speaking of ethics

By Hope C. Todd

Representing Clients With Diminished Capacity

Mick Wiggins

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.[1] Many other decisions about a representation also belong to the client, after consultation and communication with the lawyer.[2]

But what happens when the client who disagrees with you has diminished capacity to make decisions about a representation due to age, illness, mental disability, or other impairment?[3] 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.[4] 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;[5] 2) communicating with the client to the maximum extent possible about the representation;[6] 3) ascertaining the client's wishes and desires;[7] 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.[8]

However, when a lawyer represents a child, a person with mental impairment or illness, or an incapacitated person ... maintaining a "typical" attorney–client relationship may not always be possible . . . .

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.[9]

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,[10] 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).[11] 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 articulately 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.[12] 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 Still Leaves Some Questions Unanswered,* Elizabeth Laffitte, 17 Geo. J. Legal Ethics 313 (Winter 2004) (discussing approaches to determining client capacity).

4 In some circumstances, the substantive law will both define and govern a lawyer's responsibilities in representing a client with diminished capacity. *See* D.C. Bar Legal Ethics Comm. Op. 295 (2000).

5 Rule 1.14, Comment 2.

6 *Id.,* Comments 2 and 4.

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 own 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 also* ABA 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").

Disciplinary Actions Taken by the Board on Professional Responsibility

Original Matters

IN RE TERRI Y. LEA. Bar No. 422762. February 4, 2010. The Board on Professional Responsibility recommends that the D.C. Court of Appeals suspend Lea for 180 days in addition and consecutive to the period of suspension imposed in *Lea I*. Lea violated rules pertaining to the unauthorized practice of law; making false or misleading communications about the lawyer or her services; using letterhead or other professional designation in violation of Rule 7.1; failure to respond to the Office of Bar Counsel's lawful demand for information; conduct involving dishonesty, fraud, deceit, or misrepresentation; and engaging in conduct that seriously interferes with the administration of justice. In addition, Lea failed to comply with an order of the board compelling a response to Bar Counsel's inquiries. Specifically, while administratively suspended for nonpayment of dues, Lea represented a claimant in an automobile accident. Rules 5.5(a), 7.1, 7.5, 8.1(b), 8.4(c), and 8.4(d) and D.C. Bar R. XI, § 2(b)(3).

Disciplinary Actions Taken by the District of Columbia Court of Appeals

Reciprocal Matters

IN RE PETER R. MAIGNAN. Bar No. 461974. February 4, 2010. In a reciprocal matter from Maryland, the D.C. Court of Appeals indefinitely suspended Maignan with fitness, with the right to reapply for reinstatement in the District of Columbia after being reinstated in Maryland, or in five years, whichever occurs first, as reciprocal discipline. Maignan's misconduct in Maryland involved two separate incidents. First, Maignan entered his appearance in the Circuit Court for Prince George's County on behalf of a criminal defendant and represented that he was authorized to appear in court after the Maryland Court of Appeals had entered an order of indefinite suspension in 2005. Second, Maignan failed to deposit a $4,000 retainer fee into his trust account and then submitted falsified documents relating to the representation to Maryland disciplinary authorities.

IN RE RICHARD LLOYD THOMPSON II. Bar No. 448816. February 4, 2010. In a reciprocal matter from Maryland, the D.C. Court of Appeals ordered that Thompson be indefinitely voluntarily suspended, with reinstatement conditioned upon a showing that his disability has ended and that he is fit to resume the practice of law as identical reciprocal discipline.

IN RE BRUCE H. TROXELL. Bar No. 326827. February 4, 2010. In a reciprocal matter from Virginia, the D.C. Court of Appeals disbarred Troxell as functionally equivalent reciprocal discipline. The Virginia State Bar Disciplinary Board revoked Troxell's law license.

Interim Suspensions Taken by the District of Columbia Court of Appeals

IN RE BARBARA L. BRACKETT. Bar No. 445457. February 4, 2010. Brackett was suspended on an interim basis based upon discipline imposed in Virginia.

IN RE HARVEY D. COLEMAN. Bar No. 915256. February 4, 2010. Coleman was suspended on an interim basis based upon a disability suspension imposed in Virginia.

IN RE MICHAEL M. HADEED JR. Bar No. 395388. February 4, 2010. Hadeed was suspended on an interim basis based upon his conviction of a serious crime in the United States District Court for the Eastern District of Virginia.

Disciplinary Actions Taken by Other Jurisdictions

In accordance with D.C. Bar Rule XI, § 11(c), the D.C. Court of Appeals has ordered public notice of the following nonsuspensory and nonprobationary disciplinary sanctions imposed on D.C. attorneys by other jurisdictions. To obtain copies of these decisions, visit www.dcbar.org/discipline and search by individual names.

IN RE NEVILLE P. CRENSHAW. Bar No. 417212. On June 25, 2008, the Fifth District Subcommittee Section I of the Virginia State Bar publicly reprimanded Crenshaw.

IN RE JOHN C. STULL. Bar No. 978685. On December 4, 2009, the Delaware Supreme Court publicly reprimanded Stull.

The Office of Bar Counsel compiled the foregoing summaries of disciplinary actions. Informal Admonitions issued by Bar Counsel and Reports and Recommendations issued by the Board on Professional Responsibility are posted on the D.C. Bar Web site at www.dcbar.org/discipline. Most board recommendations as to discipline are not final until considered by the court. Court opinions are printed in the Atlantic Reporter *and also are available online for decisions issued since August 1998. To obtain a copy of a recent slip opinion, visit www.dcappeals.gov/dccourts/appeals/opinions_mojs.jsp.*