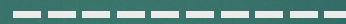


THE ETHICS OF REPRESENTING CLIENTS WITH DISABILITIES



DISCLOSURE OF CLIENT CONFIDENCES IN A THERAPEUTIC RELATIONSHIP

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OPENING THOUGHTS

- ▶ Agency v. Paternalism
- ▶ Lawyer-client relationships are agency relationships.
- ▶ Rule of Professional Conduct 1.2(a) structures the decision-making relationship between lawyer and client.
- ▶ “[A] lawyer shall abide by a client’s decisions concerning the objectives of representation and ... consult with the client as to the means by which they are to be pursued.” Rule 1.2(a).

OPENING THOUGHTS

- ▶ Clients with diminished capacity are still clients.
- ▶ Individuals with diminished capacity often have many others who are looking after their perceived best interests.
- ▶ The lawyer should generally be the client's champion, not one more person who thinks he or she knows what is best for the client.

THE “NORMAL” LAWYER-CLIENT RELATIONSHIP

- ▶ Lawyers must communicate clearly with clients with the goal that client decision-making will be informed.
- ▶ Lawyers must promptly communicate with the client about any matter requiring the client’s informed consent and explain the matter to the extent reasonably necessary to permit the client to make informed decisions. Rule 1.4(a)(1) and 1.4(b).

THE “NORMAL” LAWYER-CLIENT RELATIONSHIP

- ▶ Lawyers must reasonably consult with the client about the means of achieving the client’s objectives. Rule 1.4(a)(2).
- ▶ Lawyers must keep the client reasonably informed about the status of the matter. Rule 1.4(a)(3).
- ▶ Lawyers must comply with reasonable client request for information. Rule 1.4(a)(4).

THE “NORMAL” LAWYER-CLIENT RELATIONSHIP

- ▶ Lawyers must consult with the client about any relevant limitation on the lawyer’s conduct when the lawyers knows the client expects assistance not permitted by the rules. Rule 1.4(a)(5).
- ▶ Reasonable refers to conduct of a reasonably prudent and competent lawyer.
- ▶ In representing clients with disabilities, reasonable conduct will require conduct that takes into account any relevant disabilities.

THE “NORMAL” LAWYER-CLIENT RELATIONSHIP

- ▶ ““Informed consent”” denotes agreement by a person to a proposed course of conduct after the lawyer has communicated adequate information and explanation about the material risks of and reasonably available alternatives to the proposed course of conduct” Rule 1.0(e).
- ▶ Informed consent refers to the state of mind of the client, not the intent of the lawyer.

THE “NORMAL” LAWYER-CLIENT RELATIONSHIP

- ▶ Rule 2.1: “In representing a client, a lawyer shall exercise independent professional judgment and render candid advice. In rendering advice, a lawyer may refer not only to law but to other considerations such as moral, economic, social and political factors, that may be relevant to the client’s situation.”

THE “NORMAL” LAWYER-CLIENT RELATIONSHIP

- ▶ The Rules of Professional Conduct clearly side with the lawyer’s role being one of agency and not one of paternalism.
- ▶ That agency relationship must be marked by communications with the client that are appropriately adjusted to the client’s ability to understand.

THE “NORMAL” LAWYER-CLIENT RELATIONSHIP

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- ▶ All but the most sophisticated clients are operate under “diminished capacity” in the sense of not having a ready grasp of complicated legal concepts.
- ▶ A primary role of the lawyer is to act as a translator between the world of the law and the “real” world.
- ▶ The lawyer must be able to speak both “languages” fluently.

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."

RULE 1.14—CLIENT WITH DIMINISHED CAPACITY

- ▶ (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—CLIENT WITH DIMINISHED CAPACITY

- ▶ (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 to reveal information about the client, but only to the extent reasonably necessary to protect the client's interests.

RULE 1.14—CLIENT WITH DIMINISHED CAPACITY

- ▶ (d) This Rule is not violated if the lawyer acts in good faith to comply with the Rule.
- ▶ It is rare under the Rules of Professional Conduct for there to be an explicit recognition that a lawyer's subjective good faith creates a defense to a claim of that the lawyer violated a rule.

THE RULE 1.14 DEFAULT POSITION

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- ▶ A lawyer's relationship with a client with diminished capacity should be treated as a "normal" lawyer-client relationship.
- ▶ What is "normal?"
- ▶ Normal means respect for the integrity and autonomy of the client. Comment [2].
- ▶ Normal means providing the client with information in a manner that promotes effective client decision-making.

THE RULE 1.14 DEFAULT POSITION

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- ▶ No client is “normal.” Every client is unique.
- ▶ A lawyer must deal with every client by taking into account the client’s particular characteristics that will affect how the client takes in and processes information needed to fulfill the client’s decision-making role.
- ▶ The need to communicate effectively is highest when the client is called upon to determine objectives of representation.

THE RULE 1.14 DEFAULT POSITION

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- ▶ Rule 1.14 deals specifically with clients whose capacity is diminished.
- ▶ The thrust of Rule 1.14(a) also applies when the client's legal capacity is not diminished, but has a disability that does not affect capacity.
- ▶ In the case of a disabled client whose legal capacity is not diminished, the lawyer must still take account of the disability.

THE DISABLED CLIENT

- ▶ Lawyers must be attuned to any client disability that could be an impediment to the lawyer's duties under the Rules of Professional Conduct.
- ▶ Such disabilities might include clients with mobility issues and clients with communications disabilities.

ACCOMMODATING THE DISABLED CLIENT

- ▶ Is your law office accessible? Are there architectural barriers?
- ▶ Are you equipped to communicate with clients who are unable to speak or whose language is not the same as yours?
- ▶ Consider the need for interpretation services.
- ▶ Consider the appropriateness of developing skills that allow you to communicate directly with your client without an interpreter.

THE ATTORNEY-CLIENT PRIVILEGE

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- ▶ The presence of a necessary interpreter in a lawyer-client consultation does not destroy the confidentiality element of the attorney-client privilege.
- ▶ The presence of a third party there for emotional support will generally destroy the privilege.
- ▶ “When necessary to assist in the representation, the presence of such persons generally does not affect the applicability of the attorney-client evidentiary privilege.”
Comment [3].

THE ATTORNEY-CLIENT PRIVILEGE

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- ▶ Make sure the interpreter knows about the importance of confidentiality and maintains all information learned about the client's matter in complete confidence.
- ▶ Consider requiring the interpreter to read, understand and sign a written acknowledgment about maintaining confidentiality.

CLIENTS WITHOUT LEGAL CAPACITY

- ▶ The lawyer-client relationship is typically a contractual relationship.
- ▶ An exception is when the lawyer serves as counsel by court appointment. The order of appointment serves as the substitute for a contract.
- ▶ If the client is not legally competent, the client cannot contract and no lawyer-client relationship can be formed.

CLIENTS WITHOUT LEGAL CAPACITY

- ▶ If a client does not have legal capacity, the client will typically have a fiduciary (e.g., guardian ad litem or legal guardian) who is authorized to act on behalf of the incompetent individual.
- ▶ The lawyer for the fiduciary represents the fiduciary, not the ward.
- ▶ It is the fiduciary's job—not the lawyer's—to make decisions in the wards best interests and direct the lawyer accordingly.
- ▶ A lawyer for a fiduciary may not assist in

CLIENTS WITH DIMINISHED CAPACITY

- ▶ Rule 1.14(b) addresses representing clients with diminished, but not an absence of, legal capacity.
- ▶ The rule switches to a modified paternalistic model. It does so to protect the client against risk of “substantial physical, financial or other harm.”
- ▶ The lawyer’s belief that protection is needed must be objectively reasonable (except it doesn’t—see Rule 1.14(d)).

CLIENTS WITH DIMINISHED CAPACITY

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- ▶ The lawyer must determine that action must be taken in the absence of the client's ability to adequately protect his or her own interests.
- ▶ The lawyer's permissible actions are limited to taking "reasonably necessary protective action."
- ▶ This can include consulting with others who could take direct protective action.
- ▶ And in appropriate cases seek appointment of a guardian or GAL. Note that this rule does not authorize the

PROTECTING CLIENT CONFIDENTIALITY

- ▶ Lawyers must ordinarily protect information about their representation of clients with diminished capacity the same as with other clients.
- ▶ However, when a lawyer is authorized to take protective action pursuant to Rule 1.14(b), disclosure of information only as necessary to protect the client's interests is impliedly authorized and client consent is not required.

ACTING IN AN EMERGENCY— COMMENTS 9 & 10

- ▶ If action is needed to protect the client from imminent and irreparable harm, the lawyer may take protective legal action even on behalf of a legally incapacitated person.
- ▶ No other person in a protective role should be available before the lawyer acts.
- ▶ Such action is only authorized to protect avoid the imminent or irreparable harm.

ACTING IN AN EMERGENCY— COMMENTS 9 & 10

- ▶ “The lawyer should take steps to regularize the relationship or implement other protective measures as soon as possible.”
- ▶ The lawyer should not seek compensation for such emergency actions.

DISCLOSING CLIENT CONFIDENCES IN A THERAPEUTIC RELATIONSHIP

LAWYERS ARE PEOPLE TOO

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- ▶ Practice of law is stressful.
- ▶ Depression rates are high.
- ▶ Chemical dependency rates are high.
- ▶ Anxiety is high.
- ▶ Many lawyers need professional help.
- ▶ May a lawyer disclose client confidences in a therapeutic relationship?

CLIENT INFORMATION IS CONFIDENTIAL

- ▶ Remember: All information related to a client representation must be kept confidential. Rule of Prof. Cond. 1.6(a).
- ▶ There are exceptions. Rule of Prof. Cond. 1.6(b).
- ▶ No exception for disclosures in a therapeutic relationship.

USE OF HYPOTHETICALS

- ▶ Client information that can be traced to an identifiable client rarely needs to be disclosed in a therapeutic relationship.
- ▶ It can be presented hypothetically and without revealing any details that would allow the therapist to identify the client.
- ▶ But, sometimes the hypothetical itself will be enough to identify the client, esp. in cases that are well known/notorious.

DISCLOSURE

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- ▶ So long as the therapeutic relationship is privileged, disclosure of information that could be traced to an identifiable client should be allowed.
- ▶ IC 25-33-1-17 (patient-psychologist)
- ▶ IC 25-23.6-6-1 (client-mental health counselor)
- ▶ IC 34-46-3-1(3) (parishioner-clergy)
- ▶ Indiana needs a rule change.

JUDGES AND LAWYERS ASSISTANCE PROGRAM (JLAP)

- ▶ JLAP is a great resource to lawyers who are suffering.
- ▶ 317-833-0370 or 866-428-5527
- ▶ 320 N. Meridian Street
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THE END

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