

RHONDA HILL WILSON
Attorney at Law
Two Penn Center
Suite 1050
Philadelphia, PA 19102

Nursing Homes Litigation Group
Who Are, or Should Be, Your Clients
2006 ATLA Annual Convention, Seattle

Definition of Client:

When is the attorney client relationship created?

- Telephone inquiry
- In person interview
- Executed retainer agreement

You do not have an attorney client relationship if you do not accept the case. When you are declining a case you should send a letter stating the following:

- Firm in not representing him/her
- Issue of statute of limitations
- Seek the advice of other counsel if he/she wishes to pursue the matter

Who is your client?

When considering representation of clients, determine whether it is a new or existing client, and also consider who are the spouses and family members.

New Client:

- Abused Individual
- Family Member
- Close Friend
- Power of Attorney

Standing to pursue claim:

- Spouse/Children
- Power of Attorney
- Family Member as Natural Guardian
- Guardian

Assessment of Client's Interest

Resident's Desires and Interests:

Rule 1.2 (a) of the American Bar Association Model Rules of Professional Conduct states:

Scope of Representation and Allocation of Authority between Lawyer and Client

(a) Subject to paragraphs (c) and (d), a lawyer shall abide by a client's decisions concerning the objectives of representation and, as required by Rule 1.4, shall consult with the client as to the means by which they are to be pursued. A lawyer may take such action on behalf of the client as is impliedly authorized to carry out the representation...

Resident's Interests To Bring Suit:

- A resident who remains in the facility does not want to be vulnerable to wrongful acts or neglect of staff. The residents wants to remain in a nursing home and does not want to "Be a problem."

Family Interests To Bring Suit:

- Monetary greed
- Controlling Behaviors
- Division between family members
Spouses, any conflict of interest?
Children divided?

Your Client Competent?

Rule 1.14(a) of the American Bar Association Model Rules of Professional Conduct provides:

Client with Diminished Capacity

When a client's ability to make adequately considered decision 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.

Rule 1.14 (b) of the American Bar Association Model Rules of Professional Conduct provides:

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.

A Client with Diminished Capacity or Incapacity:

A person who is incapacitated may not be legally able to make contracts or decisions. Depending on your jurisdiction, incompetent does not equal incapacitated. Under previous Pennsylvania law, incompetent was defined in 20 Pa.C.S. §5501 (repealed) as:

[A] person who, because of infirmities of old age, mental illness, mental deficiency or retardation, drug addiction or inebriety:

(1) is unable to manage his property, or is liable to dissipate it or become the victim of designing persons; or

(2) lacks sufficient capacity to make or communicate responsible decisions concerning his person.

Under present law in Pennsylvania, 20 Pa.C.S. §5501 defines an incapacitated person as:

[A]n adult who ability to receive and evaluate information effectively and communicate decisions in any way is impaired to such a significant extent that he is partially or totally unable to manage his financial resources or to meet essential requirements for his physical health and safety.

You should check your state law for the applicable designation in your jurisdiction. If your client has the capacity under the law to make decisions, that is to understand what is going on around them, and to analyze and make conclusions, then this is your client.¹

The Attorney as the Guardian:

¹See American Bar Association Model Rules of Professional Conduct 1.14, Comment 1.

- An incapacitated person may have no power to make legally binding decisions;
- If a person has no legal guardian or legal representatives, then the attorney must often act as the de facto guardian.

Private Guardians or Guardianship Agencies

Private guardians or guardianship agencies may be available for persons who can pay for their services. In some states or localities, public guardianship programs exist to serve low-income incapacitated persons. In jurisdictions without a public guardianship program, a government agency or official may serve as the guardian of last resort for poor persons.

Confidentiality

Is disclosure of a developed disability required, and if so, when?

Rule 1.6 of the American Bar Association Model Rules of Professional Conduct provides:

(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 prevent the client from committing a crime or fraud that is reasonably certain to result in substantial injury to the financial interests or property of another and in furtherance of which the client has used or is using the lawyer's services;

(3) to prevent, mitigate or rectify substantial injury to the financial interests or property of another that is reasonably certain to result or has resulted from the client's commission of a crime or

fraud in furtherance of which the client has used the lawyer's services;

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

(5) 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

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

American Bar Association Model Rules of Professional Conduct 1.14 (c) provides:

(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.

Conflict of Interest Considerations

RULE 1.7 CONFLICT OF INTEREST: CURRENT CLIENTS

(a) Except as provided in paragraph (b), a lawyer shall not represent a client if the representation involves a concurrent conflict of interest. A concurrent conflict of interest exists if:

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

(b) Notwithstanding the existence of a concurrent conflict of interest under paragraph (a), a lawyer may represent a client if:

- (1) the lawyer reasonably believes that the lawyer will be able to provide competent and diligent representation to each affected client;
- (2) the representation is not prohibited by law;
- (3) the representation does not involve the assertion of a claim by one client against another client represented by the lawyer in the same litigation or other proceeding before a tribunal; and
- (4) each affected client gives informed consent, confirmed in writing.

Conflict of Interest Between the Estate and the Beneficiaries

Be alert for conflict of interest among family members.

Obtain the signature of relatives on fee agreements and other documents based on state intestacy laws to minimize later conflicts and to interview and evaluate client's family for "bad family" defense and potential inter-family conflicts and/or lack of involvement.

If an estate is involved, it is important to get a copy of the will, document, or court order appointing the guardian, administrator/administratrix, or executor /executrix to sign the fee agreement. Be mindful of any potential conflict of interest between the estate and potential beneficiaries.