

the attorney may want to listen to what others have to say when working with clients that have declining capacity so as to help gauge a client's capacity.

Despite a client having diminished capacity, rule 1.14 of the Rules of Professional Conduct directs the attorney to “maintain a normal client-[attorney] relationship with the client” “as far as reasonably possible.”<sup>20</sup> This normal relationship, the comments to rule 1.14 explains, “is based on the assumption that the client...is capable of making decisions about important matters.”<sup>21</sup> Although maintaining this normal relationship may not be possible with “severely incapacitated person[s]”, who have “no power to make legally binding decisions[.]...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.”<sup>22</sup> Regardless, the attorney always has an “obligation to treat” client's with diminished capacity “with attention and respect.”<sup>23</sup>

The comments to rule 1.14 of the Rules of Professional Conduct further suggest that under certain circumstances, “the [attorney] may seek guidance from an appropriate diagnostician” if there are concerns about diminished capacity.<sup>24</sup> In situations where the attorney is reasonably concerned the client with diminished capacity “is at risk of substantial physical, financial or other harm...and cannot adequately act in the client's own interest,” the attorney is permitted to take “reasonably necessary protective action.”<sup>25</sup> Protective action may include “consulting with... [those who]...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.”<sup>26</sup> However, when taking protective action, the attorney must be careful in considering whether disclosure of information about the client's capacity to certain persons will result in those persons acting “adversely to the client's interests.”<sup>27</sup> Ultimately, the attorney should support the client in making his or own decisions as much as the attorney can.

Although the practice of elder law involves peculiar ethical issues, an attorney who has a system in place to deal with these challenges can ethically and proficiently represent clients that are potentially vulnerable due to age, disability, or incapacity. At the core of an elder law attorney's ethics should be the desire to advance his or her client's rights of independence and autonomy. By appropriately identifying who the client is in the initial stages of representation, addressing any potential conflicts of interests upfront, and always treating the client with

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<sup>20</sup> Okla. Stat. tit. 5, Ch. 1, App. 3-A, R. 1.14(a) (2008).

<sup>21</sup> Okla. Stat. tit. 5, Ch. 1, App. 3-A, R. 1.14 cmt. 1 (2008).

<sup>22</sup> Okla. Stat. tit. 5, Ch. 1, App. 3-A, R. 1.14 cmt. 1 (2008).

<sup>23</sup> Okla. Stat. tit. 5, Ch. 1, App. 3-A, R. 1.14 cmt. 2 (2008).

<sup>24</sup> Okla. Stat. tit. 5, Ch. 1, App. 3-A, R. 1.14 cmt. 6 (2008).

<sup>25</sup> Okla. Stat. tit. 5, Ch. 1, App. 3-A, R. 1.14(b) (2008).

<sup>26</sup> Okla. Stat. tit. 5, Ch. 1, App. 3-A, R. 1.14(b) (2008).

<sup>27</sup> Okla. Stat. tit. 5, Ch. 1, App. 3-A, R. 1.14(c), cmt. 8 (2008).