



ISBA Professional Conduct Advisory Opinion

Opinion No. 20-07
September 2020

Subject: Guardians and Guardianship; Impaired Client

Digest: When a lawyer has been representing a client for several years in opposition to the court appointment of a guardian for the client's estate, and the lawyer currently believes that the client is mentally incapacitated, the Rules do not mandate the lawyer's continued prosecution of the client's appeal attempting to reverse the trial court's judgment appointing an estate guardian, in the manner of prosecution last discussed between the lawyer and the client when the lawyer believed the client had adequate capacity to make considered decisions.

References: 755 ILCS 5/Art. XIa "Guardians for Adults with Disabilities";
Kerry R. Peck, "Ethical Issues in Representing Elderly Clients with Diminished Capacity", *Illinois Bar Journal*, November, 2011;
The Law and Ethics of Lawyering, Fifth Edition, Geoffrey C. Hazard, Jr., et. al., (Foundation Press, 2010);
Illinois Rules of Professional Conduct 1.0(e), 1.2(a), 1.4(a)(1) (2) (3), 1.4(b), 1.6(a), 1.14, 1.16, 3.1;
Charles P. Sabatino, "Representing a Client with Diminished Capacity: How Do You Know It and What Do You Do About It?", *Journal of the American Academy of Matrimonial Lawyers*, Vol. 16, 2000;
Nina A. Kohn and Catheryn Koss, *Lawyers for Legal Ghosts: The Legality and Ethics Of Representing Persons Subject To Guardianship*, Washington Law Review, Vol.91:58, (2016);
ISBA Professional Conduct Advisory Opinion No. 12-10, March 2012;
American Law Institute Restatement Third of the Law Governing Lawyers (2000), Section 24;
James R. Devine, *Ethics of Representing the Disabled Client: Does Model Rule 1.14 Adequately Resolve the Best Interests/Advocacy Dilemma*, 49 Mo. L. Rev. (1984);

In the Matter of M.R., An Alleged Incompetent or Mentally Retarded Adult, 135 N.J. 155, 638 A.2d 1274 (N.J. Supreme Court (1994);

Alaska Bar Association Ethics Opinion 94-3; Paul R. Tremblay, *On Persuasion and Paternalism: Lawyer Decision-making and the Questionably Competent Client*, 1987 Utah L. Rev. 515; ABA Opinion 96-404.

FACTS

For over four years the inquiring lawyer has represented an elderly client who challenged allegations she was disabled. After a trial and appeal, the appellate court reversed an adjudication of disability as regards the client's person but let stand an adjudication of disability as regards her estate. The matter was remanded to the trial court for appointment of a new estate guardian. The estate guardian was appointed. The lawyer promptly filed an appeal of the appointment of the estate guardian. The lawyer believes the client's capacity declined subsequent to the appointment of the estate guardian and the filing of the appeal. Presently, the lawyer does not believe the client has capacity to make any adequately considered decisions regarding the appeal.

ISSUES RAISED

Is the lawyer presently bound by the ethical rules to proceed with the appeal along the lines last discussed between the lawyer and the client when the lawyer understood the client to have capacity to make considered decisions?

ANALYSIS

A client subject to a legal proceeding for the imposition of a guardian is at risk to lose the client's liberty and independence. A lawyer representing the client in such proceeding bears the heavy burden of guarding the client's fundamental rights under the Fifth Amendment to the United States Constitution prohibiting deprivation of life, liberty or property without due process of law. When a client in litigation becomes incompetent (as perceived by the lawyer) the lawyer is thrust into the role of the client's de facto guardian with respect to the litigation. In such role, the lawyer's dilemma is whether to proceed as advocate for the client's last stated objective to remove the court appointed guardian or act otherwise in what the lawyer believes are the client's best interests. The inquiring lawyer is in all likelihood considering action inconsistent with the client's last stated directives. Such consideration drives the lawyer's inquiry as to whether ethical rules bind the lawyer to continue zealously advocating along the lines last directed by the client.

A fundamental principle embodied in the ethical rules is the lawyer's obligation to communicate with the client and abide by a client's decisions. This principle is stated in Rules 1.2 and 1.4. Rule 1.2(a) provides in relevant part:

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“a lawyer shall abide by a client’s decisions concerning the objectives of representation and, as required by Rule 1.4, shall consult with the client as to the means by which they are to be pursued,…”

Rule 1.4 requires that:

“(a) A lawyer shall: (1) promptly inform the client of any decision or circumstance with respect to which the client’s informed consent, as defined in Rule 1.0(e), is required by these Rules; (2) reasonably consult with the client about the means by which the client’s objectives are to be accomplished;…”

Rule 1.0(e) defines informed consent as “the agreement by a person to a proposed course of conduct after the lawyer has communicated adequate information and explanation about the material risks of and reasonably available alternatives to the proposed course of conduct.”

While representing an incompetent client, the lawyer is unable to comply with Rule 1.2 or 1.4. The lawyer is unable to consult with the client as required by Rule 1.2 concerning the means by which the client’s objectives are to be pursued or whether such objectives should be modified. Further, the lawyer is unable to reasonably inform the client and explain matters to the client to the extent required by Rule 1.4(a) (1) (2) (3) and Rule 1.4(b) or obtain the client’s informed consent as defined in Rule 1.0(e) to any further course of action.

Rule 1.14 is intended to provide guidance to a lawyer representing a client with diminished capacity. Rule 1.14(a) states in relevant part:

“(a) When a client’s capacity to make adequately considered decisions in connection with a representation is diminished… the lawyer shall as far as reasonably possible, maintain a normal client-lawyer relationship with the client.”

Comment [1] to Rule 1.14 states in relevant part:

“The normal client-lawyer relationship is based on the assumption that the client, when properly advised and assisted, is capable of making decisions about important matters. When the client…suffers from a diminished mental capacity, however, maintaining the ordinary client-lawyer relationship may not be possible in all respects. In particular, a severely incapacitated person may have no power to make legally binding decisions. Nevertheless, a client with diminished capacity often has the ability to understand, deliberate upon, and reach conclusions about matters affecting the client’s own well-being.”

The inquiring lawyer should exercise caution with respect to the lawyer’s opinion that the client lacks the capacity to understand matters, since such determination in a clinical sense is beyond the lawyer’s expertise. However, Rule 1.14 Comment [6] attempts to provide guidance for such determination stating:

“[6] In determining the extent of the client’s diminished capacity, the lawyer should consider and balance such factors as the client’s ability to articulate reasoning leading to a decision, variability of state of mind and ability to appreciate consequences of a decision; the substantive fairness of a decision; and the consistency of a decision with the known long term commitments and values of the client. In appropriate circumstances, the lawyer may seek guidance from an appropriate diagnostician.”

Rule 1.14 (a) and Comment [1] provide little assistance to the inquiring lawyer who presents the factual situation that the lawyer no longer believes the client has capacity to make any adequately considered decisions regarding the pending appeal. Although the Rule and Comment urge the lawyer to continue to maintain a reasonable lawyer –client relationship, the lawyer faces a reality in which the lawyer is unable to engage with the client to obtain meaningful client input.

Rule 1.14(b) is similarly lacking for assistance to the inquiring lawyer. Rule 1.14(b) provides in part:

“(b) When the lawyer reasonably believes that the client has diminished capacity...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...”

In this instance, seeking a second guardian to make the client’s decisions in the pending litigation would entirely undermine the inquiring lawyer’s multi-year advocacy for the client in opposition to a guardianship and would require the lawyer to disclose the client’s confidences causing severe detriment to the client. Such disclosure would violate Rule 1.6 generally prohibiting the disclosure of client confidences. Rule 1.14(c) explicitly states that the confidences of an impaired client are protected by Rule 1.6. Rule 1.14(c) permits disclosure of confidential information only to the limited extent that such disclosure is reasonably necessary to protect the client’s interests. Almost any disclosure by the inquiring lawyer during the ongoing proceedings to subject the client involuntarily to a guardianship would be detrimental to the client’s interests. Also weighing against any attempt by the lawyer to seek a second guardian is the likelihood that courts will often not appoint a second guardian, particularly with an appeal pending over the appointment of the first guardian.

Considering the foregoing, the inquiring lawyer has a limited range of options- (1) continue to advocate zealously for removing the client’s guardian consistent with the strategy last discussed by the client when the client had capacity; (2) handle matters as a de facto guardian in what the lawyer perceives to be the best interests of the client; or (3) simply withdraw from the client’s representation.

The lawyer has inquired whether the lawyer is bound by ethical rules to proceed with the first option of continued advocacy. The Committee's review has not found a rule binding upon the lawyer which mandates that the lawyer pursue the first option. Accordingly, it is the Committee's opinion that the rules do not require the lawyer to proceed with the first option.

Rule 1.2 and The Restatement Section 24 may weigh in favor of the lawyer's pursuit of the client's objectives stated by the client prior to the client's incompetence perceived by the lawyer (option 1 stated above).

Rule 1.2(a) requires that "a lawyer shall abide by a client's decisions concerning the objectives of the representation". The client's last communicated objective which the lawyer has pursued in several years of representation and continues to pursue while prosecuting the appeal is to avoid the appointment of a guardian for the client's estate.

The Restatement Section 24(2) states in part that the lawyer should "pursue the lawyer's reasonable view of the client objectives or interests as the client would define them if able to make adequately considered decisions on the matter, even if the client expresses no wishes or gives contrary instructions".

Finally, 755 ILCS Section 5/11a-10(b) requires that a respondent in a guardianship proceeding shall have the right to counsel, either the respondent's chosen counsel or a court appointed lawyer. If the inquiring lawyer fails to advocate against appointment of the guardian, the lawyer's client is deprived of the due process right to advocacy on the client's behalf provided by statute.

It is implicit in the lawyer's inquiry that the lawyer is considering the second or may be considering the third option stated above. Notwithstanding the lawyer's past advocacy against the appointment of a guardian, the lawyer might now determine that a guardian of the client's estate is in the client's best interests, and accordingly handle matters in accordance with the second option.

The New Jersey Supreme Court in *The Matter of M.R.*, *id* stated, "The attorney's role is not to determine whether the client is competent to make a decision, but to advocate the decision that the client makes. That role, however, does not extend to advocating decisions that are patently absurd or pose an undue risk of harm to the client."

If the inquiring lawyer reasonably believes that the client presently lacks capacity to the extent that the client would be harmed in the absence of a guardian for her estate and the cost of continued prosecution of the appeal would not benefit the estate, the lawyer may determine that the client's best interests compel dismissing the appeal.

If the inquiring lawyer concludes that continued prosecution of the appeal would violate Rule 3.1 prohibiting the litigation of frivolous claims or be repugnant to the lawyer, the lawyer could attempt to withdraw from the matter pursuant to Rule 1.16. Concerning such withdrawal, ABA Opinion 96-404 states in part, "while withdrawal in these circumstances solves the lawyer's dilemma [of no longer being authorized to act for an incapacitated individual], it may

leave the impaired client without help at a time when the client needs it most.” Rule 1.16(c) requires that a lawyer who wants to withdraw from representation “must comply with applicable law requiring notice to or permission of a tribunal”. The lawyer would have to seek the court’s permission to withdraw. In seeking such permission, the lawyer would continue to be subject to Rule 1.6(a) prohibiting the lawyer’s disclosure of the client’s confidential information concerning the client’s diminished capacity. Also, Rule 1.16 (d) requires that the withdrawing lawyer shall take “steps to the extent reasonably practicable to protect a client’s interests, such as giving reasonable notice to the client, [and] allowing time for employment of other counsel”. Given the client’s condition described by the inquiring lawyer, notice is impractical and the client without assistance will be unable to employ other counsel. In all likelihood, the court would deny the lawyer’s request to withdraw. Further, the client’s case may be impaired by the lawyer’s efforts toward withdrawal.

CONCLUSION

The ethical Rules do not bind a lawyer to continue proceeding with an appeal of the court’s decision appointing a guardian for a client, who currently lacks mental capacity, in the manner discussed between the lawyer and the client previously, when the client had adequate mental capacity.

Professional Conduct Advisory Opinions are provided by the ISBA as an educational service to the public and the legal profession and are not intended as legal advice. The opinions are not binding on the courts or disciplinary agencies, but they are often considered by them in assessing lawyer conduct.

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