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RULE 4-1.14 CLIENT WITH DIMINISHED CAPACITY

(a) Maintenance of Normal Relationship. Wh[^]n a client's capacity make adequately considered decisions in connection with the representation is diminished, whether because of minority, mental impairment, or for some other reason, the lawyer must maintain a normal client-lawyer relationship with the client as much as reasonably possible.

(b) Protective Action. A lawyer is not required to seek a determination of incapacity or the appointment of a guardian or take other protective action with respect to a client. However, 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, such as, consulting with individuals or entities that have the ability to act to protect the client and, in appropriate cases, seek the appointment of a guardian ad litem or guardian. A lawyer must make reasonable efforts to exhaust all other available remedies to

protect the client before seeking removal of any of the client's rights or the appointment of a guardian.

(c) Confidentiality. Information relating to the representation of a client with diminished capacity is protected by the rule on confidentiality of information. When taking protective action under this rule, the lawyer is impliedly authorized under the rule on confidentiality of information to reveal information about the client, but only to the extent reasonably necessary to protect the client's interests.

Comment

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 has diminished capacity, however, maintaining the ordinary client-lawyer relationship may not be possible in all respects. In particular, an incapacitated person may have no power to make legally binding decisions. Nevertheless, a client with diminished capacity often has the ability to understand, deliberate on, and reach conclusions about matters affecting the client's own well-being. For example, children as young as 5 or 6 years of age, and certainly those of 10 or 12, are regarded as having opinions that are entitled to weight in legal proceedings concerning their custody. Some persons of advanced age are capable of handling routine financial matters while needing special legal protection concerning major transactions.

That a client has diminished capacity 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.

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 these persons furthers the rendition of legal services to the client and does not waive the attorney-client privilege. Nevertheless, the lawyer must keep the client's interests foremost and, except for protective action authorized under subdivision (b), must look to the client, and not family members, to make decisions on the client's

behalf. A lawyer should be mindful of protecting the privilege when taking protective action.

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 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 4-1.2(d); *Saadeh v. Connors*, 166 So. 3d 959 (Fla. 4th DCA 2015); Fla. AGO 96-94, 1996 WL 680981.

Taking protective action

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 subdivision (a) because the client lacks sufficient capacity to communicate or make adequately considered decisions in connection with the representation, then subdivision (b) permits the lawyer to take protective measures deemed necessary. These measures could include: consulting with family members, 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. Which factors the lawyer chooses to be guided by will depend on the nature of the protective action to be taken, some issues being governed by the client's substituted judgment and others by the client's best interests.

Whether the client's capacity has diminished may be shown by 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.

If a legal representative has not been appointed, the lawyer should consider whether appointment of a guardian ad litem 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. In many circumstances, however, appointment of a legal representative may be more expensive or traumatic for the client than circumstances require. Evaluation of circumstances is a matter entrusted to the lawyer's professional judgment. In considering alternatives, 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 client's condition

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 4-1.6. Therefore, unless authorized to do so, the lawyer may not disclose confidential information. When taking protective action under subdivision (b), the lawyer is impliedly authorized to make the necessary disclosures. Nevertheless, given the risks of disclosure, subdivision (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 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 these cases is an unavoidably difficult one.

Emergency legal assistance

A lawyer may, but is not required to, take legal action to protect a person with diminished capacity who is threatened with imminent and irreparable harm to the person's health, safety, or financial interests, even

though the person is unable to establish a client-lawyer relationship or 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 an emergency, however, the lawyer should not act unless the lawyer reasonably believes the person has no alternative 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 an exigent situation has the same duties under these rules as the lawyer would with respect to a client.

A lawyer who acts on behalf of a person with 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 may disclose to any tribunal involved and to any other counsel involved the nature of his or her relationship with the person while maintaining the person's confidential information.

Amended July 23, 1992, effective January 1, 1993 (605 So.2d 252); amended March 3, 2022, effective May 2, 2022 (SC20-1467).

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