ETHICAL ISSUES WHEN DEALING WITH CHILDREN OF ELDER CLIENTS

In dealing with the children of elder clients, an attorney is confronted with four primary ethical issues: conflicts of interest, confidentiality, representing an incompetent client, and understanding who the client is. The North Carolina State Bar's Rules of Professional Conduct provide important guidance for attorneys as to how these ethical issues are to be resolved. You can obtain guidance for specific questions by calling attorneys employed by the North Carolina State Bar at 919-828-4620 and presenting hypothetical scenarios for their evaluation. They may invite you to submit a written request for a formal ethics opinion.

A. Conflicts of Interest

The primary rules governing conflicts of interest that may arise between elder clients and the family members who contact you for legal assistance are Rules 1.7 and 1.8, which provide in pertinent part:

1.7 Conflict of Interest: Current Clients

(a) Except as provided in paragraph (b), a lawyer shall not represent a client if the representation involves a concurrent conflict of interest. A concurrent conflict of interest exists if:

(1) the representation of one client will be directly adverse to another client; or

(2) the representation of one or more clients may be materially limited by the lawyer's responsibilities to another client, a former client, or a third person, or by a personal interest of the lawyer.

(b) Notwithstanding the existence of a concurrent conflict of interest under paragraph (a), a lawyer may represent a client if:

(1) the lawyer reasonably believes that the lawyer will be able to provide competent and diligent representation to each affected client;

(2) the representation is not prohibited by law;

(3) the representation does not involve the assertion of a claim by one client against another client represented by the lawyer in the same litigation or other proceeding before a tribunal; and

(4) each affected client gives informed consent, confirmed in writing.

Rule 1.8 Conflict Of Interest: Current Clients: Specific Rules

(a) A lawyer shall not enter into a business transaction with a client or knowingly acquire an ownership, possessory, security or other pecuniary interest directly adverse to a client unless:

(1) the transaction and terms on which the lawyer acquires the interest are fair and reasonable to the client and are fully disclosed and transmitted in writing in a manner that can be reasonably understood by the client;

(2) the client is advised in writing of the desirability of seeking and is given a reasonable opportunity to seek the advice of independent legal counsel on the transaction; and

(3) the client gives informed consent, in a writing signed by the client, to the essential terms of the transaction and the lawyer's role in the transaction, including whether the lawyer is representing the client in the transaction.

(b) A lawyer shall not use information relating to representation of a client to the disadvantage of the client unless the client gives informed consent, except as permitted or required by these Rules.

(c) A lawyer shall not solicit any substantial gift from a client, including a testamentary gift, or prepare on behalf of a client an instrument giving the lawyer or a person related to the lawyer any substantial gift unless the lawyer or other recipient of the gift is related to the client. For purposes of this paragraph, related persons include a spouse, child, grandchild, parent, grandparent or other relative or individual with whom the lawyer or the client maintains a close, familial relationship.

. . .

(f) A lawyer shall not accept compensation for representing a client from one other than the client unless:

(1) the client gives informed consent;

(2) there is no interference with the lawyer's independence of professional judgment or with the client-lawyer relationship; and

> (3) information relating to representation of a client is protected as required by Rule 1.6.

In order to resolve a conflict of interest, the official commentary to Rule 1.7, requires you to:

> 1) clearly identify the client or clients; 2) determine whether a conflict of interest exists; 3) decide whether the representation may be undertaken despite the existence of a conflict, i.e., whether the conflict is consentable; and 4) if so, consult with the clients affected under paragraph (a) and obtain their informed consent, confirmed in writing.

Rule 1.8 prohibits the acceptance of "substantial" gifts, including testamentary gifts, but the official commentary to Rule 1.8 allows you to accept a gift from a client if it "meets general standards of fairness." Examples that satisfy the fairness test are presents given at a holiday or as a token of appreciation. The official commentary also clarifies that you are not prohibited from accepting a substantial gift from a client but the gift may be voidable by the client "under the doctrine of undue influence, which treats client gifts as presumptively fraudulent." If the client wishes to give you a substantial gift through a legal instrument such as a will or conveyance, you should refer the client to another lawyer for "detached advice" unless the client is a relative of yours. However, you may seek to have yourself or your partner appointed to a fiduciary position, recognizing that "such appointments will be subject to the general conflict of interest provision in Rule 1.7 when there is a significant risk that the lawyer's interest in obtaining the appointment will materially limit the lawyer's independent professional judgment in advising the client concerning the choice of an executor or other fiduciary."

If you are asked to perform legal services for a client for which a third party will pay, you will need to decline the representation unless you: (1) conclude that the third party payment will not interfere with the exercise of your independent professional

judgment or result in a violation of the confidentiality restrictions imposed by Rule 1.6; and (2) obtain informed consent from the client.

Although you are allowed to engage in business transactions with your clients, subject to the restrictions set forth in section (a) of Rule 1.8, the State Bar has through 2001 Formal Ethics Opinion 9 banned the receipt of sales commissions derived from the sale of financial products such as mutual funds and life insurance to clients.

2001 Formal Ethics Opinion 9 - Sale of Financial Products to Legal Client

Opinion rules that, although a lawyer may recommend the purchase of a financial product to a legal client, the lawyer may not receive a commission for its sale.

Inquiry #1:

Attorney owns a small financial planning firm that he started prior to entering law school. Through this firm, Attorney provides investment advice, invests in securities (including stock mutual funds, and bonds) and sells insurance. Attorney maintains Series 7, 63, and 65 licenses, a NC health and life insurance license, and a NC real estate license.

Attorney is starting a legal practice. As part of his legal practice, Attorney hopes to provide estate-planning services to his clients. He would like to incorporate his legal practice with his financial planning business and provide his clients with turnkey service. Attorney believes that a quality financial plan often requires estate and tax planning and that clients will benefit from working with an attorney/financial advisor because they will receive advice from someone with experience in both legal and financial matters who provides a comprehensive approach to the management of their financial assets.

For example, Attorney will use credit shelter trusts and irrevocable life insurance trusts, business planning, tax planning, and appropriate investment products to meet the needs of the client. Attorney believes that if a client desires a single person to manage his or her entire financial situation, then these integrated services should be made available. Although there may be an increased incentive to promote the use of insurance products or other investment products if the attorney also benefits from the sale of these products, Attorney believes there is minimal difference over a period of time between charging commissions and charging hourly fees for financial planning services.

2000 Formal Ethics Opinion 9 permits an attorney who is also a CPA to refer legal clients to himself as a CPA. Attorney believes that because many

accounting firms are now offering securities as part of their services, this opinion impliedly permits attorney/CPA's, who have a Series 6 license, to offer financial products and charge a fee or commission from the sale of these products.

May Attorney, with appropriate disclosures to and consent from the client, provide his estate-planning clients with financial planning services, which may include the sale of financial products, if Attorney will receive a fee or commission from the sale of such products?

Opinion #1:

No. Rule 1.8(b) of the Rules of Professional Conduct provides as follows:

During or subsequent to legal representation of a client, a lawyer shall not enter into a business transaction with a client for which a fee or commission will be charged in lieu of, or in addition to, a legal fee, if the business transaction is related to the subject matter of the legal representation, any financial proceeds from the representation, or any information, confidential or otherwise, acquired by the lawyer during the course of the representation.

This rule prevents an attorney from taking advantage of financial information received from a client during the legal relationship. If the attorney learns through confidential communications that the client has received money, the attorney may not profit from the sale of a financial product to the client. Comment [2] to Rule 1.8 specifically admonishes an attorney who is also a securities broker or insurance agent not to "endeavor to sell securities or insurance to a client when the lawyer knows by virtue of the representation that such client has received funds suitable for investment." *But see* RPC 238 (permitting a law firm to offer financial products to clients so long as no fee or commission is earned by the lawyer or law firm on the sale of such products).

Rule 1.8(b), however, does not prevent an attorney from providing law-related services to a legal client, so long as the attorney fully discloses his self-interest in the referral and the referral is in the best interest of the client. 2000 Formal Ethics Opinion 9 was not intended and does not create an exception to Rule 1.8(b). That opinion allows an attorney to provide accounting services to his legal clients. Nothing in the opinion specifically permits an attorney/CPA, who holds an appropriate license, to sell securities or other products to a client and profit from the sale. An attorney may, however, provide accounting, financial planning, or other law-related services to a client and charge a fee for rendering those services. An attorney may also provide financial products to the client, but may not profit from the sale of those products by charging either an additional fee or a commission.

Inquiry #2:

If a third party insurance salesman or financial advisor refers a client to Attorney after recommending that the client purchase a financial product from the third party, does Attorney have an ethical duty to tell the client that there are financial products available that can be purchased without paying a commission to the third party (e.g., "no load" insurance policies and mutual funds)?

Opinion #2:

Yes, if Attorney determines from all of the facts and circumstances known to him that it is in the client's best interest to consider the "no-load" options and the disclosure to the client is within the scope of Attorney's engagement.

B. Confidentiality

The primary rule governing confidentiality of information that you receive from your elder client is Rule 1.6, which provides in relevant part:

Confidentiality of Information

(a) A lawyer shall not reveal information acquired during the professional relationship with 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 protected from disclosure by paragraph (a) to the extent the lawyer reasonably believes necessary:

(1) to comply with the Rules of Professional Conduct, the law or court order;

(2) to prevent the commission of a crime by the client;

(3) to prevent reasonably certain death or bodily harm;

(4) to prevent, mitigate, or rectify the consequences of a client's criminal or fraudulent act in the commission of which the lawyer's services were used;

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

(6) 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;

When an elder client suffers from diminished capacity, Rule 1.14, which is discussed below, allows you to reveal information about your client, but only to the extent reasonably necessary to protect your client's interests. The duty of confidentiality continues after termination of the lawyer-client relationship. However, RPC 206, which is reprinted below, allows you to disclose the confidential information of a deceased client to the personal representative of the client's estate but not to the heirs of the estate.

> **RPC 206 - Disclosure of Confidential Information of a Deceased Client**
> *Opinion rules that a lawyer may disclose the confidential information of a deceased client to the personal representative of the client's estate but not to the heirs of the estate.*
>
> **Inquiry:**
>
> Decedent dies with a will that was written four months before his death and which does not provide for his brothers or sisters. The will was filed with the clerk of court in order that it might be probated. Attorney A is still in possession of earlier wills of Decedent. The brothers and sisters have asked Attorney A for copies of these earlier wills. What is Attorney A's ethical obligation in responding to this request?
>
> **Opinion:**
>
> Attorney A may only disclose confidential information of Decedent to the personal representative of Decedent's estate.
>
> The duty of confidentiality continues after the death of a client. CPR 268 and Comment to Rule 4 of the Rules of Professional Conduct. A lawyer may only reveal confidential information of a deceased client if disclosure is permitted by the exceptions to the duty of confidentiality set forth in Rule 4(c). Specifically, a lawyer may reveal confidential information of a deceased client if the disclosure was impliedly authorized by the client during the client's lifetime as necessary to carry out the goals of the representation. Rule 4(c)(1). It is assumed that a client impliedly authorizes the release of confidential information to the person designated as the personal representative of his estate after his death in order that the estate might be properly and thoroughly administered. Unless the disclosure of confidential information to the personal representative, or a third party at the personal representative's instruction, would be clearly contrary to the goals of the original representation or would be contrary to express instructions given by the client to his lawyer prior to the client's death, the lawyer may reveal a client's confidential information to the personal representative of the client's estate and he may also reveal the deceased client's confidential information to third parties at the direction of the personal representative. To the extent that CPR 268 implies that a lawyer may reveal confidential information of a deceased

client to the heirs of a decedent, in addition to the personal representative, CPR 268 is hereby specifically overruled.

C. Representing the Incompetent Client

The primary rule governing the representation of incompetent elder clients is Rule 1.14, which was first adopted in 1997 and provides:

> **Client with Diminished Capacity**
>
> (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.

The official commentary to Rule 1.14 makes clear that you must look to the client rather than the client’s family for decisions on the client’s behalf unless a legal representative has been appointed for the client. The official commentary also lists potential necessary protective actions as:

> consulting with family members, using a reconsideration period to permit clarification or improvement of circumstances, using voluntary surrogate decision-making 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.

Ethics opinion CPR314 prohibits you from preparing a will for a client you believe is not competent to make a will or preside over the execution of a will for that client. Two

ethics opinions, RPC 157 and 98 Formal Ethics Opinion 16, addressing the appointment of a guardian for a potentially incompetent client, which are reprinted below, are instructive:

> **RPC 157 - Representing a Client of Questionable Competence**
> *Opinion rules that a lawyer may seek the appointment of a guardian for a client the lawyer believes to be incompetent over the client's objection.*
> **Inquiry #1:**
> Attorney A represents a client on a social security matter and determines, from confidential communications with his client, that the client is, in the attorney's opinion, not competent to handle his affairs in relation to the representation and that the client's actions in regard to the matters involved in the representation are detrimental to the client's own interest. For example, the client who sought the attorney's assistance with receipt of benefits from the social security administration, refuses to cash checks obtained for the client from social security despite the client's obvious need for financial support. The attorney believes that either a guardian should be appointed for the client under state law or that a representative payee should be appointed for the client under federal social security law. The client refuses to agree for the attorney to seek the appointment of a guardian, to seek the appointment of a representative payee, or even for the attorney to discuss this problem with the client's family. The attorney is of the opinion that the client lacks the capacity to form objectives necessary for a normal attorney/client relationship.
> May the attorney seek the appointment of a guardian or a representative payee for the client?
> **Opinion #1:**
> Yes. The Rules of Professional Conduct do not speak directly to the question presented. There is language in the comment to Rule 2.8 concerning discharge and withdrawal suggesting that where an attorney is representing a client who is mentally incompetent she may "in an extreme case... initiate proceedings for a conservatorship or similar protection of the client." It follows that Attorney A may under the circumstances described seek the appointment of a guardian or a representative payee without the client's consent and over the client's objection if such appears to be reasonably necessary to protect the client's interests. In so doing, the attorney may disclose only her belief that there exists a good faith basis for the relief requested and may not disclose the confidential information which led her to conclude that the client is incompetent, except as permitted or required by Rule 4(c).
> **Inquiry #2:**
> In taking that action, may the attorney reveal confidential information so as to establish the grounds for guardianship or representative payee status?
> **Opinion #2:**
> *See* the answer to Inquiry #1.
> **Inquiry #3:**

If the attorney may not seek appointment of a representative payee or guardian, must the attorney withdraw from the matter?

Opinion #3:

See the answer to Inquiry #1.

98 Formal Ethics Opinion 16 - Representation of Client Resisting an Incompetency Petition

Opinion rules that a lawyer may represent a person who is resisting an incompetency petition although the person may suffer from a mental disability, provided the lawyer determines that resisting the incompetency petition is not frivolous.

Inquiry #1:

Wife, who is elderly, was removed from the marital home. Husband, who is also elderly, contacted Attorney A because Husband did not understand why his wife was removed from the home. He asked Attorney A to investigate. Attorney A discovered that Wife was the subject of an involuntary incompetency proceeding. When Attorney A gained access to Wife, she indicated that she wanted Attorney A to represent her in resisting the involuntary incompetency petition. She repeatedly said that she wanted to go home to live with her husband.

Attorney A also learned that Husband was investigated by police relative to allegations of abuse and neglect of Wife. Attorney A met with Husband and told him that he could not represent Wife in resisting the incompetency petition and represent Husband in defending against an action in connection with Wife's care or treatment. Husband agreed that Attorney A's representation would be limited to representing Wife in resisting the incompetency petition and that Husband would be responsible for paying the legal fees for that representation. A written fee agreement memorializing this arrangement was executed. Although Wife was held in a hospital at this time, she continued to express unequivocally that she desired Attorney A to represent her.

When Attorney A visited Wife, he noticed abnormalities in her behavior but he also witnessed extended periods of apparent lucidity. She repeatedly told Attorney A she wanted to go home, that she did not want an appointed guardian, and that she did not want to be declared incompetent. Attorney A filed several motions in the incompetency proceeding, including a motion to remove the guardian and for a jury trial. At the incompetency hearing before the clerk, the attorney for the Department of Social Services (DSS) and the guardian ad litem who had been appointed for Wife by the clerk, contended that Attorney A had no "standing or authority" to pursue motions on behalf of Wife. They argued that Attorney A had a conflict of interest due to his initial representation of Husband and Husband's continued payment for the representation. The clerk found that Attorney A was without "standing or authority" to represent Wife and summarily denied all motions filed on Wife's behalf by Attorney A. Attorney A's motion to stay the incompetency proceeding was also denied.

During the incompetency hearing, Attorney A was not allowed to participate as counsel for Wife. Attorney A was called as a witness, however. Wife, when she testified, could not identify Attorney A as her lawyer. However, she expressed a

desire to return home with her husband to avoid becoming a ward of the state. At the close of the evidence, the clerk declared Wife incompetent and appointed the director of DSS to be her legal guardian.

Thereafter Attorney A filed a notice of appeal seeking a trial *de novo* in superior court on the issues of right to counsel, incompetency, and right to a jury trial. The attorney for DSS now contends that Attorney A has no authority to represent Wife because she has been adjudicated incompetent and only her legal guardian may make decisions about her legal representation. The DSS lawyer now demands that Attorney A provide the guardian with a copy of every document in Wife's legal file.

Does Attorney A have a conflict of interest because he initially represented Husband?

Opinion #1:

No. The representation of Wife in the incompetency proceeding is not a representation that is adverse to the interest of Husband. Furthermore, Attorney A obtained the consent of Husband to represent only Wife in the incompetency proceeding. The exercise of Attorney A's independent professional judgment on behalf of Wife is not impaired by the prior representation of Husband. See Rule 1.7 and Rule 1.9.

Inquiry #2:

Does it matter that Husband pays for the representation of Wife?

Opinion #2:

No. Rule 1.8(f) of the Revised Rules of Professional Conduct permits a lawyer to accept compensation for representing a client from someone other than the client if the client consents after consultation; there is no interference with the lawyer's independent professional judgment or the attorney-client relationship; and the confidentiality of client information is protected.

Inquiry #3:

Wife has been declared incompetent by the state and a guardian appointed to represent her interests. Does Attorney A have to treat Wife as incompetent and defer to the decision of the guardian relative to the representation of Wife?

Opinion #3:

No. Wife is entitled to counsel of her own choosing particularly with regard to a proceeding that so clearly and directly affects her freedom to continue to make decisions for herself. Rule 1.14(a) provides as follows: "[w]hen a client's ability to make adequately considered decisions in connection with the representation is impaired, whether because of minority, mental disability, or for some other reason, the lawyer shall, as far as reasonably possible, maintain a normal client-lawyer relationship with the client." If Attorney A is able to maintain a relatively normal client-lawyer relationship with Wife and Attorney A reasonably believes that Wife is able to make adequately considered decisions in connection with her representation, Attorney A may continue to represent her alone without including the guardian in the representation. However, if Attorney A has reason to believe that Wife is incapable of making decisions about her representation and is indeed incompetent, the appeal of the finding of incompetency may be frivolous. If so,

Attorney A may not represent her on the appeal. *See* Rule 3.1 (prohibiting frivolous claims and defenses).

Inquiry #4:

Once the guardian was appointed for Wife, did the guardian become Attorney A's client, or otherwise step into the shoes of Wife, such that Attorney A may only take directions from the guardian and not from Wife?

Opinion #4:

No. Rule 1.14(a) quoted above indicates that a lawyer may represent a client under a mental disability. The lawyer owes the duty of loyalty to the client and not to the guardian or legal representative of the client, particularly if the lawyer concludes that the legal guardian is not acting in the best interest of the client.

Inquiry #5:

Does Attorney A have to turn over Wife's legal file to Wife's appointed guardian?

Opinion #5:

No. When a guardian is appointed for a client, a lawyer may turn over materials in the client's file and disclose other confidential information to the guardian if the release of such confidential information is consistent with the purpose of the original representation of the client or consistent with the express instructions of the client. *See, e.g.,* RPC 206 (attorney for deceased client may release confidential information to the personal representative of the estate). However, where, as here, the release of confidential information to a guardian is contrary to the purpose of the representation, the lawyer must protect the confidentiality of the client's information and may not release the legal file to the guardian absent a court order. *See* Rule 1.6(d)(3).

D. Understanding Who the Client Is

Your client is the person for whose benefit you are preparing legal documents. Consequently, your client is not necessarily the person with whom you are meeting to discuss the provision of legal services or the person from whom payment for those legal services is coming. Instead, when an adult child of an elder parent meets with you and asks you to prepare a trust or a power of attorney for an elder parent and the adult child offers to pay you for this service, your client is still the elder parent, not the adult child. This principle is clearly illustrated in 2003 Formal Ethics Opinion 7 and the subsequent clarification in 2006 Formal Ethics Opinion 11, both of which are set forth below. In addition, Rule 1.8(f) requires you to obtain the elder parent’s consent to accept compensation from the adult child and ensure that the adult child does not interfere with

your independent professional judgment, the attorney-client relationship, and the confidentiality of information from the client. Rule 5.4(c) also prohibits payors from interfering with your exercise of professional judgment on behalf of another person.

2003 Formal Ethics Opinion 7 - Preparation of Power of Attorney for Principal Upon Request of Prospective Attorney-in-Fact

Opinion rules that a lawyer may not prepare a power of attorney for the benefit of the principal at the request of another individual or third-party payer without consulting with, exercising independent professional judgment on behalf of, and obtaining consent from the principal.

Inquiry #1:

Adult Child asks Attorney to prepare a durable power of attorney for her father to execute. No explanation is given as to why the father is not present to make the request. Adult Child has asked that specific powers be included in document, including the power to transfer to her, as Attorney-in-Fact, title to any of her father's assets. Adult Child asks that the document contain the condition that it will be effective upon its execution by her father. Adult Child will take the Power of Attorney to her father to execute. She does not want the document to contain provisions whereby witnesses can attest to either her father's capacity or whether he is under undue influence at the time he executes the document. Adult Child is ready to write out a check for the fee.

May Attorney draft the power of attorney?

Opinion #1:

Yes, but not based solely on the instructions of Adult Child. Attorney must clarify that she represents the father and, therefore, has certain duties to the father as a client. When a lawyer is engaged by a person to render legal services to another person, the lawyer may not allow the third party to direct or regulate the lawyer's professional judgment in rendering such legal services. Rule 5.4(c). Similarly, Rule 1.8(f) provides that when a lawyer's services are being paid for by someone other than the client, the lawyer may not accept the compensation unless the client gives informed consent, there is no interference with the lawyer's independence of professional judgment or with the client-lawyer relationship, and confidential information relating to the representation of the client is protected. Competent representation of the father in this situation requires an independent consultation with the father to obtain his informed consent to the representation and to determine whether he wants or needs the power of attorney and, if so, who should be appointed attorney-in-fact and what powers should be granted to that person. For guidance on the representation of a client who may have

diminished capacity, see Rule 1.14.

The situation described in this inquiry is distinguishable from a commercial or business transaction in which the lawyer is engaged by one person to prepare a power of attorney for execution by another person. Frequently, the power of attorney names the person requesting the legal services as the attorney-in-fact. If the document is being prepared to facilitate a specific task for the benefit of this person, such as the transfer of stock or real estate, the lawyer represents the person requesting the legal services and does not represent the signatory on the power of attorney. Thus, the purpose and goals of the engagement determine the identity of the client, not the signatory on the document prepared by the lawyer.

A lawyer may be asked by a client to prepare a document for the signature of a third party under circumstances that give rise to a reasonable belief that the client may be using the lawyer's services for an improper purpose such as actual or constructive fraud or the exertion of undue influence. If so, the lawyer may not assist the client and must decline or withdraw from the representation. Rule 1.2(d) and Rule 1.16(a)(1).

Inquiry #2 (facts are unrelated to facts in Inquiry #1):

Mom is elderly and, although she lives on her own, depends upon the assistance of Daughter, her adult child. Although Daughter believes Mom's mental and physical capacities are diminishing and that Mom can no longer care for herself in her own home, Mom's mental competency is not the immediate issue. Daughter contacts Attorney, stating that she is doing so "on Mom's behalf" to have Daughter appointed as Mom's attorney-in-fact and for assistance placing Mom in a nursing home. Daughter asked for a consultation at which Mom will not be present.

May Attorney meet with Daughter alone and, if so, who will be the client, Daughter or Mom?

Opinion #2:

Attorney may meet with Daughter alone to discuss the representation. However, because the purpose of the representation is to benefit Mom, Mom is the client. See Opinion #1. Attorney must explain to Daughter, in a timely and clear manner, that Attorney represents Mom and does not represent Daughter. Rule 4.3. Further, Attorney must inform Daughter that, in the event Mom and Daughter become antagonistic, Attorney will continue to represent only Mom and any information provided to Attorney by Daughter may be used to further the representation of Mom.

Inquiry #3:

May Attorney represent both Mom and Daughter?

Opinion #3:

Yes, however, because the representation of one of the clients may be materially limited by Attorney's responsibilities to the other client, Attorney must satisfy the conditions of Rule 1.7(b) before asking the clients to consent to the joint representation. In particular, Attorney must be able to make a reasonable determination that she can provide competent and diligent representation to each affected client and she must provide sufficient information about the potential conflict to obtain Mom's and Daughter's informed consents. Their consents must be confirmed in writing. Rule 1.7(b)(1) and (4).

In a family situation such as this, a lawyer may readily determine that the parties are working together for a common goal that is in the best interest of the elderly parent. However, these situations are fraught with the potential for abuse of the elderly client or conflicts between the relative's goal for the representation (e.g., putting Mom in a nursing home) and the parent's goal (e.g., independent living). In the current situation, for example, Attorney must advise Mom that she can choose anyone to be the attorney-in-fact and is not required to name Daughter.

Comment [29] to Rule 1.7 offers these cautionary words:

In considering whether to represent multiple clients in the same matter, a lawyer should be mindful that if the common representation fails because the potentially adverse interests cannot be reconciled, the result can be additional cost, embarrassment and recriminations . . . Moreover, because the lawyer is required to be impartial between commonly represented clients, representation of multiple clients is improper when it is unlikely that impartiality can be maintained. Generally, if the relationship between the parties has already assumed antagonism, the possibility that the clients' interests can be adequately served by common representation is not very good.

Inquiry #4:

Would the following disclosure and consent form satisfy the requirements of Opinion #2?

I, [Daughter], understand that Attorney does not represent me regarding issues that concern my mother. I understand that Attorney may be representing my mother after Attorney meets with her. I also understand that whatever I say to Attorney may be used against my interests by Attorney in her representation of my mother. I understand I could hire my own lawyer and I have chosen not to do so. I have read this document and understand its contents.

Opinion #4:

Yes.

Inquiry #5:

Daughter signs the disclosure form described in Inquiry #4. Mom refuses to move to a nursing home and Daughter brings a guardianship proceeding. May Daughter's statements to Attorney in the initial interview be used by Attorney to defend Mom's competency in the guardianship proceeding brought by Daughter?

Opinion #5:

Yes.

2006 Formal Ethics Opinion 11 - Preparation of Legal Documents at the Request of Another
Opinion rules that, outside of the commercial or business context, a lawyer may not, at the request of a third party, prepare documents, such as a will or trust instrument, that purport to speak solely for principal without consulting with, exercising independent professional judgment on behalf of, and obtaining consent from the principal.

Inquiry:

This inquiry seeks a clarification of the scope of 2003 Formal Ethics Opinion 7 which provides that a lawyer may not prepare a power of attorney for the benefit of the principal at the request of another individual without consulting with, exercising independent professional judgment on behalf of, and obtaining consent from the principal. The opinion responds to an inquiry involving the preparation of a power of attorney, the conduct of the attorney-in-fact, and the appropriate actions of the lawyer who is asked to prepare the power of attorney. The opinion provides as follows:

When a lawyer is engaged by a person to render legal services to another person, the lawyer may not allow the third party to direct or regulate the lawyer's professional judgment in rendering such legal services. Rule 5.4(c). Similarly, Rule 1.8(f) provides that when a lawyer's services are being paid for by someone other than the client, the lawyer may not accept the compensation unless the client gives informed consent, there is no interference with the lawyer's independence of professional judgment or with the client-lawyer relationship, and confidential information relating to the representation of the client is protected… The situation described in this inquiry is distinguishable from a commercial or business transaction in which the lawyer is engaged by one person to prepare a power of attorney for execution by another person. Frequently, the power of attorney names the person requesting the legal services as the attorney-in-fact. If the document is being prepared to facilitate a specific task for the benefit of this

person, such as the transfer of stock or real estate, the lawyer represents the person requesting the legal services and does not represent the signatory on the power of attorney. Thus, the purpose and goals of the engagement determine the identity of the client, not the signatory on the document prepared by the lawyer. A lawyer may be asked by a client to prepare a document for the signature of a third party under circumstances that give rise to a reasonable belief that the client may be using the lawyer's services for an improper purpose such as actual or constructive fraud or the exertion of undue influence. If so, the lawyer may not assist the client and must decline or withdraw from the representation. Rule 1.2(d) and Rule 1.16(a)(1).

Does 2003 FEO 7 apply only to the preparation of a power of attorney upon the request of the prospective attorney-in-fact or does it apply broadly to the preparation of other legal documents that purport to speak solely for the principal (such as a will, an advance directive, or a trust instrument) upon the request of another person?

Opinion:

2003 Formal Ethics Opinion 7 applies to the preparation of all such legal documents for the principal upon the request of another. (A notable exception is the preparation of documents in a business or commercial context as described in the quotation from 2003 FEO 7 above.) A lawyer should not undertake the representation of a client or the preparation of a legal document on behalf of that client without having consulted with the client to obtain his informed consent to the representation and to determine whether he needs or wants the legal services requested. Further, the lawyer must exercise his independent professional judgment, and advise the client accordingly, with respect to the advisability of and the scope of the requested legal services.