

BUT I'AM NOT QUALIFIED TO PERFORM BRAIN SURGERY!

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I. INTRODUCTION:

The purpose of this article is to determine the estate planning lawyer's role in assessing a borderline incapacitated client's mental capacity and the procedure to be followed in making that determination.

As our life expectancy increases, lawyers can expect to see a substantial rise in borderline incapacitated clients. As a result, there exists a need for lawyers to understand how a client's incapacity can affect his ability to make informed decisions regarding his financial and health care objectives.

Failure to properly assess the capacity of a borderline incapacitated client may result in complications for the lawyer. Questions may be raised regarding the legitimacy of the lawyer's action or inaction. The end result may be a malpractice lawsuit or a Bar Grievance against the lawyer. At the very least, the lawyer may be required to testify to his client's capacity at or before the time of signing the contested document(s). No lawyer wants to testify that his client was incapacitated at the time he signed the document in issue, especially if the lawyer charged a fee for his services. Such testimony could be embarrassing or be perceived by one's peers as morally improper.

This article attempts to answer the following questions: Do lawyers have a duty to make sure that their client has capacity at or before the time of execution of the testamentary document, and if so, what test should be used to make that determination?

II. DOES A LAWYER HAVE AN ETHICAL OBLIGATION TO DETERMINE HIS CLIENT'S CAPACITY?

Absolutely! The lawyer-client relationship is based in contract, i.e., the lawyer agrees to represent the client and the client agrees to compensate the lawyer for his services. It follows that the client must have sufficient capacity to enter into a contract with the lawyer for his services.¹ Additionally, lawyers have a duty to counsel their clients and assist them in making the decisions that will accomplish their financial and health care objectives.

The Rules Regulating the Florida Bar 4-1.14 (Appendix "A") clearly places the responsibility of determining the client's capacity squarely on the lawyer's shoulders.

Pursuant to Rule 4-1.14, the lawyer must determine whether it is reasonably possible to maintain a

¹A distinction must be made between the duties and obligations owed to an existing client who becomes incapacitated and those owed to a potential, new client.

normal client-lawyer relationship with the client, i.e., whether the client is capable of making decisions about important matters.

If the lawyer determines: (a) that it is not reasonably possible to maintain a normal client-lawyer relationship, and (b) that the client cannot adequately act in his own interest, the lawyer must decide whether it would be in the client's best interest to seek the appointment of a guardian.

Finally, if the lawyer determines: (a) that it is not reasonably possible to maintain a normal client-lawyer relationship, (b) that the client cannot adequately act in his own interest, and (c) that it would not be in the client's best interest to seek the appointment of a guardian, then the lawyer must determine whether he must act as de facto guardian for his client. Refer to Ethics Opinion 85-4 attached hereto as Appendix "B".

As of the date of this article, there are no reported cases or Ethics Opinions where a lawyer has been reprimanded by the Florida Supreme Court for either failing to assess or improperly assessing his client's capacity.

III. IS THERE A TEST FOR CAPACITY UNDER THE RULES REGULATING THE FLORIDA BAR?

There is no test for capacity under the Rules Regulating the Florida Bar. However, Ethics Opinion 85-4, citing to Michigan Opinion CI 1055 (October 19, 1984), implies that the test is whether "the lawyer has serious doubts about the mental stability and competency of his client." Additionally, Ethics Opinion 73-25 implies that the test is whether the lawyer has "good cause to doubt the mental competency of a client".

Delaware has a similar test. There, a lawyer who drafts a will, particularly for an aged or infirm testator, should be satisfied concerning competence, and to make certain that the instrument as drafted represents the intentions of the testator. Norton v. Norton (In re Will of Norton), 672 A.2d 53 (Del. 1996).

In stark contrast with the aforementioned "intuitive" tests for incapacity, the ABA has created a more structured and interactive test for the lawyer. Comment [6] to the ABA Model Rule 1.14 reads:

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. In appropriate circumstances, the lawyer may seek guidance from an appropriate diagnostician.

This test is consistent with the test used by medical professionals to determine whether their patients have capacity to make health care decisions. Refer to Section VI. C. of this article.

IV. IN FLORIDA, DO LAWYERS HAVE A LEGAL (AS OPPOSED TO AN ETHICAL) DUTY TO DETERMINE THEIR CLIENT'S CAPACITY?

A. A VIOLATION OF AN ETHICAL DUTY DOES NOT GIVE RISE TO A PRIVATE CAUSE OF ACTION:

The Preamble to the Rules Regulating the Florida Bar, Chapter 4 reads in relevant part:

Violation of a rule should not give rise to a cause of action nor should it create any presumption that a legal duty has been breached. The rules are designed to provide guidance to lawyers and to provide a structure for regulating conduct through disciplinary agencies. They are not designed to be a basis for civil liability. Furthermore, the purpose of the rules can be subverted when they are invoked by opposing parties as procedural weapons. The fact that a rule is a just basis for a lawyer's self-assessment, or for sanctioning a lawyer under the administration of a disciplinary authority, does not imply that an antagonist in a collateral proceeding or transaction has standing to seek enforcement of the rule. Accordingly, nothing in the rules should be deemed to augment any substantive legal duty of lawyers or the extra-disciplinary consequences of violating such duty. [Emphasis added].

The courts have consistently held that a violation of an ethical rule does not give rise to a private cause of action. See Lee v. Florida Dept. of Ins. and Treasurer, 586 So.2d 1185(Fla. 1st DCA 1991); Rios v. McDermott, Will & Emery, 613 So.2d 544 (Fla. 3rd DCA1993); Smith v. Bateman Graham, P.A., 680 So.2d 497 (Fla. 1st DCA 1996); and Tew v. Arky, Freed, Stearns, et al., 655 F.Supp.1571 (S.D. Fla.1987).²

B. ATTORNEY'S DUTY TO THE CLIENT:

In Florida, does a lawyer owe a duty to the client (and possibly the client's surrogate and fiduciary) to determine his capacity at or before the time of execution of the testamentary document?

Not yet! The case of Vignes v. Weiskopf, 42 So. 2d 84 (Fla. 1949) is instructive in this regard. In Vignes, the Florida Supreme Court stated that a lawyer should comply as nearly as he can with his client's request (even if he has good cause to doubt the mental competency of a client), should expose the true situation to the court, and leave the matter to the court to decide whether in view of all facts surrounding the execution of testamentary document it should be admitted to probate.

² However, a violation of an ethical rule may be used as *some evidence of negligence*. Gomez v. Hawkins Concrete Construction, Inc., 623 F. Supp. 194 (N.D. Fla. 1985); Oberon Investments, N.V. v. Angel, Cohen and Rogovin, 492 So. 2d 1113,1114 n.2 (Fla.3rd DCA 1986), quashed on other grounds, 512 So.2d 192 (Fla. 1987); and Pressley v. Farley, 579 So.2d 160(Fla. 1st DCA 1991).

In Vignes, the testator on his death bed feebly gave instructions to his secretary for a codicil to his last will and testament. When the attorney brought the codicil to decedent's house to be signed, the testator signed it without reading it or having it read to him. Following the testator's death, the county judge refused to admit the codicil to probate because there was no evidence that the testator had read it or knew its contents and the testator lacked testamentary capacity at the time he signed it. In addition, the judge noted that the witnesses had not signed the document in the testator's conscience presence.

The testator's attorney was severely criticized by opposing counsel for allowing his client to sign the codicil even though he believed that his client did not have testamentary capacity. In response, the Florida Supreme Court stated:

Much has been said in the arguments and written in the briefs about the conduct of the attorney who drafted the codicil and who appears now as counsel for the appellees. The inference is left with us that he was guilty of some duplicity because he prepared the codicil for Daniel Weiskopf and now represents those who would have it declared invalid. We have seen what his activities were with reference to preparing the codicil, bringing it to the sickbed of the testator, and having it acknowledged and witnessed. When it was presented to the county judge for probate he joined the other two witnesses in an oath that they were present when the testator subscribed his name to the instrument; that the testator did not read it; that its contents were not read to him nor made known to him, although the attorney "asked him to read it or have its contents made known to him but the testator replied, 'I will read it later'"; that the codicil was immediately sealed; that the seal was not thereafter broken until its deposit with the court; that the attorney received no reply from the testator when he asked him if he wished three subscribing witnesses to attest his execution; that the witnesses thereupon signed the paper at the request of the attorney; "that they verily [believed] that the testator did not know the contents of what he was signing nor did he at the time of the signing thereof have testamentary capacity."

Patently the purpose of this affidavit was to apprise the court at the first opportunity precisely what happened in the sickroom when the codicil was executed.

When the attorney was interrogated about his securing the execution and attestation of the codicil, which he was later to state in the oath had been witnessed without a direct request of the testator, by one who at the time lacked testamentary capacity he gave an answer which seems to us to have been quite sensible. He said simply, "I did the best I knew how."

It occurs to us that he would have been unfaithful to an old client had he not done his best to comply with the request to prepare the codicil and bring it to him. It is true that the information was incomplete, but there is evidence that he tried diligently at the time to have it clarified. 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 question whether he was in fact capable of executing a valid codicil. That the question is debatable is demonstrated by the procedure which has taken its course in the county judge's court, the circuit court, and this court.

We are convinced that the lawyer should have complied as nearly as he could with the testator's request, should have exposed the true situation to the court, which he did, and should have then left the matter to that tribunal to decide whether in view of all facts surrounding the execution of the codicil it should be admitted to probate.

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.

OTHER STATES:

As of the date of this article, there are no reported cases holding that a lawyer is subject to civil liability to his client for either failing to assess or improperly assessing his client's capacity. However, lawyers in the following states potentially walk a fine line between the duty owed to their clients and possible exposure to civil liability:

» California: The primary duty of the attorney is to the client and is fulfilled if the attorney, convinced of testamentary capacity by his or her own observations and experience with the client, draws the will as requested. Gonsalves v. Superior Court, 19 Cal. App. 4th 1366 (Cal. App. 1993); Moore v. Anderson Zeigler Disharoon Gallagher & Gray, 109 Cal. App. 4th 1287, 135 Cal. Rptr. 2d 888 (Cal. App. 2003).

» Delaware: A lawyer who drafts a will, particularly for an aged or infirm testator, must be satisfied concerning competence, and to make certain that the instrument as drafted represents the intentions of the testator. Norton v. Norton (In re Will of Norton), 672 A.2d 53 (Del. 1996).

» Kansas: An attorney owes his client a duty to be reasonably alert to indications that the client is incompetent and to make a reasonable determination in that regard. Laing v. Shanberg, 1999 U.S. Dist. Lexis 4194 (U.S. Dist. Kansas 1999).

» Massachusetts: 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. In making the required

determination, the attorney must have undivided loyalty to the client.... A fair, objective determination in every case is in the best interest of the client. Logotheti v. Gordon, 414 Mass. 308, 607 N.E.2d 1015 (Mass. 1993).

» Michigan: A lawyer has a duty to act as a lawyer of ordinary learning, judgment, or skill under the circumstances using reasonable professional judgment. If a lawyer makes reasonable inquiry into his client's understanding of the nature and legal effect of the legal document at the time of its execution, then the lawyer is deemed to have exercised reasonable professional judgment with regard to its execution. Further, even if the lawyer was mistaken about his client's mental competency, mere errors in judgment by a lawyer are generally not grounds for a malpractice action. An attorney cannot justifiably be deemed an insurer of a client's mental competency. Persinger v. Holst, 348 Mich. App. 499, 639 N.W.2d 594 (Mich. App. 2001).

C. ATTORNEY'S DUTY TO INTENDED BENEFICIARIES:

In Florida, an intended third-party beneficiary of a testamentary document (i.e., a named beneficiary) has standing to bring an action for legal malpractice against the drafting attorney if he is able to show that the testator's intent as expressed in the will/trust is frustrated by the negligence of the testator's attorney. *See* Espinosa v. Sparber, Shevin, Shapo, Rosen & Heilbronner, 612 So. 2d 1378 (Fla. 1993). However, based on the rationale in Vignes v. Weiskopf, it would appear that a lawyer does not owe a duty to intended beneficiaries to determine his client's capacity at or before the time of execution of the testamentary document.

OTHER STATES:

The law in the following states is the same as Florida:

» California: 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. Moore v. Anderson Zeigler Disharoon Gallagher & Gray, 109 Cal. App. 4th 1287, 135 Cal. Rptr. 2d 888 (Cal. App. 2003); Featherson v. Farwell, 123 Cal. App. 4th 1022 (Cal. 2nd App. Dist. 2004); Boranian v. Clark, 123 Cal. App. 4th 1012 (Cal. 2nd App. Dist. 2004); Osornio v. Weingarten, 124 Cal. App. 4th 304 (Cal. 6th App. Dist. 2004).

In Moore, the court reasoned in part that the duty of loyalty of the attorney to the client may be compromised by imposing a duty to beneficiaries. The extension of the duty to intended beneficiaries to this context would place an intolerable burden upon attorneys. Not only would the attorney be subject to potentially conflicting duties to the client and to potential beneficiaries, but counsel also could be subject to conflicting duties to different sets of beneficiaries. The testator's attorney would be placed in the position of potential liability to either the beneficiaries disinherited if the attorney prepares the will or to the potential beneficiaries of the new will if the attorney refuses to prepare it in accordance with the testator's wishes.

The court was not persuaded that imposition of such a burden on counsel would result in less litigation. The court reasoned that ascertaining testamentary capacity is often difficult and the

potential for liability to beneficiaries who might deem any investigation inadequate would unjustifiably deny many persons the opportunity to make or amend their wills. Factors which might suggest lack of testamentary capacity to some attorneys do not necessarily denote a lack of capacity. Any doubts as to capacity might be resolved by counsel by refusing to draft the will as desired by the testator, turning the presumption of testamentary capacity on its head and requiring the testator represented by a cautious attorney to prove his competency.

» Washington: An attorney had no duty to inform intended beneficiaries under the will of his view, based on subsequent contacts with the testator, that she was incompetent at the time the will was executed. Morgan v. Roller, 58 Wn. App. 728, 794 P.2d 1313 (Wn. App. 1990).

» Minnesota: An attorney has no duty to testator's sole living relative, who claimed that testator lacked capacity to enter into the will. Francis v. Piper 597 N.W.2d 922 (Minn. App.1999).

D. ATTORNEY'S DUTY TO DISINHERITED, INTESTATE HEIRS:

In Florida, based on the rationale in Vignes v. Weiskopf, it would appear that a lawyer does not owe a duty to disinherited, intestate heirs to determine his client's capacity at or before the time of execution of the testamentary document.

Cf. Chase v. Bowen, 771 So. 2d 1181 (Fla. 5th DCA 2000). In Chase, plaintiff sued her deceased mother's lawyer for legal malpractice because he prepared her mother's revised will omitting plaintiff as a beneficiary and instead making major bequests to her mother's business associates. Plaintiff's claim was based on her allegation that the lawyer was plaintiff's lawyer as well as the lawyer for her mother and the business and that the lawyer was mandated by the ethical obligations imposed by his profession to notify her, her mother, and the associates of his irreconcilable conflict of interest in preparing her mother's rewrite of her will. Summary judgment for the lawyer was affirmed. The appellate court ruled that a lawyer who prepared a will owed no duty to any previous beneficiary, even a beneficiary he might have been representing in another matter, to oppose the testator or testatrix in changing his or her will; therefore, assistance in that change was not a conflict of interest. An attorney who drafted the will of one who changed her mind and excluded from a later will a beneficiary could not have been found to have intentionally interfered with the inheritance of such beneficiary. Drafting a will in accordance with the instruction of the testatrix was not tortious conduct.

OTHER STATES:

The law in the following states is the same as Florida:

» Massachusetts: An attorney who drafted a will that was later invalidated on grounds of a lack of testamentary capacity and undue influence did not owe a duty of care to intestate heirs at law of the deceased client. Logotheti v. Gordon, 414 Mass. 308, 607 N.E.2d 1015(Mass. 1993).

» Kansas: An attorney who drafted a trust did not owe a duty of care to an intestate heir at law of

the deceased client. Laing v. Shanberg, 1999 U.S. Dist. LEXIS 4194 (U.S. Dist. Kansas 1999).

In Laing, the lawyer drafted an estate plan, including a trust agreement, for decedent which provided that decedent's children would receive substantially less of an inheritance than they would have received under the laws of intestate succession. Decedent's daughter, who was not an intended beneficiary of her mother's trust, filed an action against her mother's lawyer alleging that he knew or should have known that decedent was mentally incapacitated at the time of the drafting of the estate planning documents. Decedent's daughter alleged that the lawyer owed her, as a person who would take by intestate succession, a duty to determine her mother's competence.

The court disagreed with the daughter and reasoned that it is a clear conflict between the duty the lawyer owed to his client, who wished to draft a trust agreement, and the duty allegedly owed to the daughter who would take only by intestate succession. An attorney owes his client a duty to be reasonably alert to indications that the client is incompetent and to make a reasonable determination in that regard. If the court were to conclude that the lawyer also owed a duty to the daughter, the court would be imposing a conflicting duty on attorneys. The lawyer could not adequately serve both his client, whose competence is necessary to execute the trust agreement, and the daughter, whose financial interests are served only if the lawyer determines that his client is not competent to execute the trust agreement.

V. TESTAMENTARY CAPACITY DEFINED:

Section 732.501, Fla. Stat. reads: "[a]ny person who is of sound mind and who is either 18 or more years of age or an emancipated minor may make a will." Whether one has testamentary capacity is a question determinable only by the mental (as opposed to the physical) capacity of the testator at the time he executed his will. The making of a will does not depend upon a sound body but upon a sound mind. The term, "sound mind" means the ability of the testator "to mentally understand in a general way the nature and extent of the property to be disposed of, and the testator's relation to those who would naturally claim a substantial benefit from the will, as well as a general understanding of the practical effect of the will as executed." In re Wilmott's Estate, 66 So.2d 465 (Fla. 1953).

How does a lawyer know if his client mentally understands in a general way: (1) the nature and extent of his property to be disposed of, (2) his relation to those who would naturally claim a substantial benefit from the will, and (3) the practical effect of the will as executed?

The problem lies, not with (1) or (2), but with (3). With (1) and (2), the lawyer can question his client about his property and relatives. However, trying to determine whether the client understands the practical effect of the will can be a daunting task! To do this, the lawyer must decide whether the client has "decisional capacity".

VI. DECISIONAL CAPACITY:

A. DECISIONAL CAPACITY DEFINED:

A starting definition of decisional capacity³ is that "it involves the ability to understand and process information so that a decision can be made and communicated." The problem with this general statement is its generality. Decisional capacity is a flexible, elusive, and ultimately, undefinable concept. Like beauty, capacity or incapacity may exist only in the eye of the beholder. And unlike pornography, without proper training, you may not know capacity when you see it.

B. ASSESSING DECISIONAL CAPACITY:

Not only is each individual at some point on a capacity continuum, but an individual's capacity can vary over time and with the task or decision in question. Individuals can be fine in the morning but fuzzy by late afternoon, and most of us have a daily biological low point when we are not at our sharpest. Furthermore, what may look like permanent incapacity is often not permanent at all, but temporary delirium caused by improper medication, a vitamin deficiency, an infection, depression, or insomnia.

Additionally, decisional capacity is decision-specific, i.e., the level of capacity needed to perform a particular task varies with the complexity of understanding the practical affect of the act. For instance, the level of capacity and understanding that one must have to execute a trust is potentially greater than that required for execute a health care surrogate designation.

In a general sense, decisional capacity is based on the client's ability to:

- (1) Understand, i.e., the ability to comprehend the disclosed information about the nature and purpose of the legal matter at issue (will, trust, durable power of attorney, etc.) as well as the risks and benefits involved;
- (2) Appreciate, i.e., the ability to appreciate the significance of the legal matter and the potential risks and benefits for one's own situation and others;
- (3) Reason, i.e., the ability to engage in a reasoning process about the risks and benefits of the legal matter vs. alternatives to the suggested course of action proposed by the lawyer; and
- (4) Choose, i.e., the ability to express a choice about whether or not to pursue the suggested course of action proposed by the lawyer.

C. ASSESSING DECISIONAL CAPACITY – MEDICAL PERSPECTIVE:

To fully understand the problems associated with assessing decisional capacity, it is helpful to understand decisional capacity from both a legal and medical perspective.

The vast majority of the research and articles on decisional capacity are in the medical field. From a medical perspective, decisional capacity is not an "all-or-nothing" concept. A patient has decisional capacity if he is capable of giving informed consent or refusal for the proposed intervention

³For purposes of this article, the terms "decisional capacity" and "capacity" are synonymous and are used interchangeably throughout this article.

(medication, surgery, etc.). The informed consent process has three main elements, information, understanding and voluntary choice. These elements are the basis for the main standards for decisional capacity. General questions for assessing a patient's decisional capacity include:

- Can the patient make and communicate a choice?
- Does the patient understand the information that is relevant to the decision at hand?
- Can the patient recognize how this information applies to his own situation?
- Is the patient's decision consistent with his own values and goals?
- Is the decision the result of a delusion or distorted view of reality?
- What are the patient's reasons for the decision? Is the reasoning process logical? (Is the patient's rationale for the decision reflective, clear, and consistent with the patient's goals and decision?)

In order of increasing complexity, a person with decisional capacity should be able to:

- Receive, comprehend, and relate relevant information;
- Express his choice consistently. This can be accomplished even by a person with significant memory deficits, and would be a minimum requirement for appointing a healthcare proxy;
- Appreciate the nature of his condition, including diagnosis, prognosis, and treatment (i.e., insight);
- Balance the risks, benefits, and burdens of various choices, including the burdens to others of choices made;
- Apply a relatively stable set of values to the choice of available options; and
- Communicate the rationale behind the choices. For example, a person refusing a minor surgical procedure with clear benefit and minimal risk should be able to explain the rationale behind the refusal.

(a) TRY TO ELIMINATE THE PHYSICAL OR EMOTIONAL BARRIERS INTERFERING WITH THE PATIENT'S DECISIONAL CAPACITY:

The beginning point is to assess the presence of either physical or emotional barriers to communication, and to do whatever is necessary to eliminate or reduce those barriers. The reduction or elimination of any such barriers is vital to ensure that the patient can fully understand the nature of his or her condition and expressed choices. Physical barriers can include medications, physical pain or suffering, hearing impairments, the effects of a stroke, or symptoms such as fever or hypotension. Emotional barriers include treatable clinical depression, anxiety, mental illness, grief, or fear.

In his article "Determining Decisional Capacity: A Medical Perspective", Robert P. Roca discusses the problems encountered by medical professionals in trying to establish a patient's decisional capacity:

Because of the variability of the prognosis of dementia depending upon the cause, it is critical to know the cause of the dementia before making any pronouncement about incapacity, particularly about its likely duration. This generally means that the patient

should have seen a physician for a complete medical history, a thorough physical examination, and laboratory testing, including measurement of blood chemistries, thyroid hormone concentration, and blood counts. Blood testing for syphilis, an electrocardiogram, a chest x-ray, and urinalysis should be obtained. Many authorities would recommend some form of neuroimaging study (e.g., computed tomography or magnetic resonance imaging of the brain), although these tests often yield little of diagnostic or therapeutic importance, particularly when dementia has been chronic and slowly progressive. A mental status examination also should be performed.

* * * *

No diagnosis, in and of itself, invariably implies incompetency. Patients with dementia, delirium schizophrenia, bipolar affective disorder, and other psychiatric conditions may be capable of making responsible decisions. Establishing that a patient lacks decisional capacity requires more than making a psychiatric diagnosis; it also requires demonstrating that the specific symptoms of that disorder interfere with making or communicating responsible decisions about the matter at hand. Because it is this practical functional issue that is most critical, it might be argued that diagnosis is at best, irrelevant to judgments about capacity and, at worst, seriously misleading in that diagnosis might be taken as grounds for incompetence in the absence of evidence of impaired decision-making capacity.

* * * *

But sometimes the judgment is made with much less confidence. The patient has a mental disorder and shows some evidence of decisional impairment but also has lucid intervals or at times gives somewhat reasonable explanations for the choices made. In such a case, do the psychiatric symptoms disable decision-making, or do they not? How does the examiner make a judgment in the face of substantial uncertainty?

In addition to physical or emotional barriers, there are many other factors that can affect a patient's decisional capacity either negatively or positively. Many elderly patients have diminished or fluctuating capacity. For example, patients who become confused at the end of the day (sundowning) can make health care decisions in the morning when they are lucid. Patients with short-term memory loss may still be able to judge the appropriateness of a suggested intervention, especially if they have shown a long-standing pattern of stable choices that can be corroborated. If, however, patients must retain current information to choose among treatment options, then short-term memory loss is relevant. In addition, hospitalization may scare, confuse, or intimidate the patient, and can compound common problems of aging such as poor eyesight or hearing loss.

Health care professionals should make a reasonable effort to maximize a patient's decisional capacity. One can enhance decisional capacity by:

- adjusting timing, treatment and medication regimens so assessment and discussions occur when the patient is most likely to be alert and oriented.
- trying to reduce fear, anxiety, anger, etc. which may interfere with good decision making.
- promoting trust and avoid coercion.
- presenting information in clearly, simply, repeatedly and in small amounts over time.

- considering whether the presence of family or friends might comfort and help the patient understand and focus on the important information.

Additionally, when in doubt about the ability to understand English, use an unbiased translator, and for those who can't speak, adjust the conversation to use yes/no questions, writing pads, or letter boards.

(b) EVALUATE THE PATIENT'S LEVEL OF CAPACITY BY ASKING SPECIFIC QUESTIONS DESIGNED TO ELICIT INTERACTION BETWEEN THE MEDICAL PROFESSIONAL AND THE PATIENT:

After assessing the presence of physical or emotional barriers to insight and communication, and attempting to reduce those barriers, the health care professional can begin to evaluate the patient's level of consciousness, attention, orientation, and ability to retain information and make a sustained informed decision by asking the patient specific questions. Sample questions to ask the patient are attached hereto as Appendix "C".

Through the process of asking open-ended questions, soliciting responses in the patient's own words, and generally interacting in a nonthreatening, conversational way, the patient's decisional capacity can usually be determined. This process allows the health care professional to determine if there are areas of misinformation that can be clarified or lack of information that can be provided to further assist with the decision making. It also allows the health care professional to gain insight as to the values and goals of the patient that may have played a role in the decision making, as well as the reasoning process of the patient. The reasoning process, in view of the goals and values of the patient, is what is important in the evaluation process.

D. ASSESSING DECISIONAL CAPACITY – LEGAL PERSPECTIVE:

Lawyers are at a disadvantage in attempting to assess their client's capacity. A lawyer neither has the medical training nor the diagnostic tools used by medical professionals to assess capacity. Are the lawyer's gut instincts and his client's response to a few questions enough to properly assess capacity? As stated above, the medical professional's first step in determining capacity is to try to eliminate the physical and/or emotional barriers interfering with his patient's capacity. Although the lawyer can attempt to eliminate some of those barriers (see below), he can neither prescribe medication nor render a psychiatric diagnosis. As a result, the medical professional is in a much better position to determine the client's decisional capacity than the lawyer.

In her article "Determining Decisional Capacity and the Need for Adult Guardianship"⁴, Rebecca J. O'Neill gave these insightful examples of some of the difficulties encountered in trying to communicate with a client to determine his decisional capacity:

⁴DCBA Brief, Journal of the DuPage County Bar Association, April 1999.

Sometimes clients have capacity to understand the documents but have difficulty communicating their understanding or desires. For example, some stroke victims have difficulty communicating, but completely understand the contents of the durable power of attorney. Sometimes, other impairments affect the person's ability to communicate, such as hearing or vision loss. Whenever there is a communication barrier, the attorney must attempt to find a way to overcome that barrier. Sometimes, it is as simple as printing the document in a larger font size or reading the document verbatim to the client. Sometimes, it means hiring an interpreter to do sign language. Sometimes, it means designing questions so the client can answer "yes" or "no". Sometimes, it means simply speaking in a very loud voice. Whatever the communication barrier, it often means being patient. Most communication barriers can be overcome.

Sometimes communication barriers cannot be overcome. When this happens, the effect is the same as if the person does not have capacity to make decisions because the person cannot communicate his or her decisions. For example, once our legal clinic was asked to provide legal services to a gentleman in a nursing home. The nursing home administration had no documentation about the man's family history. No one ever visited the man. When I talked with the man his eyes were bright and he tried to respond to my questions. He could not write or speak. He could nod his head to indicate "yes" or "no". It was clear that he wanted a will. Yet, I could not figure out a way to ascertain to whom he wanted to bequeath his possessions or who he wanted to name as an agent in a durable power of attorney. In retrospect, I wonder if I had gone through the alphabet with him and had him answer "yes" or "no" to each letter of the alphabet, if I could have eventually spelled the names of each person. Communication barriers are very frustrating for both the client and the attorney.

Jan Ellen Rein, in her article, "SYMPOSIUM: Ethics and the Questionably Competent Client: What the Model Rules Say and Don't Say",⁵ discussed some of the problems lawyers face in attempting to determine their client's capacity. She wrote:

Depending on the attorney's skill and sensitivity, a client may be competent with one lawyer and incompetent with another. Practitioners can enhance the existing capacity of their impaired elderly clients by paying attention to the environment they create for them. Specific examples of how to enhance a client's capacity by accommodating his or her special needs include (1) printing documents and communications in large, bold type with easy-to-read color background if eyesight is a problem; (2) sending materials for review before a meeting whenever possible; (3) keeping background noise and interruptions to a minimum for the hearing impaired and facing the client directly to facilitate lipreading or sitting on his or her better side for hearing; (4)

⁵SYMPOSIUM: Ethics and the Questionably Competent Client: What the Model Rules Say and Don't Say, by: Jan Ellen Rein, 9 Stan. L. & Pol'y Rev 241, Spring, 1998.

eliminating glaring surfaces, glaring lights, and uncomfortable chairs; (5) speaking in plain language and avoiding legalese; (6) giving the client plenty of time and follow up communication to ensure mutual understanding; and (7) making house calls. The lawyer's goal should be to avoid snap judgments on capacity and do whatever can be done to increase the client's comfort level and ability to participate in the decision-making process. Not allowing sufficient time with an elderly client can silence the client's voice. Understanding a senior client's true voice, values, and motives requires patience, listening ability, and an ongoing dialogue. Professor Linda Smith describes this as "a process of gradual decision-making which will involve clarification, reflection, feedback, and further investigation."

At times the lawyer should ask whether doubts about the client's capacity arise "because the client's values are different from her own." Suppose, for example, a client who has always been active in directing what to do with his assets, when speaking with you alone, says, "Do whatever my children want me to do." Does that mean that the client has become incapable of deciding how to manage his assets, or does it simply mean that the client has reached a stage in life where he values his relationship with his children more than control over his assets and wants to keep the peace above all?

Pursuant to the recommendations of Professor Peter Margulies, the Fordham Conference Capacity Working Group and the delegates to the conference adopted guidelines for use by attorneys who question client capacity. In questioning client capacity for any specific purpose, the lawyer should balance the following factors: 1. The client's ability to articulate reasoning behind his or her decision; 2. The variability of the client's state of mind; 3. The client's ability to appreciate the consequences of his or her decision; 4. The irreversibility of any decision; 5. The substantive fairness of any decision; and 6. The consistency of any decision with lifetime commitments of the client."

VII. MEDICAL CAPACITY vs. LEGAL CAPACITY:

One of the differences between medical and legal capacity is the professional's approach to the assessment of capacity. In assessing legal capacity, the focus usually is on the transaction, i.e., contract, gift giving, or executing a will or trust. In contrast, in assessing medical capacity, the focus is on the patient's quality of life, which may include forgoing life-saving treatment such as surgery. Is there a difference between the decisional capacity needed for medical treatment and the decisional capacity needed to sign a legal document? Or stated differently, if the borderline incapacitated client has the ability to provide informed consent to medical treatment or to refuse medical treatment, is there a presumption of testamentary capacity?

Different levels of capacity may be required depending on the legal act to be performed. As a general rule, the more control or autonomy a client is willing to relinquish, or the more complex the act, the more capacity the client must possess. Additionally, if the action being requested is irreversible (i.e.,

execution of a funded irrevocable trust), then the client should have a higher level of capacity than if he were merely signing a revocable trust. Is the same true in the medical profession? Does a patient need a higher level of capacity if he is being asked to consent to surgery vs. being asked to take an aspirin? Probably.

VIII. SHOULD FLORIDA ADOPT COMMENT [6] TO THE ABA MODEL RULE 1.14?

Should Florida adopt Comment [6] to the ABA Model Rule 1.14? Stated differently, do lawyers need a uniform test to assist them in making an initial determination of their client's capacity, or is the current "intuitive" test sufficient? Should lawyers be held accountable for assessing their client's capacity?

(A) SPECIAL COMMITTEE'S RECOMMENDATIONS:

In February of 2002, the President of the Florida Bar appointed a Special Committee to Review the ABA Model Rules 2002 ("Model Rules"), charging the special committee with the following mission statement:

The Special Committee to Review the ABA Model Rules 2002 has been created to study the changes to the ABA Model Rules of Professional Conduct adopted by the ABA House of Delegates in February 2002 from recommendations of the American Bar Association Ethics Commission 2000. Building on the work of the Ethics 2000 Review panel, this committee's charge is to analyze the changes to the ABA Model Rules of Professional Conduct, compare them with existing Rules Regulating The Florida Bar, and consider whether The Florida Bar should adopt the recommended changes. The primary concern in analyzing the changes to the ABA Model Rules of Professional Conduct should be protecting the public and maintaining the core values of the legal profession.

After a thorough analysis of the Model Rules, the special committee recommended that The Florida Bar adopt the majority of the Model Rules as revised by the committee. However, the committee advised the Board that in light of the various comments to its proposed revisions to the Rules Regulating the Florida Bar 4-1.14 entitled "Client Under a Disability", this Rule should not be changed without further study. A copy of the ABA Model Rule 1.14 and the committee's proposed revisions to Rule 4-1.14 are attached hereto as Appendix "D" and "E" respectively.

Based on the committee's recommendations, the Florida Bar has delayed formally revising Rule 4-1.14 pending further study. However, this window of opportunity to voice our objections to the proposed revisions is closing fast!

(B) PROPOSED COMMENTS TO RULE 4-1.14:

Both the ABA Model Rule 1.14 and the special committee's proposed revisions to Rule 4-1.14 contain nine separate Comments. Comment [6] reads:

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. In appropriate circumstances, the lawyer may seek guidance from an appropriate diagnostician.

This Comment is intended to create a uniform test with an eye on predictability of outcome and accountability. It is an interactive test to be used by lawyers to determine their client's ability to make a lucid, rationale decision based on the standards traditionally used by medical professionals. Comment [6] would be a substantial departure from the present "intuitive" test for capacity.

If a lawyer is required to make a threshold determination as to whether the client is capable of making decisions about important matters, isn't the lawyer rendering an opinion regarding his client's decisional/testamentary capacity? A client may have testamentary capacity even though he may frequently be intoxicated, use narcotics, have an enfeebled mind, failing memory, and vacillating judgment. Even an insane client can have testamentary capacity so long as he signs the will during a lucid interval. In re Weihe's Estate, 268 So. 2d 446 (Fla. 4th DCA 1972). Although a lawyer may have serious doubts about the mental stability and competency of his client, a physician may find that the client has decisional/testamentary capacity. Are the lawyer's gut instincts and his client's response to a few questions enough to properly assess capacity? Isn't a physician, with his training and diagnostic equipment, in a better position to make that determination?

IX. CONCLUSION:

In Florida, there is a clear distinction between a lawyer's ethical duty to determine his client's capacity and his legal duty.

Ethically, the lawyer must determine : (a) whether it is reasonably possible to maintain a normal attorney-client relationship with the client; (b) whether the client can adequately act in his own interest; (c) whether it would be in the client's best interest to seek the appointment of a guardian; and (d) whether he must act as de facto guardian for his client.

In contrast, a lawyer has no legal duty to determine his client's capacity. When facing a borderline incapacitated client, Vignis tells us that a lawyer should:

- comply as nearly as he can with his client's request (even if he has good cause to doubt the mental competency of a client);
- exposed the true situation to the court, and
- leave the matter to the court to decide whether in view of all facts surrounding the execution of testamentary document it should be admitted to probate.

Rule 4-1.14 requires a lawyer to make a threshold determination as to whether it is reasonably possible to maintain a normal attorney-client relationship with his client (i.e, whether the client is capable of making decisions about important matters). However, before a lawyer can properly make such a determination, the client's physical and emotional barriers to capacity must first be eliminated.

As a result, it may be necessary for the client to consult with a physician prior to the initial attorney-client interview to ensure that these barriers have been eliminated. If not, the lawyer could be more of a detriment than a benefit to the client, especially in those situations where the incapacity is temporary and can be immediately corrected. Any unnecessary delay in executing a testamentary document could have a disastrous effect on the client's estate plan, especially if the client dies in the interim.

If the aforementioned procedure is followed, then there will be no need for the lawyer to make a subsequent determination of capacity – the determination will already have been made by the physician. What if the client refuses to be evaluated by a physician? Additionally, should the client be evaluated by a physician specializing in dementia or a general practitioner? Would an evaluation by a psychologist suffice?

If a lawyer is required to make a threshold determination as to whether the client is capable of making decisions about important matters, isn't the lawyer rendering an opinion regarding his client's decisional capacity? Are lawyers qualified to render an opinion regarding their client's decisional capacity? Should the Rules Regulating the Florida Bar require lawyers to test for decisional capacity? If Florida adopts the special committee's proposed revisions to 4-1.14, including Comment [6], lawyers will have an ethical duty to test for decisional capacity.

APPENDIX A

Rule 4-1.14. Client Under a Disability

(a) Maintenance of Normal Relationship. --When a client's ability to make adequately considered decisions in connection with the representation is impaired, whether because of minority, mental disability, or for some other reason, the lawyer shall, as far as reasonably possible, maintain a normal client-lawyer relationship with the client.

(b) Appointment of Guardian. --A lawyer may seek the appointment of a guardian or take other protective action with respect to a client only when the lawyer reasonably believes that the client cannot adequately act in the client's own interest.

NOTES:

COMMENT

The normal client-lawyer relationship is based on the assumption that the client, when properly advised and assisted, is capable of making decisions about important matters. When the client is a minor or suffers from a mental disorder or disability, however, maintaining the ordinary client-lawyer relationship may not be possible in all respects. In particular, an incapacitated person

may have no power to make legally binding decisions. Nevertheless, a client lacking legal competence often has the ability to understand, deliberate upon, and reach conclusions about matters affecting the client's own well-being. Furthermore, to an increasing extent the law recognizes intermediate degrees of competence. For example, children as young as 5 or 6 years of age, and certainly those of 10 or 12, are regarded as having opinions that are entitled to weight in legal proceedings concerning their custody. So also, it is recognized that some persons of advanced age can be quite capable of handling routine financial matters while needing special legal protection concerning major transactions.

The fact that a client suffers a disability does not diminish the lawyer's obligation to treat the client with attention and respect. If the person has no guardian or legal representative, the lawyer often must act as de facto guardian. Even if the person does have a legal representative, the lawyer should as far as possible accord the represented person the status of client, particularly in maintaining communication.

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. If a legal representative has not been appointed, the lawyer should see to such an appointment where it would serve the client's best interests. Thus, if a disabled client has substantial property that should be sold for the client's benefit, effective completion of the transaction ordinarily requires appointment of a legal representative. In many circumstances, however, appointment of a legal representative may be expensive or traumatic for the client. Evaluation of these considerations is a matter of professional judgment on the lawyer's part.

If the lawyer represents the guardian as distinct from the ward and is aware that the guardian is acting adversely to the ward's interest, the lawyer may have an obligation to prevent or rectify the guardian's misconduct. See rule 4-1.2(d).

Disclosure of client's condition

Rules of procedure in litigation generally provide that minors or persons suffering mental disability shall be represented by a guardian or next friend if they do not have a general guardian. However, disclosure of the client's disability can adversely affect the client's interests. The lawyer may seek guidance from an appropriate diagnostician.

APPENDIX B

FLORIDA BAR OPINION 85-4

October 1, 1985

[Note: This opinion was reconsidered and approved by the Professional Ethics Committee at its meeting of September 10, 1998]

An attorney whose client becomes mentally ill during the pendency of her dissolution of marriage has a duty to safeguard the client's interests and may seek appointment of a guardian if the attorney believes the client cannot adequately act in her own interest.

CPR: EC 7-12

RPC: Rule 4-1.14

Opinions: 73-25; Michigan Opinion CI 1055.

The inquiring attorney represents W, who is petitioning for dissolution of marriage. A settlement agreement had been made between W and H, her husband. However, before the settlement was complete, W began exhibiting signs of mental illness. The inquiring attorney suggested W seek professional help; however, W took this as evidence that the lawyer was possibly involved in a plot against her. W refuses to see a psychiatrist or psychologist. The attorney feels that it would not be in the best interests of W for her to withdraw from representation and states that she does not want to abandon her client by withdrawing. However, she does not believe that she could allow W to sign a stipulation or go to trial, or that she could divulge to a third party W's need for psychiatric help.

The attorney should consult Ethical Consideration 7-12, which deals with the problem of a client under a disability. The EC states:

Any mental or physical condition of a client that renders him incapable of making a considered judgment on his own behalf casts additional responsibilities upon his lawyer. Where an incompetent is acting through a guardian or other legal representative, a lawyer must look to such representative for those decisions which are normally the prerogative of the client to make. If a client under disability has no legal representative, his lawyer may be compelled in court proceedings to make decisions on behalf of the client. If the client is capable of understanding the matter in question or of contributing to the advancement of his interests, regardless of whether he is legally disqualified from performing certain acts, the lawyer should obtain from him all possible aid. If the disability of a client and the lack of a legal representative compel the lawyer to make decisions for his client, the lawyer should consider all circumstances then prevailing and act with care to safeguard and advance the interests of his client. But obviously a lawyer cannot perform any act or make any decisions which the law requires his client to perform or make, either acting for himself if competent, or by a duly constituted representative if legally incompetent.

The Proposed Rules of Professional Conduct deal further with the issue. Rule 4-1.14 states:

- (a) When a client's ability to make adequately considered decisions in connection with the representation is impaired, whether because of minority, mental disability or for some other reason, the lawyer shall, as far as reasonably possible, maintain a normal client-lawyer relationship with the client.
- (b) A lawyer may seek the appointment of a guardian or take other protective action with respect to a client, only when the lawyer reasonably believes that the client cannot adequately act in the client's own interest.

The comment following the rule points out that "[i]f the person has no guardian or legal representative, the lawyer often must act as de facto guardian." Also, where the client's interests would best be served by appointment of a guardian, the comment would encourage the attorney to seek such an appointment. However, the comment recognizes that appointment of a legal representative may be traumatic for a client. It states that "[e]valuation of these considerations is a matter of professional judgment on the lawyer's part."

Florida Opinion 73-25 would require the lawyer to express to W her doubts as to W's competency and request permission to seek a judicial determination of competency. If W were to refuse (and it appears that she would), then the opinion would have the attorney withdraw from the case. In the inquiring attorney's case, however, it appears that withdrawal would not serve the best interests of the client.

Among ethics opinions of other states, Michigan Opinion CI 1055 (October 19, 1984) speaks to the type of situation posed here. The digest of the opinion in the ABA/BNA Lawyer's Manual on Professional Conduct states:

A lawyer who represents a claimant for workers' compensation benefits may refuse to withdraw from employment if, in his professional judgment, withdrawal would not advance the best interests of his client and the lawyer has serious doubts about the mental stability and competency of his client. A lawyer has a duty to safeguard the interests of a client who is mentally incompetent, including making decisions on behalf of the client such as whether to waive or fail to assert a right or position, or whether to petition the court for appointment of a legal representative.

The inquiring attorney does not have to abandon her client by withdrawing. The attorney should do what she can to safeguard the interests of her client, including making prudent decisions in behalf of the client. If the attorney believes the settlement between H and W to be fair, the attorney may help W to exercise her rights in the dissolution.

If the attorney believes that W cannot adequately act in her own interest, and that a guardian may be necessary to safeguard W's interests, the attorney may seek appointment of a legal guardian for W, even over W's objection if absolutely necessary. The inquiring attorney is in the best position to decide the proper course of action from the suggestions above. In proceeding, the attorney should be careful to respect the rights of her client, to act in the client's best interests, and to avoid overreaching.

APPENDIX C

What have you been told about _____ ?

What are your thoughts about _____?

Why do you think I recommended _____ for you?

What do you believe will happen if you either follow or reject this recommended course of action?

You have requested _____ in lieu of _____. Why?

What do you think _____ would accomplish?

The next component is to assess the client's ability to choose and to recount his decision-making process, including the basis for the decision. Sample discussion points might include:

Why do you believe it is necessary _____?

How have you reached your decision about _____ ?

What factors were most important to you in reaching your decision?

Tell me in your own words what you understand to be your main medical problem.

What treatment was recommended?

If you receive this treatment, what do you think will happen?

If you do not receive this treatment, what do you think will happen?

Can you tell me what you have decided _____?

APPENDIX D

ABA Model Rules of Professional Conduct

CLIENT-LAWYER RELATIONSHIP

RULE 1.14 CLIENT WITH DIMINISHED CAPACITY

(a) When a client's capacity to make adequately considered decisions in connection with a representation is diminished, whether because of minority, mental impairment or for some other reason, the lawyer shall, as far as reasonably possible, maintain a normal client-lawyer relationship with the client.

(b) When the lawyer reasonably believes that the client has diminished capacity, is at risk of substantial physical, financial or other harm unless action is taken and cannot adequately act in the client's own interest, the lawyer may take reasonably necessary protective action, including consulting with individuals or entities that have the ability to take action to protect the client and, in appropriate cases, seeking the appointment of a guardian ad litem, conservator or guardian.

(c) Information relating to the representation of a client with diminished capacity is protected by Rule 1.6. When taking protective action pursuant to paragraph (b), the lawyer is impliedly authorized under Rule 1.6(a) to reveal information about the client, but only to the extent reasonably necessary to protect the client's interests.

Comment

[1] The normal client-lawyer relationship is based on the assumption that the client, when properly advised and assisted, is capable of making decisions about important matters. When the client is a

minor or suffers from a diminished mental capacity, however, maintaining the ordinary client-lawyer relationship may not be possible in all respects. In particular, a severely incapacitated person may have no power to make legally binding decisions. Nevertheless, a client with diminished capacity often has the ability to understand, deliberate upon, and reach conclusions about matters affecting the client's own well-being. For example, children as young as five or six years of age, and certainly those of ten or twelve, are regarded as having opinions that are entitled to weight in legal proceedings concerning their custody. So also, it is recognized that some persons of advanced age can be quite capable of handling routine financial matters while needing special legal protection concerning major transactions.

[2] The fact that a client suffers a disability does not diminish the lawyer's obligation to treat the client with attention and respect. Even if the person has a legal representative, the lawyer should as far as possible accord the represented person the status of client, particularly in maintaining communication.

[3] The client may wish to have family members or other persons participate in discussions with the lawyer. When necessary to assist in the representation, the presence of such persons generally does not affect the applicability of the attorney-client evidentiary privilege. Nevertheless, the lawyer must keep the client's interests foremost and, except for protective action authorized under paragraph (b), must look to the client, and not family members, to make decisions on the client's behalf.

[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. In matters involving a minor, whether the lawyer should look to the parents as natural guardians may depend on the type of proceeding or matter in which the lawyer is representing the minor. If the lawyer represents the guardian as distinct from the ward, and is aware that the guardian is acting adversely to the ward's interest, the lawyer may have an obligation to prevent or rectify the guardian's misconduct. See Rule 1.2(d).

Taking Protective Action

[5] If a lawyer reasonably believes that a client is at risk of substantial physical, financial or other harm unless action is taken, and that a normal client-lawyer relationship cannot be maintained as provided in paragraph (a) because the client lacks sufficient capacity to communicate or to make adequately considered decisions in connection with the representation, then paragraph (b) permits the lawyer to take protective measures deemed necessary. Such measures could include: 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. In taking any protective action, the lawyer should be guided by such factors as the wishes and values of the client to the extent known, the client's best interests and the goals of intruding into the client's decisionmaking autonomy to the least extent feasible, maximizing client capacities and respecting the client's family and social connections.

[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. In appropriate circumstances, the lawyer may seek guidance from an appropriate diagnostician.

[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.

Disclosure of the Client's Condition

[8] Disclosure of the client's diminished capacity could adversely affect the client's interests. For example, raising the question of diminished capacity could, in some circumstances, lead to proceedings for involuntary commitment. Information relating to the representation is protected by Rule 1.6. Therefore, unless authorized to do so, the lawyer may not disclose such information. When taking protective action pursuant to paragraph (b), the lawyer is impliedly authorized to make the necessary disclosures, even when the client directs the lawyer to the contrary. Nevertheless, given the risks of disclosure, paragraph (c) limits what the lawyer may disclose in consulting with other individuals or entities or seeking the appointment of a legal representative. At the very least, the lawyer should determine whether it is likely that the person or entity consulted with will act adversely to the client's interests before discussing matters related to the client. The lawyer's position in such cases is an unavoidably difficult one.

Emergency Legal Assistance

[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.

[10] A lawyer who acts on behalf of a person with seriously diminished capacity in an emergency should keep the confidences of the person as if dealing with a client, disclosing them only to the extent necessary to accomplish the intended protective action. The lawyer should disclose to any tribunal involved and to any other counsel involved the nature of his or her relationship with the person. The lawyer should take steps to regularize the relationship or implement other protective solutions as soon as possible. Normally, a lawyer would not seek compensation for such emergency actions taken.

APPENDIX E

3094 **MODEL RULE: 1.14. CLIENT WITH DIMINISHED CAPACITY**

3095 **SUMMARY of Substantive Changes Adopted by the ABA House of Delegates**

3096 Changes terminology from clients with a “disability” to clients with “diminished capacity,”
3097 which is explained as a change in terminology only. New rule also focuses on degrees of a
3098 client’s capacity with provisions for emergency legal assistance for clients with seriously
3099 diminished capacity and sets forth protective measures a lawyer may take short of requesting a
3100 guardian if a lawyer reasonably believes that there is risk of substantial harm unless action is
3101 taken. Commentary provides guidance to attorneys dealing with clients with diminished
3102 capacity. Old commentary regarding an attorney acting as “de facto” guardian for the client was
3103 deleted.

3104 **How ABA Rule DIFFERS from EXISTING FLORIDA Rule**

3105 Florida Rule 4-1.14 uses the term “disability,” but otherwise is substantially the same as the new
3106 ABA model rule. The ABA commentary eliminates the provision in the Florida comment that if
3107 a client suffering a disability has no guardian or legal representative, “the lawyer often must act
3108 as de facto guardian,” adds a provision regarding consultation with family members, eliminates
3109 the provision imposing an obligation on lawyers to seek the appointment of a legal guardian and
3110 adds detailed guidance for lawyers regarding the taking of protective action.

3111 **RECOMMENDATION of Yes or No and REASONS**

3112 YES. The committee recommends adoption of the new ABA Model Rule as providing superior
3113 guidance to lawyers than the existing rule. The committee specifically discussed whether
3114 deletion of the commentary “the lawyer often must act as de facto guardian” is desirable. The
3115 committee concluded that if the ABA Model Rule is adopted, there is no need for this provision.
3116 The new ABA Rule 1.14(b) provides that “when the lawyer reasonably believes that the client
3117 has diminished capacity, is at risk of substantial physical, financial or other harm unless action is
3118 taken and cannot adequately act in the client’s own interest, the lawyer may take reasonably
3119 necessary protective actions, including consulting with individuals or entities that have the
3120 ability to take action to protect the client” Paragraph 5 of the commentary to the Rule sets
3121 out in detail the various types of protective action a lawyer may take if he reasonably believes
3122 that a client is at risk of substantial physical, financial or other harm. These detailed provisions
3123 are much more helpful than the vague statement that a lawyer must often act as a de facto

3124 guardian.

3125 **FLORIDA'S Rule in LEGISLATIVE FORMAT**

3126 **RULE 4-1.14 CLIENT UNDER A DISABILITY WITH DIMINISHED CAPACITY**

3127 **(a) Maintenance of Normal Relationship.** When a client's ~~ability~~ capacity to make
3128 adequately considered decisions in connection with ~~the a~~ representation is ~~impaired~~ diminished,

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3129 whether because of minority, mental disability, or for some other reason, the lawyer shall, as far
3130 as reasonably possible, maintain a normal client-lawyer relationship with the client.

3131 **(b) Appointment of Guardian.** ~~A lawyer may seek the appointment of a guardian or~~
3132 ~~take other protective action with respect to a client only when~~ When the lawyer reasonably
3133 believes that the client has diminished capacity, is at risk of substantial physical, financial or
3134 other harm unless action is taken and cannot adequately act in the client's own interest, the
3135 lawyer may take reasonably necessary protective action, including consulting with individuals or
3136 entities that have the ability to take action to protect the client and, in appropriate cases, seeking
3137 the appointment of a guardian ad litem, conservator or guardian.

3138 **(c) Confidentiality.** Information relating to the representation of a client with
3139 diminished capacity is protected by the rule on confidentiality of information. When taking
3140 protective action pursuant to this rule, the lawyer is impliedly authorized under the rule on
3141 confidentiality of information to reveal information about the client, but only to the extent
3142 reasonably necessary to protect the client's interests.

3143 **Comment**

3144 [1] The normal client-lawyer relationship is based on the assumption that the client, when
3145 properly advised and assisted, is capable of making decisions about important matters. When the
3146 client is a minor or suffers from a diminished mental capacity disorder or disability, however,
3147 maintaining the ordinary client-lawyer relationship may not be possible in all respects. In
3148 particular, ~~an~~ a severely incapacitated person may have no power to make legally binding
3149 decisions. Nevertheless, a client lacking legal competence with diminished capacity often has
3150 the ability to understand, deliberate upon, and reach conclusions about matters affecting the
3151 client's own well-being. ~~Furthermore, to an increasing extent the law recognizes intermediate~~
3152 ~~degrees of competence.~~ For example, children as young as 5 or 6 years of age, and certainly
3153 those of 10 or 12, are regarded as having opinions that are entitled to weight in legal proceedings
3154 concerning their custody. So also, it is recognized that some persons of advanced age can be
3155 quite capable of handling routine financial matters while needing special legal protection
3156 concerning major transactions.

3157 [2] The fact that a client suffers a disability does not diminish the lawyer's obligation to
3158 treat the client with attention and respect. ~~If the person has no guardian or legal representative,~~
3159 ~~the lawyer often must act as de facto guardian.~~ Even if the person ~~does have~~ has a legal
3160 representative, the lawyer should as far as possible accord the represented person the status of
3161 client, particularly in maintaining communication.

3162 [3] The client may wish to have family members or other persons participate in
3163 discussions with the lawyer. When necessary to assist in the representation, the presence of such
3164 persons generally does not affect the applicability of the attorney-client evidentiary privilege.
3165 Nevertheless, the lawyer must keep the client's interests foremost and, except for protective
3166 action authorized under paragraph (b), must to look to the client, and not family members, to

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3167 make decisions on the client's behalf.

3168 [4] If a legal representative has already been appointed for the client, the lawyer should
3169 ordinarily look to the representative for decisions on behalf of the client. ~~If a legal representative~~
3170 ~~has not been appointed, the lawyer should see to such an appointment where it would serve the~~
3171 ~~client's best interests. Thus, if a disabled client has substantial property that should be sold for~~
3172 ~~the client's benefit, effective completion of the transaction ordinarily requires appointment of a~~
3173 ~~legal representative. In many circumstances, however, appointment of a legal representative~~
3174 ~~may be expensive or traumatic for the client. Evaluation of these considerations is a matter of~~
3175 ~~professional judgment on the lawyer's part. In matters involving a minor, whether the lawyer~~
3176 ~~should look to the parents as natural guardians may depend on the type of proceeding or matter~~
3177 ~~in which the lawyers is representing the minor. If the lawyer represents the guardian as distinct~~
3178 ~~from the ward and is aware that the guardian is acting adversely to the ward's interest, the lawyer~~
3179 ~~may have an obligation to prevent or rectify the guardian's misconduct. See rule 4-1.2(d).~~

3180 **Taking Protective Action**

3181 [5] If a lawyer reasonably believes that a client is at risk of substantial physical, financial
3182 or other harm unless action is taken, and that a normal client-lawyer relationship cannot be
3183 maintained as provided in paragraph (a) because the client lacks sufficient capacity to
3184 communicate or to make adequately considered decisions in connection with the representation,
3185 then paragraph (b) permits the lawyer to take protective measures deemed necessary. Such
3186 measures could include: consulting with family members, using a reconsideration period to
3187 permit clarification or improvement of circumstances, using voluntary surrogate decisionmaking
3188 tools such as durable powers of attorney or consulting with support groups, professional
3189 services, adult-protective agencies or other individuals or entities that have the ability to protect
3190 the client. In taking any protective action, the lawyer should be guided by such factors as the
3191 wishes and values of the client to the extent known, the client's best interests and the goals of
3192 intruding into the client's decisionmaking autonomy to the least extent feasible, maximizing
3193 client capacities and respecting the client's family and social connections.

3194 [6] In determining the extent of the client's diminished capacity, the lawyer should
3195 consider and balance such factors as: the client's ability to articulate reasoning leading to a
3196 decision, variability of state of mind and ability to appreciate consequences of a decision; the
3197 substantive fairness of a decision; and the consistency of a decision with the known long-term
3198 commitments and values of the client. In appropriate circumstances, the lawyer may seek
3199 guidance from an appropriate diagnostician.

3200 [7] If a legal representative has not been appointed, the lawyer should consider whether
3201 appointment of a guardian ad litem, conservator or guardian is necessary to protect the client's
3202 interests. Thus, if a client with diminished capacity has substantial property that should be sold

3203 for the client's benefit, effective completion of the transaction may require appointment of a legal
3204 representative. In addition, rules of procedure in litigation sometimes provide that minors or
3205 persons with diminished capacity must be represented by a guardian or next friend if they do not

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3206 have a general guardian. In many circumstances, however, appointment of a legal representative
3207 may be more expensive or traumatic for the client than circumstances in fact require. Evaluation
3208 of such circumstances is a matter entrusted to the professional judgment of the lawyer. In
3209 considering alternatives, however, the lawyer should be aware of any law that requires the
3210 lawyer to advocate the least restrictive action on behalf of the client.

3211 **Disclosure of client's condition**

3212 ~~[8] Rules of procedure in litigation generally provide that minors or persons suffering~~
3213 ~~mental disability shall be represented by a guardian or next friend if they do not have a general~~
3214 ~~guardian. However, disclosure~~ Disclosure of the client's disability can diminished capacity
3215 could adversely affect the client's interests. For example, raising the question of diminished
3216 capacity could, in some circumstances, lead to proceedings for involuntary commitment.
3217 Information relating to the representation is protected by rule 4-1.6. Therefore, unless authorized
3218 to do so, the lawyer may not disclose such information. When taking protective action pursuant
3219 to paragraph (b), the lawyer is impliedly authorized to make the necessary disclosures, even
3220 when the client directs the lawyer to the contrary. Nevertheless, given the risks of disclosure,
3221 paragraph (c) limits what the lawyer may disclose in consulting with other individuals or entities
3222 or seeking the appointment of a legal representative. At the very least, the lawyer should
3223 determine whether it is likely that the person or entity consulted with will act adversely to the
3224 client's interests before discussing matters related to the client. The lawyer's position in such
3225 cases is an unavoidably difficult one. The lawyer may seek guidance from an appropriate
3226 diagnostician.

3227 **Emergency Legal Assistance**

3228 [9] In an emergency where the health, safety or a financial interest of a person with
3229 seriously diminished capacity is threatened with imminent and irreparable harm, a lawyer may
3230 take legal action on behalf of such a person even though the person is unable to establish a
3231 client-lawyer relationship or to make or express considered judgments about the matter, when
3232 the person or another acting in good faith on that person's behalf has consulted with the lawyer.
3233 Even in such an emergency, however, the lawyer should not act unless the lawyer reasonably
3234 believes that the person has no other lawyer, agent or other representative available. The lawyer
3235 should take legal action on behalf of the person only to the extent reasonably necessary to
3236 maintain the status quo or otherwise avoid imminent and irreparable harm. A lawyer who
3237 undertakes to represent a person in such an exigent situation has the same duties under these
3238 Rules as the lawyer would with respect to a client.

3239 [10] A lawyer who acts on behalf of a person with seriously diminished capacity in an
3240 emergency should keep the confidences of the person as if dealing with a client, disclosing them
3241 only to the extent necessary to accomplish the intended protective action. The lawyer should
3242 disclose to any tribunal involved and to any other counsel involved the nature of his or her
3243 relationship with the person. The lawyer should take steps to regularize the relationship or

3244 implement other protective solutions as soon as possible. Normally, a lawyer would not seek

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3245 compensation for such emergency actions taken.