

# Ethics of Working with Clients with Diminished Capacity

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**Disability  
Rights** OHIO

We have the  
legal right of way.

# Defining Terms



- Capacity
  - Ability to make a particular decision at a particular time
  - May change over time (even day to day or within the same day)
- Competency – legal standard
  - Criminal: “because of the defendant's present mental condition, the defendant is incapable of understanding the nature and objective of the proceedings against the defendant or of assisting in the defendant's defense”  
ORC 2945.37(G)
  - Guardianship: “so mentally impaired . . . that the person is incapable of taking proper care of the person’s self or property” ORC 2111.01(D)

# Assessing Capacity



- PRACTICAL Tool
  - **PRESUME** guardianship is not needed
  - Clearly identify the **REASONS** for concern
  - **ASK** if condition may be temporary/reversible
  - Determine if **COMMUNITY** resource or accommodations can address concerns
  - Consider whether a **TEAM** could help the person make decisions
  - **IDENTIFY** abilities – both strengths and limitations
  - Address potential **CHALLENGES** for identified supports
  - **APPOINT** supporter/surrogate consistent with person's values
  - **LIMIT** any necessary guardianship order

[http://www.americanbar.org/groups/law\\_aging/resources/guardianship\\_law\\_practice/practical\\_tool.html](http://www.americanbar.org/groups/law_aging/resources/guardianship_law_practice/practical_tool.html)

# General Principles



- Disability ≠ Diminished Capacity
- Bad Decisions ≠ Diminished Capacity
- Maintain normal client-lawyer relationship
  - Communication
  - Confidentiality
  - Loyalty to client
  - Independent professional judgment and candid advice
- Consider need for accommodations
- Consider all impacts on client

# 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.

# Rule 1.14 (cont)



(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.

## Rule 1.14 (cont)



(c) Information relating to the representation of a client with diminished capacity is **protected by Rule 1.6**. When taking protective action pursuant to division (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.

# Rule 1.14 Commentary



- [1] - Matters affecting the client's own well-being
  - Routine v. major transactions
- [2] - Disability does not diminish lawyer's obligations of attention and respect
  - Status of client, especially communication
- [3] - Presence of family or other person does not affect attorney-client privilege when necessary to assist in the representation
  - But decisions come from the client, not family or others



# Rule 1.14 Commentary



[4] – Legal representative directing decisions  
- Rule 1.2(d) applies if lawyer representing guardian is aware of actions adverse to ward

[5] – Examples of “protective measures:”

- Consulting with family
- Reconsideration period
- Voluntary decision-making tools (eg POAs)
- Consulting with professionals or protective services
  - Consider client’s wishes, values, and interests, least restrictive options, maximizing capabilities, respecting client’s connections

# Rule 1.14 Commentary



[6] – Assessing client’s capacity:

- Ability to articulate reasoning
- Variability of state of mind
- Ability to appreciate consequences
- Substantive fairness
- Consistency with long-term commitments and values
  - When appropriate, may seek guidance from appropriate diagnostician

# Rule 1.14 Commentary



[7] – Consider whether appointment of a legal representative is necessary to protect client’s interests

- Substantial property transactions
- Litigation representative, when required
  - Consider whether appointment would be more expensive or traumatic than necessary
  - Law may require least restrictive alternative

# Rule 1.14 Commentary



- [8] – Disclosure: an “unavoidably difficult” position
- Disclosure could adversely affect client’s interests
  - Example: involuntary commitment
    - Disclosure “impliedly authorized,” even if client directs to the contrary
    - Limited to what is reasonably necessary to protect client’s interests
    - Must consider whether person/entity will act adversely to client’s interests

# Rule 1.14 Commentary



[9] – May provide emergency legal assistance when person with seriously diminished capacity faces imminent and irreparable harm

- Allows representation even when lawyer cannot establish client relationship
- Only if no other lawyer, agent, or other representative available
- Limited to action necessary to maintain status quo or avoid imminent and irreparable harm
- Same duties as regular client relationship

[10] – Must maintain confidentiality, but also disclose nature of relationship to tribunal and counsel

- Regularize the relationship as soon as possible
- Not seek compensation

# Accommodating Clients with Disabilities



- Attorneys are covered by Title III of the ADA
- Don't assume: ask the client!
- Effective communication
  - Interpreters
  - Assistance from others (limited situations)
  - Auxiliary aids
  - Audio/visual materials
- Advocate for others (courts, etc) to accommodate

# Questions?



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