Clients With Diminished Capacity

There is a category of clients most of us never see who are classified under Arizona's Rules of Professional Conduct as having a "diminished capacity," loosely defined as not being fully capable of making adequately considered decisions in connection with the representation.[1] Though many of us think of "diminished capacity" in terms of our clients and their professed inability to pay our bills, there are individuals who need special considerations in a representation, and lawyers can get in trouble if they are not aware of them or choose to ignore them.

The clients covered under ER 1.14 include children as well as the mentally or emotionally impaired, and representing this class of people is universally recognized as one of the more challenging aspects of representation for the practicing lawyer.[2] Under ER 1.14, lawyers dealing with an impaired or disabled client are granted more latitude in their relations with the client and others involved in the representation, and actions that otherwise might be questioned or criticized in a normal client–lawyer relationship are left more to each lawyer's reasoned judgment on what she considers to be in her client's best interests—even when at times it may be directly contrary to what the client professes to want.[3]

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Let's look at the Rule.

First, ER 1.14(a) says that the lawyer shall, as far as reasonably possible, maintain a normal client–lawyer relationship with the impaired client. Before the 1983 adoption of the Model Rules of Professional Conduct by the Arizona Supreme Court, little in the legal ethics lexicon assisted lawyers when dealing with their clients' diminished capacity, and the likely effect was that many lawyers simply felt free to resign from the representation, often leaving the client more vulnerable than before. With the advent of ER 1.14(a), the lawyer now must first use reasonable efforts to maintain the relationship. But if that becomes unworkable for any reason, ER 1.14(b) provides that the lawyer may then take "protective action," including consulting with non-clients such as family members, doctors, adult-protective agencies and other professional service providers who have the ability to help protect the client.[4] And to more effectively accomplish this, ER 1.14(c) provides that the lawyer is impliedly authorized to reveal information about the client that would otherwise be protected by ER 1.6 (Confidentiality of Information).[5]

Now let's look at the practical effects of ER 1.14. Consider:

- ER 1.2 (Scope of Representation and Allocation of Authority Between Client and Lawyer) requires us as lawyers to "abide by a client's decisions concerning the objectives of the representation." If we are dealing with a client with diminished capacity, however, we are allowed to take protective actions that may be directly opposed to the client's stated wishes.
- ER 1.4 (Communication) requires us to consult with the client about the representation's objectives and to explain what is going on in the matter so the client so he can make informed decisions regarding the representation. The lawyer appointed by the court to represent a newborn child, or the lawyer representing a client with advanced Alzheimer's disease, obviously can't comply with these rules and, by virtue of ER 1.14, can be relieved from his or her obligations.
- ER 1.6 (Confidentiality of Information) prohibits, with certain specific exceptions, a lawyer from revealing information relating to the representation. As discussed above, ER 1.14(c) adds an additional exception to the confidentiality rules that applies when a lawyer is taking "protective action" for a client with diminished capacity, but only to the extent reasonably necessary to protect the client's interests.

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- ER 1.7 (Conflict of Interest: Current Clients) prohibits a lawyer from representing a client where the representation will be directly adverse to another client. Yet in circumstances covered by ER 1.14, a lawyer may not only seek the appointment of a guardian *ad litem,* a conservator, or a guardian over the wishes of the client, but can represent the guardian once the court has determined incompetency and made the appointment[6] and, under certain circumstances, can even represent the person seeking the appointment while still representing the impaired client.[7]

All of this highlights the importance of determining initially whether, in dealing with your client, you are involved with a "regular" client or one with diminished capacity. If the client is one you have been representing over the years and who has become impaired in some fashion, you should be able to continue the representation under ER 1.14(a) and then, if necessary, under ER 1.14(b). If you are retained by a legal representative of the protected person, the consensus seems to be that you are the lawyer for the legal representative only, but with derivative fiduciary responsibilities to the protected person.[8]

endnotes

1. ER 1.14 (Client with Diminished Capacity), Rule 42, ARIZ.R.S.CT.
2. GEOFFREY HAZARD, WILLIAM HODES & PETER JARVIS, THE LAW OF LAWYERING §19.02 et seq. (4th ed. 2015).
3. ABA Formal Op. 96-404, "Client Under Disability" (Aug. 2, 1996).
4. Comment [5] to ER 1.14.
5. For more on this subject, *see Impliedly Authorized Disclosure,* ARIZ. ATT'Y (Jan. 2015), at 10.
6. ABA Formal Op. 96-404, *supra* note 3.
7. *See* South Carolina Ethics Op. 06-06 (April 21, 2006) (under Rule 1.14, lawyer representing impaired father may also represent his daughter in action to have daughter appointed conservator when it is shown that father had previously granted daughter a power of attorney requesting that she be chosen); *accord,* Rhode Island Ethics Op. 2004-01 (2004).
8. *Fickett v. Superior Court,* 558 P.2d 988 (Ariz. Ct. App. 1976) (lawyer for guardian owed fiduciary duties to guardian's ward; privity of contract between lawyer and ward not required for ward to pursue malpractice action against lawyer for failure to discover client–guardian's wrongdoing).