

ETHICS FOR PARENT ATTORNEYS:
CLIENTS WITH DIMINISHED
CAPACITY
AND
CONFLICTS OF INTEREST

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Topics

- ▶ About the Office
- ▶ Allocation of Authority between Clients and Lawyer (Rule 1.2, MRPC)
- ▶ Clients with Diminished Capacity (Rule 1.14)
- ▶ Communication and Confidentiality (Rule 1.4 and Rule 1.6)
- ▶ Conflicts of Interest (Rule 1.7)
- ▶ Scope of Representation of Parents in CHIPS cases (Rule 1.2; Rule 1.16(c))
- ▶ Advisory Opinion Services of the OLPR

Office Statistics

- ▶ 2018 Complaints—1107; Steady with 2017-1110
- ▶ Active lawyers in MN—25,823 (29,774 licensed) (Also steady)
- ▶ 2018 Public Discipline (Up from 2017):
 - ▶ 8 Disbarred
 - ▶ 23 Suspended
 - ▶ 8 Publically Reprimanded/Probation
 - ▶ 6 Reprimanded
 - ▶ Private Discipline:
 - 14 Private Probations
 - 117 Admonitions (up from 90 in 2017)

Office Statistics (cont'd)

- ▶ 2018 Dismissals
- ▶ 535 Summarily Dismissed (Determination that Discipline is Not Warranted Without Investigation)
- ▶ 243 Determination that Discipline is Not Warranted (after investigation)
- ▶ Who filed Complaints?
 - ▶ Clients (442)
 - ▶ Adverse Parties (257)
 - ▶ Opposing Counsel (37)
 - ▶ Director Initiated (49)—primarily through trust account overdraft program
 - ▶ Judges, other interested parties (remainder)

Office Statistics (cont'd)

- ▶ Most Frequent Areas of Law Involved
 - ▶ Criminal (254)
 - ▶ Family Law (156)
 - ▶ General Litigation (182) (number up over 2017)
 - ▶ Probate (85) (Real estate right behind)

- ▶ Most Frequent Areas of Violations
 - ▶ Rule 1.4—Failure to Communicate
 - ▶ Rule 1.3—Diligence

Decision-making

- ▶ Client has ultimate authority to determine purpose and objectives.
- ▶ Means by which to accomplish objectives is generally left to counsel, after consultation with client.
- ▶ Where there is a disagreement, counsel must attempt a mutually agreeable resolution.
- ▶ Comments to Rule 1.2

Diminished Capacity

- ▶ Comment to Rule 1.2 [4]:
- ▶ In a case in which the client appears to be suffering from diminished capacity, the lawyer's duty to abide by the client's decisions is to be guided by reference to Rule 1.14.
- ▶ Rule 1.14's focus is on maintaining as normal a relationship as possible.

Diminished Capacity

- ▶ Comment to Rule 1.2 [4]:
- ▶ In a case in which the client appears to be suffering from diminished capacity, the lawyer's duty to abide by the client's decisions is to be guided by reference to Rule 1.14.
- ▶ Rule 1.14's focus is on maintaining as normal a relationship as possible.

Diminished Capacity

- ▶ Rule 1.14(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.
- ▶ Rule 1.14(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 reasonable protective action, including consulting 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.

Keep in Mind

- ▶ Comment [1] to Rule 1.14:
- ▶ “[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.”
- ▶ Also, if considering action under Rule 1.14(b), must keep information confidential to the extent possible:
- ▶ Rule 1.14(c) provides:
- ▶ 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(b)(3) to reveal information about the client, but only to the extent reasonably necessary to protect the client’s interests.

No Substitution of Judgment

- ▶ Rule 1.14 does not authorize a lawyer to substitute his or her judgment for that of the client's.
- ▶ An attorney may seek protective action where (1) the lawyer reasonably believes that the client has diminished capacity; (2) the client is at risk of substantial physical, financial or other harm unless action taken; and (3) the client cannot adequately act in his own interest.
- ▶ Bottom-line: Authorized to seek out someone who can legally act on the client's behalf but lawyer cannot do so.

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No Substitution of Judgment

- ▶ ABA Opinion 96-404 provides further guidance:
- ▶ Rule 1.14(b) does not authorize the lawyer to take protective action because the client is not acting in what the lawyer believes to be the client's best interest, but only when the client 'cannot adequately act in the client's own interest.' (Emphasis added.)

No Substitution of Judgment

- ▶ ABA Opinion 96-404
- ▶ A client who is making decisions that the lawyer considers to be ill-considered is not necessarily unable to act in his own interest, and the lawyer should not seek protective action merely to protect the client from what the lawyer believes are errors in judgment. Rule 2.1 permits the lawyer to offer his candid assessment of the client's conduct and its possible consequences, and to suggest alternative courses, but he must always defer to the client's decisions. Substituting the lawyer's own judgment for what is in the client's best interest robs the client of autonomy and is inconsistent with the principles of the "normal" relationship.

Communication

Rule 1.4, MRPC – Communications with clients

Comments:

[6] Ordinarily, the information to be provided is that appropriate for a client who is a comprehending and responsible adult. However, fully informing the client according to this standard may be impracticable, for example, where the client is a child or suffers from diminished capacity. See Rule 1.14.

[7] In some circumstances, a lawyer may be justified in delaying transmission of information when the client would be likely to react imprudently to an immediate communication. Thus, a lawyer might withhold a psychiatric diagnosis of a client when the examining psychiatrist indicates that disclosure would harm the client.

Conflicts

RULE 1.7: CONFLICT OF INTEREST: CURRENT CLIENTS

(a) Except as provided in paragraph (b), a lawyer shall not represent a client if the representation involves a concurrent conflict of interest. A concurrent conflict of interest exists if:

(1) the representation of one client will be directly adverse to another client; or

(2) there is a significant risk that the representation of one or more clients will be materially limited by the lawyer's responsibilities to another client, a former client, or a third person or by a personal interest of the lawyer.

Conflicts

Rule 1.7(b) Notwithstanding the existence of a concurrent conflict of interest under paragraph (a), a lawyer may represent a client if:

- (1) the lawyer reasonably believes that the lawyer will be able to provide competent and diligent representation to each affected client;
- (2) the representation is not prohibited by law;
- (3) the representation does not involve the assertion of a claim by one client against another client represented by the lawyer in the same litigation or other proceeding before a tribunal; and
- (4) each affected client gives informed consent, confirmed in writing.

Joint Representation

Rule 1.7 comment

[29] In considering whether to represent multiple clients in the same matter, a lawyer should be mindful that if the common representation fails because the potentially adverse interests cannot be reconciled, the result can be additional cost, embarrassment and recrimination. Ordinarily, the lawyer will be forced to withdraw from representing all of the clients if the common representation fails. In some situations, the risk of failure is so great that multiple representation is plainly impossible. For example, a lawyer cannot undertake common representation of clients where contentious litigation or negotiations between them are imminent or contemplated. Moreover, because the lawyer is required to be impartial between commonly represented clients, representation of multiple clients is improper when it is unlikely that impartiality can be maintained. Generally, if the relationship between the parties has already assumed antagonism, the possibility that the clients' interests can be adequately served by common representation is not very good.

Joint Representation

[31] As to the duty of confidentiality, continued common representation will almost certainly be inadequate if one client asks the lawyer not to disclose to the other client information relevant to the common representation. This is so because the lawyer has an equal duty of loyalty to each client, and each client has the right to be informed of anything bearing on the representation that might affect that client's interests and the right to expect that the lawyer will use that information to that client's benefit. See Rule 1.4. The lawyer should, at the outset of the common representation and as part of the process of obtaining each client's informed consent, advise each client that information will be shared and that the lawyer will have to withdraw if one client decides that some matter material to the representation should be kept from the other.

Withdrawal

RULE 1.16: DECLINING OR TERMINATING REPRESENTATION

(a) Except as stated in paragraph (c), a lawyer shall not represent a client or, where representation has commenced, shall withdraw from the representation of a client if:

(1) the representation will result in violation of the Rules of Professional Conduct or other law;

(2) the lawyer's physical or mental condition materially impairs the lawyer's ability to represent the client; or

(3) the lawyer is discharged.

* * *

(c) A lawyer must comply with applicable law requiring notice to or permission of a tribunal when terminating a representation. When ordered to do so by a tribunal, a lawyer shall continue representation notwithstanding good cause for terminating the representation.

Withdrawal

RULE 1.16: DECLINING OR TERMINATING REPRESENTATION

(d) Upon termination of representation, a lawyer shall take steps to the extent reasonably practicable to protect a client's interest, such as giving reasonable notice to the client, allowing time for employment of other counsel, surrendering papers and property to which the client is entitled, and refunding any advance payment of fees or expenses that has not been earned or incurred.

Discipline

Mostly fee related—

- ▶ Not court-appointed but retained counsel; describing fee as earned upon receipt or non-refundable. Prohibited by Rule 1.5(b)(3), MRPC.
- ▶ Not following the requirements of Rule 1.5(b) for flat fees not held in trust.
- ▶ Failing to provide and retain countersigned receipts for cash payments.
- ▶ Failing to return file for two months.
- ▶ Failing to attend hearings.

Lawyer Well-Being & Ethics

- ▶ New report—National Task Force on Lawyer Well-Being, *The Path to Lawyer Well-Being, Practical Recommendations for Positive Change* (August 2017)
- ▶ Specific recommendations for legal employers
 - ▶ Form a Lawyer Well-being Committee or appoint a well-being advocate
 - ▶ Assess Lawyers' Well-being (including stressors such as secondary trauma and workload)
 - ▶ Establish policies and practices to support well-being including confidential reporting procedures
 - ▶ Monitor for signs of work addiction and poor self-care
 - ▶ Actively combat social isolation and encourage interconnectivity
 - ▶ Provide training and education on well-being including during new lawyer orientation
 - ▶ Emphasize service-centered mission versus competition
 - ▶ Create standards, align incentives and give feedback on wellness efforts.
 - ▶ Duty of Competence—to include lawyer well-being (Rule 1.1)—action for regulators

Context

- ▶ During 2018: 99 open disciplinary probations—32 cases included a disability related condition, either mental health (20) and/or substance use (12) (some with both)
- ▶ The ABA/Hazelden study indicates that one-fifth of U.S. attorneys may suffer from some level of problematic drinking, and a significant percentage of study participants reported mental health concerns.
- ▶ Study participants advised that barriers to seeking treatment included (1) not wanting others to find out they needed help; and (2) concerns regarding confidentiality or privacy (and relatedly, their license).
- ▶ **Lawyer assistance programs like Lawyers Concerned for Lawyers are not required to report misconduct disclosed to them by an attorney seeking assistance. Rule 8.3(c), MRPC.**
- ▶ Please do not let concerns for your license interfere with seeking help from a lawyer assistance program.
- ▶ Lawyers Concerned for Lawyers: 651-646-5590 or help@mnlcl.org
- ▶ 24-hr crisis line: 612-332-4805

Advisory Opinion Service

- ▶ Available to licensed MN attorneys
- ▶ OLPR attorneys will provide no cost verbal opinion on application of specific facts to rules; every day an attorney is assigned to A/O tasks and spends much of the day returning calls; will receive answer the same day or next day
- ▶ Confidential; non-binding on third parties
- ▶ No opinion will be offered on (1) conduct of third parties, (2) where conduct has already occurred, and (3) OLPR does not approve lawyer advertising, but will advise rules relating to same
- ▶ In 2018, the OLPR provided 2057 opinions.
- ▶ Options: Submit a written request on line (preferred where facts are complicated or detailed); call 651-296-3952 or toll-free 1-800-657-3601 and ask for the A/O attorney
- ▶ Website: <http://lprb.mncourts.gov>

Professional Firm First & Annual Reports

- ▶ A legal entity organized for pecuniary profit may not engage in the practice of law unless it is organized under the MN Professional Firms Act (Chapter 319B).
- ▶ After registering with the MN Secretary of State, the firm must file a First Report with the Office of Lawyers Professional Responsibility.
- ▶ Reports are available by calling the office or on the website:
<http://lprb.mncourts.gov/LawyerResources/Pages/ProfessionalFirms>
- ▶ Reports must be completed and returned with the firm's organizational documents filed with the Secretary of State and a \$100 filing fee.
- ▶ Each year the firm is active with the Secretary of State an Annual Report is required regardless of whether or not the firm provided legal services during the reporting year.
- ▶ Reports are mailed out at the end of November each year.
- ▶ Reports must be completed and returned with any amendments filed that year and a \$25 filing fee.
- ▶ Check your firm's status. If you have questions please call the OLPR at 651-296-3952. *See also* Bench & Bar Article (November 2017)

Additional Resources

- ▶ Wealth of Resources on Website, <http://lprb.mncourts.gov>
- ▶ Index and text of Bench and Bar articles and MN Lawyer ethics columns by Office, sorted by Rule, Subject and Year (no precedential value but useful guidance)
- ▶ Current Rules (MRPC and RLPR) and Board Opinions
- ▶ Suspended and Disbarred Lawyer List
- ▶ Attorney Search containing all public discipline, with links to Court opinions and petitions for discipline
- ▶ Trust Account Information and Resources, including FAQs
- ▶ Professional Firm Filing Requirements
- ▶ Cross Border (Multijurisdictional Practice) Information
- ▶ Annual Reports of OLPR, including historical reports
- ▶ Announcements and News
- ▶ Board and Office Directory
- ▶ Complaint forms in English, Hmong, Russian, Somali, and Spanish

Client Security Fund

- ▶ Available to compensate clients who have been victims of dishonest conduct by an attorney that results in a direct loss.
- ▶ Loss must arise from an attorney-client relationship
- ▶ Must be caused by dishonest conduct of attorney
- ▶ Direct loss is compensable; consequential damages are not
- ▶ Has approved for payment almost \$8.6 million over life of the fund (31 years) relating to 678 claims against 187 lawyers
- ▶ Funded by \$6 from annual registration
- ▶ www.csb.mncourts.gov

Closing

- ▶ Feedback—how can the OLPR help you in your practice?
- ▶ Questions?

- ▶ Thank You!