

Clients With Diminished Capacity

By Sharon Weedn

Along with coming to grips with the graying of our profession,¹ attorneys must be alert to the fact that the general population, i.e., our clients, is aging right along with baby boomer lawyers. Fortunately, there is a rule of professional conduct that provides some guidance in ethically representing clients with diminished capacity. Supreme Court Rule 4-1.14 reads:²

(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 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.

Normal Client-Lawyer Relationship

The rule starts with the proscriptive statement that a lawyer "shall maintain a normal client-lawyer relationship" with a client with diminished capacity, but then is modified by the clause "as far as reasonably possible." The duties correlative to any client-lawyer relationship, then, apply to one with a client with diminished capacity: the lawyer must, for example, be competent, appropriately communicative, diligent, maintain client confidences, and avoid conflicts of interest. Substituting the lawyer's judgment for the client's is not part of a normal client-lawyer relationship. The lawyer should counsel the client and help the client make decisions based on appropriate information. The correlative Rules of Professional Conduct require no less. Even if a legal representative has been appointed for the client, the lawyer should treat the represented person as the client, particularly with regard to communications. The lawyer should be sensitive to the fact that there may be some routine decisions, after appropriate communication, that a client with diminished capacity is capable of making.

The prickly questions of what constitutes a "normal client-lawyer relationship" and how a lawyer can determine the extent of a client's incapacity com-

plicate practical application of Rule 4-1.14 (a). A rule of thumb for the former question is Rule 4-1.2 (a)'s charge to "abide by a client's decisions concerning the objectives of representation . . . and consult with the client as to the means by which they are to be pursued." With regard to the latter inquiry, Rule 4-1.14's comment, in paragraph 6, provides the lawyer a number of factors to consider in ascertaining capacity, including the consistency of the client's decisions with the known long-term commitments and values of the client.³

Beyond Normal

Subpart (b) of the rule describes what a lawyer may do if the lawyer becomes convinced the client has diminished capacity, is at substantial risk of physical, financial, or other harm if nothing is done, and cannot act in the client's own interest. Subpart (c) of the rule provides ethical cover for the lawyer who opts to take action under subpart (b), because virtually anything a lawyer might do in a subpart (b) factual scenario would likely run afoul of other ethical rules.⁴

What action is a lawyer authorized to take under subpart (b) of Rule 4-1.14? The lawyer may take "reasonably necessary protective action." Rule 4-1.14's comment, in paragraph 5, gives examples of such action: consulting with family members, calling for a reflective period to permit "clarification or improvement of circumstances," using voluntary surrogate decision-making tools such as durable powers of attorney, and consulting with individuals or entities that have the ability to protect the client. Reasonable protective action may include petitioning a court for ap-

pointment of a legal representative for the client. If a third party does the petitioning, the lawyer should not attempt to represent the third party.⁵

It would appear that the lawyer who opts to take action to protect a client with diminished capacity, i.e., by consulting with third parties about the problem or by petitioning a court for appointment of a legal representative, would violate the lawyer's duty to maintain client confidences. Subpart (c) of the rule, however, specifically identifies revelation of information relating to the representation of a client with diminished capacity as a revelation "impliedly authorized" to carry out the representation, and not, therefore, in violation of Rule 4-1.6 (a).

Given the risks, however, that disclosure of information regarding the client's condition may pose to the client – including, at one extreme, involuntary commitment – the rule cautions the lawyer to reveal information "only to the extent reasonably necessary to protect the client's interest." Although of small consolation to the lawyer caught in this "unavoidably difficult" situation, the comments and language of the rule are consistent in urging a course of action that will create the least intrusion possible on the client's right to make his or her own life decisions.

To Do or Not To Do

Subpart (b) of the rule discusses reasonably necessary protective actions a lawyer *may* take if persuaded a client is unable to exercise the judgment necessary to the client-lawyer relationship. It is worth noting that while the word "shall" is used in subpart (a) of the rule, subpart (b) uses the word "may," leaving to the lawyer the discretion to exercise professional judgment in deciding whether to act.⁶ Terminating a representation when the client's capacity becomes questionable may not, however, be an option. Rule 4-1.16 constrains termination of a representation if to do so would materially adversely affect the client's interests. Withdrawal may resolve the lawyer's immediate ethical dilemma, but abandoning a client at his or her most vulnerable may create more problems for everyone, including the lawyer.⁷

Endnotes

1 Gary Toohey, *Shades of Gray: The Opportunities and Challenges of an Aging Bar*, PRECEDENT, Fall 2011 at 6. Diminished capacity issues are not limited to elderly clients; they may also arise in the case of minor clients or any clients with mental impairment. This article does not integrate the substantive law and procedural rules dealing specifically with representation of minors.

2 From the adoption of Missouri's Rules of

Professional Conduct in 1986 until Rule 4-1.14's amendment in 2007, the rule addressed clients under a "disability" and spoke to the client whose judgment was "impaired." From the 2007 amendment forward, the rule has been titled "Client with Diminished Capacity" and addresses a representation where the client's capacity to make adequately considered decisions is "diminished." The semantic changes, it has been suggested, were made to encourage lawyers to recognize that individuals, i.e., clients, may experience a "continuum of capacity" requiring ongoing assessment of a client's ability to deal rationally with the specific decision to be made. *See Note, Model Rule 1.14: The Well-Intended Rule Still Leaves Some Questions Unanswered*, XVII GEO. J. LEGAL ETHICS 313 (2004).

3 *See id.* at 325-326 for brief suggestions about how to determine if a client's judgment is diminished, either through a "decisional capacity" test or a basic orientation test. *See also* ABA Commission on Law and Aging & American Psychological Assoc., *Assessment of Older Adults with Diminished Capacity: A Handbook for Lawyers* (2005).

4 *See*, e.g., Rule 4-1.2 (a) (abide by client's decision), Rule 4-1.6 (confidentiality), Rule 4-1.7 (conflict of interest).

5 *See* ABA Formal Ethics Op. 96-404 (1996).

6 *See* Rules of Professional Conduct, Scope, paragraph 14.

7 *Cf. In re Witte*, 615 S.W. 2d 421, 422 (Mo. banc 1981), appeal dismissed, cert. denied, 454 U.S. 1025, where the Supreme Court of Missouri said that evidence of a client's less than normal mental and functional capacity raised the standard of conduct the Court required of the lawyer in dealing with the client.

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