

Legal Options & Ethical Obligations for Clients with Mental Health Impairments

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Carolyn Reinach Wolf is an Executive Partner in the law firm of Abrams, Fensterman, LLP in Lake Success, New York and Director of the Firm's Mental Health Law practice.

She is the first attorney in the country with a family-focused practice dedicated to serving individuals and families struggling with serious mental illness and/or alcohol/drug addiction. Supported by a team of expert clinicians and her departmental attorneys, she specializes in guiding families through the complex landscape of legal issues that impact loved ones with serious mental illness and/or substance abuse issues. She also represents institutions, such as major hospital systems, mental health, healthcare and addiction professionals, and higher educational institutions. Ms. Wolf is a regular contributor to Psychology Today and was profiled by The New York Times in a 2013 story entitled, "A Guide in the Darkness," which ran on the front page of the Sunday Edition Metro section.

Ms. Wolf is a Past President of the National Behavioral Intervention Team Association (NaBITA), a membership association serving more than 1,500 professionals in schools, colleges and workplaces whose role is to support individuals in need of mental health intervention and to minimize the potential for school and workplace violence. She has been selected to the New York Super Lawyers list since 2013 and the Best Lawyers of America since 2018. Ms. Wolf has also been selected as an honoree of the City and State of New York's 2024 Above & Beyond Women.

Ms. Wolf holds a J.D. from the Maurice A. Deane School of Law at Hofstra University, an M.S. in Health Services Administration from the Harvard School of Public Health, and an M.B.A. in Management from the Hofstra University School of Business. She is admitted to practice in New York State and Federal Courts as well as the U.S. Supreme Court.



OVERVIEW

Mental illnesses are common in the United States with estimated that more than one in five U.S. adults live with a mental illness (57.8 million in 2021).

Source: National Institute of Mental Health

As lawyers, we must keep this statistic in mind when meeting with clients and assessing their capacity. Traditional legal responses need to be viewed and approached through an appropriate mental health lens.

Lawyers taking this course will develop the tools needed to recognize mental health impairments in clients, to understand their ethical obligations in those situations, and will become aware of the legal options available to appropriately respond and protect their clients.



OVERVIEW CONTINUED

An awareness of the legal remedies and tools are available and ability to assess their appropriateness on a case-by-case basis, will enable lawyers to assist clients in the mental health population, and assist clients whose loved ones suffer from mental health impairments.

By exploring the traditional legal resources and how they can be adapted for an individual suffering from a mental illness, this course will prepare you to navigate the ethical rules and obtain optimal outcomes for your clients.



FIRST STEPS IN A CLIENT ASSESSMENT

Whether recognized or not, each meeting with a client or potential client includes a capacity assessment by the attorney.

The Model Rules of Professional Conduct include ethical guidelines for capacity assessments and appropriate responses.

The following red flags are signals that a client may be suffering from diminished capacity or a mental health impairment. When red flags are present, attorneys must follow ethical rules in their representation.



Mental Health Red Flags

- Memory loss.
 - Inability to recall information discussed in prior meetings or communications.
- Communication problems.
 - Difficulty staying on topic, repetitive.
- Lack of mental flexibility.
 - Refusal to consider alternates or discuss the lawyer's recommendation.
- Unable to understand or acknowledge multiple options or viewpoints.



Mental Health Red Flags

- Disorientation relative to space, time, or location.
- Emotional inappropriateness.
 - Wide range of emotions, inappropriate laughter or crying.
- Behavioral signs.
 - Delusions, beliefs that are unlikely to be true, poor grooming/hygiene.
 - Inappropriate behavior in the courtroom or at the lawyer's office.
- Inability to follow-up with the lawyer's requests for information and documentation.



You've spotted a red flag,
now what?



ABA Model Rules of Professional Conduct

Rule 1.4 Communications.

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



ABA MRPC 1.4, Comment [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.

ABA MRPC 1.4, Comment [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.



ABA Model 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.



ABA MRPC 1.14, Comment [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.

In Practice: **Matter of S.B., 117 N.Y.S.3d 814
(Sup. Ct. New York Cty. 2019).**

- New York's Guardianship statute requires that an attorney for an Alleged Incapacitated Person ("AIP") ensure that the point of view of the AIP is presented to the court.
- Yet the New York Rules of Professional Conduct, RPC 1.14 regarding representation of individuals with diminished capacity, "does not provide specific guidance to an attorney for an AIP who is unclear whether his client has the capacity to direct the defense of the litigation or whether the counsel should rely on decisions to be made by the appointed agent under the AIP's power of attorney."
- "[T]o the extent an AIP has communicated a position relative to the request for the appointment of a guardian ... counsel can make decisions and pursue a litigation strategy that honor the AIP's perspective."



What if the client is unable to express or consistently state a legal position, or a client comes to you with a concern about a loved one in need of mental health services?

ABA Model Rules of Professional Conduct

Rule 1.14 Client with Diminished Capacity.

(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.



When assessing the legal options available as both the attorney for a client with diminished capacity, or the advocate on behalf of a family seeking assistance for their loved one, consider:

- Costs.
- Potential trauma to client.

Be aware of any law that requires the lawyer to advocate the least restrictive action on behalf of the client.

Keep in mind the requirements of confidentiality!

See MRPC 1.14, Comments 5-7

ABA Model Rules of Professional Conduct

Rule 1.14 Client with Diminished Capacity.

(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.

ABA MRPC 1.14, Comment [8]:

Disclosure of the client's diminished capacity could adversely affect the client's interests. For example, raising the question of diminished capacity 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.





ABA MRPC 1.14, Comment [8], (continued):
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 with 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 with will act adversely to the client's interests before discussing matters related to the client...

Keep the ethical rules and guidance in
mind, as we consider the
legal recourses available in the
Mental Health Legal Toolkit





MENTAL HEALTH LEGAL TOOLKIT

- **Guardianship or Conservatorship**
- **Management of Legal Affairs**
 - Health Care Proxy
 - Power of Attorney
 - Living Wills
- **Case Management Services**
- **Protective Measures**
 - Orders of Protection
 - Extreme Risk Protection Orders
- **Interventions**
- **Inpatient Hospitalization**
 - Voluntary
 - Involuntary
 - Court Ordered Mental Health Evaluations/Warrants
- **Outpatient Treatment**
 - Partial Hospitalization
 - Assisted Outpatient Treatment



Guardianship/Conservatorship

Consider whether appointment of a guardian ad litem, conservator or guardian is necessary to protect the client's interests or assist the client in completing the legal transaction at issue.

A guardianship (conservatorship) is a legal proceeding by which a court appoints and oversees a legal decision maker for another adult, who due to their “functional limitations” is unable to manage their own affairs.

Personal Needs Guardian - medical care, residence, travel, etc. and/or Property Management Guardian - financial decisions, defend legal proceedings, apply for benefits, etc.

Source: N.Y. Mental Hyg. Law § 81.02. In New York, incapacity refers to functional limitations rather than a mental or physical condition. **Know your state law!**



Management of Legal Affairs

A Health Care Proxy (or Power of Attorney for Health Care) (Article 29-C of the New York Public Health Law) gives authority to an appointed agent to make certain medical decisions when the principal becomes unable to do so.

A Power of Attorney (New York General Obligations Law, § 5-1501) allows the principal to appoint an agent (or attorney-in-fact) to make enumerated financial decisions either immediately, or when the principal becomes unable to do so.

A Living Will is an informed medical statement which allows an individual to set forth in detail their preferences for medical treatment, procedures, or end-of-life treatment.

Know your state law!



Case Management

Case managers are trained to assess the individual's ability and needs. Working with the individual, they can assist with daily living skills and socialization.

Case managers coordinate benefits and services provided by state, local and private agencies. Keep in mind – this requires the individual to accept the services.

Most importantly, case managers monitor the individual in the community.

Know your state law!



Protective Measures: Orders of Protection

New York family courts have jurisdiction over a proceeding concerning acts which constitute disorderly conduct, harassment, stalking, menacing, reckless endangerment, or other acts between members of the same family or household.

This civil proceeding is for the purpose of attempting to stop the verbal or physical abuse, end the family disruption and obtain protection.

In New York, an Order of Protection can include a provision to “stay away” from a person, house, school, and/or place of business, refrain from communication and/or refrain from committing a family offense.

It can also include an “exclusion order” whereby the police can forcibly remove the individual from the household.

Know your state law!



Protective Measures:

Extreme Risk Protection Orders (“ERPO”)

An ERPO seeks to prohibit an individual from purchasing, possessing or attempting to purchase or possess a firearm, rifle or shotgun.

Caution: New York’s Red Flag Law, Civil Practice Law and Rules (“CPLR”) Article 63-a, has been declared unconstitutional in certain counties:

- R.M. v. C.M., 189 N.Y.S.3d 425, (Sup. Ct. Orange County, April 4, 2023) (“... as currently written, lacks sufficient statutory guardrails to protect a citizen's Second Amendment Constitutional right to bear arms.”).
- G.W. v. C.N., 181 N.Y.S.3d 432, (Sup. Ct. Monroe County, December 22, 2022) (ERPO statute unconstitutional).
- Haverstraw Town Police v. C.G., 190 N.Y.S.3d 588, (Sup. Ct. Ulster County, April 20, 2023) (ERPO statute constitutional).

Know your state law!



Interventions

Players: During an intervention, a team consisting of a psychiatrist, a case manager, security personnel, family members, and an attorney meet with the individual.

Goal: The goal of the intervention is to bring the at-risk individual to a hospital or obtain their agreement for voluntary outpatient services including consultations and examinations by a mental health professional, or case management services.



Inpatient Hospitalizations

Hospitalization allows a mental health professional to evaluate mental health issues and establish his/her diagnosis and treatment plan, if any.

In New York, Mental Hygiene Law Article 9 sets forth the standards and procedures for the civil commitment in inpatient psychiatric settings.

New York law permits an individual can be emergently hospitalized involuntarily if an episode occurs where the individual poses a substantial risk of harm to self or others. NY MHL § 9.39.

Family members or concerned individuals can also apply to the court for an at-risk individual to receive a court mandated mental health evaluation in the inpatient setting. NY MHL § 9.43

A “suitable individual” in need of care and treatment, can make a written application for a voluntary hospitalization. NY MHL § 9.13.

Know your state law!



Outpatient Treatment Options

Partial Hospitalization

A program offering intensive outpatient psychiatric treatment, in the form of day programs throughout the week in a hospital setting. Partial Hospitalization or “PHP”, can be voluntary or court-ordered, and it provides a heightened level of observance, therapy, and medication management.

Assisted Outpatient Treatment

Assisted outpatient treatment programs, also known as “AOT”, are forms of court-ordered mandated mental health treatment in the outpatient setting, for individuals with a history of treatment non-compliance. In New York, AOT is also known as “Kendra’s Law” and is governed by Mental Hygiene Law § 9.60. The goal of AOT is to assist an individual receiving care with living and functioning in the community.

Know your state’s law!



Mental illness can impact anyone at any time. As you move forward in your legal career, remember

ABA MRPC 1.14, Comment [2]:

The fact that a client suffers a disability does not diminish the lawyer's obligation to treat the client with attention and respect ...



THANK YOU!

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