

**International Association of Defense Counsel  
2018 Professional Liability Roundtable**

**ABA Rules of Professional Conduct:  
Client with Diminished Capacity**

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April 6, 2018

**ABA Rules of Professional Conduct: Client-Lawyer Relationship**  
**Client with Diminished Capacity**

**INTRODUCTION**

Almost every lawyer throughout their legal career will be faced with the ethical dilemma of how to represent a client suffering from some form of diminished capacity, resulting from age, disability, or mental or psychiatric disorders. Fortunately, the American Bar Association provides guidance on how to properly represent a client with diminished capacity to determine and advocate the “best interests” of the client and, in some cases, in spite of the actual desires of the client. Most states have adopted and follow the ABA Rule 1.14 Client with Diminished Capacity either verbatim or in some variation, but applying this rule is not always easy. Each client will present different and difficult ethical situations and understanding the meaning of Rule 1.14 will not be a straightforward interpretation. Each circumstance will require time for reflection and thought and perhaps consultation with others than the actual client to determine how best to proceed and successfully represent the client.

**ABA RULE 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.
  
- (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 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.

For reference, Rule 1.6(a) Confidentiality of Information:

- (a) A lawyer shall not reveal information relating to the representation of a client unless the client gives informed consent, the disclosure is impliedly authorized in order to carry out the representation or the disclosure is permitted by paragraph (b).

## ABA COMMENT ON RULE 1.14

[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 1.2(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) permits 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 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. 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 decisionmaking autonomy to the least extent feasible, maximizing 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.

## DISCUSSION

Rule 1.14 on “Client with Diminished Capacity,” recognizes the need to maintain a normal client-lawyer relationship, the discretion a lawyer must uphold in order to take protective action in the face of diminished capacity, and the caution to reveal confidential information to the extent necessary to protect the client’s interests. The ABA released a Handbook titled, *Assessment of Older Adults With Diminished Capacity*, which provides examples and detailed explanation on how to approach Rule 1.14 and effectively and accurately represent a client with diminished capacity. Below is a closer look at applying Rule 1.14.

### **Rule 1.14(a)**

- A lawyer must maintain and continue their client-lawyer relationship but also in addition apply their duties to a client with diminished capacity, as stated in 1.14(a). The client, should remain and be provided with sufficient information to participate intelligently in all critical decisions.
- “A lawyer must be competent, appropriately communicative, diligent, maintain client confidences, and avoid conflicts of interest” and in addition interpreting their clients’ needs according to their capacity or changed mental condition. The lawyer should counsel the client and assist them in making the best decisions for the client based on the appropriate information known, not substituting the lawyer’s judgment for the client’s judgment.
- If a legal representative has been appointed, this person should be treated as the client as well with regard to communications and keep the appointed person in constant contact as a lawyer would with respect to their actual client. As with any client-lawyer relationship routine decisions can be frequent and keeping the appointed person up to date and informed in an obligation of the lawyer.
- Guidelines to the lawyer for what constitutes a “normal” client-lawyer relationship and determining the capacity of their client can be found in comment 6 of the ABA

Rule 1.14, including basing a client's decision-making on their consistency and history regarding the known long-term commitments and values of the client which the lawyer has observed throughout their relationship.

### **Rule 1.14(b)**

- Rule 1.14(b) rule touches upon what a lawyer may do if they are truly convinced the client has diminished capacity.
- Rule 1.14's comment, in paragraph 5, gives examples of such action: consulting with family members, calling for a reflective period to permit "clarification or improvement of circumstances," using voluntary surrogate decision-making tools such as durable powers of attorney, and consulting with individuals or entities that have the ability to protect the client. Reasonable protective action may include petitioning a court for appointment of a legal representative for the client. If a third party does the petitioning, the lawyer should not attempt to represent the third party, but represent the third party as a representative of their actual client.

### **Rule 1.1(c)**

- Revealing the contents of a client's will in such a situation is most likely not permissible pursuant to Rule 1.6 which safeguards the confidentiality of a client.
- However, 1.14(c) provides ethical protection for the lawyer who opts to take action under subpart (b) because anything a lawyer might do in a subpart (b) factual scenario would likely run afoul of other ethical rules.
- It would appear that the lawyer who opts to take action to protect a client with diminished capacity, i.e., by consulting with third parties about the problem or by petitioning a court for appointment of a legal representative, would violate the lawyer's duty to maintain client confidences. Subpart (c) of the rule, however, specifically identifies revelation of information relating to the representation of a client with diminished capacity as a revelation "impliedly authorized" to carry out the representation, and not, therefore, in violation of Rule 1.6 (a).

## **ABA Comment Discussion**

### **Comment [1]**

- There are no "one size fits all" capacity rules.
- The severity of a person's diminished capacity, or age, alters the lawyer's approach to representation.
- Each client should be assessed upon individual findings from the lawyer in order to understand how each person should be represented and to what degree.

### **Comment [2], [3], and [4] - How to communicate**

- Maintaining adequate and sufficient communication.
- Attorney-client privilege is preserved if client wishes to have family members or other persons participate in discussions with the lawyer.

- The lawyer must observe any instance of misconduct and report the misconduct in order to properly represent the client with diminished capacity, whether by the appointment legal representative or family and close associates.

## TAKING PROTECTIVE ACTION

### **Comment [5] - When should a lawyer seek appointment of a guardian, conservator or guardian ad litem?**

- Client is at risk of substantial physical, financial or other harm and the client lacks sufficient capacity to communicate or make adequately considered decisions in connection with the representation.
- Please note that the rule does not “require” the lawyer to act, but “permits” the lawyer to take protective measures.
- *In Re Link*, 713 S.W.2d 487 (Mo. 1986) (discussing the issue of appointing a guardian ad litem for an aging client suffering from diminished capacity)

### **Comment [6] - How do you determine the extent of diminished capacity?**

- Balancing Test:
  - Client’s ability to articulate reasoning leading to a decision
  - Variability of state of mind AND
  - Ability to appreciate:
    - Consequences of a decision,
    - Substantive fairness of a decision, and
    - Consistency of a decision with the known long-term commitments and values of the client.
  - **You can seek a medical diagnosis**
- Further, according to the APA Handbook on Diminished Capacity, titled “Assessment of Older Adults with Diminished Capacity: A Handbook for Lawyer”:
  - The first level of evaluation is a “preliminary screening” of capacity to identify any “red flags”
    - There is no or very minimal evidence of diminished capacity; representation can proceed.
    - There are some mild capacity concerns, but they are not substantial; representation can proceed.
      - Consider medical referral or informal mental health consultation or formal capacity assessment
    - Capacity concerns are more than mild or substantial and professional consultation or formal assessment may be merited.
      - Proceed with great caution, consider medical referral or informal mental health consultation or formal capacity assessment.
    - Capacity to proceed with the requested representation is lacking.
      - Formal capacity assessment, decline representation or withdraw protection action if appropriate.
  - Second, if needed, involves the use of a formal assessment.

- Third, requires making the legal judgment that the level of capacity is either sufficient or insufficient to proceed with representation.
  - Even if the client is formally evaluated the final responsibility rests on the shoulders of the attorney to decide whether representation can proceed as requested or not, and whether it is appropriate.
- Legal approaches to defining diminished capacity:
  - Standards of capacity
    - Testamentary capacity
    - Donative capacity
    - Contractual capacity
    - Capacity to convey real property
    - Capacity to execute a durable power of attorney
    - Decisional capacity in Health Care
    - Capacity to Mediate
  - A lawyer must also take into consideration the factors set out in this comment which include:
    - The client's ability to articulate reasoning leading to a decision.
    - Variability of state of mind.
    - Ability to appreciate consequences of a decision.
    - The substantive fairness of the decision.
    - The consistency of a decision with the known long term commitments and values of the client.
    - Irreversibility of the decision.

**Comment [7] – Appointment of a Legal Representative**

- Interesting to note that the rule takes into consideration that the appointment of a legal representative or guardian may be more traumatic for the client than the circumstances require.
- Lawyer should be aware of the state-specific guardianship and conservatorship laws in dealing with a client with diminished capacity.

**Comment [8] - Disclosure of the 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 1.6. Therefore, unless authorized to do so, the lawyer may not disclose such information. When taking protective action pursuant to Rule 1.14(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, Rule 1.14(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.

### **Comment [9] and Comment [10] - Emergency Legal Assistance**

- Explains that a lawyer may take emergency protective legal action when the individual's health, safety, or financial interests are threatened with imminent and irreparable harm, if the individual—or another acting in good faith—consulted with the lawyer and the lawyer reasonably believes the individual “has no other lawyer, agent or other representative available.”
- Advises the lawyer to “keep the confidences of the person as if dealing with a client”

### **STATES THAT HAVE ADOPTED THE RULE 1.14:**

- 46 states and territories have adopted 1.14 of the ABA Model Rules: Alabama, Alaska, Arizona, Colorado, Connecticut, Delaware, District of Columbia, Georgia, Hawaii, Idaho, Illinois, Indiana, Iowa, Kansas, Kentucky, Louisiana, Maine, Maryland, Montana, Massachusetts, Minnesota, Mississippi, Missouri, Nebraska, Nevada, New Hampshire, New Jersey, New Mexico, New York, North Carolina, North Dakota, Ohio, Oklahoma, Oregon, Pennsylvania, Rhode Island, South Carolina, South Dakota, Tennessee, Utah, Vermont, Virginia, Washington, West Virginia, Wisconsin and Wyoming.
- The only state that did not adopt some variation of Rule 1.14 is Texas.

### **MISSOURI & ILLINOIS**

Many states have discussed Rule 1.14 to provide its lawyers with as much guidance as possible if ever presented with a situation where a client begins emanating signs of diminished capacity. Missouri and Illinois both have discussed at length when a lawyer should seek appointment of a guardian, conservator or guardian ad litem. Factors to consider are: (1) is the client at risk of substantial physical, financial or other harm and (2) the clients lacks sufficient capacity to communicate or make adequately considered decisions in connection with the representation.

The specific cites for Illinois and Missouri are as follows:

- Illinois Rules of Professional Conduct R. 1.14: Client with Diminished Capacity (Adopted July 1, 2009, effective January 1, 2010)
- Missouri Rules of Professional Conduct 4-1.14: Client with Diminished Capacity Client-Lawyer Relationship (Adopted Aug. 7, 1985, eff. Jan. 1, 1986. Amended March 1, 2007, eff. July 1, 2007; Sept. 26, 2017, eff. Sept. 26, 2017)

An example of how Missouri has interpreted this question is discussed below and on the Missouri Bar website:

**QUESTION:** Attorney handled several matters for an elderly client, which included estate planning. Attorney has learned that the client is showing the signs of Alzheimer's disease and is becoming increasingly unaware of the extent of

the client's financial resources and the consequences of the client's actions or negligence in handling them. There is no family member or friend to intervene to protect the client's interests. Attorney believes that the client needs a guardian. Is Attorney obligated to inform the probate court? Is it ethically permitted for Attorney to inform the probate court? What is Attorney to do in these circumstances?

**ANSWER:** Rule 1.14, applies to the situation Attorney has described. Attorney may seek a guardian for Attorney's client, as a last resort. Under the circumstances Attorney has described, Attorney may want to inquire whether a local social services agency could be called in for assistance to the client. It is possible that the need for a guardian would be identified in that manner. If Attorney believes that Attorney's client is in danger, from the standpoint of health and physical welfare, Attorney should take prompt action to alleviate that situation, including seeking the appointment of a guardian. If Attorney's primary concern relates to questionable financial or estate planning decisions, with which the client is requesting Attorney's assistance, Attorney may decline to take the action requested. If necessary, Attorney may withdraw from further representation. Attorney may not inform the probate court of Attorney's concerns and observations unless the situation has progressed to the point where Attorney is seeking the appointment of a guardian. If Attorney decides that this type of action is warranted, Attorney must only take the action to the limited extent necessary to protect the client.

Illinois has also provided some guidance on how it has interpreted Rule 1.14 to an extent. A few examples of how Illinois has interpreted Rule 1.14 are found on the Illinois State Bar Association website, and listed below:

**Hypothetical A:** Lauren Lawyer represents Carla Client, who is of limited means and a defendant in a contract dispute. Client has a complete defense to the action based on the creditor's fraudulent conduct. However, Client instructs Lawyer to pay the disputed bill, despite Lawyers' advice to the contrary and the disastrous impact on Client's financial well-being, because Client has "always paid" her bills in the past.

- In **Hypothetical A**, if Lawyer believes Client has sufficient mental capacity to make an informed decision about the resolution of the contract dispute, she should respect Client's decision even if she thinks it is contrary to her interest, according to the provisions of Rule 1.14(a) and Comment 1 to Rule 1.14. Under ABA Opinion 96-404, the fact a client may make decisions which a lawyer considers to be "ill-considered" does not inevitably result in the conclusion that protective action is required; it is not the lawyer's role to substitute his or her judgment for the client's.
- If, however, Lawyer believes that Client's mental capacity is so diminished that it limits her ability to make an informed decision, Lawyer may have Client's family

members participate in discussions to assist Client in his decision-making, per Comment 2 to Rule 1.14. If Client is substantially impaired, Lawyer may decide per Rule 1.14(d) to take action to protect the client, including seeking the appointment of a guardian or GAL.

**Hypothetical B:** Lawyer has also represented Sam Senior for many years, and has been engaged to represent him in the sale of a residence to obtain the funds necessary to move into an assisted living facility - a move that Lawyer and Senior agree is in his best interest in light of his failing health and increasing memory problems. Shortly before the scheduled closing, Senior suffered a stroke and is unable to communicate with Lawyer or attend the closing.

- In **Hypothetical B**, given the substantial impact of Senior's stroke on his ability to adequately act in his own interest, Lawyer should take reasonable protective action under Rule 1.14(b) to obtain the appointment of a legal representative to complete the transaction on Senior's behalf.

**Hypothetical C:** Aaron Attorney is visited by two adult children of Wendy Widow. Widow's children express their concern about her ability to care for her basic needs and request Attorney's assistance getting her to explore available options. Widow has considerable assets and the children, who are the beneficiaries of her will, express their concerns that the assets might be dissipated before she dies. The children offer to pay Attorney's fee for consulting with Widow.

- Attorney meets with Widow, who asks that Attorney prepare a new will leaving her estate to her church.
- In **Hypothetical C**, to avoid the possible conflict of interest that might otherwise arise, Attorney must - at the outset of his discussions with Widow's children - clarify whom he is representing. If Attorney is representing Widow, he should advise the children that he is obliged to represent Widow's interests, not theirs. This includes pointing out to them that the fact that they are paying his fee does not affect his duty to render independent professional judgment on Widow's behalf and maintain the confidentiality of her information pertaining to the representation.
- If Attorney is representing both Widow and her children, he must advise all of them that conflicts of interest may arise that could affect his ability to represent their respective interests and maintain confidentiality. If he were representing both Widow and the children, implementing her request to prepare a new will leaving her estate to her church could violate Rule 1.7's conflict-of-interest provisions.

**Hypothetical D:** Joe and Susie Golden-years own a small but successful family business. They and their three children meet with Attorney and ask him to help them sell the business to the children.

- In **Hypothetical D**, Attorney must, at the outset of his discussions with the Goldenyears and their children, discuss the conflicts that could arise in the representation of both parties in the sale of the business. Because of the differing interests that may arise, the best course is probably to treat the joint representation of seller and buyer as prohibited under Rule 1.7. Attorney could agree to represent the Goldenyears and advise the children to obtain separate counsel, or vice versa.

## **CONCLUSION**

The representation of a person with diminished capacity or potential diminished capacity presents difficult ethical issues for the lawyer and how to successfully represent such clients. Fortunately, there is some guidance for the lawyer facing complicated questions regarding the representation itself and how to proceed in the ABA Rules of Professional Conduct and the states adopting the rules. Comments to the rules and examples of hypothetical dilemmas may prove to be useful and instrumental for the practicing lawyer.