

LAWYERS ACTING AS GUARDIANS: POLICY AND ETHICAL CONSIDERATIONS

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I. INTRODUCTION

Plenary guardianship is an extreme measure; the appointment of a guardian can result in the serious deprivation of a person's rights.¹ In the best of circumstances, a person of severely diminished capacity may be well served by a trustworthy and conscientious guardian who acts as a protector and advocate.² In

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1. One state legislature cautioned, "The Legislature finds that adjudicating a person totally incapacitated and in need of a guardian deprives such person of all her or his civil and legal rights and that such deprivation may be unnecessary." Fla. Stat. § 744.1012 (2001); see generally Lawrence A. Frolik, *Promoting Judicial Acceptance and Use of Limited Guardianship*, 31 Stetson 735 (2002) (regarding the distinction between plenary and limited guardianships).

2. One report surveyed the guardianship system in Illinois:

Guardianship has many aspects which, when it is undertaken carefully, make it an ideal mechanism for protecting the rights of persons with decisional impairments. Well-trained and dedicated guardians can be vigorous advocates for the wards for whom they are responsible. They can protect them from financial exploitation, obtain services for them, and ensure that healthcare decisions are made in a timely and responsible fashion. In an ideal guardianship system, not only are there skilled guardians available for persons with decisional impairments, but the court also has the time and resources to supervise the guardian to ensure proper decision-making and the protection of the ward's interest.

Illinois Guardianship Reform Project: Final Report 1 (Equip for Equal. 2001) [hereinafter

the worst of circumstances, the guardian might deprive the ward of any meaningful participation in the decisions that affect the ward's life and might even exploit and abuse the ward.³

Essential questions in any examination of guardianship issues are who is acting as guardian, what are the guardian's specific duties and responsibilities, and are the guardian's powers limited to areas in which the ward is functionally unable to make decisions.⁴ Because the establishment of a guardianship and the appointment of a guardian require judicial intervention, the entire process also always necessitates the involvement of lawyers.

The role of lawyers in guardianships varies. The most common role of the lawyer is as legal counsel for either the petitioner seeking the appointment as guardian or the alleged incapacitated person.⁵ Lawyers also may serve as guardians ad

Illinois Report].

3. Several studies and commentaries have been published on the issues and problems concerning guardianship. Sen. Spec. Comm. on Aging Doc. 101-22, *Roundtable Discussion on Guardianship* (June 2, 1992); Commn. on Mentally Disabled & Commn. on Leg. Problems of Elderly, *Guardianship: An Agenda for Reform — Recommendations of the National Guardianship Symposium and Policy of the American Bar Association* (ABA 1989) [hereinafter *Wingspread Recommendations*]; A. Frank Johns & Vicki Bowers, *Guardianship Folly: The Misgovernment of Parens Patriae and the Forecast of Its Crumbling Linkage to Unprotected Older Americans in the Twenty-First Century — A March of Folly? Or Just a Mask of Virtual Reality?*, 27 *Stetson L. Rev.* 1 (1997).

4. Florida Statutes Section 744.344 (2001) and New York Mental Hygiene Laws Section 81.02 (McKinney 1996) are examples of state statutes that provide that the scope of guardianship be limited to the incapacitated person's areas of diminished capacity. The Uniform Guardianship and Protective Proceedings Act provides that a court "shall grant to a guardian only those powers necessitated by the ward's limitations and demonstrated needs." Unif. Guardianship & Protective Proc. Act § 311(b), 8A U.L.A. 146 (Supp. 2001). See generally Frolik, *supra* n. 1 (arguing for greater use of limited guardianships as best serving the needs of a person with diminished capacity without needlessly degrading his or her autonomy, and arguing against plenary guardianships, which deprive the ward of all rights).

5. The question of the role of the lawyer representing the alleged incapacitated person (AIP) has been widely debated. Most commentators have found that an AIP may face unnecessary restrictions on liberty, due process, and autonomy without a competent and zealous advocate. Elizabeth Calhoun & Suzanna L. Basinger, *Right to Counsel in Guardianship Proceedings*, Clearinghouse Rev. 316, 317 (Sept.–Oct. 1999) (describing how the variable procedural safeguards in guardianship proceedings run counter to most Americans' expectations of a judicial proceeding where liberty is at stake); Vicki Gottlich, *The Role of the Attorney for the Defendant in Adult Guardianship Case: An Advocate's Perspective*, 7 *Md. J. Contemp. Leg. Issues* 191, 197–221 (1995–1996) (discussing the liberties that may be unnecessarily restricted without safeguards); Anne K. Pecora,

litem and as lawyers for the guardian.⁶ The role we examine here, however, is that specific one of the lawyer serving in the fiduciary capacity as guardian.⁷

Traditionally, lawyers serve their clients in many roles: advisor, advocate, negotiator, intermediary, and evaluator.⁸ But

Representing Defendants in Guardianship Proceedings: The Attorney's Dilemma of Conflicting Responsibilities, 1 Elder L.J. 139, 139–175 (1993) (discussing cases in which attorneys' advocacy played significant roles in the outcomes of guardianship proceedings); *but see* Frederick R. Franke, Jr., *Perfect Ambiguity: The Role of the Attorney in Maryland Guardianships*, 7 Md. J. Contemp. Leg. Issues 223, 223–237 (1995–1996) (arguing that the attorney should not act as zealous advocate when the AIP needs such representation but should act in the role of guardian ad litem, or in the best interests of the client, when the AIP is in need of protection). For a further discussion of the role of the attorney who defends putative wards, see Joan L. O'Sullivan, *Role of the Attorney for the Alleged Incapacitated Person*, 31 Stetson L. Rev. 687 (2002).

6. The meaning of the term “guardian ad litem” changes from jurisdiction to jurisdiction and may include such other terms as “court visitor,” “court evaluator,” and “court investigator.” The role of the guardian ad litem is defined by state statutes and a full discussion of this role is beyond the scope of this paper. While lawyers often serve in the guardian ad litem role, they are not the only professionals assigned to the role. For discussions of the various issues regarding the role and responsibilities and changing statutory definitions of guardian ad litem in the context of adult guardianships, consult the following: James Peden, *The Guardian Ad litem under the Guardianship Reform Act: A Profusion of Duties, A Confusion of Roles*, 68 U. Det. L. Rev. 20, 26–30 (1990); Leona Beane, ‘Guardians’ and ‘Guardians ad litem’: *What Are the Differences?*, (P.L.I. Tax L. & Est. Plan. Course Handbook Series, Guardianship Law: Article 81, Aug. 21, 2001) (available in Westlaw, 308 PLI/Est 239); *Illinois Report, supra* n. 2, at 22–23. Two commentators have noted that the notion of guardian ad litem as an agent of the court is becoming less common:

Although a number of states still utilize the concept of a guardian ad litem, the modern trend is toward recognition of the importance of legal advocacy for the incapacitated client. . . . [L]awyers are not primarily witnesses or judicial officers, but advocates for their clients' wishes. They may also serve as counselors and advisors, but there is a real difference between counseling a client about the effect of making a choice and telling the judge which choice would be “better” for the client.

Robert B. Fleming & Rebecca C. Morgan, *Lawyers' Ethical Dilemmas: A “Normal” Relationship When Representing Demented Clients and Their Families*, 35 Ga. L. Rev. 735, 753–755 (2001) (footnotes omitted).

7. “Guardian” here, unless otherwise specified, refers to the fiduciary role of guardian for an incapacitated person and for that person's estate, sometimes referred to as “conservator.” *Black's Law Dictionary* 300 (Bryan A. Garner ed., 7th ed., West 1999). The role of guardian here is examined solely within the context of adult guardianships. The issues of guardianships for minors are outside the scope of this paper.

8. The Preamble to the ABA Model Rules of Professional Conduct acknowledges the various functions of lawyers:

As a representative of clients, a lawyer performs various functions. As advisor, a

should lawyers serve their clients in other fiduciary roles, as trustees, executors of estate, or even guardians? Are lawyers any better suited or trained to serve in other fiduciary roles than are other professionals, such as accountants, bankers, or social workers?

The concept of the lawyer acting in the specific fiduciary role as guardian raises a long list of questions and concerns. When do lawyers act as guardians? Should lawyers ever serve as guardians? Is there any good public policy in support of lawyers acting as guardians? If a lawyer is acting as a guardian, should the lawyer also serve in the dual capacity of lawyer for the ward? What ethical and professional standards should a lawyer serving as a guardian follow? What fees can the lawyer as guardian or as lawyer/guardian charge?

Lawyers have always served in other fiduciary roles, including that of guardian. There are no ethical rules or laws that prohibit a lawyer from acting as a guardian, and lawyers often serve as guardians.⁹ This Article explores lawyers serving two basic functions: either as *de facto* guardian for a client of diminished capacity in Part II, or as court-appointed guardian for a judicially declared incapacitated person in Part III.¹⁰ We review the American Bar Association (ABA) Model Rules of Professional Conduct,¹¹ the ABA Ethics 2000 changes to the Model Rules,¹²

lawyer provides a client with an informed understanding of the client's legal rights and obligations and explains their practical implications. As advocate, a lawyer zealously asserts the client's position under the rules of the adversary system. As negotiator, a lawyer seeks a result advantageous to the client but consistent with requirements of honest dealing with others. As intermediary between clients, a lawyer seeks to reconcile their divergent interests as an advisor and, to a limited extent, as a spokesperson for each client. A lawyer acts as evaluator by examining a client's legal affairs and reporting about them to the client or to others.

ABA Model R. Prof. Conduct preamble ¶ 2 (2000).

9. The Authors have explored many of the ethical and policy issues facing lawyers serving in other fiduciary roles in an earlier article. Edward D. Spurgeon & Mary Jane Ciccarello, *The Lawyer in Other Fiduciary Roles: Policy and Ethical Considerations*, 62 *Fordham L. Rev.* 1357 (1994).

10. In the context of guardianships, lawyers also often serve as legal counsel for the guardian. Except in passing, the role of the lawyer as lawyer for the fiduciary is outside the scope of this Article. For a discussion of this topic, consult Bruce S. Ross, *Conservatorship Litigation and Lawyer Liability: A Guide through the Maze*, 31 *Stetson L. Rev.* 757 (2002), and Spurgeon & Ciccarello, *supra* n. 9.

11. The ABA first promulgated the Model Rules of Professional Conduct in 1983. Forty-one states and the District of Columbia have adopted the Model Rules, with some

relevant ABA ethics opinions, selected commentary on the Model Rules by the American College of Trust and Estate Counsel,¹³ some state bar ethics opinions, and some relevant case law and commentaries. At the end of Parts II and III, we make some recommendations about when, if, and how a lawyer should serve in the guardian's role.

The approach here is not to suggest that guardianship is the desired outcome or preferred method of assisting an adult of diminished capacity, but to recognize that guardianships exist and that lawyers find themselves dealing with the questions of whether to act as guardian and how to act as guardian once appointed to that role.

There is very little guidance about whether lawyers should act as guardians and how they should act once appointed as guardian. During the 1988 National Guardianship Symposium on guardianship issues, known as Wingspread,¹⁴ the conferees recognized that attorneys have special roles in guardianships:

Attorneys who act as guardians are accountable to the court in two respects — as a licensed member of the legal profession and as a judicially appointed fiduciary. As attorneys, they should abide by rules of professional conduct. As guardians, they should act in accord with state law and the judge's order. Some of the Wingspread conferees questioned whether such dual-role attorneys have, or should have, a special duty. Should selected standards for guardians be incorporated into

variations from state to state. Margaret Colgate Love & ABA Ctr. for Prof. Resp., *ABA Ethics 2000 Commission: Final Report — Summary of Recommendations* <http://www.abanet.org/cpr/e2k-mlove_article.html> (June 9, 2001).

12. In 1997 the ABA established a Commission on Evaluation of the Rules of Professional Conduct to evaluate the Model Rules. *Id.* On February 5, 2002, the House of Delegates, at its Midyear Meeting in Philadelphia, Pennsylvania, completed its review of the ABA Ethics 2000 recommendations, revising and amending the Model Rules. For a complete summary of the revisions, see ABA Ctr. for Prof. Resp., *Report 401 as Passed by the House of Delegates February 5, 2002* <<http://www.abanet.org/cpr/e2k-report-home.html>> (Feb. 2002). Revised Model Rules 1.6 and 1.14 are reprinted at 31 Stetson L. Rev. 791, 856–866 (2002). Unless otherwise indicated, all citations to the Model Rules are to the 2001 Edition of the ABA Model Rules of Professional Conduct, published in 2000.

13. Am. College of Trust & Est. Counsel, *Commentaries on the Model Rules of Professional Conduct* (3d ed. Am. College of Trust & Est. Counsel 1999) [hereinafter *ACTEC Commentaries*].

14. The Johnson Foundation's Wingspread Conference Center in Wisconsin hosted the National Guardianship Symposium, which was sponsored by the ABA Commission on Legal Problems of the Elderly and the ABA Commission on Mental Disability.

rules of professional conduct for lawyers? Should bar associations sponsor sessions instructing guardians on their duties? Again, these questions merit serious consideration and resolution by judicial and bar entities.¹⁵

The Wingspread conferees also made the following specific recommendation concerning lawyers:

Recommendation V-E, Role of Attorneys:

Rules of Professional Conduct — State supreme courts and appropriate bar entities should develop and enforce rules of professional conduct regarding the performance of attorneys in holding guardians accountable — in their roles as guardians themselves, in their representation of guardians and in their representation of wards.

Continuing Legal Education — Continuing legal education systems and bar publications should address the performance of attorneys in these roles.¹⁶

Since the 1988 Wingspread Symposium, no state supreme court or bar association has developed specific rules of professional conduct regarding the performance of attorneys in their roles as guardians.¹⁷ Some local bar associations have issued

15. *Wingspread Recommendations*, *supra* n. 3, at 26.

16. *Id.*

17. There have been attempts by individual courts, jurisdictions, and states to reform local court procedures and state guardianship laws; examples include the Washtenaw County Probate Court in Michigan and the guardianship statutory reforms in Virginia. See John E. Donaldson, *Reform of Adult Guardianship Law*, 32 U. Rich. L. Rev. 1273 (1998) (analyzing guardianship reforms in Virginia in 1997 and 1998); Bradley Geller, *Handbook for Guardians of Adults* <<http://www.courts.co.calhoun.mi.us/book037a.htm>> (accessed Feb. 4, 2002) (explaining to new guardians local court policies and procedures, written by counsel to Washtenaw County Probate Court, copyrighted 1995). No locality, however, has promulgated rules of professional conduct regarding the performance of attorneys in holding guardians accountable, in their role as guardians themselves, or in their representation of guardians and in their representation of wards. For a discussion of the need to develop a reflective model of professional conduct to resolve the ethical dilemmas that occur within the practice of elder law, see Joseph A. Rosenberg, *Adapting Unitary Principles of Professional Responsibility to Unique Practice Contexts: A Reflective Model for Resolving Ethical Dilemmas in Elder Law*, 31 Loy. U. Chi. L.J. 403 (2000). For a thorough review of efforts to monitor guardians, see Sally Balch Hurme & Erica Wood, *Guardian Accountability Then and Now: Tracing Tenets for an Active Court Role*, 31 Stetson L. Rev. 867 (2002). The New York State Unified Court System recently released two reports on abuse by court-appointed fiduciaries, many whom are attorneys. Commn. on Fiduciary Appointments, *Report on the Commission on Fiduciary Appointments*

ethics opinions, usually in the context of lawyers representing clients of diminished capacity and ABA Model Rule of Professional Conduct 1.14, and some have conducted continuing legal and judicial education sessions on guardianship issues.¹⁸ But there is no uniformity of approach to dealing with the issues regarding lawyers serving as guardians, nor are there any standards of professional conduct to guide lawyers serving as guardians.

Various commentators have examined the Model Rules in an attempt to provide guidance to lawyers confronting the difficult issues of representing older clients, especially when those clients may no longer be capable of making decisions for themselves.¹⁹ We, too, now turn first to Model Rule 1.14 as a starting point for guidance to lawyers who find themselves in the murky situation of deciding whether to act as a *de facto* guardian for a client.

<http://www.courts.state.ny.us/fiduciaryreport/fidcommreport.htm> (Dec. 2001); Off. Spec. Inspector Gen. for Fiduciary Appointments, *Fiduciary Appointments in New York: A Report to Chief Judge Judith S. Kay and Chief Administrative Judge Jonathan Lippman* <<http://www.courts.state.ny.us/fiduciaryreport/igfiduciary.html>> (accessed Jan. 27, 2002) [hereinafter *New York Reports*].

18. *Infra* nn. 59–81 and accompanying text (discussing local bar ethics opinions on confidentiality in the context of guardianship).

19. *E.g.* James R. Devine, *The Ethics of Representing the Disabled Client: Does Model Rule 1.14 Adequately Resolve the Best Interests/Advocacy Dilemma?*, 49 Mo. L. Rev. 493, 500–509 (1984) (discussing disabled clients generally and the conflicting duties of Model Rules 1.6 and 1.14); Peter Margulies, *Access, Connection, and Voice: A Contextual Approach to Representing Senior Citizens of Questionable Capacity*, 62 Fordham L. Rev. 1073 (1994) (arguing that a lawyer should view incapacitated clients contextually and should reject paternalism and strict adherence to agency principles); Jan Ellen Rein, *Ethics and the Questionably Competent Client: What the Model Rules Say and Don't Say*, 9 Stan. L. & Policy Rev. 241 (1998) (detailing the ethical dilemmas surrounding client incapacity and favoring solutions that avoid ethical dilemmas, such as preventative planning); Linda F. Smith, *Representing the Elderly Client and Addressing the Question of Competence*, 14 J. Contemp. L. 61, 73–104 (1988) (analyzing the weakness of the Model Rules in providing ethical guidance, and suggesting practical approaches for interviewing and counseling elder clients); Paul R. Tremblay, *Impromptu Lawyering and De Facto Guardians*, 62 Fordham L. Rev. 1429 (1994) (allowing *de facto* guardianship as a necessity while warning of the limited ethical guidance provided by the Model Rules) [hereinafter Tremblay, *Impromptu Lawyering*]; Paul R. Tremblay, *On Persuasion and Paternalism: Lawyer Decisionmaking and the Questionably Competent Client*, 1987 Utah L. Rev. 515 (reviewing the options available to the lawyer, favoring attempts to persuade the client to act in his or her best interests while rejecting *de facto* guardianship); James R. Wade, *Recent Developments in Representing Disabled Clients*, 136 Trusts & Ests. 35 (May 1997) (reporting on the addition to the commentary of Model Rule 1.14 regarding *de facto* guardianship).

II. LAWYERS ACTING AS DE FACTO GUARDIANS

When lawyers encounter clients whose ability to make decisions comes into question, the lawyers must “strike a delicate balance between their usual obligation ‘to zealously advocate for the client’s expressed wishes’ and their obligation not to cause harm to the client.”²⁰ A lawyer may have a client who becomes incapacitated during the course of representation. Or a lawyer may have to deal with a long-standing client who makes renewed contact and appears now to be incapacitated. Or a lawyer may have a new client who is not clearly able to communicate appear in his or her office asking for help.

Model Rule 1.14 attempts to address the ethical issues confronting a lawyer who must decide how to effectively represent a client of questionable capacity, and at what point the lawyer can cross the fine line between acting in the traditional role of lawyer as advocate of the client’s wishes and taking on the fiduciary mantle of a guardian protecting the client from harm. We examine first the rule as it existed at the time of Wingspan — The Second National Guardianship Conference,²¹ the ABA Ethics 2000 changes, relevant ABA ethics opinions, some state bar opinions, some case law, as little as it is, and the *ACTEC Commentaries*, the only guidance for lawyers in the specialized area of trusts and estates practice. We also refer to the several in-depth and perceptive analyses by legal scholars of the ethical issues faced by lawyers dealing with clients of diminished capacity.²² Finally, we suggest some recommendations to guide

20. Comm. Prof. Resp., *A Delicate Balance: Ethical Rules for Those Who Represent Incompetent Clients*, 52 Rec. Assoc. B. City N.Y. 34, 35 (Jan./Feb. 1997) (footnote omitted).

21. In November 30, 2001, Wingspan — The Second National Guardianship Conference convened on the campus of Stetson University College of Law. Primary sponsors were the National Academy of Elder Law Attorneys, Stetson University College of Law, and the Borchard Center of Law and Aging. Co-sponsors were the ABA Commission on Legal Problems of the Elderly, the National College of Probate Judges, the Supervisory Council of the ABA Section on Real Property, Probate and Trusts, the National Guardianship Association, the Center for Medicare Advocacy, the Arc of the United States, and the Center for Social Gerontology, Inc. At the time of the Wingspan Conference, the ABA Ethics 2000 proposals were pending final consideration by the ABA House of Delegates.

22. These scholars include those named in *supra* note 19. For excellent and in-depth analyses of a wide variety of ethical, policy, and legal issues that concern the representation of clients of diminished capacity, consult *Special Issue: Ethical Issues in Representing Older Clients*, 62 Fordham L. Rev. 961, 961–1583 (1994) (containing articles

lawyers functioning as *de facto* guardians in certain circumstances.

A. Model Rule 1.14: Client under a Disability

The starting point for any discussion of lawyers functioning in the role of *de facto* guardian is Model Rule 1.14. At the time of the 2001 Wingspan Conference, the rule stated:

- (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.²³

1. Model Rule 1.14(a): Maintaining a Normal Client-Lawyer Relationship with the Client

As many commentators and scholars have noted, the Model Rules did not contain adequate provisions for lawyers functioning outside the litigation construct.²⁴ Model Rule 1.14 was an attempt

and recommendations generated by the Conference on Ethical Issues in Representing Older Clients at Fordham University School of Law), and *Symposium: Joint Conference on Legal/Ethical Issues in the Progression of Dementia*, 35 Ga. L. Rev. 391, 391–834 (2001).

23. ABA Model R. Prof. Conduct 1.14. In February 2002, the ABA House of Delegates revised Model Rule 1.14, adopting the ABA Ethics 2000 proposed changes. The revised Model Rule 1.14 is reprinted at 31 Stetson L. Rev. 791, 862. As this Article was written in anticipation of the 2001 Wingspan Conference, the analysis necessarily focuses on Model Rule 1.14 as it existed before the ABA revision, and as it currently exists in those states that follow the Model Rules and have not yet considered the ABA action.

24. For example, Luther Avery has noted that "lawyer specialists like estate planners [should] develop procedures that will be prudent and productive in the face of rules that were not designed with their best interests in mind." Luther J. Avery, *The Rules of Professional Conduct for Lawyers Are Confusing*, 131 Trusts & Ests. 8, 10 (Apr. 1992). Fleming and Morgan offered further criticism of the Model Rules:

The Model Rules applied to the representation of a client with dementia fail to provide sufficient guidance to an attorney on how to effectively evaluate and represent a demented client. Although the Rules admonish the attorney to maintain as normal a relationship as possible with an incapacitated client, the Rules fail to tell an attorney how to do so.

to recognize that lawyers may very well encounter clients who are not fully functioning adults able to combat on a level playing field with other competent adults who happen to have adverse desires. In particular, a lawyer who deals with an aging clientele knows only too well that the likelihood of encountering a client of questionable mental and physical capacity is very real.²⁵

The very basis of the attorney-client relationship is, on the part of the lawyer, one of loyalty, confidentiality, and professional guidance. This basis, however, presumes the full participation of the client in the relationship. Another aspect of the attorney-client relationship is one of principal to agent. Legal tradition holds that when the principal is no longer capable of communicating effectively and participating meaningfully in the legal action, the agency of the lawyer is terminated.²⁶

Are these bases desirable in the context of many elder law situations? A lawyer still may be able to maintain client loyalty and confidentiality, and provide professional guidance, even in the face of diminished capacity on the part of the client.²⁷ The

Fleming & Morgan, *supra* n. 6, at 740.

25. See Smith, *supra* n. 19, at 61–73 (outlining physical and mental deficiencies associated with the aging process).

26. One scholar explained traditional agency principles:

At common law, an agent's authority under the principal's power of attorney generally terminated upon the principal's incompetency or death. Termination was based on the theory that agency, as a consensual relationship, cannot continue when the principal loses the ability to authorize the agent's actions. Once a principal lost competence, no one could legally transact business in the principal's stead unless appointed the guardian or conservator through judicial process.

Linda S. Whitton, *Durable Powers as a Hedge Against Guardianship: Should the Attorney-at-Law Accept Appointment as Attorney-in-Fact?*, 2 *Elder L.J.* 39, 43 (1994) (footnotes omitted). Relating agency principles to ethics rules, Devine, *supra* n. 19, at 513 remarked, "One of the greatest weaknesses of the Model Code is its failure to consider that the entire legal basis of the attorney-client relationship may be flawed by the existence of a disability preventing the effective creation of an agency." See generally Alexander M. Meiklejohn, *Incompetent Principals, Competent Third Parties, and the Law of Agency*, 61 *Ind. L.J.* 115 (1985–1986) (discussing how courts should treat property transactions entered into by agents of incompetent people).

27. We do not attempt to define capacity in this Article, as a thorough discussion of decision-making capacity is well beyond the scope of this Article. However, we do recognize that there is no universal standard or definition of decision-making capacity. See Charles P. Sabatino, *Competency: Refining Our Legal Fictions*, in *Older Adults' Decision-Making and the Law* ch. 1, 1–16 (Michael Smyer, K. Warner Schaie & Marshall B. Kapp eds., Springer Publg. Co. 1996) (describing various legal tests of incapacity); Robert P. Roca, *Determining Decisional Capacity: A Medical Perspective*, 62 *Fordham L. Rev.* 1177

application of the traditional rules of agency to the lawyer-client relationship when the client is of questionable mental capacity is too limiting if one also considers that there may be other ways to view the relationship. One commentator observed:

In contrast to the model of the zealous advocate are alternate conceptions of the lawyer's role that balance the value of client autonomy with countervailing ethical, moral, and social justice values. These models necessarily involve an activist approach by the lawyer that is more paternalistic, because they do not view client autonomy as the only value, but rather as one important value that may be diminished by the lawyer's values.²⁸

If client autonomy becomes only one of many values that the lawyer must attempt to maintain, then the lawyer may be able to find alternative approaches to dealing with a client of diminished capacity.

In many cases, even if the client is suffering from some sort of decisional impairment, the lawyer may be able to maintain a normal relationship. Comment 1 to Model Rule 1.14 recognized that "a client lacking legal competence often has the ability to understand, deliberate upon, and reach conclusions about matters affecting the client's own well-being." The comment further acknowledged that "to an increasing extent the law recognizes intermediate degrees of competence."²⁹ In all cases, the lawyer must treat the client with dignity and respect and make every attempt to communicate as effectively as possible with the client.³⁰

A competent lawyer should understand the physical aspects of aging and make accommodations in communicating with clients.³¹ Such accommodations might include having easy

(1994) (explaining how the process of diagnosing a mental disorder can help determine the decision-making capacity of an individual).

28. Rosenberg, *supra* n. 17, at 431-432, *see* Margulies, *supra* n. 19, at 1075 (arguing for a contextual approach to representing clients of questionable capacity: "A balance is needed to help lawyers retain what is empowering about the traditional conception, [to] transcend its fixation on merely legal interests, and to see clients as situated in a web of relationships.").

29. ABA Model R. Prof. Conduct 1.14 cmt. 1.

30. *Id.* at cmt. 2. According to the comment, "The fact that a client suffers a disability does not diminish the lawyer's obligation to treat the client with attention and respect." *Id.*

31. ABA Model R. Prof. Conduct 1.1. Specifically, Model Rule 1.1 states: "A lawyer

physical access to the office and appropriate lighting, providing documents in large print, speaking clearly and slowly, and addressing the client in terms that are comprehensible. If house calls are necessary, then the lawyer should attempt them. The lawyer also should attempt to understand when the client is most lucid and attempt to interview the client at those times. These accommodations are essential for providing the client with loyalty, zealous advocacy, and a normal relationship.³²

If the client is not communicating effectively even after the lawyer has attempted to make these accommodations, then the lawyer may take further steps to understand what the client is communicating. For example, the lawyer needs to reach an understanding in his or her own mind of whether the client's requests are merely eccentric, or potentially detrimental to the client.³³ For help in both maximizing a client's capacity and comprehending as fully as possible the reasons behind a client's decisions, a lawyer could turn to processes suggested by two

shall provide competent representation to a client. Competent representation requires the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation." *Id.* A lawyer may not necessarily have the knowledge and skills to deal with a client of questionable capacity. However, any lawyer whose clients regularly include older clients or persons with disabilities should understand enough about capacity to provide the client with competent representation. Rein suggests that "[a] lawyer who is not qualified—by training or experience—to deal with the questionably competent client may, in some circumstances, have a duty to refer the client to an attorney who is so qualified." Jan Ellen Rein, *Clients with Destructive and Socially Harmful Choices — What's an Attorney to Do?: Within and beyond the Competency Construct*, 62 *Fordham L. Rev.* 1101, 1141 (1994). She also suggests that state bar associations should promote "better legal services for the questionably competent elderly by requiring that lawyers who are likely to represent the elderly take a certain number of continuing legal education or other special training courses designed to assist them in providing such representation competently." *Id.* She believes that judges who preside at competency determinations should also be required to take similar training. *Id.*

32. See ABA Model R. Prof. Conduct. 1.4 (describing communication as an essential part of the lawyer-client relationship). Fleming and Morgan contrast the aspirations of the Model Rules with the practical experience of most lawyers: "Most lawyers are unprepared by their training or experiences to deal with clients with dementia. The ethical rules provide scant guidance for the kinds of problems that arise in the real world representation of demented clients and their families." Fleming & Morgan, *supra* n. 6, at 745.

33. See Smith, *supra* n. 19, at 90 (recommending that the lawyer should attempt to engage the client in "a process of gradual decision-making which will involve clarification, reflection, feedback, and further investigation").

scholars, Charles Sabatino and Peter Margulies.³⁴ However, Model Rule 1.14 did not provide guidance on how a lawyer might assess his or her client's competence or degree of competence. Comment 5 merely stated that the lawyer "may seek guidance from an appropriate diagnostician."³⁵

2. Model Rule 1.14(b): The Lawyer May Seek the Appointment of a Guardian

The Model Rule instructed that if the normal attorney-client relationship is not possible, then the "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."³⁶ Here the Model Rule took a huge leap from maintaining a normal relationship to the lawyer taking very intrusive actions. In particular, the Model Rule implied that the lawyer may act in what he or she determines to be the client's best interests even though the client may not have been able to give the lawyer comprehensible indications of the client's interests.³⁷

34. Sabatino suggested four steps to help optimize a client's capacity for decision-making: (1) "Interview the Client Alone," (2) "Adjust the Interview Environment to Enhance Communication," (3) "Know the Client's Value Framework," that is, view the client according to the client's standards and values, rather than the conventional standards of others, and (4) "Presume Capacity." Charles P. Sabatino, *Assessing Clients with Diminished Capacity*, 22 BIFOCAL 1, 2-4 (Summer 2001). Once the lawyer has "done everything practicable to optimize the client's opportunity to act with maximum capacity," the lawyer should then attempt a preliminary assessment after obtaining the client's consent. *Id.* at 4.

To assess a client's capacity, Margulies developed an approach that weighed the substance of what the client proposed to do and the reasonableness of how the client arrived at that decision. Margulies focused on six factors: (1) the client's "ability to articulate reasoning behind [the] decision," (2) the "variability of [the client's] state of mind," (3) the client's ability to appreciate the "consequences of [the] decision," (4) the "irreversibility of [the] decision," (5) the "substantive fairness of [the proposed] transaction," and (6) the "consistency [of the decision] with the client's lifetime commitments." Margulies, *supra* n. 19, at 1085.

35. ABA Model R. Prof. Conduct 1.14 cmt. 5.

36. *Id.* 1.14(b) (emphasis added). Comment 2, however, noted that "if the person has no guardian or legal representative, *the lawyer often must act as de facto guardian.*" *Id.* at cmt. 2 (emphasis added).

37. There is no clear agreement among legal scholars regarding whether a lawyer representing a client of diminished capacity should use a best interests or substituted judgment standard. Margulies, *supra* n. 19, at 1095-1096. Smith argues that the lawyer should use a substituted judgment standard:

Professor Linda Whitton suggests that at the point when a normal attorney-client relationship is not possible, the lawyer is left with limited options. The lawyer faces difficult ethical dilemmas if he or she finds it necessary to follow Model Rule 1.14(b) and considers initiating guardianship proceedings for the client he or she reasonably believes to be incompetent. Those dilemmas are:

- (1) breaching client loyalty by questioning the client's competency;
- (2) breaching client confidentiality to disclose information that would be necessary to support a petition for guardianship;
- (3) not seeking guardianship and instead withdrawing from representation to the possible detriment of the client; [and]
- (4) acting as a de facto guardian without formal judicial appointment, thereby usurping the client's decision-making authority in contravention of the normal attorney-client relationship.³⁸

If a lawyer encounters a client with whom a working relationship is no longer possible because of the client's current capacities, then the lawyer must confront these options. None of these options are easy to choose.

The Model Rules addressing loyalty and confidentiality present only limited guidance to the transactional lawyer dealing with clients of diminished capacity.³⁹ Model Rule 1.7(b) provides that

There are a variety of views about how decisions should be made in the face of the client's inability to decide. Approaches for making decision[s] on behalf of a client include following the client's expressed instructions, promoting what the attorney believes is in the person's "best interests," taking an "advocacy" position to retain the greatest freedom for the client, relying upon the family for direction, and making a "substituted judgment" to do what the particular client would most likely have wished. While each approach has certain merits, the attorney for the limited elderly client should engage in gradual counseling and be prepared to make a "substituted judgment" for the client who is not competent to act in his own interests.

Smith, *supra* n. 19, at 97.

38. Whitton, *supra* n. 26, at 52 (footnotes omitted).

39. Model Rule 1.7 addresses conflicts of interest. The first four comments to the rule fall under the heading of "Loyalty to a Client." ABA Model R. Prof. Conduct 1.7. Model Rule 1.6 addresses confidentiality of information. ABA Model R. Prof. Conduct 1.6.

[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 interest, unless: (1) the lawyer reasonably believes the representation will not be adversely affected; and (2) the client consents after consultation.⁴⁰

A lawyer who finds it necessary to consult with a diagnostician or other third party to help determine the decision-making capacity of the client conceivably could be acting in his or her own interest.⁴¹ Regarding this dilemma, Comment 4 to Model Rule 1.7 provides the following guidance:

A possible conflict does not itself preclude the representation. The critical questions are the likelihood that a conflict will eventuate and, if it does, whether it will materially interfere with the lawyer's independent professional judgment in considering alternatives or foreclose courses of action that reasonably should be pursued on behalf of the client.⁴²

Arguably, a lawyer who seeks the help of third parties is acting to maintain the lawyer's independent, professional judgment to competently represent the client. Once a lawyer has a better understanding of the client's capacity to make decisions, the lawyer can then decide whether to continue with the representation, which might include taking protective actions on behalf of the client.

According to Model Rule 1.6,⁴³ there is an exception to the confidentiality rules that would allow a lawyer to disclose enough information "to prevent the client from committing a criminal act that the lawyer believes is likely to result in imminent death or

40. ABA Model R. Prof. Conduct 1.7(b).

41. Rein, *supra* n. 31, at 1149. Rein reasoned, "[W]hen a lawyer who wonders if her client is partially or wholly incompetent consults a diagnostician, the lawyer arguably acts in her own interest and on her own behalf to the extent that she seeks to avoid disciplinary action or malpractice claims." *Id.*

42. ABA Model R. Prof. Conduct 1.7 cmt. 4.

43. All citations to the Model Rule 1.6 are to the 2001 Edition of the ABA Model Rules of Professional Conduct, published in 2000. In February 2002, the ABA House of Delegates gave final approval to a revision of Model Rule 1.6. ABA Ctr. Prof. Resp., *supra* n. 12. The revised Model Rule 1.6 and commentary are reprinted in full at 31 Stetson L. Rev. at 856-862.

substantial bodily harm.”⁴⁴ Does this exception allow the lawyer who believes his client is incompetent to consult with third parties, such as a physician, regarding the client?

Model Rule 1.14(b) provided that “[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.”⁴⁵ The Model Rule also allowed the lawyer to “seek guidance from an appropriate diagnostician.”⁴⁶ Apparently, Model Rule 1.14 allowed a further exemption to Model Rule 1.6. Clifton B. Kruse, Jr., writing in a recent *NAELA Quarterly* article that reviewed the Model Rules and the ABA Ethics 2000 changes to the Model Rules, suggested that

although ethics opinions in some states are to the contrary, the preferable view is that Model Rule 1.6 impliedly authorizes the attorney to disclose information relating to the representation to the extent necessary to serve the best interests of the client who the attorney reasonably believes to have diminished capacity.⁴⁷

Withdrawal did not appear to be a viable option for a lawyer concerned about the well-being of an incapacitated client. Would that not be a breach of client loyalty to allow the client to now fend for himself or herself when least capable to do so? The choice of *de facto* guardianship, or protective measures appropriate to

44. *Id.* R. 1.6(b)(1).

45. *Id.* R. at 1.14(b).

46. *Id.* R. 1.14 cmt. 5.

47. Clifton B. Kruse, Jr., *Model Rule 1.14 — Lessons Learned from Patch Adams — Ethical Issues Necessarily Considered When Working with Clients under Disability*, 14 *NAELA Q.* 34, 39–40 (Winter 2001). Neither the revised Model Rule 1.6 nor its predecessor expressly address the issue of clients with diminished capacity. Participants at Wingspan — The Second National Guardianship Conference passed Recommendation 61 to allow “[t]he lawyer for the fiduciary of a person with diminished capacity who knows of neglect, abuse or exploitation as defined by state law . . . to disclose otherwise confidential information per Model Rule of Professional Conduct 1.6 to the extent necessary or appropriate to protect the person with diminished capacity.” Wingspan — The Second Natl. Guardianship Conf., *Recommendations*, 31 *Stetson L. Rev.* 595, 608 (2002) [hereinafter *Wingspan Recommendations*]. The *Wingspan Recommendations*, authored by Wingspan Conferees, do not purport to have the endorsement of the Conference’s individual sponsor organizations. To view commentary or dissenting opinions, as well as the *Recommendations* on-line, visit the National Academy of Elder Law Attorney’s Web site at <<http://www.naela.com>>.

the crisis, may have been the only legitimate choice. Indeed, the Model Rules did not appear to provide the lawyer with any other choice.

B. ABA Ethics Opinions

In response to a request from the ABA Commission on Legal Problems of the Elderly resulting from Fordham University School of Law's Conference on Ethical Issues in Representing Older Clients, the ABA Standing Committee on Ethics and Professional Responsibility addressed the specific issue of when a lawyer should take protective action for a client under a disability.⁴⁸ ABA Formal Ethics Opinion 96-404 concluded that the lawyer may take protective action when the lawyer reasonably believes it necessary to do so. Nonetheless, the opinion admonished that "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."⁴⁹ The lawyer may not take protective action "merely to protect the client from what the lawyer believes are errors in judgment."⁵⁰

ABA Formal Ethics Opinion 96-404 gave some guidance on the difficult ethical dilemmas suggested above by Professor Whitton. For example, although the Opinion considered that withdrawal from the representation of a disabled client is ethically permissible as long as it does not adversely affect the client's interests, it concluded that "the better course of action, and the one most likely to be consistent with Rule 1.14(b), will often be for the lawyer to stay with the representation and seek appropriate protective action on behalf of the client."⁵¹

The Opinion specifically addressed what type of guidance a lawyer may seek from others to assess the client's capacity. The lawyer may "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."⁵² The Opinion also specifically stated that a discussion

48. ABA Standing Comm. Ethics & Prof. Resp., Formal Op. 96-404 (1996).

49. *Id.*

50. *Id.*

51. *Id.*

52. *Id.*

with a diagnostician regarding the client's condition is not a violation of Model Rule 1.6 "insofar as it is necessary to carry out the representation."⁵³ The Opinion acknowledged that there may be circumstances when the lawyer may find it necessary "to consult with the client's family or other interested persons who are in a position to aid in the lawyer's assessment of the client's capacity as well as in the decision of how to proceed."⁵⁴

The appropriate protective action should be "the action that is reasonably viewed as the least restrictive action under the circumstances."⁵⁵ While acknowledging that neither Model Rule 1.14(b) nor its comments offered a definition of protective action, the Opinion listed examples of what the action might include:

the involvement of other family members who are concerned about the 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.⁵⁶

Indeed, the Opinion implied that a lawyer should function as a *de facto* guardian in seeking the least restrictive alternatives before "resorting to a guardianship petition."⁵⁷

Once a lawyer finds that a guardian should be appointed for the client, the lawyer may go ahead and file the petition for guardianship.⁵⁸ "However, nothing in the rule suggests that the lawyer may represent a third party in taking such action," the Opinion observed, concluding "that a lawyer with a disabled client should not attempt to represent a third party petitioning for a guardianship over the lawyer's client."⁵⁹ The Opinion

53. *Id.*; see ABA Standing Comm. Ethics & Prof. Resp., Informal Op. 89-1530 (1989) (concluding that "a lawyer may consult a client's physician concerning a medical condition which interferes with the client's ability to communicate or make decisions concerning the representation even though the client has not consented and is currently incapable of doing so").

54. ABA Standing Comm. Ethics & Prof. Resp., Formal Op. 96-404. For additional analysis on the possible need to consult family members, see Clifton B. Kruse, Jr., *My Basement Is Filled with Pornography*, 12 NAELA Q. 33 (Winter 1999).

55. ABA Standing Comm. Ethics & Prof. Resp., Formal Op. 96-404.

56. *Id.*

57. *Id.*

58. *Id.*

59. *Id.* Wade, in his useful overview of the history of Model Rule 1.14 and subsequent

recognized that there may be instances when the lawyer who files a guardianship petition under Model Rule 1.14(b) also might seek to have himself or herself appointed guardian, but disfavored such an appointment “except in the most exigent of circumstances, that is, where immediate and irreparable harm will result from the slightest delay.”⁶⁰

In conclusion, the ABA Formal Ethics Opinion 96-404 recognized that the lawyer may find it necessary to function in the role of *de facto* guardian by taking protective actions if the client cannot adequately act in the client’s own interest. However, that same lawyer should not subsequently seek to be appointed the client’s guardian.⁶¹

commentaries, notes that this practice may be overly broad. Wade, *supra* n. 19, at 38. He offers several instances in which it might be preferable for the lawyer to represent a third party petitioning for a guardianship over the lawyer’s client. For example:

Suppose a lawyer represented a client and is well acquainted with the client’s family and the family relationships. Assume that property and medical powers of attorney have been executed with children as agents, but a situation has arisen in which the power of attorney cannot be utilized and limited protected proceedings are necessary. Assume also that it is reasonable to conclude that the client, if capable, would support the petition. Why should the family be required to hire other counsel to represent the petitioner, especially if, under the Opinion, the lawyer himself or herself could be the petitioner and the lawyer would be permitted to represent the guardian once appointed?

Id.

60. ABA Standing Comm. Ethics & Prof. Resp., Formal Op. 96-404.

61. *Id.* The Opinion found that the lawyer who petitions for the appointment of a guardian should not represent any third party interested in becoming the guardian. However, the Opinion does not mention the following dilemma: May a lawyer, who has previously represented a client who is now of diminished capacity and the proposed ward in a guardianship proceeding brought by a third party, continue to represent that client as the defendant in the guardianship proceeding? What if that lawyer, as permitted to do so in the Opinion, has disclosed confidential information to the limited extent necessary to assist the third person in filing the petition? If the client can agree to the lawyer’s representation, then the lawyer should attempt to explain to the client the disclosure that has taken place. If the client still wants the lawyer to represent him, then presumably the lawyer may proceed. If the client is incapable of communicating any decision to the lawyer, and the lawyer wants to continue to represent the client in the guardianship proceeding, the lawyer should seek appointment from the court as legal counsel for the proposed ward at the outset of the proceeding. The 2001 Wingspan Conference passed several recommendations regarding the multiple roles of the lawyer as fiduciary. Specifically, Recommendation 62 proposes that

[a] lawyer petitioning for guardianship of his or her client *not*: (a) be appointed as the respondent’s counsel; (b) be appointed as the respondent’s guardian ad litem for the guardianship proceeding; and (c) seek to be appointed guardian except in

C. State and Local Bar Ethics Opinions

Several states have issued ethics opinions that allow a lawyer to disclose confidential information concerning a client's competency when the lawyer determines that such a disclosure would be in the best interests of the client. Alabama allows a lawyer whose client has become incompetent to file a petition for appointment of a guardian and advises the lawyer to file the petition if the lawyer believes it is in the client's best interests.⁶² Michigan allows a lawyer to seek the appointment of a guardian or take other protective action if the lawyer reasonably believes the client cannot adequately act in the client's own interest.⁶³ Nebraska also allows a lawyer to disclose confidential information to the extent necessary to protect the client's best interests.⁶⁴ Pennsylvania has several opinions that allow a lawyer to disclose confidential information to the extent necessary to protect the client's interests, including seeking a guardianship or other protective measures.⁶⁵ Oregon allows the lawyer to disclose confidential communications to family members to avoid the necessity of a protective proceeding.⁶⁶

Other jurisdictions, notably California, prohibit the lawyer

exigent or extraordinary circumstances, or in cases where the client made an informed nomination while having decisional capacity.

Wingspan Recommendations, *supra* n. 47, at 608.

62. Ala. St. B. Off. Gen. Counsel, Formal Op. 95-03 (1995) (advising lawyers that any doubts about whether to "seek the appointment of a guardian should be resolved in favor of [the client's] 'best interest'"). Alabama ethics opinions appear to permit a lawyer to divulge confidential information to an independent diagnostician without the consent of the client if the lawyer believes the client lacks capacity to act in the client's interest. Specifically, Formal Opinion 95-06, which also permitted a lawyer to file a petition for guardianship of an incompetent client, held that Alabama ethics rules allow a lawyer to "disclose such confidential information as may be required to adequately represent [the] client and advance [the] client's interest." Ala. St. B. Off. Gen. Counsel, Formal Op. 95-06 (1995). Formal Opinion 95-03, meanwhile, contemplated that a lawyer, in assessing the client's competency, would consider the "opinions of medical experts." Ala. St. B. Off. Gen. Counsel, Formal Op. 95-03.

63. St. B. Mich. Standing Comm. Prof. Ethics, RI-76 (1991); *see* Thomas K. Byerley, *Focus on Professional Responsibility—Representing the Incompetent or Disabled Client*, 77 Mich. B.J. 1320 (Dec. 1998) (examining RI-76 in light of the ABA Model Rules of Professional Conduct).

64. Neb. B. Standing Comm. Prof. Ethics, Advisory Op. 91-4 (1991).

65. *E.g.* Pa. B. Assn. Comm. Leg. Ethics & Prof. Resp., Informal Op. 91-36 (1991); Pa. B. Assn. Comm. Leg. Ethics & Prof. Resp., Informal Op. 90-89 (1990).

66. Or. St. B. Assn. Bd. of Govs., Formal Op. 1991-41 (1991).

from taking such action on the premise that the lawyer may not initiate a conservatorship on the client's behalf without the client's consent.⁶⁷ Such action would breach confidences of the client and constitute a conflict of interest.⁶⁸ However, the Bar Association of San Francisco's Legal Ethics Committee permits, but does not obligate, an attorney to take action to protect a client's person and property if the attorney reasonably believes that the "client is substantially unable to manage his or her own financial resources or resist fraud or undue influence."⁶⁹ An attorney with such a reasonable belief may recommend appointment of a trustee, conservator, or guardian ad litem. According to the San Francisco Bar, "The attorney has the implied authority to make limited disclosures necessary to achieve the best interests of the client."⁷⁰

The Association of the Bar of the City of New York (NYC Bar) recently posed the following ethical questions for lawyers dealing with clients of questionable capacity:

How does an attorney determine if a client is competent to make decisions or appreciate the significance of legal options? If the client is not competent, or if the client's competence is questionable, must the attorney follow the client's instructions or may the attorney act in what the attorney believes to be the client's best interests? Should the attorney seek instead to have a guardian appointed and, if so, how can the attorney ask for a guardian without breaching client confidentiality? Can the attorney seek assistance from family members, physicians or other third parties?⁷¹

As the NYC Bar's Committee on Professional Responsibility noted, New York does not follow the Model Rules and New York lawyers have little guidance in this area.⁷² The NYC Bar concluded that New York should adopt a new rule "virtually identical to Model Rule 1.14," revise or expand other rules "to make clearer the standards lawyers should use to determine

67. St. B. Cal., Standing Comm. Prof. Resp. & Conduct, Formal Op. 1989-112 (1989).

68. *Id.*

69. B. Assn. S.F. Leg. Ethics Comm., Op. 1999-2 (1999). The Authors thank Bruce Ross for bringing this Opinion to their attention.

70. *Id.*

71. Comm. Prof. Resp., *supra* n. 20, at 34-35.

72. *Id.* at 35.

whether a client is competent,” and to allow New York attorneys to reveal “client confidences and secrets . . . to the limited extent necessary to inform courts and appropriate professionals about apparent client incompetence.”⁷³

After surveying judges, lawyers, and other professionals, the NYC Bar determined that New York should adopt the Model Rule 1.14 best interests approach, with a specific change to section (b) to reverse the order of actions a lawyer may take.⁷⁴ The NYC Bar recommended that “[a] lawyer may take protective action with respect to a client or seek the appointment of a guardian, only when the lawyer reasonably believes that the client cannot adequately act in the client’s own interest.”⁷⁵ The Model Rule 1.14 approach, and the approach taken in those states that follow the rule, is to suggest that the lawyer may first seek the appointment of a guardian.

To assist lawyers in determining whether a client is competent and to better understand the parameters of protective action, the NYC Bar recommended this amendment to its ethics rules:

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. Absent a court decision determining the client’s incompetency, or a clear indication that the client is incompetent such as coma or severe mental retardation, the attorney must exercise caution in determining whether a

73. *Id.* at 35–36.

74. *Id.* at 43.

75. *Id.* The NYC Bar’s Committee on Professional Responsibility studied carefully the *Report of the Working Group on Client Capacity*, 62 *Fordham L. Rev.* 1003 (1994) [hereinafter *Fordham Working Group*], emanating from the Conference on Ethical Issues in Representing Older Clients at Fordham University School of Law in 1993. The reversal of protective action and seeking the appointment of a guardian from Model Rule 1.14 was based on the Working Group’s recommendation to emphasize the priority of other protective action and the NYC Bar’s own conclusion 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.” *Comm. Prof. Resp.*, *supra* n. 20, at 43.

client cannot act on his or her own behalf. In making this determination, the attorney may seek guidance from an appropriate diagnostician, and may consider and balance factors including but not limited to the following: the client's ability to articulate the reasoning behind the particular decision in question; the variability of the client's state of mind; the client's ability to appreciate the consequences of the decision; the irreversibility of the decision; the substantive fairness of the decision, and the consistency of the decision with the lifetime commitments of the client. If a client's competence is called into question, the attorney should attempt to continue the representation and take appropriate protective action; seeking to withdraw should be a last resort. In determining what protective action to take, the lawyer's actions should be guided by the wishes and values of the client to the extent known; otherwise, according to the client's best interests.⁷⁶

As the NYC Bar noted,⁷⁷ these recommendations were based on the Comment to Model Rule 1.14, which itself was based on the report of the Fordham Working Group on Client Capacity.⁷⁸ Even though the Model Rules and the Fordham Working Group did not include a provision regarding withdrawal, the New York provision was "consistent with the majority view that withdrawal is the least favored option in this situation."⁷⁹

Finally, the NYC Bar's Committee on Professional Responsibility recommended a rule change to allow a lawyer to reveal "[c]onfidences and secrets to the extent necessary to seek judicial or professional assistance for a client whom the attorney reasonably believes cannot act in the client's own best interest."⁸⁰ This recommendation is consistent with ABA Formal Opinion 96-404, which permits disclosure to assess a client's capacity, but does not go as far as the Opinion.⁸¹ The NYC Bar does not agree that disclosures can be made to the client's family or other interested persons who are in a position to aid in the lawyer's assessment of the client's capacity as well as the decision of how

76. Comm. Prof. Resp., *supra* n. 20, at 43-44.

77. *Id.* at 44.

78. The Fordham Working Group is discussed in *supra* note 75.

79. Comm. Prof. Resp., *supra* n. 20, at 44.

80. *Id.*

81. *Id.* at 45.

to proceed.⁸² The Association of the Bar of the City of New York concluded that this broad abrogation of the attorney-client privilege should not be permitted.⁸³

D. *ACTEC Commentaries*

The American College of Trust and Estate Counsel's *Commentaries on the Model Rules of Professional Conduct*⁸⁴ concluded that Model Rule 1.14(b) should be followed:

A lawyer who reasonably believes that a client is unable to act on his or her own behalf may, but is ordinarily not required to, seek the appointment of a guardian or take other protective action with respect to the client's person and property.⁸⁵

The emphasis here was that the lawyer is not required to take protective action but may do so when he or she reasonably believes that such action is appropriate.

The *ACTEC Commentaries* supported the view regarding disclosure of the client's condition expressed in the ABA Informal Opinion 89-1530.⁸⁶ As with the Informal Opinion, the *Commentaries* provided that the lawyer's authority to disclose otherwise confidential information was implied:

[T]he lawyer for a client who appears to be disabled may have implied authority to make disclosures and take actions that the lawyer reasonably believes are in accordance with the client's wishes that were clearly stated during his or her competency. If the client's wishes were not clearly expressed during competency, the lawyer may make disclosures and take such actions as the lawyer reasonably believes are in the client's best interests.⁸⁷

The *Commentaries* to Model Rule 1.14 also dealt specifically with the ethical issues facing a lawyer who acts as lawyer either for the guardian or for the ward. A lawyer who is retained by a guardian for the disabled person stands in a lawyer-client

82. *Id.* at 45 n. 33.

83. *Id.* at 45.

84. *Supra* n. 13.

85. *ACTEC Commentaries, supra* n. 13, at 217.

86. This point is discussed in *supra* note 53.

87. *ACTEC Commentaries, supra* n. 13, at 217.

relationship with the guardian and not the disabled person. The lawyer still owes some duties to the disabled person, however, even if the lawyer for the guardian never provided representation for the disabled person.⁸⁸ The *Commentaries* also stated that “a lawyer who represented a now disabled person as a client prior to the appointment of a fiduciary may be considered to continue to represent the disabled person,” even if the disabled person’s incapacity might prevent the person from actually entering into a contract or a clear legal relationship with the lawyer.⁸⁹

Emphasizing the best interests of the disabled person, the commentary provided that a lawyer may take the protective action of asking family members or the court to appoint a guardian ad litem or another lawyer for the disabled person.⁹⁰

The *ACTEC Commentaries* to Model Rule 1.14 never mentioned the notion of the lawyer acting as a *de facto* guardian for a disabled client. Nonetheless, the various commentaries to the rule all support the taking of protective action by the lawyer if the lawyer reasonably believes the action would serve the best interests of the client.⁹¹

E. Putting the Rule to Work

While we do not disagree with Professor Whitton’s list of ethical dilemmas that might possibly confront a lawyer who represents a client of questionable capacity,⁹² we do believe that a lawyer may, and under certain circumstances should, take protective measures and even act as a *de facto* guardian to protect the client from immediate and irrevocable harm. A lawyer should take appropriate protective action only if required by the circumstances.⁹³ Indeed, it is possible to reach the conclusion

88. *Id.* at 219.

89. *Id.*

90. *Id.* at 220.

91. *ACTEC Commentaries* also note, however, that some jurisdictions may not allow a lawyer to seek the appointment of a guardian for an apparently disabled client to consult with a diagnostician regarding the condition of such a client based on the lawyer’s duty of confidentiality to the client. *Id.* at 218.

92. Whitton, *supra* n. 26, at 52 (quoted in text accompanying *supra* note 38).

93. *Fordham Working Group*, *supra* n. 75, at 1009. In its report, the Working Group on Client Capacity developed a statement of fundamental principles to guide the lawyer who determines that protective action is needed. Principle number three stated: “If the lawyer decides to act as *de facto* guardian, he or she, when appropriate, should seek to

that, in some circumstances, doing anything less than taking appropriate protective action would be a breach of client loyalty and confidentiality. It would also be a failure on the part of the lawyer to adhere to the roles set out in the Model Rules as “representative of clients, an officer of the legal system, and a public citizen having special responsibility for the quality of justice.”⁹⁴

Imagine the following scenario:⁹⁵ A public-interest lawyer welcomes a new client who has just walked in off the street. The client is not speaking very clearly but is able to identify herself and to indicate that she needs the lawyer’s help. The lawyer learns, using the maximizing-of-capacity tips suggested above,⁹⁶ that the client is living in the apartment in which she has lived for twenty years, and where the manager has been helping her take care of personal matters. The manager regularly calls a cab and puts the client in the cab with money. The cab takes the client to the grocery store and back. The manager helps the client with meals and has arranged for her to receive Meals on Wheels.⁹⁷ The manager also helps the client write out checks to pay her few bills. However, the client has begun to wander out of the building, often without any clothing. She gets lost and luckily the police have been able to get her back home. The manager is now unable to continue caring for her because the landlord has told the manager to evict the client after her last naked wandering episode. The client managed to get to the lawyer’s office because the manager got her a cab and handed her the

discontinue acting as such as soon as possible and to implement other protective solutions.” *Id.* Thus, while seeking to limit the extent of the *de facto* lawyer/guardian’s intervention, the group nonetheless recognized the very possible need for the lawyer to act in this role under appropriate circumstances.

94. ABA Model R. Prof. Conduct preamble ¶ 1.

95. The Authors thank JoAnna Sagers, attorney with the Legal Aid Society of Salt Lake, for providing insight into a similar case scenario with very different facts and outcomes.

96. Sabatino, *supra* n. 34, at 2–4 (suggesting four steps to help the lawyer optimize a client’s capacity for decision-making).

97. Meals on Wheels is a national program that provides meals to homebound seniors. The program, which is regulated by the *Older Americans Act*, 42 U.S.C. §§ 3001–3058 (1994 & Supp. 1999), is locally based and depends heavily on volunteers for the preparation and distribution of the meals to seniors determined to be eligible for the program under the locally established criteria. 42 U.S.C. § 3027(8)(A) (1994) (providing for local control of in-home nutrition programs within federal guidelines).

eviction notice so that she would be sure to take it to the lawyer.

The client is able to describe her living situation and the help she receives from the manager. She is not aware of her wandering but understands that, because of the eviction, she will have to leave her apartment. She does not understand why, but has come to the lawyer because the manager told her to do so. She wants the lawyer to help her. She wants to stay in her apartment but is afraid that people will kick her out and make her go to a nursing home. She has no family. She appears to have no assets other than her few personal belongings and social security pension income. She agrees to let the lawyer telephone the manager for more information about the eviction.

The lawyer learns from the manager that the landlord no longer wants the client there because of her wandering, nakedness, disturbance to other tenants, and the belief that the manager is spending too much time caring for the client.

The lawyer discusses these issues with the client, who says that she does go out of her house from time to time but does not understand why this should disturb her neighbors. The lawyer realizes that the client is having some difficulty concentrating and responding appropriately. The lawyer is familiar with minimal status exams and asks the client if she would allow him to ask her some questions so that the lawyer can better understand how her mind is working. The client agrees and scores low enough on the exam to cause the lawyer some concern. What is the lawyer to do?

The lawyer finds out as much as possible about the client's background and future desires. She is not able to describe, for example, how she might manage on her own without the manager. She agrees finally to go to a doctor for some evaluation and to have the lawyer negotiate on her behalf with the landlord for an extension while she is being evaluated.

As it turns out, the client is suffering from a form of dementia and the doctors believe that she needs the type of assistance available in assisted living. However, there are no assisted living facilities that accept Medicaid, and the client will have to go to a nursing home with an Alzheimer's unit. There is nobody to take the client around to see her housing options. What is the lawyer to do? Can the lawyer engage others to help the client? Can the lawyer disclose enough about the client to have social-services agencies come into the client's life to help her

choose an appropriate place to live, move, and organize all necessary financial papers to enter the facility?

After discussing her options, the client very much wants the lawyer to handle all these matters for her and even allows the lawyer to disclose necessary information about her condition to third parties to make arrangements for her. The lawyer has the local area agency on aging provide transportation for the client to visit several facilities. They discuss the options, and the client chooses, with a great deal of prompting by the lawyer. The lawyer contacts another agency to help with the packing and moving. A senior companion volunteer now assists the client in moving into the new facility, and the lawyer helps fill out the paperwork so that the client's application for Medicaid is properly filed. The lawyer also applies to the Social Security Administration for the nursing home to become the client's representative payee. The client moves into the new facility and appears fairly oriented and happy a few weeks later when the lawyer visits her.

This is a scenario with a result that is arguably the best one for the client under the circumstances. The lawyer was able to help a client who, although of diminished capacity, was still able to direct the lawyer and consent to a wide variety of actions taken on her behalf. But should the lawyer have taken all these actions? Was the lawyer the appropriate person to do so? In this case, was the lawyer actually functioning as a *de facto* guardian, or was the lawyer merely following the directions of his or her client? Certainly, if the lawyer had not done everything possible to maximize the client's capacity, to understand the client's value system, and to assist the client in some levels of decision-making, the case would have turned out differently. The client would have been evicted and possibly become a ward of the state through a public guardianship program.

If the lawyer had taken a very strict view of his or her role and decided that the client was at least capable enough to engage him or her to fight the eviction, then the lawyer would have exposed the client to a difficult court proceeding. Depending on the jurisdiction and the circumstances, the client may have had possible defenses to the eviction. But was the client capable of a court appearance? And if the client had prevailed, would she have been able to exist in her current living situation? In other

jurisdictions, like the one in which one of the Authors practices,⁹⁸ the landlord would have been able, with proper notice, to evict the tenant the following month. The lawyer would have withdrawn after the eviction order was entered, and the client would be out on the street. Does this serve the client, or even any public policy?

If the lawyer had decided, from the first interview, that the client was incapable of understanding her options and therefore unable to engage him or her as her lawyer, the lawyer would not have accepted the case and would have withdrawn from the relationship. Again, where would this client have gone? Would withdrawal serve any purpose but for the lawyer to follow a rule of professional conduct in a very strictly interpreted manner?

If this had been a client of long-standing, should the lawyer have acted any differently? If the client could have given a waiver to the lawyer to contact family members, then the lawyer could have done so, assuming there were any family members to contact. Could the lawyer have moved to the point of acting in what he or she believed to be the client's best interests, even without the clear consent of the client? The answer is yes, but only if the client were exposed to imminent harm. Arguably, eviction of a person who is possibly demented would cause the person to be exposed to imminent harm.

Under Model Rule 1.14, the lawyer decided to take protective actions before resorting to a petition for guardianship. The lawyer believed in the client's abilities and decided to act as *de facto* guardian. Even though the lawyer had no previous relationship with this client and so could not know of the client's interests prior to her incapacity, the lawyer was still able to glean enough information from the client to make informed choices for her based on the client's best interests.

Luckily, this was a public interest lawyer and so the issue of fees being paid directly did not occur. However, the lawyer's time spent negotiating with the landlord to ward off the eviction was certainly billed to the Title IIIB⁹⁹ contract with the local area agency on aging.¹⁰⁰ So, in effect, the lawyer did receive a fee for

98. Mary Jane Ciccarello practices in Utah.

99. 42 U.S.C. § 3026(a)(2)(C) (1994 & Supp. 1999) (authorizing local area agencies on aging to provide and pay for legal services to the elderly).

100. Area agencies on aging are the local entities that provide the services required by the *Older Americans Act*. *Id.* § 3002(a)(17).

legal services rendered. The lawyer did not bill to any funding source the time spent in arranging protective services and new housing for the client. Comment 7 to Model Rule 1.14, which addresses Emergency Legal Assistance, states that the “lawyer should take steps to regularize the relationship or implement other protective solutions as soon as possible. Normally, a lawyer would not seek compensation for such emergency actions taken on behalf of a disabled person.”¹⁰¹

The Fordham Working Group on Client Capacity agreed in a similar situation that ultimately, as lawyers, they would have acted as *de facto* guardians.¹⁰² The reasoning was that this level of protective action was necessary in the emergency situation and was a better approach than taking the next Model Rule 1.14 step of petitioning for the appointment of a guardian. Unless absolutely necessary for a clearly incapacitated person, a petition for guardianship would violate the client’s loyalty and confidentiality because it would reveal the client’s frailty and confusion.¹⁰³

A law student group working for an elder law clinic reached a similar decision in dealing with clients of questionable capacity.¹⁰⁴ In this case, the students were helping a married couple take their own preventive protective action with the husband’s execution of a durable general power of attorney. The students all agreed that they would assist a client of questionable capacity in completing a power of attorney if the client was still capable of a certain level of understanding and if the execution would assist a well-meaning and loving wife to care for her husband without having to resort to the indignation of a guardianship proceeding.¹⁰⁵

101. ABA Model R. Prof. Conduct 1.14 cmt. 7.

102. Tremblay, *Impromptu Lawyering*, *supra* n. 19, at 1436. Tremblay, a member of the Working Group on Client Capacity at Fordham University School of Law’s Conference on Ethical Issues in Representing Older Clients, commented on the group’s efforts to develop guidelines for lawyers dealing with a client of diminished capacity, noting that, even though none of the group viewed the imposition of guardianship in a positive light, all members agreed that “[g]iven a choice between acting for our clients informally and without obtaining permission to do so, and calling to the attention of some official authority our clients’ frailty and confusion, we easily favored the former over the latter.” *Id.*

103. *Id.*

104. Rosenberg, *supra* n. 17, at 422.

105. *Id.* One student in the elder law clinic characterized the student group’s actions in terms of advocacy for the client’s best interests:

The ability of a lawyer to determine that a client needs protective action rather than a formal guardianship reflects the human reality that people generally want to help one another and that lawyers want to help clients protect their own best interests. As the Fordham Conference made clear, however, the protective action should be limited to preserving the status quo and the action should take place only in an emergency where the client's physical or financial well-being are at risk, the client's judgment is impaired, and time is of the essence.¹⁰⁶

In the scenario above, the lawyer did preserve the status quo by protecting the client from eviction, but went further by helping the client to make new housing arrangements. In that case, the client arguably was able to direct the lawyer to take the protective actions. If the client had refused, for example, to leave the apartment even after the medical assessment, the lawyer may have been caught in the ethical dilemma of whether to withdraw at that point from representation or to petition the court for the appointment of a fiduciary, either a guardian ad litem or a guardian.

F. ABA Ethics 2000 Changes to Model Rule 1.14

The ABA Ethics 2000 changes to Model Rule 1.14 support the idea that the lawyer should first take protective action and only in emergency situations look to petitioning for the appointment of a guardian.¹⁰⁷ Indeed, the actions described in the above scenario follow the new rule closely. The new rule changes the underlying concept of disability to diminished capacity, recognizing that

Interestingly, in this case we were acting as zealous advocates within a preventive law orientation, because we thought there was much at stake and wanted to work with Mr. Allen to get the power of attorney signed. The difficulties Mr. Allen exhibited during the two hours he spent at our office, and Mrs. Allen's description of the progression of his disease, raised the possibility that it was "now or never." The cost of not acting swiftly was significant: a formal court proceeding that would culminate in a finding that Mr. Allen was an "incapacitated person." In addition, the costs of the guardianship proceeding would deplete a substantial portion of their assets. In this case, the alternative to litigation had enormous advantages.

Id. (footnotes omitted).

106. *Recommendations of the Conference*, 62 Fordham L. Rev. 989, 990 (1994).

107. Love & ABA Ctr. for Prof. Resp., *supra* n. 11. As noted in *supra* note 23, the ABA House of Delegates adopted the ABA Ethics 2000 changes to Model Rule 1.14 on February 5, 2002. The revised Model Rule 1.14 and commentary are reprinted in full at 31 Stetson L. Rev. 791, 862-866.

capacity is an elusive, changing quality and that many clients may have some level of comprehension that should be honored by legal counsel.¹⁰⁸ Comment 1 states, “[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.”¹⁰⁹

The new rule recognizes that lawyers will first opt to take protective measures before going through a judicial proceeding. The rule also recognizes and gives some guidance to lawyers as to what protective measures could include. And the rule also addresses the particularly thorny issue of how Model Rule 1.14 and Model Rule 1.6 interrelate and what would constitute an exception to the confidentiality rules when dealing with a client of diminished capacity.

The new rule states:

Rule 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, 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.

108. *Id.*

109. ABA Ctr. for Prof. Resp., *E2K Final Rules Part Two* R. 1.14 cmt. 1 <http://www.abanet.org/cpr/e2k-final_rules2.html> (accessed Feb. 6, 2002) (containing the text of the ABA Ethics 2000 revisions to the Model Rules of Professional Conduct and the *Reporter’s Explanation of Changes* following each revised Rule). In 2001, the Wingspan conferees supported in Recommendation 59 the ABA Ethics 2000 revisions to Model Rule 1.14 to give the attorney representing a client with diminished capacity greater flexibility to take protective action and recommended that the revisions be adopted by the ABA and the states. *Wingspan Recommendations*, *supra* n. 45, at 607.

- (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.¹¹⁰

The commentary under the heading "Taking Protective Action" makes it clear that protective measures could include

consulting with family members, using a reconsideration period to permit clarification or improvement of circumstances, using voluntary surrogate decision-making 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 interest 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.¹¹¹

A significant change to Model Rule 1.14 is the deletion in the Comment of the sentence, "If the person has no guardian or legal representative, the lawyer often must act as *de facto* guardian."¹¹² The *Reporter's Explanation of Changes* claims that the "Commission views as unclear, not only what it means to act as a 'de facto guardian,' but also when it is appropriate for a lawyer to take such action and what limits exist on the lawyer's ability to act for an incapacitated client."¹¹³ Thus, instead of viewing the lawyer as *de facto* guardian, the new rule provides the lawyer with specific guidance about the protective measures the lawyer may take if the lawyer reasonably believes that a client is at risk

110. ABA Ctr. for Prof. Resp., *supra* n. 109, at R. 1.14.

111. *Id.* at R. 1.14 cmt. 5. The Model Rule states that the lawyer may take reasonably necessary protective action. In the final report on the proposed changes, commentator Margaret Colgate Love notes that "the Commission decided against including a requirement that a lawyer advocate the least restrictive action on behalf of the client." Love & ABA Ctr. for Prof. Resp., *supra* n. 11.

112. ABA Ctr. for Prof. Resp., *supra* n. 109, at R. 1.14 cmt. 2 (indicating that the sentence had been deleted by a line drawn through it).

113. ABA Ctr. for Prof. Resp., *Model Rule 1.14: Reporter's Explanation of Changes*, *supra* n. 109, at ¶ 2 (under the heading "Commentary").

of substantial physical, financial, or other harm unless other action is taken.

The commentary to Model Rule 1.14 has always suggested that a lawyer would not normally seek compensation for such emergency actions taken.¹¹⁴ Not seeking compensation seems entirely appropriate where the actions are taken without full consent of the client because of the client's severely diminished capacity, and trying to get fees might require requesting the appointment of a conservator, thereby exposing the client to the court.¹¹⁵

G. Should a Lawyer Petition for Guardianship?

If a lawyer finds it necessary to petition for a guardian, what actions should be taken? Here, neither the Model Rules nor other sources provide significant guidance. As noted above, some commentators believe that the lawyer should never engage in such an activity because it means that there is no longer an attorney-client relationship on the basis of agency law and also that any such action would entirely violate client confidentiality and loyalty.¹¹⁶

But the situation poses difficult policy issues as well. In our hypothetical above, if the client were in a more severely compromised mental state and were absolutely unable to articulate where she wanted to live, or to engage the lawyer to assist with the pending eviction or any other legal action, but the lawyer had nonetheless been contacted by the manager, what steps could the lawyer take?

In such a situation, it would be possible for the lawyer to remain well within the boundaries of being a lawyer and not a *de facto* guardian. The lawyer could represent the manager and petition for the manager to become the guardian. If the manager did not seek appointment as guardian, but was the only person

114. ABA Model R. Prof. Conduct 1.14 cmt. 7.

115. The Fordham Working Group on Client Capacity added a mandatory rule that “[a] lawyer who acts pursuant to this rule may not seek a fee for services rendered in this capacity.” *Fordham Working Group*, *supra* n. 75, at 1012. The Fordham Conference plenary session deleted this rule because a majority of conferees concluded that the question of whether and when a fee may be appropriate needed further study and deliberation. See Tremblay, *Impromptu Lawyering*, *supra* n. 19, at 1433 (arguing in support of the Working Group’s rule instructing the lawyer not to seek fees).

116. *E.g.* Whitton, *supra* n. 26, at 43.

who had contacted the lawyer, the lawyer could refer the manager to Adult Protective Services, or some other public or private guardianship agency that might petition for guardianship.¹¹⁷

What if the client had been a former client — in a Medicare appeal case, for example — and the client, while very confused, was still able to contact the lawyer for help with the eviction? When the lawyer realized that the client was not able to function on her own and there really were no other arrangements that could be made for her because of her inability to communicate effectively, should the lawyer petition for the appointment of a guardian, presumably a third party and not the lawyer? Suppose there is absolutely no one else around to help her. It is clear that her incapacity is sufficient that she will need a guardianship. If there is a public guardian program, could the lawyer contact them to petition? Yes. And the lawyer could even represent the ward, because there is no ethical duty for the lawyer to zealously advocate from an adversarial standpoint to the point of blocking the guardianship when the client desperately needs help.¹¹⁸ The ABA Formal Opinion 96-404 does state that, if the lawyer needs to initiate the guardianship by filing the petition, he or she

117. See generally Alison Barnes, *The Virtues of Corporate and Professional Guardians*, 31 Stetson L. Rev. 941 (2002) (discussing how professional guardians and guardianship agencies may better serve the older person in need than family or informal support arrangements).

118. Fleming & Morgan, *supra* n. 6, at 749–750. Fleming and Morgan explicate the lawyer's duty in this circumstance:

If the lawyer is appointed to represent a clearly incapacitated individual in an incapacity proceeding, no ethical or legal rule requires the lawyer to mount a vigorous defense, calling multiple witnesses and demanding further evaluations. Although the American justice system is generally adversarial, incapacity proceedings are not necessarily treated as such. State law determines questions such as whether the proceeding will be adversarial, whether there is a right to a jury trial, and the amount of due process. Lawyers are tempted to be paternalistic, to protect the demented client by acting in her best interest, rather than advocating her wishes. However, in an incapacity proceeding, the lawyer's duty is to protect the client's constitutional and statutory rights, to advise the client of alternatives (at least to the extent that the client can understand such explanations), to ensure that the evidence of need for the guardianship meets the appropriate legal burden of proof, and to evaluate the motivations and suitability of the proposed guardian.

Id. (footnotes omitted).

should then not represent either party.¹¹⁹ Also, the lawyer should not petition and then become the guardian or the lawyer for the guardian.¹²⁰ Even in a situation in which there are very few services available, and very few lawyers in the region, to then become the lawyer for the guardian would smack of impropriety and self-serving. The client of diminished capacity is not able to waive the representation and may very well need to come back to that lawyer at some other point. There is no need for the lawyer to actively represent a ward, but the lawyer should be able to represent the ward if necessary.¹²¹

As noted above, the lawyer has some guidance from the Model Rules and ABA Opinions.¹²² The lawyer must certainly follow the laws of the jurisdiction. California prohibits the lawyer from petitioning for guardianship or conservatorship without the client's consent.¹²³ However, other jurisdictions may require the lawyer to take protective action when that action is in the client's best interests.¹²⁴ Of course, this approach means that the lawyer is able to make the determination of the client's best interests and requires the lawyer to disclose confidential information in order to protect the client.¹²⁵ Is this necessarily bad public policy?

119. ABA Standing Comm. Ethics & Prof. Resp., Formal Op. 96-104.

120. *E.g.* Fla. Stat. § 744.331(2)(b) (2001) (providing that "[a]ny attorney representing an alleged incapacitated person may not serve as guardian of the alleged incapacitated person or as counsel for the guardian of the alleged incapacitated person or the petitioner").

121. The *ACTEC Commentaries* suggest that a

lawyer who represented a now disabled person as a client prior to the appointment of a fiduciary may be considered to continue to represent the disabled person. Although incapacity may prevent a disabled person from entering into a contract or other legal relationship, the lawyer who represented the disabled person prior to incapacity may appropriately continue to meet with and counsel him or her.

ACTEC Commentaries, *supra* n. 13, at 219.

122. *Supra* nn. 23-61 and accompanying text (discussing the relevant ABA Model Rules and ethics opinions).

123. St. B. Cal. Standing Comm. Prof. Resp. & Conduct, *supra* n. 67 (advising that a lawyer who initiated conservatorship proceedings without the client's consent would necessarily breach the client's confidences and create a conflict of interest with the client).

124. *E.g.* Comm. on R. Prof. Conduct of St. B. Ariz., Op. 90-12 (1990).

125. Fleming & Morgan, *supra* n. 6, at 757. Fleming and Morgan considered an Oregon Bar ethics opinion, discussed in text accompanying *supra* note 66, as well as an ethics opinion from Maine that allowed the lawyer to consult the client's child or the state's guardianship service if the lawyer believed that the client lacked capacity to make rational financial decisions. Me. Prof. Ethics Comm. of Bd. Overseers of B. Op. 84 (1988). Fleming and Morgan concluded, "These opinions, in allowing the attorney to contact a third party,

As one commentator pointed out recently, perhaps the duty of the lawyer here confronting a similar situation is to “Do No Harm.”¹²⁶ Certainly, the approach of saying that, based on agency laws, the lawyer must terminate the relationship does harm. In some cases, the lawyer may be the only person on whom the client may rely. Indeed, the client may expect the lawyer to take protective action to safeguard her. Most clients will not take the hard line of strict ethical professional rules when they need guidance and protection.¹²⁷ The niceties of legal constructs appear to break down when people need help.

This does not suggest that lawyers should take a hands-on, overbearing, paternalistic approach to clients of diminished capacity. Just the opposite. When a competent lawyer has done everything possible to ascertain the decision-making capacity of a client and realizes, based on his or her best knowledge and understanding, that the client is not capable of protecting her interests and may be in a crisis state, then the lawyer should act, stay with it, and not terminate the relationship. At least one commentator in Florida asserts that the “attorney representing allegedly incapacitated individuals has a duty to protect the clients while preventing the courts from intervening unnecessarily in their

impliedly or explicitly overrule or at least limit the application of client confidentiality in favor of a more paternalistic approach of seeking out others to assist the client.” Fleming & Morgan, *supra* n. 6, at 757.

126. Kruse, *supra* n. 47, at 34.

127. A recent study on decision-making by older individuals in need of long-term care may provide an analogy to the lawyer as *de facto* guardian dilemma. Marshall Kapp, *Consumer ‘Choice’ in HCBC: A Test of Theory vs. Reality*, 22 *Aging Today* 4 (July/Aug. 2001) (summarizing the results of his study, *Consumer Choice in Home and Community-Based Long Term Care: Policy Implications for Decisionally Incapacitated Consumers*, copies of which are available free from the Ohio Long-Term Care Research Project, Scripps Gerontology Center, Miami University, Oxford, Ohio 45056). Kapp studied the “consumer-directed” model of health-care decision-making, which presumes that individuals in need of care are independent, autonomous consumers in the marketplace, who are capable of determining what sort of long-term care arrangements suit them best. This model, however, does not comport with practical reality. Families and health-care providers dominated the decision-making process, often with little involvement by the older individuals, many of whom had suffered a sudden decline in ability. Kapp concluded, “This research made it clear that practicality and efficiency in messy situations frequently trump the niceties of precise legal theory about autonomous decision-making processes.” *Id.* at 4. The lawyer of a client with questionable capacity similarly may be expected to be practical and efficient for the client in need.

lives.”¹²⁸ Treating a client with dignity and respect does mean respecting confidences, but not when life itself is at stake. Lawyers always are bound by professional rules and are trained in many matters. They are well suited to step into the breach and work out solutions.

The NYC Bar Committee on Professional Responsibility disagreed with the Fordham Working Group’s suggestion to permit an attorney to assist an incompetent client without the client’s permission even under extreme circumstances.¹²⁹ The Authors of this Article agree with the Fordham Working Group on Client Capacity and the ABA Ethics 2000 changes to Model Rule 1.14. The legal profession has the public obligation to protect. If a true emergency exists, and the lawyer reasonably believes in good faith that no other lawyer is available or willing to act on behalf of the purported client, then the lawyer should act. New York’s objections are valid — in extreme circumstances a lawyer may be put into a position that is inherently suspect. But the alternative is putting the client in a position of extreme vulnerability.

The best approach may be one of making as good an assessment as possible, advising the client as clearly as possible, and then taking protective action, including, as the last resort in an emergency situation, petitioning the court for the appointment of a fiduciary — guardian ad litem, conservator, or guardian — and letting the court be the examiner and judge of the relevant facts.

H. Recommendations for Lawyers Acting as *De Facto* Guardians

Lawyers function with very little guidance when dealing with clients of questionable capacity. But remaining locked in the position that the lawyer may not take affirmative acts to protect the client when the client is vulnerable is not a realistic approach. Based on the preceding discussion, the Authors suggest the following recommendations in terms of Model Rule 1.14 and whether a lawyer should take protective action on behalf of a client of diminished capacity and whether the lawyer should

128. Donna R. Blaustein, *Real Property, Probate, and Trust Law: Estate Planning for Incapacitated Individuals: Some Proposals for Practitioners*, 70 Fla. B.J. 92, 92 (June 1996).

129. Comm. Prof. Resp. *supra* n. 20, at 45–46.

petition for protective arrangements, such as the appointment of a guardians ad litem, or for a guardian.¹³⁰

- Lawyers should serve their clients as zealous advocates for as long as the client is capable of providing direction as to the legal action.
- Lawyers should make every effort to help clients maximize capacity and should make every effort to follow the Fordham Conference's recommendations on client capacity.¹³¹
- Incapacity should not be viewed, because of strict reliance on agency principles, as an automatic termination of the client-lawyer relationship in most circumstances.
- If the lawyer determines that the client is not capable of making certain decisions that must be made to protect the client from imminent harm, then the lawyer may take protective actions based on the client's previously expressed wishes. If those wishes are unknown or unclear to the lawyer, then the lawyer may act in the client's best interests. The protective actions are those suggested in the ABA Ethics 2000 changes to Model Rule 1.14.¹³²
- In emergency situations, a lawyer should serve as *de facto* guardian to achieve protection of the client. Such action is necessary to protect only in an emergency situation and should attempt only to maintain the client's status quo.
- In an emergency situation only, and if possible within the jurisdiction, the lawyer should attempt judiciary

130. Further recommendations appear in Part III *infra*.

131. *Recommendations of the Conference, supra* n. 106, at 989–992 (recommending changes to the Model Rules and offering practice guidelines on issues of client capacity).

132. ABA Model R. Prof. Conduct 1.14 cmt. 5 (as amended February 5, 2002, reprinted at 31 Stetson L. Rev. at 863–864). Comment Five is entitled “Taking Protective Action.” *Id.*

involvement short of petitioning for guardianship. Such attempts could include a request for appointment of a court visitor or guardian ad litem. If such a request is possible, the lawyer should disclose only as much as necessary to the judge, and possibly within closed chambers. This is desirable especially in certain situations, rural settings for example, where there are simply no other resources and withdrawal would mean abandonment of a person in need.

- If the lawyer finds it absolutely necessary to petition for guardianship, then the lawyer should not also serve as guardian or as lawyer for the guardian unless this was the express desire of the client prior to incapacity.
- A lawyer may not seek a fee for protective services rendered by the lawyer who has determined that the client is in need of protective and/or emergency assistance.

Ultimately, there are few ways to completely avoid emergency situations. Long-term planning for clients and for communities is important. Such planning would include:

- Better education of the public about the need to plan ahead.
- Better education of lawyers about the needs of persons with diminished capacity and about the community resources that support such persons.
- Better support for accessible legal services for older and vulnerable adults such as those services contemplated under the *Older Americans Act*.¹³³

133. 42 U.S.C. § 3026 (1994 & Supp. 1999) (directing each area agency on aging to provide to "older individuals with the greatest need" a "comprehensive and coordinated system of services," including "nutrition services," "multi-purpose senior centers," "transportation to other services, outreach and case-management services," in-home supportive services, specifically "to victims of Alzheimer's disease and other brain dysfunction," and legal assistance).

- Better education of judges about how to handle emergency situations and how to deal with persons functioning as *de facto* guardians and their wards.
- Better public programs to keep vulnerable adults within the community with support services that would help avoid the need for a guardian.

III. LAWYERS ACTING AS APPOINTED GUARDIANS

The other basic concept we examine here is that of a lawyer serving in the fiduciary capacity of guardian. Should a lawyer seek appointment as a guardian? To what standards should a lawyer serving as guardian be held? Should the lawyer receive training to serve as a guardian? And if so, what should the training include? Should a lawyer appointed as guardian also serve as the lawyer for the ward, or even the lawyer for himself or herself as guardian? How should a lawyer serving as guardian, or in dual capacities, charge fees? What other obligations does the lawyer as guardian face, such as the requirement in many jurisdictions of posting a bond, or for the lawyer to carry malpractice insurance that covers purely fiduciary activities? May a lawyer function as guardian by contracting out essential services to other providers?

Lawyers have served as guardians throughout our legal tradition. While having lawyers serve in the role of guardian is not necessarily a desired practice, it certainly is one that exists.¹³⁴

134. The great nineteenth-century English novelist, Charles Dickens, created enduring images of lawyers functioning as guardians. In *Great Expectations*, for example, the main character Pip describes a meeting with his guardian, the lawyer Mr. Jaggers:

My guardian then took me into his own room, and while he lunched, standing, from a sandwich-box and a pocket-flask of sherry (he seemed to bully his very sandwich as he ate it), informed me what arrangements he had made for me. I was to go to 'Barnard's Inn,' to young Mr. Pocket's rooms, where a bed had been sent in for my accommodation; I was to remain with young Mr. Pocket until Monday; on Monday I was to go with him to his father's house on a visit, that I might try how I liked it. Also, I was told what my allowance was to be—it was a very liberal one—and had handed to me, from one of my guardians' drawers, the cards of certain tradesmen with whom I was to deal for all kinds of clothes, and such other things as I could in reason want.

Charles Dickens, *Great Expectations* ch. 20, 159–160 (Oxford Univ. Press 1996) (originally published 1861).

A. May Lawyers Act as Guardians?

There are no ethical or statutory prohibitions that would keep a lawyer from serving as a guardian. Section 5-305 of the Uniform Probate Code (UPC) sets out the priorities for who may be a guardian:

- (a) Any qualified person may be appointed guardian of an incapacitated person.^[135]
- (b) Unless lack of qualification or other good cause dictates the contrary, the Court shall appoint a guardian in accordance with the incapacitated person's most recent nomination in a durable power of attorney.
- (c) Except as provided in subsection (b), the following are entitled to consideration for appointment in the order listed:
 - (1) the spouse of the incapacitated person or a person nominated by will of a deceased spouse or by other writing signed by the spouse and attested by at least 2 witnesses;
 - (2) an adult child of the incapacitated person;
 - (3) a parent of the incapacitated person, or a person nominated by will of a deceased parent or by other writing signed by a parent and attested by at least two witnesses;
 - (4) any relative of the incapacitated person with whom the person has resided for more than 6 months prior to the filing of the petition; and
 - (5) a person nominated by the person who is caring for or paying for the care of the incapacitated person.

135. The Comment to Section 5-305 states that only "qualified" persons may serve as guardians:

"Qualified" in its application to "persons" is not defined in this Article, meaning that an appointing court has considerable discretion regarding the suitability of an individual to serve as guardian for a particular ward. In exercising this discretion, the court should give careful consideration to the needs of the ward and to the experience or other qualifications of the applicant to react sensitively and positively to the ward's needs.

Unif. Probate Code § 5-305 cmt. [¶ 1], 8 U.L.A. 363 (1998).

- (d) With respect to persons having equal priority, the Court shall select the one it deems best qualified to serve. The Court, acting in the best interest of the incapacitated person, may pass over a person having priority and appoint a person having a lower priority or no priority.¹³⁶

The Uniform Guardianship and Protective Proceedings Act (UGPPA) sets out a different list of priorities for who may serve as guardian. Nonetheless, there is no prohibition against lawyers as a professional group serving as guardians. Moreover, the court retains full discretion in determining the appropriate qualified person to be appointed guardian and bases its appointment choice upon consideration of the best interests of the ward.¹³⁷ Section 310 states:

- (a) Subject to subsection (c), the court in appointing a guardian shall consider persons otherwise qualified in the following order of priority:
- (1) a guardian, other than a temporary or emergency guardian, currently acting for the respondent in this State or elsewhere;
 - (2) a person nominated as guardian by the respondent, including the respondent's most recent nomination made in a durable power of attorney, if at the time of the nomination the respondent had sufficient capacity to express a preference;
 - (3) an agent appointed by the respondent under [a durable power of attorney for health care] [the Uniform Health-Care Decisions Act];
 - (4) the spouse of the respondent or a person nominated by will or other signed writing of a deceased spouse;
 - (5) an adult child of the respondent;
 - (6) a parent of the respondent, or an individual nominated by will or other signed writing of a deceased parent; and

136. Unif. Prob. Code § 5-305, 8 U.L.A. 362-363 (1998).

137. Unif. Guardianship & Protective Proc. Act § 310(a), (b), 8A U.L.A. 144 (Supp. 2001).

- (7) an adult with whom the respondent has resided for more than six months before the filing of the petition.
- (b) With respect to persons having equal priority, the court shall select the one it considers best qualified. The court, acting in the best interest of the respondent, may decline to appoint a person having priority and appoint a person having a lower priority or no priority.
- (c) An owner, operator, or employee of [a long-term care institution] at which the respondent is receiving care may not be appointed as guardian unless related to the respondent by blood, marriage, or adoption.¹³⁸

The comment to this section notes the strict prohibition against the appointment as guardian of anyone affiliated with a long-term care institution at which the respondent is receiving care. "Strict application of this [prohibition] is crucial to avoid a conflict of interest and to protect the ward."¹³⁹ In addition, the comment addresses the issue of the appointment of a professional guardian as well:

A professional guardian, including a public agency or nonprofit corporation, was specifically not given priority for appointment as guardian under this Act as those given priority are limited to individuals with whom the ward has a close relationship. The Committee that drafted the Act recognized the valuable service that a professional guardian, a public agency or nonprofit corporation provides. A professional guardian can still be appointed guardian if no one else with priority is available and willing to serve or if the court, acting in the respondent's best interest, declines to appoint a person having priority. A public agency or nonprofit corporation is eligible to be appointed guardian as long as it can provide an active and suitable guardianship program and is not otherwise providing substantial services or assistance to the respondent, but is not entitled to statutory priority in appointment as guardian.¹⁴⁰

138. Unif. Guardianship & Protective Proc. Act § 310, 8A U.L.A. 144 (brackets in the original).

139. Unif. Guardianship & Protective Proc. Act § 310 cmt. [¶ 5], 8A U.L.A. 145.

140. *Id.* at [¶ 6]; see generally Alison Barnes, *supra* n. 117, at 970 (discussing professional guardians in depth).

A lawyer who has a close relationship with the alleged incapacitated person (AIP) may very well be the best person to appoint as a guardian under the UGPPA. If nominated by the AIP, a lawyer would have priority.¹⁴¹ Although there is no comment about lawyers being appointed by the court as a measure of last resort, there is no prohibition in the UGPPA against the court appointing whomever would best serve the interests of the respondent. Presumably, a court could find that a lawyer fits that requirement.

There are several situations in which it is common practice for lawyers to serve as guardians. For example, New York courts routinely recognize lawyers as persons who may be appointed by the courts to serve in the capacity of guardian. According to one commentator in a recent study of the New York guardianship system,

In most cases, the petitioner is a relative of the AIP and wants to be appointed as guardian. In descending order of frequency, the next most common petitioners are: the Department of Social Service, a hospital or nursing home, or concerned neighbors or friends. In cases where the Department of Social Service is the petitioner, the AIP usually has no next of kin and is indigent; therefore, if no one comes forward at the hearing to be guardian, the court must appoint one. In such a case, the guardian is chosen from the list of approved fiduciaries.¹⁴²

The office of court administration maintains the list that “contains the name, address, and telephone number of lawyers, social workers, accountants, psychologists and other professionals eligible to serve as court evaluator, guardian or counsel for the AIP.”¹⁴³

141. Unif. Guardianship & Protective Proc. Act § 310(a)(2), 8A U.L.A. 144 (providing that the AIP's nominee for guardian would receive priority if the AIP had sufficient capacity to express a preference, and if there is no permanent guardian currently acting for the AIP).

142. Julie M. Solinski, Student Author, *Guardianship Proceedings in New York: Proposals for Article 81 to Address Both the Lack of Funding and Resource Problems*, 17 Pace L. Rev. 445, 457–458 (1997) (footnotes omitted).

143. *Id.* at 453–454 n. 44. New York law does not specifically name lawyers as a class of persons eligible to be guardians, but this practice appears to be routine. See N.Y. Mental Hygiene Laws § 81.19 (McKinney 1996) (providing that any person found suitable by the court may serve as guardian, but omitting express reference to lawyers). New York law

Another commentator explains more specifically the role of lawyers as guardians under New York's guardianship system:

Courts most frequently appoint family members or attorneys guardian of incapacitated individuals. Though family members are likely to be favored by the Courts as the default choice, lawyers have a traditional connection with guardianship and are often seen as the appropriate professional where there is no available family member. In some states, there is a new category of non-attorney professional guardians. New York State has not taken this route; lawyers and family still reign as primary guardianship choices.¹⁴⁴

Other jurisdictions regularly allow the appointment of lawyers as guardians.¹⁴⁵ Lawyers often act in the role of private

does, however, contemplate lawyers to serve as court evaluators, which are similar in function to guardians ad litem:

The court may appoint as court evaluator any person drawn from a list maintained by the office of court administration with knowledge of property management, personal care skills, the problems associated with disabilities, and the private and public resources available for the type of limitations the person is alleged to have, including, but not limited to, an *attorney-at-law*, physician, psychologist, accountant, social worker, or nurse.

Id. § 81.09(b)(1) (emphasis added). Solinski interviewed a New York practitioner who stated that guardians were often chosen from the approved list of potential court evaluators, which specifically included lawyers. Solinski, *supra* n. 142, at 453–454 n. 44, 457–458 n. 78. For more information on the current state of the guardianship system in New York, consult the recently released *New York Reports*, *supra* n. 17, on fiduciary appointments.

144. Janet Lessem, *Duties and Responsibilities of the Guardian on a Day-to-Day Basis*, (P.L.I. Tax L. & Est. Plan. Course Handbook Series, Guardianship Law: Article 81, Aug., 2000) (available in Westlaw, 293 PLI/Est 267, 273). New York State's practice of appointing lawyers as guardians is not problem free. The *New York Daily News* published a series of articles about the abuses perpetrated against wards by lawyer/guardians. Most of the abuses reported dealt with financial exploitation of the ward's estate rather than physical abuse or neglect of the ward. See Joe Calderone & Thomas Zambito, *In Queens, Politics Can Play a Big Role*, N.Y. Daily News (May 21, 2001) (reporting that judges in Queens were favoring politically-connected law firms with lucrative guardianships); *Protect, Don't Fleece, Helpless Seniors*, N.Y. Daily News (May 23, 2001) (surveying the *Daily News* guardianship stories, and concluding that "[l]awyers appointed by the courts are depleting — legally — the life savings of the elderly and infirm by billing millions in inflated fees"); Thomas Zambito, *One Man's Legal Bills: \$329,000*, N.Y. Daily News (May 20, 2001) (describing the fees awarded to lawyers from the ward's funds, including \$85,000 to the petitioner's lawyer and \$72,000 to the guardian's lawyer).

145. In newspaper reports from other states, there are regular references to lawyers serving as guardians. Disturbingly, many of these reports examine the abuses of guardianship. *E.g.* Lou Kilzer & Sue Lindsay, *The Probate Pit: Busted System, Broken*

guardian as an extension of their fiduciary capabilities.¹⁴⁶ In those jurisdictions in which there is a system of public guardianship or that regulates and/or permits professional guardians, lawyers appear to be less involved in guardianship roles.¹⁴⁷ Nonetheless, even in jurisdictions that contemplate the use of professional guardians, or volunteer guardians as last resort, lawyers frequently are included in the list of persons who might serve as appointed guardians.¹⁴⁸

Even within the context of alternative protective arrangements such as the one suggested by Professor Whitton, lawyers play a significant fiduciary role.¹⁴⁹ Professor Whitton proposed that competent individuals should be permitted to appoint nonprofit organizations as agents under durable powers of attorney when an appropriate individual is unavailable to serve in that capacity. One new aspect in the realm of corporate guardianship was “the use of a board or committee to act as the surrogate

Lives, Rocky Mt. News 21 (Apr. 7, 2001).

146. In an important study on guardianship issues, there is a clear reference to lawyers acting as guardians: “In addition to public guardianship, a second trend in the provision of surrogate decisionmaking services has been the establishment of guardianship service programs by both individuals (lawyers and non-lawyers) and private corporations.” H.R. Rpt. 100-705, at 1–22 (Dec. 1988) (a report by a subcommittee of the Select Committee on Aging titled *Surrogate Decisionmaking for Adults: Model Standards to Ensure Quality Guardianship and Representative Payeeship Services*).

147. For example, in Washington state, “lawyers seldom act as guardians.” E-mail from Bruce Hanson to Edward D. Spurgeon (Oct. 5, 2001) (on file with the *Stetson Law Review*) (explaining that, in Washington state, “[W]e have an abundance of professional, competent guardians . . . who can perform the normal guardian functions at a fraction of a lawyer’s hourly charges.”). Moreover, Washington courts require certification for professional guardians. Wash. St. Ct., Gen. R. 23 (2000).

148. E.g. Winsor C. Schmidt, Jr., *Guardianship: Court of Last Resort for the Elderly and Disabled* ch. 10, 139 (Carolina Academic Press 1995). Schmidt examined Florida:

Florida has had several approaches to the need for guardians that is met in other states by public guardianship. These approaches include: benign neglect; informal guardianship by neighbors, nursing homes, and the like without legal process or authority; civil commitment to a mental institution (“poor man’s guardianship”); private attorneys on a *pro bono* or nominal fee basis (sometimes with dozens of wards each); banks or trust companies (for modest estates); nonprofit corporations, usually with a religious affiliation; county social service programs utilizing volunteers; citizen groups serving as guardian banks; and a newly appropriated (1982) Public Guardianship Pilot Project in the Office of the State Courts Administrator.

Id. (footnotes omitted, emphasis added).

149. Linda S. Whitton, *Caring for the Incapacitated — A Case for Nonprofit Surrogate Decision Makers in the Twenty-First Century*, 64 U. Cin. L. Rev. 879, 894–904 (1996).

decision-making body for the ward or as an advisor to the individual within the organization who is carrying out the entity's guardianship responsibilities."¹⁵⁰ Professor Whitton described several programs that utilize such panels. The Arc of North Carolina utilized a council that had at least twenty-one "members encompassing parents and relatives of developmentally disabled individuals and professionals from the fields of medicine, law, social work, mental retardation, religion, and accounting."¹⁵¹ Another board for a group in Idaho was comprised of seven to eleven volunteers from the elder law and social-service fields. A volunteer ethics committee in Maryland was "originally composed of social workers, a physician, psychologist, nurse, attorney, the director of the local area agency on aging, a rabbi, a nurse psychiatrist, an ethicist, and relatives of family members who were eligible for Department services."¹⁵²

Lawyers act as private guardians after nomination by clients, as court-appointed guardians for wards with no available relatives or friends, and as participants in non-profit and volunteer guardianship programs in some sort of fiduciary capacity, either as guardians themselves or in some advisory capacity to guardians.

B. Should Lawyers Act as Guardians?

Should a lawyer ever serve as a guardian? Is there any public policy that would suggest a benefit from lawyers acting as guardians for persons declared incompetent by a court of law?¹⁵³ There may very well be legitimate reasons to have lawyers be able to function in the role of guardian.¹⁵⁴ As the aging population

150. *Id.* at 897.

151. *Id.* at 895 n. 84 (citation omitted).

152. *Id.* (citations omitted).

153. One public policy consideration favoring lawyers acting as guardians is a projected shortage of guardians. Whitton warned, "Based on current statistical projections [regarding the increase in the elderly population in need of assistance], a growing shortage of qualified individuals to serve as either agents under durable powers or as guardians may seriously undermine care of the incapacitated in the twenty-first century." *Id.* at 880.

154. Discussing the fiduciary roles of attorneys who function as trustees and executors, one commentator finds that there may be very good reasons for lawyers to take on other fiduciary roles:

Is fiduciary service by the attorney in the client's best interest? There do appear to be a number of situations in which the client would benefit from having his

increases along with the need for protective services for persons of diminished capacity, lawyers are among the professionals who are viewed as possible candidates to serve as guardians. However, any appointment of a lawyer to a fiduciary role, including guardian, should follow strict standards of ethical and professional responsibility.¹⁵⁵

As the Authors suggested in an earlier article,

Lawyers are particularly well suited to serve in fiduciary roles because of their training in issue spotting and analysis, substantive law, communication, conflict resolution, and legal ethics. Furthermore, lawyers are bound by both the ethical rules of professional conduct and state laws governing malpractice liability. Lawyers serving as fiduciaries may also be subject to the ethical and legal rules that govern fiduciaries.¹⁵⁶

attorney act as an executor or trustee. The client may have no appropriate family member or other person to serve, and may not wish for whatever reason to name a bank trust department or other corporate fiduciary. The trust or estate may call for professional independent management but not be sufficiently large to be economically handled by a corporate fiduciary—or, for any other reason, is not an engagement which a corporate fiduciary wishes to accept. Perhaps the primary asset to be administered is a closely-held business as to which the attorney/fiduciary would have special familiarity and expertise.

William D. Haight, *Attorneys Take Fiduciary Roles*, 127 *Trusts & Ests.* 10, 12 (Feb. 1988); see Martin A. Heckscher, *The Special Problems Which Arise When an Attorney Serves as Fiduciary*, 17 *ACTEC Notes* 137, 137–138 (1991) (discussing the reasons for an apparent growing nation-wide trend of attorneys serving as fiduciaries).

155. Emphasizing the importance of competence in performance of fiduciary duties, the *Draft Statement of Principles Attorneys Acting as Other Fiduciaries* of the ABA's Section of Real Property, Probate and Trust Law's Task Force on Attorneys Acting in Other Fiduciary Roles concluded:

[T]here are circumstances in which attorneys may appropriately serve in other fiduciary roles, including those of an executor and trustee. The Task Force believes that performing in such roles carries additional responsibilities and certain risks for the attorney, and no attorney should undertake to serve as an executor, trustee or other fiduciary without being properly trained and equipped to perform all of the associated tasks in a competent and efficient manner.

Patricia Brosterhous, *Draft Statement of Principles Comes Not a Moment Too Soon*, 127 *Trusts & Ests.* 12, 27, app. (Dec. 1988) (quoting the *Draft Statement*). Principle Four on Competence stated, "All attorneys offering or providing services as an executor, trustee or other fiduciary must be competent by training and experience to do so, and the American Bar Association should undertake continuing education programs to train interested attorneys in the performance of such responsibilities." *Id.*

156. Spurgeon & Ciccarello, *supra* n. 9, at 1359.

In ABA Informal Opinion 863, issued in 1965, the Committee on Ethics and Professional Responsibility stated that it saw

no impropriety in counsel being appointed as legal guardian of the person and property of an incompetent for whom he has been performing legal services. In fact, unless there are specific reasons against such an appointment, it would seem that counsel for the incompetent would be familiar with his affairs and could handle them more expeditiously than a stranger might. It is the duty of both the appointing judge and the counsel for the incompetent client to protect the interest of the incompetent, and this duty would extend to the legal services performed by counsel and to the fees charged therefor, whether earned before or after the incompetency incurred. In such a case, the attorney dealing with such a client owes a special duty not to overreach the client.¹⁵⁷

Of course, lawyers should not serve as guardians when they lack the knowledge of the duties and responsibilities of a guardian, if they are not familiar with the physical and social needs of persons of diminished capacity, or if they do not have sufficient time to take care of the ward. Moreover, lack of appropriate court orders delineating a guardianship plan and of court monitoring of the guardian's functions leaves wide open the possibility of exploitation of the ward's estate and well-being.

C. What Standard Does the Court Use to Appoint a Guardian?

Once the court has made a determination of incapacity, the next decision should be whether the person petitioning for guardianship is the appropriate guardian. How does the court determine whether a lawyer might be the appropriate guardian?

The majority rule is that the appropriate guardian is one who serves the best interests of the ward.¹⁵⁸ Under certain circum-

157. ABA Comm. Ethics & Resp., *Informal Ethics Opinions* vol. 1, 863 (ABA 1975) (reprinting Informal Opinion 863, dated May 31, 1965, titled *Guardian of Incompetent's Person and Property*).

158. An annotation published in American Law Reports summarized the majority rule: Subject to statutory restrictions, the selection of the person to be appointed guardian is a matter which is committed largely to the discretion of the appointing court, and an appellate court will interfere with the exercise of this discretion only in the case of a clear abuse. However, it is apparent that in the exercise of such discretion the appointing court is always to keep in mind that the best interests of

stances, that may very well be a lawyer. If a lawyer has had a significant prior relationship with the ward, or if the ward would otherwise be left without a suitable guardian either because the ward has no relations or because the ward has contentious and/or abusive relations, then a court will use its discretion to appoint the lawyer who has the expertise to handle the function of guardian,¹⁵⁹ especially in the case of a lawyer having provided significant prior representation to the proposed ward and with whom the lawyer has an established relationship. It may also be the case where the professional expertise of the lawyer would serve as a useful counterbalance to a family member's co-guardianship. Finally, it may be appropriate if the lawyer is the only available and willing person to act as guardian among feuding and abusive family members and friends.

In *In re Conservatorship of Browne*,¹⁶⁰ the Appellate Court of Illinois found that the trial court had not erred in appointing a non-resident attorney as conservator for Rose Browne, who had already been adjudicated incompetent.¹⁶¹ A public conservator had challenged the appointment of the private attorney on the ground that the public conservator deserved priority in appointment because the private attorney was "a stranger" according to the statute.¹⁶² The court found that it was in Rose Browne's best interest to appoint the private attorney as conservator because she had "manifested her trust and confidence" in him by "retain[ing] him as her attorney and execut[ing] a power of attorney in his favor while she was still

the incompetent are the paramount consideration when a guardian is selected.

Peter G. Guthrie, *Priority and Preference in Appointment of Conservator or Guardian for an Incompetent*, 65 A.L.R.3d 991, 995 (1975) (footnote omitted).

159. See *In re Estate of Mosier*, 54 Cal. Rptr. 447, 455 (Cal. App. 2d Dist. 1966) (the trial court committed no error in appointing an attorney as guardian of an incompetent rather than the incompetent's adopted daughter, who was his next of kin, when "there was a reasonable basis" to believe that her appointment "would not be conducive to the incompetent's well being"); *In re Voshakes' Guardianship*, 189 A. 753, 755 (Pa. Super. 1937) (the lower court did not abuse its discretion in appointing an attorney who was "a stranger" to the incompetent even though the incompetent's sister requested the appointment of her attorney as guardian; a court should not "select as a guardian anyone who has, or may have an interest adverse to the incompetent," nor should it select counsel for one who may have an adverse interest).

160. 370 N.E.2d 148 (Ill. App. 3d Dist. 1977).

161. *Id.* at 151.

162. *Id.* at 150.

competent.”¹⁶³ The private attorney was also the preferred choice of her relatives.¹⁶⁴ Thus, the court was able to articulate why a private attorney could be the preferred choice of guardian over an established public guardian. Prior relationship, prior indication of trust, and preference of the relatives outweighed the public program’s attempt to function as the fiduciary for Rose Browne.

In a New York case, the judge actually praised the lawyer in her role as guardian: “As to Ms. Kenny, it is a credit to the legal profession and a display of personal professionalism that Ms. Kenny was willing to take on the role of attorney [co-trustee] for a pittance.”¹⁶⁵ In this case, the lawyer served as co-guardian with the disabled minor ward’s grandmother.¹⁶⁶ The goal here was for the grandmother as custodial adult to handle the daily and personal activities of the ward, but for the lawyer to make sure that financial matters concerning the ward’s special-needs trust were handled correctly along with the other needs of the ward.¹⁶⁷ The issue before the court was approval of the attorney/guardian fees.¹⁶⁸ The request was for a commission for the guardian of \$78.75 for the year and \$750 in counsel fees.¹⁶⁹ The court listed the ways in which the lawyer had acted appropriately and had obviously served a very positive public service by functioning responsibly along with the co-guardian.¹⁷⁰ The court granted the lawyer’s request for approval of her actual disbursements primarily because the defendant attorney made a threshold showing that the costs were not embraced in overhead, there was no opposition to the request, and the request was found to be reasonable upon a facial examination.¹⁷¹

But there are cases of extraordinary abuse by lawyers serving as guardians. These abuses tend to occur within the realm of fees and mismanagement of funds, rather than in the area of physical abuse or neglect. In a recent Wisconsin case, an

163. *Id.* at 151.

164. *Id.*

165. *Perez ex rel. Sonano v. Rodino*, 710 N.Y.S.2d 770, 776 (Sup. Ct. of N.Y., N.Y. County 2000).

166. *Id.* at 772.

167. *Id.*

168. *Id.* at 771.

169. *Id.* at 776.

170. *Id.*

171. *Id.* at 774, 775, 776.

attorney who was appointed guardian in two guardianship cases was suspended from the practice of law for one year.¹⁷² The court found that the attorney had collected unreasonable attorney fees from clients without the court's approval, had failed to file "the necessary reports with the court in those matters and act competently and timely in them," and had "us[ed] false statements and documents to justify his excessive fees and to mislead the person investigating his conduct."¹⁷³ The court found that "the attorney had demonstrated a willingness to place his own pecuniary interests above the interests of the clients whose representation he undertook by court appointment and to create false documents to prevent that conduct from being discovered."¹⁷⁴

The Nebraska Supreme Court held that a lawyer may be disciplined "for conduct outside the practice of law or the representation of clients, and for which no criminal prosecution has been instituted or conviction had, even though such conduct might be found to have been illegal."¹⁷⁵ In this case, the attorney functioned as both guardian of an incapacitated person "as well as the attorney for the guardianship estate."¹⁷⁶ In both roles, he mismanaged funds and filed "erroneous, incomplete, unreliable, and misleading" reports to the court.¹⁷⁷

The cases above reflect typical fiduciary abuses. Are the abuses worse when a lawyer commits them? Arguably yes, because the lawyer presumably has knowledge of fiduciary duties in addition to the ethical duties that regulate lawyers. Thus, while a lawyer may be the appropriate person to appoint as guardian, planning and monitoring safeguards must be in place to protect the ward from abuse.

D. Nomination or Appointment of the Lawyer as Guardian

If a client wants to nominate a lawyer to serve as guardian, what precautions should the lawyer take? First, the lawyer must avoid any solicitation of the client.¹⁷⁸ If the client approaches the

172. *In the Matter of Disc. Proc. Against Glynn*, 591 N.W.2d 606, 610 (Wis. 1999).

173. *Id.* at 607.

174. *Id.*

175. *State v. Bremers*, 264 N.W.2d 194, 197 (Neb. 1978).

176. *Id.* at 196.

177. *Id.*

178. ABA Model R. Prof. Conduct 7.3(a) (stating in pertinent part, "A lawyer shall not

lawyer, however, either because of a well-established prior relationship or because the client reasonably believes that the lawyer is the most appropriate person to nominate under the circumstances, then the lawyer can accept such a nomination. Indeed, Comment 4 to Model Rule 7.3 anticipates such a situation:

There is far less likelihood that a lawyer would engage in abusive practices against an individual with whom the lawyer has a prior personal or professional relationship or where the lawyer is motivated by considerations other than the lawyer's pecuniary gain. Consequently, the general prohibition in Rule 7.3(a) . . . [is] not applicable in those situations.¹⁷⁹

The lawyer should advise the client about alternatives to guardianship and assist the client in drafting such relevant documents as a durable power of attorney, advance directives, and other testamentary documents. However, as seen in the *Browne* case, a guardianship may still prove necessary. And the client may very well choose the lawyer to serve as his or her guardian.¹⁸⁰

If a client wants to nominate the lawyer as guardian, the lawyer needs to advise the client of ethical problems, including potential problems with conflicts of interest,¹⁸¹ compensation,¹⁸² confidentiality,¹⁸³ and loyalty.¹⁸⁴ If, after full disclosure, the client

by in-person or live telephone contact solicit professional employment from a prospective client with whom the lawyer has no family or prior relationship when a significant motive for the lawyer's doing so is the lawyer's pecuniary gain.").

179. *Id.* R. 7.3 cmt. 4.

180. For a discussion of the ethical issues that arise when a lawyer/draftsman serves in the fiduciary roles of trustee and executor of an estate, see Louis D. Laurino, *The Duties and Responsibilities of the Attorney/Fiduciary*, in Univ. of Miami L. Ctr., *Nineteenth Annual Philip E. Heckerling Inst. on Est. Plan.* ¶¶ 1600, 1600–1603 (John T. Gaubatz ed., Matthew Bender 1985). Laurino concludes, "An attorney/draftsman should only serve as fiduciary at the unsolicited suggestion of his client and if he agrees to serve, he should realize that there are grave legal, ethical and practical problems that he may have to overcome in order to perform his duties as a fiduciary and as an attorney." *Id.* at ¶ 1603.

181. ABA Model R. Prof. Conduct 1.7.

182. *Id.* R. 1.5.

183. *Id.* R. 1.6.

184. *Id.* R. 1.7 cmt. 1–4. Note also that EC 5-6 of the ABA Model Code of Professional Responsibility provides, "A lawyer should not consciously influence a client to name him as executor, trustee or lawyer in an instrument. In those cases where a client wishes to name his lawyer as such, care should be taken by the lawyer to avoid even the appearance

still wants to choose the lawyer as guardian, the lawyer should ask the client to handwrite a letter, composed by the client in the client's own words, and to deliver the letter to the attorney.¹⁸⁵ Any prior written nomination of the lawyer as guardian should include clear guidelines regarding the duties and responsibilities of the guardian, whether the lawyer will also serve as lawyer for himself or herself as guardian, whether the lawyer/guardian will continue to serve as lawyer for the client, and how the lawyer/guardian should be compensated for services rendered as guardian, and as lawyer if the lawyer also continues to serve as lawyer. The lawyer should also advise the client to make provisions for an alternate guardian in case the lawyer is unable to serve.

If the client is then incapacitated and there is a need for the appointment of the guardian, the lawyer should not petition the court for himself or herself, but rather hire another lawyer to handle the petition.¹⁸⁶ A lawyer who is to serve as the guardian may have a conflict of interest if he or she also petitions the court for guardianship because such an action could be self-serving. There may be some incentive for the lawyer to go ahead and institute the guardianship rather than assist the client with alternative protective arrangements. Of course, if the lawyer and client discussed this issue before the client's incapacity, and the client independently chose the lawyer to represent him or her in a guardianship proceeding as well as to serve as his or her guardian, then the lawyer may petition the court. Nonetheless, there may be local prohibitions against the lawyer petitioning for the guardianship and accepting appointment as guardian. Moreover, the ABA Formal Opinion 96-404 states that the lawyer

of impropriety." ABA Model Code Prof. Resp. EC 5-6 (1983).

185. Cf. ABA Model R. Prof. Conduct preamble, 1.7 (Model Rule 1.7 provides that a lawyer with a potential conflict of interest may represent the client if "the client consents after consultation." The Preamble under the heading "Terminology" defines "consultation" as communication sufficient "to permit the client to appreciate the matter in question." Thus, having the client provide consent in the manner described would be powerful evidence that the lawyer complied with the Model Rules).

186. In the similar circumstance of a lawyer who drafts a client's durable power of attorney, the lawyer should likewise refuse delegation of the client's durable powers. Whitton suggests that if a client independently chooses a lawyer as her appointed agent, then the lawyer should have another lawyer draft the durable power of attorney. Whitton, *supra* n. 26, at 67. However, this approach may be impractical as well as expensive and incomprehensible to a client.

to be appointed should not represent any party in the proceeding.¹⁸⁷

E. What Standards Should the Lawyer/Guardian Follow?

Once appointed, what standards should the lawyer/guardian now follow? A lawyer must always follow the legal ethical standards of his or her jurisdiction whether acting in another fiduciary role or not.¹⁸⁸ But a lawyer who functions as a guardian should receive training appropriate to that role. That training should include information on ethics and performance standards for guardians as well as on the development of a guardianship plan for the ward.

Guardians in general need to have “defined guardian performance standards and written individual guardianship plans.”¹⁸⁹ The National Guardianship Association publishes a *Model Code of Ethics for Guardians*¹⁹⁰ and a *Standards of Practice for guardians*¹⁹¹ for use by professional guardians. These standards could serve as guidelines for any lawyer acting as a guardian. State bar associations and probate courts should encourage lawyers and judges who deal with guardianship cases to be well acquainted with the National Guardianship Association’s publications, and/or should develop local standards of their own.¹⁹²

In 1988, the Wingspread conferees recommended that both model guardian performance standards be developed and distributed nationally and adapted for local use, and that guardianship plan forms be developed locally and their use

187. ABA Standing Comm. Ethics & Prof. Resp., Formal Op. 96-404. As quoted in *supra* note 59, the 2001 Wingspan Conference recommended a similar prohibition on the lawyer who files a guardianship petition. *Wingspan Recommendation*, *supra* n. 47, at 607–609.

188. Spurgeon & Ciccarello, *supra* n. 9, at 1367.

189. Norman Fell, *Guardianship and the Elderly: Oversight Not Overlooked*, 25 U. Toledo L. Rev. 189, 204 (1994).

190. Natl. Guardianship Assn., *A Model Code of Ethics for Guardians* <<http://www.guardianship.org>> (accessed Jan. 20, 2001).

191. Natl. Guardianship Assn., *Standards of Practice* (reprinted at 31 Stetson L. Rev. at 996).

192. See *Illinois Report*, *supra* n. 2, at 38–43 (discussing in detail the need for training of both private and professional guardians); *New York Reports*, *supra* n. 17 (discussing the need for training of fiduciaries and for judges appointing fiduciaries in New York); *Wingspan Recommendations*, *supra* n. 47, at 597 (calling for all guardians to “receive training and technical assistance in carrying out their duties” at Recommendation Nine).

required by the courts.¹⁹³ The conferees, basing their findings on a set of proposed standards for guardians developed by the Center for Social Gerontology and published by the U.S. House Committee on Aging,¹⁹⁴ stated that those standards should address several issues:

- 1) the basic statutory duties; 2) avoidance of conflict of interest; 3) rights of wards; 4) guardian's responsibilities and activities (including visitation requirements); 5) assessment and monitoring of the ward's living situation; 6) directions regarding medical services and treatment; 7) instructions regarding the disposition of property; and 8) responsibilities upon the death of a ward.¹⁹⁵

A lawyer, like any other person acting as the guardian of a person of diminished capacity, must have clear guidelines — similar to the ones listed above — that assist the guardian in providing the best decision-making guidance and protection possible for the ward. Standards would be useful to help guardians understand their duties and responsibilities.

In addition to standards, guardians and wards need specific guardianship plans approved and monitored by the court on some regular basis.¹⁹⁶ The Wingspread conferees found that the plan must specify the following: “necessary services; the means for obtaining these services; the manner in which the guardian will exercise his/her decision-making authority; and the extent to which decision-making will be shared with the ward.”¹⁹⁷ The purpose of a plan is to help both guardian and ward best meet the

193. *Wingspread Recommendations*, *supra* n. 3, at 25 (Recommendation V-D, Guardianship Standards and Plans).

194. *Id.* (commentary to Recommendation V-D).

195. *Id.*

196. Schmidt described the purpose and function of guardianship plans:

Guardianship plans are similar to the habilitation and treatment plans used to establish goals and methods of treatment on behalf of developmentally disabled, psychiatric, and other clients for which state services are provided. The guardianship plan is intended to serve as a bridge between identified client needs or deficits and specific services necessary to remedy these deficits. The plan may function to alert or reacquaint staff to client needs, and to facilitate long-term planning and coordination of staff and other resources to meet these needs.

Schmidt, *supra* n. 148, at 157.

197. *Wingspread Recommendations*, *supra* n. 3, at 25 (commentary to Recommendation V-D).

needs of the ward and enhance the ward's quality of life. Without set standards or forms for guardianship plans, a lawyer acting as guardian would do well to understand standards such as those published by the National Guardianship Association and to establish an individualized plan for the ward.¹⁹⁸

In the Recommendations of the 1993 Fordham Conference addressing the Lawyer as Fiduciary,¹⁹⁹ two specific items are pertinent here. Practice Guideline Seven states that "when the lawyer is serving as fiduciary, the Model Rules shall apply as if the lawyer were representing a client."²⁰⁰ Clearly, the point of this guideline is to hold a lawyer to the professional conduct rules established for lawyers even when that lawyer is functioning in another fiduciary role.²⁰¹ The Recommendation for Education finds that

[l]awyers should be trained in the social sciences relative to older persons. Thus, programs that will educate lawyers representing older persons in the range of social sciences as they affect older persons should be developed with a focus on

198. A particularly important source of guidance to the lawyer serving as guardian is the court order and/or guardianship plan that is coordinated with the court. The *National Probate Court Standards* suggest that the court in a guardianship proceeding should specifically enumerate in its order the assigned duties and powers of the guardian, as well as limitations on them, with all other rights reserved to the respondent. By listing the powers and duties of the guardian, the court's order can serve as an educational roadmap to which the guardian can refer.

In general, the court's order should only be as intrusive of the respondent's liberties as necessary. The court's order should also include a statement of the need for the guardian to involve the respondent to the maximum extent possible in all decisions affecting the respondent. The guardian should consider the preference and values of the respondent in making decisions and attempt to help the respondent regain legal capacity.

Natl. College of Prob. JJ., *Standards, National Probate Court Standards* Stand. 3.3.12 cmt. <<http://www.ncpi.org/standard/html>> (last revised Feb. 10, 2002).

199. *Recommendations of the Conference*, *supra* n. 106, at 998.

200. *Id.* at 1000.

201. See Heckscher, *supra* n. 154, at 17 (predicting that lawyers will be held to a higher standard: "It seems almost certain that, because of his claim to expertise, the attorney will be held to a higher standard of fiduciary care than the nonprofessional, family member, or friend."); Spurgeon & Ciccarello, *supra* n. 9, at 1367-1368 (arguing that a fiduciary will be held to a higher standard of care when special skills exist, or even when the client merely believes that those skills exist due to the fiduciary's representation, and that a lawyer serving solely as a fiduciary should expect to be held to the higher standard of care imposed by fiduciary law upon a fiduciary with special skills).

the decision-making capacity of older persons.²⁰²

An extension of this recommendation to the guardianship context is that lawyers who serve as guardians should be trained in disciplines relevant to their guardianship functions. Because of the heightened standard of care and the importance of additional education, if a lawyer believes that he or she cannot adequately fulfill the guardianship duties, then he or she should not accept appointment.²⁰³

Even though more elder law attorneys are engaging in multi-disciplinary practices,²⁰⁴ it generally may not be the best approach to have lawyers serving as guardians, except in those instances where the lawyer has a long-standing relationship with the client and is well positioned to secure the client's best interests. It is otherwise better for lawyers to engage other professionals who can help clients make protective arrangements²⁰⁵ and for lawyers

202. *Recommendations of the Conference, supra* n. 106, at 1001.

203. See Haught, *supra* n. 154, at 14 (discussing the need of the lawyer to be properly trained when attempting to handle other fiduciary roles: "It is axiomatic that no attorney should undertake to act as an executor or trustee without the necessary training and equipment to do a proper job. Nothing could be worse than to accept the additional responsibilities flowing from that fiduciary role without being fully prepared to discharge them effectively and efficiently.").

204. An examination of the benefits and negative aspects of multi-disciplinary practices is well beyond the scope of this Article. However, it is useful to note at this juncture that the National Association of Elder Law Attorneys (NAELA) has examined multi-disciplinary practices within the context of elder law. One commentator noted:

The NAELA Task Force on Multidisciplinary Practices [MDP] and ancillary services suggests that the elder law practitioner who chooses to engage in the MDP or ancillary services may do so in a variety of ways. First, attorneys may become dual-practitioners (e.g., lawyer with a license in clinical social work that may provide social work services themselves without the assistance of a non-lawyer social worker). Second, firms may refer clients through the use of a referral list so that clients may seek services outside of the firm, attorneys may or may not be compensated for this. Third, firms may provide ancillary services "on the premises" through non-attorney personnel (e.g., insurance agent or investment advisor). Depending on the model chosen, there are various techniques that may be used to ensure that client's need for "one stop shopping" do not outweigh ethical practice. The NAELA Task Force recommends legal, ethical, licensed, competent, and independent practice when engaging in ancillary services.

Alex L. Moschella, *Model Rule 5.7 — The Boundaries of the Profession*, 14 NAELA Q. 3, 4 (Winter 2001) (footnotes omitted).

205. Principle Five of the *Draft Statement of Principles Attorneys Acting as Other Fiduciaries* addresses the issue of Support Services and provides that: "Attorneys offering or providing services as an executor, trustee or other fiduciary should have adequate

to continue to function as lawyers for incapacitated persons or for their guardians.²⁰⁶

F. Fees

If a lawyer serves as guardian, then fee arrangements should be made with the prospective ward, if possible. Otherwise, they should be made at the outset with the court. Other safeguards should include periodic review of the necessity of the guardianship,²⁰⁷ annual monitoring of the guardianship and the fees,²⁰⁸ and judicial approval for any major financial decision or fee payment.²⁰⁹

Each jurisdiction regulates differently the issue of fees.²¹⁰ Lawyers should be well acquainted with the rules of their jurisdictions, and have clear plans for reporting expenses and seeking reimbursements for guardianship activities. Courts should be actively involved in monitoring fee and compensation issues.

A difficult problem facing some guardianship programs is the payment of fees for indigent wards. State legislatures should make provisions for compensating lawyers and other persons

support personnel and services available, either within their firm or from outside sources, to render such services properly and efficiently." Brosterhous, *supra* n. 155, at 27, app.

206. Lawyers who serve as legal counsel for a guardian still have duties that flow to the ward. A full discussion of these duties is beyond the scope of this Article. In *Fickett v. Super. Ct. of Pima County*, 558 P.2d 988, 990 (Ariz. App. Div. 2d 1976), the court determined that a lawyer representing a guardian "assumes a relationship not only with the guardian but also with the ward." For a further discussion of a lawyer/fiduciary's duty of care to third parties, see A. Frank Johns, *Fickett's Thicket: The Lawyer's Expanding Fiduciary and Ethical Boundaries When Serving Older Americans of Moderate Wealth*, 32 Wake Forest L. Rev. 445 (1997), and Spurgeon & Ciccarello, *supra* n. 9, at 1364-1366.

207. See Natl. College of Prob. J.J., *supra* n. 198, at Stand. 3.3.16 (recommending scheduled review of the guardianship order, as well as prompt review upon the ward's request).

208. See *id.* Stand. 3.3.15 cmt. (requiring the guardian to be diligent in accounting in the guardian's annual reports).

209. Cf. *id.* Stand. 3.3.12 cmt. (advising judges to grant to the guardian discretion in routine matters, but requiring the guardian to obtain prior judicial approval when the decision may "result in irreparable damage or harm," using health-care decisions to illustrate; the same principle should apply to financial matters).

210. See *id.* Stand. 3.3.14 cmt. (contemplating that reports filed by the guardian should include fees and expenses incurred by the guardian while acknowledging that "[e]ach state's respective statutory provision may establish somewhat different" specifications for guardian reports).

serving as guardians for indigent wards.²¹¹

Fees for activities of a guardian should be at a guardian's rate, not at a lawyer's rate. If the lawyer is also serving in the dual capacity as the lawyer for the ward, strict records should be kept and fees should be monitored and approved by the court.²¹²

G. Bonding and Insurance Coverage

Another issue that confronts a lawyer who acts as the guardian for an incapacitated person is what level of protection the lawyer should have in terms of posting guardian bonds and maintaining fiduciary malpractice insurance in addition to the lawyer's legal malpractice insurance. For more secure protection of the ward, public policy would require that any non-relative guardian post a bond as well as maintain appropriate fiduciary malpractice insurance.²¹³

Another reason why the lawyer who functions as a guardian should carry a fiduciary bond or liability insurance is that it is not entirely clear when the lawyer is functioning in the role of

211. A New York judge urged the state legislature to provide adequate compensation for court evaluators, guardians or attorneys in instances where there are no assets:

There are hundreds of poor elderly and handicapped in this city and thousands in the state. Attorneys, geriatric care managers, social workers and other have dutifully attended multi-session classes to qualify for court appointment. However, it is clearly unfair to expect them to spend the many hours required in the conscientious and proper performance of their tasks without a mechanism to compensate them.

Lorraine S. Miller, *Legislature Must Act on Guardian Funds*, N.Y.L.J. 2 (June 19, 2000) (letter to the Editor); see *New York Reports*, *supra* n. 17 (recommending compensation for lawyers appointed as fiduciaries for indigent wards).

212. Recommendation 64 of the 2001 Wingspan Conference states: "The lawyer who serves in the dual role of lawyer and court-appointed fiduciary [should] ensure that the services and fees be differentiated, that the service and fees be reasonable, and be subject to court approval." *Wingspan Recommendations*, *supra* n. 47, at 608.

213. Principle Two of the *Draft Statement of Principles Attorneys Acting as Other Fiduciaries* addresses "Bonding or Insurance" and states:

The attorney acting as an executor, trustee or other fiduciary should carry a fiduciary bond or liability insurance in an appropriate amount, for purposes of protecting the estate, trust or other account and its beneficiaries from any misappropriation or misapplication of fiduciary funds or other insurable loss. In this connection, the Task Force believes that the American Bar Association should study the possibility of providing such fiduciary bond or fiduciary liability insurance on a group basis to attorneys.

Brosterhous, *supra* n. 155, at 27, app.

lawyer and when he or she functions as a guardian. When the Task Force on Attorneys Acting in Other Fiduciary Roles of the Real Property, Probate, and Trust Law Section of the American Bar Association examined professional liability policies on the market, it found that some but not all of the standard policies covered an attorney serving as an executor or trustee for errors and omissions arising from his or her fiduciary service.²¹⁴ The Task Force did find, however, that coverage was generally available for lawyers acting as guardians or conservators.²¹⁵ The bottom line is that while professional liability coverage is available for lawyers serving in other fiduciary roles, there are gaps in the coverage and possibly unsettled questions of policy interpretation.

State law governs the necessity of a guardian obtaining a bond in order to qualify as a guardian. In New York, for example, before the guardian may begin to function as the guardian, the court determines whether to require or waive the filing of a bond.²¹⁶ Florida requires bonds of professional guardians, but not of lawyers serving as guardians.²¹⁷

Any lawyer who contemplates functioning as a guardian needs to be aware of the local rules regarding the posting of bonds. All lawyers who serve in any guardianship capacity should have professional malpractice insurance that covers fiduciary activities including serving as a guardian.²¹⁸

H. Recommendations for Lawyers Appointed to Act as Guardians

In light of the very few cases and guidelines for lawyers serving as guardians, we recommend the following:

- Lawyers should advise clients as fully as possible about the need to make prior protective arrangements. All

214. Haught, *supra* n. 154, at 12–13.

215. *Id.* at 12.

216. N.Y. Mental Hygiene Laws § 81.25(a) (McKinney 1996).

217. Fla. Stat. § 744.1085(2) (2001).

218. Recommendation 60 of the 2001 Wingspan Conference proposes that “[a]ll persons, including lawyers who serve in any guardianship capacity, be subjected to bonding requirements. Further, lawyers who serve as guardians should have professional liability insurance that covers fiduciary activities.” *Wingspan Recommendations*, *supra* n. 47, at 607–608.

efforts should be made to avoid the necessity of guardianship.

- If a client requests that a lawyer be named either as attorney in fact or as guardian, then full disclosure of alternatives and conflicts should take place and be documented. A written document signed by the client explaining the client's choice and understanding of consequences of the choice should be made part of the nomination.
- In the case of any client nomination of a lawyer as guardian or a court appointment of a lawyer as guardian, client's choice and the best interests of the client based on as much information as possible should form the basis of the decision as to the appropriate guardian.
- Lawyers should advise clients of the need for alternative choices and arrangements in case the lawyer is unable to serve as guardian at the client's request.
- The court should order clear fee arrangements including whether the lawyer will serve as both guardian and lawyer or only guardian and how each activity will be billed, time limitation of appointment, annual monitoring, and arrangements in place in case of need of the guardian to terminate the appointment.
- Bar associations should take the lead in providing training for lawyers serving as guardians or as lawyers for wards or guardians. Such training should also include judges, especially those who are appointing lawyers as guardians.
- Courts, bar associations, and the aging network should collaborate to provide education to the public on guardianship, alternatives to guardianships, and community resources that support persons of diminished capacity within the community.
- Courts should have some standards to rely upon when appointing a guardian and especially when appointing a lawyer as guardian.

- State task forces should study and develop non-profit surrogate decision-making programs that include lawyers, but that would ultimately discourage the practice of lawyers serving as guardians except in cases where the client deliberately chose the lawyer to act in that capacity.

IV. CONCLUSION

As our society increasingly acknowledges that persons of diminished capacity have rights and interests, we move from a paternalistic and adversarial approach based on individual, isolated interests to a contextual approach that allows lawyers to resolve problems and reach solutions for their clients of diminished capacity that include awareness of cultural issues, the role of interested third parties, and the well-being of the client. Lawyers should be actively involved to provide clients with the best possible alternatives to guardianship. When a lawyer must act to protect a client, the lawyer should follow the new Model Rule 1.14, which the various states should adopt.

If as a last resort the lawyer thinks it is necessary, or even obligatory under controlling local rules and laws, to petition for the appointment of a guardian, the lawyer should not represent any third party in the proceeding and should not then become the attorney for the appointed guardian, unless pressing needs require such an appointment. To as great an extent as possible, the lawyer should withdraw from the situation, or continue to function as the attorney for the ward. If a lawyer is nominated by the client to serve as guardian, then the guidelines suggested in this Article should be followed. Any lawyer acting as guardian should have appropriate training, should be held to strict disciplinary standards of both professions, and should be severely punished for any abuse of fiduciary powers.

These recommendations and conclusions recognize that in the current situation, guardianships do exist and lawyers are caught up in the process, facing tough ethical issues. While lawyers may be wise choices as guardians in some circumstances, the approach should not be one to generally encourage lawyers to serve in that capacity. Instead, clients and potential wards should be encouraged to seek trusted fiduciaries elsewhere, and to plan ahead for alternatives to guardianship. Finally, lawyers should be in the forefront of local task forces and legislative study groups

that encourage the development of guardianship laws and practices that better protect the person of diminished capacity by maximizing the person's capacity while providing any necessary supportive services and protections.

APPENDIX**REVISED MODEL RULES OF
PROFESSIONAL CONDUCT 1.6 AND 1.14²¹⁹****RULE 1.6: CONFIDENTIALITY OF INFORMATION²²⁰**

(a) 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 paragraph (b).

(b) A lawyer may reveal information relating to the representation of a client to the extent the lawyer reasonably believes necessary:

(1) to prevent reasonably certain death or substantial bodily harm;

(2) to secure legal advice about the lawyer's compliance with these Rules;

(3) 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; or

219. ABA Model Rules of Professional Conduct © 2002 American Bar Association. All rights reserved. Reprinted with the permission of the American Bar Association. On February 5, 2002, the ABA House of Delegates completed its review of the recommendations of the ABA Commission on Evaluation of the Rules of Professional Conduct (the ABA Ethics 2000 Commission), revising and amending the Model Rules. For a complete summary of the revisions, see ABA Center for Professional Responsibility, *Report 401 as Passed by the House of Delegates February 5, 2002* <http://www.abanet.org/cpr/e2k-report_home.html> (Feb. 2000). Copies of the pre-revision *Model Rules of Professional Conduct, 2001 Edition* are available from Service Center, American Bar Association, 750 North Lake Shore Drive, Chicago, Illinois 60611-4497, 1-800-285-2221.

220. The ABA House of Delegates adopted amendments to Model Rule 1.6 at its Annual Meeting in August 2001 and let the amendments stand at its Midyear Meeting in February 2002. ABA Ctr. Prof. Resp., *supra* n. 219.

(4) to comply with other law or a court order.

Comment

[1] This Rule governs the disclosure by a lawyer of information relating to the representation of a client during the lawyer's representation of the client. See Rule 1.18 for the lawyer's duties with respect to information provided to the lawyer by a prospective client, Rule 1.9(c)(2) for the lawyer's duty not to reveal information relating to the lawyer's prior representation of a former client and Rules 1.8(b) and 1.9(c)(1) for the lawyer's duties with respect to the use of such information to the disadvantage of clients and former clients.

[2] A fundamental principle in the client-lawyer relationship is that, in the absence of the client's informed consent, the lawyer must not reveal information relating to the representation. See Rule 1.0(e) for the definition of informed consent. This contributes to the trust that is the hallmark of the client-lawyer relationship. The client is thereby encouraged to seek legal assistance and to communicate fully and frankly with the lawyer even as to embarrassing or legally damaging subject matter. The lawyer needs this information to represent the client effectively and, if necessary, to advise the client to refrain from wrongful conduct. Almost without exception, clients come to lawyers in order to determine their rights and what is, in the complex of laws and regulations, deemed to be legal and correct. Based upon experience, lawyers know that almost all clients follow the advice given, and the law is upheld.

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

also Scope.

[4] Paragraph (a) prohibits a lawyer from revealing information relating to the representation of a client. This prohibition also applies to disclosures by a lawyer that do not in themselves reveal protected information but could reasonably lead to the discovery of such information by a third person. A lawyer's use of a hypothetical to discuss issues relating to the representation is permissible so long as there is no reasonable likelihood that the listener will be able to ascertain the identity of the client or the situation involved.

Authorized Disclosure

[5] Except to the extent that the client's instructions or special circumstances limit that authority, a lawyer is impliedly authorized to make disclosures about a client when appropriate in carrying out the representation. In some situations, for example, a lawyer may be impliedly authorized to admit a fact that cannot properly be disputed or to make a disclosure that facilitates a satisfactory conclusion to a matter. Lawyers in a firm may, in the course of the firm's practice, disclose to each other information relating to a client of the firm, unless the client has instructed that particular information be confined to specified lawyers.

Disclosure Adverse to Client

[6] Although the public interest is usually best served by a strict rule requiring lawyers to preserve the confidentiality of information relating to the representation of their clients, the confidentiality rule is subject to limited exceptions. Paragraph (b)(1) recognizes the overriding value of life and physical integrity and permits disclosure reasonably necessary to prevent reasonably certain death or substantial bodily harm. Such harm is reasonably certain to occur if it will be suffered imminently or if there is a present and substantial threat that a person will suffer such harm at a later date if the lawyer fails to take action necessary to eliminate the threat. Thus, a lawyer who knows that a client has accidentally discharged toxic waste into a town's water supply may reveal this information to the authorities if there is a present and substantial risk that a person who drinks the water will contract a life-threatening or debilitating disease and the lawyer's disclosure is necessary to eliminate the threat or

reduce the number of victims.

[7] A lawyer's confidentiality obligations do not preclude a lawyer from securing confidential legal advice about the lawyer's personal responsibility to comply with these Rules. In most situations, disclosing information to secure such advice will be impliedly authorized for the lawyer to carry out the representation. Even when the disclosure is not impliedly authorized, paragraph (b)(2) permits such disclosure because of the importance of a lawyer's compliance with the Rules of Professional Conduct.

[8] Where a legal claim or disciplinary charge alleges complicity of the lawyer in a client's conduct or other misconduct of the lawyer involving representation of the client, the lawyer may respond to the extent the lawyer reasonably believes necessary to establish a defense. The same is true with respect to a claim involving the conduct or representation of a former client. Such a charge can arise in a civil, criminal, disciplinary or other proceeding and can be based on a wrong allegedly committed by the lawyer against the client or on a wrong alleged by a third person, for example, a person claiming to have been defrauded by the lawyer and client acting together. The lawyer's right to respond arises when an assertion of such complicity has been made. Paragraph (b)(3) does not require the lawyer to await the commencement of an action or proceeding that charges such complicity, so that the defense may be established by responding directly to a third party who has made such an assertion. The right to defend also applies, of course, where a proceeding has been commenced.

[9] A lawyer entitled to a fee is permitted by paragraph (b)(3) to prove the services rendered in an action to collect it. This aspect of the rule expresses the principle that the beneficiary of a fiduciary relationship may not exploit it to the detriment of the fiduciary.

[10] Other law may require that a lawyer disclose information about a client. Whether such a law supersedes Rule 1.6 is a question of law beyond the scope of these Rules. When disclosure of information relating to the representation appears to be required by other law, the lawyer must discuss the matter with the client to the extent required by Rule 1.4. If, however, the other law supersedes this Rule and requires disclosure, paragraph (b)(4) permits the lawyer to make such disclosures as

are necessary to comply with the law.

[11] A lawyer may be ordered to reveal information relating to the representation of a client by a court or by another tribunal or governmental entity claiming authority pursuant to other law to compel the disclosure. Absent informed consent of the client to do otherwise, the lawyer should assert on behalf of the client all nonfrivolous claims that the order is not authorized by other law or that the information sought is protected against disclosure by the attorney-client privilege or other applicable law. In the event of an adverse ruling, the lawyer must consult with the client about the possibility of appeal to the extent required by Rule 1.4. Unless review is sought, however, paragraph (b)(4) permits the lawyer to comply with the court's order.

[12] Paragraph (b) permits disclosure only to the extent the lawyer reasonably believes the disclosure is necessary to accomplish one of the purposes specified. Where practicable, the lawyer should first seek to persuade the client to take suitable action to obviate the need for disclosure. In any case, a disclosure adverse to the client's interest should be no greater than the lawyer reasonably believes necessary to accomplish the purpose. If the disclosure will be made in connection with a judicial proceeding, the disclosure should be made in a manner that limits access to the information to the tribunal or other persons having a need to know it and appropriate protective orders or other arrangements should be sought by the lawyer to the fullest extent practicable.

[13] Paragraph (b) permits but does not require the disclosure of information relating to a client's representation to accomplish the purposes specified in paragraphs (b)(1) through (b)(4). In exercising the discretion conferred by this Rule, the lawyer may consider such factors as the nature of the lawyer's relationship with the client and with those who might be injured by the client, the lawyer's own involvement in the transaction and factors that may extenuate the conduct in question. A lawyer's decision not to disclose as permitted by paragraph (b) does not violate this Rule. Disclosure may be required, however, by other Rules. Some Rules require disclosure only if such disclosure would be permitted by paragraph (b). See Rules 1.2(d), 4.1(b), 8.1 and 8.3. Rule 3.3, on the other hand, requires disclosure in some circumstances regardless of whether such disclosure is permitted by this Rule. See Rule 3.3(c).

Withdrawal

[14] If the lawyer's services will be used by the client in materially furthering a course of criminal or fraudulent conduct, the lawyer must withdraw, as stated in Rule 1.16(a)(1). After withdrawal the lawyer is required to refrain from making disclosure of the client's confidences, except as otherwise permitted by Rule 1.6. Neither this Rule nor Rule 1.8(b) nor Rule 1.16(d) prevents the lawyer from giving notice of the fact of withdrawal, and the lawyer may also withdraw or disaffirm any opinion, document, affirmation, or the like. Where the client is an organization, the lawyer may be in doubt whether contemplated conduct will actually be carried out by the organization. Where necessary to guide conduct in connection with this Rule, the lawyer may make inquiry within the organization as indicated in Rule 1.13(b).

Acting Competently to Preserve Confidentiality

[15] A lawyer must act competently to safeguard information relating to the representation of a client against inadvertent or unauthorized disclosure by the lawyer or other persons who are participating in the representation of the client or who are subject to the lawyer's supervision. See Rules 1.1, 5.1 and 5.3.

[16] When transmitting a communication that includes information relating to the representation of a client, the lawyer must take reasonable precautions to prevent the information from coming into the hands of unintended recipients. This duty, however, does not require that the lawyer use special security measures if the method of communication affords a reasonable expectation of privacy. Special circumstances, however, may warrant special precautions. Factors to be considered in determining the reasonableness of the lawyer's expectation of confidentiality include the sensitivity of the information and the extent to which the privacy of the communication is protected by law or by a confidentiality agreement. A client may require the lawyer to implement special security measures not required by this Rule or may give informed consent to the use of a means of communication that would otherwise be prohibited by this Rule.

Former Client

[17] The duty of confidentiality continues after the client-lawyer relationship has terminated. See Rule 1.9(c)(2). See Rule 1.9(c)(1) for the prohibition against using such information to the disadvantage of the former client.

RULE 1.14: CLIENT WITH DIMINISHED CAPACITY²²¹

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

(b) When the lawyer reasonably believes that the client has diminished capacity, is at risk of substantial physical, financial or other harm unless action is taken and cannot adequately act in the client's own interest, the lawyer may take reasonably necessary protective action, including consulting with individuals or entities that have the ability to take action to protect the client and, in appropriate cases, seeking the appointment of a guardian ad litem, conservator or guardian.

(c) Information relating to the representation of a client with diminished capacity is protected by Rule 1.6. When taking protective action pursuant to paragraph (b), the lawyer is impliedly authorized under Rule 1.6(a) to reveal information about the client, but only to the extent reasonably necessary to protect the client's interests.

Comment

[1] The normal client-lawyer relationship is based on the assumption that the client, when properly advised and assisted, is capable of making decisions about important matters. When the client is a minor or suffers from a diminished mental capacity, however, maintaining the ordinary client-lawyer relationship may not be possible in all respects. In particular, a severely incapacitated person may have no power to make legally binding decisions. Nevertheless, a client with diminished capacity often has the ability to understand, deliberate upon, and reach conclu-

221. The ABA House of Delegates adopted amendments to Model Rule 1.14 at its Midyear Meeting in February 2002. ABA Ctr. Prof. Resp., *supra* n. 219.

sions 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 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 clarifi-

cation or improvement of circumstances, using voluntary surrogate decision-making 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 decision-making 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.