

The ethics of representing the incapacitated

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To best help a client who is weakened by age or otherwise debilitated, know the rules of professional conduct and how to apply them.

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 a relative or guardian? What if a family member is more interested in his or her inheritance than the welfare of the incapacitated person?

While ethical questions like these can make this area of practice 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 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 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 a social worker—will contact you first. It doesn't matter who makes the first call, but if it is not a family member, you should find out why the family is not calling. You don't need to speak with the family, but you should try to or at least investigate the family.

If the initial caller is a relative, 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 family member selected will be your contact person thereafter.

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?

Before selecting a guardian or representative, you need to determine whether the person 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

