

ETHICS 101 FOR TENNESSEE ELDER LAW ATTORNEYS

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“If not now, when? If not you, who?” - Unknown

“In the nature of law practice ... conflicting responsibilities are encountered. Virtually all difficult ethical problems arise from conflict between a lawyer’s responsibilities to clients, to the legal system, and to the lawyer’s own interest in remaining an upright person while earning a satisfactory living. The Rules of Professional Conduct prescribe terms for resolving such conflicts. Within the framework of these Rules many difficult issues of professional discretion can arise. Such issues must be resolved through the exercise of sensitive professional and moral judgment guided by the basic principles underlying the Rules.” TRPC, Preamble, Comment 9.

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Our Supreme Court approved the Tennessee Rules of Professional Conduct (TRPC) on August 27, 2002. Those rules govern the legal profession in this State. The text of the rules as well as the history of their adoption is on the Tennessee Bar Association website at <http://www.tba.org/committees/Conduct/index.html>.

Getting Started: Initial Issues

§ 1.1 The Lawyer's Role:

“A lawyer is a representative of clients, an officer of the legal system, and a public citizen having special responsibility for the quality of justice.” TRPC, Preamble, Comment 2.

“**As a representative of clients**, a lawyer performs various functions. **As an advisor**, a lawyer provides a client with an informed understanding of the client’s legal rights and obligations and explains their practical implications. **As an advocate**, a lawyer zealously asserts the client’s position under the rules of the adversary system. **As a negotiator**, a lawyer seeks a result advantageous to the client but consistent with requirements of honest dealing with others. **As an 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 an **evaluator** by examining a client’s legal affairs and reporting about them to the client or to others.” TRPC, Preamble, Comment 3 (emphasis added).

§ 1.2. Competence, TRPC Rule 1.1: A lawyer shall provide competent representation to a client. Competent representation requires the legal knowledge, skill, thoroughness, and preparation reasonably necessary for the representation.

COMMENTS

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.

[3] **In a situation in which a client is threatened with imminent and irreparable harm**, a lawyer may give advice or assistance in a matter in which the lawyer does not have the skill ordinarily required where referral to, or consultation or association with, another lawyer would be impractical. Even in such a situation, however, assistance should be limited to that reasonably necessary in the circumstances, for ill-considered action can jeopardize the client's interest.

[4] **A lawyer may accept representation where the requisite level of competence can be achieved by reasonable preparation.** This principle applies as well to a lawyer who is appointed as counsel for an unrepresented person. See also RPC 6.2.

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 the 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 elaborate treatment than matters of lesser consequence.

Maintaining Competence

[6] To maintain the requisite knowledge and skill, **a lawyer should engage in regular continuing study and education** that is pertinent to the lawyer's practice and should conscientiously satisfy all requirements for continuing legal education in all jurisdictions in which the lawyer is licensed to practice law. If a system of peer review has been established, the lawyer should consider making use of it in appropriate circumstances.

Practice Tip: The TRPC does not require instant expertise before accepting a client. The TRPC make it clear that we are all practicing law. Instead, if the lawyer's training and experience are inadequate to prepare her, the TRPC require that each take steps to provide competent representation for each client through study, association with a more experienced lawyer, or other means.

§ 1.3. Common Ethical Issues Confronting Elder Law Attorneys:

Conflicts of interest
Potential (e.g., future or perceived) conflicts of interest
Confidentiality

§ 1.4. Who is the Client?

Hypothetical 1, Part 1:

Sally calls your office. Her mom, Mildred, is 84 and has been disagreeably lately. Sally's sister, Mary, took matters into her hands and filed a Petition to establish a Conservatorship. A doctor opined that Mildred is fully disabled. Sally wants you to visit Mildred and speak with her about this matter.

In many situations, the initial contact is made by a family member or a caregiver. That person may transport the elder to the lawyer's office or may be present during

interviews. The elder may prefer or insist on that person being present. In all likelihood, the family member or caregiver will attempt to participate in the interview and will seek legal advice.

The TRPC neither define the term “client” nor do they tell the lawyer how to determine the identity of the client. There is no magic formula for determining the client’s identity. What the lawyer must do is ensure that the persons involved understand who the client is, and who the client is not. Preferably before, but no later than the conclusion of the initial interview, the persons involved should have reason to “believe” (defined in Rule 1.0) the scope of the representation is defined.

If the attorney will represent the Elder, but will be paid by the other family members, then the Elder must consent to the payment arrangement. In addition, the attorney must not allow the other family members to influence his or her professional judgment in rendering legal services to the Elder.

If the attorney represents the family members, then he or she should not give legal advice to the Elder and should ensure that the Elder has an opportunity to secure separate counsel. The attorney may represent both the senior citizen and other family members if it is obvious that he or she can represent each of their interests appropriately and they all consent to the multiple representation.

In practical terms, the lawyer should:

- A. Identify who he/she is representing and who will direct the scope of representation;
- B. Determine, if the Elder is the client, whether he/she has capacity to hire the lawyer and direct the representation; and
- C. If multiple parties are present, determine whether their interests diverge.

TRPC RULE 1.2, SCOPE OF THE REPRESENTATION AND THE ALLOCATION OF AUTHORITY BETWEEN THE LAWYER AND CLIENT

(a) Subject to paragraphs (c) and (d), **a lawyer shall abide by a client’s decisions** concerning the objectives of the representation and 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 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 of a client’s representation if the limitation is

reasonable under the circumstances and the client gives consent, preferably in writing, after consultation.

(d) A lawyer shall not counsel a client to engage, or assist a client, in conduct that the lawyer knows or reasonably should know 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.

(Emphasis added).

Practice Tip: The client, not the lawyer, directs the ultimate scope of the representation. Comment 1 to Rule 1.2 provides: “Both lawyer and client have authority and responsibility in the objectives and means of the representation. The client has ultimate authority to determine the purposes to be served by legal representation, within the limits imposed by law and the lawyer’s professional obligations. Also, the decisions specified in paragraph (a), such as whether to settle a civil matter, must be made by the client. Other decisions may be made by the lawyer pursuant to the lawyer’s implied authority to take action necessary to carry out the representation, subject to the lawyer’s duty to keep the client reasonably informed about the status of the representation. See RPC 1.4. A clear distinction between objectives and means sometimes cannot be drawn, and in many cases the client lawyer relationship partakes of a joint undertaking. **In questions of means, for example, the lawyer normally will assume responsibility for technical and legal tactical issues, but the lawyer usually will defer to the client regarding such questions as the expense to be incurred and concern for third persons who might be adversely affected.** Law defining the lawyer’s scope of authority in litigation varies among jurisdictions.” (Emphasis added).

TRPC RULE 1.4, COMMUNICATION

(a) A lawyer shall keep a client reasonably informed about the status of a matter and comply with reasonable requests for information within a reasonable time.

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

Practice Tip: It goes without saying that the client cannot effectively participate in the scope of the representation unless the client is informed. You must communicate regularly with your clients.

Hypothetical 1, Part 2:

You meet with Mildred and she responds to your questions with clarity. She is physically frail and is homebound. You ask her whether she understands what Mary proposes. She responds that she loves Mary, but does not want Mary telling her what to do. (Sally is present during this interview and is supportive of Mom).

TRPC RULE 1.6, CONFIDENTIALITY

(a) Except as provided below, a lawyer shall not reveal information relating to the representation of a client unless the client consents after consultation, except that the lawyer may make such disclosures as are impliedly authorized by the client in order for the lawyer to carry out the representation.

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

(1) to prevent the client or another person from committing a crime, including a crime that is reasonably certain to result in substantial injury to the financial interest or property of another, unless disclosure is prohibited or restricted by Rule 3.3;

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

(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.

(c) A lawyer shall reveal information relating to the representation of a client to the extent the lawyer reasonably believes disclosure is necessary:

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

(2) to comply with an order of a tribunal requiring disclosure, but only if ordered to do so by the tribunal after the lawyer has asserted on behalf of the client all non-frivolous claims that the information sought by the tribunal is protected against disclosure by the attorney-client privilege or other applicable law; or

(3) to comply with Rules 3.3, 4.1, or other law.

Do you violate Rule 1.6 by releasing a Power of Attorney to an Agent?

PA Eth. Op. 2002-52, 2002 WL 32077996 (Pa.Bar.Assn.Comm.Leg.Eth.Prof.Resp.)

Your inquiry to the Committee on Legal Ethics and Professional Responsibility has been referred to me for a response.

You have asked if you may release a certain power of attorney to the brother of the document's principal; the brother being also the agent named in the document. In your letter to Louise M. Lamoreaux, PBA Ethics Coordinator, you state the following facts.

Several years ago, you prepared a Durable Power of Attorney. At that time, your client was elderly, but competent. Then, as now, she has been estranged from all of her likely heirs (who may have standing in a guardianship proceeding), to wit: her daughter and her three brothers. Apparently for that reason, she instructed you verbally, at the time of execution, not to release the power of attorney document to the agent, her brother, without her specific direction.

Since the time of execution, her circumstances have changed in several significant ways. She has been admitted to a nursing facility. She failed to pay a judgment creditor, so that

her house was sold at Sheriff's sale.

Other circumstances tend to suggest she has become less able to protect herself, financially. You were told she told others that she will not deposit in a bank the approximately \$25,000.00 she is to receive from the Sheriff, but will instead keep the proceeds in her drawer at the nursing home. You have attempted to telephone her, but have been told by the nurses that she will not accept any calls (not even from her own attorney).

As to her financial affairs, the situation is exigent, as her personalty must be removed from the home, and there is the matter of protecting the realty sale proceeds.

The brother who is named as agent in the Durable Power of Attorney has telephoned you, demanding that you release the document to him.

Rule of Professional Conduct 1.14(b) provides that a lawyer may take protective action with respect to a client, but "only when the lawyer reasonably believes that the client cannot adequately act in the client's own interest."

In my opinion, you may release the power of attorney document to the brother, notwithstanding the prior verbal instruction of your client, but only after you have satisfied yourself on competent evidence that you reasonably believe the client cannot adequately protect her financial interests. I mention "competent evidence" to encourage you to visit the client personally, in the nursing home, to enable yourself to make a first-hand evaluation as to her competency, rather than to rely on the hearsay statements of others.

In doing so, you should keep in mind the admonition of Rule 1.14(a) that you should "as far as possible, maintain a normal client lawyer relationship with the client."

***2 In summary, I recommend that you visit the client, and then release the power of attorney to the named agent, if you are able to satisfy yourself that the client does suffer a mental disability sufficient to prevent her from protecting her interests; recognizing that this mental disability could preclude her from perceiving her own situation, such that she cannot give the direction to you to release the document; and recognizing further that the document was doubtlessly intended by her to be used in just such a situation as that she apparently faces.**

Your only alternative course of action would be to seek an emergency guardianship order, which you could seek, yourself, under Rule 1.14, if necessary. However, this would be more expensive to the client and more time-consuming. As such, it would less suit the exigency of this situation. Moreover, the existence of the power of attorney would ordinarily be a defense to a guardianship action, in any case. Consequently, I believe the course of action described in the prior paragraph would seem more protective of the client.

Finally, you should explain to the brother his fiduciary duties under the revised power of attorney statutes, and endeavor to assist him, if feasible, in meeting those duties.

Please note that this opinion is advisory only, and is not binding on the Disciplinary Board of the Supreme Court of Pennsylvania, or any court. It carries only such weight as an appropriate reviewing authority may choose to give it. Moreover, this is the opinion of only one member of the Committee, and is not an opinion of the full Committee.

(Emphasis added).

Do you violate Rule 1.6 by disclosing a client's intent to harm himself/herself?

CT Eth. Op. 00-5, 2000 WL 1370782 (Conn. Bar. Assn.).

In the context of the facts we have been asked to assume and subject to the qualifications set forth below, it is our opinion that a lawyer, without the client's consent, may disclose the client's intent to commit suicide in order to prevent it. The basis for this opinion is Rule 1.14, Client Under A Disability. ... Under normal circumstances a lawyer may not reveal information relating to representation of a client without the client's explicit or implicit consent. Rule 1.6(a). ... Rule 1.14(b) applies only when "the lawyer reasonably believes that the client cannot adequately act in the client's own interest." In such a situation, "[a] lawyer may seek the appointment of a guardian or take other protective action with respect to a client" Rule 1.14(b). The phrase "take other protective action" is broad and in our judgment, notwithstanding Rule 1.6, must be interpreted to include disclosing the client's suicidal intent to someone who can help prevent the suicide. Interpreting "other protective action" to exclude disclosure would defeat the purpose of Rule 1.14(b). Protecting the health and safety of a client who is unable to act in his own interest is more important than maintaining complete confidentiality of all information about the client.

See also SC Adv. Op. 99-12, 1999 WL 1893872 (S.C.Bar.Eth.Adv.Comm.) (similar result).

Is the Rule different if property is in jeopardy?

CT Eth. Op. 98-17, 1998 WL 988207 (Conn.Bar.Assn.).

You represent an elderly man who owns and manages a mobile home park in which he resides. He is assisted by a professional bookkeeper. Recently the two of you have noticed that the gentleman slurs his speech at times, makes decisions regarding the rental of his property which you characterize as "questionable," and has failed to complete leases and maintain the documentation necessary for evictions. The bookkeeper has informed you that she suspects alcohol abuse. The client lives alone and is without family of any kind since the suicide of a long-term companion. [Committee determines you cannot consult with client's doctor]. ... Your next question deals with whether you must seek the appointment of a conservator for your client, even over his objection, if you feel his behavior continues to interfere with his business. Again, we refer you to Rule 1.14 and the Commentary thereto. The general rule under subsection (a) of Rule 1.14 is that "when a client's ability to make adequately considered decisions in connection with the representation is impaired, ... the lawyer shall, as far as reasonably possible, maintain a normal client-lawyer relationship with the client." Subsection (b) permits the lawyer "to 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." (Emphasis added.) The language of the general rule is mandatory. The language of subsection (b) is permissive but authorizes intervention only where the lawyer acts upon reasonable belief that the client is not competent to make decisions in his own interest. Clearly subsection (b) means more than a belief that the client is a bad businessman.

Hypothetical 1, Part 3:

Later, Sally calls you and tells her she has worked matters out with Mary and will now support the Conservatorship so long as she is co-Conservator with Mary.

TRPC RULE 1.7, CONFLICT OF INTEREST: GENERAL RULE

(a) A lawyer shall not represent a client if the representation of that client will be directly adverse to another client, unless:

- (1) the lawyer reasonably believes the representation will not adversely affect the relationship with the other client; and
- (2) each client consents in writing after consultation.

(b) 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 interests, unless:

- (1) the lawyer reasonably believes the representation will not be adversely affected; and
- (2) the client consents in writing after consultation. When representation of multiple clients in a single matter is undertaken, the consultation shall include explanation of the implications of the common representation and the advantages and risks involved.

(c) A lawyer shall not represent more than one client in the same criminal case, unless

- (1) the lawyer demonstrates to the tribunal that good cause exists to believe that no conflict of interest prohibited under this Rule presently exists or is likely to exist; and
- (2) each client consents in writing after consultation concerning the implications of the common representation, along with the advantages and risks involved.

Selected Comments on TRPC Rule 1.7

[1] Loyalty is an essential element in the lawyer's relationship to a client. An impermissible conflict of interest may exist before representation is undertaken, in which event the representation should be declined. **The 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 parties and issues involved and to determine whether actual or potential conflicts of interest exist.**

[3] As a general proposition, **loyalty to a client prohibits undertaking representation directly adverse to that client without that client's consent.** Paragraph (a) expresses that general rule. Thus, a lawyer ordinarily may not act as an advocate against a person the lawyer represents in some other matter, even if it is wholly unrelated. On the other hand, simultaneous representation in unrelated matters of clients whose interests are only generally adverse, such as competing economic enterprises, does not require consent of the respective clients. Paragraph (a) applies only when the representation of one client would be directly adverse to the other.

[4] Loyalty to a client is also impaired when a lawyer cannot consider, recommend, or carry out an appropriate course of action for the client because of the lawyer's other responsibilities or interests. The conflict in effect forecloses alternatives that would otherwise be available to the client. Paragraph (b) addresses such situations. **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 otherwise foreclose courses of action that reasonably should be pursued on behalf of the client. Consideration should be given to whether the client wishes to accommodate the other interest involved.

[17] Members of a family may reasonably seek joint representation by a single lawyer in a matter affecting the family. Conflict questions may arise in such circumstances. For example, in estate planning, a lawyer may be called upon to prepare wills for family members, such as husband and wife, and, depending upon the circumstances, a conflict of interest may arise. Resolution of conflicts of interest between family members pursuant to this Rule must be consistent with the lawyer's duty of undivided loyalty to each client, but the lawyer may take into account the willingness of each individual client to accommodate the interests of the family as a whole or the individual interests of other family members. In estate administration, the identity of the client may be unclear. Under one view, the client is the fiduciary; under another view, the client is the estate or trust, including its beneficiaries. **The lawyer should make clear the relationship to the parties involved.**

(Emphasis added).

Hypothetical 1, Part 4:

You continue to represent Mildred opposing the Conservatorship. As you continue discussing her case with her, she expresses a desire to have her daughters help her with her finances, but gives you no direction concerning how she would structure that relationship. You suggest several alternatives and she refuses to make a decision. You make repeated calls and visits, but Mildred will not give you direction. The hearing is tomorrow.

TRPC RULE 1.14, CLIENT UNDER A DISABILITY

(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.

Reviewing Hypothetical 1:

1998 NC Eth. Op 16, 1999 WL 33262173 (N.C.St.Bar.)

Opinion rules that a lawyer may represent a person who is resisting an incompetency petition although the person may suffer from a mental disability, provided the lawyer determines that resisting the incompetency petition is not frivolous.

Inquiry # 1:

Wife, who is elderly, was removed from the marital home. Husband, who is also elderly, contacted Attorney A because Husband did not understand why his wife was removed

from the home. He asked Attorney A to investigate. Attorney A discovered that Wife was the subject of an involuntary incompetency proceeding. When Attorney A gained access to Wife, she indicated that she wanted Attorney A to represent her in resisting the involuntary incompetency petition. She repeatedly said that she wanted to go home to live with her husband.

Attorney A also learned that Husband was investigated by police relative to allegations of abuse and neglect of Wife. Attorney A met with Husband and told him that he could not represent Wife in resisting the incompetency petition and represent Husband in defending against an action in connection with Wife's care or treatment. Husband agreed that Attorney A's representation would be limited to representing Wife in resisting the incompetency petition and that Husband would be responsible for paying the legal fees for that representation. A written fee agreement memorializing this arrangement was executed. Although Wife was held in a hospital at this time, she continued to express unequivocally that she desired Attorney A to represent her.

When Attorney A visited Wife, he noticed abnormalities in her behavior but he also witnessed extended periods of apparent lucidity. She repeatedly told Attorney A she wanted to go home, that she did not want an appointed guardian, and that she did not want to be declared incompetent. Attorney A filed several motions in the incompetency proceeding, including a motion to remove the guardian and for a jury trial. At the incompetency hearing before the clerk, the attorney for the Department of Social Services (DSS) and the guardian ad litem who had been appointed for Wife by the clerk, contended that Attorney A had no "standing or authority" to pursue motions on behalf of Wife. They argued that Attorney A had a conflict of interest due to his initial representation of Husband and Husband's continued payment for the representation. The clerk found that Attorney A was without "standing or authority" to represent Wife and summarily denied all motions filed on Wife's behalf by Attorney A. Attorney A's motion to stay the incompetency proceeding was also denied.

During the incompetency hearing, Attorney A was not allowed to participate as counsel for Wife. Attorney A was called as a witness, however. Wife, when she testified, could not identify Attorney A as her lawyer. However, she expressed a desire to return home with her husband to avoid becoming a ward of the state. At the close of the evidence, the clerk declared Wife incompetent and appointed the director of DSS to be her legal guardian.

*2 Thereafter Attorney A filed a notice of appeal seeking a trial de novo in superior court on the issues of right to counsel, incompetency, and right to a jury trial. The attorney for DSS now contends that Attorney A has no authority to represent Wife because she has been adjudicated incompetent and only her legal guardian may make decisions about her legal representation. The DSS lawyer now demands that Attorney A provide the guardian with a copy of every document in Wife's legal file.

Does Attorney A have a conflict of interest because he initially represented Husband?

Opinion # 1:

No. The representation of Wife in the incompetency proceeding is not a representation that is adverse to the interest of Husband. Furthermore, Attorney A obtained the consent of Husband to represent only Wife in the incompetency proceeding. The exercise of Attorney A's independent professional judgment on behalf of Wife is not impaired by the prior representation of Husband. See Rule 1.7 and Rule 1.9.

Inquiry # 2:

Does it matter that Husband pays for the representation of Wife?

Opinion # 2:

No. Rule 1.8(f) of the Revised Rules of Professional Conduct permits a lawyer to accept compensation for representing a client from someone other than the client if the client consents after consultation; there is no interference with the lawyer's independent professional judgment or the attorney-client relationship; and the confidentiality of client information is protected.

Inquiry # 3:

Wife has been declared incompetent by the state and a guardian appointed to represent her interests. Does Attorney A have to treat Wife as incompetent and defer to the decision of the guardian relative to the representation of Wife?

Opinion # 3:

No. Wife is entitled to counsel of her own choosing particularly with regard to a proceeding that so clearly and directly affects her freedom to continue to make decisions for herself. Rule 1.14(a) provides as follows: "[w]hen 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." If Attorney A is able to maintain a relatively normal client-lawyer relationship with Wife and Attorney A reasonably believes that Wife is able to make adequately considered decisions in connection with her representation, Attorney A may continue to represent her alone without including the guardian in the representation. However, if Attorney A has reason to believe that Wife is incapable of making decisions about her representation and is indeed incompetent, the appeal of the finding of incompetency may be frivolous. If so, Attorney A may not represent her on the appeal. See Rule 3.1 (prohibiting frivolous claims and defenses).

Inquiry # 4:

*3 Once the guardian was appointed for Wife, did the guardian become Attorney A's client, or otherwise step into the shoes of Wife, such that Attorney A may only take directions from the guardian and not from Wife?

Opinion # 4:

No. Rule 1.14(a) quoted above indicates that a lawyer may represent a client under a mental disability. The lawyer owes the duty of loyalty to the client and not to the guardian or legal representative of the client, particularly if the lawyer concludes that the legal guardian is not acting in the best interest of the client.

Inquiry # 5:

Does Attorney A have to turn over Wife's legal file to Wife's appointed guardian?

Opinion # 5:

No. When a guardian is appointed for a client, a lawyer may turn over materials in the client's file and disclose other confidential information to the guardian if the release of such confidential information is consistent with the purpose of the original representation of the client or consistent with the express instructions of the client. See, e.g., RPC 206 (attorney for deceased client may release confidential information to the personal representative of the estate). However, where, as here, the release of confidential information to a guardian is contrary to the purpose of the representation, the lawyer must protect the confidentiality of the client's information and may not release the legal

file to the guardian absent a court order. See Rule 1.6(d)(3).

The Lawyer as an Advisor

Hypothetical 2, Part 1:

John and Nancy are married. John was recently admitted to a nursing home and Nancy is in your office seeking public benefits advice. Together, they have accumulated just under \$200,000 in liquid assets and own a home. All property is jointly owned. Nancy is afraid she will have to spend their savings paying for nursing home care and is afraid she will lose the home.

TRPC 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.

Comments to TRPC Rule 2.1:

Scope of Advice

[1] A client is entitled to straightforward advice expressing the lawyer's honest assessment. Legal advice often involves unpleasant facts and alternatives that a client may be disinclined to confront. In presenting advice, a lawyer endeavors to sustain the client's morale and may put advice in as acceptable a form as honesty permits. However, a lawyer should not be deterred from giving candid advice by the prospect that the advice will be unpalatable to the client.

[2] Advice couched in narrowly legal terms may be of little value to a client, especially where practical considerations, such as cost or effects on other people, are predominant. Purely technical legal advice, therefore, can sometimes be inadequate. It is proper for a lawyer to refer to relevant moral and ethical considerations in giving advice. Although a lawyer is not a moral advisor as such, moral and ethical considerations impinge upon most legal questions and may decisively influence how the law will be applied.

[3] A client may expressly or impliedly ask the lawyer for purely technical advice. When such a request is made by a client experienced in legal matters, the lawyer may accept it at face value. When such a request is made by a client inexperienced in legal matters, however, the lawyer's responsibility as an advisor may include indicating that more may be involved than strictly legal considerations.

[4] Matters that go beyond strictly legal questions may also be in the domain of another profession. Family matters can involve problems within the professional competence of psychiatry, clinical psychology, or social work; business matters can involve problems within the competence of the accounting profession or of financial specialists. Where consultation with a professional in another field is itself something a competent lawyer would recommend, the lawyer should make such a recommendation. At the same time, a lawyer's advice at its best often consists of recommending a course of action in the face of conflicting recommendations of experts.

Offering Advice

[5] In general, a lawyer is not expected to give advice until asked by the client. However, when a lawyer knows that a client proposes a course of action that is likely to result in substantial adverse legal consequences to the client, the duty to the client under Rule 1.4 may require that the lawyer act if the client's course of action is related to the representation. A lawyer ordinarily has no duty to initiate investigation of a client's affairs or to give advice that the client has indicated is unwanted, but a lawyer may initiate advice to a client when doing so appears to be in the client's interest.

Hypothetical 2, Part 2:

After speaking with Nancy, you visit with John in the nursing home. He appears confused at first. As you speak with him, he begins to understand who you are. John:

- (a) Is willing to sign a power of attorney giving Nancy authority to transfer all martial assets to herself; or*
- (b) Is afraid Nancy will leave him and refuses to sign a power of attorney or other transfer documents.*

Hypothetical 2, Part 3:

Instead of meeting with Nancy, you are meeting with John's son, Paul. Nancy is deceased. John is certain his Dad would never want to spend all of his assets paying for nursing home care and wants you to help him protect Dad's assets.

In this case, Paul wants to protect John's assets. In our view, John's interests must be considered and John must be viewed as the intended beneficiary of the asset protection plan. Taken a step further, unless Paul brings with him the power to transfer John's assets, the Elder Law Attorney cannot transfer those assets without John's consent.¹ Moreover, even if John has consent, the attorney must not assist a client in taking action that the lawyer knows is criminal or fraudulent.²

TRPC Rule 5.4(c): "A lawyer shall not permit a person who recommends, employs, or pays the lawyer to render legal services for another to direct or regulate the lawyer's professional judgment in rendering such legal services."

TRPC Rule 1.7(b): "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, ...**" (Emphasis added).

1 MRPC Rule 1.2(d). In considering whether a transfer of assets might be prohibited by Rule 1.2(d), we present the following example: "A person commits theft of property if, with intent to deprive the owner of property, the person knowingly obtains or exercises control over the property without the owner's effective consent." T.C.A. § 39-14-103.

2 MRPC Rule 1.7. Regardless of client identity, because property rights cannot be transferred without the consent of the owner or his authorized representative, the Elder Law Attorney cannot engage in Medicaid Planning without taking the Elder's interests into account. Even if the Elder is not the client, we believe that creates the type of responsibility to the Elder described in Rule 1.7(b). Furthermore, if the client represents the Elder's personal representative, the lawyer may have a duty to prevent or rectify misconduct. *See MRPC Rule 1.4, Note 4.* In sum, we do not believe the Elder Law Attorney may ethically abandon the Elder's well-being in favor of other persons who are interested in acquiring the Elder's assets.

CT Eth. Op. 97-35, 1997 WL 816056 (Conn.Bar.Assn.).

You represent a four year old child in connection with the child's application for Social Security disability benefits. The mother of the minor child has applied for benefits on behalf of the child and has retained you to represent the child on a contingency basis. [FN1] You believe that the child is likely to be found disabled and eligible to receive benefits.

The child's parents have a continuing history of verbal and physical conflict. Your client's father has informed you that the mother has a history of drug addiction and arrests for prostitution. He also reports that the Department of Children and Family Services has taken the child from the mother more than once due to neglect and abuse. The child's father has a criminal record. In your dealings with your client's parents you have found the father to be more stable than the mother.

The mother has called you and informed you that she wants to be the representative payee for the child. When you informed her that you could not guarantee that she would be the representative payee for the child, the mother told you that she was withdrawing the application. The father subsequently called and told you to proceed. The father appears genuinely concerned with the welfare of the child and would prefer a representative payee other than himself or the mother. You believe it is in the child's best interest to proceed with the application for benefits. You have not indicated who you feel would be an appropriate representative payee. You have informed a member of this committee over the telephone that from your interactions with the child and because of the child's youth you do not believe the child is able to make an informed decision.

You have asked how you should proceed with the case in order to meet your obligation to the child. You have also asked what your obligation is to the child's mother and father.

Obligation to the child:

Your client is the child. Pursuant to Rule 1.14(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."

The maintenance of a "normal attorney-client relationship requires competence (Rule 1.1), adherence to the client's instructions (Rule 1.2), diligence (Rule 1.3), communication (Rule 1.4), confidentiality (Rule 1.6), avoidance of conflict (Rules 1.7 through 1.10) and safe keeping of property (Rule 1.15)" (Informal Opinion 94-29). The comments to the rule advise that the "normal attorney-client relationship is based upon an assumption that" the child is capable of making decisions about important matters when properly advised and assisted.

*2 You have informed us that from your interactions with the child, the child is unable to make an informed decision on the issue due to the child's youth (4 years old). [FN2] In situations like this one, where the parents are at odds, and the child has no opinion, you are an appropriate person to protect the best interests of the child. (See, *Schult v. Schult*, 241 Conn. 767,779- 81 (1997) (where the court discussed the role of the attorney for the child in divorce proceedings where the child cannot directly express an opinion in holding that the attorney for the child could even advocate a position different from that of the guardian ad litem, if the trial court permits it)). Since you state that you believe it is in the child's best interest to proceed with the application for benefits, you should do what is legally necessary to accomplish that goal for your client. If in your professional judgment you decide after a thorough review of the circumstances that the child cannot act in his or her best interest and it is in the child's interest to have a conservator or a guardian ad litem appointed through the Probate Court, the rule permits you to seek such an

appointment. (Rule 1.14(b)) (See also Informal Opinion 97-19 attached.)

Obligation to the parents:

Your relationship with the parents is governed by Rule 5.4(c) which provides: "A lawyer shall not permit a person who recommends, employs, or pays the lawyer to render legal services for another to direct or regulate the lawyer's professional judgment in rendering such legal services." Therefore, you have no obligation to abide by the wishes of either parent in advocating on behalf of your client. As discussed above, your obligation is to represent the child according to your own professional judgment even if it conflicts with the desires of the parent or parents. You may not, however, advocate a position that is against the best interest of the child. The parents, if they wish, may obtain their own counsel to represent their interests. (See Informal Opinion 92-7 and Informal Opinion 87-13).

The Lawyer as an Advocate

TRPC RULE 3.1, MERITORIOUS CLAIMS AND CONTENTIONS

A lawyer shall not bring or defend or continue with the prosecution or defense of a proceeding, or assert or controvert or continue to assert or controvert an issue therein, unless after reasonable inquiry the lawyer has a basis for doing so that is not frivolous, which includes a good faith argument for an extension, modification, or reversal of existing law. ...

TRPC RULE 3.2, EXPEDITING LITIGATION

A lawyer shall make reasonable efforts to expedite litigation.

TRCP RULE 3.2, CANDOR TOWARD THE TRIBUNAL

(a) A lawyer shall not knowingly:

- (1) make a false statement of fact or law to a tribunal; or
- (2) fail to disclose to the tribunal legal authority in the controlling jurisdiction known to the lawyer to be directly adverse to the position of the client and not disclosed by opposing counsel; or
- (3) in an ex parte proceeding, fail to inform the tribunal of all material facts known to the lawyer that will enable the tribunal to make an informed decision, whether or not the facts are adverse.

(b) A lawyer shall not offer evidence the lawyer knows to be false, except that a lawyer who represents a defendant in a criminal proceeding, and who has been denied permission to withdraw from the defendant's representation after compliance with paragraph (f), may allow the client to testify by way of an undirected narrative or take such other action as is necessary to honor the defendant's constitutional rights in connection with the proceeding.

(c) A lawyer shall not affirm the validity of, or otherwise use, any evidence the lawyer knows to be false.

(d) A lawyer may refuse to offer or use evidence, other than the testimony of a client who is a defendant in a criminal matter, that the lawyer reasonably believes is false, misleading, fraudulent or illegally obtained.

(e) If a lawyer knows that the lawyer's client intends to perpetrate a fraud upon the tribunal or otherwise commit an offense against the administration of justice in connection with the proceeding, including improper conduct toward a juror or a member of the jury pool, or comes to know, prior to the conclusion of the proceeding, that the client has, during the course of the lawyer's representation, perpetrated such a crime or fraud, the lawyer shall advise the client to refrain from, or to disclose or otherwise rectify, the crime or fraud and shall consult with the client about the consequences of the client's failure to do so.

(f) If a lawyer, after consultation with the client as required by paragraph (e), knows that the client still intends to perpetrate the crime or fraud, or refuses or is unable to disclose or otherwise rectify the crime or fraud, the lawyer shall seek permission of the tribunal to withdraw from the representation of the client and shall inform the tribunal, without further disclosure of information protected by Rule 1.6, that the lawyer's request to withdraw is required by the Rules of Professional Conduct.

(g) A lawyer who, prior to conclusion of the proceeding, comes to know that the lawyer has offered false tangible or documentary evidence shall withdraw or disaffirm such evidence without further disclosure of information protected by Rule 1.6.

(h) A lawyer who, prior to the conclusion of the proceeding, comes to know that a person other than the client has perpetrated a fraud upon the tribunal or otherwise committed an offense against the administration of justice in connection with the proceeding, and in which the lawyer's client was not implicated, shall promptly report the improper conduct to the tribunal, even if so doing requires the disclosure of information otherwise protected by Rule 1.6.

(i) A lawyer who, prior to conclusion of the proceeding, comes to know of improper conduct by or toward a juror or a member of the jury pool shall report the improper conduct to the tribunal, even if so doing requires the disclosure of information otherwise protected by Rule 1.6.

(j) If, in response to a lawyer's request to withdraw from the representation of the client or the lawyer's report of a perjury, fraud, or offense against the administration of justice by a person other than the lawyer's client, a tribunal requests additional information that the lawyer can only provide by disclosing information protected by Rule 1.6 or 1.9(c), the lawyer shall comply with the request, but only if finally ordered to do so by the tribunal after the lawyer has asserted on behalf of the client all non-frivolous claims that the information sought by the tribunal is protected by the attorney-client privilege.

TRCP RULE 3.4, FAIRNESS TO THE OPPOSING PARTY AND COUNSEL

A lawyer shall not:

(a) unlawfully obstruct another party's access to evidence or unlawfully alter, destroy, or conceal a document or other material having potential evidentiary value. A lawyer shall not counsel or assist another person to do any such act; or

(b) falsify evidence, counsel or assist a witness to offer false or misleading testimony; or

(c) knowingly disobey an obligation under the rules of a tribunal except for an open refusal based on an assertion that no valid obligation exists; or

(d) in pretrial procedure, make a frivolous discovery request or fail to make a reasonably diligent effort to comply with a legally proper discovery request by an opposing party; or

(e) in trial,

(1) allude to any matter that the lawyer does not reasonably believe is relevant or that will not be supported by admissible evidence;

(2) assert personal knowledge of facts in issue except when testifying as a witness; or

(3) state a personal opinion as to the justness of a cause, the credibility of a witness, the culpability of a civil litigant or the guilt or innocence of an accused; or

(f) request a person other than a client to refrain from voluntarily giving relevant information to another party unless:

(1) the person is a relative or an employee or other agent of a client; and

(2) the lawyer reasonably believes that the person's interests will not be adversely affected by refraining from giving such information; or

(g) request or assist any person to take action that will render the person unavailable to appear as a witness by way of deposition or at trial; or

(h) offer an inducement to a witness that is prohibited by law; or pay, offer to pay, or acquiesce in the payment of compensation to a witness contingent on the content of his testimony or the outcome of the case. A lawyer may advance, guarantee, or acquiesce in the payment of:

(1) expenses reasonably incurred by a witness in attending or testifying;

(2) reasonable compensation to a witness for that witness's loss of time in attending or testifying; or

(3) a reasonable fee for the professional services of an expert witness.

Practical Issues:

1. Settlements. Client can no longer assist in directing the litigation. A settlement offer is on the table.

PA Eth. Op. 2003-07, 2003 WL 1901443 (Pa.Bar.Assn.Comm.Leg.Eth.Prof.Resp.)

Dear Attorney:

You are the attorney for the plaintiff in a personal injury lawsuit and you have received a favorable offer in settlement but despite diligent search you cannot find your client Under such circumstances, is it improper to settle the suit on behalf of your client?

The hornbook answer is this: it is professionally improper for an attorney to settle a lawsuit and direct the cashing of a settlement check without authorization by the client and such impropriety requires discipline. The basis for such a hornbook answer is a literal reading of the language in Rule 1.2(a) of the Rules of Professional Conduct: "... A lawyer shall abide by a client's decision whether to accept an offer of settlement of a matter."

Likely the most-cited case on this issue is *In re Walner*, 119 Ill.2d 511, 116 Ill.Dec. 688, 519 N.E.2d 903 (1988) ("the Walner case"). The Illinois Supreme Court considered the following facts: one of 4 plaintiffs was missing and could not be located despite a diligent search and the attorney retainer agreement stated "no settlement will be made without the consent of the injured party" even though another of the plaintiffs assured the lawyer that all the plaintiffs agreed to the settlement. In the Walner case the Illinois Supreme Court still ruled that it was improper for the lawyer to settle the missing plaintiff's claim and to deduct even a reasonable attorney fee without authority from the client. The Illinois Supreme Court did impose censure, not suspension or disbarment, because the lawyer's conduct seemed to spring from a misguided sense of efficiency and was designed to accommodate clients who were difficult to reach.

I would, however, point out to you Rule 1.14 Clients Under A Disability, particularly subsection (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. It seems to me that a client who, voluntarily or involuntarily, has disappeared and cannot be found, is in the same relation to the attorney as a client who is underage or who suffers from a mental disorder or disability.

After a hearing with the missing client separately represented and the proposed offer put on the record, the Court thus would be acting on behalf of the client in giving you authority to settle the case and to pay out attorney fees and to hold the balance until/unless the client abandons that property by not reappearing.

It would appear reasonable and professional to request the Court to appoint a guardian or legal representative in proceedings where the Court will be asked to approve the settlement proposal and to approve attorney fees and to direct how long to set aside the balance for the missing client to reappear and make a claim before the balance is escheated.

*2 Ordinarily, I would conclude by asking whether you agree to publication of this letter. However, I do not consider this as an Ethical Opinion on behalf of the Committee. Rather, it is a lawyer to lawyer communication on how to address a problem with implications for the efficient administration of the legal system despite the hornbook answer which would have this case stand dormant unless the client somehow resurfaces. I am sending a copy of this letter to the Committee; you and the Committee may wish to follow up on the incredibly interesting issue raised in this Inquiry.

(Emphasis added).

2. Lawyer as Witness (or potential witness). Tenn. Formal Ethics Opinion Number 81-F-10 (June 25, 1981). The lawyer should decline representation where he/she (or the lawyer's staff) would appear as a witness.

The Lawyer as Intermediary

TRPC RULE 2.2, LAWYER SERVING AS AN INTERMEDIARY BETWEEN CLIENTS

(a) A lawyer represents clients as an intermediary when the lawyer provides impartial legal advice and assistance to two or more clients who are engaged in a candid and non-adversarial effort to accomplish a common objective with respect to the formation, conduct, modification, or termination of a consensual legal relation between them.

(b) A lawyer shall not represent two or more clients as an intermediary in a matter unless:

- (1) as between the clients, the lawyer reasonably believes that the matter can be resolved on terms compatible with the best interests of each of the clients, that each client will be able to make adequately informed decisions in the matter, that there is little risk of material prejudice to the interest of any of the clients if the contemplated resolution is unsuccessful, and that the intermediation can be undertaken impartially;
- (2) the lawyer's representation of each of the clients, or the lawyer's relationship with each, will not be adversely affected by the lawyer's responsibilities to other clients or third persons, or by the lawyer's own interests;
- (3) the lawyer consults with each client about:
 - (i) the lawyer's responsibilities as an intermediary;
 - (ii) the implications of the intermediation (including the advantages and risks involved, the effect of the intermediation on the attorney-client privilege, and the effect of the intermediation on any other obligation of confidentiality the lawyer may have);
 - (iii) any circumstances that will materially affect the lawyer's impartiality between the clients; and
 - (iv) the lawyer's representation in another matter of a client whose interests are directly adverse to the interests of any one of the clients; and any interests of the lawyer, the lawyer's other clients, or third persons that will materially limit the lawyer's representation of one of

- the clients; and
- (4) each client consents in writing to the lawyer's representation and each client authorizes the lawyer to disclose to each of the other clients being represented in the matter any information relating to the representation to the extent that the lawyer reasonably believes is required to comply with Rule 1.4.

(c) While representing clients as an intermediary, the lawyer shall:

- (1) act impartially to assist the clients in accomplishing their common objective;
- (2) as between the clients, treat information relating to the intermediation as information protected by Rule 1.6 that the lawyer has been authorized by each client to disclose to the other clients to the extent the lawyer reasonably believes necessary for the lawyer to comply with Rule 1.4; and
- (3) shall consult with each client concerning the decisions to be made with respect to the intermediation and the considerations relevant in making them, so that each client can make adequately informed decisions.

(d) A lawyer shall withdraw from service as an intermediary if:

- (1) any of the clients so requests;
- (2) any of the clients revokes the lawyer's authority to disclose to the other clients any information that the lawyer would be required by Rule 1.4 to reveal to them; or
- (3) any of the other conditions stated in paragraph (b) are no longer satisfied.

(e) If the lawyer's withdrawal is required by paragraph (d)(2) the lawyer shall so advise each client of the withdrawal, but shall do so without any further disclosure of information protected by Rule 1.6.

Conclusion

The TRPC provide a framework within which we must operate as members of the Bar. However, the TRPC does not require that we take action which is adverse to the interests of the Elderly or infirm. In that regard, a principlism approach should be considered and, where appropriate, Elder Law Attorneys should develop an "Elder-centered" approach to assist their clients. Principlism will be further explored in the presentation accompanying this paper.

Resources

1. T. Takacs, *Elder Law in Tennessee*, Chapter 2 (Lexis Law Publishing)
2. R. Fleming, *Elder Law Answers, 2nd Edition*, Chapter 2 (Aspen Publishing)
3. Kansas Elder Law Network, <http://www.keln.org/bibs/collett.html>