

Rule 1.14. CLIENT WITH IMPAIRED CAPACITY.

## **Connecticut Rules - Practice Book**

### **RULES OF PROFESSIONAL CONDUCT**

#### **CLIENT-LAWYER RELATIONSHIPS**

*As amended through March 1, 2013*

#### **Rule 1.14. CLIENT WITH IMPAIRED CAPACITY**

(a) When a client's capacity to make or communicate adequately considered decisions in connection with a representation is impaired, 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 is unable to make or communicate adequately considered decisions, is likely to suffer 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 legal representative.

(c) Information relating to the representation of a client with impaired capacity is protected by Rule 1.6. When taking protective action pursuant to subsection (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.

COMMENTARY: The normal client-lawyer relationship is based on the assumption that the client, when properly advised and assisted, is capable of making decisions about important matters. When the client is a minor or is unable to make or communicate adequately considered decisions, however, maintaining the ordinary client-lawyer relationship may not be possible in all respects. In particular, a severely incapacitated person may have no power to make legally binding decisions. Nevertheless, a client with impaired capacity often has the ability to understand, deliberate upon, and reach conclusions about matters affecting the client's own wellbeing. For example, children as young as five or six years of age, and certainly those of ten or twelve, are regarded as having opinions that are entitled to weight in legal proceedings concerning their custody. So also, it is recognized that some persons of advanced age can be quite capable of handling routine financial matters while needing special legal protection concerning major transactions.

The fact that a client suffers a disability does not diminish the lawyer's obligation under these

rules. Even if the person has a legal representative, the lawyer should as far as possible accord the represented person the status of client, particularly in maintaining communication.

The client may wish to have family members or other persons participate in discussions with the lawyer. When necessary to assist in the representation, the presence of such persons generally does not constitute a waiver of the attorney-client evidentiary privilege. Nevertheless, the lawyer must keep the client's interests foremost and, except for protective action authorized under subsection (b), must look to the client, and not family members, to make decisions on the client's behalf.

If a legal representative has already been appointed for the client, the lawyer should look to the representative for decisions on behalf of the client only when such decisions are within the scope of the authority of the legal representative. In matters involving a minor, whether the lawyer should look to the parents as natural guardians may depend on the type of proceeding or matter in which the lawyer is representing the minor. If the lawyer represents the guardian as distinct from the ward, and is aware that the guardian is acting adversely to the ward's interest, the lawyer may have an obligation to prevent or rectify the guardian's misconduct. See Rule 1.2(d).

**Taking Protective Action.** If a lawyer reasonably believes that a client is likely to suffer substantial physical, financial or other harm unless action is taken, and that a normal client-lawyer relationship cannot be maintained as provided in subsection (a) because the client lacks sufficient capacity to communicate or to make adequately considered decisions in connection with the representation, then subsection (b) permits the lawyer to take protective measures deemed necessary. Such measures could include: consulting with family members, using a reconsideration period to permit clarification or improvement of circumstances, using voluntary surrogate decision-making tools such as durable powers of attorney or consulting with support groups, professional services, adult-protective agencies or other individuals or entities that have the ability to protect the client. In taking any protective action, the lawyer should be guided by such factors as the wishes and values of the client to the extent known, the client's best interests and the goals of intruding into the client's decision-making autonomy to the least extent feasible, maximizing client capacities and respecting the client's family and social connections.

In determining the extent of the client's impaired capacity, the lawyer should consider and balance such factors as: the client's ability to articulate reasoning leading to a decision, variability of state of mind and ability to appreciate consequences of a decision; the substantive fairness of a decision; and the consistency of a decision with the known long-term commitments and values of the client. In appropriate circumstances, the lawyer may seek guidance from an appropriate diagnostician.

If a legal representative has not been appointed, the lawyer should consider whether appointment of a legal representative is necessary to protect the client's interests. In addition, rules of procedure in litigation sometimes provide that minors or persons with impaired capacity must be

represented by a guardian or next friend if they do not have a general guardian. In many circumstances, however, appointment of a legal representative may be more expensive or traumatic for the client than circumstances in fact require. Evaluation of such circumstances is a matter entrusted to the professional judgment of the lawyer. In considering alternatives, however, the lawyer should be aware of any law that requires the lawyer to advocate the least restrictive action on behalf of the client.

**Disclosure of the Client's Condition.** Disclosure of the client's impaired capacity could adversely affect the client's interests. For example, raising the question of impaired capacity could, in some circumstances, lead to proceedings for involuntary conservatorship and/or commitment. Information relating to the representation is protected by Rule 1.6. Therefore, unless authorized to do so by these rules or other law, the lawyer may not disclose such information. When taking protective action pursuant to subsection (b), the lawyer is impliedly authorized to make the necessary disclosures, even when the client directs the lawyer to the contrary. Nevertheless, given the risks of disclosure, subsection (c) limits what the lawyer may disclose in consulting with other individuals or entities or seeking the appointment of a legal representative. At the very least, the lawyer should determine whether it is likely that the person or entity consulted with will act adversely to the client's interests before discussing matters related to the client. The lawyer's position in such cases is an unavoidably difficult one.

**Emergency Legal Assistance.** In an emergency where the health, safety or a financial interest of a person with impaired capacity is threatened with imminent and irreparable harm, a lawyer may take legal action on behalf of such a person even though the person is unable to establish a client-lawyer relationship or to make or express considered judgments about the matter, when the person or another acting in good faith on that person's behalf has consulted with the lawyer. Even in such an emergency, however, the lawyer should not act unless the lawyer reasonably believes that the person has no other lawyer, agent or other representative available. The lawyer should take legal action on behalf of the person only to the extent reasonably necessary to maintain the status quo or otherwise avoid imminent and irreparable harm. A lawyer who undertakes to represent a person in such an exigent situation has the same duties under these Rules as the lawyer would with respect to a client.

A lawyer who acts on behalf of a person with impaired capacity in an emergency should keep the confidences of the person as if dealing with a client, disclosing them only to the extent necessary to accomplish the intended protective action. The lawyer should disclose to any tribunal involved and to any other counsel involved the nature of his or her relationship with the person. The lawyer should take steps to regularize the relationship or implement other protective solutions as soon as possible. Normally, a lawyer would not seek compensation for such emergency actions taken.

**History.** P.B. 1978-1997, Rule 1.14. Amended June 26, 2006, to take effect Jan. 1, 2007; amended June 30, 2008, to take effect Jan. 1, 2009.