

ETHICAL CONSIDERATIONS WHEN REPRESENTING CLIENTS WITH DIMINISHED CAPACITY

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About Me

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ABOUT ME

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MRPC 1.14

- (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.

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MRPC 1.14(c)

- (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.

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What Is Diminished Capacity?

ACTEC Commentaries

- Someone whose intellectual acuity is so substantially impaired, as a result of some illness, condition, or injury, that the person lacks the ability to make informed financial, medical, or personal decisions.

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ABA Comments to Rule 1.14

- First, determine if the client has the ability to understand, discuss, and reach conclusions about matters involving their wellbeing.
- Determine whether they simply need assistance or are incapable of making any significant decisions regarding their wellbeing.
- Maintain communication with client as best as possible.
- The client may wish to include family members, but the attorney-client relationship stays in tact.

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Declining vs. Diminished Capacity

- Declining Capacity- Someone who is beginning to exhibit signs of reduced capacity but who possesses the ability to make informed decisions with respect to some or all financial, medical, or personal matters. (ACTEC Commentaries, 6TH ed.)
- Examples: Occasional forgetfulness, confusion, or disorientation concerning persons or events that a fully competent person would understand clearly.

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What is "Reasonably Necessary Protective Action"?

Things to Consider

- Is the client at risk of substantial physical, financial, or other harm if action is not taken?

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What is "Reasonably Necessary Protective Action"?

Examples

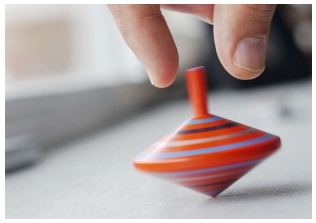
- Consulting with family members
- Allowing time to reconvene to see if client needs intervention
- Considering supported decision-making options
- Retaining professional services
- *consulting adult protective services (Mandatory reporting?)
  - Disclosing the client's diminished capacity may be a "adverse" to client's interests.
  - Request a Guardian ad litem

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IMPLIED AUTHORITY MRPC 1.14(b) and 1.14(c)

A lawyer may make disclosures of otherwise confidential information and take protective actions when a risk of substantial harm

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It's a Balancing Act!

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Tools to combat testamentary Capacity and Undue Influence

- Independent conversations with client
- Asking Open-ended questions
- Recognizing the "actors" in the process of setting up the consultation/meeting
- Recognizing any unnatural dispositions of assets

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Who is the client?

Principal v. Fiduciary

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MRPC 1.2

- (a) Subject to paragraphs (c) and (d), a lawyer shall abide by a client's decisions concerning the objectives of representation and, as required by Rule 1.4, shall consult with the client as to the means by which they are to be pursued. A lawyer may take such action on behalf of the client as is impliedly authorized to carry out the representation. A lawyer shall abide by a client's decision whether to settle a matter. In a criminal case, the lawyer shall abide by the client's decision, after consultation with the lawyer, as to a plea to be entered, whether to waive jury trial and whether the client will testify.
- (b) A lawyer's representation of a client, including representation by appointment, does not constitute an endorsement of the client's political, economic, social or moral views or activities.
- (c) A lawyer may limit the scope of the representation if the limitation is reasonable under the circumstances and the client gives informed consent.
- (d) A lawyer shall not counsel a client to engage, or assist a client, in conduct that the lawyer knows is criminal or fraudulent, but a lawyer may discuss the legal consequences of any proposed course of conduct with a client and may counsel or assist a client to make a good faith effort to determine the validity, scope, meaning or application of the law.

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Retained by Fiduciary

- Lawyer's duties are owed to the fiduciary.
- Lawyer still owes a duty to the person with diminished capacity.
- If the lawyer is aware that the fiduciary is improperly acting adversely to the person with diminished capacity, the lawyer may have an obligation to disclose in order to prevent further misconduct.

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Case Study #1



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Case Study #2



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Case Study #3



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RESOURCES

- ABA Comments to the Model Rules of Professional Conduct
- ACTEC Commentaries 6th ed.
- Assessment of Older Adults with Diminished Capacities: A Handbook for Lawyers, 2nd ed.
  - Contact aging@americanbar.org
- https://www.americanbar.org/groups/law_aging/resources/capacity_assessment/
- ABA Commission on Law and Aging's website
  - https://www.americanbar.org/groups/law_aging/resources/capacity_assessment/



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QUESTIONS?

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What can I do for you?
01
HELP YOU ORGANIZE YOUR AFFAIRS
02
ENSURE THAT WHAT YOU WANT TO HAPPEN TO YOUR ESTATE ACTUALLY HAPPENS
03
ENSURE THAT YOUR MINOR CHILDREN ARE CARED FOR IF YOU ARE UNABLE TO
04
MAKE SURE THAT YOU UNDERSTAND EVERYTHING ABOUT YOUR PLAN
05
HELP GIVE YOU PEACE OF MIND ABOUT YOUR AFFAIRS
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