

CLIENT WITH DIMINISHED CAPACITY

ALLOCATION OF DECISION-MAKING AUTHORITY

A persistent issue in working with clients who are mentally ill is the proper allocation of the decision making authority as between the lawyer and the client. The Minnesota Rules of Professional Conduct (MRPC) provide some guidance, but do not definitively answer the question of who gets the final word on what decisions. Other sources of guidance as to a lawyer's duties and responsibilities vis-a-vis the mentally ill client differ in respect to when, if ever, a lawyer may substitute his or her judgment for that of the client's.

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.

Comment

Allocation of Authority between Client and Lawyer

[1] Paragraph (a) confers upon the client the ultimate authority to determine the purposes to be served by legal representation, within the limits imposed by law and the lawyer's professional obligations. The decisions specified in paragraph (a), such as whether to settle a civil matter, must also be made by the client. See Rule 1.4(a) (1) for the lawyer's duty to communicate with the client about such decisions. With respect to the means by which the client's objectives are to be pursued, the lawyer shall consult with the client as required by Rule 1.4(a)(2) and may take such action as is impliedly authorized to carry out the representation.

[2] On occasion, however, a lawyer and a client may disagree about the means to be used to accomplish the client's objectives. Clients normally defer to the special knowledge and skill of their lawyer with respect to the means to be used to accomplish their objectives, particularly with respect to technical, legal, and tactical matters. Conversely, lawyers usually defer to the client regarding such questions as the expense to be incurred and concern for third persons who might be adversely affected. Because of the varied nature of the matters about which a lawyer and client might

disagree and because the actions in question may implicate the interests of a tribunal or other persons, this rule does not prescribe how such disagreements are to be resolved. Other law, however, may be applicable and should be consulted by the lawyer. The lawyer should also consult with the client and seek a mutually acceptable resolution of the disagreement. If such efforts are unavailing and the lawyer has a fundamental disagreement with the client, the lawyer may withdraw from the representation. See Rule 1.16(b) (4). Conversely, the client may resolve the disagreement by discharging the lawyer. See Rule 1.16(a) (3).

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[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.

As noted in Comment 4 to Rule 1.2, the typical allocation of decision making authority may change when the lawyer has a client who is suffering from diminished capacity. In such a case, Rule 1.14, MRPC, authorizes the lawyer, under certain circumstances, to take protective action on behalf of the client. It is important to note, however, that Rule 1.14(a) urges the lawyer to, as far as reasonably possible, maintain a normal client-lawyer relationship. Further, while permitting a lawyer to take protective action on behalf of the client, Rule 1.14 does not explicitly authorize a lawyer to substitute his or her judgment for that of the client's.

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 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.

(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.

Comment

[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.

[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.

[4] If a legal representative has already been appointed for the client, the lawyer should ordinarily look to the representative for decisions on behalf of the client. In matters involving a minor, whether the lawyer should look to the parents as natural guardians may depend on the type of proceeding or matter in which the lawyer is representing the minor. 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).

Taking Protective Action

[5] If a lawyer reasonably believes that a client is at risk of substantial physical, financial, or other harm unless action is taken, and that a normal client-lawyer relationship cannot be maintained as provided in paragraph (a) because the client lacks sufficient capacity to communicate or to make adequately considered decisions in connection with the representation, then paragraph (b) permits the lawyer to take protective measures deemed necessary. Such measures could 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. In taking any protective action, the lawyer should be guided by such factors as the wishes and values of the client to the extent known, the client's best interests and the goals of intruding into the client's decisionmaking autonomy to the least extent feasible, maximizing client capacities, and respecting the client's family and social connections.

[6] 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.

[7] If a legal representative has not been appointed, the lawyer should consider whether appointment of a guardian ad litem, conservator, or guardian is necessary to protect the client's interests. Thus, if a client with diminished capacity has substantial property that should be sold for the client's benefit, effective completion of the transaction may require appointment of a legal representative. In addition, rules of procedure in litigation sometimes provide that minors or persons with diminished capacity must be represented by a guardian or next friend if they do not have a general guardian. In many circumstances, however, appointment of a legal representative may be more expensive or traumatic for the client than circumstances in fact require. Evaluation of such circumstances is a matter entrusted to the professional judgment of the lawyer. In considering alternatives, however, the lawyer should be aware of any law that requires the lawyer to advocate the least restrictive action on behalf of the client.

Disclosure of the Client's Condition

[8] Disclosure of the client's diminished capacity could adversely affect the client's interests. For example, raising the question 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 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 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.

Emergency Legal Assistance

[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.

[10] A lawyer who acts on behalf of a person with seriously diminished capacity in an emergency should keep the confidences of the person as if dealing with a client, disclosing them only to the extent necessary to accomplish the intended protective action. The lawyer should disclose to any tribunal involved and to any other counsel involved the nature of his or her relationship with the person. The lawyer should take steps to regularize the relationship or implement other protective solutions as soon as possible. Normally, a lawyer would not seek compensation for such emergency actions taken.

Note that this rule and comment advises the lawyer that she or he may seek protective action on behalf of a client when: (1) The lawyer reasonably believes the client has diminished capacity; (2) the client is at risk of substantial physical, financial, or other harm unless action is taken; and (3) the client cannot adequately act in his or her own interest. Even while authorizing the taking of protective action, the rule does not go so far as to permit the lawyer to substitute his judgment for that of the client's in areas of decision making typically reserved to the client. The rule simply authorizes the lawyer to seek out someone else who may have or obtain the legal authority to make such decisions on behalf of the client. The Reporter's Note to the ABA's Ethics 2000 proposal to amend the Model Rules of Professional Conduct reflects some uncertainty and unwillingness on the part of the ABA to delineate specifically when a lawyer may substitute his judgment for that of a client who is under a disability:

[2] This Comment [to Rule 1.14] has been revised to delete the sentence, "If the person has no guardian or legal representative, the lawyer often must act as de facto guardian." The Commission views as unclear, not only what it means to act as a "de facto guardian," but also when it is appropriate for a lawyer to take such

action and what limits exist on the lawyer's ability to act for an incapacitated client. The other revision to the Comment is a grammatical and stylistic change.

Only in emergency situations does comment 9 to the rule hint that a lawyer may make important decisions on behalf of a client and then only where the client has seriously diminished capacity and is threatened with imminent and irreparable harm. The comment cautions that, even then, the lawyer should not act unless the lawyer reasonably believes that the client has no other person available to act on their behalf and should act only to the extent necessary to maintain the status quo or otherwise avoid the imminent and irreparable harm.

Other authority seems to indicate that lawyers may, under some limited circumstances, substitute their judgment for the client's. The American College of Trust and Estate Counsel in their *ACTEC Commentaries*, Fourth Edition, 2006, discusses Rule 1.14, stating:

Implied Authority to Disclose and Act. 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. 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. In determining whether to act and in determining what action to take on behalf of a client, the lawyer should consider the impact a particular course of action could have on the client, including the client's right to privacy and the client's physical, mental and emotional well-being. In appropriate cases, the lawyer may seek the appointment of a guardian ad litem, conservator or guardian or take other protective action.

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.

Lawyer Representing Client with Diminished Capacity May Consult with Client's Family Members and Others as Appropriate. If a legal representative has been appointed for the client, the lawyer should ordinarily look to the representative to make decisions on behalf of the client. The lawyer, however, should as far as possible accord the represented person the status of client, particularly in maintaining communication. In addition, the client who suffers from diminished capacity may wish to have family members or other persons participate in discussion with the lawyer. The lawyer must keep the client's interests foremost. 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.

The ALI *Restatement Third of The Law Governing Lawyers*, at Section 24, takes the position that a lawyer may substitute his or her judgment for that of a client with diminished capacity, but only to the extent that the lawyer reasonably believes that judgment is in accord with the client's objectives or interests as the client would define them:

(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.

Also of note is ABA Formal Opinion 96-404, which states, in part,

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.

COMMUNICATION WITH A CLIENT UNDER DISABILITY

As noted in Rule 1.14(a), MRPC, a lawyer working with a client under a disability must strive to maintain a normal client-lawyer relationship. Such a relationship carries with it the lawyer's obligation to adequately communicate with the client. In dealing with a client under a disability, this may be difficult. ABA Opinion 96-404 addresses this issue:

A normal client-lawyer relationship presumes that there can be effective communication between client and lawyer, and that the client, after consultation with the lawyer, can make considered decisions about the objectives of the representation and the means of achieving those objectives. When the client's ability to communicate, to comprehend and assess information, and to make reasoned decisions is partially or completely diminished, maintaining the ordinary relationship in all respects may be difficult or impossible.

Rule 1.4, MRPC, sets forth the lawyers basic duties of communication with a client. It provides:

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(f), 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.

The Comment to Rule 1.4, MRPC, the rule setting forth a lawyers duty of communication with a client, provides, in part:

[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.

Additionally, the rule contemplates that there may be circumstances where the lawyer is justified delaying communication with the client:

[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. A lawyer may not withhold information to serve the lawyer's own interest or convenience or the interests or convenience of another person. Rules or court orders governing litigation may provide that information supplied to a lawyer may not be disclosed to the client. Rule 3.4(c) directs compliance with such rules or orders.

The *ALI Restatement Third of The Law Governing Lawyers*, at Comment c to Section 24, discusses communication with a client under a disability:

When a client with diminished capacity is capable of understanding and communicating, the lawyer should maintain the flow of information and consultation as much as circumstances allow (see § 20). The lawyer should take reasonable steps to elicit the client's own views on decisions necessary to the representation. Sometimes the use of a relative, therapist, or other intermediary may facilitate communication (see §§ 70 & 71). Even when the lawyer is empowered to make decisions for the client (see Comment *d*), the lawyer should, if practical, communicate the proposed decision to the client so that the client will have a chance to comment, remonstrate, or seek help elsewhere. A lawyer may properly withhold from a disabled client information that would harm the client, for example when showing a psychiatric report to a mentally-ill client would be likely to cause the client to attempt suicide, harm another person, or otherwise act unlawfully.

As a practical matter, a lawyer dealing with a client under a disability should take whatever steps are necessary to ensure that the communications are effective and made in such a manner that the client will comprehend them. This may require face-to-face meetings with the client to explain written documents and perhaps multiple consultations on the same subject in order to be sure the client understands the nature of what is at issue and the decisions that need to be made. When utilizing the assistance of an intermediary to facilitate communication, a lawyer should be aware of the possible ramifications of the presence of that intermediary on the attorney-client privilege. Typically, the presence of a third person will vitiate the privilege unless that person's presence is necessary to facilitate the communication between lawyer and client. Inviting a third person to facilitate communications should not be undertaken lightly.