Ethical Issues in Representing Clients with Diminished Capacities

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A lawyer’s ethical duties to a client with diminished capacities are the same as with any other client: Loyalty and Confidentiality. Rule 1.14(a) requires that the lawyer “shall, as far as reasonably possible, maintain a normal client-lawyer relationship with the client.” However, age or a lessened mental capacity raise questions that may confuse matters and bring the lawyer’s duties into conflict with each other. For the lawyer asked to perform legal services for an older client or one who appears to have a diminished capacity, there are three major areas of consideration.

This issue is more important to Arkansas lawyers at this time, since the state Supreme Court is considering proposed revisions to Rule 1.14 that will bring it into alignment with the American Bar Association’s Model Rule 1.14.

I. WHO IS THE CLIENT?

A client with diminished capacity may come to a lawyer in the company of family, friends, or other care-givers. Or an existing client, whose family the lawyer has represented for some period of time on a number of different matters, may develop symptoms that cause the lawyer concern and raise a question about diminished capacities. When that occurs, it is the lawyer’s duty to clarify the situation as soon as possible and before confidential information is conveyed.

Case law has determined the elements that create a client-attorney relationship: the person consults with someone they know is an attorney, with an expectation of confidentiality, requesting legal advice, and they receive legal advice on which they rely. The lawyer should explain the elements and consequences. The answer to the question of “who is the client?” is best documented in a writing.

A. Multiple Representation.

If answers to the lawyer’s questions indicate that more than one person is requesting legal advice about the same matter, Rule 2.2 may come into play. Rule 2.2 permits a lawyer to represent the interests of multiple clients by acting as an intermediary between them under certain conditions. For example, the client with diminished capacities and the others may be co-owners of property about which they want legal advice. However, where the interests of the parties may conflict, the lawyer must assure that the representation will meet the conditions stated in the Rule. If it does not, the lawyer may not act. If there is any lingering confusion over who is the client, Rule 4.3 may come into play with regard to the third party (whether an adult child or the older person).

1. © Judith Kilpatrick. This article is revised from one distributed to persons attending Seminar on Introduction to Elder Law, Ozark Legal Services, Fayetteville, AR (October 2000).
[NOTE: Proposed changes to Arkansas’ Rules of Professional Conduct include elimination of Rule 2.2. If the rules changes are effectuated, the lawyer would look to the conflicts rules, Rule 1.7 and 1.8 (revisions to which are also under consideration), to determine whether or not he or she may undertake the joint representation. If a waiver of conflict is involved, it is best documented with a writing. Proposed changes to Rule 1.7 and 1.8 would require a writing, after “informed consent” has been obtained.]

B. Single Representation of Older/Incapacitated client.

If the lawyer determines that the person with diminished capacities is the one who wishes legal advice, the lawyer must explain the need for confidentiality and consequences of its absence. Third parties must be dismissed from the room or confidentiality will be compromised. Exceptions to this ban are third persons necessary to accomplish the purposes of the meeting, e.g., interpreters.

The courts have used several indicia to determine the client’s identity when a question later arises about it:

1. Prior representation. If the client with diminished capacities was brought to the office by a person whom the lawyer has previously represented, there is an assumption that the prior representation continues. Rule 1.3, Comment [3]. A waiver of the conflict under Rule 1.7 would be required. A clear termination of that representation is required to rebut the assumption. Even where the prior representation is ended, however, Rule 1.9 may prohibit representation of the client with diminished capacities without full disclosure and the consent of each person.

2. Payment of fees. If adult child or other third person pays the attorney’s fees, but it is the older person who is the client, Rule 1.8(f) requires the lawyer to explain the potential for conflicts of interest, Rule 1.7, and to assure that the lawyer’s independent judgment on behalf of the client is not affected.

3. Directing the lawyer’s actions. If third person does the talking, answers questions asked by the lawyer, and generally dominates the meeting, it is assumed that the third person is the client.

4. Benefitting from the lawyer’s services. A concern for undue influence leads to application of a balancing test to determine whether the third party obtained special benefits that would not otherwise have occurred.

C. Duties of Confidentiality and Loyalty.

Once the client has been identified and a relationship established, the lawyer owes the client duties of confidentiality, Rule 1.6, and loyalty. Rules 1.7(b), 5.4(c).

1. Confidentiality. The relevant portion of Rule 1.6 states:

(a) A lawyer shall not reveal information relating to representation of a client unless the client [consents after consultation, except for] gives informed consent, the disclosure[s that are] is impliedly authorized in order to carry out the representation [, and except as stated in paragraph (b)] or the disclosure is permitted by paragraph (b).2

Paragraph (b) of the Rule provides for limited disclosure of confidential information in certain circumstances, e.g., to prevent the client from committing a crime, in a dispute between the lawyer and client, in defense of charges against the lawyer concerning action in which the client was involved, or in proceedings involving the lawyer’s representation of the client.

Most problems of a client with diminished capacities begin as personal problems that call for multidisciplinary solutions. The client may come to the attorney initially for help in obtaining Social Security benefits, but the representation may evolve into other areas as the lawyer sees different facets of the client’s legal needs. In the case of

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2. [proposed deletions in brackets, proposed additions underlined.]
Social Security benefits, disclosure of confidential information may be impliedly authorized to carry out the representation. In connection with other actions by the lawyer on the client’s behalf, a separate consent to disclosure may be required and the lawyer must assure that the client understands the ramifications of such disclosures.

A lawyer may not ignore new legal issues that arise. Even if the lawyer was hired to handle only Social Security problems, the lawyer must recognize other issues, e.g., a personal injury cause of action, and either arrange to handle these, as well, or help the client to secure other representation for them.

2. Loyalty. Under Rules 1.7(b), 1.8(f), and 5.4(c), the lawyer has a duty to make full disclosure of all potential conflicts and obtain consent of the client with diminished capacities to the representation despite the existence of potential conflicts. For example, if the lawyer has represented one of the client’s children and has confidential knowledge about that person, formal disclosure and consent of both the client with diminished capacities and the former client should be documented in writing.

Even after consent has been obtained, the lawyer must be wary of the potential conflict such knowledge may pose during the lawyer’s representation of the client with diminished capacities. For example, if the client may be under a misapprehension as to the lawyer’s former client, e.g., finances, but correcting it would require disclosure of the former client’s confidential information. Obtaining the former client’s consent to disclosure could require revealing the type of confidential discussions the lawyer is having with the new client.

During the representation, the lawyer must be alert to particular situations that raise concern for the best interests of a client with diminished capacities. For example, if a will or estate plan is the object of the representation, and one third party will benefit disproportionately to others, the lawyer must assure that the client with diminished capacities understands the consequences. Similarly, if demands or expectations of third parties would be detrimental to the client with diminished capacities, the lawyer must take care to protect the client’s autonomy. The demands or expectations of third parties also may be used to pressure the lawyer into certain action. Loyalty to the client requires that the lawyer resist such pressure, despite the possibility that these third parties may challenge the lawyer’s actions in the future.

II. IS THE CLIENT COMPETENT?

The second major question that arises in the representation of client with diminished capacities is “competence”. Arkansas’ Rule 1.14 is applicable to this issue:

(a) When a client’s ability to make adequately considered decisions in connection with the representation is [impaired] diminished, whether because of minority, mental disability, or for some other reason, the lawyer shall, as far as reasonably possible, maintain a normal client-lawyer relationship with the client.
(b) [A lawyer may seek the appointment of a guardian or take other protective action with respect to a client, only when the lawyer reasonably believes that the client cannot adequately act in the client’s own interest.] 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 actions to protect the client, and in appropriate cases, seeking the appointment of a guardian ad litem, conservator or guardian.
(c) Information relating to the representation of a client with diminished capacity is protected by Rule 1.6. When taking protective action pursuant to paragraph (b), the lawyer is impliedly authorized under Rule 1.6(a) to reveal information about the client, but only to the extent reasonably necessary to protect the client’s interests.3

3. [proposed deletions in brackets, proposed additions underlined.]
[NOTE: Proposed changes affect the language of Rule 1.14 and to its interpretive Comments significantly.]

There are four points at which a lawyer must determine the client’s competence:

A. Does the client have sufficient function or decisional ability even to form an client-attorney relationship?

The elements of a client-attorney relationship were stated above (p. 1). To create an effective client-attorney relationship, the client must understand the purpose of the discussions with the lawyer, the need for particular actions, and the consequences of his or her decisions. It is the lawyer’s duty to explain matters in a way that the client will most easily understand.

1. The law assumes that one who seeks a lawyer’s help is competent. It is important that a lawyer avoid snap judgments about capacity based on physical evidence or the lawyer’s opinion about the client’s desires. Clients are allowed to make stupid decisions, act unreasonably, or be mean-spirited. A client’s values, or what he considers important, can change over time. The lawyer’s duty is not to second-guess the client, but to assure that client has all information needed about ramifications and consequences of the proposed action. One question that may help avoid misjudging the client is: If a younger client had the same goals, or wanted the same results, would the lawyer question his or her mental capacity?

2. Reversible or correctable conditions. What looks like incapacity in an client with diminished capacities is often not mental incapacity, but simply a symptom of reversible or correctable interferences. Before deciding that the client is incapacitated, the lawyer who questions a client’s reasoning may ask the client for consent to talk with doctors and obtain information about whether the client is over-medicated, is receiving inappropriate medication, or is suffering from adverse drug interactions, tumors, vitamin deficiency, metabolic problems, infections, depression, environmental deficiencies, or sensory deprivation.

3. Test for comprehension. Even where it is apparent that there is some diminishment of capacity, a lawyer should ascertain the older client’s needs and wishes and, respect and maintain to the extent possible the older client’s autonomy and right to make his own decisions. Rule 1.14(a).

Incapacity is a LEGAL, not medical, decision. In questioning a client’s capacity for specific purposes, the lawyer should balance the:

(a) Client’s ability to articulate the reasoning behind his or her decision;
(b) Variability of the client’s state of mind;
(c) Client’s ability to appreciate the consequences of his or her decision;
(d) Irreversibility of any decision;
(e) Substantive fairness of any decision; and
(f) Consistency of any decision with lifetime commitments of the client (to the extent the lawyer knows them).

B. Does the client have the degree of competence needed to engage in the particular transaction or to make the particular decision?

Competency is relative. Clients may be competent for some decisions and not others. For example, a client with diminished capacities might be competent to make a will, but not to handle detailed financial transactions. It is the lawyer’s duty to determine the extent of any incapacity and capacity of a client to make some, if not all, decisions. In so doing, the lawyer may use his or her prior knowledge of a client’s history (lifestyle, desires, values) as well as current observations during the interaction.

Practitioners can enhance existing capacity of impaired clients by paying attention to the environment they create for them:

1. Print documents and communications in large, bold type with easy-to-read color background if eyesight is a problem;
2. Send written materials for client review before a meeting whenever possible;
3. Keep background noise and interruptions to a minimum for the hearing impaired, face
the client directly to facilitate lipreading, or sit on his or her better side for hearing;

4. Eliminate glaring surfaces, glaring lights, and uncomfortable chairs;

5. Speak in plain language and avoid legalese;

6. Give the client plenty of time to think and respond, and follow up on communications to ensure mutual understanding; and

7. Make house calls (impaired clients often will function better in a familiar, relaxing, environment; home access can also give an attorney more information regarding a client’s values, coping abilities and mechanisms).6

C. Does the lawyer believe the client cannot adequately act in his or her own interests?

1. Limiting scope of representation. Rule 1.2 allows the lawyer to represent a client for some purposes and not for others.7 A lawyer may be willing to follow some client instructions when no other person will be harmed by them and the client’s overall interests will not be damaged, but not others.

2. Significant levels of incapacity. When the lawyer believes the client's instructions are not in the client’s best interests, and the representation cannot be limited, resort to the court by the lawyer should not be the first step taken. The adverse consequences to the client with diminished capacities by such action are severe. Loss of control and decision-making power over their lives is a major fear of older or partly incapacitated clients. Protective actions a lawyer might take, short of resort to guardianship in non-litigation settings, might be:

   (a) Involving family members. The lawyer could consult with family and friends to determine what client might have wanted;

   (b) Using a “time out” (where there is no immediate action required, wait for a cooling off, clarification, or improvement of the situation or circumstances);

   (c) Referring the client to a private case management office;

   (d) Referring the client to a long-term care ombudsman;

   (e) Using church or other care and support systems;

   (f) Referring the client to disability support groups;

   (g) Referring the client to social services or other governmental agencies. (Note that this last often triggers court involvement and guardianship proceedings.)8

As noted above, any resort to outside help usually will require the disclosure of confidential information, thus violating Rule 1.6. An Informal Opinion of the American Bar Association, 89-1530, suggested that authority for limited disclosure was “impliedly authorized” by Rule 1.6 to allow the lawyer to act on the client’s behalf. That position was affirmed in ABA Formal Opinion 96-404 (1996). Of course, the lawyer should obtain the client’s consent, if at all possible, before following such a course.

There is some disagreement among authorities. A Nassau, New York, Ethics Opinion, 90-17 (May 1990) advised that a lawyer retained by an older client for estate planning who formed an opinion that the client needed a conservator (the client was forgetful, unkempt, and wanted an unusual dispositive plan) may not inform family members of his conclusion because of the primary duty to preserve confidences.

3. Formal guardianship proceedings. The statutory scheme provided by Arkansas law is intended to be a last resort. Section 28-65-105 states that guardianship:

   shall be used only as is necessary to promote and protect the well-being of the person and his property, shall be designed to encourage the development of maximum


7. This rule, too, is subject to proposed changes, but the “sense” of the rule would remain the same.

self-reliance and independence of the person, and shall be ordered only to the extent necessitated by the person's actual mental, physical, and adoptive limitations.

The person subject to guardianship retains all legal and civil rights except those “expressly limited by court order. . . .” A guardianship proceeding is accomplished pursuant to Arkansas Code Sections 28-65-201 et seq. The definition of an “incapacitated person” appears in Section 28-65-101(1):

[A] person who is impaired by reason of a disability such as mental illness, mental deficiency, physical illness, chronic use of drugs, or chronic intoxication, to the extent of lacking sufficient understanding or capacity to make or communicate decisions to meet the essential requirements for his health or safety or to manage his estate.

There are few cases interpreting this language. In a case decided before the statute was revised, but cited in its current annotations, the Arkansas supreme court held that the question was “whether the powers of the mind have become so affected, . . . as to render him incapable of transacting business like the one in question.” In 1995, the Arkansas appellate court reviewed prior cases and commented:

... it is clear that no very high standard of competence is to be exacted; mere lack of good business sense not amounting to some degree of mental incompetency is ordinarily not regarded as sufficient to require guardianship. Nor does susceptibility to influence justify the appointment of a guardian, if the alleged incompetent possesses capacity to manage his property as a result of sanative reasoning, although a contrary rule prevails if, in the disposition of his property, he is guided by the will of others, rather than his own. The unsoundness of mind which will justify an appointment must be more than mere debility or impairment of memory; . . .

A recent Arkansas opinion, in dealing with a challenge to a testator’s mental capacity to execute a will, held that:

... if he has sufficient mental capacity to retain in his memory, without prompting, the extent and condition of his property, and to comprehend how he is disposing of it, and to whom and upon what consideration, at the time the will is executed, then he possesses sufficient mental capacity to execute a will.

Even guardianship can be limited in a number of ways and a lawyer should act only to the extent needed to protect the client’s interests. A guardianship can be imposed over the person, the person’s estate, or both. It can be temporary and can be limited in scope. Annual court oversight occurs by review of accountings from the guardian. Where there is no competence, unless some legal step has been taken, no one can make decisions for the older person.


11. Deffenbaugh v. Claphan, 48 Ark. App. 208, 214, 893 S.W. 2d 350, 353 (noting, at 215, 353, that the subject of the case continued to farm and was able to manage his checkbook).

12. Hodges v. Cannon, 68 Ark. App. 170, 179, 5 S.W. 3d 89, 96 (1999) (continuing at 97, 180, “A testator’s old age, physical incapacity, and partial eclipse of mind will not invalidate a will if he has the requisite testamentary capacity when the will is executed.”).


D. Is there an emergency during which the client is sufficiently incompetent or incapacitated to justify the attorney taking over as de facto guardian?

Comment [2] of Rule 1.14 notes that where a client is incapacitated, but has no guardian or legal representative, “the lawyer often must act as de facto guardian.” This statement implies that such action might be frequent, but gives no guidance to lawyers as to when and to what extent they might act. At its February 1997 meeting, the ABA House of Delegates approved the addition of Comments [9] and [10] to Rule 1.14 that discuss the conditions that trigger a de facto guardian action:

[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 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.

Comments [9] and [10] have not been adopted in Arkansas, but they are included in the proposed revisions to Rule 1.14 now pending before the Court.

The decision to take emergency action should not be made lightly, and should be for as brief a period as possible. A lawyer relying on these Comments to take control of a client’s affairs should be prepared to defend his or her decision. That only a brief action with authorization was intended is substantiated by an interpretation that the lawyer should not seek compensation for such emergency action in these circumstances.

The new Comments provide more guidance for lawyers faced with an incompetent client who has a legal emergency. Action pursuant to these Comments permits an immediate response to prevent irreparable harm. It avoids the trauma and public humiliation associated with formal guardianship proceedings. It is less intrusive, does not directly pave the way toward institutionalization, and is less permanent.

Where there is no emergency to justify a lawyer’s action on behalf of the older/incapacitated client, the lawyer is thrown back to the balancing

16. Under the proposed revision, this language would be deleted.

17. 13(2)ABA/BNA LAWYER’S MANUAL ON PROFESSIONAL CONDUCT 27, 28.
described in previous sections. A lawyer has a duty to protect a client’s interests. The lawyer cannot ignore an awkward situation.

III. ANTICIPATION AND PREVENTION

The best way for a lawyer to avoid problems in this area is before they occur. The competence of a client with diminished capacities to enter into a client-attorney relationship should be tested before it is created. If the older client is competent at initiation of the relationship, one of the items on the agenda should be planning for gradual or sudden incompetence. The lawyer should discuss with the client what he or she wants done if incapacity strikes. Different plans for different levels or types of possible incapacity can be established. Any such plan must be memorialized in writing.

Among the legal vehicles available for such planning are durable powers of appointment. For example, a Conservatorship under Arkansas Code sections 28-67-101, et seq., available when a person is unable to manage his or her property due to advanced age or physical disability. This procedure does not involve an adjudication of incapacity. A Durable Power of Attorney or Trust, under Arkansas Code sections 28-68-201 et seq, is less expensive and does not involve the court system. This path requires specific statutory language: “This Power Of Attorney shall not be affected by subsequent disability or incapacity of the principal” or “This Power Of Attorney shall become effective upon the disability or incapacity of the principal.” The use of revocable trusts is another planning device.

The lawyer who represents older clients should keep current on discoveries in the science of aging through attendance at seminars and reading of educational materials that educate lawyers on incapacitating conditions and ways to reverse or mitigate their impact on individuals. For example, it has been determined that keeping active and involved in outside activities helps to deter mental deterioration. The lawyer should encourage family and friends to keep the older client active and resist doing things for the older client that he or she can still do alone.

The lawyer also should remember that it is not only older clients who may become incapacitated. The lawyer may alert clients to the availability of private services that can help manage property and provide for personal needs.

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Sources:

13(2) ABA/BNA LAWYER’S MANUAL ON PROFESSIONAL CONDUCT 27, 28.


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