

*Challenges, Pitfalls & Ethics Involving
Potential Sorenson Clients*

Sorensen and Rule 1.14 of the Rules of Professional Conduct

Judge Edward Moss (retired)
Mediation, Arbitration, Private Judging
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Rule 1.14
Client with Diminished Capacity

The lawyer seeking a precise rule of law to follow in this situation will be disappointed.

B. Poskus, Rule of Professional Conduct 1.14, Colorado Lawyer (May 2010).

Unlike some other areas... no safe harbor exists.

Capacity is the black hole of legal ethics.

P. Margulies, Access, Connection and Voice: A Contextual Approach to Representing Senior Citizens, 62 Fordham L.Rev. 1073 (1994).

Rule 1.14
Client with Diminished Capacity

No set guidelines

“Because there are no set guidelines,
lawyers are left to their own faculties to
determine a method of determining
when a client is impaired...”

► Bray and Easley, *Dealing with the Mentally Incapacitated Client*, 33 Fam.L.Q. 329 (1999).

Rule 1.14
Client with Diminished Capacity

Only ONE thing is mandatory

*"the lawyer shall, as far as reasonably possible,
maintain a normal client-lawyer relationship...."*

Rule 1.14(a)

Rule 1.14
Client with Diminished Capacity

Everything else is optional

When the lawyer reasonably believes that the client has diminished capacity... the lawyer may take reasonably necessary protective action"

Rule 1.14(b)

Rule 1.14
Client with Diminished Capacity

Distinguish between diminished capacity and Sorensen standards

“[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.”



Differing degrees
of
Diminished Capacity

Rule 1.14
Client with Diminished Capacity

The client's "best interests"
is not your job

Rule 1.14
Client with Diminished Capacity

“If the lawyer reasonably believes that the client is unable to act in her own interests, the lawyer should consider seeking the appointment of a *guardian ad litem*.

See In re Marriage of Sorensen....”

How to support a reasonable belief

- **Discussions with your client**
- **Consult family members**
- **Consult diagnosticians**
- **Consult health care providers**
- **Assessment tools**

(for example, ABA, Assessment of Older Adults
with Diminished Capacity)

Rule 1.14
Client with Diminished Capacity

Beware of consultations which prejudice your client

"At the very least, the lawyer should determine whether it is likely that the person or entity consulted 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."

Rule 1.14, comment [8].

Rule 1.14
Client with Diminished Capacity

Make the least disclosure necessary

"When taking protective action . . . 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."

Rule 1.14(c).

