

An aerial photograph of a massive concrete dam. The dam's surface is composed of large, rectangular panels. A narrow walkway runs along the top edge of the dam, and a single person is seen walking on it, providing a sense of scale. The sky is a clear, pale blue.

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STRENGTHENING THE
STRUCTURE OF
JUSTICE: ABUSE BY



DO
YOUR
JOB.

BE
KIND.



GUARDIANSHIP UNDER FIRE



DARCY SPEARS

@DSPINV13

abc 13 ACTION NEWS

SEXTON CASINOS

FORECASTS

U.S. NEWS

TWO LOCATIONS IN SEPARATE CITIES

13 HOME IMPROVEMENT

6:02

73°

THE AXIS OF GOOD AND EVIL

FIDUCIARIES

Fudicia = Trust

FIDUCIARIES

A duty to act for someone else's benefit, while subordinating one's personal interests to that of the other person. It is the highest standard of duty implied by law (e.g. trustee, guardian).

—Black's Law Dictionary

FIDUCIARIES

- Personal Representatives
 - Agent (power of attorney)
 - Representative payee
- Executors—under a will
- Administrator—intestate estate
- Guardian—custody of the person
- Conservator—custody of property/finances
- Trustee—administer a trust

FIDUCIARIES

- Attorneys
- Bankers (depending)
- Licensed persons (depending)
 - insurance agents
 - investment advisers / financial planners
 - CPAs
 - real estate agents

- In Arizona, court-appointed guardians allegedly siphoned off millions of dollars from their wards, including \$1 million from a 77-year-old woman whose properties and personal belongings, such as her wedding album, were auctioned at a fraction of their cost.
- A Texas couple, ages 67 and 70, were declared mentally incompetent and placed in a nursing home after the husband broke his hip. Under the care of court-appointed guardians, their house went into foreclosure, their car was repossessed, their electricity was shut off, and their credit was allowed to deteriorate. The couple was allegedly given a \$60 monthly allowance and allowed no personal belongings except a television.
- A Texas probate judge was appointed a guardian for a 91-year-old woman who displayed cognitive decline. She later changed her will for the first time in 40 years, leaving \$250,000 to the probate judge, the court appointed guardian, the judge's personal accountant, and the court-appointed attorney associated with her case.

WHAT'S YOUR SUPER POWER???



"Oh, me? I have the power of attorney."

AGENT'S DUTIES

- Shall act in conformity with:
 - Principal's reasonable expectations to the extent actually known by the agent and otherwise in the principal's best interest
 - In good faith
 - Scope of authority of POA
 - **Good Faith and Loyalty**
 - **Principal's *Reasonable* Expectations, *Otherwise*, Best Interests** half
 - **Principal's Plan to the Extent Known AND in Best Interest**
 - Cooperate with agent under DPOA (reasonable expectations and best interest)
- Attempt to preserve the principal's estate plan to the extent known and if in principal's best interest (includes consideration of property value, maintenance needs, minimization of taxes, and eligibility for benefits, programs, and assistance)

JUDICIAL RELIEF/COURT ACTION

- May be sought by:
 - Principal
 - Agent
 - Guardian or conservator
 - DPOAHC
 - Spouse, parent, descendant, beneficiary, or presumptive heir
 - Gov't agency with authority to protect welfare
 - Caregiver (235B or 235E) or another person who demonstrates "sufficient interest in the principal's welfare"
 - Person asked to accept POA
 - Person designated by principal

DPOA HEALTH CARE—CH. 144B

- Agent must act in accordance with the desires of the principal as expressed in the DPOAHC or otherwise made known to the agent at any time.

- If capacity is lost, agent must act in accordance with the principal's desires as expressed or known

- Principal's Desires as Expressed or Known
If Unknown, Principal's Best Interests

- Capacity is presumed (unlike FPOA)
Principal=You

- Capacity is presumed (unlike FPOA)
or physical condition (different revocation standard than FPOA)

- Capacity is presumed (unlike FPOA)

G/C—CHAPTER 633 (REVISED)

➤ Guardian

➤ must submit “care plan”

➤ plan for facilitating participation in social activities

➤

➤

Focus on the Individual—Dignity and Respect
Protection

Significant Others

➤ need court approval to deny visitation or interaction whether at protected person’s request or person seeking to communicate; can be denied only upon showing of good cause

G/C—CHAPTER 633 (REVISED)

- Conservator
- “duties of prudence and loyalty”
- invest consistent with any known instruments
-
- Focus on the Individual—Dignity and Respect
Protection
- less decision-making flexibility for conservator

A Kansas husband and wife, who owned an unlicensed group home for mentally ill adults, abused and financially exploited a 50-year old woman in their care. The husband served as the victim's guardian and conservator, enabling the couple to convert the victim's funds for their own use, and steal nearly \$250,000 from the woman. In addition, they forced her and other residents to perform sexual acts for almost two decades as part of the fraudulent therapy treatment that they billed to Medicare. At least 20 chronically and severely mentally ill adults, including at least one with schizophrenia, resided at the home—described as a "cult." The husband, a **Discovered by children riding by the farm on a bus** and the residents in multiple capacities: landlord, caregiver, representative payee and, in the case of the 50-year old woman, the husband served as guardian.

One resident testified that the husband established and enforced a code of silence and secrecy in order to control and exploit them, creating what he called "a secluded, small, cult-like organization."

FIDUCIARY ≠ LICENSE TO STEAL

No fiduciary relationship authorizes a person to exploit the individual being served—all are relationships of service to the principal or protected person

TRUE NATURE OF THE ~~ACT=UNKNOWN=UNDUE INFLUENCE~~

Perpetrator's tactics are designed to ensure that the victim does not know what is going on and feels he or she can do nothing about it

- ✓ Isolate from others and from information
- ✓ Keep unaware
- ✓ Create lack of faith in own abilities
- ✓ Create dependency
- ✓ Create fear
- ✓ Obtain and exploit power

Public guardians appointed to care for an 88-year-old California woman with dementia sold the woman's properties below market value to buyers that included both a relative of the guardian and a city employee. One of the public guardians also moved the ward into various nursing homes without notifying family members, who had to call the police to help them find their relative. The woman developed bed sores during this time that became so serious her leg had to be amputated at the hip.

INCREASED VULNERABILITY

- Lonely
- Social/familial isolation
- Unsophisticated or disconnected as to financial matters
- Ill or cognitively impaired
- Adverse life conditions
- Tired, distracted
- Fearful
- Dependent

- A 93-year-old Florida woman died after her grandson became her temporary g
- In Michigan, two former public guardians embezzled \$300,000 from at least 50

COMMON PERPETRATOR CHARACTERISTICS

- Fiduciary=trust
- Exploitive
- OPPORTUNISTS
- Targeting, stalking, and grooming of victims
- Insulation of perpetrator
- Financial or personal issues*

CAN BE ANYONE

A Missouri taxi cab driver who became the guardian of a retired, Kansas City antiques dealer with Alzheimer's disease.

With **Lived in a wealthy neighborhood and had many "well-to-do" friends** who were also trusted.

The cab driver removed the antiques dealer from the nursing home to the cab driver's residence in 2004. About a year later,

ETHICAL RULES COMMONLY IMPLICATED

- **Rule 32:1.2**—Scope of representation and allocation of authority between client and lawyer
- **Rule 32:1.4**—Communication
- **Rule 32:1.6**—Confidentiality of info
- **Rule 32:1.7**—Conflict of interest w/ current clients
- **Rule 32:1.14**—Client with diminished capacity
- **Rule 32:2.1**—Advisor

RULE 32:1.14—CLIENT WITH DIMINISHED CAPACITY

When a client's capacity to make adequately considered decisions in connection with a representation is diminished, the lawyer shall, as far as reasonably possible, maintain a normal client-lawyer relationship with the client

RULE 32:1.14—CLIENT WITH DIMINISHED CAPACITY (COMMENT)

- Lawyer determines capacity for these purposes
- When appropriate, lawyer can consult a diagnostician
- If risk of substantial physical, financial, or other harm unless something is done and cannot protect self, lawyer can take reasonably necessary protective action—consulting with others who can protect* and possibly GAL or G/C
- Must respect values and wishes and maintain DM autonomy as much as possible—least restrictive, always
- Reasoning, variability of state of mind, ability to appreciate consequences; fairness of decision; consistency of a decision with known history and values—consider and balance

RULE 32:1.14—CLIENT WITH DIMINISHED CAPACITY (COMMENT)

- We are to assume that the client, when properly advised and assisted, is capable of making decisions about important matters
- A client with diminished capacity often has the ability to understand, deliberate upon, and reach conclusions about matters affecting the client's own well-being
- The fact that a client suffers a disability does not diminish the lawyer's obligation to treat the client with attention and respect; as much as possible, treat as a client even if there is a legal rep (talk to them!)

RULE 32:1.14—CLIENT WITH DIMINISHED CAPACITY (COMMENT)

- The client may wish to have family members or other persons participate in discussions with the lawyer
- When necessary to assist in the representation, the presence of such persons generally does not affect the applicability of the attorney-client evidentiary privilege
- Nevertheless, the lawyer must keep the client's interests foremost and, except for protective action authorized under paragraph (b), must look to the client, and not family members, to make decisions on the client's behalf

RULE 32:1.14—CLIENT WITH DIMINISHED CAPACITY (COMMENT)

- Disclosure of diminished capacity may adversely affect the client's interests
- May not disclose the information unless authorized to do so
- Court visitor?

RULE 32:1.14—CLIENT WITH DIMINISHED CAPACITY (COMMENT)

For example, children as young as five or six years of age, and certainly those of ten or twelve, are regarded as having opinions that are entitled to weight in legal proceedings concerning their custody. So also, it is recognized that some persons of advanced age can be quite capable of handling routine financial matters while needing special legal protection concerning major transactions.

NOTED.

RULE 32:1.2—SCOPE OF REPRESENTATION

➤ A lawyer shall:

▶ abide by a client's decisions concerning the objectives of representation

▶ shall consult with the client as to the means by which they are to be pursued

➤ Client has the right to terminate the lawyer at any time and to be served by another lawyer

➤ Lawyers usually have a duty to raise questions as to the propriety of their conduct or the propriety of their client's conduct, especially where there is concern for third persons who might be adversely affected



RULE 32:1.4 COMMUNICATION

A lawyer shall reasonably consult with the client about the means by which the client's objectives are to be accomplished



RULE 32:1.6—CONFIDENTIALITY

- A lawyer shall not reveal information relating to the representation of a client unless:
 - ▶ the client gives informed consent;
 - ▶ the disclosure is impliedly authorized in order to carry out the representation; or
 - ▶ the disclosure is otherwise permitted or required



RULE 32:1.7—CONFLICT OF INTEREST

➤ A lawyer shall not represent a client if the representation involves a conflict of interest, unless:

- ▶ the representation does not adversely affect another client's interests
- ▶ there is a written informed consent from the more clients after consultation and the lawyer's responsibility is explained to them



adverse to

n of one or
wyer's

**Don't hit
people.
Don't take
their stuff.**

**SPREAD THE
WORD**