STATE OF WISCONSIN IN SUPREME COURT

IN THE MATTER OF DISCIPLINARY PROCEEDINGS AGAINST THOMAS L. FRENN, ATTORNEY AT LAW.

OFFICE OF LAWYER REGULATION, Case No. 2025AP356-D

Complainant;

THOMAS L. FRENN,

Respondent.

ORDER ON CROSS-MOTIONS FOR DISPOSITIVE RELIEF

Respondent Thomas L. Frenn moves to dismiss for failure to state a claim the single-count Complaint charging him with a violation of SCR 20:1.14(a). Complainant Office of Lawyer Regulation (OLR) opposes the motion and moves for judgment on the pleadings based on the Complaint's allegations and the Answer's admissions.

Undisputed Material Facts

Both parties argue that there is no dispute of material fact (OLR Brief at 1; Frenn Brief at 1), and I agree. The undisputed material facts are as follows.

Sue Gaulke, daughter of Patricia Skiera and her agent under powers of attorney for health care and finances, engaged Attorney Frenn to represent Patricia on May 30, 2019, during the pendency of petitions for guardianship and protective placement of Patricia.[1] (Complaint, ¶¶ 7-9 at 2-3; Answer, ¶ 1 at 1; Motion to Dismiss, ¶ 7 at 2.) On July 18, 2019, a circuit court in the

[1] The parties differ concerning the scope of the representation. OLR claims Attorney Frenn was engaged "to represent Patricia regarding the guardianship and protective placement" (Complaint, ¶ 8 at 2), while Attorney Frenn claims he was engaged "to recover funds that James Skiera stole from his mother, Patricia Skiera" (Answer, ¶ 2 at 1). This difference is immaterial to the issue presented by the cross-motions.

guardianship proceeding adjudged Patrcia to be incompetent and terminated the health care power of attorney, but Sue continued to serve as Patricia's agent under the financial power of attorney. (Compl., ¶ 9 at 2-3; Ans., ¶ 1 at 1.)

Attorney Frenn subsequently represented Patricia at a mediation session and then at an arbitration hearing, both of which also involved her four children. (Compl., ¶¶ 10-11 at 3; Ans., ¶¶ 3-4 at 1; Mtn to Dismiss, ¶¶ 10 at 2, 12 at 2-3.) *After* providing that representation, Attorney Frenn met with Patricia for the first time, on October 21, 2019, ostensibly because her daughter Sue was no longer acting as agent under the financial power of attorney and the guardian would not communicate with him. (Compl., ¶ 12 at 4 and Ex. A at 1; Ans., ¶ 5 at 2; *see* Mtn to Dismiss, ¶¶ 13-14, 16 at 3; Frenn Br. at 3.) Three months later, Attorney Frenn filed his report of that interview in the guardianship proceeding. (Compl., ¶ 12 at 4 and Ex. A.) The report indicates that during the interview he informed Patricia of the result of his representation and she expressed her approval as well as her preference regarding who should manage her financial affairs. (*See id.*; Mtn to Dismiss, ¶ 14 at 3.)

Analysis

SCR 20:1.14(a) provides: "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." OLR charges that Attorney Frenn, by failing to communicate with his client for over four months, during which he represented her in mediation and arbitration, violated that rule.

Inarguably, the polestar of a "normal client-lawyer relationship" is the lawyer's consultation directly with the client. Just as obviously, in the absence of extraordinary

circumstances that consultation must occur *before* the lawyer takes any significant action on the client's behalf. The rule states that a lawyer owes that duty to a client with diminished capacity, to the extent "reasonably possible." The issue the cross-motions present is how, if at all, the rule applies to a lawyer representing an incompetent client.

Attorney Frenn draws a bright line between mere mental impairment and incompetence, noting that incompetence must be adjudicated by a court. (*See* Frenn Br. at 1-2.) He argues, at least implicitly, that with respect to representation of an incompetent client as opposed to a merely impaired one, Rule 20:1.14(a) does *not* impose an obligation on the attorney to consult with that client. Instead, he argues that the attorney for an incompetent client may and should consult exclusively with the client's legal representative as long as that representative is acting in the client's best interest. Attorney Frenn bases his argument on the first sentence of ABA Comment [4] to the rule: "If a legal representative has already been appointed for the client, the lawyer should ordinarily look to the representative for decisions on behalf of the client." Therefore, he concludes, the fact that he did not consult Patricia before representing her in the mediation and arbitration does not amount to a violation of that rule.[2]

OLR counters with ABA Comment [2]: "The fact that a client suffers from a disability does not diminish the lawyer's obligation to treat the client with attention and respect. Even if the person has a legal representative, the lawyer should as far as possible accord the represented person the status of client, particularly in maintaining communication." OLR argues that Comments [2] and [4] are not contradictory: an attorney may have to rely on the client's legal representative for certain decisions or directions, but nonetheless must consult insofar as possible

[2] Attorney Frenn's argument is somewhat inconsistent. If "an incompetent person is someone who has been adjudged incompetent by the court" (Frenn Br. at 1), then for more than six weeks after his engagement Patricia did not yet qualify as incompetent. For the purpose of this analysis, however, I accept Attorney Frenn's assertion that "during the time of [his] representation, Patricia Skiera was always incompetent." (*Id.* at 4.)

directly with the client about the subject of the representation. In support of that argument, OLR points to Comment [1], which observes that "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."

Attorney Frenn's interpretation of the rule is simplistic. The rule does not draw the bright line that he suggests. In requiring that a lawyer maintain a normal client-lawyer relationship with a client of diminished capacity, the rule does not categorically exempt representation of a client who has been adjudged as incompetent.

OLR's construction of SCR 20:1.14(a) with respect to the duty of a lawyer representing an incompetent client accords more with common sense than does Attorney Frenn's construction. Comment [1] to the rule is undoubtedly correct: a finding of incompetence does not necessarily mean that the client is completely incapable of understanding or communicating about the subject of the representation. Obviously, there are gradations of incompetence, just as there are gradations of impairments generally. One incompetent may be comatose, otherwise unresponsive, or totally cut off from reality, while another may have intermittent lapses in memory or judgment which, while not eliminating her ability to comprehend and communicate, nonetheless renders her unsuitable to make important financial or health care decisions without the aid of a legal representative.

The plain language of the rule requires an attorney to make a reasonable effort to maintain a normal professional relationship with a client of diminished capacity, regardless of whether that diminishment reaches the level of incompetence. For a comatose client, the attorney may perhaps satisfy that duty simply by verifying first-hand the client's comatose condition. But for an incompetent client who is capable of understanding and expressing herself about the

subject of the representation at some level, a lawyer must listen to and advise the client directly to the extent her diminished capacity permits, while listening to and advising the legal representative to the extent the client's diminished capacity renders that necessary.

Although Attorney Frenn eventually consulted directly with his client, OLR premises its charge on the timing of that consultation, which was only after Attorney Frenn represented his client in mediation and arbitration over the course of several months. As OLR points out, the substance of that belated consultation illustrates the purpose of the rule. What if, instead of expressing approval of what Attorney Frenn had done on her behalf, Patricia had expressed disapproval? Surely she was entitled to have her lawyer take into account her wishes, knowledge, and reasoning before he sallied forth on her behalf, even if the effects of her incompetence might ultimately compel her legal representative (her agent under the financial POA) and attorney to follow a different path. That is the entitlement SCR 20:1.14(a) protects.

The arbitrator, who was also the mediator and a retired circuit court judge, issued a decision concluding that Attorney Frenn had "entirely failed to honor the requirements of SCR 20:1.14." (Compl., ¶ 14 at 5.) Attorney Frenn argues that for a variety of reasons this conclusion is entitled to no weight. I agree that my duty is to decide the issues in this proceeding, including the issue presented by the cross-motions, independently and without deference to the arbitrator's analysis, and I have done so.

Accordingly, I deny Attorney Frenn's motion to dismiss for failure to state a claim, and grant OLR's motion for judgment on the pleadings. In my report to the Court, I will recommend that it adopt this order and conclude that Attorney Frenn violated SCR 20:1.14(a) as charged. I request that parties promptly confer and agree on a date and time for a telephone status conference to discuss further proceedings.

Dated June 30, 2025.

Charles H. Barr, Referee