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## Recommendations of the Conference

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# RECOMMENDATIONS OF THE CONFERENCE

## I. PREAMBLE

In representing older clients, attorneys should:

1. Recognize that older persons:
  - a. Have a unique set of needs that may require special attention, and
  - b. Deserve high-quality services.
2. Be alert to the concerns of their older clients and develop responses to their needs.
3. Provide balanced and appropriate legal services within the financial, medical, emotional, and family issues affecting older clients.
  - a. This is a holistic approach that may include working with other professionals.
4. Communicate in an understandable manner the intent and consequences of laws and regulations that create an impact on older clients' decision-making processes.

## II. CLIENT CAPACITY

Attorneys representing older clients must define appropriate standards and processes for determining whether older clients' or purported clients' decision-making capacities are impaired. They must also consider what interventions are appropriate, and according to what guidelines, when older clients' or purported clients' decision-making capacities are impaired.

### *A. Recommendations for the Model Rules:*

1. Model Rule 1.14(b) should be rephrased to read:

A lawyer may take protective action or seek the appointment of a guardian only when the lawyer reasonably believes the client cannot adequately act in the client's own interest.
2. The following language should be added as Model Rule 1.14(c):

While it might be necessary to disclose information, the disclosure should be strictly limited to that which is necessary to accomplish the protective purpose.
3. The following language should be added as Model Rule 1.14(d) to address legal issues arising when the existence of an attorney-client relationship is not clearly established:
  - a. A lawyer is an agent who acts upon the authority of a principal. In many cases, the lawyer will have a pre-existing relationship with a person or that person's family. In the absence of such a pre-existing relationship or a contractual agreement, express or implied, a lawyer generally may not act on behalf of a client.

- b. In certain circumstances, a lawyer may act as lawyer for a purported client even without express or limited agreement from the purported client, and may take those actions necessary to maintain the status quo or to avoid irreversible harm, if
    - i. An emergency situation exists in which the purported client's substantial health, safety, financial, or liability interests are at stake;
    - ii. The purported client, in the lawyer's good faith judgment, lacks the ability to make or express considered judgments about action required to be taken because of an impairment of decision-making capacity;
    - iii. Time is of the essence; and
    - iv. The lawyer reasonably believes, in good faith, that no other lawyer is available or willing to act on behalf of the purported client.
  - c. A "purported client" is a person who has contact with a lawyer and who would be a client but for the inability to enter into an expressed agreement.
4. The following language should be added as Model Rule 1.14(e):  
The lawyer should not be subject to professional discipline for invoking or failing to invoke the permissive conduct authorized by 1.14(b) if the lawyer has a reasonable basis for his or her action or inaction.

*B. Recommendation for Model Rule Commentary:*

1. The following language should be added to the Comments to Model Rule 1.14:
  - a. Where capacity comes into question, preference should be given to staying with the situation and taking protective action over withdrawal from the case.
  - b. If the lawyer decides to act as *de facto* guardian, he or she, when appropriate, should seek to discontinue acting as such as soon as possible and to implement other protective solutions.
  - c. If the lawyer takes protective action under Model Rule 1.14(b), the lawyer's action shall be guided by:
    - i. The wishes and values of the client to the extent known; otherwise, according to the client's best interest;
    - ii. The goal of intruding into the client's decision-making autonomy to the least extent possible;
    - iii. The goal of maximizing client capacities; and
    - iv. The goal of maximizing family and social connections and community resources.

*C. Recommendations for Practice Guidelines:*

1. A lawyer should be guided by Measures for Competent Clients, adopted from the American College of Trust and Estate Counsel Commentaries on the Model Rules of Professional Conduct, which reads:

As a matter of routine, the lawyer who represents a competent adult in estate planning matters should provide the client with information regarding the devices the client could employ to protect his or her interests in the event of disability, including ways the client could avoid the necessity of a guardianship or similar proceeding. Thus, as a service to the client, the lawyer should inform the client in a general way regarding the costs, advantages and disadvantages of durable powers of attorney, directives to physicians or living wills, health care proxies, and revocable trusts.
2. In questioning client capacity for any specific purpose, the lawyer should:
  - a. Consider and balance factors including, but not limited to, the following:
    - i. The client's ability to articulate reasoning behind his or her decision;
    - ii. The variability of the client's state of mind;
    - iii. The client's ability to appreciate the consequences of his or her decision;
    - iv. The irreversibility of any decision;
    - v. The substantive fairness of any decision;
    - vi. The consistency of any decision with lifetime commitments of the client.
  - b. Speak with the client alone;
  - c. Avail himself or herself of educational opportunities to understand and address capacity issues.
3. It may be useful for the lawyer to consult with a mental health professional to determine whether the client has a diagnosable mental disorder and whether that psychiatric condition disables the client's decision-making capacity.
4. The lawyer should refer or petition for guardianship of the client only if there are no appropriate alternatives. The lawyer should act as petitioner only if there is no one else available to act. The use of the guardianship system should be limited to the greatest extent possible.
5. Examples of protective actions that the lawyer may take include the following:
  - a. Involve family members;
  - b. Use of durable powers of attorney;
  - c. Use of revocable trusts;
  - d. Use of a "time out" to allow for cooling off, clarification, or improvement of circumstances;

- e. Referral to private case management;
  - f. Referral to long-term care ombudsman;
  - g. Use of church or other care and support systems;
  - h. Referral to disability support groups;
  - i. Referral to social services or other governmental agencies, such as consumer protection agencies.
    - i. The lawyer should carefully weigh the appropriateness and risk of agency referrals.
6. Examples of protective actions that the lawyer may take in a litigation context include:
- a. File for injunctive relief;
  - b. Request appointment of a guardian *ad litem*;
  - c. File for continuance;
  - d. File a petition for a protective order, or for limited or plenary guardianship;
  - e. Invoke regulatory or administrative remedies, for example, file a separate consumer protection complaint.

*D. Recommendation for Education:*

1. There should be collaboration among legal, medical, and allied professions to develop curricula and materials focusing on incapacitating conditions and the impact of those conditions on the decision-making abilities of older individuals.

*E. Recommendation for Further Study:*

1. A lawyer should interpret the Model Rules to accommodate multi-disciplinary approaches to providing services to older persons. Further study should endeavor to identify appropriate ways to accomplish this goal.

### III. CLIENT CONFIDENTIALITY

A lawyer should not reveal information obtained during the representation of a client without the client's consent. This rule may be inappropriate, however, when representing joint clients such as husband and wife or parent and child. Accordingly, it is important for the lawyer to discuss with a client the scope and terms of the representation at the earliest opportunity.

*A. Recommendations for Model Rule Commentary:*

1. The Comments to Model Rules 1.6 and 1.14 should reflect the following interpretation:

- a. Where a lawyer reasonably believes that a client's diminished capacity renders the client unable to appreciate the client's risk of harm, the lawyer may disclose confidential information obtained in the course of the representation without client consent with the goal of protecting the client from harm. In determining whether to make such disclosure, the lawyer must consider the following factors:
    - i. Harm to the client that is likely to result if the lawyer does or does not disclose the confidence. Harm may include damage to the physical, mental, or financial well-being of the client, damage to a clearly stated interest of the client, or damage to the client's dispositive plan.
    - ii. The degree to which the lawyer has knowledge of the individual's status, values, and objectives.
    - iii. The potential for harm to third parties, in so far as the client's interests are adversely affected.
    - iv. The nature of the confidence and the potential for embarrassing or stigmatizing the client in light of the client's personal values.
    - v. Alternatives to disclosure. In determining to which persons or agency disclosure should be made, the goal should be to minimize the intrusion into the client's life. Sources that may guide the lawyer in making that choice include the client's expressed wishes, priorities set in guardianship and health care consent statutes, and the lawyer's knowledge of appropriate community services.
  - b. When an individual seeks the lawyer's services but it is determined during initial contact that the lawyer will not represent the individual, information gained during that initial contact will be protected under the confidentiality rules, subject to the rule's stated exceptions.
2. Language should be added as a comment to Model Rule 1.6 to clarify that, where joint clients agree in advance on how to handle the communication of confidences, the agreement will govern the lawyer's determination of whether or not to disclose. For example, if there is an agreement to share confidences, the lawyer must make disclosure notwithstanding one client's subsequent attempt to modify the agreement. Similarly, if there is an agreement among joint clients not to disclose confidences among them, the lawyer may not disclose. Withdrawal from the representation of one or all clients is always necessary when irreconcilable conflict arises. Withdrawal itself shall not be considered a breach of any obligation of confidentiality owed to a client.

3. A comment to Model Rule 1.6 should be adopted to govern the situation where husband and wife, parent and child, or other related parties jointly consult the lawyer but there is not express agreement with respect to the scope of permissible disclosure of confidential information. The Comments should indicate that, in such a situation, the joint representation confers an implied consent allowing the lawyer to disclose to the other client or clients confidential information only if material to the representation.
4. In any case where the lawyer represents a family member individually and a second family member later seeks to retain the lawyer to render legal assistance on a materially related matter, the lawyer generally should not undertake the representation unless both clients consent to the representation and enter into an agreement as to disclosure as recommended in B. below.

*B. Recommendations for Practice Guidelines:*

1. After discussing the scope and terms of the representation, the lawyer and clients should enter into an agreement, preferably in writing, about the confidentiality of their disclosures. The discussion should include a review of the following options, insofar as they are otherwise legally and ethically permissible:
  - a. The lawyer *may*, in his or her discretion, disclose to each client all information gained in the course of the representation notwithstanding the fact that the person communicating the information subsequently requests that such information not be disclosed.
  - b. The lawyer *must* disclose to each client all relevant information gained in the course of the representation, notwithstanding the fact that the person communicating the information subsequently requests that such information not be disclosed.
  - c. The lawyer *cannot* disclose to one client any information gained in the course of the representation from the other client without the clients' consent.

2. Option a is the preferred practice. Option c is strongly discouraged, where not ethically impermissible, because of the inherent possibility that a conflict of interest may arise. No lawyer is obligated to undertake representation under Option c. If the client nevertheless chooses Option c, it may be necessary for the lawyer to withdraw from representation if confidential information material to the common representation is later disclosed to the lawyer. The lawyer must advise the client that a joint representation agreement concerning confidentiality governs the conduct of the lawyer until such time as the clients modify the agreement. The agreement cannot be modified without the consent of all the joint clients. It may be appropriate for the lawyer to remind clients from time to time about the confidentiality agreement.

C. *Recommendation for Education:*

1. Bar groups, and other such entities, should strive to educate clients regarding their options. They should also educate lawyers about how to counsel clients regarding their options.

D. *Recommendations for Further Study:*

1. Further study should be devoted to the question of whether a lawyer may represent joint clients with the understanding that the lawyer *cannot* disclose to one client any information gained in the course of the representation from the other client without that client's consent.
2. Further study should be conducted regarding an attorney's duty of confidentiality when the attorney learns of an older client's wrongdoing.
3. Further study should be conducted regarding the balancing of the attorney's duty to disclose to courts and tribunals and the attorney's duty of confidentiality in representing older clients.

#### IV. SPOUSAL CONFLICTS

Commentators describe four models for spousal representation — separate representation of each spouse by a separate lawyer; separate simultaneous representation of each spouse by the same lawyer; joint representation; and representation of the family unit. Joint representation is the most common and well-recognized approach. However, this type of representation is fraught with perils for client and lawyer who do not understand all the implications of issues inherent in joint representation.

*A. Recommendations for Practice Guidelines:*

1. Separate representation of husband and wife by separate lawyers is always permissible.
2. Separate representation of husband and wife by the same lawyer should only be undertaken with great care and in limited circumstances. For example, such representation might be undertaken where the estate plan of each does not depend on expectations about the dispositive plan of the other.
3. In order to undertake joint representation of fully competent spouses, the lawyer must reasonably believe that the husband and wife both understand the implications of joint representation. To accomplish this, the lawyer should review the terms and implications of the representation with the husband and wife, preferably in writing.
  - a. The lawyer's communication with husband and wife regarding joint representation must be simple and clear. The communication should help the clients to define the terms of their own relationship as it affects their estate planning goals, as well as clarify the anticipated representation. The communication must address issues of confidentiality and conflict. Specifically, in the estate planning context, the lawyer should convey that there must be no secrets between the husband and wife as to issues material to the estate plan, including assets and liabilities, health status, the people who may be affected by the estate plan, each person's dispositive plan and related goals of the representation (i.e., there should be no hidden agendas), and the content of the final products of the estate planning work.
  - b. The communication should clarify the consequences of a violation of the agreement to hold no secrets from each other on such material matters. Such consequences may include:
    - i. That the lawyer will disclose the secret to the other spouse if the first spouse is unwilling;
    - ii. That the lawyer will treat the information as a confidence and withdraw from representation; or
    - iii. That the lawyer will exercise discretion to either reveal or withdraw.

*B. Recommendation for Education:*

1. Educational programs should emphasize the perils inherent in joint representation without an explicit prior agreement.

C. *Recommendations for Further Study:*

1. Further study is needed on the nature of the husband-wife relationship and their duties to each other as it bears on the extent to which these duties may affect the duties of the lawyer to each spouse, particularly when the husband and wife are each represented by a separate lawyer. The derivative duties of the lawyer representing one spouse to the other spouse should be a focus of further study.
2. Further study is needed of the practices of the lawyer when one spouse is impaired and cannot adequately consider decisions as to the issues raised by Model Rules 1.7, 1.9, and 1.14.

## V. INTERGENERATIONAL CONFLICTS

There is a great potential for conflict among intergenerational family members. A lawyer who is approached by a family for advice or representation, therefore, needs to take particular care to identify which of these family members are the clients.

A. *Recommendations for Model Rule Commentary:*

1. The following language should be added to the Comments to Rule 1.7:  
There is a heightened potential for conflict in representing different generations with respect to asset distribution and/or decisions regarding health care. In these cases, a lawyer should be careful to identify the person or persons to whom the lawyer's duty of loyalty is owed.
2. If multiple representation of intergenerational clients is appropriate at the outset, there can be no such representation unless there is an agreement to disclose relevant, adverse confidences related to the common purposes of such representation.

B. *Recommendation for Further Study:*

1. Further study is needed regarding whether the Model Rules relevant to representing multiple, intergenerational family members are adequate as currently written or need to be expanded, clarified, or amplified by additional commentary. The efficacy of changing the rules themselves, as opposed to their comments, also requires further study.

## VI. REPRESENTING FIDUCIARIES

A lawyer representing the fiduciary must recognize that the *fiduciary*, not the beneficiary, is the client and is the party to whom a duty is owed. The lawyer has only derivative duties to the beneficiary as a result of the

representation of the fiduciary. The conferees suggest that this issue be clarified by court rule.

*A. Recommendation for Model Rule Commentary:*

1. A lawyer for a fiduciary acting in any fiduciary capacity *may* communicate otherwise confidential information to a court having jurisdiction and to parties to whom the fiduciary owes duties. Disclosures relating to those duties are impliedly authorized by Model Rule 1.6(a) in order to carry out the representation. Any doubt on this matter should be removed.

*B. Recommendation for Practice Guidelines:*

1. It is good practice for a lawyer to discuss with the fiduciary the respective roles of the fiduciary and the lawyer, and to memorialize these roles in writing. The lawyer should not agree with the fiduciary to any limitations on the derivative duties running to a beneficiary from the fiduciary representation.

*C. Recommendation for Education:*

1. Educational materials on the duties and responsibilities of fiduciaries and their lawyers should be developed for the guidance of the bench, bar, fiduciaries, and the public.

*D. Recommendation for Further Study:*

1. Model Rules 1.7 and 1.9 are not well-suited to fiduciary representations in which the lawyer represents more than one interest. For example, it is uncertain whether a lawyer may represent co-fiduciaries, or a fiduciary and a beneficiary. Further study of this issue is recommended.

## VII. LAWYER AS FIDUCIARY

Lawyers representing older clients must query whether, as a matter of public policy, lawyers should be precluded from serving as fiduciaries and whether lawyers should be permitted to draft an instrument in which the client designates the lawyer as fiduciary. A lawyer designated as a fiduciary must know whether his or her conduct is subject to the Model Rules. In addition, the lawyer acting as fiduciary must ask how Model Rule 1.9 affects him or her where the lawyer has previously represented interested parties in substantially related matters, and how Model Rule 1.6 affects him or her in the case of multiple representation. Finally, the lawyer acting as fiduciary must ask how Model Rule 2.2 affects him or her where he or she is also serving in the role of mediator.

*A. Recommendations for Model Rule Commentary:*

1. In many instances, it is appropriate and desirable for lawyers to serve as fiduciaries because of:
  - a. their specialized knowledge and training;
  - b. the ethical constraints which govern their conduct; and
  - c. the increasing need of society for qualified fiduciaries who possess a broad knowledge of the law.
2. No provision in the Model Rules prevents the lawyer *per se* from serving as a fiduciary. Subject to the specific recommended changes discussed below, the Model Rules should continue to apply to the lawyer serving in the role of fiduciary.

*B. Recommendations for Practice Guidelines:*

1. Subject to applicable state legal and ethical considerations, the lawyer should be permitted to draft an instrument in which the client designates the lawyer as fiduciary. As stated in the American College of Trust and Estate Counsel Commentary on Appointment of Scrivener as Fiduciary:

An individual is generally free to select and appoint whomever he or she wishes to a fiduciary office (e.g., trustee, executor, attorney-in-fact). None of the provisions of the Model Rules deals explicitly with the propriety of a lawyer preparing for a client a will or other document that appoints the lawyer to a fiduciary office. As a general proposition lawyers should be permitted to assist adequately informed clients who wish to appoint their lawyers as fiduciaries. Accordingly, a lawyer should be free to prepare a document for a client that appoints the lawyer to a fiduciary office so long as the client is properly informed, the appointment does not violate the conflict of interest rules of Model Rule 1.7 (Conflict of Interest: General Rule), and the appointment is not the product of undue influence or improper solicitation by the lawyer.
2. In some instances a lawyer may reasonably conclude that Rule 1.8 is implicated by the former, in which case the lawyer should comply with the provisions of Rule 1.8(a).
3. A client is properly informed if provided with information regarding the role and duties of the fiduciary, the ability of a lay person to serve as fiduciary with legal and other professional assistance, and the comparative costs of appointing the lawyer or another person or institution as fiduciary.
4. Potential conflicts may arise in two cases:
  - a. Where the attorney hires his or her own firm; and
  - b. Where the attorney serves in multiple roles.

5. The drafting lawyer shall not include exculpatory language in the drafting instrument. Where a lawyer or other paid professional is serving in the role of fiduciary, part of his or her obligation of competence is to act in a responsible way. The lawyer may not include a clause waiving the obligation to act competently.
  - a. A fiduciary may be granted expanded discretion with respect to the exercise of discretionary powers and authorities, and this approach is not precluded by the above restrictions.
6. In all cases, the fiduciary must act in good faith and with due regard to the obligations of the governing instrument.
7. When the lawyer is serving as fiduciary, the Model Rules shall apply as if the lawyer were representing a client. However, there is no attorney-client relationship between the lawyer who is a fiduciary and the beneficiaries.
8. Where the lawyer serves as a fiduciary and also represents or has represented another interested party as lawyer in a substantially related matter, the fiduciary may be required to withdraw from representing that person as lawyer or to resign as fiduciary. If the substantially related matter is one specific matter, a fiduciary *ad litem*, or a special fiduciary, may be appointed to function in the fiduciary's place during that representation. In such case, the lawyer who is a fiduciary may otherwise continue to serve as fiduciary in all other matters as permitted by Model Rule 1.9.
9. Where there is a multiple representation and the lawyer is serving as a fiduciary, if confidential information provided by one client would require the lawyer to use that information to the detriment of any other client, a fiduciary *ad litem* may be appointed to handle the particular matter regarding the confidential information, and the lawyer who is a fiduciary may continue to serve in the multiple representation. Where the case presents an ongoing problem, as opposed to a temporary one, the fiduciary *ad litem* should not be used, and the lawyer who is a fiduciary should withdraw from the multiple representation.
10. Where the lawyer who is a fiduciary serves as a mediator under Model Rule 2.2 and the mediation is unsuccessful, Model Rule 2.2(c) should be construed to permit the lawyer who is a fiduciary to continue to act as fiduciary except with respect to the subject matter of the mediation.

*C. Recommendation for Education:*

1. Lawyers should be trained in the social sciences relative to older persons. Thus, programs that will educate lawyers representing older persons in the range of social sciences as they affect older persons should be developed with a focus on the decision-making capacity of older persons.

## VIII. DIVESTMENT

Neither the Model Rules of Professional Conduct nor their comments provide guidelines regarding the specific responsibilities of lawyers counseling older clients. Practice guidelines should identify approaches for addressing important issues without expressly mandating or prohibiting particular conduct by attorneys.

*A. Recommendation for Practice Guidelines:*

1. In representing clients where divestment of assets is or may be considered, the attorney should:
  - a. Counsel clients about the full range of long-term care issues, options, consequences, and costs relevant to the client's circumstances;
  - b. Endeavor to preserve and promote dignity, self determination, and quality of life of the elderly client in the face of competing interests and difficult alternatives;
  - c. Strive to ascertain the client's fundamental values in order to be responsive to the goals and objectives of the client.

*B. Recommendations for Education:*

1. Organizations or other entities providing continuing legal education should endeavor to develop educational programming for attorneys on broad, multi-disciplinary subject areas affecting older persons.
2. Programs should be offered to provide continuing legal education on the ethical considerations in serving older clients.

*C. Recommendation for Further Study:*

1. Further study should be devoted to fashioning ethical guidelines for attorneys counseling fiduciaries in divestment planning when the principal's intent is not clear.

