

Ethics Opinion 2019-02

Rule: 1.14

Subject: Client with diminished capacity

Summary: Lawyer may not independently seek appointment of a guardian and conservator for client with diminished capacity when family have been informed of possible need and lawyer does not perceive a substantial risk to client.

BACKGROUND

Lawyer represents, and has for many years represented, an elderly client. Lawyer has drafted a variety of estate planning documents for Client over nearly a decade.

Until recently, Lawyer has not had concerns about Client's mental capacity. While Client had periodic memory lapses, which did become more common as Client aged, Lawyer always believed Client was capable of independent decisions. Lawyer confirmed this with the results of psychosocial examinations administered by Client's physician.

Client's has relied heavily on Son in managing affairs. She has also demonstrated greater favor to Son than Other Children. At various times, Other Children have expressed concern that Son is "mooching" from Client.

In the past year Son's behavior has become erratic. Son agreed to resign as Client's financial power of attorney, co-trustee of Client's trust, and to remove himself from Client's various bank accounts. While a local bank is sole trustee of Client's trust, Lawyer cannot verify the status of Client's other accounts. Other Children have expressed concern, although without any supporting evidence, that Son has not removed himself from Client's accounts and is actually siphoning money from them for his personal needs.

Client has now been diagnosed with dementia and entered a nursing home. Lawyer believes Client needs a guardian and conservator appointed. Lawyer has identified institutions who could occupy both roles. Son has indicated he cannot afford a lawyer to pursue the appointment. Other Children have indicated they are unwilling to seek appointment despite Lawyer suggesting that they do so.

Lawyer has now asked if it is permissible to seek appointment of the guardian and conservator. At this time, Lawyer has not identified a substantial risk of physical or financial harm to Client if a guardian or conservator is not appointed. Lawyer has raised the issue of seeking appointment to each of Client's children who have indicated they are unable or unwilling to seek appointment.

ANALYSIS

Lawyer's situation is governed by Rule 1.14. That rule provides:

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), 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.

Lawyer's options are constrained by the precise requirements of Rule 1.14. Lawyer is first required to exhaust the ability to maintain a normal client-lawyer relationship "as far as reasonably possible" in light of Client's diminished mental capacity. It does appear that, given Lawyer's observations of Client's diminished capacity and the diagnosis of dementia, Lawyer cannot revise existing estate documents or draft new ones on Client's behalf. Lawyer is not engaged in daily management of Client's affairs, however. It appears Lawyer has, to this point, tried to maintain a normal relationship with client and has done so.

Lawyer now asks if it is necessary, or permissible, to take "reasonably necessary protective action" such as seeking appointment of a guardian or conservator. Under the circumstances, it does not appear that it is "reasonably necessary" for Lawyer to do so.

Lawyer has consulted with Client's children about Client's dementia and, among themselves, they are aware of Son's relationship to Client's property and the inability to verify Son's statements about his management of it. Although Son has indicated that he cannot pay to appoint a guardian, Other Children have simply said they are unwilling to do so, not unable. Lawyer has consulted with institutional actors who could fulfill those roles and informed Client's children. It therefore does not appear that it is "reasonably necessary" for Lawyer to

step in and seek the appointment. Rule 1.14. This is particularly true since lawyers should respect client autonomy and family connections to the greatest degree possible when acting under Rule 1.14. *See* Rule 1.14, Note 5.

Lawyer is likewise not faced with a “substantial risk” to Client. To be “substantial” under the Rules, the fact at issue must be “clear and weighty.” Rule 1.0(l). While Other Children have speculated that Son has converted Client’s funds to his personal use, no one has provided any meaningful support of those concerns. Lawyer has not indicated a belief of the allegations either. Under those circumstances, the Committee does not believe there is a “substantial risk” which supports Lawyer taking independent action to seek appointment of a guardian or conservator.

This conclusion is supported by the opinions of others to have considered similar situations. The ABA has indicated that “reasonably necessary” steps must be the least restrictive available. *See* ABA Formal Ethics Op. 96-404. Others have agreed. *See* Vermont Ethics Op. 2006-1 (2006), Connecticut Informal Ethics Op. 04-10 (2004). Independently seeking a guardian or conservator has been rejected when the lawyer could instead consult with family members of the client who could do so. *See* ABA Formal Ethics Op. 96-404; Oregon Ethics Op. 2005-41 (2005). That action has even been called a “last resort.” *See* Missouri Informal Ethics Op. 990095 (1999).

This certainly demonstrates that Rule 1.14 imposes a difficult burden for a lawyer considering independent action to protect a client. That is intended. Client agency and autonomy are to be respected to the degree it can be. *See* Rule 1.14, Note 1 (client direction and opinions should be at least considered). Where, as here, a lawyer has realistic questions and concerns, but not reasonable certainty of a need to pursue greater than necessary infringements of client autonomy in the face of a less than substantial risk, client independence controls.

CONCLUSION

Lawyer is not faced with a substantial risk to Client. Additionally, having informed family members and others of the potential risks and possible responses, Lawyer taking independent action to obtain a guardian and conservator is not reasonably necessary. Lawyer therefore should not pursue appointment of a guardian and conservator based on Rule 1.14.