CF011 ALI-CLE 4573

The American Law Institute Continuing Legal Education
ALI-CLE Course Materials
October 5 - 6, 2023

Estate Planning for the Family Business Owner 2023

RECOGNIZING & REPRESENTING CLIENTS WHOSE CAPACITY IS DIMINISHING

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"There are few subjects about which so little can certainly be known as the operation of the human mind." Alston v. Boyd, 25 Tenn. 504 (Tenn. 1846)

Deciding what to do when questions of client capacity arise is not for the fainthearted. There are no safe harbors for two primary reasons. First, the notion of capacity is an elusive, amorphous abstraction that, in practice, cannot be divorced from the complexities of the real life situation. Second, none of the rules and authorities give the lawyer adequate guidance for assessing capacity or deciding how to proceed if doubts exist. Some rules are Delphic at best.

Jan Ellen Rein, "Ethics and the Questionably Competent Client: What the Model Rules Say and Don't Say," 9 Stanford Law & Policy Review 241 (1998)

INTRODUCTION

A 2011 CDC study found that over 16 million Americans were living with some form of cognitive impairment.

Cognitive impairment often manifests as difficulty with cognitive functioning, including memory, problem-solving, language, and decision-making

Cognitive impairment exists in many forms and in all age groups and can result from numerous causes. In some cases, it is reversible. In others, particularly with older adults, it is permanent and progressive.

Estate planning professionals encounter cognitive impairment issues usually in two contexts: 1) in helping clients plan for their possible incapacity; and 2) in dealing with clients who are already experiencing declining capacity.

For many of these clients, the cause of their declining capacity is mild cognitive impairment (MCI) (memory loss and other impairments that are normally not experienced by people in their age groups) or dementia.

MCI may but will not necessarily lead to dementia.

"Age is the major risk factor for cognitive impairment." (CDC, 2011)

Other major risk factors include obesity and chronic illness, which are also on the rise in the US.

The senior population is growing in the United States, and advances in healthcare generally mean that people are living longer. Baby boomers, who are the majority of members of the elder population, began turning 65 in 2011.

The number of Americans age 65 and older: 58 million in 2021 (about 16.5%)

By 2030 (the date the last of the Baby Boomers reaches age 65), 20% of the U.S. population is expected to be age 65 and older.

The U.S. population age 65 and over grew nearly five times faster than the total population over the 100 years from 1920 to 2020, according to the 2020 Census.

Individuals age 85 and older comprise the fastest growing segment of our population.

Ten percent of Americans over the age of 65 have dementia and another 22% have mild cognitive impairment (MCI) (cognitive impairment that is not the result of normal aging).

Starting at age 65, the risk of developing Alzheimer's disease (the major cause of dementia) doubles every 5 years.

By age 85 years and older, between 25% and 50% of people will exhibit signs of Alzheimer's disease.

About 5.8 million Americans are currently exhibiting signs of Alzheimer's disease.

5.5 million of these individuals are over age 65.

On average, a person with Alzheimer's disease lives four to eight years after diagnosis, but can live as long as 20 years, depending on other factors.

The average time between the appearance of the first symptoms of impairment to a diagnosis of dementia is 2.8 years. (Brookmeyer et al., Baltimore Longitudinal Study of Aging, 2002).

I. The Multiple Dimensions of "Capacity"

A. Terminology

1) Some use the term "competence" to describe legal status and "capacity" to refer to medical/psychological assessments
2) Some use "legal capacity" and "clinical capacity"

B. The Legal Landscape (Does the Client have Legal Capacity?)

1) Legal determination as opposed to a medical or psychological determination
2) Criminal law and civil law ramifications
3) Capacity is *presumed*
4) Capacity may be determined on a "sliding scale"
5) Civil Law: "Task Specific"
    a) Capacity to enter into or continue the attorney-client relationship
    b) Capacity to engage in certain transactions
        A) Make a will
        B) Make a gift
        C) Execute a revocable trust
        D) Execute an irrevocable trust
        E) Execute a durable financial power of attorney
        F) Execute a health care power of attorney/living will/advance directive
        G) Enter into a binding contract
        H) Make binding decisions about personal care or financial matters
        I) Participate in legal proceedings or mediation/arbitration
6) Lawyers and other professionals can take steps to "maximize" or "enhance" their clients' capacity
7) In extreme cases, lawyers & other professionals may need to take "protective action"
8) Model Rules of Professional Conduct ("MRPC") (ABA 2002)
    Rule 1.2: Scope of Representation
    Rule 1.4: Communications
    Rule 1.6: Confidentiality of Information
    Rules 1.7 -- 1.9: Conflicts of Interest
    Rule 1.14: Client with Diminished Capacity
    Rule 1.16: Declining or Terminating Representation

9) ACTEC Commentaries on the Model Rules of Professional Conduct, 6th ed. 2023 (See Appendix for ACTEC Commentary on MRPC 1.14; selected portions of Commentary on MRPC 1.6, MRPC 1.7)

10) NAELA Aspirational Standard for the Practice of Elder Law

11) American Bar Association/American Psychological Association, *Assessment of Older Adults with Diminished Capacity:*

A Handbook for Lawyers, 2d ed. 2021

A Handbook for Judges

A Handbook for Psychologists

12) Restatement (3d) of the Law Governing Lawyers

13) State Laws, Cases (including malpractice cases), and Ethical Rules

14) ABA and State Bar Opinions

ABA Legal Ethics Opinion 96-404 (issued under a prior version of MRPC 1.14)

15) Flowers & Morgan, *Ethics in the Practice of Elder Law* (ABA)

16) AARP, *Protecting Older Investors: The Challenge of Diminished Capacity* (2011)

B. The Medical/Psychological Landscape (Diagnosis and Treatment)

1) Capacity usually is not an "on/off" situation

a) May be temporary

b) May be situational

c) May be partial

d) May be treatable, reversible

2) Personal physician evaluations and forensic evaluations:

a) Evaluators use numerous capacity assessment test and tools (e.g., Mini-Mental State Exam and Modifed MMSE; Clock Drawing test; Mini-Cog; Naming Test; Financial Capacity Indicator, etc.)

See: National Institute on Aging's 2013 searchable database of over 100 "Instruments to Detect Cognitive Impairment in Older Adults"; *Assessment of Older Adults with Diminished Capacities: A Handbook for Lawyers*, App. 1, "Brief Guide to Psychological and Neuropsychological Instruments."

Clock-Drawing Test: Step 1: Give patient a sheet of paper with a large (relative to the size of handwritten numbers) predrawn circle on it. Indicate the top of the page. Step 2: Instruct patient to draw numbers in the circle to make the circle look like the face of a clock and then draw the hands of the clock to read [e.g. "1:45" or "10 minutes to 11"].

Image 1 within document in PDF format.

Naming Tests (Boston Naming Test, Philadelphia Naming Test. etc.):

Image 2 within document in PDF format.

Cultural issues: Is this an igloo...or an oven?

Image 3 within document in PDF format.

Generational issues: "Phone"

Image 4 within document in PDF format.

b) American Bar Association/American Psychological Association, *Assessment of Older Adults with Diminished Capacity: A Handbook for Lawyers, 2d ed*, p. 49, lists the following as possible evaluators: physicians, geriatricians, geriatric psychologist, geropsychologist, forensic psychologist or psychiatrist, neurologist, neuro-psychologist, geriatric assessment team; referrals from local Area Agency on Aging, American Psychiatric Association, American Psychological Association

3) American Psychiatric Association's *Diagnostic and Statistical Manual of Mental Disorders (DSM)*

a) DSM-5 released in May 2013

b) DSM-5 adds 15 new mental health conditions:

Hoarding disorder; caffeine withdrawal; cannabis withdrawal; gambling disorder; excoriation (skin-picking) disorder

"For further research" topics include "Internet use gaming disorder"

c) Used for diagnosis, prescribing treatments, insurance

d) Replaces the term "dementia" with the term "neurocognitive disorder." Each disorder is now further refined into "mild" (which does not interfere with "capacity for independence in everyday activities") or "major" degrees of impairment.

4) "Grisso Model" of forensic evaluation: Commonly used 5-step model for forensic assessment:

a) Functional component: focuses on ability to perform specific task

b) Causal component: diagnosis of what is causing the incapacity

c) Person-in-situation component: examination of the context (e.g., complex estate planning vs. "simple" will)

d) Conclusory component: some controversy as to whether expert should opine

e) Remediative component

5) Functional component

a) Cognitive functioning: understanding, memory, reasoning, planning, etc. (e.g., knowing electric bill needs to be paid)

b) Behavioral functioning: actually performing the task at hand (e.g., paying the electric bill by check or online)

c) Everyday functioning:

1) Activities of Daily Living (ADLs): bathing, toileting, eating, transferring, dressing

DISTINGUISH the physical inability to take care of oneself from decision-making capacity >>

2) Instrumental Activities of Daily Living (IADLs): manage finances; manage healthcare; managing home; functioning in the community

d) Emotional/psychological functioning

6) Causal component:

Nearly 10% of people who are diagnosed with "dementia" do not actually have dementia. Some conditions that mimic dementia are sometimes referred to as "reversible dementia"

In 2012, "Danish researchers revisited the records of nearly 900 patients thought to have dementia and discovered that 41 percent of them had received faulty diagnoses. Alcohol abuse and depression were the most common problems mistaken for dementia." *Why You May Want to Avoid a Dementia Test,* C. Aschwanden, The Washington Post, December 16, 2013.

The current global "cost" of dementia is $600 billion. World-wide rates of dementia are predicted to triple by 2050

a) More than 70% of cases will be individuals in poor countries with scant access to health care

b) In December, 2013, the world leaders at the G8 Summit set a goal for finding a cure or effective treatment of dementia by 2025

POSSIBLE CAUSES OF DIMINISHING CAPACITY

a) Delirium and confusion:

1) may be temporary and treatable (particularly if identified early)

2) possible temporary causes: drug interactions, electrolyte imbalance, dehydration or malnutrition, infection, impaired vision or hearing, myocardial problems, vitamin B-12 or folic acid deficiency, vitamin D deficiency, pain, trauma, stress, depression, anxiety, recent loss; antihistamines; hypoglycemia; build-up of toxins prior to dialysis

3) manifestations: decreased awareness of surroundings (disorientation; wandering attention; inability to stay focused): poor thinking skills and poor memory of recent events; rambling; difficulty understanding speech; behavioral changes (restlessness, disturbed sleep, irritation, agitation, combative behavior)

4) may exist on its own or may be in conjunction with dementia

5) onset is fairly quick and the symptoms are variable, even over the course of a day

b) "Mental illness": mood or thought disorders

1) manic and bipolar disorders

2) paranoia

c) Intellectual or developmental disorder (“mental retardation”)
d) Physical illness or frailty: vision, hearing, etc.
e) Organic brain damage: injury, disease, etc.
f) Alcohol or drug dependency
g) Depression:
1) Centers for Disease Control (CDC) cites this as the most common mental disorder that affects older adults
2) 80% of people with depression can be treated
h) Dementia (“Neurocognitive Disorder”)
1) Dementia is not a disease but rather an association of symptoms associated with a general decline in mental ability
Affects 1% of people age 60-64; 30-50% of those over age 85 One in three seniors dies with some form of dementia
2) Risk Factors:
Advancing age; family history; the “Alzheimer's Gene” (Apolipoprotein E-e4 Gene); poor education; poor physical condition
3) Stages of Dementia (Global Deterioration Scale)
Stage One: No Cognitive Decline
(Includes healthy people without dementia)
Stage Two: Very Mild Cognitive Decline
Normal forgetfulness associated with aging
Stage Three: Mild Cognitive Decline
Increased forgetfulness; difficulty concentrating; drop in work performance; may get lost more often; difficulty finding the right words
Lasts an average of 7 years
• Stages One -- Three = “No Dementia”
Stage Four: Moderate Cognitive Decline
Decreased memory of recent events; issues with managing finances or going new places alone; trouble finishing complex tasks accurately; difficulty; difficulties in socializing which may result in withdrawal from family and friends
Lasts an average of 2 years
• Stage Four = “Early-Stage Dementia”
Stage Five: Moderately Severe Cognitive Decline
Major memory problems, such as not remembering one's address or knowing what time of day it is; need assistance with basic activities such as dressing, bathing
Lasts an average of 1 ½ years
Stage Six: Severe Cognitive Decline (Middle Dementia)
Forgets names of loved ones, little memory of recent events; needs extensive assistance; difficulty completing sentences or even counting to ten backwards; decreased ability to speak; incontinence
Lasts an average 2 ½ years
• Stage Five -- Six = ““Mid-Stage Dementia”
Stage Seven: Very Severe Cognitive Decline
Requires assistance with almost every activity; almost no ability to speak or communicate; often loses psychomotor skills (e.g. ability to walk)
Lasts an average 2 ½ years
• Stage Seven = “Late Dementia”
4) Dementia may be caused by over 70 diseases and conditions:
Alzheimer's disease accounts for 60-80% of dementia (5 million Americans in 2013; expected to triple by 2050)

Vascular dementia (occurring after a stroke) is second most common (about 10% of dementias)

Other types include Parkinson's disease, dementia with Lewy bodies; frontotemporal dementia; Creutzfeldt-Jakob disease; Huntington's disease

One type, Normal Pressure Hydrocephalus, is sometimes correctable

• Often two or more different causes may coexist ("mixed dementia")

• The most common combination of dementias is Alzheimer's disease and vascular dementia

5) Alzheimer's Disease

a) Alzheimer's disease is not strictly a memory disorder; it affects many other mental processes such as the ability to focus, organize thoughts, and make sound judgments

b) Alzheimer's disease can affect emotions and personality as well as cognition

c) Some people will live with the disease 15-20 years or more

d) The progressive accumulation of the protein fragment beta-amyloid (plaques) outside neurons in the brain and twisted strands of the protein tau (tangles) inside neurons result in the damage and death of neurons

i) NOTE that the presence of the biomarkers for Alzheimer's Disease does not necessarily mean that the patient will exhibit manifestations of the disease:

"[T]his is a critical distinction I think in this case is that someone can have biomarker evidence of Alzheimer's disease but never develop clinical symptoms of Alzheimer's disease in their lifetime. And so although biomarkers are a tremendous advance for us in the field, they do not indicate by themselves whether or not someone has clinical Alzheimer's disease. And it's clinical Alzheimer's disease that will impact cognition, everyday function, and ultimately capacities of various kinds."

Doctor's report in United States v. Kight, ___ F.3d ___ (N.D. Ga. 2018), 2018 WL 672119

e) 2016 Research indicates a connection between the disease and common viruses such as the herpes simplex virus 1

6) 10 Warning Signs (Alzheimer's Association website)

1) Memory loss that disrupts daily life

2) Challenges in planning or solving problems

3) Difficulty completing familiar tasks, at home, at work, at leisure

4) Confusion with time or place

5) Trouble understanding visual images or spatial relationships

6) New problems with words in speaking or writing

7) Misplacing things and losing the ability to retrace steps

8) Decreased or poor judgment

9) Withdrawal from work or social activities

10) Changes in mood and personality

7) July 2013 Alzheimer's Association conference: Leading Alzheimer's researchers are suggesting that "subjective cognitive decline," which is people's own sense that their memory and thinking skills are slipping even before others have noticed, is a potentially valid early clinical indicator of the onset of Alzheimer's disease.

8) Client "early-warning signs":

1) Missed appointments

2) Frequent calls to office

3) Confusion about instructions

4) Repetition

5) Difficulty recalling past decisions

C. What is "Diminished Capacity" (The Legal Dimension)?

1. Early English law: "Idiots" ("born fools") vs. "Lunatics" (capable of regaining capacity)

a) The King could seize the land of an idiot but only administer the land of a lunatic

2. **MRPC 1.14 (2002)**: "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, ..."

Comment 6: "In determining the extent of the client's diminished capacity, the lawyer should consider and balance such factors as:

- the client's ability to articulate reasoning leading to a decision,
- variability of state of mind and ability to appreciate consequences of a decision;
- the substantive fairness of a decision; and
- the consistency of a decision with the known long-term commitments and values of the client.

3. **Uniform Guardianship and Protective Proceedings Act** (1998):

Sec. 102(5): "Incapacitated person" means an individual who, for reasons other than being a minor, is unable to receive and evaluate information or make or communicate decisions to such an extent that the individual lacks the ability to meet essential requirements for physical health, safety, or self-care, even with appropriate technological assistance.

4. **Uniform Probate Code** (Testamentary Capacity)

Sec. 2-501: "An individual 18 or more years of age who is of sound mind may make a will."

Former O.C.G.A. § 53-2-21(b): A testator must have a "decided and rational desire," which was defined as "decided, as distinguished from the wavering, vacillating fancies of a distempered intellect, and rational, as distinguished from the ravings of a madman, the silly pratings of an idiot, the childish whims of imbecility, or the excited vagaries of a drunkard."

5. **States' guardianship statutes incorporate:**

a) *Functional component*

Conn. Stat. § 45A-644: "incapable of caring for oneself" and "incapable of handling one's affairs"

(c) "Incapable of caring for one's self" or "incapable of caring for himself or herself" means that a person has a mental, emotional or physical condition that results in such person being unable to receive and evaluate information or make or communicate decisions to such an extent that the person is unable, even with appropriate assistance, to meet essential requirements for personal needs.

(d) "Incapable of managing his or her affairs" means that a person has a mental, emotional or physical condition that results in such person being unable to receive and evaluate information or make or communicate decisions to such an extent that the person is unable, even with appropriate assistance, to perform the functions inherent in managing his or her affairs, and the person has property that will be wasted or dissipated unless adequate property management is provided, or that funds are needed for the support, care or welfare of the person or those entitled to be supported by the person and that the person is unable to take the necessary steps to obtain or provide funds needed for the support, care or welfare of the person or those entitled to be supported by the person.

N.Y. McKinney's Mental Hygiene Law § 81.08: Petition for the appointment of a guardian must include: 3. a description of the alleged incapacitated person's functional level including that person's ability to manage the activities of daily living, behavior, and understanding and appreciation of the nature and consequences of any inability to manage the activities of daily living;

4. if powers are sought with respect to the personal needs of the alleged incapacitated person, specific factual allegations as to the personal actions or other actual occurrences involving the person alleged to be incapacitated which are claimed to demonstrate that the person is likely to suffer harm because he or she cannot adequately understand and appreciate the nature and consequences of his or her inability to provide for personal needs;

5. if powers are sought with respect to property management for the alleged incapacitated person, specific factual allegations as to the financial transactions or other actual occurrences involving the person alleged to be incapacitated which are claimed to demonstrate that the person is likely to suffer harm because he or she cannot adequately understand and appreciate the nature and consequences of his or her inability to provide for property management; if powers are sought to transfer a part of the alleged incapacitated person's property or assets to or

for the benefit of another person, including the petitioner or guardian, the petition shall include the information required by subdivision (b) of section 81.21 of this article;

b) *Causal component*:

Ala. Code § 26-2A-20(8): "Incapacitated person" means "Any person who is impaired by reason of mental illness, mental deficiency, physical illness or disability, physical or mental infirmities accompanying advanced age, chronic use of drugs, chronic intoxication, or other cause (except minority)...."

c) *Vulnerability*

12 Del. Code § 3901: "...such person is in danger of substantially endangering the person's own health, or of becoming subject to abuse by other persons or of becoming the victim of designing persons;"

d) *Cultural or Religious Norms*

Ark. Code Ann. § 28-65-101(5): "(C) Nothing in this chapter shall be construed to mean a person is incapacitated for the sole reason he or she relies consistently on treatment by spiritual means through prayer alone for healing in accordance with his or her religious tradition and is being furnished such treatment."

II. ROLE OF THE LAWYER IN REPRESENTING A CLIENT WITH DIMINISHED CAPACITY

A. MRPC 1.14 (2002): A Study in Contrasts (Autonomy vs. Protection)

1. Maintaining the Norm:

MRPC 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."

NYRPC 1.14: *"conventional relationship"*

NYRPC 1.14, Comment 4: The responsibilities of a lawyer may vary according to the intelligence, experience, mental condition or age of a client, the obligation of a public officer, or the nature of a particular proceeding. The conventional client-lawyer relationship is based on the assumption that the client, when properly advised and assisted, is capable of making decisions about important matters. Any condition that renders a client incapable of communicating or making a considered judgment on the client's own behalf casts additional responsibilities upon the lawyer.... 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.

MRPC 1.2: Client directs the representation

MRPC 1.2, Comment 4: "[4] In a case in which the client appears to be suffering diminished capacity, the lawyer's duty to abide by the client's decisions is to be guided by reference to Rule 1.14.

ABA Op. 96-404: "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."

MRPC 1.4: Maintaining communication

MRPC 1.14 Comment 4: "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."

MRPC 1.14 Comment 2: "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."

MRPC 1.6: Lawyer maintains client confidences

MRPC 1.14(c): "Information relating to the representation of a client with diminished capacity is protected by Rule 1.6...."

MRPC 1.14 Comment 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."

Note that no case examining the attorney-client *evidentiary privilege* has confirmed this MRPC statement.

Lawyer's file should reflect why the family member's participation is "necessary" and that lawyer made this determination prior to allowing the family member to participate

NOTE: **NYRPC & GA Rule 1:14 Comment 3** state this differently: "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 lawyer should consider such participation in terms of its effect on the applicability of the attorney-client evidentiary privilege."*

Nassau Cty. Op. 90-17: The lawyer for an elderly client may not reveal information observed about the client's "eccentric" activity to family members for the purpose of advising them that client may need to have a guardian appointed.

Rule 1.7- 1.9: Lawyer avoids conflicts of interest

ABA Op. 96-404: The obligation to maintain a normal attorney-client 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."

Conn. Informal Ethics Op. 97-17 (Lawyer who represents client in a personal injury case who suffered a traumatic brain injury is concerned that client may be unable to comprehend the consequences of her actions):

"Your first requirement is to provide a normal client-lawyer relationship. A primary aspect of a normal client-lawyer relationship is maintaining communications with the client. You have made repeated efforts to communicate with the client and should continue to do so in a reasonable fashion. See Rule 1.4. Even though your client has told you that she would send "written instructions" to you regarding her case, which have yet to come, she needs to be informed that her arbitration may be dismissed due to the lack of action in the matter. Presumably, you have already made it clear to her that you are not representing her in regards to her first accident. Your client still deserves your attention and respect.

A fairly recent interpretation of Rule 1.14 is ABA Formal Opinion 96-404 (8/2/96) which provides the basis of this opinion and copy of this opinion is attached hereto. The most difficult task is determining whether under Rule 1.14(b) you must take protective action with respect to your client. You must believe that your client cannot act in her own best interests, but this should not be based upon what you believe are ill-considered judgments alone. If you feel that you have doubts about your client's ability to act in her own best interests, it may be appropriate to seek guidance from an appropriate diagnostician. You have already attempted to discuss this matter with your client's parents and this discussion is permitted provided it is limited to your observations and conclusions of your clients' behavior, capacity and appropriate protective action.

Before you attempt any protective action, you must determine that other, less drastic, solutions are not available....

After a thorough review of the situation, your professional judgment may lead you to believe that protective action is necessary. This could mean applying for the appointment of a conservator (voluntary or involuntary) or guardian ad litem.

While Rule 1.14 does allow a lawyer to take protective action on behalf of a client, it is not a mandate a lawyer must follow. Obviously, many lawyers would feel uncomfortable filing for protective action for their client. Termination of representation is permissible, but must be performed "without material adverse effect on the interests of the client".

Rule 1.16(b). For a discussion of Rule 1.16 see Informal Opinion 93-07. While the undesirability of filing for protective action may lead some to search for the provisions of Rule 1.16(b), a withdrawal from a client at this time probably occurs when the client needs representation most. Another lawyer may have the same communication problems that you are experiencing. The ABA opinion states that it is a better course of action for lawyers to stay with the representation and seek appropriate protective action, although this does not prohibit withdrawal. In conclusion, if you are representing a client with a disability which falls under Rule 1.14, your first and foremost obligation is to maintain a normal attorney-client relationship, which would include maintaining communications with your client. Prior to taking any protective action, you should determine that other less drastic solutions are not available. If filing for a protective action is the only avenue

available, it should be as limited as possible. Finally, the Rules do provide that an attorney can withdraw from representation, but this is not a preferred course of action."

North Carolina 98 Formal Ethics Opinion 16 (Jan, 1999): Lawyer was asked by the husband of his allegedly incapacitated wife to investigate why she had been removed from the family home. The lawyer met with the wife, who indicated that she wanted the lawyer to represent her and that she wanted to go home to live with her husband rather than becoming a ward of the state. Although the lawyer noticed abnormalities in the wife's behavior, he also noted extended periods of lucidity and a consistent desire on her part not to have a guardian appointed for her. At the hearing, the state Department of Social Services (DSS) claimed the lawyer had "no standing or authority" to object on behalf of the wife. The wife testified at the hearing and could not identify the lawyer as her lawyer but did express a desire to be returned to the family home. A guardian was appointed for the wife and the lawyer appealed on her behalf. DSS objected to the lawyer's continued representation of the wife, who had now been declared "incompetent". The Formal Ethics Opinion cited Rule 1.14 and stated that "if [the lawyer] is able to maintain a relatively normal client-lawyer relationship and [the lawyer] reasonably believes that Wife is able to make adequately considered decisions in connection with her representation, [the lawyer] may continue to represent her alone without including the guardian in the representation." The Opinion also stated that the "lawyer owes the duty of loyalty to the client and not to the guardian or legal representative of the client, particularly if the lawyer concludes that the legal guardian is not acting in the best interest of the client."

2. On the Other End of the Spectrum: Emergency situations: Exploitations, Scams, Elder Abuse

a) **MRPC 1.14(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...."

b) **MRPC 1.14 Comment (9):** "In an emergency where the health, safety or a financial interest of a person with seriously diminished capacity is threatened with *imminent and irreparable harm*, a lawyer may take legal action on behalf of such a person even though the person is unable to establish a client-lawyer relationship or to make or express considered judgments about the matter, when the person or another acting in good faith on that person's behalf has consulted with the lawyer. Even in such an emergency, however, the lawyer should not act unless the lawyer reasonably believes that the person has no other lawyer, agent or other representative available. The lawyer should take legal action on behalf of the person only to the extent reasonably necessary to maintain the status quo or otherwise avoid imminent and irreparable harm. A lawyer who undertakes to represent a person in such an exigent situation has the same duties under these Rules as the lawyer would with respect to a client."

3. **Overlap of MRPC 1.6 and MRPC 1.14**:

MRPC 1.14(b): "... the lawyer may take reasonably 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.

MRPC 1.14(c): "...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."

Even if the client does not have diminished capacity:

MRPC 1.6(b): (b) A lawyer may reveal information relating to the representation of a client to the extent the lawyer reasonably believes necessary:

(1) *to prevent reasonably certain death or substantial bodily harm*;

(2) to prevent *the clie*nt from committing a crime or fraud that is reasonably certain to result in substantial injury to the financial interests or property of another and in furtherance of which the client has used or is using the lawyer's services;

(3) to prevent, mitigate or rectify substantial injury to the financial interests or property of another that is reasonably certain to result or has resulted from *the client's commission* of a crime or fraud in furtherance of which the client has used the lawyer's services;

COMPARE:

NYRPC 1.6(b): A lawyer may reveal or use confidential information to the extent that the lawyer reasonably believes necessary:

(1) to prevent reasonably certain death or substantial bodily harm;

(2) to prevent the client from committing a crime;

Georgia RPC 1.6(b)(1): A lawyer may reveal information covered by paragraph (a) which the lawyer reasonably believes necessary:

i. to avoid or prevent harm or substantial financial loss to another as a result of client criminal conduct *or third party criminal conduct* clearly in violation of the law;

ii. to prevent serious injury or death not otherwise covered by subparagraph (i) above;

New Hampshire Ethics Committee Advisory Op. # 2014-15/5: "Can an Attorney Disclose Confidential Client Information, Over a Client's Objection, to Protect the Client from Elder Abuse or Other Threats of Substantial Bodily Injury?"

Client with diminished capacity: "More important, if the client or lawyer discusses ongoing elder abuse during consultations with an outside specialist, the information may trigger a reporting obligation that does not apply to the attorney. A report to law enforcement, of course, may be a consequence that the client vehemently opposes. It may also result in an involuntary change in living arrangements, guardianship and even the arrest and prosecution of a close family member. These steps may protect the client, but there may also be less draconian measures that provide similar protection with less disruption. *Before bringing third parties into the situation, therefore, the attorney should attempt to determine whether reporting obligations will be triggered, or whether the attorney-client privilege will be waived."*

"In sum, Rule 1.6(b) (1)--*even in the absence of diminished capacity*--may also authorize an attorney to use or disclose confidential client information, over the client's objections, in order to prevent substantial harm to the client from occurring or continuing."

B. Navigating the murky waters between a "normal attorney-client relationship" and taking "reasonably necessary protective action": the client with "borderline" capacity

CASE STUDY #1

The grandson of Leonora Jones has made an appointment for her with you to discuss changing her estate plan. When Leonora and the grandson (George) arrive at your office, you note that Leonora appears shaky and frail. She insists that "Georgie" remain in your office with her. You converse with Leonora for a bit about her family. Leonora seems very confused as to how many children and grandchildren she has. She becomes very emotional and tells you, "They are all trying to steal my money from me, except for my dear Georgie. They can't wait until I die." George explains that Leonora has decided to devise a substantial sum of money to a testamentary trust for the care of her five pet Cavalier King Charles Spaniels. Leonora adds that "Georgie" will take care of the dogs and, in return, he will have whatever money is left over when the last of the dogs dies.

1. Can a client with diminishing capacity enter into or remain in an attorney-client relationship? New Client vs. Existing Client

A. *New Client*

a. Client must have capacity to enter into a contract

b. **MRPC 1.14, Comment 6** factors (the first three) should be explored in the initial interview:

1) the client's ability to articulate reasoning leading to a decision [to come to you for counsel],

2) variability of state of mind and ability to appreciate consequences of a decision;

3) the substantive fairness of a decision

c. Speak with the client alone; explore the reasons for the consultation; etc. (see below for more details about lawyers assessing capacity).

d. Some states allow an individual under guardianship to enter into an attorney-client relationship in limited circumstances:

O.C.G.A. § 29-4-20(a): "In every guardianship, the ward has the right to: (5) Individually or through the ward's representative or legal counsel, bring an action relating to the guardianship...."

At the outset of the action, consider asking the judge to approve the attorney-client relationship

CASE STUDY #2 (Part 1)

Suppose instead that three years ago Leonora consulted you and together you and she put into place an estate plan that would divide her estate equally among her children. Last year you drafted for her a durable financial power of attorney naming her grandson George as her agent. Leonora and George appear in your office and the scenario described in Case Study #1 ensues. You are saddened during this most recent visit to see how much Leonora's physical and emotional states have declined. You are worried that Leonora has "lost it." You are also concerned about her apparent dependence on George, his apparent eagerness to handle her affairs, and his apparent happiness at being appointed trustee and remainder beneficiary.

B. *Existing client whose capacity has diminished*

1. Under traditional agency law, doesn't the principal-agent relationship terminate automatically when the principal becomes incapacitated?

1) Restatement (3d) of the Law Governing Lawyers, § 31, cmt. e expressed disapproval of this rule: "If representation were terminated automatically, no one could act for the client until a guardian is appointed, even in pressing situations."

2) The Restatement (3d) of Agency, § 3.08 (2006) contains a new rule, "Loss of Capacity" that will mitigate the harsh rule of the older Restatements.

2. **MRPC 1.14** seems to presume continued representation in some cases. **ACTEC Commentaries to MRPC 1.14**:

Lawyer Representing Person with Diminished Capacity for Whom a Fiduciary Has Been Appointed by a Court. A lawyer who represented a client before the client suffered diminished capacity should ordinarily look to the court-appointed fiduciary to make decisions for the client. The lawyer is impliedly authorized to disclose to the fiduciary sufficient information to permit the fiduciary to properly protect the client's interest. The ongoing duties of a lawyer to a client with diminished capacity for whom a fiduciary has been appointed may differ from state to state.

In some situations, the scope of the fiduciary's duties and the limitations on the client's ongoing rights might be limited. For example, in some states, a court may appoint a fiduciary to exercise only limited rights of the client. In those instances, a lawyer who represented a client before the client suffered diminished capacity may be considered to continue to represent the client after a fiduciary has been appointed. Although incapacity may prevent a person with diminished capacity from entering into a contract or other legal relationship, the lawyer who represented the person with diminished capacity may appropriately continue to meet with and counsel him or her.

3. May a lawyer whose existing client's capacity becomes diminished withdraw from representation?

a. **MRPC 1.16:**

(b) Except as stated in paragraph (c), a lawyer may withdraw from representing a client if:

(1) withdrawal can be accomplished without material adverse effect on the interests of the client; ...

(4) the client insists upon taking action that the lawyer considers repugnant or with which the lawyer has a fundamental disagreement; ....

(NYPRC 1.16 does not include the "considers repugnant" language.)

b. **MRPC 1.16, Comment 6**:

[6] If the client has severely diminished capacity, the client may lack the legal capacity to discharge the lawyer, and in any event the discharge may be seriously adverse to the client's interests. The lawyer should make special effort to help the client consider the consequences and may take reasonably necessary protective action as provided in Rule 1.14.

c. **ABA Op. 96-404** (examining an earlier version of MRPC 1.14): "On the other hand, while withdrawal in these circumstances solves the lawyer's dilemma [of no longer being authorized to act for an incapacitated individual], it may leave the impaired client without help at a time when the client needs it most. The particular circumstances may also be such that the lawyer cannot withdraw without prejudice to the client. For instance, the client's incompetence may develop in the middle of a pending matter and substitute counsel may not be able to represent the client effectively due to the inability to discuss the matter with the client. Thus, without concluding that a lawyer with an incompetent client may never withdraw, the Committee believes the better course of action, and the one most likely to be consistent with Rule 1.16(b), will often be for the lawyer to stay with the representation and seek appropriate protective action on behalf of the client."

d. What if Georgie has convinced Leonora to hire another lawyer and you receive a letter from that lawyer asking for the return of her files?

Mass. Bar Ethics Op. 04-1 (2004): "A lawyer discharged by a client should normally turn over the client's file to a new attorney when requested to do so. When circumstances indicate that the client may not have had the capacity to make an adequately considered decision to discharge the lawyer, the lawyer should take further steps to ascertain whether the discharge represents the client's real wishes. Moreover, if the lawyer concludes that the client did not have such capacity and if the lawyer reasonably believes that the client is at risk of substantial harm, physical, mental, financial, or otherwise, the lawyer may consult with family members in order to protect the client's interests and may disclose confidential information of the client to family members, but only to the extent necessary to protect client's interests."

4. When you initially enter into the attorney-client relationship, consider using an engagement letter that anticipates your client's possible incapacity: e.g., advance consent to consult with certain family members.

ACTEC Commentary to MRPC 1.14: "As a matter of routine, the lawyer who represents a competent adult in estate planning matters should provide the client with information regarding the devices the client could employ to protect his or her interests in the event of diminished capacity, including ways the client could avoid the necessity of a guardianship or similar proceeding.... A lawyer may properly suggest that a competent client consider executing a letter or other document that would authorize the lawyer to communicate to designated parties (e.g., family members, health care providers, a court) concerns that the lawyer might have regarding the client's capacity."

Assume that you decide to continue your attorney-client relationship with Leonora:

2. Does the client have the capacity to enter into the transaction at issue?

A. Don't forget:

a) Differing transactions have differing levels of capacity e.g., testamentary capacity vs. capacity to contract

b) Different states have different levels of capacity for the same transaction:

O.C.G.A. §53-12-23: "A person has capacity to create an inter vivos trust to the extent that such person has legal capacity to transfer title to property inter vivos. A person has capacity to create a testamentary trust to the extent that such person has legal capacity to devise or bequeath property by will."

N.C.G.S.A. § 36C-6-601: "The capacity required to create, amend, revoke, or add property to a revocable trust or to direct the actions of the trustee of a revocable trust, is the same as that required to make a will."

c) Client must have capacity at the time the transaction is entered into

1) Even a client who has been placed under a guardianship may retain some capacity -- e.g., testamentary capacity ("lucid interval")

3. Does the lawyer have a duty to assess the client's capacity?

A. **General rule: ACTEC Commentaries to MRPC 1.14:** "If the testamentary capacity of a client is uncertain or the lawyer suspects that another person may be unduly influencing the client, the lawyer should exercise particular caution in

assisting the client to modify his or her estate plan and make reasonable inquiry, under the circumstances, to assess whether the client has the necessary capacity and any document modifying the estate plan is consistent with the client's intentions. The lawyer generally should not prepare a will, trust agreement or other dispositive instrument for a client whom the lawyer reasonably believes lacks the requisite capacity or is being unduly influenced to execute the document. On the other hand, because of the importance of testamentary freedom, the lawyer may properly assist clients whose testamentary capacity appears to be borderline or in circumstances which raise indicia of undue influence, recognizing that a trier of fact may be in the best position to make a final determination after full consideration of the facts and circumstances."

1. Sullivan v. Sullivan, 273 Ga. 130, 539 S.E.2d 120 (2000): On July 31, 1997, less than two weeks before Client Leo's death, his lawyer went to his home bearing two wills she had prepared, reflecting slightly different alternatives but both reflecting his basic plan. The lawyer was concerned about Leo's increasingly perilous mental and emotional condition and his capacity to make a will. She asked to meet with Leo alone and found him to be very confused about his family situation and his estate plan. The lawyer then told Leo's wife, Sarah, of her concerns. The lawyer was then surprised when, in just a few minutes, Sarah entered the living room with Leo dressed and seated in a wheelchair. Sarah stated that she did not care if the will was contested, it had to be signed that day, that it was "now or never." Leo executed the will under the lawyer's supervision. The lawyer then returned to her office and memorialized her concerns in a document she entitled "Memo to File in Anticipation of Litigation." At trial, the lawyer testified that she thought that Leo's capacity was in the "grey area" but she believed that if he was going to sign the will, she needed to do so that day. The jury found that Leo had lacked testamentary capacity and been the victim of Sarah's undue influence.

2. Vignes v. Weiskopf, 42 So. 2d 84 (Fla. 1949): Even though testator was found to have lacked testamentary capacity, Florida court did not fault the attorney who supervised the execution of the codicil. The client was in a great deal of pain and under the influence of several strong medications, including "cobra venom." The court observed:

> "Had the attorney arrogated to himself the power and responsibility of determining the capacity of the testator, decided he was incapacitated, and departed, he would indeed have been subjected to severe criticism when, after the testator's death, it was discovered that because of his presumptuousness the last-minute effort of a dying man to change his will had been thwarted."

B. Duty to make reasonable inquiry:

1. In re Hughes Revocable Trust, 2005 WL 2327095 (Mich. App. 2005): The attorney had "a responsibility to assess his client's mental capacity." Lawyer in this case had been told that the testator was often confused. When he met with the testator and her husband, the husband did all the talking. The court criticized the attorney for making no attempt to determine the testator's capacity.

2. San Diego Op. 1990-3 (1990): "A lawyer must be satisfied that the client is competent to make a will and is not acting as a result of fraud or undue influence.... The attorney should schedule an extended interview with the client without any interested parties present and keep a detailed and complete record of the interview."

3. Logotheti v. Gordon, 414 Mass. 308, 607 N.E.2d 715 (1993): "An attorney owes to a client, or a potential client, for whom the drafting of a will is contemplated, a duty to be reasonably alert to indications that the client is incompetent or is subject to undue influence and, where indicated, to make reasonable inquiry and a reasonable determination in that regard. An attorney should not prepare or process a will unless the attorney reasonably believes the testator is competent and free from undue influence."

4. Norton v. Norton, 672 A.2d 53 (Del. 1993) (dicta): Lawyer who drafted the will did not meet with the testator until the day he came to the hospital to present her with a document drafted at the direction of one of the testator's children that left her estate primarily to that child. "Although the question of testamentary capacity was not the principal focus of this appeal, we take the occasion to emphasize the importance for a lawyer who drafts a will, particularly for an aged or infirm testator, to be satisfied concerning competence and to make certain that the instrument as drafted represents the intentions of the testator.... [D]irect communication which precedes drafting of the instrument should be the norm if the lawyer is to discharge his obligation of assessing testamentary competence."

5. Persinger v. Holst, 248 Mich. App. 499, 639 N.W.2d 594 (2001): Lawyer was contacted by two former clients about drafting a will and power of attorney for a widow to whom the clients were not related. Lawyer met with the

widow, drafted both documents and supervised their execution. The power of attorney named one of the former clients as agent and the will named him as the sole beneficiary of her estate. The former client used the POA to divert money and property to himself. A conservator was appointed for the widow four months after she had signed the documents and the conservator sued the lawyer for legal malpractice. The court refused to find the lawyer liable. "In this case, defendant [the lawyer] made reasonable inquiry into Fuite's [the widow's] understanding of the nature and legal effect of the power of attorney that she requested before its execution. Although Fuite was subsequently adjudicated incompetent, at the time she executed the power of attorney defendant exercised reasonable professional judgment with regard to its execution. Further, even if defendant was mistaken, "mere errors in judgment by a lawyer are generally not grounds for a malpractice action." [citation omitted] This is not a case where defendant had actual knowledge that Fuite was incompetent. Similarly, the record fails to reveal overt or unmistakable signs of incompetency, or other extraordinary circumstances that would reasonably lead defendant to conclude that Fuite was incapable of understanding the nature and consequences of her actions."

4. How does a lawyer assess a client's capacity?

A. Common-sense approach -- "I know it when I see it."

1) Avoid stereotype of "ageism": Would you reach a different conclusion if your client were age 35 instead of 85?

2) Avoid value judgments: Bad judgment is not the same as lack of judgment

3) **ACTEC Commentaries to MRPC 1.14:** "In determining whether a client's capacity is diminished, a lawyer may consider:

- the client's overall circumstances and abilities, including the client's ability to express the reasons leading to a decision,
- the ability to understand the consequences of a decision,
- the legal standards and definitions of capacity for the transactions involved,
- the substantive appropriateness of a decision, and
- the extent to which a decision is consistent with the client's values, long-term goals and commitments.

B. Observable signs of possible diminished capacity: American Bar Association/American Psychological Association, *Assessment of Older Adults with Diminished Capacity: A Handbook for Lawyers*, pp. 33-36. ("Attorney Assessment Worksheet, pp. 43-46)

Possible cognitive signs:

1) Short-term memory loss (client forgets your name or purpose of visit);

2) Difficulty in communication (repeated difficulty finding words; frequent shifting to unrelated topic; but don't rule out a hearing disorder)

3) Comprehension problems (difficulty repeating back simple concepts)

4) Lack of mental flexibility (but sheer stubbornness is not necessarily a sign of diminished capacity)

5) Calculation problems (inability to do simple math)

6) Disorientation as to time, space, or location

Possible emotional signs:

1) Significant unexplainable distress (but don't discount fact that clients are often in varying stages of grief)

2) "Inappropriateness" (laughing when discussing spouse's death) Possible behavioral signs

1) Delusions (paranoia)

2) Hallucinations ("Who is that girl sitting next to you?")

3) Poor grooming/hygiene

4) Markedly inappropriate social behaviors

B. Should lawyers use common capacity-measuring tests such as the Mini-Mental State Exam?

American Bar Association/American Psychological Association, *Assessment of Older Adults with Diminished Capacity: A Handbook for Lawyers*, pp. 40-41 lists several reasons why lawyers should not use these instruments: lack of training; limited

yield of information; over-reliance; false negatives and positives; practice effects (improved performance after multiple takings of a test); lack of specificity to legal incapacity

C. Referrals and consultations with experts and others: **MRPC 1.14, Comment 6:** "In appropriate circumstances, the lawyer may seek guidance from an appropriate diagnostician."

1) Consultations with family members: **ABA Op. 96-404**: "There may also be circumstances where the lawyer will wish to consult with the client's family or other interested persons who are in a position to aid in the lawyer's assessment of the client's capacity as well as in the decision of how to proceed. Limited disclosure of the lawyer's observations and conclusion about the client's behavior seems clearly to fall within the meaning of disclosures necessary to carry out the representation authorized by Rule 1.6. It is also implicitly authorized by Rule 1.14 as an adjunct to the permission to take protective action. The lawyer must be careful, however, to limit the disclosure to those pertinent to the assessment of the client's capacity and discussion of the appropriate protective action. This narrow exception in Rule 1.6 does not permit the lawyer to disclose generally information relating to the representation.

2) Private lawyer consultation with an evaluator: client is not identified so client consent is not necessary; lawyer usually pays for this as it is a service to the lawyer

3) Suggest that client have a complete medical exam

According to the Alzheimer's Association, a medical workup for Mild Cognitive Impairment includes the following core elements:

• Thorough medical history, where the physician documents current symptoms, previous illnesses and medical conditions, and any family history of significant memory problems or dementia.

• Assessment of independent function and daily activities, which focuses on any changes from a person's usual level of function.

• Input from a family member or trusted friend to provide additional perspective on how function may have changed.

• Assessment of mental status using brief tests designed to evaluate memory, planning, judgment, ability to understand visual information and other key thinking skills.

• In-office neurological examination to assess the function of nerves and reflexes, movement, coordination, balance and senses.

• Evaluation of mood to detect depression; symptoms may include problems with memory or feeling "foggy." Depression is widespread and may be especially common in older adults.

• Laboratory tests including blood tests and imaging of the brain's structure.

4) Formal forensic capacity evaluation:

a) Disadvantages: trauma, expense, time; difficulty in convincing client or family members of the necessity

b) Advantage: strong evidence if later needed to defend a transaction (e.g., defend against an attack on testamentary capacity)

c) HIPPA requires that the clinician get the client's consent to share the results with the lawyer

d) Lawyer's referral letter: see sample in American Bar Association/American Psychological Association, *Assessment of Older Adults with Diminished Capacity: A Handbook for Lawyers*, Appendix 2

e) Remember that the assessment of "legal capacity" still ultimately rests with the lawyer

Lovett v. Estate of Lovett, 250 N.J. Super. 79, 593 A.2d 382 (1991): Testator was age 75 and suffering from weakened memory. He initially had executed a complicated tax-planning will, but the testator decided that he wanted only a simple will. His children sued the lawyer for malpractice, claiming among other things that the lawyer should have insisted that their father have a psychiatric evaluation before signing the will. The court held that the lawyer had not breached his duty of care. "Although I agree that a lawyer has an obligation not to permit a client to execute documents if he or she believes that client to be incompetent, I am not satisfied that the proofs establish that in 1985 Lovett [Testator] was incompetent or that Thomas [his lawyer] should have concluded that he was. No direct proofs regarding Lovett's competency in 1985 were presented.... The fact that Lovett wanted a simple will in spite of having a substantial estate does not suggest incompetency; nor did his age. The fact that Lovett's memory was not as strong as it had been, although a factor to be considered, was far from sufficient to warrant Thomas' refusal to act or to

require him to insist that Lovett obtain a psychological exam. Circumstances which would justify a suggestion from a lawyer that a client be psychiatrically evaluated as a prerequisite to signing legal documents would be rare. This was not such a circumstance."

5) Who are appropriate evaluators?

American Bar Association/American Psychological Association, *Assessment of Older Adults with Diminished Capacity: A Handbook for Lawyers, 2d ed.*, p. 49, lists the following as possible evaluators: physicians, geriatricians, geriatric psychologist, geropsychologist, forensic psychologist or psychiatrist, neurologist, neuro-psychologist, geriatric assessment team; referrals from local Area Agency on Aging, American Psychiatric Association, American Psychological Association

6) Suppose the evaluator's report reveals that the client is in the early stages of Alzheimer's disease?

Wilson v Lane, 274 Ga. 492, 614 S.E.2d 88 (2005): "Regardless of the stigma associated with the term 'Alzheimer's,' however, that testimony does not show how [the testator] would have been unable to form a rational desire regarding the disposition of her assets." See also Pope v. McWilliams, 280 Ga. 741, 632 S.E.2d 640 (2006), Curry v. Sutherland, 279 Ga. 489, 614 S.E.2d 756 (2005), Bishop v. Kenny, 266 Ga. 231, 466 S.E.2d 581 (1996).

7) Suppose that, prior to the evaluation, your client told you that if the evaluation revealed that she had dementia, she would seriously consider committing suicide? (The report indicates "mild dementia").

MRPC 1.4 requires a lawyer to keep the client "reasonably informed" of the status of any matter that the lawyer is handling for the client.

MRPC 1.4, Comment 7: "In some circumstances, a lawyer may be justified in delaying transmission of information when the client would be likely to react imprudently to an immediate communication. Thus, a lawyer might withhold a psychiatric diagnosis of a client when the examining psychiatrist indicates that disclosure would harm the client."

Restatement (3d) of Law Governing Lawyers, § 24, cmt.c: "A lawyer may properly withhold from a disabled client information that would harm the client, for example when showing a psychiatric report to a mentally-ill client would be likely to cause the client to attempt suicide, harm another person, or otherwise act unlawfully ."

D. What can lawyer do to maximize or enhance client capacity?

1) Multiple short meetings
   a) Ask the same questions and look for consistency
2) Time of day ("Sundowner's Syndrome")
3) Bright lighting and minimum background noise and interruptions
4) Speak clearly while facing client
5) Speak slowly and give client plenty of time to think before expecting a response
   a) Don't finish the client's sentences for her
6) Avoid using legal terms without explaining them
7) Draw diagrams
8) Use larger font in documents
9) Offer the client alternatives to the client's desired course of action
   a) Ask the client to reiterate those alternatives to you and why she has or has not chosen one
10) Allow clients ample time to review documents, both in advance and in the lawyer's office
11) Meet at client's home or facility in which client is residing
12) Without disclosing confidential information, consult with family members or caregivers as to how best to communicate with the client; when is best time to talk with client; how medications affect client, etc.

5. Is the lawyer liable to third parties for allowing a client to enter into a transaction for which the client may not have capacity?

CASE STUDY #2 (Part 2)

After extensive consultation with Leonora and a private conversation with a diagnostician whose judgment you trust, you decided that Leonora met the relatively low threshold for testamentary capacity. You also determined that she comprehended the consequences of the decision to leave much of her estate for the care of her dogs (and eventually to George), so you drafted a will that included a testamentary trust for her that carried out that plan. Leonora dies a few months later and her children challenge the probate of the will on the ground that she lacked testamentary capacity. They also sue you for legal malpractice for facilitating the execution of her will under these circumstances. What result?

A. Moore v. Anderson, Zeigler, Disharoon, Gallagher & Gray, 135 Cal. Rptr. 2d 888 (2003): Children of testator sued law firm that assisted the testator in altering his estate planning documents, alleging that the lawyers should have realized that the testator's capacity was questionable due to pain, illness and medications. Although recognizing that in some cases an attorney does owe a duty to non-clients, the court held that "an attorney preparing a will for a testator *owes no duty to the beneficiary of the will or to the beneficiary under a previous will* to ascertain and document the testamentary capacity of the client." Court said that a holding to the contrary could compromise the lawyer's duty of loyalty to his client. "The attorney who is persuaded of the client's testamentary capacity by his or her own observations and experience, and who drafts the will accordingly, fulfills that duty of loyalty *to the testator*. In so determining, the attorney should not be required to consider the effect of the new will on beneficiaries under a former will or beneficiaries of the new will." See also, Chang v. Lederman, 90 Cal. Rptr. 3d 758 (2009).

B. Charfoos v. Schultz, 2009 WL 3683314 (Mich. App. 2009) (unpublished op.): Attorney drafted will that left 70% of estate to testator's new wife. Children sued attorney for malpractice. Court refused to consider extrinsic evidence that testator lacked capacity and the attorney knew that when the will was drafted. "Because Herb is deceased, the question of his competency at the time the documents were executed must be resolved in his absence. Further, there is a similar incentive on the part of disgruntled beneficiaries to fabricate evidence regarding the decedent's competency. Finally, at its heart, this remains a case about the intent of the decedent. Plaintiffs' claim is structured as a question of Herb's competence and defendant's knowledge of Herb's competence, but their alleged damages would be dependent on the fact that defendant's alleged error thwarted Herb's intent, of which there is no intrinsic evidence." Children also claimed that the attorney had violated Michigan's version of MRPC 1.14 by failing to take protective action. The court stated that a violation of the MRPCs would not give rise to a legal malpractice action.

C. Logotheti v. Gordon, 414 Mass. 308, 607 N.E.2d 715 (1993): Heir of testator successfully challenged the will based on lack of testamentary capacity. Heir then sued the lawyer who drafted the will, alleging that the lawyer's negligence had resulted in the heir incurring counsel fees and other expenses in the will contest. The court held that while the lawyer owed a duty to his client to make a reasonable inquiry into the client's capacity, the lawyer owed no duty to the heirs of the testator.

C. Does the lawyer have any other responsibility to a client who is exhibiting diminishing capacity? (Protective Action)

CASE STUDY #2 (Part 3)

Two months after you supervised the execution of Leonora's will, Leonora and George return to your office. It is obvious to you that Leonora's condition has worsened substantially. She says little during the meeting and often appears to be staring blankly into space. George does all the talking. Periodically he looks to Leonora and says, "That is what we decided, isn't it. Grandmama?" Leonora responds, "Yes, Georgie, anything you say." George tells you that Grandmama has decided to establish immediately an irrevocable trust for the dogs, rather than wait until she dies. He makes it clear that if you won't draft this trust, he will take Grandmama to another lawyer who will. It becomes apparent to you during the conversation that George has taken complete control over Leonora's finances and most likely is already transferring her assets to himself using the power of attorney you drafted a last year.

1. Recall that MRPC allows the lawyer to take "protective action" in certain circumstances:

MRPC 1.14(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....”

In the Matter of Clark, 202 N.C. App. 151 (2010): The guardian of a woman who had suffered severe brain injury as the result of an accident hired lawyers to represent the woman in her lawsuit against those who caused the accident and to aid in setting up a Special Needs Trust with any recovered funds. The parties settled the accident litigation, but then the husband of the woman sought to have her guardianship terminated or, alternatively, to have him appointed to replace the current guardian. One of the lawyers had cause to believe that the husband's motive in urging his wife to terminate the guardianship was to allow himself access to the settlement funds. The lawyer objected to the termination of the guardianship but withdrew his objection when the parties agreed that the bulk of the settlement funds would be placed into an irrevocable Special Needs Trust. The husband and wife then objected to the fees the lawyer had charged and sought to have the lawyer sanctioned because he had failed to maintain a “normal attorney-client relationship” with the woman. The court refused to sanction the lawyer, citing subsection (b) of Rule 1.14. The appellate court noted that the trial court had found “as a fact that [the lawyer] genuinely believed that Mr. Clark was attempting to obtain control over Ms. Clark's personal injury settlement for his own purposes and that it would not be in Ms. Clark's best interests for her competency to be restored... As long as Ms. Clark's competency had not been restored, [the lawyer] had a duty to exercise his best judgment on behalf of his client, which is exactly what the trial court found that he did.”

2. What is “reasonably necessary protective action”?

MRPC 1.14 Comment 5: “... 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.”

MRPC 1.14 Comment 7: “If a legal representative has not been appointed, the lawyer should consider whether appointment of a guardian ad litem, conservator or guardian is necessary to protect the client's interests.”

3. **ABA Legal Formal Ethics Opinion 96-404** (examining an earlier version of MRPC 1.14):

“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.”

“Although not expressly dictated by the Model Rules, the principle of respecting the client's autonomy dictates that the action taken by a lawyer who believes the client can no longer adequately act in his or her own interest should be the action that is reasonably viewed as the least restrictive action under the circumstances.”

“The nature of the relationship and the representation are relevant considerations in determining what is the least restrictive action to protect the client's interests. Even where the appointment of a guardian is the only appropriate alternative, that course, too, has degrees of restriction. For instance, if the lawyer-client relationship is limited to a single litigation matter, the least restrictive course for the lawyer might be to seek the appointment only of a guardian ad litem, so that the lawyer will be able to continue the litigation for the client. On the other hand, a lawyer who has a long-standing relationship with a client involving all of the client's legal matters may be more broadly authorized to seek appointment of a general guardian or a guardianship over the client's property, where only such appointment would enable the lawyer to fulfill his continuing responsibilities to the client under all the circumstances of the representation.”

4. What are “less restrictive actions”?

Participants in the 1994 Fordham “Conference on Ethical Issues in Representing Older Clients” compiled this list:

1. Involve family members;
2. Use of durable Powers of Attorney;
3. Use of revocable trusts;
4. Use of a “time out” to allow for cooling off, clarification, or improvement of the situation, or improvement of circumstances;

5. Referral to private case management;
6. Referral to long-term care ombudsman;
7. Use of church or other care and support systems;
8. Referral to disability support groups;
9. Referral to social services or other governmental agencies, such as consumer protection agencies (keeping in mind the risk that this may trigger investigation and intervention)

Ore. Op. 1991-41: A lawyer "must reasonably be satisfied that there is a need for protective action and must then take the least restrictive form of action sufficient to address the situation. If, for example, Client is an elderly individual and Attorney expects to be able to end the inappropriate conduct simply by talking to Client's spouse or child, a more extreme course of action such as seeking the appointment of a guardian would be inappropriate."

5. Seeking a guardianship for the client:

MRPC 1.14 Comment 7: If a legal representative has not been appointed, the lawyer should consider whether appointment of a guardian ad litem, conservator or guardian is necessary to protect the client's interests. Thus, if a client with diminished capacity has substantial property that should be sold for the client's benefit, effective completion of the transaction may require appointment of a legal representative. In addition, rules of procedure in litigation sometimes provide that minors or persons with diminished capacity must be represented by a guardian or next friend if they do not have a general guardian. In many circumstances, however, appointment of a legal representative may be more expensive or traumatic for the client than circumstances in fact require. *Evaluation of such circumstances is a matter entrusted to the professional judgment of the lawyer. In considering alternatives, however, the lawyer should be aware of any law that requires the lawyer to advocate the least restrictive action on behalf of the client.

***NYRPC 1.14 Comment 7:** Seeking a guardian or conservator without the client's consent (including doing so over the client's objection) is appropriate only in the limited circumstances where a client's diminished capacity is such that the lawyer reasonably believes that no other practical method of protecting the client's interests is readily available. The lawyer should always consider less restrictive protective actions before seeking the appointment of a guardian or conservator. The lawyer should act as petitioner in such a proceeding only when no other person is available to do so.

NYSBA Op. 746 (2001): (discussion under previous NY Code of Professional Responsibility) "[T]he lawyer who serves as the client's attorney in fact may petition for the appointment of a guardian without the client's consent only if the lawyer determines that the client is incapacitated and that there is no practical alternative, through the use of the power of attorney or otherwise, to protect the client's best interests."

"If the lawyer currently represents the client, and the client opposes the appointment of a guardian, then the lawyer may not also represent him- or herself (or anyone else) as petitioner in an Article 81 proceeding. Doing so would place the lawyer in a position where he or she is advocating on behalf of one client (the petitioner) in opposition to another current client, thereby creating an impermissible conflict of interest under DR5-105(A). Indeed, in that event, the client may well expect to receive the attorney's assistance in *opposing* the guardianship petition."

ABA Op. 96-404 (examining an earlier version of MRPC 1.14) made these pronouncements:

a. Consider seeking a limited guardianship or conservatorship "allowing the client to continue managing his personal affairs."

b. The lawyer herself may file the petition for guardianship. However, "a lawyer with a disabled client should not attempt to represent a third party petitioning for a guardianship over the lawyer's client." (This would create a conflict of interest prohibited by MRPC 1.7.) (See discussion below of Dayton Bar Association v. Parisi.)

"We emphasize, however, that this does not mean the lawyer cannot consider requests of family and other interested persons and be responsive to them, provided the lawyer has made the requisite determination on his own that a guardianship is necessary and is the least restrictive alternative. The lawyer must also have made a good faith determination that the third person with whom he is dealing is also acting in the best interests of the client. In such circumstance, the lawyer may disclose confidential information to the limited extent necessary to assist the third person in filing the petition, and may provide other appropriate assistance short of representation."

c. The lawyer may recommend or support the appointment of a particular person as guardian without violating Rule 1.7:

"A lawyer who is petitioning for a guardianship for his incompetent client may wish to support the appointment of a particular person or entity as guardian. Provided the lawyer has made a reasonable assessment of the person or entity's fitness and qualifications, there is no reason why the lawyer should not support, or even recommend, such an appointment. Recommending or supporting the appointment of a particular guardian is to be distinguished from representing that person or entity's interest, and does not raise issues under Rule 1.7(a) or (b), because the lawyer has but one client in the matter, the putative ward."

But see: Cal. Formal Op. 1989-112 (1989): Seeking a guardianship for a client, even if in the client's best interest, would be a conflict of interest. San Francisco Op. 99-2: Criticizes the above opinion and takes opposite approach.

d. The lawyer may represent the person whom the lawyer supported to be guardian after the guardianship is established:

"Once a person has been adjudged incompetent and a guardian has been appointed to act on his behalf, the lawyer is free to represent the guardian. However, prior to that time, any expectation the lawyer may have of future employment by the person he is recommending for appointment as guardian must be brought to the attention of the appointing court. This is because the lawyer's duty of candor to the tribunal, coupled with his special responsibilities to the disabled client, require that he make full disclosure of his potential pecuniary interest in having a particular person appointed as guardian. See Rules 3.3 and 1.7(b). The lawyer should also disclose any knowledge or belief he may have concerning the client's preference for a different guardian."

e. The lawyer should rarely seek to have herself appointed as guardian:

"[T]he Committee cautions that a lawyer who files a guardianship petition under Rule 1.14(b) should not act as or seek to have himself appointed guardian except in the most exigent of circumstances, that is, where immediate and irreparable harm will result from the slightest delay."

6. Selected court opinions on seeking a guardianship or conservatorship for a current or former client:

a) The "nightmare client": Cheney v. Wells, 23 Misc.3d 61, 877 N.Y.S.2d 605 (2008): Ms. Wells was a difficult client. One of the many lawyers who had tried to work with her told the court, "It is almost impossible to adequately describe the nightmare of representing Ms. Wells." Her most recent lawyer sought to withdraw in the midst of litigation against Ms. Wells, telling the court that she could not represent Ms. Wells without violating her own ethical responsibilities. The court examined New York's ethical rules, MRPC 1.14, and the Restatement (3d) of the Law Governing Lawyers and concluded that there was "no ethical impediment" to the lawyer seeking a limited guardianship for Ms. Wells solely for the purpose of defending her in the litigation and that the lawyer could disclose to the court that would impose the guardianship whatever confidential information would be necessary to prove the need for a guardian. (The attorney was not appointed as the limited guardian.)

b) Some lawyers are well-intentioned... but some are "nightmare lawyers"

Dayton Bar Association v. Parisi, 131 Ohio St. 3d 345, 965 N.E.2d 268 (2012): Lawyer Parisi (who had been practicing law since 1982) represented 93-year-old woman who claimed she was being held against her will in a nursing home. The lawyer herself initially filed for a guardianship for the client, including with the petition an affidavit from a health professional of a diagnosis of dementia. Later the lawyer withdrew her own petition and filed a petition on behalf of the woman's niece. The lawyer was found to have violated MRPC 1.7 in representing both the niece and the proposed ward. The court stated:

"Indeed, the far-reaching and life-altering consequences of an incompetency determination--involving a judicial determination that a mental or physical illness or disability has left a person so mentally impaired that the person is incapable of taking proper care of the person's self or property--create an inherent conflict between the proposed ward and the applicant for guardianship, even if guardianship is ultimately in the proposed ward's best interest."

The court (citing ABA Op. 96-404) found that the protective action provisions of MRPC 1.14 do not abrogate the basic duties that a lawyer owes her client, including the duty not to represent another person who interests are adverse to those of her client. Two other actions exacerbated this matter. First, the lawyer had her client sign a power of attorney

appointing the lawyer as her agent seven weeks *after* the lawyer filed the guardianship petition. Second, when she thought that the guardianship petition might be dismissed, the lawyer, acting as the client's agent, paid $18,000 in fees to herself from the client's funds.

In re Eugster, 166 Wash.2d 293, 209 P.3d 435 (2009): Lawyer Eugster (who had been practicing law since 1970) was employed by Marion Stead when she became dissatisfied with her son Roger's actions as trustee of a supplemental needs trust set up for her. Eugster completely revised her estate plan. Among other things he created a revocable trust of which he and Roger were successor trustees and named himself as her agent under a power of attorney. Eugster then met with Roger and apparently was persuaded of Roger's good faith. Eugster wrote the following to Marion:

> Roger has been a good and dutiful son to you. I have to be honest about this. You can be proud of Roger. He is not acting to protect himself or to take things from you. He has been acting to ensure that you are taken care of, your bills are paid, your assets are protected, and that you do not have to have unwanted concerns for your welfare as you grow older. Frankly, you should be very proud of Roger.

Marion then sought counsel from another lawyer because she wasn't sure whether Eugster was representing her interests or Roger's. The new lawyer wrote Eugster, terminating both his representation of Marion and his authority to act under the power of attorney. Eugster then filed a petition for guardianship over Marion, naming himself as "Attorney/Petitioner" and Roger as co-Petitioner. Even though he had supervised Marion's execution of a will, a trust and a power of attorney three months earlier, and even though he had had no contact with her for two months, he expressed his opinion to Roger that Marion lacked competence and was a vulnerable senior. The guardian ad litem for Marion in the guardianship proceeding interviewed 14 witnesses, all of whom stated unequivocally that she was capable of handling her own affairs. The court concluded that no guardianship was necessary. Marion spent $13,500 defending against the imposition of the guardianship. In a disciplinary proceeding, the Washington State Bar Association Disciplinary Board found by a "clear preponderance of the evidence" that Eugster had engaged in seven disciplinary violations, including failing to abide by his client's directions; disclosing confidential information; using information relating to his representation of her to her disadvantage; conflict of interest by representing another person with materially adverse interest; filing the guardianship petition without reasonable investigation; and not surrendering the client's file and papers to her new lawyer. The Board recommended disbarment but the Supreme Court reduced the sanction to an 18-month suspension plus restitution of the costs incurred by Marion in defending herself in the guardianship proceedings.

Matter of Brantley, 260 Kan. 605, 920 P2d 433 (1996): Lawyer Brantley (who had been practicing law since 1970) began representing Mary Storm in 1983, following the death of her personal lawyer. He represented her in three real estate transactions. In 1989, Brantley was contacted by Mary Storm's stepson, Pfenninger, who expressed concern that Mary Storm was dissipating her assets by giving or lending them to her own son. Pfenninger told Brantley that he had already secured the agreement of Bank to serve as Mary's conservator. Brantley did not meet with Mary (other than one phone conversation) but prepared a petition for voluntary conservatorship. He also did not investigate the purported dissipation of the assets. Mary apparently signed the petition, which Brantley had an office employee take to Mary at the nursing home. "Brantley candidly admits that, at this time, he was representing the conservatee, Mary Storm; her step-son, Ralph Pfenninger; and the conservator, Security State Bank, all in the same proceeding." Brantley then assisted the bank in preparing to auction off most of Mary's personal property. Neighbors noticed that her property was being boxed up and they notified her grandson who helped Mary retain a lawyer to halt the pending auction and terminate the voluntary conservatorship. The same day that the voluntary conservatorship was terminated, Brantley asked a different judge to issue a Temporary Order restraining the "conservatee" from disposing of her estate. He did not mention that the conservatorship had been dissolved nor did he notify Mary Storm of his action. Three days later, Brantley filed an Involuntary Petition for Conservatorship in which he identified himself as attorney of the Pfenninger, the petitioner. Brantley had not consulted with Mary Storm about filing this petition that was adverse to her interest. The petition "stated that Mary Storm was 'completely disoriented as to person, place and time as noted in the letter of Daniel R. Dunn, M.D. marked Exhibit A attached hereto and made a part hereof.' In fact, there was no Exhibit A attached to the petition, there was not in existence any letter from Dr. Dunn, Respondent Brantley never contacted Dr. Dunn to request such a letter, and Respondent Brantley candidly admitted that he made up the language supposedly 'noted in the letter.'" Mary moved to have Brantley disqualified. Instead, the magistrate judge (without notifying the attorneys) visited Mary at the nursing home. The judge then ordered Mary's own

attorney to be discharged from representing her. The attorney was reinstated. A partial conservatorship was imposed and a new conservator appointed. Then Brantley, representing the discharged conservator, presented bills for the services of himself and the discharged conservator. Mary moved to live with her son in Alaska and the conservatorship was eventually transferred to Anchorage, but Brantley and Pfenninger continued to try to monitor it and to gain access to confidential information. Eventually bar disciplinary proceedings were brought against Brantley, with the following result:

> "A majority of the Hearing Panel conclude that the following noted violations of the Model Rules of Professional Conduct, Supreme Court Rule 226 [1995 Kan. Ct. R. Annot. 245], were established by clear and convincing evidence.
>
> 2. MRPC 1.1 Competence [1995 Kan. Ct. R. Annot. 251]-Respondent failed to provide competent representation to his clients in the following particulars: (a) failure to fully investigate the claims of improper transfers from the account of Mary Storm and the threatened dissipation of her assets prior to initiating conservatorship proceedings; (b) failure to personally interview a client for whom a conservatorship proceeding was proposed; (c) permitting his client conservator to proceed with sale related activities in regard to Mary Storm's personal property before a court order had been entered directing such sale, which activity resulted in unwarranted expense to Mary Storm; (d) obtaining an ex parte order in a closed involuntary conservatorship proceeding, all in connection with a planned involuntary conservatorship proceeding not yet filed; (e) preparing and causing to be filed a Petition for Involuntary Conservatorship relying on a non-existent medical report, which is herein characterized as incompetence only because there is insufficient evidence to establish a violation of MRPC 3.3 Candor Toward the Tribunal [1995 Kan. Ct. R. Annot. 311].
>
> 3. MRPC 1.2 Scope of Representation [1995 Kan. Ct. R. Annot. 255]-Respondent failed to abide by his client Mary Storm's decisions concerning the representation.
>
> 4. MRPC 1.4-Communication [1995 Kan. Ct. R. Annot. 263]-Respondent failed to keep his client, Mary Storm, reasonably informed.
>
> 5. MRPC 1.5 Fees [1995 Kan. Ct. R. Annot. 268]-Respondent failed to communicate the basis or rate of the fee to the client, Mary Storm, who was ultimately responsible therefore, and caused her estate to be charged for legal services rendered to adversarial persons.
>
> 6. MRPC 1.7 Conflict of Interest [1995 Kan. Ct. R. Annot. 275]-Respondent represented Security State Bank and Ralph Pfenninger in matters adverse to his client, Mary Storm, without consulting and without consent.
>
> 7. MRPC 1.9 Conflict of Interest [1995 Kan. Ct. R. Annot. 281]-Respondent, after undertaking to represent Mary Storm, later represented others in substantially related matters in which interests were materially adverse to her, all without her consent after consultation.
>
> 8. MRPC 1.14 Client Under Disability [1995 Kan. Ct. R. Annot. 293]-Respondent failed to reasonably maintain a normal client-lawyer relationship with Mary Storm when he believed her to be under a disability.
>
> 9. MRPC 3.3 Candor Toward the Tribunal [1995 Kan. Ct. R. Annot. 311]-Respondent made statements and allegations to the magistrate court which he knew, or should have known, to be false. In addition, he made false statements to the magistrate court without making reasonable and diligent inquiry, as above noted, into the true facts.
>
> 10. MRPC 8.4 Misconduct [1995 Kan. Ct. R. Annot. 340]-As a result of the foregoing conclusions, Respondent has violated the rules of professional conduct and has engaged in conduct prejudicial to the administration of justice."

The Disciplinary Administrator recommended to the panel a suspension of Brantley's license for a period of time, such as 6 months, and that he pay restitution to Mary. The panel, in a split decision, recommended published censure. The Supreme Court agreed with the recommendation for published censure and also assessed costs against Brantley and restitution of the fees that Mary's conservator had paid to him and the former conservator.

APPENDIX A -- ACTEC COMMENTARIES (selected portions)

ACTEC COMMENTARY ON MRPC 1.14 (6th ed., 2023)

Declining and Diminished Capacity. MRPC 1.14 does not define "diminished capacity." In some cases, it is easily identifiable, as when a minor lacks contractual capacity due sheerly to the minor's age. In other cases, the determination is more difficult, as

when an individual is exhibiting signs of dementia. The latter case rarely results in immediate "diminished capacity" but rather usually occurs gradually, with increased vulnerability as the decision-making capacity of the individual declines.

For purposes of this Commentary, a person with "diminished capacity" refers to someone whose intellectual acuity is so substantially impaired, as a result of some illness, condition, or injury, that the person lacks the ability to make informed financial, medical, or personal decisions. A formal determination of diminished capacity need not have been made by a medical doctor or a court in order for a lawyer to believe that a client suffers from diminished capacity. A lawyer must be aware, however, that his or her determination of the client's diminished capacity is subjective and that the lawyer may lack the expertise to appraise the client's capacity accurately.

A person with "declining capacity," for purposes of this Commentary, refers to someone who is beginning to exhibit signs of reduced capacity but who possesses the ability to make informed decisions with respect to some or all financial, medical, or personal matters. Signs of declining capacity include, but are not limited to, occasional forgetfulness, confusion, or disorientation concerning persons or events that a fully competent person would understand clearly. A lawyer who believes that a client suffers from either diminished capacity or declining capacity should always act in a manner that is consistent with MRPC 1.14(a)'s direction to maintain a normal lawyer-client relationship to the extent reasonably possible.

Assisting Competent Clients in Planning for Possible Incapacity. As a matter of routine, the lawyer who represents a competent adult in estate planning matters should provide the client with information regarding the devices the client could employ to protect his or her interests in the event of declining capacity, including ways the client could avoid the necessity of a guardianship or similar proceeding. Thus, as a service to a client, the lawyer should inform the client regarding the costs, advantages and disadvantages of durable powers of attorney, directives to physicians or living wills, health care proxies, revocable trusts, and other support systems, including supported decision making agreements, if appropriate under state law. A lawyer may properly suggest that a competent client consider executing a letter or other document that would authorize the lawyer to communicate to designated parties (e.g., family members, health care providers, a court) concerns that the lawyer might have regarding the client's capacity. Such a document might also include authorization to the lawyer to take appropriate protective action, such as beginning a proceeding for the appointment of a guardian or conservator for the client or suggesting to the client's family members that they do so. In addition, a lawyer may properly suggest that a durable power of attorney for health care or other healthcare proxy document authorize the agent, on behalf of the principal, to give written authorization to one or more of the client's health care providers and to disclose information for such purposes upon such terms as provided in such authorization, including health information regarding the principal, that might otherwise be protected against disclosure by the Health Insurance Portability and Accountability Act of 1996 (HIPAA). If the client wishes any durable power of attorney to become effective at a date when the client is unable to act for himself or herself, the lawyer should consider how to draft that power in light of the restrictions found in HIPAA. The lawyer also should consider whether applicable state law permits execution of a power of attorney or other document creating an agency relationship that becomes effective at a date after the date of its execution.

The lawyer should as far as possible accord the represented person the status of client, particularly in maintaining communication with the represented person. In addition, the client who suffers from declining capacity may wish to have family members or other persons participate in discussions with the lawyer. The lawyer must keep the client's interests foremost. Except for disclosures and protective actions authorized under MRPC 1.14, the lawyer should rely on the client's directions, rather than the contrary or inconsistent directions of family members, in fulfilling the lawyer's duties to the client. Before meeting with the client and others, the lawyer should consider the impact of a joint meeting on the attorney-client evidentiary privilege and discuss any issues with the client.

Implied Authority to Disclose and Act. Based on the interaction of subsections (b) and (c) of MRPC 1.14, a lawyer has implied authority to make disclosures of otherwise confidential information and take protective actions when there is a risk of substantial harm to the client and the lawyer reasonably believes that the client is unable because of diminished capacity, either temporary or permanent, to protect himself or herself. Under those circumstances, the lawyer may consult with individuals or entities that may be able to assist the client, including family members, trusted friends and other advisors. However, in deciding whether others should be consulted, the lawyer should also consider the client's wishes, the impact of the lawyer's actions on potential challenges to the client's estate plan, and the impact on the lawyer's ability to maintain the client's confidential information. If

the client has given an express direction not to consult with an individual or group, the lawyer may not override that direction unless there has been a material change that would render the express direction no longer applicable. MRPC 1.14(c) makes it clear that the lawyer is only authorized to disclose client confidences "to the extent reasonably necessary to protect the client's interests." The disclosures can be made to protect the client "even when the client directs the lawyer to the contrary." MRPC 1.14, cmt [8]. But before making such protective disclosures, it is incumbent on the lawyer to assess whether the person or entity consulted will act adversely to the client's interests. Id. See also ABA Informal Opinion 89-1530 (1989).

In determining whether to act and in determining what action to take on behalf of a client, the lawyer should consider the impact a particular course of action could have on the client, including the client's right to privacy and the client's physical, mental and emotional well-being. A lawyer is not required to seek a determination of incapacity or the appointment of a guardian or take other protective action with respect to a client. However, under MRPC 1.14(b), when the lawyer reasonably believes 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 protective action, including, in appropriate cases, seeking the appointment of a guardian ad litem, conservator or guardian. The issues associated with the lawyer's representing another person in seeking to be appointed to a fiduciary position for the client are discussed in more detail below in the section entitled *Lawyer Representing Guardian or Conservator of Current or Former Clien*t. The lawyer should also consider whether applicable state law includes mandatory reporting requirements for situations involving individuals with diminished or declining capacity where exploitation or exposure to unsafe situations is occurring, discussed in more depth below in the section entitled *Reporting Elder Abuse*.

Risk and Substantiality of Harm. For the purposes of determining whether to take protective action for a client whose capacity is diminished, the risk of harm to a client and the amount of harm that a client might suffer should both be determined according to a different scale than if the client had full capacity. During periods of declining capacity, a client may become susceptible to impaired decision-making due to an increasing inability to assess and understand risk. Additionally, the substantiality of the harm to the client may be exacerbated by the fact that the client whose capacity is diminished will not be in a position to recoup any losses suffered. In determining the risk and substantiality of harm and deciding what action to take, a lawyer should consider any wishes or directions that were clearly expressed by the client when the client had full capacity and, to the extent feasible, pursue what would have been that client's wishes and interests. Absent this knowledge, a lawyer should be permitted to take actions on behalf of a client with apparently diminished capacity that the lawyer reasonably believes are in the best interests of the client but that result in the least extensive intrusion into the client's autonomy.

Determining Extent of Diminished Capacity. In determining whether a client's capacity is diminished, a lawyer may consider the client's overall circumstances and abilities, including the client's ability to express the reasons leading to a decision, the ability to understand the consequences of a decision, the legal standards and definitions of capacity for the transactions involved, the substantive appropriateness of a decision, and the extent to which a decision is consistent with the client's values, long-term goals and commitments. In appropriate circumstances, the lawyer may seek the assistance of a qualified professional to assess the client's capacity.

Testamentary Capacity and Undue Influence. A lawyer should attempt to remain reasonably alert to indications that a client may have declining capacity or be the subject of undue influence.

If the testamentary capacity of a client is uncertain or the lawyer suspects that another person may be unduly influencing the client, the lawyer should exercise particular caution in assisting the client to modify his or her estate plan and make reasonable inquiry, under the circumstances, to assess whether the client has the necessary capacity and any document modifying the estate plan is consistent with the client's intentions. The lawyer generally should not prepare a will, trust agreement or other dispositive instrument for a client whom the lawyer reasonably believes lacks the requisite capacity or is being unduly influenced to execute the document. On the other hand, because of the importance of testamentary freedom, the lawyer may properly assist clients whose testamentary capacity appears to be borderline or in circumstances which raise indicia of undue influence, recognizing that a trier of fact may be in the best position to make a final determination after full consideration of the facts and circumstances.

The lawyer may also take into account the ability of the client to make testamentary documents if the lawyer declines to act, erring on the side of creating what may constitute an invalid document when declining to do so would leave the client with no other options. See, Vignes v. Weiskopf, 42 So. 2d 84 (Fla. 1949) ("When he reached his client's bedside there was good reason to believe, from the atmosphere there, that the client had not long to live and that he was probably not mentally alert, but these

circumstances did not make it necessary that the attorney constitute himself a court to pass on the medical and legal questions whether he was in fact capable of executing a valid codicil").

If a lawyer believes that another person may be unduly influencing the client, the lawyer should attempt to meet independently with the client to confirm the client's intentions, if the client is willing to do so, and it is possible to do so, under the circumstances. In cases in which the lawyer believes that the client's testamentary capacity is borderline, or that the client may be the subject of undue influence, the lawyer should take steps to document and preserve evidence regarding the client's testamentary capacity and the facts and circumstances involved.

Lawyer Retained by Fiduciary for Person with Diminished Capacity. The lawyer retained by a person seeking appointment as a fiduciary or retained by a fiduciary for a person with diminished capacity, including a guardian, conservator or attorney-in-fact, stands in a lawyer-client relationship with respect to the prospective or appointed fiduciary. A lawyer who is retained by a fiduciary for a person with diminished capacity, but who did not previously represent the person with diminished capacity, represents only the fiduciary. Nevertheless, in such a case the lawyer for the fiduciary owes some duties to the person with diminished capacity. See ACTEC Commentary on MRPC 1.2 (Scope of Representation and Allocation of Authority Between Client and Lawyer). If the lawyer represents the fiduciary, as distinct from the person with diminished capacity, and is aware that the fiduciary is improperly acting adversely to the person's interests, the lawyer may, under applicable state law, have an obligation to disclose, to prevent or to rectify the fiduciary's misconduct.

As suggested in the Commentary to MRPC 1.2 (Scope of Representation and Allocation of Authority Between Client and Lawyer), a lawyer who represents a fiduciary for a person with diminished capacity or who represents a person who is seeking appointment as such, should consider asking the client to agree that, as part of the engagement, the lawyer may disclose fiduciary misconduct to the court, to the person with diminished capacity, or to other interested persons. Furthermore, as is discussed below in the section entitled *Lawyer Representing Guardian or Conservator of Current or Former Client*, a lawyer who is asked to represent a person who wishes to be appointed a fiduciary for a client or former client with diminished capacity should exercise caution in undertaking such a representation and should thoroughly familiarize himself or herself with the interpretation of MRPC 1.14(b) under applicable state law.

Lawyer Representing Person with Diminished Capacity for Whom a Fiduciary Has Been Appointed by a Court. A lawyer who represented a client before the client suffered diminished capacity should ordinarily look to the court-appointed fiduciary to make decisions for the client. The lawyer is impliedly authorized to disclose to the fiduciary sufficient information to permit the fiduciary to properly protect the client's interest. The ongoing duties of a lawyer to a client with diminished capacity for whom a fiduciary has been appointed may differ from state to state.

In some situations, the scope of the fiduciary's duties and the limitations on the client's ongoing rights might be limited. For example, in some states, a court may appoint a fiduciary to exercise only limited rights of the client. In those instances, a lawyer who represented a client before the client suffered diminished capacity may be considered to continue to represent the client after a fiduciary has been appointed. Although incapacity may prevent a person with diminished capacity from entering into a contract or other legal relationship, the lawyer who represented the person with diminished capacity may appropriately continue to meet with and counsel him or her.

Whether the person with diminished capacity is characterized as a client or a former client, the client's lawyer acting as counsel for the fiduciary owes some continuing duties to him or her. See Ill. Advisory Opinion 91-24 (1991) (summarized in the Annotations following the ACTEC Commentary on MRPC 1.6 (Confidentiality of Information)). If the lawyer represents the person with diminished capacity and not the fiduciary, and is aware that the fiduciary is improperly acting adversely to the person's interests, the lawyer should take the steps necessary to protect the interests of the client consistent with this rule.

Lawyer Appointed or Hired to Represent a Person with Diminished Capacity in a Guardianship Proceeding. In many states, when a proceeding is initiated to impose a guardianship or conservatorship or other protective arrangement, the person who will be the subject of that proceeding ("respondent") is entitled automatically to be represented by counsel. In other states, the respondent or a guardian ad litem may request that the respondent be represented by counsel. The respondent may retain his or her own lawyer or a lawyer may be appointed by the court. A lawyer who is representing a respondent should ascertain exactly what role the lawyer is to play in the guardianship proceeding under applicable state law. In those states that have an articulated rule, the majority approach is that the lawyer is to advocate for the respondent's expressed wishes rather than what

the lawyer thinks may be in the client's best interests. In those states the court may also appoint a guardian ad litem whose role is to promote results that will be in the respondent's best interest rather than to advocate for the respondent's expressed preferences. In a few states, the lawyer who is appointed to represent the respondent is to act in the role of a guardian ad litem. (See, e.g., Idaho Code Ann. §15-5-303(b)).

Lawyer Representing Guardian or Conservator of Current or Former Client. Unless prohibited by applicable state law, the lawyer may represent the guardian or conservator of a current or former client, provided the representation of one will not be directly adverse to the other. See ACTEC Commentary on MRPC 1.7 (Conflict of Interest: Current Clients) and MRPC 1.9 (Duties to Former Clients). Joint representation would not be permissible if there is a significant risk that the representation of one will be materially limited by the lawyer's responsibilities to the other. See MRPC 1.7(a)(2) (Conflict of Interest: Current Clients). Because of the client's, or former client's, diminished capacity, the waiver option may be unavailable. See MRPC 1.0(e) (Terminology) (defining informed consent).

A conflict of interest may arise if the lawyer for the fiduciary is asked by the fiduciary to take action that is contrary either to the currently or previously expressed wishes of the person with diminished capacity or to the best interests of such person, as the lawyer believes those interests to be. The lawyer should give appropriate consideration to the currently or previously expressed wishes of a person with diminished capacity.

A lawyer who is considering representing a person wishing to petition to have a conservator or guardian appointed for the lawyer's client or former client whether or not the petitioner seeks to be appointed the conservator or guardian, should exercise extreme caution. Although the ABA Comments to MRPC 1.14 state that seeking appointment of such a fiduciary for a client with diminished capacity is not only permissible but may be desirable, ABA Formal Ethics Opinion 96-404, summarized in the Annotations below, states that a lawyer should not represent the person seeking to be appointed guardian or conservator for a client or former client. (“In particular, [MRPC 1.14] does not authorize a lawyer to represent a third party in seeking to have a court appoint a guardian for his client.”) Although this opinion was written before the most recent changes to MRPC 1.14, it has not been amended or withdrawn as of the date of these Commentaries. Furthermore, as summarized in the Annotations below, several state courts have held that its prohibition is correct under the current version of MRPC 1.14. If a lawyer in this situation believes that it would be inappropriate for the lawyer to represent the person who wishes to be appointed fiduciary for the lawyer's client or former client, the lawyer should consider other actions, such as seeking the appointment of a guardian ad litem to determine the best interests of the person with diminished capacity, seeking the appointment of an attorney ad litem or similar officer of the court to represent the person with diminished capacity, or simply refusing the representation.

Reporting Elder Abuse. Elder abuse has been labeled “the crime of the 21st century,” Kristen Lewis, The Crime of the 21st Century: Elder Financial Abuse, PROB. & PROP. Vol. 28 No. 4 (Jul./Aug. 2014). Individuals who are the victims of elder abuse are often reluctant to disclose the abuse and seek assistance, particularly when the abuser is a family member or someone close to the victim. Thus, a lawyer who suspects his or her client is the victim of elder abuse may be faced with the dilemma of whether to seek protection for the client by reporting the abuse and disclosing confidential information if the client refuses to or cannot consent to the disclosure. Every state has enacted elder abuse reporting laws. However, the role and obligations of lawyers with respect to the reporting of elder abuse vary significantly among the states. Some states have expressly made lawyers mandatory reporters of suspected elder abuse. See, e.g., Tex. Hum. Res. Code § 48.051(a)- (c) (2015); Miss. Code Ann. § 43-47-7(1)(a)(i) (2019); Ohio Rev. Code Ann. § 5101.63 (2019); Ariz. Rev. Stat. § 46-454(B) (2019); Mont. Code Ann. § 52-3-811 (2003) (exception where attorney-client privilege applies to information). Other states have broad mandatory reporting laws that do not exclude lawyers. See, e.g., Del. Code Ann. Tit. 31, § 3910. The exception to the duty of confidentiality in MRPC 1.6(b)(6), which allows disclosure “to comply with other law,” should apply in the states that require lawyers to report elder abuse. Disclosure in these states must be limited to what the lawyer reasonably believes is necessary to comply with the law.

In those states where a lawyer has no mandatory reporting duty, a lawyer's ability to report elder abuse where MRPC 1.6 would otherwise restrict disclosure of confidential information may be governed by MRPC 1.14(b). In addition, the lawyer's ability may be affected by any other exception to MRPC 1.6 (such as the exception for disclosing confidential information “to prevent reasonably certain death or other substantial bodily harm”). In order to rely on MRPC 1.14(b)'s permission to “take reasonably necessary protective action, including consulting with individuals or entities that have the ability to take action to protect the client,” the lawyer must first determine that the client has diminished capacity. Before the lawyer consults with other

professionals on that issue, the lawyer must be aware of the potential mandatory reporting duties of such professionals and whether such consultation will result in reporting that the client opposes or that would create undesirable disruptions in the client's living situation. The lawyer is also required under MRPC 1.14 to gather sufficient information before concluding that reporting is necessary to protect the client. See NH Ethics Committee Advisory Opinion #2014-15/5 (The Lawyer's Authority to Disclose Confidential Client Information to Protect a Client from Elder Abuse or Other Threats of Substantial Bodily Harm). In cases where the scope of representation has been limited pursuant to Rule 1.2, the limitation of scope does not limit the lawyer's obligation or discretion to address signs of abuse or exploitation (consistent with Rules 1.14 and 1.6 and the applicable state's elder abuse law) in any aspect of the client's affairs of which the lawyer becomes aware, even if beyond the agreed-upon scope of representation.

ACTEC COMMENTARY ON MRPC 1.6 (selected paragraphs)

Disclosures to Client's Agent. If a client becomes incapacitated and a person appointed as attorney-in-fact begins to manage the client's affairs, the attorney-in-fact often will ask the lawyer for copies of the client's estate planning documents in order to manage the client's assets consistent with the estate plan. However, the mere fact that the attorney-in-fact has been appointed does not waive the attorney's duty of confidentiality. The terms of the power of attorney or the instructions to the lawyer at the time the power of attorney was drafted may authorize disclosure to the attorney-in-fact in those circumstances. The attorney can avoid the issue by talking with the client about the client's preferences regarding disclosure. At the time of the request for disclosure, the attorney may also comply with the request if, after considering the specific circumstances and the specific information being requested by the attorney-in-fact, the attorney reasonably concludes that disclosure is impliedly authorized to carry out the purpose of the representation of the client. Or, of course, the power of attorney could specifically authorize the disclosure.

Client Who Apparently Has Diminished Capacity. As provided in MRPC 1.14 (Client with Diminished Capacity),a lawyer for a client who has, or reasonably appears to have, diminished capacity is, in most jurisdictions, authorized to take reasonable steps to protect the interests of the client, including the disclosure, where appropriate and not prohibited by state law or ethical rule, of otherwise confidential information. See ACTEC Commentary on MRPC 1.14 (Client with Diminished Capacity), ABA Inf. Op. 89-1530 (1989), and *Restatement (Third) of the Law Governing Lawyers*, §§24, 51 (2000). In such cases, where permitted by the jurisdiction, the lawyer may either initiate a guardianship or other protective proceeding or consult with diagnosticians and others regarding the client's condition, or both. In disclosing confidential information under these circumstances, the lawyer may disclose only that information necessary to protect the client's interests [MRPC 1.14(c) (Client with Diminished Capacity)]. Note that California does not permit the lawyer to take action without the client's consent.

ACTEC COMMENTARY TO MRPC 1.7 (selected paragraph)

Client with Diminished Capacity. As provided by MRPC 1.14 (Client with Diminished Capacity), a lawyer may take reasonable steps to protect the interests of a client the lawyer reasonably believes to be suffering from diminished capacity, including the initiation of protective proceedings. This rule exists in most jurisdictions, but not all. Note that the lawyer should only represent the petitioner in protective proceedings for a client after thorough review of the interpretation of MRPC 1.14(b) under applicable state law and consideration of conflicts of interest. See ACTEC Commentary on MRPC 1.14 (Client with Diminished Capacity). Doing so may create a conflict of interest between the lawyer and the client. The client might, for example, oppose the protective action being taken by the lawyer and consider it a breach of the duty of loyalty. In such a circumstance, the lawyer is entitled to continue to take protective action, but where possible, should call the court's attention to the client's opposition and ask that separate counsel be provided to represent the client's stated position if the client has not already retained such counsel. A lawyer who is retained on behalf of the client to resist the institution of a protective action may not take positions that are contrary to the client's position or make disclosures contrary to MRPC 1.6 (Confidentiality of Information). A lawyer who is appointed to represent the respondent in a protective action should review carefully the applicable state statutes to determine whether court-appointed counsel must advocate for the client's position or act in the client's best interest. Appointed counsel's duty varies from state to state. See ACTEC Commentary on MRPC 1.14 (Client with Diminished

Capacity) (*Lawyer Appointed or Hired to Represent a Person with Diminished Capacity in a Guardianship Proceeding)*. A lawyer who is retained or appointed to represent a person with diminished capacity who believes that he or she cannot advocate for the client's position may consider withdrawal as counsel as provided in MRPC 1.16, but must keep in mind whether the court will allow withdrawal and whether withdrawal will leave the client with no representation when representation is needed. See ABA Formal Ethics Op. 96-404.

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