

Rule 1.14: Client with Diminished Capacity

1. Current Kentucky Rule with Official Comments:

SCR 3.130(1.14) Client under a disability

(a) When a client's ability to make adequately considered decisions in connection with the representation is impaired, whether because of [minority] age, mental disability or for some other reason, the lawyer shall, as far as reasonably possible, maintain a normal client-lawyer relationship with the client.

(b) A lawyer may seek the appointment of a guardian or take other protective action with respect to a client, only when the lawyer reasonably believes that the client cannot adequately act in the client's own interest.

Supreme Court Commentary

[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 mental disorder or disability, however, maintaining the ordinary client-lawyer relationship may not be possible in all respects. In particular, an incapacitated person may have no power to make legally binding decisions. Nevertheless, a client lacking legal competence often has the ability to understand, deliberate upon, and reach conclusions about matters affecting the client's own well-being. Furthermore, to an increasing extent the law recognizes intermediate degrees of competence. 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. If the person has no guardian or legal representative, the lawyer often must act as de facto guardian. Even if the person does have a legal representative, the lawyer should as far as possible accord the represented person the status of client, particularly in maintaining communication.

[3] 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. If a legal representative has not been appointed, the lawyer should see to such an appointment where it would serve the client's best interests. Thus, if a disabled client has substantial property that should be sold for the client's benefit, effective completion of the transaction ordinarily requires appointment of a legal representative. In many circumstances, however, appointment of a legal representative may be expensive or traumatic for the client. Evaluation of these considerations is a matter of professional judgment on the lawyer's part.

[4] 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).

Disclosure of the Client's Condition

[5] Rules of procedure in litigation generally provide that minors or persons suffering mental disability shall be represented by a guardian or next friend if they do not have a general guardian. However, disclosure of the client's disability can adversely affect the client's interests. For example, raising the question of disability could, in some circumstances, lead to proceedings for involuntary commitment. The lawyer's position in such cases is an unavoidably difficult one. The lawyer may seek guidance from an appropriate diagnostician.

2. Proposed Kentucky Rule with Official Comments:

SCR 3.130(1.14) Client ~~under a disability~~ with diminished capacity

(a) When a client's ~~ability~~ capacity to make adequately considered decisions in connection with the a representation is ~~impaired~~ diminished, whether because of minority,

mental ~~disability~~ impairment or for some other reason, the lawyer shall, as far as reasonably possible, maintain a normal client-lawyer relationship with the client.

(b) ~~A lawyer may seek the appointment of a guardian or take other protective action with respect to a client only when~~ 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.

~~Supreme Court Commentary~~ 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 disorder ~~or disability~~, however, maintaining the ordinary client-lawyer relationship may not be possible in all respects. In particular, ~~an~~ a severely incapacitated person may have no power to make legally binding decisions. Nevertheless, a client ~~lacking legal competence with diminished capacity~~ often has the ability to understand, deliberate upon, and reach conclusions about matters affecting the client's own well-being. ~~Furthermore, to an increasing extent the law recognizes intermediate degrees of competence.~~ 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. ~~If the person has no guardian or legal representative, the lawyer often must act as de facto guardian.~~ Even if the person ~~does have~~ 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.

~~[3] [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. ~~If a legal representative has not been appointed, the lawyer should see to such an appointment where it would serve the client's best interests. Thus, if a disabled client has substantial property that should be sold for the client's benefit, effective completion of the transaction ordinarily requires appointment of a legal representative. In many circumstances, however, appointment of a legal representative may be expensive or traumatic for the client. Evaluation of these considerations is a matter of professional judgment on the lawyer's part. 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. [4]~~ 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

~~[5] [8]~~ Rules of procedure in litigation generally provide that minors or persons suffering mental disability shall be represented by a guardian or next friend if they do not have a general guardian. However, disclosure of the client's disability can diminished capacity could adversely affect the client's interests. For example, raising the question of disability 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. The lawyer may seek guidance from an appropriate diagnostician.

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.

3. Discussion and Explanation of Recommendation:

a. Comparison of proposed Kentucky Rule with its counterpart ABA Model Rule.

The proposed KRPC 1.14 adopts all MR 1.14 changes. This recommendation adds Comments [9] and [10] on Emergency Legal Assistance not in the current KRPC 1.14. The Committee determined that these Comments provide helpful guidance that warrants inclusion in the proposed KRPC 1.14. The ABA Reporter's Explanation of Changes expresses the Committee's view on these changes. It is adopted by the Committee for purposes of explaining recommended changes and is quoted below.

ABA Reporter's Explanation of Changes -- Model Rule 1.14

TEXT:

1. Caption: Change to "Client with Diminished Capacity"

In the caption and thereafter throughout the Rule, terminology referencing a client's capacity is changed to focus on and more accurately express the continuum of a client's capacity.

2. Paragraph (a): Terminology change

The change in terminology in this paragraph is grammatical and reflective of the change of focus of the Rule to the continuum of a client's capacity.

3. Paragraph (b): Add protective measures lawyer may take short of request for guardian and requiring risk of substantial harm unless action is taken

The Commission recommends adding guidance for lawyers regarding "protective action" the lawyer may take short of seeking a guardian, which is generally deemed appropriate only in extreme circumstances. The revision permits the lawyer to "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." The Commission believes the recommended change offers the lawyer flexibility when a client faces substantial risk of harm or when emergency legal assistance is required as described in Comments [9] and [10].

4. Paragraph (c): Add limitation on "protective action"

The Commission recommends addition of a new paragraph (c) to specify the means by which "protective action" should be limited to avoid client harm. The proposal explicitly recognizes the relationship of Rule 1.14(b) to Rule 1.6. Specifically, it states that Rule 1.6 allows disclosure of information under Rule 1.14(b) only as "reasonably necessary to protect the client's interests."

COMMENT:

[1] This Comment has been revised with collateral language changes to reflect the Rule's focus on degrees of a client's capacity.

[2] This Comment has been revised to delete the sentence, "If the person has no guardian or legal representative, the lawyer often must act as de facto guardian." The Commission views as unclear, not only what it means to act as a "de facto guardian," but also when it is appropriate for a lawyer to take such action and what limits exist on the lawyer's ability to act for an incapacitated client. The other revision to the Comment is a grammatical and stylistic change.

[3] This new Comment includes additional discussion of the potential risk in the common practice of having family members or other persons participate in the lawyer's representation of a client with diminished capacity. The change is recommended to encourage lawyers to seek such involvement since this practice may be of assistance to the representation. The Comment also points out potential risk to the extent that family members may be guided, consciously or unconsciously, by their own interests instead of the interests of the client.

[4] This revision of current Comment [3] includes additional discussion indicating that parents as natural guardians may have the same rights as legal guardians to make

decisions regarding their children, depending on the nature of the matter or proceeding. (Whether and when parents have rights to make decisions on their children's behalf is a matter of substantive law that is not addressed here.)

The discussion in current Comment [3] on the issue of whether the lawyer should seek appointment of a guardian has been moved, with modification, to new Comment [7]. Finally, current Comment [4] is now the last sentence of proposed Comment [4] in order to provide a single Comment on the lawyer's role when the client of diminished capacity already has a legal representative.

Caption: "Taking Protective Action" has been added to highlight and focus on action the lawyer may take during representation of a client with diminished capacity.

[5] This new Comment sets forth the rationale for paragraph (b) and gives additional detail on the circumstances that might trigger the lawyer's permission to consult with family members, adult protective agencies or other individuals or entities that have the authority to protect the client.

[6] This new Comment provides guidance on determining the extent of a client's diminished capacity.

[7] This new Comment addresses the issue of whether a lawyer should seek appointment of a guardian. Discussion of this issue in current Comment [3], with modification, is relocated here. The modification clarifies that, while it "may" be necessary to have a legal representative appointed to complete a transaction, it is not "ordinarily" required to the extent that a client with some degree of capacity may be able to execute a power of attorney. In addition, the discussion in current Comment [5] regarding Rules of procedure requiring a guardian or next friend has been moved to this Comment. A new final sentence serves as a useful reference to other law that may impose a requirement that the lawyer

take the least restrictive action under the circumstances.

[8] This is a revision of current Comment [5]. The first sentence has been moved to Comment [7]. The majority of the language is essentially new and refers to the limitations in paragraph (c) on the disclosure of information relating to the representation and clarifies the relationship between Rules 1.14 and 1.6. The last sentence of the current Comment has been deleted because the issue of whether a lawyer may seek guidance from a diagnostician is addressed in Comment [6].

b. Detailed discussion of reason for variance from ABA Model Rule (if any).

There is no variance in proposed KRPC 1.14 from MR 1.14.

Committee proposal adopted without change. Order 2009-05, eff 7-15-09.