Ethics Update

By

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REPRESENTING A CLIENT WITH DIMINISHED CAPACITY

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I. THE PROBLEMS

- A long time client wants to sell real estate or make a will or make a gift or enter into a business transaction. The attorney is worried that the client's diminished capacity may make the transactions voidable or unenforceable or that the client hasn't enough capacity to adequately understand the transaction. What should the lawyer do?

- A long time client wants to change her estate plan but a pattern emerges and she changes her mind back and forth depending upon which offspring brings the client to the office. The client lives with a daughter but is dependent upon income from her major asset, a farm, which is run by her son. She holds controlling interest in the farming corporation and the children each own minority shares. The lawyer believes that because of aging, the client has diminished capacity to resist undue influence of her children, i.e. "love the one you're with."

- A minor client (with no guardian ad litem) tells the lawyer that she is being sexually abused at home, but begs you to keep that information strictly confidential.

- A long time client has gone down hill mentally, suffering from periodic dementia. The client is involved in legal matters_ where you, the attorney, feel that he needs a guardian or a guardian ad litem. You tell the client and the clients says "no way" and fires you and requests that you return his file and tells you not to breath a word of your doubts to anyone.

- A lawyer provides stock documents and his name to a commercial estate planning service. The estate planning service interviews the prospective client, transfers the information to the

lawyer, the lawyer prepares the stock documents and returns them to the estate planning service. The estate planning service sees to the execution of the stock documents. The client has diminished capacity but the lawyer doesn't know it because the lawyer never interviews or explains the documents to the client.

- A lawyer receives a call from a client making unreasonable demands in a demented state. The lawyer tells the client that the client is not making sense. In response, the client orders the lawyer to quit working on the file and fires the lawyer.

- A long time client is a woman who is alcoholic and diabetic and prone to depression. She becomes ill when she does not eat properly and doesn't take her medication. She is hospitalized. While in the hospital she becomes confused. The hospital seeks to place her under guardianship with protective placement. They want her to be compliant with her medication and stop drinking. She is allegedly a danger to herself by neglecting her medication and drinking instead of eating. In lucid moments she promises to be compliant at home. She asked you, her long time lawyer, to do everything to "get her out" and resist the guardianship placement although you reasonably believe that it is in her best interest to stay in the hospital. You believe that getting her out may kill her and the relatives think she ought to be in the hospital.

II. THE LAW

A. THE RULE OF CONDUCT:

"SCR 20:1.14 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.
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(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 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.

(c) Information relating to the representative of a client with diminished capacity is protected by SCR 20:1.6. When taking protective action pursuant to par. (b), the lawyer

is impliedly authorized under SCR 20:1.6(a) to reveal information about the client, but only to the extent reasonably necessary to protect the client's interests." (emphasis supplied)

B. AUTHORITIES AND INTERPRETATION OF THE RULES:

1. There are no Wisconsin disciplinary cases or ethics committee opinions concerning the rule. There is no Wisconsin committee comment. The closest authority involving a diminished capacity client is in Matter of Disciplinary Proceedings Against Strasburg, 154 Wis. 2d 90, 452 N.W. 2d 151 (1990)

2. ABA Formal Opinion 96-404.

3. Other cases and opinions discussing the rule:

In the Matter of Keen K. Brantley, 260 Kan. 605,920 P.2d 433(1966);
In the Matter of the Disciplinary Proceedings of William H. Fraser,
83 Wash. 2d 884, 523 P.2d 921(1974);
In the Matter of Steven Paul Flack, 272 Kan. 465,33 P.3rd 1281 (2001);
In Re Guardianship of Henderson, 150 N.H. 349, 838 A.2d 1277 (2003);
Formal Ethics Opinion No. 504 (May 15, 2000), Los Angeles County Bar Association Professional Responsibility and Ethics Committee,
www.LACBA.org.

III. PARSING SCR 20:1.14

The rule is broken down into three clauses which I call the "SHALL" paragraph (a}, the "MAY" paragraph (b) and the "INFORMATION" paragraph (c).

A. The "Shall" Component.

SCR 20:1.14(a) says: "The lawyer shall as far as reasonably possible, maintain a normal client-lawyer relationship with the client." The rules define "shall":

"The rules of professional conduct are rules of reason. They should be interpreted with reference to the purpose of legal representation and of the law itself. Some of the rules are imperative, cast in the terms 'shall' or 'shall not.' These define proper conduct for the purposes of professional discipline." (emphasis supplied) Preamble to SCR Chapter 20.

Therefore, the lawyer must treat a client with diminished capacity as a normal client . . . "as far as reasonably possible . . ." To act otherwise is to risk professional discipline.

"(T)he lawyer should continue to treat the client with attention and respect, attempt to communicate and discuss relevant matters, and continue as far as reasonably possible to take action consistent with the client's directions and decisions."

This means that the lawyer cannot patronize, condescend or take over decision making for the client. The lawyer's cannot interpose the lawyer's opinions about "best interests" of the client. The lawyer is not a guardian ad litem. All lawyers in active practice have unimpaired clients who make bad decisions but are nonetheless entitled to make those bad decisions. Likewise, a client of impaired capacity does not relinquish the right to make decisions even if they are not in the client's best interest.

"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 ... Rule 1.14(b) cannot be construed to grant broad license for even the most well-intentioned lawyer to take control over every aspect of a disabled client's life. . ." (emphasis supplied) ***ABA Formal Opinion 96-404.***

Lawyers who attempt to usurp a disabled client's autonomy have gotten in trouble:

In *Brantley*, supra., a Kansas lawyer acted directly contrary to his old and infirm client's expressed wishes because he believed she was coming under the influence of her ne'er do well son. Brantley was found to have violated 1.14 because he "failed to reasonably maintain a normal client-lawyer relationship with Mary Storm when he believed her to be under a disability" and he "failed to abide by his client Mary Storm's decisions concerning the representation." Brantley, supra. at page 440 of 920 P. 2d.

In *Flack*, supra., a Kansas lawyer used an estate planning service to interview clients, including a diminished capacity client to prepare an estate plan. The lawyer then prepared the estate documents which the estate planning service had the client execute. These were stock documents. The lawyer never met with or maintained an attorney client relationship with the diminished capacity person but of course charged a fee. He was disciplined for violating Rule 1.14.

In *Strasberg*, supra., Attorney Strasberg took his marching orders from the client's daughter and "did not meet or speak" with the client until "3 weeks after he had been retained..." Instead he had a psychologist evaluate the client. The psychologist concluded the client was incompetent at some times and improved at others. Strasberg took a number of actions without consulting the diminished capacity client. The Supreme Court found Strasberg guilty of representing conflicting interests without consent and in violation of old 20:32(3) (pre 1988) for lack of diligence "by failing to meet or speak with the woman concerning the legal effect of the document ... " Strasberg, supra. at page 95 of 154 Wis. 2d.

B. The "May" Component of the Rule.

SCR 20:1.14 (b) says "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 reasonably necessary protective action ... " (emphasis supplied)

1. Client must be unable to "adequately act in (client's) own interest" due to diminished capacity.

"If the client is, in fact, incompetent, simply staying in touch with the client may not be sufficient to empower the lawyer to act on behalf of the client or to protect the client's interests. Because the relationship of client and lawyer is one of principal and agent, principals of agency law might operate to suspend or terminate the lawyer's authority to act when a client becomes incompetent, and the client's disability may prevent the lawyer from fulfilling the lawyer's obligation to the client unless a guardian is appointed or some other protective action is taken to aid the lawyer in the effective representation of the client. For example, . . . where the disabled client has property that should be sold for the client's benefit, but completion of the transaction requires the appointment of a legal representative who can act on the client's behalf. Many other situations can be envisioned where the client's immediate legal needs cannot be accomplished without the intervention of a legal representative, or where the client's personal needs cannot be met without the aid of some protective action." ***ABA Formal Opinion 96-404.***

A lawyer may consult with health care professionals to make this judgment of incapacity:

"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 a known long- term commitments and values of the client. In appropriate circumstances the lawyer may seek guidance from an appropriate diagnostician.

2. There must be "risk of substantial harm" in order for the lawyer to take protective action.

Protective action is limited to situations where there is "risk of substantial physical, financial or other harm."

Compare SCR 20:1.6 (b) where a lawyer "shall reveal information" in a situation where "the lawyer reasonably believes is likely to result in death or substantial bodily harm or in substantial injury to the financial interest or property of another ... " Here it's not a likely probability but merely a "risk" which empowers the lawyer to exercise his/her discretion to take protective action.

3. Options for protective action.

a. Consult Family Members:

"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 effect that applicability of the attorney-client evidentiary privilege." ABA Comment to SCR 20:1.14, paragraph 3.

Remember, you must ultimately listen to the client, not other family members who may have divided loyalties or hidden agendas or conflicting interests. See In re Strasburg and Brantley, supra. where the lawyer adopted the best interests of the relatives rather than the client. "(T)he lawyer must keep the client's interests foremost and ... look to the client and not the family members, to make decisions on the client's behalf." (Emphasis supplied) ABA Comment to SCR 20:1.14, paragraph 3.

Be careful in discussing diminished capacity with relatives: "disclosure of the client's diminished capacity could adversely affect the client's interests . . . 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. The lawyer's position in such cases is an unavoidably difficult one." ABA comment to SCR 20:1.14 paragraph 8.

b. Use the Least Restrictive Protective Action.

The lawyer should take only the least restrictive protective action. Less restrictive measures suggested by the ABA including "using a reconsideration period to permit clarification or improvement of circumstances, using voluntary surrogate decision-making 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 decision-making autonomy to the least extent feasible, maximizing client capacities and respecting the client's family and social connections." ABA Comment to SCR 1.14, paragraph 5.

c. Formal Protective Action, Guardians, Conservators, Guardian ad Litem.

A lawyer is specifically authorized by the rule to seek "the appointment of a guardian ad litem, conservator or guardian." SCR 20:1.14(b).

The ABA opinion concludes "When, after consideration of less drastic means, a lawyer has concluded that a guardian should be appointed for his client, the lawyer may file a petition ... Rule 1.14(b) clearly permits the lawyer to do so." (emphasis supplied) ***ABA Formal Opinion 96-404.***

Great latitude seems to be given to lawyers in this sensitive area, but a lawyer can go too far. See Henderson, 150 N.W. 349, 838 A. 2d 1277 (2003) where the lawyer 'blurred boundaries of legal counsel and guardian ad item by presenting certain facts suggesting that proposed ward was not incompetent but then ultimately concluded that the appointment of a guardian was reasonable ...' "

"In such circumstances, the lawyer may disclose confidential information to the limited extent necessary to assist the third person in filing the petition, and may provide other appropriate assistance short of representation." (emphasis supplied) ***ABA Formal Opinion 96-404.***

Should the lawyer petition to have the lawyer appointed guardian? Probably not: 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 "except in the most exigent circumstances, that is, where immediate and irreparable harm will result from the slightest delay." ***ABA Formal Opinion 96-404.***

C. Confidential Client Information Must be Protected From Disclosure.

Under SCR 20:1.14(c) information with respect to a diminished capacity client is protected just as if the client did not have diminished capacity. See SCR 20:1.6 The ability of the lawyer to take protective action when necessary is not an abrogation of this duty. The lawyer cannot reveal information about the client except "to the extent reasonably necessary to protect the client's interests." In such circumstances, the lawyer may disclose confidential information to the limited extent necessary to assist the third person in filing the petition, ***ABA Formal Opinion 96-404.***

Once a guardian ad litem or conservator is appointed the lawyer can reveal confidential information to the guardian.

Such was the case addressed in Formal Ethics Opinion No. 504 from the Los Angeles County Bar Association. There, an attorney was told by a minor client that the minor client was being sexually abused at home. The minor told the lawyer not to reveal such information. Obviously, the minor was "at risk of substantial physical ... harm." SCR 1.14(b) The formal opinion advised the attorney to keep the secret of his client and seek appointment of a guardian ad litem for the minor without disclosing to the court the protected information. However, since a guardian ad litem must work in the best interests of the child and can make decisions for the ward, the attorney, after appointment of a guardian ad litem, would be allowed to disclose such information in order to protect the client from further harm.

"If a guardian ad litem is appointed for the minor client, the next issue is whether the attorney is ethically permitted to discuss with the guardian ad litem the minor client's confidential information, including the incidents of sexual abuse. For purposes of this opinion, the committee assumes that a guardian ad litem has a power to control and direct the minor ward's litigation and controls the minor ward's attorney-client privilege. Therefore, if a guardian ad litem is appointed, the attorney may ethically discuss with the guardian ad litem the fact and circumstances that the minor client has been sexually abused and look to the guardian ad litem for instruction." ***LACBA Formal Opinion 504.***

D. Withdrawal is a Last, Disfavored Option

Should the attorney simply seek to withdraw when disabled client makes representation impossible, although this may amount to abandoning the client. However, the ABA opinion permits it.

"In the absence of Rule 1.14 a lawyer whose client becomes incompetent would have no choice but to withdraw, not only because a lawyer who continues the representation would be acting without authority, but also because a lawyer would be unable to carry out his responsibilities to the client under the rules.. . while Rule 1.14 permits a lawyer to take protective action in such situations, it does not compel a lawyer to do so and many lawyers are uncomfortable with the prospect of having to so act. The committee considers that withdrawal is ethically permissible as long as it can be accomplished without material adverse effect on the interest of the client." ***ABA Formal Opinion 96-404.***

However, the ABA committee did recognize the drastic effect of withdrawal on the client: "On the other hand, while withdrawal in these circumstances solves the lawyer's dilemma, it may leave the impaired client without help at a time when the client needs it most." In the end, the ABA committee suggests that "the better course of action, and the one most likely to be consistent with the rules will often be for the lawyer to stay with

the representation and seek appropriate protective action on behalf of the client." ***ABA Formal Opinion 96-404.***

IV. CONCLUSION

The ABA conclusion says it best:

"When a client is unable to act adequately in his own interest, a lawyer may take appropriate protective action including seeking the appointment of a guardian. The lawyer may consult with diagnosticians and others, including family members, in assessing the client's capacity and for guidance about the appropriate protective action. The action taken shall be the least restrictive of the client's autonomy that will yet adequately protect the client in connection with the representation. Withdrawal from representation of a client who becomes incompetent is disfavored, even if ethically permissible under the circumstances." ABA Formal Opinion 96-404.

ABA COMMENT TO SCR 20:1.14

ABA 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 of ten 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 a disability 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 I.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) pem1its 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 o(circumstances, using voluntary surrogate decision-making 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 fiction, 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 decision-making autonomy to the least extent feasible, maximalizing 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 of diminished capacity 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 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. The lawyer's position in such cases is an unavoidably difficult one.

Emergency Legal Assistance

[9] In an emergency where the health, safety or a 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 with 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.