

ETHICAL ISSUES FOR ELDER LAW ATTORNEYS

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(August 2004)**

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(July 2020)**

Elder law attorneys frequently face ethical issues arising out of their specialized area of practice. Often these questions are related to the diminished capacity of a client. This article briefly explores some of the ethical issues that may arise when a lawyer suspects that a client has become incompetent or is otherwise unable to make adequately considered decisions. The ethical issues that may arise include questions of conflicts of interest, which can come about for a variety of reasons, such as the involvement of children, caregivers, or others in consultations between the lawyer and the elder or the fact that someone other than the client is paying for the legal services. Ethical issues may also arise concerning the scope of the attorney's representation, communicating with unrepresented parties, and matters of client confidentiality.

An ethical issue may develop this way: Suppose a lawyer has represented a client for a number of years on estate-planning matters. The lawyer is contacted by the client's adult child, who believes that the client has become cognitively impaired and may be at risk of harm from a non-family caretaker who is allegedly seeking to exercise undue influence over the client. The son or daughter asks the lawyer for assistance in taking steps to protect the client, including possibly obtaining an appointment as client's guardian. At about the same time, the lawyer receives a letter from another attorney, enclosing a form signed by the client, discharging him. The new attorney is demanding that the lawyer turn over the client's file to her and has directed the lawyer not to contact the client.

Under ordinary circumstances, the lawyer's ethical obligations under these circumstances would be straightforward: A lawyer is obligated to withdraw from the representation of a client when discharged. Mass. R. Prof. C. 1.16(a)(3). A lawyer is also required to return the former client's file and other property within a reasonable time following the client's request. Mass. R. Prof. C. 1.15A(b). However, where there is reason to believe that the client may be incapacitated or under the undue influence of a third party, the lawyer is permitted to contact the client directly for the limited purpose of ascertaining if the client has actually discharged him, and to make a judgment as to whether the client was competent to make that decision. Compare MBA Ethics Opinion 04-1 (January 22, 2004) (discussing a similar situation, and suggesting that one possible scenario would be for the lawyer to write to the new attorney and request a private meeting with the "former" client to confirm his instructions); New York State Bar Ass'n Comm. on Professional Ethics, Op. 775 (May 4, 2004) (concluding that lawyer may contact the former client directly in order to ascertain the client's genuine wishes).

If, as a result of speaking with the client, the lawyer is satisfied that the decision to terminate the representation was not the product of undue influence or a lack of competency, the lawyer must withdraw and turn over the file as instructed. See Mass. R. Prof. C. 1.16(a)(3) and 1.15A(b), supra. To act contrary to the client's stated instructions concerning termination of the representation, without speaking with the client or counsel and without evidence of incompetency would constitute ethical misconduct. See Admonition 17-06, 33 Mass. Att'y Disc R. 557 (2017) (lawyer received admonition for refusing to abide by elderly client's instructions regarding change of counsel; lawyer suspected undue influence but did not attempt to communicate with client to validate that suspicion before taking actions contrary to client's stated wishes).

If, on the other hand, the lawyer determines that the client has become incompetent or lacks sufficient capacity to communicate or make adequately considered decisions regarding the representation, and the lawyer believes that the client is at risk of substantial harm (physical, mental, financial, or otherwise), Mass. R. Prof. C. 1.14 ("Client with Diminished Capacity") comes into play. Under Mass. R. Prof. C. 1.14(b), the lawyer may continue the representation to the extent necessary to protect the client's interests. If the lawyer determines that the client is at risk and lacks the physical or mental ability to protect himself or herself, the rule also authorizes the lawyer to take further protective steps on the client's behalf, including consulting individuals or entities that have ability to take action to protect the client and, in appropriate cases, seeking the appointment of a guardian *ad litem*, conservator, or guardian.

If the lawyer determines that a client in the hypothetical situation described above, or indeed any client, has become incapacitated, but the lawyer nevertheless wishes to withdraw from the representation, the lawyer may only do consistent with the provisions of Mass R. Prof. C. 1.16(b). In particular, unless some type of good cause exists for withdrawal (see Rule 1.16(b)(2) through (7)), the lawyer can only terminate the representation if withdrawal can be accomplished "without material adverse effect on the interests of the client." However, where the client "is at risk of substantial physical, financial or other harm unless action is taken" (see Mass. R. Prof. C. 1.14(b)), the better course of action would be for the attorney to continue the representation in order to take protective action on the client's behalf. See ABA Formal Ethics Opinion 96-404.

If the lawyer chooses to continue to represent the client, the proper scope of the representation must be considered. Mass. R. Prof. C. 1.2(a) provides that "[a] lawyer shall seek the lawful objectives of his or her client through reasonably available means permitted by law and these rules." Mass. R. Prof. C. 1.4 requires a lawyer to keep a client reasonably informed about the status of a matter and to explain a matter to the extent reasonably necessary to permit the client to make decisions regarding the representation, among other things. However, if the client has become incompetent or unable to communicate or make adequately considered decisions in connection with the representation, the client will be unable to provide direction to the lawyer as to the scope of the representation. Under these circumstances, as

noted above, the lawyer is authorized by Mass. R. Prof. C. 1.14(b) to take protective action on behalf of the client. However, this authority does not operate to give the lawyer control over every aspect of the incapacitated client's life. See ABA Formal Ethics Opinion 96-404.

In seeking assistance for the client, the lawyer must take the least intrusive action possible, and "may consult only those individuals or entities reasonably necessary to protect the client's interests and may not consult any individual or entity that the lawyer believes . . . will act in a fashion adverse to the interests of the client." Mass. R. Prof. C. 1.14(b). The lawyer may contact various individuals or entities that may have authority to protect the client. The lawyer is permitted to consult family members, even though the family member might be personally interested in the situation, if the lawyer reasonably believes that the family member will not act adversely to the client's interest. Mass. R. Prof. C. 1.14, comment [3]. In seeking assistance for his client, the lawyer is permitted to reveal his client's confidences, otherwise protected by Mass. R. Prof. C. 1.6(a), but only to the extent necessary to protect the client's interests in connection with the representation. Mass. R. Prof. C. 1.14(b).

In the hypothetical scenario above, the lawyer may contact the adult son or daughter for information regarding the client, but he should not agree to represent the child in the matter. See Admonition 17-06, supra (lawyer's misconduct in failing to respect elderly client's stated wishes in regard to change of counsel aggravated by his subsequent representation of client's daughter in seeking appointment of conservator over client). The representation of the child would be directly adverse to the client, and might be materially limited by the lawyer's responsibilities to the client. In addition, the client would not be able to consent to the conflict. Mass. R. Prof. C. 1.7(a) and (b). In speaking with the adult son or daughter concerning the matter, the lawyer must not state or imply that the lawyer is disinterested and must clarify that he is representing only the elderly client. Mass. R. Prof. C. 4.3(a). Accordingly, the lawyer should decline to give any advice to the son or daughter, other than the advice to secure their own counsel. Mass. R. Prof. C. 4.3(b). Finally, the lawyer may not accept compensation from the client's family members. To do so would create a potential conflict requiring the client's written and informed consent to waive and, in this example, the client would be unable to give that consent. Mass. R. Prof. C. 1.8(f)(1).

As noted above, Mass. R. Prof. C. 1.14(b) authorizes the lawyer to seek the appointment of a guardian for the client; but this option is warranted only as a last resort. The lawyer can file a petition asking the probate court to appoint a guardian or conservator for the client. However, the lawyer should not represent a third party who is seeking appointment as guardian or seek to serve as guardian. The representation of the potential guardian would be directly adverse to the representation of the client and, here, the client cannot consent to the representation because of incapacity. Mass. R. Prof. C. 1.7(a). To the extent that the lawyer believes that representation of the client has concluded, the lawyer still should not represent a person seeking the appointment as guardian of the former client, because the guardianship proceeding would be "substantially related" to the prior representation of the client, and the client, who has become incompetent, would be unable to consent after consultation to the representation. Mass. R. Prof. C. 1.9(a); ABA Formal Ethics Opinion 96-404.

A lawyer who undertakes representation of a third party in seeking the appointment of a guardian over a former client may also violate Mass. R. Prof. C. 1.9(c). That rule prohibits lawyers from using confidential information relating to the prior representation of the client to the disadvantage of the client, or for the advantage of the lawyer or a third party, without the client's consent after consultation. However, where the lawyer's representation of a client included making provisions for the appointment of guardian if and when the client needed one, information concerning the client's wishes in that regard – such as the client's preference for the appointment of a particular person as guardian – would not be “confidential information relating to the representation” that the lawyer was required to protect, but rather information the lawyer was implicitly authorized to disclose because of the nature of the legal representation. See Mass. R. Prof. C. 1.6(a) (exempting disclosures “impliedly authorized to carry out the representation” from general prohibition against disclosure of client's confidential information). See also, Guardianship of James A. Smith, 43 Mass. App. Ct. 493 (1997) (when a principal has nominated his future guardian by durable power of attorney, the probate court must appoint the person so nominated in the absence of good cause or disqualification).

If a guardian or other fiduciary is appointed to represent the client, the lawyer should look to the court-appointed fiduciary to make decisions on behalf of the client. See Mass. R. Prof. C. 1.14, comment [2]. The lawyer would not have a continuing ethical obligation to represent the ward's interests after the guardian is appointed. See Matter of Hocker, 439 Mass. 709 (2003) (Rule 1.14 imposes no affirmative duty on a lawyer appointed by a judge during guardianship proceedings to continue to represent her client after the judge has adjudicated the client to be mentally incompetent, appointed a permanent guardian for the client, and vacated the appointment). However, the lawyer would have certain continuing ethical obligations to the client, including the obligation to preserve the client's confidences pursuant to Mass. R. Prof. C. 1.6, subject to the exceptions enumerated in that rule.

The key to following the ethical rules discussed above is to continue representing the client, and abiding by the client's stated wishes, until such time as the client's incapacity or impairment makes it impossible to provide counsel to or receive direction from the client. If and when that occurs, and the client becomes at risk of personal harm or financial exploitation, the lawyer must exercise judgment in how to respond in order to protect the client, but must remain loyal to client and not undertake legal representation of a family member or third party in regard to the matter. If the lawyer is uncertain of his or her ethical responsibilities in such a situation, a review of the rules and comments referenced in this article should help resolve any doubts. However, the Office of Bar Counsel is also available to provide individual guidance to lawyers who uncertain of how to deal with situations involving elderly clients who may be suffering from diminished capacity. To obtain such assistance, call bar counsel's ethical helpline (617-728-8750) on any Monday, Wednesday, or Friday afternoon from 2:00 to 4:00.