

Helpful Ethics Opinions for Trust and Estate and Elder Law Practitioners

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This article discusses CBA Formal Ethics Opinions 126, 130, 131, and 132, which provide guidance for handling clients and case information in trust and estate and elder law matters.

The Colorado Bar Association Ethics Committee (the Committee) recently released several Formal Ethics Opinions that directly impact Colorado trust and estate and elder law practitioners. Formal Ethics Opinions are issued for “advisory” purposes only.¹ This article summarizes four recent Formal Ethics Opinions and discusses their impact. Practitioners are cautioned to review opinions in full when dealing with a specific issue and to be mindful that the opinions are not dispositive of every ethical quandary that may arise.

CBA Formal Ethics Opinion 126

In Formal Ethics Opinion 126, Representing the Adult Client with Diminished Capacity, the Committee addressed ethical issues that arise when an attorney believes an adult client has diminished mental capacity.² This Formal Ethics Opinion does not address a client’s diminished capacity due to being a minor nor representation of a client in an adult protective proceeding.³

Maintaining the Attorney-Client Relationship

Rule 1.14 of the Colorado Rules of Professional Conduct (the Rules) requires an attorney representing a client with diminished mental capacity, as far as reasonably possible, to maintain a “normal” attorney-client relationship with the client, on the basis that he or she may have legally sufficient ability to understand, deliberate upon, and reach conclusions about matters affecting the client’s own well-being.⁴

Frequently, a client in this situation may wish for family members to participate in conferences with the attorney. The presence of such persons generally should not affect the applicability of the attorney-client evidentiary privilege.⁵ However, in such situations the attorney must keep the client’s interests foremost and look to the client to make decisions on the client’s behalf, with

the exception of authorized protective action under Rule 1.14(b).⁶

Applying this guideline to real-life situations involving clients with diminished capacity is rarely simple or easy. The attorney must exercise professional judgment regarding the extent to which the client understands the matters under consideration. Further, the attorney must distinguish between situations in which the client is merely making poor decisions but has sufficient capacity and situations in which poor judgment may be the result of diminished capacity.

Diminished Capacity

Rule 1.14 does not define “capacity,” but simply refers to the client’s “capacity to make adequately considered decisions in connection with representation.”⁷ An attorney should consider and balance the following factors with regard to a client’s diminished capacity:

- the ability to articulate reasoning leading to a decision,
- the variability of state of mind and ability to appreciate consequences of a decision,
- the substantive fairness of a decision, and
- the consistency of a decision with the known long-term commitments and values of the client.⁸

If an attorney is uncertain about the client’s mental state, the attorney can recommend that the client obtain a written opinion from a doctor about the client’s mental abilities.⁹ The attorney should retain such a letter in the client’s file, possibly as evidence of the client’s capacity near the time the client executed estate planning documents.¹⁰

Managing the Client

The type and degree of complexity of the document the client executes (e.g., will, trust, power of attorney, or contract) can affect the legal standard for capacity.¹¹ For example, to make

a valid will the testator or testatrix must be “of sound mind,” which reflects a potentially low bar for capacity.¹²

An attorney may ask the client questions as a way for the attorney to gauge the client’s mental status and assess how to proceed with regard to the client’s representation. Questions about the current date, the current president, the names and ages of children and grandchildren, and the types and value of assets the client possesses are instructive. Attorneys should be sensitive to how they ask such questions and how they interpret the answers. Answers to such questions are not determinative of the client’s capacity, and an attorney is not necessarily an expert on mental capacity issues. However, such answers can be helpful in determining the extent and course of the attorney’s representation and services. In some instances, more formal testing may be desirable.

CBA Formal Ethics Opinion 130

In Formal Ethics Opinion 130, Online Posting and Sharing of Materials Related to the Representation of a Client, the Committee addressed the interaction between matters of public record and the Rules on confidentiality. Formal Ethics Opinion 130 expressly identifies the general practices of posting and sharing litigation materials, which includes probate litigation, as being subject to the Rules.¹³ As specified in Formal Ethics Opinion 130, the Rules cover information contained in public records that relates to the representation of a current client.¹⁴

Matters of Public Record

Rule 1.6, which covers the duty of confidentiality, may affect certain documents that are part of the public record in an estate planning context. For example, a client may transfer title to real property via a beneficiary deed to a friend. The drafting attorney records the executed

beneficiary deed, and the beneficiary deed becomes part of the public record. The client's estate plan may include a will that disposes of the client's other assets. A family member who is a beneficiary under the client's will and has a copy of it may contact the drafting attorney during the client's lifetime and inquire about how the client's real property will be handled after the client's death. Even though a beneficiary deed is a matter of public record, the contents of the deed should be kept confidential, unless the client is willing to waive such confidentiality.

In a post-death situation, a lodged will and a recorded deed are both a matter of public record. However, if a third party contacts the attorney regarding the contents of a deceased client's lodged will or recorded deed, the best practice for the attorney is to not provide information about the will's or deed's contents unless a court order is obtained waiving confidentiality.

CBA Formal Ethics Opinion 131

Formal Ethics Opinion 131, Representing Clients with Diminished Capacity Where the Subject of the Representation is the Client's Diminished Capacity, provides guidance for attorneys involved in an adult protective proceeding when acting as counsel or as a guardian ad litem for an allegedly incapacitated adult.¹⁵ Formal Ethics Opinion 131 does not address the representation of minors, nor does it address proceedings where a guardian ad litem has been appointed on behalf of a minor.¹⁶ Proceedings for the appointment of a guardian ad litem on behalf of a minor are handled by the Office of the Child's Representative and are a subject to different procedures than those involving adults.¹⁷

Counsel for Allegedly Incapacitated Persons

As a threshold matter, before acting as counsel for a client who may have diminished capacity, an attorney should assess whether the alleged incapacity is so severe that the attorney cannot form an attorney-client relationship.¹⁸ When an attorney represents an allegedly incapacitated person as counsel, that attorney is subject to Rules 1.6 and 1.14, as noted previously.¹⁹ Under Rule 1.14, an attorney whose client may have

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If during the course of the representation the alleged incapacity becomes so severe that

an attorney cannot continue the attorney–client relationship, the attorney should withdraw from representation as attorney for the client.²¹ If there is no guardian ad litem in the protective proceeding, Formal Ethics Opinion 131 states that the withdrawing attorney should inform the court of the attorney’s inability to continue the attorney–client relationship and request that the court appoint a guardian ad litem.²²

The Role of Counsel versus Guardian ad Litem

Formal Ethics Opinion 131 recognizes that the same attorney may take on different roles in an adult protective proceeding at different points in time. An attorney may start off as a court-appointed attorney representing a client whose diminished capacity is the subject of an adult protective proceeding. If the attorney later reasonably believes that client is no longer able to maintain a meaningful attorney–client relationship, the attorney may take steps to withdraw from the representation. The attorney may also petition the court to convert the appointment as attorney to that of a guardian ad litem.²³ When considering such a conversion, the attorney must consider whether this change in roles would create a conflict that the allegedly incapacitated individual cannot waive and not proceed with an appointment as guardian ad litem.²⁴ If the attorney petitions the court to convert the appointment to an appointment as guardian ad litem, the attorney must protect the confidential or privileged information that the attorney obtained from the allegedly incapacitated person while serving in the role of attorney.²⁵

Generally, an attorney who is appointed as a guardian ad litem in an adult protective proceeding is not subject to the ethical or legal duties of an attorney or fiduciary, because the role of a guardian ad litem is different than that of an attorney or fiduciary representing the allegedly incapacitated person.²⁶ The role of an attorney representing an allegedly incapacitated person is to consult with the client and to abide by the client’s decisions.²⁷ On the other hand, the guardian ad litem’s role is to act and make recommendations in the allegedly incapacitated person’s “best interests” while considering,

but acting independently of, the desires of the allegedly incapacitated person.²⁸

CBA Formal Ethics Opinion 132

In CBA Formal Ethics Opinion 132, Duty of Confidentiality of the Will Drafter Upon the Death of Testator, the Committee concluded that the confidentiality of client information required under Rule 1.6 does not have an exception for the “death of client,” and thus an attorney’s duty of confidentiality continues even after the client’s death.²⁹ The Committee specifically concluded that the duty of confidentiality applies to a drafting attorney when a potentially interested party inquires about a deceased client’s dispositive instruments and intent.³⁰

To comply with Rule 1.6, the Committee stated that the best practice is for the drafting attorney to not voluntarily provide the potentially interested party information regarding the decedent’s dispositive instruments and intent unless (1) the decedent specifically authorized such a disclosure, (2) the personal representative authorizes such a disclosure, or (3) a court orders such a disclosure.³¹

The Reasons for Confidentiality

The attorney–client relationship gives rise to protection against disclosure of client information under various principles of law, including the attorney–client privilege, the work-product doctrine, and Rule 1.6. These principles may operate inconsistently. For example, Colorado courts have recognized the attorney–client privilege with limited exceptions, but have distinguished the operation of confidentiality under the Rules.³² In this regard, the Committee noted that in *Wesp v. Everson* the Colorado Supreme Court recognized the existence of the testamentary exception to the evidentiary attorney–client privilege after the client’s death, but distinguished between the attorney–client privilege and Rule 1.6 addressing confidentiality.³³

The general assumption of attorneys and the courts has been that clients will want information regarding communication with the client in the preparation of estate planning documents disclosed to the extent that it facilitates the implementation of the client’s wishes. On

this basis, under the testamentary exception, there is no attorney–client privilege as to the drafting attorney in disputes between heirs and devisees after death.³⁴ On the other hand, the attorney–client privilege continues as to third parties claiming against the estate, such as creditors.³⁵

With regard to confidentiality of communication concerning a deceased client, if an attorney can be required to testify in court as to communication with the client involving estate planning, the utility of maintaining confidentiality as to those communications may be subject to question. In any event, attorneys may want to consider including post-death waivers of both the attorney–client privilege and confidentiality in their fee agreements (such waivers should reference the estate planning file and billing statements). The waiver in the fee agreement should specifically authorize the attorney to make post-death disclosures to prevent or resolve disputes over the client’s estate plan and address attorney compensation for time spent on such post-death matters.

Conclusion

The Formal Ethics Opinions discussed above provide specific guidance for managing clients and case information in trust and estate and elder law matters. Attorneys who work in these areas should review their practices for compliance with the ethical duties discussed in the Formal Ethics Opinions. 



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NOTES

1. www.cobar.org/ethicsopinions.
2. CBA Formal Ethics Opinion 126, Representing the Adult Client with Diminished Capacity at 1 (May 6, 2015).
3. *Id.*
4. Colo. RPC 1.14, cmt. [1].
5. Colo. RPC 1.14, cmt. [3].
6. *Id.*
7. CBA Formal Ethics Opinion 126 at 4.
8. Colo. RPC 1.14, cmt. [6].
9. See CBA Formal Ethics Opinion 126 at 4.
10. See *id.*
11. See Rosenberg, “Being of Sound Mind: Standards for Testamentary (and Other) Capacity,” 40 *Colorado Lawyer* 89 (July 2011).
12. CRS § 15-11-501; *Breeden v. Stone*, 992 P.2d 1167, 1170-1172 (Colo. 2000).
13. CBA Formal Ethics Opinion 130, Online Posting and Sharing of Materials Related to the Representation of a Client at 1 (Apr. 3, 2017).
14. *Id.* at 3.
15. CBA Formal Ethics Opinion 131, Representing Clients with Diminished Capacity Where the Subject of the Representation is the Client’s Diminished Capacity at 1 (Sept. 13, 2017).
16. *Id.*
17. See Chief Justice Directive 04-06, Supreme Court of Colorado (Revised Jan. 1, 2016), www.courts.state.co.us/Courts/Supreme_Court/cjds.
18. CBA Formal Ethics Opinion 131 at 2.
19. *Id.*
20. *Id.* at 6-7.
21. *Id.* at 2.
22. *Id.* at 2-3. See also Colo. RPC 1.14, cmt. [7].
23. CBA Formal Ethics Opinion 131 at 9.
24. *Id.* at 10.
25. *Id.* See also Colo. RPC 1.6.
26. CBA Formal Ethics Opinion 131 at 9-10.
27. See *id.*; Colo. RPC 1.2.
28. CBA Formal Ethics Opinion 131 at 10.
29. CBA Formal Ethics Opinion 132, Duty of Confidentiality of the Will Drafter Upon the Death of Testator at 1 (Sept. 26, 2017).
30. *Id.* at 3.
31. *Id.*
32. See *Wesp v. Everson*, 33 P.3d 191, 200 (Colo. 2001); *Denver Nat’l Bank v. McLagan*, 298 P.2d 386, 388 (Colo. 1956); *In re Estate of Shapter*, 85 P. 688, 691 (Colo. 1905).
33. See CBA Formal Ethics Opinion 132 at 1-2.
34. Wade, *Wade/Parks—Colorado Law of Wills, Trusts, and Fiduciary Administration* at §42.19. (CLE in Colo., Inc. 8th ed. 2017).
35. *Id.*