Representing Clients With Diminished Capacity

Usually, when a lawyer is faced with a client who disagrees with the lawyer’s advice or recommended course of action, the lawyer does well to remember that the matter is the client’s and not his or her own. Much like when a patient signs out of a hospital against medical advice, it is the client who must live with the consequences of his or her choices, even when those consequences are dire. Obviously, decisions whether to settle, plead guilty, or testify in a criminal matter fundamentally are the client’s—and not the lawyer’s—to make. Many other decisions about a representation also belong to the client, after consultation and communication with the lawyer.

But what happens when the client disagrees with you has diminished capacity to make decisions about a representation due to age, illness, mental disability, or other impairment? Or perhaps more difficult still, what happens when your client’s legal decision maker disagrees with your advice on behalf of an impaired client?

In Opinion 353, the D.C. Bar Legal Ethics Committee confronts the issue of “whether a lawyer representing a client with diminished capacity can seek the appointment of a substitute surrogate decision-maker when the current surrogate decision-maker is making decisions for the client against the advice of the lawyer.”

The inquiring lawyer represents an incapacitated client with a home in foreclosure. The client’s granddaughter, who serves as her personally selected power of attorney (POA) agent, rejects the lawyer’s advice (the basis for the advice is detailed in the opinion) that she step aside and permit a substitute POA agent for purposes of the foreclosure litigation. The lawyer asks whether he must proceed with the litigation as is, seek a substitute surrogate decision maker contrary to the wishes of the client’s POA agent, or withdraw from representation.

The Legal Ethics Committee begins by citing Rule 1.14, which specifically governs the ethical conduct of lawyers representing clients with diminished capacity. Rule 1.14(a) requires that a lawyer maintain a typical lawyer–client relationship with such a client to the extent reasonably possible. However, when a lawyer represents a child, a person with mental impairment or illness, or an incapacitated person such as the client described in the opinion’s inquiry, maintaining a “typical” attorney–client relationship may not always be possible and, in some cases, may be impossible.

As discussed in Rule 1.14’s extensive commentary, maintaining a typical lawyer–client relationship necessarily includes: 1) affording the client the respect and status of a client; 2) communicating with the client to the maximum extent possible about the representation; 3) ascertaining the client’s wishes and desires; and 4) if the client cannot make legally binding decisions regarding the representation, ordinarily looking to the client’s surrogate decision maker for such decisions on behalf of the client.

Rule 1.14(b) allows a lawyer to take “reasonably necessary protective action” when a client with diminished capacity is at risk of substantial harm and is unable to act in his or her own interest.

Opinion 353, acknowledging that neither Rule 1.14 nor its comments clearly address the situation where the surrogate decision maker is acting contrary to the advice of the client’s lawyer, and where the client is unable to communicate her wishes to the lawyer, first concludes that the decision “to seek a change in the POA agent for purposes of pursuing this litigation” is one that would normally belong to a client. As such, this is a decision about which the lawyer should “ordinarily look to the client’s surrogate decision-maker,” here, the client’s chosen POA agent.

The opinion next explains that the lawyer may only substitute his judgment for the judgment of the surrogate decision maker in circumstances that would permit a lawyer to take protective action under Rule 1.14(b). Thus, the substitution of the POA agent in the foreclosure litigation would only be possible under Rule 1.14(b) if the lawyer determines that the client is in fact at substantial risk of financial, physical, or other harm if the POA agent does not step aside.

In a typical lawyer–client relationship, a lawyer may occasionally wish to substitute his or her own opinion for that of a client’s. To the extent this desire compels a lawyer to articulatedly and persuasively communicate to a client the reasons for pursuing a particular course of conduct or for reaching a particular decision in a matter, such a desire is wholly consistent with ethical mandates. Nonetheless, because most decisions ultimately belong to the client, a lawyer must yield to the client’s wishes, notwithstanding the lawyer’s professional opinion to the contrary.

Pursuant to Rule 1.14, in the absence of substantial harm, a lawyer who represents a client with diminished capacity must also respect that client’s right to make decisions, even where the lawyer believes a decision to be ill-advised. In Opinion 353, although unable to communicate her wishes about the particular conflict at issue, the client, by selecting her granddaughter as her durable POA agent, was clearly expressing a choice about whom she wanted to make legally binding decisions for her in the event of incapacity. Thus, the conclusions of Opinion 353 are consistent with the rule: the client’s choice deserves significant weight.

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Notes
1 See Rule 1.2(a) of the District of Columbia Rules of Professional Conduct. A client is also entitled to the information that will allow the client to make such decisions. See D.C. Rule 1.4.
2 See D.C. Rule 1.2(a). “The client has ultimate authority to determine the purposes to be served by legal representation, within the limits imposed by law and the lawyer’s professional obligations.” D.C. Rule 1.2, Comment [1].
3 Assessing a client’s diminished capacity is beyond the scope of this column. D.C. Rule 1.14 recognizes that diminished capacity exists along a continuum and that individuals may have the capacity to make some decisions, but not others. In the absence of a medical diagnosis or formal adjudication, assessing client capacity is complicated, and few lawyers are trained to render such determinations. See Representing a Client With Diminished Capacity: How Do You Know It and What Do You Do About It? Charles P. Sabatino, 16 J. Am. Acad. Matrimonial Law 481 (2000); Model Rule 1.14: The Well-Intended Rule
4 Professional Conduct, A client is also entitled to the protection, advice, and counsel of the lawyer, and to have the lawyer render such services as may reasonably be required for the client’s well-being. . . . [m]any people with intellectual disabilities, often has the ability to understand, deliberate upon, and act in accordance with their decisions, but not others. In the absence of a medical diagnosis or formal adjudication, assessing client capacity is complicated, and few lawyers are trained to render such determinations. See Representing a Client With Diminished Capacity: How Do You Know It and What Do You Do About It? Charles P. Sabatino, 16 J. Am. Acad. Matrimonial Law 481 (2000); Model Rule 1.14: The Well-Intended Rule.
6 Rule 1.14, Comment 2.
7 Id., Comments 1 and 3; (Even where a client has no ability to make legally binding decisions, “[that client] often has the ability to understand, deliberate upon, and reach conclusions about matters affecting the client’s well-being. . . . [m]any people with intellectual disabilities, while lacking sufficient capacity to make binding decisions, have, and are capable of expressing, opinions about a wide range of matters that affect their lives.”)
8 Id., Comment 4. A surrogate decision maker is defined as “an individual or entity appointed by a court or otherwise authorized by law to make important decisions on behalf of an individual who lacks capacity to make decisions in one or more significant areas of his or her life. [It] includes, but is not limited to, guardian ad litem, plenary or limited guardian or conservator, proxy decision-maker, or other legal representative.” Id., Comment [2].
9 See Rule 1.14(b). Protective action can include “consulting with family members, . . . with support groups, professional services, adult-protective agencies or other individuals or entities that have the ability to protect the client.” Comment 5. In any event, such measures should be “narrowly fashioned.” See D.C. Bar Legal Ethics Comm. Op. 353 (2010).
10 The opinion necessarily assumes that the surrogate decision maker is acting within the scope of the authority provided to her by law. As a preliminary matter, a lawyer representing a client with diminished capacity should initially ascertain the scope of the legal authority of any existing surrogate decision maker.
11 The opinion specifically recognizes that conduct by a surrogate decision maker that would require a lawyer to withdraw if engaged in by the client could constitute substantial harm under Rule 1.14(b).
12 See alsoABA Opinion 96–404 (“A client who is making decisions that the lawyer considers to be ill-considered is not necessarily unable to act in his own interest, and the lawyer should not seek protective action merely to protect the client from what the lawyer believes are errors in judgment.”).