

Representing Clients With Diminished Capacity

Heart of America Fellows Institute

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REPRESENTING CLIENTS WITH DIMINISHED CAPACITY

I. APPLICABLE MODEL RULES OF PROFESSIONAL CONDUCT

A. Rule 1.2 – Scope of Representation and Allocation of Authority Between Client and Lawyer

- (a) Subject to paragraphs (c) and (d), a lawyer shall abide by a client's decisions concerning the objectives of the representation and, as required by Rule 1.4, shall consult with the client as to the means by which they are to be pursued. A lawyer may take such action on behalf of the client as is impliedly authorized to carry out the representation. A lawyer shall abide by a client's decision whether to settle a matter. In a criminal case, the lawyer shall abide by the client's decision, after consultation with the lawyer, as to a plea to be entered, whether to waive jury trial and whether the client will testify.
 - (b) A lawyer's representation of a client, including representation by appointment, does not constitute an endorsement of the client's political, economic, social or moral views or activities.
 - (c) A lawyer may limit the scope of the representation if the limitation is reasonable under the circumstances and the client gives informed consent.
 - (d) A lawyer shall not counsel a client to engage, or assist a client, in conduct that the lawyer knows is criminal or fraudulent, but a lawyer may discuss the legal consequences of any proposed course of conduct with a client and may counsel or assist a client to make a good faith effort to determine the validity, scope, meaning or application of the law.
1. Comment [4] to Rule 1.2 – In a case in which the client appears to be suffering diminished capacity, the lawyer's duty to abide by the client's decisions is to be guided by reference to Rule 1.14.

B. Rule 1.4 - Communication

- (a) A lawyer shall:
 - (1) promptly inform the client of any decision or circumstance with respect to which the client's informed consent, as defined in Rule 1.0(e), is required by these Rules;
 - (2) reasonably consult with the client about the means by which the client's objectives are to be accomplished;

- (3) keep the client reasonably informed about the status of the matter;
 - (4) promptly comply with reasonable requests for information; and
 - (5) consult with the client about any relevant limitation on the lawyer's conduct when the lawyer knows that the client expects assistance not permitted by the Rules of Professional Conduct or other law.
- (b) A lawyer shall explain a matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation.

C. Rule 1.6 - Confidentiality of Information

- (a) A lawyer shall not reveal information relating to representation of a client unless the client gives informed consent, the disclosure is impliedly authorized in order to carry out the representation or the disclosure is permitted by paragraph (b).
- (b) A lawyer may reveal information relating to the representation of a client to the extent the lawyer reasonably believes necessary:
- (1) to prevent reasonably certain death or substantial bodily harm;
 - (2) to prevent the client from committing a crime or fraud that is reasonably certain to result in substantial injury to the financial interests or property of another and in furtherance of which the client has used or is using the lawyer's services.
 - (3) to prevent, mitigate or rectify substantial injury to the financial interests or property of another that is reasonably certain to result or has resulted from the client's commission of a crime or fraud in furtherance of which the client has used the lawyer's services.
 - (4) to secure legal advice about the lawyer's compliance with these Rules;
 - (5) to establish a claim or defense on behalf of the lawyer in a controversy between the lawyer and the client, to establish a defense to a criminal charge or civil claim against the lawyer based upon conduct in which the client was involved, or to respond to allegations in any proceeding concerning the lawyer's representation of the client;
 - (6) to comply with other law or a court order; or

(7) to detect and resolve conflicts of interest arising from the lawyer's change of employment or from changes in the composition or ownership of a firm, but only if the revealed information would not compromise the attorney-client privilege or otherwise prejudice the client.

(c) A lawyer shall make reasonable efforts to prevent the inadvertent or unauthorized disclosure of, or unauthorized access to, information relating to the representation of a client.

D. Rule 1.7 - Conflicts of Interest

(a) Except as provided in paragraph (b), a lawyer shall not represent a client if the representation involves a concurrent conflict of interest. A concurrent conflict of interest exists if:

(1) the representation of one client will be directly adverse to another client; or

(2) there is a significant risk that the representation of one or more clients will be materially limited by the lawyer's responsibilities to another client, a former client or a third person or by a personal interest of the lawyer.

(b) Notwithstanding the existence of a concurrent conflict of interest under paragraph (a), a lawyer may represent a client if:

(1) the lawyer reasonably believes that the lawyer will be able to provide competent and diligent representation to each affected client;

(2) the representation is not prohibited by law;

(3) the representation does not involve the assertion of a claim by one client against another client represented by the lawyer in the same litigation or other proceeding before a tribunal; and

(4) each affected client gives informed consent, confirmed in writing.

E. Rule 1.14 - 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 disability 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 guardian ad litem, conservator or guardian.
- (c) Information relating to the representation of a client with diminished capacity is protected by Rule 1.6. When taking protective action pursuant to paragraph (b), the lawyer is impliedly authorized under Rule 1.6(a) to reveal information about the client, but only to the extent reasonably necessary to protect the client's interests.
 - 1. The comments to Rule 1.14 provide:
 - a) Comment [1] – . . . [A] client with diminished capacity often has the ability to understand, deliberate upon, and reach conclusions about matters affecting the client's own well-being.
 - b) Comment [2] – The fact that a client suffers a disability does not diminish the lawyer's obligation to treat the client with attention and respect. Even if the person has a legal representative, the lawyer should as far as possible accord the represented person the status of client, particularly in maintaining communication.
 - c) Comment [8] – Disclosure of the client's diminished capacity could adversely affect the client's interests. For example, raising the question of diminished capacity could, in some circumstances, lead to proceedings for involuntary commitment. Information relating to the representation is protected by Rule 1.6. Therefore, unless authorized to do so, the lawyer may not disclose such information. When taking protective action pursuant to paragraph (b), the lawyer is impliedly authorized to make the necessary disclosures, even when the client directs the lawyer to the contrary. Nevertheless, given the risks of disclosure, paragraph (c) limits what the lawyer may disclose in consulting with other individuals or entities or seeking the appointment of a legal representative. At the very least, the lawyer should determine whether it is likely that the person or entity consulted with will act adversely to the client's interests before

discussing matters related to the client. The lawyer's position in such cases is an unavoidably difficult one.

II. **CONSIDERATIONS WHEN A CLIENT HAS DIMINISHED CAPACITY**

A. “Diminished capacity” is not defined in the Model Rules

1. ACTEC commentary on Rule 1.14

- a) A formal determination of diminished capacity need not have been made by a medical doctor or a court in order for a lawyer to believe that a client suffers from diminished capacity. A lawyer must be aware, however, that his or her determination of the client's diminished capacity is subjective and that the lawyer may lack the expertise to appraise the client's capacity accurately.
- b) Comment [6] to Rule 1.14 – In determining the extent of the client's diminished capacity, the lawyer should consider and balance such factors as: the client's ability to articulate reasoning leading to a decision, variability of state of mind and ability to appreciate consequences of a decision; the substantive fairness of a decision; and the consistency of a decision with the known long-term commitments and values of the client. In appropriate circumstances, the lawyer may seek guidance from an appropriate diagnostician.

B. In order to take protective action, a lawyer must believe the client

1. Has diminished capacity
2. Is at risk of substantial physical, financial, or other harm unless action is taken; and
3. Cannot adequately act in the client's own interest.

C. Protective action might include

1. Consulting with other individuals or entities that might be able to help protect the client
 - a) Comment [5] to Rule 1.14 provides this might include “consulting with family members, using a reconsideration period to permit clarification or improvement of circumstances, using voluntary surrogate decisionmaking tools such as durable powers of attorney or

consulting with support groups, professional services, adult-protective agencies or other individuals or entities that have the ability to protect the client.”

2. Seeking appointment of a guardian, conservator, or both.

D. Conflicts of interest arise in connection with seeking protective action

1. Comment [3] to Rule 1.14 provides that “the lawyer must keep the client's interests foremost and, except for protective action authorized under paragraph (b), must look to the client, and not family members, to make decisions on the client's behalf.”

2. Comment [4] to Rule 1.14 provides “If the 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 1.2(d).”

3. ACTEC commentary on Rule 1.7

a) [A] lawyer may take reasonable steps to protect the interests of a client the lawyer reasonably believes to be suffering from diminished capacity, including the initiation of protective proceedings. This rule exists in most jurisdictions, but not all. Note that the lawyer should only represent the petitioner in protective proceedings for a client after thorough review of the interpretation of MRPC 1.14(b) under applicable state law and consideration of conflicts of interest. See ACTEC Commentary on MRPC 1.14 (Client with Diminished Capacity). Doing so may create a conflict of interest between the lawyer and the client. The client might, for example, oppose the protective action being taken by the lawyer and consider it a breach of the duty of loyalty. In such a circumstance, the lawyer is entitled to continue to take protective action, but where possible, should call the court's attention to the client's opposition and ask that separate counsel be provided to represent the client's stated position if the client has not already retained such counsel. A lawyer who is retained on behalf of the client to resist the institution of a protective action may not take positions that are contrary to the client's position or make disclosures contrary to MRPC 1.6 (Confidentiality of Information).

- E. Confidentiality issues with seeking protective action
 - 1. When taking protective action pursuant to Rule 1.14(b), a lawyer is impliedly authorized under Rule 1.6(a) to reveal information about the client, but only to the extent reasonably necessary to protect the client's interests.
 - 2. ACTEC commentary on Rule 1.14
 - a) Based on the interaction of subsections (b) and (c) of MRPC 1.14, a lawyer has implied authority to make disclosures of otherwise confidential information and take protective actions when there is a risk of substantial harm to the client and the lawyer reasonably believes that the client is unable because of diminished capacity, either temporary or permanent, to protect himself or herself. Under those circumstances, the lawyer may consult with individuals or entities that may be able to assist the client, including family members, trusted friends and other advisors. However, in deciding whether others should be consulted, the lawyer should also consider the client's wishes, the impact of the lawyer's actions on potential challenges to the client's estate plan, and the impact on the lawyer's ability to maintain the client's confidential information. If the client has given an express direction not to consult with an individual or group, the lawyer may not override that direction unless there has been a material change that would render the express direction no longer applicable.
 - b) [B]efore making such protective disclosures, it is incumbent on the lawyer to assess whether the person or entity consulted will act adversely to the client's interests.
- F. Maintaining a relationship with a client whose capacity has diminished
 - 1. ACTEC commentary to Rule 1.14
 - a) A lawyer who believes that a client suffers from either diminished capacity or declining capacity should always act in a manner that is consistent with MRPC 1.14(a)'s direction to maintain a normal lawyer-client relationship to the extent reasonably possible.
 - b) Except for disclosures and protective actions authorized under MRPC 1.14, the lawyer should rely on the client's directions, rather than the contrary or inconsistent directions of family members, in fulfilling the lawyer's duties to the client.

- G. May an attorney withdraw from representing a client whose capacity has diminished, or may a client with diminished capacity terminate the attorney-client relationship?
1. Rule 1.16(b)(1) provides that a lawyer may withdraw from representing a client if withdrawal can be accomplished without material adverse effect on the interests of the client.
 2. Comment [6] to Rule 1.16 provides “If the client has severely diminished capacity, the client may lack the legal capacity to discharge the lawyer, and in any event the discharge may be seriously adverse to the client's interests. The lawyer should make special effort to help the client consider the consequences and may take reasonably necessary protective action as provided in Rule 1.14.
 3. Upon termination of the relationship by the lawyer or client, Comment [9] requires the lawyer to “take all reasonable steps to mitigate the consequences to the client.”
- H. Clients with diminished capacity may be especially susceptible to undue influence.
1. ACTEC commentary to Rule 1.14
 - a) *Testamentary Capacity and Undue Influence.* A lawyer should attempt to remain reasonably alert to indications that a client may have declining capacity or be the subject of undue influence. If the testamentary capacity of a client is uncertain or the lawyer suspects that another person may be unduly influencing the client, the lawyer should exercise particular caution in assisting the client to modify his or her estate plan and make reasonable inquiry, under the circumstances, to assess whether the client has the necessary capacity and any document modifying the estate plan is consistent with the client's intentions. The lawyer generally should not prepare a will, trust agreement or other dispositive instrument for a client whom the lawyer reasonably believes lacks the requisite capacity or is being unduly influenced to execute the document. On the other hand, because of the importance of testamentary freedom, the lawyer may properly assist clients whose testamentary capacity appears to be borderline or in circumstances which raise indicia of undue influence, recognizing that a trier of fact may be in the best position to make a final determination after full consideration of the facts and circumstances.

The lawyer may also take into account the ability of the client to make testamentary documents if the lawyer declines to act, erring on the side of creating what may constitute an invalid document when declining to do so would leave the client with no other options. See, *Vignes v. Weiskopf*, 42 So. 2d 84 (Fla. 1949) ("When he reached his client's bedside there was good reason to believe, from the atmosphere there, that the client had not long to live and that he was probably not mentally alert, but these circumstances did not make it necessary that the attorney constitute himself a court to pass on the medical and legal questions whether he was in fact capable of executing a valid codicil").

If a lawyer believes that another person may be unduly influencing the client, the lawyer should attempt to meet independently with the client to confirm the client's intentions, if the client is willing to do so, and it is possible to do so, under the circumstances.

In cases in which the lawyer believes that the client's testamentary capacity is borderline, or that the client may be the subject of undue influence, the lawyer should take steps to document and preserve evidence regarding the client's testamentary capacity and the facts and circumstances involved.

2. Undue influence has been described as a process not an event
 - a) Sometimes it may be accomplished by an overt threat
 - b) Often it is accomplished over an extended period of time by the influencer establishing a relationship with the person being influenced

III. ASSESSING DIMINISHED CAPACITY

- A. Normal aging
- B. Impact of retirement
- C. Capacity defined

IV. 10 COMMANDMENTS OF CAPACITY

V. AUTONOMY V. BENEFICENCE

- A. Cognitive concerns
- B. Medical concerns
- C. Psychiatric concerns
- D. Mitigating factors

VI. THE ROLE OF THE PROFESSIONAL

VII. THE PSYCHOLOGY OF ROMANCE SCAMS

- A. How they work
- B. Psychological variables associated with increased risk
- C. Age-associated financial vulnerability

VIII. THE ROLE OF CAPACITY AND INTERVENTION