

**Working with an Aging Population,
Advising the Client/Donor with
Questionable Capacity: Ethical and Practical Concerns and Suggestions**

**Matthew G. Perlow
Husch Blackwell Sanders LLP
314-345-6442**

A. Attorneys' Ethical Rules and Considerations-

1. This outline will focus largely on the ethical rules governing attorneys acknowledging that similar considerations affect other professionals but relying on the fairly well developed rules and authority concerning attorneys and such issues. Rule 4-1.14 of the Missouri Rules (which is the same as Rule 1.14 of the Model Rules of Professional Conduct) governs the actions of attorneys.

2. Rule 4-1.14 is a successor to Model Code EC 7-12 which only provided that a lawyer representing a disabled client had “additional responsibilities.”

3. EC 7-12 was interpreted by the Courts to provide that an attorney owed his client the right to unfettered advocacy. (Query how this applies to estate planning not involving litigation or controversy.)

4. Rule 4-1.14 provides:

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 next friend, guardian ad litem, conservator or guardian.

c) Information relating to the representation of a client with diminished capacity is protected by Rule 4-1.6. When taking protective action pursuant to Rule 4-1.14(b), the lawyer is impliedly authorized under Rule 4-1.6(a) to reveal information about the client, but only to the extent reasonably necessary to protect the client's interests.

5. The Model Rules impose a rule of reason on attorneys in requiring the maintenance of a normal client-lawyer relationship and in determining whether a guardian should be appointed.

6. Commentators have cited the two parts of the rule as establishing somewhat inconsistent requirements; representing the client in the same manner as if not disabled and acting in the client's best interest in determining whether to appoint a guardian.

7. The Comments to the Rule and the Rule itself observe that individuals have intermediate levels of capacity. It recognizes particularly that older individuals often can handle routine matters but may need special protection concerning major transactions and allows taking intermediate measures short of guardianship but only if there is a danger of harm to the client.

8. The Comments emphasize that a lawyer has an obligation to treat disabled clients with attention and respect and that in considering whether to seek appointment of

a guardian the lawyer should consider the expense and trauma for the client. Confidentiality is also an important consideration with the Rule authorizing disclosure that is reasonably necessary (also a consideration for other professionals).

9. The Office of the Chief Disciplinary Counsel in Missouri has issued two informal advisory opinions involving Rule 4-1.14 and estate planning situations.

a) Informal Advisory Opinion #990095 addresses the issue of whether an attorney who perceives a client is becoming incompetent should inform the probate court. The opinion states that a guardian must be sought only as a last resort and that the attorney should consider intermediate measures such as the involvement of a social services agency. An attorney may decline to assist his client or withdraw from the representation but may not inform the probate court unless a guardian is being sought.

b) Informal Advisory Opinion #950078 raises the question of whether an attorney who represented a client may afterwards represent a child in an incompetency proceeding for the client. It was advised that the attorney may be involved in the incompetency hearing but cannot continue to represent the client in estate planning matters.

10. Other professionals are governed by ethical codes and standards that have a similar intent regarding the protection of individuals. See for example the Code of Ethical Principles and Standards of the Association of Fundraising Professionals which requires treating individuals with dignity and respect, requires donors information to be kept confidential, and requires awareness of the codes of ethics of other professionals. Many if not all trust companies have

adopted their own code of ethics setting forth similar limitations. Accountants are guided by the AICPA Code of Professional Conduct which states that Accountants are to exercise Due Care and thereby act in the best interest of those for whom service is performed and requires confidentiality.

B. Capacity Issues

1. Before we get to the issue of whether Rule 4-1.14 (or similar rules for other professionals) applies, a decision must be made that there is an issue of capacity. Rule 4-1.14 does not address the issue of the definition of capacity.

2. Each case or situation involves different measures or issues of capacity. Estate planning involves particular capacity issues.

3. Under Missouri law, capacity has been defined differently for various documents involved in the planning process.

4. Wills - In order to execute a valid Will, a person must be of sound mind. § 474.310 R.S.Mo. This requires that a person has the ability to:

- a) understand the ordinary affairs of life;
- b) understand the nature and extent of their property;
- c) know the persons who are the natural objects of their bounty; and
- d) intelligently weigh and appreciate their natural obligations.

5. Trusts – The law prior to the enactment in Missouri of the Uniform Trust Code provided that the settlor of a living trust must have the mental capacity to make an effective inter vivos transfer of the property that will become the trust estate. See Elizabeth E. Parrigin, I Mo. Trusts, Powers of Attorney, Custodianships and Nonprobate Matters, § 1.55 (Mo. Bar 2nd ed. 2006). Essentially, the mental capacity required to make

an inter vivos gift is the same as that necessary to make a Will. Dixon v. Bradsher, 779 S.W.2d 727, 732 (Mo. App. 1989). This was also, therefore, the standard that was involved in the context of inter vivos charitable gifts. The enactment of the Uniform Trust Code effectively codified this rule with respect to trusts.

6. Durable Powers of Attorney - The grantor of a durable power of attorney must have the mental capacity to understand the nature of his acts and the significance of the document. Pazdernik v. Decker, 652 S.W.2d 319 (Mo. App. 1983).

7. Undue influence must also be considered. Undue influence is such influence which amounts to force, coercion or overpersuasion that it destroys the free agency and willpower of the testator. This is evidenced by:

- a) the presence of deteriorated physical or mental health;
- b) opportunity to influence an individual;
- c) the property of the decedent being disposed of in an unnatural manner; and
- d) the fact that bequests are changed from a previous will. See Lopiccolo v. Semar, 890 S.W.2d 754 (Mo. App. 1995).

8. Undue influence may be suggested when someone else picks the attorney or other advisor and that choice is inconsistent with a previous relationship. It may also be indicated where another person brings the client to the appointment and speaks for them or is otherwise involved in the process. Assets being owned jointly with a favored beneficiary or the favored beneficiary being named in beneficiary designations may also evidence undue influence.

C. Practical Considerations and Tactical Suggestions

1. When undertaking to represent a client or continue the representation of a client, or advising regarding proposed gifts, one must consider the capacity and undue influence issues and the resulting possibility of a future contest action. This may require compiling a record of the planning process showing that the client had sufficient capacity and that there was no undue influence.

2. When a determination is made that there is a risk of a future contest action and the attorney or other advisor has determined that the client has sufficient capacity, a number of steps may be taken:

a) Inform the client of the possibility of a future contest action and the implications of such;

b) Discuss the options to support the validity of the documents or actions and the costs and what is involved;

c) Recommend a course of action depending upon the level of capacity.

3. Essentially the attorney or other advisor is creating a record for future use in a contest action. A number of options and considerations exist, all of which have upsides and downsides. The following are steps and courses of action to be considered.

a) Ensure that all communications are only between the client and the advisor to avoid implications of undue influence.

b) The client should travel to meetings alone and otherwise act independently.

c) All meetings should exclude beneficiaries except, perhaps, a spouse.

d) The client may prepare a narrative explaining the reasons for their estate plan. This can have a downside if the narrative itself would be damaging due to the appearance of the client on video, their voice on tape, or their handwriting.

e) The elements of capacity may be considered at this time and a statement prepared to show the elements. The same considerations as above in d. apply.

f) Consider stating reasons for favor or disfavor of beneficiaries in a document but make them brief to avoid misstatements that could be deleterious to a case.

g) Consider in terrorem distributions or bequests to a disfavored beneficiary that disappear if contests are initiated.

h) Consider the client's medical records and possibly interview their physician to determine their opinion regarding capacity. This may also be risky. An examination could be part of this process. Perhaps get an oral report first.

i) Allow the client sufficient time to consider drafts of documents and plans.

j) Review drafts of documents and plans with the client in detail if possible and give the client sufficient time to review final documents before signing.

k) Choose witnesses for the execution ceremony who will appear credible at trial and who have good memories. A witness who is familiar with the

client and their abilities may be helpful but may also be dangerous upon cross-examination.

l) Familiarize the witnesses with the client's condition and the steps for signing documents.

m) Review the documents and the signing process with the client prior to signing.

n) Possibly record the execution ceremony either in sound or full audio and video. Yet consider how the client will appear or sound. Consider scripting and rehearsing the signing ceremony. Say as little as possible and keep to the basics. Be careful to preserve the tape to avoid the implication of its destruction.

o) When taping, be careful of the client's comments and consider covering the elements of capacity with them.

p) Prepare a post execution memorandum to memorialize the signing process. Witnesses may do the same.

q) Consult a litigator about possible contest issues.

r) When selecting fiduciaries, consider whether they will diligently defend a contest action.

s) Beware of claims against advisors for tortious inference with expectancy, fraud, malpractice or conspiracy.

t) When all else fails, consider getting court consent to provide estate planning and related services for a client with doubtful capacity.