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FAMILY LAW

Rules and Procedures When You're Concerned About Your Client's Mental Health

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While attorneys are not qualified to diagnose mental illness or assess a client's mental capacity, it is important for lawyers to be aware of each client's mental well-being and cognizant of the ethical and procedural issues in play they suspect a client may suffer from diminished mental capacity. The client's right to self-determination is key; however, courts and attorneys must be mindful of occasions where an individual's diminished capacity may interfere with their ability to act within their own best interests. The RPCs, statutes, caselaw and civil procedure provide attorneys guidance in navigating the representation of a potentially mentally diminished client.

RPCs

If you, as an attorney, have reason to believe that a client has diminished mental capacity, the RPCs mandate that you must nonetheless continue to maintain as normal an attorney-client relationship as possible under the circumstances. RPC 1.14(a). In fact, under RPC 1.2(a), you are required to "abide the client's decisions" and to do so with "reasonable diligence" pursuant to RPC 1.3. Your role as an attorney is "not to determine whether the client is competent to make a decision, but to advocate the decision the client makes." *In the Matter of M.R.*, 135 N.J. 155, 176 (1994). That role, however, does not extend to advocating client decisions that are "patently absurd or that pose an undue risk to the client." *Id.*

Thus, if you find that you are unable to maintain a "normal" attorney-client relationship due to your client's mental health, and you are concerned that the client is "at risk of substantial physical, financial, or other harm," you may take reasonable steps to protect the client under RPC 1.14(b).

Specifically, RPC 1.14 provides:

> When a client's capacity to make adequately considered decisions in connection with the 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.*
>
> *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 *reasonably necessary* protective action, including consulting with individuals or entities that have the ability to take action to protect the client

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> and, in appropriate cases, seeking the appointment of a guardian ad litem, conservator, or guardian.
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> Information relating to the representation of a client with diminished capacity is protected by RPC 1.6. When taking protective action pursuant to paragraph (b), the lawyer is impliedly authorized under RPC 1.6(a) to *reveal information about the client, but only to the extent reasonably necessary to protect the client's interests.*

RPC 1.14 (emphasis added).

If an attorney believes it appropriate to take steps to protect the client's physical, financial or other interests, she remains subject to the privilege considerations of RPC 1.6 (Confidentiality of Information), which provides, in part, that a lawyer shall not reveal information relating to representation of a client unless the client consents after consultation. As provided in RBC 1.14(c), however, lawyers may disclose information otherwise protected by RPC 1.6 "to the extent reasonably necessary to protect the client's interests" when that lawyer believes the client has diminished capacity. Thus, the attorney is permitted to share the most restrictive amount of information necessary to others, including the court, in the interests of protecting her client if she believes the client is jeopardizing the client's own best interests due to compromised mental health or capacity.

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Procedural Options: General Guardian vs. Guardian Ad Litem

In seeking to protect the client's best interests pursuant to RPC 1.14(b), the attorney or the court may consider whether the appointment of a guardian ad litem ("GAL") (R. 4:26-2) or general guardian (N.J.S.A. 3B:12-24, et. seq., and R. 4:86-1, et. seq.) is appropriate, depending upon the degree to which the client is believed to have diminished capacity. A general guardian appointment may be appropriate where the client lacks capacity to handle the majority of their personal affairs, while a GAL may be appropriate if the client's lack of capacity is limited to decision making in litigation.

General Guardian. In cases of a client's severe diminished capacity, it may be appropriate for the attorney to seek the appointment of a general guardian over the person and property of the incapacitated client. This is an extreme measure as a general guardianship deprives the allegedly incapacitated person of control over her property and personal affairs. *See, S.T. v. 1515 Broad Street*, 455 N.J. Super. 538, 552 (App. Div. 2018). Such an appointment requires formal adjudication by the court in a proceeding instituted under N.J.S.A. 3B:12-24, et seq., and R. 4:86-1, et. seq., and which considers the constitutional rights of the alleged incapacitated person.

In order to commence a guardianship application, R. 4:86 requires a filed complaint in the New Jersey Superior Court, Chancery Division, Probate Part, and affidavits of at least two physicians, or one physician and a psychologist, providing a "diagnosis and prognosis." R. 4:86-2. The affidavits must provide opinion as to the extent to which the person is "unfit and unable to govern himself or herself and to manage his or her affairs" and must set forth "with particularity the circumstances and conduct of the alleged incapacitated person upon

which the opinion is based." *Id*. The process requires a formal hearing, and the court must make findings regarding the alleged incapacitated person's mental health pursuant to clear and convincing evidence. R. 4:86-6.

If the court reaches judgment of legal incapacity, the judge will appoint a guardian over the person or property. The guardian must accept the appointment, post a bond, and attend training pursuant to R. 4:86-5(b). The guardian must thereafter file annual reports with the Surrogate as to the well-being of the incapacitated person and provide a financial accounting of the incapacitated person's affairs pursuant to N.J.S.A. 3B:12-42.

Guardian Ad Litem. In instances where a client's diminished capacity does not impact the totality of their personal affairs but, rather, affects only that portion of their life related to a particular litigation, it is more appropriate to seek the appointment of a GAL rather than a general guardian. The GAL appointment does not require the court to make an adjudication of incompetency and, instead, requires only that there be an "allegation" that the individual suffers from some diminished capacity. In this regard, the GAL has less power over the alleged incompetent than a general guardian and is appointed for the limited purposes of representing the interests of a minor or alleged incompetent in the context of a particular litigation. See R. 4:26-2. A separate action is not necessary and the court may appoint the GAL within the context of the litigation at issue. The "function" of the GAL is simply to "insure the protection of the rights and interests of a litigant who is apparently incompetent to prosecute or defend the lawsuit." *S.T.*, 455 N.J.Super. at 553 (quoting *In re S.W.*, 158 N.J. Super. 22, 25-26 (App. Div. 1978)).

In *S.T. v. 1515 Broad Street,* 455 N.J. Super. at 555-557, the Appellate Division reviewed the standard for appointing a GAL and drew a distinction between two discrete potential roles of the GAL: that of fact-finder, and that of decision maker. In the first instance, where the court appoints a GAL to serve merely as a fact-finder to investigate the mental health of the litigant and to assist the court in determining the "best interests" of that person, the court may do so based upon a showing of "good cause." *Id.* In that instance, the GAL is appointed to conduct an investigation, submit a report to the court, and advise the court as to whether a formal competency hearing is necessary. *Id*. (citing Pressler & Verniero, Current N.J. Court Rules, cmt. 3 on R. 4:46-2 (2018)).

If, after the court reviews the GAL report and makes a determination that the litigant is unable to make litigation decisions consistent with his or her best interests, the court may then appoint the GAL to make decisions in the litigation on behalf of the litigant consistent with the litigant's "best interests." *Id*. at 556. Here, the court must be mindful of the litigant's rights of self-determination and, accordingly, must specifically identify which decisions the person lacks capacity to make pursuant to "clear and convincing evidence." *Id*. at 557-559. The court may then appoint the GAL to make those decisions on behalf of the alleged incompetent litigant. *Id.* at 559 (citing *In re Conroy,* 98 N.J. 321, 381 (1985)). Interestingly, the client's attorney and the GAL may then seek to advance differing positions in the litigation—with the attorney advocating for the client's desires and the GAL advocating for the client's best interests.

Conclusion

Clients have the right to self-determination, and attorneys are charged with zealously representing the client's decisions and objectives—but only to the degree that the decisions and objectives are not patently absurd and do not cause the client physical, financial or other harm. This is especially true where the attorney suspects the client may be making questionable decisions that may cause the client harm based upon a limited mental capacity. In those situations, the attorney has the responsibility of identifying the most restrictive information necessary to communicate his or her concerns to the court or others in an effort to protect the client. If necessary, the attorney or the court can seek to appoint a GAL or general guardian to assist the client and to act in the client's best interests. ■

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