



HENNEPIN LAWYER

Ethics: Navigating Your Clients' Mental Health Issues

By: Eric T. Cooperstein

You've been representing Chris for about six months. They have quite a few challenges: in addition to the employment litigation that you are handling, you know that Chris lost two close relatives to COVID last winter and their child is struggling with an eating disorder. Although you initially exchanged calls and e-mails with Chris regularly, you haven't heard from them in over three weeks despite leaving messages in multiple forms. Written discovery responses were due a week ago and opposing counsel has been hounding you to schedule Chris' deposition. You really want to help Chris but you are becoming concerned that you could be on the receiving end of a motion to compel and that opposing counsel or the court may think that you are the problem. What should you do?

Lawyers are not, by and large, trained as mental health professionals. Yet

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mental health is a recurring issue in representing clients, particularly in litigation matters. A client with a legal matter is often in pain: physical pain from an accident or exposure to toxic substances; financial pain from the loss of a job or the risks of bet-the-company disputes; or emotional pain from a divorce or probate feuds. As if these stressors were not enough, clients bring with them their past struggles with depression; substance abuse; anxiety disorders; traumas born of child abuse, military service, or racial discrimination; and a multitude of other conditions. Clients may not share these latter issues, sometimes leaving a lawyer with little more than speculation about a client's ability to handle the tensions of a legal matter.

The Rules of Professional Conduct offer little guidance to lawyers about how to navigate a client's mental illness. Rule 1.14 tells us only that when a lawyer "reasonably believes that the client has diminished capacity . . . the lawyer shall, as far as reasonably possible, maintain a normal relationship with the client." Neither the rule nor the comments offer a definition of diminished capacity, but Comment 8 warns us that disclosure of the client's diminished capacity could "adversely affect the client's interests," so don't do that. Nevertheless, it is on the lawyer to determine "the extent of the client's diminished capacity," weighing such factors as the client's apparent reasoning ability, ability to appreciate the consequences of a decision, and "variability of state of mind." See Rule 1.6, cmt. 6.

None of that really helps the lawyer figure out what to do about a client who does not respond to the lawyer's messages, insists the lawyer pursue bizarre or frivolous investigations or legal theories, or fails to follow court orders.

The easy answer might be to withdraw. Walk away. The lawyer did not create the client's problems and the lawyer is unlikely to be able to solve them. The Rules say a whole lot more about how to get out than they do about how to stay in. If withdrawal would not have a "material adverse effect" on the client's matter, i.e. no real prejudice on the client's case, the lawyer is free to go. If the client has "failed substantially to fulfill an obligation to the lawyer" or "rendered [the representation] unreasonably difficult," the lawyer may be able to withdraw even if there is some prejudice.

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"Lawyers quickly develop tremendous loyalty to their clients and hesitate to abandon them, even when the client has, perhaps through no real fault of their own, been unreasonably difficult."

For many lawyers, this is a wholly unsatisfactory answer. Lawyers quickly develop tremendous loyalty to their clients and hesitate to abandon them, even when the client has, perhaps through no real fault of their own, been unreasonably difficult. Here are a few thoughts on managing these situations:

Assess the Client

You may not be trained in mental health but, as discussed in a prior column, you have past client experiences that help guide you. When a client's speech pattern, thought process, emotional reaction, and other conduct deviates from your observations of many past clients, you can trust your gut that there is more to the situation than just the stress of litigation.

Raise the Issue

Find ways to delicately raise whether your client has any history or treatment for mental health issues.

- "I hear how upset you are. Many of my clients have found therapy or medication to be helpful. Do you have a therapist you can connect with?"
- "This kind of case can be emotionally draining. Is there anyone you can talk to about this besides me?"
- "I'm so glad you called. I've been wondering whether you are experiencing some depression."
- "What I have found over the years is that when clients find it difficult to respond to my messages, they are experiencing some type of depression or anxiety and do not even really know it."

When clients exhibit signs of paranoia or delusion, they may reject the notion that there is anything wrong with them. I believe a lawyer may truthfully say that if the client received an evaluation from a medical professional supporting the client's perspective, that report could be used to bolster the client's case.

Encouraging Compliance and Re-evaluation I have represented multiple clients who were taking medication for depression or anxiety, but the effectiveness of the drugs had waned and the doctor refilling the prescription was not thoroughly evaluating the situation. Similarly, I have had clients who were prescribed anxiety medication to be taken on an "as-needed" basis, except the client never saw the need. Do not be shy about asking your client questions about the extent of their treatment and medication. If the client has a history of substance abuse, ask whether they are sober and how their program of relapse prevention is going. Clients may benefit from their lawyers' urging them to reconnect with their support systems.

Document Discretely

Take good notes of your oral communications with clients. Remember that your notes are part of the client's file and you will likely have to provide those notes if asked. "Client's thinking is disjointed today; rambling" is better than some derogatory reference.

Bottom Lines

Compassion is important in the practice of law but each of us must figure out our limits. Some of our clients have deep-seated issues that we, as lawyers, are not going to solve. Where might you draw the line? There is no one right answer but here are some ideas:

- The client's conduct will likely result in you failing to comply with a court order or deadline.
- The client only responds when you threaten to withdraw. This will inevitably lose its effectiveness the more times you use it. Draw the line on the second or third threat, then stop negotiating with the client over their cooperation.

- The manifestation of the client's illness is coupled with verbal abuse of you or your staff.
- The client is using their illness or difficult situation to manipulate you emotionally to remain in the case but continues to fail to cooperate.
- The difficulty in representing the client is creating a mental health issue for you, which could manifest itself in heightened anxiety (beyond what you usually experience in representing clients), becoming "frozen" and unable to complete work in the client's case or other cases, an urge to relapse, or other symptoms. These are also good times to call Lawyers Concerned for Lawyers for a confidential discussion about what you are experiencing.

It may be that you reach your own bottom line and choose to exercise your option to withdraw. The lawyer in the hypothetical above is likely close to their bottom line. By the time a lawyer decides to withdraw from such a situation, the lawyer's own mixed emotions sometimes manifest themselves in an angry termination letter. Try to leave your own emotions out of it. Write a letter summarizing what has happened, describe the efforts you have made to work with the client, and state in an emotionally neutral way your decision to end the relationship.

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***Eric T. Cooperstein, the "Ethics Maven,"
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