Rule 1.14: Representing and Providing Emergency Legal Assistance to Persons with Decision-Making Limitations

(a) For purposes of this Rule, a person has "decision-making limitations" if the person has substantial difficulty receiving and understanding information, evaluating information, or making or communicating decisions despite appropriate supportive efforts or accommodations.

(b) Even when a lawyer's client has decision-making limitations that affect the client's ability to provide direction to the lawyer, or that affect the client's ability to make reasoned, informed choices, the lawyer shall, as far as reasonably possible, maintain an ordinary client-lawyer relationship with the client. For these purposes, an "ordinary client-lawyer relationship" includes abiding by the client's decisions concerning the objectives of the representation, keeping the client adequately informed about the status of the matter, explaining matters to the extent reasonably necessary for the client to make informed decisions regarding the representation; and rendering candid advice to the client. See Rules 1.2, 1.4, and 2.1.

(c) Notwithstanding paragraph (b), a lawyer may take reasonably necessary protective action without the client's consent if the lawyer reasonably believes (1) that the client is at risk of substantial physical, financial, or other harm unless action is taken and (2) that, because of the client's decision-making limitations, the client cannot adequately protect their own interests against this risk. The confidences and secrets of a client with decision-making limitations are protected by Rule 1.6. However, when taking protective action pursuant to this paragraph, a lawyer may reveal a client's confidences and secrets to the extent the lawyer reasonably believes it necessary to protect the client's interests.

(d) In some circumstances, when an emergency poses a threat of imminent, substantial, and irreparable harm to the health, safety, or financial interests of a person with decision-making limitations, a lawyer may take legal action on behalf of the person even though the person is unable to establish a client-lawyer relationship with the lawyer, or even though the person is unable to make or communicate reasoned, informed judgments about the matter. A lawyer is allowed to take this emergency action if all of the following conditions are met:

(1) the person with decision-making limitations has consulted with the lawyer, or another person, acting in good faith on that person's behalf, has consulted with the lawyer;

(2) the lawyer reasonably believes that the person with decision-making limitations has no other lawyer, agent, or representative available to act on the person's behalf; and

(3) the lawyer takes legal action on behalf of the person with decision-making limitations only to the extent reasonably necessary to maintain the status quo or to otherwise avoid imminent and irreparable harm.

A lawyer who undertakes to represent a person with decision-making limitations in such an emergency has the same duties under these Rules as the lawyer would have with respect to a client. The lawyer shall keep the confidences and secrets of the person as if dealing with a client, disclosing them only to the extent necessary to accomplish the intended protective action. The lawyer must disclose to any tribunal involved, and to any other lawyer or agency involved, the nature of the lawyer's relationship with the person with decision-making limitations, and the lawyer must take steps to regularize the relationship or to implement other protective solutions as soon as possible.

COMMENT

Client Abilities and Limitations

[1] A client's decision-making limitations do not diminish the lawyer's obligations under these Rules or the importance of treating the client with attention and respect. Except as provided in this Rule, a client with decision-making limitations is owed all the protections ordinarily afforded by the client-lawyer relationship.

[2] Decision-making limitations can be situational in nature and can vary in degree and over time. A client may have decision-making limitations with regard to certain issues and not others. A client with decision-making limitations often can understand, deliberate upon, and reach conclusions about matters affecting the client's own well-being. For example, some adults with substantial decision-making limitations, including those due to intellectual, developmental or cognitive disabilities, mental health conditions or substance abuse disorder, can make legal decisions. In addition, even if

unable to make some or all decisions, persons with decision-making limitations, including even very young minors, may have preferences and values that can guide the lawyer's representation.

[3] A client's decision-making limitations may be affected by multiple factors. Sometimes decision-making limitations can be alleviated or eliminated by using supports or making accommodations to enhance the client's decision-making abilities, and the use of these supports or accommodations can assist the lawyer in maintaining an ordinary client-lawyer relationship. Examples of supports and accommodations include communication devices or services, assistance of appropriate third parties or supported decision-making, environmental changes (e.g., conducting client meetings in a familiar setting), and using plain language or otherwise modifying the lawyer's communication and counseling techniques for the client.

Ordinary Client-Lawyer Relationship

[4] Lawyers are required to maintain, as far as reasonably possible, an ordinary client-lawyer relationship with clients with decision-making limitations. An ordinary client-lawyer relationship is based, in part, on the assumption that the client, when properly advised and assisted, can make and communicate reasoned, informed decisions about important matters. When the client has decision-making limitations, however, maintaining an ordinary client-lawyer relationship may not be possible in all respects. In particular, a client with decision-making limitations may have limited ability to make or communicate legally binding decisions.

[5] The client may wish to have family members or other persons participate in discussions with the lawyer. The lawyer should seek the client's informed consent to the presence of such persons. See Rule 1.6(a). If the presence of such persons assists in the representation, the lawyer should document these persons' role for future reference and to avoid a waiver of the attorney-client evidentiary privilege. Nevertheless, even when family members or other persons participate in discussions with the lawyer, the lawyer must keep the client's interests foremost and, except for protective action authorized under paragraph (b), must look to the client, and not family members or other persons, to make decisions on the client's behalf. Whenever possible, the lawyer should afford the client the opportunity to communicate privately with the lawyer without the presence or influence of others.

[6] When a family member or another seeks a lawyer's services on behalf of an individual who may have decision-making limitations, the lawyer should identify who the client is and seek to establish an ordinary lawyer-client relationship with that client. When a family member or another seeks the lawyer's assistance in drafting a legal document to be executed by an individual who may have decision-making limitations, the lawyer should be alert to the possibility of undue influence or fraud.

[7] When the client has granted an agent authority to make decisions, including an agent acting under a power of attorney, the lawyer nevertheless should take direction from the client and maintain communication with the client to the extent feasible unless the client has otherwise directed or is unable to provide direction. In addition, a lawyer may consult with and represent a person who seeks to challenge the actions of an agent or terminate or modify the agent's appointment. When representing a client in such situations, the lawyer must take direction from the client and advocate for the client's objectives. When a court has appointed a guardian, conservator, or other appointee who is not a guardian ad litem to act on behalf of a lawyer's client or prospective client, a lawyer should ordinarily look to the court appointee for those decisions on behalf of the client or prospective client over which the appointee has authority. However, a lawyer may consult with and represent a person subject to guardianship or conservatorship who seeks representation to challenge or modify the terms of that arrangement, or who seeks representation with regard to any other matter over which the person retains decision-making authority. When representing a client in such situations, the lawyer must take direction from the client and advocate for the client's objectives. If a lawyer represents the guardian, conservator, or agent of a person with decision-making limitations, and is aware that the guardian, conservator, or agent is acting adversely to the person's interest, the lawyer may have an obligation to prevent or rectify the misconduct. See Rule 1.2(d) and Rule 8.4(a)-(c).

[8] When a client in a criminal matter appears to have decision-making limitations, the lawyer's ethical duty to render competent representation and to protect the client's constitutional rights may require the lawyer to seek a competency evaluation or other mental health evaluation to determine whether the client is capable of deciding whether to testify or to plead guilty or to determine whether the client can meaningfully participate in preparation for trial, sentencing, or any another adjudicatory process. Because a client's

liberty may be at stake, these questions are uniquely difficult. Judicial decisions vary regarding whether, without the client's informed consent, a lawyer for the accused may or must raise doubts with the court about the competency of the accused. In such situations, lawyers should inform themselves of relevant judicial decisions and other authority in the jurisdiction and are encouraged to seek guidance from other organizations and resources, such as the ABA Defense Function Standard on Establishing and Maintaining an Effective Client Relationship and the ABA Criminal Justice Standards on Mental Health.

[9] A lawyer representing a minor should be mindful that the minor may have decision-making limitations due to age and stage of development. As with adult clients with decision-making limitations, the lawyer for a minor with decision-making limitations should, as far as reasonably possible, maintain an ordinary client-lawyer relationship with the minor. Accordingly, a lawyer for a minor capable of providing direction ordinarily should advocate for the minor's objectives of the representation. See Rule 1.2(a). In assessing the minor's decision-making limitations with regard to providing direction on a legal matter or with regard to any other aspect of the client-lawyer relationship, a lawyer should consider a variety of factors such as the minor's developmental stage, cognitive ability, emotional development, ability to communicate, ability to understand consequences, and consistency of decisions, the informed opinions of professionals and others with knowledge of the child's abilities and limitations, and the factors identified in the *Taking Protective Action* Comments below.

[10] A lawyer acting as guardian ad litem for a person is often tasked with advocating for the best interest of that person. Because the lawyer's assessment of what is in the best interest of that person may diverge from that person's objectives, lawyers who simultaneously act as a guardian ad litem for a person and provide direct legal representation of that person may find themselves in an ethically untenable position and should consider the need to withdraw as counsel or request to be relieved of the guardian ad litem appointment.

[11] A lawyer representing a client with decision-making limitations can employ a variety of techniques to ensure that the lawyer's representation is competent. For example, the lawyer can use developmentally appropriate interviewing and counseling skills when representing a minor, employ or

invite the client to use supports and accommodations that make it easier for the client to understand and communicate information, or meet with the client at a place and time where the client is likely to have less difficulty providing direction. To identify and learn such techniques, lawyers can seek guidance from resources developed by professional associations and others with expertise in working with individuals with decision-making limitations.

Taking Protective Action

[12] If a lawyer reasonably believes that a client is at risk of substantial physical, financial, or other harm unless action is taken, and that an ordinary client-lawyer relationship cannot be maintained as provided in paragraph (b) paragraph (c) permits the lawyer to take protective measures the lawyer reasonably deems 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, healthcare professionals, other professional services, adult-protective agencies, or other persons 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 minimizing intrusion into the client's decision-making autonomy, maximizing client capacities, and respecting the client's family and social connections. In litigation involving the capacity of the client, such as a guardianship or conservatorship proceeding, the lawyer should advocate for the client's expressed position regarding what, if any, protective action should be taken.

[13] In determining the extent of the client's decision-making limitations, the lawyer should consider and balance such factors as the client's ability to articulate reasoning leading to a decision; any variability of the client's state of mind and the client's ability to understand the consequences of a decision; the client's appreciation of the substantive fairness of a decision; the consistency of the client's expressed decision with the known long-term commitments and values of the client; and whether supports or accommodations could alleviate the factors contributing to the client's decision-making limitations. A lawyer's reasonable belief that the client cannot make and communicate reasoned, informed decisions may be based on the lawyer's own observations.

When evaluating a client's decision-making capacities, a lawyer who is aware of a healthcare professional's evaluation of the client's abilities and limitations should take that evaluation into consideration. But the lawyer should recognize that this evaluation may have been done for a different purpose, and that the healthcare professional may have used standards that differ from the relevant legal standard. The lawyer should also consider the possibility that the client's abilities at the time of this evaluation may have been different from the client's present abilities.

For these reasons, a lawyer's evaluation of a client's abilities should ordinarily not rest exclusively on the particular medical diagnosis that was reached in a prior healthcare evaluation. Rather, the lawyer should focus on the client's functional abilities, and the lawyer should consider whether, and to what extent, the client's limitations could be alleviated by the use of accommodations or supports.

[14] A lawyer is permitted to form a reasonable belief that a client has decision-making limitations even though the client has not been evaluated by a healthcare professional or a court. Nevertheless, in appropriate circumstances, the lawyer may seek guidance from a healthcare professional with relevant expertise or with knowledge of the client's abilities or limitations. If obtaining this guidance requires revealing the client's confidences or secrets and the client does not or cannot give informed consent, the lawyer may reveal these confidence or secrets as permitted by paragraph (c).

[15] If a lawyer reasonably believes that the client meets the criteria set forth in paragraph (c) of this Rule, the lawyer may consider whether appointment of a guardian ad litem, conservator, or guardian is necessary to protect the client's interests. For example, if the client has substantial property that should be sold for the client's benefit, effective completion of the transaction may require the creation of a temporary or limited guardianship or conservatorship, or a court order. In addition, rules of procedure in litigation sometimes provide that minors or persons with decision-making limitations must have their interests represented by a guardian ad litem or next friend if they do not have a general guardian. In many circumstances, however, appointment of such a legal representative may be more intrusive, expensive, or traumatic for the client than circumstances in fact require. Evaluation of the particular circumstances is a matter entrusted to the

professional judgment of the lawyer. However, a lawyer should generally advocate the least restrictive action on behalf of the client consistent with the law. A lawyer should also communicate with the client regarding any such protective action to the extent feasible, unless the client's knowledge of these matters is not necessary for the client to make informed choices about the representation and would be detrimental to the client or to the lawyer's ability to protect the client's interests. See Rule 1.4.

[16] If another person has petitioned a court for an appointment of a conservator or a guardian, or has petitioned for any other restriction on the client's legal capacity, the lawyer may not advocate for this appointment or restriction if the client opposes it. If the lawyer represents a client who is a respondent in a proceeding for guardianship or conservatorship, the lawyer must advocate for the client's objectives if they are known or ascertainable.

[17] Taking protective action under paragraph (c) of this Rule does not, without more, require a lawyer to terminate the representation. However, the lawyer must inform the client of the protective action, and the lawyer should consider whether withdrawing from the representation has become necessary under Rule 1.16(a) because of the unconsented-to protective action. For example, the lawyer may have a conflict of interest necessitating withdrawal in light of the particular protective action, the subject of the representation, the nature of the client-lawyer relationship, or other relevant considerations. See, e.g., Rule 1.7.

Disclosure of Information When Taking Protective Action

[18] Public disclosure of a client's decision-making limitations could adversely affect the client's interests. For example, raising the question of decision-making limitations could, in some circumstances, lead to proceedings for involuntary civil commitment. A client's confidences and secrets are protected by Rule 1.6. Thus, when taking protective action pursuant to paragraph (c), a lawyer may reveal those confidences or secrets only to the extent reasonably necessary to protect the client's interests. Moreover, even when no client confidences or secrets are involved, disclosure of a client's decision-making limitations may involve risk to the client's interests, and paragraph (c) therefore limits what the lawyer may disclose when consulting other persons or entities, or when seeking the appointment of a legal representative. At the very least, before discussing matters related to the client, the lawyer should investigate and determine whether it is likely

that the person or entity the lawyer intends to consult will act adversely to the client's interests.

Emergency Legal Assistance

[19] In an emergency which poses a threat of imminent, substantial, and irreparable harm to a health, safety, or financial interest of a person with decision-making limitations, paragraph (d) of this Rule allows a lawyer to take legal action on behalf of the person even though the person is unable to establish a client-lawyer relationship with the lawyer or to make or communicate reasoned, informed judgments about the matter. The lawyer is allowed to take legal action on behalf of the person with decision-making limitations 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 with decision-making limitations in such an emergency has the same duties under these Rules as the lawyer would have with respect to a client.

[20] A lawyer who undertakes to assist a person with decision-making limitations in such an emergency has the same duties under these Rules as the lawyer would have with respect to a client. The lawyer must protect the person's confidences and secrets, 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 lawyer or agency involved, the nature of the lawyer's relationship with the person with decision-making limitations, and the lawyer should take steps to regularize the relationship or implement other protective solutions as soon as possible. Ordinarily, a lawyer would not seek compensation for such emergency actions taken.