

SCENARIO #1:

You represent Joe Client on a charge of possession of cocaine (Class I felony). Joe is a vagrant, and his record consists of five first-degree trespasses on business properties. He also has three prior misdemeanor larcenies, a felony larceny, and a prior possession charge that was dismissed.

When you meet with Joe about his case, Joe sometimes ventures into unrelated, bizarre topics such as how he talks to brown rabbits and to the prophet Isaiah. Most of the time, though, Joe is coherent, and he admits his guilt to the charge. As a result of his occasional flights of fancy, you believe that Joe may be incapable of proceeding, but you are not entirely convinced of his incapacity because of his predominant lucidity. You have not had time to have Joe evaluated, and the prosecution is willing to send Joe to drug treatment court if he pleads guilty on his next court date.

Joe wants to take the deal, but you are not sure whether Joe can truly give a knowing and voluntary plea. Moreover, you have concerns that he will not be able to complete drug treatment court. The alternative is for Joe to serve some months in jail now. What do you do?

SCENARIO #2:

Sally Defendant is charged with a Class 2 misdemeanor, willfully or negligently setting fire to a field. Sally tells you when you first meet her that she “likes the pretty flames.” She also says that she has been a patient of Dr. Psychiatrist but that she has not taken her medications for several months. According to Dr. Psychiatrist’s records, Sally is bipolar.

Sally is being held in the local detention center because she has no one to post her bail. She is being offered time served. You strongly believe that she is incapable of proceeding and also that she possibly has an insanity or diminished capacity defense because of her mental health issues. You want to have her evaluated, but you also know that it would take at least a month to get the evaluation done and that she may be committed for longer than her potential exposure if she is found incapable of proceeding. What do you do?

SCENARIO #3:

Rex Offender is charged with one count of first-degree burglary (Class D felony) for breaking into the garage of a family's home. Because of numerous convictions for possession and various misdemeanors, Rex has a record level of IV and is looking at significant prison time if he is found guilty. The prosecutor is offering a plea to second-degree burglary (Class G), for which Rex could get either a substantially reduced sentence or even probation. You also think that Rex may have a defense that he did not intend to steal anything from the garage but was merely looking for a place to sleep that night.

The problem is that Rex simply will not speak to you. You have tried several times to discuss his case with him, both at the jail and in court, and he simply stares at or past you. You have tried several different tactics, including cajoling him and making small talk, all to no avail. Time is drawing near either to plead or to go to trial, and you must tell the judge what your client wishes, but you have no idea what that is. If you try the case, you may run a defense that Rex has not authorized and which may not, in fact, be true. What do you do?

SCENARIO #4:

You represent Dana Perp on a charge of assault with a deadly weapon (A1 misdemeanor). Dana pulled a knife on her husband, Vince, in their kitchen. Dana's friend, Wendy, was present and will testify that Vince was angry at Dana for spending too much money when she and Wendy went shopping that day. According to Wendy, Vince started coming towards Dana with a beer bottle in his hand, and Dana grabbed a butcher knife to protect herself.

You have thought about letting Dana take the stand, but she is prone to going off on tangents, including discussing in great detail her and Vince's long, tormented history, how she witnessed a terrible train wreck as a child, and how her "good angel" and her "bad angel" fight all the time. Dana has been a patient at the local mental health clinic, where she has been diagnosed as depressive. Dana is on Xanax but admits that she takes it sporadically. You have noted that she is more likely to go off track in her conversations when she has been taking the medication.

You do not think you can control Dana on the stand, and Wendy is available and willing to testify to the above so that you can establish self-defense. However, Dana insists on testifying. She also objects to your calling Wendy, because she believes that Wendy and Vince are having an affair and that Wendy will turn on her on the stand, thereby guaranteeing that Dana will go to jail and Wendy will have Vince all to herself.

You have explained repeatedly to Dana that you think Wendy will be a good witness for her and that you really don't think Dana needs to testify, but she is adamant. What do you do?

Rules of Professional Responsibility

Client-Lawyer Relationship

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 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.

Comment

[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 decision-making 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 decision-making 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 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.

History Note: Statutory Authority G. 84-23

Adopted July 24, 1997; Amended March 1, 2003.

ETHICS OPINION NOTES

CPR 314. An attorney who believes his or her client is not competent to make a will may not prepare or preside over the execution of a will for that client.

RPC 157. A lawyer may seek the appointment of a guardian for a client the lawyer believes to be incompetent over the client's objection if reasonably necessary to protect the client's interest.

RPC 163. A lawyer may seek the appointment of an independent guardian ad litem for a child whose guardian has an obvious conflict of interest in fulfilling his fiduciary duties to the child.

98 FEO 16. Opinion rules that a lawyer may represent a person who is resisting an incompetency petition although the person may suffer from a mental disability, provided the lawyer determines that resisting the incompetency petition is not frivolous.

98 FEO 18. Opinion rules that a lawyer representing a minor owes the duty of confidentiality to the minor and may only disclose confidential information to the minor's parent, without the minor's consent, if the parent is the legal guardian of the minor and the disclosure of the information is necessary to make a binding legal decision about the subject matter of the representation.