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Helping Those in Need:
Clients with Diminished Capacity

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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.

Maintaining the Relationship

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 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 Opinion 2005-41 (rev 2016), which addresses the Oregon rule specifically, counsels that if the lawyer concludes that protective action is necessary, the action should be tailored to the particular circumstances, using the following example (at 2): "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." OSB Formal Opinion 2005-159 (rev 2016) echoes this point (at 2) in the context of evaluating the need for a guardian ad litem for a parent with mental competency issues in a juvenile dependency or termination of parental rights proceeding: "[L]awyers should request GALs for their clients only when a client consistently demonstrates lack of capacity to act in his or her own interests and it is unlikely that the client will be able to attain the requisite mental capacity to assist in the proceedings within a reasonable time."

ABA Formal Opinion 96-404 (1996), 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 (at 8): "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."

ABOUT THE AUTHOR

Mark J. Fucile of Fucile & Reising LLP handles professional responsibility, risk management and attorney-client privilege issues for lawyers, law firms and corporate and governmental legal departments throughout the Northwest. Mark has chaired both the WSBA Committee on Professional Ethics and its predecessor, the WSBA Rules of Professional Conduct Committee. Mark is a member of the Oregon State Bar Legal Ethics Committee and the Idaho State Bar Section on Professionalism & Ethics. Mark writes the Ethics Focus column for the Multnomah (Portland) Bar's *Multnomah Lawyer*, the Ethics & the Law column for the WSBA *Bar News* and is a regular contributor on legal ethics to the WSBA *NWSidebar* blog. Mark is the editor-in-chief and a contributing author for the WSBA *Legal Ethics Deskbook* and a principal editor and contributing author for the OSB *Ethical Oregon Lawyer* and the WSBA *Law of Lawyering in Washington*. Before co-founding Fucile & Reising LLP in 2005, Mark was a partner and in-house ethics counsel for a large Northwest regional firm. He also teaches legal ethics as an adjunct for the University of Oregon School of Law at its Portland campus. Mark is admitted in Oregon, Washington, Idaho, Alaska and the District of Columbia. He is a graduate of the UCLA School of Law. Mark's telephone and email are 503.224.4895 and Mark@frllp.com.