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Adult Guardianship Privacy, Redaction, and Professional Responsibility

*Alberto B. Lopez**

According to statistics published by the Alzheimer’s Association in 2022, 74 million Americans will be 65 years of age by 2030, a figure that will represent more than 20% of the entire population seven years from now.¹ Because the risk of Alzheimer’s disease increases with age,² the demographics indicate that an increasing number of individuals will develop cognitive impairments that interfere with their functional capacities. The nation’s aging cohort and the associated cognitive decline will, in turn, inevitably trigger an increasing need for adult guardianships. An adult guardianship is a protective arrangement created when a court appoints an individual to make personal and/or financial decisions for an individual who cannot make those decisions.³ Although the number of individuals subject to adult guardianships is unknown at present,⁴ the frequency of petitions seeking to establish protective arrangements is guaranteed to increase over the next decades.

A petition to establish an adult guardianship not only asks a court to remove an adult’s agency by transferring decision-making authority to a third party, but it also threatens an adult’s privacy by disclosing personal information in court documents. Adult guardianship filings routinely include a physician’s evaluation of an adult’s mental condition as well as a court investigation evaluating the necessity of guardianship,

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¹ ALZHEIMER’S ASS’N, 2022 ALZHEIMER’S DISEASE FACTS AND FIGURES: MORE THAN NORMAL AGING: UNDERSTANDING MILD COGNITIVE IMPAIRMENT 27 (2022), <https://www.alz.org/media/documents/alzheimers-facts-and-figures.pdf>.

² *Id.* at 13.

³ *See* UNIF. GUARDIANSHIP, CONSERVATORSHIP, AND OTHER PROTECTIVE ARRANGEMENTS ACT § 102(3), (9) (UNIF. L. COMM’N 2017). This piece refers to “adult guardianships” to mean both guardianship of the person and estate. *See id.* § 313(c). Conservatorships, which delegate decision-making authority regarding property/financial affairs, are also subject to the same privacy concerns because the process of appointing a conservator is similar to the process of appointing a guardian. *See id.* §§ 302, 402.

⁴ *See generally* Letter from Elizabeth Warren, U.S. Sen., & Robert P. Casey, U.S. Sen. to Hon. Xavier Becerra, Sec’y, U.S. Dept. Health & Hum. Servs., & Hon. Merrick Garland, Att’y Gen., Dept. Just. (July 1, 2021), <https://int.nyt.com/data/documenttools/warren-spears-letter/54dfe78a81eb7135/full.pdf>.

which may include an assessment of an adult's financial situation.⁵ Because court documents are public documents, personal details about an adult's mental state and financial accounts could become accessible to the public. And as court documents are increasingly available online,⁶ an adult's sensitive information is more readily exposed to misappropriation; the threat of harm is directly proportional to access.

Recognizing concerns regarding confidentiality in guardianship documents, states provide an array of front-end privacy protections for personal information in adult guardianship pleadings.⁷ Some states have statutory safeguards, while others rely on either administrative or local court rules to shelter an adult from hazards associated with the inclusion of private information in adult guardianship pleadings. New Hampshire statutory law, for example, declares that guardianship “[r]ecords, reports, and evidence submitted to the court or recorded by the court shall be confidential.”⁸ Other states, however, do not require sealing the entire record *ab initio* but instead take a more permissive approach to prohibiting public access. Kansas law recites that a court “may issue a written order directing that any medical or treatment records, evaluations or investigative reports filed with the court . . . shall be separately maintained in a confidential manner[.]”⁹ Like many topics within probate law, the degree of protection afforded to personal information in guardianship petitions predictably varies by jurisdiction.¹⁰

⁵ See, e.g., OHIO REV. CODE ANN. § 2111.03 (West 2022) (requiring a statement of the “whole estate of the ward”); *Id.* § 2111.031 (addressing medical examinations); *Id.* § 2111.041(A)(2) (requiring a description of the “physical and mental condition” of the person subject to the guardianship petition). See also ARIZ. REV. STAT. ANN. § 14-5303(C)-(D) (2022).

⁶ See, e.g., Julie Garber, *How to Locate and Request Online Probate Court Records*, BALANCE (July 20, 2022), <https://www.thebalancemoney.com/locate-request-probate-records-3504967> [<https://perma.cc/MKLA-EUMQ>]; see also *MyMNGuardian (MMG)*, MINN. JUD. BRANCH, <https://www.mncourts.gov/Help-Topics/MyMNGuardian.aspx> [<https://perma.cc/VH3F-R3TH>] (detailing electronic submission procedures).

⁷ See Erica McCrea, *A Survey of Privacy Protections in Guardianship Statutes and Court Rules*, 38 BIFOCAL 50, 50 (2017).

⁸ N.H. REV. STAT. ANN. § 464-A:8(VI) (2022); see also, e.g., CONN. GEN. STAT. § 45a-670(c) (2022) (declares that “all records of cases related to guardianship . . . shall be confidential” except under a limited set of circumstances).

⁹ KAN. STAT. ANN. § 59-3093(a) (2022); see also, e.g., NEB. REV. STAT. § 84-712.05(2) (2022) (directing that some records, like medical records, “may be withheld from the public by the lawful custodian of the records”).

¹⁰ For a full list of state privacy and confidentiality protections, see *Privacy and Confidentiality: Guardianship Statutes and Court Rules*, AM. BAR ASS'N (Aug. 31, 2020), https://www.americanbar.org/content/dam/aba/administrative/law_aging/chartguardianshipprivacy.pdf. On the federal level, the Federal Rules of Civil Procedure require redaction of specific information contained in electronic and paper filings “to protect privacy and security concerns relating to electronic filing of documents and the public availability

Regardless of the source or scope of protection, responsibility for shielding the personal information of an adult subject to a guardianship from disclosure, generally, rests with the adult's attorney.¹¹ The 2022 California Rules of Court recite that social security numbers and financial accounts numbers should not be included in pleadings and that "[t]he responsibility for excluding or redacting identifiers . . . from all documents . . . rests solely with the parties and their attorneys."¹² More exhaustively, Connecticut's list of personal information to be removed from documents filed with a court includes

an individual's date of birth; mother's maiden name; motor vehicle operator's license number; Social Security number; other government issued identification number except for juris, license, permit or other business related identification numbers that are otherwise made available to the public directly by any government agency or entity; health insurance identification number; or any financial account number, security code or personal identification number (PIN).¹³

Like other states, Connecticut concludes by declaring that "[t]he responsibility for omitting or redacting personal identifying information rests solely with the person filing the document."¹⁴

Common mechanisms employed to satisfy redaction mandates include redaction software, redaction tools within programs like Adobe Acrobat, and the age-old method of find-and-remove for personal information using nothing more than eyes and a Sharpie marker.¹⁵ Whether using software or Sharpies, however, redacting mistakes inevitably occur. To that end, an American Bar Association article, entitled "Embarassing Redaction Failures," described numerous redaction mishaps

. . . of documents filed electronically." FED. R. CIV. P. 5.2(a) advisory committee notes (quoting Pub. L. No. 107-347 § 205(c)(3)).

¹¹ See e.g., *Privacy and Confidentiality: Guardianship Statutes and Court Rules*, AM. BAR ASS'N COMM'N ON L. & AGING (Aug. 31, 2020), https://www.americanbar.org/content/dam/aba/administrative/law_aging/chartguardianshipprivacy.pdf

¹² CAL. R. CT., 1.201(b).

¹³ COMM'N ON OFF. LEGAL PUBL'NS, *Pleadings, in 2022 CONNECTICUT PRACTICE BOOK* § 4-7(a) (2022).

¹⁴ *Id.* § 4-7(c).

¹⁵ One redaction software package, for example, is offered by UnitedLex, *See Operations, Risk & Compliance: Data Privacy*, UNITEDLEX, <https://unitedlex.com/services/data-privacy/> [<https://perma.cc/R7PA-FER3>]. Adobe Acrobat provides instructions regarding redaction. *Removing Sensitive Content from PDFs*, ADOBE (Sept. 19, 2022), <https://helpx.adobe.com/acrobat/using/removing-sensitive-content-pdfs.html> [<https://perma.cc/4WJ9-YW83>].

from attorneys and judges.¹⁶ Attorneys representing a former Trump campaign manager, Paul Manafort, failed to redact information from court documents, which suggested that Manafort had been less than straightforward during an FBI investigation.¹⁷ Similarly, a California federal judge improperly redacted information in a ruling involving Apple and Samsung Electronics.¹⁸ While the unredacted material did not reveal any patent information,¹⁹ the redaction failure probably prompted furious judicial efforts to fix the problem, while Apple and Samsung scrambled to determine what, if any, adverse consequences might result from the inadvertent disclosures.

Disclosing sensitive information in adult guardianship pleadings may not affect the competitive balance among tech giants, but redaction failures in adult guardianship cases cause cognizable injury to the individual subject to guardianship. Most adult guardianship abuse involves the guardian, but harms stemming from improper redaction include “identity theft, scams, and fraud.”²⁰ Beyond redaction errors that trigger fraud-related damage, the failure to redact medical information from guardianship pleadings could inflict non-monetary harm on the person subject to guardianship.²¹ Individuals place a high value on health information privacy, and erroneous release of medical information might cause embarrassment and/or alter personal relationships.²² In short, redaction failures may not only harm an individual from a financial perspective, but also represent an affront to individual dignity.

The foreseeability of redaction-related harms in the near future highlights the importance of the first defense against such harms – the Model Rules of Professional Conduct.²³ The provision that most readily

¹⁶ Judge Herbert B. Dixon, Jr., *Embarrassing Redaction Failures*, AM. BAR ASS’N (May 1, 2019), https://www.americanbar.org/groups/judicial/publications/judges_journal/2019/spring/embarrassing-redaction-failures/ [<https://perma.cc/NE46-BZTU>].

¹⁷ *Failed Redaction Reveals Paul Manafort’s “Lies to the FBI,”* BBC (Jan. 8, 2019), <https://www.bbc.com/news/world-us-canada-46804127> [<https://perma.cc/J3KB-3E3C>].

¹⁸ See Dan Levine & Carlyn Kolker, *Apple Versus Samsung Ruling Divulges Secret Details*, REUTERS (Dec. 6, 2011, 2:22 AM), <https://www.reuters.com/article/us-apple-samsung-ruling/exclusive-apple-versus-samsung-ruling-divulges-secret-details-idUSTRE7B425D20111206> [<https://perma.cc/7NNA-LFY3>].

¹⁹ See *id.* (stating that the redaction failure “did not expose the technical workings of the iPad – or anything close.”).

²⁰ McCrea, *supra* note 7, at 50.

²¹ Joseph Rosenberg, *Routine Violations of Medical Privacy in Article 81 Guardianship Cases: So What or Now What?*, 85 NYSBA J. 34, 35 (2013) (“Unauthorized disclosure of private health-related information is unlawful and damaging to a person, but it also may shift the predominant frame of guardianship from a functional assessment to a medical diagnosis.”).

²² See INST. MED. NAT’L ACADS., *BEYOND THE HIPAA PRIVACY RULE: IMPROVING HEALTH THROUGH RESEARCH* (Sharyl J. Nass et al. eds., 2009).

²³ MODEL RULES OF PRO. CONDUCT r. 1.6 (AM. BAR ASS’N 2020).

applies to a redaction failure is Model Rule 1.6, which requires a lawyer to “make reasonable efforts to prevent the inadvertent or unauthorized disclosure of, or unauthorized access to, information relating to the representation of a client.”²⁴ An attorney’s effort must be “reasonable,” which is gauged by factors such as the “sensitivity of the information.”²⁵ Because much of the information in guardianship documents is sensitive, an attorney’s failure to ensure successful redaction seemingly falls short of the reasonableness standard. As evidence of that shortfall, courts have levied monetary penalties, such as attorney’s fees, and other sanctions against attorneys who failed to protect sensitive information in court-submitted documents.²⁶ Whatever safe harbor might be offered by the “reasonable” standard, courts are likely to conclude that the failure to redact mental health assessments or financial information in adult guardianship pleadings is unreasonable and impose appropriate sanctions.

In addition to a violation of Model Rule 1.6, a redaction failure also runs perilously close to violating the competence requirement of Model Rule 1.1. Under that provision, an attorney is required to be familiar with “the benefits and risks associated with relevant technology.”²⁷ As the annotation to that section details, numerous state ethics opinions require attorneys to have a basic understanding of technological advances ranging from cloud computing to metadata.²⁸ Importantly, the failure to scrub metadata from legal documents has led to the release of private information into the public sphere on numerous occasions.²⁹ Even if not an independent violation of the rule, Rule 1.1 also states that “a lawyer’s failure to comply with a duty imposed by another ethics rule may also constitute a lack of competence under Rule 1.1.”³⁰ In other words, a redaction error that violates Rule 1.6, such as the failure to redact metadata, could also be a violation of Rule 1.1. Thus, attorneys should take steps to redact metadata from adult guardianship court filings, to avoid running afoul of two basic rules of professional ethics.

²⁴ *Id.* at r. 1.6(c).

²⁵ *See id.* at r. 1.6 cmt. 19.

²⁶ *See, e.g.,* Reed v. AMCO Ins. Co., No. 3:09-CV-0328-LRH-RAM, 2012 WL 846475, at *5 (D. Nev. Mar. 9, 2012) (granting attorney’s fees for costs of motions to seal and sanction as a penalty against an attorney who included confidential information in court documents); Weakley v. Redline Recovery Servs., LLC, No. 09cv1423 BEN (WMC), 2011 WL 1522413, at *2 (S.D. Cal. Apr. 20, 2011) (ordering an attorney to pay \$900 for five years of credit monitoring after including a social security number on two documents that were on the internet for three weeks).

²⁷ MODEL RULES OF PRO. CONDUCT r. 1.1 cmt. 8 (AM. BAR ASS’N 2020).

²⁸ ANN. MODEL RULES OF PRO. CONDUCT r. 1.1 annot. (AM. BAR ASS’N 2020).

²⁹ Philip J. Favro, *A New Frontier in Electronic Discovery: Preserving and Obtaining Metadata*, 13 B.U. J. SCI. & TECH 1, 5-6 (2007).

³⁰ ANN. MODEL RULES OF PRO. CONDUCT r. 1.1 annot. (AM. BAR ASS’N 2020).

While technological advances will undoubtedly make redaction easier and faster, the Model Rules of Professional Conduct will remain a stimulus for effective redaction. In fact, the backstop provided by the Model Rules counsels against an overreliance on redaction software. One mistaken keystroke can thwart the software's utility and subsequently release an individual's sensitive information to the public. To reduce the probability of mistake, attorneys should couple the usage of redaction software with the age-old double-checking with their eyes, before submitting adult guardianship papers to courts. Technology might make redaction quicker, but it cannot entirely displace the necessity of carefully reading guardianship documents. In the end, meticulous redaction not only prevents harm to an adult subject to guardianship, but also helps an attorney avoid being ensnared by Model Rules 1.6 and 1.1.