The Effects of Mental Health Issues in Matrimonial Law

By Lee Rosenberg, Editor-in-Chief

It is a regular refrain—"My husband is crazy!," "My wife hasn't been officially diagnosed, but she is bipolar," "The whole family are alcoholics," "He should be on meds. . ."

While it is practically the norm for a spouse to assert that the other has a mental health issue, what if they are right or if our client's own behavior appears to demonstrate impairment? Certainly, the law provides remedies, but they may not be so obvious—particularly given the rules of advocacy and confidentiality owed to one's own client—and asserting or acknowledging the impairment of the other party may have other consequences, which could serve as a double-edged sword. Historically, mental health and addiction issues have had a stigma attached and its demonstration has usually had the most profound effect on child custody. The court system, though, does provide services and there are also various specialty treatment programs designed to assist. Opioid addiction challenges have been part of the public discourse in recent years just as marijuana use has become more legally acceptable. Anxiety and depression seem to almost always appear in some form during forensic custody evaluations and urine testing instantly available in our family courts. Let us look then at some of our challenges.

Our Own Client

Ethically, we are bound to advocate— and, while the word "zealous" no longer appears in the current our professional rules,[1] we must still advance the client's interests and protect their confidences. The Rules of the Chief Judge also provide that attorneys for children serve in the role of advocate— still using the adverb "zealous,"[2] and that they may substitute their judgment only in limited and defined circumstances,

> When the attorney for the child is convinced either that the child lacks the capacity for knowing, voluntary and considered judgment, or that following the child's wishes is likely to result in a substantial risk of imminent, serious harm to the child, the attorney for the child would be justified in advocating a position that is contrary to the child's wishes. In these circumstances, the attorney for the child must inform the court of the child's articulated wishes if the child wants the attorney to do so, notwithstanding the attorney's position.[3]

Our statewide Rules of Professional Conduct do, however, provide guidelines in Rule 1.14 where there is "diminished capacity":

> Client With Diminished Capacity
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> (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 conventional relationship with the client.
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> (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.
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> (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.[4]

While the Rule references "minority, mental impairment or...some other reason," only "minority" is readily definable. (DRL §2.) "Capacity" in the Domestic Relations Law is also defined at least in part (see, e.g., DRL § 140,

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but the extent of the diminution of such capacity under Rule 1.14 is based on what the lawyer "reasonably believes." The Domestic Relations Law also provides for annulment or declarations of nullity where a party is "mentally retarded" or "mentally ill" or without "sound mind" [DRL § 140(c)] and where such mental illness is "incurable" for five years or more [DRL § 140(f)], DRL § 141, physical incapacity when continuing and incurable [DRL § 140(d)], and where one's ability to contract the marriage is compromised by "force, duress or fraud" [DRL § 140(e)].

The Mental Health Law also offers some guidance:

> Mental disability is recognized in the Mental Hygiene Law §1.03(3) as "mental illness, intellectual disability, developmental disability, alcoholism, substance dependence, or chemical dependence." Mental illness is also defined therein at §1.03(20), as "an affliction with a mental disease or mental condition which is manifested by a disorder or disturbance in behavior, feeling, thinking, or judgment to such an extent that the person afflicted requires care, treatment and rehabilitation." Under MHL§ 1.03(52), "'Persons with serious mental illness' means individuals who meet criteria established by the commissioner of mental health, which shall include persons who are in psychiatric crisis, or persons who have a designated diagnosis of mental illness under the most recent edition of the Diagnostic and Statistical Manual of Mental Disorders and whose severity and duration of mental illness results in substantial functional disability. Persons with serious mental illness shall include children and adolescents with serious emotional disturbances."

In the area of trusts and estates, the issue of capacity has been discussed as to varying levels depending on the type of document to which the term is being applied—capacity to enter into a trust (similar to a contract, the grantor must comprehend and understand the nature of the transaction and be able to make a rational judgment concerning the particular transaction) *vis-a-vis* execute a deed.[5] The American Bar Association also has promulgated legal standards of diminished capacity.[6]

It would certainly appear that the term "mental impairment" from Rule 1.14 infers a lesser degree of proof than the DRL's mentally ill or mental retardation, and along with "some other reason" would encompass various forms of dependency, addiction, substance abuse, spousal abuse, and depression, for example. Of course, diagnoses by a litigant's therapist, psychiatrist or a finding by TASC or a court-appointed mental health professional based upon DSM testing and clinical findings would lead counsel to have to consider the level, import and impact of the impairment— if the court does not intervene first.

Commentaries to Rule 1.14 guide us, but provide caution given that the risk of disclosure of the condition being potentially adverse to the client's interests. In taking "protective action" though, the Commentary states "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 in 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."

Two Sides of the Coin

Of course, if there is a sense that the other party suffers from some form of disability of impairment, it becomes fodder for discovery on the financial aspects and possibly custody. But, be careful what you wish for. Given that there is limited disclosure on issues of custody in the First and Second Appellate Divisions[7] a client's developing mental health or addictive condition might not ever officially come to light, but could very well affect their ability to parent a child. That being said, a person's physical and mental conditions are placed at issue in a contested custody matter, a proper showing is needed to warrant that discovery.[8] Opening up the Pandora's Box by asserting incapacity can satisfy that standard.[9] Such a finding, which affects the incapacitated spouse on custody, may also, however, result in the other spouse being subject to a non-durational spousal support award where there is an inability to become self-supporting[10] or having an agreement set aside.

Rule 1.14 offers the possibility of guardian ad litem, conservator or guardian to assist in a proper case. If the impairment is or becomes a disability or complete incapacity, the stakes become higher in the attorney's decision-making process. Barring situations where the condition is blatant, it would appear that the confidences of the client remain paramount and must still be protected and that where disclosure of the client's concoction would affect his/her position in the case, the balancing act ensues. If the situation becomes too problematic, counsel may make application to the court to withdraw, but must again protect the client's confidences in the process.

If it is suspected that there is indeed a real issue of diminished capacity, further inquiry into the mental health past and present should be undertaken, along with the careful determination as to the next steps re-

quired to protect both the client and yourself, if it is your client who is at risk. Ensure others in your office are present and document the discussions, with the client being made aware that you have concerns and what they are. If the client is not in counseling—suggest it, and possible mitigate both the condition and the issue. If it is the other side, explore the issue within the financial aspects of the case where discovery is readily available and also determine if the diminished capacity is one which also requires the court's attention, perhaps with the appointment of an attorney for the children, an order of protection, or the appointment of an guardian ad litem as the lesser avenues to pursue at first.

We live in a stressful world and parties going through divorce are confronted with one of the greatest additional stressors that exist—causing the proverbial distinction between criminal matters "bad people doing bad things vs "good people doing bad things." Navigating the mental health aspects of these matters when true diminished capacity exists encompasses a variety of skills and awareness—yet another function of the many responsibilities of the family lawyer.

Endnotes

1. 22 N.Y.C.R.R. Part 1200—Rules of Professional Conduct; Sanders, Paul C., *Whatever Happened to 'Zealous' Advocacy*, NYLJ March 11, 2011.
2. 22 N.Y.C.R.R. § 7.2.
3. 22 N.Y.C.R.R. § 7.2(d)(3).
4. Rule 1.6 relates to protecting client confidences.
5. See *In re Lewis*, 59 Misc. 3d 1217(A) (Sur. Ct., Kings Co. 2012); *In re Estate of ACN*, 133 Misc. 2d 1043 (Sur. Ct., N.Y. Co. 1986).
6. https://www.americanbar.org/content/dam/aba/administrative/law_aging/2012_aging_capacity_hbk_ch2.authcheckdam.pdf.
7. Discovery as to issues of custody has been historically limited in the First and Second Departments as it was as well on fault. *See,* however, *Howard S. v. Lillian S.*, 14 N.Y.3d 431 (2010) on the fault issue. *Garvin v. Garvin*, 162 A.D.2d 497 (2d Dep't 1990); *S.R.E.B. v. E.K.E.B.*, 48 Misc. 3d 1217(A) (Sup. Ct., Kings Co. 2015).
8. *Torelli v. Torelli*, 50 A.D.3d 1125 (2d Dep't 2008); *Worysz v. Ratel*, 101 A.D.3d 893 (2d Dep't 2012); *Duval v. Duval*, 85 A.D.3d 1096 (2d Dep't 2011).
9. *Wegman v. Wegman*, 37 N.Y.2d 940 (1975).
10. *Greco v. Greco*, 161 A.D.3d 9525 (2d Dep't 2018); *Tiger v. Tiger*, 155 A.D.3d 1386 (2d Dep't 2018); *Christopher C. v. Bonnie C.*, 40 Misc. 3d 859 (Sup. Ct., Suffolk Co. 2013).