Supported Decision-Making and the Law: Ethical Considerations

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POP QUIZ

What is an attorney’s most important Ethical Duty?
TRICK QUESTION

LOYALTY

LOYALTY IS BEHIND ALL THE ETHICAL RULES AND RESPONSIBILITIES

ABA Model Rules: PREAMBLE: A LAWYER’S RESPONSIBILITIES

[2] As a representative of clients, a lawyer performs various functions. As a representative of clients, a lawyer performs various functions. As advisor, a lawyer provides a client with an informed understanding of the client's legal rights and obligations and explains their practical implications. As advocate, a lawyer zealously asserts the client's position under the rules of the adversary system. As negotiator, a lawyer seeks a result advantageous to the client but consistent with requirements of honest dealings with others. As an evaluator, a lawyer acts by examining a client's legal affairs and reporting about them to the client or to others.
MODEL RULES ON LOYALTY

ABA Model Rule 1.4
(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(e), 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.

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 jury trial and whether the client will testify.

EVERYONE has the Right to Make Choices
ABA Model Rule Rule 1.2, comment 1:
[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.

Rule 1.6 Confidentiality Of Information
(a) A lawyer shall not reveal information relating to the representation of a client unless the client gives informed consent, the disclosure is impliedly authorized in order to carry out the representation or the disclosure is permitted by paragraph (b).
ANOTHER POP QUIZ

How do you meet these duties if the client has diminished capacity?
How do you:
- Promptly inform?
- Reasonably consult?
- Understand the clients decisions?
- Get informed consent?

SUPPORTED DECISION-MAKING: EMPOWERING LOYALTY TO CLIENTS

“people with disabilities use friends, family members, and professionals to help them understand the situations and choices they face, so they may make their own decisions. . . .”

- Blanck & Martinis, 2015
Benefits of Self-Determination

People with greater self determination are:
- Healthier
- More independent
- More well-adjusted
- Better able to recognize and resist abuse
  - Khemka, Hickson, & Reynolds, 2005; O’Connor & Vallerand, 1994; Wehmeyer & Schwartz, 1998

Supported Decision-Making and Self Determination

“Supported Decision-Making has the potential to increase the self-determination of older adults and people with disabilities, encouraging and empowering them to reap the benefits from increased life control, independence, employment, and community integration”
  - Blanck & Martinis, 2015
Supported Decision-Making
Is Required By The Model Rules

ABA Model Rule 1.14:
(a) When a client's capacity to make
duly 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.

Comments To Model Rule 1.14

“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.”
COMMENTS TO MODEL RULE 1.14

“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.”

COMMENTS TO MODEL RULE 1.14

“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.”
MISSOURI STOPLIGHT TOOL

IDENTIFYING ALTERNATIVES TO GUARDIANSHIP

<table>
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<th>Name of Individual</th>
<th>Name of person completing this form</th>
<th>Relationship to individual activity area</th>
<th>Self</th>
<th>Family</th>
<th>Friend</th>
<th>Guardian</th>
<th>Other</th>
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- LegalGuardian
- Informed Consent
- ADL
- Money Management
- Health/Safety
- Social

MISSOURI STOPLIGHT TOOL

Tools to help people identify areas where they may need support.
Missouri Stoplight Tool:
FINDING SUPPORT: ASSESSING NEEDS

Beyond the Binary Worksheet:

https://www.aclu.org/other/beyond-binary-using-supported-decision-making-lens-evaluating-competence

BEYOND THE BINARY WORKSHEET

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FINDING SUPPORT: IDENTIFYING SUPPORTERS

Setting the Wheels in Motion Worksheet:

**Sources of Support: Providers and Agencies**

- **Education**: “Student Led” IEPs and Transition Plans
- **Employment**: Vocational Rehabilitation IEPs
- **Medical Care**: Person Centered Planning in Medicaid Waivers
- **Adult Services**: Centers for Independent Living PASS plans, ABLE Accounts

**Source of Support: Special Education**

The Purpose of Special Education
“to ensure that all children with disabilities have available to them a free appropriate public education. . . and prepare them for further education, employment, and independent living.”
Source of Support: SpEd Transition Services

Transition services are “a coordinated set of activities”
- To “facilitate the child’s movement from school to post-school activities, including post-secondary education, vocational education, integrated employment (including supported employment), continuing and adult education, adult services, independent living, or community participation;”
- Are “based on the individual child’s needs, taking into account the child’s strengths, preferences, and interests; and
- Include “instruction, related services, community experiences, the development of employment and other post-school adult living objectives, and, when appropriate, acquisition of daily living skills and functional vocational evaluation.”

20 USC 1401(34)

Source of Support: Vocational Rehabilitation

Some services that are available:
- Assessments
- Counseling
- Job search and retention services
- Education
- Assistive technology
- Medical and mental health care
- On the job training
- Job coaches
- Transportation
- Services to family members (like Day Care!)

- 34 CFR 361.48
**Source of Support: Person Centered Planning**

Person Centered Plan MUST:
- Address “health and long-term services and support needs in a manner that reflects individual preferences and goals.”
- Result “in a person-centered plan with individually identified goals and preferences, including those related community participation, employment, income and savings, health care and wellness, education and others.”


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**Hypothetical**

Mother, Father, 18 year old child with intellectual disabilities come to your office. Say that they were advised to seek guardianship for the child, but don’t want it. Want to do Power of Attorney instead
- Who is the Client?
- What is your duty?
- What do you do?
- If you do a POA, how can you make sure client is competent to sign?
- How can you memorialize this?
HYPOTHEtical

Same fact pattern, but they say they want guardianship.

- Who is the Client?
  - How does this impact the rest of your representation?
- What is your duty?
- What do you do?
- How do you do it?

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HYPOTHETICAL

You are appointed counsel for a person in a guardianship matter.
Client says she does not want a guardian. You believe she needs one.

- What do you do?
- What is your ethical duty in advising the client regarding the case?
- How do you memorialize/document?

HYPOTHETICAL

You are appointed to represent a criminal defendant. You believe he is incompetent to stand trial. He has a plea offer to resolve the case with no jail time. He wants to take it.

- What do you do?
- What factors influence your decision?
About this Project

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