

131

**REPRESENTING CLIENTS WITH
DIMINISHED CAPACITY WHERE THE
SUBJECT OF THE REPRESENTATION IS
THE CLIENT'S DIMINISHED CAPACITY**

Adopted September 13, 2017

Scope

This opinion addresses the representation of clients where the subject of the representation is an adult protective proceeding (guardianship and conservatorship). It also encompasses ethical issues when the lawyer is acting as a *guardian ad litem* in an adult protective proceeding or when the lawyer represents an allegedly incapacitated person. While lawyers are appointed as *guardians ad litem* in the majority of adult protective proceedings, non-lawyers may also be appointed.

The Colorado Bar Association (CBA) has issued a separate formal ethics opinion that addresses representing clients with diminished capacity where the presence of diminished capacity is incidental to the lawyer's representation. See CBA Formal Op. 126, "Representing the Adult Client With Diminished Capacity" (2015). This opinion does not cover representation of individuals who are minors or who may have a mental incapacity in addition to their incapacity due to their minority.

Syllabus

A lawyer may become involved in adult protective proceedings in a variety of ways. The lawyer may have a long-term lawyer-client relationship with a client who, over the course of the representation, develops diminished capacity and becomes the

subject of an adult protective proceeding. Perhaps more commonly, the lawyer may become involved in the adult protective proceeding because the individual alleged to have diminished capacity, or an adult child of the allegedly incapacitated person, retains the lawyer for the purpose of representing the allegedly incapacitated person in the adult protective proceeding. In another common scenario, the lawyer may be appointed by the court as counsel for the allegedly incapacitated person. Still other lawyers may be appointed by the court as *guardians ad litem* in the adult protective proceeding.

Whether the lawyer acting as counsel in an adult protective proceeding had a preexisting lawyer-client relationship with the allegedly incapacitated person, is retained to represent that person for the first time as a result of a protective proceeding, or is court-appointed counsel, the controlling ethical rule is Rule 1.14 of the Colorado Rules of Professional Conduct (Colo. RPC or the Rules).

However, Rule 1.14's application to the lawyer in an adult protective proceeding differs from the application of Rule 1.14 when the discovery of diminished capacity is incidental to the legal representation. The lawyer representing the allegedly incapacitated person in an adult protective proceeding is subject to the same considerations relative to lawyer-client privilege and confidentiality under Rule 1.6 that apply to any other lawyer.

If the allegedly incapacitated person's alleged incapacity is so severe that the lawyer cannot form or continue a lawyer-client relationship, the lawyer should decline or withdraw from representation, and if the lawyer has entered an appearance in the protective proceeding, he or she should seek to withdraw from the representation. If

there is no *guardian ad litem* in the protective proceeding when the lawyer seeks to withdraw, the withdrawing lawyer should inform the court of the lawyer's inability to form or continue the lawyer-client relationship and should request the appointment of a *guardian ad litem*. Colo. RPC 1.14, cmt. [7]; see also C.R.S. § 15-14-305 (preliminaries to hearing), C.R.S. § 15-14-309 (right to a lawyer post-adjudication).

Guardians Ad Litem

A lawyer serving as a *guardian ad litem* in an adult protective proceeding has certain different responsibilities and ethical issues. In *People v. Gabriesheski*, 262 P.3d 653 (Colo. 2011), the Colorado Supreme Court ruled that a *guardian ad litem* is an independent officer of the court and the minor is not the *guardian ad litem*'s client.¹ *Gabriesheski* involved a minor, not an adult protective proceeding. But, to the extent the role of the *guardian ad litem* for a minor may be similar to the role of the *guardian ad litem* in an adult protective proceeding, *Gabriesheski* may provide some insight. In a dependency and neglect case, the *guardian ad litem* is tasked with investigating, reporting, and representing the child's best interest. As there is no lawyer-client relationship in the traditional sense, the child has no expectation of privacy for communications with the *guardian ad litem*. This part of *Gabriesheski* is the traditional

¹ In *L.A.N. v. L.M.B.*, 292 P.3d, 942 (Colo. 2013) the Colorado Supreme Court ruled that the "GAL's 'client' is the 'best interest of the child,'" *id.* at 949 (citing C.R.S. § 19-3-203(3) (a section of the Colorado Children's Code), & Chief Justice Directive 04-06, "Court Appointments Through the Office of the Child's Representative"). The cited authorities apply only to *guardians ad litem* representing minors. To date, no Colorado

interpretation of the role of a *guardian ad litem* in adult protective proceedings, and is the generally accepted interpretation of how *Gabriesheski* applies in adult protective proceedings.

As an independent actor in protective proceedings, the *guardian ad litem* has no client, and therefore, except to the extent that the Rules apply to all Colorado lawyers, Rule 1.14 and Rule 1.6 are not directly implicated. Rather, because the allegedly incapacitated person is not the *guardian ad litem*'s client, the *guardian ad litem* also has no lawyer-client privilege with regard to any information he or she obtains, concerning the allegedly incapacitated person, including information from that person.

Maintaining a Normal Lawyer-client Relationship

The lawyer's effective and efficient representation of any client depends on the client's ability to receive, analyze, and process information and advice received from the lawyer, and to accurately inform the lawyer regarding information relevant to the representation. CBA Formal Op. 126. When the lawyer represents an allegedly incapacitated person, this ability is compromised. The question becomes to what extent the ability to form and maintain a lawyer-client relationship is compromised. Colo. RPC 1.14(a) is implicated in representation of an allegedly incapacitated person. Rule 1.14(a) mandates that the lawyer, "as far as reasonably possible, maintain a normal lawyer-client relationship with the client." Despite the client's diminished capacity, the client retains the right to determine the goals and objectives of the representation and to

appellate court has opined on the question of who is the *guardian ad litem*'s client in an adult protective proceeding

consult with the lawyer concerning the means by which the objectives are obtained. Colo. RPC 1.2(a). Thus, the lawyer must consult with the client and respect and be guided by the client's assessment and direction. Colo. RPC 1.14, cmt. [1]. Still, the lawyer should remain cognizant of the client's limited capacity and how that impacts the client's ability to effectively communicate his or her true intentions.

However, because the lawyer representing the allegedly incapacitated person begins the representation knowing of the alleged incapacity, Rule 1.14(b) applies only in a limited way to permit the lawyer to seek professional assistance in determining how to communicate with the allegedly incapacitated person. In this circumstance, Rule 1.14 would not appear to extend to steps the lawyer would normally take, including "consulting with individuals or entities that have the ability to take actions to protect the client," since the very situation that led to the representation is the incapacity, which the lawyer was aware of at the outset. The first sentence of Rule 1.14(c) applies in that situation, and the lawyer is subject to Rule 1.6. However, the implied exception of the second sentence of Rule 1.14(c) does not apply to the lawyer for the allegedly incapacitated person in an adult protective proceeding, as the lawyer representing the allegedly incapacitated person in such a proceeding represents the client's interests as expressed to the lawyer by the client. The protective proceeding permitted under Rule 1.14(b) is already in progress, and therefore the lawyer may not reveal confidential information, as the reason for this sentence (the right to reveal information so as to pursue appropriate protective proceedings) has already occurred.

Absent a lawyer-client relationship, the *guardian ad litem* should be guided by the

Rules but need not follow the goals and objectives of the allegedly incapacitated person. Rather, the *guardian ad litem* should be guided by what he or she believes, in his or her professional opinion, is in the best interests of the allegedly incapacitated person. The *guardian ad litem* is appointed by the court and is directed by the court to advise the court and act in the best interests of the allegedly incapacitated person, regardless of whether the advice and actions of the *guardian ad litem* are consistent with the goals and objectives of the allegedly incapacitated person.²

The primary difference between representing a fully competent client and an allegedly incapacitated client concerns communication. A lawyer representing an allegedly incapacitated person, should adjust his or her interview and communication style so that the allegedly incapacitated client can understand the information provided by the lawyer to the fullest extent possible. This may require the lawyer to modify and simplify language so that the client can understand and internalize it in order to make an informed decision. See Roberta K. Flowers & Rebecca C. Morgan, “Ethics in the Practice of Elder Law,” Am. Bar Ass’n, 2013. Such a modification in communication style is similar to the adjustment in language a lawyer might use with a less educated client, compared to the language the lawyer might use with a highly educated client or

² For guardians (as distinguished from *guardians ad litem*), the standard under Colorado law is known as “substituted judgment,” C.R.S. § 15-14-314(1); “best interests” is the standard only if the desires and personal values of the allegedly incapacitated person

one who has expertise in the subject matter of the litigation.

The lawyer also may adjust his or her communication technique by accepting the assistance of a third party who enjoys the special confidence of the allegedly incapacitated person. Such person is typically an adult child or other relative of the allegedly incapacitated person, but may be any person in whom the allegedly incapacitated person places special confidence.

While normally the presence of a third party destroys the lawyer-client privilege, this is generally not so if the presence of the third party is necessary to assist in the representation. Colo. RPC 1.14 cmt. [3]. However, the lawyer should be cognizant that in all circumstances, the lawyer's duty is to follow the client's objectives and goals, not to defer to the goals or objectives of the third party assisting the client in communicating with the lawyer. Colo. RPC 1.14, cmt [3].

The lawyer also may communicate with an allegedly incapacitated person using written memoranda to summarize conversations or requesting the client to explain what the lawyer has just stated. This type of interaction between lawyer and client may enable the lawyer to gain a better sense of the client's capacity to grasp, interpret, and retain information.

Another step the lawyer should consider in his or her attempt to maintain a normal lawyer-client relationship includes scheduling meetings with the client at a time of day when the client has the greatest level of capacity, such as early in the day,

cannot be established. *Id.* By contrast, the "best interests" standard always applies to *guardians ad litem*. See C.R.S. § 15-14-314.

immediately after the client has eaten, or after the client has rested.

Requests for Representation by Others Seeking Protective Proceedings

Where the lawyer has had a prior lawyer-client relationship with the allegedly incapacitated person, and an adult relative (typically an adult child or other trusted relative) or others approach the lawyer to commence a protective proceeding against the former client, the lawyer must decline the representation. Colo. RPC 1.9. In the typical situation, the lawyer will have created an estate plan for the allegedly incapacitated person, including creating powers of attorney naming the relative who has approached the lawyer as an agent under the power of attorney, and that agent now wishes the lawyer to commence a protective proceeding against the client. In this situation, the lawyer most likely has obtained confidential information concerning the allegedly incapacitated person that may directly or indirectly impact any protective proceeding. The lawyer may recommend to the agent or relative other lawyers qualified in protective proceedings who might represent the agent or relative, but the lawyer cannot provide information to the referred lawyer concerning the reason for the referral. Colo. RPC 1.6. Note also that the lawyer must not provide referrals to other lawyers in his or her law firm, since all members of the firm are disqualified from accepting representation if one member is disqualified. *Liebnow v. Boston Enterprises, Inc.*, 2013 CO 8, 296 P. 3d 108, 118; see also Colo. RPC 1.10(a).

Most available guidance for *guardians ad litem* is written in terms of, and applies to appointments in dependency and neglect cases, in which the *guardian ad litem* must act in the minor's best interests. The only existing guidance for *guardians ad litem* in

adult protective proceedings is Chief Justice Directive 04-05, Section VII, “Duties of *Guardians Ad Litem* and Court Visitors Appointed on Behalf of Wards or Impaired Persons.” Under that directive, the court appointing the *guardian ad litem* determines the scope of the *guardian ad litem*’s duties. The *guardian ad litem* should request clarification of the court’s appointing directive as necessary for the *guardian ad litem* to accomplish his or her role in the protective proceeding.

Confusion Among Roles Between Counsel for Allegedly Incapacitated Persons and Guardians *Ad Litem*

Ethical issues frequently arise when a lawyer for an allegedly incapacitated person or a *guardian ad litem* loses sight of his or her role in the legal process. This often occurs when the lawyer continues to represent a client whose capacity has decreased to the point where it is impossible to maintain a meaningful lawyer-client relationship. If the lawyer reasonably believes the client is unable to act in his or her own interests, the lawyer should consider seeking appointment of a *guardian ad litem*. See *In re Sorensen*, 166 P.3d 254 (Colo. App. 2007); Colo. RPC 1.14; CBA Formal Op. 126. If the lawyer determines that the client or potential client cannot form a lawyer-client relationship, the lawyer may take steps to withdraw from the representation or the lawyer may petition the court to convert the lawyer’s court appointment to appointment as a *guardian ad litem*. See Restatement (Third) of Agency § 1.01 (Agency Defined); § 3.04 (Capacity to Act as Principal); § 3.06(3) (Termination of Actual Authority - in General); § 3.08(1) (Loss of Capacity); see also Restatement (Third) of the Law Governing Lawyers § 20 (A Lawyer’s Duty to Inform and Consult with a Client); § 31

(Termination of a Lawyer's Authority). If the lawyer seeks appointment as a *guardian ad litem*, the lawyer should remain diligent in protecting confidential or privileged information obtained from the client while the lawyer served in the capacity of lawyer for the allegedly incapacitated person. See Colo. RPC 1.6. Before requesting the court to change the lawyer's role from lawyer to *guardian ad litem*, the lawyer should consider whether such a shift in roles might create a conflict of interest, which might not be waivable by the now-incapacitated client.

However, the lawyer may not continue to act on behalf of a client with whom the lawyer can no longer maintain a lawyer-client relationship. Colo. RPC 1.2 requires the lawyer to act in consultation with the client and to abide by the decision of the client. If the client can no longer provide such guidance or consult with the lawyer, the lawyer may not act on behalf of the client. The obverse problem exists for the *guardian ad litem*, whose role is to act and make recommendations in the best interests of the client. The *guardian ad litem* has the duty to consider, but to act independently of, the desires of the allegedly incapacitated person. When the *guardian ad litem* loses sight of this mandate and falls back into the more familiar role of advocate for the allegedly incapacitated person, the lawyer abdicates his or her role as independent advisor to the court, and becomes a self-appointed counsel for the allegedly incapacitated person, contrary to the appointment order.

Conclusion

Adult protective proceedings are an important and growing area of legal representation. However, there is little ethics guidance on representing a client with

diminished capacity in such proceedings, and even less with regard to the role of the *guardian ad litem*.