

**New York State Bar Association
Committee on Professional Ethics**

Opinion 1296 (07/08/2026)

Topic: Representing an Alleged Incapacitated Person in Article 81 proceedings

Digest: In a proceeding under Article 81 of the Mental Hygiene Law, an attorney for an alleged incapacitated client may not advocate for the appointment of a guardian or other restriction if the client opposes it.

Rules: 1.2(a), 1.14(a)-(b)

FACTS

1. The inquirer has been appointed, pursuant to Mental Hygiene Law (“MHL”) § 81.10 as counsel for an alleged incapacitated person (“AIP”). The AIP has not been adjudicated incapacitated and at this stage is legally presumed competent.
2. The Article 81 proceeding was recently begun by the AIP’s sibling. A court evaluator has been appointed. The AIP’s spouse has moved to intervene in the proceedings.
3. The inquirer has considered the AIP’s background and health status. For example, a few years ago she was diagnosed with Alzheimer’s disease and recently got married.
4. The AIP previously executed trust documents, a power of attorney, and a health care proxy naming her sibling (the current petitioner) as agent.
5. After getting married, the AIP executed a new will, a new power of attorney and health care proxy replacing her sibling with her spouse and one other person. After her sibling commenced the Article 81 proceeding and the inquirer’s appointment, the AIP’s spouse introduced her to another law firm in an effort to retain private counsel for the Article 81 matter, but that firm declined representation and contacted the inquirer to express serious reservations about the AIP’s capacity to retain counsel.
6. The AIP has demonstrated significant memory deficits. For example, she has told the court evaluator, in the inquirer’s presence, that she does not know whether she is married. In conversation with the inquirer and the court evaluator, she has been unable to give basic information about her spouse, or basic details regarding her assets. She is unaware of recent transfers of real property into and out of her trust and cannot identify her financial advisors.
7. The inquirer believes that the AIP presently lacks the functional capacity to manage her affairs and requires a guardian of the person, a guardian of the property, and a geriatric care manager.
8. However, in conversation with the court evaluator the AIP can articulate certain clear positions. First, the AIP does not want a guardian appointed. Second, she wants the inquirer to

retain a medical expert in Alzheimer's disease to demonstrate that she is capable of managing her affairs.

QUESTION:

9. In a proceeding under Article 81 of the New York State Mental Hygiene Law, where a court evaluator as well as counsel for the AIP have been appointed, must counsel for the AIP adhere strictly to the AIP's expressed wishes, or does Rule 1.14 authorize or require counsel for the AIP to take protective action, including advocating for a guardian, if the attorney reasonably believes the client cannot adequately act in her own interest?

OPINION:

10. Rule 1.14 of the New York Rules of Professional Conduct (the "Rules") provides for the representation of a client with "diminished capacity." The Rule applies in all instances where a lawyer represents a person whose ability to make considered decisions regarding the representation is diminished, and provides, under certain conditions, for the lawyer to take action the lawyer believes "reasonably necessary" to protect the client. Prior to the adoption of Rule 1.14, this Committee said that a lawyer for an AIP could petition for a guardian, even against the client's wishes, if the AIP was incapacitated. The question raised by this inquiry is whether Rule 1.14 permits a lawyer for an AIP to petition for a guardian or otherwise take a position contrary to the client's expressed wishes before the AIP has been adjudicated to be incapacitated.

11. Rule 1.14 provides, in pertinent part (with emphasis added):

CLIENT WITH DIMINISHED CAPACITY

(a) When a client's capacity to make adequately considered decisions in connection with a representation is diminished, whether because of minority, mental impairment or for some other reason, the lawyer shall, as far as reasonably possible, maintain a conventional relationship with the client.

(b) When the lawyer reasonably believes that the client has diminished capacity, is at risk of substantial physical, financial or other harm unless action is taken and cannot adequately act in the client's own interest, *the lawyer may take reasonably necessary protective action, including consulting with individuals or entities that have the ability to take action to protect the client and, in appropriate cases, seeking the appointment of a guardian ad litem, conservator or guardian.*

DISCUSSION:

12. The black letter text of New York Rule 1.14(b) suggests that if the inquirer "reasonably believes that the client [here, the AIP] has diminished capacity" (as the inquirer here believes), and "is at risk of substantial physical, financial or other harm unless action is taken" (as the inquirer also believes), and if the inquirer reasonably believes that the client with diminished capacity "cannot adequately act in the client's own interest" (as the inquirer believes), then the lawyer for the AIP may take "reasonably necessary protective action" including, in appropriate cases, seeking the appointment of a guardian. The Comments to the New York version of Rule

1.14 do not specifically address the issue of acting against an AIP's expressed wishes, but Comment [16] to ABA Model Rule 1.14 – as amended in February 2026 – does specifically address this issue, providing: “If another person has petitioned a court for an appointment of a conservator or a guardian or another restriction on the client’s legal capacity, *the lawyer may not advocate for such an appointment or restriction if the client opposes it.*” (Emphasis added.)

13. In N.Y. State 1046 ¶ 5 (2016), which dealt with conflicts of interest in an Article 81 proceeding, this Committee took a position similar to ABA Comment [16]. Opinion 1046 stated:

The role of independent counsel to the AIP is *to represent the interests of the AIP* where (i) the AIP has requested counsel, (ii) the AIP wishes to contest the petition or petitioner does not consent to the authority requested in the petition ..., or (iii) the court determines that there is a potential conflict between the court evaluator’s role and the advocacy needs of the AIP. [Emphasis added.]

14. Although this Committee does not render opinions on the meaning of statutes, some basic background about the New York Mental Hygiene Law will be helpful. A finding of incapacity in an Article 81 proceeding requires a determination by the court that the AIP “is unable to provide for personal needs and/or property management; and ... the person cannot adequately understand and appreciate the nature and consequences of such inability.” MHL § 81.02(b). To assist the court in making this determination, a court evaluator must be appointed at the commencement of the proceeding. MHL § 81.09(a). The court evaluator’s duties are extensive and include interviewing the AIP, explaining the nature of the proceeding to the AIP, determining whether the AIP understands the consequences of the proceeding, researching the AIP’s alleged incapacity and preparing a report to the court setting forth the evaluator’s observations as to the AIP’s condition, affairs and situation. MHL § 81.09(c).

15. If (as here) an AIP is not represented by counsel of the AIP’s own choosing, the court may appoint counsel when, among other circumstances, the AIP wishes to contest the Article 81 petition or the court determines that appointment of counsel would be helpful in the resolution of the matter. MHL § 81.09(a). Unlike the court evaluator, who acts as a neutral investigator to assist the court in determining incapacity, the attorney for the AIP – which is the inquirer’s role here – acts as the AIP’s advocate. N.Y. State 1046. In so acting, the attorney must “as far as reasonably possible” maintain a “conventional relationship” with the AIP. Rule 1.14(a). Inherent in any conventional attorney-client relationship, in our view, is the requirement that the attorney “abide by [the] client’s decisions concerning the objectives of representation.” Rule 1.2(a).

16. As applied in the present context, this means that if an AIP opposes appointment of a guardian, that the attorney for an AIP in an Article 81 proceeding must oppose the appointment of a guardian, even if the attorney personally believes that the AIP lacks capacity to manage her own affairs. Failing to oppose the appointment of a guardian when the AIP insists otherwise would amount to seeking a guardian over the client’s objection, which “is appropriate only in the limited circumstances where a client’s diminished capacity is such that the lawyer reasonably believes that no other practical method of protecting the client’s interests is readily available.” Rule 1.14, Cmt. [7]. Moreover, in this instance, the pendency of the Article 81 proceeding itself serves as a “method of protecting the client’s interests,” obviating the need for the attorney to take other protective action. *See J. Sullivan, Role of the Attorney for the Alleged*

Incapacitated Person, 31 Stetson L. Rev. 687, 712 (2002) (“In a guardianship case, because a petitioner already has filed for guardianship, the attorney need not take other protective action”).

17. The Law Revision Commission Commentary on Mental Hygiene Law § 81.10 provides further support for our analysis, explaining that the role of counsel under § 81.10 is to represent the person alleged to be incapacitated and ensure that the point of view of the person alleged to be incapacitated is presented to the court. Thus, to the extent an AIP has communicated a position against the appointment of a guardian, the AIP's counsel must make decisions and pursue a litigation strategy that honors the AIP's position. As the New Jersey Supreme Court stated in an analogous context, the role of an attorney representing a person with diminished capacity “is not to determine whether the client is competent to make a decision, but to advocate the decision that the client makes” unless that decision is “patently absurd or . . . pose[s] an undue risk of harm to the client.” *In re M.R.*, 135 N.J. 155, 176 (N.J. 1994). We believe that conclusion reflects the intent of New York Rule 1.14.

18. Our conclusion is also consistent with ABA Comment [16] (quoted above), which states that the lawyer for a client with diminished capacity may not advocate for appointment of a guardian if the client opposes it. At the time of the publication of this opinion, the New York State Bar Association was considering whether to recommend that New York adopt a similar Comment to New York Rule 1.14 (if New York’s Courts amend Rule 1.14 to conform more closely to ABA Model Rule 1.14), so ABA Comment [16] may soon have added relevance in New York.

CONCLUSION:

19. In a proceeding under Article 81 of the Mental Hygiene Law, an attorney for an alleged incapacitated person may not advocate for the appointment of a guardian or other restriction if the client opposes it.

(06-26)