

Ethical Issues Involving Deceased, Incompetent and Unavailable Clients



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Overview



- Clients with special circumstances
 - Diminished capacity
 - Unavailable
 - Death

- Contexts
 - General representational issues
 - Issues during IRS examination
 - Issues during litigation

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General Representational Issues

General Representational Issues

- Clients with diminished capacity
 - Model Rule 1.14
 - Who is the client?
 - Confidential communications
 - Informed consent
 - Best practices
 - Attorney-client privilege
- Unavailable clients
- Death of a client

General Representational Issues



Hypo 1

- Daughter Dee has long helped Mom and Dad with their affairs. She calls one day to tell you that Mom has been diagnosed with dementia. It's early stage, so Mom has good moments and bad moments. She still knows her family members, but she is forgetful about things.
- Before it progresses too far and she can't sign anything, Mom and Dad want to change their estate planning documents to name Dee, instead of brother Bob, in a variety of fiduciary capacities. They may also want to make some gifts to Dee's children (but not to brother Bob's).
- Since Mom and Dad don't have e-mail and it's hard for them to get into the city, Dee reminds you to send all correspondence through her (as Mom and Dad have often requested in the past).

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General Representational Issues



Model Rule 1.14 – Client with Diminished Capacity

- (a) When a client's capacity to make adequately considered decisions in connection with a representation is diminished, whether because of minority, mental impairment or for some other reason, the lawyer shall, as far as reasonably possible, **maintain a normal client-lawyer relationship** with the client.
- (b) When the lawyer reasonably believes that the client has diminished capacity, is at **risk of** substantial physical, **financial or other harm** unless action is taken **and cannot adequately act in the client's own interest**, the lawyer **may** take reasonably necessary protective action, including **consulting with individuals or entities that have the ability to take action to protect the client** and, in appropriate cases, seeking the appointment of a guardian ad litem, conservator or guardian.
- (c) Information relating to the representation of a client with diminished capacity is protected by Rule 1.6. When taking protective action pursuant to paragraph (b), the lawyer is impliedly authorized under Rule 1.6(a) to **reveal information about the client, but only to the extent reasonably necessary to protect the client's interests.**

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