

CLIENTS WITH DIMINISHED
CAPACITY
AND
CONFLICTS OF INTEREST

Susan M. Humiston
Director
Office of Lawyers Professional Responsibility

Agenda

- Introduction
- 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

Allocation of Authority

- Rule 1.2 (a) of the Minnesota Rules of Professional Conduct provides the general rule allocating decision making authority in an attorney-client relationship:
- Text of Rule:
 - (a) Subject to paragraphs (c) and (d), **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 a jury trial and whether the client will testify.

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

- 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.

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.

Contrary Authority

- ALI Restatement Third of The Law Governing Lawyers at Section 24 provides:
- (2) A lawyer representing a client with diminished capacity as described in Subsection (1) [essentially restating the provisions of 1.14(a)] and for whom no guardian or other representative is available to act, must, with respect to a matter within the scope of the representation, pursue the lawyer's reasonable view of the client's 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.

Contrary Authority

- The position of the restatement has not been adopted in Minnesota however.
- 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.)

ABA Op. 96-404 (cont'd)

- 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 Issues

- 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.

Minn. Stat. § 260C.163

- **Subd. 3. Appointment of counsel.** (a) The child, parent, guardian or custodian **has the right to effective assistance of counsel in connection with a proceeding in juvenile court** as provided in this subdivision.
- (f) Court-appointed counsel for the parent, guardian, or custodian under this subdivision is at county expense. If the county has contracted with counsel meeting qualifications under paragraph (g), the court shall appoint the counsel retained by the county, unless a conflict of interest exists. If a conflict exists, after consulting with the chief judge of the judicial district or the judge's designee, the county shall contract with competent counsel to provide the necessary representation. **The court may appoint only one counsel at public expense for the first court hearing to represent the interests of the parents, guardians, and custodians, unless, at anytime during the proceedings upon petition of a party, the court determines and makes written findings on the record that extraordinary circumstances exist that require counsel to be appointed to represent a separate interest of other parents, guardians, or custodians subject to the jurisdiction of the juvenile court.**

Conflicts of Interest

- **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.

Rule 1.7(b), MRPC (cont'd)

- (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 (cont'd)

- [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.

State v. Paige

765 N.W. 2d 134 (Minn. App. 2009)

- The state and federal constitutions guarantee the right to counsel in criminal trials. U.S. Const. amend. VI; Minn. Const. art. I, § 6. **The right to counsel includes the right to effective assistance of counsel.** *Strickland v. Washington*, 466 U.S. 668, 686, 104 S.Ct. 2052, 2063, 80 L.Ed.2d 674 (1984). To establish ineffective assistance of counsel, a defendant must show (1) that counsel's performance was deficient, and (2) that the deficient performance prejudiced the defense. *Id.* at 687, 104 S.Ct. at 2064.

State v. Paige – cont.

- A lawyer's performance is deficient if he represents a client despite having a conflict of interest. *See Wood v. Georgia*, 450 U.S. 261, 271–72, 101 S.Ct. 1097, 1103–04, 67 L.Ed.2d 220 (1981) (noting that defendant had “right to representation that is free from conflicts of interest”). A conflict of interest exists if “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.” Minn. R. Prof. Conduct 1.7(a)(2). Thus, the existence of a conflict of interest typically depends on whether the lawyer’s decisions were “materially limited.” Because of this limitation, prejudice to the defendant is generally presumed when the lawyer has a conflict of interest. *See Mickens v. Taylor*, 535 U.S. 162, 167–70, 122 S.Ct. 1237, 1241–43, 152 L.Ed.2d 291 (2002) (discussing cases in which deficient performance and prejudice inquiries overlapped).

Rule 1.16, MRPC

- **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.

What to Do?

- If there is conflict in the joint representation
 - determine if it is consentable
 - Do you reasonably believe you can provide competent and diligent representation to each affected client?
 - Will you be able to freely share confidential information among the joint clients?
 - Will you be asserting a claim by one client against another client?
 - Will each affected client give informed consent confirmed in writing?

What to Do?

- If conflict not consentable or clients won't consent – bring motion for separate representation on grounds that extraordinary circumstances exist.
- Existence of non-consentable or non-consented to conflict of interest is contrary to the statute's requirement that “The child, parent, guardian or custodian has the right to effective assistance of counsel in connection with a proceeding in juvenile court . . .”
- If court denies motion, per 1.16(c), MRPC, may proceed with the joint representation.

Rule 1.9, MRPC

- (a) A lawyer who has formerly represented a client in a matter shall not thereafter represent another person in the same or a substantially related matter in which that person's interests are materially adverse to the interests of the former client unless the former client gives informed consent, confirmed in writing.
- If you represent both parents and the guardian/custodian at only the first hearing, may you continue to represent only one of them in subsequent proceedings?

SHAROOD V. HATFIELD

210 N.W. 2d 275 (1973)

- This court has recognized its inherent power to regulate the practice of law in many decisions. In the syllabus written by the court to the case of *Petition for Integration of Bar of Minnesota*, 216 Minn. 195, 12 N.W.2d 515, 516, we said:
- ‘* * * (T)he power to make the necessary rules and regulations governing the bar was intended to be vested exclusively in the supreme court, free from the dangers of encroachment either by the legislative or executive branches * * *.’

Scope of Representation

- Rule 1.2 provides that:
 - A lawyer may limit the scope of a representation if the limitation is reasonable under the circumstances and the client gives informed consent.
- Note the scope of appointment in order.
- Rule 1.16(c): A lawyer must comply with applicable law requiring notice to or permission of a tribunal when terminating representation. When ordered to do so by a tribunal, a lawyer shall continue to representation notwithstanding good cause for terminating the relationship.

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
- 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>

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