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Consumer Track

When Your Hair Has More Silver Than Your Pocket: Bankruptcy Issues Involving the Elderly

CONCURRENT SESSION

Jane H. Downey, Moderator
Moore Bradley Myers Law Firm | Columbia, S.C.

Cheryl E. James
Office of the Chapter 13 Trustee (E.D. Ky.) | Lexington

Angela M. Kirby
Kirby Law, LLC | Columbia, S.C.

David S. Weidenbaum
Office of the U.S. Trustee | Atlanta

2022

When Your Hair Has More Silver Than Your Pocket – Bankruptcy Issues for the Elderly

So, exactly how old is "elderly"?

There appears to be no consensus on how old one must be before they are officially "elderly" or even exactly what the term "elderly" represents. The most prevalent thinking, if assessing the question based only on chronology, one is elderly at the earliest at age 65. The "early elderly" are those age 65 to age 74. Those 75 years and older are referred to as the "late elderly".

Some determine elderly based on life events or social roles such as retirement and eligibility for government or employer-sponsored age-based benefits and programs. The Social Security Administration reports 90% of individuals over age 65 receive social security benefits. So, under a life-event approach, 9 out of 10 folks age 65 and over are defined as elderly.

See discussions at https://devotedguardians.com/at-what-point-is-someone-considered-elderly/, https://www.elderguru.com/how-old-is-old/

According to AARP, the age at which you are officially "old" or "elderly" is typically "it depends on who you ask." The definition seems to have a consensus that "old" is over 65 or over 70 (unless you ask someone who is 65 or 70). From the 2017 U. S. Trust Insights on Wealth & Worth report. (http://www.ustrust.com/ust/pages/insights-on-wealth-and-worth-2017.aspx)

> Millennials (born 1981 – 1996, currently ages 26 to 41, were 21-36 when data was gathered) believed that you are old once you turn 59.
> Gen Xers (born 1965 – 1980, currently ages 42 to 57, ages 37-52 in 2017) believed that you are old once you turn 65.
> Boomers (born 1946 – 1964, currently ages 58 to 76, ages 53-72 in 2017) believed that you are not old until you turn 73
> Silent Generation or Post War (born 1928 – 1945, currently ages 77 and older) believed that age 73 is old.

Statistics of Increased Bankruptcies of the Elderly

According to a 2019 Forbes' article, the bankruptcy filings for individuals that are age fifty-five (55) to sixty-four (64) have increased by 64% from 1991 to 2016. The bankruptcy filings for individuals that are age sixty-five (65) to seventy-four (74) have increased by 204% from 1991 to 2016.

What are the reasons behind these staggering statistics?

Per Forbes and the American Bankruptcy Institute, the most documented cause for elderly bankruptcy filings in six out of ten cases was the elderly individuals increased medical costs or medical debts. This is being driven by individuals living longer and having more medical care over their lifetime as well as significantly increased costs to provide medical care to the aging population. Medicare now pays a smaller share of healthcare for those individuals over 65 years of age, and we have extended the age by which you can even receive a monthly Social Security

check. The longer the wait the more that you will get. Most individuals cannot wait until they are 70 years old to start collecting their monthly check.

Another reason cited in an article by Teresa Ghilarducci in an article titled "Elderly Bankruptcy Is On the Rise – Here's Why," was that "trade unions have weakened, real wages have stagnated, and good pensions have eroded." It is true, far less companies now provide pensions and the elderly have to rely solely on life savings, monthly Social Security and Medicare to cover all of their expenses. As we all know, Social Security has not increased with inflation and does not cover all of one's monthly expenses. Hence, leaving a shortfall and leaving the elderly to struggle with debts.

Without ongoing support of a company pension, individuals that were not financially able or not disciplined enough to voluntarily contribute to retirement plans such as a 401(k) or self-directed Individual Retirement Accounts (IRA) are struggling financially to make their life savings and monthly income from Social Security cover their expenses.

We have also seen a large trend in parents co-signing for children's debts (school loans, car loans, mortgages, etc.) to assist their adult children. If the adult children default on these loans, then the parents are left holding the debt. Boomers typically want to pay their bills and the next generation may not have that same drive or moral obligation as the older generation has exhibited.

Furthermore, the elderly are vulnerable to predators! Predators come in all forms, total strangers, relatives, caregivers, trusted professionals, and even businesses that use scare tactics to entice seniors or offer cheap services to the elderly.

Top Ten Senior Scams as reported by the National Coalition on Aging (http://www.ncoa.org/)

1. Health Care/Medicare/Health Insurance Fraud

Since the scammers know that anyone over the age of 65 has access to Medicare, then it is easy to pose as a Medicare representative and trick individuals into giving their personal information (SSN and date of birth and other confidential information) that can be used. In addition, this type of scammer will offer to provide services typically at a mobile clinic and collect the individual's information and actually bill Medicare for their services.

2. Counterfeit Prescription Drugs

These scammers are mostly found on the internet when the seniors are looking to reduce their prescription costs. The harm is two-fold: seniors are wasting their hard earned money on useless prescriptions and they may actually inflict harm by purchasing unsafe and unregulated substances. This may lead to additional medical problems for the seniors.

When Your Hair Has More Silver Than Your Pocket – Bankruptcy Issues for the Elderly

3. Funeral and Cemetery Scams

FBI warns of two types of funeral and cemetery fraud targeted at seniors.

i. Scammers use the obituaries to attend the funeral to take advantage of the surviving spouse claiming the Decedent had an outstanding debt.

ii. Funeral homes take advantage of a grieving family member who may be unaware of costs of funeral services to add additional charges to the bill. One such scenario is trying to get a family member to buy an expensive display or burial coffin for someone that has been cremated.

4. Fraudulent Anti-Aging Products

Who doesn't want to find the fountain of youth? There is a trend among the elderly to seek out treatments and medications to preserve their youthful appearance, and this leads to the risk of scammers. One noted Botox scam was reported in Arizona in 2006 which netted the distributors $1.5 million in a year's time and jailtime for the distributors. Like the counterfeit prescriptions, knock-off Botox can result in major health consequences adding to additional medical costs.

5. Telemarketing

According to the NCOA, the elderly make twice as many purchases over the phone than the national average. Therefore, fake telemarketers prey on the lonely senior citizen who may have no else one to talk to, and the scammers are able to easily convince the senior to give out their personal credit card information to the caller. The information is shared and the individual becomes a target.

Some common telemarketing schemes are as follows:

"The Pigeon Drop" Per the NCOA, the scammer tells the senior that the scammer has found a large sum of money and that he or she is willing to share the "found money" with the senior if they will deposit the funds into their account and withdraw the money. By the time, the check turns up a NSF the scammer is long gone with the seniors money.

"The Fake Accident Ploy" Per the NCOA, the scammer gets the senior to wire or send money on the pretense that a relative is in the hospital and needs the funds.

"Charity Scams" Per the NCOA, the scammer gets the senior to donate money to a fake charity and this often occurs after natural disasters to prey upon the seniors vulnerability.

6. Internet Fraud

Most common are the Email/Phishing Scams with a link to update personal information for what looks like a legitimate business or the IRS about a tax refund and the examples are endless as the scammers are hard at work preying on the elderly.

When Your Hair Has More Silver Than Your Pocket – Bankruptcy Issues for the Elderly

Romantic interests where lonely seniors have fallen in love with a scammer, and after adequate time then the romantic interest/scammers need funds for medical bills or to travel somewhere.

7. Investment Schemes

Bernie Madoff's Pyramid scheme is probably the most notable, but the investment schemes can also be selling investment products to seniors with the hopes of increasing their wealth and the financial advisors receive large commissions.

8. Homeowner/Reverse Mortgage Scams

Most seniors own their own home and have significant equity built up in the home. Seniors are the target of many home improvement scams by unscrupulous individuals alleging that the homeowner has significant damage to roof or structural problems. The senior goes forward with the alleged repairs out of fear of their biggest asset falling to disrepair. The seniors do not involve children or get second opinions, and the scammers put tarps over roofs and make it look like work is commencing and sometimes leave the home is worse shape than when they started and typically they will leave town in the middle of the night without completion of the job, if there was ever a job to be done.

Reverse Mortgage Scams: Due to their popularity among seniors, scammers have jumped on the reverse mortgage bandwagon. Unsecured reverse mortgage can lead property owners to lose their homes when scammers offer money or exchange of real estate for the title to the senior's homes. Also, using reverse mortgages to draw out equity in your home to obtain the money to fix up your home as noted above.

9. Sweepstakes and Lottery Scams

Most everyone is familiar with this form of fraud, but the scammers inform their victim that they have won a prize, sweepstakes, or lottery of sorts, and the victim will have to pay a fee to get the winnings or must pay taxes on the prize. The scammers are long gone with the collected fees or prizes before the senior realizes that the winnings will not be delivered or that the check was a bad check.

10. The Grandparent Scam

Scammers will place a call to a senior and allege to be a grandchild that has been in a car accident, overdue rent, car repairs or has gotten into some trouble. Most importantly, the grandparent is not to tell the grandchild's parent of the distressed financial situation, but rather the "grandchild" wants cash or gift cards sent to a disclosed address.

Additional Senior Scams that we see in the Probate World

Untrustworthy agents abusing their fiduciary duty under a Power of Attorney.

Caregivers and children using parent's credit cards and adding themselves to bank accounts, which disrupts the estate plan.

When Your Hair Has More Silver Than Your Pocket – Bankruptcy Issues for the Elderly

Children using scare tactics to get parents to transfer assets to qualify for Medicaid or using the same scare tactics to transfer assets to avoid being placed in a nursing home.

Caregivers and trusted individuals getting seniors to change their wills and their estate plans.

Very well-educated individuals falling victim to many internet scams such as romantic interests, foreign lottery, or unwittingly laundering money for internet scammers.

Things to Consider When:

1. The debtor is of advanced age and shows signs of diminished capacity.

First, consider the guidance of the Rules of Professional Conduct, specifically Rule 1.14, Client With Diminished Capacity.

Model Rule 1.14 states,

> (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.

In addition to the Rule, the comments are also instructive. The debtor should participate in decisions about the representation to the greatest degree possible. For debtors that require assistance this assistance may be informal as a family member attending meetings with the debtor. The assistance may be more formal, such as a power of attorney. Or, as a legally appointed guardian. Keep in mind the guidance of Rule 1.6, you must maintain Confidentiality of Information once you determine which party, the debtor or a legal representative, is your client.

Model Rule 1.6 states,

> (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).

When Your Hair Has More Silver Than Your Pocket – Bankruptcy Issues for the Elderly

> (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 prevent the client from committing a crime or fraud that is reasonably certain to result in substantial injury to the financial interests or property of another and in furtherance of which the client has used or is using the lawyer's services;
> >
> > (3) to prevent, mitigate or rectify substantial injury to the financial interests or property of another that is reasonably certain to result or has resulted from the client's commission of a crime or fraud in furtherance of which the client has used the lawyer's services;
> >
> > (4) to secure legal advice about the lawyer's compliance with these Rules;
> >
> > (5) 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;
> >
> > (6) to comply with other law or a court order; or
> >
> > (7) to detect and resolve conflicts of interest arising from the lawyer's change of employment or from changes in the composition or ownership of a firm, but only if the revealed information would not compromise the attorney-client privilege or otherwise prejudice the client.
>
> (c) A lawyer shall make reasonable efforts to prevent the inadvertent or unauthorized disclosure of, or unauthorized access to, information relating to the representation of a client.

There are a number of considerations when the debtor is represented by an attorney-in-fact. The court and/or trustee may question the debtor's decision-making ability. Did the debtor have the capacity to give the power? Is the debtor aware of the bankruptcy filing? Who retained the attorney and did the attorney meet with the debtor? At a minimum, provide a copy of the appointing document to the trustee.

Three to five years is a long time for another party to make plan payments and meet the duties of a debtor. Counsel may want to give consideration to suggesting to the attorney-in-fact (or the debtor) that a state court appoint a guardian for the debtor prior to the filing. If there is no guardian at the time of the filing, Federal Rule of Bankruptcy Procedure 1004 allows the bankruptcy court to appoint a guardian for a debtor. Or, in the face or concerns about the debtor's capacity, the bankruptcy court could require the attorney-in-fact to seek a state court appointed guardian. Most states allow such an appointment.

There are many benefits to having a court-appointed guardian. The state imposes standards that an individual must meet to be appointed. The state supervises throughout the guardianship to

determine the guardian is acting in the debtor's best interest. The appointed guardian must provide notice if the individual can no longer serve and the court will appoint a successor.

How Lawyers Should Respond to Cognitive Decline in a Client, by Mark C. Palmer, Attorney at Work, June 22, 2022 edition. https://www.attorneyatwork.com/how-lawyers-should-respond-to-client-diminished-cognitive-capacity/?ct=t(115-062222-Palmer). Article is reprinted in these materials starting on page 11. Originally published by AttorneyatWork.com. Reprinted with permission.

2. An elderly client has become a victim of a scam or identity theft.

If an elderly person is a victim of elder fraud contact the National Elder Fraud Hotline, operated by the Office for Victims of Crime (OVC). The OVC hotline is available M-F from 10:00 a.m. – 6:00 p.m. EST. The hotline is operated by the U.S. Department of Justice for reporting fraud against anyone age 60 or older. The government website states, the hotline is staffed by professional case managers that will assist the victim through reporting at all levels, federal, state and local and will connect the victim with available resources. The hotline number is 833-FRAUD-11 or 833-372-8311. https://ovc.ojp.gov/program/stop-elder-fraud/providing-help-restoring-hope.

If the scam is presented in a phone call you may also report to the Federal Trade Commission online or by calling 877-FTC-HELP (877-382-4357).

3. The children or family members of elderly person are mishandling assets.

A 2019 review by the Consumer Financial Protection Bureau (CFPB) found that more than two-thirds of reported cases of elder financial exploitation involved a family member. A 2022 analysis of federal and state data conducted by cybersecurity research company Comparitech estimated that the costs to older adults for financial exploitation was close to $4.8 billion each year. The analysis focused only on the reported cases. Experts estimate most cases are not reported. Perhaps not surprising, fraud on older adults brings greater financial loses when the perpetrator is known and not a stranger or anonymous. The CFPB research estimated the average cost of fraud by a known individual is $42,700.

Look for the warning signs of elder financial abuse.

Sudden major changes in personal or financial life.
Providing financial assistance to a new person or one with whom a recent close bond was developed, especially if the elder is less forthcoming with information about the relationship.
A family member begins to control contact and communication with the individual.

To protect the older adult, consider having the primary caregiver provide an accounting to other family members. Or, give more than one individual access to the financial records of the older adult. Have those difficult conversations.

When Your Hair Has More Silver Than Your Pocket – Bankruptcy Issues for the Elderly

4. A client has a reverse mortgage and wants to file a bankruptcy case.

Reverse Mortgages

Per the National Coalition on the Aging (NCOA), legitimate reverse mortgages have increased by more than 1,300% between 1999 and 2008.

Reverse Mortgage 101

What is a reverse mortgage?

In simple terms, it's a secured loan for qualified homeowners that are age sixty-two (62) and above that want to tap into their home equity without having to make monthly payments. It is a tool to help the aging population, who may not have enough savings or income to pay their monthly expenses. However, as noted in the Senior Scams section, you only want to consider a loan that is backed by the Federal Housing Administration (FHA), as there are many imposters and scams in this area.

What are the terms of a reverse mortgage?

The borrower must be 62 or older. The borrower must have around 50% equity in their home. There are various factors to the calculation of equity based on life expectancy, payment plans, and current interest rates. The borrower must reside in their home and must maintain their home to the satisfaction of the mortgage company. Vacating the home for more than twelve consecutive months is considered a permanent move, which triggers the payoff of the loan. There is an annual written certification required to be filed with the mortgage company. Once the borrower no longer lives in the home or the home is sold then the mortgage must be paid off in 180 days from death of the borrower or if the borrower vacates the home for more than twelve consecutive months.

When does a reverse mortgage make sense?

The senior wants to remain in their home as long as possible and the costs of the reverse mortgage can be spread out over the duration of the life of the loan. A sample of the expenses associated with a reverse mortgage is outlined in an article entitled Reverse Mortgage: The Pros and Cons, written by Amy Fontinelle. See her article at https://www.investopedia.com/reverse-mortgage-pros-and-cons-5209641.

The reverse mortgage can provide a "line of credit" for emergency funds or additional non-taxable income. Many individuals use the reverse mortgage to pay caregivers, which will allows them to remain in their home and not go to a nursing home or assisted living. They are withdrawing the equity while having a place to live.

Both spouses are over the age of 62 and both spouses can be borrowers on the reverse mortgage.

You are financially able to maintain your home and pay the property taxes, insurance, maintenance and repairs.

When Your Hair Has More Silver Than Your Pocket – Bankruptcy Issues for the Elderly

Your home does not have sentimental value to you or your heirs. The senior may view their home as an asset by which to leverage their comfort during retirement years.

When does a reverse mortgage not make sense?

You don't have enough equity in your home to justify the withdrawal of equity and the costs of the reverse mortgage.

If someone else lives with you that is not a borrower on the loan then they may be "evicted" once the borrower moves out of the home due to death or inability to remain in the home. If you are married and your spouse is not 62 years of age then you should not consider a reverse mortgage if your spouse can't be a borrower on the loan as your spouse will be forced to pay off the loan or might even have to vacate and sell the home if he or she is not on the mortgage at the death of the borrower or if the borrower goes to a nursing home.

If you have health problems and may need to move to an assisted living or nursing home, then a reverse mortgage may not make sense due to the closing costs are being taken out of the equity in the home and once you no longer live in the home then the reverse mortgage must be paid off in 180 days.

If you are not financially able to maintain your home and pay the property taxes, insurance, maintenance and repairs, then the loan will be due regardless of whether you vacate your home.

Your home has sentimental value to your heirs and has been in the family a long time. Look for other options.

Considerations before filing bankruptcy

Reverse mortgage loans are usually not dependent on a client's income. The lender will assess the condition of the home and whether the borrower has sufficient income to maintain the property and pay recurring costs of ownership like property taxes and insurance premiums.

If the client did not take a lump sum when the loan was mad and instead has elected to take monthly payments, there may still be equity in the property that is not subject to the mortgage loan. Determine whether the client can claim an exempt interest in the equity and if no exemption is available will the non-exempt equity present a liquidation issue in the bankruptcy case.

Know your court. Does the court view monthly payments made to the debtor on a reverse mortgage loan an increase in debt? Is court approval required to allow the debtor to continue receiving monthly payments, *i.e.* increasing their debt post-petition?

Who stands to inherit the property at the client's death? Can that individual file a bankruptcy case to stop a foreclosure on the property subject to the reverse mortgage and pay the matured mortgage loan in the bankruptcy plan?

When Your Hair Has More Silver Than Your Pocket – Bankruptcy Issues for the Elderly

Additional Resources

Bankruptcy for Estate Planners: What You Need to Know, or at Least Be Aware Of https://www.munsch.com/portalresource/lookup/wosid/cp-base-4-19402/overrideFile.name=/Bankruptcy%20for%20Estate%20Planners_What%20you%20Need%20to%20Know,%20or%20at%20Least%20be%20Aware%20of.pdf

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Ask the Experts at 2Civility.org – article from Attorney at Work, June 22, 2022 edition

https://www.attorneyatwork.com/how-lawyers-should-respond-to-client-diminished-cognitive-capacity/?ct=t(115-062222-Palmer)

How Lawyers Should Respond to Cognitive Decline in a Client

By Mark C. Palmer

QUESTION: *I've represented an individual client for almost 20 years in various transactional and litigation matters. Over the past year, I've noticed what seems to be a mild yet steady decline in his cognitive abilities. He has stopped email communications and now will only talk on the phone or have someone bring him to my office. Our discussions of pending matters are becoming disjointed and repetitive.*

Can I continue to properly serve a client who may have diminished capacity? What if he continues to decline?

ANSWER: According to the Alzheimer's Association, there are many reasons why someone may show signs of diminished capacity. Some acute symptoms may pass or are corrected, while others may be chronic and eventually debilitating to one's mental and physical functioning.

For example, millions of Americans are living with Alzheimer's or other dementias, says the Alzheimer's Association. As our growing population continues to age, so too may the number of people with dementia, as the risk increases with advancing age.

The Alzheimer's Association predicts that 12.7 million Americans 65 and older (almost 1 in 6) will have Alzheimer's by 2050.

For lawyers, the Rules of Professional Conduct demand that we keep client confidence (ABA Model Rule 1.6) while maintaining a normal client-lawyer relationship (Rule 1.14(a)). Few lawyers are medical professionals, qualified to make a diagnosis, let alone properly spot the signs of a true cognitive issue.

How Do You Best Serve a Client With Cognitive Decline?

So, what should lawyers do if they begin to notice a change in a client's behavior and become uncomfortable with the client's ability to properly contribute to the attorney-client relationship?

How should a lawyer handle situations where a client wants to take steps that might cause physical, emotional or financial harm, for example, to the client or others?

Let's explore these questions, which will help determine how you can best serve your client while staying within the boundaries of your ethical obligations.

1. How does a lawyer know if the client has diminished capacity?
2. How might this change how a lawyer represents a client?
3. What protective measures can the lawyer take while meeting ethical obligations?

1. Assessing Diminished Cognitive Capacity

As Model Rule 1.14(a) directs, a lawyer "shall, as far as reasonably possible, maintain a normal client-lawyer relationship with the client" when a client's capacity is diminished. Nevertheless, how does a lawyer assess a client's capacity in the first place?

Part (b) of the Rule invokes the reasonableness standard: "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 interest …"

This triggers the circular logic definition of reasonableness under Rule 1.0(i): "'Reasonable belief' or 'reasonably believes' when used in reference to a lawyer denotes that the lawyer believes the matter in question and that the circumstances are such that the belief is reasonable." But this offers no help when it comes to what behaviors to look for in your client.

Fortunately, when you dig deeper into the comments of Rule 1.14, you find Comment 6, which provides some guiding factors to "consider and balance" in identifying and evaluating such circumstances. These include:

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

Clients, however, may make foolish or impulsive demands or decisions aside from any diminished capacity. Poor judgment on the part of the client alone shouldn't trigger the protective action sought by Rule 1.14.

In fact, ABA Formal Ethics Opinion 96-404 states:

"A client who is making decisions that the lawyer considers to be ill-considered is not necessarily unable to act in his own interest, and the lawyer should not seek protective action merely to protect the client from what the lawyer believes are errors in judgment. Rule 2.1 permits the lawyer to offer his candid assessment of the client's conduct and its possible consequences, and to suggest alternative courses, but he must always defer to the client's decisions. Substituting the lawyer's own judgment for what is in the client's best interest robs the client of autonomy and is inconsistent with the principles of the 'normal' relationship."

Comment 6 also permits lawyers to seek guidance from an "appropriate diagnostician" under "appropriate circumstances."

The ability to seek the opinion of a professional in evaluating diminished capacity could offer an important perspective in understanding your client's abilities, especially in situations where the onset of symptoms has been slow and likely not so apparent to the lawyer.

In certain cases, such as the execution of estate planning documents when a client's mental capacity is in question or challenged, it may be wise to recommend that the client obtain a doctor's written opinion about their mental abilities at that time.

Remember, while your client's confidentiality of information is protected under Rule 1.6, you do have the flexibility to reveal such information to the extent necessary to protect that client under Rule 1.14(c).

Likewise, any advice the lawyer receives from the professional diagnostician is protected by Rule 1.6.

2. Impact on the Client Relationship

As mentioned above, Rule 1.14 allows a client with diminished capacity to make decisions and manage their affairs as any other client would when reasonably possible. The totality of each client's circumstances will determine the extent and degree of their ability to participate should capacity be a legitimate concern.

As Model Rule 1.14, Comment 1 states, in part:

[A] client with diminished capacity often has the ability to understand, deliberate upon, and reach conclusions about matters affecting the client's own well-being. For example, children as young as five or six years of age, and certainly those of ten or twelve, are regarded as having opinions that are entitled to weight in legal proceedings concerning their custody. So also, it is recognized that some persons of advanced age can be quite capable of handling routine financial matters while needing special legal protection concerning major transactions.

The initial question posed mentions the change in maintaining communication with the client, as he has stopped using email. This likely demands changing how you represent the client, in terms of the mode of communication at the least.

Rule 1.4 is built on keeping the client informed so they can make considered decisions about the objectives of their representation and the means of achieving those objectives.

Just as you're forced to reconcile confidentiality of information with maintaining a normal relationship (Rules 1.6 and 1.14), attorneys must do their best to give clients "sufficient information to participate intelligently in decisions concerning the objectives of the representation and the means by which they are to be pursued, to the extent the client is willing and able to do so" (Rule 1.4, Comment 5).

So, attorneys must not only provide sufficient information, but also try to reasonably evaluate the client's comprehension of the information.

3. Taking Protective Measures

Rule 1.14 may seem harsh in tethering a lawyer to a matter when a client's competency cannot allow for diligent representation. Yet, while allowing a lawyer to withdraw may remedy the lawyer's dilemma, it would leave the impaired client without help at a time when they likely need it most.

A lawyer can abandon representation only when they're unable to establish or maintain a lawyer-client relationship imposed by Rule 1.14. In this event, the lawyer must seek permission from the court to withdraw, if applicable, or take further protective actions allowed under Rule 1.14(b) outside the bounds of a normal lawyer-client relationship.

The lawyer is permitted, even against the client's wishes and direction, to take action to appoint a guardian ad litem, guardian or conservator. Comments 5-7 guide what constitutes appropriate "protective action" and to what extent.

Comment 7 states:

"If a legal representative has not been appointed, the lawyer should consider whether appointment of a guardian ad litem, conservator or guardian is necessary to protect the client's interests. Thus, if a client with diminished capacity has substantial property that should be sold for the client's benefit, effective completion of the transaction may require appointment of a legal representative. In addition, rules of procedure in litigation sometimes provide that minors or persons with diminished capacity must be represented by a guardian or next friend if they do not have a general guardian. In many circumstances, however, appointment of a legal representative may be more expensive or traumatic for the client than circumstances in fact require. Evaluation of such circumstances is a matter entrusted to the professional judgment of the lawyer. In considering alternatives, however, the lawyer should be aware of any law that requires the lawyer to advocate the least restrictive action on behalf of the client."

Before taking protective actions:

The lawyer should inform the client of their concerns about the client's capacity before taking protective actions. While the lawyer is permitted to act independently of the client's direction concerning taking protective actions, the lawyer must continue to follow their other ethical obligations including communications (Rule 1.4) and candid advice (Rule 2.1).

For example, considerations surrounding the onset of dementia may have implications beyond legal matters, such as moral, economic, social and political factors, which may be relevant to the client's situation.

Before involving other parties:

Lastly, as you navigate the additional demands of serving a client with diminished capacity, don't lose sight of keeping your client's interests first and consider the interests of others only insofar as they matter to the client.

While it may seem appropriate or even comforting to involve other parties, especially family members, in the client's deliberative process, lawyers must consider the impact of outside involvement. This involvement could lead to undue influence or the disclosure of confidential information.

Ethical Obligations Don't Recede

When a lawyer suspects diminished capacity in a client, the lawyer's ethical obligations don't recede. In fact, the client's diminished capacity may require the lawyer takes additional steps in servicing and representing the client.

The duties of competence, communication, confidentiality and advice may require additional measures to ensure that the client's decision-making ability and authority are upheld and prioritized. A lawyer may be faced with making difficult determinations and, when necessary, take protective measures, even when they may go against the client's wishes.

Resources:

- ABA Formal Opinion 96-404, Client Under a Disability.
- Colorado Bar Association Formal Opinion 126: Representing the Adult Client With Diminished Capacity.
- ISBA Professional Conduct Advisory Opinion No. 12-10, Withdrawal from Representation; Impaired Client; Confidentiality.
- New York City Bar Formal Opinion 2018-1: Protective Action, and Disclosures of Confidential Information, to Benefit a Prospective Client with Diminished Capacity.
- State Bar of California Standing Committee on Professional Responsibility and Conduct Formal Opinion No. 2021-207.
- Assessment of Older Adults with Diminished Capacities: A Handbook for Lawyers, 2nd Edition, by the ABA Commission on Law and Aging and the American Psychological Association.

The Illinois Supreme Court Commission on Professionalism was established by the Illinois Supreme Court in 2005 under Supreme Court Rule 799(c) to foster increased civility, professionalism, and inclusiveness among lawyers and judges in Illinois. By advancing the highest standards of conduct among lawyers and judges, the Commission works to better serve clients and society alike. For more information, visit 2Civility.org and follow us on Twitter @2CivilityOrg.

Rule 1.14: Client with Diminished Capacity

https://www.americanbar.org/groups/professional_responsibility/publications/model_rules_of_professional_conduct/rule_1_14_client_with_diminished_capacity/

Client-Lawyer Relationship

(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.

Rule 1.14 Client With Diminished Capacity - Comment

https://www.americanbar.org/groups/professional_responsibility/publications/model_rules_of_professional_conduct/rule_1_14_client_with_diminished_capacity/comment_on_rule_1_14/

Client-Lawyer Relationship

[1] The normal client-lawyer relationship is based on the assumption that the client, when properly advised and assisted, is capable of making decisions about important matters. When the client is a minor or suffers from a diminished mental capacity, however, maintaining the ordinary client-lawyer relationship may not be possible in all respects. In particular, a severely incapacitated person may have no power to make legally binding decisions. Nevertheless, a client with diminished capacity often has the ability to understand, deliberate upon, and reach conclusions about matters affecting the client's own well-being. For example, children as young as five or six years of age, and certainly those of ten or twelve, are regarded as having opinions that are entitled to weight in legal proceedings concerning their custody. So also, it is recognized that some persons of advanced age can be quite capable of handling routine financial matters while needing special legal protection concerning major transactions.

[2] The 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 has a legal representative, the lawyer should as far as possible accord the represented person the status of client, particularly in maintaining communication.

[3] The client may wish to have family members or other persons participate in discussions with the lawyer. When necessary to assist in the representation, the presence of such persons generally does not affect the applicability of the attorney-client evidentiary privilege. Nevertheless, the lawyer must keep the client's interests foremost and, except for protective action authorized under paragraph (b), must look to the client, and not family members, to make decisions on the client's behalf.

[4] 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. In matters involving a minor, whether the lawyer should look to the parents as natural guardians may depend on the type of proceeding or matter in which the lawyer is representing the minor. If the 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. See Rule 1.2(d).

Taking Protective Action

[5] If a lawyer reasonably believes that a client is at risk of substantial physical, financial or other harm unless action is taken, and that a normal client-lawyer relationship cannot be maintained as provided in paragraph (a) because the client lacks sufficient capacity to communicate or to make adequately considered decisions in connection with the representation, then paragraph (b) permits the lawyer to take protective measures deemed necessary. Such measures could include: consulting with family members, using a reconsideration period to permit clarification or improvement of circumstances, using voluntary surrogate decisionmaking tools such as durable powers of attorney or consulting with support groups, professional services, adult-protective agencies or other individuals or entities that have the ability to protect the client. In taking any protective action, the lawyer should be guided by such factors as the wishes and values of the client to the extent known, the client's best interests and the goals of intruding into the client's decisionmaking autonomy to the least extent feasible, maximizing client capacities and respecting the client's family and social connections.

[6] In determining the extent of the client's diminished capacity, the lawyer should consider and balance such factors as: the client's ability to articulate reasoning leading to a decision, 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. In appropriate circumstances, the lawyer may seek guidance from an appropriate diagnostician.

[7] If a legal representative has not been appointed, the lawyer should consider whether appointment of a guardian ad litem, conservator or guardian is necessary to protect the client's interests. Thus, if a client with diminished capacity has substantial property that should be sold for

the client's benefit, effective completion of the transaction may require appointment of a legal representative. In addition, rules of procedure in litigation sometimes provide that minors or persons with diminished capacity must be represented by a guardian or next friend if they do not have a general guardian. In many circumstances, however, appointment of a legal representative may be more expensive or traumatic for the client than circumstances in fact require. Evaluation of such circumstances is a matter entrusted to the professional judgment of the lawyer. In considering alternatives, however, the lawyer should be aware of any law that requires the lawyer to advocate the least restrictive action on behalf of the client.

Disclosure of the Client's Condition

[8] Disclosure of the client's diminished capacity could adversely affect the client's interests. For example, raising the question of diminished capacity could, in some circumstances, lead to proceedings for involuntary commitment. Information relating to the representation is protected by Rule 1.6. Therefore, unless authorized to do so, the lawyer may not disclose such information. When taking protective action pursuant to paragraph (b), the lawyer is impliedly authorized to make the necessary disclosures, even when the client directs the lawyer to the contrary. Nevertheless, given the risks of disclosure, paragraph (c) limits what the lawyer may disclose in consulting with other individuals or entities or seeking the appointment of a legal representative. At the very least, the lawyer should determine whether it is likely that the person or entity consulted with will act adversely to the client's interests before discussing matters related to the client. The lawyer's position in such cases is an unavoidably difficult one.

Emergency Legal Assistance

[9] In an emergency where the health, safety or a financial interest of a person with seriously diminished capacity is threatened with imminent and irreparable harm, a lawyer may take legal action on behalf of such a person even though the person is unable to establish a client-lawyer relationship or to make or express considered judgments about the matter, when the person or another acting in good faith on that person's behalf has consulted with the lawyer. Even in such an emergency, however, the lawyer should not act unless the lawyer reasonably believes that the person has no other lawyer, agent or other representative available. The lawyer should take legal action on behalf of the person only to the extent reasonably necessary to maintain the status quo or otherwise avoid imminent and irreparable harm. A lawyer who undertakes to represent a person in such an exigent situation has the same duties under these Rules as the lawyer would with respect to a client.

[10] A lawyer who acts on behalf of a person with seriously diminished capacity in an emergency should keep the confidences of the person as if dealing with a client, disclosing them only to the extent necessary to accomplish the intended protective action. The lawyer should disclose to any tribunal involved and to any other counsel involved the nature of his or her relationship with the person. The lawyer should take steps to regularize the relationship or implement other protective solutions as soon as possible. Normally, a lawyer would not seek compensation for such emergency actions taken.

Rule 1.6: Confidentiality of Information

https://www.americanbar.org/groups/professional_responsibility/publications/model_rules_of_professional_conduct/rule_1_6_confidentiality_of_information/

Client-Lawyer Relationship

(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 prevent the client from committing a crime or fraud that is reasonably certain to result in substantial injury to the financial interests or property of another and in furtherance of which the client has used or is using the lawyer's services;

(3) to prevent, mitigate or rectify substantial injury to the financial interests or property of another that is reasonably certain to result or has resulted from the client's commission of a crime or fraud in furtherance of which the client has used the lawyer's services;

(4) to secure legal advice about the lawyer's compliance with these Rules;

(5) 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;

(6) to comply with other law or a court order; or

(7) to detect and resolve conflicts of interest arising from the lawyer’s change of employment or from changes in the composition or ownership of a firm, but only if the revealed information would not compromise the attorney-client privilege or otherwise prejudice the client.

(c) A lawyer shall make reasonable efforts to prevent the inadvertent or unauthorized disclosure of, or unauthorized access to, information relating to the representation of a client.

Rule 1.6 Confidentiality of Information - Comment

https://www.americanbar.org/groups/professional_responsibility/publications/model_rules_of_professional_conduct/rule_1_6_confidentiality_of_information/comment_on_rule_1_6/

Client-Lawyer Relationship

[1] This Rule governs the disclosure by a lawyer of information relating to the representation of a client during the lawyer's representation of the client. See Rule 1.18 for the lawyer's duties with respect to information provided to the lawyer by a prospective client, Rule 1.9(c)(2) for the lawyer's duty not to reveal information relating to the lawyer's prior representation of a former client and Rules 1.8(b) and 1.9(c)(1) for the lawyer's duties with respect to the use of such information to the disadvantage of clients and former clients.

[2] A fundamental principle in the client-lawyer relationship is that, in the absence of the client's informed consent, the lawyer must not reveal information relating to the representation. See Rule 1.0(e) for the definition of informed consent. This contributes to the trust that is the hallmark of the client-lawyer relationship. The client is thereby encouraged to seek legal assistance and to communicate fully and frankly with the lawyer even as to embarrassing or legally damaging subject matter. The lawyer needs this information to represent the client effectively and, if necessary, to advise the client to refrain from wrongful conduct. Almost without exception, clients come to lawyers in order to determine their rights and what is, in the complex of laws and regulations, deemed to be legal and correct. Based upon experience, lawyers know that almost all clients follow the advice given, and the law is upheld.

[3] The principle of client-lawyer confidentiality is given effect by related bodies of law: the attorney-client privilege, the work product doctrine and the rule of confidentiality established in professional ethics. The attorney-client privilege and work product doctrine apply in judicial and other proceedings in which a lawyer may be called as a witness or otherwise required to produce evidence concerning a client. The rule of client-lawyer confidentiality applies in situations other than those where evidence is sought from the lawyer through compulsion of law. The confidentiality rule, for example, applies not only to matters communicated in confidence by the client but also to all information relating to the representation, whatever its source. A lawyer may not disclose such information except as authorized or required by the Rules of Professional Conduct or other law. See also Scope.

[4] Paragraph (a) prohibits a lawyer from revealing information relating to the representation of a client. This prohibition also applies to disclosures by a lawyer that do not in themselves reveal protected information but could reasonably lead to the discovery of such information by a third person. A lawyer's use of a hypothetical to discuss issues relating to the representation is permissible so long as there is no reasonable likelihood that the listener will be able to ascertain the identity of the client or the situation involved.

Authorized Disclosure

[5] Except to the extent that the client's instructions or special circumstances limit that authority, a lawyer is impliedly authorized to make disclosures about a client when appropriate in carrying out the representation. In some situations, for example, a lawyer may be impliedly authorized to admit a fact that cannot properly be disputed or to make a disclosure that facilitates a satisfactory conclusion to a matter. Lawyers in a firm may, in the course of the firm's practice, disclose to each other information relating to a client of the firm, unless the client has instructed that particular information be confined to specified lawyers.

Disclosure Adverse to Client

[6] Although the public interest is usually best served by a strict rule requiring lawyers to preserve the confidentiality of information relating to the representation of their clients, the confidentiality rule is subject to limited exceptions. Paragraph (b)(1) recognizes the overriding value of life and physical integrity and permits disclosure reasonably necessary to prevent reasonably certain death or substantial bodily harm. Such harm is reasonably certain to occur if it will be suffered imminently or if there is a present and substantial threat that a person will suffer such harm at a later date if the lawyer fails to take action necessary to eliminate the threat. Thus, a lawyer who knows that a client has accidentally discharged toxic waste into a town's water supply may reveal this information to the authorities if there is a present and substantial risk that a person who drinks the water will contract a life-threatening or debilitating disease and the lawyer's disclosure is necessary to eliminate the threat or reduce the number of victims.

[7] Paragraph (b)(2) is a limited exception to the rule of confidentiality that permits the lawyer to reveal information to the extent necessary to enable affected persons or appropriate authorities to prevent the client from committing a crime or fraud, as defined in Rule 1.0(d), that is reasonably certain to result in substantial injury to the financial or property interests of another and in furtherance of which the client has used or is using the lawyer’s services. Such a serious abuse of the client-lawyer relationship by the client forfeits the protection of this Rule. The client can, of course, prevent such disclosure by refraining from the wrongful conduct. Although paragraph (b)(2) does not require the lawyer to reveal the client’s misconduct, the lawyer may not counsel or assist the client in conduct the lawyer knows is criminal or fraudulent. See Rule 1.2(d). See also Rule 1.16 with respect to the lawyer’s obligation or right to withdraw from the representation of the client in such circumstances, and Rule 1.13(c), which permits the lawyer, where the client is an organization, to reveal information relating to the representation in limited circumstances.

[8] Paragraph (b)(3) addresses the situation in which the lawyer does not learn of the client’s crime or fraud until after it has been consummated. Although the client no longer has the option of preventing disclosure by refraining from the wrongful conduct, there will be situations in which the loss suffered by the affected person can be prevented, rectified or mitigated. In such situations, the lawyer may disclose information relating to the representation to the extent necessary to enable the affected persons to prevent or mitigate reasonably certain losses or to attempt to recoup their losses. Paragraph (b)(3) does not apply when a person who has

committed a crime or fraud thereafter employs a lawyer for representation concerning that offense.

[9] A lawyer's confidentiality obligations do not preclude a lawyer from securing confidential legal advice about the lawyer's personal responsibility to comply with these Rules. In most situations, disclosing information to secure such advice will be impliedly authorized for the lawyer to carry out the representation. Even when the disclosure is not impliedly authorized, paragraph (b)(4) permits such disclosure because of the importance of a lawyer's compliance with the Rules of Professional Conduct.

[10] Where a legal claim or disciplinary charge alleges complicity of the lawyer in a client's conduct or other misconduct of the lawyer involving representation of the client, the lawyer may respond to the extent the lawyer reasonably believes necessary to establish a defense. The same is true with respect to a claim involving the conduct or representation of a former client. Such a charge can arise in a civil, criminal, disciplinary or other proceeding and can be based on a wrong allegedly committed by the lawyer against the client or on a wrong alleged by a third person, for example, a person claiming to have been defrauded by the lawyer and client acting together. The lawyer's right to respond arises when an assertion of such complicity has been made. Paragraph (b)(5) does not require the lawyer to await the commencement of an action or proceeding that charges such complicity, so that the defense may be established by responding directly to a third party who has made such an assertion. The right to defend also applies, of course, where a proceeding has been commenced.

[11] A lawyer entitled to a fee is permitted by paragraph (b)(5) to prove the services rendered in an action to collect it. This aspect of the rule expresses the principle that the beneficiary of a fiduciary relationship may not exploit it to the detriment of the fiduciary.

[12] Other law may require that a lawyer disclose information about a client. Whether such a law supersedes Rule 1.6 is a question of law beyond the scope of these Rules. When disclosure of information relating to the representation appears to be required by other law, the lawyer must discuss the matter with the client to the extent required by Rule 1.4. If, however, the other law supersedes this Rule and requires disclosure, paragraph (b)(6) permits the lawyer to make such disclosures as are necessary to comply with the law.

Detection of Conflicts of Interest

[13] Paragraph (b)(7) recognizes that lawyers in different firms may need to disclose limited information to each other to detect and resolve conflicts of interest, such as when a lawyer is considering an association with another firm, two or more firms are considering a merger, or a lawyer is considering the purchase of a law practice. See Rule 1.17, Comment [7]. Under these circumstances, lawyers and law firms are permitted to disclose limited information, but only once substantive discussions regarding the new relationship have occurred. Any such disclosure should ordinarily include no more than the identity of the persons and entities involved in a matter, a brief summary of the general issues involved, and information about whether the matter has terminated. Even this limited information, however, should be disclosed only to the extent reasonably necessary to detect and resolve conflicts of interest that might arise from the possible

new relationship. Moreover, the disclosure of any information is prohibited if it would compromise the attorney-client privilege or otherwise prejudice the client (e.g., the fact that a corporate client is seeking advice on a corporate takeover that has not been publicly announced; that a person has consulted a lawyer about the possibility of divorce before the person's intentions are known to the person's spouse; or that a person has consulted a lawyer about a criminal investigation that has not led to a public charge). Under those circumstances, paragraph (a) prohibits disclosure unless the client or former client gives informed consent. A lawyer's fiduciary duty to the lawyer's firm may also govern a lawyer's conduct when exploring an association with another firm and is beyond the scope of these Rules.

[14] Any information disclosed pursuant to paragraph (b)(7) may be used or further disclosed only to the extent necessary to detect and resolve conflicts of interest. Paragraph (b)(7) does not restrict the use of information acquired by means independent of any disclosure pursuant to paragraph (b)(7). Paragraph (b)(7) also does not affect the disclosure of information within a law firm when the disclosure is otherwise authorized, see Comment [5], such as when a lawyer in a firm discloses information to another lawyer in the same firm to detect and resolve conflicts of interest that could arise in connection with undertaking a new representation.

[15] A lawyer may be ordered to reveal information relating to the representation of a client by a court or by another tribunal or governmental entity claiming authority pursuant to other law to compel the disclosure. Absent informed consent of the client to do otherwise, the lawyer should assert on behalf of the client all nonfrivolous claims that the order is not authorized by other law or that the information sought is protected against disclosure by the attorney-client privilege or other applicable law. In the event of an adverse ruling, the lawyer must consult with the client about the possibility of appeal to the extent required by Rule 1.4. Unless review is sought, however, paragraph (b)(6) permits the lawyer to comply with the court's order.

[16] Paragraph (b) permits disclosure only to the extent the lawyer reasonably believes the disclosure is necessary to accomplish one of the purposes specified. Where practicable, the lawyer should first seek to persuade the client to take suitable action to obviate the need for disclosure. In any case, a disclosure adverse to the client's interest should be no greater than the lawyer reasonably believes necessary to accomplish the purpose. If the disclosure will be made in connection with a judicial proceeding, the disclosure should be made in a manner that limits access to the information to the tribunal or other persons having a need to know it and appropriate protective orders or other arrangements should be sought by the lawyer to the fullest extent practicable.

[17] Paragraph (b) permits but does not require the disclosure of information relating to a client's representation to accomplish the purposes specified in paragraphs (b)(1) through (b)(6). In exercising the discretion conferred by this Rule, the lawyer may consider such factors as 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 conduct in question. A lawyer's decision not to disclose as permitted by paragraph (b) does not violate this Rule. Disclosure may be required, however, by other Rules. Some Rules require disclosure only if such disclosure would be permitted by paragraph (b). See Rules 1.2(d), 4.1(b),

8.1 and 8.3. Rule 3.3, on the other hand, requires disclosure in some circumstances regardless of whether such disclosure is permitted by this Rule. See Rule 3.3(c).

Acting Competently to Preserve Confidentiality

[18] Paragraph (c) requires a lawyer to act competently to safeguard information relating to the representation of a client against unauthorized access by third parties and against inadvertent or unauthorized disclosure by the lawyer or other persons who are participating in the representation of the client or who are subject to the lawyer's supervision. See Rules 1.1, 5.1 and 5.3. The unauthorized access to, or the inadvertent or unauthorized disclosure of, information relating to the representation of a client does not constitute a violation of paragraph (c) if the lawyer has made reasonable efforts to prevent the access or disclosure. Factors to be considered in determining the reasonableness of the lawyer's efforts include, but are not limited to, the sensitivity of the information, the likelihood of disclosure if additional safeguards are not employed, the cost of employing additional safeguards, the difficulty of implementing the safeguards, and the extent to which the safeguards adversely affect the lawyer's ability to represent clients (e.g., by making a device or important piece of software excessively difficult to use). A client may require the lawyer to implement special security measures not required by this Rule or may give informed consent to forgo security measures that would otherwise be required by this Rule. Whether a lawyer may be required to take additional steps to safeguard a client's information in order to comply with other law, such as state and federal laws that govern data privacy or that impose notification requirements upon the loss of, or unauthorized access to, electronic information, is beyond the scope of these Rules. For a lawyer's duties when sharing information with nonlawyers outside the lawyer's own firm, see Rule 5.3, Comments [3]-[4]. _

[19] When transmitting a communication that includes information relating to the representation of a client, the lawyer must take reasonable precautions to prevent the information from coming into the hands of unintended recipients. This duty, however, does not require that the lawyer use special security measures if the method of communication affords a reasonable expectation of privacy. Special circumstances, however, may warrant special precautions. Factors to be considered in determining the reasonableness of the lawyer's expectation of confidentiality include the sensitivity of the information and the extent to which the privacy of the communication is protected by law or by a confidentiality agreement. A client may require the lawyer to implement special security measures not required by this Rule or may give informed consent to the use of a means of communication that would otherwise be prohibited by this Rule. Whether a lawyer may be required to take additional steps in order to comply with other law, such as state and federal laws that govern data privacy, is beyond the scope of these Rules.

Former Client

[20] The duty of confidentiality continues after the client-lawyer relationship has terminated. See Rule 1.9(c)(2). See Rule 1.9(c)(1) for the prohibition against using such information to the disadvantage of the former client.

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Faculty

Jane H. Downey is a partner with Moore Bradley Myers Law Firm in Columbia, S.C., where she focuses her practice on consumer and business bankruptcy, debtor/creditor law, loan modifications and arbitration and mediation. She represents creditors, debtors and unsecured creditor committees in chapter 7, 9, 11, 12 and 13 business and consumer cases, including bankruptcy litigation. She also is on the list of mediators with the U.S. Bankruptcy Court for the District of South Carolina. Ms. Downey assists consumers with loan modifications both in and outside of bankruptcy. She is one of the five attorneys at Moore Taylor recognized in *Super Lawyers*, and she currently serves on the editorial board of *South Carolina Lawyer* magazine and the South Carolina Bar Pro Bono Committee. Ms. Downey volunteers with the South Carolina Bar's Ask-a-Lawyer Program and with Credit Abuse Resistance Education (CARE). Locally, she is an organizer of Open Streets Columbia through her appointment by the City of Columbia City Council to the Bicycle and Pedestrian Advisory Committee. Ms. Downey is a frequent speaker on bankruptcy topics, particularly those involving domestic law, and she has been listed in *Lawdragon*'s Leading U.S. Bankruptcy Lawyer list. Ms. Downey serves on the editorial board of ABI's Southeast Bankruptcy Workshop. She reeived her undergraduate degree in 1987 from Furman University and her J.D. in 1990 from Emory Law School.

Cheryl E. James is a staff attorney for Chapter 13 Trustee Beverly M. Burden in Lexington, Ky. During her nine years with the trustee, she's covered cases in every division of the Eastern District of Kentucky and currently focuses on the Frankfort, Covington and Ashland divisions. Prior to joining the trustee's staff, Ms. James was a member of the staff of the late Judge Joseph M. Scott, Jr. and the late Judge Joe Lee in the Eastern District Bankruptcy Court. She worked with the judges on two occasions for a total of seven years. In between her service with the bankruptcy court, Ms. James was an associate on the bankruptcy and litigation teams at the law firm of Greenebaum, Doll & McDonald, PLLC (now Dentons Bingham Greenbaum). She worked as program manager for the National Association of Chief Information Officers's (NASCIO's) information architecture program prior to joining the bankruptcy court staff. Ms. James is a member of the John Rowe Chapter of the National Bar Association, the Kentucky Bar Association and ABI. In addition, she is a sustaining member of the Junior League of Lexington and a former board member of God's Pantry Food Bank and Prevent Child Abuse Kentucky. Ms. James received her B.A. with honors in computer science from Transylvania University with a minor in math and her J.D. from the University of Kentucky College of Law.

Angela M. Kirby is a sole practitioner with Kirby Law, LLC in Columbia, S.C., where she practices in the areas of estate planning, probate administration and litigation, trust administration and litigation, guardianships and conservatorships, fiduciary appointments, business succession planning, special and supplemental needs trusts, elder law, probate and trust mediation, estate and gift taxation and prenuptial agreements. Prior to attending law school, she was an accountant at KPMG Peat Marwick. Ms. Kirby is a former associate probate judge for Richland County. The Supreme Court of South Carolina has designated her as a Certified Estate Planning and Probate Specialist based on her years of experience and passing an additional complex examination that tested her abilities in this particular field of law. As a former CPA, Ms. Kirby brings her accounting and financial experience to each estate plan that she works on for her clients. As a former associate probate judge, she spent more than five years on the bench overseeing complex probate issues. She has represented hundreds

of personal representatives and heirs, and has been involved in all aspects of probate administration and litigation. Ms. Kirby has been listed in *Super Lawyers* for several consecutive years. She also received the Midlands Legal Elite award in the field of estate planning for several consecutive years. Ms. Kirby is a member of the advisory board for the Midlands Technical College paralegal program and speaks annually for the South Carolina Bar on various estate-planning and probate topics. She received her B.S. in business administration *cum laude* in 1986 from the College of Charleston, her Master's with honors in professional accountancy in 1987 from Clemson University College of Business and Behavioral Science and her J.D. in 1993 in estate planning and probate from the University of South Carolina Law School.

David S. Weidenbaum has been a trial attorney with the Office of the U.S. Trustee in Atlanta since 2006. Previously, he clerked for Bankruptcy Judge Mary Grace Diehl in the U.S. Bankruptcy Court for the Northern District of Georgia from 2004-06, represented chapter 13 trustees from 1999-2003, and was in private practice from 1998-99 and 2003-04, representing debtors and creditors. Mr. Weidenbaum received his B.A. in history *magna cum laude* from the State University of New York at Albany in 1993 and his J.D. from Emory Law School in 1997.