

CLIENTS WITH DIMINISHED CAPACITY AND CONFLICTS OF INTEREST

Patrick R. Burns
First Assistant Director
Office of Lawyers Professional Responsibility

Decision-Making

- Rule 1.2 (a), MRPC, and the accompanying comment sets for the general rule allocating decision making authority in an attorney-client relationship:
- “(a) Subject to paragraphs (c) and (d), a lawyer shall abide by a client’s decisions concerning the objectives of 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 a jury trial and whether the client will testify.”

Rule 1.14, MRPC

- (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 reasonable protective action,** including consulting 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.

Rule 1.14 and Confidentiality

- (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(b)(3) to reveal information about the client, but only to the extent reasonably necessary to protect the client's interests.

Rule 1.2 defers to 1.14

- [4] In a case in which the client appears to be suffering from diminished capacity, the lawyer's duty to abide by the client's decisions is to be guided by reference to Rule 1.14.

Substituting Judgment – Rule 1.14

- [1] The normal client-lawyer relationship is based on the assumption that the client, when properly advised and assisted, is capable of making decisions about important matters. When the client is a minor or suffers from a diminished mental capacity, however, maintaining the ordinary client-lawyer relationship may not be possible in all respects. In particular, a severely incapacitated person may have no power to make legally binding decisions. Nevertheless, 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. For example, children as young as five or six years of age, and certainly those often or twelve, are regarded as having opinions that are entitled to weight in legal proceedings concerning their custody. So also, it is recognized that some persons of advanced age can be quite capable of handling routine financial matters while needing special legal protection concerning major transactions.
- [2] The fact that a client suffers an impairment 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.

Rule 1.14 Cmt. Cont.

- “[3] The client may wish to have family members or other persons participate in discussions with the lawyer. When necessary to assist in the representation, the presence of such persons generally does not affect the applicability of the attorney-client evidentiary privilege. **Nevertheless, 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.**”
- “[9] **In an emergency where the health, safety, or 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 a person even though the person is unable to establish a client-lawyer relationship or to make or express considered judgments about the matter, when the person or another acting in good faith on that person’s behalf has consulted the lawyer.** Even in such an emergency, however, the lawyer should not act unless the lawyer reasonably believes that the person has no other lawyer, agent or other representative available. **The lawyer should take legal action on behalf of the person only to the extent reasonably necessary to maintain the status quo or otherwise avoid imminent and irreparable harm.** A lawyer who undertakes to represent a person in such an exigent situation has the same duties under these Rules as the lawyer would with respect to a client.”

ACTEC Position

- *Implied Authority to Disclose and Act.* Based on the interaction of subsections (b) and (c) of MRPC Rule 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.
- *Risk and Substantiality of Harm.* For the purposes of this rule, the risk of harm to a client and the amount of harm that a client might suffer should both be determined according to a different scale than if the client were fully capable. **In particular, the client's diminished capacity increases the risk of harm and the possibility that any particular harm would be substantial. If the risk and substantiality of potential harm to a client are uncertain, a lawyer may make reasonably appropriate disclosures of otherwise confidential information and take reasonably appropriate protective actions.** In determining the risk and substantiality of harm and deciding what action to take, a lawyer should consider any wishes or directions that were clearly expressed by the client during his or her competency. **Normally, a lawyer should be permitted to take actions on behalf of a client with apparently diminished capacity that the lawyer reasonably believes are in the best interests of the client.**

Restatement Position

- *ALI Restatement Third of The Law Governing Lawyers*, at Section 24:
- (2) A lawyer representing a client with diminished capacity as described in Subsection (1) [essentially restating the provisions of 1.14(a)] and for whom no guardian or other representative is available to act, must, with respect to a matter within the scope of the representation, pursue the lawyer's reasonable view of the client's objectives or interests as the client would define them if able to make adequately considered decisions on the matter, even if the client expresses no wishes or gives contrary instructions.

ABA Op. 96-404

- Rule 1.14(b) does not authorize the lawyer to take protective action because the client is not acting in what the lawyer believes to be the client's best interest, but only when the client 'cannot adequately act in the client's *own* interest.' (Emphasis added.) A client who is making decisions that the lawyer considers to be ill-considered is not necessarily unable to act in his own interest, and **the lawyer should not seek protective action merely to protect the client from what the lawyer believes are errors in judgment.** Rule 2.1 permits the lawyer to offer his candid assessment of the client's conduct and its possible consequences, and to suggest alternative courses, but he must always defer to the client's decisions. Substituting the lawyer's own judgment for what is in the client's best interest robs the client of autonomy and is inconsistent with the principles of the "normal" relationship.

Communications Issues

- Rule 1.4, MRPC – Communications with clients
- Comments:
- [6] Ordinarily, the information to be provided is that appropriate for a client who is a comprehending and responsible adult. However, fully informing the client according to this standard may be impracticable, for example, where the client is a child or suffers from diminished capacity. See Rule 1.14.
- [7] In some circumstances, a lawyer may be justified in delaying transmission of information when the client would be likely to react imprudently to an immediate communication. Thus, a lawyer might withhold a psychiatric diagnosis of a client when the examining psychiatrist indicates that disclosure would harm the client.

Minn. Stat. §260C.163

- **Subd. 3. Appointment of counsel.** (a) The child, parent, guardian or custodian **has the right to effective assistance of counsel in connection with a proceeding in juvenile court** as provided in this subdivision.
- (f) Court-appointed counsel for the parent, guardian, or custodian under this subdivision is at county expense. If the county has contracted with counsel meeting qualifications under paragraph (g), the court shall appoint the counsel retained by the county, unless a conflict of interest exists. If a conflict exists, after consulting with the chief judge of the judicial district or the judge's designee, the county shall contract with competent counsel to provide the necessary representation. **The court may appoint only one counsel at public expense for the first court hearing to represent the interests of the parents, guardians, and custodians, unless, at anytime during the proceedings upon petition of a party, the court determines and makes written findings on the record that extraordinary circumstances exist that require counsel to be appointed to represent a separate interest of other parents, guardians, or custodians subject to the jurisdiction of the juvenile court.**

Rule 1.7(a), MRPC

- **RULE 1.7: CONFLICT OF INTEREST: CURRENT CLIENTS**
- (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.

Rule 1.7(b), MRPC

- (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.

Rule 1.7 Cmt. Re Joint Representation

- [29] In considering whether to represent multiple clients in the same matter, a lawyer should be mindful that if the common representation fails because the potentially adverse interests cannot be reconciled, the result can be additional cost, embarrassment and recrimination. Ordinarily, the lawyer will be forced to withdraw from representing all of the clients if the common representation fails. In some situations, the risk of failure is so great that multiple representation is plainly impossible. **For example, a lawyer cannot undertake common representation of clients where contentious litigation or negotiations between them are imminent or contemplated. Moreover, because the lawyer is required to be impartial between commonly represented clients, representation of multiple clients is improper when it is unlikely that impartiality can be maintained. Generally, if the relationship between the parties has already assumed antagonism, the possibility that the clients' interests can be adequately served by common representation is not very good.**

Rule 1.7 Cmt. Re Joint Representation

- [31] As to the duty of confidentiality, continued common representation will almost certainly be inadequate if one client asks the lawyer not to disclose to the other client information relevant to the common representation. This is so because the lawyer has an equal duty of loyalty to each client, and each client has the right to be informed of anything bearing on the representation that might affect that client's interests and the right to expect that the lawyer will use that information to that client's benefit. See Rule 1.4. The lawyer should, at the outset of the common representation and as part of the process of obtaining each client's informed consent, advise each client that information will be shared and that the lawyer will have to withdraw if one client decides that some matter material to the representation should be kept from the other.

State v. Paige

765 N.W. 2d 134(Minn. App. 2009)

- The state and federal constitutions guarantee the right to counsel in criminal trials. U.S. Const. amend. VI; Minn. Const. art. I, § 6. **The right to counsel includes the right to effective assistance of counsel.** *Strickland v. Washington*, 466 U.S. 668, 686, 104 S.Ct. 2052, 2063, 80 L.Ed.2d 674 (1984). To establish ineffective assistance of counsel, a defendant must show (1) that counsel's performance was deficient, and (2) that the deficient performance prejudiced the defense. *Id.* at 687, 104 S.Ct. at 2064.

State v. Paige – cont.

- A lawyer's performance is deficient if he represents a client despite having a conflict of interest. *See Wood v. Georgia*, 450 U.S. 261, 271–72, 101 S.Ct. 1097, 1103–04, 67 L.Ed.2d 220 (1981) (noting that defendant had “right to representation that is free from conflicts of interest”). A conflict of interest exists if “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.” Minn. R. Prof. Conduct 1.7(a)(2). Thus, the existence of a conflict of interest typically depends on whether the lawyer’s decisions were “materially limited.” Because of this limitation, prejudice to the defendant is generally presumed when the lawyer has a conflict of interest. *See Mickens v. Taylor*, 535 U.S. 162, 167–70, 122 S.Ct. 1237, 1241–43, 152 L.Ed.2d 291 (2002) (discussing cases in which deficient performance and prejudice inquiries overlapped).

Rule 1.16, MRPC

- **RULE 1.16: DECLINING OR TERMINATING REPRESENTATION**

- (a) Except as stated in paragraph (c), a lawyer shall not represent a client or, where representation has commenced, shall withdraw from the representation of a client if:

- (1) the representation will result in violation of the Rules of Professional Conduct or other law;

- (2) the lawyer's physical or mental condition materially impairs the lawyer's ability to represent the client; or

- (3) the lawyer is discharged.

* * *

- (c) A lawyer must comply with applicable law requiring notice to or permission of a tribunal when terminating a representation. When ordered to do so by a tribunal, a lawyer shall continue representation notwithstanding good cause for terminating the representation.

What to Do?

- If there is conflict in the joint representation – determine if it is consentable
 - Do you reasonably believe you can provide competent and diligent representation to each affected client?
 - Will you be able to freely share confidential information among the joint clients?
 - Will you be asserting a claim by one client against another client?
 - Will each affected client give informed consent confirmed in writing?

What to Do?

- If conflict not consentable or clients won't consent – bring motion for separate representation on grounds that extraordinary circumstances exist.
- Existence of non-consentable or non-consented to conflict of interest is contrary to the statute's requirement that “The child, parent, guardian or custodian has the right to effective assistance of counsel in connection with a proceeding in juvenile court . . .”
- If court denies motion, per 1.16(c), MRPC, may proceed with the joint representation.

Rule 1.9, MRPC

- (a) A lawyer who has formerly represented a client in a matter shall not thereafter represent another person in the same or a substantially related matter in which that person's interests are materially adverse to the interests of the former client unless the former client gives informed consent, confirmed in writing.
- If you represent both parents and the guardian/custodian at only the first hearing, may you continue to represent only one of them in subsequent proceedings?

SHAROOD V. HATFIELD

210 N.W. 2d 275 (1973)

- This court has recognized its inherent power to regulate the practice of law in many decisions. In the syllabus written by the court to the case of *Petition for Integration of Bar of Minnesota*, 216 Minn. 195, 12 N.W.2d 515, 516, we said:
- ‘* * * (T)he power to make the necessary rules and regulations governing the bar was intended to be vested exclusively in the supreme court, free from the dangers of encroachment either by the legislative or executive branches *
* * ’