



POA'S, Guardianships, and Client Capacity

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Georgia Rules of Professional Conduct

▶ 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 scope and 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.

Georgia Rules of Professional Conduct

- ▶ RULE 1.6 CONFIDENTIALITY OF INFORMATION
- ▶ A lawyer shall maintain in confidence all information gained in the professional relationship with a client, including information which the client has requested to be held inviolate or the disclosure of which would be embarrassing or would likely be detrimental to the client, unless the client gives informed consent, except for disclosures that are impliedly authorized in order to carry out the representation, or are required by these Rules or other law, or by order of the Court.

Georgia Rules of Professional Conduct

- ▶ Rule 1.14: Client with Diminished Capacity
 - ▶ (a) lawyer shall maintain normal relations when reasonably possible
 - ▶ (b) Protective action is allowed when the client faces “substantial physical, financial or other harm”
 - ▶ Disclosure of reasonably necessary information when taking protective action

Establishing the Attorney-Client Relationship

ASK:

Who is your client?

Does the potential client want to retain you?

Can the potential client retain you?

Emergency Action

- ▶ Rule 1.14, Comment 9 permits the attorney to take emergency action
 - ▶ Health, safety or a financial interest of a person with seriously diminished capacity must be threatened with imminent and irreparable harm
 - ▶ Legal action only to the extent reasonably necessary to maintain the status quo or avoid the harm
- ▶ Rule 1.14, Comment 10:
 - ▶ Disclose only what's necessary to achieve the intended protection
 - ▶ Disclose the nature of your relationship with the client
 - ▶ Regularize the attorney/client relationship as soon as possible
 - ▶ Normally wouldn't seek compensation

Protective Action

- ▶ Employed only when the normal attorney-client relationship cannot be maintained
- ▶ Client must be facing a risk of substantial physical, financial or other harm
- ▶ Rule 1.14, Comment 6: Factors to consider when evaluating client capacity
 - ▶ Client's ability to articulate reason behind decision
 - ▶ Variability of state of mind
 - ▶ Ability to appreciate the consequences
 - ▶ Fairness of the decision
 - ▶ Consistency of decision

Types of Protective Action

- ▶ Attorneys should advocate for the least restrictive measure to protect their client
- ▶ Guardianships are considered a last resort. Many states, including Georgia, prioritize less restrictive legal options.

Guardianship

- ▶ Appointment of a Legal Representative
 - ▶ Only when necessary to protect the client's interests (statutory mandate)
 - ▶ May be more expensive or traumatic than the circumstances require
 - ▶ Law requires the lawyer to take the least restrictive action possible
 - ▶ Two types of legal appointments:
 - ▶ Guardianships
 - ▶ Conservatorships

Guardianship (Continued)

- ▶ Guardianships; Loss of Rights
 - ▶ Contract to marry
 - ▶ Consent to medical treatment
 - ▶ Make, modify or terminate contracts
 - ▶ Establish a residence or change domicile
 - ▶ Bring or defend any action(except guardianship)
 - ▶ May retain testamentary capacity/right to vote
- ▶ Conservatorship
 - ▶ Probate court appointment of a person to make decisions for the client regarding personal property
 - ▶ Similar loss of rights to contract, conduct business



▶ Rule 1.14, Comment 5 lists several possible alternatives:

- ▶ Consulting with family members
- ▶ Reconsideration period to permit clarification or improvement of circumstances
- ▶ Professional services, adult-protective agencies or other individuals or entities that have the ability to advocate for the client

Rule 1.14, possible alternatives (cont'd):

- ▶ Financial Powers of Attorney
- ▶ Advance Directives for Healthcare
- ▶ Temporary Medical Consent Guardianship
O.C.G.A. § 29-4-18
- ▶ Temporary Healthcare Placement
O.C.G.A. § 31-36A-7

The PRACTICAL Method

- ▶ Checklist of steps during the client interview and immediately after to assist in case analysis
- ▶ Joint product of four American Bar Association entities:
 - ▶ The Commission on Law and Aging
 - ▶ Commission on Disability Rights
 - ▶ Section on Real Property, Trust, and Estate Law
 - ▶ Section on Civil Rights and Social Justice
- ▶ Designed to raise awareness about decision-making options for persons with disabilities that are less restrictive than guardianship

The PRACTICAL Method

P

- **Presume** that guardianship is not needed.

R

- **Reason**. Clearly identify the reasons for concern.

A

- **Ask** if a triggering concern may be caused by temporary or reversible conditions

The Practical Method (Continued)

C

- **Community.** Determine if concerns can be addressed by connecting the individual to family or community resources.

T

- **Team.** Ask the person whether he or she already has developed a team to help make decisions.

I

- **Identify** areas of strengths and limitations in decision-making

The PRACTICAL Method (Continued)

C

- **Challenges**. Screen for and address any potential challenges presented.

A

- **Appoint** legal supporter or surrogate consistent with person's values and preferences

L

- **Limit** any necessary guardianship petition and order.

Hypothetical 1

- ▶ Hospital calls about a longterm patient they feel needs to be placed elsewhere. Patient has no present, willing family or friends. He suffered a brain injury in a motorcycle crash and has been in the hospital for several months. Hospital staff asks you to participate in the case. You meet with hospital staff, and, afterward visit client. He lies in a fetal position on his bed and does not respond to your attempts to gain his attention. You leave. The next morning, you decide to try again. You show up unannounced, Jarvis is up and talking. You introduce yourself and he shakes your hand. He talks about getting out of “here.” Then he points out the window across the street advising that the car parked out there is his motorcycle.

Hypothetical 2

- ▶ Middle-aged daughters show up in your office with their 72yo mother, whom they advise you has Alzheimer's. The older one, Jen, says that their brother, Ed, has taken momma's land from her and put her out of the house. The other sister, Len, offers an emphatic "YES!" You think she may be tipsy. Jen tells you that momma needs someone to look after her and that she wants guardianship of her mother, and she wants the land put in her name so she can manage it for momma. Len asks "but, if we put it in Jen's name it'll still be momma's, right?" The mother, Luann, volunteers no information. You ask her how she is today, she responds, "ok, I guess." Jen says "she is NOT ok! Lester put her out!" Len says, "Lester's a shit!" You get a call from your receptionist; a man identifying himself as Ronnie, Luann's other son, is on the line.

"People can't, unhappily, invent their mooring posts, their lovers and their friends, anymore than they can invent their parents. Life gives these and also takes them away and the great difficulty is to say 'Yes' to life." James Baldwin

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