

## **Formal Opinion 2018-1: Protective Action, and Disclosures of Confidential Information, to Benefit a Prospective Client with Diminished Capacity.**

**Topic:** Implied authority to take action, and to disclose confidential information, for the protection of a prospective client with diminished capacity.

**Digest:** A lawyer may take reasonably necessary protective action when a prospective client has seriously diminished capacity, cannot adequately act in his or her own interest, and is at risk of substantial physical, financial or other harm unless action is taken. When taking protective action, the lawyer is impliedly authorized under Rule 1.6(a) to reveal information about the prospective client to the extent reasonably necessary to protect the prospective client's interests. In interacting with the court or others in the course of taking protective action, the lawyer must clarify that the lawyer is not the prospective client's representative and that no client-lawyer relationship exists with the prospective client.

**Rules:** Rules 1.6, 1.14, 1.18, 3.3, 4.1 & 8.4.

Question: Under what circumstances may a lawyer take protective action for the benefit of a prospective client who, because of seriously diminished capacity, appears to be unable to form a client-lawyer relationship?

### **Opinion:**

#### **I. Introduction**

Rule 1.14 of the New York Rules of Professional Conduct (collectively, the "New York Rules" or "Rules") addresses the representation of a client whose capacity to make adequately considered decisions in the representation is diminished. Rule 1.14(b) describes the action that a lawyer may take to protect an incapacitated client from substantial harm, and Rule 1.14(c) recognizes that the lawyer in this situation is "impliedly authorized" to disclose the client's confidential information to the extent reasonably necessary to protect the client's interests. This Opinion addresses whether a lawyer may make comparable disclosures to benefit one who is not a current client but a *prospective* client who, because of incapacity, cannot retain the lawyer. The following scenario illustrates the problem that we address.

A tenant is brought to a legal services lawyer by a neighbor who is concerned that the tenant faces eviction from her apartment in the very near future for failing to pay rent. The lawyer would be willing and able to represent the tenant and defend the tenant in an upcoming hearing in housing court if it were ethically and legally permissible to do so. But while meeting with the tenant, the lawyer becomes concerned that the tenant is so seriously mentally incapacitated that she cannot retain the lawyer. The lawyer would nevertheless like to help, even in the absence of a client-lawyer relationship. This could include contacting a government protective-services agency or disclosing the tenant's diminished capacity to the housing court, which may then contact the protective services agency and stay proceedings. To do so, however, the lawyer would disclose information learned in the course of the meeting concerning the tenant's incapacity and her legal problem.

## II. Analysis

The threshold question in the above scenario is whether the tenant is a “prospective client,” in which case, the lawyer would have a duty of confidentiality to the tenant under Rule 1.18, even if no client-lawyer relationship was ever established. Under Rule 1.18(a), “a person who consults with a lawyer about the possibility of forming a client-lawyer relationship with respect to a matter is a prospective client.” Rule 1.18(b) provides that: “Even when no client-lawyer relationship ensues, a lawyer who has learned information from a prospective client shall not use or reveal that information, except as Rule 1.9 would permit with respect to information of a former client.”

If the tenant is not a prospective client (or current or past client) to whom confidentiality is owed, the legal services lawyer may try to help her using whatever information the lawyer learned from meeting with her or from other sources. Although the lawyer cannot act as the tenant’s agent in negotiating or contracting with the landlord or in filing a motion or answer in the litigation, because the lawyer does not represent her, the lawyer is not foreclosed from drawing on his legal knowledge, training and expertise to provide the kinds of help that a knowledgeable and concerned friend or neighbor who is not in a fiduciary relationship with the tenant might provide. *See* NYSBA Ethics Op. 486 (1978) (discussing permissible actions when lawyer learns, unrelated to the course of the representation, of a client’s intention to commit suicide).

Where the law permits, efforts to assist an incapacitated non-client may include (1) notifying a social services agency or a government adult-protective agency of the person’s condition and need for assistance, (2) acting as a witness, intervenor or “friend of the court” to apprise a court of the person’s incapacity and suggest that the court stay the proceedings or take other appropriate measures, or (3) requesting to be appointed the person’s attorney by the court, or moving for the appointment of another to serve as the person’s legal guardian or guardian *ad litem*. In dealing with a court, a government or social services agency, or another third party, the lawyer must be mindful of the duty of candor. *See* Rules 3.3(a)(1), 4.1, 8.4(c). The lawyer may not deceptively convey that the person is a client. When seeking protective action for the benefit of someone who is not a client, the lawyer must be clear that he is not acting as the person’s legal representative or agent, since otherwise a court or third party may assume that a client-lawyer relationship exists.

If, however, the tenant has “consult[ed] with a lawyer about the possibility of forming a client-lawyer relationship with respect to” the eviction matter, the tenant is a “prospective client” and the lawyer will have a confidentiality duty that may limit the protective action that the lawyer may take. Under Rule 1.18(a), the person’s capacity is irrelevant to the question of whether she is a prospective client. Even if, in hindsight, a person lacks the capacity to retain the lawyer, the person becomes a “prospective client” once she consults with the lawyer about forming a client-lawyer relationship in a matter.

In the scenario described above, where the tenant is brought to the legal services lawyer’s office by a neighbor, the tenant is likely to be a “prospective client” under Rule 1.18(a). The tenant will not be a “prospective client” if she is entirely uncommunicative, if she never

expresses interest (either herself or through her neighbor) in possibly retaining the lawyer and never otherwise communicates about this possibility, or if the lawyer, out of concern about the tenant's capacity, ends the meeting before such a discussion takes place. She will be a prospective client, however, if she consults the lawyer about the possibility of securing the lawyer's assistance, no matter how briefly.

Assuming the tenant not only discusses the possibility of enlisting the legal services lawyer's help but affirmatively requests or consents to the lawyer's help, and assuming the lawyer is willing to provide legal assistance, the next question is whether the lawyer may enter into a client-lawyer relationship with the tenant. A client-lawyer relationship may be established by court appointment even absent an agreement between the client and the lawyer, but the relationship "ordinarily is a consensual one." RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 14, Cmt. b (2000); *see also* NYSBA Ethics Op. 746 (2001) (a client-lawyer relationship is "ordinarily created by express or implied agreement between the lawyer and the client"). Where a prospective client's capacity is in doubt, the lawyer must make a threshold determination of whether she has the capacity to consent to the lawyer's representation. *See* RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS, *supra*, § 14, Cmt. d.

If a lawyer proposes to enter into an enforceable client-lawyer contract – for example, one including a provision to pay legal fees – the lawyer must ascertain whether the prospective client has the legal capacity to enter into such a contract.<sup>1</sup> However, the standard governing whether a person has the capacity to form a client-lawyer relationship under the Rules is not necessarily as stringent as the standard governing a person's legal capacity to enter into a fee agreement or the standard governing a person's legal capacity to retain a lawyer to act as an agent on her behalf.<sup>2</sup> Forming a client-lawyer relationship under the Rules for certain purposes, such as for purposes of obtaining legal advice or the lawyer's help in communicating with others, may require no more than the ability to consent to, or to express a desire for, the lawyer's help.

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<sup>1</sup> *See* Kentucky Bar Association, Op. KBA E-440 (Nov. 18, 2016) ("[A]t the initial state of the representation the lawyer's first duty is to determine whether the client suffers from diminished capacity to the extent the client cannot legally consent to an attorney-client contract."); Colorado Bar Association ("CBA"), Op. 126 (May 6, 2015) ("The lawyer's assessment of a client's capacity also is important when the lawyer initiates representation of the client. A client-lawyer relationship is a matter of contract, and the client's capacity to contract is a legal issue."); *see also* ABA Commission on Law and Aging, ASSESSMENT OF OLDER ADULTS WITH DIMINISHED CAPACITY: A HANDBOOK FOR LAWYERS 1 (2005) ("[T]he lawyer must determine whether or not a prospective client has sufficient legal capacity to enter into a contract for the lawyer's services. Failing this, representation cannot proceed.").

<sup>2</sup> Even if an individual lacks capacity to enter into an enforceable contract, the individual may have capacity to express a desire for a lawyer's assistance and thereby enter into a client-lawyer relationship. For example, children may be able to retain lawyers even if, because of their minority, any fee agreement between the child and the lawyer would be unenforceable. *See, e.g., In re Anonymous*, 333 N.Y.S.2d 897, 899 (Fam. Ct. Rockland Cnty. 1972) ("It would therefore clearly appear that the intention of the Legislature in enacting sections 241 and 249 of the Family Court Act was to provide for representation of a minor in a Family Court proceeding by a Law Guardian or counsel of his own choosing and not by a guardian ad litem pursuant to CPLR. In this case, the respondent was very ably represented throughout the entire proceeding by 'counsel of his own choosing' and therefore there was no necessity for the appointment of a Law Guardian in this matter.").

Rule 1.14 presupposes that, in many cases, individuals with diminished capacity are capable of maintaining a client-lawyer relationship. Comment [1] to Rule 1.14 recognizes that a lawyer may represent someone who is incapable of making certain considered judgments on her own behalf, although this condition “casts additional responsibilities upon the lawyer.” The Comment further recognizes that a lawyer may be able to represent someone who is severely incapacitated and unable to make legally binding decisions. Comment [6] to Rule 1.14 provides guidance regarding how to determine whether an existing client has decision-making capacity<sup>3</sup> but not regarding whether an individual has the capacity to retain a lawyer in the first place.

If the tenant discusses the possibility of enlisting the legal services lawyer’s help but the lawyer does not agree to represent her because the lawyer has not yet been able to determine whether the tenant has the requisite capacity to enter into a client-lawyer relationship, has concluded that she lacks capacity to form such a relationship, or has serious doubts about her capacity, the lawyer nonetheless has a confidentiality duty to the tenant as a “prospective client.”<sup>4</sup> Rule 1.18(b) provides that the scope of the confidentiality duty owed to a prospective client is the same as that owed under Rule 1.9 to a former client. Rule 1.9 in turn provides that as a general matter, a lawyer owes the same confidentiality duty to a former client as to a current client under Rule 1.6.<sup>5</sup> In other words, under the New York Rules, a lawyer owes essentially the same confidentiality duty to a prospective client as to a current or former client.

Rule 1.6, which establishes the scope of the duty of confidentiality, allows a lawyer to disclose or use a *current* client’s “confidential information”<sup>6</sup> not only when the client explicitly

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<sup>3</sup> For example, Comment [6] states that in making this determination, the lawyer:

should consider and balance such factors as: (i) the client’s ability to articulate reasoning leading to a decision, (ii) variability of state of mind and ability to appreciate consequences of a decision; the substantive fairness of a decision, and (iii) 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.

*See also* Nancy M. Maurer, *Ethical Issues in Representing Clients with Diminished Capacity*, ALBANY LAW SCHOOL RESEARCH PAPER NO. 24, 1-16 (citing Paul Tremblay, *On Persuasion and Paternalism: Lawyer Decisionmaking and the Questionably Competent Client*, 3 UTAH L. REV. 515, 537 (1987)) (“It is not enough to consider whether the client’s decisions are unwise but, rather, whether the client can give reasons for specific decisions and understand the consequences. The lawyer should not ‘confuse eccentric with incapacity.’”).

<sup>4</sup> Under Rule 1.18(c) and (d), the lawyer may also have a responsibility to detect and resolve potential conflicts of interest between the prospective client and the lawyer’s existing or future clients, which would be triggered by this duty of confidentiality to the prospective client. The issue of conflicts of interest involving prospective clients is beyond the scope of this Opinion.

<sup>5</sup> Rule 1.9(c)(2) provides: “A lawyer who has formerly represented a client . . . shall not thereafter . . . reveal confidential information of the former client protected by Rule 1.6 except as these Rules would permit or require with respect to a current client.”

<sup>6</sup> Rule 1.6 defines “confidential information” to include “information gained during or relating to the representation of a client, whatever its source, that is (a) protected by the attorney-client privilege, (b) likely to be embarrassing or detrimental to the client if disclosed, or (c) information that the client has requested be kept confidential.” *See generally* NYCBA Formal Op. 2017-2 (2017). The confidentiality duty would not apply if the particular information that the lawyer intends to disclose to the social services agency or to the housing court does not fit within this

gives “informed consent” but also when the lawyer is “impliedly authorized” to reveal or use client confidences. Specifically, Rule 1.6(a)(2) provides that a lawyer may reveal confidential information if “the disclosure is impliedly authorized to advance the best interests of the client and is otherwise reasonable under the circumstances or customary in the professional community.” Ordinarily, the lawyer’s implied authority to disclose a client’s confidential information arises out of the lawyer’s “general authority [as an agent] to take steps reasonably calculated to further the client’s objectives in the representation.” RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS, *supra*, § 61, Cmt. b.

Even though a lawyer is not the former or prospective client’s agent, the concept of “implied authorization” applies to former and prospective clients no less than to current clients, because Rules 1.18 and 1.9 generally incorporate the same confidentiality duty as is applied to current clients under Rule 1.6. Some of the circumstances where a lawyer may disclose a *former* client’s confidential information to advance the former client’s best interests have been identified in past opinions.<sup>7</sup>

When a current client is incapacitated, a lawyer is “impliedly authorized” to disclose client confidences in limited circumstances to protect the client from imminent harm. This ethical authority is explicitly recognized by Rule 1.14(c) and in Comments to the Rules. Rule 1.14 provides in full as follows:

- (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 conventional 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.

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definition. Ordinarily, the lawyer’s opinion that a client or prospective client is mentally incapacitated will be, in the very least, “embarrassing . . . if disclosed.” We assume in our hypothetical situation that disclosure of this information would in fact be embarrassing and that this information is therefore “confidential information” as defined by Rule 1.6.

<sup>7</sup> See NYSBA Ethics Op. 1084 (2016) (concluding that under Rule 1.6(a)(2) a lawyer may reveal confidential information learned from a deceased former client to a co-defendant based on the former client’s desire to exonerate the co-defendant); NYSBA Ethics Op. 1078 (2015) (advising that, pursuant to Rule 1.6(a)(2), a lawyer for a deceased former client may disclose to former client’s son that he never drafted the former client’s will, did not refer the former client to another law firm and did not have an original copy of the will); NYSBA Ethics Op. 970 (2013) (concluding that a lawyer for a deceased former client may have authority to disclose a client’s file to executor of former client’s estate under Rule 1.6(a)(2)).

(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), 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.

*See also* Rule 1.14, Cmt. [8] (“When taking protective action pursuant to paragraph (b), the lawyer is impliedly authorized to make the necessary disclosures, even when the client directs the lawyer to the contrary.”); Rule 1.6, Cmt. [5] (“Lawyers are also impliedly authorized to reveal information about a client with diminished capacity when necessary to take protective action to safeguard the client's interests.”).<sup>8</sup>

Although Rule 1.14(c), by its terms, applies only to incapacitated *current* clients, the same underlying principle applies with regard to incapacitated *former* and *prospective* clients. Prior authorities recognize that a lawyer has implied authorization to disclose confidences to protect an incapacitated *former* client, where the termination of the client-lawyer relationship is occasioned by the client's incapacity.<sup>9</sup> Likewise, a lawyer has implied authority to make reasonably necessary disclosures in emergency circumstances to protect a *prospective* client who is unable to form a client-lawyer relationship due to incapacity. This is especially true where protective action would advance the very objective for which the prospective client discussed the possibility of forming a client-lawyer relationship.

Therefore, in the scenario with which this Opinion began, if the lawyer reasonably concludes that the tenant lacks capacity to retain the lawyer and is at risk of substantial harm because she will imminently be evicted from her apartment, the lawyer may take protective action, which may include limited action in the eviction proceeding reasonably necessary to preserve the status quo or otherwise avoid imminent and irreparable harm.<sup>10</sup> In taking protective

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<sup>8</sup> As the above cited Comments recognize, Rule 1.14(c) is simply a special application of Rule 1.6(a)(2) in the case of a client under Rule 1.14(a) whose “capacity to make adequately considered decisions in connection with a representation is diminished, whether because of minority, mental impairment or for some other reason.” Even in the absence of Rule 1.14(c), a lawyer would be impliedly authorized under the confidentiality rule to make disclosures where reasonably necessary to protect the incapacitated client from imminent harm, as this Committee and others recognized before New York adopted Rule 1.14 in 2009. *See* NYCBA Formal Op. 1987-7 (1987) (finding that a lawyer may disclose client's mental disability in conservatorship proceeding even absent client's consent); NYSBA Ethics Op. 746 (advising that an incapacitated client's attorney may petition for appointment of a guardian).

<sup>9</sup> *See* RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS, *supra*, § 31, Cmt. e (recognizing that, despite the general rule that an agent's authority ends when the principal is incapacitated, a lawyer may continue to act to protect the rights of an incapacitated client, but must act consistently with the provisions governing the representation of clients with diminished capacity); *see also* NYSBA Ethics Op. 746 (“Under agency principles, a lawyer's authority to act for the client would ordinarily terminate upon the client's permanent, total incapacity as it would upon the client's death, but this is not invariably true. In court proceedings, for example, it may be appropriate for a lawyer to continue to represent the totally incapacitated client in order to protect his or her interests.”) (internal citation omitted).

<sup>10</sup> This Opinion does not attempt to address the full range of actions that a legal services lawyer may take to advance the interests of an incapacitated prospective client. In some scenarios, the lawyer may simply communicate concerns to a social worker who is in a position to help the prospective client; in others, the lawyer may explore

measures, the lawyer is impliedly authorized to reveal confidential information about the prospective client to a court, a social services agency or another, but only to the extent reasonably necessary to protect the prospective client's interests. Because disclosing the prospective client's diminished capacity could potentially prejudice the prospective client, the lawyer must ascertain whether the court or third party will act adversely to the prospective client and, even if satisfied that disclosure will be helpful, disclose only as little confidential information as is necessary for the prospective client's protection. *See* Rule 1.14, Cmt. [8]. If the lawyer is uncertain whether proposed action will benefit or prejudice the prospective client, the lawyer should seek guidance from a professional with greater knowledge and experience. Ordinarily, there will be no reasonable necessity to disclose confidential information to protect the person when adequate assistance is already available – for example, when the incapacitated individual already has a lawyer, agent or other representative who can protect the individual. *See* ABA Model Rule 1.14, Cmt. [9].<sup>11</sup>

Our interpretation of the Rules is consistent with, but does not depend on, the ABA's Comments on Emergency Legal Assistance to Rule 1.14 of the ABA Model Rules of Professional Conduct which many states other than New York have adopted. Comments [9] and [10] provide guidance to lawyers assisting individuals with seriously diminished capacity on an emergency basis in the absence of a client-lawyer relationship. Comment [9] to Model Rule 1.14 provides in part:

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 such a person even though the person is unable to establish a client-lawyer relationship or to make or express considered judgments about the matter, when the person or another acting in good faith on that person's behalf has consulted with the lawyer.

Comment [10] states in part:

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more significant action. *See, e.g.*, CBA Op. 126 (“If the lawyer becomes aware during the first meeting with a prospective client that the prospective client may not have the capacity to enter into an agreement to form the client-lawyer relationship, the lawyer may consider other alternatives, including speaking to other appropriate persons.”). If a lawyer undertakes legal protective action for an incapacitated party who is not a current client, such as an emergency motion to stay an incapacitated tenant's eviction, the lawyer must be candid with the court, as previously discussed. Unless appointed to serve as the tenant's lawyer or to serve the tenant in another fiduciary capacity, the lawyer must be clear that he is acting in his individual capacity and not as the tenant's lawyer, although the tenant may have discussed the possibility of securing the lawyer's help.

<sup>11</sup> As noted at the outset, this Opinion focuses on the ethical considerations applicable when a lawyer responds to an emergency facing someone with seriously diminished capacity who is a “prospective client” – that is, someone who “who consults with a lawyer about the possibility of forming a client-lawyer relationship.” The principles discussed here may apply differently when helping an incapacitated person who is threatened with imminent and irreparable harm but who has never been a client or prospective client – e.g., when the tenant's friend acting in good faith seeks the lawyer's help for a tenant with seriously diminished capacity with whom the lawyer cannot speak because of time constraints or because of the seriousness of the tenant's incapacity. In this scenario, the lawyer would not be subject to a confidentiality duty to the tenant under Rule 1.18. In communicating with the court or others, however, the lawyer would have to be candid about the lawyer's lack of any direct relationship or interaction with the tenant. The lawyer would also have to consider whether the tenant's friend was a client or prospective client and, if so, what ethical obligations follow. We leave fuller discussion of this scenario to another day.

A lawyer who acts on behalf of a person with seriously diminished capacity in an emergency 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.

We caution that these Comments to the ABA Model Rules do not imply that a lawyer has legal authority, comparable to that of a lawyer for a current client, to act on behalf of an incapacitated non-client in an emergency. Rather, they recognize that there is meaningful assistance that a lawyer can offer to a person with diminished capacity in an emergency situation even when the person is not a current client.<sup>12</sup>

### **III. Conclusion**

We conclude that a lawyer may take reasonably necessary protective action when a prospective client has seriously diminished capacity, cannot adequately act in his or her own interest, and is at risk of substantial physical, financial or other harm unless action is taken. When taking protective action, the lawyer is impliedly authorized under Rule 1.6(a) to reveal information about the prospective client to the extent reasonably necessary to protect the prospective client's interests. In interacting with the court or others in the course of taking protective action, the lawyer must clarify that the lawyer is not the prospective client's representative and that no client-lawyer relationship exists with the prospective client.

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<sup>12</sup> It appears that the NYSBA's drafting committee decided not to recommend the adoption of Comments [9] and [10] out of concern that they may be read to "authorize a lawyer to act [as a lawyer] on behalf of one who has not sought to employ the lawyer and with whom the lawyer has no [client-lawyer] relationship." Maurer, *supra*, 1-19 (quoting Committee on Standards of Attorney Conduct, Proposed New York Rules of Professional Conduct Rules 1.14, Reporters' Notes, 206). We believe the fairer interpretation of the ABA's Comments is that, as this Opinion describes, lawyers can help protect incapacitated non-clients in emergency situations as long as they avoid conveying the misimpression that they are acting as the non-clients' lawyers. In any event, we do not consider the NYSBA's decision not to adopt the ABA's Comments as a rejection of any of the principles or guidance set forth in this Opinion.