



**New York State Bar Association
Committee on Professional Ethics**

Opinion 1224 (06/03/2021)

Topic: Conflicts of interest; diminished capacity.

Digest: When a lawyer is jointly representing two clients as joint purchasers in a transaction and one of them no longer wishes to proceed, the lawyer cannot continue to represent both clients without violating Rule 1.7, which prohibits lawyers from jointly representing clients with differing interests. That one of the clients has diminished capacity does not alter this conclusion.

Rules: Rules 1.7; 1.14

FACTS

1. The inquirer is an attorney who has known his clients, a husband (“H”) and wife (“W”), for over a decade. H and W entered a contract to jointly purchase real property (“Transaction 1”). Shortly afterwards, H was involuntarily committed for a period of time to a psychiatric facility. No petition to appoint a guardian for H was subsequently filed. H wants to move forward with Transaction 1, but W now does not.

2. Separately, just prior to his involuntary commitment, H set up an LLC, with both H and W as members, with the intent that the LLC would buy a second property (“Transaction 2”). No contract has been signed, but H wants to move forward with Transaction 2 while W now does not.

3. W holds a power of attorney (“POA”) for H which confers upon W the power to act on behalf of H with respect to real estate transactions, and W has instructed inquirer both to terminate the contract in Transaction 1 and to discontinue negotiations toward a contract in Transaction 2. The inquirer asks if he may ethically follow W’s instructions.

QUESTION

4. Where a husband and wife who are joint clients provide conflicting instructions whether or not to proceed with real estate transactions in which they each have a financial interest, where the wife holds a power of attorney for the husband, and where there is reason to believe that the husband may have diminished capacity, may an attorney follow the instructions of the wife and act contrary to the stated wishes of the husband?

OPINION

5. Our analysis focuses on Rule 1.7 of the New York Rules of Professional Conduct (the “Rules”). Under Rule 1.7(a)(1), a lawyer may not represent a client (or clients) if “a reasonable lawyer would conclude” that “the representation will involve the lawyer in representing differing

interests,” unless the conflict is consentable and the lawyer obtains each affected client’s informed consent pursuant to Rule 1.7(b). “Differing interests” are defined in Rule 1.0(f) “to include every interest that will adversely affect either the judgment or the loyalty of a lawyer to a client, whether it be a conflicting, inconsistent, diverse or other interest.”

6. Here, it is abundantly clear that clients H and W now have differing interests. Rule 1.7 therefore prohibits the inquirer from representing them both unless they each give their informed consent, confirmed in writing. See Comment [4] to Rule 1.7 (“If a conflict arises after representation has been undertaken, the lawyer ordinarily must withdraw from the representation unless the lawyer has obtained the informed consent of the client under the conditions of paragraph (b)”).

7. Implicit in the current inquiry, however, is a question about whether either diminished capacity or a power of attorney require a different outcome. With regard to a client’s diminished capacity, Rule 1.14(a) provides that “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.” See generally N.Y. State 1144 ¶ 11 (2018) (discussing various aspects of Rule 1.14). By mandating that a lawyer maintain a conventional relationship with a client who has diminished capacity as far as reasonably possible, Rule 1.14(a) requires the inquirer, as much as reasonably possible, to carry out the wishes of H, despite his apparent diminished capacity. See Comment [3] to Rule 1.14 (“the lawyer must keep the client’s interests foremost” and must generally “look to the client ... to make decisions on the client’s behalf.”). Accordingly, regardless of H’s alleged diminished capacity, Rule 1.7(a)(1) prevents the Inquirer from going forward with the joint representation of H and W because they have “differing interests” absent the informed consent of both H and W. Here, however, securing the informed written consent of H and W to the joint representation is not possible because the clients are each directing the attorney to pursue mutually exclusive objectives (go forward and not go forward).

8. The inquirer’s remaining question -- whether he can honor the instructions of W and terminate the Transactions in reliance on W’s use of the POA to act on H’s behalf-- presents questions of law that are outside the scope of this committee’s jurisdiction. We do not opine on issues of law. However, the presence of the POA highlights the conflicted position that inquirer occupies. An unconflicted lawyer might well advise H to seek immediate revocation of the POA so that W does not attempt to use the POA in a manner contrary to H’s wishes -- but if the inquirer were to do so, he would be acting contrary to W’s interests. See Comment [8] to Rule 1.7 (“The critical questions are the likelihood that a difference in interests will eventuate and, if it does, whether it will adversely affect the lawyer’s professional judgment in considering alternatives or foreclose courses of action that reasonably should be pursued on behalf of the client.”).

CONCLUSION

9. When a lawyer is jointly representing two clients as purchasers in a transaction and one of them no longer wishes to proceed, the lawyer cannot continue to represent both clients jointly without violating Rule 1.7. That one of the clients has diminished capacity does not alter this conclusion.

(11-21)