

JAKE POLLACK EXPLORES LEGAL ETHICS IN ESTATE PLANNING WHEN A CLIENT'S COMPETENCE IS IN DOUBT IN DBA HEADNOTES ARTICLE

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Partner Jacob N. Pollack authored the Dallas Bar Association (DBA) *Headnotes* article titled, "Ethics: A Question of (the Client's) Competence." The piece explores Texas Disciplinary Rule of Professional Conduct 1.02(g) requiring an attorney to take reasonable action to have a guardian or other legal representative appointed, or seek other protective orders, for a client whenever the attorney reasonably believes that it is necessary to protect a client who lacks legal competence.

Pollack summarizes *Franks v. Roades*, a 2010 case in which siblings quarreled over a guardianship obtained for their mother. In that case, the attorney representing the mother, as well as the daughter who sought the guardianship, was sued for breach of fiduciary duty against the mother; however, the court found that the attorney could not be liable for following the ethical obligation imposed by Rule 1.02(g). Pollack closes his article with a word of advice, "While the question of a client's competence may be raised most often with estate planning attorneys, the Texas Disciplinary Rule of Professional Conduct apply to *all* Texas attorneys. If you are faced with that question, remember Rule 1.02(g)."

Ethics: A Question of (the Client's) Competence

You handled Mrs. Smith's estate planning several years ago. Mrs. Smith, a widow, designated her only child, Alice, as her agent in her financial power of attorney. Alice never married or had children, and has not worked for many years. Several months ago, Alice moved back home when Mrs. Smith's mental faculties began to digress.

When you last spoke to Mrs. Smith, she had difficulty recalling and understanding her planning and processing basic information. Her financial advisor and nephew have recently contacted you to

complain about Alice's control of Mrs. Smith's estate. The advisor is concerned that Mrs. Smith will not have sufficient assets for her long-term support, and the nephew (who is the successor agent) wants to hire you to have Alice removed.

As Mrs. Smith's attorney, what should you do? What can you do? Is there anything you must do?

Texas Disciplinary Rule of Professional Conduct 1.02(g) requires that an attorney take reasonable action to have a guardian or other legal representative appointed, or seek other protective orders, for a client whenever the attorney reasonably believes that such action should be taken to protect a client who lacks legal competence. The comments following the rule provide that the lawyer should see to the appointment of a guardian or take other protective steps when it reasonably appears advisable to serve the client's best interests.

Rule 1.02(g) was analyzed in Franks v. Roades in 2010. In that case, Mrs. Franks' mental condition deteriorated, and she became unable to handle her own affairs. Her daughter, who was her agent, was helping her pay her bills, buy groceries, go to doctors' appointments, and manage her medications.

To the contrary, Mrs. Franks' son disagreed with her doctors, encouraged her to not take her medication, and threatened his sister concerning their mother's care. Her daughter ultimately hired Mrs. Franks' attorney to file an application for guardianship.

A mediated settlement was reached, and the guardianship proceeding was non-suited. However, Mrs. Franks' attorney was later sued for breach of fiduciary duty, alleging that he wrongfully initiated and pursued the guardianship.

The appellate court ruled in favor of the attorney. The court reiterated that an attorney's fiduciary duty is breached when the attorney improperly benefits from the attorney-client relationship, typically by subordinating the client's interests to his own, improperly using client confidences, engaging in self-dealing, or making misrepresentations.

The contentions here were that, in pursuing the guardianship, the attorney represented someone adverse to his original client, and that the attorney personally benefitted because he was paid to handle the matter, and that the attorney failed to discuss the matter with his client before pursuing it.

The court found that the attorney actually represented Mrs. Franks, just through the person she had appointed to handle matters for her, so the representation was not adverse. The court further noted that "personally" benefitting from the representation of a client cannot be the sole measure for a breach of fiduciary duty claim because attorneys generally expect to be paid.

The court acknowledged that attorneys have a fiduciary duty to fully disclose all material facts that might affect a client's rights, but the disciplinary rules recognize that full disclosure may sometimes be impractical, as for example, when the client suffers from a mental disability.

The court noted that a failure to follow the disciplinary rules cannot give rise to civil liability; therefore, following the disciplinary rules (by seeking a guardian for an incompetent client) also cannot give rise to civil liability.

Finally, the court concluded that because the attorney believed that Mrs. Franks was incompetent, because her circumstances indicated that his belief was reasonable, and because he merely complied with the disciplinary rules, he did not breach his fiduciary duty by initiating or pursuing the guardianship.

While the question of a client's competence may be raised most often with estate planning attorneys, the Texas Disciplinary Rule of Professional Conduct apply to all Texas attorneys. If you are faced with that question, remember Rule 1.02(g).

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