January 31, 2001 Laprath filed a petition for the appointment of a guardian and conservator for Tom Laprath a/k/a Tom J. Laprath. In the petition she requested that she and her son, Ben, be appointed as guardians and conservators, as well as temporary guardians and conservators. She presented an ex parte "Order Appointing Temporary Guardian and Conservator" to Circuit Judge Kathleen Trandahl. The order was signed and filed on January 31, 2001. It provided for a hearing on the petition for appointment of guardian and conservator on February 6, 2001.

[¶ 14.] Laprath never discussed her intention to file the petition for guardianship with Tom, nor did she provide him with prior notice. On February 2, 2001 Tom was served with a copy of the petition, the ex parte order and the notice of hearing. Tom promptly retained attorney Rick Johnson to resist the guardianship. Laprath was informed and on February 5, 2001 she wrote to Johnson and told him that she was Tom's payee, temporary guardian and conservator who was owed "more like $20,000 in legal fees given already." Johnson responded by letter on February 8, 2001. It provided, in part:

> I have had an opportunity to meet with Tom. He doesn't seem to be incompetent at all to me. I'll have to admit that Tom nearly had a heart attack on your last letter

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where you are claiming legal fees in the amount of $15,000 to $20,000 for helping him.

Thus the first thing that must be addressed is that since Tom does not agree to that billing it is obvious that you have a very significant conflict of interest in trying to serve as his guardian. Furthermore, serving as his attorney and guardian is a conflict. Tom does not want you to be his guardian or conservator, and he wants you to quit interfering with his ability to get a driver's license.

Johnson also suggested:

1. That you immediately resign as his temporary guardian.

2. That you forward to my office copies of any bills that need to be paid as ***48** well as any correspondence you have had on his [sic] these bills.

3. That you resign your position as payee of any of Tom's Social Security benefits, including the moneys [sic] previously on deposit and provide a breakdown of all checks that have been written by you since becoming a payee for any of Tom's social security monies or any other funds.

4. That if there are some potential buyers for some of Tom's equipment that you forward the information on that so Tom can consider those sales.

5. That you submit an itemized statement of any costs and attorney fees that you claim to be entitled to since the date you claim to have represented Tom, including the Social Security claim.

Please get back to me right away because if you are not willing to resign this temporary conservatorship and guardianship as I will want to have an immediate hearing before the circuit court if that is necessary.

On February 13, 2001 Johnson filed and served a motion to set aside the temporary guardianship.

[¶ 15.] Laprath continued her work on the guardianship proceedings. On February 16, 2001 Laprath, as payee, paid herself, as attorney, an additional $1,007 in attorney fees for the guardianship matter. She paid herself from Tom's money and took the money without notice to or approval of Tom or his new attorney. A document dated February 18, 2001, signed by Laprath and filed in the guardianship matter provided:

FORGIVENESS OF DEBT:

Comes now, Gwendolyn Laprath, the Good Samaritan/ and One of the Petitioners herein who has given legal advice and general care to Tom J. Laprath on or before January 1, 2001 in the amount of approximately $15,000 to $20,000, no bill has been written for these services, and will not be written:

That Gwendolyn Laprath does hereby forgive all outstanding debts for attorney fees incurred by Tom J. Laprath prior to January 1, 2001. Gwendolyn Laprath does not forgive those attorney fees, costs, and caretaker/guardian fees incurred from and after January 2, 2001.

[¶ 16.] The motion to set aside the temporary guardianship was heard and granted by Circuit Judge Steven L. Zinter on February 23, 2001. Judge Zinter heard Tom's motion to dismiss the petition for guardianship and Laprath's motion for approval of attorney fees "in the amount of $3,000.00 upon the approximately $9,000.00 expended to date" on May 24, 2001. In granting the motion to dismiss, Judge Zinter found:

1. That the proceedings to secure a guardianship/ conservatorship over the alleged person in need of protection, Thomas J. Laprath, were done ex parte.

2. That the guardianship/conservatorship proceedings have now been dismissed in their entirety by the Court.

3. That attorney Gwen Laprath was representing herself as well as others in the pursuit of said guardianship/conservatorship proceedings.

4. That Thomas J. Laprath did not want any guardianship or conservatorship over him and the same was done contrary to his wishes.

5. That neither this court nor any other circuit court has ever appointed the petitioner or any other person to ***49** be the guardian or conservator for Thomas J. Laprath.

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6. That the services that are the subject matter of the petitioner's present claim for attorney fee compensation were not shown to be for the benefit of Thomas J. Laprath and on their face show that some of the services being billed for were either not necessary or unreasonably incurred.

Judge Zinter concluded:

1. The court has jurisdiction over this petition.

2. That the petitioner Gwen Laprath has not shown legal cause as to why she should receive the fees requested in her petition herein.

3. The court does not consider that it has before it the issue of the repayment of any fees previously collected by Gwen Laprath.

B.

[¶ 17.] In response to Johnson's legal representation of Tom, Laprath authored a series of letters to Johnson as well as an answer to the motion to dismiss the guardianship. She copied the letters and answer to a number of individuals who had nothing to do with the guardianship proceedings.

[¶ 18.] In a February 5, 2001 letter to a relative of Tom who was going to testify to Tom's total competency, Laprath chastised the relative for encouraging Tom to retain an attorney "that costs $500 per hour." In a February 9, 2001 letter to Johnson she wrote "you of course, will be the greedy attorney using this poor family member for his last dime at $500/hr." And, in her answer to the motion to dismiss, Laprath asserted "[f]urther that Rick Johnson has without benefit of court order required Tom J. Laprath to pay him at least the sum of $5,000 to date in attorney fees." Johnson did not charge $500 per hour. He had not received any fees, retainer or compensation from Tom.

[¶ 19.] Laprath also authored a March 19, 2001 letter where she told Johnson to be on his "best behavior" when he deposed her or she "will walk." She offered a compromise. If Ben, Tom and Laprath's son, would agree to be Tom's sole guardian and she served as his secretary to draw and transmit checks, she wanted Johnson to "resign as Tom's attorney for 1 yr. and stop this 'targeting the messenger' because you don't have a case." She concluded by writing, "your behavior has been reprehensible in all of this and you don't need the work for George [Johnson's son who is a lawyer]. I hope you will teach George better morals than you have exhibited. A good moral attorney would have advised Tom to work with his family and get his act together as he will not improve but will continue to decline."

C.

[¶ 20.] After reviewing Rule 8.3(a), (Reporting of Professional Conduct), and Rule 8.4, (Misconduct), of the South Dakota Rules of Professional Conduct, Johnson filed a formal complaint against Laprath with the Disciplinary Board. The complaint concerned Laprath's conduct in the guardianship proceedings as well as her mischaracterizations in her letters and answer. Johnson believed that Laprath had potentially violated SDCL 16–18–14, 16–18–16, 16–18–19 and 16–18–20 as well as Rules 1.5(a)-(b) and 8.4 of the Rules of Professional Conduct. Johnson wrote, "I believe this matter deserves the disciplinary board's consideration in order to potentially protect the public from unethical or incompetent legal services, and as a means of reinforcing that Ms. Laprath must respect and uphold the image and ***50** integrity of the attorneys she practices with as a whole."

II.

WIEST COMPLAINT

[¶ 21.] The Department of Revenue periodically reviews its files to determine those license holders who have not filed or paid their sales, use or contractors' excise tax. The Department's summary of a license holder is reviewed by an attorney to determine whether there is a prima facia criminal case. If there is, the Department sends the license holder a letter giving the holder five days to return delinquent returns and/or payment. If the license holder complies, no complaint is issued at that time.

[¶ 22.] It is the practice of the Attorney General's office to forward to the State Bar of South Dakota a copy of the "five-day letter" sent to any lawyer licensed to practice law in South Dakota. It makes no difference if the attorney has come into compliance or not.

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[¶ 23.] On September 28, 2001 Assistant Attorney General David D. Wiest sent a five-day letter to Laprath who had failed to file sales tax returns and timely pay the tax due for the months of May, June, July and August 2001. Laprath admits that she failed to file the sales tax returns and pay the tax owed. She, however, did not have enough money to timely pay the tax. Ultimately the tax was paid.

[¶ 24.] In addition, Laprath failed to timely file sales tax returns for January, February, May, July and November 2002. As of January 9, 2003 she owed $20.94 in unpaid sales tax.

III.

LEIGHTON ESTATES

[¶ 25.] On September 14, 2001 Laprath entered into a written fee agreement with Merle J. Leighton for the probate of two "estates in Todd County, and the BIA Trust Assets." The fee agreement, on a form titled "Contingent Fee Agreement," provided that Laprath would receive "$4,240.00 as an advance against anticipated expenses and attorney fees." The agreement did not state the basic fee. It did, however, give Laprath an additional eight percent fee "[i]f the real estate is sold."

[¶ 26.] To pay her fee Laprath made arrangements for Leighton to borrow $5,500 from BankWest in Gregory, South Dakota. She accompanied Leighton to the bank and co-signed the note. To secure the note Leighton mortgaged estate property. On October 12, 2001 Laprath asserted an attorney's lien against the two estates and assigned her lien to BankWest.

[¶ 27.] On October 12, 2001 Laprath received the sum of $4,240 as her retainer. She did not put it in a trust account. Rather she used it to pay her delinquent sales tax and penalty and her personal needs. At the time she spent the retainer, she had not earned the money, nor did she release her attorney's lien.

IV.

KAUPP GUARDIANSHIP

[¶ 28.] In March 1995 Oswald J. Kaupp retained Laprath with regard to an "arrest warrant and the writing of a 'Kaupp Trust." ' At the time she was retained Laprath advised Kaupp that he needed a guardian. Family members, however, felt a trust was more appropriate.

[¶ 29.] Despite her misgivings about Kaupp's mental capacity, Laprath drafted trust documents which Kaupp signed. Legal disagreements arose between Kaupp and Laprath and he refused to sign some documents she presented to him. As a ***51** result she filed a petition requesting that she be appointed his guardian on July 25, 1995. The petition alleged that Kaupp was incompetent and asked that her appointment be for a "limited time during which the legal matters will be settled and the ranching operations streamlined." Laprath requested attorney fees although she had already accepted a $3,100 retainer from Kaupp.

[¶ 30.] On August 10, 1995 Kaupp discharged Laprath as his attorney. On September 6, 1995 Kaupp, represented by his court appointed attorney John Simpson, filed a motion to dismiss Laprath's petition for guardianship. He asked that the petition be dismissed "for the reason that he has discharged attorney Laprath, that prior to her discharge she took positions that were adverse to his interests and contrary to his wishes and she therefore lacked any standing as an interested party under the statute to invoke the jurisdiction of the court in these proceedings."

[¶ 31.] Laprath resisted the motion to dismiss. Following a hearing, the trial court, Judge Trandahl, entered findings of fact, conclusions of law, and an order of dismissal. The court found in part:

4.

That Attorney Laprath had disagreements with O.J. Kaupp which reflected that she had interests that were adverse to his and for that reason and because she had been terminated as his attorney she had no standing as an interested party to institute these proceedings.

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5.

If a conservator is appointed herein it may become his or her duty to investigate the legal work that had been done by attorney Laprath, and for that reason she cannot act as petitioner, guardian or conservator.

6.

That the court finds that attorney Lapraths request for court approved attorney fees are without merit.
It concluded:

1.

The court concludes that Attorney Laprath is not an interested party within the meaning of SDCL 29A–5–305.

2.

The court concludes that Attorney Laprath is not entitled to attorney fees.

3.

The court concludes that Attorney Laprath lacks standing and has a conflict of interest and her petition should be dismissed.

V.

TRUST ACCOUNTING

[¶ 32.] Laprath uses a single checking account for her personal and professional transactions. Prior to April 2001, she never maintained a trust account for the handling of client's funds. In April 2001 she did designate a savings account that she had at BankWest in Gregory, South Dakota as a trust account. Laprath uses this trust account for several purposes and commingles her own funds in the account. She makes cash withdrawals from the trust account and either purchases bank money orders or deposits the proceeds in her professional/personal checking account.

[¶ 33.] Laprath does not maintain the records required by SDCL 16–18–20.1 which provides:

> Every attorney shall maintain complete records of the handling, maintenance and disposition of all funds, securities ***52** and other properties of a client at any time in his possession, from the time of receipt to the time of final distribution, and shall preserve such records for a period of five years after final distribution of such funds, securities or other properties or any portion thereof, and failure to keep such records shall be grounds for appropriate disciplinary proceedings.

[¶ 34.] SDCL 16–18–20.2 requires the maintenance of seven minimum trust accounting records:

(1) A separate bank account or accounts and, if utilized, a separate savings and loan association account or accounts. Such accounts shall be located in South Dakota unless the client otherwise directs in writing. The account or accounts shall be in the name of the lawyer or law firm and clearly labeled and designed as a "trust account."

(2) Original or duplicate deposit slips and, in the case of currency or coin, an additional cash receipts book, clearly identifying:

(a) The date and source of all trust funds received; and

(b) The client or matter for which the funds were received.

(3) Original cancelled checks, or copies of both sides of the original checks produced through truncation or check imaging, or the equivalent, all of which must be numbered consecutively.

(4) Other documentary support for all disbursements and transfers from the trust account.

(5) A separate trust accounts receipts and disbursements journal, including columns for receipts, disbursements, transfers, and the account balance, and containing at least:

(a) The identification of the client or matter for which the funds were received, disbursed, or transferred;

(b) The date on which all trust funds were received, disbursed, or transferred;

(c) The check number for all disbursements; and

(d) The reason, such as "settlement," "closing," or "retainer," for which all trust funds were received, disbursed, or transferred.

(6) A separate file, ledger, or computer file with an individual card, page, or computer document for each client or matter, showing all individual receipts, disbursements, or transfers and any unexpended balance, and containing;

(a) The identification of the client or matter for which trust funds were received, disbursed, or transferred;

(b) The date on which all trust funds were received, disbursed, or transferred;

(c) The check number of all disbursements; and

(d) The reason, such as "settlement," "closing," or "retainer," for which all trust funds were received, disbursed, or transferred.

(7) All bank or savings and loan association statements for all trust accounts.

Laprath fails to maintain any of these minimum accounting records.

[¶ 35.] SDCL 16–18–20.2 also requires minimum trust accounting procedures:

(1) The lawyer shall cause to be made monthly:

(a) Reconciliations of all trust bank or savings and loan association accounts, disclosing the balance per bank, deposits in transit, outstanding checks identified by date and check number, and any other items necessary to reconcile the ***53** balance per bank with the balance per the checkbook and the cash receipts and disbursements journal; and

(b) A comparison between the total of the reconciled balances of all trust accounts and the total of the trust ledger cards, pages, or computer documents, together with specific descriptions of any difference between the two totals and reasons therefor.

(2) At least annually, a detailed listing identifying the balance of the unexpended trust money held for each client or matter.

(3) The above reconciliations, comparisons, and listing shall be retained for at least six years.

(4) The lawyer shall file with the State Bar of South Dakota a trust accounting certificate showing compliance with these rules annually, which certificate shall be filed annually between December first and January thirty-first on a form approved by the Disciplinary Board.

Laprath failed to follow these minimum accounting procedures. She did, however, file with the State Bar certificates showing compliance with the trust accounting rules in 1993, 1994, 1995, 1996, 1997, 1998, 1999, 2000, and 2001. The certificates were false and Laprath knew they were false.

VI.

COMPETENCY

[¶ 36.] In proceedings before the Referee, Circuit Court Judge Jack R. Von Wald, the Disciplinary Board subpoenaed a sitting justice of the South Dakota Supreme Court [1] and three sitting circuit court judges to testify. All had significant prior contact with Laprath in the capacity of a circuit judge. Each was asked if he or she had formed an opinion as to Laprath's competency to practice law. Judge Max A. Gors stated, "I do not believe she is competent." According to Justice Zinter, "Ms. Laprath does not meet the standards of competence of lawyers practicing in South Dakota." Judge Lori S. Wilbur testified, "My opinion is that Ms. Laprath is not competent, as I understand the Rules of Professional Conduct, to practice law; and it is a chronic problem." Judge Kathleen Trandahl testified, "[i]t is my legal opinion based upon a review of the files, having worked with Ms. Laprath over the years, that she is not competent to practice law.... She does not possess the ability to do that."

[¶ 37.] Each judge cited specific instances when Laprath's competency came into question. Records of these cases are included in the record of the proceedings before this Court and have been reviewed. They support the judges' testimony. The judges' testimony reveals common themes regarding Laprath's competency to practice law:

- Laprath does not understand how to commence an action, venue an action, give notice prior to hearing, or appeal administrative matters;
- Laprath is unable to diagnose and analyze even the most common legal problem and solve it within applicable rules;
- Laprath's written documents are error laden, poorly written, illogical or incomprehensible;
- Laprath's oral communication is poor. She fails to lay the proper foundation for evidence, objections are not made or are inappropriate, and evidence is ***54** presented in a disjointed, rambling fashion; and
- Laprath is chronically late in filing documents and court appearances.

[¶ 38.] Justice Zinter noted:

> You know, she can find a statute, and she can find facts. But to put the two together and to figure out what the legal problem really is and to solve it within the rules or procedure or evidence or whatever the applicable rules are, she just—she never gets that part of it done.
>
> * * *
>
> I hate to say it that way, but it's just a mess from beginning to end when Ms. Laprath is involved and this case is an example of that. You know, I really don't like saying these things because I really like Gwen as a person. I think her heart is in the right place, and I think she tries to do the right thing, but it's almost impossible for her to get a pleading or document filed, which isn't wrong in some respect. Whether it's a minor defect or major, it's going to have some problem with it. And I—I fully realize—you know, we've all practiced law, and we've—everybody makes mistakes. And I'm not talking about, you know, a mistake—I don't think anybody would—a little mistake here and there that all lawyers do, because I would never call anybody to task for something like that. But this is a situation—like in this file when I read through it again the other day, I mean it's just every document virtually; it has problems, whether it's spelling and grammar or whether it's just incomplete sentences or failure to grasp what's going on, or not using the rules or following the rules of procedure or the rules of evidence. It's something like that in almost everything that's filed.

DISCIPLINARY BOARD/REFEREE

[¶ 39.] The Disciplinary Board as well as the Referee concluded:

A. Respondent has violated SDCL 16–18–14 concerning respect for parties and witnesses.

B. Respondent has violated SDCL 16–18–16 concerning the commencement or continuance of an action or proceeding from any motive of passion or interest.

C. Respondent has violated SDCL 16–18–19 concerning an attorney's duty to use such means only as are consistent with truth, and never to seek to mislead the judges by any artifice or false statement of facts or law.

D. Respondent has violated SDCL 16–18–20.1 by failure to maintain complete records of the handling, maintenance and disposition of client's funds, securities and other properties.

E. Respondent has violated SDCL 16–18–20.2 by failure to maintain minimum trust accounting records and minimum trust accounting procedures.

F. Respondent has violated the following rules of Professional Conduct (Rule):

(1) Rule 1.1 concerning competence;

(2) Rule 1.2 concerning scope of representation;

(3) Rule 1.5 concerning fees;

(4) Rule 1.7 concerning conflicts of interest;

(5) Rule 1.8 concerning conflicts of interest, and prohibited transactions;

(6) Rule 1.14 concerning a client under disability;

(7) Rule 1.15 concerning the safekeeping of property;

***55** (8) Rule 1.16 concerning terminating representation;

(9) Rule 3.3 concerning candor toward the tribunal;

(10) Rule 3.4 concerning fairness to opposing parties and counsel;

(11) Rule 4.1 concerning truthfulness in statements to others;

(12) Rule 4.4 concerning respect for rights of third persons; and

(13) Rule 8.4(a)(c)(d) concerning professional misconduct.

[¶ 40.] The Disciplinary Board and the Referee conducted exhaustive hearings in this matter. Each made detailed findings of fact and conclusions of law before recommending Laprath's disbarment. Each recommended that Laprath be disbarred.

STANDARD OF REVIEW

[3] [4] [5] [¶ 41.] This Court gives careful consideration to the findings of the Disciplinary Board and Referee because they have had the advantage of encountering the witnesses first hand. *In Re Discipline of Light*, 2000 SD 100, 615 N.W.2d 164. "We do not, however, defer to a sanction recommended by the Referee." *Id.,* 2000 SD 100 at ¶ 9, 615 N.W.2d at 167. "The final determination for the appropriate discipline of a member of the State Bar rests firmly with the wisdom of this Court." *Matter of Discipline of Wehde*, 517 N.W.2d 132, 133 (S.D.1994).

LEGAL ANALYSIS

[6] [¶ 42.] Since the earliest days of organized government in this jurisdiction, the authority exercised by practicing attorneys has been under the supervision of its highest judicial authority. *See* ch 5, 1st Session, Laws of the Territory of Dakota, 1862. An attorney has always been viewed as possessing and exercising substantial power and authority:

> A certificate of admission to the bar is a pilot's license which authorizes its possessor to assume full control of the important affairs of others and to guide and safeguard them when, without such assistance, they would be helpless. Moreover, in [South Dakota] it is a representation made by this court that he [or she] is worthy of the unlimited confidence which clients repose in their attorneys; trustworthy to an extent that only lawyers are trusted, and fit and qualified to discharge the duties which devolve upon members of his profession.

In re Egan, 52 S.D. 394, 402, 218 N.W. 1, 4 (1928) (quoting *In Re Kerl*, 32 Idaho, 737, 188 P. 40 (1920)). As such, we have consistently held that the holder of a certificate to practice law from this Court holds a privilege to serve the public by the practice of law and not an absolute right:

> 'the right to practice law' is not in any proper sense of the word a 'right' at all, but rather a matter of license and high privilege. Certainly, it is in no sense an absolute right. It is in the nature of a franchise to the enjoyment of which no one is admitted as a matter of right, but only upon proof of fitness and *qualifications which must be maintained if the privilege is to continue in enjoyment.* (emphasis added).

Application of Widdison, 539 N.W.2d 671, 675 (S.D.1995) (quoting *Egan,* 52 S.D. at 398, 218 N.W. at 2–3).

[7] [8] [¶ 43.] Article V, section 12 of the South Dakota Constitution states that "[t]he Supreme Court by rule shall govern terms of courts, admission to the bar, and discipline of members of the bar." While this is a grant of regulatory authority to this Court, it also places an affirmative duty upon us to carry out this mandate. Moreover, this Court, in SDCL 16–19–31, has defined its constitutional regulatory relationship with the bar as:

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> [T]he license to practice law in this state is a continuing proclamation by the Supreme ***56** Court that the holder is fit to be entrusted with professional and judicial matters, and to aid in the administration of justice as an attorney and as an officer of the court. It is the duty of every recipient of that privilege to conduct himself [and herself] at all times, both professionally and personally, in conformity with the standards imposed upon members of the bar as conditions for the privilege to practice law.

The purpose of disciplinary proceedings is to protect the public from fraudulent, unethical or incompetent practices by attorneys. *Matter of Discipline of Kallenberger*, 493 N.W.2d 709 (S.D.1992). They "protect the public and the administration of justice from lawyers who have not discharged, will not discharge, or are unlikely to properly discharge their professional duties to clients, the public, the legal system, and the legal profession." ABA Standards for Imposing Lawyer Sanctions Rule 1.1 (1991). They are not conducted to punish the lawyer. *Petition of Pier*, 1997 SD 23, 561 N.W.2d 297.

> The preservation of trust in the legal professional is essential. *Pier,* 1997 SD 23 at ¶ 8, 561 N.W.2d at 299. Lawyers in the practice of law have a formidable responsibility to protect their clients' "property, their freedom, and at times their very lives." Matter of Chamley, 349 N.W.2d 56, 58 (S.D.1984). "Only by providing high quality lawyering can the integrity of the legal profession remain inveterate and the confidence of the public and the Bar remain strong." *Wehde,* 517 N.W.2d at 133.

In Re Discipline of Mattson, 2002 SD 112, ¶ 40, 651 N.W.2d 278, 286.

I.

JOHNSON COMPLAINT

A.

[9] [¶ 44.] Upon receipt of Tom's lump sum benefits Laprath, as representative payee, paid herself a quarter of the benefits as attorney fees. She had no fee agreement or approval with Tom to do so and no authorization from the Social Security Administration. In the course of the next month she advanced attorneys fees to herself from Tom's benefits for a guardianship proceeding for Tom that she planned on pursuing. Tom had never asked her to be his guardian nor had he approved the attorney fees. She then, as representative payee, retained herself, as attorney, to "prosecute" a guardianship proceeding for Tom. She represented herself and her son in securing an ex parte order appointing themselves temporary guardians over Tom, who was given no notice. After Tom objected and secured his own attorney, Laprath continued to pursue the guardianship and pay herself attorney fees from Tom's benefits. She represented that she had incurred "more than $20,000" in legal fees for the guardianship. In the three month period following receipt of the $11,304 in social security benefits Laprath paid herself $4,883 in attorney fees from these benefits.

[10] **[11]** **[12]** [¶ 45.] It is fundamental law that an attorney, while representing a client, must not do anything knowingly that is inconsistent with the terms of employment or contrary to the client's best interests. *Speckels v. Baldwin,* 512 N.W.2d 171 (S.D.1994). "The nature of the relationship between attorney and client is highly fiduciary. It consists of a very delicate, exacting and confidential character. It requires the highest degree of fidelity and good faith. It is a purely personal relationship, involving the highest personal trust and confidence." *Rosebud Sioux Tribe v. Strain,* 432 N.W.2d 259, 264 (S.D.1988).

[¶ 46.] In her dealings with Tom, Laprath violated her fiduciary obligation. As ***57** an attorney Laprath had a duty "not to encourage either the commencement or continuation of an action or proceeding from any motive of passion or interest." SDCL 16–18–16. Here, Laprath charged exorbitant attorney fees without a fee agreement with Tom for work he did not authorize. She paid herself fees before services were rendered. She depleted his social security benefits by almost half in three months to pay herself for work that a court found did not benefit Tom, was not necessary, and was unreasonable.

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She failed to recognize any conflict between her serving as Tom's representative payee, Tom's attorney, attorney for herself and her son seeking guardianship, and as Tom's temporary guardian. And, she continued to pursue the guardianship and pay herself attorney fees from Tom's benefits after Tom terminated the attorney-client relationship and hired another attorney to represent him in resisting the guardianship.

[¶ 47.] At a minimum Laprath's actions in this matter violated Rules 1.2 (Scope of Representation), 1.5 (Fees), 1.7 and 1.8 (Conflict of Interest), and 1.14 (Client Under a Disability).

[¶ 48.] Laprath contends, however, that all of her actions as representative payee and attorney were discretionary and therefore shield her from discipline. Laprath believes that the Preamble to the Rules of Professional Conduct as well as Rule 1.14 (Client Under a Disability) and its comment support her contention.

[¶ 49.] The Preamble to the Rules of Professional Conduct provides, in part:

> The Rules of Professional Conduct are rules of reason. They should be interpreted with reference to the purposes of legal presentation and of the law itself. Some of the Rules are imperatives, cast in the terms of "shall" or "shall not". These define proper conduct for purposes of professional discipline. Others, generally cast in the term "may", are permissive and define areas under the Rules in which the lawyer has professional discretion. *No disciplinary action should be taken when the lawyer chooses not to act or acts within the bounds of such discretion.* Other Rules define the nature of relationships between the lawyer and others. The Rules are thus partly obligatory and disciplinary and partly constitutive and descriptive in that they define a lawyer's professional role.
>
> (emphasis supplied).

Rule 1.14 provides:

> (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.

[¶ 50.] The comment to Rule 1.14 provides, in part:

> If a legal representative has already been appointed for the client, a 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 could 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, ***58** 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.

In her brief to the Referee, Laprath indicated that the final sentence in the quoted comment paragraph was followed by the sentence, "This evaluation is discretionary and not subject to review by the Disciplinary Board, or the Court." No such sentence exists in the comment to Rule 1.14.

[¶ 51.] Because Rule 1.14(b) says that a lawyer "may" seek appointment of a guardian under certain circumstances, Laprath believes her action in seeking her and her son's appointment as guardian and all of her actions with regard to the guardianship are discretionary and not subject to discipline. Laprath misinterprets Rule 1.14, however. The ABA Committee on Ethics and Professional Responsibility explains:

> Rule 1.14(b) creates a narrow exception to the normal responsibilities of a lawyer to his client, in permitting the lawyer to take action that by its very nature must be regarded as "adverse" to the client. However, Rule

1.14 does not otherwise derogate from the lawyer's responsibilities to his client and certainly does not abrogate the lawyer-client relationship. In particular, it does not authorize a lawyer to represent a third party in seeking to have a court appoint a guardian for his client. Such a representation would necessarily have to be regarded as "adverse" to the client and prohibited by Rule 1.7(a), even if the lawyer sincerely and reasonably believes that such representation would be in the client's best interests, unless and until the court makes the necessary determination of incompetence. Even if the court's eventual determination of incompetence would moot the argument that the representation was prohibited by Rule 1.7(a), the lawyer cannot proceed on the assumption that the court will make such a determination. In short, if the lawyer decides to file a guardianship petition, it must be on his own authority under Rule 1.14 and not on behalf of a third party, however well-intentioned.

* * *

Seeking the appointment of a guardian for a client is to be distinguished from seeking to be the guardian, and the Committee cautions that a lawyer who files a guardianship petition under Rule 1.14(b) should not act as or seek to have himself appointed guardian except in the most exigent of circumstances, that is, where immediate and irreparable harm will result from the slightest delay. Even in the latter situations, a lawyer may have to act before the appointment has been actually made by a court. A lawyer whose incapacitated client is about to be evicted, for instance, should be permitted to take action on behalf of the client to forestall or prevent the eviction, for example, by filing an answer to the eviction complaint. In such a case the lawyer should take appropriate steps for the appointment of a formal guardian, other than himself, as soon as possible.
ABA Com. On Ethics and Professional Responsibility, *Client Under a Disability,* Formal Op 96–404.

B.

[13] [¶ 52.] In her letters to Johnson and others and her answer to the motion to dismiss, all of which were copied to individuals having nothing to do with the guardianship, Laprath asserted that Johnson charged $500 per hour and has been paid $5,000 in attorney fees by Tom. Neither accusation was true and Laprath admitted ***59** that she had nothing to back them up. By doing so, Laprath failed in her duty as an attorney "to employ, for the purpose of maintaining the causes confided to [her], such means only as are consistent with truth[.]" SDCL 16–18–19.

[14] [¶ 53.] In addition to providing knowingly false information, Laprath's letters contain inflammatory statements that are personally and professionally offensive. She violated her duty and her oath to "abstain from all offensive personality." SDCL 16–16–18. This is an on-going obligation, a lawyer's duty under SDCL 16–18–14, and a lawyer's responsibility to use the law's procedures only for legitimate purposes and not to harass or intimidate others. *In re Discipline of Eicher*, 2003 SD 40, 661 N.W.2d 354.

[¶ 54.] In fairness to Laprath she did attempt to write to Johnson and apologize. The letter provided: [2]

November 7, 2001

Rick Johnson

Johnson, Eklund, Nicholson, and Peterson

P.O. Box 149

Gregory, SD 57533

RE: letter of apology re In the Matter of Tom J. Laprath Tripp County

Dear Ms. Laprath: [sic]

I deeply regret the non-professional attitude I adopted and used in my correspondence to you regarding the guardianship of Tom J. Laprath. It was unprofessional and well beneath my usual standard of behavior. It will not occur again. Please accept my heartfelt apology.

Best regards,

/s/_____

Gwendolyn Laprath

C.

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[¶ 55.] At various points in these proceedings Laprath has charged that Johnson's complaint to the Disciplinary Board was part of a scheme by Johnson to harass her and to cause economic harm and emotional distress to her. She believes that the matters he complained about are inconsequential.

[¶ 56.] Other than her allegation, Laprath provided no evidence to support her claim. Indeed, Johnson had a duty to report professional misconduct. Rule 8.3(a) provides that "[a] lawyer having knowledge that another lawyer has committed a violation of the Rules of Professional Conduct that raises a substantial question as to that lawyer's honesty, trustworthiness or fitness as a lawyer in other respects, shall inform the appropriate professional authority."

[¶ 57.] Laprath has also contended that she did not receive due process at the Disciplinary Board hearing because board member Gregory Eiesland and Rick Johnson were partners, with twenty others, in a limited partnership that owns land for hunting purposes. She also questioned whether she received a fair hearing due to her belief that three members of the board were unfamiliar with social security and guardianship laws. Laprath filed a motion to dismiss the disciplinary action. The matter was fully briefed. The Referee recommended that the motion be denied. This Court considered her motion, briefs, recommendation and denied the motion to dismiss on October 17, 2002. There is no evidentiary basis to support her charges. This point was not lost on the Referee as ***60** he found "[Laprath] tends to blame others, including judges, clients, and other lawyers for her lack of competence." As in previous disciplinary cases, we do not condone baseless attacks on the integrity of members of the judiciary, Disciplinary Board or members of the bar simply because they are doing their duty in matters of attorney discipline. *Matter of Dorothy*, 2000 SD 23, ¶¶ 42–48, 605 N.W.2d 493, 505–8; *Eicher,* 2003 SD 40, ¶ 35, n.6, 661 N.W.2d at 363, n.6.

II.

WIEST COMPLAINT

[15] **[16]** [¶ 58.] Laprath admits that she failed to file sales tax returns and timely pay the tax due for the months of May, June, July and August 2001. The failure to pay sales tax within thirty days from the date due constitutes a Class 1 misdemeanor. SDCL 10–45–48.1(2). The failure to file a sales tax return within thirty days from the date of return is due is also a Class 1 misdemeanor. SDCL 10–45–48.1(4). The violation of SDCL 10–45–48.1(2) or SDCL 10–45–48.1(4) two or more times in any twelve-month period is a Class 6 felony. SDCL 10–45–48.1(6).

[¶ 59.] Consequently, Laprath was facing two Class 6 felonies for her failure to file the sales tax returns and pay the tax owed. It was only because she complied with the Department of Revenue's demand for return of the delinquent returns and payment of the tax within the allotted time that the Department decided not to pursue a criminal prosecution.

[¶ 60.] According to Laprath, her repeated failure to file tax returns and pay the tax in a timely manner was due to her surgery, a lack of funds, and "the need to file and maintain a lawsuit for the guardianship of Tom J. Laprath." Nevertheless, this Court has noted, that "[f]inancial problems, however, do not excuse nor do they justify a course of conduct in the handling of a client's funds that leads to the misallocation or withholding, however temporary, of such funds." *In re Rude*, 88 S.D. 416, 221 N.W.2d 43, 47–48 (1974). In addition, if her health problems were so disabling, she had the duty to secure other counsel to properly handle her client's affairs. *Matter of Discipline of Stanton*, 446 N.W.2d 33 (S.D.1989).

[17] **[18]** [¶ 61.] Laprath also believes that she cannot be disciplined for her failure to file returns and taxes because she was not criminally prosecuted for that failure. Laprath misunderstands the purpose of attorney discipline. It is for the protection of the public, not the punishment of the offender. The Department's decision not to pursue a criminal prosecution has nothing to do with this Court's "inherent power to supervise the conduct of attorneys who are its officers." SDCL 16–19–20. This Court, and not criminal prosecutors, or some other third party, is solely entrusted with attorney discipline. *Cf Eicher,* 2003 SD 40, ¶ 27, 661 N.W.2d at 370; *Mattson,* 2002 SD 112, ¶ 51, 651 N.W.2d at 288.

[19] **[20]** **[21]** **[22]** [¶ 62.] Sales tax is money held in trust for the state. *Kallenberger,* 493 N.W.2d at 711. "[T]ax defalcation ... borders on embezzlement of funds received from clients in payment of sales tax, which monies [an

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attorney], in effect, holds in trust for remittance to the State." *In re Discipline of Crabb*, 416 N.W.2d 258, 260 (S.D.1987).

> While each individual sales tax delinquency may appear at first glance a minor violation, this court must look at the entire picture. "A pattern of repeated offenses, even ones of minor significance when considered separately, can indicate indifference to legal obligation." SDCL ch 16–18, Appx Rule 8.4 ***61** Comment. Therefore this court holds that Kellenberger's conduct indicated an indifference to legal and financial obligations[.]

Kallenberger, 493 N.W.2d at 712.

III.

LEIGHTON ESTATES

[23] [¶ 63.] In this matter Laprath used her client to enter a transaction that benefited herself. She took her client to the bank to borrow money, had the client mortgage estate property, and had the borrowed funds paid to herself so she could pay her sales tax arrears. She co-signed the note, filed an attorney's lien against the estate, and assigned her lien to the bank. She does not dispute that she knowingly took the money before performing the services she agreed to perform. Her actions, at a minimum, violated Rule 1.5 (Fees) and Rules 1.7 and 1.8 (Conflicts of Interest).

IV.

KAUPP GUARDIANSHIP

[24] [¶ 64.] In this matter Laprath drafted documents for and had them signed by a client that she considered incompetent. She took positions adverse to her client's interests and contrary to his wishes. When he objected, she alleged that he was incompetent and filed a petition requesting that she be appointed his guardian. She believed that Rule 1.14 (Client under a Disability) mandated her to seek her own appointment, something the rule clearly does not require. *See* ABA Formal Op 96–404, *supra* at ¶ 51. Her client, who had not given his consent to her filing the petition, discharged her. When his court appointed attorney filed a motion to dismiss Laprath's petition, she resisted.

[¶ 65.] Laprath's actions, at a minimum, violated Rules 1.2 (Scope of Representation), 1.7 and 1.8 (Conflict of Interest), and 1.14 (Client Under a Disability).

V.

TRUST ACCOUNTING

[25] [¶ 66.] Laprath admits that she did not maintain a client trust account prior to April 2001. The trust and financial records she has maintained since then are "so incomplete and confusing that one would have to be a Houdini to interpret [her] records." *In re Discipline of Mines*, 2000 SD 89 at ¶ 22, 612 N.W.2d 619, at 628. She maintains none of the minimum trust accounting records required by and clearly set forth in SDCL 16–18–20.2. She fails to follow the mandatory minimum trust accounting procedures required by SDCL 16–18–20.2. She knowingly filed false compliance certificates with the State Bar for nine years.

[¶ 67.] Like Mines, Laprath has "deplorable" office and financial practices. *Mines,* 2000 SD 89 at ¶ 22, 612 N.W.2d at 628. Her failure to follow the mandates of SDCL 16–18–20.2, the fact that her "trust account" is subject to overdrafts, her knowing failure to keep client funds and property separate from her own, her participation in setting up loans for clients to pay her fees, her habit of taking and keeping money for fees before she has earned them, and her failure to timely file returns and pay her sales tax is substantial professional misconduct in violation of Rule 8.4.

VI.

COMPETENCY

[26] **[27]** [¶ 68.] The first rule of the Rules of Professional Conduct declares: "A lawyer shall provide competent representation to a client. Competent representation requires the legal knowledge, ***62** skill, thoroughness and preparation reasonably necessary for the representation." [3] This Court takes its obligation to assure the public of the competency of the bar most seriously:

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> With the authority to license, suspend, disbar, and reinstate lawyers comes the awesome responsibility to the public of this state to assure, to the best of our ability, that lawyers have basic competence to advise and represent their clients. We intend to respond to that responsibility in a serious, conscientious manner.
> *Matter of Voorhees*, 403 N.W.2d 738, 739 (S.D.1987).

Laprath disputes the Referee's findings of lack of her competence based upon a challenge to the judges who testified against her.

[28] [¶ 69.] At the hearing before the Referee, four judges that Laprath frequently appeared before were subpoenaed to testify. Laprath objected based upon *Appeal of Schramm*, 414 N.W.2d 31 (S.D.1987) which she claimed stood for the proposition that "an expert must testify as to the competency of the person being licensed ... and that other fellow practitioners of the same education and experience are not qualified as experts to testify." She also contends that she has far more experience in the law than Judges Wilbur and Trandahl so their opinions are suspect and unreliable. Contrary to the allegation of Laprath against Judges Wilbur and Trandahl, mere length of time one is a member of the Bar does not equate with superior professional skills and competence. She contends that Justice Zinter recanted his opinion that she was incompetent, which he did not. She believes her appearances before Judge Gors were too remote to form a basis for an opinion of incompetency. They are not.

[¶ 70.] Laprath has misinterpreted this Court's opinion in *Schramm.* In that case, this Court adopted the rationale of the majority of jurisdictions and held that where issues of competence and negligence are of a complicated nature, expert testimony is required in administrative hearings to establish the proper competency ***63** standards and whether they are met. The Court noted:

> The adoption of such a requirement should impose no great hardship on the Board nor interfere with its obligation to protect the public. At the hearing, the Board subpoenaed two dentists who practiced in the same town as appellant and another who practiced in a similar locale, all of whom have seen numerous examples of appellant's professional work. It would have been very simple to have asked these expert witnesses as to the standard of competency for dentists in the Winner area and similar locales and whether the examples of appellant's work they saw met the standard.

Schramm, 414 N.W.2d at 37, fn. 9. The Court's holding was limited to standards for dentists, but applied to licensing boards and decisions that would ultimately be reviewed by the courts under SDCL ch 1–26. The reason for this rationale is that the jurists, who ultimately decide the case based on the administrative records, have no expertise in dentistry. There was no competent way for this Court to review the literally hundreds of x-rays and plaster casts of teeth prepared by Schramm to determine his competency absent expert testimony from experts in the field of dentistry.

[¶ 71.] The same is not applicable in attorney disciplinary cases. All four judges who testified in this case, members of the Disciplinary Board, the Referee and members of this Court are veteran members of the bar. Judges in other contexts are routinely called upon to make determinations as to attorney competence in a particular matter. *Strickland v. Washington,* 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984) (professional competence in criminal defense matters); *Keegan v. First Bank of Sioux Falls,* 519 N.W.2d 607 (S.D.1994) (attorney malpractice).

[29] **[30]** [¶ 72.] The Supreme Court has the inherent power to supervise the conduct of attorneys who are its officers. SDCL 16–19–20. Bar discipline is an administrative process under the authority of the justices of this Court. SDCL ch 16–19. *See Matter of Eisenhauer*, 426 Mass. 448, 689 N.E.2d 783 (1998). Here the four judges testified before this Court's appointed Referee.

[¶ 73.] As a trial judge, each had the unique "opportunity to observe and evaluate the character, competence, industry and fidelity of the lawyers who regularly appear before him [or her] day in and day out." State ex rel. *Lawrence v. Henderson,* 1 Tenn.Crim.App. 199, 433 S.W.2d 96 (1968). As a trial judge, each also has disciplinary responsibilities including:

> A judge who receives information indicating a substantial likelihood that a lawyer has committed a violation of the Code of Professional Responsibility should take appropriate action. A judge having

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> knowledge that a lawyer has committed a violation of the Code of Professional Responsibility that raises a substantial question as to the lawyer's honesty, trustworthiness or
>
> fitness as a lawyer in other respects shall inform the appropriate authority.

Canon 3(D)(2) Code of Judicial Conduct. *See Eicher,* 2003 SD 40 at ¶ 49–50, 661 N.W.2d at 369–370.

> Because of their critical position in the judicial bureaucracy, judges are required to insure that the integrity of the judicial system is preserved and maintained. Among the administrative responsibilities imposed on a judge in Canon 3, therefore, is that of taking or initiating appropriate disciplinary measures ***64** against a judge or lawyer for unprofessional conduct of which the judge may become aware. Thus, a judge exposes himself or herself to the disciplinary action for failure to report the misconduct of other judges or attorneys to attorney disciplinary bodies and judicial conduct commissions.
>
> Judicial conduct commissions are adjuncts of the modern judicial bureaucracy and, as such, judges are required to comply with directives of these bodies and fully cooperate with them in matters involving the legitimate exercise of their disciplinary function.

Jeffrey M. Shaman, et al, Judicial Conduct and Ethics § 6.15 (3d ed 2000).

[31] [¶ 74.] The Referee entered sixty-six findings of fact and concluded that Laprath had violated five statutes and thirteen Rules of Professional Conduct. The Referee concluded that Laprath violated Rule 1.1 which provides:

> A lawyer shall provide competent representation to a client. Competent representation requires the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation.

"[T]he enforcement of competent standards has been generally limited to relatively exotic, blatant, or repeated cases of lawyer bungling." C. Wolfram, Modern Legal Ethics § 5.1 (1986). The record in this case clearly demonstrates a blatant and repeated case of lawyer bungling demonstrating "a continuing pattern of gross incompetence." *Matter of Disciplinary Action Against Nassif*, 547 N.W.2d 541, 543 (N.D.1996).

[¶ 75.] A myriad of examples of incompetence have already been set forth in this opinion. We also note that this Court found Laprath's representation deficient in several respects in *Freeman v. Leapley,* 519 N.W.2d 615 (S.D.1994). The Federal District Court as well as the Eighth Circuit Court of Appeals held that Laprath's assistance was ineffective and prejudiced the defendant. *Freeman v. Class,* 911 F.Supp. 402 (D.S.D. 1995); *Freeman v. Class,* 95 F.3d 639 (8th Cir.1996).

[¶ 76.] Finally, we can not overlook Laprath's lack of competence in the presentation of her defense in this disciplinary proceeding. In addition to misrepresenting key facts and law, she has demonstrated her lack of understanding of the most fundamental legal doctrines and rules of procedure.

APPROPRIATE DISCIPLINE

[32] [¶ 77.] "Appropriate discipline in any given case necessarily depends upon the seriousness of the misconduct by the attorney and the likelihood of repeated instances of similar misconduct." *Matter of Discipline of Martin*, 506 N.W.2d 101, 105 (S.D.1993). We also consider the prior record of the attorney. *Matter of Bihlmeyer*, 515 N.W.2d 236 (S.D.1994).

[33] [¶ 78.] The level of professional competence that one must possess to be granted the privilege to practice law in this state has its basis in the recognition of its goal- to "assume ... control of the important affairs of others and to guide and safeguard them when, without such assistance, they would be helpless." *Egan,* 52 S.D. at 402, 218 N.W. at 4. A law school graduate will not ordinarily immediately possess the same skills as those of a veteran trial attorney. Any lawyer may be presented with a client seeking assistance over a legal problem with which the lawyer is unfamiliar. Obviously, a trip to the law books will be necessary to bring the attorney up to a level of competence to assist the client. Moreover, we recognize that human frailty being what it is, mistakes may happen where the competent attorney ***65** simply commits an act of malpractice. While this individual act may subject the

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attorney to respond in monetary damages, it is not the basis for removal from the bar.

[34] **[35]** [¶ 79.] However, there exists a fundamental level of competence which an attorney must possess. This is not permanently achieved with graduation and admission to the bar. It is a continual and on-going obligation. " 'Each day of an attorney's [professional] life demands that these requirements be met anew.' " *Eicher,* 2003 SD 40, ¶ 25, 661 N.W.2d at 363. As noted, it might be that the attorney is being presented with a request for assistance by a client which will require the attorney to educate himself or herself on the law in that particular area or refer the matter to another attorney who is familiar with that area of the law. If, however, after many years of practice, the attorney habitually, because of lack of ability, fails to improve his or her level of expertise to that of a competent attorney, and based on this past record, gives no indication that he or she is willing, and/or capable of rising to that minimum competency level, it becomes the duty of this Court to act for the protection of the public.

[36] [¶ 80.] The extent of Laprath's incompetence and misconduct disclosed in the records of this proceeding is overwhelming. It is pervasive throughout every aspect of her practice. She does not manage her office adequately. She does not comply with the rules governing trust accounts. She does not honor the obligations of a fiduciary. She does not represent her clients competently and does not separate her own interests from those of her clients. She does not know or understand the substantive or procedural law. She does not understand the Rules of Professional Conduct. She refuses to take responsibility for her own actions and makes excuses or places the blame on someone else. She has failed to rectify her failure or correct her misconduct and has not demonstrated an ability to do so.

[¶ 81.] Laprath's conduct "as evidenced in this record and [her] prior disciplinary history, demonstrates a clear, continuing pattern of gross incompetence, unacceptable office practices, inadequate record keeping, and mishandling ... of client funds." *Nassif,* 547 N.W.2d at 544.

[¶ 82.] We have had professional violations before us in the past although not to the numerical extent we have here. However, in previous cases, the violations were intentional acts. While in a few instances, rational judgment may have been diminished to a point by alcohol or narcotic drugs, no one questioned the attorneys' underlying competence or capability to comply with the rules. Here, however, we have an attorney who in the view of four judges before whom she has frequently appeared, the Disciplinary Board and this Court's Referee, does not possess the minimal professional skills to comprehend the nature of the rules or how to comply with them.

[¶ 83.] It is not just the lack of competency in her legal work that is of concern. Laprath's inability to comprehend the professional rules as to when she is entitled to other people's money for fees for legal work competently done, is most troubling. It is clear that this inability on both counts presents a danger to the public in the future.

[¶ 84.] In appearance before this Court, Laprath refused to accept responsibility for her acts and errors. She claimed she was being subject to unfair treatment because she was a female attorney and because she was a rural solo practitioner. There is nothing in the record to support either allegation. This type of blaming ***66** others mentality has been repeatedly rejected by this Court as an acceptable justification for unprofessional misconduct. *Widdison,* 539 N.W.2d at 678, *Eicher,* 2003 SD 40 at ¶ 52, 661 N.W.2d at 370.

[¶ 85.] It is clear she is unrepentant and refuses to acknowledge or admit her misconduct. We have held that such an attitude merits our "serious consideration" in determining an appropriate discipline to protect the public. *Dorothy,* 2000 SD 23 at ¶ 41, 605 N.W.2d at 505. Moreover, she does not present any type of plan to remedy the situation.

[¶ 86.] The counsel for the Disciplinary Board pointed out in oral argument that none of the mitigating factors adopted by the American Bar Association are applicable here. We agree. [4]

[¶ 87.] Thus, we are left with the question: does Laprath's lack of competence somehow excuse her conduct? As the purpose of attorney discipline is to protect the public and not punish the intentional violator, the obvious conclusion is that ignorance of the law and professional rules or the lack of professional competence is no excuse for her conduct. The alcoholic may achieve sobriety, the drug addict-abstinence, the embezzler-newfound honesty. Thus, they are capable of rehabilitation. "History is

replete with those who have overcome a weakness or character flaw and risen to what Attorney at Law Abraham Lincoln declared to be the 'better angels of our nature. " ' *Eicher,* 2003 SD 40, ¶ 29, 661 N.W.2d at 371. However, here all credible evidence points to the fact Laprath has not possessed the skills of a competent lawyer.

[¶ 88.] Disbarment is generally appropriate when a lawyer's "course of conduct demonstrates that the lawyer does not understand the most fundamental legal doctrines or procedures, and the lawyer's conduct causes injury or potential injury to a client." Rule 4.51, ABA Standards for Imposing Lawyer Sanctions. Disbarment "should be imposed on lawyers whose course of conduct demonstrates that they cannot or will not master the knowledge and skills necessary for minimally competent practice." Commentary, Rule 4.51. There is no option but to disbar Laprath.

[¶ 89.] Therefore, we order:

(1) Effective immediately, a judgment shall be entered disbarring Laprath, and striking her name from the Clerk's roll of attorneys;

(2) Laprath shall immediately comply with the provisions of ***67** SDCL 16–19–78 through 81 inclusive and return all files and documents to her clients.

[¶ 90.] SABERS, KONENKAMP and MEIERHENRY, Justices, and MILLER, Retired Justice, concur.

[¶ 91.] MILLER, Retired Justice, acting by appointment, sitting for ZINTER, Justice, disqualified.

All Citations

670 N.W.2d 41, 2003 S.D. 114

Footnotes

1 Although now a Justice of the South Dakota Supreme Court, Justice Zinter's testimony focused on his experiences with Laprath during the time he was a circuit court judge and not during the subsequent time he has been a Justice on this Court.

2 Although the address and the contents of the letter clearly indicate it was intended to be a letter of apology from Laprath to Johnson, the letter inexplicably opens with Laprath addressing the apology to herself rather than Johnson.

3 The comment to this rule provides a more detailed description of competency:

> In determining whether a lawyer employs the requisite knowledge and skill in a particular matter, relevant factors include the relative complexity and specialized nature of the matter, the lawyer's general experience, the lawyer's training and experience in the field in question, the preparation and study the lawyer is able to give the matter and whether it is feasible to refer the matter to, or associate or consult with, a lawyer of established competence in the field in question. In many instances, the required proficiency is that of a general practitioner. Expertise in a particular field of law may be required in some circumstances.
>
> A lawyer need not necessarily have special training or prior experience to handle legal problems of a type with which the lawyer is unfamiliar. A newly admitted lawyer can be as competent as a practitioner with long experience. Some important legal skills, such as the analysis of precedent, the evaluation of evidence and legal drafting, are required in all legal problems. Perhaps the most fundamental legal skill consists of determining what kind of legal problems a situation may involve, a skill that necessarily transcends any particular specialized knowledge. A lawyer can provide adequate representation in a wholly novel field through necessary study. Competent representation can also be provided through the association of a lawyer of established competence in the field in question.
>
> * * *
>
> Competent handling of a particular matter includes inquiry into an analysis of the factual and legal elements of the problem, and use of methods and procedures meeting the standards of competent practitioners. It also includes adequate preparation. The required attention and preparation are determined in part by what is at stake; major litigation and complex transactions ordinarily require more elaborate treatment than matters of lesser consequence.

4 "Although we have not adopted the ABA Standards for Imposing Lawyer Sanctions, and are not adopting them here, for guidance we do consider the Standards." *Light,* 2000 SD 100 at ¶ 13, 615 N.W.2d at 168.

> Rule 9.2 of the ABA Standards for Imposing Lawyer Sanctions identifies ten factors that may be considered in aggravation. Seven are applicable here: (1) prior disciplinary offenses; (2) dishonest or selfish motive; (3) a pattern

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of misconduct; (4) multiple offenses; (5) refusal to acknowledge wrongful nature of conduct, (6) vulnerability of victim, and (7) substantial experience in the practice of law.

Rule 9.3 of the ABA Standards for Imposing Lawyer Sanctions identifies thirteen mitigating factors, none of which are applicable here. They are:

(1) absence of a prior disciplinary record; (2) absence of a dishonest or selfish motive; (3) personal or emotional problems; (4) timely good faith effort to make restitution or to rectify consequences of misconduct; (5) full and free disclosure to disciplinary board or cooperative attitude toward proceedings; (6) inexperience in the practice of law; (7) character or reputation; (8) physical or mental disability or impairment; (9) delay in disciplinary proceedings; (10) interim rehabilitation; (11) imposition of other penalties or sanctions; (12) remorse; and (13) remoteness of prior offenses.

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EXHIBIT I

159 N.H. 285
Supreme Court of New Hampshire.

In re WYATT'S CASE.

No. LD-2009-002.
|
Argued: June 16, 2009.
|
Opinion Issued: Sept. 18, 2009.

Synopsis
Background: Professional Conduct Committee (PCC) petitioned for disbarment of attorney.

Holdings: The Supreme Court, Hicks, J., held that:

[1] attorney, who represented ward in connection with voluntary conservatorship violated conflict-of-interest rules by concurrently representing conservator in that matter, by concurrently and successively representing conservator and ward's wife in guardianship proceedings, and by successively representing conservator against ward's challenge to management of conservatorship; and

[2] disbarment was appropriate baseline sanction; but

[3] two-year suspension would be imposed based on consideration of aggravating and mitigating factors.

Suspension ordered.

Attorneys and Law Firms

****400** James L. Kruse, assistant disciplinary counsel, of Concord, on the brief and orally, for the professional conduct committee.

Donald L. Wyatt, Jr., on the brief and orally, pro se.

Opinion

HICKS, J.

***289** On February 10, 2009, the Supreme Court Professional Conduct Committee (PCC) filed a petition recommending that the respondent, Donald L. Wyatt, Jr., be disbarred. *See Sup. Ct. R.* 37A(III)(d)(2)(C)(iv). We order the respondent suspended for a period of two years.

The respondent has stipulated to, and we accept, the following underlying facts. *See Conner's Case,* 158 N.H. 299, 300, 965 A.2d 1130 (2009); *Sup. Ct. R.* 37A(III)(c)(5). The respondent is an attorney licensed to practice in New Hampshire. Beginning in the spring of 1998, he served as personal counsel to David Stacy. David was a full-time employee of his mother and held her general power of attorney. The respondent advised David on a variety of personal matters, including his "relations with trustees of trusts previously established for his benefit." The respondent's firm prepared a general power of attorney in 2000 authorizing Michel Brault to manage David's affairs. Brault was a personal friend of the respondent and the chief executive officer of a former corporate client of the respondent's firm.

In January 2001, David's mother "dismissed" him and cut off his support. The respondent represented David in negotiations with his mother in an effort to secure financial support. The negotiations culminated in a contract between David and his mother in May 2001, in which they agreed to execute and exchange mutual general releases. Other contract provisions included an agreement for management of David's healthcare, a sale and lease back of David's home, and the creation and eventual funding of various trusts. The contract required that David file a petition for voluntary ***290** conservatorship in New Hampshire requesting that Brault act as his conservator. The contract, by its terms, terminated if, among other things, David terminated the conservatorship or removed the conservator without cause.

The respondent, Brault and David reviewed the contract and related documents at a meeting in Paris, France. The respondent discussed David's litigation options against his mother and his option to forego his mother's support. The respondent also explained conservatorship, its voluntary nature, and "how it separated ****401** [David's] affairs into two distinct parts, an estate portion and a personal portion, and how he could end that separation by asserting that he had capacity and that he wanted to take back control of his affairs." The respondent cautioned David that taking back control, however, could effectively discharge his mother's contractual obligations to him.

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David ultimately decided to sign the contract and execute related documents, including the petition for conservator.

During and shortly after their Paris discussion, David expressed his desire that the respondent continue to serve as his personal attorney. David informed Brault that he also wanted the respondent to serve as counsel for the conservatorship estate. The respondent advised David that the conservator would "determine if and when [the respondent] would serve as counsel." The respondent did not, at this point, discuss conflicts of interest. At one point, the respondent had "[a] lengthy discussion ... about the potential for disagreements and discord between [David and Brault]." The respondent was confident that David "understood that Mr. Brault would be managing his affairs and that in the event of disagreement between the two, Mr. Brault ... would have the last word."

The Carroll County Probate Court granted David's petition for conservator in June 2001, and, as requested, appointed Brault as conservator. Brault then retained the respondent to represent the "Estate of David E. Stacy." To the extent authorized by Brault, the respondent continued to "interact directly with [David] on matters involving his personal, as opposed to his estate, rights." The respondent advised Brault on the operation of the conservatorship, including whether Brault should or could expend funds for certain expenses, and whether Brault could buy a new or second home for David. The respondent consistently advised Brault that he could not make personal choices for David, but must choose "what to contract ... and ... pay for." In an attempt to minimize David's legal fees, Brault informed David in the fall of 2001 that he must thereafter seek permission before consulting with the respondent about any new legal matters.

The respondent learned in the fall of 2001 that Brault was not attending to some details of his duties as conservator. He also learned that David, ***291** with his wife Svetlana's help, "was contacting creditors, opening new credit cards and accounts, contacting insurance agents, realtors, and various other vendors in an apparent attempt to avoid the limitations of the Conservatorship." The respondent suggested that Brault get assistance with administrative tasks and advised him that he had authority to engage such professionals. The respondent recommended an accounting firm and offered his paralegal to provide administrative support at a fixed rate.

The respondent continued representing the estate in "performing and perfecting [David's] rights under the contracts with [his mother] and with other creditors and third parties." He also represented David with respect to certain personal matters, such as preparing a will, a health care power of attorney, child support for a matter predating the conservatorship, and other debtor/creditor claims against David.

During the winter of 2001, Brault sought the respondent's advice concerning whether to fund what he considered questionable medical expenses. David had been referred to a doctor in Texas for severe abdominal pain. He wanted the conservatorship to pay for his wife and daughter to travel and stay in Texas for an extended period of time. The respondent acted as an intermediary because the issue involved ****402** both personal rights and financial issues. He filed a motion for instructions with the probate court seeking court approval to set up a debit card account for certain miscellaneous expenses. The court granted the motion in February 2002.

David underwent abdominal surgery on March 1. At some point, he expressed to the respondent his dissatisfaction with the medical staff and doctors and threatened to check himself out of the hospital. Svetlana informed Brault and the respondent that David had a history of self-destructive behaviors, demands for unwarranted treatment, abuse of drugs and alcohol, threats of suicide, and abuse of both her and her daughter. The respondent made clear to Svetlana that he would not represent her regarding the domestic violence issues and referred her to another attorney. However, he remained concerned about David's mental health in view of these and other observations, including an incident where the respondent came to David's house and observed him opening two surgical wounds.

The respondent researched ethical and guardianship issues, contacted peers, and had a law clerk prepare a memorandum. He ultimately advised Brault and Svetlana to consider obtaining a limited guardianship for medical purposes only. The respondent advised them to hire their own counsel. The respondent advised them that, as David's counsel, he would be required to appear at the guardianship proceeding, would object for the record, but if the guardianship were narrow, he would support the action. ***292** The respondent never informed David that

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he was recommending an attorney for Svetlana. He also never discussed the guardianship with David.

Brault and Svetlana hired Attorney Thomas Walker to initiate guardianship proceedings in the Carroll County Probate Court. Attorney Walker attached to the petition supporting affidavits prepared by the respondent and signed by Svetlana and Brault. Even after Brault and Svetlana engaged separate counsel, the respondent continued to provide legal services to Brault and Svetlana in the pursuit of a guardianship. The respondent billed the conservatorship for these legal services.

The Carroll County Probate Court held a hearing on the guardianship petition on March 26, 2002. When asked by the probate court if he represented David, the respondent informed the court that he had yet to speak with David, that he presumed David would object to the proceeding, and that such objection would conflict him out of the case. He agreed to notify David of any orders, to advise him, and then allow him to give instructions. The court offered to appoint other counsel for David, but the respondent thought it best for him to at least advise David of the proceedings given his "ongoing relationship with the conservatorship estate." The respondent agreed to call the register as soon as he obtained David's instructions regarding the guardianship proceedings. The court then appointed Brault and Svetlana temporary co-guardians over David's person, and authorized the respondent to effect service upon David and confer with him.

After researching Texas law regarding domestication of the New Hampshire order and representation of an impaired client, the respondent traveled to Texas with Brault and Svetlana. They met with doctors, social workers and administrators the next day. Dr. Charles Brunicardi informed them that surgery had not revealed any condition that would explain David's reports of pain, that David had intentionally harmed himself the night before leaving him in grave condition, and that they were obtaining a psychiatric diagnosis. The respondent was prohibited ****403** from speaking with David due to his condition.

The respondent called the register of probate and informed her that he was denied access to David for medical reasons and could not effect service of the temporary guardianship order. He then met with, and Brault engaged, Sharon Gardner, a local attorney in Texas, to make service and to advise Svetlana and Brault. Attorney Gardner ultimately concluded that domestication of the order was unnecessary and it was decided to have David served when medically possible.

After Brault, Svetlana and the respondent returned to New Hampshire, David repeatedly contacted them from Texas. On April 2, David asked the ***293** respondent why the three had been to Texas and whether he was representing Svetlana and Brault against him. The record suggests that a doctor informed David that the respondent had traveled to Texas with Brault and Svetlana. The respondent replied: "no, of course not, that [a separate Texas attorney] was representing them."

Attorney Gardner effected service upon David on April 3. The respondent recalls advising David at or shortly after service that he would not be able to represent David in the New Hampshire guardianship case and that he should retain new counsel. The respondent forwarded the return of service to the probate court on April 10. The respondent did not clarify in the accompanying letter his status as David's personal counsel or whether David opposed the guardianship. The respondent claims to have written the probate court on April 9 to confirm David's need for independent New Hampshire counsel, but there is no written documentation of this communication. The respondent further recalls a chambers conference in May 2002 at which he apprised the court of David's opposition to the guardianship and his need for counsel, but there is no official record of this conference.

Subsequently, Brault contacted Dr. Robert Fisher in Texas to arrange a meeting with him, Svetlana and the respondent. Upon their arrival, the hospital counsel informed the respondent and Svetlana that the hospital was unwilling to communicate further with them unless they obtained a Texas court order.

Dr. Fisher met with Brault. He informed Brault, who later informed the respondent, that David remained in serious condition and that a psychiatrist evaluated David and confirmed the suspicion of a psychiatric disorder. The respondent did not notify David of these meetings and David was not represented by independent counsel.

The respondent then became convinced that David was disabled. He discussed with Brault and Svetlana the need to domesticate the New Hampshire order. In mid-April

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2002, the respondent contacted Attorney A. Rodman Johnson. Svetlana and Brault retained Attorney Johnson as local counsel to represent them in connection with the guardianship matter. The respondent then undertook with Attorney Johnson to have the New Hampshire temporary guardianship order domesticated. The clerk of court for the Harris County Probate Court, however, rejected the petition without presenting it to the court because of procedural defects.

After Svetlana and Brault retained Attorney Johnson, the respondent continued to provide legal services to Svetlana and Brault in pursuit of the guardianship over David's person and to bill the conservatorship. The respondent met with Attorney Johnson on April 21 and drafted documents and pleadings to file in the Harris County Probate Court on behalf of ***294** Brault. They jointly prepared and filed on April 22 ****404** an application for appointment of temporary guardian over the person seeking a limited guardianship for David's medical care. Attorney Johnson signed the application along with the respondent, *pro hac vice,* on behalf of Brault as conservator and co-guardian.

The Harris County Probate Court issued an initial emergency order on April 23 appointing Brault temporary guardian over the person until June 21. The court also appointed Robert MacIntyre as David's attorney. Attorney MacIntyre met with the respondent and Brault, obtained records, and discussed the conservatorship and his compensation. The respondent indicated that Brault would seek assistance from David's mother and other trustees in order to secure funding. Attorney MacIntyre met with David on April 24. From this point, David was represented in connection with the guardianship by attorneys other than the respondent; in fact, David informed Attorney MacIntyre that he was unhappy with and no longer wanted the respondent to represent him.

On May 24, the respondent prepared and filed a petition for guardian of an incapacitated person in New Hampshire and requested that Brault be appointed guardian. The respondent indicated that David would need appointed counsel. In a verified motion to extend the temporary orders, the respondent apprised the court of David's medical problems in Texas and the unsuccessful effort to domesticate the New Hampshire guardianship order. There was no reference to the guardianship proceeding in Texas or David's objection thereto. The respondent never discussed with David or Attorney MacIntyre, David's Texas counsel, whether there could be a conflict of interest associated with representing Brault in the New Hampshire guardianship proceeding.

The Harris County Probate Court conducted a hearing on June 12 to consider the temporary and permanent guardianship issues. Deborah Stacy, David's biological sister, filed an application to be appointed guardian over David's person. The respondent had never before heard from or met Deborah, and David previously told him that she was estranged. Deborah appeared at the June 12 hearing with her attorney, James Wyckoff. Attorney MacIntyre appeared on David's behalf along with Attorney Hutchison, David's guardian *ad litem.* Brault attended and was represented by Attorney Johnson and the respondent.

Attorney MacIntyre moved to disqualify the respondent as counsel for Brault, citing a conflict of interest. Attorney Johnson, on behalf of the respondent, argued that the respondent had appeared on previous pleadings, that other counsel knew he was lead counsel, and that he was acting in response to an ethical duty to protect David. The respondent argued that in May 2001 he discontinued representing David personally and was now ***295** engaged only by the conservator to represent the conservatorship estate. He acknowledged that he had access to a large amount of privileged and confidential information, but assured the court he had not previously represented David with respect to "any matter involving his personal liberty or his medical care." The court declined to sign an order of disqualification until a proposed order was presented, but denied the motion to allow the respondent to appear *pro hac vice* in the case. The court granted Attorney Johnson's request to permit the respondent to remain at counsel table. The respondent continued to serve as counsel to Brault and the conservatorship.

Dr. Scarano testified at the June 12 hearing, recommending appointment of a temporary guardian to make David's ****405** health care decisions. Deborah testified to establish her biological relationship. David expressed his preference that Deborah be his guardian if such an appointment was necessary. The court thereafter appointed Deborah as temporary guardian, in accordance with preference under Texas law, subject to confirmation

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of her legal status as a sibling and until the anticipated final hearing.

At a later meeting between the respondent, Brault, Svetlana and Attorney Johnson, Brault indicated that David alleged in the past that Deborah conspired to steal from him. Brault further expressed "concern that [David's] current position favoring his sister as guardian was the product of his illness." Brault thereafter authorized Attorney Johnson to file a motion to remove Deborah as temporary guardian. Brault and Svetlana expressed their desire to have the respondent's continued counsel in the case. Attorney Johnson wrote to the respondent on June 12 expressing an interest in retaining him to provide certain " 'legal assistant' " services such as legal research, preparation of witnesses, and the preparation of legal documents. Attorney Johnson moved on June 13 to reconsider the decision appointing Deborah as guardian. The respondent participated in drafting this pleading. The court scheduled a hearing for July 10.

Attorney MacIntyre organized a meeting on July 10, the day of the hearing, to attempt to resolve the dispute over the proper temporary guardian. The respondent, Brault, and Attorneys Johnson, MacIntyre, Wyckoff and Hutchison all attended the meeting. They agreed to continue the hearing until a further meeting could be held with Brault and Deborah regarding a plan to have David move to Massachusetts to live with Deborah.

Subsequently, Deborah, Brault, the respondent and Attorneys MacIntyre, Wyckoff and Hutchison met. The respondent addressed whether a new guardianship proceeding would be required in Massachusetts and what expenses would be covered by the conservatorship. Brault ***296** agreed to hold the motion to reconsider in abeyance, in consideration of Deborah's assurances that she would attend to David's needs in Massachusetts and pursue domestication of the Texas order on temporary guardianship in Massachusetts. Attorney Roy McCandless of Concord, New Hampshire, entered an appearance July 11 on behalf of David in the Carroll County Probate Court matters.

In August 2002, the respondent advised Brault that because David moved to Massachusetts and Deborah intended that he remain there, the New Hampshire guardianship was no longer necessary and should be withdrawn. Attorney McCandless assented to and the court approved the respondent's notice of withdrawal.

Attorney McCandless filed a motion for instructions in the Carroll County Probate Court confirming that David objected to the respondent's involvement as counsel for Brault due to a conflict of interest and arguing that David was entitled to independent counsel in regard to any aspect of the conservatorship, the guardianship matter, and his marital case. The respondent, at Brault's instruction, filed an objection on behalf of Brault and the conservatorship, noting that the New Hampshire guardianship proceeding had been withdrawn and asserting that David had no need for independent counsel except to review annual accountings and to provide representation in his divorce. The court scheduled a hearing on the matter for January 2003.

The Texas guardianship proceedings were dismissed January 21 pursuant to motions filed by Attorneys Wyckoff and Hutchison, to which Brault agreed. On ****406** January 28, the Carroll County Probate Court issued a scheduling order directing the parties to address the disqualification of the respondent from representing the conservatorship estate, among other issues.

The respondent and Attorney McCandless continued to dispute, through pleadings filed with the probate court, the conflict of interest issue and the propriety of his fees. On March 18, just prior to a scheduled hearing in the probate court, Brault and his attorney, David Azarian, appeared at the respondent's office and informed him that Brault had decided to resign as conservator. The respondent informed the court at the March 18 hearing that Brault had tendered his resignation and had authorized the respondent to withdraw as counsel for the estate. The court ultimately approved a stipulation regarding Brault's resignation, a transition period to a new conservator, the appointment of Deborah as the new conservator, and interim financial issues. Deborah, who was now the court-appointed conservator of David's estate, filed a sworn complaint in May 2003 against the respondent alleging professional misconduct. David subsequently adopted the accusations as his own complaint. Thereafter, the respondent ***297** cooperated with the attorney discipline office (ADO) in developing a stipulated set of facts and exhibits. The ADO issued a notice of charges in October 2007 alleging violations of New Hampshire Rules of Professional Conduct (Conduct

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Rules) 1.7 (amended 2007), 1.9 (amended 2007) and 8.4(a) based upon the stipulated facts. The ADO amended the notice in November 2007, alleging a violation of Conduct Rule 1.5 (amended 2007). A hearing panel found that the respondent violated each Conduct Rule charged and recommended public censure as the appropriate sanction. The PCC heard oral argument in December 2008 and, in January 2009, accepted the stipulated facts, adopted the hearing panel's rulings, but directed disciplinary counsel to petition for disbarment. In its petition for disbarment, the PCC asserts violations of Conduct Rules 1.7, 1.9, 1.5 and 8.4(a). The respondent disputes each asserted violation.

[1] We first consider whether the respondent violated the Conduct Rules. The PCC's findings of violations of the Conduct Rules must be supported by clear and convincing evidence. *Sup.Ct. R.* 37A(III)(d)(2)(C). In attorney discipline matters, we defer to the PCC's factual findings if supported by the record, but retain ultimate authority to determine whether, on the facts found, a violation of the rules governing attorney conduct has occurred and, if so, the appropriate sanction. *Young's Case,* 154 N.H. 359, 366, 913 A.2d 727 (2006).

[2] We begin with a brief review of conservatorships. A person who deems himself unfit to prudently manage his affairs because of mental or physical disability may voluntarily apply for the appointment of a conservator. *See* RSA 464-A: 13 (2004). "Conservators were originally called guardians and ... a conservator has the same powers and obligations as a guardian in so far as they relate to the property of the ward." *Yeaton v. Skillings,* 103 N.H. 352, 354, 172 A.2d 354 (1961) (quotation omitted); *see* RSA 464-A:15 (2004). "A conservatorship differs from a guardianship in that it is voluntary rather than involuntary, is limited to the estate of the ward, and it is not necessary that the ward be mentally incompetent...." *Filip v. Gagne,* 104 N.H. 14, 16, 177 A.2d 509 (1962).

I. Concurrent Conflicts of Interest

The PCC alleges the respondent violated Conduct Rule 1.7(a) and (b). At all ****407** times relevant to this proceeding, Conduct Rule 1.7 provided:

> (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
>
> ***298** (2) each client consents after consultation and with knowledge of the consequences.
>
> (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 and with knowledge of the consequences. 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.

N.H.R. Prof. Conduct 1.7.

A. Conduct Rule 1.7(b)

[3] In addition to representing David with respect to the conservatorship, the respondent concurrently represented Brault as conservator. *Cf. Vinson & Elkins v. Moran,* 946 S.W.2d 381, 402 (Tex.App.1997) ("Generally, an attorney hired by the executors or trustees to advise them in administering the estate or trust represents the executors or trustees...."). Brault contracted for the respondent's services and signed his name, as conservator, on the contract as the client. The respondent thereafter advised Brault concerning the operation of the conservatorship. The PCC contends that the respondent impermissibly represented David and Brault. We agree.

A conflict exists under Conduct Rule 1.7(b) when the representation "may be materially limited" by duties owed to another client. This language is broad, *Boyle's Case,* 136 N.H. 21, 23, 611 A.2d 618 (1992), and focuses not upon direct adversity at the outset, but the risk that it or other material limitations may arise in the course of the dual representation. *See N.H.R. Prof. Conduct* 1.7 ABA Model Code Comments; 1 G. Hazard, Jr. & W. Hodes, *The Law of Lawyering* § 10.4, at 10-12 (3d ed.2007).

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While Brault was charged with making certain decisions for the ward, *see Atlantic Restaurant Mgt. Corp. v. Munro,* 130 N.H. 460, 464, 543 A.2d 916 (1988), there existed at least some risk of adversity developing between him and David. *See* M. Jasper, *Guardianship, Conservatorship and the Law* 1 (2008) ("An improperly conducted ... conservatorship can result in fraud and ***299** thievery, and can jeopardize the health and safety of the ward or conservatee, particularly when non-family members are appointed as ... conservators."). Certain facts known to the respondent made the risk of adversity between David and Brault significant. The respondent had recently doubted Brault's ability to "deal with the complexities of managing [David's] affairs." The respondent assisted David in the past with his "relations with trustees." Furthermore, David was contractually compelled to enter the conservatorship as a condition of future support from his mother. Therefore, the respondent, before agreeing to represent Brault, should have foreseen that David might challenge the reasonableness of Brault's discretionary decisions, *see Morse v. Trentini,* 100 N.H. 153, 156, 121 A.2d 563 (1956), seek a ****408** new conservator, *see* RSA 464-A:15,:39, III (2004), or assert violations of Brault's fiduciary duties.

The respondent argues that no conflict could exist in view of the doctrine of primary and derivative clients. *See* G. Hazard, Jr. & W. Hodes, *supra* § 2.7, at 2-11. Pursuant to that doctrine, a lawyer representing a fiduciary "must be deemed employed to further" the fiduciary's legally required service to the beneficiary; must ensure that truthful and complete information is passed along to the client by the fiduciary; and must "*disobey* instructions that would wrongfully harm the beneficiary." *Id.* at 2-11, 2-12. There is some support in our Conduct Rules for the doctrine's underlying principle. *See N.H.R. Prof. Conduct* 1.14 ABA Model Code Comments (2007) (amended 2007) (providing that lawyer representing guardian and aware that guardian acting adversely to ward's interest "may have an obligation to prevent or rectify the guardian's misconduct"). *But see State v. Decker,* 138 N.H. 432, 438, 641 A.2d 226 (1994) (noting that Conduct Rules "are aimed at policing the conduct of attorneys, not at creating substantive rights on behalf of third parties").

However, we have not adopted the primary-derivative client doctrine. We further note that the doctrine appears to rest largely upon cases imposing legal duties upon a lawyer as a basis for civil liability. *See* G. Hazard, Jr. & W. Hodes, *supra* § 2.7, at 2-11 to 2-16. The Conduct Rules, however, were "designed to provide guidance to lawyers and ... a structure for regulating conduct through disciplinary agencies ... [,] not ... [as] a basis for civil liability," *N.H.R. Prof. Conduct* Scope Commentary (repealed 2008). *See* ABA Comm. on Ethics and Prof'l Responsibility, Formal Op. 380 (1994) ("The fact that the fiduciary client has obligations toward the beneficiaries does not impose parallel obligations on the lawyer, or otherwise expand or supersede the lawyer's responsibilities under the Model Rules of Professional Conduct.").

***300** Furthermore, although the doctrine extends to beneficiaries some of the duties owed by the lawyer to the fiduciary-client, including some limited form of loyalty, *see* G. Hazard, Jr. & W. Hodes, *supra* § 2.7, at 2-11, this does not create a direct attorney-client relationship with the beneficiary, *cf., e.g., In re Estate of Gory,* 570 So.2d 1381, 1383 (Fla.Dist.Ct.App.1990), and does not address competing loyalties where a lawyer represents *both* fiduciary and beneficiary. *See* 3 R. Mallen & J. Smith, *Legal Malpractice* § 28:10, at 1267 (2009) ("Although in many respects the interests of the ward and conservator coincide, if they diverge, the conservator's attorney owes a duty only to the conservator."); *cf.* ABA Comm. on Ethics and Prof'l Responsibility, Formal Op. 426 (2002) (discussing conflicts where lawyer serving as fiduciary concurrently represents beneficiary of an estate); *Restatement (Third) of the Law Governing Lawyers* § 135 comment *c* (2000) (same). The doctrine, therefore, does not relieve a lawyer undertaking dual representation of fiduciary and beneficiary from discussing with both clients future, material limitations that might occur and the effect of such limitations upon the attorney-client relationships, *see, e.g., Restatement (Third) of the Law Governing Lawyers* § 122 comment *c(i).*

Thus, the respondent violated Conduct Rule 1.7(b) because there is no evidence that he considered and reasonably concluded that the concurrent representation of Brault and David would not adversely affect either client, *see N.H. R. Prof.* Conduct 1.7(b)(1), or that the clients consented "after consultation and with knowledge of the consequences," *N.H.R.* ****409** *Prof. Conduct* 1.7(b)(2). Although at one point the respondent had "[a] lengthy discussion ... about the potential for disagreements and discord between the two," the respondent did not expressly discuss conflicts of

interest or their potential impact upon the attorney-client relationship.

B. Conduct Rule 1.7(a)

"A lawyer shall not represent a client if the representation of that client will be directly adverse to another client...." *N.H.R. Prof. Conduct* 1.7(a). The PCC asserts that representing Brault and Svetlana in the New Hampshire and Texas guardianship proceedings constituted a violation of Conduct Rule 1.7(a). We agree.

[4] **[5]** **[6]** The respondent first disputes the finding that he represented Svetlana and Brault in the New Hampshire guardianship proceeding. "An attorney-client relationship is created when (1) a person seeks advice or assistance from an attorney, (2) the advice or assistance sought pertains to matters within the attorney's professional competence, and (3) the attorney expressly or impliedly agrees to give or actually gives the desired advice or assistance." *McCabe v. Arcidy,* 138 N.H. 20, 25, 635 A.2d 446 (1993) (quotation omitted).

[7] ***301** The stipulated facts and exhibits directly and inferentially support the finding that, by clear and convincing evidence, the respondent formed attorney-client relationships with Brault and Svetlana in pursuit of the New Hampshire guardianship. Consultation with the intent of seeking legal advice is the fundamental basis of the attorney-client relationship. *See id.* The manifestation of intent may be implied by surrounding circumstances or ratification of the attorney's actions. *See Restatement (Third) of the Law Governing Lawyers* § 14 comment *c.* Brault consulted the respondent in late 2001 about guardianships and later accepted the respondent's counsel and continued assistance. Svetlana implicitly sought the respondent's assistance around the time of David's March 1 surgery by relating to the respondent her problems and concerns about David. She too later accepted the respondent's counsel and continued assistance. The respondent thereafter communicated advice in his capacity as a lawyer both before and after Brault and Svetlana hired Attorney Walker to initiate guardianship proceedings. The respondent also drafted affidavits accompanying the petition for guardianship and billed the conservatorship for each of these services. *See Bilodeau v. Antal,* 123 N.H. 39, 45, 455 A.2d 1037 (1983) (stating that compensation may be evidence of practicing law in representative capacity). Indeed, the respondent confirmed the existence of the attorney-client relationships by advising David after service of the New Hampshire order to retain new counsel.

[8] The respondent next argues that pursuing the guardianship was ethically permissible in light of Conduct Rule 1.14 (amended 2007) and Texas Rule of Professional Conduct 1.02(g). He conceded at oral argument that, unless permitted by these rules, representing Brault and Svetlana in the guardianship proceedings violated Conduct Rule 1.7(a).

At all times relevant to this action, Conduct Rule 1.14 provided:

> (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. The client's impairment shall also be considered in determining the adequacy of consultation.
>
> ****410** (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.

N.H.R. Prof. Conduct 1.14.

***302** In light of the "absolute and unconditional" right to counsel in guardianship proceedings, RSA 464-A:6, I (2004), we have stressed that a lawyer acting under Conduct Rule 1.14 " 'shall, as far as reasonably possible, maintain a normal client-lawyer relationship with the client.' " *In re Guardianship of Henderson,* 150 N.H. 349, 350, 838 A.2d 1277 (2003) (quoting *N.H.R. Prof. Conduct* 1.14(a)). "This obligation implies that the lawyer should continue to treat the client with attention and respect, attempt to communicate and discuss relevant matters, and continue as far as reasonably possible to take action consistent with the client's directions and decisions." ABA Comm. on Ethics and Prof'l Responsibility, Formal Op. 404 (1996). "[T]he principle of respecting the client's autonomy dictates that the action taken ... should be the action that is reasonably viewed as the least restrictive action under the circumstances." *Id.*

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The respondent's actions fell well outside the safe harbor of Conduct Rule 1.14. Although Conduct Rule 1.14(b) "clearly permits the lawyer himself to file a petition for guardianship upon concluding that it is necessary to protect the client and there are no less restrictive alternatives available [,] ... nothing in the rule suggests that the lawyer may represent a third party in taking such action." *Id.* "[I]f the lawyer decides to file a guardianship petition, it must be on his own authority under Rule 1.14 and not on behalf of a third party, however well-intentioned." *Id.*

[9] The respondent argues that he complied with Conduct Rule 1.14 because any direct adversity between clients became moot after the Carroll County Probate Court made a finding of incapacity before granting the temporary, limited guardianship over David's person. We acknowledge that there is some support for the contention that a finding of incapacity moots otherwise prohibited adversity. *See id.* (stating that representation of third parties in seeking guardianship over client is adverse and prohibited by Conduct Rule 1.7(a) "unless and until the court makes the necessary determination of incompetence"). Nevertheless, the respondent's argument fails because he cannot justify the means chosen-representing others in seeking a guardianship in New Hampshire-by the end result. *See id.* ("Even if the court's eventual determination of incompetence would moot the argument that the representation was prohibited by Rule 1.7(a), the lawyer cannot proceed on the assumption that the court will make such a determination.").

Furthermore, appointment of a temporary guardian does not "have the effect of an adjudication of incapacity." RSA 464-A: 12, V (2004). Although the Carroll County Probate Court in fact made a specific finding of ***303** incapacity, we question the efficacy of the *ex parte* finding in light of RSA 464-A: 12, V and furthermore because it was entered after a hearing at which the proposed ward, through the respondent's actions, was denied his statutory right to legal counsel, *see* RSA 464-A:6, I. *See* RSA 464-A: 12, IV (2004) (providing additional requirements for appointment of temporary guardian when matter is contested); *Restatement (Second) of Judgments* § 72 (1982) (stating that judgment in a contested action may be avoided by person adjudicated incompetent if inadequately represented by counsel in the proceeding); *cf. Restatement (Second) of* ****411** *Judgments* § 68(4) (stating that default judgment may be avoided by person adjudicated incompetent if "no representative was appointed to act for" him or her).

[10] Next, the respondent mistakenly cites as justification for his actions Texas Rule of Professional Conduct 1.02, which provides, in relevant part:

> (g) A lawyer shall take reasonable action to secure the appointment of a guardian or other legal representative for, or seek other protective orders with respect to, a client whenever the lawyer reasonably believes that the client lacks legal competence and that such action should be taken to protect the client.

Tex. Gov't Code Ann. tit. 2, subt. G, app. A, art. 10, § 9 (Vernon 2005). This rule is inapplicable to the respondent's actions because at all times relevant to the Texas court proceedings, Conduct Rule 8.5(B) provided, in relevant part:

> (B) *Choice of Law.* In any exercise of the disciplinary authority of this jurisdiction, the rules of professional conduct to be applied shall be as follows:
>
> (1) for conduct in connection with a proceeding in a court before which a lawyer has been admitted to practice (either generally or for purposes of that proceeding), the rules to be applied shall be the rules of the jurisdiction in which the court sits, unless the rules of the court provide otherwise; and
>
> (2) for any other conduct,
>
> (i) if the lawyer is licensed to practice only in this jurisdiction, the rules to be applied shall be the rules of this jurisdiction, and
>
> (ii) if the lawyer is licensed to practice in this and another jurisdiction, the rules to be applied shall be the rules of the admitting jurisdiction ***304** in which the lawyer principally practices; provided, however, that if particular conduct clearly has its predominant effect in another jurisdiction in which the lawyer is licensed to practice, the rules of that jurisdiction shall be applied to that conduct.

N.H.R. Prof. Conduct 8.5 (amended 2005, 2007).

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Texas law does not apply under Conduct Rule 8.5(B)(1) because there is no evidence that the respondent was "admitted to practice" in Texas. He was denied admission *pro hac vice* and was not a member of the Texas bar during the relevant time period. Texas law similarly would not apply under Conduct Rule 8.5(B)(2) because the record indicates that, at the relevant times, the respondent was admitted to practice only in New Hampshire, *see N.H.R. Prof. Conduct* 8.5(B)(2)(i), and further suggests that his principal practice was in New Hampshire, *see N.H.R. Prof. Conduct* 8.5(B)(2)(ii).

II. Successive Conflicts of Interest

[11] **[12]** The PCC alleges the respondent violated Conduct Rule 1.9. Conduct Rule 1.9 protects former clients by recognizing "the twin duties an attorney owes to a former client: The duty to preserve confidences and the duty of loyalty." *Sullivan Cnty. Reg. Refuse Dist. v. Town of Acworth,* 141 N.H. 479, 483, 686 A.2d 755 (1996) (quotation and brackets omitted). At all relevant times, Conduct Rule 1.9 provided, in part:

> (a) A lawyer who has formerly represented a client in a matter shall not thereafter represent another person in the same or a substantially related matter in which that person's interests are materially adverse to the interests of the former client unless the former client consents after consultation and with knowledge of the consequences.

N.H.R. Prof. Conduct 1.9(a). The PCC argues that the respondent breached Conduct ****412** Rule 1.9 after he concluded representing David by continuing to represent Brault in the Texas and New Hampshire guardianship matters and in connection with the disputed management of the conservatorship. We agree.

[13] A violation of Conduct Rule 1.9 consists of four elements: a valid attorney-client relationship between the attorney and the former client; materially adverse interests between the former client and a present client; ***305** representation of the present client in the same or a substantially related matter; and a lack of consent on the part of the former client. *See Sullivan Cnty. Reg. Refuse Dist.,* 141 N.H. at 481-82, 686 A.2d 755.

A. The Guardianship Proceedings

We will assume that the respondent ceased representing David on April 24, 2002. The respondent thereafter continued representing Brault with respect to the Texas and New Hampshire guardianship proceedings. The May 2002 effort to extend the temporary guardianship order was the same matter as the temporary guardianship ordered by the Carroll County Probate Court. The simultaneous effort to establish a permanent guardianship over David's person in New Hampshire was substantially related given the factual overlap between the two actions. Similarly, the guardianship proceedings in Texas were substantially related to the New Hampshire guardianship matters and the conservatorship itself because each concerned David's capacity and autonomy to make decisions. Representing Brault in each of these proceedings was materially adverse to David's interests because David opposed a guardianship over his person. *See N.H.R. Prof. Conduct* 1.9(a).

Because there is no evidence that David consented to the conflict after consultation and with knowledge of the consequences, the respondent violated Conduct Rule 1.9(a) by representing Brault in the New Hampshire and Texas guardianship proceedings after April 24, 2002.

B. Management of the Conservatorship

[14] The respondent further violated Conduct Rule 1.9(a) by representing Brault against David's challenges to the management of the conservatorship and payment of certain expenses. This matter was the same and/or substantially related to the earlier conservatorship matters. David's interests were materially adverse to Brault's because he was alleging misconduct on the conservator's part. While the respondent argues that there was no true adversity until March 18, 2003 (the date Brault resigned as conservator), he should have detected the adversity as early as August 2002, when Attorney McCandless detailed concerns about payment of certain legal and medical expenses by the conservatorship and the respondent's conflict of interest. Because there is no evidence that David consented to the conflict, *see id.,* the respondent violated Conduct Rule 1.9(a).

III. Illegal Fees

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[15] The PCC alleges the respondent violated Conduct Rule 1.5(a), by charging "illegal fees" because his fees were "generated during the period ***306** of time when [he] was acting in violation of Rules 1.7 and 1.9." The PCC briefly mentioned this violation at oral argument, citing *In re Estate of McCool,* 131 N.H. 340, 553 A.2d 761 (1988). However, in its brief the PCC makes only passing reference to the alleged violation of Conduct Rule 1.5 without any analysis or argument. We therefore consider it waived. *See In re Estate of Leonard,* 128 N.H. 407, 409, 514 A.2d 822 (1986).

****413** *IV. Conduct Rule 8.4(a)*

Conduct Rule 8.4(a) prohibits lawyers from "violat[ing] or attempt[ing] to violate the Rules of Professional Conduct." *N.H.R. Prof. Conduct* 8.4(a). By violating Conduct Rules 1.7(a), 1.7(b), and 1.9(a), the respondent also violated Conduct Rule 8.4(a).

V. Sanction

[16] **[17]** **[18]** Having concluded that the respondent violated the Conduct Rules, we turn to the sanction.

> We retain the ultimate authority to determine the appropriate sanction for a violation of the rules governing attorney conduct. When determining whether to impose the ultimate sanction of disbarment, we focus not on punishing the offender, but on protecting the public, maintaining public confidence in the bar, preserving the integrity of the legal profession, and preventing similar conduct in the future.

Conner's Case, 158 N.H. at 303, 965 A.2d 1130 (citation omitted).

[19] **[20]** "In deciding the appropriate sanction, we consider the case on its own facts and circumstances." *Id.* (quotation omitted). Where there exist multiple misconduct charges, "the sanction imposed should at least be consistent with the sanction for the most serious instance of misconduct among a number of violations; it might well be and generally should be greater than the sanction for the most serious misconduct." *Id.* We look to the *ABA Standards for Imposing Lawyer Sanctions* (1992) (Standards) for guidance. *Id.* Under the Standards, we consider: (a) the duty violated; (b) the lawyer's mental state; (c) the potential or actual injury caused by the lawyer's misconduct; and (d) the existence of aggravating or mitigating factors. *Id.* (quotation omitted).

We first consider the duty violated. By violating Conduct Rules 1.7 and 1.9, the respondent continuously violated his duties of loyalty to multiple clients over a period of almost two years. We have described the duty of loyalty as a "bedrock dut[y] of the legal profession." *Id.* These conflicts of interest were, as the PCC characterized them, "open and obvious."

[21] ***307** Next, we review the respondent's mental state at the time of the violations. The respondent's mental state may be one of intent, knowledge, or negligence. *Id.* at 304, 965 A.2d 1130. "What is relevant ... is the volitional nature of the respondent's acts, and not the external pressures that could potentially have hindered his judgment." *Grew's Case,* 156 N.H. 361, 366, 934 A.2d 537 (2007). Given the length of time during which the respondent operated under various conflicting interests, and the fact that at least twice these ethical concerns were raised in motions for disqualification, we agree with the PCC that the respondent's behavior was, at a minimum, knowing.

We next consider the actual and/or potential injury visited by the respondent's misconduct. By operating under a conflict of interest at the inception of the conservatorship, the respondent exposed the estate to potential double-dealing, and put at risk the conservatorship, the contract with David's mother, and the funding of David's trusts. In addition to causing David distress, the respondent's misconduct, coupled with his denial thereof, had the effect of denying David legal representation in the New Hampshire guardianship proceedings. *See Henderson,* 150 N.H. at 351, 838 A.2d 1277 ("In a guardianship proceeding, the proposed ward is entitled to counsel who will undertake representation of his or her legal interests."). The potential for injury in such a denial is reflected within the statutory mandate that all proposed ****414** wards have an "absolute and unconditional" right to legal counsel. RSA 464-A:6, I. The proposed ward "needs an advocate to make sure the court hears his or her wishes and preferences, that his or her due process rights are respected, and that he or she retains as much dignity and autonomy as possible." J. Hyman, *Elder Law and*

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Financial Strategies: Planning for Later in Life § 8.02[5], at 8-23 (2009).

Considering the duty violated, the respondent's mental state, and the harm and potential harm caused, we conclude, as did the PCC, that the appropriate baseline sanction is disbarment. The Standards provide for disbarment where a lawyer:

> (b) simultaneously represents clients that the lawyer knows have adverse interests with the intent to benefit the lawyer or another, and causes serious or potentially serious injury to a client; or
>
> (c) represents a client in a matter substantially related to a matter in which the interests of a present or former client are materially adverse, and knowingly uses information relating to the representation of a client with the intent to benefit the lawyer or another, and causes serious or potentially serious injury to a client.

***308** *Standards, supra* § 4.31. In violating Conduct Rules 1.7(a) and 1. 9, the respondent undertook and persisted in representations which he knew or should have known were improper. Other attorneys twice pointed out the conflicts of interest. Furthermore, the respondent persisted in rendering legal advice during the Texas proceeding despite a court order denying his admission *pro hac vice.* The injuries caused can only be characterized as serious and/or potentially serious. Finally, the respondent intended to benefit Brault by steadfastly defending Brault's conduct against David's challenges to the legal fees and the June 2002 accounting. The respondent also intended to benefit Svetlana by advancing her attempt to gain greater control over David at a time when the respondent suspected that she harbored ulterior motives. Accordingly, we agree with the PCC that the respondent's misconduct in connection with the conflicts of interest rises above that warranting merely suspension, a sanction appropriate "when a lawyer knows of a conflict of interest and does not fully disclose to a client the possible effect of that conflict, and causes injury or potential injury to a client," *id.* § 4.32.

[22] **[23]** We next consider the effect of aggravating and mitigating factors upon the baseline sanction of disbarment. The PCC identified the following aggravating factors: selfish motive due to the large amount of fees garnered; a pattern of misconduct; refusal to acknowledge the wrongful nature of his conduct; his substantial experience; his lack of restitution or any effort to return fees; and David's vulnerability. We acknowledge his substantial experience, his pattern of misconduct and multiple violations, his refusal to acknowledge the wrongful nature of his conduct, and, most importantly in this case, David's vulnerability to overreaching. *See id.* § 9.22.

We agree with the PCC that the respondent's lack of disciplinary record and his excellent reputation among judges and practicing attorneys mitigate his misconduct. Furthermore, at oral argument the respondent apologized to the court, David, the PCC and the bar and, although he disputed the findings of misconduct, he recognized that reaching this point in the disciplinary process evidenced some fundamental failure on his part. *See id.* § 9.32(*l*) (identifying remorse as mitigating factor). Additionally, although "a lawyer has a professional duty to cooperate ****415** with the committee's investigation," *Richmond's Case,* 152 N.H. 155, 161, 872 A.2d 1023 (2005), we accord mitigating weight to the respondent's "full and free disclosure to [the] disciplinary board ... [and his] cooperative attitude toward [the] proceedings." *Id.* § 9.32(e). We also attach significant mitigating weight to the delay in these proceedings. The PCC explained at oral argument that the delay was due, in part, to a backlog. While we have previously rejected delay as ***309** a mitigating factor, *see Douglas' Case,* 156 N.H. 613, 621-22, 937 A.2d 891 (2007), the delay here was not caused by the respondent and, if anything, was minimized by his cooperative attitude. *See generally* Annotation, *Attorneys at Law: Delay in Prosecution of Disciplinary Proceeding as Defense or Mitigating Circumstance,* 93 A.L.R.3d 1057 § 18 (1979 & Supp.2009) (collecting cases where delay considered mitigating).

Taking into consideration all of these circumstances, we conclude that suspension is the appropriate sanction. We typically impose disbarment pursuant to the Standards where conflicted attorneys act pursuant to some selfish or improper motive. *See Conner's Case,* 158 N.H. at 304, 965 A.2d 1130 (avoiding malpractice claim); *Wolterbeek's Case,* 152 N.H. 710, 717, 886 A.2d 990 (2005) (financial gain); *Coffey's Case,* 152 N.H. 503, 513-14, 880 A.2d 403 (2005) (excessive fees and acquisition of property for less than market value). While the respondent improperly favored Brault's and Svetlana's interests, the reasonableness of the respondent's fear for

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David's welfare was never questioned in these proceedings and mitigates much, though not all, of his misconduct. Imposing the ultimate sanction of disbarment under these circumstances might discourage appropriate action pursuant to Conduct Rule 1.14. On the other hand, public censure, the sanction recommended by the hearing panel and urged by the respondent, is insufficient to protect the public and preserve the integrity of the legal profession. *See Shillen's Case,* 149 N.H. 132, 140, 818 A.2d 1241 (2003) (ordering public censure where conflicted attorney acted negligently). The respondent's continuous and knowing violations of his duties of loyalty warrant a greater sanction. Therefore, we order the respondent suspended for two years. Three years is the maximum period of suspension under the Standards, thus communicating to the bar and the public the primacy of the duty of loyalty and the sanctity of client autonomy. The suspension begins upon the date this order becomes final. We further order the respondent to reimburse the committee for its expenses in investigating and prosecuting this matter. *See Sup. Ct. R.* 37(19)(a).

So ordered.

BRODERICK, C.J., and DALIANIS and DUGGAN, JJ., concurred.

All Citations

159 N.H. 285, 982 A.2d 396

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EXHIBIT J

Committee Opinion
February 10, 2003

LEGAL ETHICS OPINION 1769

CONFLICT – WHETHER AN ATTORNEY CAN REPRESENT THE DAUGHTER IN GAINING GUARDIANSHIP OF INCOMPETENT MOTHER WHO IS CURRENTLY A CLIENT IN AN OTHER MATTER.

You have presented a hypothetical situation in which a legal aid office has been asked by the daughter of an elderly, incompetent woman to represent the daughter in seeking guardianship of her mother. The mother is also currently a client of the legal aid office in an unrelated matter.

Under the facts you have presented, you have asked the committee to opine as to whether the acceptance of the daughter as a client for this guardianship petition would trigger an impermissible conflict of interest for the legal aid office.

The appropriate and controlling disciplinary rules relative to your inquiry are Rule 1.7, which governs concurrent conflicts of interest, and Rule 1.14, which addresses representing a client with a disability. Rule 1.7 squarely addresses the conflict triggered by an attorney representing adverse parties in the same matter:

> (a) A lawyer shall not represent a client if the representation of that client will be directly adverse to another existing client, unless:
>
> (1) the lawyer reasonably believes the representation will not adversely effect the relationship with the other client; and
>
> (2) each client consents after consultation.

The committee notes that under Rule 1.10(a), any conflict arising under Rule 1.7 for one attorney would be imputed to every other attorney in the office.

Applying Rule 1.7(a) to the attorney in the present hypothetical presents insurmountable problems. This committee does not see how that attorney could fulfill either of the two requirements listed under paragraph (a), above. As for the first requirement, that the representations not be adversely affected, it seems unlikely that the representation of the mother in a legal matter would not be adversely affected by a finding of her incompetence. Even were that hurdle cleared, the second requirement can not be met. This committee sees no way for an attorney on the one hand to argue that a client is incompetent and, on the other hand, to argue that the same client can provide valid consent.

Should the attorney in this hypothetical actually consider his client to be incompetent, that attorney can look to Rule 1.14 for guidance. That rule specifically addresses the difficulties in representing a client under a disability. The rule does suggest that the lawyer should, "as far as reasonably possible, maintain a normal client-lawyer relationship" However, should the lawyer reasonably believe that "the client cannot adequately act in the client's own interest," then the lawyer "may seek the appointment of a guardian or take other protective action." Rule 1.14(a)

and (b). Thus, should the attorney in this hypothetical reasonably believe that the mother cannot adequately act in her own interest, he could seek the appointment of a guardian.

This committee's two conclusions in this matter - that there would be an impermissible conflict of interest for the attorney to represent the daughter in seeking a guardian and that, under certain circumstances, the attorney may permissibly seek appointment of a guardian under Rule 1.14 - are not contradictory. This committee believes that in addressing this same dilemma regarding Rule 1.7 and Rule 1.14, the ABA correctly made a critical distinction. *See*, ABA 96-404 (1996)[1]. In its opinion on this same question, the ABA distinguished between an attorney representing a third party petitioner and filing the petition himself:

> Rule 1.14(b) creates a narrow exception to the normal responsibilities of a lawyer to his client, in permitting the lawyer to take action that by its very nature must be regarded as "adverse" to the client. However Rule 1.14 does not otherwise derogate from the lawyer's responsibilities to this client, and certainly does not abrogate the lawyer-client relationship. In particular, it does not authorize a lawyer to represent a third party in seeking to have a court appoint a guardian for his client. Such a representation would necessarily have to be regarded as "adverse" to the client and prohibited by Rule 1.7(a)...

[1]The ABA, in this opinion, is interpreting Model Rules 1.7 and 1.14, which are substantially similar to Virginia's corresponding rules.

Committee Opinion
February 10, 2003

This committee concurs with the ABA's analysis of the interplay between Rule 1.7 and Rule 1.14 in the present context. Neither the attorney in this hypothetical, nor anyone in his office, may properly represent the daughter in petitioning for a guardian for her mother, also a client of this attorney's office. Such an action is by its very nature an adverse action with respect to the mother. However, the attorney may permissibly consider any information provided by the daughter regarding the mother in determining this attorney's duties toward the mother with regard to Rule 1.14. That rule would be the proper source for guidance for this attorney should he believe the mother's competence is questionable.

This opinion is advisory only, based only on the facts you presented and not binding on any court or tribunal.

Committee Opinion
February 10, 2003

EXHIBIT K

SC Adv. Op. 05-11 (S.C.Bar.Eth.Adv.Comm.), 2005 WL 1704509

South Carolina Bar Ethics Advisory Committee
Ethics Advisory Opinion 05-11
July 15, 2005

***1** Upon the request of a member of the South Carolina Bar, the Ethics Advisory Committee has rendered this opinion on the ethical propriety of the inquirer's contemplated conduct. This Committee has no disciplinary authority. Lawyer discipline is administered solely by the South Carolina Supreme Court through its Commission on Lawyer Conduct.

RULES 1.7, 1.14 and 1.16

Facts

Attorney has an estate planning client, Mrs. Smith. Due to Mrs. Smith's incapacity, the probate court has appointed her daughter, Mrs. Jones, as conservator. Mrs. Smith has left South Carolina. Mrs. Jones lives outside South Carolina. The court has retained jurisdiction. Attorney has received requests from Mrs. Smith and Mrs. Jones requesting the legal file. Attorney has suggested to Mrs. Jones that she request an order from the court which would order the attorney to turn over the file or that new counsel be secured to represent Mrs. Smith so that the file can be turned over to a new lawyer. Neither Mrs. Smith or Mrs. Jones has responded to any of those suggestions.

Question

May Attorney turn over the legal file to either Mrs. Smith or Mrs. Jones?

Summary

If an attorney reasonably believes that the client can adequately act in her interest, the attorney should withdraw from representation and return the file to the client within a reasonable time so as not to prejudice the client. If a guardian has been appointed for the client, the attorney should consult with the guardian, after attempting to communicate with client concerning the termination. If a guardian has not been appointed for client, and attorney reasonably believes that the client cannot adequately act in their own interest concerning attorney's termination, the attorney may seek the appointment of a guardian or take other protective action.

Opinion

While not clear from the facts presented, we assume that the client has discharged attorney. Under Rule 1.16(a)(3) the lawyer shall withdraw from representation when discharged by the Client. In Ethics Advisory Opinion 92-37 we advised that, under Rule 1.16(d) following termination of representation, the lawyer upon request should deliver the file to the client within a reasonable time so as not to prejudice the interests of the client and advised the manner of return. However, the Official Comments to Rule 1.16(d) provide as follows: “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 for the client. See Rule 1.14.”
Rule 1.14 includes the following provisions.

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> "(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.
>
> ***2** (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."

Rule 1.14(a) requires that the lawyer, representing a client with impaired ability, shall to the extent reasonably possible maintain a normal client-lawyer relationship with the client. Under Rule 1.14(b) the lawyer **may** seek the appointment of a guardian or take other appropriate action **only** when the lawyer **reasonably** believes that the client cannot adequately act in his or her interest. The difficulty as pointed out in the official comments to Rule 1.14 is that the disclosure of the client's condition could adversely affect the client's interests, and thus places the lawyer in an unavoidably difficult position. The ABA Committee on Ethics and Professional Responsibility stated that Rule 1.14 (b) creates a narrow exception to the normal responsibilities of a lawyer to his client, in permitting the lawyer to take action that by its very nature must be regarded as adverse to the client. The lawyer's action under Rule 1.14(b) can precipitate a claim from the client, as in Kutnick v. Fischer, 2004-Ohio-5378 (Ohio App.), where a client albeit unsuccessfully sued attorney for malicious civil prosecution and abuse of process, where attorney sought determination of competency and appointment of guardian under Rule 1.14 (b).

Under Rule 1.16(a)(3) the attorney must withdraw from the case if discharged by his client. If the attorney withdraws, under Rule 1.16(d) attorney must deliver the file to the client as discussed in Opinion 92-37. Under the facts as presented Ms. Smith is the client, not Ms. Jones the Conservator. While title to property vests in the conservator and the conservator may prosecute or defend actions to protect the estate, generally the conservator does not have authority to make personal decisions. Attorney must make a reasonable determination as to whether client can adequately act in her own interest in the matter of attorney's termination. Under the facts as presented the client apparently has some incapacity and the Probate Court has appointed the daughter as Conservator, while retaining jurisdiction. If the daughter had been appointed guardian of the client, the attorney would ordinarily look to the representative for decisions on behalf of the client as provided in the Comments to Rule 1.14, after attempting to communicate with client. If a guardian has not been appointed, and **only** if the attorney reasonably believes that the client cannot adequately act in her own interest in the matter of attorney's termination, attorney may seek the appointment of a guardian or take other protective action. Since the Probate Court has retained jurisdiction, attorney may seek protective action in Probate Court concerning attorney's termination. If the attorney seeks the appointment of a guardian, this action must be on attorney's own authority under Rule 1.14 and not on behalf of a third party, which would be prohibited under Rule 1.7(a).

SC Adv. Op. 05-11 (S.C.Bar.Eth.Adv.Comm.), 2005 WL 1704509

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EXHIBIT L

126

Representing the Adult Client With Diminished Capacity

Adopted May 6, 2015

Scope

This opinion addresses ethical issues that arise when a lawyer believes that an adult client's ability to make adequately considered decisions is diminished. Although Rule 1.14 of the Colorado Rules of Professional Conduct (Colo. RPC or Rules) also addresses a client's diminished capacity due to minority, this opinion is limited to the consideration of ethical issues that arise by reason of the diminished capacity of a client due to reasons other than the client's minority. This opinion does not address representation in adult protective proceedings.[0]

Syllabus

At times, a lawyer may need to consider whether an adult client's capacity to make adequately considered decisions relating to the representation is diminished. If the lawyer reasonably concludes that the client's capacity is diminished in such a manner as to impair the client's ability to make adequately considered decisions regarding the representation, including whether to give informed consent to a course of conduct by the lawyer when required, the lawyer must nevertheless maintain a normal client–lawyer relationship with the client so far as is reasonably possible. If the lawyer reasonably believes that the client's diminished capacity places the client at risk of substantial physical, financial, or other harm unless action is taken and that the client cannot adequately act in the client's own interests, the lawyer should consider whether to take reasonable protective action necessary to protect the client's interests. In taking such protective action, the lawyer should be guided by the wishes and values of the client and the client's best interests, and any protective action taken should intrude into the client's decision-making authority to the least extent feasible. When taking such protective action, the lawyer is impliedly authorized to disclose information relating to the representation which Colo. RPC 1.6 would otherwise prohibit, but the implied authorization is only to the extent reasonably necessary to protect the client's interests. The lawyer should take care to ensure that information thus disclosed will not be used against the client's interests. Differences may arise between the lawyer and client regarding whether or to what extent the client's capacity is diminished, whether the lawyer should disclose information regarding the client's condition despite the

client's lack of consent to such disclosure, or whether the lawyer should take any action to protect the client. These differences may present conflicts between the client's and the lawyer's respective interests, and the lawyer must assess whether those conflicts will materially limit the representation of the client.

Summary of Opinion

Introduction

A lawyer's effective and efficient representation of a client's interests depends substantially upon the client's ability to receive, analyze, and process information and advice received from the lawyer and to accurately inform the lawyer regarding information relevant to the representation. Generally, the client has the right to determine the objectives of the lawyer's representation and to be consulted by the lawyer as to the means by which such objectives are to be pursued. Colo. RPC 1.2(a).

Moreover, many actions that the lawyer takes in the course of representing the client require the client's informed consent, which the Rules define as the client's agreement to a proposed course of conduct after the client has been provided by the lawyer with adequate information and explanation about the material risks of and reasonably available alternatives to the proposed course of conduct. Colo. RPC 1.0(e). Thus, the client–lawyer relationship substantially depends upon the capacity of the client to make the adequately considered decisions that are required in connection with the representation.

Diminished capacity issues can arise in virtually any setting, involving any area of law, where a client–lawyer relationship exists. To illustrate different ethical issues, this opinion uses one transactional and one litigation hypothetical.

1. Transactional scenario—elderly client. A longtime, elderly client meets with you to prepare her estate plan. The client is accompanied by her son. The client directs that the bulk of her estate be left to her son and only a nominal portion be left to her daughter. You draft a will in accordance with those instructions and give it to the client to review. Days later, the client returns, this time accompanied by her daughter. The client explains that, having spoken with her daughter, she now wishes to leave the bulk of the estate to the daughter. You suspect that your longtime client is evidencing signs of dementia and that her two children are taking advantage of her mental state and attempting to unduly influence her testamentary decisions.

2. Litigation scenario—divorce. You represent a wife in a proceeding for dissolution of marriage. After the wife separated from her husband, she was diagnosed with a psychological disorder that interferes with her ability to understand and make decisions based upon your advice. She has instructed you to tell no one about this diagnosis. Your client has no separate assets, and there is a substantial marital estate. Your client tells you that she wants to settle the

proceeding in a manner where she receives no assets or maintenance. You believe that a court would never enter such an order after trial or approve such a settlement upon conscionability review, but if the court did so the result would be the impoverishment of your client.

Maintaining a Normal Client Relationship

Colo. RPC Rule 1.14 contains only one mandatory obligation: "When a client's capacity to make adequately considered decisions in connection with a representation is diminished, whether because of minority, mental impairment, or for some other reason, the lawyer shall, as far as reasonably possible, maintain a normal client–lawyer relationship with the client." Colo. RPC 1.14(a); *accord* Restatement (Third) of the Law Governing Lawyers § 24(1) (2000) (Restatement).

Unlike the discretionary actions permitted under Rule 1.14(b), once the lawyer forms a reasonable belief that the client has diminished capacity, Rule 1.14(a) requires that the lawyer maintain a normal relationship with the client insofar as reasonably possible notwithstanding the client's diminished capacity. The fact that the client suffers from a lack of capacity does not lessen the lawyer's obligation to treat the client with attention and respect. Colo. RPC 1.14, cmt. [2]. This is so even if a guardian or other representative has been appointed for the client and the guardian or other representative is the legal decision-maker with regard to the representation. The lawyer representing a client with diminished capacity should continue to accord the client attention and respect; attempt to communicate and discuss relevant matters with the client; and continue, as far as reasonably possible, to take action consistent with the client's directions and decisions. *See, e.g.*, American Bar Ass'n (ABA) Comm. on Ethics and Prof. Resp. Formal Op. 96-404, "Client Under a Disability" (1996) (ABA Op. 96-404); Or. State Bar Formal Ethics Op. 2005-159, "Competence and Diligence: Requesting a Guardian Ad Litem in a Juvenile Dependency Case" (2005) (Or. Op. 2005-159) (although a client who has become incompetent to handle his own affairs can be difficult to represent, a lawyer must maintain as regular a lawyer-client relationship as possible and must adjust the representation to accommodate the client's limited capacity); *In re Flack*, 272 Kan. 465, 33 P.3d 1281, (2001) (lawyer who knew that client was impaired had a duty to maintain a normal client–lawyer relationship with client, including a duty to abide by her estate planning objectives as far as reasonably possible).

Rule 1.14 recognizes that (a) "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," (b) when the client suffers from a diminished mental capacity, maintaining the normal client–lawyer relationship may not be possible "in all respects," and (c) that a client suffering from diminished capacity "often has the ability to understand and deliberate upon, and reach conclusions about matters affecting the client's own well-being."

Colo. RPC 1.14, cmt. [1]. Although Rule 1.14(b) creates a narrow exception to the normal responsibilities of a lawyer to his or her client—permitting the lawyer to take action that by its very nature could be regarded as "adverse" to the client—it does not otherwise diminish the lawyer's responsibilities to the client and certainly does not abrogate the client–lawyer relationship. *See, e.g.*, *In re Laprath*, 2003 S.D. 114, 670 N.W.2d 41 (2003) (Rule 1.14 did not authorize lawyer to represent third party in seeking to have court appoint guardian for his client). The duty to maintain a normal client–lawyer relationship precludes a lawyer from acting solely as an arm of the court, using the lawyer's assessment of the "best interests" of the client to justify waiving the client's rights without consultation, divulging the client's confidences, disregarding the client's wishes, or presenting evidence against the client. *E.g.*, *In Re Lee*, 132 Md. App. 696, 754 A.2d 426 (2000)*; In re Guardianship of Henderson*, 150 N.H. 349, 838 A.2d 1277 (2003*)* (the duty to maintain a normal client–lawyer relationship with the client requires lawyer to represent and advocate the client's interests and avoid assuming the role of guardian *ad litem*).

Assessing the Client's Capacity

Colo. RPC 1.14 does not define "capacity," but, in the context of stating a lawyer's ethical duties in representing a client with diminished capacity, Rule 1.14(a) refers to the pertinent capacity as the client's "capacity to make adequately considered decisions in connection with a representation." Thus, the lawyer should not confuse what may appear to be a client's imprudent or ill-considered decisions with decisions made by the client *because* of a diminished capacity. A client's poor judgment does not warrant protective action under Rule 1.14(b). ABA Op. 96-404 ("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"); Rest. § 24 cmt. [c] (lawyer should not construe as proof of disability a client's insistence upon view of client's welfare that lawyer considers unwise or at variance with lawyer's views). In the transactional scenario described above, where the lawyer is concerned about the client's mental state—about her capacity to make adequately considered decisions about her estate—the lawyer can discuss those concerns with the client alone and away from the client's children. The lawyer also can recommend that the client obtain a doctor's written opinion about her mental abilities, which the lawyer can retain in the client's file as evidence of the client's capacity at or near the time of her execution of estate planning documents.

A client may have the capacity to make adequately considered decisions about some aspects of the representation yet have a diminished capacity to do so with respect to other aspects. The degree of capacity required of the client to make adequately considered decisions concerning the scope and objectives of the representation, including giving informed consent to

proposed actions, necessarily will depend upon the complexity of the factual and legal issues involved in those decisions. Consequently, the lawyer should assess the capacity of the client, and determine if the client suffers from diminished capacity, in the context of those complexities. In the litigation scenario described above, the lawyer already is aware that the client has a diagnosis of a psychiatric disorder but should still apply his or her best judgment about the extent to which the client can continue to participate in the decisions that must be made in the course of her representation. If the lawyer reasonably believes that the client is unable to act in her own interests, the lawyer should consider seeking the appointment of a guardian *ad litem*. *See In re Marriage of Sorensen*, 166 P. 3d 254 (Colo. App. 2007) (Rule 1.14 permits attorney to seek appointment of guardian *ad litem* when attorney reasonably believes the client is unable to act in his or her own interests).

The lawyer's assessment of a client's capacity also is important when the lawyer initiates representation of the client. A client–lawyer relationship is a matter of contract, and the client's capacity to contract is a legal issue. If the lawyer becomes aware during the first meeting with a prospective client that the prospective client may not have the capacity to enter into an agreement to form the client–lawyer relationship, the lawyer may consider other alternatives, including speaking to other appropriate persons. In that circumstance, the lawyer should consider the duties to a prospective client described in Rule 1.18 Colo. RPC. If the lawyer concludes that the prospective client lacks the capacity to enter into the client–lawyer relationship, the lawyer may wish to consider and discuss with the prospective client the establishment of a conservatorship or guardianship by a close relative or person whose interests are aligned with the prospective client in order to protect the prospective client's interests and facilitate representation of the prospective client.

In every situation where the client's capacity to participate in the decision-making process may be diminished, the lawyer must nonetheless endeavor, as far as reasonably possible, to maintain a normal client–lawyer relationship, including communicating and consulting with the client with regard to matters and issues involved in the representation. This may entail special efforts on the part of the lawyer to communicate in a manner that will allow the client to make those decisions concerning the representation that the client's capacity permits. A lawyer is not excused from the duty to communicate with the client simply because the client may suffer from diminished capacity. *See e.g.*, *State ex. rel. Nebraska State Bar Ass'n v. Walsh*, 206 Neb. 737, 294 N.W.2d 873 (1980) (lawyer disciplined for failure to sufficiently explain to deaf mute client the nature of workman's compensation claim and proceedings and necessity of appeal); *In re Brantley*, 260 Kan. 605, 920 P.2d 433 (1996) (lawyer disciplined for failure to adequately communicate with client believed to have diminished capacity); Or. Op. 2005-159

(lawyer should "examine whether the client can give direction on decisions that the lawyer must ethically defer to the client").

Rule 1.14 does not attempt to identify or enumerate the causes or conditions that may result in a client's diminished capacity, other than to explain that the diminishment may be because of "minority [or] mental impairment" or may be "for some other reason." Thus, the lawyer should consider and evaluate any condition that limits or interferes with the client's decision-making capacity, in order to determine whether the condition is such that the client lacks the capacity to make adequately considered decisions regarding the representation within the meaning of the rule.

Comment [6] to Rule 1.14 enumerates several factors the lawyer should consider in assessing the diminishment of a client's capacity:

> the client's ability to articulate reasoning leading to a decision, variability of state of mind and ability to appreciate consequences of a decision; the substantive fairness of a decision; and the consistency of a decision with the known long-term commitments and values of the client.

Comment [6] adds that "[i]n appropriate circumstances, the lawyer may seek guidance from an appropriate diagnostician."[1] ABA Opinion 96-404 observes:

> If a lawyer is unable to assess his client's ability to act or if the lawyer has doubts about the client's ability, Comment [5] [now Comment [6]] to Rule 1.14 suggests it is appropriate for the lawyer to seek guidance from an appropriate diagnostician, particularly when a disclosure of the client's condition to the court or opposing parties could have adverse consequences for the client. Such discussion of a client's condition with a diagnostician does not violate Rule 1.6 (Confidentiality of Information), insofar as it is necessary to carry out the representation. See ABA Informal Opinion 89-1530. 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.

The ABA opinion cautions, however, that the lawyer must be careful to limit the disclosure to information that is pertinent to the assessment of the client's capacity and determination of the appropriate protective action, noting that "this narrow exception in Rule 1.6 does not permit the lawyer to disclose generally information relating to the representation."

Thus, if necessary, the lawyer may seek information and assistance from others, such as the client's family members or appropriate diagnosticians, in assessing the client's capacity to make decisions relating to the representation. *See also* N. Y. City Bar Ass'n Formal Op. 1997-2

(1997) (in forming conclusions about the client's capacity, lawyer must take into account not only information and impressions derived from lawyer's communications with client, but also other relevant information that may reasonably be obtained from other sources, and lawyer also may seek guidance from other professionals and concerned parties); State Bar of N.D. Ethics Comm. Op. 00-06 (2000) (lawyer who believes that divorce client will accept offer contrary to her best interests to avoid disclosing her substance abuse problem must determine if client is able to consider her decision adequately; lawyer may consult with professional to determine nature and extent of client's disability); Pa. Bar Ass'n Legal Ethics and Prof. Resp. Comm., Formal Op. 87-214 (1988) (lawyer who reasonably believes that client cannot handle her financial affairs and health care needs may seek court appointment of physician to report to court on threshold issue of client's competence); *see generally*, *Assessment of Older Adults with Diminished Capacity: A Handbook for Lawyers* (ABA Comm'n on Law and Aging and the Am. Psycholog. Ass'n 2005).

The lawyer must take care to ensure that any information that the lawyer discloses in the process of assessing the client's capacity will not be used in a manner that is adverse to the client's best interests. Thus, the lawyer should not disclose client information to persons whose interests are adverse or potentially adverse to those of the client.

Taking Protective Action

As indicated above, Rule 1.14(b) leaves to the lawyer's discretion whether or not to take protective action to protect the client's interests. However, the Rule establishes three predicates for such protective action. The lawyer must "reasonably believe" that the client (1) has diminished capacity, (2) is at risk of substantial physical, financial or other harm unless protective action is taken, and (3) cannot adequately act in the client's own interest.

Under Rule 1.0(i), a "reasonable belief" means that the lawyer "believes the matter in question" and that "the circumstances are such that the belief is reasonable." Thus, while leaving to the lawyer's discretion whether or not to take protective action, Rule 1.14(b) establishes the three conditions precedent enumerated above, to taking protective action, and each of those preconditions must satisfy the objective standard of "reasonable belief" by the lawyer.

In addition to the lawyer's obligation under Rule 1.14(a) to endeavor to maintain a normal client–lawyer relationship with the client suffering from diminished capacity, and the requirements of Rule 1.14(b) for undertaking any protective action, the lawyer should consult with and inform the client with regard to the nature and extent of any protective action the lawyer intends to undertake, providing the client with the lawyer's considerations and reasoning in deciding to take that action. In doing so, the lawyer should consider and respect the client's

desires and values and should attempt to obtain the client's understanding of the need for the contemplated protective action to protect the client's interests. In the litigation scenario, for instance, the lawyer may have to advise the client that the lawyer believes the symptoms relating to her diagnosis may affect her decision-making and that the lawyer is considering alternatives relating to that situation. Those alternatives might include the appointment of a guardian *ad litem* to protect the client's interests in the marital estate and to participate in other decisions arising in the course of the proceedings. In such event, before taking such action, the lawyer should explain and discuss with the client the lawyer's reasons and considerations in proposing such action and describe and explain what steps would be taken in effecting such action. If the client opposes or objects to the proposed protective action and such opposition and objections cannot be resolved, the lawyer should consider whether withdrawal from representation is required.

Reasonably Necessary Action

Under Rule 1.14(b), protective action taken by the lawyer must be "reasonably" necessary to protect the client's interests. The nature and extent of the protective action depends upon the nature and extent of the client's diminished capacity to make adequately considered decisions and the complexity of the decisions needed to be made. The lawyer should be guided by "the client's best interests and the goals of intruding into the client's decision making autonomy to the least extent feasible, maximizing client capacities and respecting the client's family and social connections." Colo. RPC 1.14, cmt. [5]; *see also* ABA Op. 96-404; Vt. Bar Ass'n Advisory Ethics Op. 2006-1 (2006); Conn. Bar Ass'n Prof. Ethics Comm. Informal Op. 04-10 (2004).

If the client's diminished capacity appears to be mild and the client is merely tentative or hesitant in making decisions, the lawyer should provide advice in the simplest terms possible, and, if necessary, in repetitive fashion, providing the client the time to review and digest the advice and the suggested alternatives. In the transactional scenario, for instance, the lawyer may want to advise the client that changing her estate planning documents so quickly depending on which child brought her to the lawyer's office lays a foundation for costly litigation between her children down the road. The lawyer may want to discuss with the client the alternative of resolving family issues about the family's estate through mediation. Providing the client with written advice and alternatives may assist the client in reaching appropriate decisions.

The principle of informed consent that underlies client autonomy normally requires the lawyer to refrain from overly suggestive advice which, due to the lawyer's perceived superior status, may encroach on client autonomy and could lead to a paternalistic relationship. *See* Paul R. Tremblay *On Persuasion and Paternalism: Lawyer Decisionmaking and the Questionably*

Competent Client, 1987 *Utah L.Rev.* 515, 527 (1987). But the client may simply not possess the mental dexterity to make quick decisions, particularly while under a degree of pressure. In such cases the lawyer should provide the client with an opportunity and time to reconsider decisions that were initially made on short notice, preserving the client's autonomy in reaching the final decisions.

When the client needs assistance in making adequately considered decisions regarding the representation, the lawyer may find it useful and appropriate to involve persons whose natural interests are congruent with those of the client, such as trusted family members who may be in a position to help the client make decisions. In the litigation scenario, the lawyer may confer with the client, who is concerned about disclosure of her diagnosis of a psychological disorder, to determine whether there may be trusted friends or family members, perhaps those who are already helping her in other ways, who could also help her make decisions in the divorce litigation.

If another person becomes involved to assist the client in making the necessary decisions, then, to protect the attorney–client privilege, the lawyer's consultation with that person should preferably take place out of the client's presence, with the lawyer keeping the client separately informed about the consultation. However, the client may wish to have family members or other persons participate in discussions with the lawyer. When necessary to assist in the representation, the presence of such persons might not vitiate the attorney–client privilege but the lawyer should take care to avoid an unintended waiver of the privilege.

The application and impairment of the attorney–client privilege is beyond the scope of this opinion. However, Comment [3] to Rule 1.14 states: "The client may wish to have family members or other persons participate in discussions with the lawyer. When necessary to assist in the representation, the presence of such persons generally does not affect the applicability of the attorney–client evidentiary privilege." *See also Rest.* § 70 (the evidentiary privilege is retained when a "person's participation is reasonably necessary to facilitate the client's communication with a lawyer, and if the client reasonably believes that the person will hold the communication in confidence").

The lawyer may consider a client's previously executed power of attorney or other grant of agency, which appointed an individual as an agent for the client with authority to make decisions for the client in areas relating to the representation. Before the lawyer relies on decisions of the agent under the client's previous grant of agency, the lawyer must be satisfied that the client had the ability to understand the import of that grant at the time the client made it.

The lawyer for the client with diminished capacity should become familiar with social agencies or support groups that may be able to provide assistance to the client in making

decisions with respect to matters within their areas of service, and should be prepared to advise the client regarding their services.

In more severe cases of diminishment, the lawyer should consider and advise the client regarding the appointment of a guardian *ad litem* who may have special knowledge and experience in the subject matter involved in the representation to act on behalf of the client in certain areas of the decision-making process, such as determining or changing the objectives of representation or settlement. The appointment of a conservator or special conservator with authority to deal with the client's property to the extent needed in the representation may be proper and may be required by other parties to the transaction or litigation under the circumstances. Under Rule 1.14(b), the lawyer for a client with diminished capacity may seek the appointment of a guardian to protect the client's interests if there is no less drastic alternative. ABA Op. 96-104 (appointment of guardian is a "serious deprivation of the client's rights and ought not to be undertaken if other, less drastic, solutions are available"); Or. Op. 2005-159 (lawyers should seek appointment of guardians only when client "consistently demonstrates lack of capacity to act in his or her own interests and is unlikely to assist in the proceedings").

A lawyer should not seek to be appointed as the client's guardian, "except in the most exigent of circumstances, that is, where immediate and irreparable harm will result from the slightest delay, and even then, only on a temporary basis." ABA Op. 96-404; *accord, In re Laprath*, 670 N.W. 2d at 51. Moreover, the lawyer should not represent a third party petitioning for the appointment of a guardian for the lawyer's client. ABA Op. 96-404; *accord*, *In re Wyatt* 982 A.2d 396 (N.H. 2009); Mass Bar Ass'n Ethics Op. 05-5 (2005) (lawyer may not represent client's son seeking appointment as client's guardian); Va. Legal Ethics Op. 1769 (2003) (legal aid lawyer may not represent daughter seeking appointment of guardian for elderly mother represented by same office in unrelated matter but may seek appointment of guardian if warranted under Rule 1.14); *see also* S.C. Bar Ethics Advisory Op. 06-06 (2006) (law firm may petition court for appointment of conservator and/or guardian for impaired client, but may not represent client's daughter in proceeding to have daughter named as such unless she is already acting as client's representative); *but see* R.I. Supreme Court Ethics Advisory Panel Op. 2004-1 (2004) (lawyer may represent party seeking appointment as guardian over elderly client if lawyer "reasonably believes that a guardianship is in the elderly client's best interest").

Disclosure of Client Information

Rule 1.14(c) is discretionary. It permits the lawyer, when taking protective action pursuant to Rule 1.14(b), to disclose information relating to the representation that Rule 1.6

would require be maintained in confidence absent the client's informed consent to disclosure: "When taking protective action pursuant to paragraph (b), the lawyer is impliedly authorized under Rule 1.6(a) to reveal information about the client, but only to the extent reasonably necessary to protect the client's interests." Correspondingly, Rule 1.6(a) provides: "A lawyer shall not reveal information relating to the representation of a client unless the client gives informed consent, *the disclosure is impliedly authorized in order to carry out the representation,* or the disclosure is permitted by [Rule 1.6(b)]." (Emphasis supplied).

Thus, while Rule 1.14(b) provides that reasonably necessary protective action may include "consulting with individuals or entities that have the ability to take action to protect the client . . .," Rule 1.14(c) limits such a disclosure to what is reasonably necessary to protect the client's interests.

Comment [8] to Rule 1.14 observes that disclosure of the client's diminished capacity could itself adversely affect the client's interests, including, at its extreme, by resulting in proceedings for involuntary commitment of the client. The lawyer must take care to ensure that information disclosed for the purpose of protecting the client's interests is not used against the client's interests. This is particularly tricky in the litigation scenario, where the client's diagnosed psychiatric disorder interferes with her ability to understand the lawyer's advice and disclosure of information concerning the diagnosis could be used to the client's detriment in other issues in the divorce proceedings.

The lawyer must consider whether persons to whom disclosure is proposed have potential conflicting interests with the client's interests that might lead to further disclosure or to use of the information to the client's detriment. The lawyer may wish to consider whether to require confidentiality agreements or similar commitments, or the lawyer's written consent to further disclosure, before making the lawyer's disclosure.

In disclosing information relating to a client with diminished capacity, the lawyer needs to be keenly aware of the limitations. The disclosure must be required in taking reasonably necessary protective action and reasonably necessary to protect the client's interests. Rule 1.0(h) defines the terms "reasonable" and "reasonably," "when used in relation to conduct by a lawyer" in the Rules, as "denot[ing] the conduct of a reasonably prudent and competent lawyer."

Accordingly, a lawyer taking protective action must exercise the care that a reasonably prudent and competent lawyer would exercise with regard to what information is disclosed, to whom it is disclosed, and the possible uses of the information by persons to whom it is disclosed or by others who may learn of it.

The lawyer for the client with diminished capacity should first seek the client's informed consent to disclosure of information in the course of protective action and should explain to the client the information to be disclosed and the lawyer's reasons for seeking

permission to disclose such information. If the client refuses to consent to disclosure or objects to disclosure, the lawyer should give respect and consideration to the client's objections and should make reasonable efforts to assuage the client's concerns in order to obtain the client's informed consent.

This opinion has suggested that the lawyer, acting reasonably prudently and competently, might consider seeking the appointment of a guardian *ad litem* or other fiduciary to protect the interests of the client with a diminished capacity, although the lawyer should avoid seeking such an appointment if less drastic action will suffice. Comment [8] to Rule 1.14 states, in part: "When taking protective action pursuant to paragraph (b), the lawyer is impliedly authorized to make the necessary disclosures, *even when the client directs the lawyer to the contrary*." (Emphasis supplied.) As previously noted, both Rule 1.6(a) and Rule 1.14(c) refer to the lawyer's implied authority to disclose information relating to the representation.

Normally, the law of agency dictates that an agent's implied authority terminates when it is expressly withdrawn or terminated by the principal. Restatement (Third) of Agency, § 3.06. Consequently, when the lawyer takes protective action pursuant to Rule 1.14(b) over the client's objections, the lawyer should exercise his or her authority to disclose information relating to the representation of the client with an especially high degree of care and caution. *See, e.g., Sturdza v. United Arab Emirates*, 644 F.Supp. 2d 50 (D.D.C. 2009) (lawyer sought the appointment of a guardian *ad litem* over the objections of client). If the court finds the client competent to register an objection to the lawyer's conduct, the client's objections might be found to constitute an effective termination of the lawyer's representation.

Termination of Representation

When a client with a diminished capacity to make adequately considered decisions about the representation objects to the lawyer's disclosure of information that the lawyer believes to be necessary in order to protect the client's interests, the lawyer must assess whether an irreconcilable difference impairs the client–lawyer relationship, preventing the lawyer from effectively and competently representing the client. In such an instance, the lawyer must assess whether continued representation of the client would present a conflict requiring the lawyer's withdrawal pursuant to Rule 1.7(a)(2), precluding a representation if there is a significant risk that the representation will be materially limited by the lawyer's personal interest, in combination with Rule 1.16(a), requiring termination of a representation if continuation would result in violation of the Rules of Professional Conduct, *i.e.*, in this case, Rule 1.7(a)(2).

If the lawyer seeks protective action contrary to the directions of the client, then the lawyer's interests are probably adverse to those of the client, and the lawyer cannot represent the

client in the protective proceedings—and possibly not thereafter in the underlying representation. The lawyer may be required to withdraw from representation. Rule 1.14 may thus place the lawyer in the dual positions of having to encroach on client autonomy while also having to withdraw, leaving the client unrepresented at a critical time. If the client is incapacitated (as opposed to suffering diminished capacity), the client may even be unable to form a client–lawyer relationship with a new lawyer to take over the underlying representation. The lawyer should consider such impacts and consequences prior to seeking the protective action that may engender them. The lawyer should be acutely aware of the potential consequences of taking protective action over the client's objections.

In the litigation scenario, for instance, if the lawyer believes protective action is necessary to protect the client's best interests and that the client cannot adequately act in her own best interests or otherwise participate in the litigation, the lawyer may have a conflict of interest with the client, if the client has stated that she does not want her psychiatric disorder disclosed. In that circumstance, the lawyer may have no choice other than to withdraw due to the lawyer's inability to adequately represent the client's interests. Such a dilemma, combined with the other issues of limits on disclosure and whether withdrawal would leave the client in jeopardy of substantial financial harm, render difficult the determination as to a proper course of action under Rule 1.14, when the lawyer reasonably perceives a diminished capacity in the client.

The lawyer should be aware that withdrawal from representation due to taking actions adverse to the client's perceived interest or in contradiction of the client's direction can be a two-edged sword. While the rules may dictate withdrawal, the lawyer also may be leaving a client with diminished capacity without effective representation from the lawyer most likely to have knowledge of the client's positions, intentions, and interests, while leaving the client unable to retain new legal counsel due to the client's diminished capacity. The lawyer may consider petitioning the court for appointment of a guardian *ad litem* under such circumstances.

Disagreements between the lawyer and a client with diminished capacity about disclosure of information relating to the client's mental or physical condition that contributes to or causes the client's diminished capacity or about the nature or extent of protective action to be taken by the lawyer may lead to the client's discharge of the lawyer from the representation. Rule 1.16(a)(3) provides that a lawyer shall not represent a client after the client has discharged the lawyer. Comment [6] to Rule 1.16 notes that a client with severely diminished capacity "may lack the legal capacity" to discharge the lawyer and points out that the lawyer's discharge may be "seriously adverse" to the client's interests. Comment [6] suggests that in such case the lawyer should "make special effort to help the client consider the consequences" and that the lawyer may take reasonably necessary protective action as provided in Rule 1.14. Moreover,

Comment [4] to Colo. RPC Rule 1.2, dealing with the allocation of authority between client and lawyer, states, "In a case in which the client appears to be suffering diminished capacity, the lawyer's duty to abide by the client's decisions is to be guided by reference to Rule 1.14." Thus, the considerations discussed above relating to the client's capacity to make adequately considered decisions relating to the representation, and whether the lawyer should take reasonable action necessary to protect the client from substantial physical, financial or other harm, apply equally to the client's decision to discharge the lawyer.

Notes

[1]. "Protective proceedings" refers generally to guardianship and conservatorship actions. The term stems from the title of the Uniform Guardianship and Protective Proceedings Act, C.R.S. §§ 15-14-101, *et seq.* The term also appears in the Uniform Adult Guardianship and Protective Proceedings Jurisdiction Act, C.R.S. §§ 15-14.5-101, *et seq.* The latter Act defines "protective proceedings" as "a judicial proceeding in which a protective order is sought or has been issued." CRS § 15-14.5-102 (11).

[2]. *See In re Brantley*, 920 P.2d 433 (lawyer violated Rule 1.14 when he failed to personally meet with client to assess her state of mind or understanding of financial affairs prior to filing a petition to establish a voluntary conservatorship for client); *see also* Ind. Ethics Op. 2-2001 (2001) (failure to ascertain client's physical and mental condition and evaluate client's capacity violates Rule 1.14); Or. Op. 2005-159 lawyer should "examine whether the client can give directions that the lawyer must ethically defer to the client").

EXHIBIT M

OPINION 2006-1
Synopsis

With regard to a client whom a lawyer reasonably believes cannot adequately act in her own interest, the lawyer must maintain as far as possible a normal client-lawyer relationship but may take action to protect the client including seeking appointment of a guardian. The lawyer may consult with an appropriate diagnostician with regard to the client's condition but must protect against disclosure of confidential information. Although in limited circumstances withdrawal from representation may be permissible, the Professional Responsibility Section believes that continuing the representation and the attendant risks is the preferable course. When there is no matter of active representation, the Rules of Professional Conduct do not impose a duty on the lawyer to accept further requests for representation. A lawyer's own conscience and personal beliefs about moral and ethical conduct may influence the decision to accept the representation and assist the client.

Issue

When a client's persistent beliefs and unsubstantiated claims of theft of papers, including claims directed at the lawyer, demonstrate that the client is mentally unstable, how does the lawyer continue to represent the client and protect against the risk of being reported by the client for unprofessional conduct?

Facts

An older client has severe mental problems which are evidenced at least in part by accusations that people steal from her all the time including a claim against the lawyer that he had taken her "papers and records." She claims that people come into her house at night while she is sleeping and steal from her. There is no ongoing active representation. Rather the lawyer has handled matters in the past and anticipates handling matters in the future. The client also considers the requesting attorney to be her lawyer, even if there is not a current matter. The attorney is concerned that there is a real risk, given the client's mental status and volatility that the client will eventually file a complaint with the Professional Responsibility Board based on her fear that papers are being stolen etc.

Relevant Rules of Professional Conduct[1]

[1] Note that substantial amendments to the Vermont Rules of Professional Conduct have been proposed by the Advisory Committee but have not yet been reviewed and approved by the Vermont Supreme Court. The proposed amendments incorporate comprehensive and significant changes to the American Bar Association's Model Rules of Professional Conduct that were adopted by the ABA House of Delegates in 2001-2003.

The comment period for the amendments to the Vermont Rules ended on April 15, 2005. For the text of the amendments and explanatory comments and Reporter's Notes go to: http://www.vermontjudiciary.org/rules/proposed/index.htm

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.

...

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;
>
> ...

(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:

> ...
>
> (6) other good cause for withdrawal exists.

Discussion

Given the fact that there is no active representation of the client, there is no obligation under the VRPC to accept a future request for representation. This conclusion does not change with regard to a client under a disability. The lawyer may feel a moral and ethical obligation to continue to handle matters for a client under a disability and doing so is not mandated by the VRPC but is clearly consistent with the spirit of the Rules: "Many of a lawyer's professional responsibilities are prescribed in the Rules of Professional Conduct, as well as substantive and procedural law. However, a lawyer is also guided by *personal conscience* and the approbation of professional peers." VRPC Preamble: A Lawyer's Responsibilities (emphasis supplied).[2]

[2] It should be noted that the Rules do not impose an obligation upon a lawyer who declines a request for representation to assist the client in finding new representation or to assist new counsel with relevant historical information about the client. However, if the client's disability would interfere with the

If the Supreme Court adopts the proposed amendments to the VRPC, Rule 1.14 will change in significant respects. In particular, amendments to VRPC 1.14, if adopted, may restrict the circumstances of when a lawyer can act to protect a client "with diminished capacity" to circumstances where in addition to the client's inability to adequately act on her own interest, the client also "is at risk of substantial physical, financial or other harm unless action is taken." Additionally, subsection (c) of the current rule which addresses when a lawyer may take action on behalf of a person under a disability, who is not a client, is beyond the scope of this opinion.

The Section addressed Rule 1.14 indirectly in Opinion 2000-03. That opinion addressed a situation in which appointed counsel for mental health proceedings was discharged by the client prior to a merits hearing. Given the pending hearing, the Section opined that counsel would have to continue to prepare but that it was permissible to seek withdrawal providing that the client was competent to understand withdrawal.

When helping a paranoid client, a lawyer may not always be able to maintain a normal client-lawyer relationship due to the client's inability to make reasoned decisions on information provided. Rule 1.14 (a) requires that the lawyer normalize the relationship as far as possible. Comments to the rule make clear that at a minimum the lawyer must continue to give the client attention and respect and maintain communication. Comments to the rule also point out that even though a client may be incompetent to make legally binding decisions, the client may still have the "ability to understand, deliberate upon, and reach conclusions about matters affecting the client's own well-being." This comment underscores the continuing obligation to keep a client informed and that the level of competence may not put all decisions out of reach. ABA Formal Opinion 96-404 emphasized that under the similar provision of former Model Rule 1.14(a), the obligation to maintain a normal client-lawyer relationship "implies that the lawyer should continue to treat the client with attention and respect, attempt to communicate and discuss relevant matters, and continue as far as reasonably possible to take action consistent with the client's directions and decisions."

The Reporter's Note to Rule 1.14 explains the relationship between subparts (a) and (b) "[i]t requires the lawyer to try to maintain a client-lawyer relationship which is as normal as possible with the client whose ability to make decisions is impaired, and permits the lawyer to seek protective action regarding the client only when the lawyer reasonably believes the client cannot adequately act in the client's own interest." The comments acknowledge that "[i]n 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." Furthermore, the comments point out that disclosure of the client's condition may adversely affect the

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likelihood that the client will be able to find a new lawyer or communicate relevant historical information necessary to the representation, the lawyer may be faced with a difficult situation and will have to look to his or her own conscience for how to proceed.

client's interests and trigger other legal consequences. In dramatic understatement, the comments observe: "The lawyer's position in such cases is an unavoidably difficult one." In order to provide some guidance in these situations, the comments offer that the lawyer "may seek guidance from an appropriate diagnostician." Fundamentally, however, when conditions exist that meet subpart (a), i.e. client incapacity, the lawyer should be no different than any other agent with an incompetent principal and without authority to act. Subpart (b) permits that action and comments to the Rule offer a further departure from the Rules by permitting disclosure of confidential client information as necessary to take the action or to seek guidance from an appropriate diagnostician. (Proposed amendments to Rule 1.14 make this authorization explicit and specifically incorporate reference to Rule 1.6 and state that when taking protective action there is an implied authorization to disclose confidential information as is reasonably necessary).

The facts before the Section are especially challenging because while the client needs legal assistance, there is no specific issue of representation facing the client at this juncture. As noted above, under the proposed amendments to Rule 1.14, this situation would leave the lawyer unable to act because although the client may not be able to adequately act on her own interest, there is no current "risk of substantial physical, financial or other harm unless action is taken." ABA Formal Opinon 96-404, discussing the identical language to Rule 1.14(b) is directly on point to this situation and is reproduced at length:

> The scope of authority granted a lawyer under Rule 1.14(b) appears on the face of the rule to be quite broad. For example, the language of Rule 1.14(b) appears to permit a lawyer to take protective action whether or not immediately necessary to the lawyer's effective representation of the client, if, in the matter at hand, the client cannot adequately act in the client's own interest. Thus, a lawyer who has a longstanding existing relationship with a client, but no specific present work, is not, for lack of such assignment, barred from taking appropriate action to protect a client where 1.14(b) applies.
>
> On the other hand, there are limits as to when a lawyer may take protective action under Rule 1.14(b), and as to what action may be taken. 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."[5] [Reproduced below] (Emphasis added) 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 lawyer 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.

> Equally important, Rule 1.14(b) 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. Rather, the authority granted under Rule 1.14(b) to seek protective action should be exercised with caution in a limited manner consistent with the nature of the particular lawyer/client relationship and the client's needs, as discussed more fully below.
>
> 5. "In other words, the 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." M. SILBERFIELD AND A. FISH, WHEN THE MIND FAILS; A GUIDE TO DEALING WITH INCOMPETENCY (University of Toronto Press, 1994).

The Section agrees with ABA Formal Opinion 96-404 that under the current version of VRPC 1.14(b) "a lawyer who has a longstanding existing relationship with a client, but no specific present work, is not, for lack of such assignment, barred from taking appropriate action to protect a client where 1.14(b) applies." Nonetheless, protection of the lawyer from potential complaints to the Professional Responsibility Board has no place in the analysis of whether protective action may be taken. Rather, to the extent possible, the lawyer must maintain an ordinary client-lawyer relationship and may take protective action only when the lawyer reasonably believes that the client cannot act adequately in her own interest. In forming that assessment, the lawyer may consult with an appropriate diagnostician and may disclose client confidences as necessary to the consultation. The Section also believes that any protective action taken must be the least restrictive possible under the circumstances in order to preserve client autonomy. See ABA Formal Opinion 96-404.

Withrawal

Under Rule 1.16 (a)(1) a lawyer must withdraw from representation where the client becomes incompetent both because the lawyer's authority would be revoked by the client's incompetence and because the lawyer would be unable to carry out professional responsibilities to the client under the Rules. Rule 1.14 provides an exception to this Rule but does not compel the lawyer to continue the representation or to take protective action on behalf of the client. Permissive withdrawal under Rule 1.16 (b) is allowed when it may be accomplished without material adverse affect on the interests of the client or under subpart (6) for other good cause. With a client under a disability, withdrawal may solve the lawyer's problem but likely leaves the client in harm's way. The Section does not believe, as a matter of policy that the mere fact of a disability is enough to constitute 'other good cause' as contemplated by 1.16(b)(6). However, a client's disability can be good cause if it so impairs the attorney-client relationship that the attorney cannot do his or her job and there is reason to think that another attorney will be able to better cope with the client's disability. Alternatively, where the disability is sufficiently profound that

a client is not competent to assess withdrawal, it would appear to meet the limitation in the Rule that termination of the representation will cause a material adverse effect on the client.

In the question facing the Section, the issue is not if the client's disability will affect her interests but when. In these circumstances, it may be appropriate, if the lawyer does not have the constitution to act to protect the client, for the lawyer to withdraw. However, the need for legal representation and identification of appropriate resources for finding another lawyer should in these circumstances be communicated to the client.

ABA Formal Opinion 96-404 concluded that the better course was to stay with the representation. Other states ethics opinions concur: Me. Ethics Op. 84 (1988) (withdrawal not likely to be satisfactory resolution of dilemma, as it leaves client without advice when it seems to be most needed; withdrawal inappropriate unless client insists that lawyer not obtain conservator after lawyer has already begun proceedings); N.Y.City Ethics Op. 83-1 (undated) (withdrawal least-desirable option). However, in some instances, withdrawal may be appropriate as this Section found in Opinion 2000-3 involving appointed counsel who was discharged by a client and permitted to withdraw upon making a determination that the client was competent to make the decision to discharge counsel. See, e.g., Ill.Ethics Op. 89-12 (1990) (lawyer who believes client's irrational behavior and incapacity to act in own best interests are making representation unreasonably difficult may seek to withdraw); Pa.Ethics Op. 98-83 (1998) (lawyer may seek court permission to withdraw from case when client grows increasingly agitated, unreasonable, and irrational regarding case, refusing to permit lawyer to hire necessary expert to evaluate complex financial aspects of case); see also Restatement (Third) of the Law Governing Lawyers § 24 cmt. d (2000) (when lawyer discloses client's diminished capacity to tribunal against client's wishes, lawyer may be required to attempt to withdraw if disclosure causes client effectively to discharge lawyer); id. cmt. f (if lawyer believes guardian of client with diminished capacity to be acting lawfully but inconsistently with best interests of client, lawyer may remonstrate with guardian or withdraw).

If the client is competent to make the decision about discharging the lawyer, the Section believes that withdrawal may be appropriate so long as there are adequate safeguards to allow the client to identify and access other lawyers. However, when the client's competence is not sufficient to protect her own interests, withdrawal only solves the lawyer's problems and may put the client in harm's way. In these circumstances, the Section believes that withdrawal should not be pursued, even if permissible.

EXHIBIT N

NY Eth. Op. 746 (N.Y.St.Bar.Assn.Comm.Prof.Eth.), 2001 WL 901079

New York State Bar Association
Committee on Professional Ethics

TOPIC: REPRESENTING INCAPACITATED CLIENT; PETITIONING FOR APPOINTMENT OF GUARDIAN; ATTORNEY-IN-FACT UNDER DURABLE POWER OF ATTORNEY; REPRESENTATION OF ONESELF AS ATTORNEY-IN-FACT/PETITIONER

Opinion Number 746
July 18, 2001

Digest: Lawyer serving as client's attorney-in-fact may not petition for appointment of guardian without client's consent unless lawyer determines that client is incapacitated, that there is no practical alternative through use of power of attorney or otherwise to protect client's best interests, and that no one else is available to serve as petitioner. Subject to conflict of interest restrictions, lawyer may represent self in proceeding if client does not oppose petition and lawyer will not be a witness.

***1** Code: DR 4-101, DR 5-101, DR 5-102(A), DR 5-105(A), DR 5-108(A), EC 7-11, EC 7-12

QUESTION

When an attorney, who has been named by a client as attorney-in-fact in a durable power of attorney, later determines the client is no longer competent to handle his or her own affairs, may the attorney petition for appointment of a guardian and, if so, may the attorney represent him- or herself (as petitioner) in the guardianship proceeding?

LEGAL BACKGROUND

Durable Power of Attorney

In 1975, the New York legislature amended the law relating to powers of attorney to permit the granting of a power which would remain in full force even after the grantor became incompetent. [1] This enables individuals to plan for the possibility of future disability by designating persons of their choice to manage their financial affairs. [2] This "durable" power was seen as a means of handling matters that might otherwise require the expense, delay, inconvenience and possible embarrassment of having a court appoint a guardian who might be unknown to the grantor. The statute provides a detailed form for the granting of a number of specific and general powers which vest the grantee with a virtually alter-ego status for the grantor. There are some limitations not pertinent to this opinion. [3] Although the power to retain an attorney in the future is not among the specific powers listed in the statutory form, neither does the statute specifically prohibit the retention of an attorney by the attorney-in-fact.

Guardianship under Article 81 of the Mental Hygiene Law

Article 81 of the Mental Hygiene Law was enacted in 1993. The statute allows for the judicial appointment of a legal guardian for one 's personal needs, property management or both, [4] when a person is incompetent to conduct his or her own affairs. [5] The statute contemplates a system which is tailored to meet the specific needs of the individual by taking into account the personal wishes, preferences and desires of the alleged incapacitated person. The guardian is to engage in the least restrictive form of intervention, consistent with the concept that the needs of persons with incapacities are as diverse and complex as they are unique to the individual. [6]

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***2** There is a two-pronged test to determine whether a guardian should be appointed. First, the court must consider all of the evidence, including the report of a "court evaluator," and the sufficiency and reliability of all available resources. [7] Included among the "resources" to be considered is a valid power of attorney. [8] Second, the individual must agree to the appointment or must be incapacitated. [9] A determination of incapacity must be based on clear and convincing evidence that the person is likely to suffer harm because he or she is unable to provide for his or her personal needs and/or property management and cannot adequately understand and appreciate the nature and consequences of this inability. [10]

A guardianship proceeding may be brought by one of seven different categories of persons or entities, including "a person otherwise concerned with the welfare of the person alleged to be incapacitated." [11] The court is authorized to award legal fees to the petitioner's counsel, payable from the assets of the incompetent individual. [12]

An attorney-in-fact is required to account to a later-appointed guardian during the continuance of the appointment, notwithstanding the durable nature of the power. [13] It is not clear from New York statutes whether the guardian has the power to revoke a durable power of attorney, [14] although the uncertainty is not germane to this inquiry. The differing and seemingly overlapping roles of the attorney-in-fact and Article 81 guardian cause some confusion, but the statute contemplates dismissal of a petition for appointment of a guardian where it is determined that the alleged incapacitated person had, in lucid times, carefully thought out and provided for how his or her affairs might be handled under such circumstances. The existence of a durable power of attorney can be a factor in such a dismissal. [15]

OPINION

May the attorney-in-fact petition for the appointment of a guardian?

For the reasons discussed below, the lawyer who serves as the client's attorney-in-fact may petition for the appointment of a guardian without the client's consent only if the lawyer determines that the client is incapacitated and that there is no practical alternative, through the use of the power of attorney or otherwise, to protect the client's best interests.

Although no disciplinary rule of the Code expressly addresses the representation of an incapacitated client, the obligations of lawyers representing clients with questionable capacity are addressed by ECs 7-11 [16] and 7-12. [17] Additional guidance is afforded by various opinions of bar association ethics committees in the state, *see, e.g.*, N.Y. City 1997-2; N.Y. City 1987-7; Nassau County 98-2, and in the secondary literature. *See, e.g.*, Nancy M. Maurer & Patricia W. Johnson, "Ethical Conflicts in Representing People With Questionable Capacity," in *Representing People With Disabilities* (N.Y.S. Bar Ass'n, 2d ed. 1997); Association of the Bar of the City of New York, Committee on Professional Responsibility, "A Delicate Balance: Ethical Rules for Those Who Represent Incompetent Clients," 52 *The Record* 34 (1997) ("A Delicate Balance"). Additionally, guidance may be found in the literature on legal ethics outside New York. *See, e.g., Annotated Model Rules of Professional Conduct* ("*Annotated Model Rules*") 209-27 (4th ed. 1990) (annotation to Rule 1.14 of ABA Model Rules of Professional Conduct); Restatement (Third) of the Law, The Law Governing Lawyers ("Restatement"), §24 (2000). The following general principles emerge from this material.

***3** The lawyer-client relationship is an agency relationship that is ordinarily created by express or implied agreement between the lawyer and client. *See* Restatement, *supra*, §14. Therefore, the client must ordinarily have the capacity to enter into this agreement, *id.* §14, comment d, and to determine the objectives of the representation. *Cf.* EC 7-7; DR 7-101(A)(1). Under agency principles, a lawyer's authority to act for the client would ordinarily terminate upon the client's permanent, total incapacity as it would upon the client's death, but this is not invariably true. *See* Restatement,

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supra, §31, comment e. In court proceedings, for example, it may be appropriate for a lawyer to continue to represent the totally incapacitated client in order to protect his or her interests. [18]

In the course of representing a client, a lawyer generally "must provide independent, zealous and competent representation and must preserve the client's confidences in accordance with the provisions of the Code of Professional Responsibility." N.Y. City 1997-2. This is true even where, because of the client's age or mental condition, the client's ability to participate fully in making decisions relating to the representation is impaired. *Id.* When representing a client whose ability to make considered decisions is impaired, the lawyer "must, as far as reasonably possible, maintain a normal client-lawyer relationship with the client and act in the best interests of the client." Restatement, *supra*, §24(1). This includes a responsibility to "maintain the flow of information and consultation as much as circumstances allow," including, where it will be helpful, through "the use of a relative, therapist, or other intermediary." *Id.* §24, comment c. Although the lawyer may accept direction from those who are legally authorized to direct the representation on behalf of the client, the lawyer's ultimate responsibility is to the client. See N.Y. State 371 (1975); *cf.* N.Y. State 698 (1998).

The lawyer's responsibilities may vary, however, depending on the client's age or mental condition. EC 7-11. Further, the lawyer may have additional responsibilities when "[a]ny mental or physical condition ... renders a client incapable of making a considered judgment on his or her own behalf," including a responsibility "in court proceedings to make decisions on behalf of the client." EC 7-12. The lawyer may not, however, "perform any act or make any decision which the law requires the client to perform or make, either acting alone if competent, or by a duly constituted representative if legally incompetent." *Id.* [19]

***4** As ECs 7-11 and 7-12 reflect, there is generally no bar to representing a client whose decision making capacity is impaired, but who is capable of making decisions and participating in the representation. Insofar as the client is making reasoned decisions concerning those matters that are for the client to decide and these decisions appear to be in the client's best interests, there would ordinarily be no need for the lawyer even to consider withdrawing from the representation or seeking the appointment of a guardian who would substitute his or her judgment for that of the client. When a client's capacity to make decisions is impaired, seeking to withdraw is generally seen as the least satisfactory response because doing so leaves the client without assistance when it is most needed. *See Annotated Model Rules, supra*, at 225 (citing authority). Seeking the appointment of a guardian or conservator over the client's objection is also generally to be avoided if possible. Often, notwithstanding his or her impairment, the client will be capable of making those decisions relating to the representation that are entrusted to the client. *See* Restatement, *supra*, §24 comment c ("Disabilities in making decisions vary ...; they may impair a client's ability to decide matters generally or only with respect to some decisions at some times"), *quoted with approval in* N.Y. City 1997-2. Even where the client is incapable of making necessary decisions, however, it will often be preferable not to seek the appointment of a guardian because doing so would be "embarrassing for the client," Restatement, *supra*, §24 comment b, or "too expensive, traumatic, or otherwise undesirable or impractical in the circumstances." *Id.* § 24 comment d.

Thus, seeking a guardian is appropriate only in the limited circumstances where "a client's diminished capacity is severe and no other practical method of protecting the client's best interests is available." *Id.* §24 comment e. *Accord* "A Delicate Balance," *supra*, at 43 (noting "the almost universal view ... that guardianships, though occasionally necessary, are often quite onerous: they may drain the client's estate, result in protracted legal proceedings, and substitute the judgment of a total stranger for those of the client, the client's family, and the client's personal attorney"); ABA Formal Op. 96-404 (1996) ("The 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."); Recommendations of the Conference on Ethical Issues in Representing Older Clients, 62 Fordham L. Rev. 989, 991 (1994) (""Recommendations") ("The lawyer should refer or petition for guardianship of the client only if there are no appropriate alternatives."). In such drastic circumstances, notwithstanding the duty of confidentiality imposed by DR 4-101, the lawyer may reveal client confidences and secrets to the limited extent necessary to protect the client. *See* N.Y. City 1987-7 (1987) (when the client is unable to care for him- or herself or property because of alcoholism, and will face financial, if not personal, ruin as a result, the lawyer may disclose

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confidences to the court in seeking appointment of a conservator, but should seek the court's permission to do so in camera and under seal), *discussed in* Maurer & Johnson, *supra*, at 1-16.

***5** When a question arises concerning the client's capacity, "[c]lients with disabilities should be presumed capable of making decisions and participating in the lawyer-client relationship." Maurer & Johnson, *supra*, at 1-9. In determining whether the client has the capacity to direct the representation, ""the lawyer must take account not only of information and impressions derived from the lawyer's [communications with the client], but also of other relevant information that may reasonably be obtained, and the lawyer may in appropriate cases seek guidance from other professionals and concerned parties." N.Y. City 1997-2; *see generally* Recommendations, *supra*, 62 Fordham L. Rev. at 991.

In light of these general principles, it appears that seeking appointment of a guardian without the client's informed consent will be proper only if the lawyer believes the client is incapacitated, the lawyer cannot adequately protect the client's interests by using the power granted in the durable power of attorney, and there is no other practical alternative that is less restrictive. *See* Recommendations, *supra*, 62 Fordham L. Rev. at 991 (recommending the following as examples of protective actions that the lawyer may take as a preferable alternative to petitioning for guardianship the following: involving family members, use of durable powers of attorney, use of revocable trusts, referral to private care management, referral to long-term care ombudsman, use of care and support systems, referral to disability support groups, and referral to social services or other government agencies). As discussed above, Article 81 favors the least intrusive intervention available to meet the personal and financial needs of a person alleged to be incapacitated; in fact, courts construing that statute have penalized persons for bringing frivolous Article 81 petitions when other resources could be used to meet the client's needs. [20] Assuming that the client has sufficient assets and a valid power of attorney, the holder of the power of attorney may be able to meet the personal and financial needs of the incapacitated client by hiring necessary personnel to care for those needs, including taking the step of applying for admission to a nursing home under the broad powers of the durable power of attorney. [21] Absent sufficient assets, public assistance may be brought to bear in the process of applying for admission to a nursing home. If there is no valid health care proxy, there is a provision in the statute to bring a proceeding for the appointment of a limited guardian to handle the health care needs of the person whose needs are at issue. [22] In sum, the appointment of a guardian should be sought only where necessary and, in many situations, the lawyer's ability to continue to exercise the power of attorney will make the appointment of a guardian unnecessary.

***6** Finally, even if petitioning for appointment of a guardian is warranted, the lawyer who serves as both lawyer and attorney-in-fact for the client is not necessarily the preferable person to serve in the additional role as petitioner under Article 81. Rather, unless the client consents, "[t]he lawyer should act as petitioner only of there is no one else available to act." Recommendations, *supra*, 62 Fordham L. Rev. at 991. Thus, the lawyer should initially ascertain whether a family member, friend, or other concerned individual is available to serve in that role.

May the attorney represent him- or herself as petitioner in the guardianship proceeding?

If the lawyer currently represents the client, and the client opposes the appointment of a guardian, then the lawyer may not also represent him- or herself (or anyone else) as petitioner in an Article 81 proceeding. Doing so would place the lawyer in a position where he or she is advocating on behalf of one client (the petitioner) in opposition to another current client, thereby creating an impermissible conflict of interest under DR 5-105(A). Indeed, in that event, the client might well expect to receive the attorney's assistance in *opposing* the guardianship petition. Even if the alleged incapacitated person was formerly a client but is no longer one, if he or she objects to the appointment of a guardian the lawyer may be barred by DR 5-108(A) from representing him- or herself (or anyone else) as petitioner, since the current representation would likely be adverse to a former client in a matter substantially related to the subject of the former representation. In that event, as attorney-in-fact, the lawyer should retain separate counsel to process the Article 81 matter.

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If the client does not object to appointment of a guardian, the attorney may be forbidden from serving as a lawyer in the guardianship proceeding if there will be a contested hearing under Article 81 on the issue of client incompetence and it is obvious that the attorney would be called as a *witness* in the Article 81 hearing on that issue. In that event, too, the lawyer should retain separate counsel to process the Article 81 matter. DR 5-102(A); N.Y. State 635 (1992).

If the client does not oppose the guardianship petition and the lawyer will not serve as a witness, then we are aware of no categorical ethical restriction against the attorney-in-fact representing him- or herself as petitioner in the Article 81 proceeding. Although serving in the dual role means that there is no independent individual client to whom the lawyer is accountable, given other safeguards, we do not believe that this in itself makes the dual role impermissible. For example, while there is an absence of accountability (when an attorney-in-fact hires him- or herself) concerning the extent of attorney fees in processing the Article 81 matter, the court will oversee the reasonableness of such fees. Mental Hygiene Law Sec. 81.16 (f) ("... court may award reasonable compensation for the attorney for the petitioner ..."). While there would also be an absence of client scrutiny of the attorney's conduct when the petitioner in the proceeding is not another competent person or entity, [23] once the petition is presented, the court must appoint a "court evaluator," whose duties include consulting with the person alleged to be incapacitated, determining whether the person wishes separate legal counsel, investigating and reporting to the court as to the nature of the incapacity and what action should be taken. [24]

***7** The lawyer must consider whether the lawyer's own interests, including any interests arising out of the role as attorney-in-fact, may reasonably affect the lawyer's exercise of professional judgment as lawyer in the Article 81 proceeding, in which event there may be an impermissible conflict of interest under DR 5-101. However, we conclude that when one petitions under Article 81 in one's role as attorney-in-fact, the dual role as attorney-in-fact and lawyer for oneself as attorney-in-fact does not give rise to a conflict *per se*. Although we are unaware of any prior ethics opinions precisely on point, we note that, in other contexts, lawyers have been permitted to serve in a fiduciary capacity and, at the same time, to represent themselves as fiduciaries. *See, e.g.*, N.Y. State 610 (1990) (observing that "it is not improper under the Code for a lawyer-draftsman to serve as executor of a will so long as the decision to nominate the attorney is the product of the client's own free will."); N.Y. State 471 (1977) (opining that it would be ethically proper for an attorney to serve as a receiver in a mortgage foreclosure action and retain the attorney's firm as counsel for the action). Moreover, although this committee cannot offer opinions on questions of law, we note that we are unaware of any legal restraint on a person holding both attorney-in-fact and attorney at law roles. [25]

Finally, as a matter of sound practice, this problem should be considered and addressed with the client at the time the power of attorney is drafted. Ideally, the lawyer and client will make provisions concerning the client's future incapacity, including the possible need to retain counsel for an Article 81 proceeding and whether the attorney will serve as counsel in the proceeding. [26]

CONCLUSION

A lawyer serving as a client's attorney-in-fact may not petition for the appointment of a guardian without the client's consent unless the lawyer determines that the client is incapacitated; there is no practical alternative, through the use of the power of attorney or otherwise, to protect the client's best interests; and there is no one else available to serve as petitioner. Subject to conflict of interest restrictions, if the lawyer petitions for the appointment of a guardian, the client does not oppose the petition, and the lawyer will not be a witness in a contested hearing, the lawyer may represent him- or herself in the proceeding.

Footnotes

1 N.Y. Gen. Oblig. Law §5-1501 *et seq.*.

2 1988 Recommendations of the Law Revision Commission.

3 The form does not authorize the making of medical or other health care decisions. N.Y. Gen. Oblig. Law §5-1501. Also, the agent cannot perform acts which, by their nature, by public policy or by contract, require personal performance. *Zaubler v. Picone*, 100 A.D.2d 620 (2d Dept 1984). Examples are voting and commencing a divorce action in behalf of the principal.

4 N.Y. Mental Hyg. Law § 81.02(a).

5 *Id.* §81.06, *et seq.*

6 *Id.* §81.01.

7 *Id.* §81.02(a).

8 *Id.* § 81.19(d). "In making any appointment under this article the court shall consider: 1. any appointment or delegation made by the person alleged to be incapacitated in accordance with the provisions of section 5-1501 ... of the general obligations law ..."

9 *Id.* § 81.02(a)(2).

10 *Id.* § 81.02 (b).

11 *Id.* §81.06(a)(1).

12 N.Y. Mental Hyg. Law § 81.16(f).

13 N.Y. Gen. Oblig. Law § 5-1505(2).

14 N.Y. Mental Hyg. Law § 81.22(b), prohibits a guardian from revoking a power granted under General Obligations Law §5-1501, but section 5-1505(2) provides that the guardian ... "shall have the same power such principal would have had if he or she were not disabled or incompetent to *revoke, suspend or terminate all or any party of such power of attorney*" (emphasis added). At least one court has acknowledged the conflict. *See Rochester General Hospital (Levin)*, 158 Misc. 2d 522, 529 (S. Ct. Monroe Co. 1993).

15 *See, e.g., Matter of Crump (Parthe)*, 640 N.Y.S. 2d 147, *vacated and withdrawn* 230 A.D. 850 (2d Dep't 1996) (alleged incapacitated person made valid power of attorney and health care proxy).

16 EC 7-11 provides: "The responsibilities of a lawyer may vary according to the intelligence, experience, mental condition or age of a client, ... Examples include the representation of an illiterate or an incompetent ...."

17 EC 7-12 provides:

Any mental or physical condition that renders a client incapable of making a considered judgment on his or her own behalf casts additional responsibilities upon the lawyer. Where an incompetent is acting through a guardian or other legal representative, a lawyer must look to such representative for those decisions which are normally the prerogative of the client to make. If a client under disability has no legal representative, the lawyer may be compelled in court proceedings to make decisions on behalf of the client. If the client is capable of understanding the matter in question or of contributing to the advancement of his or her interests, regardless of whether the client is legally disqualified from performing certain acts, the lawyer should obtain from the client all possible aid. If the disability of a client and the lack of a legal representative compel the lawyer to make decisions for the client, the lawyer should consider all circumstances then prevailing and act with care to safeguard and advance the interests of the client. But obviously a lawyer cannot perform any act or make any decision which the law requires the client to perform or make, either acting alone if competent, or by a duly constituted representative if legally incompetent.

18 According to the Restatement:

The general rule ... may be inappropriate as applied to a lawyer's beneficial efforts to protect the rights of an incapacitated client. Such a client continues to have rights requiring protection and often will be able to participate to some extent in the representation .... If representation were terminated automatically, no one could act for a client until a guardian is appointed, even in pressing situations. Even if the client has been adjudicated to be incompetent, it might still be desirable for the representation to continue, for example to challenge the adjudication on appeal or to represent the client in other matters. Although a lawyer's authority therefore does not terminate automatically in such circumstances, the lawyer must act in accordance with the principles of § 24 [dealing with a client with diminished capacity] in exercising continuing authority.

Restatement, *supra* § 31, comment e.

19 There is disagreement about the scope of this limitation; for example, authorities disagree as to whether or not, in a court proceeding, a lawyer may settle a case when the client lacks capacity to do so. Maurer & Johnson, *supra*, at 1-7 & n.41.

20 See, for example, *Matter of Crump (Parthe)*, 640 N.Y.S. 2d 147, *vacated and withdrawn* 230 A.D. 2d 950 (2d Dep't 1996), where the court ordered the earlier appointed guardian to return the property to the alleged incapacitated person and required the petitioner to pay the guardian's compensation, her own legal fees, the fees of the court evaluator and those of her expert. The court found that the alleged incapacitated person had sufficient assets and valid durable power of attorney and health care proxy.

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21 *Cf. Matter of Maher*, 207 A.D. 2d 133 (2d Dept 1994) (affirming trial court's determination that there was no need for an appointed guardian for property management pursuant to Article 81, because the allegedly incapacitated person's attorney had the client's power of attorney).

22 N.Y. Mental Hyg. Law §81.22 (a)(8).

23 The proceeding may be brought by seven different categories of persons or entities, including "the person alleged to be incapacitated", or "a person otherwise concerned with the welfare of the person alleged to be incapacitated." Entities include the department of social services, a hospital, a school, and a residential health care facility. *Id.* §81.06.

24 *Id.* §81.09.

25 2A N.Y. Jur. 2d §19, citing *Ginsberg. v. Brody*, 185 N.Y.S. 46 (N.Y. App. Term 1920).

26 One can add provisions to the statutory form of durable power of attorney if they are not inconsistent with other provisions of the statutory short form. N.Y. Gen. Oblig. Law §5-1503. While the naming of an attorney to conduct an Article 81 proceeding is not included in the specified powers, it would not be inconsistent with those powers.

NY Eth. Op. 746 (N.Y.St.Bar.Assn.Comm.Prof.Eth.), 2001 WL 901079

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Exhibit O

KENTUCKY BAR ASSOCIATION
Ethics Opinion KBA E-314
Issued: August 1986

This opinion was decided under the Code of Professional Responsibility, which was in effect from 1971 to 1990. Lawyers should consult the current version of the Rules of Professional Conduct and Comments, SCR 3.130 (available at http://www.kybar.org), before relying on this opinion.

Question: A lawyer has been representing a personal injury client, but has serious doubts about the client's competency. The lawyer is discharged by the client without warning, and counsel is concerned about possible undue influence by successor counsel or others, as well as the effects of the discharge on the client's interests. May the lawyer initiate proceedings for a conservatorship or similar protection of the client?

Answer: Qualified yes.

References: EC 7-12; Proposed Model Rules 1.14 and 1.16 and Comment.

OPINION

The current Code does not adequately address the problem encountered by lawyers who must deal with the disabled client. These are relegated to EC 7-12, which states that "if the disability of the client and the lack of legal representative compel the lawyer to make decisions for his client, the lawyer should consider all circumstances then prevailing and act with care to safeguard and advance the interests of the client."

Proposed Model Rules 1.14 and 1.16 address the problem more directly, and we cite them as persuasive authority in answering the question.

Model Rule 1.14(a) states that in dealing with the disabled client, the lawyer "shall, as far as is reasonably possible, maintain a normal client-lawyer relationship with the client." Sub part (b) of the same Rule permits the lawyer to "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."

Although a client ordinarily has the right to discharge the lawyer at any time, with or without cause, the mentally incompetent client may lack the legal capacity to exercise that right, and the discharge may be seriously adverse to the client's interests. Accordingly, the lawyer should be permitted to help the client understand the consequences of the discharge, and according

to the Comments to Model Rule 1.16 (Declining or Terminating Representation), may in an extreme case, initiate proceedings for a conservatorship or similar protection of the client.

The Committee does not feel that an attorney should take such action after discharge, except in extreme cases. We emphasize extreme cases, in recognition of the client's presumed right to discharge counsel and retain other counsel, and the need for substantial evidence of incompetency, undue influence, and/or prejudice to the interests of the client. Counsel must recognize that the initiation of judicial proceedings may adversely impact on other interests of the client, or create an appearance that counsel is serving only his or her own interests. In no event should the attorney initiating such action serve as the guardian or conservator for purposes of exercising decision-making power relating to the discharge.

Note to Reader

This ethics opinion has been formally adopted by the Board of Governors of the Kentucky Bar Association under the provisions of Kentucky Supreme Court Rule 3.530 (or its predecessor rule). The Rule provides that formal opinions are advisory only.

EXHIBIT P

RI-176

October 29, 1993

SYLLABUS

A lawyer may not undertake representation of both a mother and daughter in proceedings to establish a guardian ship for the mother when the lawyer knows the mother's and daughter's interests in establishing the guardian ship are adverse.

A lawyer may not undertake representation which requires a client to possess the requisite competence to execute legal documents and also subjects the client to proceedings which, if successful, would adjudge the client to be incompetent to handle legal affairs.

If a lawyer is disqualified from representation in a matter, a lawyer who joins the disqualified lawyer's firm after the representation was undertaken but before the disqualified lawyer has withdrawn is imputedly disqualified from the matter.

References: MRPC 1.2(a) and (b), 1.4(b), 1.7(b), 1.9(a), 1.10(a), 1.11(a), 1.16(a), 2.2, 3.3(a)(1).

TEXT

Lawyer A was hired by a daughter to establish a **guardian** ship for her estranged mother, whose affairs were being attended to under a durable power of attorney granted to a third party. The **guardian** ship was contested and ultimately denied. One year later the mother complained to the daughter about activities of the person to whom the mother had given the durable power of attorney, and the daughter agreed to help only if the mother consented to a **guardian** ship. When the mother consented, mother and daughter hired Lawyer A to start a **guardian** ship proceeding. The mother signed a revocation of the durable power of attorney prepared by Lawyer A. The second petition for **guardian** ship was denied by the court, but the presiding judge indicated appointment of a conservator may be possible.

Lawyer B represented the mother in contesting the first **guardian** ship proceeding, and now represents the third party holding the durable power of attorney. On advice of counsel, the third party refuses to release any information to Lawyer A regarding the handling of the mother's assets, although the daughter has information that the assets are being mismanaged.

Lawyer C had served as **guardian** *ad litem* for the mother in the original **guardian** ship proceedings and had found the mother to be competent. Lawyer C has subsequently joined the law firm of Lawyer A, and would be handling the litigation concerning the **guardian** ship matter if it proceeds to hearing.

Lawyers A and C ask whether ethics rules require withdrawal of either or both of them. Since Lawyer B has not sought guidance from the Committee, ethics rules applicable to Lawyer B shall not be addressed.

The jurisdiction of the Committee on Professional and Judicial Ethics is limited to expressing its written opinion concerning the ethical propriety of the inquirer's own prospective conduct. The Committee does not answer inquiries by individual members concerning past conduct or the conduct of other lawyers. Matters involving violations of the Michigan Rules of Professional Conduct are for the Attorney Grievance Commission to investigate and prosecute. However, a lawyer who has knowledge that another lawyer has committed a significant violation of the Rules raising a substantial question about that lawyer's honesty, trustworthiness, or fitness as a lawyer, is duty bound to inform the Attorney Grievance Commission. MRPC 8.3.

The starting point in any analysis of conflicts of interest is to determine the existence of a client-lawyer relationship, past or present. In the first petition for **guardian** ship Lawyer A represented the daughter, whose interests were adverse to the mother.

When the daughter and mother visited Lawyer A together, Lawyer A was first required to analyze the prospective representation in light of the prior representation of the daughter. Applying MRPC 1.9(a), the prospective representation of mother and daughter in seeking a revocation of the durable power of attorney and petitioning for **guardian** ship for the mother is not "materially adverse" to the interests of the former client daughter since their common objective is the protection of the mother and the preservation of the mother's assets. Thus, MRPC 1.9(a) does not prohibit the prospective representation.

Since there appear to be no conflicts between the prospective representation and former representation by Lawyer A, Lawyer A must then consider whether current representation of both mother and daughter in the prospective representation is permissible. There are two factors presented by this inquiry which make dual representation of the mother and daughter in the prospective representation improper.

First, the facts reveal that the prospective representation would involve drafting a document whereby the mother revokes a durable power of attorney, and then petitioning for appointment of a **guardian** ship for the mother. If the mother is competent to understand her rights and freely decide to revoke the durable power of attorney, what legitimate grounds may be raised for the establishment of a **guardian** ship? The mother's revocation of the durable power of attorney appears to be evidence of the fact that the mother is capable of handling her own affairs, whereas the **guardian** ship proceeding is indicative of her incapacity to handle her own affairs. The two positions are not reconcilable. If Lawyer A believes that the mother is competent to revoke the power of attorney, it would be improper for Lawyer A to bring the **guardian** ship proceeding because that would require the lawyer to make a false statement of a material fact to the court in violation of MRPC 3.3(a)(1).

Second, the facts state that the original **guardian** ship proceeding was contested by the mother, that the mother and daughter were "estranged," and that the daughter refused to assist the mother with the revocation of the power of attorney unless the mother consented to the **guardian** ship. Lawyer A is aware of these facts. A lawyer has a duty to fully counsel a client regarding the representation and its possible consequences [MRPC 1.2(a)], and to provide a client with all information necessary for the client to make an informed decision [MRPC 1.4(b)]. Applying MRPC 1.7(b), Lawyer A's representation of the mother would be materially limited by the wishes of the daughter to obtain a **guardian** ship. A disinterested lawyer could not reasonably believe the representation of the mother would not be adversely affected. Conversely, the representation of the daughter would be materially limited and adversely affected if Lawyer A fully counseled the mother that the **guardian** ship is not necessary or desirable in obtaining relief from the durable power of attorney.

Lawyer A may not avoid the conflict by viewing the prospective representation under MRPC 2.2, which states:

"(a) A lawyer may act as intermediary between clients if

"(1) the lawyer consults with each client concerning the implications of the common representation, including the advantages and risks involved and the effect on the client-lawyer privileges, and obtains each client's consent to the common representation;

"(2) the lawyer reasonably believes that the matter can be resolved on terms compatible with the client's best interests, that each client will be able to make adequately informed decisions in the matter, and that there is little risk of material prejudice to the interests of any of the clients if the contemplated resolution is unsuccessful; and

> "(3) the lawyer reasonably believes that the common representation can be undertaken impartially and without improper effect on other responsibilities the lawyer has to any of the clients.
>
> "(b) While acting as intermediary, the lawyer shall consult with each client concerning the decisions to be made and the considerations relevant in making them so that each client can make adequately informed decisions.
>
> "(c) A lawyer shall withdraw as intermediary if any of the clients so requests, or if any of the conditions stated in paragraph (a) is no longer satisfied. Upon withdrawal, the lawyer shall not continue to represent any of the clients in the matter that was the subject of the intermediation."

As previously discussed, the prospective representation cannot "be resolved on terms compatible with the clients' best interests" as required by MRPC 2.2(a)(2), nor may it be undertaken "impartially and without improper effect on other responsibilities the lawyer has to any of the clients" as required by MRPC 2.2(a)(3).

Nor may Lawyer A undertake the prospective representation on the pretext that the client-lawyer relationship only runs between Lawyer A and the mother, since Lawyer A has facts that show the mother does not want or need a **guardian** ship, even though she may have consented to one before legal consultation.

Nor may Lawyer A undertake the prospective representation under the guise that Lawyer A's participation has been limited pursuant to MRPC 1.2(b), since there are no facts showing that the clients received full consultation regarding the limiting of the objectives of the representation.

MRPC 1.16(a) requires a lawyer to withdraw from representation if the representation will result in violation of the Rules of Professional Conduct. As reasoned above, Lawyer A must withdraw from the **guardian** ship matter. If Lawyer A is disqualified from the representation pursuant to MRPC 1.7(b) or 2.2, then all lawyers in Lawyer A's firm are imputedly disqualified from the matters. MRPC 1.10(a), including Lawyer C.

Although Lawyer C is imputedly disqualified because of Lawyer A's conflict, we think it important to address the question of Lawyer C participating in the matter if Lawyer C were *not* a member of Lawyer A's firm.

When a lawyer is asked by one person to seek the appointment of a **guardian** over the person or property of another, the attorney functions as the lawyer for the petitioner and not for the alleged incapacitated person. The law recognizes that the motives of the prospective **guardian** may be contrary to the legal interests of the prospective ward. See MCLA 700.443; MCLA 700.467 and MCR 5.201. In this inquiry, it is clear that Lawyer A was the attorney for the daughter in the first **guardian** ship proceeding, and that Lawyer C, as **guardian** *ad litem*, had fiduciary and statutory duties toward the mother. The original **guardian** ship proceeding was contested, and the interests of the mother and the daughter were adverse.

The facts do not state whether Lawyer C joined Lawyer A in law practice before the durable power of attorney representation was undertaken, or sometime thereafter.

When Lawyer C served as **guardian** *ad litem* for the mother, Lawyer C was a "public official" under the purview of MRPC 1.11(a), which states:

> "Except as law may otherwise expressly permit, a lawyer shall not represent a private client in connection with a matter in which the lawyer participated personally and substantially as a public officer or employee, unless the appropriate government agency consents after consultation. No lawyer in a firm with which that lawyer is associated may knowingly undertake or continue representation in such a matter, unless:
>
> "(1) the disqualified lawyer is screened from any participation in the matter and is apportioned no part of the fee therefrom; and

"(2) written notice is promptly given to the appropriate government agency to enable it to ascertain compliance with the provisions of this rule."

Since Lawyer C participated as **guardian** *ad litem* in the previous proceeding, and in fact determined that the mother was competent, Lawyer C would be prohibited from participating in the subsequent **guardian** ship matter even if Lawyer C were not a member of Lawyer A's firm.

EXHIBIT Q

ADVISORY ETHICS OPINION 87-14

SYNOPSIS:

After withdrawing from the joint representation of a husband and wife in a probate court proceeding due to a potential conflict between the interest of the clients, an attorney may not thereafter undertake the representation of the wife only in a related probate guardianship proceeding where the husband and wife's interests may be in conflict and where information gained during the earlier joint representation may be relevant to the guardianship proceeding.

FACTS:

A lawyer was appointed by the Probate Court to represent both husband and wife in an probate accounting. The lawyer determined at the time that the interests and position asserted by both clients was identical. The lawyer later determined there might be some question as to the wife's ability to adequately communicate her position, so a guardian *ad litem* was appointed by the Court to assist the wife. The guardian *ad litem* on behalf of the wife asserted a position different in the probate matter from that of the husband, so the lawyer withdrew from representation of both parties due to the adversity of their conflicting positions under DR 5-105(B). After his withdrawal, the wife's parents initiated a new involuntary guardianship petition against her. The attorney is then requested to represent the wife through court appointed guardian *ad litem* in this new involuntary guardianship matter, and inquires whether such representation is appropriate.

ANALYSIS:

The decision as the ethical propriety of representing only the wife in this new matter hinges upon (a) whether the lawyer's independent professional judgment on the wife's behalf is likely to be adversely affected by the previous representation, (b) whether or not the attorney, pursuant to the previous representation, gained any secrets or confidences which in this new matter would potentially be used adversely to the husband, and (c) whether or not the proposed representation would have a tendency to diminish public confidence in the legal system.

The lawyer initially withdrew from the representation of both husband and wife because the wife's guardian *ad litem* asserted a position inconsistent from that of the husband, therefore preventing the attorney from continuing representation of either client under DR 5-105(B). Although the attorney would be advocating the interests of only the wife through the guardian *ad litem,* it is not inconceivable that, as part of the involuntary guardianship process, the husband might be called as a witness by the wife's parents in an attempt to provide evidence to support the involuntary guardianship.

This brings us to the issue of whether in the earlier representation of both, the attorney may have gained knowledge of secrets and confidences of the husband which, in the involuntary guardianship hearing process, might be used to the advantage of the wife or as cross-examination material against the husband.[1] Although the husband is no longer a client, the attorney is still obligated to preserve the secrets and confidences gained in his earlier representation. The probability that this information may emerge on cross-examination seems directly contrary to the mandates of Canon 4.[2] The test is whether his representation of the wife in the involuntary guardianship is likely to require the attorney to do anything which will injuriously affect his former client and "whether he will be called upon in his new relation to use against his former client any knowledge or information acquired through his former connection."[3]

While the lawyer may, under certain circumstances, use this information after full disclosure and authorization by the former client,[4] there is the overriding concern of avoiding even the appearance of impropriety.[5] The public perception of this attorney cross-examining a former client could create the appearance that the cross-examination information would have, or at least could have, been gained by virtue of the previous representation, whether or not such a waiver had been obtained from the client. It is our view, therefore, that public confidence and the avoidance of even the appearance of impropriety mandate the attorney refusing to represent the wife.

[1] DR4-101(a)(A)(B).
[2] See previous Opinion No. 80-14.
[3] *In Re: Themelis*, 117 Vt. 19(1951).
[4] See: DR 4-104(C)(1).
[5] EC 9-1, 9-2.

EXHIBIT S

WASHINGTON STATE BAR ASSOCIATION

Opinion: 980
Year Issued: 1986
RPC(s): RPC 1.9(b)
Subject: Conflict of interest; representation of wife in petition for guardianship of husband when lawyer previously represented both husband and wife

The Rules of Professional Conduct Committee discussed your inquiry concerning the propriety of a lawyer who had represented a husband and wife in various legal matters now undertaking to represent the wife in petitioning for guardianship for the estate of the disabled husband. The Committee did not reach a definitive answer, but did want me to advise you of their general discussion.

First, the Committee was of the opinion that RPC 1.9(b) will prevent the lawyer from undertaking such representation if it would involve the use of confidences or secrets about the husband which he learned from the prior representation. The Committee saw the guardianship proceeding as an adversarial one which would create a conflict in seeking the appointment of the wife as the guardian. After the guardian was appointed, however, because of the fiduciary obligation to the ward, the lawyer might be able to undertake further representation of the wife/guardian. Since the guardian would stand in the place of the ward, the lawyer could reveal confidences or secrets to the guardian after the appointment. The Committee also noted that in the guardianship proceeding, the lawyer might be a witness which might also interfere with his representation of the wife.

There was considerable feeling that the answer would depend upon the specific facts in each case regarding the conflict of interest between the wife and the husband in seeking the appointment of the wife as a guardian. In the facts of your inquiry, the husband and wife seem to have separate financial interests because not all of the husband's property was community property. The Committee was clear that if the lawyer were aware of an actual conflict of interest or the use of confidences or secrets, that the lawyer could not represent the wife in seeking the guardianship.

EXHIBIT S

MASSBAR ASSOCIATION

Opinion 05-05

May 2005

Summary: It would be inappropriate for a lawyer for a long-time client to represent a son seeking to have a guardian appointed for the client when it seems likely that the lawyer will be opposing the client's wishes and the lawyer would not be able to comply with the consent and reasonableness tests that would permit such representation. Moreover, the lawyer also ought not to represent the son if it seems likely that she will be a necessary witness in a guardianship proceeding.

Facts: Lawyer represents a long-time client whose mental condition has deteriorated. A psychiatrist is recommending guardianship and has asked a son to contact lawyer about representing the son in the guardianship because of lawyer's long representation of the client. In the recent past, the client has refused to deal with certain important financial and personal care issues and lawyer declined to act further. Lawyer inquires whether she may represent the son in the guardianship proceeding and asks whether it will make a difference if the psychiatrist provides a medical certificate certifying the client's lack of mental capacity.

Discussion: Rule 1.14 of the Massachusetts Rules of Professional Conduct provides as follows:

(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) If a lawyer reasonably believes that a client has become incompetent or that a normal client-lawyer relationship cannot be maintained as provided in paragraph (a) because the client lacks sufficient capacity to communicate or to make adequately considered decisions in connection with the representation, and if the lawyer reasonably believes that the client is at risk of substantial harm, physical, mental, financial, or otherwise, the lawyer may take the following action. The lawyer may consult family members, adult protective agencies, or other individuals or entities that have authority to protect the client, and, if it reasonably appears necessary, the lawyer may seek the appointment of a guardian ad litem, conservator, or a guardian, as the case may be. The lawyer may consult only those individuals or entities reasonably necessary to protect the client's interests and may not consult any individual or entity that the lawyer believes, after reasonable inquiry, will act in a fashion adverse to the interests of the client. In taking any of these actions the lawyer may disclose confidential information of the client only to the extent necessary to protect the client's interests.

On the facts presented, a psychiatrist has already concluded that the client needs a guardian. Thus, there are grounds for the lawyer to believe that the client is incompetent. Rule 1.14 urges a lawyer to maintain a lawyer-client relationship with an impaired client as far as possible but also provides that a lawyer may take certain protective action on behalf of an impaired client in specific situations. For example, the lawyer may seek to have a guardian appointed and may reveal confidential information in order to protect a client's interests. Normally, as the client's long-time lawyer, the lawyer could represent the client in a guardianship proceeding if the client so desired, although the lawyer is under no obligation to do so. The lawyer has apparently already declined to act on behalf of the client because of the client's refusal to look after his affairs properly. It is unclear on the facts whether the lawyer can be said to consider herself his attorney even though she has not formally withdrawn from representation.

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The lawyer is of the opinion that guardianship proceedings should be instituted and the son is ready to do so. He has asked the lawyer to represent him in those proceedings. It is unclear whether the language of Rule 1.14 that "if it reasonably appears necessary, the lawyer may seek the appointment of a . . . guardian" means that in some circumstances a lawyer may represent a family member petitioning for such appointment if the lawyer believes that a guardianship is in the client's best interests. We do not need to address that issue in this inquiry because there are two reasons why the lawyer may not be able to do so on the facts as presented.

In the first place, the facts indicate that the client may want to contest a guardianship proceeding. By representing the son, the lawyer would be taking a position adverse to his own client, or former client as the case may be, in violation of Rule 1.7 or 1.9. In our view, it would not be possible to meet the consent requirement of those two Rules that would permit adverse representation. The lawyer would not be in a position to rely on consent in the unlikely event it was obtained, given her view of the client's capacity. Moreover, the lawyer would either be adverse to a current client or adverse to a former client in a substantially related matter and using confidential information about the client's neglect of financial and personal care matters against him. In addition, the lawyer possesses relevant information as an observer of the client's conduct that may or may not constitute confidential information.

In addition to the conflict of interest issue, the lawyer may well conclude that she ought not to represent the son for an additional reason. The son knows that the lawyer favors a guardianship provision and apparently also why. In those circumstances, the son may want the lawyer to testify and the lawyer might well be willing to do so if the court permits such testimony. Rule 3.7 deals with that circumstance:

(a) A lawyer shall not act as advocate at a trial in which the lawyer is likely to be a necessary witness except where:

(1) the testimony relates to an uncontested issue;

(2) the testimony relates to the nature and value of legal services rendered in the case; or

(3) disqualification of the lawyer would work substantial hardship on the client.

(b) A lawyer may act as advocate in a trial in which another lawyer in the lawyer's firm is likely to be called as a witness unless precluded from doing so by Rule 1.7 or Rule 1.9.

If the lawyer concludes that she is likely to be a necessary witness in the event of litigation over a guardianship, Rule 3.7 is a second reason why she should not represent the son since none of the exceptions would seem to apply.

As stated in the Rules of the Committee on Professional Ethics, this advice is that of a committee without official government status.

This opinion was approved for publication by the Massachusetts Bar Association's House of Delegates on May 25, 2005.

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EXHIBIT T

CT Eth. Op. 97-21 (Conn.Bar.Assn.), 1997 WL 700699

Connecticut Bar Association
Committee on Professional Ethics

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DUTY TO DISCLOSE ALLEGEDLY FRAUDULENT ACTS OF CLIENT

Informal Opinion Number 97-21
1997

***1** You have requested the opinion of the Committee concerning your ethical obligations in connection with the following set of facts.

Client ("C") retained you to recover damages for injuries she sustained in a slip and fall accident in front of a store. Initially, she thought that her ankle was only sprained and neither reported the accident to the police nor notified the owner of the premises. When she contacted you four days later, complaining of severe pain, you advised her to get medical attention. Upon examination, it turned out that her ankle was fractured. You further advised her to report the accident to the police. She did so, telling the police, as she had told you, that she had fallen in front of the store.

Subsequently, you advised C that you believed her claim against the storeowner was weak due to lack of immediate notification and the absence of independent witnesses to the accident. In response, C asked you if she would be better off to obtain witnesses who would support a claim that she had fallen on her landlord's ("L") stairs, commenting that she knew L had homeowner's insurance. You advised C that making a false claim against L, supported by false witnesses, would be fraud. A week later, C advised you that she no longer wished to pursue her claim for damages against S. That same day, however, you received a fax from another attorney ("A") stating that he had been retained by C, and that C no longer desired your services in connection with her claim against L.

Based on this course of events, you formed the belief that C intends to commit a fraud against L, using the services of Attorney A. You wrote to C, again advising her that pursuing a claim against L would be fraud, but received no response to your letter. You believe that Attorney A has no knowledge that C's claim against L is fraudulent.

You have advised the Committee of your strong belief that "my moral imperatives command me to disclose fraud," but that you are concerned that the Supreme Court's analysis of Rule 1.6 of the Rules of Professional Conduct in Lewis v. Statewide Grievance Committee, 235 Conn. 693 (1996) prohibits disclosure in these circumstances because your services were not used in the commission of the fraudulent act.

Rule 1.6, "Confidentiality Of Information," provides as follows:
(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 paragraphs (a), (b), (c), and (d).

(b) A lawyer shall reveal such information to the extent the lawyer reasonably believes necessary to prevent the client from committing a criminal act that the lawyer believes is likely to result in death or substantial bodily harm.

***2** (c) A lawyer may reveal such information to the extent the lawyer reasonably believes necessary to:

(1) Prevent the client from committing a criminal act that the lawyer believes is likely to result in substantial injury to the financial interest or property of another;

(2) Rectify the consequence of a client's criminal or fraudulent act in the commission of which the lawyer's services had been used.

(d) A lawyer may reveal such information 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.

In Lewis, the Supreme Court was called upon to analyze Rule 1.6(c)(2), the "rectifying fraud" exception to Rule 1.6(a). In that case, the Court held as follows:
In order for an attorney to reveal a confidence for the purpose of preventing fraud under rule 1.6(c)(2), the attorney must: (1) reasonably believe such revelation is necessary; (2) reveal the information only to the extent the attorney reasonably believes is necessary; (3) reasonably believe the client has or is committing a fraudulent act; and (4) reasonably believe the attorney's services had been used in committing that fraudulent act.

* * * *

General legal advice in which an attorney explains, in good faith, why a client's case is unlikely to succeed or is destined to fail does not, however, constitute aiding a fraud if the client chooses to hire another attorney and attempts later to prosecute the case. (footnote omitted)

235 Conn. at 701.

Here, as in Lewis, there is no suggestion that your services were used in the commission of a criminal or fraudulent act, and it is clear that Rule 1.6(c)(2) provides no basis for disclosure.

In these circumstances, however, you must also consider the potential applicability of Rule 1.6(c)(1), a limited exception to Rule 1.6(a) that permits disclosure to prevent the client from committing a criminal act that the attorney reasonably believes is likely to result in substantial injury to the financial interest or property of another.

How to balance the competing policy interests underlying the fundamental rule of client confidentiality against the social desirability of preventing future criminal acts has been the subject of considerable debate. Connecticut's Rule 1.6(c)(1) represents a compromise between the standard embodied in the Model Rules, which permits disclosure only where the attorney reasonably believes disclosure is necessary to prevent a client's criminal act likely to result in imminent death or substantial bodily harm, and the standard previously set forth in former DR4-101(C)(3), which permitted disclosure to prevent a client's criminal act without regard to the seriousness of the prospective crime. By permitting disclosure only in the limited circumstances set forth in Rule 1.6(c)(1), but then measuring those limitations in terms of the attorney's "reasonable belief," the "likelihood" of harm, and the "substantiality" of the prospective injury, Rule 1.6(c)(1) necessarily leaves to the attorney involved some degree of discretion to strike an appropriate balance between those competing policy interests by making an informed and conscientious judgment regarding disclosure. While the result of this compromise is not a "bright line" rule, some additional guidance is provided by the Official Comment to the Rule:

> ***3** Paragraph (c)(1) permits a lawyer to reveal a client's intent to commit a criminal act that is likely to cause substantial injury to the financial interests or property of another. The lawyer's exercise of discretion requires consideration of factors discussed above, and the magnitude of the effect of the act on the prospective victim, if within the lawyer's knowledge. Disclosure adverse to the client should

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> be no greater than the lawyer reasonably believes necessary to the purpose, and, if practical, should follow an attempt by the lawyer to persuade the client to follow a lawful course. A lawyer's decision not to take preventive action under paragraph (c) does not violate this Rule.

In this instance, you have taken the first step suggested by the Official Comment you have attempted to persuade the client to pursue a lawful course. Having been unsuccessful in that effort, you have concluded that C intends to persist in an unlawful course and believe that disclosure is necessary to prevent that from happening. Based on the facts that you report, the Committee agrees that there is a reasonable basis for that belief.

You must next determine whether the client's intended act rises to the level of a crime. Unlike Rule 1.6(c)(2), which may be triggered by "criminal" or "fraudulent" acts, Rule 1.6(c)(1) expressly limits disclosure to circumstances involving prospective "criminal" acts. Unless you reasonably believe that the client intends to commit a criminal act, Rule 1.6(c)(1) provides no basis for disclosure. [1]

If you reasonably conclude that C's intended conduct would be criminal, you must then analyze whether that conduct is likely to result in "substantial" injury to the financial interest or property of another. While that term is not defined in the Rule, the Official Comment to Rule 1.6(c)(1) counsels that an attorney must consider "the magnitude of the effect on the prospective victim, if within the lawyer's knowledge." In attempting to draw the line between "substantial" and "insubstantial" injuries, however, it is apparent the attorney's exercise of discretion is not limited solely to an assessment of the "magnitude of the effect," particularly since, as is often the case, the potential magnitude may be unknown or unknowable (both in absolute terms and in terms of the impact upon a particular victim). The definition of "substantial" set forth in the Terminology section of the Rules, i.e., "a material matter of clear and weighty importance," provides further guidance, and suggests that the attorney also should assess the nature, substance, and seriousness of the prospective offense. In the circumstances described in your inquiry, the Committee believes that the character and seriousness of the prospective offense (i.e., an intentional fraud to be committed using the services of unwitting successor counsel) reasonably support a conclusion of "substantial" injury.

***4** If each of the foregoing preconditions to disclosure have been met (i.e., your reasonable belief as to: (1) the necessity for disclosure; (2) the client's intent to commit a criminal act; and (3) the likelihood that the criminal act will result in substantial injury to the financial interest or property of another), you are then permitted, but not required, to make an appropriate disclosure. As set forth in the Official Comment to the Rule, that disclosure "… should be no greater than the lawyer reasonably believes necessary to the purpose." Consistent with that principle, the Committee believes, in the circumstances you have described, disclosure of the underlying facts should be limited to successor counsel.

The Committee on Professional Ethics

Wesley W. Horton
Chair

ATTACHMENT

client's well-being, use of a durable power of attorney or a revocable trust where a client of impaired capacity has the capacity to execute such a document, and referral to support groups or social services that could enhance the client's capacities or ameliorate the feared harm. [10] Any of these types of protective action could be less restrictive than the appointment of a guardian. The lawyer should, if time permits, explore the availability of such less restrictive actions before resorting to a guardianship petition.

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The nature of the relationship and the representation are relevant considerations in determining what is the least restrictive action to protect the client's interests. Even where the appointment of a guardian is the only appropriate alternative, that course, too, has degrees of restriction. For instance, if the lawyer-client relationship is limited to a single litigation matter, the least restrictive course for the lawyer might be to seek the appointment only of a guardian ad litem, so that the lawyer will be able to continue the litigation for the client. On the other hand, a lawyer who has a longstanding relationship with a client involving all of the client's legal matters may be more broadly authorized to seek appointment of a general guardian or a guardianship over the client's property, where only such appointment would enable the lawyer to fulfill his continuing responsibilities to the client under all the circumstances of the representation.

While there may be circumstances in which the appointment of a general guardian to assume control over every aspect of the client's life is the only reasonable course, in some, if not many, circumstances it may be sufficient for the client's protection to arrange for a guardian to manage the client's financial affairs, allowing the client to continue managing his personal affairs.

The Lawyer May Seek a Guardian but May Not Represent Another in Doing So

***5** When, after consideration of less drastic means, a lawyer has concluded that a guardian should be appointed for his client, the lawyer may file the petition for guardianship. By its terms, Rule 1.14(b) clearly authorizes a lawyer himself to file a petition for guardianship when the lawyer has made the requisite finding concerning the client's inability "to adequately act in the client's own interest." Conscious of his general duty of loyalty, and his specific obligation under Rule 1.14(a) to maintain as normal as possible a relationship with an incompetent client, a lawyer may feel discomfort at being the petitioner. The lawyer may also be discomfited by being in the position of taking action, regardless of how necessary and appropriate, that will take away the client's fundamental right of independence. Nevertheless, in the extraordinary circumstances in which it applies, Rule 1.14(b) clearly permits the lawyer to do so.

A lawyer who finds himself in this awkward position may prefer that someone else file the petition. In practice, too, it is not uncommon for the lawyer to be approached by a family member or other third party with a request that the lawyer represent that third party in pursuing the petition. As discussed above, Rule 1.14(b) clearly permits the lawyer himself to file a petition for guardianship upon concluding that it is necessary to protect the client and there are no less restrictive alternatives available. However, nothing in the rule suggests that the lawyer may represent a third party in taking such action, and after considerable analysis, the Committee concludes that a lawyer with a disabled client should not attempt to represent a third party petitioning for a guardianship over the lawyer's client.

Rule 1.14(b) creates a narrow exception to the normal responsibilities of a lawyer to his client, in permitting the lawyer to take action that by its very nature must be regarded as "adverse" to the client. However, Rule 1.14 does not otherwise derogate from the lawyer's responsibilities to his client, and certainly does not abrogate the lawyer-client relationship. In particular, it does not authorize a lawyer to represent a third party in seeking to have a court appoint a guardian for his client. Such a representation would necessarily have to be regarded as "adverse" to the client and prohibited by Rule 1.7(a), even if the lawyer sincerely and reasonably believes that such representation would be in the client's best interests, unless and until the court makes the necessary determination of incompetence. Even if the court's eventual determination of incompetence would moot the argument that the representation was prohibited by Rule 1.7(a), the lawyer cannot proceed on the assumption that the court will make such a determination. In short, if the lawyer decides to file a guardianship petition, it must be on his own authority under Rule 1.14 and not on behalf of a third party, however well-intentioned.

We emphasize, however, that this does not mean the lawyer cannot consider requests of family and other interested persons and be responsive to them, provided the lawyer has made the requisite determination on his own that a guardianship is necessary and is the least restrictive alternative. The lawyer must also have made a good faith determination that the third person with whom he is dealing is also acting in the best interests of the client. In such

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circumstance, the lawyer may disclose confidential information to the limited extent necessary to assist the third person in filing the petition, and may provide other appropriate assistance short of representation.

***6** Seeking the appointment of a guardian for a client is to be distinguished from seeking to be the guardian, and the Committee cautions that a lawyer who files a guardianship petition under Rule 1.14(b) should not act as or seek to have himself appointed guardian except in the most exigent of circumstances, that is, where immediate and irreparable harm will result from the slightest delay. Even in the latter situations, a lawyer may have to act before the appointment has been actually made by the court. A lawyer whose incapacitated client is about to be evicted, for instance, should be permitted to take action on behalf of the client to forestall or prevent the eviction, for example, by filing an answer to the eviction complaint. In such a case the lawyer should take appropriate steps for the appointment of a formal guardian, other than himself, as soon as possible. [11]

Recommending a Guardian and Making Necessary Disclosures

A lawyer who is petitioning for a guardianship for his incompetent client may wish to support the appointment of a particular person or entity as guardian. Provided the lawyer has made a reasonable assessment of the person or entity's fitness and qualifications, there is no reason why the lawyer should not support, or even recommend, such an appointment. Recommending or supporting the appointment of a particular guardian is to be distinguished from representing that person or entity's interest, and does not raise issues under Rule 1.7(a) or (b), because the lawyer has but one client in the matter, the putative ward.

Once a person has been adjudged incompetent and a guardian has been appointed to act on his behalf, the lawyer is free to represent the guardian. However, prior to that time, any expectation the lawyer may have of future employment by the person he is recommending for appointment as guardian must be brought to the attention of the appointing court. This is because the lawyer's duty of candor to the tribunal, coupled with his special responsibilities to the disabled client, require that he make full disclosure of his potential pecuniary interest in having a particular person appointed as guardian. See Rules 3.3 and 1.7(b). The lawyer should also disclose any knowledge or belief he may have concerning the client's preference for a different guardian. The substantive law of the forum may require such disclosure. [12]

Conclusion

When a client is unable to act adequately in his own interest, a lawyer may take appropriate protective action including seeking the appointment of a guardian. The lawyer may consult with diagnosticians and others, including family members, in assessing the client's capacity and for guidance about the appropriate protective action. The action taken should be the least restrictive of the client's autonomy that will yet adequately protect the client in connection with the representation. Withdrawal from representation of a client who becomes incompetent is disfavored, even if ethically permissible under the circumstances. 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.

Footnotes

1 It is not the role of the Committee to opine on issues of law; the Committee expresses no opinion one way or the other regarding the criminality of the conduct described in your inquiry.

10 *See Working Group on Client Capacity*, 62 Fordham L.Rev. 1003 (1994).

11 Comment 2 to Rule 1.14 recognizes that there are circumstances in which the lawyer must act as de facto guardian.

12 *See, e.g.,* Illinois Probate Act of 1975. Article XI.A, Guardians for Disabled Adults, 755 ILCS 5/11a-8:

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Section 11a-8. Petition. The petition for adjudication of disability and for the appointment of a guardian of the estate or the person or both of an alleged disabled person must state, if known: (a) the relationship and interest of the petitioner….

CT Eth. Op. 97-21 (Conn.Bar.Assn.), 1997 WL 700699

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EXHIBIT U

NY Eth. Op. 986 (N.Y.St.Bar.Assn.Comm.Prof.Eth.), 2013 WL 11324019

New York State Bar Association
Committee on Professional Ethics

TOPIC: WHETHER IT IS A CONFLICT OF INTEREST FOR A LAWYER WHO REPRESENTS A MENTALLY INCAPACITATED CLIENT IN A MEDICAID BENEFITS PROCEEDING TO ALSO REPRESENT THE CLIENT'S SISTER IN SEEKING TO PETITION FOR A GUARDIANSHIP FOR THE CLIENT WHERE THE INCAPACITATED CLIENT'S STATED WISHES AS TO LIVING ARRANGEMENTS ARE CONTRARY TO THE SISTER'S POSITION

Opinion Number 986
October 25, 2013

Digest: It is a conflict of interest for a lawyer who represents a mentally incapacitated client in a Medicaid benefits proceeding to also represent the client's sister in seeking to petition for a guardianship for the client where the incapacitated client's stated wishes as to living arrangements are contrary to the sister's position.

***1 Rules** 1.7, 1.14

QUESTION

1. May a lawyer who represents a mentally incapacitated adult in a Medicaid benefits proceeding also represent that person's sister in seeking to petition for a guardianship for him where the sister, against the client's wishes, has refused to remove her brother from a hospital and will not permit him to return to her home?

BACKGROUND

2. A Legal Services lawyer was retained to represent a severely incapacitated man to appeal the denial of certain Medicaid services. He has been diagnosed with schizophrenia and mental retardation. A recent evaluation concluded that he is "unable to function autonomously, and he cannot make financial or health decisions on his own. He is significantly mentally retarded." The client is not able to make decisions during the representation and "does not understand what is involved in appealing the denial of Medicaid Services." The client was assisted by his sister in applying for Legal Aid Services.

3. The sister has cared for and lived with the client until recently, when the client accidentally set fire to the sister's home. The sister brought him to a hospital where he remains. The hospital wants to discharge the client and his expressed desire is to return to the sister's home. The sister is unwilling to accept the client back to her home.

4. The attorney states that there is no practical method of protecting the client's interests other than to have a guardian appointed. There is no other family. Social services agencies have extremely limited resources. The sister is willing to serve as the guardian, but the client is so incapacitated that he is not capable of consenting or objecting to the appointment of his sister as guardian.

5. The attorney asks whether he is permitted to represent the sister in a petition for guardianship over her brother.

OPINION

6. The lawyer asks whether concurrent representation of client A with significant diminished capacity and another client (B) who seeks to become the guardian for client A is permissible when the stated wishes of client A are directly contrary

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to the position of Client B as the prospective guardian. To what extent is the lawyer bound by the arguably unreasonable and ill-considered stated desire of the incapacitated client in assessing whether such a conflict exists? What action is permissible by the lawyer?

***2** 7. Concurrent conflicts of interest are governed by Rule 1.7 of the Rules of Professional Conduct which prohibits a lawyer from representing clients with "differing interests." This includes "every interest that will adversely affect either the judgment or the loyalty of a lawyer to a client, whether it be a conflicting, inconsistent, diverse, or other interest. Rule 1.0(f); See also Rule 1.7 Cmts. [1],[2],[8]. The lawyer is expected to be loyal, protect client confidences and provide independent judgment.

8. In the representation of Client A in the Medicaid appeal, the lawyer learned of the client's stated desire to return to his sister's home. Living arrangements are a fundamental interest of the client as contemplated by Rule 1.7. Unquestionably, if Client A did not have significant diminished capacity, the lawyer could not undertake to represent his sister in any proceeding where Client A's stated desires would be undermined, and in this case directly contrary to the client's wishes, by the lawyer's representation of another client. [1]

9. Thus, the question is whether the client's significantly diminished capacity alters the judgment as to whether the lawyer would be representing "differing interests" if he undertook representation of the sister in the guardianship proceeding. As explained below, it does not.

10. Rule 1.14 seeks to provide guidance to a lawyer in such circumstances. It acknowledges the difficulty of providing diligent and competent representation to clients who have diminished capacity precisely because the client is often incapable of understanding and making decisions about the matter. In such circumstances, even though the representation may be premised upon the goal of maximizing a client's autonomy and dignity, the lawyer may believe that advocating the client's stated position to be directly contrary to what the lawyer reasonably believes is the only viable choice for the client with significant diminished capacity. May the lawyer maintain a position contrary to the client's stated wishes when that client has significant diminished capacity?

11. Rule 1.14 suggests a course of action for the attorney in such circumstances. [2] First, a lawyer must "as far as reasonably possible" maintain a normal lawyer-client relationship. The fact that a client suffers from mental illness or retardation does not diminish the lawyer's responsibility to treat the client attentively and with respect. Rule 1.14, Cmt. [2].

12. Second, Rule 1.14 permits a lawyer to take protective action when the lawyer reasonably believes that the client is at risk of physical, financial, or other harm unless such action is taken. Before considering what measures to undertake, lawyers must carefully evaluate each situation based on all of the facts and circumstances. "Any condition that renders a client incapable of communicating or making a considered judgment on the client's own behalf casts additional responsibilities on the lawyer." Roy D. Simon, Simon's Rules of Professional Conduct Annotated, 662 (2013). One of those responsibilities is to acknowledge that even clients with diminished capacity may have the ability to make decisions or reach conclusions about matters affecting their own well-being.

***3** 13. Any protective action taken by the lawyer should be limited to what is essential to carry out the representation. Thus, the lawyer may consult with family members, friends, other individuals, agencies or programs that have the ability to take action to protect the client. The Rule does not specify all of the potential protective actions that may be undertaken, but it makes clear that seeking the appointment of a guardian is the last resort, when no other protective action will protect the client's interests.

14. This opinion presumes that, before considering guardianship, the attorney has considered and exhausted other options. First, the lawyer has attempted to maintain a normal client-lawyer relationship as best as possible under the

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circumstances. A primary aspect of that relationship is to maintain communications with the client. The attorney has determined that the client's stated desire is to return to his sister's home. Even if the attorney reasonably believes this to be unwise, unreasonable, or otherwise ill advised, the client still deserves attention and respect.

15. Second, before deciding whether to take protective action with respect to the client, the lawyer has a reasoned basis, beyond what he believes to be the client's ill considered judgments, to conclude that the client cannot act in his own best interests and that protective action is necessary. The lawyer unsuccessfully attempted to communicate with the client, obtained information and assistance from the client's sister, and sought a medical evaluation.

16. It is not clear whether there are other individuals, community resources or social services agencies that may be of assistance to the client. Nor is it clear whether other options have been explored prior to seeking the appointment of a guardian. This includes an assessment as to whether or not referral to support groups or social services could provide protection to the client.

17. These alternatives should be exhausted prior to seeking the appointment of a guardian. The situation is particularly fraught for clients with limited financial means and social support networks. There are few social services available to assist such clients, thereby leaving the attorney in circumstances with few options to carry out representation as contemplated by Rule 1.14. Therefore, these circumstances require a lawyer to exercise careful judgment to adopt a course of action that best protects the client's interests.

18. The lawyer must recognize that seeking a guardianship is an extreme measure as it "deprives the person of so much and control over his or life." *In the Matter of the Guardianship of Dameris L.*, 38 Misc 3d 570 (Sur. Ct. NY Cty 2012) citing Rose Mary Bailly, Practice Commentaries, McKinney's Con Law of NY, Book 34A, Mental Hygiene Law § 81.01 at 79 (2006). It has been suggested that the lawyer should seek a guardian only if "serious harm is imminent, intervention is necessary, no other ameliorative development is foreseeable, and nonlawyers would be justified in seeking guardianship." Paul R. Tremblay, *On Persuasion and Paternalism: Lawyer Decisionmaking and the Questionably Competent Client*, 3 Utah L. Rev. 515, 566. (1997); See 62 Fordham L. Rev. 1073 (1993-1994)

***4** 19. Article 81 of the Mental Hygiene Law, allows for the judicial appointment of a legal guardian for one's personal needs, property management or both, when a person is incompetent to conduct his or her own affairs. N.Y. Mental Hygiene Law § 81.02(a); 81.06 et seq. The statute expects that the system is tailored to meet the individual's specific needs by taking into account the incapacitated person's wishes, and preferences. N.Y. State 746 (2001).

20. Assuming that the attorney has undertaken this thorough evaluation of the circumstances, and now reasonably believe that guardianship is the only alternative, that lawyer may seek out others to petition for the guardianship.

21. The guardianship process is initiated by a petition. The lawyer may seek out any available individual, social service agency or private organization to petition for guardianship. Article 81 specifies seven categories of persons who may file such a petition. § 81.06.

22. The court then is required to appoint a court evaluator who will recommend whether the alleged incapacitated person (AIP) requires counsel. The court evaluator will also make recommendations as to who should serve as guardian and make appropriate living arrangements. Any conflicts between the sister and AIP will be addressed by the court evaluator. *See e.g.*, MHL 81.09(c)(5)(xv). It is not apparent whether court evaluators are appointed in all matters as required by statute.

23. The court then considers all of the evidence and determines, by clear and convincing evidence, whether the person is likely to suffer harm because he or she is unable to provide for his or her personal needs and/or property management and cannot adequately understand and appreciate the nature and consequences of this inability. § 81.02 (b).

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24. The guardian is to engage in the "least restrictive form of intervention, consistent with the concept that the needs of persons with incapacities are as diverse and complex as they are unique to the individual." NY Mental Hgy Law § 81.01.

25. The attorney may suggest that the sister seek a petition for guardianship and may make suggestions as to individuals or agencies to assist her in completing the petition, but the lawyer may not represent her in petitioning for the guardianship. Her interests are contrary to that of the client. She has clearly stated, contrary to the client's desires, that she will not permit him to return to her home. Thus, the attorney would be in conflict with his client if he represents the sister and assists her in filing a petition seeking an objective contrary to the client's stated desire.

26. The lawyer's position in protecting the client's interests is complicated by perceived difficulties for lay persons in completing the petition for guardianship and the lack of social service and other resources to assist the family of incapacitated people. The sister may desire to file a petition for guardianship but may be ill-equipped to do so and there may be no assistance available to her. Consequently, it may be that the attorney is the only person who can reasonably seek the appointment of a guardian. In general, a lawyer should only act as petitioner in seeking the appointment of a guardian if there is no one else who reasonably can do so. Simon, Rules of Prof Conduct Annot. at 663, N.Y. State 746 (2001).

***5** 27. In general, the interests of the petitioner in a guardianship proceeding are in conflict with that of the client, notably where there will be a contested hearing and the petitioner will serve as a witness. However, where the client does not oppose the guardianship or is incapacitated and cannot express an opinion as to the guardianship, Rule 1.14 implicitly acknowledges that the lawyer may file the petition to seek a guardianship in circumstances where the guardianship will not be subject to a hearing and no one else is reasonably available to file the petition. We previously considered the issue of whether an attorney-in-fact could petition for guardianship for a client and concluded, under the then-existing Code of Professional Conduct, that it was permissible under circumstances such as those presented here where there is no other option and there will not be a contested hearing under Article 81. We considered whether the "dual role" of petitioner in a guardianship proceeding and as client representative was impermissible in these circumstances and concluded that, given other safeguards in the Article 81 proceedings, the dual role was not impermissible. N.Y. State 746 (2001). We affirm that opinion under the Rules of Professional Conduct.

28. Should the attorney file the petition for guardianship, and the court become aware that the sister may be the only person who can be appointed as the client's guardian, the lawyer should advise the court of the sister's position regarding the client's living arrangements. The court can then consider whether, in light of the potential conflict between the client and his sister, she is the appropriate guardian.

29. Thus, using the same reasoning, Connecticut has determined that in these circumstances should the lawyer petition for the appointment of a guardian, the lawyer does not need to withdraw from representation on the underlying Medicaid matter. In circumstances involving clients with disabilities, this is not a preferred course of action. *See* Connecticut Inf. Opinion 97-19 (1997).

30. Assuming that a guardian is appointed, the lawyer should consult with the client and the guardian as to the position to be asserted in the Medicaid matter. The guardian is the representative of the client. The rationale for the appointment of a guardian is to have someone who can make decisions for the incompetent client. Thus, after the appointment of the guardian, the lawyer generally must take direction from that guardian.

31. Finally, Rule 1.14 is often frustrating because it does not provide solutions to all problems in dealing with clients with diminished capacity. It does, however, provide "an intelligible frame of reference for the lawyer and those who might later judge his conduct." Geoffrey C. Hazard Jr. and W. William Hodes, The Law of Lawyering, § 1.14:101, p.439. (1990). See Connecticut Inf. Opinion 97-19.

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CONCLUSION

32. It is a conflict of interest for a lawyer who represents a mentally incapacitated client in a Medicaid benefits proceeding to also represent the client's sister in seeking to petition for a guardianship for the client where the incapacitated client's stated wishes as to living arrangements are contrary to the sister's position.

***6** 9-13

Footnotes

1 In some circumstances, the concurrent conflict may be waived, but not in this case. Even if the lawyer reasonably believed that he could provide competent and diligent representation to both Clients A and B, Client A is not capable of providing informed consent to such a waiver. Rule 1.7 (b)

2 Rule 1.14 provides that:

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

(b) When the lawyer reasonably believes that the client has diminished capacity, is at risk of substantial physical, financial or other harm unless action is taken and cannot adequately act in the client's own interest, the lawyer may take reasonably necessary protective action, including consulting with individuals or entities that have the ability to take action to protect the client and, in appropriate cases, seeking the appointment of a guardian ad litem, conservator or guardian.

(c) Information related to representation of a client with diminished capacity is protected by Rule 1.6. When taking protective action pursuant to paragraph (b), the lawyer is impliedly authorized under Rule 1.6 (a) to reveal information about the client, but only to the extent reasonably necessary to protect the client's interests.

NY Eth. Op. 986 (N.Y.St.Bar.Assn.Comm.Prof.Eth.), 2013 WL 11324019

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EXHIBIT V

CA Eth. Op. 1989-112 (Cal.St.Bar.Comm.Prof.Resp.), 1989 WL 253260

California State Bar
Standing Committee On Professional Responsibility and Conduct

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ISSUE: MAY AN ATTORNEY INSTITUTE CONSERVATORSHIP PROCEEDINGS ON A CLIENT'S BEHALF, WITHOUT THE CLIENT'S CONSENT, WHERE THE ATTORNEY HAS CONCLUDED THE CLIENT IS INCOMPETENT TO ACT IN HIS BEST INTEREST?

Formal Opinion Number 1989-112
1989

DIGEST: Although the attorney may feel that it is in the client's best interest to do so, it is unethical for an attorney to institute conservatorship proceedings contrary to the client's wishes, since by doing so the attorney will be divulging the client's secrets and representing either conflicting or adverse interests. However, should the client's conduct interfere with or unduly inhibit the attorney's ability to carry out the purpose for which the attorney was retained, withdrawal may be appropriate.

***1** AUTHORITIES INTERPRETED: Rules of Professional Conduct 3-110, 3-310, 3-700 and 5-210 of the State Bar of California.
Business and Professions Code section 6068, subdivision (e).

DISCUSSION

The Committee has been asked to opine on the ethical propriety of an attorney instituting conservatorship proceedings on behalf of a client but against that client's express wishes. For purposes of this discussion, it is assumed that the client's behavior patterns and dealings with his attorney over a significant period of time have convinced the attorney that the client requires a conservator. It is also assumed that other lawyer in the community would have a reasonable basis for concluding the same.

1. Duty to Protect Client Secrets

This situation is governed broadly by Business and Professions Code section 6068, subdivision (e), which provides that an attorney has the duty to:

> maintain inviolate the confidence, and at every peril to himself [or herself] to preserve the secrets, of his or her client.

What the attorney has seen or heard during the course of the relationship with the client may be a client "secrets." (See State Bar Formal Opinion 1987-93 which states ". . . the attorney-client relationship involves not just the casual assistance of a member of the bar, but an intimate process of consultation and planning which culminates in a state of trust and confidence between a client and his attorney.") Here, it is assumed that the attorney has spent considerable time in the client's presence, observing his behavior and coming to the conclusion that he can no longer properly care for himself. [1] It is also assumed that information imparted to the attorney by the client during the course of their relationship of confidence, while not necessarily a protected "communication" (see Evid. Code, §952), would be embarrassing or detrimental to the client if divulged by the attorney to third parties, and as such qualifies as a "secret." (State Bar Formal Opinions 1988-96 and 1987-93.)

***2** By 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. An attorney is absolutely prohibited 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. (Stockton Theatres v. Palermo (1953) 121 Cal.App.2d 616 [264 P.2d 74].) The Committee thus concludes that the attorney may not divulge what the attorney has observed of the client's behavior.

While the American Bar Association has adopted a model rule providing that, under certain circumstances, an attorney may initiate conservatorship proceedings, [2] this rule has not been adopted in California.

2. Conflicting and Adverse Interests

Rule of Professional Conduct 3-310 [3] provides that an attorney cannot represent conflicting interests, absent the informed written consent of all parties concerned, and cannot accept employment adverse to a client or former client absent the same consent. This rule creates two stumbling blocks in the situation under consideration. First, the attorney will necessarily be advocating and protecting the interests of those third parties with whom the client is coming into contact on a regular basis (including family members); and second, it is questionable whether the client, assuming he is unable to tend to his needs, can understand sufficiently the complexities of this dilemma to provide informed consent to the attorney's representation of conflicting interests. Thus, the conflict may not be waivable.

Rule 3-310 further contemplates that if the attorney has had a "relationship" with another party (such as a member of the client's family) who is interested in the representation, the attorney cannot continue such representation without all affected clients' informed written consent. In addition, under paragraph (E), the attorney here is barred from continuing to represent the client if she accepts compensation from the client's family at whose direction she participates in the conservatorship, absent the client's informed consent.

3. Attorney Competence

Under Rule of Professional Conduct 3-110 [4], an attorney must act "competently," which means applying the learning, skill and diligence necessary to discharge duties connected with the employment or representation. Here, an argument can be made that there is a presumption of incompetence if a conservator is not appointed since the attorney is placing (or leaving) the client in a vulnerable position where he is helpless to care for himself properly, and his condition will likely worsen with time.

***3** The attorney has represented the client "competently" if he or she diligently applies the learning and skill necessary to perform his or her duties arising from employment or representation. Rule 3-110 defines "ability" as having the requisite level of learning and skill and being mentally, emotionally and physically able to perform legal services. Accordingly, the rule does not compel the conclusion here that the attorney has acted incompetently by failing to institute conservatorship proceedings, since the attorney has simply followed his or her client's instructions. Rather, the rule suggests that competency is synonymous with proficiency and adequate preparation. The attorney here has performed competently by carrying out the limited representation for which he or she was originally retained.

4. Withdrawal From Employment

Rule of Professional Conduct 3-700 [5] subsections (B) and (C) provide for, respectively, mandatory and permissive withdrawal. While there is no explicit provision in rule 3-700 which either permits or requires a member to withdraw from employment based on initiating a conservatorship, under subsection (C)(1), if the client is engaging in conduct

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which "renders it unreasonably difficult" for the attorney to carry out the employment effectively, and that same conduct leads the attorney to the conclusion that the client needs a conservator, withdrawal may be permitted under the circumstances. [6]

CONCLUSION

It is the opinion of the Committee that instituting a conservatorship on these facts is barred by Business and Professions Code section 6068, subdivision (e), and furthermore creates a conflict that may not be waivable. The 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. While the attorney will not fall below the level of competence required by simply continuing the representation for which he or she was retained and avoiding filing a conservatorship for the client, withdrawal may be appropriate or even mandatory if the client's conduct impedes the attorney's ability to effectively carry out the duties for which he or she was retained. [7]

This opinion is issued by the Standing Committee on Professional Responsibility and Conduct of the State Bar of California. It is advisory only. It is not binding upon the courts, the State Bar of California, its board of governors, any persons or tribunals charged with regulatory responsibilities, or any member of the State Bar.

Footnotes

1 California Probate Code sections 1801 and 1828.5, while not controlling on the ethical issue presented here, will provide guidance to the attorney in deciding whether a conservatorship would be appropriate under the circumstances.

2 ABA Model Rule 1.14 provides that:

(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 reasons, 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.

3 California Rule of Professional Conduct 3-310 provides:

(A) If a member has or had a relationship with another party interested in the representation, or has an interest in its subject matter, the member shall not accept or continue such representation without all affected clients' informed written consent.

(B) A member shall not concurrently represent clients whose interests conflict, except with their informed written consent.

(C) A member who represents two or more clients shall not enter into an aggregate settlement of the claims of or against the clients, except with their informed written consent.

(D) A member shall not accept employment adverse to a client or former client where, by reason of the representation of the client or former client, the member has obtained confidential information material to the employment except with the informed written consent of the client or former client.

(E) A member shall not accept compensation for representing a client from one other than the client unless:

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

(2) Information relating to representation of a client is protected as required by Business and Professions Code section 6068, subdivision (e); and

(3) The client consents after disclosure, provided that no disclosure is required if:

(a) such nondisclosure is otherwise authorized by law, or

(b) the member is rendering legal services on behalf of any public agency which provides legal services to other public agencies or members of the public.

(F) As used in this rule "informed" means full disclosure to the client of the circumstances and advice to the client of any actual or reasonably foreseeable adverse effects of those circumstances upon the representation.

4 Rule of Professional Conduct 3-110 provides:

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(A) A member shall not intentionally, or with reckless disregard, or repeatedly fail to perform legal services competently.
(B) To perform legal services competently means diligently to apply the learning and skill necessary to perform the member's duties arising from employment or representation. If the member does not have sufficient learning and skills when the employment or representation is undertaken, or during the course of the employment or representation, the member may nonetheless perform such duties competently by associating or, where appropriate, professionally consulting another member reasonably believed to be competent, or by acquiring sufficient learning and skill before performance is required, if the member has sufficient time, resources, and ability to do so.
(C) As used in this rule, the term "ability" means a quality or state of having sufficient learning and skill and being mentally, emotionally, and physically able to perform legal services.

5 Rule of Professional Conduct 3-700 provides:
(B) Mandatory Withdrawal.
A member representing a client before a tribunal shall withdraw from employment with the permission of the tribunal, if required by its rules, and a member representing a client in other matters shall withdraw from employment, if:
(1) The member knows or should know that the client is bringing an action, conducting a defense, asserting a position in litigation, or taking an appeal, without probable cause and for the purpose of harassing or maliciously injuring any person; or
(2) The member knows or should know that continued employment will result in violation of these rules or of the State Bar Act; or
(3) The member's mental or physical condition renders it unreasonably difficult to carry out the employment effectively.
(C) Permissive Withdrawal.
If rule 3-700(B) is not applicable, a member may not request permission to withdraw in matters pending before a tribunal, and may not withdraw in other matters, unless such request or such withdrawal is because:
(1) The client
(a) insists upon presenting a claim or defense that is not warranted under existing law and cannot be supported by good faith argument for an extension, modification, or reversal of existing law, or
(b) seeks to pursue an illegal course of conduct, or
(c) insists that a member pursue a course of conduct that is illegal or that is prohibited under these rules or the State Bar Act, or
(d) by other conduct renders it unreasonably difficult for the member to carry out the employment effectively, or
(e) insists, in a matter not pending before a tribunal, that the member engage in conduct that is contrary to the judgment and advice of the member but not prohibited under these rules or the State Bar Act, or
(f) breaches an agreement or obligation to the member as to expenses or fees.
(2) The continued employment is likely to result in a violation of these rules or of the State Bar Act; or
(3) The inability to work with co-counsel indicates that the best interests of the client likely will be served by withdrawal; or
(4) The member's mental or physical condition renders it difficult for the member to carry out the employment effectively; or
(5) The client knowingly and freely assents to termination of the employment; or
(6) The member believes in good faith, in a proceeding pending before a tribunal, that the tribunal will find the existence of other good cause for withdrawal.

6 The Committee wishes to stress that withdrawal under these circumstances should be viewed by the attorney as a last resort. Given his needs and questionable capacity, the client conceivably will be prejudiced by the attorney's withdrawal, which should be sought only if absolutely compelled by the circumstances, after the attorney has done everything he or she possibly can to assist the client.

7 To the extent the client poses an actual or apparent threat to the safety of others, this opinion is not intended to reach the possible application of the "duty to warn" created by the California Supreme Court in Tarasoff v. Regents of University of California (1976) 17 Cal.3d 425.

CA Eth. Op. 1989-112 (Cal.St.Bar.Comm.Prof.Resp.), 1989 WL 253260

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EXHIBIT W

KENTUCKY BAR ASSOCIATION
RULES OF THE SUPREME COURT OF KENTUCKY

PRACTICE OF LAW

SCR 3.130(1.14) Client with diminished capacity

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

(b) When the lawyer reasonably believes that the client has diminished capacity, is at risk of substantial physical, financial or other harm unless action is taken and cannot adequately act in the client's own interest, the lawyer may take reasonably necessary protective action, including consulting with individuals or entities that have the ability to take action to protect the client and, in appropriate cases, seeking the appointment of a guardian ad litem, conservator or guardian.

(c) Information relating to the representation of a client with diminished capacity is protected by Rule 1.6. When taking protective action pursuant to paragraph (b), the lawyer is impliedly authorized under Rule 1.6(a) to reveal information about the client, but only to the extent reasonably necessary to protect the client's interests.

HISTORY: Amended by Order 2009-05. eff. 7-15-09; adopted by Order 89-1, eff. 1-1-90

SUPREME COURT COMMENTARY

2009:
(1) The normal client-lawyer relationship is based on the assumption that the client, when properly advised and assisted, is capable of making decisions about important matters. When the client is a minor or suffers from a diminished mental capacity, however, maintaining the ordinary client-lawyer relationship may not be possible in all respects. In particular, a severely incapacitated person may have no power to make legally binding decisions. Nevertheless, a client with diminished capacity often has the ability to understand, deliberate upon, and reach conclusions about matters affecting the client's own well-being. For example, children as young as five or six years of age, and certainly those of ten or twelve, are regarded as having opinions that are entitled to weight in legal proceedings concerning their custody. So also, it is recognized that some persons of advanced age can be quite capable of handling routine financial matters while needing special legal protection concerning major transactions.

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

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

(4) If a legal representative has already been appointed for the client, the lawyer should ordinarily look to the representative for decisions on behalf of the client. In matters involving a minor, whether the lawyer should look to the parents as natural guardians may depend on the type of proceeding or matter in which the lawyer is representing the minor. If the lawyer represents the

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

Taking Protective Action

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

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

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

Disclosure of the Client's Condition

(8) Disclosure of the client's diminished capacity could adversely affect the client's interests. For example, raising the question of diminished capacity could, in some circumstances, lead to proceedings for involuntary commitment. Information relating to the representation is protected by Rule 1.6. Therefore, unless authorized to do so, the lawyer may not disclose such information. When taking protective action pursuant to paragraph (b), the lawyer is impliedly authorized to make the necessary disclosures, even when the client directs the lawyer to the contrary. Nevertheless, given the risks of disclosure, paragraph (c) limits what the lawyer may disclose in consulting with other individuals or entities or seeking the appointment of a legal representative. At the very least, the lawyer should determine whether it is likely that the person or entity consulted with will act adversely to the client's interests before discussing matters related to the client. The lawyer's position in such cases is an unavoidably difficult one.

Emergency Legal Assistance

(9) In an emergency where the health, safety or a financial interest of a person with seriously diminished capacity is threatened with imminent and irreparable harm, a lawyer may take legal action on behalf of such a person even though the person is unable to establish a client-lawyer relationship or to make or express considered judgments about the matter, when the person or

another acting in good faith on that person's behalf has consulted with the lawyer. Even in such an emergency, however, the lawyer should not act unless the lawyer reasonably believes that the person has no other lawyer, agent or other representative available. The lawyer should take legal action on behalf of the person only to the extent reasonably necessary to maintain the status quo or otherwise avoid imminent and irreparable harm. A lawyer who undertakes to represent a person in such an exigent situation has the same duties under these Rules as the lawyer would with respect to a client.

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

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EXHIBIT X

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Board of Overseers of the Bar

State of Maine

Board of Overseers of the Bar

Grievance Commission
File No. 14-316

BOARD OF OVERSEERS OF THE BAR)
Petitioner)
)
v.)
)
)
)
E. ANNE CARTON, ESQ.)
of Brunswick, ME)
Me. Bar #2672)
Respondent)

Report of Findings
Grievance Commission Panel B
M. Bar R. 7.1(e)(2)(3)

Introduction

On June 15, 2015, pursuant to due notice, Panel B of the Grievance Commission conducted a disciplinary hearing open to the public according to Maine Bar Rule 7.1(e)(2), concerning the Respondent, E. Anne Carton, Esq., of Brunswick, Maine. Panel members included Thomas H. Kelley, Esq., Chair; Vendean Vafiades, Esq.; and Kenneth Roberts, Public Member. The Board of Overseers of the Bar was represented by Deputy Bar Counsel Aria Eee. Respondent was present and was represented by Peter J. DeTroy, III, Esq.

This proceeding was initiated by the filing of a Disciplinary Petition by the Board of Overseers of the Bar, dated February 19, 2015. The Petitioner filed a response through counsel dated March 24, 2015. Those documents are part of the Board's official record.

The Board submitted Exhibits 1-37 in advance of the hearing, and those exhibits were accepted by the panel at the hearing without objection. The Board also submitted Exhibit 38 at the hearing, which was admitted over the objection of the Respondent for whatever evidentiary value it may have. The Respondent submitted Exhibits 1-54 in advance of the hearing, including supplements A to Exhibits 1, 2, 3, 13, 15, 26, 27, 38, and supplements A and B to Ex. 49, and those exhibits were admitted without objection. The Respondent also offered supplements A and B to Ex. 11 at the hearing, and those exhibits were admitted without objection.

Procedural and Factual History

The events that lead to this proceeding began in the summer of 2011 when the Complainant, Darlene Grover, sought the assistance of Attorney Carton in managing the financial affairs of her mother, Lillian Robinson, after Ms. Robinson suffered a traumatic brain injury. Some background history is necessary, however, to the understanding of this dispute.

In 2005 Lillian Robinson retained the services of Attorney Hylie West of Damariscotta, Maine to update her estate plan. In October 2005, Ms. Robinson executed several documents that had been prepared for her by Attorney West, including a Power of Attorney from Lillian Robinson to Attorney Anne Carton, a reserve Power of Attorney to Attorney Stoddard Smith, a Promissory Note and Personal Guaranty from Darlene Grover to Lillian Robinson, a Living Will, an

Authorization for Use and Disclosure of Protected Health Information, Nomination of Guardian and Conservator, Last Will and Testament, Third Amendment to Revocable Trust Agreement, a Living Trust, and a Letter of Instruction regarding the use of the Power of Attorney. In addition to granting Attorney Carton a Power of Attorney, Ms. Robinson nominated Ms. Carton as conservator in the event it was necessary to ask the Probate Court to appoint a conservator. The Third Amendment to the Revocable Trust Agreement also designated Anne Carton to serve as trustee of the Lillian Robinson Living Trust in the event of Ms. Robinson's disability or death. Attorney West noted that the Power of Attorney was an essential element of the estate plan and often enabled families to avoid the expense and complications of a guardianship or conservatorship proceeding. (Testimony of Hylie West; Board. Ex. 3, 3A and B; 4, 4A and 4B; Respondent's Ex.33-36).

Both Darlene Grover and Lillian Robinson had previously employed the legal services of Anne Carton (for a divorce and a real estate transaction respectively) and had been very satisfied with her services, and that is apparently what prompted Ms. Robinson to grant a Power of Attorney to Attorney Carton. Attorney Carton acknowledged at the hearing that Lillian Robinson had stopped by the office in 2005 and asked her if she would be willing to serve as Lillian's Power of Attorney (POA) and that she had agreed. Hylie West sent the original POA and copies of the various other estate documents to Attorney Carton in late October 2005, and she sent acknowledgment of receipt of those documents to Attorney West in early March

2006. (B. Ex.4A and 4B). Lillian Robinson's Letter of Instruction directed Attorney Carton and her backup Stoddard Smith to use the POA in the event of her disability but only after consulting with her physicians.

(B. Ex. 3 and 3A).[1]

In late June 2011, Lillian Robinson suffered a traumatic brain injury, and within a few days of that event Darlene Grover sought Attorney Carton's legal assistance, particularly in dealing with her mother's finances. The exact date of the initial contact is not clear but must have occurred before July 7, 2011, when guardian/conservator documents were sent by Attorney Carton to Stan Grover. (B Ex.5). At the time of initial contact, Attorney Carton testified that she did not remember that Lillian Robinson had granted her a Power of Attorney to be used in the event of Ms. Robinson's incapacity. Thus, she advised Ms. Grover to seek an emergency guardianship and conservatorship of her mother, and Ms. Grover authorized Attorney Carton to represent her for that purpose. (Testimony of Darlene Grover and testimony of Anne Carton).

Attorney Carton drafted the necessary documents, including notices to Darlene Grover's brothers, Stanley Grover and Terry Grover. A letter of July 7, 2011, to Stanley Grover stated that the probate documents would be filed the following week, but that the filing was delayed at the request of Darlene Grover, who was apparently having reservations about proceeding. (B. Ex 6). By the end of July 2011, Ms. Grover authorized Attorney Carton to proceed, and on

[1] Attorney Carton's acknowledgment of receipt referred to the Letter of Instruction as "unsigned," but the copy of the Letter of Instruction submitted by the Board was signed.

August 1, 2011, Ms. Carton sent the Joined Petitions for Appointment of Guardian and Conservator along with related documents to the Cumberland County Probate Court. Those documents included a certification by a physician dated July 21, 2011, that Lillian Robinson was incapacitated. On August 16, 2011 Probate Judge Mazziotti issued an ex parte order appointing Darlene Grover Temporary Guardian and Temporary Conservator of Lillian Robinson for a period of three months. (B. Ex. 5-10; R. Ex. 1-8).

At the time of her accident, Lillian Robinson was 85 years old and Darlene Grover lived with her mother and provided her with care and assistance. Although Darlene and her brother Stanley had very poor relations with one another, Stanley expressed satisfaction with Darlene's care of her mother and initially expressed the view that she would make an appropriate guardian for their mother. On the other hand, Stanley Grover repeatedly expressed doubts about Darlene's ability to manage Lillian's financial affairs. Further, he later expressed opposition to the appointment of Darlene as guardian, through his attorney, because he thought Darlene might restrict his contact with his mother. (R. Ex. 2, 9, and 16). Although there is no direct statement from Terry Grover in the record, a mediation report from the fall of 2011 indicates that Terry was satisfied with Darlene's care of their mother but wanted to ensure that he had access to and information about the mother. (R. Ex. 17).

Although Darlene Grover had attended at least one of the 2005 meetings with Attorney Hylie West when he was drafting estate papers for Lillian Robinson, when she first contacted Anne Carton in late June or early July 2011, she did not remember that her mother had given Anne Carton a Power of Attorney. Ms. Grover insisted, however, that she recalled that fact within a short time of the initial contact and had asked Anne Carton about the POA by early to mid-July 2011, i.e. before the probate action was filed. Ms. Grover testified further that Attorney Carton at first stated that she did not have a POA and that it took some persuasion over a few days before Attorney Carton agreed to search her records. Attorney Carton, on the other hand, testified that Darlene Grover did not raise the issue of the POA with her until mid-August 2011 and that she did not realize until August 17 or 18, after her assistant had searched files in storage, that she had a Power of Attorney for Lillian Robinson. (Testimony of Darlene Grover and testimony of Anne Carton).

The Panel accepts as credible Darlene Grover's testimony that Anne Carton was dubious about having a POA when the issue was first raised and that Ms. Grover had to persuade her to search for that document. The panel does not find Ms. Grover's recollection of the timing of this discussion to be reliable, however. Thus the panel concludes that the discussion(s) about the POA most likely occurred in mid-August 2011.

When asked why she had not realized that she had a POA for Lillian Robinson when Ms. Grover first contacted her, Attorney Carton stated that she

kept a record of POAs in her file but because another attorney had prepared the estate documents, Lillian Robinson was not in her POA client database. Attorney Carton also stated that she relied completely on her legal assistant to let her know whether a prospective new client or new client matter raised a conflict issue. Ms. Carton also stated that she had served as a trustee for a few individuals and she did not know how many POAs were in her files. (Testimony of Anne Carton).

Attorney Carton testified that upon learning that she had a Durable Power of Attorney for Lillian Robinson, she had a discussion with Darlene Grover about the POA and the other documents and in particular about the authority of a conservator compared to that of an agent under a POA. That meeting apparently occurred on August 23, 2011. Attorney Carton did not draft a file memorandum about that discussion. Further, Attorney Carton took no immediate steps to advise the Probate Court or Darlene Grover's brothers in writing of her discovery of the POA or to raise a concern about a possible conflict of interest. (Testimony of Anne Carton; B. Ex. 2).

The conflict of interest inquiry regarding Attorney Carton's role as attorney for Darleen Grover and her authority as agent for Lillian Robinson apparently came up at a conference in the Probate Court on September 21, 2011. It is not clear who raised the issue or how it was presented because there was no written record of the proceeding and apparently no formal order of the Court. Darlene Grover testified that her brother Terry raised the issue.

Attorney Carton has never specifically acknowledged any conflict and cited as her reason for withdrawing as Darlene Grover's attorney the fact that Darlene and her brothers were not in agreement about who should manage their mother's finances.[2] In any event, Attorney Carton stated that she and Judge Mazziotti agreed that "I should cease representing Darlene, but continue to be involved on behalf of her mother." (B. Ex. 2 at 2; Response of Anne Carton to Disciplinary Petition; testimony of Darlene Grover; testimony of Anne Carton).

Shortly after the September 21st conference, Attorney Carton referred Darlene Grover to Attorney Jennifer Davis of Topsham, and Jennifer Davis advised Anne Carton by letter of October 2, 2011, that she was representing Ms. Grover and that she understood that her fees would be paid by Ms. Carton in her capacity as agent by POA for Lillian Robinson. (B. Ex. 11).

During the fall of 2011, there was considerable conflict between Darlene Grover and her brothers. The primary causes of the discord involved Terry and Stanley Grover's desire to have assurances of access to their mother if Darlene were to continue as guardian and the brothers' concern that Darlene was not the right person to serve as conservator. Efforts to mediate these differences continued through the fall of 2011 and into the winter of 2012, although it appears that no final formal agreement was reached by the siblings. (R. Ex. 11-26A).

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[2] In her Motion to Withdraw as Counsel for Darlene Grover, dated November 21, 2011, Attorney Carton was perhaps alluding to a conflict in citing Maine Rule of Professional Conduct 1.16 (a) (1) (representation will result in a violation of the rules of professional conduct or other laws) along with 1.16(b) (7) (other good cause), but she did not provide any specific details about those grounds.

On November 16, 2011, the Probate Court extended the appointment of Darlene Grover as temporary guardian and conservator without objection until December 21, 2011, at which time a conference with the Court was scheduled. Attorney Carton moved to withdraw as counsel for Darlene Grover on November 21, 2011. On December 21, 2011, Attorney Davis entered her appearance for Darlene Grover, and Judge Mazziotti granted Anne Carton's Motion to Withdraw. After the conference on December 21st the Judge issued a scheduling order and an interim order that: 1) continued the appointment of Darlene Grover as temporary guardian for Lillian Robinson with provisions for Attorney Davis to facilitate family members' contact with Ms. Robinson; 2) discontinued Darlene Grover's appointment as temporary conservator; 3) directed Attorney Carton to "continue to manage the finances of Lillian under the authority of a General Durable Power of Attorney given by Lillian to Ms. Carton for that purpose"; and 4) directed Attorney Carton to "provide all parties with any financial information reasonably requested." (R. Ex. 22; also 18 and 21). In September 2012, the Probate Court found that Lillian Robinson was incapacitated and appointed Darlene Grover as permanent guardian. (R. Ex. 29). In December 2012, Judge Mazziotti dismissed the petition for a conservator, finding that it was unnecessary because Lillian Robinson's finances were adequately protected by Anne Carton in her capacity as attorney in fact and trustee. (R. Ex. 39).

Attorney Carton served as agent or attorney in fact for Lillian Robinson pursuant to the POA from the fall of 2011 until September 2013, and during

that time she also served as Trustee of the Lillian Robinson Living Trust. During that two-year period there was considerable friction between Darlene Grover and Anne Carton over the management of Lillian Robinson's finances. In September 2013, Anne Carton resigned as agent and trustee for Lillian Robinson and turned those duties over to Attorney Stoddard Smith, who had been designated by Lillian Robinson as the person to take over those roles in the event Ms. Carton was unable or unwilling to continue. (*See generally* R. 27-49B).

Complaint of Darlene Grover and Disciplinary Petition of the Board of Overseers of the Bar

On July 16, 2014, the Board of Overseers of the Bar received a complaint from Darlene Grover, dated July 12, 2014, about the conduct of Attorney Anne Carton in the course of representing Ms. Grover and assisting Lillian Robinson. Ms. Grover faulted Attorney Carton for: 1) not promptly recognizing that she had a Power of Attorney for Ms. Robinson and thus causing unnecessary expenses for a conservatorship and contributing to friction among the Grover siblings; 2) failing to recognize she had a conflict of interest; and 3) failing to manage Lillian Robinson's financial affairs properly while serving as Trustee and as attorney in fact for Lillian. Attorney Carton responded with a detailed explanation and defense of her conduct. (B. Ex. 1 and 2).

After investigating Ms. Grover's complaint, Bar Counsel determined there were sufficient grounds to believe that Attorney Carton had violated provisions

of the Maine Rules of Professional Conduct and thus filed a Disciplinary Petition on February 19, 2015. The Petition alleged the following violations: Rules 1.3 [diligence] and 1.15 [safekeeping of client's property] for failing to recognize promptly that Attorney Carton had a Power of Attorney for Lillian Robinson; Rules 1.1 [competence], 1.7 [conflicts of interest – current clients], and 1.9 [duties to former clients] for filing an apparently unnecessary conservatorship, taking action adverse to Lillian Robinson without disclosing the potential conflict or obtaining consent; Rules 1.1 [competence], 1.5(a) [excessive fees], and 8.4(d) [conduct prejudicial to the administration of justice] by causing unnecessary legal expenses and contributing to discord among Ms. Robinson's adult children; Rule 1.7 [conflict of interest] and 1.16 [termination of representation] by failing to withdraw promptly as attorney for Darlene Grover after realizing she had a POA; Rules 1.3 [diligence], 1.4 [communication], and 8.4(d) [conduct prejudicial to the administration of justice] for not responding promptly to requests for payments of support for Lillian Robinson in her capacity as attorney in fact and trustee; and Rules 1.5(a) [fees]; 1.7(a)(2) [personal conflict], 1.15 [safekeeping property], and 8.4(a) and (d) [misconduct and conduct prejudicial to the administration of justice].

Attorney Carton, through counsel, offered several key points in response to the Petition and in defense of her conduct, including: she had not discovered the POA for Lillian Robinson until after she had filed the petition to have Darlene Grover appointed guardian and conservator and after the Probate Court had issued a temporary appointment, and thus the Board was incorrect

in alleging she knew of the POA when she filed the petition; she had no fiduciary duty to Lillian Robinson until after she had knowledge of her disability; she had no conflict of interest because she was not aware there was any friction among family members at the time she filed the guardian and conservator petition; the existence of the POA did not render the probate petition unnecessary; conversations with Ms. Robinson's health care providers and Darlene Grover lead her to believe that Lillian wanted her daughter to be appointed guardian; the friction among family members pre-dated her representation of Darlene Grover; and she handled Ms. Robinson's finances appropriately and had legitimate concerns about Darlene Grover's use of her mother's funds.

Findings and Conclusions

At the conclusion of the hearing in this matter Deputy Bar Counsel Eee stated that the Board did not intend to press its claims pertaining to Attorney Carton's handling of her financial management duties as trustee and attorney in fact for Lillian Robinson and thus was withdrawing the claims of violations of the Rules of Professional Conduct as they pertained to those financial management duties. The Panel concurs with this decision. While there was friction and disagreement between Darlene Grover and Anne Carton about the appropriate handling of Lillian Robinson's funds, there was no evidence of misconduct on Attorney Carton's part. Although Ms. Grover provided numerous bank statements, Ms. Carton repeatedly requested that Darlene

Grover prepare a budget setting forth regular expenses, which appears to have been a very prudent request, and Ms. Grover's failure to do so contributed substantially to the tension between the two.

The Panel has two areas of concern about Attorney Carton's conduct that raise questions under the Rules of Professional Conduct. One is her failure to determine that she held a Power of Attorney for Lillian Robinson when Darlene Grover contacted her in late June or early July of 2011and sought assistance in taking care of Ms. Robinson's finances. The other is whether Attorney Carton, upon realizing that she did hold a POA for Ms. Robinson, took sufficiently prompt steps to identify the conflict issues, to notify the appropriate parties of those issues, and to withdraw promptly from representation of Ms. Grover.

Failure to Identify and Exercise Her Fiduciary Obligation to Lillian Robinson

Lillian Robinson had a Durable Power of Attorney and other estate documents prepared by Hylie West in anticipation of the type of situation that arose in late June 2011, when she became incapacitated and unable to manage her own financial affairs. If Attorney Carton had determined that she held a POA for Ms. Robinson when Darlene Grover contacted her after her mother's accident, she could have used her authority under the POA to pay bills and manage bank accounts and otherwise deal with the financial issues that prompted Darlene to seek her assistance. Also, she would have had a

copy of Lillian Robinson's nomination of Darlene Grover as her guardian and herself as conservator as necessitated by the circumstances (R. Ex.33). There would have been no immediate need to rush into Probate Court with a guardian and conservator petition. As Hylie West testified, an essential purpose of the POA and the other estate documents is to avoid the complications and expense of a probate proceeding when the client's intentions are clearly stated.

The Panel disagrees with Attorney Carton's assertion that a petition for appointment of a guardian and conservator would have been necessary in any event. Darlene Grover was living with Lillian Robinson and providing her care and assistance, and Darlene's brothers agreed that was an appropriate placement for their mother. The POA gave Attorney Carton the authority not only to manage Ms. Robinson's financial affairs but also to arrange for medical care. The POA gave Ms. Carton broad authority to act on Lillian Robinson's behalf, making it unlikely that a conservator was necessary. Certainly that was the conclusion of Probate Judge Mazziotti, who discontinued the temporary conservator appointment in December 2011, and directed Ms. Carton to use her POA to manage Ms. Robinson's financial affairs. And in December 2012, the Judge dismissed the petition for a conservator as unnecessary. The Panel also notes that if Attorney Carton had the POA and accompanying estate documents available to her when Ms. Grover first contacted her in 2011, she would have discovered that Lillian Robinson wanted her daughter to serve as guardian if necessary but had nominated Attorney

Carton, not Ms. Grover, to be conservator if such an appointment became necessary.

Even if the Panel assumes that a guardianship was necessary in the summer of 2011, it is likely the probate process would have been smoother and less contentious if a petition for appointment of Darlene Grover as conservator had not been joined with the guardianship petition. Darlene's brothers were particularly concerned about her ability to manage their mother's finances. Although friction also developed between Darlene and the brothers over their access to their mother, that topic might have been less contentious if it had not been intertwined with financial management considerations.

Attorney Carton notes that, after her injury, Lillian Robinson expressed to Attorney Carton and others, including health care providers, that she wanted her daughter to manage her care and her financial affairs, and Attorney Carton cites that in support of her decision to seek appointment of Ms. Grover as guardian and conservator. The Panel notes, however, that Ms. Robinson's medical providers had determined that she was incapacitated at the time, and thus it is difficult to evaluate such statements. By contrast, Ms. Robinson had a comprehensive estate plan prepared for her in 2005 at a time when she was competent, and those documents are the most appropriate source of guidance as to her wishes.

Unfortunately Lillian Robinson's carefully developed estate plan was frustrated by Attorney Carton's failure to identify that she held a POA for Ms.

Robinson, and the Panel concludes that this failure in all likelihood caused unnecessary legal expenses for Ms. Robinson's estate and aggravated pre-existing tensions among family members. Even Attorney Carton testified that the legal and financial uncertainties in mid-July, 2011, were "very stressful" for the family. Her summary explanation of her position is that she safeguarded the files by keeping them in storage and she was not under any obligation to act on Lillian Robinson's behalf until asked to use the POA. The Panel concludes that it is impossible to safeguard documents, even if stored, if you do not have a system in place to identify that those documents even exist and the lack of knowledge of their existence, especially when you have acknowledged in writing that they have been entrusted to you, is not a defense for failure of your obligation to protect the interests of your client.

At least three Rules of Professional Conduct are pertinent. Rule 1.1 requires an attorney to act competently on behalf of clients, and competent representation encompasses having office systems and practices that will flag relevant documents in a file or representation in prior matters that may indicate a potential conflict at the outset of a request for legal assistance. This includes providing adequate supervision to a legal assistant who is assisting an attorney in identifying conflicts.

Rule 1.7, governing conflicts with current clients, also applies. Although Anne Carton had not been Ms. Robinson's attorney for estate planning purposes, Lillian Robinson had designated Attorney Carton as her fiduciary for

estate management purposes after inquiring in person if she would do so. While it is not necessary for an attorney in fact to be an attorney at law, it is likely that Ms. Robinson selected Attorney Carton at least in part for her presumed legal expertise. Attorneys are often called upon to act as fiduciaries, e.g. as trustees, agents, and directors of corporations, and it is imperative that their conflict management systems identify client and matter conflicts with their fiduciary responsibilities. *See* Rule 1.7(a) (2), which cites an attorney's duty to "a third person," typically a fiduciary obligation. Finally, Rule 1.15 requires attorneys to safeguard the property of clients or third persons that is placed in their possession. While this rule most often involves financial matters, it also applies to documents placed with an attorney for safekeeping.

The Panel concludes, therefore, that Attorney Carton failed to meet her obligations under Maine Rules of Professional Conduct 1.1, 1.7(a) (2), and 1.15 by failing to have sufficient office systems in place to identify her fiduciary obligation to Lillian Robinson when she was contacted by Darlene Grover in late June/early July 2011.

Handling of the Conflict of Interest Once Discovered

If Attorney Carton had determined she held a POA for Lillian Robinson when she was first contacted by Darlene Grover, presumably she would have also realized that her fiduciary obligation to Ms. Robinson would present a conflict of interest if she were to represent Ms. Grover in a petition for appointment of a guardian and conservator. Further, Attorney Carton

presumably would have informed Darlene Grover that she (Carton) could manage Lillian Robinson's finances with the POA and that Darlene Grover should engage separate counsel if she wanted to pursue a probate action. Darlene Grover acknowledges that neither she nor Attorney Carton initially knew that Attorney Carton held a POA. Ms. Grover testified that she told Attorney Carton about the POA in July not long after they first spoke, i.e. before the probate petition had been filed. As the Panel noted above, however, we conclude that Attorney Carton's recollection of when she first realized she had a POA, i.e. around August 17 or 18, 2011, is more reliable than Ms. Grover's recollection.

The Panel believes that Attorney Carton had an obligation, once she learned of the POA, to take prompt steps to notify the Court and Darlene Grover of the conflict and to withdraw from representation of Darlene Grover. The obligation to act promptly can be found in Rule 1.3, which requires a lawyer to act "with reasonable diligence and promptness," and in Rule 1.4(a)(1), which requires the attorney to promptly inform a client of a circumstance that requires the client's informed consent. An obligation to act promptly can also be inferred from Rule 1.7 and the other conflicts rules. Attorney Carton acted in a dilatory manner, however, after learning of the POA. There is no evidence that she promptly explained the problem to Darlene Grover and moved for withdrawal. There is no evidence that she informed the Probate Court of the conflict prior to the September 21, 2011, judicial

conference. Further, she did not move to formally withdraw as Darlene Grover's attorney until November 21, 2011.

At the conclusion of the hearing Attorney Carton, through counsel, argued (or at least seemed to argue) that there was no conflict at the time she realized she had the POA, because the petition for guardian and conservator had already been filed and Darlene Grover had been appointed temporary guardian and conservator. The Panel finds this argument unconvincing. Counsel for Attorney Carton suggested to Attorney Hylie West that the Probate Judge's appointment of a conservator would "trump" the POA, but Attorney West replied that the instructions of the principal, i.e. Ms. Robinson, would trump a temporary court order. The Maine probate code, 18-A M.R.S §5-908, provides that the appointment of a conservator does not terminate or limit a POA unless the court so orders. Ultimately Judge Mazziotti agreed that the POA "trumped" the temporary order.

Attorney Carton also argued that her fiduciary obligation did not arise until she chose to exercise her authority under the POA. The Panel also disagrees with this contention. A Maine durable power of attorney is effective when executed by the principal. Lillian Robinson did not want the POA used until she was incapacitated, but she had been medically determined to be incapacitated when Attorney Carton realized she had the POA, and the exercise of that power was appropriate and necessary at that time.

Attorney Carton and Judge Mazziotti discussed the conflicts issue at the September 21 probate conference, and Attorney Carton agreed to withdraw as Ms. Grover's attorney. Once Attorney Carton withdrew as Darlene Grover's attorney, her continued participation in the probate proceedings as Ms. Robinson's fiduciary was potentially adverse to the interests of her former client. There is no specific evidence that Attorney Carton obtained the informed consent of Darlene Grover to continue participating in the probate matter, but the panel is willing to assume that Judge Mazziotti discussed these issues with the parties on September 21st and that Ms. Grover consented to Attorney Carton's continued involvement in the matter.

The Panel concludes that Attorney Carton failed to recognize the conflict of interest and take steps to deal with the conflict with the promptness that the Rules of Professional Conduct contemplate. The Panel determines there was no evidence presented that Attorney Carton's conduct caused direct financial harm, compromised the health and safety of her client, or prejudiced the parties.

The Panel is most concerned about the inadequacy of Attorney Carton's office management and her continuing failure to recognize the need to improve her client database and conflict checking systems. The problems that arose in this case would in all likelihood have been avoided with better systems in place. The Panel strongly recommends that Attorney Carton consults with

appropriate parties, e.g. other attorneys, information management consultants, and takes steps to improve her office management.

The Panel also notes that Attorney Carton had represented both Darlene Grover and Lillian Robinson in the past and seemed genuinely concerned about both. There is no evidence that Attorney Carton willfully or intentionally disregarded their interests. Although there was some injury to the client, the Panel concludes that the misconduct is minor, that there is little or no injury to the public, the legal system, and the profession, and that there is little likelihood of repetition by the Respondent. The Panel therefore concludes that the appropriate sanction in this matter is a dismissal with warning pursuant to Maine Bar Rule 7.1(e)(3)(B).

Date: July 1, 2015

Thomas H. Kelley, Esq., Panel Chair

Vendean V. Vafiades, Esq.

Kenneth L. Roberts, Public Member