Attorneys' Ethical Duties When Representing Clients With Diminished Capacity

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These days, it's good to be a trusts and estates lawyer.

While the rest of legal field is scrambling to figure out how to survive the next few weeks and months with little new business coming in and much existing business on hold, attorneys who represent the elderly and infirm report a boom in business. Everyone, it seems, is feeling vulnerable and thinking about their own mortality.

How could you not? If it is not the media and its 24/7 reporting of all things COVID-related, it is the visual aids everywhere you go–from masks to gloves to "elbow bumps." Death, or thoughts of death, surround us.

Now everyone, it seems, wants their "affairs" in order. That includes the families of the elderly as well as others with disabilities and underlying health conditions that require frequent hospitalizations or medical interventions. From what we now know, they are at a particularly high risk of death or serious illness from the novel coronavirus.

Apart from the physical toll caused by COVID-19, there is the still unfolding story of the mental health affects of this virus. There, we were not starting from zero. On the contrary, according to the National Alliance on Mental Illness (NAMI), the largest grassroots mental health organization in the U.S., 1 in 5 adult Americans (approximately 44 million) were reported to suffer from some form of mental health condition or disorder–and that was *before* the global pandemic. I suspect the number now is actually much higher.

Thus, it is likely that at some point in your legal career (and it may be sooner than you think!), you will be asked to represent an individual client, or a representative of a corporate client, who suffers from some degree of mental illness. While we are all trying to figure out what next, it is important for attorneys to understand their ethical obligations when it comes to the representation of a client with a mental illness or is otherwise incapacitated.

The Ethical Rules Regarding Diminished Capacity Clients

For lawyers in this position, they need to know ABA Model Rule of Professional Conduct 1.14, which addresses client-lawyer relationships where the client suffers from a mental illness or diminished capacity. Rule 1.14, a version of which has been adopted in all 50 states and the District of

Columbia, states, "the lawyer shall, as far as reasonably possible, maintain a normal client-lawyer relationship with the client."

That, of course, may be easier said than done. If an attorney believes his or her client suffers from a mental illness, the pivotal question to consider is whether the client cannot adequately act in the client's own interest.

General Guidelines

If the client cannot act in his or her own interest, then an attorney "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 guardian *ad litem*, conservator or guardian."

Note the absence of mandatory "shall" language for appointing a guardian. And not everyone is jumping on the guardianship bandwagon. According to the Center for Public Representation, which advocates for "Supported Decision-Making" (or SDM) as an "effective alternative" to guardianship, some jurisdictions recommend guardian appointment only as a last resort, as clients with disabilities may see such an appointment as a betrayal or breach of trust or the duty of confidentiality.

Still, not everyone has bought into the SDM model. Moreover, individuals who have guardians appointed may be in no condition at all to make important decisions about their financial affairs. That is particularly true today, where we face a new disease that acts so quickly and with such potentially devastating consequences that the individual may need more than just "support"'–they may truly be incapable of making their own decisions.

One bar has explained that an attorney for a disabled client will be held to a higher standard of responsibility: "As the difficulty of the situation increases, so too does the lawyer's responsibility. 'For every degree that [the lawyer] by his testimony and evidence proved a less than normal mental and functional capacity on the part of his client...he raised by an equivalent degree the standard of conduct which the Court must require of him in his dealings with the client." Alabama Ethics Opinion RO-95-03.

At the same time, an attorney "cannot be disciplined for any action that has a reasonable basis and arguably is in his client's best interests" Alabama Ethics Opinion 95-06, quoting Hazard and Hodes, *The Law of Lawyering*.

Instead, attorneys should implement means to support the client and ensure an effective legal decision making process. According to a joint publication of the ABA and American Psychological Association, a two-prong test may be useful when determining the existence and degree of a client's mental illness:

(1) "take reasonable steps to optimize capacity;" and

(2) “perform a preliminary assessment of capacity.”

Duty to Assess Client’s Mental Capacity

Attorneys should be aware of mental health symptoms to spot a mental illness when representation commences. This, again, may be easier said than done. After all, most attorneys are not trained in mental health assessment. And the younger or less experienced the attorney, the more difficult it can be for the attorney to determine if their client is suffering from a mental illness that affects their capacity to such a degree that the client is unable to understand the lawyer’s advice or make informed decisions.

The issue must be evaluated on a case-by-case basis. Attorneys at the very least should, in the normal course of speaking with their client, be able to determine that there may be an issue of the client’s capacity. If an attorney remains uncertain about a client’s mental state after a preliminary assessment, then the attorney may need to consult the help of a mental health professional. If an attorney does not discover a mental illness until after representation commences, the attorney should take steps to ensure the client’s interests have been preserved. Indeed, contracts and other legal documents may be considered invalid if the client did not possess the requisite capacity at the time the document was signed.

And if that should ever occur, it is likely that the person who will be blamed for the invalid instrument is the lawyer, under the theory the lawyer was negligent in failing to properly assess his or her client’s mental health and either knew, or should have known, that the client was incompetent.

One authority explains that perhaps the clearest and most enduring articulation of client capacity remains that of the President’s Commission for the Study of Ethical Problems in Medicine and Biomedical and Behavioral Research, enunciated in their seminal 1982 report: “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 information; and (3) the ability to reason and to deliberate about one’s choices.”

Whether to Seek a Guardian for a Client

The ethics rules adopted in most states provide that a lawyer may seek a guardian for a client under a disability, “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.” Model Rule 1.14(b). As the language of the Model Rule underscores, and as numerous State Ethics opinions emphasize, seeking a guardian for a client should happen only if the client is incompetent, and even then it should only be the last resort. It is an option, and never mandatory, unless the attorney seeks to withdraw from the representation of an incompetent and otherwise unprotected client (in which case the attorney’s duty will be to bring the matter to the attention of the tribunal so that an appropriate guardian may be appointed to protect the client’s interests).

Bad Client Decisions Do Not Equate With Incompetence

Clients are entitled to make bad decisions. A lawyer is not to seek a guardian for a client because the client displays bad judgment, makes imprudent choices, or disagrees with the attorney's assessment of his or her best interest. "The lawyer has an absolute duty to advocate for client's desires even if, in the lawyer's opinion,those desires are against the best interests of the client." Alaska Bar Assoc. Ethics Opinion 94-3. The test is not whether the client is acting in his or her own best interests, but, as Model Rule 1.14(b) makes clear, whether the client can act in his or her own interest at all, a far more difficult standard to meet.

Proper Conduct With Diminished Capacity Client

Once an attorney determines whether a client has a mental illness and takes the proper legal precautions, the attorney should also consider his or her behavior toward the client as the representation continues. For any client, effective representation goes far beyond the bare minimum legal and ethical requirements. Effective representation requires communication and understanding.

An instructive ABA article identifies the various types of mental illnesses that lawyers may encounter and how attorneys may provide the most effective and beneficial representation to their client, organized by type of illness. The article addresses clients with dementias, psychotic disorders, more mild "functional disorders" primarily involving depression and anxiety, personality disorders, and disorders involving substance use.

Attorneys representing a client with diminished capacity should constantly evaluate whether the client is capable of acting in his or her own interest, and adjust representation accordingly. We are in a position to help people who trust us and seek us out for advice regardless of a particular client's mental or physical state.

Mental illness affects millions of adults in the United States. For more information and resources about mental health issues, contact the National Alliance on Mental Illness (NAMI).

Attorneys themselves are not immune from not only the physical issues now faced by the country with COVID-19, but also the related mental health issues. In April 2020, the ABA Commission on Lawyer Assistance Programs published COVID-19 Mental Health Resources for the thousands of attorneys who find themselves struggling with mental health or addiction issues.

Let's be careful out there.

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