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**Maricopa County Bar Foundation's  
Volunteer Lawyers Program**

**Saturday, November 17**



**Papago  
Golf Course**



**5595 E. Moreland Street • Phoenix**

**Registration/Breakfast 7 a.m. Start Time 8:30 a.m.  
Luncheon/Reception 1 p.m.**

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*The Tim Huff Pro Bono Golf Classic benefits the Maricopa County Bar Foundation and Volunteer Lawyers Program, which supports low-income families who are in need of civil legal services. Each year, the Volunteer Lawyers Program helps more than 10,000 people in Maricopa County.*

**Register now at [mcbfgolf.org](http://mcbfgolf.org)**

The Maricopa County Bar Foundation is a 501(c)3 non-profit corporation, tax ID #86-0442773  
To become a sponsor, contact Paul McIlroy, [pmcilroy@casepoint.com](mailto:pmcilroy@casepoint.com)

# Q&A



## LAWYER LIABILITY AND ETHICS

### Client with Diminished Capacity— How Does an Attorney Know When ER 1.14 Applies?



**Jessica L. Beckwith**

The population in the United States is aging. According to the Alzheimer's Association's website, "As the number of older Americans grows rapidly, so too will the number of new and existing cases of Alzheimer's. Today, someone in the United States develops Alzheimer's every 65 seconds. By mid-century, someone in the United States will develop the disease every 33 seconds." Why do attorneys need to worry so much about Alzheimer's? Based on statistics like these, it is possible, if not probable, that more attorneys will be faced with clients who have or develop diminished capacity during the representation.

Many of us may be thinking how we, as attorneys, will be able to deal with this type of situation? Well, as with many tricky situations, looking to the Ethical Rules first is likely going to guide you in the right direction. Rule 1.14(a) states (emphasis added), "When a client's capacity to make adequately considered decisions in connection with the 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." So, maintaining a normal client-lawyer relationship is what we should aim to do even when presented with suspected or confirmed client diminished capacity.

However, as the first comment to Rule 1.14 acknowledges, "maintaining the ordinary client-lawyer relationship may not be possible in all respects."

The comments to Rule 1.14 contemplate the attorney having the client's family members or other trusted persons participate in attorney-client discussions if the client wishes. However, allowing third parties to participate in the attorney-client relationship must be done with care so as to not jeopardize the attorney-client privilege. Generally, as long as the third party is present to assist the client with diminished capacity, then the privilege has not been compromised by that individual's presence. A best practice may be to document the client file with a memorandum about the request for and need for a third party to be present with the client based on the client's diminished capacity.

Comment 4 states in part that, "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." If there is no legal representative for the client, the attorney will need to determine the best course of action.

Rule 1.14(b) governs when a lawyer may take protective action. The Rule states, "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." There are two requirements necessary before the lawyer may (not must) act on a belief of diminished capacity and not simply maintain the regular attorney client relationship: (1) a reasonable belief of diminished capacity; and (2) risk of substantial harm to the client unless action is taken.

How does an attorney know whether Rule 1.14(b) is applicable? Comment 6 states, "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."

Information relating to the representation is protected by ER 1.6. (See Comment 8 to Rule 1.14.) "Disclosure of the client's diminished capacity could adversely affect the client's interest." (*Id.*) This information could affect the client's personal interests as well as the client's interest in the legal representation. Comment 8 expressly states that the attorney's position when determining whether to act is an "unavoidably difficult one."

Rule 1.14 is designed to guide attorney's faced with this difficult situation. The comments to the Rule are quite instructive. Although every situation will be different and there are no easy answers in this situation, knowledge about the boundaries that govern your role as counsel to a person with diminished capacity will enable you to protect your client and meet your ethical obligations. ■

*Jessica Beckwith is an attorney with Lewis Brisbois Bisgaard & Smith LLP. She is an attorney regulation and ethics attorney admitted to practice in Arizona and California. She can be reached at [jessica.beckwith@lewisbrisbois.com](mailto:jessica.beckwith@lewisbrisbois.com) or 213.680.5100.*