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Whom Do You Represent?: The Role of Attorneys Representing Individuals with Surrogate Decision Makers

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Surrogate decision-making arrangements are ubiquitous. Surveys suggest that the majority of older Americans have a surrogate decision maker who is empowered to make decisions on their behalf, most commonly an agent appointed under a power of attorney ("POA") for finances or for health care.[1] The result is that attorneys frequently represent clients who have a surrogate decision maker with the authority to make decisions on the matter underlying the representation.

From the perspective of the attorney, such representations raise several important questions. First, from whom should the attorney take direction? Should the attorney look to the surrogate or to the person for whom the surrogate has been appointed? Second, with whom should the attorney communicate? Should the attorney share information with the surrogate, the individual who appointed the surrogate, or both?

From the perspective of a court, such representations also raise important questions. If an attorney claims to represent a principal for whom a surrogate has been appointed, should the court expect the attorney to take direction from the principal and communicate with the principal? If the attorney is not doing so, should the court treat the principal as an unrepresented party? In addition, if the attorney is not doing so, should the attorney's behavior be seen as a red flag suggesting exploitation?

This article seeks to provide guidance on the proper role of the attorney when representing an individual for whom a surrogate decision maker has been appointed. Specifically, it considers two types of surrogates: (1) agents appointed pursuant to a POA for finances,[2] and (2) guardians or conservators appointed by a court.[3] In doing so, it seeks to inform the courts about expectations for attorney behavior. This is valuable not only so that judges can be confident that the attorneys appearing before them actually represent the persons whom they allege to represent. It is also valuable because it may empower judges to identify cases in which an attorney is either consciously or unwittingly facilitating an agent's exploitation of a vulnerable person.

I. CLIENTS WITH AGENTS APPOINTED UNDER POWERS OF ATTORNEY

A. THE CHALLENGE

Imagine that an individual comes to an attorney's office and presents a document that, by all appearances, is a valid POA appointing that person as the agent (also called an "attorney-in-fact") for the individual who executed the document (the "principal"). The individual asks the attorney to assist the agent in performing an act that appears to be fully authorized by the document. May the attorney assist? Does the attorney have any obligation to the principal to determine the validity of the document or to otherwise question the agent's directions? Should and must the attorney alert the principal to the request? And to what extent should the attorney disclose information provided by the agent to the principal?

Similarly, imagine an attorney appears in court and identifies herself as counsel to the principal. Appearing with her is the agent appointed under the document and it is apparent that the attorney is taking direction from the agent. Should the court inquire as to whether the principal has been consulted or agrees to the course of action? Should the court require the principal's presence? Does the answer depend on whether the attorney reports that the principal is incapacitated? Does the answer depend on whether the agent's actions advantage the agent or the agent's associates personally?

B. THE ATTORNEY'S ROLE

When an individual who has appointed an agent under a POA seeks representation, an attorney may look to the individual for direction as if no such document had been executed. This is because execution of a POA does not limit the powers of the person executing it. Rather, the principal retains all

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Footnotes

1. *See* AARP Research Group, LEGAL DOCUMENTS AMONG THE 50+ POPULATION: FINDINGS FROM AN AARP SURVEY 5 (2000), http://assets.aarp.org/rgcenter/ econ/will.pdf (reporting that 45% of Americans age 50 or older reported having a power of attorney for finances, with this rate increasing with age and 73% of those 80 and over having one). In addition, surveys suggest that the majority of older adults have appointed an agent to make healthcare decisions for them in the event they cannot make such decisions for themselves. *See* Jaya K. Rao et al., *Completion of Advance Directives Among U.S. Consumers*, 46 AM. J. PREV. MED. 65, 68 (2014) (finding, based on a national mail survey, that more than two-thirds of adults age 55 and over had an advance directive).
2. A durable power of attorney is increasingly referred to simply as a power of attorney (POA) and this article adopts this modern practice. Indeed, the Uniform Power of Attorney Act takes the position that all powers of attorney are durable unless they state otherwise and thus uses the term "power of attorney" only. *See* UNIF. POWER OF ATTORNEY ACT (UNIF. LAW COMM'N 2006).
3. While actual numbers are unknown, an estimated 1.5 million people in the United States are subject to guardianship or conservatorship.

rights he or she had before execution of the document, including the right to engage the services of an attorney.[4]

The challenging issue for the lawyer is not whether the lawyer *may* take direction from the principal, but whether the lawyer *must* take direction from the principal. Such a situation may arise where the agent seeks to engage the attorney to represent the principal, but seeks to limit the attorney's interactions with the principal. Here, the leading sources of ethical guidance fail to provide the level of clarity that might be expected given the frequency with which the issue arises.

The only time the issue is addressed in the Model Rules of Professional Conduct is in the comments to Rule 1.14, the rule that addresses attorneys' duties to clients with diminished capacity (a situation that only captures a subset of persons who have executed POAs). Comment 2 to Rule 1.14 instructs the attorney to "as far as possible accord the represented person the status of client, particularly in maintaining communication."[5] By contrast, Comment 4 to Rule 1.14 states, "If a legal representative has already been appointed for the client, the lawyer should ordinarily look to the representative for decisions on behalf of the client."[6] Thus, while one comment indicates that the attorney's default approach should be to act as the attorney would if no such surrogate had been appointed, the other suggests the opposite default.

While the Comments cannot be fully reconciled, the underlying text of the Model Rules suggests that one way to reduce the inconsistency is to read Comment 4 narrowly. That text directs attorneys to maintain a normal attorney-client relationship with limited exceptions, and taking direction from someone other than the client is not ordinary practice.

Recent court cases considering whether attorneys acted properly in refusing to take direction from an agent provide further support for the conclusion that Comment 4 should be read narrowly. In the 2015 case of *In re Runge*,[7] the North Dakota Supreme Court took the position that Comment 4's direction to look to the agent for decisions was not applicable where an attorney had independently assessed the client's capacity and determined that the client had capacity to make the legal decision at issue. The same year, in *In re Szymowitz*,[8] the D.C. Court of Appeals found that Comment 4's direction did not apply to a situation where the surrogate transferred property to himself because such "self-dealing" was "not ordinary" practice.[9] Together, these cases suggest that attorneys act appropriately in refusing to take direction from an agent when a principal with capacity wishes to provide that direction or when an agent is engaged in self-dealing (even absent a finding that the self-dealing constitutes a breach of the agent's fiduciary duty). Thus, when an attorney is asked by an agent appointed under a POA to represent the principal, best practice will typically be to meet with the principal before undertaking the representation. This will allow the attorney to determine whether the principal has the ability to provide direction and wishes to do so, or whether the principal either lacks that ability or would prefer to delegate to the agent.[10] It will also allow the attorney to determine the extent to which the principal wishes to receive communication about the representation.[11] In addition, such a meeting provides an opportunity for the attorney to assess whether, including by making the request for representation, the agent is acting in a manner consistent with the agent's fiduciary duty.

The challenging issue for the lawyer is . . . whether the lawyer *must* take direction from the principal.

Best practice typically will involve such a meeting even if the agent represents to the attorney that the principal lacks the capacity to provide direction. Such representations by agents are not always truthful. In some cases, the agent may not appreciate the individual's abilities. In other cases, the agent may be deliberately misleading the attorney in an attempt to use the attorney's services to accomplish a task the agent knows to be inconsistent with the principal's wishes or interests. Indeed, it appears that a significant portion of financial exploitation is accomplished through the misuse of a POA,[12] sometimes with the assistance of an attorney who (presumably unwittingly) assists the agent with transactions that constitute impermissible self-dealing. Meeting with the principal at the outset of the representation, especially not in the presence of

4. *Cf. In re* Runge, 858 N.W.2d 901, 907 (N.D. 2015) (holding that an attorney had no ethical duty to consult with an agent appointed pursuant to a POA for health care before assisting the principal in revoking the agent's authority because "no guardianship or conservatorship existed that withdrew [the principal's] authority to act for himself. Rather, [the principal] shared his authority to act and he remained free to withdraw the authority conferred under that power of attorney . . . .").
5. MODEL RULES OF PROF'L CONDUCT r. 1.14 cmt. 2 (AM. BAR ASS'N 2002).
6. *See* MODEL RULES OF PROF'L CONDUCT r. 1.14 cmt. 4 (AM. BAR ASS'N 2002).
7. 858 N.W.2d at 907.
8. 124 A.3d 1078 (DC Ct. App. 2015).
9. 124 A.3d at 1087–88 (considering the propriety of an attorney taking action under the direction of an agent without consulting the principal).
10. In addition, if the attorney determines that the principal wishes to provide direction, the attorney can also use the meeting to assess the extent to which the principal wishes to have information about the representation shared with the agent.
11. Communication may be beneficial to the principal even if the principal wishes to delegate provision of direction to the agent. Communication may empower principals who have the ability to monitor the agent and potentially to withdraw the agent's authority if the agent is acting in a matter that is inconsistent with the principal's wishes.
12. Reports of POA abuse are common and the elder protection community has identified POA abuse an important concern. *See* Nina A. Kohn, *Elder Empowerment as a Strategy for Curbing the Hidden Abuses of Durable Powers of Attorney,* 59 RUTGERS L. REV. 1, 5-7 (2006). It is estimated that in excess of 5% of older adults are subject to major financial exploitation, a category that includes POA abuse. *See* RON ACIERNO, MELBA HERNANDEZ-TEJADA, WENDY MUZZY & KENNETH STEVE, NATIONAL ELDER MISTREATMENT STUDY 6 (March 2009), *available at* http://www.ncjrs.gov/pdffiles1/nij/

Courts should be alert to the possibility that attorneys appearing . . . on behalf of a principal may be taking direction from an agent.

the agent, can thus help thwart such exploitation.

Should the agent seek to restrict interaction with the principal, best practice will typically be for the attorney to refuse to represent the principal under such circumstances. A request to restrict disclosures to the principal is a red flag that the agent may be attempting to abuse the agent's authority, and an attorney is well-advised to avoid situations in which the attorney's services may be used in furtherance of unlawful activity. In certain cases, if the attorney believes that the agent has good reasons for limiting disclosure, the attorney might reasonably agree to represent the agent in the agent's role as a fiduciary.[13] Representing the agent instead of the principal has the potential to significantly reduce the need to involve the principal, although it may not obviate the need for disclosure. Even if the attorney merely represents the agent, the attorney has certain duties to the principal, which may include a duty to prevent the agent from misconduct or to disclose such misconduct.[14]

C. THE COURT'S ROLE

Courts should be alert to the possibility that attorneys appearing in front of them on behalf of a principal may be taking direction from the agent. In many cases, such an approach is perfectly appropriate. However, it is not enough for the court simply to review the appointing document to see that the agent's actions fall within the powers granted to the agent. Especially where the agent has a personal interest in the outcome of the matter before the court (e.g., where the transaction would benefit the agent or an associate of the agent), the court should consider the possibility that the representation may be inconsistent with the agent's fiduciary duty. By being vigilant to such possibilities, the court may be able to avoid assisting the agent in accomplishing improper acts or exploitation of the principal.

Courts should also recognize that the principal who has the capacity to engage and direct an attorney is free to do so, and that the attorney need neither consult with nor defer to the agent in such situations. Likewise, when the principal has capacity and objects to the agent's actions, courts should insist that an attorney appearing on behalf of the principal take direction from the principal, not the agent.

II. CLIENTS WITH APPOINTED GUARDIANS OR CONSERVATORS

A. THE CHALLENGE

Challenging situations also arise for attorneys and for courts when attorneys represent a person subject to guardianship or conservatorship. Such representations may arise in a variety of contexts. An individual subject to guardianship or conservatorship may seek to challenge something related to that arrangement—ranging from its very existence, to the powers granted the guardian, to the appointment of a particular person as guardian or conservator. The individual may also seek representation to address an issue unrelated to the guardianship or conservatorship, including an issue with regard to which the person has retained rights. These rights may either be retained because they are retained as a matter of state law (e.g., are not removed even when an appointment is plenary)[15] or because the court only partially removed rights (e.g., in the case of a limited guardianship).

B. THE ATTORNEY'S ROLE

From an attorney's perspective, two overarching issues arise when asked to represent an individual subject to guardianship or conservatorship: (1) may the attorney accept the represen-

grants/226456.pdf (last visited May 20, 2017). However, there is not currently a clear estimate of the rate of POA-specific abuse although attempts at estimation have been made. *See, e.g.,* LINDA S. WHITTON, NATIONAL CONFERENCE OF COMMISSIONERS ON UNIFORM STATE LAWS, NATIONAL DURABLE POWER OF ATTORNEY SURVEY RESULTS AND ANALYSIS (2002), *available at* http://www.uniformlaws.org/shared/docs/power %20of%20attorney/dpasurveyreport_102902.pdf (last visited May 20, 2017) (reporting that 64% of 371 attorneys surveyed by the National Conference of Commissioners on Uniform State Laws had encountered abuse by an agent acting under a POA and nearly a quarter had encountered more than ten instances of such abuse); Hans A. Lapping, *License to Steal: Implied Gift-Giving Authority and Powers of Attorney*, 4 ELDER L. J. 143, 167-68 (1996) (citing a student-conducted study by Albany Law School's Government Law Center).

13. A key issue for the attorney to determine at the outset of the representation, therefore, is whether the attorney is representing the principal or the agent. The American College of Trusts and Estates Counsel has taken the position that which role the attorney has depends on whether the attorney had a prior attorney-client relationship with the principal. If the attorney did, then the principal is the client. If the lawyer did not, then the lawyer represents only the fiduciary. *See* AM. COLL. OF TRUSTS & ESTATE COUNSEL, COMMENTARIES ON THE MODEL RULES OF PROFESSIONAL CONDUCT 162 (5th ed. 2016).
14. The American College of Trusts and Estate Counsel contemplates that the lawyer for the fiduciary will owe duties to the "disabled person," including to "to disclose, to prevent, or to rectify the fiduciary's misconduct." *Id.* This is a more expansive position than that taken by Rule 1.6 of the Model Rules of Professional Conduct. *See* MODEL RULES OF PROF'L CONDUCT r. 1.6 (allowing an attorney to reveal "information relating to the representation . . . to prevent, mitigate, or rectify substantial injury to the financial interests or property of another that is reasonably certain to result or has resulted from the client's commission of a crime or fraud in furtherance of which the client has used the lawyer's services.").
15. For example, in a number of states, the right to vote is retained as a matter of law. *See* Sally Balch Hurme & Paul S. Appelbaum, *Defining and Assessing Capacity to Vote: The Effect of Mental Impairment on the Rights of Voters*, 38 MCGEORGE L. REV. 931, 950 (2007).

tation, and (2) if the attorney accepts the representation, from whom does the attorney take direction and with whom does the attorney communicate?

1. Permissible Scope of Representation

Individuals subject to guardianship or conservatorship[16] have been found by a court to be unable to make some decisions for themselves and have had the right to make those decisions delegated to a third party (alternatively called a "guardian" or "conservator").[17] This has led some to conclude that attorneys cannot represent such persons.[18] This conclusion is understandable as attorneys generally can only represent those with capacity to contract to engage the attorney and to provide the attorney with direction as part of that representation. Nevertheless, it is erroneous.

There is no common-law prohibition on attorneys representing people subject to guardianship. Despite some suggestions to the contrary, as the author and a colleague explored in a prior article,[19] neither contract law[20] nor agency law[21] preclude such representations.

The conclusion that persons subject to guardianship cannot engage an attorney is also, moreover, inconsistent with state statutory law. Many states have adopted statutes that explicitly or implicitly require that persons subject to guardianship be permitted to engage counsel to represent their interests in certain conditions. In some states, there is an explicit right to counsel, for example, to seek restoration of rights. Even more states have adopted the "least restrictive alternative" standard that requires a similar result. Denying an individual subject to guardianship or conservatorship the ability to engage an attorney to assist with matters related to retained rights (including the right to challenge the existence, terms, or conditions of the arrangement) violates the standard by denying the individual more rights than is necessary for the individual's protection.[22]

[D]enying the right to counsel would violate the constitutional rights of individuals subject to guardianship and conservatorship.

Most importantly, denying the right to counsel would violate the constitutional rights of individuals subject to guardianship and conservatorship. Such individuals retain substantial due-process rights, and exercising those rights may require representation.[23] These rights cannot be protected simply by allowing a guardian or court to engage an attorney to represent the individual. When the individual is challenging the existence, terms, or conditions of the appointment, the guardian or conservator has a conflict of interest and may even be the individual's primary adversary.

Although individuals subject to guardianship or conservatorship thus can have a right to engage an attorney, the right is constrained. Consistent with the common-law agency principle that an agent can only do what the principal can do,[24] such persons only have a right to engage an attorney to represent them with regard to rights that are retained. However, retained rights are not simply those rights that a court does not strip from the particular individual. Retained rights are also rights that state or federal law render unaffected by the

16. Traditionally, such persons have been said to be found "incapacitated" and are called "wards." The modern approach is to focus not on the person's status but on whether the person's needs can be met short of imposition of a guardianship, and to replace the stigmatizing word "ward" with person-centered language.
17. The term "guardian" is typically used to refer to a person appointed by a court to make decisions with respect to the personal affairs of an individual who has been adjudicated unable to make those decisions, and the term "conservator" is typically used to refer to a person who is appointed by a court to make decisions with respect to the property and financial affairs of an individual who has been adjudicated by a court to be unable to make those decisions. However, some states use the term "guardian" to refer to both types of appointees, and a few states use the term conservator to apply to both. *See* Nina A. Kohn, *Matched Preferences and Values: A New Approach to Selecting Legal Surrogates*, 52 San Diego L. Rev. 399, 402 n.7 (2015) (discussing state differences in terminology).
18. *See, e.g.*, *In re* Guardianship of Zaltman, 843 N.E.2d 663, 664 (Mass. App. Ct. 2006) (requiring an evidentiary hearing to determine whether a woman had capacity to retain counsel to challenge the guardianship before permitting her to engage such counsel).
19. *See generally*, Nina A. Kohn & Catheryn Koss, *Lawyers for Legal Ghosts: The Ethics and Legality of Representing Persons Subject to Guardianship*, 91 Washington L. Rev. 581 (2016).
20. As courts have recognized, constitutional due-process guarantees prohibit such an interpretation. Moreover, the doctrine of necessaries has been recognized as giving rise to a claim for fees by an attorney who supplies legal services to an incapacitated individual, including those subject to guardianship seeking to terminate that guardianship. *See id.* at 591–97.
21. Agents are only prohibited from performing acts the principal cannot perform *See* Restatement (Third) of Agency § 3.04(1) (Am. Law Inst.2006). Individuals subject to guardianship retain many rights. These include those powers not delegated to the guardian because the appointment is limited or because state statutory law allows persons subject to guardianship to retain them. It also includes the right to challenge the terms and conditions of the guardianship as constitutional due-process protections render these retained rights as well. Thus, agency law does not bar attorney representation as to these issues. For further discussion of this point, see Kohn & Koss, *supra* note 19, at 589–91.
22. For further discussion of this issue, *see* Kohn & Koss, *supra* note 19, at 602–04.
23. *See In re* Mark C.H., 906 N.Y.S.2d 419, 425 (Surr. Ct. 2010) (finding that an individual subject to guardianship had a due-process right to periodic review of the arrangement). Similarly, it is generally accepted that constitutional due-process guarantees require individuals for whom a guardian or conservator is sought have notice of those proceedings and an opportunity to be heard. *See, e.g.*, Susan G. Haines & John J. Campbell, *Defects, Due Process, and Protective Proceedings*, 2 Marq. Elder's Advisor 13, 15–16 (2000) (discussing due-process jurisprudence as applied to guardianship proceedings).
24. Notably, the durable POA is a statutory creation that was specifically designed to overcome this common-law rule. For a history of the POA, *see* Kohn, *supra* note 12, at 5-7.

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imposition of a guardianship or conservatorship.[25] Most importantly, they include the rights guaranteed as a matter of constitutional right to due process: the right to challenge the existence of the guardianship or the terms and conditions of that guardianship.

2. *The Attorney's Role*

An attorney representing a person subject to guardianship or conservatorship on an issue as to which the individual has a right to retain counsel (e.g., to challenge the existence of the arrangement or its terms or conditions, to exercise other retained rights, or to receive legal counsel about rights) has the same role and ethical responsibilities as an attorney representing a client who is not subject to guardianship. This includes the duty to provide competent representation, consult with the individual, and take direction from the individual. This is not to say the attorney can never deviate from the normal attorney-client relationship. Just as with clients who have never been adjudicated incapacitated, an attorney may—pursuant to Model Rule 1.14—deviate from the normal relationship to take "reasonably necessary protective action" when the lawyer reasonably believes that a client has diminished capacity, is at risk of substantial harm, and cannot act in her own interest.[26] In such situations, the attorney may reveal confidential information or act without the consent of the client to the extent it is "reasonably necessary to protect the client's interests."[27] Thus, even when protective action is appropriate, the client continues to be entitled to have her information kept confidential unless the risk to the client justifies a breach of confidentiality.[28]

This approach is supported by state bar opinions and most court opinions on point,[29] as well as by the Restatement (Third) of Law Governing Lawyers. The Restatement states the general rule that an attorney should generally take direction from a guardian, but recognizes two significant exceptions: (1) for proceedings that are adversarial to the guardian, including a petition to terminate the guardianship or remove the guardian,[30] and (2) in circumstances where the person subject to guardianship has authority to act without the guardian's knowledge or permission (i.e., for retained rights).[31]

3. *The Role of Courts*

When faced with an attorney who purports to represent an individual subject to guardianship or conservatorship, courts should typically consider two questions: (1) does the individual have the authority to engage the attorney in this way, and (2) is the attorney acting in a manner consistent with the lawyer's ethical duties.

As subsection B indicates, the answer to the first question turns on what the underlying representation is about. If the representation is to seek termination of the guardianship, remove the guardian, or otherwise challenge the terms of conditions of the guardianship, the individual has authority to engage the attorney. Likewise, if the representation is for the purpose of explaining his or her rights to the individual or providing assistance with regard to a retained right, the individual also has authority to engage the attorney. By contrast, the individual lacks authority to hire counsel to directly represent the person to accomplish a transaction or other objective that the person has been stripped of the right to pursue. Thus, by way of example, if the person has had the right to sell property removed, an attorney cannot represent the individual in the sale of the home, but may represent the person in a proceeding to restore the right to sell the property.

It is critical that courts not interfere with the right of an individual subject to guardianship or conservatorship to engage counsel in such situations.[32] While all indications are that the vast majority of guardians perform their duties in good faith, this is not uniformly the case. Guardianships and conservatorships can, unfortunately, be a site of exploitation. Reports of guardians and conservators exploiting those for whom they are appointed abound.[33] Attorney representation of individuals subject to guardianship or conservatorship is one antidote to abuse. An attorney can help the individual understand her continuing rights, seek the removal of a guardian or conservator who is misusing authority, and petition for the termination of an unnecessary guardianship or conservatorship. Moreover, such representation is critical in situations in which individuals seek to restore their rights by either terminating a

25. Notably, these vary by state but may include fundamental rights such as the right to vote.
26. *See* Model Rules of Prof'l Conduct r. 1.14(b).
27. *See id.* at r. 1.14(b)–(c).
28. For a decision tree outlining attorneys' ethical duties in this regard, see Kohn & Koss, *supra* note 19, at 631.
29. For a comprehensive review and discussion of state bar opinions and court opinions on this matter, see Kohn & Koss, *supra* note 19, at 619–30.
30. Restatement (Third) of Law Governing Lawyers § 24(3) (Am. Law Inst. 2000).
31. *Id. cmt. f* ("If the lawyer believes the guardian to be acting lawfully but inconsistently with the best interests of the client, the lawyer may remonstrate with the guardian or withdraw . . . .").
32. It is unfortunate that some courts have mistakenly concluded that individuals subject to guardianship cannot retain counsel or that counsel might have to obtain court approval for engaging in such representations.
33. There is no credible national estimate of the rate of abuse by guardians, but reports of abuse are not uncommon. *See* U.S. Gov't Accountability Off., GAO-17-33, Elder Abuse: The Extent of Abuse by Guardians Is Unknown, But Some Measures Exist to Help Protect Older Adults, 6–11 (2016) (discussing the current state of knowledge); U.S. Gov't Accountability Off., GAO-10-1046, Guardianships: Cases of Financial Exploitation, Neglect and Abuse of Seniors, (2010) (concluding that the GAO could not determine whether guardianship abuse is widespread, but identifying hundreds of allegations during a 20-year period).

guardianship or conservatorship or, at least, reducing the powers delegated to the guardian or conservator.[34]

The answer to the second question, is the attorney acting consistent with his or her ethical responsibilities, is most likely to arise when there is reason to believe that the purported counsel for the individual subject to guardianship or conservator represents an interest of a person other than that individual. Unfortunately, many guardianships and conservatorships occur in the context of intense intra-family disputes. When the counsel has been arranged or paid for by a person other than the individual subject to guardianship or conservatorship,[35] a court may have a reasonable concern as to whether the counsel is truly taking direction from the individual or from someone else.

Where the court has reason to suspect the individual is not being truly represented by the attorney, the court may wish to appoint a guardian ad litem, visitor, or similar person to make further inquiries. In limited situations, the court may wish to go further and appoint counsel for the individual. Which approach is preferable will likely depend both on the rules of practice for the jurisdiction and on the nature of the matter before the court.

In short, while the notion that a person who has been stripped of legal capacity or adjudicated unable to make legal decisions would be able to hire an attorney may seem incongruous at first blush, it is imperative that courts facilitate—not impede—such representations. To be sure, courts should be vigilant to the possibility that purported counsel for the individual may be acting pursuant to the direction of someone else. But where the attorney is truly taking direction from the person on a matter which the person has a right to pursue, counsel should be treated as would any other lawyer before the court.

III. CONCLUSION

It is critical for courts to understand the appropriate role of attorneys who represent individuals with appointed surrogates. While all indications are that most surrogates are faithful and act in a manner consistent with their fiduciary duties, the unfortunate reality is that many do not. Being alert to the possibility that attorneys appearing on behalf of a person for whom a surrogate is appointed may not actually be acting at that person's direction or in that person's interest allows courts to potentially prevent certain forms of exploitation. Likewise, by recognizing that attorneys can represent those with appointed surrogates—including those subject to plenary guardianship or conservatorship—courts can play a role in rectifying abuse, when it does occur, by ensuring that such persons have access to the judicial system.

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34. *See* Jenica Cassidy, *Restoration of Rights in the Termination of Adult Guardianship*, 23 ELDER L.J. 83, 121 (2015) ("one of the greatest barriers to restoration is the ability of the protected individual to hire counsel").
35. Such payments are permitted by the Model Rules of Professional Conduct, but are suspect. *See* MODEL RULES OF PROF'L CONDUCT r. 1.8(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.").