

## **RECENT DEVELOPMENTS IN ETHICS AND MALPRACTICE**

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Mr. Schmidt was admitted to the Colorado Bar in 1962 and to the Texas Bar in 1989. He is a member of the Denver, Colorado, Texas, and American Bar Associations. He served on the American Bar Association's Standing Committee on Lawyer Competence. He has been active in committee work on behalf of the Probate and Trust Law Section of the American Bar Association and is currently the Vice-Chair of the Committee on Ethics and Malpractice. Mr. Schmidt was a founder of the Rocky Mountain Estate Planning Counsel and served as its first President. He has authored a number of estate planning publications, including two books on the subject of Wills, trusts, and estate planning, "How to Live – and to Die – with Colorado Probate" (Gulf Publishing 1985) and "Preserving Your Wealth" (Bradford Publishing 2003). He is a frequent lecturer and has presented papers to The American College of Trust and Estate Counsel, the Southwestern Legal Foundation, The Notre Dame Estate Planning Institute, The American Institute of Certified Public Accountants, and The University of Denver Estate Planning Symposium. He is a Fellow of the American College of Trust and Estate Counsel and previously served as the Colorado State Chairman. He is listed in "The Best Lawyers in America," "Who's Who in American Law," "Who's Who in the West," "Who's Who in the World," "Who's Who in America," and the "Bar Register of Preeminent Lawyers."

# RECENT DEVELOPMENTS IN ETHICS AND MALPRACTICE

## REPRESENTING THE CLIENT WITH DIMINISHED CAPACITY

By L. William Schmidt, Jr.

### **I. Representing Clients Under a Disability**

As the general population continues to live longer, there is an increasing likelihood that a client will have diminished capacity or may become completely incompetent. Increasing attention is being given by the American Law Institute (ALI), the American Bar Association (ABA), and the American College of Trust and Estate Counsel (ACTEC).

### **II. Resources**

The ACTEC Commentaries On the Model Rules of Professional Conduct (Third Edition) was adopted by the ACTEC Board of Regents in March 1999. These Commentaries are being updated in the draft of a Fourth Edition. The ABA recently modernized the Model Rules of Professional Conduct (popularly known as Ethics 2000). ALI has several Restatements which deal with these issues: Restatement (Third) of the Law Governing Lawyers (2000); and Restatement (Third) of Agency (2001).

### **III. Determining Loss of Capacity**

The 2001 draft of Restatement (Third) of Agency changes the previous automatic termination of an agent's actual and apparent authority upon the principal's loss of capacity. The new rule provides that termination of actual authority occurs only when the agent has noticed that (1) the principal's loss of capacity is permanent, or (2) the principal has been adjudicated to lack capacity. The principal's loss of capacity does not terminate "apparent" authority.

ACTEC Model Rule 1.14 provides the following:

*Client under a Disability.*

(a) When 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.

(b) A lawyer may seek the appointment of a guardian or take other protective action with respect to a client only when the lawyer

reasonably believes that the client cannot adequately act in the client's own interest.

#### **IV. Protecting the Incapacitated Client**

The lawyer may have represented a client for many years and become concerned that the client has reached a point where he or she is not exercising reasonable judgment in the management of financial affairs or may be insisting on making changes in an estate plan which the lawyer is concerned are contrary to long established family relationships. The lawyer may also observe undue influence being exerted by family members or acquaintances on elderly clients. Is the lawyer justified in requesting court intervention? In the ACTEC commentary to Model Rule 1.7 relating to conflict of interest, it is stated that a lawyer may take reasonable steps to protect the interests of a client reasonably believed to be disabled, including the initiation of protective proceedings. However, if the lawyer was retained in the first instance to resist such proceedings, a position contrary to such representation obviously cannot be taken.

#### **V. Addition to Engagement Letters**

ACTEC has published a set of recommended engagement letters for use in conjunction with the ACTEC commentaries. The following language is suggested as an addition to the basic estate planning engagement letter:

If concerns develop regarding your capacity, I will continue to represent you and to protect your interests to the extent consistent with my standards of practice and ethical responsibilities. A 1996 ethics opinion issued by the American Bar Association (Formal Opinion 96-404) concludes that, when a client is unable to act adequately in his own interest, the lawyer may take appropriate action in assessing the client's capacity and considering protective action (which may include seeking appointment of a guardian/conservator). To the extent I would continue to act on your behalf, I would only take actions that I reasonably believe to be in your best interests and consistent with your previously expressed wishes. Unless you direct me otherwise in writing, you authorize me in such representation (1) to communicate with your family, your physicians and your other advisors and disclose to them such pertinent confidential information as I may determine to be reasonably appropriate under the circumstances, and (2) to represent one or more members of your family or other advisors acting in a fiduciary or like capacity for you or your property (excluding, however, any proceeding involving determination of your capacity).