Representing Clients With Diminished Capacity

Daniel Webster-Batchelder American Inn of Court – Table 8

Written Materials for May 5, 2021 CLE

Practitioners, especially those who work in trusts, estates, probate and family law, routinely deal with people whose mental capacity is diminished for any number of reasons. Their capacity may be permanently diminished, or it may be diminished because of a temporary stressor. These representations raise unique ethical issues that practitioners need to navigate carefully and skillfully; the purpose of these materials and our presentation is to summarize the applicable rules, decisions and guidance in order to help members of the Inn handle these situations appropriately.

Most Relevant Rules:

- N.H. R. Prof. Cond. 1.14 – *Client with Diminished Capacity*
- N.H. R. Prof. Cond. 1.3—*Diligence*
- N.H. R. Prof Cond. 1.4 – *Client Communications*
- N.H. R. Prof. Cond. 1.6 – *Confidentiality of Information*
- N.H. R. Prof. Cond. 1.7 – *Conflicts of Interest*

New Hampshire has largely adopted the ABA Model Rule 1.14, which provides a helpful framework for practitioners who confront these difficult issues. The first thing to keep in mind in these situations is the Rule's exhortation that **"the lawyer shall, as far as reasonably possible, maintain a normal client-lawyer relationship with the client."** N.H. R. Prof. Cond. 1.14(a).

It is only in situations where the lawyer "reasonably believes that the client has diminished capacity" and reasonably believes that the client is at "risk of *substantial* physical, financial or other harm unless action is taken and [the client] cannot adequately act in the client's own interest" that a lawyer may take "reasonably

necessary protective actions, including consulting with individuals or entities that have the ability to protect the client" and "in appropriate cases, seeking the appointment of a guardian ad litem, conservator, or guardian." *Id.* at §§ 1.14(b) (emphases added).

In such situations, client confidences still enjoy protection under Rule 1.6, though lawyers are impliedly authorized to reveal information about the client, when taking protective action, though only to the "extent reasonably necessary to protect the client's interests." *Id.* at §§ 1.14(c). And, plainly, the lawyer's duty to effect a client's lawful instructions about the handling of a matter can be relaxed, particularly where the client does not wish to be subjected to a guardianship or similar oversight—but it is a drastic step to disregard a client's lawful wishes, as it is to divulge client confidences to a third party, making client incapacity one of the thornier ethical issues most lawyers will ever have to confront.

One clear guiding principle is that the lawyer should take the least restrictive steps necessary to protect a client or her interests. This principle is noted in the text of the rule, and emphasized by the Ethics Committee's Comment 3: "ABA Comment 7 highlights that the least restrictive action should be taken, based upon the circumstances of each client." The ABA comment at issue focuses on situations where a guardian or other legal representative may be needed—such as when the client has substantial property that should be sold for their benefit, or where court rules require the client be represented by a guardian or next friend—but the principle applies in all contexts where a lawyer has to set aside one of her usual ethical obligations to limit or avoid harm to a client who lacks capacity.

Several questions arise whenever a lawyer confronts this unenviable situation. First, and maybe most obviously, is *how do I determine if the client truly has diminished capacity*? Although a complete guide to assessing a client's capacity is beyond the scope of a 1-hour CLE, there are some helpful guideposts you should be aware of. One very helpful resource you may wish to consult is the ABA and American Psychological Association ("APA")'s *Assessment of Older Adults with Diminished Capacity: A Handbook for Lawyers* (2005) (the "ABA/APA Handbook").

A-The Capacity Determination

Although New Hampshire has not adopted all of the comments to the ABA Model Rule, comment 6 is very helpful as a starting point in conducting a capacity assessment.[1] The comment instructs that 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." ABA Model R. Prof. Cond. 1.14 cmt c. Furthermore, "in appropriate circumstances, the lawyer may seek guidance from an appropriate diagnostician" to make a capacity determination. *Id.* However involving a third-party medical provider is potentially fraught with peril, for a number of reasons, including that doing so may vitiate the attorney-client privilege, and it may trigger

[1] The New Hampshire Bar Association Ethics Committee has relied on this comment in at least one significant Ethics Opinion. *See The Lawyer's Authority to Disclose Confidential Client Information to Protect a Client from Elder Abuse or Other Threats of Substantial Bodily Harm*, Ethics Committee Advisory Opinion No. 2014-15/05 at p.3 (reproduced in Appendix).

mandatory elder abuse reporting requirements that our Ethics Committee have concluded do not apply to lawyers, but which would apply to care providers employed to assist in a capacity determination. *See* Ethics Opinion No. 2014-15/05 at n.11.

Because of the potentially grave consequences for both client and counsel, the incapacity determination obviously needs to be approached carefully. The ABA and APA *Handbook* urges us to look at three specific "facets" of diminished capacity: 1.) Standards of capacity for the transaction at issue,[2] 2.) Approaches to Capacity in state guardianship and conservatorship laws, and 3.) Ethical guidelines for assessing client capacity (i.e., the comment 6 factors enumerated above).

With respect to the "standards of capacity for the transaction at issue," testamentary capacity is a helpful example to consider. In many states, one would likely first turn to the Probate Code. *See* Candice A. Garcia-Rodrigo, *Tips for Representing a Client with Diminished Capacity*, ABA Section on Litigation Practice Point (Jan. 29, 2016). Although New Hampshire's probate statutes do not appear to have a firm process for determining capacity, the common law has a venerable test that practitioners should be aware of:

> In order to have sufficient mental capacity to make the will, [the testatrix], at the time of making it, must have been able to understand the nature of the act she was doing, to recollect the property she wished to dispose of and understand its general nature, to bear in mind those who were then her nearest relatives as such, and to make an election upon whom and how she would bestow the property by her will; that she must have had the ability, the mental power or capacity to do this; that if she had, the law regarded her as of sufficient mental capacity to make the will; that if she had not this capacity at the time, &c., the jury would find her not of sane

[2] For example, the Handbook identifies several different legal capacities, with different standards, that frequently arise: testamentary capacity, donative capacity, contractual capacity, capacity to convey real property, capacity to execute a power of attorney, decisional capacity in healthcare, and capacity

> mind; but if at the time, &c., she had this capacity, the jury would inquire further, for in this case it was claimed that she was laboring under what is called active insanity, of which the test is *delusion;*. . . the mere fact of the possession of a delusion may not be sufficient to render a person utterly incapable of making a valid will; that a person of sufficient mental capacity, though under a delusion, may make a valid will; if the will is in no way the offspring of the delusion, it is unaffected by it; but that if the will is the offspring of the delusion, if the delusion causes it to be made as it is made, or if its provisions in any way result from or are affected by the delusion, it is not a valid will; that the will of a person, who has been or is ordinarily insane, will be valid, so far as this question is concerned, if made at a lucid interval, that is, when the testatrix is not in fact insane; is not under delusion[.]
>
> *In re Estate of Washburn*, 141 N.H. 658, 662 (1997) (quoting *Boardman v. Woodman*, 47 N.H. 120, 122 (1866)) (emphases in original).

The first element of this test is likely the most important, as it focuses the most clearly on capacity. *Washburn*, 141 N.H. at 662. Accordingly, to determine if a client lacks capacity for testamentary purposes, lawyers should likely consider whether their clients can understand the nature of the decisions they are making, to understand their property interests and the identities of the other involved parties, and articulate how and why they may wish to deal with their property.

The common-law on a party's mental capacity to enter into a contract is not extremely well-defined, likely because New Hampshire treats contracts entered into by "mentally incompetent persons" as voidable, requiring the incompetent person's representative (or heirs) to sue for rescission. *See Sawtelle v. Tatone*, 105 N.H. 398, 402 (1964). There does not appear to be a clear formulation of the degree of incapacity that makes a contract voidable. As the Restatement (2d) of Contracts, § 12 notes, "[c]apacity to contract may be partial and its existence in respect of a particular transaction may depend upon the nature of the transaction or upon other

circumstances." The Restatement goes on to note that "A natural person who manifests assent to a transaction has full legal capacity to incur contractual duties thereby unless he is (a) under guardianship, or (b) an infant, or *(c) mentally ill or defective*, or (d) intoxicated." *Id.*at §§ 12(b) (emphasis added). Clearly, the practitioner who has to determine whether her client possesses the capacity to enter into a contract (or to settle a litigated case at mediation, for example) will have a difficult assessment to make.

Of course, the lawyer should, in addition to the legal standards applicable to the transaction at hand, look to our guardianship and conservatorship laws to help make the capacity determination; RSA 464-A:2 measures "incapacity" according to functional limitations. "[Incapacity]" as used in RSA 464-A, "shall be construed to mean or refer to any person who has suffered, is suffering or is likely to suffer substantial harm due to an inability to provide for his personal needs for food, clothing, shelter, health care or safety or an inability to manage his or her property or financial affairs. Inability to provide for personal needs or to manage property shall be evidenced by acts or occurrences, or statements which strongly indicate imminent acts or occurrences." To place a person under guardianship, evidence showing the acts or occurrences outlined in the statute must have occurred within the prior 6 months.

Once the lawyer has considered all of the relevant guideposts, she is ultimately required to make the capacity determination based on her own professional judgment. One very helpful resource in this regard is the ABA/APA Handbook's "Capacity Worksheet," which provides a useful form to guide the interview and assessment of a client. Again, this is included in the Appendix to this presentation.

A final note of caution is necessary: one of the very few ethics opinions in New Hampshire touching on this subject goes to significant lengths to caution practitioners that a client's bad decisions do not amount to diminished capacity, and that "Rule 1.14 does not give the lawyer carte blanche to impose on the client the lawyer's personal view of what is in the client's best interest. Rather, Rule 1.14 authorizes the lawyer to engage in a *limited intervention* when the client's mental incapacity is such that he or she cannot adequately protect his or her own interests." N.H. Bar Ass'n Ethics Committee Advisory Opinion No. 2014-15/05 (quoting Rotunda and Dzienkowski, *Legal Ethics: The Lawyer's Deskbook on Professional Responsibility* at 658-659).

B—Steps to Take When Dealing With a Client With Diminished Capacity

If you have determined that a client lacks capacity, you have several options under Rule 1.14 to protect their interests. The first step listed in the rule involves "consultation with individuals or entities that have the ability to protect the client." N.H. R. Prof. Cond. 1.14(b). The New Hampshire Bar Association's Ethics Committee has expressed its clear concern that such communications may not preserve an attorney-client privilege, notwithstanding the comments to the ABA Model Rule suggesting otherwise, so you are well-advised to limit such consultations to the greatest degree possible. The relaxation of your obligations under Rule 1.6 may prevent you from being held responsible in a PCC proceeding for engaging in such consultation, but the potential waiver of the client's privileged communications is an obvious and difficult concern you must confront.

The rule contemplates that you would consult with several potential resources to protect the client's interests. If the client lacks capacity to the point of having been

placed under guardianship, you would be expected to consult with the guardian. If the client is an unemancipated minor, you would be expected to consult with her parents. However, you should not consult with the client's legal guardians in two situations: "where the lawyer represents the client in a matter against the interests of the legal representative or where that the legal representative instructs the lawyer to act in a manner that will violate that person's legal duties toward the client." N.H. Bar Ass'n Ethics Cmte. Cmt. 4 to Rule 1.14.

The rule also contemplates including other family members in legal decisionmaking, and the New Hampshire Ethics Committee makes the point that the client's "non-traditional" relationships should be considered in this circumstance, especially where the client previously enshrined these important relationships in planning documents or otherwise. In any circumstance where you undertake to communicate with a third party about the client's matter under this Rule, however, you must first satisfy yourself that it is unlikely that the person or entity consulted will act adversely to the client's interests.

In addition to consulting with a third party, there are other protective actions you may be able to set in motion short of seeking guardianship: "using a reconsideration period to permit clarification or improvement of circumstances, using voluntary surrogate decision-making tools such as durable powers of attorney or consulting with support groups, professional services, adult-protective agencies or other individuals or entities that have the ability to protect the client." ABA Model Rule 1.14, cmt. 5.

Also, you may be empowered to seek the appointment of a guardian ad litem, conservator, or guardian under the plain language of the rule. N.H. R. Prof. Cond.

1.14(b). Relatedly, in certain emergency circumstances, you may be able to take emergency legal action on behalf of a client, even though she may lack the capacity to form a lawyer-client relationship with you. ABA Model Rule, cmt. 9. Such steps are not to be taken lightly, and should only be undertaken to the "extent reasonably necessary to maintain the status quo or otherwise avoid imminent and irreparable harm." *Id.*

In taking any protective action on behalf of a client with diminished capacity, "the lawyer should be guided by such factors as the wishes and values of the client to the extent known, the client's best interests and the goals of intruding into the client's decision-making autonomy to the least extent feasible, maximizing client capacities and respecting the client's family and social connections." *Id.*at cmt. 5.

C-Conclusion

Dealing with clients with diminished capacity is certainly one of the most ethically fraught and difficult situations most of us are likely to face in the course of our practices. It is important to bear in mind a few guiding principles when you are confronted with this situation:

1—Treat the client as you would any other client to the greatest extent possible;
2—Conduct a careful and nuanced assessment of the client's capacity before proceeding to take any protective action. You may want to consult your own ethics counsel before undertaking this task;
3—If you reach the conclusion that you have to intervene to protect the client's interests, do so in the most limited fashion possible.

We hope our presentation will illustrate how to grapple with some of the basic questions you are likely to confront in this very difficult situation, and that the materials we have summarized here (and included in our appendix) will prove helpful.

CLIENTS WITH DIMINISHED CAPACITY

Daniel Webster-Batchelder AIC
Table 8
May 5, 2021

Warren Will and Jane Will

Warren Will and Jane Will

- Should Attorney Codicil speak to the Warren and Jane jointly?
- Is there anything he should do or anything he should explain before speaking with them jointly?

Warren Will and Jane Will

- What steps should Codicil take to assess Warren's capacity?
- When does he need to take these steps?

Warren Will and Jane Will

- “When the lawyer reasonably believes that the client has diminished capacity, is at risk of substantial physical, financial or other harm unless action is taken and cannot adequately act in the client's own interest, 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, conservator or guardian.” NHRPC 1.14(b).

Warren Will and Jane Will

- Beyond capacity issues, are there other factors that Codicil should consider before modifying the will?

Warren Will and Jane Will

- What responsibility does Codicil have to assess the situation for potential undue influence?
- What should he do if he believes there is a possibility of undue influence here?

Warren Will and Jane Will

- Are there any alternative solutions that Codicil could propose to address the concerns regarding compensating Jane for her caregiver services?

Warren and Jane, continued…

Warren and Jane, cont.

- Any problems with Codicil taking this meeting with Jane?
- What could he have done instead?

Warren and Jane, cont.

- Does Codicil have an obligation to reveal Jane's plans to Warren?
- Does Codicil have any mandatory reporting obligations with regard to Jane's plan?
- Does Codicil have any ability or duty to intervene in any way?

Warren Will and Jane Will

- Can Codicil advise Jane regarding the guardianship proceeding?

Warren and Jane, cont.

- *In re Guardianship of Henderson*, 150 N.H. 349, 350 (2003) (while a ward in a guardianship matter is entitled to counsel, that same counsel cannot also act as guardian ad litem).

Warren Will and Jane Will

- Would the situation be different if Warren, subsequent to his fall, is having more severe memory issues, doesn't recognize Jane, and has tried to escape the nursing home several times by climbing out of his window and rappelling down the side of the building using tied-together bedsheets?

Jack and Jill

Jack and Jill . . . Questions

- First, are there any issues present that may hinder the formation of the attorney client privilege here?
  - What are those issues?

Jack and Jill . . . Questions

- Are there any ethical issues at play with Jack meeting with the attorney alone when Jill was the one that made the appointment?
  - What are those?

Jack and Jill . . . Questions

- What is the counseling role of the attorney when the client is impaired?
- Should the attorney recommend outside counseling or therapy to assist in Jack better understanding the issues at play in the divorce settlement?
  - Is Jack showing an understanding and appreciation of the issues?
  - What, if anything, can the lawyer do?

Ethics Rule 1.14

- If a lawyer reasonably believes that a client is at risk of substantial physical, financial or other harm unless action is taken, and that a normal client-lawyer relationship cannot be maintained because the client lacks sufficient capacity to communicate or to make adequately considered decisions in connection with the representation, then 1.14(b) permits the lawyer to take protective measures deemed necessary.

Ethics Rule 1.14

- The first step listed in the rule involves "consultation with individuals or entities that have the ability to protect the client." N.H. R. Prof. Cond. 1.14(b).
- Such measures could include:
  - consulting with family members, using a reconsideration period to permit clarification or improvement of circumstances, using voluntary surrogate decision making tools such as durable powers of attorney or consulting with support groups, professional services, adult-protective agencies or other individuals or entities that have the ability to protect the client.

HOWEVER . . .

- Rule 1.14 does not give the lawyer carte blanche to impose on the client the lawyer's personal view of what is in the client's best interest.
- Rule 1.14 authorizes the lawyer to engage in a limited intervention when the client's mental incapacity is such that he or she cannot adequately protect his or her own interests."
- N.H. Bar Ass'n Ethics Committee Advisory Opinion No. 2014-15/05

Jack and Jill . . . Questions

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