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Ethical Issues Facing Attorneys Representing the Incapacitated
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A lawyer who is consulted by someone who may be incapacitated should be prepared to encounter ethical issues not common to typical personal injury cases. Who will be the client--the incapacitated person or the relative or guardian? What if a family member of the potentially incapacitated person is more interested in his or her inheritance than the welfare of the incapacitated person?

While ethical questions like these can make these cases especially challenging, the cases can also be uniquely rewarding. Lawyers who handle cases involving incapacitated people are not only easing the distress of family members who face difficult decisions in caring for incapacitated relatives, but they are also furthering society's interest in protecting the physical, mental, and financial well-being of some of its most vulnerable citizens.

The initial contact in cases involving incapacitated individuals usually comes from a member of the incapacitated person's family--a spouse, a child, a sibling, or another relative. But sometimes a nonrelative--a neighbor, a clergy member, or social worker--will contact you first. Although it does not make a difference who makes the first call, if it is not a family member, then you should know why the family is not making the call. As the attorney you do not *need* to speak with the family, but you *should* speak to or at least investigate the family. If the initial caller is a family member, then it is important to have the family present at the first meeting to explain the process of pursuing the case and to choose a guardian/representative. The selected family member is thereafter your contact person.

If several family members attend the first meeting, be sure to clarify who your primary contact will be. Who will provide the information necessary to initiate and advance the case? Who will be responsible for paying court costs, your fee, and other case-related expenses? Determine who your client is. Are you being asked to represent the incapacitated person or someone else who will serve as the person's guardian or conservator?

Even before a guardian or representative is selected, your first step will be to determine whether the person actually is capable of making legal decisions. If possible, arrange to have the potentially incapacitated person come to your office for the initial client meeting so you can evaluate firsthand his or her demeanor and physical and cognitive abilities. If the person is homebound or living in a nursing home or other facility, plan to visit him or her in that setting.

Be aware that these cases often involve conflict-of-interest issues, especially if the person who contacted you is related to the incapacitated person. Rule 1.7 of the ABA Model Rules of Professional Conduct provides that a lawyer generally cannot agree to represent two parties if doing so would create a concurrent conflict of interest. There are some exceptions to the rule, but even if the exceptions apply, both parties must give informed consent to the dual representation, confirmed in writing.

Consider a scenario where a woman comes to you claiming that her mother is confined to a nursing home and has been profoundly injured as a result of the facility's neglect. It appears from the facts that the mother is severely brain damaged, cannot speak or move, and probably will never be released from institutional care as a result of the neglect. She has no other children and no living spouse.

Your preliminary analysis reveals that there is strong evidence of neglect, and that a claim against the nursing home probably will yield a substantial award or settlement. However,

in speaking to the daughter, it becomes clear that she is not interested in using any recovery to provide additional care for her mother. Instead, she is solely interested in conserving her inheritance.

As counsel, you will have to choose whether to represent the daughter or mother. Model Rule 1.7(a) prohibits you from representing both parties because there is a concurrent conflict of interest. It is also clear that the mother will not be able to give informed consent, confirmed in writing.[1]

Now suppose that the totally incapacitated mother is a former client. In that case, Model Rule of Professional Conduct 1.9 controls. It provides that unless you obtain the mother's informed consent, you cannot represent the daughter in a related matter if her interests are materially adverse to the mother's. Since the mother here is totally incapacitated, no informed consent can be obtained.

As in this example, a client who is incapable of making knowing and thoughtful decisions probably will not be able to give informed consent. Without this, the duty to your original and now incapacitated client takes precedence, and you should not represent another person with conflicting interests.

When addressing a client's consent, you must also consider Rule 1.14 regarding guardianship if your client has a disability. This rule is discussed further in the competence section below.

Assess the client's interest

If you decide to represent the incapacitated person rather than family members, it is important to discern, if possible, the incapacitated person’s interests and desires. The ABA rules

require that you interview the client, and I recommend doing so in person, not over the phone. Arrange to meet in a setting most comfortable for the client, if possible.

At the meeting, you should assess the goals of your representation. Is the client preparing to enter into contracts for goods and services, including legal services? Does he or she have the ability to understand a contractual agreement? Is the client preparing a will, trust, or living will? Does he or she have testamentary capacity--that is, does the client comprehend the content of the estate and understand which family members or cherished individuals will receive the bequests? Is this visit to determine the client's instructions for health care and advanced care directives? Does the client appear to be of sound mind to make these decisions?

It is important to know and follow the client's wishes, not those of others. Perhaps you have a client who is a resident of a nursing home and chooses to remain there. Family members, however, do not want the client to be vulnerable to wrongful acts or neglect that they believe occurs at the facility.

If the resident wants to remain in the nursing home and does not want to "be a problem," then you are required by Rule 1.2 of the Model Rules of Professional Conduct to consult with the client in a "normalized environment" and abide by his or her decision. For example, arrange to speak with the client in a private room in the nursing home, without staff and family members present.

However, if your client is waning in cognitive and decision-making functions and you do not believe that remaining in the nursing home would be in his or her best interests, you must go further to determine your client's capability to make this decision.

Determine competence

To determine your client’s capability to make decisions, listen carefully to his or her answers to your questions about the case to discern the client's cognitive function. Does he or she seem confused or disoriented? Consider taking a medical history to determine if there are any organic problems or existing diagnoses that could affect his or her capacity.

If the client appears to have some ability limitations but is not totally incapacitated, try to make the attorney-client relationship as normal as possible. Take steps to mitigate the client's limitations. For example, if he or she has problems seeing or hearing, visual or hearing aids may help your communication. If the client is not competent without taking medications, schedule your meetings after the medications have been administered.

If you determine that because of a physical or mental incapacity the client can no longer handle his or her own affairs, manage finances, make informed medical decisions, or maintain his or her physical well-being, then Rule 1.14(b) allows an attorney to seek a guardian for the incapacitated person.

In most jurisdictions, a guardian is responsible for asserting an incapacitated person's rights and protecting his or her best interests. Guardians must be appointed by a court, and the duties of guardians are defined by the nature and extent of their appointment.

A guardian can serve in one of several capacities, including emergency versus permanent, limited versus full, and as guardian of the person rather than as guardian of the estate. Some courts use conservators to protect the incapacitated, but a conservator usually protects only the person's financial interests. There are other types of guardians, such as a guardian ad litem, who is usually appointed only for the purpose of litigation and decisions related to the case.

In some states or localities, public guardianship programs exist to serve low-income, incapacitated people. In jurisdictions without a public guardianship program, a government agency or official may serve as the guardian of last resort for the indigent. People who can pay for services may use private guardians or guardianship agencies.

Usually the court will approve and appoint any qualified person, corporate fiduciary, private guardianship, support agency**,** or local or county agency to serve as an incapacitated person's guardian.

The court is not likely to appoint someone who has a conflict of interest with the incapacitated person. For example, in some jurisdictions, the court will not appoint family members because they may have direct financial interests in the amount of money spent on the incapacitated person.[2]

Sometimes an attorney must act as the guardian-in-fact. When it is apparent that the incapacitated person does not have the ability to make legally binding decisions, then the attorney often serves as a de facto guardian until the court can appoint one.

Establish confidentiality

When representing incapacitated clients whose family members are involved as a guardian, representative or concerned individual, and there is no concurrent representation, you must consider not only conflicts of interest, but also issues of confidentiality and the goals of the representation.[3] The family member who is the guardian or representative for the incapacitated person may contact you to find out the status of the case as it progresses. But you may only disclosed information to your client and the actual family member who has the legal ability to make decisions for the incapacitated client.

Rule 1.6 requires confidentiality except in the following situations: 1) the client waives or agrees to disclosure, 2) you believe disclosure is necessary to reveal information to prevent death or bodily harm, 3) to prevent the client from committing a crime or fraud that uses your services, or 4) the court orders disclosure. If your client has not specifically agreed to release information to a family member, then you must not release the information no matter how well-intentioned the family member's concerns or questions are.

You may have a client who becomes incapacitated while you are representing him or her in a case. If you notice a rapid cognitive descent, with whom can you discuss this observation? To whom must it be revealed, and when?

Rule 1.6 (a) applies to the release of information to a physician on behalf of your client. The lawyer may disclose information that is necessary to further the representation and is impliedly authorized. Rules 1.6 and 3.3 apply to disclosing the decline of a client's physical or mental ability to a third party--such as opposing counsel or the court.

Rule 3.3 requires lawyers to act honestly in dealing with the court. You cannot offer any evidence that you know is false. For example, if you know that your client suffers from newly diagnosed and aggressive cancer, you must divulge that information if there is a claim of future damages and questions about the client's health have been asked during discovery or at trial.

These are just a few of the many ethical decisions you must make when representing the elderly or incapacitated client. Nevertheless, if you remember that "a lawyer, as a member of the legal profession, is a representative of clients, an officer of the legal system, and a public citizen having special responsibility for the quality of justice,"[4] you will be able to safely tread the ethical minefield.

1 *See also* Model R. Prof. Conduct 1.8, 1.9 (ABA 2002), www.abanet.org/cpr/mrpc/rule_1_8.html, www.abanet.org/cpr/mrpc/rule_1_9.html (last accessed Jan. 22. 2007).

2 *Wilhelm v. Wilhelm*, 657 A.2d 34 (Pa. Super. 1995).

3 *See* Comment, Model R. Prof. Conduct 1.2 (11) (ABA 2004) (special obligations when dealing with a beneficiary).

4 Preamble, Scope & Terminology §(1), Model R. Prof. Conduct (ABA 2002), www.abanet.org/cpr/mrpc/preamble.html (last accessed Jan 22, 2007).