

Dealing with Clients with Diminished Capacity Under Rule 4-1.14

By Shannon L. Briesacher

The rule regarding clients with diminished capacity seems straightforward and simple: attempt to maintain a normal client-attorney relationship where possible and seek guidance and protective action when it is necessary and in the client's best interest. There are a number of other ethical implications, however, and the prudent practitioner would be well-advised to adequately contemplate all of the special considerations in dealing with a client with diminished capacity.

For instance, when a client incapable of communicating has a legal representative, how does an attorney determine who is the client? In discussing the client's special needs with other interested parties, does an attorney violate his or her duty regarding confidentiality or waive the attorney-client privilege? If an attorney represents a guardian who is acting adversely to the guardian's incapacitated charge, does an attorney have a duty to intervene? The new Rule 4-1.14 provides guidance in dealing with all of these ethical issues by expanding its directives in the comments to the rule. The rule further seeks to help attorneys determine when protective action is needed and provides direction as to how to go about obtaining such protective action on behalf of an incapacitated client.

Rule 4-1.14 states:

(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 normal client-lawyer 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 the individuals or entities that have the ability to take action to protect the client and in appropriate cases, seeking the appointment of a next friend, guardian ad litem, conservator or guardian.

(c) Information relating to the representation of a client with diminished capacity is protected by Rule 4-1.6. When taking protective action pursuant to Rule 4-1.14(b), the lawyer is impliedly authorized under Rule 4-1.6(a) to reveal information about the client, but only to the extent reasonably necessary to protect the client's interests.

THE GENERAL STANDARD

Subsection (a) of Rule 4-1.14 sets the general standard for how clients with diminished capacity are to be treated.

The rule recognizes that even when a client's ability to make decisions is impaired, be it through minority or disability, an attorney should take reasonable steps to maintain a normal attorney-client relationship. The rule also recognizes that a normal attorney-client relationship is not always possible, yet attorneys are required to be attentive and respectful to the client, communicating directly with the client where feasible.¹ The attorney should take reasonable steps to elicit the client's views on the representation and may use family members or others to facilitate communication when necessary.² At the same time, an attorney should not assume that the client is unable to participate in his or her own representation or needs protective action simply because the client advocates a judgment that the attorney believes to be erroneous.³ A minor or mentally impaired client can often participate meaningfully in a legal proceeding even if he or she is not found to be legally competent and attorneys are expected to facilitate such participation when possible.⁴

When communication is impaired and other individuals are involved, it may be difficult to determine from whom directives should come. Where the client is capable of communication, but family members are necessary to facilitate communication, the attorney must look to the client for direction and

not to the family members.⁵ Where a legal representative has already been appointed it is appropriate for the attorney to look to the representative for decisions on behalf of the client.⁶ Where the matter involves a minor, the attorney may be able to rely on the parents as natural guardians, depending on the nature of the legal action.⁷ Less clear is the situation where the client has no family members and no representative. In the American Bar Association's Model Rule 1.14, the ABA declined to explicitly provide that an attorney may make decisions on behalf of a client with diminished capacity.⁸ At the same time, the Restatement (Third) of the Law Governing Lawyers § 24 cmt. d (2000) indicates that a lawyer may make decisions arising within the scope of representation, normally made by the client, if the attorney reasonably believes that the client is incapable of making the decision.⁹ Such a situation demonstrates the delicate balance required in ascertaining the client's ability to participate and the client's need to have a representative act in the client's best interest.

SEEKING PROTECTIVE ACTION

Subsection (b) of Rule 4-1.14 creates a "test" for determining when a lawyer may take protective action on behalf of a client with diminished capacity and requires that the lawyer believe that the client has diminished capacity, believe that the client is at risk of substantial physical, financial or other harm and believe that the client cannot act in his or her own best interest. So if an attorney is not medically trained, how does an attorney go about meeting the first prong of the test in determining that a client has diminished capacity?

An attorney should consider the client's ability to articulate reasoning, the variability of the client's state of mind and the client's ability to appreciate the consequences of the decisions that are made.¹⁰ An attorney should also consider the substantive fairness of the decisions and the consistency of the decision with the long-term commitments and values of the client.¹¹ An attorney may seek counsel from a diagnostician in this regard and the ABA suggests that an attorney additionally consult with the client's family or other individuals who can provide insight into the client's capacity.¹²

Once an attorney has determined that the client suffers diminished capacity there are a number of avenues available in seeking protective action. An attorney may seek guidance from others empowered to act on behalf of the client, like family members, professional services and support groups, and adult-protective agencies.¹³ If a legal representative has not been appointed, the attorney should also consider seeking appointment of next of friend, guardian ad litem, conservator or guardian, if necessary to protect the client's interests.¹⁴ In considering whether to take any protective action, the attorney should consider the wishes and values of the client, and the client's best interest, with the goal of maximizing the client's capacities and maintaining as much autonomy as possible.¹⁵ Comment (7) of the rule warns that while appointment of a representative may appear necessary, it also may be expensive or traumatic for the client so an attorney should use caution and be aware of other, less restrictive alternatives.¹⁶

Rule 4-1.14 recognizes that emergency situations may occur and pro-

vides the following in Comment (9):

In an emergency where the health, safety, or a financial interest of a person with seriously diminished capacity is threatened with imminent and irreparable harm, a lawyer may take legal action on behalf of such person even though the person is unable to establish a client-lawyer relationship or to make express considered judgments about the matter when the person or another acting in good faith on that person's behalf has consulted with the lawyer.

Even in such an emergency, comment (9) warns that a lawyer should not act unless the lawyer believes that there is no other lawyer, agent or legal representative available and should only act to maintain the status quo and avoid imminent and irreparable harm.¹⁷ A lawyer would not usually seek compensation for services rendered in this capacity.¹⁸

REVEALING OF CONFIDENTIAL INFORMATION

Subsection (c) of Rule 4-1.14 clearly establishes that information relating to the representation of a client with diminished capacity is confidential. The Rule carves out an exception, however, for an attorney who seeks to take protective action pursuant to Rule 4-1.14(b) and allows an attorney to reveal confidential information when limited and in the client's best interest. This is true even if the client has expressly told the attorney not to disclose such information.¹⁹ Recognizing that disclosure of such information could be harmful to the client's interests, an attorney is not permitted to disclose confidential infor-

mation pursuant to Rule 4-1.14(c), including the client's status as one of diminished capacity, unless the attorney is seeking protective action, the disclosure is limited and it is in the client's best interest. So when might disclosure be permissible in practice? As discussed above, an attorney may appropriately consult the family members of a client with diminished capacity and may usually do so without fear of waiving the attorney-client privilege.²⁰ Also discussed above, an attorney might find it necessary to consult a doctor regarding a diagnosis of diminished capacity. Finally, as expressly provided for in the rule, an attorney may reveal the status of the client's condition when seeking a guardian or legal representative pursuant to Rule 4-1.14(b).

PUTTING IT ALL TOGETHER

Consider the following scenario: You are contacted by Grandson Greg, who informs you that his Grandmother Gertrude needs a will and power of attorney. You have never represented either person. Grandson Greg informs you that Grandmother Gertrude is easily disoriented and confused, but that he is aware of what Grandmother Gertrude wants. You arrange to meet with Grandson Greg and Grandmother Gertrude that afternoon.

1. Knowing that Grandmother Gertrude is easily confused, is it permissible to discuss the legal matters directly with Grandson Greg? If you are drafting the will and power of attorney on behalf of Grandmother Gertrude, then you must try to establish a normal attorney-client relationship with Grandmother Gertrude, which means communicating directly with her regarding her wishes. If after talking with Grand-

mother Gertrude you determine that she suffers diminished capacity, you may rely on Grandson Greg to facilitate communication, but must still keep in mind that Gertrude is your client. Therefore, it will be your job to assure that Grandmother Gertrude's wishes are carried out.

2. After speaking with Grandmother Gertrude, you determine that she does not have the capacity to make a will. Grandson Greg suggests that you petition for him to be appointed guardian over Grandmother Gertrude, which appears to be necessary for Grandmother Gertrude's protection. Can you represent Grandson Greg in his guardianship petition? Can you also represent Grandmother Gertrude? Pursuant to Rule 4-1.14(b), an attorney may represent Grandson Greg in a guardianship proceeding. However, you will not be able to continue representing Grandmother Gertrude.¹

3. Grandson Greg is appointed guardian over Grandmother Gertrude. When you first spoke with Grandmother Gertrude, you remember her stating that she wished to leave all of her worldly possessions to the church. You become aware that Grandson Greg has committed Grandmother Gertrude to a questionable nursing facility and is using her assets to refurbish his home. As Grandson Greg's attorney, are you obligated to intervene? Comment (4) to Rule 4-1.14 states that "[i]f a lawyer represents the guardian as distinct from the ward and is aware that the guardian is acting adversely to the ward's interest, the lawyer may have an obligation to prevent or rectify the guardian's misconduct. See Rule 4-1.2(d)."

Whether representing a five-year old child in a custody action or an eighty-

five year old woman in a guardianship proceeding, the clear intent of Rule 4-1.14 is that all clients be afforded, to the extent possible, the benefit of direct communication with an attorney and respect for the client's wishes and directives. When it is not possible to achieve a typical attorney-client relationship, however, Rule 4-1.14 and the comments thereto provide guidance in ensuring that attorneys have avenues for appropriately guarding the best interests of clients with diminished capacity, while at the same time achieving ethical compliance.

ENDNOTES

- 1 Comment (2) to Rule 4-1.14.
- 2 RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 24 cmt. c (2000); Comment (3) to Rule 4-1.14.
- 3 ABA Formal Ethics Opinion 96-404 (1996).
- 4 Comment (1) to Rule 4-1.14.
- 5 Comment (3) to Rule 4-1.14.
- 6 Comment (4) to Rule 4-1.14.
- 7 *Id.*
- 8 Annotated Model Rules of Professional Conduct, 5th Edition, ABA, p. 238.
- 9 *Id.*
- 10 Comment (6) to Rule 4-1.14.
- 11 *Id.*
- 12 ABA Formal Ethics Op. 96-404 (1996).
- 13 Comment (5) to Rule 4-1.14.
- 14 Comment (7).
- 15 Comment (5).
- 16 Comment (7); ABA Formal Ethics Op. 96-404 (1996).
- 17 Comment (9) to Rule 4-1.14.
- 18 Comment (10) to Rule 4-1.14.
- 19 Comment (8) to Rule 4-1.14.
- 20 Comment (3) to Rule 4-1.14.



Shannon L. Briesacher is staff counsel for the Office of Chief Disciplinary Counsel in Jefferson City.