

**WHAT'S UP DOC?
AN INTERVIEW WITH THE
DOCTOR ABOUT LEVELS OF INCAPACITY**

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**STATE BAR OF TEXAS
27TH ANNUAL ADVANCED
ESTATE PLANNING AND PROBATE COURSE**

**JUNE 4-6, 2003
Marriott Rivercenter--San Antonio, Texas**

¹ The author would like to thank Sharon B. Gardner, Darlene Payne Smith, and the Honorable Jim Scanlan for their assistance and contributions to this paper.

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I. SCOPE OF ARTICLE.

Practitioners who concentrate in the estate planning, probate, and guardianship area encounter legal and ethical issues arising from a potential client's or client's questionable capacity with increasing frequency. Many of these issues remain unsettled and further guidance is needed from our Courts and Legislature. In the interim, this article attempts to address the legal, ethical, and practical considerations that arise when representing persons with questionable capacity. It does not purport to provide definitive answers but, rather, a starting point and hopefully some guidance when dealing with these issues.

All references to sections will refer to the Texas Probate Code unless otherwise noted.

II. VARYING STANDARDS OF CAPACITY.

A. Contractual Capacity.

In Texas, a person has "mental capacity" to contract if, at the time of contracting, he "appreciated the effect of what [he] was doing and understood the nature and consequences of [his] acts and the business [he] was transacting." *Mandell & Wright v. Thomas*, 441 S.W.2d 841, 845 (Tex. 1969); *see also Bach v. Hudson*, 596 S.W.2d 673, 675-76 (Tex.Civ.App.--Corpus Christi 1980, no writ); *Board of Regents of the Univ. of Tex. v. Yarbrough*, 470 S.W.2d 86, 90 (Tex.Civ.App.—Waco 1971, writ ref'd n.r.e.). The requisite mental capacity depends on the contemplated transaction. Thus, a client may have sufficient capacity to enter into certain contracts, agreements, etc., but not others.

Mental capacity, or a lack thereof, may be shown by circumstantial evidence, including:

- a person's outward conduct, "manifesting an inward and causing condition;"
- any pre-existing external circumstances tending to produce a special mental condition; and
- the prior or subsequent existence of a mental condition from which a person's mental capacity (or incapacity) at the time in question may be inferred.

See Bach, 596 S.W.2d at 676.

The question of whether a person, at the time of contracting, knows or understands the nature and consequences of his actions is generally an issue of fact for the jury. *See Fox v. Lewis*, 344 S.W.2d 731, 739 (Tex.Civ.App.—Austin 1961, writ ref'd n.r.e.). However, allegations that a person is merely nervous, appears tense or anxious, or has personal problems, is not sufficient to raise a fact issue as to whether a person lacked capacity. *See Schmaltz v. Walder*, 566 S.W.2d 81, 83 (Tex.Civ.App.--Corpus Christi 1978, writ ref'd n.r.e.); *Mandell & Wright v. Thomas*, 441 S.W.2d 841, 845 (Tex. 1969). Rather, relevant evidence may include "evidence of prior actions, conduct, utterances, and transactions of a person whose mental capacity is in question." *Bach*, 596 S.W.2d at 677 (citing *Miguez v. Miguez*, 221 S.W.2d 293, 295-96 (Tex.Civ.App.--Beaumont 1949, no writ); *Carr v. Radkey*, 393 S.W.2d 806 (Tex. 1965); *Buhidar v. Abernathy*, 541 S.W.2d 648, 651 (Tex.Civ.App.--Corpus Christi 1976, writ ref'd n.r.e.)).

B. Testamentary Capacity.

Generally, less mental capacity is required to make a valid will than to make a valid contract. *See Rudersdorf v. Bowers*, 112 S.W.2d 784 (Tex.Civ.App.—Galveston 1937, writ dismissed w.o.j.); *Hamill v. Brashear*, 513 S.W.2d 602 (Tex.Civ.App.—

Amarillo 1974, writ ref'd n.r.e.). Thus, the tests regarding capacity to contract are generally not applied in determining the question of testamentary capacity. See *Venner v. Layton*, 244 S.W.2d 852 (Tex.Civ.App.—Dallas 1951, writ ref'd n.r.e.). There remains some authority, however, suggesting otherwise. A few Texas courts have held that the legal standards for determining the existence of mental capacity for purposes of executing a will are substantially the same as the mental capacity for executing a contract. *Bach v. Hudson*, 596 S.W.2d 673 (Tex.Civ.App.—Corpus Christi 1980) (discussed *supra*).

Section 57 of the Texas Probate Code mandates that the test for testamentary capacity includes the requirement that the testator be of “sound mind.” Sound mind is referred to both commonly and in Texas case law as testamentary capacity even though Section 57 does impose other requirements. The sound mind element of testamentary capacity means that at the time the testator signs the will, he or she has sufficient mental capacity to:

- *understand* the business in which he or she is engaged;
- *know* the general nature and extent of his or her property;
- *understand* the effect of the act of making a will;
- *know* the persons to whom he or she wishes to give their property to and the persons dependent upon him or her for support; and
- collect in his or her mind the elements of business to be transacted in executing the will and hold them long enough to perceive their obvious relationship to each other and to form a reasonable judgment about them.

See *Tieken v. Midwestern State Univ.*, 912 S.W.2d 878 (Tex.App.—Fort Worth 1995, no writ) (emphasis added) (*citing Prather v. McClelland*, 13 S.W. 543, 546 (Tex. 1890)); see also *McNaley v. Sealy*, 122 S.W.2d 330 (Tex.Civ.App.—Austin 1938, writ dismissed); *Horton v. Horton*, 965 S.W.2d 78, 85 (Tex.App.—Fort Worth 1998, no writ) (courts generally limit evidence regarding testator's capacity to time period surrounding will execution).

The issue of whether a person has testamentary capacity is usually a question of fact. See *Smith v. Welch*, 285 S.W.2d 823 (Tex.Civ.App.—Texarkana 1955, writ ref'd n.r.e.). No particular standard is prescribed. See *Farmer v. Dodson*, 326 S.W.2d 57 (Tex.Civ.App.—Dallas 1959). See also *Brown v. Mitchell*, 12 S.W. 606 (Tex. 1889); *Garrison v. Blanton*, 48 Tex. 299 (1877); *Wilson v. Estate of Wilson*, 593 S.W.2d 789 (Tex.Civ.App.—Dallas 1979); *Anderson v. Clingensmith*, 369 S.W.2d 634 (Tex.Civ.App.—Fort Worth 1963, writ ref'd n.r.e.); *Nowlin v. Trotman*, 348 S.W.2d 169 (Tex.Civ.App.—Amarillo 1961, writ ref'd n.r.e.); *Green v. Dickson*, 208 S.W.2d 119 (Tex.Civ.App.—Galveston 1948, writ ref'd n.r.e.).

It is notable that while lack of testamentary capacity may appear to imply lack of intelligent mental power, it is not necessary for a person to be highly intelligent to dispose of his or her property by will. See *Bell v. Bell*, 237 S.W.2d 688 (Tex.Civ.App.—Amarillo 1951, no writ); *Lowery v. Saunders*, 666 S.W.2d 226 (Tex.Civ.App.—San Antonio 1984, writ ref'd n.r.e.). Rather, lack of education or proof of illiteracy has little, if any, bearing on mental capacity to make a will. *Oliver v. Williams*, 381 S.W.2d 703 (Tex.Civ.App.—Corpus Christi 1964, no writ).

C. Incapacity for Purposes of a Guardianship.

For guardianship purposes, Section 601 of the Texas Probate Code defines an incapacitated person to including the following:

- (A) a minor;
- (B) an adult individual who, because of a physical or mental condition, is substantially unable to provide food, clothing, or shelter for himself or herself, to care for the individual's own physical health, or to manage the individual's own financial affairs; or
- (C) a person who must have a guardian appointed to receive funds due the person from any governmental source.

TEX. PROB. CODE ANN. § 601(13) (Vernon Supp. 2000).

Evidence of a physical or mental condition must be based on reoccurring acts or occurrences with the preceding six (6) month period and not based on a single action or occurrence. *See* TEX. PROB. CODE ANN § 684 (c) (Vernon Supp. 2000).

III. QUESTIONABLE CAPACITY.

A. Potential Disabilities.

A potential client may suffer from a disability that could effect either the representation or basis for the representation. A disability is generally defined as a limitation on a person's ability to perform socially defined roles and tasks within a sociocultural and physical environment. *See* Michael Lichtenstein, M.D., M.Sc., *Capacity - The Medical Perspective*, STATE BAR OF TEXAS ELDER LAW COURSE, Chpt. 10 (2000). Disability is the "gap between the person's capabilities and the environment's demand." *See Id.* at Page 3. While a client's disability will not always prevent the representation, the ability to recognize the most frequently encountered

conditions and disorders may assist in carrying out the representation in a manner that is in the client's best interest and also accomplishes his or her desired purpose. The following is an overview of capacity and potential disorders which may impact the decision whether to take the client's case. *See also* Richard C. Simons, M.D., *UNDERSTANDING HUMAN BEHAVIOR IN HEALTH AND ILLNESS* (3d ed. 1985) (discusses various personality disorders that may affect client relationship).

1) Mental Incapacity.

As discussed previously, mental capacity generally relates to the requisite ability to appreciate the effect of a choice and understand the nature and consequences of such choice. The ability to make such choices is contingent on the process used to reach his or her decision. Generally, a person has the requisite mental capacity when they are able to reach their decision as a result of the following four (4) step process:

- Understanding the relevant information regarding the choice;
- Appreciating the likely consequences of each choice;
- Manipulating the information rationally; and
- Communicating a stable decision.

See Lichtenstein, *Capacity - The Medical Perspective* at Page 6.

This four step process must be applied to each decision. Therefore, a person may have sufficient mental capacity to make certain decisions, but not others. This is the logical result of the application of this process to choices or decisions that involve varying levels of complexity and consequences. *See Id.*

Potential mental incapacity can result from a number of disorders, diseases, and conditions. Although a thorough discussion is beyond the

scope of this outline, common causes of medical incapacity include:

- Dementing disorders such as Alzheimer's, dementia, etc.;
- Cerebrovascular diseases such as strokes, and multi-infarct dementia;
- Depression;
- Alcohol and drugs;
- Vitamin deficiency such as Vitamin B12 or Folic Acid;
- Thyroid imbalances or diseases; and
- Diseases that effect the central nervous system such as syphilis and AIDS.

See Lichtenstein, *Capacity - Medical Perspective* at Page 9.

2) Borderline Personality Disorder.

Personality disorders are generally classified as either neurotic or psychotic. Neurotic disorders may include hypochondria, obsessive-compulsive behavior, and/or victim-like behavior. Psychotic disorders may include feelings of being stalked by unknown persons, unreasonable suspicions and anger or violence problems. Borderline personality disorders are not in between these two categories, but rather involve signs and symptoms that are characteristic of both. Instability is the prevalent identifying factor.

A client with personality disorders will typically be impulsive and unpredictable. The clients' interpersonal relationships will appear few and/or unstable as they are likely to be uncertain about their own self-image, self-esteem and goals. One day, the client will be cooperative and appreciative and the next day may be hostile. As a result, they may be susceptible to undue influence and mistake.

3) Paranoid Avoidant.

The paranoid avoidant person is extremely sensitive to any potential rejection, humiliation, or shame. His self-esteem is severely impaired and he may be devastated

by the slightest suggestion of criticism or disapproval. Although this person desires affection and acceptance, they shy away from social contacts and close interpersonal relationships. The task of pointing out the downside of this potential client's legal matter may totally destroy the person and send him into an avoidance state. As a client, the paranoid avoidant is apt to be distrusting and may be unwilling to divulge information that is necessary for you to handle his legal problems.

4) Manic and Bipolar Disorders.

Potential clients with manic or bipolar disorders are particularly alarming in that it is almost impossible to detect if the potential client is interacting well on the day of the initial meeting. A potential client who is both manic and depressive will have large mood swings, ranging from irrational fears and hopelessness to unwarranted giddiness. In mania, the client is expansive, euphoric and full of good humor. But, when criticized, the client becomes irritable,

argumentative and threatening. In the depressive mode, the client is sad, tearful, hopeless in the extreme, and even suicidal. At times these potential clients may lack the requisite capacity to complete the contemplated representation.

5) Passive-Aggressive Personality Disorder.

The passive-aggressive client appears to be quiet and respecting on the surface. Passive-aggressive behavior is marked by anger that is cloaked by a friendly attitude but expressed in passive or indirect forms of aggression. Other signs of passive-aggression are procrastination, stubbornness, and obstructionism. The passive-aggressive client always has a ready excuse for any inaction or aggression. An example of this type of behavior is a meeting with the client which goes well, in your opinion, which is followed within days by a hostile letter stating a total irrational view of that same meeting. While the passive aggressive disorder does not generally result in a client lacking capacity, it may lead to mistrust, delusions and undue influence that could affect the representation.

6) Organic Brain Syndrome.

Organic Brain Syndrome (“OBS”) is characterized by a temporary or permanent dysfunction of the brain. The direct cause of the dysfunction is unknown and this makes treatment with medication a hit or miss proposition. There is a loss of brain function in all OBS. The loss of function is opposite of the acquisition of functions during the person’s growth; for example, the first brain function that is lost is the intellectual or cognitive function. The next functions that deteriorate are motor skills and consciousness.

Potential client’s suffering from OBS may be difficult to identify because he or she may be having a good day at the first meeting. Therefore, it may be only after the representation is commenced that the attorney begins to see signs of capacity issues. These

clients are more susceptible to claims of lack of mental capacity. *See discussion supra.*

B. Warning Signs.

It is wise to be aware of potential warning signs during the initial telephone call or meeting with a potential client. These warning signs may indicate incapacity or another disability that could effect either the representation or basis for the representation.

Unfortunately, no clear warning signs exist for attorneys. Below is an attempt to outline some potential warning signs that might require future inquiry, the cancellation of a contract, or even the notification of a court under the State Bar Disciplinary Rules. *See discussion supra.* Potential warning signs may include:

- Memory problems evidenced by excessive reliance on third parties to provide basic information;
- Tendency to avoid answering questions that relate to memory recall;
- Covering, i.e. answers a question with responses like: everyone knows that, or glib answers;
- Repeated conversations regarding the same issues or concerns that have been previously responded to;
- Unusual reliance on another person for their basic daily needs such as food, shelter, clothing, and communication needs;
- Signs of hypochondria, particularly when faced with a meeting, court appearance or deadline;
- Obsessive/compulsive behavior; (while all litigation is stressful, one can dwell on a subject with no ability to move on);
- Victim-like behavior, such as the inability to ever perceive the contribution of one’s own actions to the current situation;

- Significant mood swings in short periods making rational decisions difficult;
- Unreasonable suspicions, such as that a family member is an enemy, stealing money, trying to kill without any factual or logical basis;
- Manic/depressive behavior, such as behaving extremely jubilant for no reason at a serious time, or being depressed, sad and tearful when the case is going well;
- Obsession for revenge, such as the desire and intent to file frivolous pleadings and inflict causes of action which are not based in law, regardless of how much the client is counseled;
- Anxiety disorders, or illnesses which prevent the client from leaving his or her home on various days and/or the inability to subject themselves to a group of persons; this can also manifest itself as agoraphobia and other phobias;
- Substance abuse disorders to the degree that communication is limited to days when the client has not abused the substance to the degree they are incoherent;
- Mental retardation, to the degree that the person possesses a certain level of understanding, but not necessarily the ability to contract;
- Major depression to the degree there are changes in appetite, sleep patterns, energy, concentration, and possibly feelings of hopelessness and suicidal thoughts;
- Schizophrenia or schizophrenia affective disorders which, when not controlled, result in delusions, disorganized speech, and possibly hallucinations;
- Amnesic disorders that are difficult to address such as fluctuating

dementia and dementia of Alzheimer's type;

- Psychopharmacological disorders such that the client is non-compliant with medications, over-medicates, or abuses both prescribed and over-the-counter medications.

An attorney may witness some or many of these traits yet be hesitant to "play doctor." Attorneys are placed in a difficult position when trying to ascertain the capacity of a client. Most attorneys have no medical or psychiatric training. Additionally, the questions involved in attempting to "test" the potential clients can prove to be both insulting and embarrassing to the potential client. See discussion *infra*. Thus, handling the issue becomes one of instinct and is based on the specific facts at each case. Realistically, the decision to represent a client is often based on one visit, and questions of capacity or at least a potential disability arise at a later date. It is often difficult to determine whether the person may lack capacity versus simply a problem that can be dealt with or eccentricity.

C. Basic Considerations.

Every potential representation includes two (2) primary considerations: (i) does the proposed client have the ability to enter into the proposed engagement and transactions, and (ii) does the attorney desire to enter into the representation.

1) Capacity to Engage in Underlying Transaction.

An adjudication of incapacity can have a significant effect on a person's ability to engage in the underlying transaction.

a. No Adjudication of Capacity.

Generally, mental capacity is determined at the time the document at issue is executed or the person enters into a transaction. Therefore, unless a person has been adjudicated to be incapacitated at the time the

attorney is retained, the contract was executed, the will was executed, etc., the law presumes that he or she possesses sufficient mental capacity to enter into the transaction. *See Estate of Galland v. Rosenberg*, 630 S.W.2d 294, 297 (Tex.Civ.App.—Houston [14th Dist.] 1981, writ ref'd n.r.e.). The presumption of capacity may, however, be overcome with relevant and credible evidence. *See discussion supra*.

b. Adjudication of Incapacity.

The determination of incapacity does not, however, automatically result in a person lacking sufficient capacity to execute any document or instrument or enter into certain transactions. Each of these proposed actions must be determined based on the particular facts, circumstances, time frame, and abilities of the person subject to a guardianship. For example, under the current guardianship laws, persons under temporary guardianship are presumed to have capacity. Furthermore, a ward subject to a permanent guardianship is presumed to retain all rights not expressly granted to his or her guardian.

With regard to estate planning, an adjudication of the testator's incapacity prior to the execution of a will is typically admissible on the issue of the testator's mental capacity. *See Haile v. Holtzclaw*, 414 S.W.2d 916 (Tex. 1967). When the adjudication remains in effect on the date the will was executed, the testator will generally be presumed to lack testamentary capacity. *See Bogel v. White*, 168 S.W.2d 309 (Tex.Civ.App.—Galveston 1942, writ ref'd). This presumption may be overcome by evidence of testamentary capacity. *Id.* at 311. On the other hand, an adjudication that a person was totally or partially incapacitated entered *after* the date of the will is generally not admissible as evidence on the question of testamentary capacity. *See Carr v. Radkey*, 393 S.W.2d 806 (Tex. 1965). For example, in *Stephen v. Coleman*, the testator signed his

will three days before being adjudicated incompetent. The subsequent adjudication did not raise any presumption of lack of testamentary capacity. *See Stephen v. Coleman*, 533 S.W.2d 444 (Tex.Civ.App.—Fort Worth 1976, writ ref'd n.r.e.).

2) Evaluating Potential Engagement.

It is rumored that Abraham Lincoln gave the following advice to a new lawyer upon passing the bar, "Young man, it's more important to know what cases not to take than it is to know the law." Jay G. Foonberg, *HOW TO START AND BUILD A LAW PRACTICE* (3d. 1991) at 135. Unfortunately, neither President Lincoln or anyone else can advise an attorney which clients, or cases, should or should not be taken. Rather, it is a product of the attorney's legal education, practical experience, intuition, and sometimes his or her moral and ethical beliefs. Each case must be evaluated based on the facts and circumstances of that particular proposed representation. A few suggestions regarding evaluating proposed engagement follows.

a. Meet the Proposed Client.

It is advisable to personally meet the client before agreeing to the proposed representation. This face-to-face meeting is particularly important when capacity may be an issue. Although not doctors, attorneys are under ethical obligations to at least make a good faith effort to determine his or her client has the requisite capacity to retain counsel.

b. Assess Legal Competency.

Rule 1.01 of the Texas Disciplinary Rules of Professional Conduct provides that an attorney may not accept or continue the representation which the attorney knows or should know is beyond his or her legal competence. When determining whether a matter is beyond an attorney's competence, the area the underlying representation is not the only issue. Relevant factors include the complexity of the particular case, the lawyer's

experience in addressing the facts of that particular case, the time the lawyer is available to address the issues, and the attorney's experience in handling issues raised by such representation.

Furthermore, while a lawyer may be technically competent to handle the proposed engagement, the lawyer may determine that the proposed client's needs could be better served by referring the potential client to another attorney who has dealt with the specific issues and complexities that may be raised during the representation. An attorney does not violate the Rules of Ethics if, however, he or she associates with another attorney for purposes of gaining additional knowledge or expertise with regard to the client's specific issues, provided, the client's representation can be carried out in a competent manner upon receiving such additional advice.

c. Assess Litigation Risks.

Some cases involve greater litigation risks than others. An attorney is not under an ethical obligation to accept every requested engagement. It is appropriate for an attorney to consider whether the proposed engagement will result in him or her becoming an unwilling witness in future litigation. While every estate plan inherently requires that the lawyer, on some level, become a witness to the proposed estate planning representation and, thus, the client's capacity, some representations are more complex than others. Furthermore, third parties may appear to be influencing the potential client and attempt to advise the attorney how the proposed client wishes to leave his or her property. If the potential client is not willing to meet with the attorney without these third parties present, the lawyer should strongly consider declining the engagement. To do otherwise may place the lawyer in a situation of being a party to an alleged conspiracy scheme or interference claims with the third parties.

d. Consider Potential Conflicts of Interest.

The Texas Disciplinary Rules of Professional Conduct also provide that an attorney should not represent individuals who have material conflicts of interest. Alleged conflicts of interest are generally raised when an attorney represents both a husband and a wife, or other joint clients, in the estate planning context. While potential conflicts of interest do not prohibit all joint representations, it is necessary to evaluate the potential conflicts, the effect, the nature, implications, and the possible consequences of the joint representation, before agreeing to the joint engagement. When one client has questionable capacity, additional attention should be given to potential conflicts of interest. Even if the client has capacity to execute estate planning documents, he or she may not arguably have capacity to waive potential conflicts of interest. Furthermore, if one of the two clients has questionable

capacity, the other client may later be faced with claims of undue influence or utilizing their position to encourage the client with questionable capacity to execute estate planning documents that he or she would not otherwise execute. In such a case, the clients may benefit from retaining separate attorneys.

3) Effect of Determination of Lack of Capacity.

If it is determined that a contract was "executed by a person who does not have the mental capacity to contract, the contract is voidable; and if such person signed a contract without sufficient mental capacity to understand the nature and consequences thereof, the contract is not binding and may be set aside." See *Schmaltz v. Walder*, 566 S.W.2d 81, 83 (Tex.Civ.App.—Corpus Christi 1978, writ ref'd n.r.e.).

VI. REPRESENTATION CONSIDERATIONS.

A. Estate Planning.

The following is a discussion of various considerations in an estate planning engagement involving a client of questionable capacity.

1) Determining Capacity.

When the representation involves estate planning, it is advisable to make a preliminary determination whether the proposed client has the sufficient capacity to execute the estate planning documents. In most cases, the attorney will be able to make this initial determination by meeting the client and determining whether he or she suffers from a disability that may raise an issue as to his or her incapacity. When the client may suffer from a disability that could call his or her capacity into question, it may then be advisable to seek additional information and, possibly, an opinion from a healthcare provider. Each of these points are discussed below.

a. Initial Assessment.

Most estate planning representation begins with a face-to-face meeting with the client or potential clients. It is during the initial meeting that the attorney, either knowingly or instinctively, begins the process of evaluating his or her client for purposes of determining whether the client has the requisite testamentary capacity to execute the will. Such assessment is vital to ensuring that the client's wishes are carried out. Often times, the estate planning attorney is the single most important witness in a subsequent challenge to the client's capacity. It is his or her observations that are the foundation of the proponent's case when asserting the client had the requisite capacity to execute the will, trust, or other estate planning document.

The extent of the initial assessment generally depends on the age, medical condition, and any possible disabilities of the client. Because capacity is a fundamental requirement to execute the will, the attorney can typically venture into areas which would otherwise be considered outside the scope of legal representation. Often times, the client understands it is necessary to ask these questions to increase the likelihood the will or estate planning document will be enforceable in the future. The extent of the initial assessment depends on the previously discussed factors. Therefore, when the client is in their forties, has suffered from no accident or head injury, and appears to exhibit no signs of the questionable capacity, the initial assessment may be nothing more than asking about his or her family, property, and his or her proposed disposition. When this client is in the first stages of Alzheimer's, additional information may be requested in this initial assessment. For example, the attorney may ask about the client's family history, including, but not limited to, children, grandchildren, brothers, and sisters, even though these individuals may not be in the

estate plan. It is the attorney's ability to testify that the client was aware of all these individuals that will further clarify or provide evidence that the testator knew of his family, even the extended family, at the time he or she executed his or her will. If the testator intends to leave his or her property to someone other than the "natural objects of his or her bounty," the attorney and client should discuss the client's reasons for this disposition. Regardless of the reasons, if the client's logic is founded on a reasonable basis, this will provide evidence to support the admission of the will and the client's capacity.

Additionally, the lawyer should discuss, in detail, the client's property interests. Again, this will allow the attorney to testify that the testator was familiar with the nature and extent of his or her property.

Finally, the attorney should discuss with the client his or her medical condition, the medications he or she is taking, and, if appropriate, ask the client to recall various matters of local or national significance. Often times, the clients will not be insulted when asked these questions after a candid conversation with regard to your desires to make yourself a fact witness so his or her intent can be carried out at a later date.

b. Medical Evaluations.

In certain cases, it may be appropriate for the client to seek a medical evaluation before proceeding with the estate planning representation. This evaluation serves two (2) purposes. First, it may be questionable whether the client has the requisite capacity to execute his or her estate planning documents. This sometimes occurs after a client has had a stroke, brain injury, or is subject to a guardianship. In these situations, the medical evaluation may be beneficial in determining the client's capacity to proceed with the requested representation.

Note also that when the individual is subject to a guardianship, permission of the ward's guardian, and possibly the court, may be required to proceed. This can be generally handled by the guardian submitting an application to the court advising it of the ward's requests and seeking permission to proceed with psychological and neurological testing of the ward in order to determine whether he or she has the requisite capacity to execute estate planning documents. At the time of the testing, the physician should be aware of the applicable capacity test, including testamentary, and any other capacity which may be required, in order to execute the proposed documents.

Second, while the attorney may be comfortable the client possesses the requisite capacity to pursue the representation, the client's family or financial situation may indicate that a subsequent will contest is likely. In such cases, the attorney may believe that a medical evaluation, could be beneficial in a subsequent will contest. This would provide additional evidence that the testator had the requisite testamentary capacity to execute his or her estate planning documents. The medical evaluation may be a letter from the client's treating physician or a complete psychological or neurological evaluation.

If a psychiatrist or neurologist is to be retained for purposes of completing the medical evaluation, he or she should be familiar with the legal test for capacity and have experience determining and testifying to capacity, or lack thereof. A good approach to selecting a physician is to ascertain and hire a physician that the court appoints on independent psychiatric exams in guardianship proceedings. These individuals generally have the court's respect and the requisite level of expertise in the areas of capacity and mental examinations. Regardless of who is selected, he or she

should be board certified, if possible, and have adequate credentials.

2) Drafting.

When drafting estate planning documents for a client of questionable capacity, the attorney may want to consider including additional provisions and/or take extra precautions that may be beneficial in the event that the document is later subject to a challenge based on lack of capacity. A discussion of some commonly utilized suggestions follows.

a. Simplicity.

Inherent in the definition of testamentary capacity is the premise that the testator understood he or she was executing a will, and that he or she understood the effect of its terms. Due to our current transfer tax structure, most wills include lengthy and complex provisions that address a plethora of administrative and tax issues. While generally advisable, these additional provisions can create a lengthy and onerous document. A contestant of the will may attempt to convince a jury that the testator could not have understood the contents of the will and, thus, could not have had the requisite testamentary capacity. This can be illustrated by putting the proponent on the stand and asking him or her to explain certain portions of the will.

While the test for testamentary capacity does not require that the testator understand every provision of his or her will, a jury may be persuaded by this argument. Therefore, when drafting a will or similar dispositive instruments, the drafter should attempt to simplify the document based on the facts and circumstances of the particular client. For example, a client that has a marginally taxable estate may benefit from a shorter will that provides for the outright disposition of his or her estate and only includes necessary boilerplate to ensure the bequests are carried out. Thus, the drafter may choose to exclude

standard provisions providing for contingent trusts, addressing administrative issues, providing for the payment of transfer taxes, including tax apportionment, etc.

b. Identification of Family Members.

One of the elements of testamentary capacity is that the testator is aware of the natural objects of his or her bounty. *See* discussion *supra*. It is advisable to identify the testator's family in the will even if he or she does not intend to provide for them. This evidences that the testator was aware of these individuals. The will may also include a statement that the testator has made no provision for them in his or her will, however, any stated reasons should be carefully drafted to avoid a potential claim for testamentary slander. If you do identify the beneficiaries by name, make sure the testator has their names correct.

c. Identification of Property.

Similarly, another element of testamentary capacity is that the testator is aware of the nature and extent of his property. *See* discussion *supra*. As evidence, the drafter should consider generally identifying the testator's assets. A detailed listing is not necessary. Rather, the will may include a general listing of the assets in the will. For example, they may provide that the testator owns a home in Austin, a vacation house in Kerrville, cash, securities, automobiles, furnishings and personal effects and other real and personal property. Again, this provides some evidence in a subsequent will contest of the testator's capacity.

d. Size of Font.

When the testator suffers from impaired vision, consideration should be given to how the testator will review the will prior to its execution. The computer age provides a number of tools to assist in this regard. If the testator has limited sight, the drafter should consider enlarging the print size. Similarly,

double spacing the document and/or a magnifying glass often assists the testator when reviewing the proposed will. If, however, the testator has such limited sight that he or she cannot review the document, the drafter, in the presence of witnesses, should read the will to the testator.

3) Ancillary Documents.

The execution of ancillary documents in conjunction with estate planning becomes particularly important when a client has questionable capacity or whose incapacity is contemplated in the future.

a. Appointment Considerations.

When a client has questionable capacity, consideration should be given to the appointment of individuals who most likely will not have a potential conflict of interest which may result in challenges to their actions. For example, the client may desire to appoint an individual as his or her agent under a power of attorney. The power of attorney may also authorize the agent to establish a management trust to provide for the client in the event of his or her incapacity. The power of attorney may provide, however, that the trust must be established with a corporate fiduciary rather than an individual. In the event a family member questions the agent's actions, the agent would then have the ability to establish a management trust to prevent the client's assets from being subjected to an unnecessary and retaliatory guardianship. Furthermore, if the client intends to appoint non-family members as his or her agent to make financial and medical decisions, the attorney should understand the reasons for the appointments in the event this becomes an issue in the future. This will allow the attorney to assist the client in carrying out his or her desires and potentially avoiding a guardianship should one be sought by the client's family members in the future.

b. Appoint Successors.

Furthermore, consideration should be given to the appointment of a number of successor agents to make financial and medical decisions. Third parties may attempt to either intimidate an agent into non-action or resignation, or the agent may not be able to serve due to incapacity or death. A client will have greater assurance that his or her desires will be carried out by his appointed agents rather than a guardian when he or she designates a number of persons who can act if the predecessor agent cannot serve or qualify.

c. Authorize Creation of Management Trust.

Revocable management trusts provide an effective and appropriate means to plan for a client's future incapacity. While a discussion of the advantages and disadvantages of revocable management trusts are beyond the scope of this outline, these trusts provide an effective means of providing for future management, reducing the risk that individuals will attempt to gain control of the client's estate through a guardianship, allow the client to direct the management of his or her assets when he or she is unable to do so, and reflect a reasoned and appropriate business judgment. Typically, the courts presiding over guardianship proceeding will respect the creation of a management trust, either by the client or by an agent pursuant to a duly executed durable power of attorney, if the terms of the trust are standard in their nature and do not allow overreaching by the trustee or third parties. Furthermore, even if the client has questionable capacity, the courts will generally not seek to set aside the management trust when the assets are being provided for by a corporate trustee and the beneficiary is the alleged incapacitated client.

d. Disqualify Persons to Serve as Guardian.

The issue of a client's incapacity is often raised by individuals who seek to control the client's estate. It is therefore important for the client to appoint individuals he or she wishes to serve as his or her guardian and designate

individuals they do not wish to serve as their guardian. Courts must consider the disqualification of a person when making its decision as to who should be appointed as the client's guardian, in the event it is necessary. Therefore, any designations of guardianship should name any persons, entities, or classes of persons, in which the client does not wish to serve as his or her guardian in the event the need arises.

4) Execution Ceremony.

No aspect of the estate planning process will garner greater scrutiny than the execution ceremony. A discussion of the more significant considerations follows:

a. Place of Execution.

Because of the increased likelihood of a contest, the drafter should give careful consideration to where the document is executed as this is often a focus in a subsequent will contest. If possible, the testator should execute his or her estate planning documents at the drafting attorney's office. This is indicative of a typical business arrangement and that the testator's health was sufficient to travel to the attorney's office. If possible, the testator and the drafting attorney should avoid including a beneficiary of the will in the execution arrangements. While the testator may depend on these beneficiaries, it is that dependency that can lead to claims of influence or manipulation. Therefore, the testator should be encouraged to drive him or herself, if able, or arrange another means of travel that indicates a level of capacity.

If it is necessary to execute documents at home or in a hospital, arrangements should be made to ensure independent and credible witnesses and a Notary Public are present. It will be helpful if the witnesses and Notary Public are persons who can be readily located in the future.

b. Persons Present at Execution.

All potential beneficiaries should be excluded from the execution ceremony. As discussed *supra*, the drafter should encourage the testator to exclude potential beneficiaries from all arrangements related to the drafting of the will including, driving the testator to meetings, reviewing drafts of the will, reading the will to the testator, and being present at any meeting between the testator and his attorney and paying for the estate plan. Further, the attorney should arrange for at least two (2) credible and competent witnesses and Notary Public to be present during the entire ceremony. *See discussion infra.*

c. Selecting Witnesses and Notary Public.

If capacity is a significant issue, the attorney should also consider involving a medical professional in the execution ceremony, either as an attesting witness or consultant prior to the execution. It is advisable to weigh the impact his or her presence may have in triggering an inquiry by an interested party or the court which might not otherwise occur. This requires a balancing act. If undecided, err on the side of caution and involve the medical professional.

When the testator is hospitalized, the attorney should consider whether to discuss with the testator's physician or the nurse on duty the testator's present condition prior to executing the will. It may also be advisable to find out whether the testator had visitors and, if necessary, interview them. In certain circumstances, it may be advisable to review the client's medical chart.

The drafter should also consider whether it would be beneficial to review each provision of the will with the client in the presence of the witnesses. When reviewing the will, explain the effect of a particular provision on the bequests made to other family members. Also, secure a confirmation of a large gift to one child. If the client confirms that he or she understands the effects of his or her plan, the

drafter will have more assurance that the client fully understands the entire estate plan. As an extra precaution, it may be useful to read the instrument in the presence of the attesting witnesses. If possible, the will should be simple and easy to understand. Simplicity ensures that the client understands each provision and will not tire before the will is read and executed.

5) Miscellaneous.

a. Memos to File.

Upon the conclusion of the execution ceremony, the attorney should consider dictating a memo to his or her file. The memo may later refresh the recollections of the attorney in the event of a challenge to the documents. The memo should reflect the persons in attendance, the place of execution, any significant matters discussed, for example, the identity of family members, the reasons for executing of the documents, and that the testator understood the documents he or she was executing. Furthermore, the memo should reflect when persons entered and left the place of execution, and the time and sequence of the execution ceremony, for example, which documents were signed first, who took the requisite oaths, etc.

b. Storage of Documents.

If the client has questionable capacity, the attorney should discuss with the client where the document should be stored. Some clients may be better served when the attorney keeps the original documents. Other clients want to take possession of the original documents. However, this can lead to future issues of loss, revocation, and destruction by third parties.

Regardless of the ultimate decision made, the attorney should document the storage of the documents in their file. If the instruments are given to the client, the attorney should follow up with a letter to the client confirming that the client decided to take possession of these

documents. The attorney may also suggest that the documents be placed in a safe deposit box to avoid access by third parties. Alternatively, if the client requests that the attorney continue to maintain the originals in his or her offices, this should be confirmed in a letter.

Furthermore, if the client does not want the attorney to release the will to third parties, in the event of future incapacity, this fact should be confirmed in a letter to the client. Such a request becomes significant in the event a guardian of the client's person and/or estate is appointed. *See* discussion *supra*.

B. Guardianship Proceedings.

Implicit in every guardianship proceeding is the potential incapacity of the proposed ward. However, the mere fact that an individual is the subject of a proposed guardianship proceeding or actually under a guardianship does not render the ward or proposed ward unable to retain counsel. Rather, as with any representation, the ability to retain counsel is based on the mental capacity of the ward or proposed ward, and his or her ability to understand the terms of transaction of retaining the lawyer. Furthermore, the ward or proposed ward's requested representation may depend on what the engagement entails.

1) Proposed Ward's Right to Counsel.

An application for guardianship and the related proceeding "threatens the personal and financial freedoms of a proposed ward, and those freedoms of a proposed ward must be ably defended." *Oldham v. Calderon*, No. 14-95-01426-CV, 1998 WL 104819 (Tex.App.—Houston [14th Dist.] 1998, no writ)(not designated for publication). To ensure that every proposed ward has legal representation, the court presiding over an application to create or a guardianship is required to appoint an attorney ad litem to represent the proposed ward. *See* TEX. PROB.

CODE ANN. §§ 647, 694C(a) (Vernon Supp. 2000). The automatic appointment provisions do not, however, always supplant the proposed ward's right to retain counsel of his or her own choice.

a. Basis of Authority.

In all civil cases, a party is generally entitled to represent himself or herself or to be represented by an attorney, TEX. R. CIV. P. 7. However, when, as in a guardianship proceeding, the central issue in the civil case is whether the client has the legal capacity to handle his or her affairs, the right to retain counsel must be considered in conjunction with the proposed ward's ability to understand the act of retaining counsel. Although there is little specific statutory authority, probate courts have consistently recognized that a proposed ward has the right to retain private counsel to defend against a pending application for guardianship. See TEX. R. CIV. P. 7.; *Oldham v. Calderon*, 1998 WL 104819 at *3; *Price v. Golden*, 2000 WL 1228681, No. 03-99-00769-CV (August 31, 2000) (not reported to date). In *Calderon*, the proposed ward privately retained Calderon to defend her against a request for guardianship. The Harris County Probate Court ruled that the proposed ward had the right to be represented by counsel of her own selection. Affirming the decision on appeal, the Houston Court of Appeal recognized that a proposed ward has the right to select her own counsel and be ably defended. *Id.* at *3. The appellate court further noted that:

[A] trial court can make the most rational decision concerning appointment of a guardian only where the interests of the proposed ward are vigorously represented. Therefore, to the extent [Calderon] could work more effectively with [the proposed ward] in this case than an attorney selected by the

court, her estate was benefited, not harmed, by their involvement.

Id.

Furthermore, the recent opinion of *Price v. Golden*, confirms that a person under a temporary guardianship may retain counsel, both individually, and via his or her attorney-in-fact, and that such contract (even if later proved to be incapacitated) is *voidable*, not void. 2000 WL 1228681, No. 03-99-00769-CV (August 31, 2000) (not reported to date). In *Price v. Golden*, the proposed ward's attorney-in-fact engaged Golden to defend the proposed ward in a contested guardianship matter. The trial court also appointed an ad litem who denied the need for a guardianship. The applicant for guardianship filed a motion to show authority under Tex. R. Civ. P. 12, but it was never heard by the trial court. See discussion of Rule 12 Motions, *infra*. A settlement agreement was ultimately reached by all parties that resulted in the dismissal of the request for the appointment of a permanent guardian of the estate and appointed the applicant for guardianship as guardian of the proposed ward's person. The settlement did not address the payment of Golden's fees and expenses incurred in defending against the guardianship.

At the hearing to appoint the guardian, the medical evidence established that the proposed ward was incapacitated at the time the proposed ward engaged Golden. Golden's fees were not addressed at that hearing. Golden subsequently filed an application seeking payment of his attorney's fees and expenses, related to his representation of the proposed ward, from her estate. Golden also sought the payment of his fees and expenses for the time period after the appointment of the guardian of the person. Golden claimed that these fees and expenses were necessary to implement the settlement agreement, or related to the approval of his attorney's fees and expenses. The trial court, however, held

that the contract was void and the proposed ward lacked capacity to contract with Golden. Notwithstanding this finding, the trial court awarded Golden the majority of his fees and expenses incurred prior to the appointment of the guardian of the person, but denied his fees and expenses incurred after the appointment, on the basis that the parties waived the right to challenge Golden's fees incurred up to the date of the settlement.

The guardian of the person appealed the trial court's order granting a portion of Golden's fees arguing that there was no enforceable contract for legal services or statutory authority to award attorney's fees to Golden. He also argued that the ward lacked capacity to hire Golden and thus, the attorney fee contract was void. Golden file a cross-appeal arguing that the trial court erred in finding that (i) the attorney fee contract was void after the appointment of a permanent guardian of the person, and (ii) fees incurred after the date of the settlement were not recoverable under the theory of *quantum merit*.

The appellate court held that a contract with an incapacitated person is voidable at the election of the incapacitated person or someone authorized to act on his or her behalf but was not *automatically* void. *Id.* The contract continues until active steps are taken to either disaffirm it or find it voidable. The appellate court further noted that even when a person is legally incapacitated, a contract for legal services may be considered a necessary good or service. *See* discussion of *Breaux, infra*. Thus, the appellate court affirmed the trial court's finding that the guardian of the person waived his motion to show authority by not obtaining a ruling prior to the approval of the settlement agreement.

The *Price* decision is one of the first cases to confirm the authority of the proposed ward's attorney-in-fact to engage counsel for the proposed ward. At a minimum, *Price* points

out that a lawyer who defends a potentially incapacitated person is wise to have the contract guaranteed and approved by an agent who holds a power of attorney. Note, however, the power of attorney should be durable in nature to protect against a later finding that the proposed ward was incapacitated at the time of the engagement.

b. Considerations Before Accepting Representation.

As previously discussed, the right to represent a proposed ward is not absolute. Therefore, an attorney who is considering representing a proposed ward should use reasonable means to confirm the alleged incapacitated person has the capacity to retain counsel. It is suggested that the attorney personally meet the potential client to determine whether the potential client appears to be acting independently, understands that he or she is seeking to retain the attorney to represent them, is generally oriented to time, place and person, and understands basic financial arrangements and resulting obligations. If the court has appointed an attorney ad litem, it is suggested that permission be given by the proposed ward's court appointed counsel.

Furthermore, it is advisable to seek the opinion of the potential client's physician or a doctor qualified to render a medical opinion regarding the potential client's capacity to enter into a contract. If possible, the doctor should reduce his or her opinions to writing.

2) Ward's Right to Counsel.

After a guardian has been appointed, the ward may generally lose the legal right to retain counsel. *See Breaux v. Allied Bank of Texas*, 699 S.W.2d 599 (Tex.App.—Houston [14th Dist.] 1985, writ ref'd n.r.e.). However, both courts and the Restatement (Second) of Contracts recognize exceptions to this general rule. *See United Pacific Insu. Comp. v. Buchanan*, 765 P.2d. 23 (Wash. Ct. App. 1989). First, the comments to Section 13 of

the Restatement (Second) of Contract recognize that a ward may be capable of managing his or her own property if the ward regains his or her ability to reason, or has a lucid interval and the guardianship has been effectively abandoned. *Id.* (citing Restatement (Second) of Contracts § 13 (1981)). Further, Texas courts recognize even a ward may contract for necessities. *See Breaux*, 699 S.W.2d at 604 (citing *Ferguson v. Fitze*, 173 S.W. 500 (Tex.Civ.App.—Galveston 1914, writ ref'd)). Legal services may be necessities. *Id.* The retained attorney will have the burden of showing that the legal services rendered were in fact necessities. *Id.*

Furthermore, the Texas Probate Code was recently amended to clarify that a ward has the right to retain private counsel to represent him or her in seeking the restoration of his or her rights. *See* TEX. PROB. CODE ANN. § 694K (Vernon Supp. 2000). Section 694K provides that:

(a) A ward may retain an attorney for a proceeding involving the complete restoration of the ward's capacity or modification of the ward's guardianship.

(b) The court may order that compensation for services provided by an attorney retained under this section be paid from funds in the ward's estate only if the court finds that the attorney had a good-faith belief that the ward had the capacity necessary to retain the attorney's services.

Id.

3) Challenging Attorney's Standing to Represent Ward.

Any party may challenge the authority of counsel to represent an alleged client. The challenge may be based on the client's inability to retain counsel due to incapacity.

The exclusive tool for challenging the authority of alleged counsel is Rule 12 of the Texas Rules of Civil Procedure. *See Angelina County v. McFarland*, 374 S.W.2d 417, 423 (Tex. 1964); *Gulf Regional Educ. Television Affiliates v. University of Houston*, 746 S.W.2d 803, 809 (Tex. App.—Houston [14th Dist.] 1988, writ denied); *Valley Int'l Properties, Inc. v. Brownsville Sav. & Loan Ass'n*, 581 S.W.2d 222 (Tex. Civ. App.—Corpus Christi 1979, no writ). A plea in abatement or a motion to dismiss will not suffice. *See Fulcher v. Texas State Bd. of Public Accountancy*, 571 S.W.2d 366, 372 (Tex. Civ. App.—Corpus Christi 1978, writ ref'd n.r.e.); *Cook v. City of Booker*, 167 S.W.2d 232, 233 (Tex. Civ. App.—Amarillo 1942, no writ). The challenged lawyer has the burden of showing his authority. If the attorney fails to prove his authority to represent the ward, his pleadings will be stricken. If the attorney meets his burden, the order authorizing him or her to continue to represent the proposed ward has been held by at least one court to be a final order.

This rule has been used to question whether a party has the power or authority to hire an attorney. *See Gulf Regional Educ. Television Affiliates v. University of Houston*, 746 S.W.2d 803, 809 (Tex. App.—Houston [14th Dist.] 1988, writ denied). An adverse result under a Rule 12 challenge can be costly to a lawyer with no authority – he may not be paid. *See, e.g., Breaux v. Allied Bank*, 699 S.W.2d 599 (Tex. App.—Houston [14th Dist.] 1985, writ ref'd n.r.e.). Also, at least one attorney has been disbarred for representing an incapacitated person without authority. *See State Bar v. Kilpatrick*, 874 S.W.2d 656, 657 (Tex. 1994).

4) Payment of Legal Fees.

An attorney who successfully defeats an application for guardianship or restores the ward can clearly look to his or her client for

payment. However, attorneys who are unsuccessful in their attempts to defend against a guardianship or restore a ward still may be entitled to their fees if the court finds that they have acted with a good faith belief that the proposed ward or ward had the capacity to retain the attorney's services. *See Oldham v. Calderon*, 1998 WL 104819 (not published); *Price v. Golden*, 2000 WL 1228681; TEX. PROB. CODE ANN. § 694K (Vernon Supp. 2000).

One of the few opinions or cases to address this issue is the unpublished decision of *Oldham v. Calderon*, 1998 WL 104819 (not published). In *Calderon*, the party opposing the payment of the private attorney's fees argued that attorneys selected privately by proposed ward should only be paid if the guardianship application is defeated. The Houston Court of Appeals, however, equated this to mandating a proposed ward to hiring a private attorney to contest a guardianship "on a contingent fee basis, i.e., whereby the attorney could be paid only if successful in avoiding appointment of a guardian." *Oldham v. Calderon*, 1998 WL 104819 at *3 The appellate court refused to adopt this position as it "would be contrary to the interest of both the proposed ward and her estate in that it could cause (i) fewer attorneys to be willing to accept the engagement under such constraints, and (ii) considerably higher fees to be charged to compensate the lawyer for the uncertainty of recovery." *Id.* Rather, the court held that the trial court could award attorney's fees to private counsel, even if unsuccessful in defeating the guardianship. The trial court was authorized to do so because it was "(a) required to appoint an attorney ad litem to represent [the proposed ward's] interests and to compensate that attorney for doing so; and (b) allowed [private counsel] to fulfill the role of that attorney ad litem." *Id.*; *see also Price v. Golden*, *supra*.

Since the *Calderon* decision, Section 694K was enacted to provide some statutory authority when representing wards seeking their restoration or a modification of their guardianship. Section 694K provides that the attorney is entitled to his or her fees if the "court finds that the attorney had a good faith belief that the ward had the capacity necessary to retain the attorney's services. *See* TEX. PROB. CODE ANN. § 694K (Vernon Supp. 2000); *See also* discussion *supra*.

When the attorney is authorized to represent a ward, the court presiding over the ward's estate may authorize payment from the ward's estate.

V. RESPONSIBILITY OF ATTORNEY TO INCAPACITATED CLIENT.

A. Protecting Client.
As discussed in Section II, Rule 1.02(g) of the Texas Disciplinary Rules of Professional Conduct require that an attorney take reasonable action to secure the appointment of a legal guardian or other representative if the lawyer reasonably believes that the client lacks capacity and such action is necessary to "protect the client." *See* TEX. R. DISCIPLINARY P. 1.02(a) & 1.02(g), *reprinted in* TEX. GOV'T CODE ANN., tit. 2, subtit. G app. (Vernon Supp. 2000) (emphasis added). However, none of the Rules of Ethics, the comments thereto, or any Texas case, clearly provides what is necessary to protect a client. It is generally believed that Rule 1.02(g) does not impose a duty on an attorney to seek a guardianship for every client that lacks mental capacity. Rather, an attorney should do so only if the client does not plan for his or her own incapacity and the attorney believes that the appointment of a guardian is necessary to protect the client.

In many cases, the client will have existing estate planning documents that appoint individuals to make the client's medical and

financial decisions in the event he or she is unable. In this case, the attorney may wish to contact the designated agents so they may take actions to protect the client. If possible, the client should authorize this contact prior to his or her own incapacity. This may be done in the engagement letter or during conversations with the attorney.

Alternatively, if the attorney has a client he believes lacks capacity, has not designated individuals to make his or her financial and/or medical decisions in the event the need arises, and appears to need protection, the attorney should consider filing an application for guardianship of the client. It is strongly recommended that the attorney not attempt to seek his or her own appointment. Rather, the attorney should advise the court that the client lacks capacity and requires the appointment of an independent third party selected by the court. The request for the appointment of the third party allows the attorney to comply with his or her duties and avoid any appearance of impropriety or conflict of interest.

Alternatively, an attorney now has the option of writing a letter to the court pursuant to Section 683A of the Texas Probate Code. *See* TEX. PROB. CODE ANN. § 683A (Vernon Supp. 2000). Section 683A provides that any person may forward an information letter to the court about a person believed to be incapacitated. The letter should include the following:

- Name, address, telephone number, county of residence, date of birth of the alleged incapacitated person;
- Type of residence of the alleged incapacitated person, for example, a healthcare facility, etc.;
- Relationship between the informant and the alleged incapacitated person;
- Names and telephone numbers of any known friends or relatives of the alleged incapacitated person;
- Whether guardian of the person and estate has been appointed in the state of Texas;
- Whether the alleged incapacitated person has executed a power of attorney, and, if so, the appointed agent's name, address, and telephone number;
- The property of the alleged incapacitated person;
- The amount and sources of monthly income of the alleged incapacitated person; and
- The nature and degree of the alleged incapacitated person's incapacity and whether that person is an imminent danger to his person and/or estate.

TEX. PROB. CODE ANN. § 683(A) (Vernon Supp. 2000).

B. Releasing Client Information.

1) Estate Planning Documents.

An attorney should generally not release a living client's estate planning file without the permission of the client or a court order. It remains unclear whether a legal representative is entitled to possession of an incapacitated client's original will. *See Baumann v. Willis*, 721 S.W.2d 535 (Tex. App.--Corpus Christi 1986, no writ). In *Baumann*, an attorney represented the ward for many years prior to guardianship. The ward's daughter attempted to secure possession of the will prior to the time the ward was declared to be incapacitated. At that time, the ward directed her attorney to not deliver the will to her daughter or to anyone else, nor to disclose the contents of the will, prior to her death. The ward was subsequently declared to be incapacitated and the daughter was appointed as guardian. A few years later, the guardian/daughter demanded that the attorney deliver the ward's will to the guardian.

The trial court concluded that the guardian "had failed to show a legal right to take physical possession of her ward's last will and testament." *Id.* On appeal, the appellate court determined that a will is not property as the Probate Code defines the term and thus there was no reason for the attorney to surrender the will as it would be contrary to his client's specific instructions. The court also noted that a ward's will does not relate to any matter within the guardian's powers or duties or in any manner affect her action as a guardian because a will is not effective until death and at that time the guardian's authority ceases. *Id.*; *see also Mastick v. The Superior Court of City and County of San Francisco*, 29 P. 869 (Cal.1892) (guardian not entitled to possession or knowledge of contents of ward's will).

2) Personal and Financial Records.

An attorney may only reveal a client's confidential information to the client or the client's representatives. When a client is incapacitated, the client's legal representatives may include a guardian, an attorney-in-fact, or other authorized recipient of such information.

When the client is subject to a guardianship, the right of a guardian to receive such information will depend on the powers granted to him or her. If the client has been determined to be totally incapacitated, and a full guardianship of the client's estate has been granted, the guardian of the estate is entitled to take possession of all property belonging to the ward, collect all debts, rentals, or claims due the ward, enforce all obligations in favor of the ward, and to bring and defend suits by or against the ward. *See TEX. PROB. CODE ANN. § 768* (Vernon Supp. 2000). Furthermore, a guardian of the estate is entitled to take possession of the ward's personal property, record books, title papers, and other business papers of the ward. *See TEX. PROB. CODE ANN. § 771* (Vernon Supp. 2000).

If the client's legal representative is an agent pursuant to a power of attorney, the attorney should review the power of attorney to confirm that the powers granted the agent are sufficient to include taking possession of documents or information that would otherwise be subject to the attorney/client privilege. Furthermore, the attorney should attempt to confirm that the power of attorney remains in effect and has not been revoked by the client.

3) Attorney/Client Privilege.

Communications between an attorney and his or her client are subject to the attorney/client privilege. *See* TEX. R. EVID. 503. Pursuant to this rule of privilege, client has the right to refuse to disclose, and prevent any other person from disclosing, confidential communications made to the attorney with the purpose of facilitating the rendition of professional legal services to such client. *Id.* This privilege belongs to the client and cannot be waived by an attorney without the client and/or his or her representative's consent. Generally, Rule 503 of the Texas Rules of Evidence provides that the privilege may be claimed by the client, the client's guardian or conservator, or the personal representative of a deceased client. Until waived, the attorney must claim the privilege on behalf of his or her client. *See Id.*

When the client is incapacitated, an attorney should not release any information relating to the legal representation until the client or his or her legal representative has authorized the release by waiving the privilege. A duly appointed guardian of a client's estate is authorized to waive the privilege. However, the Rules of Evidence do not expressly authorize the waiver by an agent under attorney-in-fact. Therefore, attorneys should be cautious in releasing privilege material to an agent under a power of attorney. It is advisable to review the power of attorney to determine the powers granted to the agent. If the power of attorney is not durable in nature, or does not specifically authorize the agent to handle the client's legal matters, the attorney should consider requesting a court order before releasing the requested documents.

VI. RESPONSIBILITY OF GUARDIAN/AGENT'S COUNSEL TO INCAPACITATED WARD/PRINCIPAL.

A. Overview.

The age old question of who is the client has become increasingly complicated in recent years. Generally, the attorney-client relationship is a contractual relationship whereby the attorney agrees to render professional services for the client. *Parker v. Carnahan*, 772 S.W.2d 151, 156 (Tex. App.—Texarkana 1989, writ denied). The resulting contract may be either expressed or implied from the actions of the parties. Once established, the attorney-client relationship imposes numerous duties on the lawyer. These include the duty to use utmost good faith in dealings with the client, to maintain the confidences of the client, and to use reasonable care in rendering professional services to the client. *Perez v. Kirk & Carrigan*, 822 S.W.2d 261, 265 (Tex. App.—Corpus Christi 1991, writ denied); *See also Yaklin v. Glusing, Sharpe & Krueger*, 875 S.W.2d 380 (Tex. App.—Corpus Christi 1994, no writ).

B. Possible Existence of Attorney-Client Relationship.

An issue has arisen in the last few years whether an attorney representing the legal representative of an incapacitated person represents the incapacitated person, through the guardian or agent, or only represents the legal representative, i.e., the guardian or agent. Although there is no clear answer, at least one Texas court has recognized that a guardian's retention of an attorney for a ward establishes an attorney-client relationship as between the attorney and the ward. *See Daves v. Comm. for Lawyers Discipline*, 952 S.W.2d 573 (Tex. App.—Amarillo 1997, writ denied).

In *Daves*, the parents of a minor retained an attorney to file an application to be appointed the minor's legal guardian. The parents then also sought permission from the guardianship court to allow the attorney to represent the minor in pursuing a cause of action for personal injuries. After the settlement of a fee and other disputes with the parents' prior counsel, the attorney was charged with violating the Texas Rules of Professional Conduct and subsequently suspended from the practice of law. The violations included conflicts of interest in the representation of both the parents and the minor.

The attorney first alleged that he had no attorney-client relationship with the minor/ward as a matter of law because he was not "court-appointed." *Id.* at 576. The appellate court, however, held that comment 12 to Rule 1.02 of the Texas Rules of Professional Conduct does not provide that a lawyer must be court appointed to represent a person under disability. *Id.* at 577 (comments to Rule 1.02 only apply to that particular rule and do not apply to the other rules, including conflicts of interest). The appellate court further held, regardless of Rule 1.02, that the actions of the attorney and the parents/guardians clearly demonstrated that the attorney was representing the minor/ward. The court held that "attorney-client relations may be implied if the parties by their conduct manifested an intent to create such a relationship." *Id.* at 577 (citing *Perez v. Kirk & Carrigan*, 822 S.W.2d 261, 265 (Tex. App. – Corpus Christi 1991, writ denied); *Parker v. Carnahan*, 772 S.W.2d 151, 156 (Tex. App. – Texarkana 1989, writ denied); *Duval County Ranch Co. v. Alamo Lumber Co.*, 663 S.W.2d 627, 633 (Tex. App. – Amarillo 1983, writ ref'd n.r.e.)). Finally, the appellate court held that even if Rule 1.02 did apply, the parents, as guardians, had a duty to the minor/ward and they retained the attorney to assist them in pursuing the minor/ward's

claims. Therefore, even though retained by the parents, the court found that the attorney "had a duty not only to the parents as co-guardians, but also to the child whose claims he was asserting, and the attorney-client relationship was established between the child and the [attorney] under comment 12 to Rule 1.02." *Id.* at 577.

Furthermore, the Texas Rules of Professional Conduct also appears to recognize that a person under a disability, via a guardianship or otherwise, can be the "client." See TEX. R. DISCIPLINARY P. 1.02, comment 13, reprinted in TEX. GOV'T CODE ANN., tit. 2, subtit. G app. (Vernon Supp. 2000). Comment 13 to Rule 1.02 provides that "if a legal representative has already been appointed for the client, the lawyer should ordinarily look to the representative for decisions on behalf of the *client*." *Id.* (emphasis added).

The possible existence of an attorney-client relationship could also be argued based on Texas decisions that have found an attorney-client relationship existed between a minor child and the attorney retained by the child's next friend. On point is the decision of *Byrd v. Woodruff*, 891 S.W.2d 689, 700-01 (Tex. App. – Dallas 1994, writ dism'd by agr.). In *Woodruff*, a minor's parents, as next friend, retained an attorney to pursue a cause of action relating to personal injuries incurred by the minor child. The court also appointed a guardian ad litem to represent the minor's best interests. A settlement was ultimately reached and the minor's settlement proceeds were to be placed in a trust for the benefit of the minor. The court approved the proposed settlement. Upon reaching majority, the emancipated minor sued the attorney for negligence, legal malpractice, and breach of fiduciary duty. *Id.* at 699. The trial court granted the attorney's motion for summary judgment resulting in the dismissal of the emancipated minor's claims. Reversing the

trial court, the Dallas Court of Appeals held that the attorney acted as the minor's attorney and an attorney-client relationship existed between the attorney and the minor. *Id.* at 701. As such, the attorney "had a duty to protect the [minor's] interests." *Id.* This duty included seeing that the minor's assets were properly managed and protected for her benefit. *Id.* The appellate court further held that the attorney could be liable for a third party's negligence or wrongful conduct when the conduct is foreseeable. *Id.*: see also *Broughton v. Humble Oil & Refining Co.*, 105 S.W.2d at 485 (attorney retained by agent is deemed to be attorney of principal's selection).

While a Texas case directly on point has yet to be decided, Texas could follow the lead of other states that have recognized the existence of an attorney-client relationship. See *Fickett v. Superior Court*, 558 P.2d 988, 990 (Ariz. 1976) (rejecting attorney's claim of no privity, court found that attorney who undertakes to represent guardian of incompetent person assumes relationship not only with guardian but also with ward.); *Schwartz v. Hamblen*, 685 N.E. 2d 871 (Ill. 1997). Like Texas, these states follow the general rule that an attorney owes a duty only to the person who is his or her client. *Geaslen v. Berkson, Gorov & Levin, Ltd.*, 581 N.E.2d 138 (Ill. 1991). However, they have recognized that an exception must exist when an attorney is hired by a client specifically for the purpose of benefiting a third party. *Pelham v. Griesheimer*, 440 N.E.2d 96 (Ill. 1982); *Schechter v. Blank*, 627 N.E.2d 106 (Ill. App. 1993); see also *McLane v. Russell*, 546 N.E.2d 499 (Ill. 1989). In determining whether a duty is owed to a third party, the key factor to be considered is whether the attorney acted at the direction of or on behalf of the client for the benefit of a third party. *Schwartz*, 685 N.E.2d at 174; *Pelham*, 440 N.E.2d at 96.

C. Possible Duties Regardless of Privity.

Texas law has long held that when an attorney, acting for his client, participates in fraudulent activities, his or her actions are "foreign to the duties of an attorney." *Querner v. Rindfuss*, 966 S.W.2d 661 (Tex. App.—San Antonio 1998, writ denied) (estate attorney may be held liable for fraud) (citing *Poole v. Houston & T.C. Ry. Co.*, 58 Tex. 134, 137 (Tex. 1882); *McKnight v. Riddle & Brown, P.C.*, 877 S.W.2d 59, 61 (Tex. App. — Tyler 1994, writ denied); *Likover v. Sunflower Terrace II, Ltd.*, 696 S.W.2d 468, 472 (Tex. App. — Houston [1st Dist.] 1985, no writ)). In such event, the attorney may be held personally liable if he or she "knowingly commits a fraudulent act or knowingly enters into a conspiracy to defraud a third person." *Id.* (citing *Likover*, 696 S.W.2d at 472). The attorney cannot shield himself or herself from liability on the basis that he or she was an agent of the client because no one is justified on that ground of knowingly committing a willful and premeditated fraud for another. *Id.* (citing *Poole*, 58 Tex. at 137-38; *Likover*, 696 S.W.2d at 472; *Hennigan v. Harris County*, 593 S.W.2d 380, 383 (Tex. Civ. App. — Waco 1979, writ ref'd n.r.e.)).

Therefore, depending of the facts of the case, an attorney could be held liable for fraud, conversion, conspiracy, unjust enrichment, breach of fiduciary duty and constructive fraud. *Querner*, 966 S.W.2d at 670-671. Each claim must, however, be considered in light of the actions shown to have been taken by the attorney in order to determine whether he or she can be held liable for such actions. If the facts show that the attorney actively engages in fraudulent conduct in furtherance of some conspiracy or otherwise, the attorney can be held liable. *Id.* at 666.

Similarly, if the facts show that an informal fiduciary relationship or confidential relations exists, the attorney may also be held

liable. *Id.* at 667. The Texas Supreme Court has recognized the difficulty of formulating a definition of “fiduciary” that is sufficient to cover all cases. *Crim Truck & Tractor v. Navistar Intern.*, 823 S.W.2d 591, 593 n. 3 (Tex.1992). In Texas, certain informal relations may give rise to a fiduciary duty. These informal fiduciary relationships have been called “confidential relationships” and may arise “where one person trusts in and relies upon another, whether the relation is a moral, social, domestic or merely personal one.” *Id.* at 594; *see also Fitz-Gerald v. Hull*, 237 S.W.2d 256, 261 (Tex. 1951). Confidential relationships exist in those cases “in which influence has been acquired and abused, in which confidence has been reposed and betrayed.” *Texas Bank & Trust Co. v. Moore*, 595 S.W.2d 502, 507 (Tex.1980). The existence of confidential relationships is usually a question of fact. *Crim Truck & Tractor*, 823 S.W.2d at 594.

Until these issues are decided by the Texas Supreme Court or addressed by the Texas Legislature, practitioners should be aware that certain actions could increase the potential exposure to such claims. For example, if the attorney signed the pleadings as counsel for the guardianship, one could argue that he or she intended to represent the guardianship rather than the individual serving as guardian. *See Querner v. Rindfuss*, 966 S.W.2d 661 (Tex. App.—San Antonio 1998, writ denied) (estate attorney may be held liable for fraud). In *Querner*, the appellate court noted that the fact that the attorney retained an executor who characterized his representation as “the attorney for the estate” raised a fact question whether there was privity or a fiduciary relationship between the attorney and the beneficiaries of the estate. *Id.*

D. Theft By Legal Representative.

Attorneys representing guardians and attorneys-in-fact should clearly and carefully advise their clients of their fiduciary duties at the time of their appointment or designation and assist those clients in complying with the provisions of the Texas law during the period they are serving as a fiduciary. However, the realities of practicing law teach us that not all clients are perfect and not all clients follow their attorney’s advice. When those clients are acting as a fiduciary, the client’s actions may become a reflection on his or her attorney. Furthermore, the client may have unknowingly used the lawyer’s services to further the client’s fraudulent conduct.

For example, a person may have obtained a guardianship to gain control of an individual’s assets and to use those for his or her personal benefit. Upon discovering the nefarious conduct, the attorney representing the guardian must decide whether he or she can continue to represent the guardian and, regardless, whether they can do anything ethically to rectify or mitigate the damage to the ward.

When faced with such a situation, the attorney may, but is not required to, disclose information gained from attorney-client communications regarding theft of the ward’s or principal’s property, or fraud on the ward’s or principal’s estate. Rule 1.05 provides as follows:

- (1) A lawyer may reveal confidential information:
 - (a) When the lawyer has been expressly authorized to do so in order to carry out the representation.
 - (b) When the client consents after consultation.
 - (c) To the client, the client's representatives, or the members, associates, and employees of the

- lawyer's firm, except when otherwise instructed by the client.
- (d) *When the lawyer has reason to believe it is necessary to do so in order to comply with a court order, a Texas Disciplinary Rules of Professional Conduct, or other law.*
 - (e) To the extent reasonably necessary to enforce a claim or establish a defense on behalf of the lawyer in a controversy between the lawyer and the client.
 - (f) To establish a defense to a criminal charge, civil claim or disciplinary complaint against the lawyer or the lawyer's associates based upon conduct involving the client or the representation of the client.
 - (g) *When the lawyer has reason to believe it is necessary to do so in order to prevent the client from committing a criminal or fraudulent act.*
 - (h) *To the extent revelation reasonably appears necessary to rectify the consequences of a client's criminal or fraudulent act in the commission of which the lawyer's services had been used.*

See TEX. R. DISCIPLINARY P. 1.05, *reprinted in* TEX. GOV'T CODE ANN., tit. 2, subtit. G app. (Vernon Supp. 2000).

Furthermore, the comments to Rule 1.05 indicate that full protection of client information is not justified when a client plans to or engages in criminal or fraudulent conduct or where the culpability of the lawyer's conduct is involved. The comments elaborate on several situations where an attorney may disclose client communications. First, the lawyer may reveal information relating to the representation in order to avoid assisting a client's criminal or fraudulent conduct, and Rule 1.05(c)(4) permits doing so. Second, an attorney has a duty not to use

false or fabricated evidence and Rule 1.05(c)(4) permits revealing information necessary to comply with this rule. Third, the lawyer may have been unknowingly involved in past conduct by the client that was criminal or fraudulent. In this circumstance, the lawyer's services were made an instrument of the client's crime or fraud and, therefore, the comments state that the "lawyer has a legitimate interest both in rectifying the consequences of such conduct and in avoiding charges that the lawyer's participation was culpable." *Id.* cmt 12. Rule 1.05(c)(6) and (8) give the attorney the discretion to reveal both unprivileged and privileged information in order to serve those interests. Finally, when an attorney learns that a client intends prospective conduct that is criminal or fraudulent, his or her knowledge of the client's purpose may enable the lawyer to prevent commission of the prospective crime or fraud. The comments state that "[w]hen the threatened injury is grave, the lawyer's interest in preventing the harm may be more compelling than the interest in preserving confidentiality of information." *Id.* at cmt 13. Rule 1.05(c)(7) grants the lawyer the professional discretion, "based on reasonable appearances, to reveal both privileged and unprivileged information in order to prevent the client's commission of any criminal or fraudulent act." *Id.* Finally, comment 13 to Rule 1.05 provides that:

The lawyer's exercise of discretion under paragraphs (c) and (d) involves consideration of such factors as the magnitude, proximity, and likelihood of the contemplated wrong, the nature of the lawyer's relationship with the client and with those who might be injured by the client, the lawyer's own involvement in the transaction, and factors that may extenuate the client's conduct in question. In any case, a disclosure adverse to the client's interest should be no greater than the lawyer believes necessary to the purpose. Although preventive action is permitted by paragraphs

(c) and (d), failure to take preventive action does not violate those paragraphs. But see paragraphs (e) and (f). Because these rules do not define standards of civil liability of lawyers for professional conduct, paragraphs (c) and (d) do not create a duty on the lawyer to make any disclosure and no civil liability is intended to arise from the failure to make such disclosure. See TEX. R. DISCIPLINARY P. 1.05, comment 14, *reprinted in* TEX. GOV'T CODE ANN., tit. 2, subtit. G app. (Vernon Supp. 2000).

At a minimum, the attorney should consider resigning as the guardian's or agent's attorney. When the representation involves a court proceeding, such as a guardianship, the attorney should resign as attorney of record. In a guardianship proceeding, this may signal the court that a problem exists that requires closer scrutiny. This also allows the attorney to comply with comment 21 to Rule 1.05 which provides that "[i]f the lawyer's services will be used by the client in materially furthering a course of criminal or fraudulent conduct, the lawyer must withdraw, as stated in Rule 1.15(a)(1)." *Id.* at cmt 21.

VII. APPLICABLE RULES OF ETHICS.

A. Overview.

Each state's code of professional conduct is intended to guide attorneys when providing legal services. While a discussion of all states' codes of professional conduct is beyond the scope of this outline, a review of Texas and the ABA's provisions provide similar guidelines for professionals assisting potentially incapacitated person.

The preamble to the Texas Disciplinary Rules of Professional Conduct provides that an attorney's responsibilities include being a representative of the client, an officer of the legal system, and a public citizen having special responsibility for the quality of justice. See TEX. R. DISCIPLINARY P. Preamble: A

Lawyer's Responsibilities, *reprinted in* TEX. GOV'T CODE ANN., tit. 2, subtit. G app. (Vernon Supp. 2002). A lawyer, as the representative of his or her client, performs various functions. As an advisor, the lawyer provides the client with an informed understanding of the client's legal rights and obligations and explains their practical implications. As advocate, a lawyer zealously asserts the client's position under the rules of the adversary system. As negotiator, a lawyer seeks a result advantageous to the client, but consistent with requirements of honest dealing with others. As intermediary between clients, a lawyer seeks to reconcile their divergent interests and, to a limited extent, act as a spokesperson for each client. When carrying out these duties, the attorney is expected to act as evaluator by examining a client's affairs and reporting about them to the client or to others. *See Id.*

The preamble provide that the rules are intended to be rules of reason. They define what is considered to be proper conduct for purposes of professional discipline. These rules provide some guidance on what is considered proper conduct when representing a potentially incapacitated client. The relevant rules and related comments are discussed below. Note that the rules are mandatory, cast in the terms "shall" or "shall not," while the comments are permissive and, therefore, often in the terms of "may" or "should" as they define areas in which the lawyer has professional discretion. TEX. R. DISCIPLINARY P. Preamble.

B. New ABA Model Rules of Professional Conduct.

In 1997, the American Bar Association began a review and revisions of the ABA Model Rules of Professional Conduct. In November of 2000, after several years of study, public comments and revision, the commission overseeing the revisions issued its report. This report recommended numerous

changes to the ABA Model Rules. In February of 2002, the revised ABA Model Rules of Professional Conduct were adopted. A complete copy of the adopted ABA Model Rules can be obtained from the ABA Website at <http://www.abanet.org>.

1. Purpose Of Model Rules.

The ABA Model Rules of Professional Conduct are intended to serve as a national framework for implementation of standards of professional conduct. The Model Rules, like all model legislation, are intended to be modification at the level of local implementation. Viewed as a whole, however, the Model Rules are intended to represent “a responsible approach to the ethical practice of law and are consistent with professional obligations imposed by other law, such as constitutional, corporate, tort, fiduciary, and agency law.” MODEL RULES OF PROFESSIONAL RESPONSIBILITY Chair’s Introduction (1983)

2. Disciplinary Rule 1.03; Communications.

Rule 1.6 of the ABA Model Rules relates to communications during the course of legal representation. ABA MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.6 (2002). Rule 1.6 generally provides as follows:

- (a) A lawyer shall not reveal information relating to the representation of a client unless the client gives informed consent, the disclosure is impliedly authorized in order to carry out the representation, or the disclosure is permitted by paragraph (b).
- (b) A lawyer may reveal information relating to the representation of a client to the extent the lawyer reasonably believes necessary:
 - (1) to prevent *reasonably certain death or substantial bodily harm*;

- (2) to secure legal advice about the lawyer's compliance with these Rules;
- (3) to establish a claim or defense on behalf of the lawyer in a controversy between the lawyer and the client, to establish a defense to a criminal charge or civil claim against the lawyer based upon conduct in which the client was involved, or to respond to allegations in any proceeding concerning the lawyer's representation of the client; or
- (4) *to comply with other law or a court order.*

See Id. (emphasis added).

3. Disciplinary Rule 1.14; Client With Diminished Capacity.

When a client suffers from a disability that may affect his or her ability to make decisions, new ABA Model Rule 1.14 provides as follows:

- (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.*

See ABA MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.14 (2002).

The comments to Rule 1.14 stress that a typical lawyer-client relationship is based on the assumption that the client is capable of making his or her own decisions. When a client is incapacitated, this may not be possible. Nevertheless, the ABA Model Rules are based on the premise that while a client may lack some of the competence needed to make certain decisions, client may have the ability to “understand, deliberate upon, and reach conclusions about matters affecting the client's own well-being.” MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.14 cmt. 1 (2002). Likewise, when a state, such as Texas and Tennessee, recognizes a client may have intermediate degrees of capacity, the client may be entitled to make some decisions but not others. Therefore, the comments provide that:

[t]he fact that a client suffers a disability does not diminish the lawyer's obligation to treat the client with attention and respect. Even if the person does have a legal representative, the lawyer should as far as possible accord the represented person the status of

client, particularly in maintaining communication.

ABA MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.14 cmt. 1 (2002).

4. Disclosure to Protect Ward in Guardianship.

The comments to ABA Rule 1.14 further impose a duty on an attorney representing a guardian to act as a gatekeeper for improper conduct by the guardian. The comments provide that when a “lawyer represents the guardian as distinct from the ward, and is aware that the guardian is acting adversely to the ward's interest, the lawyer may have an obligation to prevent or rectify the guardian's misconduct. MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.14 cmt. 4 (2002); *see also discussion infra.*

C. Texas Rules of Disciplinary Conduct.

1. Disciplinary Rule 1.02; Attorney-Client Relationship.

Rule 1.02 of the Texas Disciplinary Rules of Professional Conduct addresses the scope and objectives of an attorney-client representation. Rule 1.02 provide as follows:

- (a) Subject to paragraphs (b), (c), (d), (e), (f), and (g), a lawyer shall abide by a client's decisions:
- (1) concerning the objectives and general methods of representation;
 - (2) whether to accept an offer of settlement of a matter, except as otherwise authorized by law;
 - (3) In a criminal case, after consultation with the lawyer, as to a plea to be entered, whether to waive jury trial, and whether the client will testify.
- ...
- (g) *A lawyer shall take reasonable action to secure the appointment of a guardian or other legal representative for, or seek other*

protective orders with respect to, a client whenever the lawyer reasonably believes that the client lacks legal competence and that such action should be taken to protect the client.

See TEX. R. DISCIPLINARY P. 1.02(a) & 1.02(g), reprinted in TEX. GOV'T CODE ANN., tit. 2, subtit. G app. (Vernon Supp. 2002) (emphasis added).

The comments to Rule 1.02 provide additional guidance with regard to the duties imposed by Rule 1.02. Comment 12 clarifies that Rule 1.02(a) assumes that the lawyer is legally authorized to represent the client. It provides that the “usual attorney-client relationship is established and maintained by consenting adults who possess the *legal capacity* to agree to the relationship.” See *Id.* cmt 12 (emphasis added). Comment 12 also recognizes that an attorney may be entitled to represent a client suffering from a disability but provides that the “relationship can be established only by a legally effective appointment of the lawyer to represent a person.” *Id.* However, unless the lawyer is legally authorized to act for a person under a disability, the attorney-client relationship does not exist for the purpose of Rule 1.02. *Id.*

Comment 13 to Rule 1.02 addresses the situation when a client clearly requires the appointment of a legal representative. Comment 13 provides that:

If a legal representative has already been appointed for the client, the lawyer should ordinarily look to the representative for decisions on behalf of the client. If a legal representative has not been appointed, paragraph (g) requires a lawyer in some situations to take protective steps, such as initiating the appointment of a guardian. The lawyer should see to such appointment

or take other protective steps when it reasonably appears advisable to do so in order to serve the client's best interests. See Rule 1.05(c)(4), d(1) and (d)(2)(i) in regard to the lawyer's right to reveal to the court the facts reasonably necessary to secure the guardianship or other protective order.

See TEX. R. DISCIPLINARY P. 1.02 cmt 13, reprinted in TEX. GOV'T CODE ANN., tit. 2, subtit. G app. (Vernon Supp. 2002) (emphasis added).

2.

Disciplinary Rule 1.03; Communications.

Rule 1.03 of the Texas Disciplinary Rules of Professional Conduct relates to communications during the course of legal representation. Rule 1.03 generally provides as follows:

- (a) A lawyer shall keep a client reasonably informed about the status of a matter and promptly comply with reasonable requests for information.
- (b) A lawyer shall explain a matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation.

See TEX. R. DISCIPLINARY P. 1.03, reprinted in TEX. GOV'T CODE ANN., tit. 2, subtit. G app. (Vernon Supp. 2002).

However, when a client suffers from a disability that renders him or her incapacitated, the attorney should consider making additional efforts to communicate with both the client and his or her legal representative. Comment 5 to Rule 1.03 suggests the following:

In addition to communicating with any legal representative, a lawyer should seek to maintain reasonable

communication with a client under a disability, insofar as possible. When a lawyer reasonably believes a client suffers a mental disability or is not legally competent, it may not be possible to maintain the usual attorney-client relationship. Nevertheless, the client may have the ability to understand, deliberate upon, and reach conclusions about some matters affecting the client's own well-being. Furthermore, to an increasing extent the law recognizes intermediate degrees of competence. For example, children's opinions regarding their own custody are given some weight. The fact that a client suffers a disability does not diminish the desirability of treating the client with attention and respect. See also Rule 1.02(e) and Rule 1.05, Comment 17.

See TEX. R. DISCIPLINARY P. 1.03, cmt 5, *reprinted in* TEX. GOV'T CODE ANN., tit. 2, subtit. G app. (Vernon Supp. 2002).

3. Disciplinary Rule 1.05; Confidentiality.

Rule 1.05 addresses the confidentiality of information and provides guidance regarding when an attorney can release client information, confidential and/or privileged. With regard to clients under a disability, Comment 17 to Rule 1.05 provides as follows:

In some situations, Rule 1.02(g) requires a lawyer representing a client under a disability to seek the appointment of a legal representative for the client or to seek other orders for the protection of the client. The client may or may not, in a particular matter, effectively consent to the lawyer revealing to the court confidential information and facts reasonably necessary to secure the desired appointment or order. Nevertheless, *the*

lawyer is authorized by paragraph (c) (4) to reveal such information in order to comply with Rule 1.02(g). See also paragraph 5, Comment to Rule 1.03.

See TEX. R. DISCIPLINARY P. 1.05, cmt 17, *reprinted in* TEX. GOV'T CODE ANN., tit. 2, subtit. G app. (Vernon Supp. 2002) (emphasis added).

VIII. CONCLUSION.

Representation of clients suffering from a disability or with questionable capacity raises ethical considerations in fulfilling a lawyers responsibility. Balancing the client's rights while preserving his or her dignity requires a great deal of patience and understanding. However, those attorneys who decide to assist these individuals often find the representation to be very rewarding. In doing so, they will have to address a number of legal, ethical and practical considerations. Hopefully, the preceding discussion will provide some guidance in the process.

Capacity – The Medical Perspective²

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**STATE BAR OF TEXAS
27TH ANNUAL ADVANCED
ESTATE PLANNING AND PROBATE COURSE**

JUNE 4-6, 2003

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Marriott Rivercenter--San Antonio, Texas

Outline

1. Definitions
 - A. Disability
 - B. Mental Capacity

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 - C. Depression
 - D. Alcohol and Drugs
 - E. Vitamin Deficiencies (B12 and Folate)
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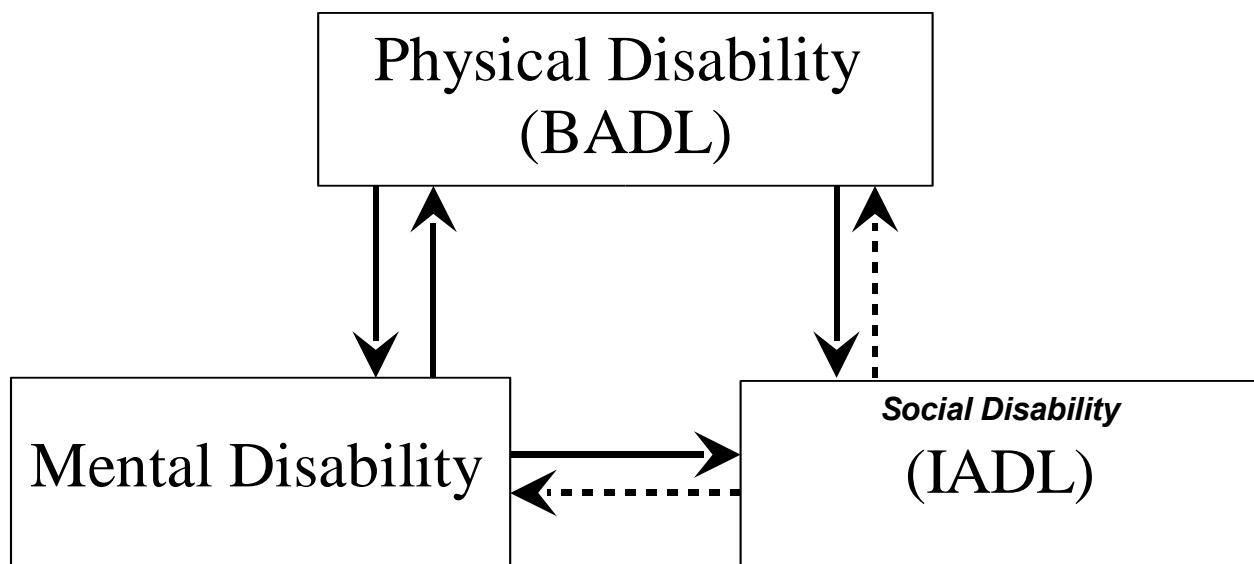
4. Ascertainment of Mental Capacity
 - A. Interview
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 1. Folstein Mini-Mental Status Examination
 2. CLOX 1 and 2
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5. Five Cases

Definitions - Disability

Disability results when an individual can no longer perform their activities or is severely limited in their task performance. It represents a limitation in performing *socially* defined roles and tasks expected of an individual within a sociocultural and physical environment.

Disability is the gap between a person's capability and the environment's demand. Three inter-related basic forms:



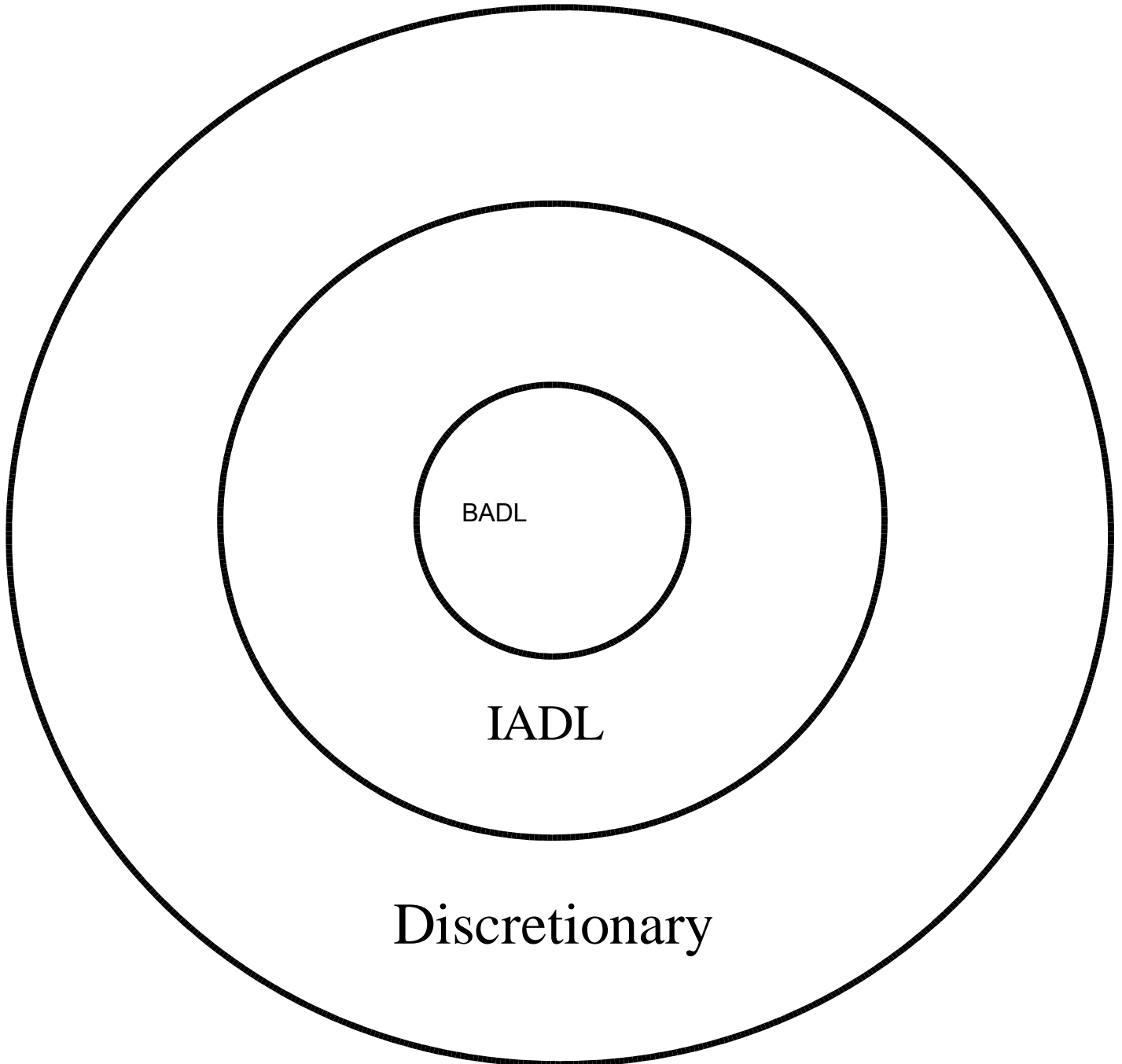
Basic Activities of Daily Living (BADL)

1. Eating
2. Bathing
3. Dressing
4. Walking
5. Transferring
6. Toileting

Instrumental Activities of Daily Living (IADL) (Things your parents did for you)

1. Driving
2. Housework (heavy and light)
3. Yardwork
4. Managing Finances
5. Shopping
6. Meal Preparation
7. Medication
8. Telephoning

Discretionary Activities



Universe of Function

Definitions – Mental Capacity

Mental capacity refers to the ability to evidence a choice (four point process):

1. Understand relevant information regarding choices
2. Appreciate likely consequences of each choice
3. Manipulates the information rationally
4. Communicates a stable decision

Mental capacity varies with the complexity of the decision.

Incapacitated Adult

Texas Probate Code
§601(13)(B)

“An adult individual who, because of a physical or mental condition, is substantially unable to provide *food, clothing, or shelter* for himself or herself, to care for the individual’s own *physical health*, or to manage the individual’s *financial affairs*;...”

§684(c)

“*Recurring* acts or occurrences within the preceding six-month period and *not by isolated instances* of negligence or bad judgement”

N.B. Italics added for emphasis

Principles of Medical Ethics

Beneficence

Pursuit of only those treatments that will contribute to the well-being of the individual.

Autonomy

The principle of self-determination – “so long as they do not interfere with the liberty of others, persons should be free to define their notion of the good life (or death) and should likewise be free to pursue their own good in their own way.”

Substituted Judgement

Family, guardians, and caregivers should make the same decisions the individual would make if the individual was capable of doing so.

If wishes not known, then decisions should be based on best interests, i.e., what a “reasonable person” would do.

Causes of Mental Incapacity in Elders

1. Primary Dementing Disorders
 - A. Alzheimer's Disease
 - B. Psychoses
2. Cerebrovascular Disease
 - A. Strokes
 - B. Multi-infarct Dementia
3. Depression
4. Alcohol and Drugs
5. Vitamin Deficiencies
 - A. B12
 - B. Folic Acid
6. Thyroid Disease – Hypothyroidism

7. Infections
- A. Syphilis
 - B. HIV

Definition - Dementia

Dementia is the acquired loss of intellectual ability that occurs over a long period of time and affects many areas of cognitive functioning. Although memory loss is a sentinel feature of the dementing disorders, it is usually accompanied by impairment in other areas of cognitive ability (e.g., language, spatial relationships).

Loss of intellectual ability compared to person's peak or usual performance.

Distinguish from delirium, a confusional state which is comes on suddenly. Usually a secondary treatable cause is present.

- Can a person who has only isolated memory impairments be considered mentally incapacitated?

Medical Assessment

1. Interview

- A. Patient – ascertain reliability
- B. Other sources:
 - 1. Family
 - 2. Friends and Caregivers
- C. Review Medical Records

2. Physical Examination:

- A. Evidence of self-neglect
- B. Neurological Examination – looking for evidence of strokes – asymmetry in exam.
- C. Performance based tasks – dressing, walking, transferring

3. Mental Status Testing:

- A. Folstein Mini-mental Status Examination (MMSE)

- B. CLOX 1 and 2
- C. Geriatric Depression Scale (GDS)
- D. May need formal neuropsychiatric testing in early cases.

Folstein Mini-Mental Status Examination (MMSE)

1. *A Screening Test*
2. One of a number of mental status screening tests developed in the late 1970's. The MMSE has become the most commonly used because it taps into multiple domains of cognition:
 - A.Orientation E.Language
 - B.Registration F. Spatial Relationships
 - C.Recall G.Naming
 - D.Attention H.Sequencing
3. Scores range from 0 to 30, with 30 being perfect. Scores less than 24 are indicative of the presence of dementia. The lower the score, the more certain one is of the diagnosis.

4. Dependent on level of education and ethnicity. Prorate for hearing and vision.

CLOX 1 and 2

1. *A Screening Test*
2. Ascertains Executive Functions – that is, functions that are required to organize and sequence tasks – “orchestration.”
3. Problems with the CLOX may emerge before there are abnormalities on the MMSE. Therefore:
 - A. May detect dementia in earlier stages.
 - B. May detect different forms of dementia (subcortical – e.g., depression) – which may eventually lead to different treatment options.
4. Scores range from 0 to 15 with 15 being perfect. CLOX 1 scores less than 10 are indicative of executive deficits.

Improvements on CLOX 2 may indicate how well a person may be cued or prompted

Depressed Mood

sk.

Cognitive Impairment

Geriatric Depression Scale (GDS)

1. *A screening test.*
2. Ascertains how the person felt over the past week.
3. Scores range from 0-15 on the short form of the GDS. Scores of “0” indicate no evidence of depression. Scores of 10 or more are indicative of a major depression.
4. Persons with early dementia may become depressed because they are aware of their cognitive losses. Alternatively, depression itself may cause some cognitive impairment, primarily through an inability to concentrate and attend to tasks at hand. Either way, it is worthwhile searching for and treating

depressive symptomatology.

Case 1

- 76 year old gentleman
 - Suffers a stroke – can't speak well, but communicates by nodding or shaking head.
 - Dependent in most IADL
 - Independent in BADL
 - Children file for guardianship
 - Gentleman wants his wife, not his children, to help him.
-
- MMSE = 12/30
 - CLOX 1 = 4/15
 - CLOX 2 = 14/15
 - GDS = 3/15

Does this gentleman need a guardian?

If so, does he have the capacity to choose
his guardian?

Case 2

- 79 year old gentleman
 - Alzheimer's Disease
 - Dependent in all IADL
 - Dependent in some ADL
 - Wife (2nd) has an affair
 - Children hire private investigator
 - Children take father and file for divorce.
-
- MMSE = 17/30 – repeat 14/30
 - GDS = 6/15
 - CLOX – not done

Does this gentleman have the capacity to decide he wants a divorce from his wife?

Case 3

- 77 year old woman – widowed
 - Lives alone – little insight into her condition – denies having problems
- Problems with IADL:
 - Finances • Housekeeping
 - Driving • Meal Preparation
- Independent in BADL
 - Not bathing
 - Putting on the same clothes each day

- MMSE = 24/30
- CLOX 1 = 9/15

- CLOX 2 = 14/15
- GDS = 1/15

Does this woman need a guardian?
Where should she live?

Case 4

- 82 year old woman
 - Lives alone – Husband has Alzheimer's Disease – in Assisted Living Center
 - History of a stroke – physically recovered well – states she can't think as well.
 - Struggles with IADL – has help
 - Independent with BADL

- MMSE = 30/30, repeat 28/30

- CLOX 1 = 6/15
- CLOX 2 = 14/15
- GDS = 7/15

Is this woman demented?

Case 5

- 83 year old woman
 - Living alone in her own home
 - Becoming forgetful
 - She is hypothyroid
 - Forgets to take her thyroid medication
-
- Intervention: Children call to remind her to take her medications

	Feb	April
TSH (0.4-5.5 uIU/ml)	33.0	<0.1

MMSE	26/30	-
CLOX 1	4/15	11/15
CLOX 2	3/15	13/15
GDS	2/15	-

Striking improvement in CLOX scores associated with thyroid replacement.

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