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SPECIAL FOCUS: DISABILITY LAW
ETHICAL CONSIDERATIONS WHEN REPRESENTING A CLIENT WHO
IS "UNDER A DISABILITY"

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An attorney is subject to specific ethical requirements when representing a client whose decisionmaking capacity is impaired whether due to a psychiatric disability, cognitive impairment, minority, or problems associated with aging.¹ This article will examine the limited utility of the Vermont Rules of Professional Conduct when representing a client under these circumstances, and why the recommendations of the American Bar Association's Commission on Evaluation of the Rules of Professional Conduct provides needed guidance to the practitioner on how to best represent the client and, at the same time, protect the client's autonomy.

Agency Relationship

The attorney's relationship to her client is one of agency.² Therefore, it is generally acknowledged that an attorney cannot represent a client's interest without her informed and competent consent. As with a physician, an attorney must be satisfied the client has the capacity to make critical decisions concerning the client's affairs. Lacking a client's valid, informed consent, the attorney has no authority to act on the client's behalf.³ Therefore, "a client's disability will have a bearing upon whether a lawyer-client relationship exists at all."⁴

Judging Capacity

A person may be incompetent in fact, but not in law, and may also lack a guardian or authorized legal representative. Under these circumstances, an attorney must first determine if the client has the capacity to be a client. Under exigent circumstances, as will be discussed later, ethical considerations may still require the attorney to represent an incompetent client,⁵ but otherwise the attorney will not have the proper authority under principles of agency to provide representation. However, an attorney must be careful not to confuse eccentricity, life-style choices, imprudence, or differences in core values with incompetence.⁶ Furthermore, clients "may be competent for some matters, but incompetent for others."⁷ For example, a client might have the capacity to execute a Durable Power of Attorney to designate an attorney-in-fact to sell her home, but lack the capacity to understand the financial complexities of the transaction.

Attorneys also should be mindful not to fall into the trap of presuming that individuals lack capacity to make decisions about their lives solely because they have a cognitive impairment or psychiatric disability. On the contrary, most clients with these kinds of disabilities are acutely aware of their needs and desires. Their difficulty is in trusting an attorney to act in accordance with those expressed needs and desires as opposed to the attorney's, or, indeed, society's, paternalistic presumptions.⁸ Often it is simply a matter of taking the time needed to develop a rapport with the client that will allow the attorney to better appreciate and understand what the client is trying to communicate.⁹

Once she has agreed to represent the client, however, what is the attorney's ethical obligations if she later determines the client's "ability to make adequately considered decisions in connection with the representation is impaired?"¹⁰

The Old "Rule"

In 1999, Vermont replaced its Code of Professional Responsibility with the Rules of Professional Responsibility. The Code itself did not address the ethical requirements when representing a client whose decisionmaking ability is impaired. Rather, the non-mandatory Ethical Considerations that accompanied the Code dealt with this conundrum by providing some basic, but inadequate, guiding principles. Essentially, Ethical Consideration 7-12 suggested that an attorney representing a client who has lost capacity continue to act on her client's behalf in an ongoing court proceeding, but refrain from taking action in making decisions the law

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requires her client to make.¹¹ Thus, the Code offered little in the way of guidance to the practitioner.

The Current Rule

While an improvement over the Code, Vermont's current Rules of Professional Conduct governing the representation of a client with questionable capacity are vague and contradictory.¹² Patterned after the American Bar Association's Model Rule 1.14, subparagraph (a) of Vermont's Rule 1.14 requires the attorney, "as far as reasonably possible, [to] maintain a normal client-lawyer relationship with the client."¹³ It then encourages the attorney in subparagraph (b) of the Rule to seek appointment of a guardian "or take other protective action when the lawyer reasonably believes that the client cannot adequately act in the client's own interest."¹⁴ The Rule, therefore, fails to recognize the differing degrees of capacity, as well as other options that an attorney should consider and implement before resorting to the extraordinary measure of bringing a guardianship action against one's own client.¹⁵

Recommended Revisions

to the Rule

The American Bar Association's Commission on Evaluation of the Rules of Professional Conduct took these shortcomings into account when it recommended extensive revision of Model Rule 1.14. The amended rule proposed by the Commission would, among other things, permit an attorney to take protective action on behalf of a client who has a diminished capacity to consent only when the attorney reasonably believes the client is at "risk of substantial financial or other harm unless action is taken."¹⁶ The current rule does not specify when protective action should be taken on behalf of a client whose mental capacity is diminished. This is an important but missing caveat.

The Commission also recommended a more graduated approach to protecting the client's interests by suggesting the Bar amend subparagraph (b) of the Rule to encourage the attorney to consult with "individuals or entities that have the ability to protect the client, and, in appropriate cases, seeking the appointment of a guardian ad litem, conservator or guardian."¹⁷

Finally, both the present model and Vermont Rule 1.14 are silent as to the kinds of protective actions an attorney might employ when the "normal client-lawyer relationship cannot be main-

tained."¹⁸ The Commission recognized that the language of the rule poses the danger that attorneys will feel justified in bringing a guardianship action when, in fact, this step should be reserved for only the most "extreme circumstances."¹⁹ Therefore, the Commission recommended revisions that would encourage the attorney to take less restrictive and intrusive measures to protect the client. The kinds of interventions the Commission recommended the Bar enumerate in its Comment to the Rule were "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."²⁰

By suggesting these various options, the Commission recognized, among other things, that many clients with a diminished capacity may be competent enough to consent to consultation with trusted family members or peers, or may be willing to work with a professional service or protective agency to assist the client, but not have the capacity to understand or consent to more complex legal matters.

In some instances, the client may even lack capacity to consent to consultation with family members or other persons who might be in a position to provide assistance. The Commission, therefore, recommended an amendment to the Rule that would allow the attorney to reveal confidential information about the client, "but only to the extent reasonably necessary to protect the client's interests."²¹ The current Rule is silent on this point.²² The lack of this provision puts the attorney at a great disadvantage for it would be nearly impossible to take protective action on behalf of a client without violating long-cherished principles of attorney-client privilege.

Even with this provision, however, an attorney must be careful not to assume family members will always act responsibly on behalf of the client. In some instances, they may have a conflict of interest of which the attorney is unaware, such as an acrimonious or even abusive relationship with the client. Therefore, the attorney must have a reasonable belief the family member with whom she is consulting is someone her client trusts.

Recommended Revisions to the

Comment to the Rule

The Commission further recommended the Bar make extensive revisions to the Comment to the Rule to offer the practitioner more guidance than the Comment currently provides. The current Comment, for example, provides no guidance for determining the extent to which a client's capacity to assist in her representation is impaired. The Commission recommended adding a paragraph to the Comment that would encourage the practitioner "to 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."²³ It also suggests the attorney seek consultation with "an appropriate diagnostician."²⁴ The Commission also recommended a new paragraph to the Comment that would honor a client's voluntary desire to have "family members or other persons participate in discussions with the lawyer" to assist in the representation.²⁵ The Commission does, however, remind the attorney

that while family members and other persons may be useful in assisting the client in her representation, they can-not make decisions for her.²⁶ For example, many practitioners have experienced the children of their elderly clients bringing them in to execute a will in which the children themselves have a stake. The children's obvious conflict of interest precludes them from assisting the client-parent in making decisions regarding the parent's testamentary wishes. Even the children's presence in the attorney's waiting room while the attorney meets with the elderly parent can be intimidating for the parent, and have an improper influence on the representation.

"De Facto Guardianship"

Perhaps the most troubling language in the Comment to Vermont's Rule 1.14 is the suggestion the attorney act as the client's "de facto guardian" when the mentally incapacitated client has no guardian or legal representative.²⁷ This concept is counter to the requirement of the Rule that the attorney strive to maintain a normal client-attorney relationship.²⁸

Because subparagraph (b) of the Rule permitting the attorney to take protective action is permissive, the Comment impliedly allows the attorney to choose either to act as de facto guardian or to take protective action. Since taking protective action would require the attorney to divulge confidential information about her client, which is currently not permitted, an attorney would feel justified in avoiding taking protective actions on behalf of her client, and instead act as her client's de facto guardian. Moreover, the attorney could proceed as her client's de facto guardian effectively without anyone knowing she was doing so. For instance, under this theory, presumably the attorney could continue in the sales transaction of her client's home even though the client had lost the capacity to direct the representation sometime after the client executed the sales contract. This result seems inevitable, and yet, a radical departure from any notions of agency and informed consent.

Taken together, the Rule and the Comment gives the attorney the extraordinary authority to usurp her client's autonomy without a shred of due process or any sort of judicial or public oversight. The danger of allowing de facto guardianship is the complete "absence of accountability and restraint. The purpose of informed consent is to protect client autonomy, particularly against misperception of client values and conflicts of interest."²⁹ By encouraging de facto guardianship, the Rule entirely defeats this purpose.

In its Evaluation of the Model Rules of Professional Conduct, the Commission recommended the Bar amend the Comment by striking out this language entirely. The Commission made this recommendation because it considered the provision "unclear, not only what it means to act as a "de facto guardian," but also when it is appropriate for an attorney to take such action and what limits exist on the attorney's ability to act for an incapacitated client."³⁰

Deleting the de facto guardianship language from the Comment section of the Rule will act to further preserve the client's autonomy, and protect her from attorney paternalism that is already acknowledged as a problem in the profession.³¹ The "denial of the de facto guardian alternative will force attorneys to make genuine efforts to discern the reasons for their clients' choices, and to involve family members [as appropriate] if difficulties persist."³²

Emergencies

Vermont incorporated into Rule 1.14 provisions found in the Comment section of the Model Rule

1.14 regarding representation of an incapacitated client in the event of an emergency.³³ This provision allows an attorney to represent an incapacitated client with whom she will be unable to form an agency relationship if the client "is threatened with imminent and irreparable harm."³⁴ For example, there may be no time to bring a guardianship petition, or take other protective actions, when the disabled client is facing imminent eviction from her home. However, after the emergency is averted, the attorney must "take steps to regularize the relationship or implement other protective solutions as soon as possible."³⁵

Maintaining a "Normal"

Client-Attorney Relationship

In maintaining a normal client-attorney relationship, the practitioner must take the time to assess the client's stated goals and unearth the motivations underlying them. This is referred to by some commentators as the "counseling process."³⁶ It is tempting for an attorney to substitute her own judgment for that of her clients, or impose what she feels is in the client's best interest, and then to try to convince the client of her position.³⁷ Either approach, while perhaps more economical, risk depriving both the client and the practitioner of the rewards of actually forming a relationship, as opposed to the ungratifying experience of just going through the formalities. The attorney's role in the counseling process is to help the client identify the needs and fears out of which her goals are formulated, examine the various options, and, together, decide the best course of action.³⁸ In this manner, an attorney will be more successful in maintaining a "normal" client-attorney relationship with all of her clients, but especially those clients who may have a diminished mental capacity to make decisions.

Conclusion

The counseling process is advantageous for all clients. However, for clients with cognitive impairments or psychiatric disabilities, this model is imperative. The needs and fears of most of these clients are likely to be born out of a life-long struggle for autonomy and a long-suffering absence of choice in determining their own lives.

Only the counseling process can address these needs and fears. If, as advocates, we do not honor their struggle and allow their voices to be heard, who will? _____

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