

Chapter 6B

**Helping Those in Need: Clients
with Diminished Capacity**

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Helping Those in Need: Clients with Diminished Capacity¹

As lawyers, we are often called on to evaluate others. Opposing counsel we are negotiating against, witnesses we will be cross-examining or juries to whom we will be presenting a case are all ready examples. One of the most difficult situations a lawyer can face, however, is determining whether a client has the requisite capacity to make decisions. Lawyers who practice elder law or estate planning face this issue more frequently than the rest of us. But, even a business lawyer can unexpectedly encounter this situation if a long-time client, due to age or infirmity, no longer seems have the capacity to make decisions in the client's interest.

RPC 1.14 addresses clients with diminished capacity from two related perspectives. First, it outlines the duty a lawyer has to a client in that situation to maintain as normal a professional relationship as possible. Second, it deals with the difficult circumstance when a lawyer concludes that a client may be in need of a guardian or similar fiduciary to protect the client. In this column, we'll look at both elements of the rule.

General Duty. RPC 1.14(a) counsels that when a lawyer has a client whose “capacity to make adequately considered decisions in connection with a representation is diminished . . . the lawyer shall, as far as reasonably possible, maintain a normal client-lawyer relationship with the client.” The comments to ABA Model Rule 1.14 upon which Oregon's corresponding rule is based note that even a client with some diminished capacity may be capable of making a wide range of routine decisions. The comments also stress maintaining both direct communication with the client and as normal a relationship as possible within the constraints involved.

Protecting the Client. RPC 1.14(b) and (c) address the very difficult circumstance when a lawyer concludes that due to a client's diminished capacity, the client “is at risk of substantial

¹ Mark J. Fucile, December 2009 *Multnomah Lawyer*. Reprinted with permission of the Multnomah Bar Association.

physical, financial or other harm unless action is taken[.]” In that situation, RPC 1.14(b) allows a lawyer to “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.” RPC 1.14(c), in turn, finds that the lawyer in that situation is impliedly authorized to reveal sufficient otherwise confidential information necessary to protect the client’s interests.

Comment 6 to ABA Model Rule 1.14 outlines the factors the lawyer should consider in balancing the extent of the client’s diminished capacity against the possible actions necessary to protect the client: “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.” OSB Formal Ethics Opinion 2005-41, which addresses the Oregon rule specifically, also counsels that if the lawyer concludes that protective action is necessary, the action should be tailored to the particular circumstances, using the following example: “If . . . Lawyer expects that Client’s questionable behavior can be addressed by Lawyer raising the issue with Client’s spouse or child, a more extreme course of action, such as seeking appointment of a guardian, would be inappropriate.”

ABA Formal Ethics Opinion 96-404, which discusses Model Rule 1.14 in detail, highlights three important qualifiers.

The first relates to the lawyer’s assessment of the client’s capacity. The opinion notes that the focus is on whether the client can act in the client’s *own* interest. In other words, the fact that a client simply makes different decisions than ones the lawyer would make or, for the

client’s own reasons, makes what the lawyer considers “bad” decisions, doesn’t necessarily mean that the client’s capacity to make decisions is compromised.

The second concerns seeking the assistance of family members. The opinion encourages this oftentimes critical channel of consultation. At the same time, it also counsels that although Model Rule 1.14(b) allows the lawyer to seek protective action for the client’s benefit, the lawyer should not generally represent a third party seeking formal protective action (even if a family member) due to the potential conflict between the interests of the client and the third party.

The third involves the guardian sought. As the opinion puts it: “Seeking the appointment of a guardian for a client is to be distinguished from seeking to be the guardian, and the Committee cautions that a lawyer who files a guardianship petition under Rule 1.14(b) should not act as or seek to have himself appointed guardian except in the most exigent of circumstances, that is, where immediate and irreparable harm will result from the slightest delay.”

Contextual and Resource Summary

Contextual Materials

Former Oregon DR 7-101(C)

Adopted effective January 2, 1990

Replaced by Oregon RPC 1.14 effective January 1, 2005

Oregon RPC 1.14

Based on ABA Model Rule 1.14

Note: Oregon's RPCs do not include the accompanying ABA Model Rule comments.

ABA Model Rule 1.14 and Accompanying Comments

("Client with Diminished Capacity")

Adopted by the ABA in 1983 and amended in 2002

Available on the ABA Center for Professional Responsibility's web site at:

http://www.americanbar.org/groups/professional_responsibility/publications/model_rules_of_professional_conduct/model_rules_of_professional_conduct_table_of_contents.html

Restatement (Third) of the Law Governing Lawyers (2000), § 24

("A Client with Diminished Capacity")

ORS 9.330 ("Scope of Attorney's Authority")

Resources

ABA Formal Ethics Opinion 96-404 (1996)

("Client under a Disability")

Available on the ABA Center for Professional Responsibility's web site

OSB Formal Ethics Op. 2005-41 (2005)

("Competence and Diligence: Client with Diminished Capacity")

Available on the Oregon State Bar web site

OSB Formal Ethics Op. 2005-159 (2005)

("Competence and Diligence: Requesting a Guardian ad Litem in a Juvenile Dependency Case")

Available on the Oregon State Bar web site

Ethical Oregon Lawyer, Chapter 18, Revised 2015

("Representing Clients with Diminished Capacity and Disability")

Available in the "Bar Books" section of the members-only OSB web site

