

WHEN A CLIENT IS IMPAIRED

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WHEN YOUR CLIENT IS IMPAIRED: ADDICTION AND ETHICAL ISSUES FOR ATTORNEYS

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Why does addiction matter?

In many areas of law, addiction and dependency to alcohol, drugs or compulsive behaviors such as gambling, are present in a significant percentage of cases. From a purely legal standpoint, whether someone has a problem and is addressing it can affect the outcome of their case. As a lawyer, you may be in a position of influence when someone is in trouble, either because they are the person with the direct problem or because they are affected by it. In this article we will explore the issues of addiction and dependency and discuss ways in which lawyers may have an impact. For the purposes of this article, the most common addiction, alcoholism, is the primary example.

The disease of addiction

The American Medical Association (AMA) defines “alcoholism” as a primary, chronic disease with genetic, psychosocial, and environmental factors influencing its development and manifestations. The disease is often progressive and fatal. It is characterized by continuous or periodic impaired control over drinking, preoccupation with the drug alcohol, use of alcohol despite adverse consequences, and distortions in thinking, most notably denial.ⁱ

The American Society of Addiction Medicine (ASAM) defines “addiction” as a disease process characterized by the continued use of a specific psychoactive substance despite physical, psychological or social harm.ⁱⁱ

The American Psychiatric Association’s *Diagnostic and Statistical Manual (DSM V)* has combined the prior categories of “substance dependence” and “substance abuse” into the category of “Substance Use Disorder. Substance use disorders are patterns of symptoms resulting from use of a substance which the individual continues to take, despite experiencing problems as a result.

Substance use disorders span a wide variety of problems arising from substance use, and cover 11 different criteria. Assessors will base the severity of DSM-V substance use disorders on the number of criteria found to exist within a 12 month period. 2–3 criteria indicate a mild disorder, 4–5 criteria indicate a moderate disorder and 6 or more indicate a severe disorder

1. The substance is taken in larger amounts or for longer than intended.
2. A desire or unsuccessful efforts to cut down, control or stop using the substance.
3. Spending significant time acquiring, using, or recovering from use of the substance.
4. Cravings or a strong desire to use the substance.
5. Failure to fulfill major obligations at work, home or school, because of recurrent substance use.
6. Continuing to use, despite the occurrence of persistent or recurrent problems in social or interpersonal relationships.
7. Reducing involvement in or giving up important social, occupational or recreational activities because of substance use.

8. Recurrent use even when it is physically hazardous.
9. Continued use despite knowing of a persistent or recurring physical or psychological problem that may have been caused or exacerbated by the substance.
10. Requiring more of the substance to achieve intoxication or the desired effect or a diminished effect with the same amount of use (tolerance).
11. Development of withdrawal symptoms that are characteristic of the substance or use of the substance to avoid withdrawal symptoms.

The DSM-V also lists substance-induced disorders which include intoxication, withdrawal, substance induced mental disorders, including substance induced psychosis, substance induced bipolar and related disorders, substance induced depressive disorders, substance induced anxiety disorders, substance induced obsessive-compulsive and related disorders, substance induced sleep disorders, substance induced sexual dysfunctions, substance induced delirium and substance induced neurocognitive disorders.

In the DSM-V, pathological gambling has been moved from “Impulse Control Disorder Not Elsewhere Classified,” to now be defined as a gambling disorder (and the only disorder) within the category of “Substance-Related and Addictive Disorders.” Of the 10 criteria listed, 4-5 indicate mild severity, 6-7 moderate severity and 8-9, severe. The criteria are:

1. Preoccupation with gambling
2. Need to gamble with increasing amounts of money
3. Repeated unsuccessful efforts to control, cut back, or stop
4. Restless or irritable when attempting to cut down or stop
5. Gambling used as a way of escaping problems or distressed mood
6. “Chasing” losses
7. Lying to conceal the extent of involvement with gambling
8. Committed illegal acts to finance gambling
9. Jeopardized or lost a relationship or job
10. Relies on others to provide money to relieve a desperate financial situation (bail out).ⁱⁱⁱ

Risk factors

Family History. Various studies show that children of alcoholics are four to eight times more likely than the population as a whole to develop problems with alcohol. These children often are at higher risk for other behavioral problems as well.^{iv} Genetics may determine the body’s ability to metabolize alcohol and may also lead to a temperament that creates higher risk. Environmental factors may be as significant. This can include whether the home is abusive, whether there is neglect and what sorts of rules and rituals exist around alcohol and other substances. In cultures where use is limited by scope and occasion, there is less addiction and misuse.

Age at First Use. Individuals who reported that they first used alcohol before age 15 were more than 5 times as likely to report past year alcohol dependence or misuse than people who first used alcohol at age 21 or older.^v Use, for the purposes of this survey, means first intoxication in the case of alcohol. For other drugs, it is defined as first use of any kind. With an increased risk in an alcoholic and/or dysfunctional family, the ability of the younger brain to use without dependence is further compromised.

Gender. Women are statistically less likely to have alcohol or other substance dependency and misuse than men. Most often, women don't seek help until the disease is more advanced than for men, partly because of stigma attached to public intoxication for women. There is also more shame reported among women who have misuse or addiction problems.

Stress, along with mental or physical illness weakens the body and brain's ability to be resilient against addiction and misuse. This can occur from the attraction of a behavior that removed feelings because of the effect of the alcohol or drugs. Mind altering substances do just that, they alter brain chemistry. The result can be a change in the way the brain responds to the stimulus of the alcohol or drug. The brain believes that the presence of the substance is normal and craves it, sometimes to the point of feeling the need for survival.

A Family Disease.

Family members are not the cause of someone else's drinking problem. They cannot cure it and they cannot control it. Yet there is often a feeling of responsibility and shame over not being able to "get someone to stop." However, the family members' reactions to the behavior might also contribute to family problems and have an impact in any kind of case. Family dynamics may also extend to work or community "families" where significant enabling behavior may take place. Any member of this "family" may be your client, the defendant, witnesses, etc.

The chemically dependent family will operate by a set of rules. The alcohol is the most important thing in the family's life, but the family will not perceive this as the cause of their problems. There will be an effort to maintain the status quo, whatever it takes because somehow that proves there is no problem. The entire family is involved in some way and as has their own rules and roles. The biggest rule is to keep the family secret and this is accomplished by keeping one's true feelings to themselves.

The partner or spouse may react to incidents by taking on specific roles. Imagine a scenario where the user promised to pick up the kids or attend an event and either fails to appear or is intoxicated when they do. Here are some possible reactions that may carry over into your client interactions.

The Rescuer

The "rescuer" won't allow the incident become a problem and will do everything to protect the user from her own actions. This might include covering up mistakes, lying and otherwise protecting him from anything that might be a cause of distress (and thus produce more drinking). She will tell no one and minimize the problem if anyone else raises it. Her denial is as great as that of the user. As problems escalate, she may start carrying out his responsibilities. She may get a second job to pay bills over cover bail and excuses his failure to perform.

The Provoker

The "provoker" will respond with punishment. This can range from the silent treatment to rage. He might complain to others that she is a loser and lets everyone know how angry and disgusted he is with her. He wants it to look like it couldn't be his fault. And he won't let it go. The resentments build as the behavior escalates and there are frequent reminders of past transgressions, especially when there are others to listen.

The Martyr

The "martyr" feels shame for the user's behavior and tries to make him feel guilty. She tells him and others how embarrassed she is. Or she may isolate and avoid others because of her shame. She may become depressed and withdrawn. This shame may be particularly acute if the addiction is around sex, gambling or drugs.

The Enabler

Each of these examples is that of an enabler. The spouse may adopt a particular role or may switch back and forth between all of them. None of them helps with the illness and all of them can contribute to problems.

The disease of alcoholism affects the spouse's or partner's life, her thinking and her attitude and she may not even realize that it's the issue. Enablers can also be parents, children, siblings and family systems that have developed outside of a blood or marital relationship. Usually, the change occurs slowly. Alcoholism is a progressive disease. Occasional or mildly unacceptable behavior will be excused – *he just had too much to drink, he didn't really mean it*. As the behavior becomes less and less tolerable, over months and years, it is still being accepted and can become the new "normal." The chaos that now exists would have been unacceptable at an earlier time, but because it was gradual, it is not recognized for what it is. The family member may become a drinking buddy with or without developing their own dependency. The same rescuer, provoker and martyr roles take on an interesting twist when both partners are regularly using and one has a dependency problem. What has become "the new normal" for the individual and the family might be a significant issue in the criminal justice context.

When the spouse is co-dependent, she often has much lower self esteem because she will be misused by the user to protect the use – sometimes physically, but not always. If she grew up in an alcoholic family, she may have been attracted to what she knew. Children, including adult children of alcoholics, have their own roles.^{vi} As a child, the role is a protector from the family secret and the family mayhem. As an adult, these roles can hold the person back in every aspect of his or her life.

The hero will try to repair the family by excelling in everything and making up for perceived shortcomings in themselves, the users and others who respond to the user. This child will often serve as a mediator between the parents, one or both of whom may be using.

The enabler wants to avoid pain at all costs. This child may even provide alcohol to the user to calm things down.

The scapegoat protects the family secret by acting out and becoming the focus. This may be at home, in school or in the community. This child is angry because of the emotional volatility of the family situation, and this child is more likely to be involved in the criminal justice system.

The lost child is the one you may not notice. This child avoids contact with family problems and may escape in fantasy or other ways to avoid reality.

The mascot will try to survive using humor. This child works to divert attention from the family and may be the class clown because that is where validation can occur.

Clearly, the disease of alcoholism has an impact on every member of the family. Sometimes children report more problems with the non-drinking parent than with the alcoholic.

The non-drinking or non-dependent parent will have trouble seeing themselves as part of the problems but they can be much more volatile. The alcoholic is predictable. The children will know when they have opportunities to ask for things and when it's time to stay out of the way. There's a routine and they know it. But the other parent is a different story. One minute they see the provoker – threatening consequences like divorce (I'll divorce you) or death (I'm going to get a call that you went off the road) that can terrify the children. A moment later the rescuer is back, excusing unacceptable behavior, and cleaning up the mess. Those children may be your client.

Other addictions.

Alcohol is only one of many substances to which addiction occurs. Other drugs such as opiates and prescription drugs can cause as much havoc as alcohol. The cravings that occur in the brain of an addict will typically occur much more quickly and be much more virulent with drugs like methamphetamines.

Compulsive behaviors or process addictions create similar reactions in brain chemistry. The triggers can cause as strong a reaction as the presence of a substance. Addictions involving money include gambling, shopping and shoplifting. Gambling addiction is now Sexual compulsivity can be very confusing and scary for family members. Eating disorders are a type of addiction and obsession with computer or fantasy games can cause significant problems as well. While there is significant debate about whether people carry out the fantasies they experience on computer porn or game sites, there is no question that individuals engage in risky and abnormal behavior to protect any addiction.

What Is Your Role?

As a defense attorney, there will be times when an addiction is obvious and you know that you will not have a chance of obtaining the legal result your client wants unless they participate in some sort of abstinence or treatment. Most cases are not as clear cut. While it is not your job to be a counselor or an assessor, you are in a position of influence. Does your client interview include questions about the possible presence of addiction? Some would argue that because of the prevalence of these issues, you have an obligation to make such an inquiry, but at the same time, denial may be very strong. If the answer is yes, or you think it should be, then what? Do you have a place they can call to go further? Do you know how to reach the chemical dependency services in counties where you practice? Are there psychologists to whom you feel confident referring clients? It is not your job to get them there or to keep them from drinking if they have acknowledged there is a problem. But you can say that you think they may get a better legal result if they follow the recommendations of these other professionals. Just as it is necessary to use your creativity in helping your client with their legal problems you can use that same creativity and persistence to suggest that now is the time to make other changes in their lives for the better. When it comes to a license or a verdict or award, this may be a very big carrot.

As a prosecutor, there are many ways to insist on an evaluation but there are challenges as well. An evaluation is not complete without collateral information and that can be hard to come by. Treatment is expensive, many defendants can't pay for it and public funds are limited. It's a balancing act to protect the public and provide rehabilitation opportunities. The growth of drug and DWI courts provide many opportunities and their availability can give hope to lawyers on both

sides that those with multiple offenses may in fact get off of the merry-go-round. Many lawyers say this helps their stress level as well.

In any other practice area, the presence of substance use or other addictive disorders will make a difference in the case. The bankruptcy lawyer should know that bankruptcy can be viewed as a “big win” for the compulsive gambler. Considerations of whether and how much a client or opposing party is using or engaged in mind altering substances or behaviors will affect the lawyer’s strategy, advice and expected outcomes in nearly every area of law. Often the client or other party will have additional legal concerns when substance or behavioral issues are present.

Ethical Considerations

Rule 1.14 of the Minnesota Rules of Professional Conduct relates to clients with diminished capacity.^{vii} There may be occasions when the client is not able to make adequate decisions on their own behalf because of their impairment. While occasions with the level of severity may be rare, there may be an obligation to seek assistance. What may be more likely is that the fact that you could “consult. . . individuals or entities that have the ability to take action to protect the client” may be enough incentive for the client to seek help.

Rule 1.4 requires that the lawyer must keep a client informed on any matter but notes that this “may be impracticable. . . where the client. . . suffers from diminished capacity.”^{viii} There are times when a lawyer is required to or would like to withdraw from representation. Rule 1.16 provides that a lawyer should be aware that a client’s diminished capacity may affect the withdrawal or discharge.^{ix}

In keeping with the lawyer’s role as more than a technician, Rule 2.1 provides guidance for the lawyer as advisor. Lawyers are advised to look beyond providing advice “couched in narrow legal terms.” In addition, referrals to other professionals are encouraged including “those “within the professional competence of psychiatry, clinical psychology, or social work.” Finally, although lawyers are expected to give that advice which is asked for, “when a lawyer knows a client proposes a course of action that is likely to result in substantial adverse legal consequences to the client, the lawyer’s duty to the client under Rule 1.4 may require that the lawyer offer advice if the client’s course of action is related to the representation.”^x Thus if a client insists that they don’t have a drinking problem despite a variety of consequences, you are in a very good position to suggest that they obtain a professional assessment and then advise them that they are more likely to get the legal result they are hoping for if they follow the recommendations of that assessment.

Rule 1.2 addresses the scope of representation and notes that despite the need to abide by a client’s decision, reference to rule 1.14 regarding diminished capacity is appropriate.^{xi}

What if it’s another lawyer?

According to studies by the American Bar Association and others, lawyers are twice as likely to be alcoholics as the rest of the population.^{xii} It is likely that you will encounter another lawyer whose alcoholism or another issue impairs their ability to practice. Those other issues include mental illness, physical illnesses such as Alzheimer’s disease that may cause diminished capacity.

While there is an obligation to report serious misconduct,^{xiii} the conduct often does not rise to that level or it may just be a general observation of concern or a change in behavior or temperament that

occurs over time. In your own organization, are there procedures to follow to protect clients if the lawyer is unable to perform adequately, and do you know them? Organizations can be held responsible if they knew of misconduct and did not act to prevent or respond to it.^{xiv} A confidential call to Lawyers Concerned for Lawyers will allow you to talk through a situation and options for providing help to a colleague in your organization.^{xv}

But what if you don't work with them? Concerns often arise when an opposing counsel smells like alcohol in a meeting, deposition or in court, or more frequently, does not seem to be tracking or is conducting herself in a way that doesn't make sense. Sometimes the conduct is not that egregious and just as the codependent family member hopes it will go away, it seems best to do nothing.

Typically three things will happen if you have an impaired opponent. Their work will be delayed, inefficient and inadequate. Your client will pay more because you devote more time to following up, correcting mistakes and other case administration that shouldn't be necessary. Second, your client or the defendant may ultimately get a result that would not have occurred if there had been equal representation. There is a strong temptation to let it alone because there may be a better result by law, but ultimately, the help that might otherwise have been available, is not there. And third, your stress level will increase. While there may be delays and other difficulties from opposing counsel that have nothing to do with impairment, it happens often enough that you may have some other options. Ultimately clients, the administration of justice and the public's trust of lawyers and the judicial system are all harmed when a lawyer is impaired.

We have built a system where the lawyers themselves ensure competence through the bar exam and a character and fitness examination. We support that competence through CLE requirements. We have a lawyer discipline system and a client security fund if things go wrong. Each of these protects the public and the reputation of the justice system. But we also can take care of ourselves and each other through a confidential lawyer assistance program. The conduct you observe may not rise to the level of reporting to discipline and there is often reluctance to do so in any case.

If you decide to pick up the phone and call LCL because you are concerned about another lawyer, what will happen? First and foremost, your call is confidential. You may call for advice on how to deal with a situation or you may call about someone you are concerned about. You might also wish to visit our web site (www.mnlcl.org), e-mail us directly at help@mncl.org, or visit our offices. When someone calls LCL for the first time, we will talk with you to determine how best to be of assistance. We will describe what we think options may be and you can choose to go no further or to even give us your name. Be assured that we will never rely on the report of one person, especially if you are opposing counsel, to reach out to someone. But that other lawyer may be in serious trouble, especially if they are isolated and it takes the effort of someone whom is concerned to make a difference. One lawyer told us, "There had been delays and difficulties from the start and when I finally met with the lawyer in person it was obvious that they were not on top of things. Calling LCL to say that this person might need some help greatly reduced my stress level." The lawyer who reported the problem was not told and will not be told what might have been done to reach out to the lawyer they were concerned about.

The core services of LCL are crisis response, assessments, referrals, mental or chemical health interventions, short term counseling, on-going support through a mentorship program, and therapist facilitated mental health support groups. All of the services are confidential and free and access to a therapist is available by phone 24 hours a day.

As you read this, you may wonder if your use of alcohol or your craving for other substances or processes like gambling is affecting you as a lawyer. Your call is confidential as well, and we will refer you to the appropriate professional and peer support. We have received calls such as “I drank too much this weekend and felt lousy again this morning. I’d like to find out if I might have a problem.” Or “I get to my office and I just can’t get started. There are things I know I need to do and I just can’t do it.” We’ll get you started on getting help and learning what your resources are. As lawyers we are problem solvers and it’s hard to ask for help to solve our own. But when we are affected by a dependence on alcohol or other mental illnesses or addictions, we are even less able to take care of ourselves. Fortunately, with Lawyers Concerned for Lawyers, you are not alone and there is help.

ⁱ Robert M. Morse and Daniel K. Flavin, “The Definition of Alcoholism.” *Journal of the American Medical Association*, August 26, 1992, Vol. 268, No. 8, pp. 1012 – 1014.

ⁱⁱ *Principles of Addiction Medicine*, 2d ed., 1968.

ⁱⁱⁱ American Psychiatric Association, *Diagnostic and Statistical Manual (DSM V)*, text revision, 2013.

^{iv} C Holden, “ Probing the complex genetics of alcoholism,” *Science* 11 January 1991 251: 163-164.

^v SAMHSA. “Alcohol Dependence or Abuse and Age at First Use”, *National Survey on Drug Use and Health*, 2003.

^{vi} Sharon Wegscheider-Cruse, *Another Chance, Hope and Health for the Alcoholic Family*, Science and Behavior Books, 1989

^{vii} RULE 1.14: MRPC, Client with Diminished Capacity

^{viii} Rule 1.4 MRPC, Communication

^{ix} Rule 1.16 MRPC, Declining or Terminating Representation.

^x Rule 2.1 MRPC, Advisor

^{xi} Rule 1.2 MRPC, Scope of Representation and Allocation of Authority Between Client and Lawyer.

^{xii} John W. Clark, Jr., “We’re From the Bar and We’re here to Help You,” *G.P. Solo Magazine* (A.B.A. Pub.; v.21, no. 7: October/November 2004).

^{xiii} Rule 8.3 MRPC, Reporting Professional Misconduct

^{xiv} Rule 5.1 MRPC, Responsibilities of a Partner or Supervisory Lawyer

^{xv} Lawyers Concerned for Lawyers may be contacted at 651-646-5590 or 866-525-6466. The email is help@mncl.org and the website is www.mncl.org.

Appendix 1 Minnesota Rules of Professional Conduct

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 reasonable protective action, including consulting 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(b)(3) to reveal information about the client, but only to the extent reasonably necessary to protect the client's interests.

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 often 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 an impairment 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 decisionmaking 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 decisionmaking 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 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), 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 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 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] In an emergency where the health, safety, or 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 the lawyer. Even in such an emergency, however, the lawyer should not act unless 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 who undertakes to represent a person in such an exigent situation has the same duties under these Rules as the lawyer would with respect to a client.

[10] 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. The lawyer should take steps to regularize the relationship or implement other protective solutions as soon as possible. Normally, a lawyer would not seek compensation for such emergency actions taken.

RULE 1.4: COMMUNICATION

(a) A lawyer shall

(1) promptly inform the client of any decision or circumstance with respect to which the client's informed consent, as defined in Rule 1.0(f), is required by these rules;

(2) reasonably consult with the client about the means by which the client's objectives are to be accomplished;

(3) keep the client reasonably informed about the status of the matter;

(4) promptly comply with reasonable requests for information; and

(5) consult with the client about any relevant limitation on the lawyer's conduct when the lawyer knows that the client expects assistance not permitted by the Rules of Professional Conduct or other law.

(b) A lawyer shall explain a matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation.

Comment

[1] Reasonable communication between the lawyer and the client is necessary for the client effectively to participate in the representation.

Communicating with Client

[2] If these rules require that a particular decision about the representation be made by the client, paragraph (a)(1) requires that the lawyer promptly consult with and secure the client's consent prior to taking action unless prior discussions with the client have resolved what action the client wants the lawyer to take. For example, a lawyer who receives from opposing counsel an offer of settlement in a civil controversy or a proffered plea bargain in a criminal case must promptly inform the client of its substance unless the client has previously indicated that the proposal will be acceptable or unacceptable or has authorized the lawyer to accept or to reject the offer. See Rule 1.2(a).

[3] Paragraph (a)(2) requires the lawyer to reasonably consult with the client about the means to be used to accomplish the client's objectives. In some situations—depending on both the importance of the action under consideration and the feasibility of consulting with the client—this duty will require consultation prior to taking action. In other circumstances, such as during a trial when an immediate decision must be made, the exigency of the situation may require the lawyer to act without prior consultation. In such cases the lawyer must nonetheless act reasonably to inform the client of actions the lawyer has taken on the client's behalf. Additionally, paragraph (a)(3) requires that the lawyer keep the client reasonably informed about the status of the matter, such as significant developments affecting the timing or the substance of the representation.

[4] A lawyer's regular communication with clients will minimize the occasions on which a client will need to request information concerning the representation. When a client makes a reasonable request for information, however, paragraph (a)(4) requires prompt compliance with the request, or if a prompt response is not feasible, that the lawyer, or a member of the lawyer's staff, acknowledge receipt of the request and advise the client when a response may be expected. Client telephone calls should be promptly returned or acknowledged.

Explaining Matters

[5] The client should have sufficient information to participate intelligently in decisions concerning the objectives of the representation and the means by which they are to be pursued, to the extent the client is willing and able to do so. Adequacy of communication depends in part on the kind of advice or assistance that is involved. For example, when there is time to explain a proposal made in a negotiation, the lawyer should review all important provisions with the client before proceeding to an agreement. In litigation a lawyer should explain the general strategy and prospects of success and ordinarily should consult the client on tactics that might or are likely to result in significant expense or to injure or coerce others. On the other hand, a lawyer ordinarily will not be expected to describe trial or negotiation strategy in detail. The guiding principle is that the lawyer should fulfill reasonable client expectations for information consistent with the duty to act in the client's best interests, and the client's overall requirements as to the character of representation. In certain circumstances, such as when a lawyer asks a client to consent to a representation affected by a conflict of interest, the client must give informed consent, as defined in Rule 1.0(f).

[6] Ordinarily, the information to be provided is that appropriate for a client who is a comprehending and responsible adult. However, fully informing the client according to this standard may be impracticable, for example, where the client is a child or suffers from diminished capacity. See Rule 1.14. When the client is an organization or group, it is often impossible or inappropriate to inform every one of its members about its legal affairs; ordinarily, the lawyer should address communications to the appropriate officials of the organization. See Rule 1.13. Where many routine matters are involved, a system of limited or occasional reporting may be arranged with the client.

Withholding Information

[7] In some circumstances, a lawyer may be justified in delaying transmission of information when the client would be likely to react imprudently to an immediate communication. Thus, a lawyer might withhold a psychiatric diagnosis of a client when the examining psychiatrist indicates that disclosure would harm the client. A lawyer may not withhold information to serve the lawyer's own interest or convenience or the interests or convenience of another person. Rules or court orders governing litigation may provide that information supplied to a lawyer may not be disclosed to the client. Rule 3.4(c) directs compliance with such rules or orders.

RULE 1.16: DECLINING OR TERMINATING REPRESENTATION

(a) Except as stated in paragraph (c), a lawyer shall not represent a client or, where representation has commenced, shall withdraw from the representation of a client if:

- (1) the representation will result in violation of the Rules of Professional Conduct or other law;
- (2) the lawyer's physical or mental condition materially impairs the lawyer's ability to represent the client; or
- (3) the lawyer is discharged.

(b) Except as stated in paragraph (c), a lawyer may withdraw from representing a client if:

- (1) withdrawal can be accomplished without material adverse effect on the interests of the client;
- (2) the client persists in a course of action involving the lawyer's services that the lawyer reasonably believes is criminal or fraudulent;
- (3) the client has used the lawyer's services to perpetrate a crime or fraud;
- (4) the client insists upon taking action that the lawyer considers repugnant or with which the lawyer has a fundamental disagreement;
- (5) the client fails substantially to fulfill an obligation to the lawyer regarding the lawyer's services and has been given reasonable warning that the lawyer will withdraw unless the obligation is fulfilled;
- (6) the representation will result in an unreasonable financial burden on the lawyer or has been rendered unreasonably difficult by the client; or
- (7) other good cause for withdrawal exists.

(c) A lawyer must comply with applicable law requiring notice to or permission of a tribunal when terminating a representation. When ordered to do so by a tribunal, a lawyer shall continue representation notwithstanding good cause for terminating the representation.

(d) Upon termination of representation, a lawyer shall take steps to the extent reasonably practicable to protect a client's interests, such as giving reasonable notice to the client, allowing time for employment of other counsel, surrendering papers and property to which the client is entitled, and refunding any advance payment of fees or expenses that has not been earned or incurred.

(e) Papers and property to which the client is entitled include the following, whether stored electronically or otherwise:

- (1) in all representations, the papers and property delivered to the lawyer by or on behalf of the client and the papers and property for which the client has paid the lawyer's fees and reimbursed the lawyer's costs;
- (2) in pending claims or litigation representations:
 - (i) all pleadings, motions, discovery, memoranda, correspondence and other litigation materials which have been drafted and served or filed, regardless of whether the client has paid the lawyer for drafting and serving the document(s), but shall not include pleadings, discovery, motion papers, memoranda and correspondence which have been drafted, but not served or filed, if the client has not paid the lawyer's fee for drafting or creating the documents; and

(ii) all items for which the lawyer has agreed to advance costs and expenses regardless of whether the client has reimbursed the lawyer for the costs and expenses, including depositions, expert opinions and statements, business records, witness statements, and other materials that may have evidentiary value;

(3) in nonlitigation or transactional representations, client files, papers, and property shall not include drafted but unexecuted estate plans, title opinions, articles of incorporation, contracts, partnership agreements, or any other unexecuted document which does not otherwise have legal effect, where the client has not paid the lawyer's fee for drafting the document(s).

(f) A lawyer may charge a client for the reasonable costs of duplicating or retrieving the client's papers and property after termination of the representation only if the client has, prior to termination of the lawyer's services, agreed in writing to such a charge.

(g) A lawyer shall not condition the return of client papers and property on payment of the lawyer's fee or the cost of copying the files or papers.

Comment

[1] A lawyer should not accept representation in a matter unless it can be performed competently, promptly, without improper conflict of interest and to completion. Ordinarily, a representation in a matter is completed when the agreed-upon assistance has been concluded. See Rules 1.2(c) and 6.5. See also Rule 1.3, Comment [4].

Mandatory Withdrawal

[2] A lawyer ordinarily must decline or withdraw from representation if the client demands that the lawyer engage in conduct that is illegal or violates the Rules of Professional Conduct or other law. The lawyer is not obliged to decline or withdraw simply because the client suggests such a course of conduct; a client may make such a suggestion in the hope that a lawyer will not be constrained by a professional obligation.

[3] When a lawyer has been appointed to represent a client, withdrawal ordinarily requires approval of the appointing authority. See also Rule 6.2. Similarly, court approval or notice to the court is often required by applicable law before a lawyer withdraws from pending litigation. Difficulty may be encountered if withdrawal is based on the client's demand that the lawyer engage in unprofessional conduct. The court may request an explanation for the withdrawal, while the lawyer may be bound to keep confidential the facts that would constitute such an explanation. The lawyer's statement that professional considerations require termination of the representation ordinarily should be accepted as sufficient. Lawyers should be mindful of their obligations to both clients and the court under Rules 1.6 and 3.3.

Discharge

[4] A client has a right to discharge a lawyer at any time, with or without cause, subject to liability for payment for the lawyer's services. Where future dispute about the withdrawal may be anticipated, it may be advisable to prepare a written statement reciting the circumstances.

[5] Whether a client can discharge appointed counsel may depend on applicable law. A client seeking to do so should be given a full explanation of the consequences. These consequences may include a decision by the appointing authority that appointment of successor counsel is unjustified, thus requiring self-representation by the client.

[6] If the client has severely diminished capacity, the client may lack the legal capacity to discharge the lawyer, and in any event the discharge may be seriously adverse to the client's interests. The lawyer should make special effort to help the client consider the consequences and may take reasonably necessary protective action as provided in Rule 1.14.

Optional Withdrawal

[7] A lawyer may withdraw from representation in some circumstances. The lawyer has the option to withdraw if it can be accomplished without material adverse effect on the client's interests. Withdrawal is also justified if the client persists in a course of action that the lawyer reasonably believes is criminal or fraudulent, for a lawyer is not required to be associated with such conduct even if the lawyer does not further it. Withdrawal is also permitted if the lawyer's services were misused in the past even if that would materially prejudice the client. The lawyer may also withdraw where the client insists on taking action that the lawyer considers repugnant or with which the lawyer has a fundamental disagreement.

[8] A lawyer may withdraw if the client refuses to abide by the terms of an agreement relating to the representation, such as an agreement concerning fees or court costs or an agreement limiting the objectives of the representation.

RULE 2.1: ADVISOR

In representing a client, a lawyer shall exercise independent professional judgment and render candid advice. In rendering advice, a lawyer may refer not only to the law but to other considerations such as moral, economic, social, and political factors that may be relevant to the client's situation.

Comment

Scope of Advice

[1] A client is entitled to straightforward advice expressing the lawyer's honest assessment. Legal advice often involves unpleasant facts and alternatives that a client may be disinclined to confront. In presenting advice, a lawyer endeavors to sustain the client's morale and may put advice in as acceptable a form as honesty permits. However, a lawyer should not be deterred from giving candid advice by the prospect that the advice will be unpalatable to the client.

[2] Advice couched in narrow legal terms may be of little value to a client, especially where practical considerations, such as cost or effects on other people, are predominant. Purely technical legal advice, therefore, can sometimes be inadequate. It is proper for a lawyer to refer to relevant moral and ethical considerations in giving advice. Although a lawyer is not a moral advisor as such, moral and ethical considerations impinge upon most legal questions and may decisively influence how the law will be applied.

[3] A client may expressly or impliedly ask the lawyer for purely technical advice. When such a request is made by a client experienced in legal matters, the lawyer may accept it at face value. When such a request is made by a client inexperienced in legal matters, however, the lawyer's responsibility as advisor may include indicating that more may be involved than strictly legal considerations.

[4] Matters that go beyond strictly legal questions may also be in the domain of another profession. Family matters can involve problems within the professional competence of psychiatry, clinical psychology, or social work; business matters can involve problems within the competence of the accounting profession or of financial specialists. Where consultation with a professional in another field is itself something a competent lawyer would recommend, the lawyer should make such a

recommendation. At the same time, a lawyer's advice at its best often consists of recommending a course of action in the face of conflicting recommendations of experts.

Offering Advice

[5] In general, a lawyer is not expected to give advice until asked by the client. However, when a lawyer knows that a client proposes a course of action that is likely to result in substantial adverse legal consequences to the client, the lawyer's duty to the client under Rule 1.4 may require that the lawyer offer advice if the client's course of action is related to the representation. Similarly, when a matter is likely to involve litigation, it may be necessary under Rule 1.4 to inform the client of forms of dispute resolution that might constitute reasonable alternatives to litigation. A lawyer ordinarily has no duty to initiate investigation of a client's affairs or to give advice that the client has indicated is unwanted, but a lawyer may initiate advice to a client when doing so appears to be in the client's interest.

RULE 1.2: SCOPE OF REPRESENTATION AND ALLOCATION OF AUTHORITY BETWEEN CLIENT AND LAWYER

(a) Subject to paragraphs (c) and (d), a lawyer shall abide by a client's decisions concerning the objectives of representation and, as required by Rule 1.4, shall consult with the client as to the means by which they are to be pursued. A lawyer may take such action on behalf of the client as is impliedly authorized to carry out the representation. A lawyer shall abide by a client's decision whether to settle a matter. In a criminal case, the lawyer shall abide by the client's decision, after consultation with the lawyer, as to a plea to be entered, whether to waive a jury trial and whether the client will testify.

(b) A lawyer's representation of a client, including representation by appointment, does not constitute an endorsement of the client's political, economic, social, or moral views or activities.

(c) A lawyer may limit the scope of the representation if the limitation is reasonable under the circumstances and the client gives informed consent.

(d) A lawyer shall not counsel a client to engage, or assist a client, in conduct that the lawyer knows is criminal or fraudulent, but a lawyer may discuss the legal consequences of any proposed course of conduct with a client and may counsel or assist a client to make a good faith effort to determine the validity, scope, meaning, or application of the law.

Comment

Allocation of Authority between Client and Lawyer

[1] Paragraph (a) confers upon the client the ultimate authority to determine the purposes to be served by legal representation, within the limits imposed by law and the lawyer's professional obligations. The decisions specified in paragraph (a), such as whether to settle a civil matter, must also be made by the client. See Rule 1.4(a)(1) for the lawyer's duty to communicate with the client about such decisions. With respect to the means by which the client's objectives are to be pursued, the lawyer shall consult with the client as required by Rule 1.4(a)(2) and may take such action as is impliedly authorized to carry out the representation.

[2] On occasion, however, a lawyer and a client may disagree about the means to be used to accomplish the client's objectives. Clients normally defer to the special knowledge and skill of their lawyer with respect to the means to be used to accomplish their objectives, particularly with respect to technical, legal, and tactical matters. Conversely, lawyers usually defer to the client regarding such questions as

the expense to be incurred and concern for third persons who might be adversely affected. Because of the varied nature of the matters about which a lawyer and client might disagree and because the actions in question may implicate the interests of a tribunal or other persons, this rule does not prescribe how such disagreements are to be resolved. Other law, however, may be applicable and should be consulted by the lawyer. The lawyer should also consult with the client and seek a mutually acceptable resolution of the disagreement. If such efforts are unavailing and the lawyer has a fundamental disagreement with the client, the lawyer may withdraw from the representation. See Rule 1.16(b)(4). Conversely, the client may resolve the disagreement by discharging the lawyer. See Rule 1.16(a)(3).

[3] At the outset of a representation, the client may authorize the lawyer to take specific action on the client's behalf without further consultation. Absent a material change in circumstances and subject to Rule 1.4, a lawyer may rely on such an advance authorization. The client may, however, revoke such authority at any time.

[4] In a case in which the client appears to be suffering from diminished capacity, the lawyer's duty to abide by the client's decisions is to be guided by reference to Rule 1.14.

Independence from Client's Views or Activities

[5] Legal representation should not be denied to people who are unable to afford legal services, or whose cause is controversial or the subject of popular disapproval. By the same token, representing a client does not constitute approval of the client's views or activities.

Additional comments are available in the complete rules.

RULE 8.3: REPORTING PROFESSIONAL MISCONDUCT

(a) A lawyer who knows that another lawyer has committed a violation of the Rules of Professional Conduct that raises a substantial question as to that lawyer's honesty, trustworthiness, or fitness as a lawyer in other respects, shall inform the appropriate professional authority.

(b) A lawyer who knows that a judge has committed a violation of the applicable Code of Judicial Conduct that raises a substantial question as to the judge's fitness for office shall inform the appropriate authority.

(c) This rule does not require disclosure of information that Rule 1.6 requires or allows a lawyer to keep confidential or information gained by a lawyer or judge while participating in a lawyers assistance program or other program providing assistance, support, or counseling to lawyers who are chemically dependent or have mental disorders.

Comment

[1] Self-regulation of the legal profession requires that members of the profession initiate disciplinary investigation when they know of a violation of the Rules of Professional Conduct. Lawyers have a similar obligation with respect to judicial misconduct. An apparently isolated violation may indicate a pattern of misconduct that only a disciplinary investigation can uncover. Reporting a violation is especially important where the victim is unlikely to discover the offense.

[2] A report about misconduct is not required where it would involve violation of Rule 1.6. However, a lawyer should encourage a client to consent to disclosure where prosecution would not substantially prejudice the client's interests.

[4] The duty to report professional misconduct does not apply to a lawyer retained to represent a lawyer whose professional conduct is in question. Such a situation is governed by the rules applicable to the client-lawyer relationship.

[5] Information about a lawyer's or judge's misconduct or fitness may be received by a lawyer in the course of that lawyer's participation in a bona fide lawyers assistance program or other program that provides assistance, support or counseling to lawyers, including lawyers and judges who may be impaired due to chemical abuse or dependency, behavioral addictions, depression or other mental disorders. In that circumstance, providing for the confidentiality of information obtained by a lawyer-participant encourages lawyers and judges to participate and seek treatment through such programs. Conversely, without such confidentiality, lawyers and judges may hesitate to seek assistance, which may then result in additional harm to themselves, their clients, and the public. The rule therefore exempts lawyers participating in such programs from the reporting obligation of paragraphs (a) and (b) with respect to information they acquire while participating. A lawyer exempted from mandatory reporting under part (c) of the rule may nevertheless report misconduct in the lawyer's discretion, particularly if the impaired lawyer or judge indicates an intent to engage in future illegal activity, for example, the conversion of client funds. See the comments to Rule 1.6.

Additional comments are available in the complete rules.