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RPC 1.14:
Representing Clients with Diminished Capacity

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RPC 1.14, which is titled "Client with Diminished Capacity," is a seldom-litigated rule.[1] At the same time, the rule and its associated comments provide important practical guidance to lawyers[2] navigating what are almost always difficult personal circumstances for the clients concerned.[3] Although we might reflexively think of RPC 1.14 as the province of elder law specialists or estate planners, lawyers ranging from criminal defense counsel to business advisors can and do encounter the issues involved—sometimes unpredictably and often uncomfortably.

In broad strokes, RPC 1.14 addresses clients with diminished capacity from two related perspectives.[4] First, it outlines the duty lawyers have to clients in those circumstances to maintain as normal a professional relationship as possible. Second, the rule deals with situations when a lawyer concludes that a client may be in need of a guardian or similar fiduciary. In this column, we'll look at both facets of the rule.[5]

General Duty

RPC 1.14(a) states our general duty to clients with diminished capacity:

> 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.

Comment 1 to RPC 1.14 elaborates on this point by noting that clients may vary across a spectrum in their ability to grasp advice and direct the lawyer:

> 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.

Comment 3 to RPC 1.14, in turn, notes the important role that family members play in facilitating a lawyer's interactions with a client in this regard—while also including a cautionary reminder on the potential for undue influence:

> 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 [authorized] protective action . . ., must look to the client, and not family members, to make decisions on the client's behalf.

Finally, Comments 2 and 4 to RPC 1.14 stress that even where a fiduciary has been appointed for a client, the ward is the lawyer's client rather than the fiduciary unless the lawyer has entered into a representation of the latter or

both.[6] The comments do not recommend a particular "model" in this regard and who a lawyer represents in any particular scenario is very fact-dependent. Nor is a given situation necessarily static. A client's condition, for example, might deteriorate to the point that as a matter of agency law the lawyer no longer has authority to act for the client.[7] The comments underscore, however, that the lawyer should closely analyze this question based on the particular circumstances involved because they can have important implications for conflicts, confidentiality and fee arrangements.[8]

Protecting the Client

RPC 1.14(b) and (c) address the very difficult situation when a lawyer concludes that a client's diminished capacity puts the client "at risk of substantial physical, financial or other harm unless action is taken[.]"[9] In that scenario, 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, counsels that the lawyer in that situation is impliedly authorized to reveal confidential information—"but only to the extent reasonably necessary to protect the client's interests."

Comment 6 to RPC 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." The Washington Supreme Court in *In re Eugster*, 166 Wn.2d 293, 327, 209 P.3d 435 (2009), emphasized the sensitivity of this situation, noting that "[a] lawyer's decision to have her client declared incompetent is a serious act that should be taken only after an appropriate investigation and careful, thoughtful deliberation."

Comment 8 to RPC 1.14 describes the lawyer's position in revealing confidential information to protect the client as "an unavoidably difficult one" and emphasizes the comparatively narrow scope of a lawyer's implied authority in this circumstance:

> [G]iven 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.[10]

ABA Formal Opinion 96-404 (1996), which discusses Model Rule 1.14 in detail and is available on the ABA web site, highlights three important qualifiers when seeking protection on behalf of the client.

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.[11] 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."[12]

Summing Up

RPC 1.14 is not a precise roadmap for every situation a lawyer may face when representing a client with diminished capacity. The rule and the accompanying comments, however, provide practical general guidance to apply in what are almost always unique—and uniquely personal—circumstances.

ABOUT THE AUTHOR

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[1]When originally adopted in Washington in 1985, the rule was RPC 1.13. *See* Robert H. Aronson, *An Overview of the Law of Professional Responsibility: The Rules of Professional Conduct Annotated and Analyzed*, 61 Wash. L. Rev. 823, 854 (1986) (discussing the RPCs as originally adopted in Washington). The rule number in Washington changed to RPC 1.14 in 2006 as part of a comprehensive package of amendments mirroring general amendments at the time to the corresponding ABA Model Rules. *See* WSBA, *Reporter's Explanatory Memorandum to the Ethics 2003 Committee's Proposed Rules of Professional Conduct* at 166-67 (2004) (on file with author). As a part of those amendments, the title of the rule was changed from "client under a disability" to "client with diminished capacity." This also mirrored a similar change to the ABA Model Rule, which the drafters of the amendments concluded "'more accurately express(es) the continuum of a client's capacity.'" ABA, *A Legislative History: The Development of the ABA Model Rules of Professional Conduct, 1982-2013* at 347 (2013) (quoting ABA Ethics 2000 Commission Reporter's Explanation of Changes). For a national compilation of cases interpreting and applying variants of ABA Model Rule 1.14, *see* ABA, *Annotated Model Rules of Professional Conduct* 254-64 (9th ed. 2019). Similar considerations are discussed in Section 24 of the *Restatement (Third) of the Law Governing Lawyers* (2000).

[2] LLLT RPC 1.14 generally parallels lawyer RPC 1.14 while recognizing that some actions that a lawyer, such as initiating court proceedings, are not available to LLLTs.

[3] Several WSBA advisory opinions cite the rule. Some, such as Advisory Opinions 2190 (2009) and 202101 (2021) on the interplay of RPC 1.14 and, respectively, competency and civil commitment proceedings, include discussions of general application. Others, such Advisory Opinion 1011 (1986) addressing clients who threaten suicide, are more narrowly tailored to specific scenarios. A searchable database of opinions is available on the WSBA web site. Two other accessible WSBA publications also examine the rule in considerable depth: *The Law of Lawyering in Washington* at 4-30 to 4-35 (2012); and the *Legal Ethics Deskbook* at 19-1 to 19-16 (2d ed. 2020).

[4] This column addresses clients with cognitive impairment. RPC 1.14, however, also includes minors whose decision-making is influenced by age rather than impairment. For a discussion of this latter area, *see* Bruce R. Boyer, *Representing Child-Clients with "Diminished Capacity": Navigating an Ethical Minefield*, 24 Prof. Law., No. 1 at 36 (2016).

[5] Comments 9 and 10 to RPC 1.14 address the comparatively rare circumstance where a lawyer may need to take protective action for a non-client with diminished capacity. *See generally Matter of Dependency of E.M.*, __ Wn.2d __, __ P.3d __, 2021 WL 1418883 (2021) (discussing implied authority under Comment 9 to RPC 1.14).

[6] In Washington, a lawyer's representation of a fiduciary does not also include, as a matter of law, representation of a ward or similar beneficiary. *See generally Matter of Estate of Larson*, 103 Wn.2d 517, 520-21, 694 P.2d 1051 (1985) (noting principle in probate context); WSBA Advisory Ops. 202001 (2020) (discussing application in wrongful death action), 1221 (1988) (trust setting).

[7] *See In re Houts*, 7 Wn. App. 476, 484, 499 P.2d 1276 (1972) ("If the adult is in fact incompetent at the time of the hearing, even though he was competent when he retained the attorney, the subsequent incompetency serves to terminate the attorney's authority to act as his attorney."). *See also* RPC 1.16 (withdrawal).

[8] *See, e.g., In re Fraser*, 83 Wn.2d 884, 895-96, 523 P.2d 921 (1974), *overruled on other grounds*, *In re Boelter*, 139 Wn.2d 81, 96, 985 P.2d 328 (1999) (conflict between interests of jointly represented guardian and ward); *see also In re McKean*, 148 Wn.2d 849, 866 n.12, 64 P.3d 1226 (2003) ("[Lawyer] was not only the lawyer, but also was the personal representative of the estate. This heightened his ethical duty. We will not address the ethically precarious territory a lawyer enters when he takes on the roles of both attorney and personal representative for an estate, but we will let it suffice to note that in order to chart such territory successfully, a lawyer must be extremely alert to potential ethical violations.").

[9] RPC 1.14(b).

[10] Comment 8 also notes regarding potential involuntary commitment risk in particular: "[R]aising the question of diminished capacity could, in some circumstances, lead to proceedings for involuntary commitment . . . [U]nless authorized to do so, the lawyer may not disclose such information." *See also* WSBA Advisory Op. 2099 (2005) at 2 (discussing Comment 8).

[11] Lawyers should also consider the kind of fiduciary appropriate to the particular circumstances. *See* RPC 1.14, cmt. 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."); *see, e.g., In re Blakely*, 111 Wn. App. 351, 358-59, 44 P.3d 924 (2002) (discussing then-RPC 1.13 and the scope of the guardianship sought).

[12] *Id*. at 8.