

**STATE BAR ASSOCIATION OF NORTH DAKOTA
ETHICS COMMITTEE**

Opinion No. 09-03

The Ethics Committee received a request for an opinion on whether the Requesting Attorney (RA) is obligated to share information regarding representation of a ward with the ward's legal guardian in a criminal matter.

I. FACTS.

The RA is a public defender whose client has been declared "an incapacitated person" because of a mental disability. The RA's client's mother was appointed guardian and the Letters of Guardianship provide:

The powers and duties conferred upon the [Guardian] ... [is] appropriate as the least restrictive form of intervention consistent with the ability of the ward for self care are as follows:

....

 X FULL LIMITED NONE LEGAL MATTERS

....

The client's guardian has insisted that consistent with the Letters of Guardianship, the attorney communicate with her about the case and allow her to have input concerning case strategy and essential client decisions. The client, however, has said that she does not want the RA to discuss the case with the guardian. With those facts in mind, the RA poses two questions: (1) whether he has an obligation to communicate with the guardian regarding representation over the express instructions of the client to keep the information confidential; and (2) if he has an obligation to communicate with the guardian, who has authority to make decisions about entries of pleas, waiver of jury trial, or whether the client will testify at trial.

The RA makes it clear that his questions do not relate to his client's competency to stand trial or to any defenses to the charges against her based on mental disease or defect. The RA further goes on to state that he does not believe that his thoughts on his client's competency would be dispositive on whether he has any duties to the guardian.

II. DISCUSSION.

The relevant Rule of Professional Conduct is Rule 1.14 "Client With Limited Capacity." The Rule states:

(a) When a client's capacity to make adequately considered decisions in connection with a representation is limited, 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 limited capacity, is at risk of substantial physical, financial, or other harm unless action is taken, and the client 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 limited 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.

N.D.R. Prof. Conduct 1.14. The Rule requires that the lawyer, as far as reasonably possible, maintain a normal attorney-client relationship with a client with diminished capacity. Id. at (a). Absent consent, information relating to representation must be maintained confidential except to the extent reasonably necessary to protect the client's interests when the client cannot adequately act in the client's own interests and is at risk of substantial harm. Id. at (b) and (c).

The comments provide further guidance and state in part:

[1] A normal client-lawyer relationship exists in those situations where the client, when properly advised and assisted, is capable of making or communicating responsible decisions concerning the client's person or affairs. ... Maintaining a normal client-lawyer relationship also may not be possible if the client has limited capacity. Limited capacity may result from e.g. mental illness, mental deficiency, physical illness, or disability, chronic use of drugs, chronic intoxication, or other such cause.

[3] The fact that a client is a minor or has limited capacity does not diminish the lawyer's obligation to treat the client with attention and respect. Even if the person has an appointed representative, the lawyer should as far as possible accord the represented person the status of client, particularly in maintaining communication. Appointed representatives include guardians ad litem, conservators, guardians, individuals appointed in a durable power of attorney or in an advanced health care directive.

[4] Family members or other persons may serve as representatives of a client with limited capacity in discussions with the lawyer. 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 the representatives, to make decisions on the client's behalf.

[5] If the client has an appointed representative, the lawyer should ordinarily look to the representative for decisions on behalf of the client. The lawyer should be cognizant of the extent of the powers and duties conferred upon the client's appointed representative. ... Where the client is the appointed representative as distinct from the minor or the person with limited capacity and a lawyer knows that the appointed representative is acting adversely to the interests of the person with limited capacity, the lawyer may have an obligation to prevent or rectify the appointed representative's misconduct.

N.D.R. Prof. Conduct 1.14, Comments 1, 3-5.¹

There are no North Dakota ethics opinions on point, nor has the North Dakota Supreme Court addressed this issue. The ABA Model Rules of Professional Responsibility (Annotated) (2007) (Model Rules) provide some guidance with respect to

¹ The Comments to the Rule conclude, while not directly addressing this situation, that a "lawyer's position in such cases is an unavoidably difficult one." *Id.* at Comment 9.

the RA's ethical duties (p. 216). The annotation to the Model Rules indicates that the maintenance of a "normal client-lawyer relationship" may be difficult or impossible because of the client's diminished capacity. Id. (citing ABA Formal Ethics Opinion, O. 96-404 (1996)). A lawyer who represents a client with diminished capacity must, where reasonably possible, communicate with that client, comply with the client's objectives, work with her, and make sure the client is informed concerning the representation. Id.

The comments to North Dakota's Rule 1.14 also clearly state that where the client has an appointed guardian, the lawyer should "ordinarily" look to the guardian for decisions on the client's behalf. N.D.R. Prof. Conduct, Comm. 5. Further, the Comment requires a lawyer to recognize the extent of powers conferred upon the guardian by a court. In this case, the RA has indicated that the Letters of Guardianship provide that the powers conferred upon the guardian are consistent with the ward's abilities to care for herself and include "full" powers with respect to legal matters. The annotated Model Rules also indicate that where the client has a legal representative appointed by a court, the lawyer would ordinarily look to that representative for decisions made on the client's behalf. ABA Model Rules of Prof. Responsibility (Annotated) (2007), p. 218 (citing In re Guardianship of Hocker, 791 N.E.2d 302 (Mass. 2003) (indicating that "adjudication of incompetence and appointment of guardian ends court-appointed lawyer's representation of proposed ward unless guardian chooses to continue it.")). However, what may ordinarily be required must be limited by the nature of the representation, particularly in criminal matters, and the lawyer's other obligations under the rules including Rule 1.6.

Chapter 30.1-28 of the North Dakota Century Codes deals with guardians of incapacitated persons. When dealing with the procedures for court appointment of a guardian of an incapacitated person, the petition seeking appointment of a guardian must clearly state: “[T]he extent of the guardianship sought, including whether the nominated guardian seeks to have full authority, limited authority, or no authority in each area of residential, educational, medical, legal, vocational, and financial decisionmaking.” N.D.C.C. § 30.1-28-03(2)(f). The order appointing a guardian also limits the powers of the guardian to those specified in the order. N.D.C.C. § 30.1-28-04(5). In addition to conferring powers upon the guardian, a district court must state whether the guardian has “no authority, general authority, or limited authority” in making decisions on the ward’s behalf when it comes to legal matters. *Id.* The orders appointing the guardian in case of the RA’s client, confer “full” legal authority on the guardian. Therefore, a district court in North Dakota has determined that the RA’s client is incapacitated to the point where the guardian was vested with full rights to make determinations with respect to “full” legal matters.

One Supreme Court has indicated that when a person has had guardianship proceedings in front of a court, in essence, the person is not capable of taking care of herself. Guardianship of Hocker, 791 N.E.2d 302, 307 (Mass. 2003). The Massachusetts court stated:

When a person is adjudicated incompetent, as Hocker has been, “[t]he necessary effect ... is that the ward is in law ... incapable of taking care of himself, as to all the world.” *Fazio v. Fazio, supra* at 399-400, 378 N.E.2d 951, quoting *Leggate v. Clark*, 111 Mass. 308, 310 (1873). The permanent guardian stands in the place of the ward in making decisions about the ward’s well-being, and the guardian is held to high standards of fidelity in exercising this authority for the ward’s benefit. See, e.g., *Dolbeare v. Bowser*, 254 Mass. 57, 61, 149 N.E. 626 (1925) (guardian’s

“authority and interest extend only to such things as may be for the benefit or advantage of the ward”); *Smith v. Smith*, 222 Mass. 102, 106, 109 N.E. 830 (1915) (relationship between guardian and ward is fiduciary as matter of law). To be sure, an adjudication of incompetency under G.L. c. 201, § 6, does not obviate the need for a guardian or a judge to consult a ward's feelings or opinions on a matter concerning his care. See *Doe v. Doe*, 377 Mass. 272, 279, 385 N.E.2d 995 (1979). It does not make the ward any less worthy of dignity or respect in the eyes of the law than a competent person. See *Superintendent of Belchertown State Sch. v. Saikewicz*, 373 Mass. 728, 745, 370 N.E.2d 417 (1977). It does not deprive the ward of fundamental liberty interests. See *Guardianship of Doe*, 411 Mass. 512, 517-518, 583 N.E.2d 1263, cert. denied sub nom. *Doe v. Gross*, 503 U.S. 950, 112 S.Ct. 1512, 117 L.Ed.2d 649 (1992). But the rights and interests of one adjudicated to be incompetent must of necessity and “for the benefit or advantage of the ward,” *Dolbeare v. Bowser*, *supra* at 61, 149 N.E. 626, often be vindicated in a manner different from that of the mentally competent.

Id. A North Dakota district court has determined that the RA's client in this case is incapacitated to the point where her guardian was vested with rights to make determinations with respect to “full” and legal matters. However, according to the information provided, RA's client remains competent to stand trial in the criminal proceeding for which RA is providing representation.

The RA is faced with a difficult situation. One ethics opinion out of North Carolina indicates that under Rule 1.14(a), “[t]he lawyer owes a duty of loyalty to the client and not to the guardian or legal representative of the client, particularly if the lawyer concludes that the legal guardian is not acting in the best interest of the client.” N.C. Ethics Opinion 98-16. The North Carolina Ethics Committee went on to say that when a guardian has been appointed for a client, the lawyer may turn over materials in a client's file to the guardian if the release is consistent with the purpose of the representation of the client, or consistent with express instructions of the client. Id.

The RA's first question is whether he has an obligation, under the North Dakota Rules of Professional Responsibility, to communicate with the guardian regarding representation over express instructions of the client to keep the information confidential. It is the Committee's opinion that he does, in fact, have a responsibility to communicate with the guardian in this matter. However, the extent and scope of those discussions is entirely another matter, and is limited under Rule 1.14(c) "to the extent reasonably necessary to protect the client's interests."

The second question posed by the RA was, if he has an obligation to communicate with the guardian, who then has the authority to make decisions regarding entry of a plea, waiver of a jury trial, or whether the client will testify at trial? The answer to this question is much more complex. The question raises significant due process and other constitutional issues, questions of law that are beyond the purview of the Ethics Committee. We note, as an example, that Rule 11(b) of the North Dakota Rules of Criminal Procedure require the court to address the defendant in open court to determine his understanding of his rights, and to ensure that the defendant's plea is voluntary. The rule is based on constitutional requirements, and may go beyond any ethical considerations.

III. CONCLUSION.

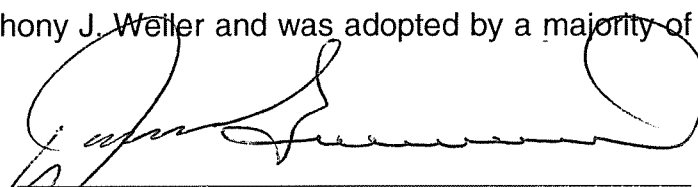
In answering the RA's first question, it is the Committee's determination that he does have an obligation to communicate with his client's guardian, even though the client has expressed that he not do so, but only to the extent necessary to protect the client's interests. Guardianship proceedings were held in accordance with North Dakota law, and the client's guardian was vested with "full" powers over legal matters. The

comments indicate that the attorney should ordinarily look to the guardian for decisions on behalf of the client and the lawyer should consult with the guardian with respect to the client's legal representation. Once again, however, the obligation to communicate with the guardian as to the extent, nature, and scope of the representation is entirely another matter which is limited by Rule 1.14(c) and the RA must look to the client's best interests. Even though the client has a guardian, the attorney should, as far as possible, accord the client the status of client, and particularly maintain communication with her in all matters pertaining to the representation. If the RA is concerned that the guardian is acting adverse to his client's interests, the RA may be obligated to prevent or rectify the guardian's alleged misconduct.

The second question posed by the RA, asking who has the authority to make decisions regarding a plea, waiver of a jury trial, or whether the client will testify, is a question of law beyond the purview of the Ethics Committee. Therefore, the Ethics Committee is unable to address or answer the RA's second question.

The RA should explain to his client that he has an obligation to communicate with the guardian and if the client continues to forbid such communication, the RA may be forced to withdraw from the case or seek court intervention.

This Opinion was drafted by Anthony J. Weller and was adopted by a majority of the Committee on July 16, 2009.



Dann Greenwood