

WHAT OPTIONS EXIST WHEN YOU RECOGNIZE A PROBLEM?

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LAWYER COMPETENCY IN THE 21ST CENTURY

November 21, 2014

Austin

CHAPTER 2

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TABLE OF CONTENTS

I. INTRODUCTION..... 1

II. VOLUNTARY OPTIONS 1

 A. Having the “Difficult Conversation” 1

 1. Preparing for the Meeting 1

 2. Approaching the Lawyer 1

 B. Texas Lawyers Assistance Program 1

 1. Concern for an Impaired Attorney 1

 2. Concern for Yourself 2

 3. Contact TLAP 2

III. INVOLUNTARY OPTIONS 2

 A. Filing a Grievance 2

 B. Grievance Referral Program 2

IV. GUARDIANSHIP 3

 A. Definition 3

 B. Potential Disabilities 3

 1. Mental Incapacity 3

 2. Manic and Bipolar Disorders 4

 3. Organic Brain Syndrome 4

 4. Chronic Alcoholism and Drug Dependency 4

 5. Dementia and Alzheimer Diagnosis 4

 C. Warning Signs 4

 D. Texas Disciplinary Rules 1.02(g) 5

 1. Texas Rules of Disciplinary Conduct - Disciplinary Rule 1.02; Attorney-Client Relationship: 5

 2. Duty: 5

 E. Medical Evaluation: 5

 F. Steps in a Guardianship: 6

 1. The Filing of the Application 6

 2. Service Requirements: 6

 3. Medical Evidence: 6

 4. Trial or Hearing 6

 5. Burden of Proof: 6

 6. Order of Guardianship 6

 G. Practical Advise: 6

 1. Litigation 6

 2. Standing 6

 3. Closing or Transferring the Law Practice 6

 H. Temporary Guardianship: 7

 1. Filing of Temporary Guardianship 7

 2. Hearing 7

 I. Guardianship Conclusion: 7

V. MENTAL COMMITMENT 7

 A. Definitions: 7

 B. The Commitment Process: 7

 1. Emergency Detention Without a Warrant (Peace Officer) - § 573.001 7

 2. Emergency Detention with a Warrant - § 573.011 8

 3. Mental Commitment: 8

 C. Voluntary Commitment: 9

 D. Forced Medication: 9

 1. Definitions Related to the Administration of Medication 9

 2. Application – § 574.104 9

3. Hearing: 10
E. Less Restrictive Alternative: 10
VI. RESOURCES..... 10
EXHIBIT A - Physician’s Certificate of Medical Examination 11

WHAT OPTIONS EXIST WHEN YOU RECOGNIZE A PROBLEM?

I. INTRODUCTION

Lawyers experiencing impairment due to a cognitive, substance use or mental health disorder often display similar symptoms. A once highly proficient and professional lawyer may begin to miss deadlines, fail to return phone calls, ignore emails, or be late to court hearings. He may have always been a “sharp dresser” but now often appears disheveled. She may seem confused about facts related to a case or appear unable to form cogent arguments. The lawyer of concern could be your opposing counsel, fellow associate or presiding judge. That lawyer could also be you.

Every lawyer has bad days and tough periods over the course of his or her career. As we recognize some of these signs of impairment, it is common for us to question our ability to make judgments about another lawyer’s competence to practice. We are not medical experts; however, we do not need to be an expert to see that something is wrong to such an extent that it is impairing his or her ability to ethically practice law. We do not need to diagnose the problem to reach out to the impaired attorney to offer help or express concern, nor are we required to render a diagnosis when executing our duty to take action under the Disciplinary Rules of Professional Conduct (Rules).

This paper sets forth the options, both voluntary and mandatory, for the lawyer who has recognized signs of impairment in another member of our profession. The information presented is applicable to all types of impairment, but special focus will be given to cognitive impairment, particularly of senior lawyers. If concerns exist that do not rise to the level of mandated reporting, a confidential call may be made to the Texas Lawyers Assistance Program (TLAP). A mandated report to the Office of the Chief Disciplinary Counsel is a step up on the continuum of intervention measures. Ultimately, guardianship or commitment could become unfortunate, but necessary, options.

II. VOLUNTARY OPTIONS

A. Having the “Difficult Conversation”

Having an honest and direct conversation with a person who, you believe, is suffering from an impairment can seem exceptionally daunting. We may feel that “this isn’t something I was taught in law school,” but your ability to speak eloquently and persuasively is a skill that you bring to the experience. When you are faced with speaking to a senior member of the profession, likely someone you have known for years and for whom you have respect, the task can seem more formidable.

1. Preparing for the Meeting

The Lawyers Assistance Committee of the State Bar of Texas developed some tips for approaching the senior lawyer. In preparing for the meeting, they suggest:

- consulting with the Texas Lawyers Assistance Program to help develop a plan
- partnering with someone the lawyer trusts and respects
- including a witness
- planning to meet in a non-confrontational and private setting

2. Approaching the Lawyer

Adopt an attitude of respect and gentle concern, rather than one of judgment, when meeting with the lawyer. Act with kindness and with regard for preserving the lawyer’s dignity. If possible, try not to treat the situation as a crisis. Other tips include:

- talking about what you have observed and what other members of the profession are saying
- being direct and specific, but avoid being harsh and judgmental
- reviewing their good qualities and shared happy memories
- avoiding lecturing and acting as an authority figure
- then, letting him or her speak
- listening closely and respectfully

Also, be prepared to offer suggestions for taking action by:

- suggesting that a specific professional be consulted and have contact information with you (TLAP can help you with referrals)
- recommending a plan that will support him or her in their practice or in their transition from the practice, including inactive status or disability suspension

Remember that this is likely to be a process and not a one-time event. Follow up with the lawyer shortly afterwards. Even if your meeting was not well received, know that you have planted a seed and that your words play no small part in the lawyer’s considerations for how to proceed.

B. Texas Lawyers Assistance Program

1. Concern for an Impaired Attorney

The Rules mandate reporting of a lawyer if a violation of those Rules has occurred which “raises a substantial question as to the lawyer’s honesty, trustworthiness or fitness.” Rule 8.03(a). Fitness is

defined as those “qualities of physical, mental and psychological health that enable a person to discharge a lawyer’s responsibilities to clients in conformity with the Rules.” More helpful is the definition of “lack of fitness” which is indicated by “a persistent inability to discharge, or unreliability in carrying out, significant obligations.” Comments to the Rule, note that “the term substantial refers to the seriousness of the possible offense and not the quantum of evidence of which the lawyer is aware.”

If the lawyer who is required to report under Rule 8.03(a) has knowledge “or suspects” that the lawyer of concern is “impaired by chemical dependency on alcohol or drugs or by mental illness” the report may be made to TLAP. Rule 8.03(c). Doing so has the effect of discharging the concerned lawyer’s duty to report. Sec. 467.005(b) Health & Safety Code. Because an isolated violation may simply be the tip of the iceberg, comments to this section note that “a lawyer should not fail to report an apparent disciplinary violation merely because he or she cannot determine its existence or scope with absolute certainty.”

It is important to note that the concerned individual may contact TLAP to request assistance for a lawyer even when there is no evidence that the potentially impaired attorney has violated any of the Rules.

TLAP is the approved peer assistance program for lawyers and as such “[a]ny information, report, or record that an approved peer assistance program...gathers, or maintains under this chapter is confidential. Sec. 467.007 Health & Safety Code. Consequently, neither the identity of the reporting lawyer nor the information provided is revealed to anyone, including the impaired attorney. Likewise, the outcome of TLAP’s work with the impaired attorney is not released to the caller. Additionally, the caller who reports information in good faith is immune from civil liability for reporting the information. Sec. 467.008 Health & Safety Code.

In cases involving cognitive impairment, TLAP staff can provide the following assistance:

- consultation with the reporting attorney on how to have the “difficult conversation” themselves (see above)
- contact with the impaired attorney to offer support and referrals to professionals for assessment and/or treatment
- connection with one of TLAP’s peer volunteers who can offer peer support and guidance

TLAP maintains an extensive database of physicians and mental health professionals who are known to provide a high level of service to members of the legal profession.

2. Concern for Yourself

Lawyers who are concerned that they themselves may be suffering from cognitive impairment may call TLAP for support, education regarding their condition, referrals to professionals in their community and connection with a TLAP peer volunteer. All communication with the caller who is self-referred is confidential unless disclosure is required due to a health care emergency. Sec. 467.007 Health & Safety Code.

It should be noted that Rule 1.15 requires a lawyer to decline representation, or withdraw from representation, of a client if his or her “mental psychological condition materially impairs the lawyers fitness to represent the client.

3. Contact TLAP

Lawyers, law students or judges who are concerned that another, or that they themselves, may be suffering from an impairment can contact TLAP at 1-800-343-8527. Staff members are on call evenings and weekends. Emails may be sent to the Director, Bree Buchanan, JD, at bree.buchanan@texasbar.com. Additionally, information regarding TLAP and resources can be found at www.TexasBar.com/TLAP.

III. INVOLUNTARY OPTIONS

A. **Filing a Grievance**

Although a lawyer who is concerned that another lawyer is impaired may discharge his or her duty to report them to the disciplinary authority by reporting them to TLAP, there may be circumstances where it is most appropriate to make a report to the disciplinary authority. Because reports to TLAP made under 8.03(c) are confidential, the Chief Disciplinary Counsel is not alerted.

Lawyers or members of the public who wish to file a grievance may do so through the Chief Disciplinary Counsel’s online submission process at: <http://cdc.texasbar.com/cdc/Home/Index>.

A grievance could theoretically result in a range of possibilities given the circumstances at hand, including a referral to the Grievance Referral Program, reprimands, suspensions, disbarment, resignation in lieu of discipline, and disability suspension. If a lawyer has not committed misconduct and does not have any discipline pending, he or she could voluntarily resign.

B. **Grievance Referral Program**

Implemented in 2007, the Grievance Referral Program (GRP) is an important component of the attorney disciplinary system. It was designed to help identify and assist lawyers who have impairment or performance issues and who enter the disciplinary system as a result of minor misconduct. GRP allows the Commission for Lawyer Discipline to refer to the

program lawyers who have engaged in minor misconduct and who otherwise meet the GRP eligibility criteria. In exchange for a dismissal of the underlying complaint by the Commission, the lawyer agrees to complete a remedial or rehabilitative program individually tailored to the respondent lawyer’s needs. If the lawyer does not fully complete the terms of the agreement in a timely manner, the underlying complaint moves forward through the usual disciplinary process.

IV. GUARDIANSHIP

A. Definition

Guardianship is an extreme step, and as to lawyers, should be only considered if all other avenues of help fail. If the compromised attorney is at such a state of mind to be judicially declared incompetent, then his or her career is at an end. A guardianship is a judicial declaration that a person fits the following definition pursuant to the Texas Estates Code §1002.017.

Sec. 1002.017. Incapacitated Person.

- (1) a minor;
- (2) an adult who, because of a physical or mental condition, is substantially unable to:
 - (A) provide food, clothing, or shelter for himself or herself;
 - (B) care for the person's own physical health; or
 - (C) manage the person's own financial affairs; or
- (3) a person who must have a guardian appointed for the person to receive funds due the person from a governmental source.

Added by Acts 2011, 82nd Leg., R.S., Ch. 823 , Sec. 1.02, eff. January 1, 2014.

If the mental condition has digressed to seeking the court to declare rights removed, it is also time to take steps to limit access to law firm records. The law firm runs the risk of destroyed records, lost records or conversations and conduct that place the law firm at risk. At tremendous risk is the attorney/client privilege as the lawyer may lack the capacity to disseminate material in a safe fashion or to converse with opposing counsel.

B. Potential Disabilities

A disability is generally defined as a limitation on a person’s ability to perform socially defined roles and tasks within a sociocultural and physical environment. *See* Michael Lichtenstein, M.D., M.Sc., *Capacity - The Medical Perspective*, STATE BAR OF TEXAS ELDER

LAW COURSE, Chpt. 10 (2000). Disability is the “gap between the person’s capabilities and the environment’s demand.” *See Id.* at Page 3. While a person’s disability will not always result in incapacity, the ability to recognize the most frequently encountered conditions and disorders may be a factor in deciding if a guardianship as appropriate. The following is a brief overview and potential disorders that may impact the decision whether to seek guardianship, and if so, if the condition appears permanent and progressive, or treatable. *See also* Richard C. Simons, M.D., *UNDERSTANDING HUMAN BEHAVIOR IN HEALTH AND ILLNESS* (3d ed. 1985) (discusses various personality disorders).

1. Mental Incapacity

Mental capacity relates to the requisite ability to appreciate the effect of a choice and understand the nature and consequences of such choice. The ability to make such choices is contingent on the process used to reach his or her decision. Generally, a person has the requisite mental capacity when they are able to reach their decision as a result of the following four (4) step process:

- Understanding the relevant information regarding the choice;
- Appreciating the likely consequences of each choice;
- Manipulating the information rationally; and
- Communicating a stable decision.

This four-step process must be applied to each decision, which could be hundreds a day in the practice of law. Thus, when dealing with attorneys, their education may allow them to mask many difficulties. A person may have sufficient mental capacity to make certain decisions, but not others. This is the logical result of the application of this process to choices or decisions that involve varying levels of complexity and consequences. The practice of law has no room for a series of bad days, when a client’s liberty or property are at stake.

Potential mental incapacity can result from a number of disorders, diseases, and conditions. Although a thorough discussion is beyond the scope of this outline, common causes of medical incapacity include:

- Dementia disorders such as Alzheimer’s, dementia, etc.;
- Cerebrovascular diseases such as strokes, and multi-in-farct dementia;
- Depression;
- Alcohol and drug abuse and addiction;

- Vitamin deficiency such as Vitamin B12 or Folic Acid;
- Thyroid imbalances or diseases; and
- Diseases that effect the central nervous system such as syphilis and AIDS.

2. Manic and Bipolar Disorders

Persons with manic or bipolar disorders are particularly difficult because they can interact well in certain settings. A person who is both manic and depressive will have large mood swings, ranging from irrational fears and hopelessness to unwarranted giddiness. In mania, the person is expansive, euphoric and full of good humor. But, when criticized, the person becomes irritable, argumentative and threatening. In the depressive mode, the person is sad, tearful, hopeless in the extreme, and even suicidal. At times they may lack the requisite capacity to handle certain matters or be susceptible to influence or poor decisions. But, whether they meet the standard of incapacity of a guardianship is often difficult to prove. This particular disorder is difficult to control as medications can control the disease for awhile and then may not control the ups and downs as effectively as time goes on.

3. Organic Brain Syndrome

Organic Brain Syndrome (“OBS”) is characterized by a temporary or permanent dysfunction of the brain. The direct cause of the dysfunction is unknown and this makes treatment with medication a hit or miss proposition. There is a loss of brain function in all OBS. The loss of function is opposite of the acquisition of functions during the person’s growth; for example, the first brain function that is lost is the intellectual or cognitive function. The next functions that deteriorate are motor skills and consciousness. A person suffering from OBS may be difficult to identify because he or she may be having a good day when encountered and then hours later begin to fade. Only after significant interaction will signs of capacity issues become evident. If a person is around the attorney all day, the loss of the cognitive function will be evident. At first, the loss may seem normal but soon the effect on daily work will be apparent.

4. Chronic Alcoholism and Drug Dependency

It is estimated that nearly 14 million Americans abuse alcohol, 1 in every 3 adults. The International Classification of Disorders (ICD-10) uses the following criteria to diagnose alcoholism:

Men: 3 to 7 drinks almost every day or 7 or more drinks at least 3 times a week.

Women: 2 to 5 drinks almost every day or 5 or more drinks at least 3 times a week.

The use of alcohol or drugs does not necessarily correlate to incapacity needed to appoint a guardian. But use can lead to permanent impairment or susceptibility to undue influence. It is often very difficult to obtain guardianship when the incapacity is related to drug or alcohol use. The lawyer will enter treatment, get sober, but will need monitoring in order to stay sober. Also chronic alcoholism may decrease brain function and reasoning, and become permanent.

5. Dementia and Alzheimer Diagnosis

Senile dementia is sometimes referenced as being age related. References to multi infarct disease, or mini strokes are also indicated suggesting impairment. From cross-examining psychiatrists, it appears that Alzheimer’s or multi-infarct dementia is not reversible and is progressive, while some forms of dementia can be treated. Consideration should be given to a person’s willingness to consider evaluation and treatment before filing a guardianship proceeding. Dementia, however, is not reversible and the attorney should use the time of stabilized capacity to close down his practice slowly and with dignity.

C. Warning Signs

As with much of these cases, it is often difficult to initially gage a person’s incapacity or a disability that could lead to bad judgment, exploitation, confusion and inability to focus. But some of the more common warning signs include:

- Memory problems evidenced by excessive reliance on third parties to provide basic information and detail;
- Tendency to avoid answering questions that relate to memory recall i.e. masking;
- Covering, i.e. answers a question with responses like: everyone knows that, or glib answers;
- Repeated conversations regarding the same issues or concerns that have been previously responded to;
- Unusual reliance on another person for their basic daily needs such as food, shelter, clothing, and communication needs, commonly referred to in medical records as “ADLs” or “activities of daily living”;
- Signs of hypochondria, particularly when faced with a client meeting, court appearance or deadline for filing;
- Obsessive/compulsive behavior;
- Victim-like behavior, such as the inability to ever perceive the contribution of one’s own actions to

the current situation, but to deflect the inability to focus onto others;

- Significant mood swings in short periods making rational decisions difficult;
- Unreasonable suspicions, such as that a fellow law partner is an enemy, stealing money, trying to harm them without any factual or logical basis;
- Manic/depressive behavior, such as behaving extremely jubilant for no reason at a serious time, or being depressed, sad and tearful when work is going well and there is no perceived problem; this can even occur in court or in front of clients;
- Anxiety disorders, or illnesses which prevent the client from leaving his or her home on various days and/or the inability to subject themselves to a group of persons; this can also manifest itself as agoraphobia and other phobias;
- Substance abuse disorders to the degree that communication is limited to days when the lawyer has not abused the substance to the degree they are incoherent;
- Major depression to the degree there are changes in appetite, sleep patterns, energy, concentration, and possibly feelings of hopelessness and suicidal thoughts; These are often not shared;
- Schizophrenia or schizophrenia affective disorders which, when not controlled, result in delusions, disorganized speech, and possibly hallucinations; these may not have exhibited themselves in law school but usually manifest before age of forty;
- Amnesic disorders that are difficult to address such as fluctuating dementia and dementia of Alzheimer’s type such as early onset dementia, Leewy Bodies, etc.; and
- Psychopharmacological disorders such that the Lawyer is non-compliant with medications, over-medicates, or abuses both prescribed and over-the-counter medications.

D. Texas Disciplinary Rules 1.02(g)

There is also a duty for other lawyers to report or take action regarding clients that are incapacitated.

Other attorneys could use the same guidelines in dealing with law partners or associates who have compromised capacity issues, since lawyers have such a high fiduciary duty to clients and it is not overreaching to have a duty to protect fellow lawyers, and to protect your clients from them.

1. Texas Rules of Disciplinary Conduct - Disciplinary Rule 1.02; Attorney-Client Relationship:

Rule 1.02 of the Texas Disciplinary Rules of Professional Conduct addresses the scope and objectives of an attorney-client representation. Rule 1.02 provide as follows:

- (a) Subject to paragraphs (b), (c), (d), (e), (f), and (g), a lawyer shall abide by a client’s decisions:
 - (1) concerning the objectives and general methods of representation;
 - (2) whether to accept an offer of settlement of a matter, except as otherwise authorized by law;
 - (4) In a criminal case, after consultation with the lawyer, as to a plea to be entered, whether to waive jury trial, and whether the client will testify.

...

(g) *A lawyer shall take reasonable action to secure the appointment of a guardian or other legal representative for, or seek other protective orders with respect to, a client whenever the lawyer reasonably believes that the client lacks legal competence and that such action should be taken to protect the client.*

See TEX. R. DISCIPLINARY P. 1.02(a) & 1.02(g), reprinted in TEX. GOV’T CODE ANN., tit. 2, subtit. G app. (Vernon Supp. 2002) (emphasis added).

The comments to Rule 1.02 provide additional guidance with regard to the duties imposed by Rule 1.02. Comment 12 clarifies that Rule 1.02(a) assumes that the lawyer is legally authorized to represent the client. It provides that the “usual attorney-client relationship is established and maintained by consenting adults who possess the *legal capacity* to agree to the relationship.” See *Id.* cmt 12 (emphasis added). Comment 12 also recognizes that an attorney may be entitled to represent a client suffering from a disability but provides that the “relationship can be established only by a legally effective appointment of the lawyer to represent a person.” *Id.* However, unless the lawyer is legally authorized to act for a person under a disability, the attorney-client relationship does not exist for the purpose of Rule 1.02. *Id.*

2. Duty:

While 1.02(g) relates to an attorney/client relationship, each lawyer within a firm is a fiduciary to another. We have an obligation to make sure that legal work is not hindered by a compromised attorney.

E. Medical Evaluation:

If an attorney is impaired, he or she will not submit to a medical evaluation wherein the results are shared with the Court and others. When a guardianship is filed, it may necessitate a request for an

Independent Medical Examination. The motion can be filed with the Application for Guardian. It normally will not be heard until the attorney on which the guardianship is filed is provided an attorney ad litem, who represents them just as a chosen attorney. The Estate Code requires four (4) days notice in order for the Motion for Mental Exam to be heard. A copy of the form doctor’s letter is attached as **Exhibit A**, to demonstrate the types of questions the physician is asked to answer.

F. Steps in a Guardianship:

1. The Filing of the Application

- a. Appointment of attorney ad litem
- b. Possible court investigator visit
- c. Possible appointment of guardian ad litem if warranted (to determine best interest)

2. Service Requirements:

- a. Attorney who is incapacitated must be personally served always – cannot be waived
- b. Parents, spouse, siblings
- c. Agent under power of attorney

3. Medical Evidence:

- a. Gather known medical from home
- b. Use power of attorney;
- c. With HIPAA release
- d. May require Independent Medical Exam if no medical available

4. Trial or Hearing

- a. Citation on proposed incapacitated must be returned for ten days
- b. Doctors letter is hearsay
- c. Must have agreement for admission of medical without the live physician testimony

5. Burden of Proof:

- a. Is always on Applicant
- b. Must be clear and convincing evidence as to:
 - (1) Incapacity
 - (2) Best interest of person to have guardian
 - (3) The person’s rights will be protected by guardianship
- c. Must be by Preponderance
 - (1) All other issues

- (2) Disqualification/eligibility
- (3) Specific lawyer functions can and cannot do

- d. Must be recurring acts of incapacity over last 120

6. Order of Guardianship

- a. Must address voting (§ 11.002 Texas Election Code)
- b. Must address driving (§ 521.201 Texas Transportation Code)
- c. Must address possessing firearms (§ 1202.201 Texas Estates Code)

G. Practical Advise:

1. Litigation

A Guardianship will not shield the impaired attorney or the law firm from being sued over the acts and omissions of the incapacitated person. In fact, it may not ever stop a deposition. The existence of a guardianship does not render a person unable to testify or to give his deposition. *See Mobile Oil Corp v. Floyd*, 810 SW2d 321 (Tex. App. – Beaumont 1991, no writ). However, there is a rebuttable presumption of incapacity so the testimony may be precluded. The adjudication also does not protect the attorney from standing trial in a criminal proceeding. *See Koehler v. State*, 830 S.W.2d 665 (Tex. App. – San Antonio, 1992, no writ).

2. Standing

Choose your applicant for guardian carefully. Law partners are not good choices. By the very nature of the relationship, they probably possess an adverse interest. Should the law partner or someone indebted to the lawyer apply, they can be challenged. The correct way to attack standing is by filing a Motion in Limine as to standing. See § 1055.001 Texas Estates Code. *See also Womble v. Atkins*, 331 S.W.2d 294 (Tex.1960).

3. Closing or Transferring the Law Practice

The grant of a guardianship does not immediately solve any problem with the client files and day to day activities. The firm may be a professional corporation or limited liability corporation and thus, the guardian is in charge of shares, not the actual business. A mechanism must be put in place to put the guardian in management in order to protect the clients and the lawyer’s assets. Texas Rule of Disciplinary Procedure § 13.01 discusses the notice to clients, but does not lend guidance as to whether or not the client is to be notified of the guardianship.

Of paramount importance is the location and handling of original client documents and their return. The lawyer may hold original wills, codicils, deeds and other irreplaceable documents. They must be dealt with and cannot be destroyed. There is also the issue of records retention for closed files as well as client files where the client cannot be located or contacted. For a comprehensive source, see Lee R. Nemchick, "Records Retention in the Private Legal Environment" 90 LAW LIBRARY J.7 (200i) http://www.aallnet.org/mm/Publications/lj/LLJ-Archives/Vol-93/pub_lj_v93n01/2001-01.pdf.

Finally, the lawyer's malpractice carrier should probably be notified, and a tail policy obtained to protect the attorney going forward. See § 16.003 Tex. Civ. Prac. & Rem. Code.

H. Temporary Guardianship:

Sometimes the lawyer has issues that can be reversed. Due to the nature of the issue, the attorney may not be able to respond to intervention, lectures, or threats. A temporary guardianship may be the filing that pushes the attorney into facing his or her issues. Since a temporary guardianship is just that, temporary, then the attorney may be backed into a corner by facing the possibility of a permanent guardianship and the likelihood of losing the law license.

1. Filing of Temporary Guardianship

- a. No medical is needed
- b. Personal service required
- c. Attorney ad litem required

2. Hearing

- a. Attorney ad litem or guardian ad litem can ask for closed hearing
- b. The appointment of temporary guardian is not a finding of incapacity
- c. The temporary expires in sixty (60) days with no further action

I. Guardianship Conclusion:

A guardianship is a severe and permanent solution to an impaired attorney. Once a guardianship is granted, any legal career comes to an end. It is not an ideal end to a career that was otherwise pristine. If possible, a guardianship is a remedy of last resort as it is public record and a source of private information shared with all.

V. MENTAL COMMITMENT

Mental commitments are covered under the Texas Health & Safety Code. The commitment and hospitalization of attorneys suffering from mental illness in Texas is civil and not criminal in nature. The

procedure, including the affidavit, and warrant are completely private and confidential. There is no public data base where you can locate the names of person who have been mentally committed.

A. Definitions:

1. The term "Mental Illness" is defined as an illness, disease, or condition that either (1) substantially impairs a person's thought, perception of reality, emotional process, or judgment or (2) grossly impairs behavior as demonstrated by recent distributed behavior §571.003(14). This definition does not include a person suffering from epilepsy, senility, alcoholism, or a mental deficiency. However, a person who suffers from a mental illness along with another condition is still subject to commitment under the Code.
2. The term "Mental Health Facility" is defined as a mental health facility that can provide 24-hour residential and psychiatric services and the
 - a. Is operated by the Texas Department of State Health Services (DSHS);
 - b. Is a private mental hospital licensed by DSHS;
 - c. Is a community center, a facility operated by or under contract with a community center, or another entity designated by DSHS to provide mental health services;

B. The Commitment Process:

The commitment process must be broken down into three parts so that it can be better understood (i) Emergency Detention, (ii) Protective Custody; and (iii) Commitment. Each serves the purpose of protecting a person who constitutes a danger to themselves or others.

1. Emergency Detention Without a Warrant (Peace Officer) - § 573.001

A warrantless detention is the preferred method of emergency detention because of the very nature of a situation requiring intervention: The Code requires an officer to have sufficient reason to believe (1) that a person is mentally ill and (2) that because of such illness, a substantial risk of harm to self or others exists unless immediate restraint is employed. § 573.001(a). If an officer encounters a person who truly meets the criteria for emergency detention, there should never be time to secure a warrant. A peace officer without a warrant may take into custody any such person suffering from mental illness, may transport the person to the nearest appropriate inpatient mental health

facility – or a mental health facility deemed suitable by the local mental health authority if an appropriate inpatient mental health facility is not available – and may immediately file an application with the facility for the person’s detention. No detention is permitted in a private facility without the consent of the head of such facility.

2. Emergency Detention with a Warrant - § 573.011

Any adult may file an Application for the Emergency Detention of another. If the application is granted, a warrant is issued. Before issuance of an emergency warrant is approved, there must be adequate and credible information presented so that a reasonable decision may be formulated to protect the rights of the individual against the rights of society in general. The determination of what may be adequate and credible information is very difficult and can be accomplished only on a case-by-case basis. The sole purpose of the issuance of these warrants is to protect the individual or others when a substantial imminent risk of serious harm exists and immediate intervention or restraint is necessary to prevent injury. Thus, both the facts that form the basis for the requested warrant and the person who furnished these facts must play a key role in the decision-making process. Therefore, the court can require the applicant to appear and be examined in order to attest the adequacy and credibility of the information furnished.

Peace officers are under similar constraints when exercising their authority under the warrantless detention provision contained in the Code. The same can be said of physicians and psychiatrists when performing their duties during preliminary examinations after emergency detention.

The applicant must have reason to believe and must believe and must believe all four of the following: (1) the person evidences mental illness; (2) there exists a substantial risk of serious harm to self or others; (3) such risk of harm is imminent unless the person is restrained; and (4) such belief is based on specific recent behavior, overt acts, attempts or threats. In the application, the applicant must state and describe the following in detail: (1) the basis for the risk of harm; (2) the behavior, acts, attempts, or threats that form the basis of the applicant’s belief; and (3) the relationship of the applicant to the individual. Any other available relevant information may accompany the application. § 573.011.

3. Mental Commitment:

a. **Elements for Commitment**

Under §§ 574.034(a) and 574.035(a), the necessary elements for involuntary inpatient commitment are that the proposed patient is mentally ill and as a result

- (1) The proposed patient is likely to cause serious harm to himself or
- (2) The proposed patient is likely to cause serious harm to others; or
- (3) The proposed patient
 - a. Is suffering severe and abnormal mental, emotional, or physical distress; and
 - b. Is experiencing substantial mental or physical deterioration of the proposed patient’s ability to function independently, which is exhibited by the proposed patient’s inability, except for reasons of indigence, to provide for the proposed patient’s basic needs, including food, clothing, health or safety; and
 - c. Is unable to make a rational and informed decision as to whether to submit to treatment.

b. **Sufficiency of Evidence:**

The burden of proof shall be to prove each element of the applicable criterion by “clear and convincing” evidence. §§ 574.034(a) and 574.035(a); *see Addington v. Texas*, 441 U.S. 418 (1979). Clear and convincing evidence is defined as that measure of proof that produces a firm belief or conviction in the mind of the fact-finder as to the truth of the allegations sought to be established. *State v. Addington*, 588 S.W.2d 569, 570 (Tex. 1979). Clear and convincing evidence is an intermediate evidentiary standard that requires more than a preponderance of evidence but less than a reasonable-doubt standard. *Id.* It is the State’s burden to meet the elements for commitment. *In re J.S.C.*, 812 S.W.2d 92, 94 (Tex. App. – San Antonio 1991, no writ). The state defends the commitment and its validity.

The clear and convincing evidence necessary for an order for inpatient mental health services must include expert testimony and, unless waived, must include evidence of a recent overt act or a continuing pattern of behavior that tends to confirm either (a) the likelihood of serious harm to the proposed patient or others; or (b) the proposed patient’s distress and the deterioration of ability to function. §§ 574.034(d) and 574.035(e); *in re Breeden*, 4 S.W.3d 782 (Tex. App. – San Antonio 1999, no pet). In a hearing for temporary mental health services, the evidence of the recent overt act or continuing pattern of behavior may be waived. § 571.034 (f).

c. **Order for Temporary Mental Health Services - § 574.034:**

An Order for Temporary Mental Health Services shall state that treatment is authorized for not longer than 90 days. § 574.034(g). The Judge may enter an

order committing the person to a mental health facility for inpatient care. See §§ 574.034 and 574.035. Alternatively, the judge may enter an order requiring the patient to participate in mental health services in outpatient care, including but not limited to programs of community MHA centers or services by private psychiatrists and psychologists. See §§ 574.034(b), 574.035(b) and 574.037. The period of commitment for inpatient or outpatient services is for a period not to exceed 90 days. The Court shall not specify any period shorter than 90 days nor more than 90 days upon an Application for Temporary Mental Health Services.

Under a determination for temporary or extended mental health services, a judge may advise, but may not compel, a proposed patient to participate in counseling, to refrain from the use of alcohol or illicit drugs, or to receive treatment with psychoactive medication as specified by an outpatient mental health services plan. §§ 574.034(i), 574.035 (j).

d. Order for Extended Mental Health Services - § 574.035:

An Order for Extended Mental Health Services shall state that treatment is authorized for not longer than 12 months. § 574.035(h). The court cannot enter an order for extended commitment unless (1) the clear and convincing burden of proof standard is met for all mental illness elements; (2) findings are made that the condition of the patient will last longer than 90 days; and (3) the patient has been an inpatient under court order pursuant to the Texas Mental Health Code or the Texas Code of Criminal Procedure for at least 60 consecutive days in the last 12 months. § 574.035(a)-(b). The court shall not specify any period shorter than twelve months on an extended commitment. “The court cannot make its findings solely from certificates of examination for mental illness but shall hear testimony.” *House v. State*, 222 S.W. 3d 497, 500 (Tex. App. – Houston [14th Dist.] 2007, pet filed).

C. Voluntary Commitment:

a. Voluntary Admission of Adults - § 572.001 et seq.

Any individual 18 years of age or older may request to be admitted on a voluntary basis to an inpatient mental facility. Guardians of adults have no authority to voluntarily admit a person to an inpatient psychiatric facility. Once a person has been voluntarily admitted, no Application for Court Ordered Mental Health Services may be filed unless a written request for release has been filed with the head of the facility, or it is determined that such individual meets the criteria for court ordered services and (1) is absent without authorization or (2) refuses or is unable to consent to appropriate treatment. § 572.005. Should a voluntary patient request to leave the facility, he or she may still be detained in the facility for a short period

before the release. Thus a facility is given time to file an Application for Court Ordered Mental Health Services and obtain an OPC.

The amount of time a voluntary patient may be detained after request to leave is limited. See § 572.004. Within 4 hours of the patient’s request for discharge, the facility must notify the responsible physician. If the physician has a reasonable cause to believe that the patient might meet the criteria for court-ordered mental health services or emergency detention, the physician must examine the patient within 24 hours of the patient’s filed request for discharge. If the physician believes that the patient meets the criteria for detention, the physician should either discharge the patient or file an application for court-ordered mental health service or emergency detention no later than 4:00 p.m. on the succeeding business day after the examination.

D. Forced Medication:

1. Definitions Related to the Administration of Medication

- a. “Capacity” means a patient’s ability to understand the nature and consequences of a proposed treatment, including the benefits, risks, and alternatives to the proposed treatment, and to make a decision whether to undergo the proposed treatment.
- b. “Psychoactive medication” means a medication prescribed for the treatment of symptoms of psychosis or other server mental or emotional disorders and that is used to exercise an effect on the central nervous system to influence and modify behavior, cognition, or affective state when treating the symptoms of mental illness.
- c. “Psychoactive mediation” includes the following categories when used as described:
 - i. Antipsychotics or neuroleptics;
 - ii. Antidepressants;
 - iii. Agents for control of mania or depression;
 - iv. Antianxiety agents; sedatives, hypnotics, or other sleep-promoting drugs; and psychomotor stimulants.
- d. “Modification” means a change of class of mediation authorized in the order.

2. Application – § 574.104

- a. **The physician may file an application for an order to authorize the administration of a psychoactive medication regardless of the patient’s refusal if:**

- i. The physician believes that the patient lacks the capacity to make a decision regarding the administration of the psychoactive medication;
- ii. The physician determines that the medication is the proper course of treatment for the patient;
- iii. The patient is under an order for mental health services; and
- iv. The patient verbally or by other indication refuses to take the medication voluntarily.

b. The application must state:

- i. That the physician believes that the patient lacks the capacity to make a decision regarding administration of the psychoactive medication and the reasons for that belief;
- ii. Each medication the physician wants the court to compel the patient to take;
- iii. Whether an application for court-ordered mental health services under §§ 574.034 or 574.035 has been filed;
- iv. Whether a court order for inpatient mental health services for patient has been issued and if so, under what authority it was issued;
- v. The physician’s diagnosis of the patient; and
- vi. The proposed method for administering the medication and if the method is not customary, an explanation justifying the departure from the customary methods.

3. Hearing:

- a. The hearing on the application must be held no later than the thirtieth (30) day after the date the application is filed.
- b. The hearing may be held on the date of a hearing on an application for court-ordered mental health services so long as the patient has been committed and there is a separate hearing.
- c. The case may be transferred to a court with jurisdiction where a committed patient is receiving court-ordered services.
- d. The court may grant one continuance on a party’s motion for good cause shown. The court may grant more than one continuance only with the agreement of the parties.

E. Less Restrictive Alternative:

The commitment process may save an attorney’s career. Unlike a guardianship, this is a private, confidential procedure. It can help save a career in that it is not a finding of incapacity, and requires personal knowledge to swear out a warrant. On the downside,

hearsay is admissible in the hearings. To protect the person’s rights, you must have a probable cause hearing in 72 hours of the commitment. Also, the attorney can waive his or her final hearing and get the help he or she needs. It can also stay private to the rest of the person’s law practice, and no one can find a public record.

VI. RESOURCES

How to Protect Clients and the Firm in the Event of Death, Disability or Abandonment of Practice: A guide for Texas attorneys, their relatives and staff, and the public

(<http://www.texasbarcle.com/materials/closingapractic.html>)

Transitioning with Dignity: the ABC’s of Helping the Senior Lawyer:

<http://www.texasbar.com/AM/Template.cfm?Section=Employers1&Template=/CM/ContentDisplay.cfm&ContentID=15861>

EXHIBIT A
PHYSICIAN'S CERTIFICATE OF MEDICAL EXAMINATION

In the Matter of the Guardianship of
an Alleged Incapacitated Person

For Court Use Only
Court Assigned:

The purpose of this certificate is to enable the Court to determine whether the individual identified above is incapacitated according to the legal definition, and whether a guardian should be appointed to care for him or her.

DEFINITION OF INCAPACITY

For purposes of this certificate, an "Incapacitated Person" is "an adult individual who, because of a physical or mental condition, is substantially unable to provide food, clothing or shelter for himself or herself, to care for the individual's own physical health, or to manage the individual's own financial affairs." Texas Estates Code § 1002.017.

GENERAL INFORMATION

Proposed Ward's Name
Date of Birth Age Gender M F
Current Location of Ward:
Physician's Name Phone: ()
Office Address

YES NO -- I am a physician currently licensed to practice in the State of Texas.
I have been the doctor for the Proposed Ward since
I last examined the Proposed Ward on , 20 at:
a Medical facility the Proposed Ward's residence
Other:

YES NO -- The Proposed Ward is under my continuing treatment.
YES NO -- Prior to the examination, I informed the Proposed Ward that communications with me would not be privileged.
YES NO -- A mini-mental status exam was given. If "YES," please attach a copy.

Based upon my last examination of the Proposed Ward, I provide the following information:

1. EVALUATION OF THE PROPOSED WARD'S PHYSICAL CONDITION

Physical Diagnosis:
Conditions underlying diagnosis:
a. Prognosis:
b. Severity: Mild Moderate Severe
c. Treatment:

2. EVALUATION OF THE PROPOSED WARD'S MENTAL FUNCTION

Mental Diagnosis:
Conditions underlying diagnosis:
a. Prognosis:
b. Severity: Mild Moderate Severe
c. Treatment:
YES NO --- A summary of Proposed Ward's medical history is attached (if reasonably available).

- YES NO --- Would the Proposed Ward benefit from supports and services that would allow the individual to live in the least restrictive setting?
- YES NO --- Does this mental diagnosis include dementia?

2. EVALUATION OF THE PROPOSED WARD’S MENTAL FUNCTION, continued

- YES NO --- Would the Proposed Ward benefit from placement in a secured facility for the elderly or a secured nursing facility that specializes in the care and treatment of people with dementia?
- YES NO --- Would the Proposed Ward benefit from medications appropriate to the care and treatment of dementia?
- YES NO --- Does the Proposed Ward have sufficient capacity to give informed consent to the administration of dementia medications?

3. DECISION MAKING

Alertness, Attention, and Deficits

Alertness: Alert Lethargic Stupor

Proposed Ward is oriented to the following (check all that apply):

- Person Time Place Situation

In my opinion, the ability of the Proposed Ward to make or communicate responsible decisions concerning himself or herself is affected by the Proposed Ward’s deficits and abilities as indicated:

Deficit(s) (check all that apply): Short-term memory Long-term memory Immediate recall

- YES NO --- Able to understand or communicate (verbally or otherwise)
- YES NO --- Able to recognize familiar objects and persons
- YES NO --- Able to perform simple calculations
- YES NO --- Able to reason logically
- YES NO --- Able to grasp abstract aspects of his or her situation or to interpret idiomatic expressions or proverbs
- YES NO --- Able to break complex tasks down into simple steps and carry them out
- YES NO --- The Proposed Ward’s periods of impairment from the deficits indicated above (if any) vary substantially in frequency, severity, or duration

In my opinion, the Proposed Ward is able to make or communicate responsible decisions concerning himself or herself regarding the following:

A. Business and Managerial Matters; Financial Matters

- YES NO --- Contract and incur obligations; handle a bank account; apply for, consent to and receive governmental benefits and services; accept employment; hire employees; sue and defend on lawsuits; make gifts of real or personal property?
- YES NO --- If “YES,” should amount deposited in any such bank account be limited?
- YES NO --- Execute a Durable Power of Attorney?
- YES NO --- Execute a Health Care Power of Attorney?

B. Personal Living Decisions

- YES NO --- Determine own residence?
- YES NO --- Safely operate a motor vehicle?
- YES NO --- Vote in a public election?
- YES NO --- Make decisions regarding marriage?
- YES NO --- Able to purchase ammunition and fire arms?

C. Medical Decision-Making

- YES NO --- Consent to medical, dental, psychological, and psychiatric treatment?
- YES NO --- Administer own medications on a daily basis?

D. Daily Life Activities

Administer to daily life activities (e.g., bathing, grooming, dressing, walking toileting):

- YES, independently YES, with assistance NO, requires total care

4. DEVELOPMENTAL DISABILITY

YES NO --- Does the Proposed Ward have developmental disability?

If "YES," is the disability a result of the following? (Check all that apply)

- Mental retardation? Autism? Static Encephalopathy? Cerebral Palsy? Down's Syndrome? Other? Please Explain

DETERMINATION OF MENTAL RETARDATION

The court may not grant an application to create a guardianship if the basis for the Proposed Ward's incapacity is mental retardation unless a Determination of Mental Retardation is made.

The assessment, at a minimum, must include:

- 1) a measure of the Proposed Ward's intellectual functioning; 2) a determination of the Proposed Ward's adaptive behavior level; and 3) evidence of origination during the Proposed Ward's developmental period.

As a physician, you may use a previous assessment, social history, or relevant record from a school district, another physician, a psychologist, a public agency, or a private agency if you determine that the previous assessment, social history, or record is valid.

- 1. What is your assessment of the Proposed Ward's level of intellectual functioning and adaptive behavior? Mild Moderate Severe Profound
2. Yes No---Is there evidence that the mental retardation originated during the Proposed Ward's developmental period?

5. EVALUATION OF CAPACITY

YES NO --- Based on the information above, it is my opinion that the Proposed Ward is incapacitated according to the definition given at the top of page 1.

If "YES," please indicate the level of incapacity

- PARTIAL TOTAL

If you answered "YES" to any of the questions regarding decision-making in Section 3 (previous page) and believe the Proposed Ward is totally incapacitated, please explain:

Four horizontal lines for explanation of total incapacity.

If you answered "NO" to all of the questions regarding decision-making in Section 3 (previous page) and believe the Proposed Ward is partially incapacitated, please explain:

Four horizontal lines for explanation of partial incapacity.

6. ABILITY TO ATTEND COURT HEARING

If a hearing on an application for the appointment of a guardian is scheduled in court:

YES NO --- The Proposed Ward would be able to attend, understand, and participate in the hearing.

YES NO --- Because of his or her incapacities, it would **not** be advisable for the Proposed Ward to appear at a Court hearing because the Proposed Ward would not be able to understand or participate in the hearing.

YES NO --- Does any current medication taken by the Proposed Ward affect the demeanor of the Proposed Ward or his or her ability to participate fully in a court proceeding

7. ADDITIONAL INFORMATION OF BENEFIT TO THE COURT

If you have additional information concerning the Proposed Ward that you believe the Court should be aware of or other concerns about the Proposed Ward that are not included above, please explain:

Physician's Signature

Date

Physician's Name Printed