

**HOW TO MAINTAIN A NORMAL  
CLIENT-LAWYER RELATIONSHIP  
WITH A MENTALLY DISABLED  
CLIENT:**

**Ethical Obligations When Representing a  
Mentally Disabled Client**

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## **Attorney's Obligations to clients with diminished capacity are in ABA Model Rules of Professional Conduct 1.14 and 1.16**

### **Rule 1.14: Client with Diminished Capacity**

#### *Client-Lawyer Relationship*

(a) 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.

(b) 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.

(c) Information relating to the representation of a client with diminished 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.

ABA Model Rule of Professional Conduct 1.14

### **Rule 1.16: Declining or Terminating Representation**

#### *Client-Lawyer Relationship*

(a) Except as stated in paragraph (c), a lawyer shall not represent a client or, where representation has commenced, shall withdraw from the representation of a client if:

- (1) the representation will result in violation of the rules of professional conduct or other law;
- (2) the lawyer's physical or mental condition materially impairs the lawyer's ability to represent the client; or
- (3) the lawyer is discharged.

(b) Except as stated in paragraph (c), a lawyer may withdraw from representing a client if:

- (1) withdrawal can be accomplished without material adverse effect on the interests of the client;
- (2) the client persists in a course of action involving the lawyer's services that the lawyer reasonably believes is criminal or fraudulent;

- (3) the client has used the lawyer's services to perpetrate a crime or fraud;
- (4) the client insists upon taking action that the lawyer considers repugnant or with which the lawyer has a fundamental disagreement;
- (5) the client fails substantially to fulfill an obligation to the lawyer regarding the lawyer's services and has been given reasonable warning that the lawyer will withdraw unless the obligation is fulfilled;
- (6) the representation will result in an unreasonable financial burden on the lawyer or has been rendered unreasonably difficult by the client; or
- (7) other good cause for withdrawal exists.
- (c) A lawyer must comply with applicable law requiring notice to or permission of a tribunal when terminating a representation. When ordered to do so by a tribunal, a lawyer shall continue representation notwithstanding good cause for terminating the representation.
- (d) Upon termination of representation, a lawyer shall take steps to the extent reasonably practicable to protect a client's interests, such as giving reasonable notice to the client, allowing time for employment of other counsel, surrendering papers and property to which the client is entitled and refunding any advance payment of fee or expense that has not been earned or incurred. The lawyer may retain papers relating to the client to the extent permitted by other law.

ABA Model Rule of Professional Conduct 1.16

### **Determining Whether Your Client Has a Mental Disability**

**Behavioral or Physiological Clues:** Your client may start exhibiting certain behaviors or characteristics that are indicative of a person with a mental disability. Some of those behaviors/characteristics are:

- **Circular Nature of Client's Conversation:** Your client may have difficulty or be unable to follow a logical train of thought. They not be able to get from point A to point B.<sup>1</sup>
- **Use of Mental Health Terms:** If you client has been diagnosed and treated for their mental disability, they may talk about their caseworker, therapist, medications, or about being in the hospital for treatment.<sup>2</sup>

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<sup>1</sup> Representing a Client with Mental Disability: A South Dakota Attorney's Guide p. 20-21 (May 8, 2018). [http://ujs.sd.gov/uploads/docs/Mental\\_Illness\\_handbook.pdf](http://ujs.sd.gov/uploads/docs/Mental_Illness_handbook.pdf)

<sup>2</sup> *Id.*

- **Paranoid Statements:** Your client may exhibit phobias or irrational fears and may make paranoid statements or accusations.<sup>3</sup>
- **Reality Confusion:** Your client may be experience hallucinations and may be hearing voices, seeing things, having illusions, or perceive a harmless image as threatening. Your client may also have delusions (consistent false beliefs) and may seem disoriented and confused about their surroundings.<sup>4</sup>
- **Speech and Language Problems:** Your client may have difficulty with speaking or carrying on a conversation. Some speech difficulties include incoherence and nonsensical speech, or using a made-up language. Additionally, your client may have difficulty staying on track in a conversation and may change the subject mid-sentence, speak tangentially, or persistently repeat themselves.<sup>5</sup>
- **Memory and Attention Issues:** Your client may exhibit a short attention span, inability to focus when discussing emotionally charged issues, or amnesia.<sup>6</sup>
- **Inappropriate Emotional Tone:** Your client may exhibit a range of emotions such as suspicion, hostility, and/or excitement. Your client may also express little emotion or a more downcast and depressed state or emotional instability.<sup>7</sup>
- **Personal Insight and Problem-solving Difficulties:** Your client may lack self-awareness that they have a mental health issue. They may be easily frustrated and their self-esteem may be too high or too low. Additionally, they may be inflexible and find it difficult to learn from their own mistakes.<sup>8</sup>
- **Unusual Social Interactions:** Your client may have issues relating to others. They may experience isolation, estrangement, difficulty recognizing social cues, emotional withdrawal, lack of inhibition, and strained relationships with family and friends. They may also be confrontational.<sup>9</sup>
- **Medical Symptoms and Complaints:** You should always be aware of physical symptoms, including hypochondria, self-harm, accident-prone, insomnia, excessive sleep, blurred vision, hearing problems, headaches, dizziness, nausea, and loss of control of

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<sup>3</sup> *Id.*

<sup>4</sup> *Id.*

<sup>5</sup> *Id.*

<sup>6</sup> *Id.*

<sup>7</sup> *Id.*

<sup>8</sup> *Id.*

<sup>9</sup> *Id.*

bodily functions. Many of these symptoms indicate serious or chronic mental health issues, but many are side-effects of prescription medications.<sup>10</sup>

### **What to do if you suspect your client has a mental disability?**

- If your client has told you about their mental health history and treatment and is willing to talk to you about it, ask questions. Here are some questions you might consider:
  - Are you currently taking any medications? If so, what are they?
  - Have you ever been treated for a mental or emotional issue?
  - Have you ever been treated for substance abuse?
    - If they have received treatment, inquire as to with whom, where, how long and timeframes.
  - Are you currently receiving treatment? If so, from whom?
  - Do you know your diagnosis?
  - What types of medication are you taking now? Have you taken medications in the past? What were those medications?
  - Have you ever been hospitalized for a mental health issue? If so, when and where? Did a court or judge order that you be hospitalized?
  - Are there doctors, friends, or family members I can talk to that are familiar with your treatment?<sup>11</sup>
- Ask your client for any records that might be helpful. These may include, employment records, school records, medical records, and/or SSI or Social Security Disability Insurance (SSDI) benefits.

### **Assessing Your Client's Decision-making Capacity**

- This can be difficult for a few reasons:
  - 1) an attorney may not initially realize the client has a mental disability,
  - 2) Attorneys are not health care professionals and are not trained to diagnose medical conditions, and
  - 3) Attorneys with more experience with mentally disabled clients may be able to recognize the signs sooner than an attorney who has had limited exposure.

“Decision making capacity requires, to greater or lesser degree: (1) possession of a set of values and goals; (2) the ability to communicate and to understand informational and (3) the ability to reason and to deliberate about one’s choices.”<sup>12</sup>

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<sup>10</sup> *Id.*

<sup>11</sup> *Id.* at 21-22

<sup>12</sup> Michael McCabe, Jr., What They Didn't Teach You in Law School: Representing Client with Diminished Capacity (October 6, 2015). <https://www.ipethicslaw.com/what-they-didnt-teach-you-in-law-school-representing-client-with-diminished-capacity/>

A lawyer may seek a guardian for a client with a mental illness, “or take other protective action with respect to a client, only when the lawyer reasonably believes that the client cannot adequately act in the client’s own interest.”<sup>13</sup>

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, but only when the client cannot act in the client’s own interest. 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 judgement.<sup>14</sup>

### **Maintaining a Normal Client-lawyer relationship**

Rule 1.14 states that when a client’s capacity to make decisions is limited due to mental impairment “the lawyer shall, as far as reasonably possible, maintain a normal client-lawyer relationship with the client.” Model Rule 1.14(a)

In re Runge, 858 N.W.2d 901

- Attorney’s actions in helping client with limited capacity revoke power of attorney did not violate N.D.R. Prof. Conduct 1.14.

Medina Cty. Bar Assn v. Carlson, 100 Ohio St.3d 134

- The Ohio Supreme Court held that attorney’s conduct violated the rules of professional conduct by arranging to buy property, which was the subject of litigations, from a mentally ill client for a fraction of its value.

The Florida Bar v. Betts, 530 So.2d 928

- The Supreme Court found that the attorney improperly coerced an incapacitated client into executing a codicil to his will.

In re Disciplinary Proceeding Against Vanderbeek, 153 Wash.2d 64

- The court found that VanDerbeek charged his clients who suffered from mental illness excessive fees for legal services.

In re Disciplinary Action Against Kuhn, 785 N.W.2d 195 (2010)

- The court found that the attorney’s conduct in drafting a new will for an incapacitated client without communicating with the client’s court appointed guardian.

### **Withdrawing from Representation**

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<sup>13</sup> Model Rule 1.14(b)

<sup>14</sup> Conn. 96-404.

Rule 1.16 states that a lawyer may withdraw from representation from a client if it can be “accomplished without material adverse effect on the interests of the client...”

Attorney Grievance Com’n of Maryland v. Draper, 307 Md. 435 (1986)

- The court found that the attorney who suffered from a mental illness was unable to provide adequate legal representation and failed to withdraw.

People v. Mendus, 360 P.3d 1049 (2015)

- The court found that lawyer suffered from serious mental health issues while representing two clients in divorce proceedings and failed to withdraw and protect their interests. The lawyer also neglected to safeguard clients funds and keep proper financial records.

In re Disciplinary Proceeding Against Wickersham, 178 Wash.2d 653 (2013)

- The court held that the attorney violated professional rules of conduct relating to administration of justice, client communications, protecting client interests, proper withdrawal from a case, competent representation, and fitness to practice law due to mental health issues.