Rule 4-1.14: Diminished Capacity Resolving Diminished Clarity

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Picture this: you are an estate planning attorney in South Florida. It is a great place to hang your shingle because Florida has the highest percentage of senior citizens of any state in the nation, and many of them have settled here. On a Friday afternoon, you receive a call from Anita Yomoney, who introduces herself as the new girlfriend of your 87-year-old client, John Smith. You have represented and drafted various estate planning documents for John Smith over the past 10 years. The last time you saw John was in person three years ago and his estate was valued at over $15 million. Anita says that John would like to meet with you to update his estate plan. As any ethical estate planner would do, you tell Anita that you are happy to assist but you would need to meet directly with John Smith to receive the directions from him.

The day of the appointment arrives, and John Smith walks into your office accompanied by Anita. You tell Anita to wait in the lobby. John looks much older than when you last saw him and is much harder to understand. You ask him about Anita, his children, and how life has been since you last met. John says he met Anita on a dating app and that his children haven't called him in over two years. He mentions that he has repeatedly tried to reach out to his children, but each time he dials their respective phone numbers, he receives a message that the number has been disconnected. When you ask him about his assets, he explains that he believes he has about $3 million left because of the market's volatility and the time he has spent in the casino. John says he would like to leave everything in his estate to Anita and disinherit his children. He mentions that Anita will leave him unless he provides for her in his estate plan. Your RPPTL spider senses begin to tingle, and a slight sweat begins to form on your brow. Oh boy…what do you do now?

Until May 2, 2022, lawyers in your position might have struggled to determine whether they would be required under the Rules Regulating The Florida Bar to seek a determination of incapacity or the appointment of a guardian or take other "protective action" with respect to John Smith. Under the former version of Rule 4-1.14(b), effective January 1, 1993, to May 2, 2022, "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."[1] (Emphasis added.) Nevertheless, despite the "only" and "reasonably necessary" language found in the former version of Rule 4-1.14(b), the Comment to former Rule 4-1.14 seemed to posit a more affirmative obligation on the part of the lawyer, stating "If the [client] has no guardian or legal representative, the lawyer often must act as de facto guardian. … If a legal representative has not been appointed, the lawyer should see to such an appointment where it would serve the client's best interests."[2]

On the other hand, petitioning for a determination of incapacity or guardianship could conflict with your fiduciary duty to John Smith and your prohibition against sharing confidential information, and could ultimately cost you your license.[3] It was especially unclear to what extent you could communicate with John's children under these circumstances, as lawyers in Florida are prohibited from disclosing confidential information unless authorized to do so.[4] What if Anita has been blocking the children's phone calls and phone numbers? What if Anita has been feeding false information to John about his children? Although Comment 5 of the ABA Model Rule 1.14 suggests that a lawyer is implicitly authorized to communicate with family members when the lawyer "reasonably believes that a client is at risk of substantial physical, financial, or other harm unless action is taken, and that a normal client-lawyer relationship cannot be maintained,"[5] Florida's former version of Rule 4-1.14 and its Comment did not contain similar language and differed in many respects from the ABA Model Rule 1.14.

On March 3, 2022, the Florida Supreme Court enacted major revisions to Rule 4-1.14 and its comment to bring the rule more in line with ABA Model Rule 1.14.[6] These revisions began as an RPPTL Section initiative focused on providing better clarity on what a lawyer *may* or *must* do when the lawyer believes a client has diminished capacity. The most significant changes that lawyers should note are an entirely revised subsection (b), entitled "Protective Action," and the addition of a new subsection (c), entitled "Confidentiality."[7] In addition, the revised Comment to Rule 4-1.14 provides enhanced clarity for lawyers who remain unsure about their obligations under the revised Rule. The Comment contains subheadings that correspond with the Rule's "Protective Action" and "Confidentiality" subsections, (b) and (c), respectively, and a separate subheading discussing considerations when a lawyer

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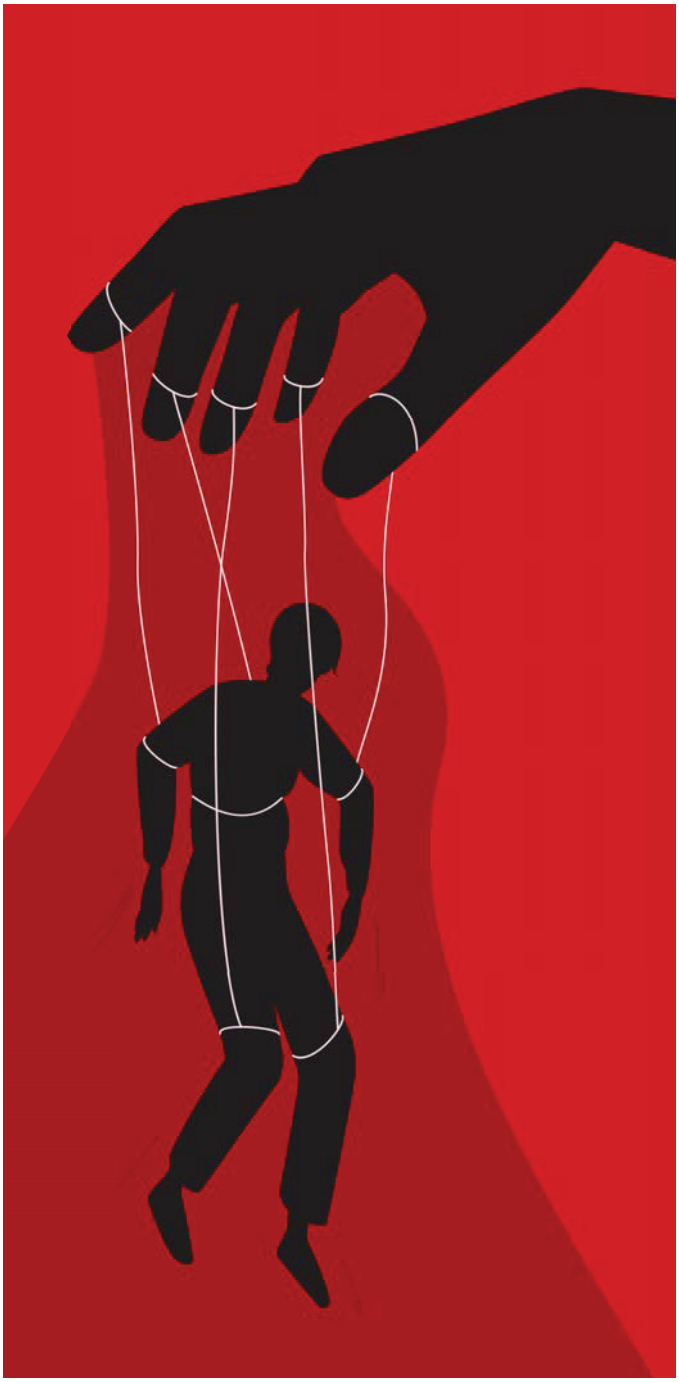
decides to provide "Emergency legal assistance." By bringing the Florida Rule more in line with the ABA Model Rule, the Florida Supreme Court enabled practitioners to rely more decisively on the commentary provided in by the Model Rule in addition to the new commentary provided by the Florida Rule.

Revised subsection (b) makes it clear that "[a] lawyer is not required to seek a determination of incapacity or the appointment of a guardian or take other protective action with respect to a client."[8] This resolves any doubt as to whether a lawyer is jeopardizing his or her license for deciding not to petition for a determination of incapacity when presented with the client scenario detailed above. Nevertheless, subsection (b) *authorizes* a lawyer to take "reasonably necessary protective action" when the lawyer believes the client has "diminished capacity, is at a risk of substantial physical, financial, or other harm unless action is taken " and the client " cannot adequately act in the client's own interest."[9] In addition to the well-known and controversial solution of seeking the appointment of a guardian, subsection (b) provides a less controversial alternative, which is merely to "[consult] with individuals or entities that have the ability to act to protect the client." Much in line with the public policies surrounding Chapter 744, subsection (b) reminds practitioners that "reasonable efforts" must be made "to exhaust all other available remedies to protect the client before seeking removal of any of the client's rights or the appointment of a guardian."[10]

Would conferring with John's children or the "individuals or entities that have the ability to act to protect the client" run afoul of your duty of confidentiality under Rule 4-1.6 ? Revised subsection (c) of Rule 4-1.14 makes it clear that the lawyer is impliedly authorized under Rule 4-1.6 to reveal information about the client in connection with taking protective action under subsection (b), as long as information is revealed only to the extent reasonably necessary to protect the client's interests.[11] The revised Comment to Rule 4-1.14 goes so far as to confirm that the presence and assistance of family members or other persons necessary to assist in the representation of a client further the rendition of legal services to the client and do not waive the attorney-client privilege. However, except for taking protective action authorized under subsection (b), the lawyer must look to the client to make decisions on the client's behalf and should still be mindful of protecting the privilege when taking protective action. This is particularly important if the persons or entities with whom the lawyer consults could end up acting adversely to the client's interests. The Comment provides that, "At the very least, the lawyer should determine whether it is likely the person or entity consulted with will act adversely to the client's interests before discussing matters related to the client."[12] The lawyer may not represent a third party in seeking to have a court appoint a guardian for the client.[13] Practice note: consider making a note to your file why you chose to speak with the selected persons or entities and their relationship to the client.



What about being a "de facto guardian" (as mentioned in the old Comment) for your client? And what does that even mean? Does a "de facto guardian" lawyer have separate fiduciary duties to the client apart from those included or implied by your initial scope of representation? No need to fear: that sentence in the Comment has been deleted. Specifically, the Comment now provides suggestions and examples of how an attorney may take protective action and emphasizes other alternatives to seeking a guardianship. It even references the "substituted judgment" and "best interests" standards found in Chapter 744 and that the protective action selected will often be governed by one of those standards.[14]

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Lastly, how do you even determine whether John Smith has diminished capacity for you to take action under the Rule? Is it enough that he has admitted to gambling away a significant amount of money and that Anita might be taking advantage of him? Is the old adage "where there's smoke, there's fire" appropriate here? ABA Opinion 96-404[15] states:

A client who is making decisions that the lawyer considers to be ill-considered is not necessarily unable to act in his own interest, and the lawyer should not seek protective action merely to protect the client from what the lawyer believes are errors in judgment. … Substituting the lawyer's own judgment for what is in the client's best interest robs the client of autonomy and is inconsistent with the principles of the "normal relationship."

Luckily, the revised Comment provides some factors you may incorporate into your determination of John's capacity, such 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."[16] Lawyers should also feel free to consult any commentaries that interpret the now similar MRPC 1.14.[17] For instance, the ACTEC Commentaries to MRPC 1.14 provide helpful guidance in deciding whether protective action is warranted:

> In determining whether to act and in determining what action to take on behalf of a client, the lawyer should consider the impact a particular course of action could have on the client, including the client's right to privacy and the client's physical, mental and emotional well-being. … For the purposes of this rule, the risk of harm to a client and the amount of harm that a client might suffer should both be determined according to a different scale than if the client were fully capable. In particular, the client's diminished capacity increases the risk of harm and the possibility that any particular harm would be substantial. If the risk and substantiality of potential harm to a client are uncertain, a lawyer may make reasonably appropriate disclosures of otherwise confidential information and take reasonably appropriate protective actions. In determining the risk and substantiality of harm and deciding what action to take, a lawyer should consider any wishes or directions that were clearly expressed by the client when he or she had full capacity. Normally, a lawyer should be permitted to take actions on behalf of a client with apparently diminished capacity that the lawyer reasonably believes are in the best interests of the client.[18]

The new Florida Rule 4-1.14 conforms almost entirely to the model rule[19] and should ultimately give Florida lawyers more confidence in their reliance on MRPC 1.14's longstanding commentaries.

Florida lawyers may take refuge in the clarifications provided by the revised Rule 4-1.14. They may rest assured that their licenses are not on the line for taking or not taking protective action for clients who possibly suffer from diminished capacity.


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Endnotes

1 Emma Rubin, *Elderly Population in U.S. by State*, Consumer (February 17, 2022), https://www.consumeraffairs.com/homeowners/elderly-population-by-state.html.

2 R. Regulating Fla. Bar 4-1.14 (effective January 1, 1993, to March 3, 2022).

3 *See* In re Eugster, 166 Wn. 2d 293 (Wash. 2009).

4 R. Regulating Fla. Bar 4-1.6

5 *See* Model Rules of Prof'l Conduct r. 1.14, cmt. (Am. Bar Ass'n 1980).

6 *See* In Re: Amendments To The Rules Regulating The Florida Bar – Biennial Petition, Case No. SC20-1467.

7 R. Regulating Fla. Bar 4-1.14 (2022).

8 *Id.*

9 *Id.*

10 *See* Fla. Stat. § 744.334(1) (2022).

11 R. Regulating Fla. Bar 4-1.14 (2022).

12 *Id.*

13 ABA Comm'n on Ethics & Prof'l Responsibility, Formal Op. 96-404 (1996) ("However, Rule 1.14 does not otherwise derogate from the lawyer's responsibilities to his client, and certainly does not abrogate the lawyer-client relationship. In particular, it does not authorize a lawyer to represent a third party in seeking to have a court appoint a guardian for his client. Such a representation would necessarily have to be regarded as "adverse" to the client and prohibited by Rule 1.7(a)… .")

14 Compare Fla. Stat. § 744.441, (2022) and In re Guardianship of Bohac, 380 So. 2d 550 (Fla 2d DCA 1980) with Fla. Stat. §§ 744.312(1) and 744.361 (2022).

15 ABA Comm'n on Ethics & Prof'l Responsibility, Formal Op. 96-404 (1996).

16 R. Regulating Fla. Bar 4-1.14 (2022).

17 *See generally* Model Rules of Prof'l Conduct r. 1.14 (Am. Bar Ass'n1980).

18 ACTEC Commentary on MRPC 1.14 (5th Ed. 2016).

19 The reader should note that the Florida Rule does differ in some respects from the model rule, but the new Florida rule arguably provides elevated guidance to the practitioner.