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PROFESSIONAL RESPONSIBILITY AND REPRESENTING CLIENTS WITH DIMINISHED CAPACITY

Professor Robert Rubinson
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THIS IS NOT EASY!

• Norms of attorney-client relationship dissolve
• The “attorney’s position . . . is an unavoidably difficult one”
• Lots of words: not much guidance in “real” cases
• Sometimes called “the black hole of legal ethics”
MAIN LESSON OF RULE 19-301.14

“The lawyer shall, as far as reasonably possible, maintain a normal client-lawyer relationship with a client who has diminished capacity.”
Defining and Assessing Diminished Capacity

• **Defining Diminished Capacity**
  • Diminished capacity is when a “client’s capacity to make adequately considered decisions in connection with a representation is diminished” (Rule 19-301.14(c))
  • There can be “intermediate degrees of competence” (Comment [1])
  • Diminished capacity can be due to “minority, mental impairment or some other reason” (Comment [1])

• **Assessing Diminished Capacity** (Comment [6])
  • “Client’s ability to articulate reasoning related to a decision”
  • “Variability of state of mind and ability to appreciate the consequences of a decision”
  • “Substantive fairness of a decision”
  • Consistency of a decision with what a client has valued or done in the past
  • Possible guidance from “an appropriate diagnostician”
OTHER RELEVANT RULES

“Allocation of Authority” – Rule 19-301.2(a)

• Clients decide “the objectives of the representation” and attorneys “shall consult with the client as to the means by which they are to be pursued”

• When a “client appears to be suffering from diminished capacity,” these requirements are guided by the “diminished capacity” rule (Comment [4])

Communication (Rule 19-301.4)

• Requires attorney to keep client “reasonably informed about the status of a matter” and “explain a matter to . . . permit the client to make informed decisions regarding the representation”

• “Fully informing the client . . . may be impracticable . . . Where the client suffers from diminished capacity” (Comment [6])
“REASONABLY NECESSARY PROTECTIVE ACTION” – Rule 19-301.14(b)

• Lawyer “may” take “reasonably necessary protective action” when:
  • Lawyer “reasonably believes” that the client has diminished capacity
    -and-
  • Client risks “substantial physical, financial or other harm . . . unless action is taken”
    -and-
  • Client cannot adequately act in the client's own interests

NOTE: Comment [9] references “imminent and irreparable harm”

• Examples of ”reasonably necessary protective action” (Comment [5])
  • Consult with family members
  • Delay action
  • Consult with individuals or entities that can take action to protect the client
  • Employ surrogate decision-making such as durable powers of attorney
  • Seek appointment of a guardian ad litem, conservator, or guardian

• Guidance about what actions to take (Comment [5])
  • The wishes and values of the client “to the extent known”
  • The client’s best interests
  • Respecting the client’s “family and social connections”
  • Intrusion “into the client’s decision-making autonomy” should be “to the least extent feasible.”
INVOLVEMENT OF FAMILY MEMBERS

• The client may wish to have family members or other persons participate in discussions with the lawyer
• The lawyer must still keep the client's interests foremost
• The lawyer must still look to the client, and not family members, to make decisions except for “reasonably necessary protective action”
• Must still maintain confidentiality unless there is “implied authorization” and even if there is such authorization confidential information should be disclosed only to “the extent reasonably necessary” (Rule 19-301.14(c))
• Beware of the potential waiver of attorney-client privilege
CHALLENGES IN DECIDING WHAT TO DO

• Assessing the degree of diminished capacity
  • Stereotypes
  • Variability
  • Communication difficulties does not necessarily mean impaired cognition
  • Disagreement with client’s decisions does not necessarily mean diminished capacity
  • Lack of expertise in assessment

• The guardianship option
  • Drastic deprivation of rights
  • Delay
  • Expense
  • Conflicts for lawyer
  • Traumatic for client

• Consulting Family Members
  • How close must the family member be?
  • Are there conflicting interests and how can we tell?
  • Which family members should be consulted and what if they disagree?
  • Sometimes easier than communicating with client
  • Secrecy privilege/confidentiality concerns
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