

Supplement to Executive Council Agenda

1. **General Standing Division:**

a. Action Item:

Professionalism and Ethics – *Gwynne A Young, Chair*

Consideration and vote on proposed changes to Rule 4-1.14 (sc. Client Under A Disability) of the Rules Regulating The Florida Bar (see attached).

PROFESSIONALISM & ETHICS COMMITTEE

Real Property, Probate and Trust Law Section – The Florida Bar
Rule 4-1.14 (*sc.* Client Under A Disability) of the Rules Regulating The Florida Bar

On Friday, May 31, 2019 the Professional & Ethics Committee voted to seek amendments to Rule 4-1.14 (*sc.* Client Under A Disability) of the Rules Regulating The Florida Bar (Florida Rule 4-1.14) as modified by Rule 1.14 (*sc.* Client With Diminished Capacity) of the American Bar Association's Model Rules of Professional Conduct (ABA Rule 1.14) with clarification and style edits. Florida Rule 4-1.14 as modified by ABA Rule 1.14 is shown in legislative format – highlighted are the clarification and style edits.

The Florida Bar's Ethics 2000 Review Panel (The Florida Bar Panel) recommended adoption of ABA Rule 1.14; but, reportedly due to comments from the Standing Committee on Legal Needs of Children, the Public Interest Law Section, University of Miami School of Law's Center for Ethics and Public Service, Florida's Children First!, Circuit Court Judge Raymond T. McNeal, and Sixth Circuit Public Defender Bob Dillinger the ABA Rule 1.14 was not adopted in Florida. However, the American Bar Association reports most states have adopted ABA Rule 1.14.

The Florida Bar Panel studied the recommendations of the American Bar Association Ethics Commission 2000. The Florida Bar Panel's charge was "to analyze the ABA recommendations and compare them with existing Rules Regulating The Florida Bar" with a "primary concern in analyzing the ABA Ethics Commission 2000 recommendations should be protecting the public and maintaining the core values of the legal profession." The Florida Bar Panel agreed with most of the changes proposed by the ABA "Ethics 2000" Commission. Specifically, regarding ABA Rule 1.14 The Florida Bar Panel reported:

SUMMARY of Substantive Changes Adopted by the ABA House of Delegates

Changes terminology from clients with a "disability" to clients with "diminished capacity," which is explained as a change in terminology only. New rule also focuses on degrees of a client's capacity with provisions for emergency legal assistance for clients with seriously diminished capacity and sets forth protective measures a lawyer may take short of requesting a guardian if a lawyer reasonably believes that there is risk of substantial harm unless action is taken. Commentary provides guidance to attorneys dealing with clients with diminished capacity. Old commentary regarding an attorney acting as "de facto" guardian for the client was deleted.

How ABA Rule DIFFERS from EXISTING FLORIDA Rule

Florida Rule 4-1.14 uses the term “disability,” but otherwise is substantially the same as the new ABA model rule. The ABA commentary eliminates the provision in the Florida comment that if a client suffering a disability has no guardian or legal representative, “the lawyer often must act as *de facto* guardian,” adds a provision regarding consultation with family members, eliminates the provision imposing an obligation on lawyers to seek the appointment of a legal guardian and adds detailed guidance for lawyers regarding the taking of protective action.

RECOMMENDATION of Yes or No and REASONS

YES. The committee recommends adoption of the new ABA Model Rule as providing superior guidance to lawyers than the existing rule. The committee specifically discussed whether deletion of the commentary “the lawyer often must act as *de facto* guardian” is desirable. The committee concluded that if the ABA Model Rule is adopted, there is no need for this provision. The new ABA Rule 1.14(b) provides that “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 actions, including consulting with individuals or entities that have the ability to take action to protect the client” Paragraph 5 of the commentary to the Rule sets out in detail the various types of protective action a lawyer may take if he reasonably believes that a client is at risk of substantial physical, financial or other harm. These detailed provisions are much more helpful than the vague statement that a lawyer must often act as a *de facto* guardian.

RULE 4-1.14 CLIENT UNDER A DISABILITY WITH DIMINISHED CAPACITY

(a) **Maintenance of Normal Relationship.** 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, or for some other reason, the lawyer ~~shall, as far as reasonably possible, must~~ maintain a normal client-lawyer relationship with the client as much as reasonably possible.

(b) **Appointment of Guardian Protective Action.** ~~A lawyer may is not~~ required to seek the appointment of a guardian or take other protective action with respect to a client. only when ~~However,~~ 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. A lawyer must make reasonable efforts to exhaust all other available remedies to protect the client before seeking removal of any the client's rights.

(c) **Confidentiality.** Information relating to the representation of a client with diminished capacity is protected by the rule on confidentiality of information. When taking protective action pursuant to this rule, the lawyer is impliedly authorized under the rule on confidentiality of information to reveal information about the client, but only to the extent reasonably necessary to protect the client's interests.

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 5 or 6 years of age, and certainly those of 10 or 12, are regarded as having opinions that are entitled to weight in legal proceedings concerning their custody. ~~So also, it is recognized that some~~ 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 these 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 subdivision (b), must to look to the client, and not family members, to make decisions on the client's behalf.

[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. 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 4-1.2(d).

Taking Protective Action

[5] If a lawyer reasonably believes that a client is at risk of substantial physical, financial, or other harm unless protective action is taken, and that a normal client-lawyer relationship cannot be maintained as provided in paragraph subdivision (a) because the client lacks sufficient capacity to communicate or to make adequately considered decisions in connection with the representation, then paragraph subdivision (b) permits the lawyer to take protective measures deemed necessary. Such These measures could include: consulting with family members, using a reconsideration period to permit clarification or improvement of circumstances, using voluntary surrogate decision-making 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 decision-making 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 natural 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 client's condition

[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 diminished capacity could, in some circumstances, lead to proceedings for involuntary commitment. Information relating to the representation is protected by rule 4-1.6. Therefore, unless authorized to do so, the lawyer may not disclose such confidential information. When taking protective action pursuant to paragraph subdivision (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 subdivision (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 these 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 with seriously diminished capacity who is threatened with imminent and irreparable harm to the person's health, safety, or financial interests 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 alternative 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 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.~~