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THE SPOTLIGHT

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WEALTH PLANNING, ADMINISTRATION,
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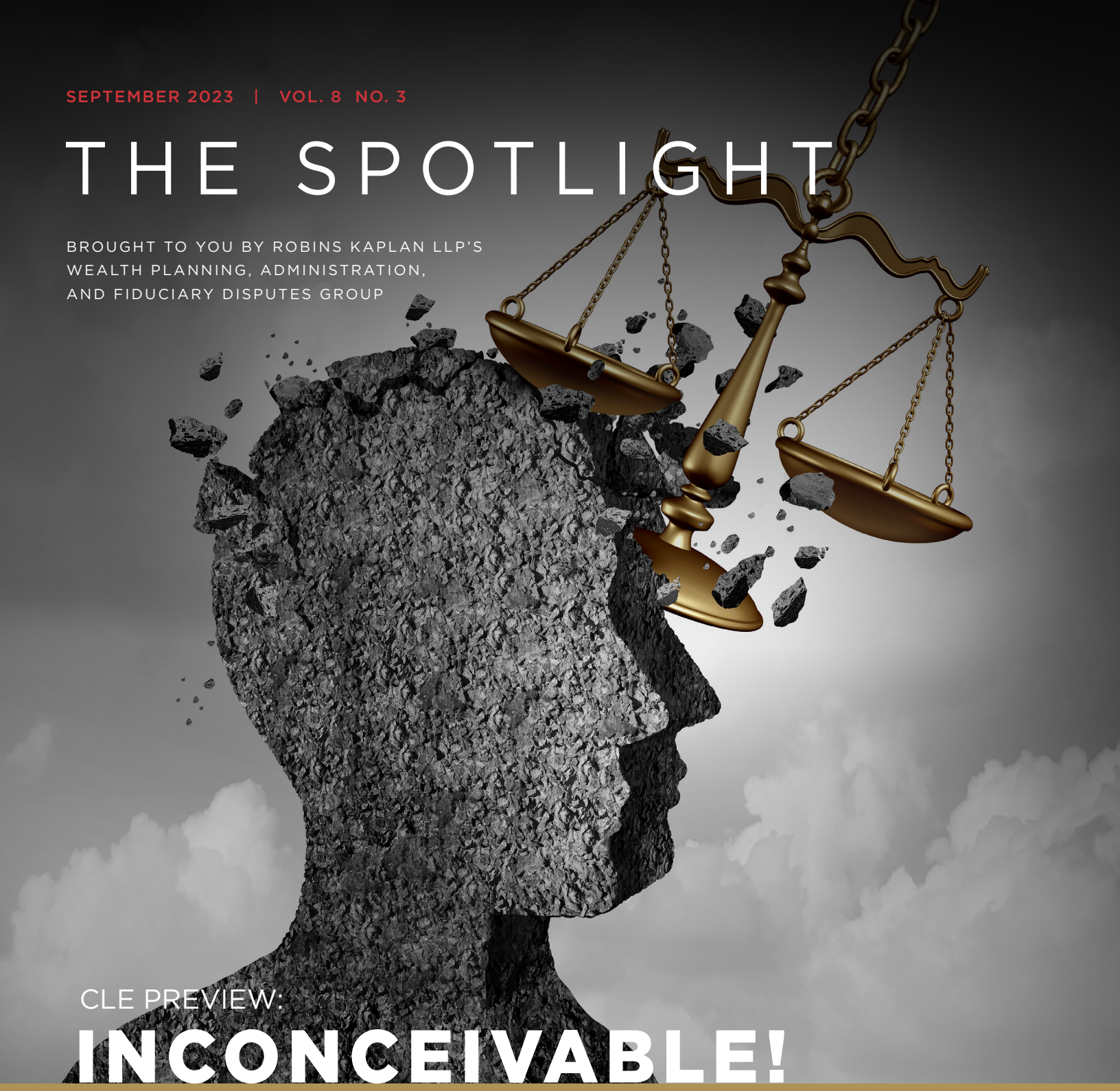


CLE PREVIEW:

INCONCEIVABLE!

FIDUCIARY CIRCUMSTANCES THAT YOU NEVER IMAGINED **(BUT MAYBE SHOULD)**

THURSDAY
NOV 2

REGISTER TODAY!

Professionals who work with clients in the fiduciary space have amassed stories and experiences that were unimaginable in the earliest stages of their careers—leading to the common remark that "you can't make this stuff up." Our keynote speaker will be Katie Engelhart, a contributing writer to the New York Times Magazine whose piece "A Story of Dementia: The Mother Who Changed" was recently featured as the New York Times Magazine's cover story. Embedded in these stories and experiences are difficult judgment calls, lessons learned, and opportunities for important reflection on what it means to be a fiduciary in a world full of the unknown, unexpected, and misunderstood.

WELCOME TO THE SPOTLIGHT

BROUGHT TO YOU BY ROBINS KAPLAN LLP'S WEALTH PLANNING, ADMINISTRATION, AND FIDUCIARY DISPUTES GROUP

The Spotlight strives to provide a forum to discuss the latest news and compelling issues impacting fiduciaries and those to whom fiduciaries owe duties. Whether you are an officer, director, trustee, beneficiary, trust officer, attorney, financial advisor, or anyone impacted by the law governing fiduciaries, we hope that you will find this newsletter interesting, informative, and perhaps at times even a bit entertaining.

Fiduciary disputes come in many varieties, but they share some consistent themes that involve the erosion of trust, high emotion, and opportunities—sometimes missed—for creative approaches to avoid or resolve litigation. As practitioners and teachers of fiduciary law, our attorneys have built a reputation for excellence in meeting the needs of individuals and organizations facing complex fiduciary issues, starting with the transactional and estate planning work that can mitigate risk from the beginning. We counsel individuals and business owners in a broad range of fiduciary issues, from estate planning and business succession, to dispute resolution and litigation when unavoidable.

Is there a topic affecting your practice that you would like us to discuss in an upcoming issue of The Spotlight? Let us know at all_marketing@robinskaplan.com.

– Denise S. Rahne and Steven K. Orloff

CLE KEYNOTE SPEAKER: **JOURNALIST AND NEW YORK TIMES CONTRIBUTOR KATIE ENGELHART**

BY GABE BERG

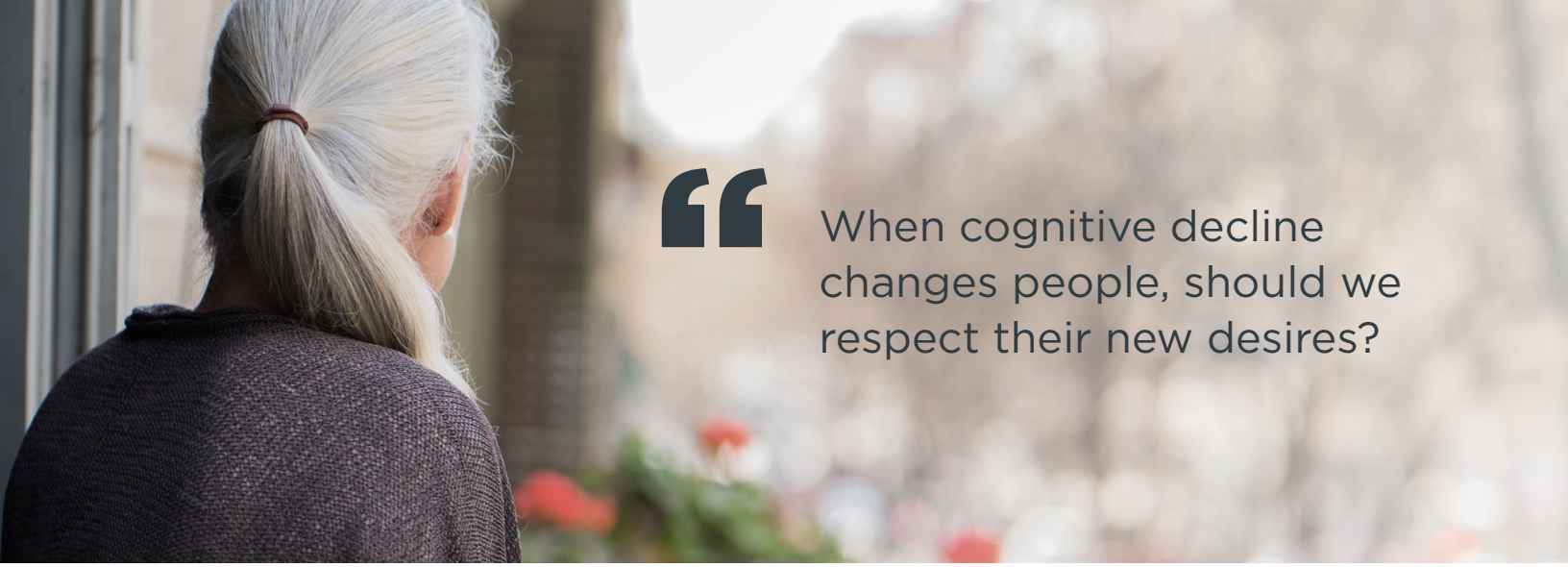
In anticipation of our upcoming annual CLE, entitled "Inconceivable: Fiduciary Circumstances That You Never Imagined (But Maybe Should)," we are excited to feature this profile of our keynote speaker, Katie Engelhart, and some of her reporting. Katie is a journalist, documentary producer, and contributing writer at the New York Times Magazine. Based in New York and Toronto, she is a Fellow at New America.

Katie's reporting came to our attention earlier this year with her New York Times Magazine feature article "The Mother Who Changed: A Story of Dementia," which told the story of a mother suffering from Alzheimer's disease, the man she had a romantic relationship with after the death of her husband, and her two daughters.

Katie's reporting focuses on ethics and medicine, and "The Mother Who Changed: A Story of Dementia" was not her first foray into the topic of elder issues. Her story "What Happened in Room 10?" for the California Sunday Magazine won a George Polk Award for Magazine Reporting in 2021. The article was the product of Katie's months-long investigation into the first COVID outbreak in an American nursing home — and, more broadly, the rise of the for-profit nursing home industry in America. The article also won the John Bartlow Martin Award for Public Interest Journalism and the MOLLY Prize for Investigative Journalism, and it was a finalist for the National Magazine Award in Feature Writing.

More recently, she penned an opinion piece for the New York Times Sunday edition about dementia in the prison population, entitled: "I've Reported on Dementia for Years, and One Image of a Prisoner Keeps Haunting Me." That image is "that of a prisoner who, as a result of cognitive impairment, no longer remembers his crimes — but is still being punished for them." She visits a "Memory Disorder Unit" in Massachusetts, "the federal prison system's first purpose-built facility for incarcerated people with Alzheimer's disease and other forms of dementia." And as is the case with all her writing, she grapples with challenging questions with no easy answers. One of the clinical directors she speaks to states: "In this country, we incarcerate way too many people for way too long. We give people life sentences. And then they turn 90, they're in diapers, they get demented. We have to ask ourselves, what are we accomplishing?"

In "The Mother Who Changed," Katie poses the question: "When cognitive decline changes people, should we respect their new desires?" This was the key question in a lawsuit brought by the mother's two daughters. The mother, Diane Norelius, found herself alone for the first time in 2011 after the death of her husband of 53 years. She later started a relationship with Denzil Nelson, a caretaker on the Norelius farm. According to her daughters, Diane had always complained about Denzil — that he smelled bad or would stop by for coffee when she wished he wouldn't. Then, suddenly, Denzil



> When cognitive decline changes people, should we respect their new desires?

moved in with Diane and she referred to him as "the love of my life." The daughters later learned that Diane had been diagnosed with dementia. Shortly after her diagnosis, Diane gave Denzil her financial power of attorney and granted him the right to live in her house when she died. She also dissolved her financial trust that held all her assets and investments of which one of the daughters was trustee. The daughters filed an elder-abuse claim against Denzil and a motion for immediate temporary (and later, permanent) guardianship and conservatorship of their mother, requesting control of Diane's finances. Sadly, the story was familiar to those of us who handle trust and estate and conservatorship/guardianship matters.

Katie's stories, while focused on medicine and ethics, also touch upon tough legal issues. Indeed, much of her reporting in "The Mother Who Changed," came from transcripts from the various legal proceedings that arose as a result of Diane's dementia and relationship with Denzil. And the legal issues were many: What does it mean to have legal capacity, and how should that be decided? How does the law answer the philosophical question of whether the decision making of the "then-self: before the disease" or the "now-self," should prevail? If Diane and Denzil were having sex, was she competent enough to consent to it, or was it rape? How could Diane and Denzil share the same legal counsel when he was alleged to be her abuser? Should Diane's stated preferences be dispositive, or, as suggested by an expert, are they analogous to the expert's six-year-old grandson stating his preferences — very few of which are allowed?

Unlike lawyers, who have a duty to zealously represent their clients and focus on telling their client's story as persuasively as possible, as a journalist, Katie is able to tell a more comprehensive story that seeks to include a wide variety of perspectives— the daughters, Denzil, the lawyers, medical professionals, guardians/conservators, and the judge. But that doesn't necessarily mean she can provide any clear answers to the questions she raises.

We look forward to talking to Katie in greater depth about her reporting on these important issues and challenges that will no doubt continue and likely increase.

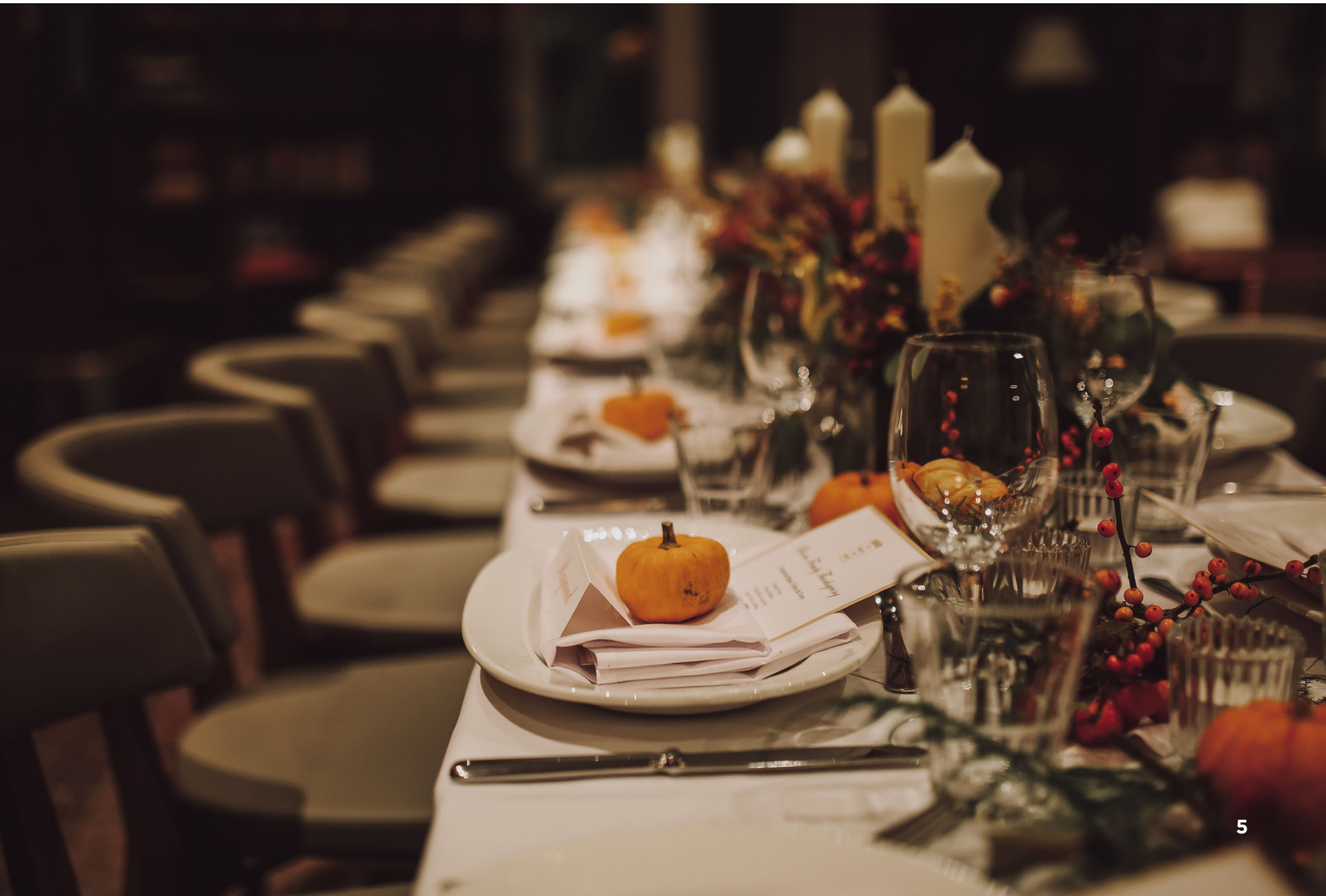
Gabe Berg has tried numerous complex commercial jury trials, bench trials and arbitrations, as plaintiffs and defendants across a broad range of business sectors.

EVENSTAD FAMILY TRIAL AFTERMATH:
RULE 408 MAY NOT BE USED AS A SWORD AND SHIELD

BY ANNE LOCKNER

It's unlikely the extended Evenstad family, former owners and heirs of the Upsher-Smith company, will be celebrating Thanksgiving together this year. After all, the last time the family got together was likely for the 16-day bench trial in Minnesota state court before Judge Edward T. Wahl,[1] who considered Serene Warren's (née Evenstad) various fiduciary-duty and shareholder-oppression claims against her family's company (ACOVA), her family members (including her parents and brother), and a trustee. In a 354-page opinion in *Warren v. ACOVA*, issued on March 27, 2023, Judge Wahl ruled against Serene Warren and denied her request for a buyout. He instead ordered that ACOVA must continue to wind down operations and liquidate now that it has sold its primary asset, the Upsher-Smith pharmaceutical company.

One of the many issues that Judge Wahl addressed in the lengthy opinion was the following: What are the confines of Rule of Evidence 408 and when can settlement and mediation discussions be admissible at trial? During trial, the court admitted evidence of discussions at two mediations — one in 2017 and one in



2019 — "as well as communications between the parties' attorneys in the aftermath of those mediations[.]" While the court had explained on the record its reasoning, it further elaborated on the ruling in the opinion.

Many legal practitioners have a knee-jerk reaction to an opposing party making any reference to settlement discussions or statements made during mediations. That may have something to do with the fact that many mediators' agreements contain language that creates a contractual agreement between the parties.

But Minn. R. Evid. 408 (and its analogous but not-identical federal counterpart, Fed. R. Evid. 408) is more nuanced than just prohibiting the admission of any reference to mediation or settlement. Minn. R. Evid. 408 states:

> Rule 408. Compromise and Offers to Compromise
>
> Evidence of (1) furnishing or offering or promising to furnish, or (2) accepting or offering or promising to accept, a valuable consideration in compromising or attempting to compromise a claim which was disputed as to either validity or amount, is not admissible to prove liability for or invalidity of the claim or its amount. Evidence of conduct or statements made in compromise negotiations is likewise not admissible. This rule does not require the exclusion of any evidence otherwise discoverable merely because it is presented in the course of compromise negotiations. This rule also does not require exclusion when the evidence is offered for another purpose, such as proving bias or prejudice of a witness, negativing a contention of undue delay, or proving an effort to obstruct a criminal investigation or prosecution.

The court provided several reasons why admitting the settlement evidence was appropriate.

First, noting that the evidence was not being admitted to prove either liability or invalidity of Serene's claims or the amount of those claims, the court found that Serene Warren herself opened the door to admitting the evidence by seeking a buyout under Minn. Stat. § 302A.751 and § 302A.467. In considering this equitable claim, the court "is obliged to consider 'all circumstances of the case' to assess if" the defendants acted in a way that was "unfairly prejudicial to Serene that frustrated her reasonable expectations of financial separation," and the mediation negotiations were necessary to consider a "complete picture of the parties' dealings[.]" *Warren v. ACOVA, Inc*., No. 27-CV-18-3944 2023 WL 2663230 (Minn. Dist. Ct. Mar. 27, 2023).

Many legal practitioners have a knee-jerk reaction to an opposing party making any reference to settlement discussions or statements made during mediations.

Thus, the court found that, in seeking to exclude the settlement evidence, "Serene sought to use Rule 408 as a sword and a shield." *Id.* at 312. Serene pled "her claims as if these communications never occurred, turning a blind eye to the continual — and in the Courts view, good faith — efforts by ACOVA and the Evenstad defendants seeking to reach agreement with Serene for ACOVA to buy out her ACOVA stock." *Id.* But "[s]he cannot have it both ways: she cannot offer her side of the mediation evidence while simultaneously seeking to preclude Defendants from offering other contextual evidence relating to the mediations." *Id.* at 313. The court had proposed solving the sword-shield problem by "broadly exclud[ing] any settlement evidence that either Serene or any of the Defendants sought to offer," but Serene declined the court's proposal. *Id.*

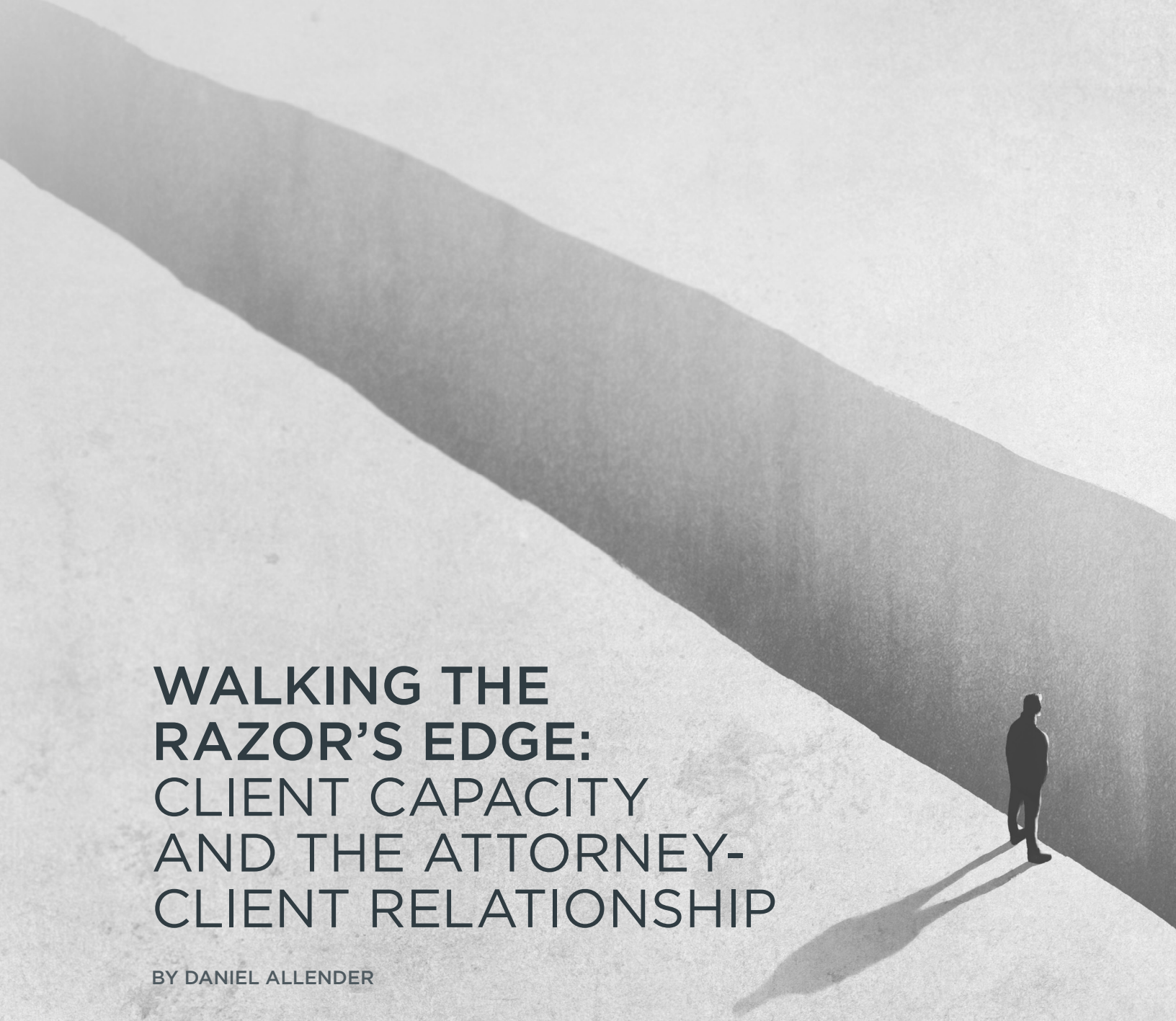
Second, the court also made clear that the 2017 and 2019 mediation evidence was offered "to disprove Serene's claim, pled for the first time after the 2019 post-mediation negotiations ended, that they had acted in ways that were unfairly prejudicial to and deprived her of her reasonable expectations of receiving fair value for her ACOVA shares." *Id.* at 315. Thus, the mediations were addressing different disputes than Serene's later-asserted "reasonable expectation" or "fair separation" claim. Because "[t]he scope of Rule 408 is limited to the particular claim discussed during the compromise discussion," the court held that the rule did not preclude offering evidence to disprove a different claim that had not yet been asserted at the time of the mediations. *Id.* 314.

The court was careful to caution that its "ruling on this issue does not mean settlement evidence should always be admitted in all lawsuits involving section 302A.751 buyout claims." *Id.* at 313. Rather, the unique nature of the "two-track process by which the mature, readily marketable generic drug business would be sold first, followed by efforts to wind down the company selling off all remaining assets to fund distributions to all shareholders" made it impossible to separate the continuing negotiations from the mediations. *Id.* at 313-14.

Nevertheless, practitioners will likely try to apply this holding to other shareholder-oppression claims and expand it to other scenarios as well. Therefore, attorneys — and their clients — should be mindful of how their demands, offers, and conduct during the course of a mediation could be used against them to show the reasonableness of conduct if that is relevant to an equitable determination.

Anne Lockner is a partner in the firm's business litigation department who handles complex business disputes, including fiduciary disputes that arise among companies and their shareholders, offers, and directors.

[1] Judge Wahl will be a panelist at Robins Kaplan's upcoming CLE, Inconceivable! Fiduciary Circumstances That You Never Imagined (But Maybe Should).



WALKING THE RAZOR'S EDGE: CLIENT CAPACITY AND THE ATTORNEY-CLIENT RELATIONSHIP

BY DANIEL ALLENDER

"Representing a client with diminished capacity is like walking on the edge of a razor – only more precarious and potentially more painful if the attorney missteps."

-PROFESSOR THOMAS E. SIMMONS, SOUTH DAKOTA SCHOOL OF LAW[1]

Special problems arise for attorneys representing individuals with diminished mental capacity. Indeed, there are few ethical dilemmas more difficult. Diminished capacity can call into question the attorney's authority to act on the client's behalf at all. And it can cause direct conflict between the attorney's duties of loyalty and confidentiality.

Under the common law, the incapacity of a principal wholly terminates an agency relationship. RESTATEMENT (SECOND) OF AGENCY § 122(1). If the common law were strictly applied to the attorney-client relationship, a client's diminished capacity could be viewed as ending the relationship altogether. But many jurisdictions have adopted a more nuanced approach. As the Restatement observes, even those with diminished capacity "continue to have rights requiring protection," and are often "able to participate to some extent in the representation." RESTATEMENT (THIRD) LAW GOVERNING LAWYERS § 31, cmt. e. For example, even a client with diminished capacity should have the right to retain counsel to resist an application for an appointment of a guardian ad litem . *Graham v. Graham*, 240 P.2d 564 (Wash. 1950).

Ultimately, most states have recognized that determining whether the attorney's authority persists during diminished capacity calls for legal judgment informed by the attorney's duties of loyalty and confidentiality and other fiduciary obligations. For example, the duty of loyalty requires the attorney to act in the client's best interests. But what if the attorney concludes that the client's best interest is that the client lose the right of self -determination, such as by appointment of a conservator? States that have adopted ABA Model Rule 1.14(b), like Minnesota, hold that a lawyer has implied consent to speak with relatives or other third parties who can help the client, and even reveal information relating to the client's apparent lack of capacity, when necessary to protect the client from financial harm. Other states, like California, view

[1] Professor Tom Simmons is a law professor at the University of South Dakota School of Law. He will be presenting the ethics portion of our upcoming CLE, "Inconceivable: Fiduciary Circumstances That You Never Imagined (But Maybe Should)," which will be held on November 2, 2023.

that approach as an unacceptable breach of the attorney's duty of confidentiality, unless the client expressly consents to such a disclosure. *See* State Bar of California, Formal Opinion No. 2021-207. Under the California approach, when confronted with an impossible choice, the lawyer may have to simply decline from carrying out the client's wishes and even terminate the representation. *Id.*

Neither approach is without shortcomings. For example, assume an attorney believes his client is suffering from diminished capacity. The client contacts the lawyer, asking for help transferring real property to the client's nephew to the exclusion of the client's children. The lawyer, suspecting undue influence, retains a consultant with the client's permission to evaluate the client's capacity. After the consultant reports back that the client has indeed lost the capacity to understand the transaction, the nephew reveals he now has power of attorney over the client's estate and instructs the lawyer to proceed with the transaction. When the lawyer tries to contact the client, the nephew isolates the client and prevents the communication. What can the ethical attorney do? In states like Minnesota, the attorney is empowered by Rule 1.14(b) to seek help for the client, including by disclosing facts related to the diminished capacity. But doing so may lead to the client permanently losing the right to make independent financial decisions. In contrast, in California, the lawyer's only option is to try to re-establish contact with the client or simply withdraw from the representation, leaving the client defenseless against the unscrupulous nephew.

Of course, in real life, the circumstances faced by attorneys are far messier than the hypothetical above. Regardless of the situation, attorneys have an obligation to maintain, as far as reasonably practicable, a normal attorney-client relationship. This means keeping the client informed, providing competent advice, and taking direction from the client to the extent possible. Even among clients with unquestionable capacity, each client's ability to understand legal strategy and participate in the representation will vary. In each case, an attorney must be diligent in ensuring effective communication and respecting the client's objectives. When disabilities or other capacity issues come into play, these obligations do not simply go away. To the contrary, even greater care must be exercised in ensuring they are fulfilled.

Attorneys must also avoid paternalism, being "careful not to construe as proof of disability a client's insistence on a view of the client's welfare that a lawyer considers unwise or otherwise at variance with the lawyer's own views." RESTATEMENT (THIRD) LAW GOVERNING LAWYERS § 24 cmt. c. An attorney must stay mindful that their primary responsibility is to effect the wishes of the client after the client has understood the available options and legal and practical implications of the course ultimately chosen. *Moore v. Anderson, Zeigler, Disharoon, Gallagher & Gray, PC*, 135 Cal. Rptr. 2d 888 (Cal. App. 2003). In evaluating a client's objectives, attorneys should be mindful to listen not just to their client's stated goals, but also to their ability to explain their reasoning and to appreciate the likely consequences of their actions.

And finally, attorneys should recognize that the clients themselves should be involved in any concerns about capacity issues. Some clients may benefit from including a trusted family member into the decision-making. Attorneys should be encouraged to raise any concerns they have with the client and allow the client, to the greatest extent possible, an opportunity to participate in deciding how to address concerns about their own capacity.

Daniel Allender is a trial attorney who navigates high-stakes disputes across industries, with an emphasis on retail, real estate, and technology companies.

MEET OUR ISSUE EDITOR:

ANNE M. LOCKNER

Anne M. Lockner is a partner in the firm's National Business Litigation Group and a member of the firm's Executive Board. With over 20 years of experience litigating and trying cases in state and federal courts throughout the country, she has extensive experience in representing companies of all sizes in a wide array of complex business disputes involving breaches of fiduciary duties among shareholders, breaches of contract, fraud, trade secret misappropriation, and non-compete cases. When she is not handling fiduciary disputes, Anne enjoys watching her twin daughters (learn to) play volleyball, listening to them (learn to) play clarinet and flute, watching baking shows with her husband and daughters, and reading a variety of books—both fiction and non-fiction. She can be reached at **ALockner@RobinsKaplan.com**.

FEATURE BIO:

TIM BILLION

Tim practices in Robins Kaplan's Business Litigation Group and has represented clients in a wide variety of cases, including trust and fiduciary litigation, contract and fraud claims, earn-out disputes, class action lawsuits, personal injury claims, constitutional litigation, internal investigations, and criminal proceedings. Tim also advises tribes across the country.

Tim has garnered numerous recognitions for his practice. Chambers USA named Tim as one of two nationwide "Leading Lawyers in Native American Law: Associates to Watch" in 2021 and 2022. Super Lawyers named Tim a "Rising Star" in 2019, 2020, and 2021, a distinction given to the top 2.5% of lawyers. The Best Lawyers in America included Tim on its "Ones to Watch" list in 2021 and 2022 for Commercial Litigation and Trusts and Estates Litigation. Tim has also been named a North Star Lawyer in recognition of his commitment to providing pro bono legal services. Regardless of the size or type of case, Tim uses the litigation process to maximize strategic advantage while staying focused on the client's goals.

Tim is actively involved in bar associations and activities. Tim is the President of the Second Circuit Bar Association and served as past Editor of the South Dakota Trial Lawyer's newsletter, the Barrister. Tim also co-chairs the South Dakota State Bar's Indian Law Committee and serves on the State Bar's Committee on Diversity and Inclusion. In addition, Tim is the South Dakota state chair for the American Bar Association's Council of Appellate Lawyers.

Outside of the office, Tim does his best to keep up with his two young kids, enjoys spending time with his wife, Kelsey, and tries to occasionally play a round of golf.

ROBINS KAPLAN LLP

800 LASALLE AVENUE
SUITE 2800
MINNEAPOLIS MN 55402

BISMARCK
BOSTON
LOS ANGELES
MINNEAPOLIS
NEW YORK
SILICON VALLEY
SIOUX FALLS

800 553 9910
ROBINSKAPLAN.COM

BOSTON

ANTHONY A. FROIO
Managing Partner, Boston, MA
Member of the Executive Board
AFroio@RobinsKaplan.com
617.267.2300

LOS ANGELES

DANIEL ALLENDER
Partner; Chair, LGBTQ+ Resource Group
DAllender@RobinsKaplan.com
310.552.0130

MINNEAPOLIS

DENISE S. RAHNE
Wealth Disputes
Partner; Co-Chair, Wealth Planning,
Administration, and Fiduciary Disputes
DRahne@RobinsKaplan.com
612.349.8500

ANNE M. LOCKNER
Business Fiduciary Disputes
Partner; Member of Executive Board
ALockner@RobinsKaplan.com
612.349.8470

STEVE K. ORLOFF
Wealth Planning
Partner; Co-Chair, Wealth Planning,
Administration, and Fiduciary Disputes
SOrloff@RobinsKaplan.com
612.349.8500

NEW YORK

GABRIEL BERG
Partner
GBerg@RobinsKaplan.com
212.980.7458

NORTH DAKOTA & SOUTH DAKOTA

TIMOTHY BILLION
Partner
TBillion@RobinsKaplan.com
612.349.8475