

OREGON RULES OF PROFESSIONAL CONDUCT AND COMMUNICATION WITH IMPAIRED CLIENTS

Communicating effectively with impaired clients and beneficiaries is an important skill for any elder law attorney. At a bare minimum, the attorney should comply with the Oregon Rules of Professional Conduct. The attorney should also be aware of other skills and obligations when working with clients or beneficiaries that have diminished capacity.

I. Be Competent.

Competence means legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation.

“Rule 1.1 Competence

A Lawyer shall provide competent representation to a client. Competent representation requires the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation.”

- A. Skill and Knowledge.** Attorneys should be careful to only accept those cases where the attorney has the competence to act. If any attorney lacks competence, then the attorney should seek assistance from competent attorneys and other sources in order to learn the matter.
- B. Thoroughness and Preparation.** If an attorney is too busy to be thorough with an impaired client, or the attorney does not have the patience and time to properly prepare to help an impaired client, the attorney should not represent the impaired client.

II. Abide by Your Client’s Decisions and Consult with Your Client.

A lawyer is required to abide by a client’s decisions concerning the objectives of representation and to consult with the client about how the client wants to accomplish those objectives.

“Rule 1.2 Scope of Representation and Allocation of Authority Between Client and Lawyer

(a) Subject to paragraphs (b) and (c), 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. A lawyer may take such action on behalf of the client as is impliedly authorized to carry out the representation. A lawyer shall abide by a client’s decision whether to settle a matter. In a criminal case, the lawyer shall abide by the client’s decision, after consultation with the lawyer, as to a plea to be entered, whether to waive jury trial and whether the client will testify.

(b) A lawyer may limit the scope of the representation if the limitation is reasonable under the circumstances and the client gives informed consent.

(c) A lawyer shall not counsel a client to engage, or assist a client, in conduct that the lawyer knows is illegal or fraudulent, but a lawyer may discuss the legal consequences of any proposed course of conduct with a client and may counsel or assist a client to make a good faith effort to determine the validity, scope, meaning or application of the law. ”

A. Communicate in a Manner in which the Client Can Understand the Basics.

If a client has diminished capacity, a lawyer should attempt to explain the issues in a manner which the client can understand. Sometimes this means simplifying language or vocabulary, drawing pictures, outlining options with pros and cons in a column format, or giving the client examples which include real life scenarios are helpful. Try explaining things different ways, and check in with the client to determine whether they have understood enough to explain it in their own words. Some clients may not be able to understand the basics. The goal is to attempt to provide the best possible explanation for the particular client that has the most likely potential to explain the issue to the client. Each client will be different.

B. Abide by the Client’s Decisions.

Attorneys cannot substitute their own judgment for the judgment of the client.

III. Don’t Neglect Your Client.

It can be challenging to work with a client with diminished capacity. The client’s expectations and ability to predict what is reasonable may be impaired. Set good boundaries at the beginning of the representation. Follow the boundaries that you establish, even if the client has difficulty doing so.

“Rule 1.3 Diligence

A lawyer shall not neglect a legal matter entrusted to the lawyer.”

IV. Communicate with the Client

“Rule 1.4 Communication

(a) A lawyer shall keep a client reasonably informed about the status of a matter and promptly comply with reasonable requests for information.

(b) A lawyer shall explain a matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation.”

A. Information. Inform the client of the status promptly.

B. Requests. If a client makes requests, comply with reasonable requests. If a client’s request is unreasonable, don’t mislead a client and tell the client you are doing something you do not intend to do. It is important to be direct and honest with the client.

- C. Give the Client the Best Opportunity to Make an Informed Choice.** Rule 1.4(b) requires a lawyer to explain a matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation. Be careful to only take direction from your client. Try to ensure that the client is the party making the decision and to the extent that a decision is made, help the client recognize the consequences. It may be that the client cannot recall the choices or the options. The goal is to give the client the best opportunity to make those choices.

V. The Client with Diminished Capacity Rule.

“Rule 1.14 Client with Diminished Capacity

(a) When a client’s capacity to make adequately considered decisions in connection with a representation is diminished, whether because of minority, mental impairment or for some other reason, the lawyer shall, as far as reasonably possible, maintain a normal client-lawyer relationship with the client.

(b) 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.

(c) Information relating to the representation of a client with diminished capacity is protected by Rule 1.6. When taking protective action pursuant to paragraph (b), the lawyer is impliedly authorized under Rule 1.6(a) to reveal information about the client, but only to the extent reasonably necessary to protect the client’s interests.”

A. Maintain a Normal Client-Lawyer Relationship as Far as Reasonably Possible.

At the commencement of the attorney client relationship, it is up to the attorney to inquire about and establish the ground rules and the nature of the representation. The attorney must consider how did the client become the client? Does the client have capacity to contract?

B. Clients at Risk of Substantial Harm.

If the client is at risk of substantial harm, a lawyer *may* take reasonable necessary protective action, including seeking the appointment of a guardian and reveal confidences only to the extent reasonably necessary to protect the client’s interests. Protective action is not limited to a protective proceeding. It could include other less intrusive actions that are the most appropriate to protect the client from the substantial harm.

VI. Render Independent, Candid Advice.

“Rule 2.1 Advisor

In representing a client, a lawyer shall exercise independent professional judgement and render candid advice. In rendering

advice, a lawyer may refer not only to law but to other considerations such as moral, economic, social and political factors, that may be relevant to the client's situation."

A. Independent Advice.

Be careful to avoid inappropriate influence to color your opinion or advice. Make sure that your advice is tailored to the client and not to what other want for the client or your desire to have your bill paid.

B. Candid Advice.

Often it is important to be direct. Avoid patronizing the client. Avoid putting the client in a position where the client is trying to please the attorney. Be honest and frank. Describing consequences in an overly optimistic or pessimistic manner can set the client up to be disappointed or confused.

C. Understand the Practical Consequences to the Client.

In order to give good legal advice, a lawyer may need to have knowledge and experience with family dynamics, financial issues and a practical understanding about what happens in circumstances similar to the client's situation. The ability to appreciate and explain the practical consequences of a particular course of action to a client is intertwined with the rule requiring an attorney to be competent. If a lawyer is unfamiliar with practical issues, the lawyer needs to take the same actions that the lawyer would need to take if the lawyer was unfamiliar with the law.

VII. Take Positions that Are Reasonable and In Good Faith.

"Rule 3.1 Meritorious Claims and Contentions

In representing a client or the lawyer's own interests, a lawyer shall not knowingly bring or defend a proceeding, assert a position therein, delay a trial or take other action on behalf of a client, unless there is a basis in law and fact for doing so that is not frivolous, which includes a good faith argument for an extension, modification or reversal of existing law, except that a lawyer for the defendant in a criminal proceeding, or the respondent in a proceeding that could result in incarceration may, nevertheless so defend the proceeding as to require that every element of the case be established."

A. Balancing Obligations to the Client with the Realities of the Situation.

Clearly, the lawyer must abide by the client's decisions and objectives. However, many times in the practice of elder law it is obvious that a client's capacity is so impaired that the client cannot effectively make decisions or has objectives that are unrealistic. It is important that the lawyer advise the client that the objectives may be unreasonable and unattainable. It is equally important that after the lawyer gives the client this advice and the client enough information to understand the advice to the best of the client's ability, that the lawyer then represents what the client's position is in an honest and reasonable way with as little posturing as possible. Oftentimes, an attorney cannot obtain the exact result the client wants. However, the lawyer may advocate to achieve some of the client's underlying goals.

B. Courteous and Professional Conduct.

In a case where there is a difficulty with the client's position due to their diminished capacity or lack of capacity, it is crucial for the attorney to remain absolutely courteous and respectful to the other parties or the other attorneys. Counsel can note that counsel is aware of the evidence and simply explain that the client has been made aware of the evidence and wishes to proceed in the manner requested by the client.