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Newsletters

Legal Ethics Trend – Representing Clients with Diminished Capacity

May 3, 2022

The #FreeBritney movement catapulted the ethical challenges of conservatorships into the public eye. Pop icon Britney Spears, whose father was appointed as her conservator in 2008, stands at the center of this cultural awakening. Thanks to the controversy, the issue of client diminished capacity and legal freedom of choice has never been more topical. Yet, this area of legal ethics remains ambiguous and unclear, with one author stating "capacity is the black hole of ethics".

How should a lawyer ethically proceed when they have a client with diminished capacity? An even trickier question is what a lawyer should do when they suspect—but are not sure—that their client may have suffered a change to their level of capacity? May a lawyer ethically raise concerns over their client's capacity and disclose client information in an effort to get the client the help they need?

These scenarios trigger Model Rule of Professional Conduct 1.14. As of December 11, 2018, most states had adopted some version of this rule, with California and Texas as the two outliers. While California did not adopt Rule 1.14, the state recently published Formal Ethics Opinion 2021-207 (Client with Diminished Capacity).

Rule 1.14 posits that a lawyer shall, as far as reasonably possible, maintain a normal lawyer/client relationship with their client who has diminished capacity. But, if the lawyer reasonably believes that their client has diminished capacity, Rule 1.14 permits a lawyer to take reasonably necessary protective action. This includes consulting with individuals or entities that have the ability to take action to protect the client and, in appropriate cases, seek the appointment of a guardian ad litem, conservator or guardian, if the lawyer reasonably believes that the client is at risk of substantial physical, financial, or other harm.

Most lawyers are not licensed medical doctors capable of diagnosing an individual's diminished capacity. So how should a lawyer determine whether their client has diminished capacity? Comment [6] to Rule 1.14 notes that the lawyer should consider and balance factors such as the client's ability to articulate reasoning leading to a decision; variability of their state of mind; ability to appreciate consequences; the substantive fairness of a decision; and the consistency of the decision with the known long-term commitments and values of the client. In appropriate circumstances, the lawyer may seek guidance from a qualified diagnostician.

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But to whom can a lawyer disclose that they are concerned about their client's capacity? Comment [8] provides that the lawyer's position in this instance is "unavoidably difficult." Rule 1.14(b) allows a lawyer to take reasonably protective action, including consulting with individuals or entities that have the ability to protect the client. While Subsection (b) allows disclosure, Subsection (c) cautions that information relating to the representation of a client with diminished capacity is protected by Rule 1.6 (Confidentiality of Information). Thus, unless authorized to do so, a lawyer may not disclose information relating to the representation of their client except if taking protective action to prevent death or bodily harm, crime or fraud, financial injury, to secure legal advice about compliance with the Rules, to establish a claim or defense on behalf of the lawyer, comply with a court order, or to resolve conflicts of interests if the information does not compromise attorney-client privilege or prejudice the client. Note that your particular home state might have different standards on when disclosure is impliedly authorized.

In order to not run afoul of Rule 1.6, lawyers should determine whether it is likely that the person or entity they consult would act adversely to the client's interests. Disclosure to the wrong individual could have serious repercussions, ranging from loss of reputation to involuntary hospitalization. For clients who prefer to have family members or other trusted individuals participate in discussions about legal decisions, Comment [3] suggests that this generally should not eliminate the applicability of evidentiary attorney-client privilege.

Takeaways:

- Treat a client with diminished capacity as normally as possible for the circumstances.
- Recognize that there is a spectrum of available options. While one client may only need to run decisions by a trusted family member, others may need an appointed guardian ad litem or conservator.
- When evaluating whether a client has diminished capacity, weigh factors such as the client's ability to articulate their reasoning, ability to appreciate the consequences, and whether the decision is in line with previous goals. In applicable circumstances, reach out to an appropriate diagnostician.
- When seeking third-party help for the client, gauge whether it is likely that the person or entity consulted will act with the client's best interests in mind. A medical doctor or psychologist may be a more suitable option than the client's cash-strapped fifth cousin twice removed.

Britney Spears's conservatorship was eventually terminated after 13 years. While Britney's journey has shined a light on the issue of conservatorships and diminished capacity, the law surrounding how to ethically handle clients with diminished capacity remains murky. Rule 1.14 offers guidance on this tricky, and potentially toxic, problem.

Be mindful that the Model Rules of Professional Conduct and most ethics opinions serve only as a guide for ethical lawyering. Always consult the professional conduct rules of your state to determine whether and to what extent your rules and laws differ from the resources listed above.

Peter Margulies, *Access, Connection, And Voice: A Contextual Approach To Representing Senior Citizens Of Questionable Capacity*, 62 Fordham L. Rev. 1073, 1082 (1994).

ABA CPR Policy Implementation Committee, *Variations of the ABA Model Rules of Professional Conduct Rule 1.14: Client with Diminished Capacity* (Dec. 11, 2018).