The Conundrum of Capacity Part 2:
I Think My Client Has Diminished Capacity.
What Are My Ethical Obligations?
13 June 2024

The following are excerpts from four ethics opinions issued by the Pennsylvania Bar Association Committee on Legal Ethics and Professional Responsibility. These ethics opinions were the basis for the hypotheticals used in the June 13, 2024 CLE. The full unedited opinions can be found on the PBA website.

NOTE:
The PBA includes this disclaimer at the end of its ethics opinions:

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<u>Source Material For Scenarios</u>:

INQUIRY NO. 91-36 – The Love Scam (hypothetical #1)

In this request, the inquirer asks what ethical restrictions apply to the inquirer seeking the appointment of a guardian for a present client who has been certified as mentally disabled both by the Social Security Administration and in civil commitment proceedings in the State Court system, and who is presently

confined in a mental health care facility, when the inquirer learns that the client has signed a check for a significant amount of money and mailed it to an out-of-state girlfriend whom the inquirer knows the client has never personally met and where the inquirer currently holds a power of attorney to act on behalf of the disabled client.

It would appear that this inquiry is controlled by the provisions of Pa.R.A.P. 1.14 dealing with the representation of a client under a disability.

The difficulty presented is that the inquirer would like to seek the appointment of a guardian or to take protective action by way of the inquirer's power of attorney in order to stop payment on the check to the girlfriend and to prevent the further dissipation of the client's assets by the client. The inquirer was advised that because the inquirer was convinced of the inability of the client to make considered decisions, the inquirer was authorized, only as far as reasonably necessary and while maintaining a normal client relationship, to prevent such dissipation of assets.

However, subparagraph (b) of Rule 1.14 authorizes a lawyer to take such action as is necessary to acquire the appointment of a guardian or to accomplish other protective actions with respect to the client where the lawyer reasonably believes that the client cannot adequately act in his own best interest.

Here, the inquirer believes that the client cannot adequately act in his own interest and this belief is reasonable because it is based upon the determinations of mental disability of both the Social Security Administration and the appropriate State Court. Under these circumstances, the normal attorney-client privilege described in Pa.R.P.C. 1.6 preventing revealing information relating to the representation of a client must yield to the inquirer's obligations under Pa.R.P.C. 1.14 to protect the disabled client from designing persons and to reasonably preserve the client's assets.

Thus, the inquirer would be permitted to introduce into evidence in a guardianship proceeding evidence produced or the orders in the social Security Administration matter or in the State Court proceedings which find the client to be mentally disabled.

The inquirer was, however, cautioned that wherever an infringement of the normal client confidentiality rule is permissible, the lawyer involved should reveal only such information as is absolutely necessary to protect the client and to preserve the client's confidences in those matters for which no disclosure is necessary. Thus, a reasoned judgment should be exercised in what the lawyer should decide to disclose in the contemplated guardianship proceedings.

INQUIRY NO. 2013-026 – What are your ethical obligations towards opposing parties who may have diminished capacity? (hypothetical #2)

Inquirer asked whether there was an ethical obligation to notify or report to the court that the opposing party to a divorce action may not understand the divorce complain and subsequent pleadings, such as a §3301(c) affidavit of consent or a §3301(d) affidavit of separation, where the opposing party is unrepresented, is illiterate, and, while not declared incapacitated, is working with the county's Intellectual and Developmental Disabilities Department, hereinafter "IDD"?

The answer is no. Nowhere do the Rules of Professional Conduct set forth an express or implied obligation upon you to notify the Court of an opposing party's assumed incapacity or state of mind.

(Notably, the applicable Rule of Court, i.e., Pa. R.C.P. 1930.4, regarding Service of Original Process in Domestic Relations Matters does not impose this obligation either).

Examination of Rule 3.3 regarding "Candor Toward the Tribunal" guides us to this conclusion. Essentially, Rule 3.3, "Candor Towards the Tribunal," provides a lawyer shall not knowingly (a) make or fail to correct a false statement of law or fact made by the lawyer to the tribunal; (b) fail to disclose adverse and controlling legal authority to the tribunal; and (c) offer evidence that the lawyer knows to be false. The Rule further imposes the duty upon a lawyer to "take reasonable remedial measures, including, if necessary, disclosure to the tribunal." Where his or her client is engaging or has engaged in criminal or fraudulent conduct. Rule 3.3(b).

Filing and serving a divorce complaint upon a pro se divorce litigant who you believe, but do not know, may not understand the meaning of the complaint, even when explained to her, is neither criminal nor fraudulent.

However, if the opposing party truly is unable to understand the meaning of the divorce complaint, there is a slim chance that proceeding with a divorce action, whether pursuant to §3301(c) or (d) of the Pennsylvania Divorce Code, without taking reasonable remedial measures could potentially result in a petition to open or vacate the final decree on the basis of extrinsic fraud, i.e., a "collateral matter which precluded a fair hearing or presentation of one side of the case." 23 Pa. C.S.A. §3332.

Therefore, to protect against the possibility of such a petition and, in the event it does occur, the success of such a petition, you should take remedial steps now.

Rules 4.3 and 1.14, along with common sense, provide guidance as to the remedial steps you can consider taking. Rule 4.3, "Dealing with Unrepresented Persons," imposes a duty upon you to make clear to any unrepresented opposing party that you are not disinterested in the legal 2 proceeding and that you are unable to give him or her legal advice other than to seek his or her own attorney. Rule 1.14, "Client with Diminished Capacity," deals solely with your responsibilities when your client may be laboring under diminished capacity, not an opposing party. Helpfully, the Explanatory Comment [1] to the Rule indicates that a "client suffering from diminished capacity often has the ability to understand, deliberate upon, and reach conclusion about matters affecting the client's own well-being." Thus, the Rule recognizes that diminished capacity might not affect a party's ability to understand and make decisions related to the lawsuit and this logic applies to your opposing party as well. The Explanatory Comment further advises that a lawyer dealing with a client who has diminished capacity might want to involve the client's family in discussions and, if a legal representative has been appointed for the client, look to that legal representative to make decisions. Explanatory Comment [3] and [4] to Rule 1.14.

Ultimately, you may consider whether appointment of a guardian ad litem is necessary. Explanatory Comment [7] to Rule 1.14. Obviously appointment of a guardian ad litem is expensive and probably the course of last resort. The duties and advice set forth in these Rules and Comments are helpful to determine the reasonable remedial measures you should take when dealing with the opposing party.

During our discussion, you indicated that the opposing party lives with her brother, who is neither incapacitated nor illiterate and who cares for her. I explained to you that illiteracy is not a basis to claim

bad service or extrinsic fraud in that the illiterate recipient of legal pleadings can and should get someone to read them to him or her. You also explained that, while the opposing party does suffer from some cognitive disability, you did not know the extent of the disability. You further knew that she had not been "declared incapacitated." I explained that, with your client's approval, you should contact the client's brother (and serve the complaint upon him per Pa.R.C.P. 1930.4(a)(2)(i) regarding the divorce and see if he is his sister's legal guardian and/or power of attorney. That way, you can deal with him regarding the divorce. If the brother is aware of the pending proceedings, he can explain those proceedings to the opposing party, obtain an attorney and/or guardian ad litem for her, and, perhaps, help make the divorce process less complicated and protracted as may be necessary without his involvement. At the minimum, even if the brother is not the legal guardian or power of attorney, if you copy him on all correspondence going to the opposing party, you are creating a record of your efforts to remediate the opposing party's potential inability to understand the divorce proceedings and, thus, weakening the opposing party's ability at a later date to claim that she was somehow precluded from defending herself regarding entry of the final divorce decree.

INQUIRY NO. 97-51 – Representing An Incapacitated Person Who Has Guardians Appointed (hypothetical #3)

You have requested an opinion with respect to the duty of a lawyer representing an incapacitated person when there are previously appointed legal guardians of the person and of the estate of such person appointed pursuant to the Pennsylvania incapacity laws. Specifically, the lawyer on behalf of the incapacitated person has indicated that at the request of the incapacitated person he will contest an annulment of the marriage of the incapacitated person brought by the guardians.

As you indicated, Section 1.14 of the Rules of Professional Conduct provides that a lawyer should if possible maintain a normal direct relationship with the client even though he or she may be under a disability, with the assumption being that the client when properly advised and assisted is capable of making decisions about legal matters. When the client is a minor or suffers from a mental disorder or disability, maintaining the client-lawyer relationship may not be possible in all respects.

The existence of a client lawyer relationship depends on an express and comprehensive authorization from the client to the lawyer. Whether a client-lawyer relationship exists for a specific purpose will depend on the circumstances and may be a question of fact.

If a legal representative has already been appointed for the client, the lawyer should ordinarily look to the representative for decisions on behalf of the client. Comments to Rule 1.14.

In response to your inquiry, the threshold question is whether the incapacitated person is in the first instance able to form a valid client-lawyer relationship with the lawyer.

If as you describe the person is totally incapacitated and cannot give any meaningful input into any decisions regarding her person or her estate, then presumably she cannot understand the relationship with her lawyer or make an informed legal judgment. Her lawyer by contesting the annulment proceeding would be in violation of Rule 1.4 because no valid client-lawyer relationship exists with his client. This is a factual determination however, and the lawyer before representing her must carefully

evaluate her degree of incapacity taking into consideration any medical reports he may have, and determine whether she is capable of making informed decisions.

This decision is that the lawyer, and in the absence of detailed information concerning the person and her disability, I am unable to issue an unqualified opinion that the lawyer by contesting the annulment of the marriage is in violation of the Rules of Professional Conduct.

INQUIRY NO. 90-79 – 2 Sisters, A Brother and A Will (hypothetical #4)

You advise that you have been representing two adult sisters one of whom has had serious memory problems for some time, although she does not suffer from Alzheimer's Disease. The sister with the memory problem (hereinafter "M") has signed a general power of attorney making her brother attorney-in-fact for purposes of carrying out her general business affairs. Some time ago, the two sisters came to your offices for the purpose of having M's Will prepared. In the Will, her sister was named executrix. The Will was routine and provided for an equal division of M's estate between siblings. More recently, the brother came into your office with the power-of-attorney, which M had executed in his favor. The brother advised that M did not understand what was in her Will and wanted to be certain that the competent sister has nothing to do with her affairs. Accordingly, the brother asked you for a copy of her Will so that he may explain its contents to her.

You have asked, under the circumstances, whether you may provide a copy of M's Will to the brother based upon his request and because he is her attorney-infact. While you have requested that M come to your office so that you could personally review her Will with her, the brother advises that M is reluctant to do so because she is afraid that you will tell her sister about the meeting.

Your inquiry raises a number of difficult issues, the most serious of which is dealing with a client under disability. Pennsylvania Rule of Professional Conduct 1.14, entitled "Clients Under Disability" provides in 1.14 (a) that "When a client's ability to make adequately considered decisions in connection with the representation is impaired, whether because of minority, mental disability or for some other reason, the lawyer should, as far as reasonably possible, maintain a normal client lawyer relationship with client." The Rule goes on, however, in subpart (b) to provide that "A lawyer may seek the appointment of a guardian or take other protective action with respect to a client, only when the lawyer reasonably believes that the client cannot adequately act in the client's own interest."

Based upon the facts which you have described, it is for you to determine whether M's memory impairment rises to the level that you are required to take action under Rule 1.14 (b). Should you conclude that such protective action is required, I would further advise that, at least initially, you take a benign approach. Arranging for a meeting with M, together with her brother, either in your offices or at her home, accompanied by an appropriate explanation of the confidentiality of such meeting may assuage her concerns about confidentiality in connection with keeping such meeting secret from her sister. Whether the power of attorney which M has executed in favor of her brother is broad enough to cover her estate planning is a matter of law about which neither I nor the Committee can or will opine. Moreover, you would be well advised to conduct sufficient due diligence to satisfy yourself that the brother is acting exclusively in M's best interests. Should you conclude that he is not, that his motives are suspect, and/or that he may be attempting to reshape M's Will for his benefit, or for the benefit of his

heirs, the likelihood that you will be required to take other protective actions, including without limitation, seeking appointment of a guardian, increases.

Initially, however, a meeting between you, M and the brother hopefully should resolve these problems. I suggest that you memorialize the meeting and ensure that a copy of the minutes of such meeting is personally delivered to M so that she may have a record of it and remind herself about what took place. You should specifically advise her to do so.