CHAPTER 2:

Appointment of Attorney as *Guardian ad Litem*

2.1 Right to Counsel

A. Right to Retained or Appointed Counsel

An allegedly incapacitated respondent has the right to be represented by counsel in guardianship proceedings under G.S. Ch. 35A. G.S. 35A-1107(a). *See also Simon v. Craft*, 182 U.S. 427 (1901); *In re Deere*, 708 P.2d 1123, 1126 (Okla. 1985).

B. Right to Retain Counsel

An allegedly incapacitated respondent has the right to retain counsel of his or her own choosing if he or she has the mental capacity (and financial ability) to do so. G.S. 35A-1107(a). *See also* 98 Formal Ethics Opinion 16 (N.C. State Bar 1999).

A third party (including a relative or friend of a respondent) may retain a lawyer to represent an allegedly incapacitated respondent in an adult guardianship proceeding and pay the retained attorney's fee on behalf of the respondent as long as the respondent consents to being represented by the retained attorney and has sufficient mental capacity to consent to being represented by the retained attorney. *See* 98 Formal Ethics Opinion 16 (N.C. State Bar 1999). An attorney who has been retained by a third party to represent an allegedly incapacitated respondent in an adult guardianship proceeding may do so and accept payment of his or her attorney's fee from the third party as long as the respondent consents to being represented by the retained attorney and has sufficient mental capacity to consent to being represented by the retained attorney and the acceptance of payment from the third party will not interfere with the lawyer's professional judgment or the attorney-client relationship with the respondent or result in the disclosure of confidential client information. *See* 98 Formal Ethics Opinion 16 (N.C. State Bar 1999).

The mere fact that an attorney retained to represent an allegedly incapacitated respondent in an adult guardianship proceeding has represented the spouse or another relative of the respondent (other than a spouse or relative who is the petitioner in the pending guardianship proceeding) does not, in and of itself, constitute a conflict of interest that disqualifies the

attorney from representing the respondent in the pending guardianship proceeding. *See 98* Formal Ethics Opinion 16 (N.C. State Bar 1999).

Practice Note: An attorney who is retained by or on behalf of an allegedly incapacitated respondent in an adult guardianship proceeding must comply with Rule 1.14 of the N.C. State Bar's Revised Rules of Professional Conduct if the attorney determines that the respondent's mental capacity is diminished. Rule 1.14 is discussed in more detail in § 2.6 of this chapter.

C. Constitutional and Statutory Right to Appointed Counsel

It is not clear that an allegedly incapacitated respondent has a *constitutional* right to appointed counsel in a guardianship proceeding. *See Rud v. Dahl*, 578 F.2d 674, 679 (7th Cir. 1978). *Cf. In re Gilbuena*, 209 Cal. Rptr. 556, 559–60 (Cal. Ct. App. 1985); *In re Deere*, 708 P.2d 1123, 1126 (Okla. 1985); *In re Fey*, 624 So.2d 770, 771 (Fla. Dist. Ct. App. 1993); *In re Lee*, 754 A.2d 426, 439 (Md. Ct. Spec. App. 2000).

Instead, most states provide, by statute, for the appointment of an attorney to represent an allegedly incapacitated respondent in a guardianship proceeding if the respondent is unable to retain counsel, if the respondent is indigent, or in other circumstances.

D. Appointment of Attorney as *Guardian ad Litem*

North Carolina's current guardianship statute provides for the appointment of an attorney to represent an allegedly incapacitated respondent as the respondent's *guardian ad litem* in a proceeding to appoint a guardian for the respondent pursuant to Articles 1 and 5 of G.S. Chapter 35A unless the respondent retains counsel. G.S. 35A-1107(a).

The appointment of an attorney to serve as the respondent's *guardian ad litem* pursuant to G.S. 35A-1107(a) is not dependent on a determination that the respondent is indigent. *Cf.* G.S. 7A-451(a)(13) (providing that an *indigent* person is entitled to the services of appointed counsel in adult guardianship proceedings under Article 1 of G.S. Chapter 35A).

The appointment of an attorney to serve as an allegedly incapacitated respondent's *guardian ad litem* pursuant to G.S. 35A-1107(a) does not require the court to find reasonable cause to believe that the respondent is, in fact, incapacitated. *Cf. Hagins v. Greensboro Redevelopment Comm'n*, 275 N.C. 90 (1969) (holding that a court may not appoint a *guardian ad litem* for an allegedly incapacitated party to a civil action or proceeding absent adequate notice to the party, opportunity to be heard, and sufficient evidence regarding the party's incapacity).

2.2
Appointment and Discharge of Attorney as *Guardian ad Litem*

A. Statutory Authority

G.S. 35A-1107(a) provides that when a petition is filed seeking the appointment of a guardian for an allegedly incapacitated adult, an attorney must be appointed to represent the respondent as the respondent's *guardian ad litem* unless the respondent has retained counsel.

The Clerk is not required to find that the respondent is indigent before appointing an attorney to serve as the respondent's *guardian ad litem* pursuant to G.S. 35A-1107(a). *Cf.* G.S. 7A-451(a)(13); G.S. 7A-450.

B. Appointment by Court

The Clerk of Superior Court generally is responsible for appointing an attorney to represent an allegedly incapacitated respondent in a guardianship proceeding pursuant to G.S. 35A-1107(a). The Clerk's appointment of an attorney as the respondent's *guardian ad litem*, however, must be in accordance with rules adopted by North Carolina's Office of Indigent Defense Services (IDS). G.S. 35A-1107(a); G.S. 7A-489.3(a)(3). *See also N.C. Attorney General Advisory Opinion to Malcolm Ray Hunter* (March 11, 2004).

C. Indigent Defense Services' Rules Governing Appointment

Rule 1.5 of the rules adopted by North Carolina's Office of Indigent Defense Services governs the appointment of attorneys for respondents in guardianship proceedings. In districts that have a Public Defender, the appointment generally must be made in accordance with the plan for appointment of counsel in non-criminal cases adopted by the Public Defender and approved by the Office of Indigent Defense Services. In districts that do not have a Public Defender, the appointment generally must be made on a systematic and impartial basis in accordance with the plan for appointment of counsel in non-criminal cases adopted by the judicial district bar or the county bar association, or, in the absence of such a plan, by the court. Rule 1.5 also provides that, in any district, the Office of Indigent Defense Services may provide for the appointment of counsel for respondents in guardianship proceeding in accordance with a contract, plan, or program approved by IDS. *See N.C. Attorney General Advisory Opinion to Malcolm Ray Hunter* (March 11, 2004).

An attorney may not be appointed to represent a respondent in a guardianship proceeding unless the attorney has agreed to the placement of his or her name on the list of attorneys subject to appointment in guardianship proceedings, or, if the attorney has not agreed to do so, has otherwise consented to be appointed.

IDS rules do not currently impose any special qualifications for attorneys who are appointed to represent respondents in guardianship proceedings. Special qualifications, however, may be required under local appointment plans.

An attorney who is appointed to represent a respondent in a guardianship proceeding may not delegate to another attorney any material responsibilities to the respondent

unless the court finds that the substitute attorney practices in the same law firm as the appointed attorney, that the substitute attorney is on the list of attorneys who are eligible for appointment, that the substitute attorney and the respondent consent to the delegation, and that the delegation is in the respondent's best interest. IDS Rule 1.5(d)(2).

D. Discharge of Appointed Attorney

G.S. 35A-1107(a) does not expressly address the right of an allegedly incapacitated respondent to waive his or her right to be represented by appointed counsel or to discharge an attorney who has been appointed to serve as his or her *guardian ad litem*.

G.S. 35A-1107(a), however, does provide that an attorney who has been appointed to represent an allegedly incapacitated respondent as the respondent's guardian ad litem may be discharged, in accordance with any rules adopted by the Office of Indigent Defense Services, if the respondent retains counsel.

Practice Note: The IDS rules do not expressly address the circumstances under which an appointed attorney may or must be discharged in adult guardianship proceedings in which counsel has been retained by or on behalf of an allegedly incapacitated respondent. Many, if not most, Clerks are reluctant to discharge the attorney who has been appointed under G.S. 35A-1107 when counsel has been retained by or on behalf of an allegedly incapacitated respondent—often because they fear that the retained attorney represents the interests of the petitioner or a relative of the respondent, rather than the respondent's interests or because they do not believe that the respondent has sufficient mental capacity to retain counsel. If, however, an allegedly incapacitated respondent is represented by retained counsel *and* by an attorney who is appointed under G.S. 35A-1107, the role and responsibilities of the appointed attorney are even less clear than in cases in which a respondent is not represented by retained counsel and the relationship between the respondent's appointed attorney and retained counsel may be legally and professionally complex and problematic.

E. Withdrawal of Appointed Attorney

IDS Rule 1.7 governs the withdrawal of counsel appointed to represent respondents in guardianship proceedings. Under that rule, the court may, upon application of the attorney appointed to the case and for good cause shown, permit the attorney to withdraw from the case.

F. Scope of Representation by Appointed Attorney

Unless he or she is discharged or allowed to withdraw, an attorney who is appointed to represent a respondent in a guardianship proceeding represents the respondent until the guardianship petition is dismissed or until a guardian is appointed for the respondent. G.S. 35A-1107(b). If a guardian is appointed, appointed counsel must continue to represent the respondent until the entry of appeal to the appellate division or the expiration of the time for appeal. IDS Rule 1.7(a).

If a guardianship order is appealed to the Superior Court, appointed counsel must continue to represent the respondent until the superior court enters a final order deciding the appeal and until the entry of an appeal from the Superior Court's order or the expiration of the time for appeal therefrom. IDS Rule 1.7(a). If the Superior Court remands a guardianship proceeding to the Clerk of Superior Court, appointed counsel must continue to represent the respondent in connection with the proceeding on remand.

If the case is appealed to the North Carolina Court of Appeals, the Office of Appellate Defender is appointed to represent the respondent. IDS Rule 3.2(b). That Office may assign the case to an attorney within that Office or to outside counsel on the roster of appellate attorneys maintained by that Office. IDS Rule 3.2(d).

2.3
Statutory Powers and Duties of Appointed Attorney

Practice Note: An attorney who is appointed as the *guardian ad litem* for an allegedly incapacitated respondent under G.S. 35A-1107 does *not* have any authority to act as the respondent's guardian with respect to matters involving the respondent's medical care or the respondent's property. An attorney who is appointed as the *guardian ad litem* for an allegedly incapacitated respondent under G.S. 35A-1107 does *not* have the authority to act as the respondent's "emergency" or "interim" guardian.

A. Determining and Expressing the Respondent's Wishes

G.S. 35A-1107(b) requires an attorney who is appointed to represent an allegedly incapacitated respondent to

- personally visit the respondent as soon as possible following the attorney's appointment;
- make every reasonable effort to determine the respondent's wishes with respect to the guardianship proceeding; and
- present the respondent's express wishes to the court at all relevant stages of the proceeding.

B. Considering Whether Limited Guardianship Is Appropriate

G.S. 35A-1107(b) also requires appointed counsel to consider the appropriateness of limited guardianship and, if a limited guardianship is appropriate, to make recommendations to the court regarding the rights, powers, and privileges that the respondent should be allowed to retain.

C. Powers and Duties Under N.C. R. Civ. P. 17

An attorney appointed pursuant to G.S. 35A-1107 has all of the powers and duties of a *guardian ad litem* appointed to represent an incapacitated party pursuant to N.C. R. Civ. P. Rule 17, including the authority and responsibility to

- carefully investigate all facts relevant to the pending proceeding;
- secure or subpoena witnesses to testify on behalf of the respondent; and
- do all other things that are required to protect the respondent's rights and interests in connection with the pending proceeding.

Practice Note: If the respondent is represented by retained counsel, the respondent's retained attorney, rather than the attorney appointed as the respondent's *guardian ad litem*, may have the authority, in consultation with the respondent, to make decisions regarding the respondent's representation in the proceeding. *See* 98 Formal Ethics Opinion 16 (N.C. State Bar 1999).

D. Demanding an Evaluation, Closed Hearing, Jury Trial, or Appeal

Practice Note: If the respondent is represented by retained counsel, the respondent's retained attorney, rather than the attorney appointed as the respondent's *guardian ad litem*, may have the authority to exercise the following rights on behalf of the respondent.

G.S. Ch. 35A expressly authorizes the attorney who represents the respondent to request, on behalf of the respondent, that

- the issue of incapacity be determined by a jury;
- the hearing in a guardianship proceeding be closed to the public.

G.S. Ch. 35A implicitly authorizes the attorney who represents the respondent to

- request, on behalf of the respondent, that the court order a multidisciplinary evaluation of the respondent;
- give notice of appeal, on behalf of the respondent, from an order finding the respondent to be incapacitated or appointing a guardian for the respondent.

E. Making Recommendations Regarding the Respondent's "Best Interests"

G.S. 35A-1107(b) provides that an attorney who is serving as the respondent's *guardian ad litem* may make recommendations concerning the respondent's best interests if the respondent's best interests differ from the respondent's express wishes regarding guardianship. This issue is discussed in more detail in § 2.4 of this chapter.

F. Waiving the Respondent's Substantive Legal Rights

Neither G.S. Ch. 35A nor N.C. R. Civ. P. Rule 17 authorizes an attorney who is serving as the *guardian ad litem* for an allegedly incapacitated respondent in a guardianship proceeding to waive, compromise, or settle the respondent's substantive legal rights or to consent to the entry of a judgment against the respondent *without* the respondent's consent.

2.4
Role of Appointed Attorney or *Guardian ad Litem*

Practice Note: The discussion in this section assumes that the respondent is not represented by retained counsel. If an allegedly incapacitated respondent is represented by retained counsel and an attorney has been appointed as the respondent's guardian ad litem under G.S. 35A-1107 and is not discharged as the respondent's guardian ad litem, the role and responsibilities of the appointed attorney may be even less clear than in cases in which a respondent is not represented by retained counsel and the relationship between the respondent's appointed attorney and retained counsel may be legally and professionally problematic.

A. Attorney or *Guardian ad Litem*?

Although most state guardianship statutes nominally provide that a court-appointed lawyer acts as either the respondent's attorney or *guardian ad litem*, the role and responsibilities of court-appointed lawyers in guardianship proceedings are not always clearly defined.

G.S. 35A-1107, for example, states that the role of an attorney appointed to represent an allegedly incapacitated respondent in a guardianship proceeding generally is that of a *guardian ad litem* appointed pursuant to N.C. R. Civ. P. Rule 17. The precise nature and scope of the role and responsibilities of an attorney who is appointed as the *guardian ad litem* for an incapacitated respondent in a guardianship proceeding, however, are not entirely clear.

B. The "Zealous Advocate" and "Best Interest" Perspectives

Discussions regarding the role of lawyers who are appointed to represent allegedly incapacitated respondents in guardianship proceedings often are couched in terms of two competing models or perspectives: the "zealous advocate" model and the "best interest" perspective.

C. The "Best Interest" Perspective

Under the "best interest" perspective, the role of a court-appointed lawyer in a guardianship proceeding should be to determine, represent, and protect the respondent's "best interest." Under this model, a court-appointed lawyer acts primarily as an investigator or officer of the court rather than the respondent's attorney or a zealous advocate for the position voiced by the respondent. "In this role, the attorney determines what is in the best interest of the person who is the subject of the guardianship [proceeding,] . . . uses his or her own judgment to decide whether the person is competent, investigates the situation, and typically files a report with the court advocating what the attorney decides is in the best interest of the client." Joan L. O'Sullivan, *Role of the Attorney for the Alleged Incapacitated Person*, 31 Stetson L. Rev. 687, 687 (2001–02).

The responsibilities of a court-appointed lawyer under the "best interest" model therefore generally include

- conducting an independent and impartial investigation of the respondent's mental capacity, needs, and situation; and
- making recommendations to the court with respect to the respondent's need for a guardian, the nature and scope of the proposed guardianship, the suitability of the proposed guardian, and the respondent's best interests even if those recommendations conflict with the respondent's expressed desire or position with respect to the guardianship proceeding.

D. The "Zealous Advocate" Model

By contrast, proponents of the "zealous advocate" model contend that the role of a court-appointed attorney in guardianship proceedings is to act as "a zealous advocate for the wishes of [his or her] client." *In re Mason*, 701 A.2d 979, 982 (N.J. Super. Ch. Div. 1997). The "zealous advocate" model, therefore, requires a court-appointed lawyer to represent the allegedly incompetent respondent in a guardianship proceeding in the same manner, insofar as it is possible to do so, she would represent any client in a pending legal proceeding.

More specifically, the "zealous advocate" model requires a respondent's court-appointed lawyer to "advise the [respondent] of all the options as well as the practical and legal consequences of those options and the probability of success in pursuing any one of those options; give that advice in the language, mode of communication and terms that the [respondent] is most likely to understand; and (c) zealously advocate the course of actions chosen by the [respondent]." *Wingspan—The Second National Guardianship Conference: Recommendations*, 31 Stetson L. Rev. 595, 601 (2002).

Proponents of the "zealous advocate" model contend that the potential loss of the respondent's legal rights in a guardianship proceeding requires, as a matter of public policy if not due process, that a court-appointed lawyer act as the respondent's attorney and advocate in any case in which the respondent is unable, due to indigency or incapacity, to retain legal counsel of his own choice or adequately communicate his own position regarding the guardianship proceeding to the court. They also contend that the "zealous advocate" model should apply even in cases in which the respondent's incompetency is clear or uncontested, since the respondent may need an advocate to contest other aspects of the guardianship proceeding, including the scope of the proposed guardianship, the suitability of the proposed guardian, or the residential placement or medical treatment of the respondent. *See In re M.R.*, 638 A.2d 1274, 1285 (N.J. 1994). And while proponents of the "zealous advocate" model generally recognize that a court-appointed attorney's role "does not extend to advocating [a respondent's] decisions [if they] are patently absurd or . . . pose an undue risk of harm" to the respondent, they also contend that "advocacy that is diluted by excessive concern for the [respondent's] best interests . . . raise[s] troubling questions for attorneys in an adversarial system." *In re M.R.*, 638 A.2d at 1285.

E. "Zealous Advocate," "Best Interest," or "Both Hats?"

Courts and commentators commonly use the "zealous advocate" and "best interest" models to describe and distinguish the role of court-appointed lawyers in guardianship proceedings, often equating the "best interest" model with a lawyer's role as *guardian ad litem* and the "zealous advocate" model with a lawyer's role as the respondent's attorney. It is far from clear, however, that the "best interest" model accurately and completely describes the role of a *guardian ad litem* in guardianship proceedings *or* that the "zealous advocate" model adequately describes the role of a court-appointed lawyer who acts as the attorney for an allegedly incompetent respondent.

As noted above, the "zealous advocate" model does not require that an attorney always advocate the positions or wishes of her client. And the rules of professional conduct (N.C. Revised Rules of Professional Conduct, Rule 1.14) governing lawyers allow a lawyer to make decisions on behalf of a client if the client's mental incapacity prevents him from making appropriate decisions in connection with a legal proceeding and the lawyer's actions are in the client's "best interest." Nor is there an exact correlation between the "best interest" model and the role and responsibilities of a *guardian ad litem* for an allegedly incompetent adult.

So while the "zealous advocate" and "best interest" models may provide a general context for discussing the role of court-appointed lawyers in guardianship proceedings, their usefulness is limited and they are not determinative.

As a result of this ambiguity and confusion, some lawyers who are appointed to represent allegedly incapacitated respondents in guardianship proceedings simply choose whichever role they prefer. Some choose what they may perceive to be the "easier" or "safer" role—simply investigating the facts and presenting information to the court. Others believe that they should act in what they perceive to be the respondent's "best interest," rather than acting as a "zealous advocate" for the respondent or the respondent's expressed wishes. And others believe that they can and should act as zealous advocates, opposing the appointment of a guardian for the allegedly incompetent respondent, if the respondent desires to do so, without regard to whether guardianship is in the respondent's "best interest."

The result of choosing one role rather than the other, however, may be that "some important functions [that should be performed by an attorney or *guardian ad litem*] may never be performed by anyone [and] other functions may be performed by persons who do not have the training to perform them properly. . . ." James M. Peden, *The Guardian ad litem Under the Guardianship Reform Act: A Profusion of Duties, a Confusion of Roles*, 68 U. Det. L. Rev. 19, 29 (1990–91).

Confronted with the dilemma of whether to act as the respondent's attorney or *guardian ad litem*, some court-appointed lawyers attempt to "wear both hats." *See* A. Frank Johns, *Guardianship from 1978 to 1988 in View of Restructure* (N.C. Bar Foundation, 1988). And while this is not a problem *if* and to the extent that the responsibilities of these two roles are consistent with each other and with state law, some courts and commentators believe that the roles of attorney and *guardian ad litem* are "materially different," are potentially, if not inherently, incompatible, and should not be performed simultaneously by one person. *See*

In re Lee, 754 A.2d 426, 438 (Md. Spec. Ct. App. 2000) ("the duties of an attorney may at times conflict with the duties of a *guardian ad litem*"); Vicki Gottlich, *The Role of the Attorney for the Defendant in Adult Guardianship Cases: An Advocate's Perspective*, 7 Md. J. Contemp. L. Issues 191, 194 (1995–96); Sally Balch Hurme, *Current Trends in Guardianship Reform*, 7 Md. J. Contemp. L. Issues 143, 151 (1995–96) (suggesting that in most cases, "the same person cannot, and should not, serve in both roles simultaneously"); Elizabeth R. Calhoun and Suzanna L. Basinger, *Right to Counsel in Guardianship Proceedings*, 33 Clearinghouse Rev. 316, 319 (Sept.–Oct. 1999). *See also* G.S. 7B-602(c) and G.S. 7B-1101(c) (prohibiting an attorney from acting as both the attorney and *guardian ad litem* for a parent in a juvenile court proceeding).

2.5
Professional and Ethical Responsibilities of Appointed Attorney

A. General Scope of the Rules of Professional Conduct

All North Carolina attorneys, including attorneys who are appointed as *guardians ad litem* for respondents in guardianship proceedings, are subject to the requirements and limitations contained in the North Carolina State Bar's Revised Rules of Professional Conduct (RPC). Some of the RPC, however, "create duties that are owed only in the professional client-lawyer relationship" while "other rules . . . apply . . . [even when] a lawyer is acting in a non-professional capacity." 2004 Formal Ethics Opinion 11 (North Carolina State Bar, Jan. 21, 2005).

B. Application of the Rules to Lawyers Who Are Appointed as *Guardians ad Litem*

The extent to which lawyers who are appointed as *guardians ad litem* in guardianship proceedings are subject to the RPC, therefore, depends on whether the lawyers who are appointed to represent allegedly incapacitated respondents under G.S. 35A-1107 have a client-lawyer relationship with the respondent, or whether they are acting in a "non-professional capacity" when they are serving as *guardians ad litem*.

The North Carolina State Bar's ethics committee recently addressed a similar issue in the context of lawyers who are appointed, pursuant to G.S. 7B-1101(1) and Rule 17, as guardians ad litem for "incapacitated" parents who are respondents in juvenile proceedings involving termination of parental rights. *See* 2004 Formal Ethics Opinion 11; *see also In re Shepard*, 162 N.C. App. 215 (2004). The ethics committee ruled that if another lawyer is appointed as the parent's attorney, the lawyer who is appointed as the parent's *guardian ad litem* "does not have a client-lawyer relationship with the parent, and therefore, would not be governed by the Rules of Professional Conduct relating to duties owed to clients."

Thus, a court-appointed lawyer who acts "purely as a guardian [ad litem] and not [as] an attorney" is *not* bound by the ethical rules governing confidentiality (Rule 1.6), zealous advocacy (Rule 1.3), loyalty (Rules 1.7 through 1.10), or evaluations for use by third persons (Rule 2.3), but is subject to the ethical rules governing candor toward the court

(Rule 3.3), fairness to opposing party and counsel (Rule 3.4), ex parte communications with and unlawful influence of judicial officials (Rule 3.5), and dishonesty, fraud, deceit, misrepresentation, and conduct prejudicial to the administration of justice (Rule 8.4).

The committee, however, also ruled that if a court appoints a lawyer to act as a party's attorney and *guardian ad litem*, the lawyer must comply with the Rules of Professional Conduct that apply to client-lawyer relationships. Given the ambiguity regarding the role of lawyers who are appointed to represent respondents in guardianship proceedings, a lawyer who is appointed under G.S. 35A-1107 may be acting as the respondent's attorney *and guardian ad litem* in cases in which the respondent has not retained counsel. And if this is so, a lawyer who is appointed as the *guardian ad litem* for an unrepresented respondent in a guardianship proceeding is subject to the Rules of Professional Conduct that govern client-lawyer relationships.

C. Responsibilities as a "Zealous Advocate"

When a lawyer has an attorney-client relationship with a client, the RPC generally require the lawyer to act, within the bounds of law and insofar as possible, as a "zealous advocate" for her client. The official comments to Rule 1.3 of the North Carolina State Bar's Revised Rules of Professional Conduct require a lawyer to "act with commitment and dedication to the interests of the client and with zeal in advocacy upon the client's behalf." In representing a client, a lawyer is required to "abide by a client's decisions concerning the objectives of representation and . . . consult with the client as to the means by which they are to be pursued." RPC Rule 1.2. In representing a client, however, a lawyer may exercise her professional judgment to waive or fail to assert a right or position of the client and may exercise professional discretion in determining the means by which a matter should be pursued. RPC Rule 1.2(a)(3); RPC Rule 1.4 (Comment 1). *Cf. State v. Ali*, 329 N.C. 391, 403 (1991).

A lawyer's professional obligation to act as a zealous advocate for her client "is not a license to raise frivolous defenses or to stand obdurately on procedural points." *See* O'Sullivan, 7 Md. J. Contemp. Legal Issues at 68; *see also* RPC Rule 3.1; RPC Rule 1.2(a)(2). It does, however, require a court-appointed lawyer to

- communicate with her client;
- explain the potential legal consequences of and the legal options with respect to the pending litigation to the client;
- ascertain the client's wishes with respect to pending litigation;
- secure and present evidence and arguments on behalf of the client; and
- take appropriate actions (such as objecting to inadmissible evidence and cross-examining adverse witnesses) necessary to protect the client's legal rights and interests in the litigation.

At a minimum, the rule of "zealous advocacy" requires a lawyer who is appointed as the attorney and *guardian ad litem* for an allegedly incapacitated respondent in a guardianship proceeding to ensure that

- the respondent is not found to be incompetent in the face of insufficient evidence;
- guardianship is not ordered if there are appropriate and less restrictive alternatives available to protect the respondent's interests;
- the guardian appointed for an incompetent respondent is suitable and qualified; and
- appropriate limits are placed on the guardianship when necessary to protect the respondent's rights and interests.

D. Responsibility to Protect Client Confidences and Secrets

If a court-appointed lawyer acts as the attorney and *guardian ad litem* for a respondent in a guardianship proceeding, the lawyer has an ethical and professional obligation to protect the respondent's confidences and secrets and is prohibited from revealing information about the respondent acquired during the attorney-client relationship unless the respondent gives informed consent to the disclosure or disclosure is authorized under the Revised Rules of Professional Conduct. *See* 2004 Formal Ethics Opinion 11.

E. Other Professional Responsibilities When Representing Clients

In addition, a lawyer who is appointed as the respondent's attorney and *guardian ad litem* is subject to the State Bar's rules governing

- communication with a client (Rule 1.4);
- competent legal representation (Rule 1.1);
- loyalty to a client and conflicts of interest (Rules 1.7 through 1.10);
- terminating legal representation (Rule 1.16);
- undertaking evaluations for use by third parties (Rule 2.3);
- the assertion of nonmeritorious claims or defenses (Rule 3.1);
- dilatory practices and delaying litigation (Rule 3.2);
- candor toward the court (Rule 3.3);
- fairness to the opposing party and counsel (Rule 3.4);
- *ex parte* communications with judicial officials and unlawful attempts to influence judicial officials (Rule 3.5);
- testifying as a witness at trial (Rule 3.7);
- making false statements of law or fact to others (Rule 4.1);
- communication with persons represented by counsel (Rule 4.2);
- dealing with unrepresented persons (Rule 4.3);
- respect for the rights of others (Rule 4.4);
- dishonesty, fraud, deceit, misrepresentation, and conduct prejudicial to the administration of justice (Rule 8.4); and
- representing clients with diminished mental capacity (Rule 1.14).

2.6
Representing Persons with Diminished Capacity

A. RPC Rule 1.14

If a lawyer who is appointed as the *guardian ad litem* for a respondent in a guardianship proceeding is subject to the ethical and professional rules governing client-lawyer relationships, the lawyer's representation of the allegedly incompetent respondent may be affected by RPC Rule 1.14, which governs a lawyer's representation of a client with diminished mental capacity. The rule 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* 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.

Because an adult respondent in guardianship proceedings is alleged to be mentally incapacitated or incompetent, a court-appointed lawyer who acts as the attorney and *guardian ad litem* for an allegedly incompetent respondent must consider whether and to what extent Rule 1.14 applies with respect to her representation of the respondent.

B. Role and Responsibilities of Lawyers Under Rule 1.14

"Representing a questionably competent client is always an enormous challenge. . . . The client may be confused about some things, but not about others. He or she may make bad decisions and insist that the lawyer advocate for him or her, or may demand that the lawyer defend a seemingly indefensible position." Joan L. O'Sullivan, *Role of the Attorney for the Alleged Incapacitated Person*, 31 Stetson L. Rev. 687, 725 (2001–02).

If a court-appointed lawyer representing an allegedly incapacitated respondent in a guardianship proceeding determines that the respondent's capacity to make adequately considered decisions in connection with the pending proceeding is diminished due to a mental impairment, the lawyer must, as far as reasonably possible, maintain a normal attorney-client relationship with the respondent.

Comment 1 to Rule 1.14 reminds lawyers that "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." Thus, the North Carolina State Bar's ethics committee has ruled that an attorney may represent an allegedly incompetent respondent in opposing adjudication of the respondent's incompetency and appointment of a guardian if (a) the respondent instructs the attorney to do so, (b) the attorney determines that the respondent has sufficient mental capacity to make an adequately considered decision to oppose the guardianship petition, and (c) opposing the petition does not require the attorney to present a frivolous claim or defense on behalf of the respondent or violate another rule of professional conduct. *See* 1998 Formal Ethics Opinion 16.

Protective action by lawyer. Rule 1.14, however, allows a lawyer to take "protective action" on behalf of a client (and presumably contrary to the client's expressed wishes) if the lawyer determines that the client's mental impairment is such that he cannot make adequately considered decisions that will adequately protect his interests in connection with a legal proceeding and is thereby at risk of substantial physical, financial, or other harm. (Even in these instances, however, the lawyer may disclose confidential information about the client only to the extent reasonably necessary to protect the client's interests.) Similarly, comments 9 and 10 to Rule 1.14 allow a lawyer to take legal action on behalf of a person whose mental capacity is so severely diminished that he cannot establish a client-lawyer relationship with the attorney or make or express considered judgments about a legal matter *if* a person acting in good faith on behalf of the incapacitated person requests the lawyer to act on behalf of the incapacitated person and legal action is required to avoid imminent and irreparable harm to the health, safety, or financial interests of the incapacitated individual. And comment 7 to Rule 1.14 suggests that any protective action that a lawyer takes on behalf of a client with diminished capacity 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 decision-making autonomy to the least extent feasible, maximizing client capacities and respecting the client's family and social connections."

Lawyer's authority to make decisions for client. Similarly, the Restatement (Third) of the Law Governing Lawyers states that when a lawyer determines that a client is unable to make adequately considered decisions regarding the matter of legal representation, the lawyer may pursue her reasonable view of the client's objectives or interests as the client would define them if able to make adequately considered decisions—even if the client expresses no wishes or gives contrary instructions.

When a client's disability prevents maintaining a normal client-lawyer relationship and there is no guardian or other legal representative to make decisions for the client, the lawyer may be justified in making decisions with respect to questions within the scope of the representation that would normally be made by the client. A lawyer should act only on a reasonable belief, based on appropriate investigation, that the client is unable to make an adequately considered decision rather than simply being confused or misguided. *See* Restatement (Third) of the Law Governing Lawyers § 24, Comment d.

"Zealous advocacy" and "best interest" under Rule 1.14. In some instances, ethical and professional rules may require a court-appointed lawyer to oppose adjudication of the respondent's incompetency, to oppose the appointment of a guardian or interim guardian, to oppose the appointment of a particular person as guardian or interim guardian, or to propose a limited, rather than plenary, guardianship. In other instances, though, the rules may justify the lawyer's conceding the respondent's incompetency or accepting the appointment of a guardian to manage the respondent's affairs. In the case of a comatose (or a severely delusional, demented, or cognitively impaired) respondent, Rule 1.14 clearly allows a court-appointed lawyer to take legal action on behalf of the respondent in a guardianship proceeding to the extent necessary to protect the respondent's health, safety, or financial interests from imminent and irreparable harm. Thus, a court-appointed lawyer may act, with little or no guidance from a severely incapacitated respondent, to ensure that "(1) there is no less restrictive alternative to guardianship; (2) proper due-process procedure is followed; (3) the petitioner proves the allegations in the petition [as required by law] . . .; (4) the proposed guardian is a suitable person to serve; and (5) if a guardian is appointed, the order leaves the client with as much autonomy as possible." O'Sullivan, 31 Stetson L. Rev. at 726.

On the other hand, though, a court-appointed lawyer who acts as the attorney and *guardian ad litem* for an allegedly incompetent adult in a guardianship proceeding may *not* disclose confidential information to the court without the respondent's consent and may *not* make recommendations to the court regarding the respondent's best interests *if* those interests differ from the respondent's express wishes *and* the respondent's mental impairment does not prevent his making adequately considered decisions that will adequately protect her interests in connection with the guardianship proceeding. *In re Lee*, 754 A.2d 426, 439–41 (Md. Ct. Spec. App. 2000).

C. Assessing a Client's Mental Capacity

In assessing a respondent's mental capacity, lawyers should remember that a person does not lack capacity merely because a guardianship proceeding has been brought against him or he "does things that other people find disagreeable or difficult to understand. Indeed, a great danger in capacity assessment is that eccentricities, aberrant character traits, or risk-taking decisions will be confused with incapacity. A capacity assessment first asks what kind of person is being assessed and what sorts of things that person has generally held to be important." Charles P. Sabatino, *Representing a Client with Diminished Capacity: How Do You Know It And What Do You Do About It?* 16 J. Am. Acad. of Matrimonial Lawyers 481, 486 (2000).

And because capacity may be "affected by countless variables: time, place, social setting, emotional, mental or physical states, etc.," capacity assessment should be approached in "two stages—first take reasonable steps to optimize capacity; and second, perform a preliminary assessment of capacity." Sabatino, 16 J. Am. Acad. of Matrimonial Lawyers at 486–99.

Assessment of a respondent's cognitive capacity should focus on the respondent's decision-making *process* more than the decisional *output* of the respondent's reasoning. The issue is whether the respondent's reasoning process is significantly impaired, not whether

the respondent's decisions are, in an objective sense, reasonable. In assessing a respondent's cognitive capacity, the issue is not whether the respondent's cognitive abilities are impaired, subaverage, or suboptimal, but rather whether the respondent's cognitive abilities are at least minimally sufficient to make important decisions.

A court-appointed lawyer, therefore, should consider several factors in assessing a respondent's cognitive capacity:

- awareness (extent of the respondent's capacity to perceive, concentrate, remember information);
- comprehension (ability to understand and assimilate information);
- reasoning (ability to integrate and rationally evaluate information);
- deliberation (ability to weigh facts and alternatives in light of personal values and potential consequences);
- understanding (ability to appreciate the nature of the situation and the possible consequences of one's decisions);
- choice (ability to express in a sufficiently stable and consistent manner one's preference or decision).

Similarly, comment 6 to Rule 1.14 states:

> 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 known long-term commitments and values of the client.

Standard screening tests, such as the Mini-Mental Status Examination (MMSE) or the Short Portable Status Questionnaire (SPSQ), may be useful in making preliminary assessments of a respondent's mental capacity. These tests, however, "provide only a crude global assessment of cognitive functioning" and do not establish or "rule out the ability to perform some decisionmaking tasks." Sabatino, 16 J. Am. Acad. of Matrimonial Lawyers at 493. Thus, in appropriate circumstances a lawyer may, and should, seek guidance from an appropriate diagnostician regarding the nature and extent of a respondent's incapacity. RPC Rule 1.14, Comment 6.

D. Communicating with Persons with Diminished Capacity: Practice Pointers

In a case involving a person with diminished mental capacity, the lawyer's communication with the person must take into account the person's mental capacity. For example, persons who suffer from Alzheimer's disease may experience "sundowner syndrome," becoming more confused around dusk. A lawyer representing a person with Alzheimer's disease, therefore, should communicate with the person early in the morning or after a meal. Similarly, lawyers should use simple terms and concrete examples in explaining legal proceedings and the possible consequences of guardianship to persons with diminished mental capacity. *See* O'Sullivan, 31 Stetson L. Rev. at 715, 727–28.

A person's physical condition, such as hearing loss, also should be taken into consideration in determining the attorney's obligations under Rule 1.4. Lawyers can attempt to enhance their communication with elderly or impaired clients by printing documents in large type, speaking in plain language and avoiding legalese, sending materials to clients for review before meetings, and minimizing background noise and distractions. Jan Ellen Rein, *Ethics and the Questionably Competent Client: What the Model Rules Say and Don't Say*, 9 Stan. L. & Policy Rev. 241, 244 (1998). Another useful technique to test the client's understanding of advice or explanations provided by a lawyer is to ask the client to paraphrase (not merely repeat) what the lawyer said.

2.7 Compensation of Appointed and Retained Attorneys for Respondents

If a respondent is not determined to be incapacitated and the court finds that the petitioner did not have reasonable grounds to bring the proceeding, the reasonable fee for respondent's appointed counsel as determined by the court must be taxed to and paid by the petitioner. G.S. 35A-1116(c)(2).

If a respondent is determined to be incapacitated and the respondent is not indigent, the reasonable fee for respondent's appointed counsel as determined by the court must be taxed to and paid by the respondent or the respondent's estate. G.S. 35A-1116(c)(1).

If an indigent respondent is determined to be incapacitated, the reasonable fee for respondent's appointed counsel, as determined by the court in accordance with IDS rules, must be submitted to and paid by the Office of Indigent Defense Services in accordance with IDS rules. G.S. 35A-1116(c)(3); IDS Rule 1.9.

2.8 Civil Liability of Appointed Attorneys

The North Carolina Supreme Court has held that a person who is appointed to serve as a *guardian ad litem* for an incapacitated party to a civil action may be held liable for damages resulting from his or her failure to exercise due diligence in the protection of the party's rights and estate. *Travis v. Johnston*, 244 N.C. 713, 722 (1956).

A recent decision by the North Carolina Court of Appeals, however, suggests that attorneys who are appointed to represent allegedly incapacitated respondents in guardianship proceedings are entitled to quasi-judicial immunity from civil liability in connection with the exercise of their official duties in guardianship proceedings. *Dalenko v. Wake County Dept. of Human Services*, 157 N.C. App. 49, 56–58 (2003). *Cf. Collins v. Tabet*, 806 P.2d 40, 48 (N.M. 1991).

Appendix 2-1
Additional Resources

The role and responsibilities of appointed counsel in guardianship proceedings are discussed in more detail in John L. Saxon, *The Role and Responsibilities of Court-Appointed Lawyers in Guardianship Proceedings*, Administration of Justice Bulletin No. 2005/06 (Chapel Hill: School of Government, The University of North Carolina at Chapel Hill, 2005), available online at www.sog.unc.edu/pubs/electronicversions/pdfs/aojb0506.pdf.

RPC Rule 1.14 is discussed in detail in Jan Ellen Rein, *Ethics and the Questionably Competent Client: What the Model Rules Say and Don't Say,* 9 Stan. L. & Policy Rev. 241 (1998), and in Elizabeth Laffitte, *Model Rule 1.14: The Well-Intended Rule Still Leaves Some Questions Unanswered,* 17 Georgetown J. Legal Ethics 313 (2003). *See also* Restatement (Third) of the Law Governing Lawyers § 24.

Some of the professional and ethical obligations of lawyers who act as the attorneys for allegedly incompetent respondents in guardianship proceedings are discussed in greater detail in Joan L. O'Sullivan, *Role of the Attorney for the Alleged Incapacitated Person*, 31 Stetson L. Rev. 687, 713–19 (2001–02), and in Vicki Gottlich, *The Role of the Attorney for the Defendant in Adult Guardianship Cases: An Advocate's Perspective*, 7 Md. J. Contemp. L. Issues 191, 201–07 (1995–96).

Issues regarding the legal representation of older adults and persons with diminished capacity also are addressed in: *Assessment of Older Adults with Diminished Capacity: A Handbook for Lawyers* (Washington, DC: ABA Commission on Law and Aging, 2005); *Representing Older Persons with Diminished Capacity: Ethical Considerations* (Washington, DC: AARP National Legal Training Project, 2005); Charles P. Sabatino, *Representing a Client with Diminished Capacity: How Do You Know It And What Do You Do About It?* 16 J. Am. Acad. of Matrimonial Lawyers 481, 486 (2000); and Erica Wood and Audrey K. Straight, *Effective Counseling of Older Clients: The Attorney-Client Relationship* (Washington, DC: ABA Commission on Legal Problems of the Elderly, 1995).