OPINION 2006-1
Synopsis

With regard to a client whom a lawyer reasonably believes cannot adequately act in her own interest, the lawyer must maintain as far as possible a normal client-lawyer relationship but may take action to protect the client including seeking appointment of a guardian. The lawyer may consult with an appropriate diagnostician with regard to the client's condition but must protect against disclosure of confidential information. Although in limited circumstances withdrawal from representation may be permissible, the Professional Responsibility Section believes that continuing the representation and the attendant risks is the preferable course. When there is no matter of active representation, the Rules of Professional Conduct do not impose a duty on the lawyer to accept further requests for representation. A lawyer's own conscience and personal beliefs about moral and ethical conduct may influence the decision to accept the representation and assist the client.

Issue

When a client's persistent beliefs and unsubstantiated claims of theft of papers, including claims directed at the lawyer, demonstrate that the client is mentally unstable, how does the lawyer continue to represent the client and protect against the risk of being reported by the client for unprofessional conduct?

Facts

An older client has severe mental problems which are evidenced at least in part by accusations that people steal from her all the time including a claim against the lawyer that he had taken her "papers and records." She claims that people come into her house at night while she is sleeping and steal from her. There is no ongoing active representation. Rather the lawyer has handled matters in the past and anticipates handling matters in the future. The client also considers the requesting attorney to be her lawyer, even if there is not a current matter. The attorney is concerned that there is a real risk, given the client's mental status and volatility that the client will eventually file a complaint with the Professional Responsibility Board based on her fear that papers are being stolen etc.

Relevant Rules of Professional Conduct[1]

[1] Note that substantial amendments to the Vermont Rules of Professional Conduct have been proposed by the Advisory Committee but have not yet been reviewed and approved by the Vermont Supreme Court. The proposed amendments incorporate comprehensive and significant changes to the American Bar Association's Model Rules of Professional Conduct that were adopted by the ABA House of Delegates in 2001-2003.

The comment period for the amendments to the Vermont Rules ended on April 15, 2005. For the text of the amendments and explanatory comments and Reporter's Notes go to: http://www.vermontjudiciary.org/rules/proposed/index.htm

Rule 1.14. Client Under a Disability

(a) When a client's ability to make adequately considered decisions in connection with the representation is impaired, whether because of minority, mental disability or for some other reason, the lawyer shall, as far as reasonably possible, maintain a normal client-lawyer relationship with the client.

(b) A lawyer may seek the appointment of a guardian or take other protective action with respect to a client only when the lawyer reasonably believes that the client cannot adequately act in the client's own interest.

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Rule 1.16. Declining or Terminating Representation

(a) Except as stated in paragraph (c), a lawyer shall not represent a client or, where representation has commenced, shall withdraw from the representation of a client if:

> (1) the representation will result in violation of the rules of professional conduct or other law;
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> ...

(b) Except as stated in paragraph (c), a lawyer may withdraw from representing a client if withdrawal can be accomplished without material adverse effect on the interests of the client, or if:

> ...
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> (6) other good cause for withdrawal exists.

Discussion

Given the fact that there is no active representation of the client, there is no obligation under the VRPC to accept a future request for representation. This conclusion does not change with regard to a client under a disability. The lawyer may feel a moral and ethical obligation to continue to handle matters for a client under a disability and doing so is not mandated by the VRPC but is clearly consistent with the spirit of the Rules: "Many of a lawyer's professional responsibilities are prescribed in the Rules of Professional Conduct, as well as substantive and procedural law. However, a lawyer is also guided by *personal conscience* and the approbation of professional peers." VRPC Preamble: A Lawyer's Responsibilities (emphasis supplied).[2]

[2] It should be noted that the Rules do not impose an obligation upon a lawyer who declines a request for representation to assist the client in finding new representation or to assist new counsel with relevant historical information about the client. However, if the client's disability would interfere with the

If the Supreme Court adopts the proposed amendments to the VRPC, Rule 1.14 will change in significant respects. In particular, amendments to VRPC 1.14, if adopted, may restrict the circumstances of when a lawyer can act to protect a client "with diminished capacity" to circumstances where in addition to the client's inability to adequately act on her own interest, the client also "is at risk of substantial physical, financial or other harm unless action is taken." Additionally, subsection (c) of the current rule which addresses when a lawyer may take action on behalf of a person under a disability, who is not a client, is beyond the scope of this opinion.

The Section addressed Rule 1.14 indirectly in Opinion 2000-03. That opinion addressed a situation in which appointed counsel for mental health proceedings was discharged by the client prior to a merits hearing. Given the pending hearing, the Section opined that counsel would have to continue to prepare but that it was permissible to seek withdrawal providing that the client was competent to understand withdrawal.

When helping a paranoid client, a lawyer may not always be able to maintain a normal client-lawyer relationship due to the client's inability to make reasoned decisions on information provided. Rule 1.14 (a) requires that the lawyer normalize the relationship as far as possible. Comments to the rule make clear that at a minimum the lawyer must continue to give the client attention and respect and maintain communication. Comments to the rule also point out that even though a client may be incompetent to make legally binding decisions, the client may still have the "ability to understand, deliberate upon, and reach conclusions about matters affecting the client's own well-being." This comment underscores the continuing obligation to keep a client informed and that the level of competence may not put all decisions out of reach. ABA Formal Opinion 96-404 emphasized that under the similar provision of former Model Rule 1.14(a), the obligation to maintain a normal client-lawyer relationship "implies that the lawyer should continue to treat the client with attention and respect, attempt to communicate and discuss relevant matters, and continue as far as reasonably possible to take action consistent with the client's directions and decisions."

The Reporter's Note to Rule 1.14 explains the relationship between subparts (a) and (b) "[i]t requires the lawyer to try to maintain a client-lawyer relationship which is as normal as possible with the client whose ability to make decisions is impaired, and permits the lawyer to seek protective action regarding the client only when the lawyer reasonably believes the client cannot adequately act in the client's own interest." The comments acknowledge that "[i]n many circumstances, however, appointment of a legal representative may be expensive or traumatic for the client. Evaluation of these considerations is a matter of professional judgment on the lawyer's part." Furthermore, the comments point out that disclosure of the client's condition may adversely affect the

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likelihood that the client will be able to find a new lawyer or communicate relevant historical information necessary to the representation, the lawyer may be faced with a difficult situation and will have to look to his or her own conscience for how to proceed.

client's interests and trigger other legal consequences. In dramatic understatement, the comments observe: "The lawyer's position in such cases is an unavoidably difficult one." In order to provide some guidance in these situations, the comments offer that the lawyer "may seek guidance from an appropriate diagnostician." Fundamentally, however, when conditions exist that meet subpart (a), i.e. client incapacity, the lawyer should be no different than any other agent with an incompetent principal and without authority to act. Subpart (b) permits that action and comments to the Rule offer a further departure from the Rules by permitting disclosure of confidential client information as necessary to take the action or to seek guidance from an appropriate diagnostician. (Proposed amendments to Rule 1.14 make this authorization explicit and specifically incorporate reference to Rule 1.6 and state that when taking protective action there is an implied authorization to disclose confidential information as is reasonably necessary).

The facts before the Section are especially challenging because while the client needs legal assistance, there is no specific issue of representation facing the client at this juncture. As noted above, under the proposed amendments to Rule 1.14, this situation would leave the lawyer unable to act because although the client may not be able to adequately act on her own interest, there is no current "risk of substantial physical, financial or other harm unless action is taken." ABA Formal Opinon 96-404, discussing the identical language to Rule 1.14(b) is directly on point to this situation and is reproduced at length:

> The scope of authority granted a lawyer under Rule 1.14(b) appears on the face of the rule to be quite broad. For example, the language of Rule 1.14(b) appears to permit a lawyer to take protective action whether or not immediately necessary to the lawyer's effective representation of the client, if, in the matter at hand, the client cannot adequately act in the client's own interest. Thus, a lawyer who has a longstanding existing relationship with a client, but no specific present work, is not, for lack of such assignment, barred from taking appropriate action to protect a client where 1.14(b) applies.
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> On the other hand, there are limits as to when a lawyer may take protective action under Rule 1.14(b), and as to what action may be taken. Rule 1.14(b) does not authorize the lawyer to take protective action because the client is not acting in what the lawyer believes to be the client's best interest, but only when the client "cannot adequately act in the client's *own* interest."[5] [Reproduced below] (Emphasis added) A client who is making decisions that the lawyer considers to be ill-considered is not necessarily unable to act in his own interest, and the lawyer should not seek protective action merely to protect the client from what the lawyer believes are errors in judgment. Rule 2.1 permits the lawyer to offer his candid assessment of the client's conduct and its possible consequences, and to suggest alternative courses, but he must always defer to the client's decisions. Substituting the lawyer's own judgment for what is in the client's best interest robs the client of autonomy and is inconsistent with the principles

of the "normal" relationship.

> Equally important, Rule 1.14(b) cannot be construed to grant broad license for even the most well-intentioned lawyer to take control over every aspect of a disabled client's life, or to arrange to have such control vested in someone other than the client. Rather, the authority granted under Rule 1.14(b) to seek protective action should be exercised with caution in a limited manner consistent with the nature of the particular lawyer/client relationship and the client's needs, as discussed more fully below.
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> 5. "In other words, the client's capacity must be judged against the standard set by that person's own habitual or considered standards of behavior and values, rather than against conventional standards held by others." M. SILBERFIELD AND A. FISH, WHEN THE MIND FAILS; A GUIDE TO DEALING WITH INCOMPETENCY (University of Toronto Press, 1994).

The Section agrees with ABA Formal Opinion 96-404 that under the current version of VRPC 1.14(b) "a lawyer who has a longstanding existing relationship with a client, but no specific present work, is not, for lack of such assignment, barred from taking appropriate action to protect a client where 1.14(b) applies." Nonetheless, protection of the lawyer from potential complaints to the Professional Responsibility Board has no place in the analysis of whether protective action may be taken. Rather, to the extent possible, the lawyer must maintain an ordinary client-lawyer relationship and may take protective action only when the lawyer reasonably believes that the client cannot act adequately in her own interest. In forming that assessment, the lawyer may consult with an appropriate diagnostician and may disclose client confidences as necessary to the consultation. The Section also believes that any protective action taken must be the least restrictive possible under the circumstances in order to preserve client autonomy. See ABA Formal Opinion 96-404.

Withrawal

Under Rule 1.16 (a)(1) a lawyer must withdraw from representation where the client becomes incompetent both because the lawyer's authority would be revoked by the client's incompetence and because the lawyer would be unable to carry out professional responsibilities to the client under the Rules. Rule 1.14 provides an exception to this Rule but does not compel the lawyer to continue the representation or to take protective action on behalf of the client. Permissive withdrawal under Rule 1.16 (b) is allowed when it may be accomplished without material adverse affect on the interests of the client or under subpart (6) for other good cause. With a client under a disability, withdrawal may solve the lawyer's problem but likely leaves the client in harm's way. The Section does not believe, as a matter of policy that the mere fact of a disability is enough to constitute 'other good cause' as contemplated by 1.16(b)(6). However, a client's disability can be good cause if it so impairs the attorney-client relationship that the attorney cannot do his or her job and there is reason to think that another attorney will be able to better cope with the client's disability. Alternatively, where the disability is sufficiently profound that

a client is not competent to assess withdrawal, it would appear to meet the limitation in the Rule that termination of the representation will cause a material adverse effect on the client.

In the question facing the Section, the issue is not if the client's disability will affect her interests but when. In these circumstances, it may be appropriate, if the lawyer does not have the constitution to act to protect the client, for the lawyer to withdraw. However, the need for legal representation and identification of appropriate resources for finding another lawyer should in these circumstances be communicated to the client.

ABA Formal Opinion 96-404 concluded that the better course was to stay with the representation. Other states ethics opinions concur: Me. Ethics Op. 84 (1988) (withdrawal not likely to be satisfactory resolution of dilemma, as it leaves client without advice when it seems to be most needed; withdrawal inappropriate unless client insists that lawyer not obtain conservator after lawyer has already begun proceedings); N.Y.City Ethics Op. 83-1 (undated) (withdrawal least-desirable option). However, in some instances, withdrawal may be appropriate as this Section found in Opinion 2000-3 involving appointed counsel who was discharged by a client and permitted to withdraw upon making a determination that the client was competent to make the decision to discharge counsel. See, e.g., Ill.Ethics Op. 89-12 (1990) (lawyer who believes client's irrational behavior and incapacity to act in own best interests are making representation unreasonably difficult may seek to withdraw); Pa.Ethics Op. 98-83 (1998) (lawyer may seek court permission to withdraw from case when client grows increasingly agitated, unreasonable, and irrational regarding case, refusing to permit lawyer to hire necessary expert to evaluate complex financial aspects of case); see also Restatement (Third) of the Law Governing Lawyers § 24 cmt. d (2000) (when lawyer discloses client's diminished capacity to tribunal against client's wishes, lawyer may be required to attempt to withdraw if disclosure causes client effectively to discharge lawyer); id. cmt. f (if lawyer believes guardian of client with diminished capacity to be acting lawfully but inconsistently with best interests of client, lawyer may remonstrate with guardian or withdraw).

If the client is competent to make the decision about discharging the lawyer, the Section believes that withdrawal may be appropriate so long as there are adequate safeguards to allow the client to identify and access other lawyers. However, when the client's competence is not sufficient to protect her own interests, withdrawal only solves the lawyer's problems and may put the client in harm's way. In these circumstances, the Section believes that withdrawal should not be pursued, even if permissible.