

INTRODUCTION

Individuals age 65 or older currently represent about 15% of the U.S. population. This figure continues to rise, with 10,000 Baby Boomers turning age 65 every day. Longer lives are unfortunately often accompanied by diminishing mental capacity and increased vulnerability. Clients and potential clients whose capacity is diminishing present complex ethical challenges to the professionals who are advising them. Recognizing “diminishing capacity” requires both a medical/psychological and a legal analysis.

CASE STUDY #1

Huguette Clark, heiress and philanthropist, died in 2011 in Beth Israel Medical Center in NYC at the age of 104. She owned several luxurious homes, including mansions and two Fifth Avenue apartments, but she lived from 1988 until her death as a recluse in her hospital room. She had no descendants or living siblings, only distant relatives. Ms. Clark executed a will in 2005 that left the bulk of her \$300 million estate to charity. The will also left about \$30 million to her long-time nurse (who had already received millions in gifts from Ms. Clark), \$12 million to her goddaughter and nothing to her relatives. During her lifetime, Ms. Clark had transferred \$1.5 million at the request of her lawyer to build a security system in the West Bank Israeli settlement where his daughter and her family lived. In 2010, two of her relatives initiated an investigation into how her finances were being handled by her lawyer and her accountant. After receiving a report from the New York County District Attorney, a Surrogate judge denied the relatives’ petition that a guardian be appointed for her. When Ms. Clark died, 19 relatives challenged her will, claiming that she had lacked testamentary capacity and been defrauded by her nurse, her lawyer, and her accountant.

I. RECOGNIZING DIMINISHING CAPACITY

A. “Diminishing Capacity: The Medical/Psychological Perspective

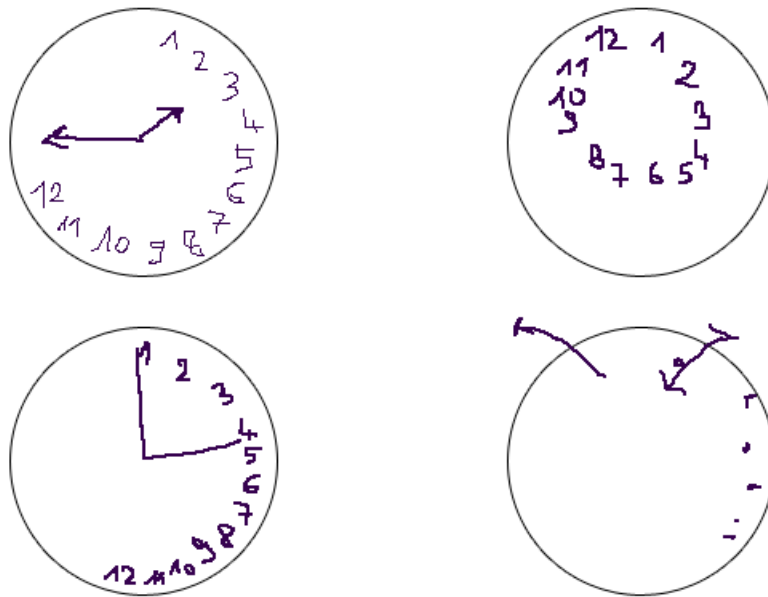
- 1) Capacity usually is not an “on/off” situation
 - a) May be temporary
 - b) May be situational
 - c) May be partial
 - d) May be treatable, reversible

2) Personal physician evaluations and forensic evaluations:

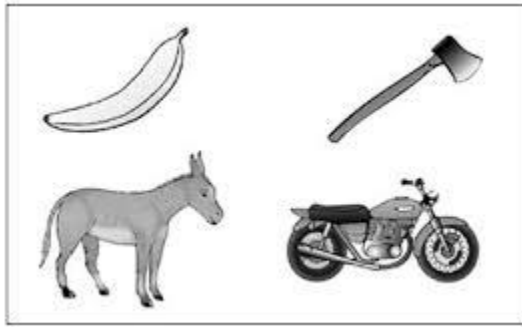
a) Evaluators use numerous capacity assessment test and tools (e.g., Mini-Mental State Exam and Modified MMSE; Clock Drawing test; Mini-Cog; Naming Test; Financial Capacity Indicator, etc.)

See: National Institute on Aging’s 2013 searchable database of over 100 “Instruments to Detect Cognitive Impairment in Older Adults”

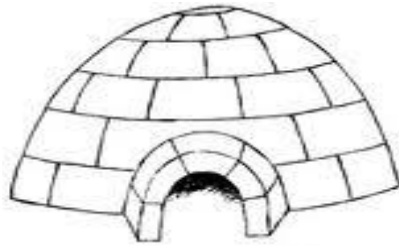
Clock-Drawing Test: Step 1: Give patient a sheet of paper with a large (relative to the size of handwritten numbers) predrawn circle on it. Indicate the top of the page.
Step 2: Instruct patient to draw numbers in the circle to make the circle look like the face of a clock and then draw the hands of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



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



Cultural issues:



Generational issues:



b) American Bar Association/American Psychological Association, *Assessment of Older Adults with Diminished Capacity: A Handbook for Lawyers*, p. 33, lists the following as possible evaluators: physicians, geriatricians, geriatric psychologist, 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.

POSSIBLE CAUSES OF PERCEIVED “INCAPACITY”:

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 APOE-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; 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

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

B. “Diminishing Capacity”: The Legal Perspective

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.

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.”

C. 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) 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 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. 14-18; “Capacity Worksheet for Lawyers,” pp. 23-26)

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

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)

Behavioral signs

- 1) Delusions (paranoia)
- 2) Hallucinations (“Who is that girl sitting next to you?”)
- 3) Poor grooming/hygiene

C. 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. 21-22 lists several reasons why lawyers should not use these instruments: lack of training; limited yield of information; over-reliance; false negatives and positives; lack of specificity to legal incapacity

D. 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

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) Lawyers and other professionals can take steps to "maximize" or "enhance" their clients' 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.

II. REPRESENTING A CLIENT WITH DIMINISHING CAPACITY

CASE STUDY #2

Nelle Harper Lee, author, died in 2016 in Monroeville, Alabama, at the age of 89. She is known throughout the world for her first novel, *To Kill a Mockingbird*. Although she later wrote a few short stories, she published nothing else until 2015. In that year, Harper Lee stunned the literary world by announcing that she would be releasing for publication a second novel, entitled *Go Set a Watchman*. No sooner had the announcement been made than speculation began as to whether the decision to publish the novel had been the independent decision of the then-88-year-old author or an attempt on the part of her lawyer and others to exploit the reputation of a reclusive woman who was in ill health and resided in an assisted living facility. Ms. Lee's business affairs had been handled by her sister and lawyer, Alice Lee. In 2011, Alice Lee retired (at age 100) and Tonja Carter, a young lawyer in Alice Lee's firm, took over the handling of Harper Lee's affairs. Soon after this "transfer of power," the usually reclusive Harper Lee became involved in a series of lawsuits and disputes that were spear-headed by Tonja Carter. Many who knew Harper Lee opined that such actions were not characteristic of Harper Lee, particularly the suit in which she accused the small museum in her hometown of Monroeville, Alabama, of exploiting her name and fame without paying her compensation. Alice Lee died in 2014. Less than three months later, Tonja Carter wrote for Harper Lee the press release announcing that Ms. Carter had "found" the *Watchman* manuscript in a safe deposit box and that Harper Lee wished for the book to be published. The Alabama Securities Commission and Department of Human Resources received an anonymous report that Harper Lee was the victim of "elder abuse," but, upon investigation, it closed the case without taking any action.

A. ABA 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."

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.” (This sentence does not appear in NYRPC.)

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: GA Rule 1:14 Comment 3 states 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.*"

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 client* 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:

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. The Client with “Borderline” Capacity

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

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. **ACTEC Commentaries to MRPC 1.14:**

Person With Diminished Capacity Who Was a Client Prior to Suffering Diminished Capacity and Prior to the Appointment of a Fiduciary. 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 for the person. 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 at a time when the person was competent 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 the alleged abuser has convinced the client to hire a different lawyer?

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:

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, the lawyer should exercise particular caution in assisting the client to modify his or her estate plan. The lawyer generally should not prepare a will, trust agreement, or other dispositive instrument for a client who the lawyer reasonably believes lacks the requisite capacity. On the other hand, because of the importance of testamentary freedom, the lawyer may properly assist clients whose testamentary capacity appears to be borderline. In any such case the lawyer should take steps to preserve evidence regarding the client's testamentary capacity.”

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. Suppose an 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).

5. 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.”

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

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.

CASE STUDY #3

Brooke Russell Astor, philanthropist and socialite, died in 2007, at the age of 105. In 2006, her grandson instigated an investigation into the exploitation of her financial affairs by her son, Anthony Marshall (who was serving as her guardian), and his attorney after Ms. Astor had been diagnosed with dementia. Among the charges were that Anthony had stolen his mother's favorite Childe Hassam painting. (He later sold the painting for \$10 million and kept a \$2 million commission.) Ms. Astor's grandson also accused his father of neglecting Ms. Astor, leaving her to live in squalor and depriving her of her medications. Anthony was convicted in 2009 of grand larceny and his attorney of forgery. Anthony Marshall was replaced as her guardian by Annette De La Renta. In a will written in 2002 and amended three times after that, Ms. Astor gave increasingly more of her estate to her son as opposed to the charities that would have benefitted under earlier wills. Her will was challenged after her death and, in settlement of this action, Anthony's share of his mother's estate was reduced from \$31 million to \$14.5 million.

C. Taking Protective Action

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):

“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.”

APPENDIX A

(Reprinted with permission of the ACTEC Foundation)

ACTEC COMMENTARY ON MRPC 1.14 (5th ed., 2016)

Preventive Measures for Competent Clients. 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. 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, and revocable trusts. 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. In addition, a lawyer may properly suggest that a durable power of attorney authorize the attorney-in-fact, 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 the durable power of attorney to become effective at a date when the client is unable to act for him- or herself, the lawyer should consider how to draft that power in light of the restrictions found in HIPAA.

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 him 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. 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. In appropriate cases, the lawyer may seek the appointment of a guardian ad litem, conservator or guardian or take other protective action.

Risk and Substantiality of Harm. For the purposes of this rule, 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 were fully capable. In particular, the client's diminished capacity increases the risk of harm and the possibility that any particular harm would be substantial. If the risk and substantiality of potential harm to a client are uncertain, a lawyer may make reasonably appropriate disclosures of otherwise confidential information and take reasonably appropriate protective actions. 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 during his or her competency. Normally, 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.

Disclosure of Information. As amended in 2002, MRPC 1.14(c) makes clear that a lawyer is impliedly authorized to disclose client confidences "but only to the extent reasonably necessary to protect the client's interests." This is so "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).

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 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.

Lawyer Representing Client with Diminished Capacity May Consult with Client's Family Members and Others as Appropriate. If a legal representative has been appointed for the client, the lawyer should ordinarily look to the representative to make decisions on behalf of the client. The lawyer, however,

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 diminished 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. In meeting with the client and others, the lawyer should consider the impact of a joint meeting on the attorney-client evidentiary privilege.

Reporting Elder Abuse. Elder abuse has been labeled “the crime of the 21st century,” Kristin Lewis, *The Crime of the 21st Century: Elder Financial Abuse*, PROB. & PROP. Vol. 28 No. 4 (Jul./Aug. 2014), and the federal and state governments are responding with legislation and programs to prevent and penalize the abuse. The role and obligations of lawyers with respect to elder abuse varies significantly among the states. Some states have made lawyers mandatory reporters of elder abuse. *See, e.g.*, Tex. Hum. Res. Code § 48.051(a)–(c) (2013) (Texas); Miss. Code Ann. § 43-47-7(1)(a)(i) (2010) (Mississippi); Ohio Rev. Code Ann. § 5101.61(A) (2010) (Ohio); A.R.S. § 46-454(B) (2009) (Arizona); Mont. Code Ann. § 52-3-811 (2003) (Montana) (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, but disclosure would be limited to what the lawyer reasonably believes is necessary to comply. In states where there is no mandatory reporting duty of lawyers, a lawyer's ability to report elder abuse where MRPC 1.6 may restrict disclosure of confidentiality would be governed by MRPC 1.14 in addition to any other exception to MRPC 1.6 (such as when there is a risk of death or substantial bodily harm). In order to rely on MRPC 1.14 to disclose confidential information to report elder abuse, the lawyer must first determine that the client has diminished capacity. If the lawyer consults with other professionals on that issue, the lawyer must be aware of the potential mandatory reporting duties of such professional 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 state 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.

Testamentary Capacity. If the testamentary capacity of a client is uncertain, the lawyer should exercise particular caution in assisting the client to modify his or her estate plan. 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. On the other hand, because of the importance of testamentary freedom, the lawyer may properly assist clients whose testamentary capacity appears to be borderline. In any such case the lawyer should take steps to preserve evidence regarding the client's testamentary capacity.

In cases involving clients of doubtful testamentary capacity, the lawyer should consider, if available, procedures for obtaining court supervision of the proposed estate plan, including substituted judgment proceedings.

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 have an obligation to disclose, to prevent or to rectify the fiduciary's misconduct. See MRPC 1.2(d) (Scope of Representation and Allocation of Authority Between Client and Lawyer) (providing that a lawyer shall not counsel a client to engage, or assist a client, in conduct that the lawyer knows is criminal or fraudulent).

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.

Person with Diminished Capacity Who Was a Client Prior to Suffering Diminished Capacity and Prior to the Appointment of a Fiduciary. 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 for the person. 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 at a time when the person was competent may appropriately continue to meet with and counsel him or her. If the client became incapacitated while the lawyer was representing the client, that very incapacity may preclude the client from terminating the attorney-client relationship. 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 has an obligation to disclose, to prevent or to rectify the fiduciary's misconduct.

Wishes of Person with Diminished Capacity Who Is Under Guardianship or Conservatorship When the Fiduciary is the Client. 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 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.

May Lawyer Represent Guardian or Conservator of Current or Former Client? 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*).

ACTEC COMMENTARY ON MRPC 1.6 (2016 Addition)

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.

APPENDIX B: RESOURCES

- 1) 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
- 2) ACTEC Commentaries on the Model Rules of Professional Conduct
(See Appendix A for ACTEC Commentary on MRPC 1.14 & MRPC 1.6)
- 3) NAELA Aspirational Standard for the Practice of Elder Law (2d ed.)
- 4) American Bar Association/American Psychological Association, *Assessment of Older Adults with Diminished Capacity:*
 - A Handbook for Lawyers*
 - A Handbook for Judges*
 - A Handbook for Psychologists*
- 5) Restatement (3d) of the Law Governing Lawyers
- 6) State Laws, Cases (including malpractice cases), and Ethical Rules
- 7) ABA and State Bar Opinions
 - ABA Legal Ethics Opinion 96-404 (issued under a prior version of MRPC 1.14)
- 8) Flowers & Morgan, *Ethics in the Practice of Elder Law* (ABA)
- 9) AARP, *Protecting Older Investors: The Challenge of Diminished Capacity* (2011)