

Supported Decision-Making and the Law: Ethical Considerations

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POP QUIZ

What is an attorney's
most important Ethical
Duty?

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TRICK QUESTION

LOYALTY

National Resource Center for Supported Decision-Making
EVERYONE has the Right to Make Choices

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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 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.

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EVERYONE has the Right to Make Choices

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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..

MODEL RULES ON LOYALTY

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.

MODEL RULES ON LOYALTY

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.

MODEL RULES ON LOYALTY

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 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.**

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.”**

FINDING SUPPORT: ASSESSING NEEDS

Tools to help people identify areas where they may need support.

Missouri Stoplight Tool:

[file:///C:/Users/BBI%20ADMIN/Downloads/Guardianship%20Manual%20Appendix%201%20\(1\).pdf](file:///C:/Users/BBI%20ADMIN/Downloads/Guardianship%20Manual%20Appendix%201%20(1).pdf)

MISSOURI STOPLIGHT TOOL

IDENTIFYING ALTERNATIVES TO GUARDIANSHIP			
Name of individual: _____			
Name of person completing this form: _____			
Relationship to individual (circle one): Self Family Friend Guardian Other: _____			
How long have you known the individual? _____			
<p>This checklist is a tool designed to be used <i>only</i> for the purposes of the training program.</p> <p>NO Guardianship: Understanding Your Options & Alternatives.</p> <p>It is designed to assist with identifying a person's ability to make decisions and manage key areas of the individual's life. It is intended to assist with exploring alternatives and less restrictive options to plenary or full guardianship.</p> <p>The questions listed below are <i>not</i> exhaustive and are <i>not</i> intended to provide a final determination of what a person should (or should not) do in their unique circumstances.</p>	<p>LEAST RESTRICTIVE:</p> <p>Individual Makes Own Decisions</p> <p>"YES"</p> <p>If the answer is "YES," place a ✓ in the box.</p> <p>If the answer is "NO,"</p> <p>→</p>	<p>Individual Needs Support With Making Decisions</p> <p>"NO"</p> <p>If there is an ALTERNATIVE that meets this need, list it below.</p> <p>If NO Alternative meets this need, go to next column.</p> <p>→→</p>	<p>SEVERELY RESTRICTIVE:</p> <p>Individual Has SUBSTANTIAL TO ALL Decision-Making Capacities</p> <p>"NO"</p> <p>Place a 0 in the box and consider whether you need to address the need through the court-supervised EXPLORES.</p>
EMPLOYMENT			
Can the person make and communicate choices in regard to employment?			
Can the person look for and find a job (go to employment agency, respond to ads, use contacts)?			
MONEY MANAGEMENT			
Is the person able to manage their money (i.e. meet financial commitments, such as regular bills)?			
Is the person able to manage the monetary benefits he or she is supposed to receive?			
Is the person able to identify and resist financial exploitation?			
HEALTH & NUTRITION			
Does the person make decisions about where, when, & what to eat?			
Can the person follow a prescribed diet and/or take medicines as directed?			
Does the person understand the need to maintain personal hygiene and dental care?			
Can the person make and communicate decisions regarding medical treatment, including understanding the consequences of not accepting treatment?			
Does the person understand health consequences associated with high risk behaviors (alcohol use, overeating, high-risk sexual activities, etc.)?			
Can the person alert others and seek medical help for serious health problems?			


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

Beyond the Binary
Competence Evaluation Tool

	Check this box if the person makes their own choices or can do this task independently .	Check this box if the person can make decisions or do this task with support . Describe supports needed or in place.	Check this box if the person cannot make decisions or complete this task even with supports . Describe why supports don't work.
COMMUNICATION			
Can express preferences			
Can provide detailed information			
Can explain reasons of communication			
PERSONAL CARE			
Choosing what to wear			
Getting dressed			
Choosing what to eat, and when to eat			
Taking care of personal hygiene (for example, showering, bathing, brushing teeth)			
HEALTH CARE			
Remembering to take medicine			
SAFETY			
Making safe choices around the house (for example, turning off the stove, having fire alarms)			
Understanding and getting help if being treated badly (abused or neglected)			
Making choices about alcohol and drugs			

FINDING SUPPORT: IDENTIFYING SUPPORTERS

Setting the Wheels in Motion Worksheet:

<http://supporteddecisionmaking.org/sites/default/files/Supported-Decision-Making-Teams-Setting-the-Wheels-in-Motion.pdf>

SETTING THE WHEELS IN MOTION WORKSHEET

Supported Decision-Making Teams: Setting the Wheels in Motion

Date: _____ Individual with Exceptional Abilities: _____

Current SDM Team Members or Assistants: _____

The flowchart for Part 1 starts with 'Begin Brainstorm!' leading to 'Assessment?'. From 'Assessment?', arrows point to 'Decisions they already make?' and 'How do they make them?'. 'Decisions they already make?' leads to 'Which are important to them?'. 'How do they make them?' also leads to 'Which are important to them?'. 'Which are important to them?' leads to 'SDM Agreement'.

Part 1: HOW can I help my Friend or Family Member use SDM?
Start by BRAINSTORMING! (This can be free form or See ACLU Brainstorming Guide or others included in the SDM Toolkit attached.)

Is it necessary to have the individual assessed? Would it be beneficial? Are there assessments already completed that can help determine this person's current decision making skills? (See suggested SDM Assessments in the SDM Toolkit attached.)

What decisions can and does the person already make?

How are these decisions made?

What decisions are important to the person? (See suggested sample SDM Agreements in the SDM Toolkit.)

The flowchart for Part 2 starts with 'List those Trained and likely Willing' leading to 'Accept and Support?'. 'Accept and Support?' leads to 'Part 2: WHO should be on the Team?'. 'Part 2: WHO should be on the Team?' leads to 'Knowledge/Expertise?' and 'Available Long Term?'. 'Knowledge/Expertise?' leads to 'Flexible and willing to make individual "the agenda"?'.

Part 2: WHO should be on the SDM Team?
List people who are both trained and likely willing to go on the SDM journey.

Do these people also accept and support the individual?

Do these people have knowledge/expertise in an area we may include in the SDM agreement?

Will they likely be available long term? Could they be an interim Team member for the short term?

Are they flexible and willing to make the individual "the agenda"?

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.**”

20 U.S.C. § 1400(d)(1)(A) (emphasis added).

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)

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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

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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.”

www.medicaid.gov/medicaid-chip-program-information/by-topics/long-term-services-and-supports/home-and-community-based-services/downloads/1915c-fact-sheet.pdf

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?

HYPOTHETICAL

Same fact pattern but the person they want guardianship of is an older adult with early stage Alzheimers-related dementia

- 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?

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?

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