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# Clients with Diminished Capacity and Ethics in Attorney-Client Relationships

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## I. Capacity and How We Define It.

A. **Guardianship and Conservatorship**. How we define incapacity for the purposes of protective proceedings (guardianship and conservatorship) changed with the adoption of the Colorado Uniform Guardianship and Protective Proceedings Act<sup>1</sup> which became effective in January of 2001.

1. For the purposes of *guardianship*, we dispensed with labels in favor of a functional definition regarding the respondent's health, safety and self-care:

"Incapacitated person means an individual, other than a minor, who *is unable to effectively receive and evaluate information or both or make or communicate decisions* to such an extent that the individual lacks the ability to satisfy essential requirements for physical health, safety, or self-care, even with appropriate and reasonably available technological assistance."<sup>2</sup>

2. In the context of *conservatorships*, the burden is upon the petitioning party to establish by clear and convincing evidence that the respondent is

"unable to manage property and business affairs because the individual *is unable to effectively receive and evaluate information or both or to make or communicate decisions*, even with appropriate and reasonably available technological assistance."<sup>3</sup>

However, although the language is confusingly similar, in a conservatorship the statutes provide that appointment of a conservator, or entry of another protective order, *is not* an order determining incapacity.<sup>4</sup>

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<sup>1</sup> C.R.S. §§ 15-14-101 through 15-14-432.

<sup>2</sup> C.R.S. §15-14-102 (5).

<sup>3</sup> C.R.S. § 15-14-401 (1)(b)(I).

<sup>4</sup> C.R.S. § 15-14-409 (4); *In re Estate of Gallavan*, 89 P.3d 521 (Colo. App. 2004); *In re Estate of Romero*, 126 P.3d 228 (Colo. App. 2005).

B. **Testamentary Capacity.**

1. Simply stated, this is the ability to make a will. "Testament" derives from the Roman law, as incorporated into early English common law, and is the term for leaving personal property by will. Hence the phrase: "Last Will and Testament."
2. Fundamental concept of "freedom of testation." In other words, a testator "may dispose of his property as he pleases, and that [he] may indulge his prejudice against his relations and in favor of strangers, and that if he does so, it is no objection to his will."<sup>5</sup>
3. In order to possess testamentary capacity an individual must be 18 years of age and of "sound mind."<sup>6</sup> What then constitutes sound mind? *Estate of Spicer H. Breeden v. Stone*<sup>7</sup> is among the more recent cases in Colorado to confirm the requirements of testamentary capacity:
  - a. **Cunningham Test (*Cunningham v. Stender*)<sup>8</sup>**  
Holding that the mental capacity to make a will requires that:
    - i. The testator must understand the *nature* of her act.
    - ii. She must know the extent of her property.
    - iii. She must understand the proposed testamentary disposition
    - iv. She must know the natural objects of her bounty; and
    - v. The will represents her wishes.
  - b. **Insane Delusion Test (*In re Cole's Estate*)<sup>9</sup>**  
Holding that a person who was suffering from an insane delusion at the time he executed the will may lack testamentary capacity. An insane delusion is a persistent belief in that which has no existence in fact, and which is adhered to against all evidence. The party asserting that a testator was suffering from an insane delusion has the burden of proof.
  - c. ***Breeden* holding:** Before a will can be invalidated because of a lack of testamentary capacity due to an insane delusion, the insane delusion must materially affect the disposition in the will.

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<sup>5</sup> *Lehman v. Lindenmyer*, 48 Colo. 305, 313, 109 P. 956, 959 (1909).

<sup>6</sup> C.R.S. §15-11-501.

<sup>7</sup> *Estate of Spicer H. Breeden v. Stone*, 992 P.2d 1167 (Colo. 2000).

<sup>8</sup> *Cunningham v. Stender*, 127 Colo. 293, 301, 255 P.2d 977 981-2 (1953). Ironically, the testatrix had been adjudicated a mental incompetent less than four months before she signed her will. The case was reversed as the jury instructions failed to instruct that one element of testamentary capacity is knowing the natural objects of one's bounty as set forth in *Lehman*.

<sup>9</sup> *In re Cole's Estate*, 75 Colo. 264, 269, 226 P.143, 145 (1924).

C. **Contractual Capacity.**

1. The *Breeden* case was also extremely important in that it confirmed the holding from the 1946 case, *Hanks v. McNeil Coal Corp.* 114 Colo. 578, 585, 168 P.2d 256, 260 (1946), which held that **testamentary** capacity is the same as **contractual** capacity. (NOTE: Not all states subscribe to the legal theory that testamentary capacity equates to contractual capacity. See, Kiley, Ann C., “*Setting Aside the Grantor’s Deed on Grounds of Incapacity and Undue Influence*,” 36 Colo. Lawyer, 57 (May 2007).
2. The Supreme Court confirmed, holding that “one may have insane delusions regarding some matters and be insane on some subjects, yet [be] capable of transacting business concerning matters wherein such subjects are not concerned, and such insanity does not make one incompetent to contract unless the subject matter of the contract is so connected with an insane delusion as to render the afflicted party incapable of understanding the nature and effect of the agreement or of acting rationally in the transaction.”
3. *Hanks* sets out the standard for the requisite causal connection between insane delusions and contractual capacity that is also applicable to testamentary capacity.
4. The standard for contractual capacity was set forth in a 1964 case, *Davis v. Colorado Kenworth Corp.*, 396 P.2d 958, 961 (Colo. 1964) *Powderhorn Coal Co. v. Weaver*, 835 P.2d 616 (Colo. Ct. App. 1992). *Davis* held that to execute a contract an individual must be capable of understanding and appreciating the extent and effect of business transactions to be undertaken. One may be insane on some subjects and still have the capacity to contract. Mr. Davis was previously determined to be criminally insane, but this was not determinative of his capacity to contract. Where there is a lack of **mental capacity** to enter into a contract based upon mental incompetency, the contract is voidable by the person lacking capacity to contract.
5. Colorado Jury Instructions 4<sup>th</sup> 30:23 (2006) on Mental Incapacity indicates that an individual is not legally responsible for breach of contract if at the time the contract was entered into the individual lacked the *mental capacity to understand the nature and effect of the contract*.

D. **Capacity to Make a Trust.**

In her excellent article, *Being of Sound Mind: Standards for Testamentary (and Other) Capacity*, 40 Colo. Law. 89 (July 2011), Amy Rosenberg asserts that Colorado has no statute addressing who can make a valid trust:

Absence of a statute does not appear to have impeded the development of a capacity standard. The question remains whether to treat a trust as a testamentary instrument (when it disposes of property on the grantor’s death) or a contract. Arguably, different standards could be applied based on the trust’s purposes—for example, a testamentary standard for dispositions at death and a contractual standard for trustee obligations and administrative procedures—but legal writers tend to apply either a single testamentary or contractual standard.

Rosenberg goes on to note that the Uniform Trust Code, which has yet to be adopted in Colorado, provides that the capacity required to create, amend, revoke, or add property to a revocable trust, or to direct the actions of the trustee of a revocable trust, is the same as that required to make a will.

E. **Decisional Capacity.**

1. Decisional Capacity is defined in the Colorado Patient Autonomy Act as “the ability to provide informed consent to or refusal of medical treatment.” This definition occurs in conjunction with our medical power of attorney statute which indicates that when the principal lacks *decisional capacity*, in other words, the ability to provide informed consent, then the agent authorized under a medical power of attorney, or the health care proxy, may make medical decisions. C.R.S. §15-14-505 (4).
2. But this begs the questions: In order to execute a valid advance medical directive or medical power of attorney, must an individual have decisional capacity, or merely contractual capacity, or testamentary capacity - and is there a meaningful difference?
3. In 1914, the venerated jurist, Justice Benjamin Cardozo, declared  

. . . every human being of adult years and sound mind has a right to determine what shall be done with his own body.<sup>13</sup>
4. “Informed consent” is required for decisional capacity. In *Canterbury v. Spence*,<sup>14</sup> the emphasis was on the physician’s duty to disclose all information that is material to the patient’s decision making process, not just what was customarily provided by doctors’ standards.
5. “Informed consent” is also defined in the context of the client-lawyer relationship and denotes the agreement by a person to a proposed course of conduct after the lawyer has communicated adequate information and explanation about the material risks of and reasonably available alternatives to the proposed course of conduct.<sup>15</sup>
6. The doctrine of “implied consent” has arisen through the courts over the years which allows physicians to act, even against the patient’s wishes, after attempting to reach family or guardians who could consent to or refuse treatment. The doctrine of implied consent can be seen at work with treatment of an unconscious accident victim in the emergency room. No time exists to obtain consent, and due to the medical emergency, certain care must be rendered or the individual will die.
7. This points up some of the difficulty in obtaining emergency guardianships for medical decision making purposes. The courts, operating from the legal

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<sup>13</sup> *Schloendorff v. Society of New York Hospitals*, 211 N.Y. 125, 105 N.E. 92, 93 (1914).

<sup>14</sup> *Canterbury v. Spence*, 464 F.2d 772 (D.C.Cir.), cert. denied 409 U.S. 1064, 93 S. Ct. 560 (1972).

<sup>15</sup> Rule 1.0(e), Colo. Rules of Prof. Conduct. See also Rule 1.14 regarding client with diminished capacity.

perspective of the individual's right to be free from unauthorized treatment and a violation of one's bodily integrity, must be concerned with constitutionally protected fundamental rights of autonomy and self-determination.

8. From the medical perspective, treatment may be medically indicated, and the physicians, nurses, occupational and physical therapists, social workers and hospital administrators may all be in agreement that something must be done immediately. However, if it were truly a matter of life or death, the physician would treat under the theory of implied consent. If the situation is not emergent, not critical, then there can be no justification for side-stepping the patient's constitutional rights to due process which could take away his or her rights to provide informed consent or refuse treatment. (For a discussion of what gives rise to an emergency protective proceeding see, Stewart, C. Jean, "Determination of Emergency Conditions for Protective Proceedings," Denver Probate Court Quarterly Newsletter, Nov. 2006.)
9. In a 1985 Colorado case, *People v. Medina*,<sup>16</sup> the court determined that even though an individual has been certified mentally ill and lacks the ability to provide informed consent to the administration of psycho tropic medications, his right to refuse such medications can only be abrogated by the court after notice and hearing, once the court is satisfied by clear and convincing evidence that:
  - a. The patient is incompetent to effectively participate in the treatment decision;
  - b. Treatment by antipsychotic medication is necessary to prevent a significant and likely long-term deterioration in the patient's mental condition or to prevent the likelihood of the patient causing serious harm to himself or others in the institution;
  - c. A less intrusive treatment alternative is not available;
  - d. The patient's need for treatment by antipsychotic medication is sufficiently compelling to override any bona fide and legitimate interest of the patient in refusing treatment.

F. **Incapacity Under the Uniform Power of Attorney Act.**

1. With the adoption of the Uniform Power of Attorney Act ("UPPOA") effective in 2010, yet another wrinkle occurs.

"Incapacity" is defined as the inability of an individual to manage property or business affairs because the individual has an impairment in the ability to receive and evaluate information or make or communicate decisions even with the use of technological assistance. C.R.S. §15-14-702(5).

Yet the UPPOA is silent as to the level of capacity required to execute a valid POA. The Supreme Court has found "[a] person who is not in a mental condition to contract and conduct his business is not in a condition to appoint an agent for that purpose" and that the principal must possess contractual capacity to execute

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<sup>16</sup> *People v. Medina*, 705 P.2d 961 (Colo.1985).

or revoke a valid power of attorney. The court also tended to use the term “incompetent” interchangeably with lack of capacity.<sup>17</sup>

G. **Capacity to Nominate a Guardian or Conservator.**

In a recent Court of Appeals ruling, *In re the Estate of Runyon*, where there had been no testimony by the respondent or by medical experts as to the respondent's capacity to nominate a guardian or conservator at the trial court, the matter was remanded with instructions to hold such an evidentiary hearing.<sup>18</sup>

This case indicates that capacity may be task specific. In other words, distinctions may be drawn in determining levels of capacity and that the ability (capacity) to nominate a fiduciary may be lower than the ability to manage one's own business and financial affairs.

Query: If a respondent may have such diminished capacity or ability to warrant the appointment of a guardian or a conservator, but retain sufficient capacity to nominate a fiduciary, in the context of powers of attorney, must the principal have contractual capacity to conduct business or simply the capacity to understand that the document names an agent to act on behalf of the principal?

Case: In a recent hotly contested protected proceeding where the respondent suffered a mysterious and serious closed head injury during a hunting trip, the hospital was adamant that respondent had sufficient capacity to designate his choice of agent to make medical decisions but that he lacked the capacity to provide informed consent for his own treatment.

H. **Capacity to Provide Informed Consent for Representation.**

The respondent's right to counsel prior to being adjudicated an incapacitated person and through hearing on permanent orders has been long established under *Estate of Milstein*.<sup>19</sup>

Senate Bill 16-131, effective August 10, 2016, makes it clear that the right to counsel may be extended post-adjudication with the adoption of C.R.S. §15-14-319 and §15-14-434. However, if the court finds by clear and convincing evidence that the ward lacks sufficient capacity to provide informed consent for representation, then a guardian *ad litem* is to be appointed.

The right to counsel is retained for the limited purpose of interlocutory appeal of the trial court's decision as to the right to counsel. The adoption of this new provision restates the court's inherent right to appoint counsel for the ward should the court determine the ward needs such representation.<sup>20</sup> The threshold for the purpose of these new provisions is informed consent.

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<sup>17</sup> *In re Trust of Franzen*, 955 P.2d 1018 (Colo. 1998).

<sup>18</sup> *In re the Estate of Runyon*, 343 P.3d 1072, (Colo. App. 2014).

<sup>19</sup> *Estate of Milstein v. Ayers*, 955 P.2d 78 (Colo.App. 1998).

<sup>20</sup> Rule 17 (c), C.R.C.P.

## PART II. SOME ETHICAL CONSIDERATIONS

Selected provisions of the Colorado Rules of Professional Conduct are set forth below.

The reader is strongly encouraged to review the relevant CRPC Rule in its entirety, along with the Comments and Annotations, all of which are available online at:  
<http://www.cobar.org/RulesofProfessionalConduct>

### II. Ethical Considerations

Rule 1.0	Informed Consent
Rule 1.1	Competence
Rule 1.2	Scope of Representation
Rule 1.4	Communication
Rule 1.6	Confidentiality of Information
Rule 1.7	Conflicts. Current Clients
Rule 1.8	Conflicts of Interest
Rule 1.14	Client with Diminished Capacity*
Rule 2.1	Advisor
Ethics Opinion 126	Representing the Adult Client with Diminished Capacity ( <i>Excluding Representation in Adult Protective Proceedings</i> )
Ethics Opinion 131	Representing the Adult Client with Diminished Capacity Where the Subject of the Representation is the Client's Diminished Capacity

*\*If you read nothing else in this section, at least become familiar with Rule 1.14, Ethics Opinions 126 and 131.*

### RULE 1.0. TERMINOLOGY

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(e) "Informed consent" denotes the agreement by a person to a proposed course of conduct after the lawyer has communicated adequate information and explanation about the material risks of and reasonably available alternatives to the proposed course of conduct.

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### COMMENT

#### ***Confirmed in Writing***

[1] If it is not feasible to obtain or transmit a written confirmation at the time the client gives informed consent, then the lawyer must obtain or transmit it within a reasonable time thereafter. If a lawyer has obtained a client's informed consent, the lawyer may act in reliance on that consent so long as it is confirmed in writing within a reasonable time thereafter.

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#### ***Informed Consent***

[6] Many of the Rules of Professional Conduct require the lawyer to obtain the informed consent of a client or other person (e.g., a former client or, under certain circumstances, a prospective client) before accepting or continuing representation or pursuing a course of conduct. See, e.g., Rules 1.2(c), 1.6(a) and 1.7(b). The communication necessary to obtain such consent will vary according to the Rule involved and the circumstances giving rise to the need to obtain informed consent. The lawyer must make reasonable efforts to ensure that the client or other person possesses information reasonably adequate to

make an informed decision. Ordinarily, this will require communication that includes a disclosure of the facts and circumstances giving rise to the situation, any explanation reasonably necessary to inform the client or other person of the material advantages and disadvantages of the proposed course of conduct and a discussion of the client's or other person's options and alternatives. In some circumstances it may be appropriate for a lawyer to advise a client or other person to seek the advice of other counsel. A lawyer need not inform a client or other person of facts or implications already known to the client or other person; nevertheless, a lawyer who does not personally inform the client or other person assumes the risk that the client or other person is inadequately informed and the consent is invalid. In determining whether the information and explanation provided are reasonably adequate, relevant factors include whether the client or other person is experienced in legal matters generally and in making decisions of the type involved, and whether the client or other person is independently represented by other counsel in giving the consent. Normally, such persons need less information and explanation than others, and generally a client or other person who is independently represented by other counsel in giving the consent should be assumed to have given informed consent.

[7] Obtaining informed consent will usually require an affirmative response by the client or other person. In general, a lawyer may not assume consent from a client's or other person's silence. Consent may be inferred, however, from the conduct of a client or other person who has reasonably adequate information about the matter. A number of Rules require that a person's consent be confirmed in writing. See Rules 1.7(b) and 1.9(a). For a definition of "writing" and "confirmed in writing," see paragraphs (n) and (b). Other Rules require that a client's consent be obtained in a writing signed by the client. See, e.g., Rules 1.8(a) and (g). For a definition of "signed," see paragraph (n).

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## **Rule 1.1. Competence**

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

### **COMMENT**

#### ***Legal knowledge and skill***

[1] In determining whether a lawyer employs the requisite knowledge and skill in a particular matter, relevant factors include the relative complexity and specialized nature of the matter, the lawyer's general experience, the lawyer's training and experience in the field in question, the preparation and study the lawyer is able to give the matter and whether it is feasible to refer the matter to, or associate or consult with, a lawyer of established competence in the field in question. In many instances, the required proficiency is that of a general practitioner. Expertise in a particular field of law may be required in some circumstances.

[2] A lawyer need not necessarily have special training or prior experience to handle legal problems of a type with which the lawyer is unfamiliar. A newly admitted lawyer can be as competent as a practitioner with long experience. Some important legal skills, such as the analysis of precedent, the evaluation of evidence and legal drafting, are required in all legal problems. Perhaps the most fundamental legal skill consists of determining what kind of legal problems a situation may involve, a skill that necessarily transcends any particular specialized knowledge. A lawyer can provide adequate representation in a wholly novel field through necessary study. Competent representation can also be provided through the association of a lawyer of established competence in the field in question.

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### ***Thoroughness and Preparation***

[5] Competent handling of a particular matter includes inquiry into and analysis of the factual and legal elements of the problem, and use of methods and procedures meeting the standards of competent practitioners. It also includes adequate preparation. The required attention and preparation are determined in part by what is at stake; major litigation and complex transactions ordinarily require more extensive treatment than matters of lesser complexity and consequence. An agreement between the lawyer and the client regarding the scope of the representation may limit the matters for which the lawyer is responsible. See Rule 1.2(c).

### ***Maintaining Competence***

[6] To maintain the requisite knowledge and skill, a lawyer should keep abreast of changes in the law and its practice, engage in continuing study and education and comply with all continuing legal education requirements to which the lawyer is subject.

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## **RULE 1.2. SCOPE OF REPRESENTATION AND ALLOCATION OF AUTHORITY BETWEEN CLIENT AND LAWYER**

- (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. A lawyer shall abide by a client's decision whether to settle a matter. In a criminal case, the lawyer shall abide by the client's decision, after consultation with the lawyer, as to a plea to be entered, whether to waive jury trial and whether the client will testify.**
- (b) A lawyer's representation of a client, including representation by appointment, does not constitute an endorsement of the client's political, economic, social or moral views or activities.**
- (c) A lawyer may limit the scope or objectives, or both, of the representation if the limitation is reasonable under the circumstances and the client gives informed consent. A lawyer may provide limited representation to pro se parties as permitted by C.R.C.P. 11(b) and C.R.C.P. 311(b).**
- (d) A lawyer shall not counsel a client to engage, or assist a client, in conduct that the lawyer knows is criminal or fraudulent, but a lawyer may discuss the legal consequences of any proposed course of conduct with a client and may counsel or assist a client to make a good faith effort to determine the validity, scope, meaning or application of the law.**

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### **Rule 1.4. Communication**

#### **(a) A lawyer shall:**

- (1) promptly inform the client of any decision or circumstance with respect to which the client's informed consent, as defined in Rule 1.0(e), is required by these Rules;**
- (2) reasonably consult with the client about the means by which the client's objectives are to be accomplished;**
- (3) keep the client reasonably informed about the status of the matter;**
- (4) promptly comply with reasonable requests for information; and**

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

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

#### **COMMENT**

[1] Reasonable communication between the lawyer and the client is necessary for the client effectively to participate in the representation.

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#### ***Explaining Matters***

[5] The client should have sufficient information to participate intelligently in decisions concerning the objectives of the representation and the means by which they are to be pursued, to the extent the client is willing and able to do so. Adequacy of communication depends in part on the kind of advice or assistance that is involved. For example, when there is time to explain a proposal made in a negotiation, the lawyer should review all important provisions with the client before proceeding to an agreement. In litigation a lawyer should explain the general strategy and prospects of success and ordinarily should consult the client on tactics that are likely to result in significant expense or to injure or coerce others. On the other hand, a lawyer ordinarily will not be expected to describe trial or negotiation strategy in detail. The guiding principle is that the lawyer should fulfill reasonable client expectations for information consistent with the duty to act in the client's best interests, and the client's overall requirements as to the character of representation. In certain circumstances, such as when a lawyer asks a client to consent to a representation affected by a conflict of interest, the client must give informed consent, as defined in Rule 1.0(e).

[6] Ordinarily, the information to be provided is that appropriate for a client who is a comprehending and responsible adult. However, fully informing the client according to this standard may be impracticable, for example, where the client is a child or suffers from diminished capacity. See Rule 1.14. . .

#### ***Withholding Information***

[7] In some circumstances, a lawyer may be justified in delaying transmission of information when the client would be likely to react imprudently to an immediate communication. Thus, a lawyer might withhold a psychiatric diagnosis of a client when the examining psychiatrist indicates that disclosure would harm the client. . .

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#### **Rule 1.6. Confidentiality of Information**

**(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 reveal the client's intention to commit a crime and the information necessary to prevent the crime;**

(3) to prevent the client from committing a 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;

(4) 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;

(5) to secure legal advice about the lawyer's compliance with these Rules, other law or a court order;

(6) 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

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

## COMMENT

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[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.

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### ***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.

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### ***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. . . .

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[7] Paragraph (b)(3) is a limited exception to the rule of confidentiality that permits the lawyer to reveal information to the extent necessary to enable affected persons or appropriate authorities to prevent the client from committing a fraud, as defined in Rule 1.0(d), that is reasonably certain to result in substantial injury to the financial or property interests of another and in furtherance of which the client has used or is using the lawyer's services. Such a serious abuse of the client-lawyer relationship by the client forfeits the protection of this Rule. The client can, of course, prevent such disclosure by refraining from the wrongful conduct. Although paragraph (b)(3) does not require the lawyer to reveal the client's misconduct, the lawyer may not counsel or assist the client in conduct the lawyer knows is fraudulent. See Rule 1.2(d). See also Rule 1.16 with respect to the lawyer's obligation or right to withdraw from the representation of the client in such circumstances, and Rule 1.13(c), which permits the lawyer, where the client is an organization, to reveal information relating to the representation in limited circumstances.

[9] 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, other law, or a court order. In most situations, disclosing information to secure such advice will be impliedly authorized for the lawyer to carry out the representation. . . .

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## **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.**

## **COMMENT**

### ***General Principles***

[1] Loyalty and independent judgment are essential elements in the lawyer's relationship to a client. Concurrent conflicts of interest can arise from the lawyer's responsibilities to another client, a former client or a third person or from the lawyer's own interests. . . .

[2] Resolution of a conflict of interest problem under this Rule requires the lawyer to: 1) clearly identify the client or clients; 2) determine whether a conflict of interest exists; 3) decide whether the representation may be undertaken despite the existence of a conflict, i.e., whether the conflict is

consentable; and 4) if so, consult with the clients affected under paragraph (a) and obtain their informed consent, confirmed in writing. . .

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[3] A conflict of interest may exist before representation is undertaken, in which event the representation must be declined, unless the lawyer obtains the informed consent of each client under the conditions of paragraph (b). To determine whether a conflict of interest exists, a lawyer should adopt reasonable procedures, appropriate for the size and type of firm and practice, to determine in both litigation and non-litigation matters the persons and issues involved. See also Comment to Rule 5.1. Ignorance caused by a failure to institute such procedures will not excuse a lawyer's violation of this Rule. As to whether a client-lawyer relationship exists or, having once been established, is continuing, see Comment to Rule 1.3 and Scope.

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#### ***Identifying Conflicts of Interest: Directly Adverse***

[6] Loyalty to a current client prohibits undertaking representation directly adverse to that client without that client's informed consent. Thus, absent consent, a lawyer may not act as an advocate in one matter against a person the lawyer represents in some other matter, even when the matters are wholly unrelated. The client as to whom the representation is directly adverse is likely to feel betrayed, and the resulting damage to the client-lawyer relationship is likely to impair the lawyer's ability to represent the client effectively. . .

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#### ***Interest of Person Paying for a Lawyer's Service***

[13] A lawyer may be paid from a source other than the client, including a co-client, if the client is informed of that fact and consents and the arrangement does not compromise the lawyer's duty of loyalty or independent judgment to the client. See Rule 1.8(f). If acceptance of the payment from any other source presents a significant risk that the lawyer's representation of the client will be materially limited by the lawyer's own interest in accommodating the person paying the lawyer's fee or by the lawyer's responsibilities to a payer who is also a co-client, then the lawyer must comply with the requirements of paragraph (b) before accepting the representation, including determining whether the conflict is consentable and, if so, that the client has adequate information about the material risks of the representation.

#### ***Prohibited Representations***

[14] Ordinarily, clients may consent to representation notwithstanding a conflict. However, as indicated in paragraph (b), some conflicts are nonconsentable, meaning that the lawyer involved cannot properly ask for such agreement or provide representation on the basis of the client's consent. When the lawyer is representing more than one client, the question of consentability must be resolved as to each client.

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[19] Under some circumstances it may be impossible to make the disclosure necessary to obtain consent. For example, when the lawyer represents different clients in related matters and one of the clients refuses to consent to the disclosure necessary to permit the other client to make an informed decision, the lawyer cannot properly ask the latter to consent. In some cases the alternative to common representation can be that each party may have to obtain separate representation with the possibility of incurring additional costs. These costs, along with the benefits of securing separate representation, are factors that may be considered by the affected client in determining whether common representation is in the client's interests.

### **Confirmed in Writing**

[20] Paragraph (b) requires the lawyer to obtain the informed consent of the client, confirmed in writing. Such a writing may consist of a document executed by the client or one that the lawyer promptly records and transmits to the client following an oral consent. See Rule 1.0(b). See also Rule 1.0(n) (writing includes electronic transmission). If it is not feasible to obtain or transmit the writing at the time the client gives informed consent, then the lawyer must obtain or transmit it within a reasonable time thereafter. See Rule 1.0(b). The requirement of a writing does not supplant the need in most cases for the lawyer to talk with the client, to explain the risks and advantages, if any, of representation burdened with a conflict of interest, as well as reasonably available alternatives, and to afford the client a reasonable opportunity to consider the risks and alternatives and to raise questions and concerns. Rather, the writing is required in order to impress upon clients the seriousness of the decision the client is being asked to make and to avoid disputes or ambiguities that might later occur in the absence of a writing.

### **Revoking Consent**

[21] A client who has given consent to a conflict may revoke the consent and, like any other client, may terminate the lawyer's representation at any time. Whether revoking consent to the client's own representation precludes the lawyer from continuing to represent other clients depends on the circumstances, including the nature of the conflict, whether the client revoked consent because of a material change in circumstances, the reasonable expectations of the other client and whether material detriment to the other clients or the lawyer would result.

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[27] For example, conflict questions may arise in estate planning and estate administration. A lawyer may be called upon to prepare wills for several family members, such as husband and wife, and, depending upon the circumstances, a conflict of interest may be present. In estate administration the identity of the client may be unclear under the law of a particular jurisdiction. Under one view, the client is the fiduciary; under another view the client is the estate or trust, including its beneficiaries. In order to comply with conflict of interest rules, the lawyer should make clear the lawyer's relationship to the parties involved.

[28] Whether a conflict is consentable depends on the circumstances. For example, a lawyer may not represent multiple parties to a negotiation whose interests are fundamentally antagonistic to each other, but common representation is permissible where the clients are generally aligned in interest even though there is some difference in interest among them. Thus, a lawyer may seek to establish or adjust a relationship between clients on an amicable and mutually advantageous basis; for example, in helping to organize a business in which two or more clients are entrepreneurs, working out the financial reorganization of an enterprise in which two or more clients have an interest or arranging a property distribution in settlement of an estate. The lawyer seeks to resolve potentially adverse interests by developing the parties' mutual interests. Otherwise, each party might have to obtain separate representation, with the possibility of incurring additional cost, complication or even litigation. Given these and other relevant factors, the clients may prefer that the lawyer act for all of them.

#### *Special Considerations in Common Representation*

[29] In considering whether to represent multiple clients in the same matter, a lawyer should be mindful that if the common representation fails because the potentially adverse interests cannot be reconciled, the result can be additional cost, embarrassment and recrimination. Ordinarily, the lawyer will be forced to withdraw from representing all of the clients if the common representation fails. In some situations, the risk of failure is so great that multiple representation is plainly impossible. For example, a lawyer cannot undertake common representation of clients where contentious litigation or negotiations between them are imminent or contemplated. Moreover, because the lawyer is required to be impartial between commonly represented clients, representation of multiple clients is improper when it is unlikely that impartiality can be maintained. Generally, if the relationship between the parties has already assumed antagonism, the possibility that the clients' interests can be adequately served by common representation is not very good. Other relevant factors are whether the lawyer subsequently will represent both parties on a continuing basis and whether the situation involves creating or terminating a relationship between the parties.

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[31] As to the duty of confidentiality, continued common representation will almost certainly be inadequate if one client asks the lawyer not to disclose to the other client information relevant to the common representation. This is so because the lawyer has an equal duty of loyalty to each client, and each client has the right to be informed of anything bearing on the representation that might affect that client's interests and the right to expect that the lawyer will use that information to that client's benefit. See Rule 1.4. The lawyer should, at the outset of the common representation and as part of the process of obtaining each client's informed consent, advise each client that information will be shared and that the lawyer will have to withdraw if one client decides that some matter material to the representation should be kept from the other. In limited circumstances, it may be appropriate for the lawyer to proceed with the representation when the clients have agreed, after being properly informed, that the lawyer will keep certain information confidential. For example, the lawyer may reasonably conclude that failure to disclose one client's trade secrets to another client will not adversely affect representation involving a joint venture between the clients and agree to keep that information confidential with the informed consent of both clients.

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#### **Rule 1.8. Conflict of Interest: Current Clients: Specific Rules**

**(a) lawyer shall not enter into a business transaction with a client or knowingly acquire an ownership, possessory, security or other pecuniary interest adverse to a client unless:**

- (1) the transaction and terms on which the lawyer acquires the interest are fair and reasonable to the client and are fully disclosed and transmitted in writing in a manner that can be reasonably understood by the client;**
- (2) the client is advised in writing of the desirability of seeking and is given a reasonable opportunity to seek the advice of independent legal counsel on the transaction; and**
- (3) the client gives informed consent, in a writing signed by the client, to the essential terms of the transaction and the lawyer's role in the transaction, including whether the lawyer is representing the client in the transaction.**

**(b) A lawyer shall not use information relating to representation of a client to the disadvantage of the client unless the client gives informed consent, except as permitted or required by these Rules.**

**(c) A lawyer shall not solicit any substantial gift from a client, including a testamentary gift, or prepare on behalf of a client an instrument giving the lawyer or a person related to the lawyer any substantial gift unless the lawyer or other recipient of the gift is related to the client. For purposes of this paragraph, related persons include a spouse, child, grandchild, parent, grandparent or other relative or individual with whom the lawyer or the client maintains a close, familial relationship.**

**(d) Prior to the conclusion of representation of a client, a lawyer shall not make or negotiate an agreement giving the lawyer literary or media rights to a portrayal or account based in substantial part on information relating to the representation.**

**(e) A lawyer shall not provide financial assistance to a client in connection with pending or contemplated litigation, except that:**

**(1) a lawyer may advance court costs and expenses of litigation, the repayment of which may be contingent on the outcome of the matter; and**

**(2) a lawyer representing an indigent client may pay court costs and expenses of litigation on behalf of the client.**

**(f) A lawyer shall not accept compensation for representing a client from one other than the client unless:**

**(1) the client gives informed consent;**

**(2) there is no interference with the lawyer's independence of professional judgment or with the client-lawyer relationship; and**

**(3) information relating to representation of a client is protected as required by Rule 1.6.**

**(g) A lawyer who represents two or more clients shall not participate in making an aggregate settlement of the claims of or against the clients, or in a criminal case an aggregated agreement as to guilty or nolo contendere pleas, unless each client gives informed consent, in a writing signed by the client. The lawyer's disclosure shall include the existence and nature of all the claims or pleas involved and of the participation of each person in the settlement.**

**(h) A lawyer shall not:**

**(1) make an agreement prospectively limiting the lawyer's liability to a client for malpractice unless the client is independently represented in making the agreement; or**

**(2) settle a claim or potential claim for such liability with an unrepresented client or former client unless that person is advised in writing of the desirability of seeking and is given a reasonable opportunity to seek the advice of independent legal counsel in connection therewith.**

**(i) A lawyer shall not acquire a proprietary interest in the cause of action or subject matter of litigation the lawyer is conducting for a client, except that the lawyer may:**

**(1) acquire a lien authorized by law to secure the lawyer's fee or expenses; and**

**(2) contract with a client for a reasonable contingent fee in a civil case.**

**(j) A lawyer shall not have sexual relations with a client unless a consensual sexual relationship existed between them when the client-lawyer relationship commenced.**

**(k) While lawyers are associated in a firm, a prohibition in the foregoing paragraphs (b) through (i) that applies to any one of them shall apply to all of them.**

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**RULE 1.14. CLIENT WITH DIMINISHED CAPACITY** *[All comments included.]*

**(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 conclusions about matters affecting the client's own well-being. For example, children as young as five or six years of age, and certainly those of ten or twelve, are regarded as having opinions that are entitled to weight in legal proceedings concerning their custody. So also, it is recognized that some persons of advanced age can be quite capable of handling routine financial matters while needing special legal protection concerning major transactions.

[2] The fact that a client suffers a disability does not diminish the lawyer's obligation to treat the client with attention and respect. Even if the person has a legal representative, the lawyer should as far as possible accord the represented person the status of client, particularly in maintaining communication.

[3] The client may wish to have family members or other persons participate in discussions with the lawyer. When necessary to assist in the representation, the presence of such persons generally does not affect the applicability of the attorney-client evidentiary privilege. Nevertheless, the lawyer must keep the client's interests foremost and, except for protective action authorized under paragraph (b), must look to the client, and not family members, to make decisions on the client's behalf.

[4] If a legal representative has already been appointed for the client, the lawyer should ordinarily look to the representative for decisions on behalf of the client. In matters involving a minor, whether the lawyer should look to the parents as natural guardians may depend on the type of proceeding or matter in which the lawyer is representing the minor. If the lawyer represents the guardian as distinct from the ward, and is aware that the guardian is acting adversely to the ward's interest, the lawyer may have an obligation to prevent or rectify the guardian's misconduct. See Rule 1.2(d).

***Taking Protective Action***

[5] If a lawyer reasonably believes that a client is at risk of substantial physical, financial or other harm unless action is taken, and that a normal client-lawyer relationship cannot be maintained as provided in paragraph (a) because the client lacks sufficient capacity to communicate or to make adequately considered decisions in connection with the representation, then paragraph (b) permits the lawyer to take protective measures deemed necessary. Such measures could include: consulting with family members, using a reconsideration period to permit clarification or improvement of circumstances, using voluntary surrogate 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.

## **RULE 2.1. ADVISOR**

**In representing a client, a lawyer shall exercise independent professional judgment and render candid advice. In rendering advice, a lawyer may refer not only to law but to other considerations such as moral, economic, social and political factors, that may be relevant to the client's situation. In a matter involving or expected to involve litigation, a lawyer should advise the client of alternative forms of dispute resolution that might reasonably be pursued to attempt to resolve the legal dispute or to reach the legal objective sought.**

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