

13-03

Opinion No. 13-03

Utah Ethics Opinion

Utah State Bar Ethics Advisory Opinion Committee

October 25, 2013

Issued September 11, 2013

ISSUE

1. Whether a lawyer violates her duty to diligently represent a client who wishes to appeal a juvenile court's order, but refuses to sign the Notice of Appeal (which will be dismissed without appellant's signature pursuant to statute) due to her diminished capacity.

OPINION

2. Under Rule 1.14, if the lawyer believes the client is at risk of substantial harm unless action is taken and cannot adequately act in the client's own interest, the lawyer should take reasonable steps to protect the client's interests.

FACTS

3. Lawyer has defended Client's parental rights in child welfare proceedings. Client has been found permanently criminally incompetent and was receiving extensive services through Division of Services for People with Disabilities (DSPD). DSPD determined that Client has diminished capacity. Lawyer has always been able to effectively communicate with Client and has defended Client's parental rights in accordance with her wishes. The State filed a Verified Petition for Termination of Parental Rights, and Lawyer represented Client at trial. On four occasions—at the beginning of trial, during trial, and after the Court ruled to terminate Client's parental rights—Lawyer advised Client of her right to an appeal and advised Client that she would be required to sign a Notice of Appeal. On all four occasions, Client indicated she would refuse to sign anything but wanted to appeal. Utah Code Ann. § 78A-6-1109 requires an appellant's signature on every Notice of Appeal from a juvenile court order. If the Notice of Appeal is submitted without signature, the appeal is dismissed and the appellant loses his or her right to the appeal. Lawyer filed a Motion for Extension of Time and an Affidavit of Diligence and awaits a response from the Court.

ANALYSIS

4. Rule 1.3 requires that lawyers "act with reasonable diligence and promptness in representing a client." Utah R. Prof. Conduct 1.3. Moreover, the Rules specifically address representation of clients with diminished capacity in Rule 1.14. The Rule states:

(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 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.

(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.

Utah R. Prof. Conduct 1.14. The Rules define the term "substantial" as "a material matter of clear and weighty importance." Utah R. Prof. Conduct 1.0(m).

5. Here, despite Lawyer's ability to effectively communicate with Client in the past, a normal client-lawyer relationship does not exist. Client has been found permanently criminally incompetent. Furthermore, Client has stated on four occasions that she would like to appeal the juvenile court's decision, but that she refuses to sign a Notice of Appeal. Pursuant to statute, in the absence of a signature on the Notice of Appeal, Client's appeal will be dismissed and Client will lose her right to appeal. If Lawyer believes Client is at risk of substantial harm, Lawyer should take protective action. The Committee believes it is a strategic decision concerning what exactly Lawyer should do to take such protective action, however the Committee notes that Rule 1.14 suggests the appointment of a guardian ad litem. If the Court appoints a guardian ad litem to take the ministerial step of signing the Notice of Appeal, the letter of the law would be satisfied and Client's wishes respected. It may also be appropriate for Lawyer to file the appeal without Client's signature and challenge the

requirement as applied to Client.

CONCLUSION

6. If a client with diminished capacity refuses to take certain necessary acts to carry out the client's goal, the lawyer should take protective action. 4810-9256-0405, v. 1

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