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Representing the Adult Client With Diminished Capacity

Adopted May 6, 2015

Scope

This opinion addresses ethical issues that arise when a lawyer believes that an adult client's ability to make adequately considered decisions is diminished. Although Rule 1.14 of the Colorado Rules of Professional Conduct (Colo. RPC or Rules) also addresses a client's diminished capacity due to minority, this opinion is limited to the consideration of ethical issues that arise by reason of the diminished capacity of a client due to reasons other than the client's minority. This opinion does not address representation in adult protective proceedings.⁰

Syllabus

At times, a lawyer may need to consider whether an adult client's capacity to make adequately considered decisions relating to the representation is diminished. If the lawyer reasonably concludes that the client's capacity is diminished in such a manner as to impair the client's ability to make adequately considered decisions regarding the representation, including whether to give informed consent to a course of conduct by the lawyer when required, the lawyer must nevertheless maintain a normal client-lawyer relationship with the client so far as is reasonably possible. If the lawyer reasonably believes that the client's diminished capacity places the client at risk of substantial physical, financial, or other harm unless action is taken and that the client cannot adequately act in the client's own interests, the lawyer should consider whether to take reasonable protective action necessary to protect the client's interests. In taking such protective action, the lawyer should be guided by the wishes and values of the client and the client's best interests, and any protective action taken should intrude into the client's decision-making authority to the least extent feasible. When taking such protective action, the lawyer is impliedly authorized to disclose information relating to the representation which Colo. RPC 1.6 would otherwise prohibit, but the implied authorization is only to the extent reasonably necessary to protect the client's interests. The lawyer should take care to ensure that information thus disclosed will not be used against the client's interests. Differences may arise between the lawyer and client regarding whether or to what extent the client's capacity is diminished, whether the lawyer should disclose information regarding the client's condition despite the

client's lack of consent to such disclosure, or whether the lawyer should take any action to protect the client. These differences may present conflicts between the client's and the lawyer's respective interests, and the lawyer must assess whether those conflicts will materially limit the representation of the client.

Summary of Opinion

Introduction

A lawyer's effective and efficient representation of a client's interests depends substantially upon the client's ability to receive, analyze, and process information and advice received from the lawyer and to accurately inform the lawyer regarding information relevant to the representation. Generally, the client has the right to determine the objectives of the lawyer's representation and to be consulted by the lawyer as to the means by which such objectives are to be pursued. Colo. RPC 1.2(a).

Moreover, many actions that the lawyer takes in the course of representing the client require the client's informed consent, which the Rules define as the client's agreement to a proposed course of conduct after the client has been provided by the lawyer with adequate information and explanation about the material risks of and reasonably available alternatives to the proposed course of conduct. Colo. RPC 1.0(e). Thus, the client-lawyer relationship substantially depends upon the capacity of the client to make the adequately considered decisions that are required in connection with the representation.

Diminished capacity issues can arise in virtually any setting, involving any area of law, where a client-lawyer relationship exists. To illustrate different ethical issues, this opinion uses one transactional and one litigation hypothetical.

1. Transactional scenario—elderly client. A longtime, elderly client meets with you to prepare her estate plan. The client is accompanied by her son. The client directs that the bulk of her estate be left to her son and only a nominal portion be left to her daughter. You draft a will in accordance with those instructions and give it to the client to review. Days later, the client returns, this time accompanied by her daughter. The client explains that, having spoken with her daughter, she now wishes to leave the bulk of the estate to the daughter. You suspect that your longtime client is evidencing signs of dementia and that her two children are taking advantage of her mental state and attempting to unduly influence her testamentary decisions.

2. Litigation scenario—divorce. You represent a wife in a proceeding for dissolution of marriage. After the wife separated from her husband, she was diagnosed with a psychological disorder that interferes with her ability to understand and make decisions based upon your advice. She has instructed you to tell no one about this diagnosis. Your client has no separate assets, and there is a substantial marital estate. Your client tells you that she wants to settle the

proceeding in a manner where she receives no assets or maintenance. You believe that a court would never enter such an order after trial or approve such a settlement upon conscionability review, but if the court did so the result would be the impoverishment of your client.

Maintaining a Normal Client Relationship

Colo. RPC Rule 1.14 contains only one mandatory obligation: “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.” Colo. RPC 1.14(a); *accord* Restatement (Third) of the Law Governing Lawyers § 24(1) (2000) (Restatement).

Unlike the discretionary actions permitted under Rule 1.14(b), once the lawyer forms a reasonable belief that the client has diminished capacity, Rule 1.14(a) requires that the lawyer maintain a normal relationship with the client insofar as reasonably possible notwithstanding the client’s diminished capacity. The fact that the client suffers from a lack of capacity does not lessen the lawyer’s obligation to treat the client with attention and respect. Colo. RPC 1.14, cmt. [2]. This is so even if a guardian or other representative has been appointed for the client and the guardian or other representative is the legal decision-maker with regard to the representation. The lawyer representing a client with diminished capacity should continue to accord the client attention and respect; attempt to communicate and discuss relevant matters with the client; and continue, as far as reasonably possible, to take action consistent with the client’s directions and decisions. *See, e.g.*, American Bar Ass’n (ABA) Comm. on Ethics and Prof. Resp. Formal Op. 96-404, “Client Under a Disability” (1996) (ABA Op. 96-404); Or. State Bar Formal Ethics Op. 2005-159, “Competence and Diligence: Requesting a Guardian Ad Litem in a Juvenile Dependency Case” (2005) (Or. Op. 2005-159) (although a client who has become incompetent to handle his own affairs can be difficult to represent, a lawyer must maintain as regular a lawyer-client relationship as possible and must adjust the representation to accommodate the client’s limited capacity); *In re Flack*, 272 Kan. 465, 33 P.3d 1281, (2001) (lawyer who knew that client was impaired had a duty to maintain a normal client–lawyer relationship with client, including a duty to abide by her estate planning objectives as far as reasonably possible).

Rule 1.14 recognizes that (a) “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,” (b) when the client suffers from a diminished mental capacity, maintaining the normal client–lawyer relationship may not be possible “in all respects,” and (c) that a client suffering from diminished capacity “often has the ability to understand and deliberate upon, and reach conclusions about matters affecting the client’s own well-being.”

Colo. RPC 1.14, cmt. [1]. Although Rule 1.14(b) creates a narrow exception to the normal responsibilities of a lawyer to his or her client—permitting the lawyer to take action that by its very nature could be regarded as “adverse” to the client—it does not otherwise diminish the lawyer’s responsibilities to the client and certainly does not abrogate the client–lawyer relationship. *See, e.g., In re Laprath*, 2003 S.D. 114, 670 N.W.2d 41 (2003) (Rule 1.14 did not authorize lawyer to represent third party in seeking to have court appoint guardian for his client). The duty to maintain a normal client–lawyer relationship precludes a lawyer from acting solely as an arm of the court, using the lawyer’s assessment of the “best interests” of the client to justify waiving the client’s rights without consultation, divulging the client’s confidences, disregarding the client’s wishes, or presenting evidence against the client. *E.g., In Re Lee*, 132 Md. App. 696, 754 A.2d 426 (2000); *In re Guardianship of Henderson*, 150 N.H. 349, 838 A.2d 1277 (2003) (the duty to maintain a normal client–lawyer relationship with the client requires lawyer to represent and advocate the client’s interests and avoid assuming the role of guardian *ad litem*).

Assessing the Client’s Capacity

Colo. RPC 1.14 does not define “capacity,” but, in the context of stating a lawyer’s ethical duties in representing a client with diminished capacity, Rule 1.14(a) refers to the pertinent capacity as the client’s “capacity to make adequately considered decisions in connection with a representation.” Thus, the lawyer should not confuse what may appear to be a client’s imprudent or ill-considered decisions with decisions made by the client *because* of a diminished capacity. A client’s poor judgment does not warrant protective action under Rule 1.14(b). ABA Op. 96-404 (“Rule 1.14(b) does not authorize the lawyer to take protective action because the client is not acting in what the lawyer believes to be the client’s best interest”); Rest. § 24 cmt. [c] (lawyer should not construe as proof of disability a client’s insistence upon view of client’s welfare that lawyer considers unwise or at variance with lawyer’s views). In the transactional scenario described above, where the lawyer is concerned about the client’s mental state—about her capacity to make adequately considered decisions about her estate—the lawyer can discuss those concerns with the client alone and away from the client’s children. The lawyer also can recommend that the client obtain a doctor’s written opinion about her mental abilities, which the lawyer can retain in the client’s file as evidence of the client’s capacity at or near the time of her execution of estate planning documents.

A client may have the capacity to make adequately considered decisions about some aspects of the representation yet have a diminished capacity to do so with respect to other aspects. The degree of capacity required of the client to make adequately considered decisions concerning the scope and objectives of the representation, including giving informed consent to

proposed actions, necessarily will depend upon the complexity of the factual and legal issues involved in those decisions. Consequently, the lawyer should assess the capacity of the client, and determine if the client suffers from diminished capacity, in the context of those complexities. In the litigation scenario described above, the lawyer already is aware that the client has a diagnosis of a psychiatric disorder but should still apply his or her best judgment about the extent to which the client can continue to participate in the decisions that must be made in the course of her representation. 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*, 166 P. 3d 254 (Colo. App. 2007) (Rule 1.14 permits attorney to seek appointment of guardian *ad litem* when attorney reasonably believes the client is unable to act in his or her own interests).

The lawyer's assessment of a client's capacity also is important when the lawyer initiates representation of the client. A client-lawyer relationship is a matter of contract, and the client's capacity to contract is a legal issue. If the lawyer becomes aware during the first meeting with a prospective client that the prospective client may not have the capacity to enter into an agreement to form the client-lawyer relationship, the lawyer may consider other alternatives, including speaking to other appropriate persons. In that circumstance, the lawyer should consider the duties to a prospective client described in Rule 1.18 Colo. RPC. If the lawyer concludes that the prospective client lacks the capacity to enter into the client-lawyer relationship, the lawyer may wish to consider and discuss with the prospective client the establishment of a conservatorship or guardianship by a close relative or person whose interests are aligned with the prospective client in order to protect the prospective client's interests and facilitate representation of the prospective client.

In every situation where the client's capacity to participate in the decision-making process may be diminished, the lawyer must nonetheless endeavor, as far as reasonably possible, to maintain a normal client-lawyer relationship, including communicating and consulting with the client with regard to matters and issues involved in the representation. This may entail special efforts on the part of the lawyer to communicate in a manner that will allow the client to make those decisions concerning the representation that the client's capacity permits. A lawyer is not excused from the duty to communicate with the client simply because the client may suffer from diminished capacity. See *e.g.*, *State ex. rel. Nebraska State Bar Ass'n v. Walsh*, 206 Neb. 737, 294 N.W.2d 873 (1980) (lawyer disciplined for failure to sufficiently explain to deaf mute client the nature of workman's compensation claim and proceedings and necessity of appeal); *In re Brantley*, 260 Kan. 605, 920 P.2d 433 (1996) (lawyer disciplined for failure to adequately communicate with client believed to have diminished capacity); Or. Op. 2005-159

(lawyer should “examine whether the client can give direction on decisions that the lawyer must ethically defer to the client”).

Rule 1.14 does not attempt to identify or enumerate the causes or conditions that may result in a client’s diminished capacity, other than to explain that the diminishment may be because of “minority [or] mental impairment” or may be “for some other reason.” Thus, the lawyer should consider and evaluate any condition that limits or interferes with the client’s decision-making capacity, in order to determine whether the condition is such that the client lacks the capacity to make adequately considered decisions regarding the representation within the meaning of the rule.

Comment [6] to Rule 1.14 enumerates several factors the lawyer should consider in assessing the diminishment of a client’s capacity:

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.

Comment [6] adds that “[i]n appropriate circumstances, the lawyer may seek guidance from an appropriate diagnostician.”¹ ABA Opinion 96-404 observes:

If a lawyer is unable to assess his client’s ability to act or if the lawyer has doubts about the client’s ability, Comment [5] [now Comment [6]] to Rule 1.14 suggests it is appropriate for the lawyer to seek guidance from an appropriate diagnostician, particularly when a disclosure of the client’s condition to the court or opposing parties could have adverse consequences for the client. Such discussion of a client’s condition with a diagnostician does not violate Rule 1.6 (Confidentiality of Information), insofar as it is necessary to carry out the representation. See ABA Informal Opinion 89-1530. For instance, if the client is in the midst of litigation, the lawyer should be able to disclose such information as is necessary to obtain an assessment of the client’s capacity in order to determine whether the representation can continue in its present fashion.

The ABA opinion cautions, however, that the lawyer must be careful to limit the disclosure to information that is pertinent to the assessment of the client’s capacity and determination of the appropriate protective action, noting that “this narrow exception in Rule 1.6 does not permit the lawyer to disclose generally information relating to the representation.”

Thus, if necessary, the lawyer may seek information and assistance from others, such as the client’s family members or appropriate diagnosticians, in assessing the client’s capacity to make decisions relating to the representation. *See also* N. Y. City Bar Ass’n Formal Op. 1997-2

(1997) (in forming conclusions about the client's capacity, lawyer must take into account not only information and impressions derived from lawyer's communications with client, but also other relevant information that may reasonably be obtained from other sources, and lawyer also may seek guidance from other professionals and concerned parties); State Bar of N.D. Ethics Comm. Op. 00-06 (2000) (lawyer who believes that divorce client will accept offer contrary to her best interests to avoid disclosing her substance abuse problem must determine if client is able to consider her decision adequately; lawyer may consult with professional to determine nature and extent of client's disability); Pa. Bar Ass'n Legal Ethics and Prof. Resp. Comm., Formal Op. 87-214 (1988) (lawyer who reasonably believes that client cannot handle her financial affairs and health care needs may seek court appointment of physician to report to court on threshold issue of client's competence); *see generally, Assessment of Older Adults with Diminished Capacity: A Handbook for Lawyers* (ABA Comm'n on Law and Aging and the Am. Psycholog. Ass'n 2005).

The lawyer must take care to ensure that any information that the lawyer discloses in the process of assessing the client's capacity will not be used in a manner that is adverse to the client's best interests. Thus, the lawyer should not disclose client information to persons whose interests are adverse or potentially adverse to those of the client.

Taking Protective Action

As indicated above, Rule 1.14(b) leaves to the lawyer's discretion whether or not to take protective action to protect the client's interests. However, the Rule establishes three predicates for such protective action. The lawyer must "reasonably believe" that the client (1) has diminished capacity, (2) is at risk of substantial physical, financial or other harm unless protective action is taken, and (3) cannot adequately act in the client's own interest.

Under Rule 1.0(i), a "reasonable belief" means that the lawyer "believes the matter in question" and that "the circumstances are such that the belief is reasonable." Thus, while leaving to the lawyer's discretion whether or not to take protective action, Rule 1.14(b) establishes the three conditions precedent enumerated above, to taking protective action, and each of those preconditions must satisfy the objective standard of "reasonable belief" by the lawyer.

In addition to the lawyer's obligation under Rule 1.14(a) to endeavor to maintain a normal client-lawyer relationship with the client suffering from diminished capacity, and the requirements of Rule 1.14(b) for undertaking any protective action, the lawyer should consult with and inform the client with regard to the nature and extent of any protective action the lawyer intends to undertake, providing the client with the lawyer's considerations and reasoning in deciding to take that action. In doing so, the lawyer should consider and respect the client's

desires and values and should attempt to obtain the client's understanding of the need for the contemplated protective action to protect the client's interests. In the litigation scenario, for instance, the lawyer may have to advise the client that the lawyer believes the symptoms relating to her diagnosis may affect her decision-making and that the lawyer is considering alternatives relating to that situation. Those alternatives might include the appointment of a guardian *ad litem* to protect the client's interests in the marital estate and to participate in other decisions arising in the course of the proceedings. In such event, before taking such action, the lawyer should explain and discuss with the client the lawyer's reasons and considerations in proposing such action and describe and explain what steps would be taken in effecting such action. If the client opposes or objects to the proposed protective action and such opposition and objections cannot be resolved, the lawyer should consider whether withdrawal from representation is required.

Reasonably Necessary Action

Under Rule 1.14(b), protective action taken by the lawyer must be "reasonably" necessary to protect the client's interests. The nature and extent of the protective action depends upon the nature and extent of the client's diminished capacity to make adequately considered decisions and the complexity of the decisions needed to be made. The lawyer should be guided by "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." Colo. RPC 1.14, cmt. [5]; *see also* ABA Op. 96-404; Vt. Bar Ass'n Advisory Ethics Op. 2006-1 (2006); Conn. Bar Ass'n Prof. Ethics Comm. Informal Op. 04-10 (2004).

If the client's diminished capacity appears to be mild and the client is merely tentative or hesitant in making decisions, the lawyer should provide advice in the simplest terms possible, and, if necessary, in repetitive fashion, providing the client the time to review and digest the advice and the suggested alternatives. In the transactional scenario, for instance, the lawyer may want to advise the client that changing her estate planning documents so quickly depending on which child brought her to the lawyer's office lays a foundation for costly litigation between her children down the road. The lawyer may want to discuss with the client the alternative of resolving family issues about the family's estate through mediation. Providing the client with written advice and alternatives may assist the client in reaching appropriate decisions.

The principle of informed consent that underlies client autonomy normally requires the lawyer to refrain from overly suggestive advice which, due to the lawyer's perceived superior status, may encroach on client autonomy and could lead to a paternalistic relationship. *See* Paul R. Tremblay *On Persuasion and Paternalism: Lawyer Decisionmaking and the Questionably*

Competent Client, 1987 *Utah L.Rev.* 515, 527 (1987). But the client may simply not possess the mental dexterity to make quick decisions, particularly while under a degree of pressure. In such cases the lawyer should provide the client with an opportunity and time to reconsider decisions that were initially made on short notice, preserving the client's autonomy in reaching the final decisions.

When the client needs assistance in making adequately considered decisions regarding the representation, the lawyer may find it useful and appropriate to involve persons whose natural interests are congruent with those of the client, such as trusted family members who may be in a position to help the client make decisions. In the litigation scenario, the lawyer may confer with the client, who is concerned about disclosure of her diagnosis of a psychological disorder, to determine whether there may be trusted friends or family members, perhaps those who are already helping her in other ways, who could also help her make decisions in the divorce litigation.

If another person becomes involved to assist the client in making the necessary decisions, then, to protect the attorney–client privilege, the lawyer's consultation with that person should preferably take place out of the client's presence, with the lawyer keeping the client separately informed about the consultation. However, 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 might not vitiate the attorney–client privilege but the lawyer should take care to avoid an unintended waiver of the privilege.

The application and impairment of the attorney–client privilege is beyond the scope of this opinion. However, Comment [3] to Rule 1.14 states: “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.” *See also Rest. § 70* (the evidentiary privilege is retained when a “person's participation is reasonably necessary to facilitate the client's communication with a lawyer, and if the client reasonably believes that the person will hold the communication in confidence”).

The lawyer may consider a client's previously executed power of attorney or other grant of agency, which appointed an individual as an agent for the client with authority to make decisions for the client in areas relating to the representation. Before the lawyer relies on decisions of the agent under the client's previous grant of agency, the lawyer must be satisfied that the client had the ability to understand the import of that grant at the time the client made it.

The lawyer for the client with diminished capacity should become familiar with social agencies or support groups that may be able to provide assistance to the client in making

decisions with respect to matters within their areas of service, and should be prepared to advise the client regarding their services.

In more severe cases of diminishment, the lawyer should consider and advise the client regarding the appointment of a guardian *ad litem* who may have special knowledge and experience in the subject matter involved in the representation to act on behalf of the client in certain areas of the decision-making process, such as determining or changing the objectives of representation or settlement. The appointment of a conservator or special conservator with authority to deal with the client's property to the extent needed in the representation may be proper and may be required by other parties to the transaction or litigation under the circumstances. Under Rule 1.14(b), the lawyer for a client with diminished capacity may seek the appointment of a guardian to protect the client's interests if there is no less drastic alternative. ABA Op. 96-104 (appointment of guardian is a "serious deprivation of the client's rights and ought not to be undertaken if other, less drastic, solutions are available"); Or. Op. 2005-159 (lawyers should seek appointment of guardians only when client "consistently demonstrates lack of capacity to act in his or her own interests and is unlikely to assist in the proceedings").

A lawyer should not seek to be appointed as the client's guardian, "except in the most exigent of circumstances, that is, where immediate and irreparable harm will result from the slightest delay, and even then, only on a temporary basis." ABA Op. 96-404; *accord, In re Laprath*, 670 N.W. 2d at 51. Moreover, the lawyer should not represent a third party petitioning for the appointment of a guardian for the lawyer's client. ABA Op. 96-404; *accord, In re Wyatt* 982 A.2d 396 (N.H. 2009); Mass Bar Ass'n Ethics Op. 05-5 (2005) (lawyer may not represent client's son seeking appointment as client's guardian); Va. Legal Ethics Op. 1769 (2003) (legal aid lawyer may not represent daughter seeking appointment of guardian for elderly mother represented by same office in unrelated matter but may seek appointment of guardian if warranted under Rule 1.14); *see also* S.C. Bar Ethics Advisory Op. 06-06 (2006) (law firm may petition court for appointment of conservator and/or guardian for impaired client, but may not represent client's daughter in proceeding to have daughter named as such unless she is already acting as client's representative); *but see* R.I. Supreme Court Ethics Advisory Panel Op. 2004-1 (2004) (lawyer may represent party seeking appointment as guardian over elderly client if lawyer "reasonably believes that a guardianship is in the elderly client's best interest").

Disclosure of Client Information

Rule 1.14(c) is discretionary. It permits the lawyer, when taking protective action pursuant to Rule 1.14(b), to disclose information relating to the representation that Rule 1.6

would require be maintained in confidence absent the client's informed consent to disclosure: "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." Correspondingly, Rule 1.6(a) provides: "A lawyer shall not reveal information relating to the representation of a client unless the client gives informed consent, *the disclosure is impliedly authorized in order to carry out the representation*, or the disclosure is permitted by [Rule 1.6(b)]." (Emphasis supplied).

Thus, while Rule 1.14(b) provides that reasonably necessary protective action may include "consulting with individuals or entities that have the ability to take action to protect the client . . .," Rule 1.14(c) limits such a disclosure to what is reasonably necessary to protect the client's interests.

Comment [8] to Rule 1.14 observes that disclosure of the client's diminished capacity could itself adversely affect the client's interests, including, at its extreme, by resulting in proceedings for involuntary commitment of the client. The lawyer must take care to ensure that information disclosed for the purpose of protecting the client's interests is not used against the client's interests. This is particularly tricky in the litigation scenario, where the client's diagnosed psychiatric disorder interferes with her ability to understand the lawyer's advice and disclosure of information concerning the diagnosis could be used to the client's detriment in other issues in the divorce proceedings.

The lawyer must consider whether persons to whom disclosure is proposed have potential conflicting interests with the client's interests that might lead to further disclosure or to use of the information to the client's detriment. The lawyer may wish to consider whether to require confidentiality agreements or similar commitments, or the lawyer's written consent to further disclosure, before making the lawyer's disclosure.

In disclosing information relating to a client with diminished capacity, the lawyer needs to be keenly aware of the limitations. The disclosure must be required in taking reasonably necessary protective action and reasonably necessary to protect the client's interests. Rule 1.0(h) defines the terms "reasonable" and "reasonably," "when used in relation to conduct by a lawyer" in the Rules, as "denot[ing] the conduct of a reasonably prudent and competent lawyer."

Accordingly, a lawyer taking protective action must exercise the care that a reasonably prudent and competent lawyer would exercise with regard to what information is disclosed, to whom it is disclosed, and the possible uses of the information by persons to whom it is disclosed or by others who may learn of it.

The lawyer for the client with diminished capacity should first seek the client's informed consent to disclosure of information in the course of protective action and should explain to the client the information to be disclosed and the lawyer's reasons for seeking

permission to disclose such information. If the client refuses to consent to disclosure or objects to disclosure, the lawyer should give respect and consideration to the client's objections and should make reasonable efforts to assuage the client's concerns in order to obtain the client's informed consent.

This opinion has suggested that the lawyer, acting reasonably prudently and competently, might consider seeking the appointment of a guardian *ad litem* or other fiduciary to protect the interests of the client with a diminished capacity, although the lawyer should avoid seeking such an appointment if less drastic action will suffice. Comment [8] to Rule 1.14 states, in part: "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.*" (Emphasis supplied.) As previously noted, both Rule 1.6(a) and Rule 1.14(c) refer to the lawyer's implied authority to disclose information relating to the representation.

Normally, the law of agency dictates that an agent's implied authority terminates when it is expressly withdrawn or terminated by the principal. Restatement (Third) of Agency, § 3.06. Consequently, when the lawyer takes protective action pursuant to Rule 1.14(b) over the client's objections, the lawyer should exercise his or her authority to disclose information relating to the representation of the client with an especially high degree of care and caution. *See, e.g., Sturdza v. United Arab Emirates*, 644 F.Supp. 2d 50 (D.D.C. 2009) (lawyer sought the appointment of a guardian *ad litem* over the objections of client). If the court finds the client competent to register an objection to the lawyer's conduct, the client's objections might be found to constitute an effective termination of the lawyer's representation.

Termination of Representation

When a client with a diminished capacity to make adequately considered decisions about the representation objects to the lawyer's disclosure of information that the lawyer believes to be necessary in order to protect the client's interests, the lawyer must assess whether an irreconcilable difference impairs the client-lawyer relationship, preventing the lawyer from effectively and competently representing the client. In such an instance, the lawyer must assess whether continued representation of the client would present a conflict requiring the lawyer's withdrawal pursuant to Rule 1.7(a)(2), precluding a representation if there is a significant risk that the representation will be materially limited by the lawyer's personal interest, in combination with Rule 1.16(a), requiring termination of a representation if continuation would result in violation of the Rules of Professional Conduct, *i.e.*, in this case, Rule 1.7(a)(2).

If the lawyer seeks protective action contrary to the directions of the client, then the lawyer's interests are probably adverse to those of the client, and the lawyer cannot represent the

client in the protective proceedings—and possibly not thereafter in the underlying representation. The lawyer may be required to withdraw from representation. Rule 1.14 may thus place the lawyer in the dual positions of having to encroach on client autonomy while also having to withdraw, leaving the client unrepresented at a critical time. If the client is incapacitated (as opposed to suffering diminished capacity), the client may even be unable to form a client–lawyer relationship with a new lawyer to take over the underlying representation. The lawyer should consider such impacts and consequences prior to seeking the protective action that may engender them. The lawyer should be acutely aware of the potential consequences of taking protective action over the client’s objections.

In the litigation scenario, for instance, if the lawyer believes protective action is necessary to protect the client’s best interests and that the client cannot adequately act in her own best interests or otherwise participate in the litigation, the lawyer may have a conflict of interest with the client, if the client has stated that she does not want her psychiatric disorder disclosed. In that circumstance, the lawyer may have no choice other than to withdraw due to the lawyer’s inability to adequately represent the client’s interests. Such a dilemma, combined with the other issues of limits on disclosure and whether withdrawal would leave the client in jeopardy of substantial financial harm, render difficult the determination as to a proper course of action under Rule 1.14, when the lawyer reasonably perceives a diminished capacity in the client.

The lawyer should be aware that withdrawal from representation due to taking actions adverse to the client’s perceived interest or in contradiction of the client’s direction can be a two-edged sword. While the rules may dictate withdrawal, the lawyer also may be leaving a client with diminished capacity without effective representation from the lawyer most likely to have knowledge of the client’s positions, intentions, and interests, while leaving the client unable to retain new legal counsel due to the client’s diminished capacity. The lawyer may consider petitioning the court for appointment of a guardian *ad litem* under such circumstances.

Disagreements between the lawyer and a client with diminished capacity about disclosure of information relating to the client’s mental or physical condition that contributes to or causes the client’s diminished capacity or about the nature or extent of protective action to be taken by the lawyer may lead to the client’s discharge of the lawyer from the representation. Rule 1.16(a)(3) provides that a lawyer shall not represent a client after the client has discharged the lawyer. Comment [6] to Rule 1.16 notes that a client with severely diminished capacity “may lack the legal capacity” to discharge the lawyer and points out that the lawyer’s discharge may be “seriously adverse” to the client’s interests. Comment [6] suggests that in such case the lawyer should “make special effort to help the client consider the consequences” and that the lawyer may take reasonably necessary protective action as provided in Rule 1.14. Moreover,

Comment [4] to Colo. RPC Rule 1.2, dealing with the allocation of authority between client and lawyer, states, “In a case in which the client appears to be suffering diminished capacity, the lawyer’s duty to abide by the client’s decisions is to be guided by reference to Rule 1.14.” Thus, the considerations discussed above relating to the client’s capacity to make adequately considered decisions relating to the representation, and whether the lawyer should take reasonable action necessary to protect the client from substantial physical, financial or other harm, apply equally to the client’s decision to discharge the lawyer.

Notes

¹. “Protective proceedings” refers generally to guardianship and conservatorship actions. The term stems from the title of the Uniform Guardianship and Protective Proceedings Act, C.R.S. §§ 15-14-101, *et seq.* The term also appears in the Uniform Adult Guardianship and Protective Proceedings Jurisdiction Act, C.R.S. §§ 15-14.5-101, *et seq.* The latter Act defines “protective proceedings” as “a judicial proceeding in which a protective order is sought or has been issued.” CRS § 15-14.5-102 (11).

². See *In re Brantley*, 920 P.2d 433 (lawyer violated Rule 1.14 when he failed to personally meet with client to assess her state of mind or understanding of financial affairs prior to filing a petition to establish a voluntary conservatorship for client); see also Ind. Ethics Op. 2-2001 (2001) (failure to ascertain client’s physical and mental condition and evaluate client’s capacity violates Rule 1.14); Or. Op. 2005-159 lawyer should “examine whether the client can give directions that the lawyer must ethically defer to the client”).