

Dealing With a Client With Diminished Capacity

by

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Reprinted from *Minnesota Lawyer* (October 3, 2005)

The client establishes the objectives of the representation while the lawyer generally has control over the means by which those objectives are pursued. Rule 1.2 of the Minnesota Rules of Professional Conduct (MRPC) recognizes that reality, providing that “a lawyer shall abide by a client’s decisions concerning the objectives of representation” and that the lawyer “shall consult with the client as to the means by which [the objectives] are to be pursued.”

What happens to the lawyer-client relationship when the client’s ability to make informed decisions regarding the representation is impaired? How does the lawyer distinguish client impairment from a poor decision that while flawed, needs to be respected? Finally, if the client is impaired, what remedial actions are available to the lawyer?

Little help

Rule 1.14 provides the lawyer with guidelines to address those questions. Until its recent amendment (effective Oct. 1), the rule was entitled “Client Under a Disability” and provided that when a client’s ability to make adequately considered decisions in connection with the representation was impaired, “the lawyer shall, as far as reasonably possible, maintain a normal client-lawyer relationship with the client.”

If the lawyer reasonably believed that the client could not act in the client’s own interest, then “the lawyer may seek the appointment of a guardian or take other protective action with respect to a client.” The rule and the accompanying comment provided little specific guidance, however, to the lawyer attempting to determine when a client was under a disability or what protective action the lawyer could undertake.

Take for example a client who has struggled with serious depression throughout the course of a dissolution proceeding. Suddenly the client announces that the lawyer should drop the client’s clearly meritorious (and clearly needed) claim for maintenance. More ominously, the client questions whether life is really worth living and perhaps everyone would be better off if the client were dead. Did the instruction to drop the maintenance claim represent an instruction regarding the objectives of the representation with which the lawyer had a professional obligation to comply? Could the lawyer seek assistance for the client to prevent a possible suicide without violating the professional obligation not to reveal client confidences or secrets?

Before its recent amendment, Rule 1.14 and the accompanying comment provided little assistance to resolve those questions.

Lots of help

The amended Rule 1.14, now entitled “Client With Diminished Capacity,” offers significantly more guidance to the lawyer. The amended rule more fully explains the circumstances under which the lawyer may take reasonable protective action. Such actions may be taken when the lawyer reasonably believes the client “has diminished capacity, is at risk of substantial physical, financial, or other harm unless action is taken” and the client “cannot act in the client’s own interest.”

New language in the unofficial comment to Rule 1.14 also offers guidance in assessing diminished capacity. “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 the example above, the lawyer might ask the client to explain the reasons for the decision to drop the claim for maintenance and whether the client understands the ramifications of such a decision. The extent to which the client can articulate reasons for the decision, or express an appreciation for consequences of the decision, will assist the lawyer in determining the extent of any diminished capacity.

In addition to providing assistance in evaluating the extent of the client’s diminished capacity, the rule modifications offer greater guidance to the lawyer regarding what remedial actions may be undertaken.

New language to the rule provides that based on a reasonable belief of diminished capacity resulting in substantial risk to the client, the lawyer may take reasonable protective actions including “consulting 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.”

This provides more direction than the earlier version of the rule, which simply provided that the lawyer could seek the appointment of a guardian “or take other protective action.” New language in the comment to the rule identifies further protective measures the lawyer may take. They include “consulting with family members, using a reconsideration period to permit clarification or improvement of circumstances, using voluntary surrogate decisionmaking 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.”

Dealing with a client with diminished capacity presents the lawyer with a difficult task of balancing the client’s right to direct the client’s own case and the lawyer’s obligation to act in the client’s best interest. While never easy to do, the newly amended Rule 1.14 and accompanying comment provide the lawyer with significant guidance in achieving that balance.