

Vermont Rules of Professional Conduct
Rule 1.14 – Client with Diminished Capacity

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*This unofficial version was last updated on **November 14, 2022**.*

- Kennedy's Highlights
- (NOT a substitute for full research of the rule & opinions/decisions on it)
- Rule 1.14 has not been amended since 2009

RULE 1.14. Client With Diminished Capacity.

(a) When a client's capacity to make adequately considered decisions in connection with a 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.

(b) 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 and, in appropriate cases, seeking the appointment of a guardian ad litem, conservator or guardian.

(c) Information relating to the representation of a client with diminished capacity is protected by Rule 1.6. When taking protective action pursuant to paragraph (b) or (d), 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.

(d) In an emergency where the health, safety, or a financial interest of a person with seriously diminished capacity is threatened with imminent and irreparable harm, a lawyer may take legal action on behalf of the person even though the person is unable to establish a client-lawyer relationship or to make or express considered judgments about the matter, provided that the following conditions exist:

- (1) The person or another person acting in good faith in that person's behalf has consulted with the lawyer.
- (2) 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 acting under this paragraph has the same duties under these rules that the lawyer would have with respect to a client. The lawyer should take steps to regularize the relationship or implement other protective solutions as soon as possible.

Comment

[1] 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 suffers from a diminished mental capacity, 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 diminished capacity often has the ability to understand, deliberate upon, and reach conclusions about matters affecting the client's own well-being. 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.

[2] The fact that a client suffers a disability does not diminish the lawyer's obligation to treat the client with attention and respect. 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.

[3] 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 affect the applicability of the attorney-client evidentiary privilege. Nevertheless, 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, to make decisions on the client's behalf.

[4] 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. 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

[5] If a 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 as provided in paragraph (a) because the client lacks sufficient capacity to communicate or to make adequately considered decisions in connection with the representation, then paragraph (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.

[6] In determining the extent of the client's diminished 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.

[7] If a legal representative has not been appointed, the lawyer should consider whether appointment of a guardian ad litem, conservator or guardian is necessary to protect the client's interests. Thus, if a client with diminished capacity has substantial property that should be sold for the client's benefit, effective completion of the transaction may require appointment of a legal representative. In addition, rules of procedure in litigation sometimes provide that minors or persons with diminished 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

[8] Disclosure of the client's diminished capacity could adversely affect the client's interests. For example, raising the question of diminished capacity could, in some circumstances, lead to proceedings for involuntary commitment. Information relating to the representation is protected by Rule 1.6. Therefore, unless authorized to do so, the lawyer may not disclose such information. When taking protective action pursuant to paragraph (b) or (d), 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, paragraph (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

[9] A lawyer who acts on behalf of a person with seriously diminished capacity in an emergency pursuant to paragraph (d) 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. Normally, a lawyer would not seek compensation for such emergency actions taken.

Reporter's Notes — 2009 Amendment

V.R.P.C. 1.14 is amended to conform to changes in Model Rule 1.14, retaining as V.R.P.C. 1.14(d) the provision for emergency action originally adopted as V.R.P.C. 1.14(c) that is not in the Model Rule text but is found in what is now ABA Comments [9] and [10]. See Reporter's Notes to V.R.P.C. 1.14 (1999). As noted below, the amendment to Model Rule 1.14(b) provides a mechanism for such action. V.R.P.C. 1.14(d) has been amended for consistency with changes in ABA Comment [9].

The ABA Reporter's Explanation is as follows:

TEXT:

1. Caption: Change to "Client with Diminished Capacity"

In the caption and thereafter throughout the Rule, terminology referencing a client's capacity is changed to focus on and more accurately express the continuum of a client's capacity.

2. Paragraph (a): Terminology change

The change in terminology in this paragraph is grammatical and reflective of the change of focus of the Rule to the continuum of a client's capacity.

3. Paragraph (b): Add protective measures lawyer may take short of request for guardian and requiring risk of substantial harm unless action is taken

The Commission recommends adding guidance for lawyers regarding "protective action" the lawyer may take short of seeking a guardian, which is generally deemed appropriate only in extreme circumstances. The revision permits the lawyer to "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 guardian ad litem, conservator or guardian." The Commission believes the recommended change offers the lawyer flexibility when a client faces substantial risk of harm or when emergency legal assistance is required as [provided in V.R.P.C. 1.14(d) and] described in Comments [9] and [10].

4. Paragraph (c): Add limitation on "protective action"

The Commission recommends addition of a new paragraph (c) to specify the means by which "protective action" should be limited to avoid client harm. The proposal explicitly recognizes the relationship of Rule 1.14(b) to Rule 1.6. Specifically, it states that Rule 1.6 allows disclosure of information under Rule 1.14(b) [or (d)] only as "reasonably necessary to protect the client's interests."

COMMENT:

[1] This Comment has been revised with collateral language changes to reflect the Rule's focus on degrees of a client's capacity.

[2] This Comment has been revised to delete the sentence, "If the person has no guardian or legal representative, the lawyer often must act as de facto guardian." The Commission views as unclear, not only what it means to act as a "de facto guardian," but also when it is appropriate for a lawyer to take such action and what limits exist on the lawyer's ability to act for an incapacitated client. The other revision to the Comment is a grammatical and stylistic change.

[3] This new Comment includes additional discussion of the potential risk in the common practice of having family members or other persons participate in the lawyer's representation of a client with diminished capacity. The change is recommended to encourage lawyers to seek such involvement since this practice may be of assistance to the representation. The Comment also points out potential risk to the extent that family

members may be guided, consciously or unconsciously, by their own interests instead of the interests of the client.

[4] This revision of [former] Comment [3] includes additional discussion indicating that parents as natural guardians may have the same rights as legal guardians to make decisions regarding their children, depending on the nature of the matter or proceeding. (Whether and when parents have rights to make decisions on their children's behalf is a matter of substantive law that is not addressed here.)

The discussion in [former] Comment [3] on the issue of whether the lawyer should seek appointment of a guardian has been moved, with modification, to new Comment [7]. Finally, [former] Comment [4] is now the last sentence of proposed Comment [4] in order to provide a single Comment on the lawyer's role when the client of diminished capacity already has a legal representative.

Caption "Taking Protective Action" has been added to highlight and focus on action the lawyer may take during representation of a client with diminished capacity.

[5] This new Comment sets forth the rationale for paragraph (b) and gives additional detail on the circumstances that might trigger the lawyer's permission to consult with family members, adult-protective agencies or other individuals or entities that have the authority to protect the client.

[6] This new Comment provides guidance on determining the extent of a client's diminished capacity.

[7] This new Comment addresses the issue of whether a lawyer should seek appointment of a guardian. Discussion of this issue in [former] Comment [3], with modification, is relocated here. The modification clarifies that, while it "may" be necessary to have a legal representative appointed to complete a transaction, it is not "ordinarily" required to the extent that a client with some degree of capacity may be able to execute a power of attorney. In addition, the discussion in [former] Comment [5] regarding rules of procedure requiring a guardian or next friend has been moved to this Comment. A new final sentence serves as a useful reference to other law that may impose a requirement that the lawyer take the least restrictive action under the circumstances.

[8] This is a revision of [former] Comment [5]. The first sentence has been moved to Comment [7]. The majority of the language is essentially new and refers to the limitations in paragraph (c) on the disclosure of information relating to the representation and clarifies the relationship between Rules 1.14 and 1.6. The last sentence of the current Comment has been deleted because the issue of whether a lawyer may seek guidance from a diagnostician is addressed in Comment [6].

[9] and [10] The changes reflect the Rule's new focus on degrees of a client's capacity.

Former ABA Comment [6] (now ABA Comment [9]) was not appended to V.R.P.C. 1.14 and is not included in these amendments, because, as noted above, its language has been incorporated in the rule. Changes in ABA Comment [9] are reflected in what is now V.R.P.C. 1.14(d). ABA Comment [10] is V.R.P.C. Comment [9]. A sentence that was incorporated in V.R.P.C. 1.14(d) continues to be omitted from that Comment.

Reporter's Notes

This rule has no counterpart in the Vermont Code. It requires the lawyer to try to maintain a client-lawyer relationship which is as normal as possible with the client whose ability to make decisions is impaired, and permits the lawyer to seek protective action regarding the client only when the lawyer reasonably believes the client cannot adequately act in the client's own interest. Rule 1.14(c) is based on paragraph [6] and part of paragraph [7], added to the Comment by the ABA House of Delegates in February 1997. The provision is included in the Vermont rule because it imposes the equivalent of a limited client-lawyer relationship on the lawyer. The final paragraph of the Comment contains the remainder of paragraph [7], also added by the February 1997 action of the House of Delegates.