

Respecting Choice and Preferences of the Client

Your client qualified to have you appointed as a Suitable Representative. Your client has one or more disabilities that significantly impaired your client's ability to represent herself. However, your client has abilities and interests. Your client participated in the qualification process. They approved your appointment. Your client has not lost the right to make choices and state preferences about the case. You may recommend and advise your client, but you may not make choices on their behalf without their agreement. You are not the client's guardian. Your client has the right to disagree with your recommendations and advice. It is their case, after all.

Consider this scenario:

Your client tells you about some personal information she considers sensitive and very confidential. She does not want you to tell anyone else.

- You see in a WAC that this information could be important to her case.
- You read the WAC to your client. You explain how this information could help her to get the outcome she wants.
- She refuses to allow you to disclose the information to the agency or during the hearing.
 - You may ask her to help you understand her choice.
 - You may decide to bring this up again during your next meeting. However, you need to clearly state that you will accept the client's choice.

You will advocate for your client even when you disagree with their choices and preferences about the case. There are some exceptions. For example, you may opt to withdraw in the unlikely event the client's course of action is one you reasonably believe is criminal or fraudulent, or will perpetrate a crime or fraud. You may opt to withdraw if the client's course of action is something you consider repugnant, or you have a fundamental disagreement with the client.

Understanding your client's communication needs

Your client needs to know the options and consequences in order to make choices about the case. You need to understand what your client really wants. To do that, you need to know your client understands what you have communicated. For example, you may know your client has copies of the law and the case documents. However, you may not have asked about your client's reading skills. You will need to know if your client is able to read well. Your client may have poor reading skills or not be able to read at all.

Your clients may have intellectual, cognitive, developmental, psychiatric or mental health disabilities. Some recommendations to effectively understand and communicate include:

- Use simple, direct sentences

- Use concrete, specific language. Avoid abstract language. When possible, use words that relate to things you both can see.
- Be prepared to repeat the same information more than once in different ways.
- Give exact instructions. For example, “I will call you at 10:30”, rather than “I will call back to talk to you in 15 minutes.”
- Avoid giving too many options or too much information at one time, which may be confusing.
- Eliminate distractions and minimize background noise if possible.
- Avoid sensory overload by providing information gradually and clearly
- Ask the client’s preference for information in written or verbal form
- Listen attentively. Wait for the client to finish speaking. If needed, clarify what the client has said.
- Do not pretend to understand if you do not. Ask the client to repeat what they said.
- Be patient, flexible, and supportive when communicating with the client.
- Recognize that the client may need to have instructions repeated. Is the client able to take notes, or do you need to take notes for the client to review? Does the client need to receive written or verbal reminders, such as about the sequence of things, tasks, or events?
- Be aware if you feel uncomfortable. Often, people with a disability will sense your discomfort. It is okay to admit you feel some discomfort and talk about that.

Respecting your client’s choices and preferences.

You may need to pay careful attention if your client appears eager to please or always agrees with what you say. Some people with intellectual, cognitive, or developmental disabilities may tell you what they think you want to hear. For example, you may need to be careful when asking the client questions. You will want to phrase questions without suggesting the desired or preferred responses. It is disrespectful to your client to manipulate them into agreeing with you. You want to avoid taking advantage of a client who is suggestible, even if what you are suggesting is something you believe is in their best interest.

Even if you disagree with a chosen path, it is the client’s right to choose the path. You are not serving as your client’s guardian. You are serving as their representative to advocate for their interests and preferences in a hearing before OAH.

Here are some recommendations for communicating your respect for your client:

- Treat a client who is an adult as an adult
- Do not patronize or condescend when communicating with a client
- Never threaten a client
- Do not make decisions for the client
- Do not assume you know the client’s preferences

- Do not assume you know what is best for the client
- Do not use the client's secrets and confidences against them

What to do if your client's mental or cognitive abilities deteriorate?

Many cases at OAH are closed within 90 days of the date a party filed an appeal. However, some cases are open for many months. It is possible over the duration of your appointment that you will observe a deterioration in your client's mental or cognitive abilities.

As far as reasonably possible, a Suitable Representative should take steps to maintain a normal client relationship even if the client's capacity to make adequately informed decisions is diminished.

A non-lawyer can serve as a Suitable Representative. OAH expects that all Suitable Representatives will follow the rules for lawyer-client relationships. The Rules of Professional Conduct (RPC) [1.14](#) addresses clients with diminished capacity:

(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.

Regarding a client's diminished capacity, the comments to rule 1.4 help guide your analysis of the situation:

[1] 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 . . . 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. . . . So also, it is recognized

that some persons of advanced age can be quite capable of handling routine financial matters while needing special legal protection concerning major transactions.

[2] The fact that a client suffers 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.

[3] 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.

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The Washington State Bar Association has a section on its website for frequently asked ethics questions. Here is the WSBA [FAQ](#) link. One question is, "What should I do when I feel my client lacks the ability to make decisions or the client's ability to do so is deteriorating?" There are tips for protective action you might take.

A client's deteriorating capacity may be one of the most difficult challenges that you could face as a Suitable Representative. There may be difficult conversations you will have with a client. There are no easy answers or solutions. However, you should be guided by the RPCs and such factors as:

- The wishes and values of the client to the extent known;
- The client's best interests and the goal of minimizing intrusion into the client's decision-making autonomy
- Maximizing client capacities and respecting the client's family and social connections