

## THE FORGOTTEN RULE OF PROFESSIONAL CONDUCT – REPRESENTING A CLIENT WITH DIMINISHED CAPACITY

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### ABSTRACT

All attorneys who maintain client-lawyer relationships must continually, or at least periodically, assess each client's mental capacity. Under the Model Rules of Professional Conduct, this assessment is a two-step process. First, the attorney must ensure that an individual has enough mental capacity to establish or maintain a normal client-lawyer relationship, and second, the attorney must ensure that the individual has enough mental capacity to legally bind him or herself in the desired transaction or intended course of action. If the attorney determines that at any point in time, a particular client has diminished capacity, then Model Rule 1.14 requires the attorney to take whatever extra steps are required to maintain a normal client-lawyer relationship. However, if the client does have diminished capacity and such diminished capacity puts the client at risk of substantial harm, then the attorney is allowed under Model Rule 1.14 to take certain protective actions on behalf of the client, even though the diminished capacity means that the client cannot consent to those actions, and even if the attorney's actions permitted under this rule actually violate other canon rules governing the client-lawyer relationship.

Almost all states have adopted either the exact or a modified version of Model Rule 1.14, so this rule basically affects every attorney in every licensing jurisdiction where client-lawyer relationships are established. Although this rule has been around for over two decades, a vast majority of attorneys do not even know it exists, let alone comply with its mandates. Mostly because of the aging of the American population, many of the various states' attorney disciplinary commissions are beginning to enforce this rule. Therefore, this article serves two purposes: first, as an education as to how the rule works, how attorneys can make non-clinical assessments of the mental capacities of

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their individual clients, and how attorneys can think about best business practices to defend themselves should they be accused of violating their state's version of Model Rule 1.14; and second, by highlighting some of the problems with the rule and comments in their current iterations and by suggesting changes.

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## I. INTRODUCTION

If you are an attorney and you have clients, in whatever field of law you might practice, it is expected that you understand the concept of a normal client-lawyer relationship, and that you fully comply with all of the interweaving and sometimes conflicting rules of professional responsibility that govern your practice. One of the rules discusses what you must do, and what you can choose to do, if and when any of your clients has diminished mental capacity. The rule assumes you have the required competency to make clinical assessments of proper mental capacity, or at least enough competency to understand when other professionals should be consulted to assist you in your legal determination. Further, you and all of your fellow attorneys who maintain relationships with clients, are expected to have the competency and established business practices to alter your communication techniques and all logistical obstacles inherent in your practice so that such a client with diminished mental capacity (although retaining still “enough” mental capacity) is sufficiently supported and therefore can maintain his or her autonomy. Finally, the rules also assume that you, as an attorney representing a client with diminished capacity, understand that you might be able to take extra-ordinary steps to pro-

tect such a client from harm, even if your actions actually violate other rules governing that same client-lawyer relationship.

Still not convinced that you need to worry about the mental capacity of your particular clients?

Do you represent clients who either buy or sell property through a deed?<sup>1</sup>

Do you represent business owners regarding their internal succession planning?<sup>2</sup>

Do you represent individuals executing trusts and wills, the expected beneficiaries and heirs of these estate planning documents, or even the unexpected beneficiaries and grantees, such as charitable organizations or non-related caretakers?<sup>3</sup>

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1. See, e.g., *Bach v. Hudson*, 596 S.W.2d 673, 675 (Tex. App. 1980). “Later, Bach [the seller of the land] refused to consummate the sale. The primary dispute during the course of the trial concerned Bach’s mental capacity to execute the contract.” *Hudson*, 596 S.W.2d at 675.

2. See, e.g., *Bach v. Bach*, 26 N.E.2d 858, 859-60 (Ill. 1940) (determining that “the record sustains the finding that the deed and bill of sale were given for ample consideration, and that the grantor had the mental capacity to transact business;” and thus, rejecting the arguments made by the conveyor’s survivors that “due to the excessive use of liquor, [he] was incapable of transacting or understanding business.”). Other seemingly normal business transactions can also be questioned. For example, in recent headlines, Donald Sterling, a principal owner of the Los Angeles Clippers, was ordered by the NBA commissioner and fellow team owners to sell his shares of team ownership after he made some racist remarks. The actual ownership shares were titled to a Sterling family trust, which named Mr. Sterling and his wife, Shelly, as trustees. In a very complicated set of legal proceedings, a California Probate court ruled that since Donald Sterling was previously diagnosed with Alzheimer’s Disease and had diminished capacity, that his wife Shelly therefore had authority to make the unilateral decision to sell the team since his protests had no legal merit. See, e.g., Josh Peter, *Sterling Trial Spotlights Major Issue for Baby Boomers*, USA TODAY, July 7, 2014, <http://www.usatoday.com/story/sports/nba/clippers/2014/07/07/donald-shelly-sterling-trial-mental-capacity-question-baby-boomers/12326043/>.

3. See, e.g., *Deranger v. State*, 652 So.2d 400, 401 (Fla. Dist. Ct. App. 1995) (under Florida law, “a person commits theft by knowingly obtaining or using another’s property with the intent to appropriate the property to his or her own use or to the use of another” and “proof [of the victim’s nonconsent to a transfer of property] may include evidence that the defendant knew the victim lacked the mental capacity to consent to the taking of his or her property[.]” determining that the caretaker knew of the individual’s diminished capacity and therefore committed theft). This happens way too often, generally when a will is executed in the final days or months of the testator’s life, when all family and children are cut out from the will and the non-related caregiver takes all. Either this new will is valid, or it is not. For example, in recent headlines, see, e.g., Jason Meisner, *Ernie Banks’ Caretaker Ordered to Give Full Accounting of his Assets*, CHICAGO TRIBUNE, Feb. 24, 2015, <http://www.chicagotribune.com/news/local/breaking/ct-ernie-banks-probate-court-met-20150224-story.html>.

Now, as a battle over Banks’ posthumous wishes heats up in the wake of his death last month, a Cook County judge has ordered the Hall of Famer’s long-time caretaker, Regina Rice to provide a full accounting of the slugger’s estate. Rice, who was left everything in a will signed by Banks just months before he died, had initially estimated his ‘known’ assets at just \$16,000 . . . . The court appearance was the first since bombshell allegations from Banks’ twin sons that accused Rice of taking advantage of the ailing baseball star and coercing

Do you represent clients who are married, and either one or both file for divorce or separation?<sup>4</sup>

Do you represent clients in their income tax matters?<sup>5</sup>

Do you represent mental illness institutions and their employees, or do you represent patients of such institutions?<sup>6</sup>

Do you represent insurance companies or insured individuals?<sup>7</sup>

him into signing a will in October that cut his family out of his estate and left her all his assets.

*Id.*

4. *See, e.g.*, *de Bruin v. de Bruin*, 195 F.2d 763, 764 (D.C. Cir. 1952). In regard to who may testify about any individual's level of mental capacity to effectively file for divorce, laymen who have had a particularly good vantage point for observing the person under scrutiny may express their opinions as to mental capacity to the court or jurors who have not had such an opportunity. And the court or jurors are the reasonable men who may find the truth therefrom. This is the method required for fact-finding under our system of jurisprudence, despite great advances in psychiatry in recent decades. The physician's testimony was not offered as being that of an expert in the field of psychiatry. He had known the appellee for many years and had attended her three times during January and February of 1941, early in her illness. The admissibility of his testimony, therefore, did not depend upon any special competence in mental disorders. *de Bruin*, 195 F.2d at 764.

5. *See, e.g.*, *Orr v. Commissioner*, No. 11017-07S, 2010 WL 1655520, at \*2 (T.C. Apr. 26, 2010). In an interesting decision, the Tax Court reviewed a taxpayer's economic activities for 2004, which consisted of retirement benefits, other miscellaneous income, money lost to gambling and to scams, and how deductions were taken on the tax return filed for that year. The Internal Revenue Service ("IRS") argued there were numerous errors on the taxpayer's return. Although the Tax Court agreed that the gambling losses were not deductible, it denied the IRS contention that an accuracy-related penalty should be imposed. Some of the more salient holdings of the court are: "None of [taxpayer's] businesses had a reasonable potential for profit. The fact that she thought they did tends to show that her mental capacity was diminished, and the fact that she persisted in them tends to show that she did not know how far her mental capacity had diminished[;]"

The fact that [taxpayer] once prepared tax returns at H & R Block does suggest that she had more relevant knowledge and experience than the average taxpayer. But we infer that her skills deteriorated with time and with her overall mental capacity. By the time she prepared her 2004 return, she was neither able to determine the correct treatment herself nor recognize that she was unable to do so . . . [Taxpayer] should have made a greater effort to find someone able to help her with her particular tax issue, but we find her diminished mental capacity to be reasonable cause for this omission.

*Orr*, 2010 WL 1655520, at \*15. The court further stated, "[w]e similarly accept as reasonable cause for [taxpayer's] significant but apparently isolated compliance problems her diminished mental capacity associated with depression which made her unable to work, her gambling problem, her recent loss of multiple family members, and her responsibility of caring for her ailing husband." *Id.*

6. *See, e.g.*, *Charter Peachford Behavioral Health Sys. v. Kohout*, 504 S.E.2d 514, 524 (Ga. Ct. App. 1998) (determining that if a patient "had the mental capacity to voluntarily admit herself for treatment and to be discharged from hospitals" then the "Plaintiff was not legally incompetent within the meaning of [the Georgia statute] so as to toll the statute of limitation.").

7. *See, e.g.*, *Cain v. Aetna Life Ins.*, 360 So. 2d 322, 324-25 (Ala. 1978). The issue here was whether the insured had the mental capacity needed at the moment that she revised the beneficiary designation form, and how a jury should weigh evidence. The court stated:

Do you represent a doctor, hospital, or other medical service provider (whether a non-profit facility, a for-profit facility, or a government-run facility) or the patients receiving their services, where informed consent is required?<sup>8</sup>

Or, ripping a story straight from the headlines, do you represent a famous author whose capacity is at issue when she has spent most of her life refusing to publish a sequel to her transformative first novel, but suddenly, as a nonagenarian<sup>9</sup> in failing health, ostensibly offers it up for publication?<sup>10</sup>

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[i]t is true, as plaintiff has contended, that wide latitude is to be given when the question involved is mental capacity. In fact, a number of Alabama decisions have held a trial court committed reversible error by unduly restricting the scope of inquiry on that issue . . . . This case differs, however, in that the testimony which is offered as to the decedent's actions in March 1976, would go to establish her mental "capacity" at that time. There is no disagreement about her mental "capacity" in March 1976. It is her mental "incapacity" on August 25, 1976, which is at issue. Therefore, such evidence does not "bear probatively on the chronic and progressive mental impairment of the testatrix . . ." and we do not think the trial court abused its discretion in refusing to admit such testimony.

*Cain*, 360 So. 2d at 324-25.

8. See, e.g., *Franklin v. United States*, 992 F.2d 1492, 1497-98 (10th Cir. 1993). A veteran allegedly did not consent to the surgery which led to his death, and the federal court looked at two issues: "First, should a claim of unauthorized surgery based on incapacity to consent be treated as merely one variant of the lack-of-consent theory and, thus, a medical battery, or should it be grouped with uninformed consent claims under the rubric of negligence?" and second, is the government itself through the Veteran's Administration negligent for "inadequately assessing [decedent's] capacity to consent and failing to recognize the need to consult [his spouse]?" *Franklin*, 992 F.2d at 1497-98.

9. While most attorneys are familiar with octogenarians (think back to learning about the Rule Against Perpetuities and the fictitious and purely hypothetical "fertile octogenarian"), new terms must be incorporated in our normal lexicon and discourse because

The U.S. Census Bureau projects that the population age 85 and over could grow from 5.5 million in 2010 to 19 million by 2050. Some researchers predict that death rates at older ages will decline more rapidly than is reflected in the U.S. Census Bureau's projections, which could lead to faster growth of this population.

See AGINGSTATS.GOV, available at [http://www.agingstats.gov/Main\\_Site/Data/2012\\_Documents/Population.aspx](http://www.agingstats.gov/Main_Site/Data/2012_Documents/Population.aspx). The terms are, nonagenarian, "a person who is between 90 and 99 years old," see *Nonagenarian*, MIRRIAMWEBSTER.COM, <http://www.merriam-webster.com/dictionary/nonagenarian> (last visited May 11, 2016); centenarian, a person who lives to or beyond the age of 100 years, see *Centenarian*, MIRRIAMWEBSTER.COM, <http://www.merriam-webster.com/dictionary/centenarian> (last visited May 11, 2016); and, finally, an even newer term, a supercentenarian, "someone who has lived to or passed [his or her] 110th birthday," *Supercentenarian*, WIKIPEDIA, <http://en.wikipedia.org/wiki/Supercentenarian> (last visited Mar. 24, 2016).

10. See, e.g., Mercy Pilkington, *State of Alabama Declares Harper Lee Competent to Publish*, GOODEREADER (Apr. 10, 2015), <http://goodereader.com/blog/e-book-news/state-of-alabama-declares-harper-lee-competent-to-publish>. When a state government, through its appropriate court of law, is asked to step in and evaluate the mental capacity of an elderly citizen, it is usually over things like his ability to drive a car, or live on his own, or keep control over his finances. As our aging population lives longer and longer, their physical bodies are still running, but their mental abilities get called into question, especially when a bizarre decision on the individual's part is made. When

Unfortunately, if you are like a good majority of licensed attorneys, as you read this opening paragraph, you do not even recognize the rule being discussed.<sup>11</sup> Perhaps you start thinking back to your law school days and most likely do not have any recognition of any lectures in your professional responsibility classes about this particular rule. You do not remember this topic being discussed in any of your recent ethics-related continuing legal education seminars or conferences. You also, if you are in the majority, do not remember any such issues in your law firm's emergency meetings of its ethics committee. However, this is a rule that has been in force in one iteration or another for over two decades, and even if forgotten and neglected thus far, it most certainly needs to be dusted off, studied, and incorporated in all aspects of your best business practices going forward. It applies to all attorneys in all practice areas who form client-lawyer relationships.

A client can come to you for advice before taking action or entering into a transaction or can come to your offices only after problems are discovered. You can have an ongoing client-lawyer relationship with a particular individual. You can be meeting him or her for the first time today, and either the client might be speaking for himself, or there might be a surrogate, such as an adult child, speaking to you on behalf of the ostensible client. Your role as an attorney will not only affect the client's legal consequences, but will also determine whether you properly maintained a normal client-lawyer relationship. The ABA Model Rules of Professional Conduct ("the Model Rules")<sup>12</sup> contain a rule on how attorneys must represent a client with diminished capacity, and Model Rule 1.14 has basically been adopted as is, or in

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outsiders feel this decision involves the senior citizen being scammed or taken advantage of, it is time to seek outside dispute resolution to protect the individual. That is what an anonymous, but concerned, citizen was thinking when reporting famed author Nelle Harper Lee to state officials over a dubious decision to publish the long-hidden sequel to *To Kill a Mockingbird*, the highly controversial title *Go Set a Watchman*. Why the controversy? Because friends of the author and literary insiders alike do not believe this is actually Lee's decision. Lee's long-time attorney Alice Lee—also the author's sister, fifteen years older, and reportedly more like a mother due to speculation about their mother's mental illness—looked after the author's interests until her retirement at the age of 100. Alice appointed another lawyer in her firm to take over as her sister's attorney; about four months ago, Alice died at age 103 and the long-lost manuscript miraculously appeared. *Id.*

11. The author has presented on this subject at several local and national bar association programs, where the incentive was ethics credits, and where unscientific polling of the audience suggested most were there simply for the ethics credits, but expressed that clients with diminished capacity would never be an issue with their particular client base or their specific area of legal practice. Additionally, the author has unscientifically polled various Professional Responsibility professors at various law schools, and most indicated either that they do not teach this rule at all, or for those that do, spend at most 30 minutes out of the entire semester.

12. See generally MODEL RULES OF PROF'L CONDUCT (AM. BAR ASS'N 2013).

some amended form, in every licensing jurisdiction in the United States.<sup>13</sup>

As described in this article, Model Rule 1.14 absolutely requires the attorney to assess a client's mental capacity at every meeting or interaction, and then, arguably requires a second assessment to be made. The first assessment is whether the individual client (or agent on behalf of an organizational client) has enough mental capacity to either establish a normal client-lawyer relationship or to continue an existing normal client-lawyer relationship. Then, the second assessment (which is not actually spelled out within the rule) is whether the individual client (or agent on behalf of an organizational client) has enough mental capacity to legally enter into the desired transaction or to legally allow the attorney to do what the client wants the attorney to do. If the answers to both assessments are answered in the affirmative, then there is no problem and Model Rule 1.14 is automatically satisfied. However, should either assessment be answered in the negative, then Model Rule 1.14 provides a roadmap for the attorney to either take no further actions on behalf of the client and preserve *status quo*, or to take affirmative actions on behalf of the client because the client will likely be harmed if the attorney does not take such actions.

Part II of this article analyzes the Model Rules of Professional Conduct. It starts with the general set of rules governing all normal client-lawyer relationships, and then it focuses on the lawyer's specific rules under Model Rule 1.14 when the attorney determines that a client has diminished capacity (note from the onset the difference between diminished mental capacity and a total lack of mental capacity). The article suggests that the current wording of the rule only establishes the first prong of investigation, which requires the attorney to determine that the client has enough mental capacity to establish or maintain a normal client-lawyer relationship and can therefore provide the attorney with informed consent. There is implicitly a second prong, which requires the attorney to determine that the client has the requisite mental capacity to legally bind him or herself in a transaction or course of action. However, since most attorneys are not clini-

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13. See Appendix B for a complete review of each state's comparable rule. It seems that the only cases of discipline against attorneys seem to be where the attorney profited through self-dealing against a client with diminished capacity. See, e.g., MAUNSEL W. HICKEY ET AL., 1 LOUISIANA PRACTICE ESTATE PLANNING § 4:149 (2015-2016) (summarizing cases in Louisiana where attorneys have been disciplined for violating that state's version of Model Rule 1.14); *In re Cofield*, 937 So. 2d 330, 343 (La. 2006) (a lawyer breached his fiduciary obligations as a trustee for a mentally-disabled client, engaged in questionable transactions with the client, and attempted to thwart attempts by the client's family to remove the lawyer as trustee); *In re Maxwell*, 44 So. 3d 668, 675 (La. 2010) (disbarring a lawyer for misconduct toward incapacitated client).



cally trained in such assessments, Part III provides three categories of legal definitions of mental capacity already established by the courts. First, are the criminal law cases, which define a defendant's mens rea at the time of the commission of the alleged crime, the mental capacity needed for a defendant to stand trial and properly communicate with the attorney, and mental capacity issues that might mitigate the sentencing of a convicted individual. Second, are the cases that define mental capacity of patients when they are supposedly providing informed consent to their medical doctors and providers. Third, are the cases that define mental capacity in relation to executing a will, entering into normal business transactions, and getting married (Illinois jurisprudence is examined, and then various other states' case law is compared). Part IV then provides some tools and ideas that attorneys might incorporate into their normal business practices to determine the specific mental capacity for any individual client, such as setting up a business practice that fully incorporates clients with diminished capacity, summarizing some of the assessment tools available to the general public, and other logistical and theoretical issues to consider. Appendix A contains a proposed set of red-line amendments to the existing model rule, Appendix B provides a state-by-state analysis of actual rules within the various jurisdictions, and Appendix C contains a proposed set of red-line amendments to the existing comments of Model Rule 1.14.

## II. MODEL RULES OF PROFESSIONAL CONDUCT

Each state “undoubtedly has broad powers to regulate the practice of law within its borders.”<sup>14</sup> While free to develop and adopt their own rules for professional responsibility for admitted members of the bar, states often look to various sources for guidance. The most common source a state can use as a starting point is the American Bar Association's Model Rules of Professional Conduct of 1983, as amended.<sup>15</sup> The Model Rules are annotated with comments, which add color to the rules and which can assist the attorney with compli-

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14. *Brotherhood of R.R. Trainmen v. Va. ex rel. Va. State Bar*, 377 U.S. 1, 6 (1964).

15. *See generally* MODEL RULES OF PROF'L CONDUCT (AM. BAR ASS'N 2013). According to the portion of their website titled “About the Model Rules,” first the American Bar Association (“ABA”) published Canons of Professional Ethics in 1908, and then, after being amended several times, in 1969, the Canons were replaced by the Model Code of Professional Responsibility. The Model Rules of Professional Conduct were adopted by the ABA House of Delegates in 1983. These Model Rules have been amended 13 times since adoption in 1983. The section of their website titled “Most Recent Changes to the Model Rules” details the amendments, and the portion of the website titled “State Adoption of Model Rules” provides appropriate links for that purpose.

ance. While there are other sources,<sup>16</sup> unless indicated, this article focuses on the Model Rules.

Unfortunately, each specific ethical question or dilemma that arises requires each individual attorney to mull over the governing ethical rules and come to a conclusion that, in the best case scenario, justifies the attorney's decisions or actions, and, in the worst case scenario, could be used as an affirmative defense to prevent any disciplinary action against the attorney. There are a few resources available to assist attorneys in reaching conclusions before taking any action. For example, each state disciplinary commission has an ethics "hotline" or other method of soliciting ethical advice,<sup>17</sup> and most bar associations, Inns of Court, attorneys' individual *alma mater* law schools, or other professional organizations that an attorney can voluntarily join will have various outlets for formal and informal ethics training and inquiries.

This Article focuses in on a specific rule of professional conduct, and unfortunately, those resources that are available for general ethical inquiries might not have any particular specialty in providing assistance to attorneys as they make assessments of their client's mental capacity. There are, however, three specific sources of assistance specifically related to clients with diminished mental capacity that are available to all attorneys (even though from the titles and organizations, they each ostensibly target attorneys who work with aging and older clients who statistically have a greater chance of losing mental capacity over time). An absolute *must read* is the "Assessment of Older Adults with Diminished Capacity: A Handbook for Lawyers."<sup>18</sup> Additionally, there are "Commentaries" promulgated by

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16. See, e.g., RESTATEMENT (THIRD) THE LAW GOVERNING LAWYERS (AM. LAW INST. 2000).

17. See, e.g., ATTORNEY REGISTRATION & DISCIPLINARY COMMISSION OF THE SUPREME COURT OF ILLINOIS, <http://www.iardc.org/ethics.html> (last visited Mar. 8, 2016).

18. ABA COMM. ON L. & AGING & AM. PSYCHOLOGICAL ASS'N & AM. PSYCHOLOGY ASS'N, ASSESSMENT OF OLDER ADULTS WITH DIMINISHED CAPACITY: A HANDBOOK FOR LAWYERS (2005), <http://www.apa.org/pi/aging/resources/guides/diminished-capacity.pdf> [hereinafter "ABA Handbook"]. "This handbook represents a collaborative effort of members of the ABA [through its Commission on Law and Aging] and the American Psychological Association ("APA") [through its Committee on Aging]." Although now a decade old, it is still quite relevant and informative, and "offers ideas for effective practices and makes suggestions for attorneys who wish to balance the competing goals of autonomy and protection as they confront the challenges of working with older adults with diminished capacity." *Id.* The ABA Handbook provides an education in mental capacity and the underlying law, and provides worksheets and other summaries for the attorney to use when assessing clients. *Id.*; see, e.g., James H. Pietsch & Margaret Hall, *Elder Law and Conflicts of Interest in the United States and Canada*, 117 PENN ST. L. REV. 1191, 1208-09 (2013) ("Some recommendations that the Handbook lays out are focusing on decisional abilities rather than cooperativeness or affability."); Michele A. Haber, MD, MSSW, MPH & Charles P. Sabatino, JD, *Assessment of Decision-Making Ability in Cognitively Impaired Older Adults: A Medical and Legal Perspective*, (2014),

the American College of Trust and Estate Counsel<sup>19</sup> and “Attorney’s Aspirational Standards” promulgated by the National Academy of Elder Law Attorneys.<sup>20</sup>

Even with such precautions, no attorney knows with certainty which clients will be dissatisfied, which will sue with a civil action alleging malpractice, and which will file complaints with the attorney’s disciplinary commission. Attorneys are reminded that these rules of professional responsibility are merely the minimum thresholds. Although, out of necessity, an attorney must respect and abide by his or her licensing state’s actual rules of professional conduct, “[a] lawyer should strive to attain the highest level of skill, to improve the law and the legal profession and to exemplify the legal profession’s ideals of public service.”<sup>21</sup> “The Rules of Professional Conduct are rules of reason. They should be interpreted with reference to the purposes of legal representation and of the law itself.”<sup>22</sup> Although comments accompanying the Model Rules (or actual state rules) provide some explanations, nuance, and guidance, attorneys are reminded

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<http://apps.americanbar.org/aging/cle/docs/impairoidolderadults.pdf>. As part of that combined effort between the two professional associations, two other handbooks were published: ABA Comm’n on L. & Aging & Am. Psychological Ass’n, *Judicial Determination of Capacity of Older Adults in Guardianship Proceedings* (2006), <http://www.apa.org/pi/aging/resources/guides/judges-diminished.pdf> and ABA Comm’n on L. & Aging & Am. Psychological Ass’n, *Assessment of Older Adults with Diminished Capacity: A Handbook for Psychologists* (2008), <http://www.apa.org/pi/aging/programs/assessment/capacity-psychologist-handbook.pdf>. While the reader of this Article might be neither a judge nor a psychologist, reading this trilogy brings some perspective as to what the attorney’s true role is when assessing any client’s mental capacity.

19. COMMENTARIES ON THE MODEL RULES OF PROFESSIONAL CONDUCT, THE AMERICAN COLLEGE OF TRUST AND ESTATE COUNSEL FOUNDATION (4th ed., 2006), [hereinafter “ACTEC Commentaries”], <http://www.actec.org/publications/commentaries/#MRPC1.14> (accessed December 9, 2012); see also Catherine Houston Richardson, *A ‘Rest in Peace’ Guide of Estate Planning Ethics*, 28 J. LEGAL PROF. 217, 221 (2004) (“The ACTEC Commentaries, unlike the Model Rules, help an attorney decide how to handle multiple clients without the conflicts, possibly providing a more economical and efficient representation to the client.”).

20. Gregory S. French, et. al., *Aspirational Standards for the Practice of Elder Law with Commentaries*, 2 NAELA J. 5 (2006) [hereinafter “NAELA Asp. Strds”]. For cautions with relying on these aspirational standards, see *id.*; see also A. Frank Johns & Bernard A. Krooks, *Elder Clients with Diminished Capacity: NAELA’s Response to Specific Case Applications and Its Development of Aspirational Standards that May Cross Professional Organizational Boundaries*, 1 NAELA J. 197 (2005). The Aspirational Standards thoroughly outline how an Elder Law attorney should handle various issues including: client identification, potential conflict of interest, confidentiality, competent legal representation, client capacity, communication and advocacy, marketing, ancillary services, and public service. These standards are thorough and uniquely developed to assist elder law attorneys in the problems they face.

21. MODEL RULES OF PROF’L CONDUCT pmb. 7 (AM. BAR ASS’N 2013).

22. MODEL RULES OF PROF’L CONDUCT pmb. 14 (AM. BAR ASS’N 2013).

that only the rules themselves, and not the annotated comments, are “authoritative.”<sup>23</sup>

This Article focuses on how an attorney can represent a client with diminished capacity. However, before exploring those specific rules, the Article starts with a summary of all of the major rules inherent in any normal client-lawyer relationship. “There are four key ethical issues that arise in the representation of any client—preservation of client authority, adequate communication with the client, preservation of confidential information, and avoidance of conflicts of interest.”<sup>24</sup> These canons generally supersede the specific instance of representing a client with diminished capacity. However, this Article argues that when an attorney is confronted by a client with diminished capacity, especially when that client is at risk of harm, unless the attorney takes action, Model Rule 1.14 should be elevated to a more prominent ethical canon. As such, the comments should be reviewed from time to time and updated to include evolving best practices.

#### A. NORMAL CLIENT-LAWYER RELATIONSHIPS

The general rules described herein apply to *normal* client-lawyer relationships. It seems, however, that this term of art is, in and of itself, as elusive and as subjective as any other specific rule of professional conduct. An attorney, when in a client-lawyer relationship, has a duty to serve the client’s wishes as opposed to simply what the attorney thinks are the best interests of the client.<sup>25</sup> Unfortunately, there is no concrete and objective assistance to attorneys in determining what a *normal* client-lawyer relationship actually looks like. Therefore, each attorney must determine for himself or herself what constitutes a *normal* client-lawyer relationship. Note that the maintenance of a *normal* client-lawyer relationship is a key aspect of Model Rule 1.14, as explained below.

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23. MODEL RULES OF PROF’L CONDUCT pmb. 21 (AM. BAR ASS’N 2013).

24. Henry Dlugacz & Christopher Wimmer, *The Ethics of Representing Clients With Limited Competency in Guardianship Proceedings*, 4 ST. LOUIS U. J. HEALTH L. & POL’Y 331, 343 (2011) (itemized numbers omitted).

25. While there is seemingly no good definition of a normal client-lawyer relationship, for a discussion of at least one example of what is not a normal attorney-client relationship, see, e.g., 51 Mass. Prac., Professional Malpractice § 16.17 (“Other federal courts have reached an opposite conclusion [than Massachusetts] on the grounds that class members (at least in large classes) are fundamentally different from actual clients and that a normal attorney–client relationship should not be deemed to exist between the lawyer and every class member, at least as to efforts to disqualify the lawyer when he or one of his partners represent a client who is adverse to a member of the class in an unrelated matter. Useful precedent on the issue is decidedly sparse”).

For purposes of this Article, which focuses in on Model Rule 1.14 and only summarizes the other rules, there are three main components to a normal client-lawyer relationship: (1) the attorney is competent; (2) the attorney provides the client with proper diligence, confidentiality, and zealous representation; and (3) the attorney finds appropriate ways to communicate with the client. The attorney does need to solicit clients, but if he or she chooses to do so, then it is inherent upon that attorney to ensure that all advice, counseling, and actions taken by the attorney conform to this concept of a normal client-lawyer relationship.

### 1. *Competency of the Attorney*

The underlying assumption with every client-lawyer relationship is that the attorney is competent. “A lawyer shall provide competent representation to a client. Competent representation requires the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation.”<sup>26</sup> It is up to the attorney to recognize when “the required proficiency is that of a general practitioner,”<sup>27</sup> as opposed to other matters where “[e]xpertise in a particular field of law may be required.”<sup>28</sup> A lawyer can adequately educate and reasonably prepare him or herself or seek outside assistance,<sup>29</sup> and is required to keep abreast of the evolution of the law and technology, primarily through formal continuing legal education programs.<sup>30</sup>

As described below, communication is an integral part of a client-lawyer relationship, and becomes especially important when a client has diminished mental capacity. While the comments to the competency rule only focus on doctrinal skills, this Article argues that it ostensibly includes client counseling and communication techniques, and that an attorney will not be able to offer a defense for mishandling a client-lawyer relationship with a client of diminished capacity simply because he or she was not competent in understanding, analyzing and communicating with that client.<sup>31</sup>

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26. MODEL RULES OF PROF'L CONDUCT r. 1.1 (AM. BAR ASS'N 2013).

27. MODEL RULES OF PROF'L CONDUCT r. 1.1 cmt. 1 (AM. BAR ASS'N 2013).

28. *Id.*

29. MODEL RULES OF PROF'L CONDUCT r. 1.1 cmt. 2, 4-7 (AM. BAR ASS'N 2013).

30. MODEL RULES OF PROF'L CONDUCT r. 1.1 cmt. 8 (AM. BAR ASS'N 2013).

31. Note that the author finds it personally beneficial to attend conferences about mental capacity where the speakers are non-attorney professionals, such as Licensed Social Workers, geriatric nurses or neuro-psychologists. The author also tries to attend programs to help him improve his general counseling and communication skills, in addition to the more technical programs on the doctrinal and ethical aspects of the law. Similarly, the author finds it quite useful to present the basic legal framework, such as the legal definition of mental capacity, to an audience of non-attorney professionals, especially since questions and comments from the audience identify different aspects of

2. *Duties Owed to the Client: Diligence, Confidentiality, and Zealous Representation*

Most of the duties flowing from the client-lawyer relationship attach only after the client has requested the lawyer to render legal services and the lawyer has agreed to do so. Whether a client-lawyer relationship exists for any specific purpose can depend on the circumstances and may be a question of fact.<sup>32</sup>

Beyond that, the Model Rules themselves do not offer much of a definition of the client.<sup>33</sup> So it seems that an attorney's actions, in the context of surrounding circumstances, might lead a reasonable prospective client<sup>34</sup> to believe that he or she is truly an actual client,<sup>35</sup> therefore, the attorney should follow up as soon as practical in writing either explicitly announcing that a client-lawyer relationship has begun, or emphatically denying the existence of such a relationship. If there is a client-lawyer relationship in the eyes of the attorney, then the engagement letter should be crafted to comply with Model Rule 1.2, which states in part, that "[a] lawyer may take such action on behalf of the client as is impliedly authorized to carry out the representation."<sup>36</sup>

In order to allow the client to maintain his or her autonomy within a normal client-lawyer relationship, the attorney must refrain from substituting his or her idea of what is in the client's best interests.<sup>37</sup> Attorneys are warned that "[s]ubstituting the lawyer's own judgment for what is in the client's best interest robs the client of au-

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client-lawyer relationships than would usually be identified by an audience of attorneys or law students.

32. MODEL RULES OF PROF'L CONDUCT pmbl. 17 (AM. BAR ASS'N 2013).

33. MODEL RULES OF PROF'L CONDUCT r. 1 (AM. BAR ASS'N 2013) (excluding a specific definition of a client).

34. MODEL RULES OF PROF'L CONDUCT r. 1.18 (AM. BAR ASS'N 2013) (providing some color as to who might ultimately be considered an actual client, but still not a concrete rule as to who is an actual client).

35. See, e.g., *Margulies By & Through Margulies v. Upchurch*, 696 P.2d 1195, 1200 (Utah 1985) ("[respondent] contends that a personal request for legal services or advice by the client and an acceptance by the attorney is necessary for an attorney-client relationship to be formed. We disagree. Even in the absence of an express attorney-client relationship, circumstances may give rise to an implied professional relationship or a fiduciary duty toward the client, thereby invoking the ethical mandates governing the practice of law.").

36. MODEL RULES OF PROF'L CONDUCT r. 1.2(a) (AM. BAR ASS'N 2013). Note that sometimes the marketing by the attorney, especially when that attorney communicates "the fact that the lawyer does or does not practice in particular fields of law," will inform the individual(s) seeking legal advice, counsel, or services which of those individual(s) will actually become a current client of the attorney's and enjoy the protection of a normal client-lawyer relationship. See MODEL RULES OF PROF'L CONDUCT r. 7.4(a) cmt. 1 (AM. BAR ASS'N 2013).

37. Kerry R. Peck, *Ethical Issues in Representing Elderly Clients with Diminished Capacity*, 99 ILL. B.J. 572, 573 (2011) (citations omitted).

tonomy and is inconsistent with the principles of the ‘normal’ relationship.”<sup>38</sup> Note the difference among professionals. For example, “Social workers are ‘ethically bound to evaluate the totality of circumstances and protect what they believe to be the client’s best interest.’ In contrast, lawyers are trained to fully represent a client’s legal interests as generally defined by the client.”<sup>39</sup>

When the attorney examines “the client’s legal decision through generic cognitive screens or family consultations,” then there might be an over-reliance on the family objectives (especially if the family strongly opposes the client’s wishes), which can lead to a greater chance of an erroneous assessment of diminished capacity.<sup>40</sup> Attorneys are strongly cautioned that there might be some biases within the medical community to err on the side of finding incapacity, thus necessitating medical intervention and treatment, which fuels and perpetuates the “disability economy.”<sup>41</sup>

Finally, the attorney must always worry about the conflict of interest rules. Potential conflicts are more troublesome with some specific areas of practice. For example, in an elder law or estate planning attorney’s office, many times a family member or a trusted friend accompanies the client at several meetings, and often times seems to have tacit authority from the client to freely talk about the client’s best interests. However, in some cases, that trusted third party might actually be inflicting undue influence over the client, thus questioning the client’s actual legal capacity to enter into such transactions. Under the conflict of interest rules, the attorney is required to avoid representation of one client “if it will directly be adverse to another client.”<sup>42</sup> This becomes crucial in identifying who the actual client is, and if it is the elder person (as would likely be suggested by an attorney purporting to be an elder law or estate planning attorney), or a defendant (as would likely be suggested by an attorney purporting to be a criminal defense attorney), or the title holder (as would likely be suggested by an attorney purporting to be a real estate attorney), then the attorney should not simultaneously represent the family members or trusted friends who accompany the client and who possibly even

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38. ABA Comm. on Ethics & Prof’l Responsibility, Formal Ethics Op. 96-404 (1996). Note, this opinion still seems to be relevant, even though it based on the earlier iteration of Model Rule 1.14.

39. Thomas Richard Stasi, *Reform That Understands Our Seniors: How Interdisciplinary Services Can Help Solve the Capacity Riddle in Elder Law*, 45 U. MICH. J.L. REFORM 695, 717 (2012) (citations omitted).

40. *Id.* at 701.

41. Dlugacz, *supra* note 24, at 367-68.

42. MODEL RULES OF PROF’L CONDUCT r. 1.7(a)(1) (AM. BAR ASS’N 2013).

pay the legal fees.<sup>43</sup> At the other end of the spectrum, if the client does not have any family or trusted friends, or if there is disharmony among such family members and trusted friends, then the client might specifically ask the attorney to take on a fiduciary role over the client's property or health or both. To that end, "[t]he lawyer's own interests should not be permitted to have an adverse effect on representation of a client."<sup>44</sup>

### 3. *Communication with the Client*

Communication is a key element in the establishment and maintenance of a normal client-lawyer relationship.<sup>45</sup> "A lawyer shall explain a matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation."<sup>46</sup> Under the comments, "reasonable communication between the lawyer and the client is necessary for the client effectively to participate in the representation."<sup>47</sup> Additionally, "the information to be provided is that appropriate for a client who is a comprehending and responsible adult. However, fully informing the client according to this standard may be impracticable, *for example, where the client is a child or suffers from diminished capacity. See Rule 1.14.*"<sup>48</sup> The attorney must always remember that sometimes the manner in which an attorney chooses to explain legal matters to a client will often times influence the client's decisions, regardless of the client's mental capacity.<sup>49</sup>

Sometimes, the client decides that he or she is more comfortable with a family member or friend to accompany him or her, regardless of the level of the client's mental capacity. If it is *necessary* for third parties to be present during the conversations, especially if needed to be the liaison communicators between the attorney and the actual client, then the presence of other persons *generally does not* affect appli-

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43. MODEL RULES OF PROF'L CONDUCT r. 1.7(a)(1) cmt. 13 (AM. BAR ASS'N 2013). "A lawyer may be paid from a source other than the client, including a co-client, if the client is informed of that fact and consents and the arrangement does not compromise the lawyer's duty of loyalty or independent judgment to the client." *Id.*

44. MODEL RULES OF PROF'L CONDUCT r. 1.7(a)(1) cmt. 10 (AM. BAR ASS'N 2013).

45. In Illinois, for example, communication failures represented the second highest reason clients filed grievances against their attorneys, following complaints about neglect (which often times were simply the failure to communicate with the client as to the status of the representation); see *2013 Annual Report Highlights*, ILL. ATTORNEY REGISTRATION & DISCIPLINARY COMM'N (2013), [http://www.iardc.org/2013\\_Annual\\_Report\\_Highlights.pdf](http://www.iardc.org/2013_Annual_Report_Highlights.pdf).

46. MODEL RULES OF PROF'L CONDUCT r. 1.4(b) (AM. BAR ASS'N 2013).

47. MODEL RULES OF PROF'L CONDUCT r. 1.4(b) cmt. 1 (AM. BAR ASS'N 2013).

48. MODEL RULES OF PROF'L CONDUCT r. 1.4(b) cmt. 6 (AM. BAR ASS'N 2013) (emphasis added).

49. See Janine Robben, *I'm OK, You're . . . ? : What Lawyers Should Know about Their Clients' Capacity to Make Decisions*, 71 OR. ST. B. BULL. 19, 22, Sept. 2011.



cability of the client-lawyer privilege.<sup>50</sup> The attorney should, at appropriate times and always with due respect to the client's desires to have those third parties present, ask those third parties to leave the room for a short period of time so that the attorney can talk solely with the client. The attorney should also offer assistance of a neutral professional, such as a translator if the client's first language is not English or if the client prefers to use a sign language interpreter. Sometimes a family member who speaks the client's native tongue or can sign might not have experience with some of the complicated verbiage used by attorneys and in legal matters. This Model Rule clearly puts the onus on the attorney to monitor all aspects of communication to ensure that the appropriate level of communication needed in a normal client-lawyer relationship is achieved.

Part of communication is the idea of informed consent.

Informed consent is literally the client's agreement for the lawyer to begin or continue on a proposed course of conduct after receiving reasonably adequate information and explanation about the risks and the proposed alternatives. The client's agreement is fundamentally an acquiescence to the lawyer's suggestion or advice as to the steps to be taken to pursue an objective or to respond to a situation.<sup>51</sup>

Informed consent has evolved over the past century in the realm of physician-patient relationships.<sup>52</sup> With attorneys, and their client-lawyer relationships, the evolution of exactly what informed consent<sup>53</sup> means is in its infancy, so we all need to be cautious and aware of how

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50. MODEL RULES OF PROF'L CONDUCT r. 1.14 cmt. 3 (AM. BAR ASS'N 2013).

51. David C. Little, *Informed Consent Under the Rules of Professional Conduct*, 40 COLO. LAW. 109, 110 (2011). According to Mr. Little, who participated in the drafting and updates to the Model Rules, "the ABA Commission did not intend any change in the substance of lawyer-client communications[,] . . . [but] . . . believed that the phrase 'consent after consultation' was not well understood, and that the term 'informed consent' more likely conveyed to lawyers what the Rules require." *Id.*

52. See *infra* notes 128-139 for a more detailed discussion of informed consent in the medical context.

53. Under Model Rule 1.0(e), Informed Consent is defined as "the agreement by a person to a proposed course of conduct after the lawyer has communicated adequate information and explanation about the material risks of and reasonably available alternatives to the proposed course of conduct." Comment six to this Rule generally alerts the attorney that although

[a] lawyer need not inform a client or other person of facts or implications already known to the client or other person; nevertheless, a lawyer who does not personally inform the client or other person assumes the risk that the client or other person is inadequately informed and the consent is invalid. In determining whether the information and explanation provided are reasonably adequate, relevant factors include whether the client or other person is experienced in legal matters generally and in making decisions of the type involved, and whether the client or other person is independently represented by other counsel in giving the consent.

MODEL RULES OF PROF'L CONDUCT r. 1.0 cmt. 6 (AM. BAR ASS'N 2013). Additionally, Comment seven to this rule indicates that

evolving case law instructs us. This Article offers no opinion as to whether informed consent in the client-lawyer relationship should or should not mirror the current understanding of informed consent in the physician-patient relationship. Rather, it cautions attorneys that just as medical doctors sometimes get sued for malpractice or are summoned in front of their disciplinary boards when accusations of lack of informed consent are filed, we attorneys also need to deal with this obliquely interpreted concept of “informed consent.”

As to the privileges that accrue in a client-lawyer relationship, the client-lawyer privilege only can be used as a defense to keep communications privileged for those communications leading to actual legal advice. This means that when a client communicates with an attorney for other reasons, then the privilege does not attach or may be lost.<sup>54</sup> Similarly, the client-lawyer relationship might be compromised if family members, friends, or other surrogates for the client are consulted by the attorney regarding confidential client information, even if allowed in certain circumstances under Model Rule 1.14.<sup>55</sup>

#### B. MODEL RULE 1.14 - CLIENTS WITH DIMINISHED CAPACITY

Basically, Model Rule 1.14 (a) requires the maintenance of a normal client-lawyer relationship even if the attorney believes that the client has diminished mental capacity; (b) allows an attorney to take protective actions when a client’s diminished capacity puts him or her at risk of harm; and (c) provides some limits and parameters of the attorney’s protective actions taken under paragraph (b).<sup>56</sup> In addition to first recognizing if a client, at any particular meeting, has the required capacity to understand and communicate at a level sufficient enough for the attorney to establish a new client-lawyer relationship with the individual, or to maintain an ongoing normal client-lawyer relationship with the individual, this Article argues that Model Rule 1.14 *implies* that the attorney must also determine whether that indi-

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[o]btaining informed consent will usually require an affirmative response by the client or other person. In general, a lawyer may not assume consent from a client’s or other person’s silence. Consent may be inferred, however, from the conduct of a client or other person who has reasonably adequate information about the matter.

MODEL RULES OF PROF’L CONDUCT r. 1.0 cmt 7 (AM. BAR ASS’N 2013).

54. Gregory C. Sisk & Pamela J. Abbate, *The Dynamic Attorney-Client Privilege*, 23 GEO. J. LEGAL ETHICS 201, 217 (2010). “Conversations with people who happen to be lawyers do not come under the shield of confidentiality unless those conversations are a prelude to, and become part and parcel of, a legal representation.” *Id.* Query as to whether an attorney can successfully argue that the documents recording his assessment and evaluation of a client’s mental capacity can meet this “prelude to, and become part and parcel of, a legal representation” test. *Id.*

55. See *supra* note 50 and accompanying text.

56. MODEL RULES OF PROF’L CONDUCT r. 1.14 (AM. BAR ASS’N 2013).

vidual has the requisite mental capacity for each legal transaction or decision that the client seeks counsel or assistance from the attorney.

Model Rule 1.14 applies universally to all attorneys who have clients. Any attorney in any practice area might ultimately face sanctions from his or her disciplinary body for noncompliance. Unfortunately, the literature<sup>57</sup> suggests that only two groups of attorneys even take steps to comply with this rule: criminal defense attorneys (and prosecutors) who grapple with a defendant's *mens rea* at the time of commission of the alleged crime, his or her competency to stand trial, and any mental capacity issues that might influence and mitigate sentencing if found guilty; and, medical malpractice attorneys, who need to establish or disprove any informed consent that the patient gave to the doctor. The literature suggests that the large swath of attorneys who deal with all manner of legal transactions on behalf of their clients, such as normal business intercourse, contract negotiations and execution, real estate deals, and family decisions, either are ignorant of Model Rule 1.14 or simply assume complete mental capacity in all of their clients without any further investigation.<sup>58</sup> It seems that it is only during subsequent litigation that issues of diminished capacity are even suggested, and many court decisions demonstrate that there were no objective written opinions entered into evidence by attorneys, medical professionals, or others at the time of the litigation. Many of these holdings simply weigh oral testimony of how any witness recalls the general mental state of the individual under scrutiny, and do not even focus in on specific mental capacity at that time for that particular transaction. Thus, this Article warns that any attorney who does not indicate in his or her notes that the client was assessed and was determined to have mental capacity might unwittingly be *de facto* in violation of Model Rule 1.14. This author believes that an attorney will have a better defense with an assessment improperly performed than he or she will have if no assessment was made at all.

All attorneys are reminded that diminished mental capacity might become an issue for any client in various ways. While it might

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57. The author ran an unscientific search in Westlaw, under Secondary Sources, using the terms "compliance representing clients diminished mental capacity" (without quotes), and in reading the titles of articles and the titles of the respective journals, came to this anecdotal conclusion.

58. However, the literature suggests that a small subset of transactional attorneys do actually understand the rule and the issues around mental capacity: elder law and estate planning attorneys who deal with elderly individuals, who are more likely to have diminished capacity simply because of their advanced ages; family law attorneys who deal with minors, who statutorily lack mental capacity until attaining the age of majority; and disability attorneys, who deal with individuals who are born with or develop mental, personality, or intellectual impairments.

be easiest to be on alert when a client has a diagnosed mental illness, suffers from an immediate head injury (such as a stroke or a physical injury to the brain), or is advancing in age, any person as a client can have periods of diminished capacity. For example, the client might be under the influence of a chemical substance and battling an addiction,<sup>59</sup> or under certain state laws, the person might be deemed disabled and therefore legally classified as having diminished capacity “because of gambling, idleness, debauchery or excessive use of intoxicants or drugs, so spends or wastes his estate as to expose himself or his family to want or suffering, . . . or is diagnosed with fetal alcohol syndrome or fetal alcohol effects.”<sup>60</sup>

The remainder of this section analyzes Model Rule 1.14, Section III provides the legal definitions of mental capacity, and Section IV provides some advice for attorneys on making such assessments. The actual wording of Model Rule 1.14, broken down into its three provisions, is referred to in this article as “The First Prong.” This Article argues that in addition to the current wording of the Model Rule, there is an unwritten provision referred to in this article as “The Second Prong,” that requires the attorney to know the mental capacity needed in that state for that particular transaction and to ensure that the client has that level of mental capacity before assisting the client with entering into that transaction.

1. *The First Prong – The Client’s Mental Capacity to Begin or Maintain a Client-Lawyer Relationship*

The First Prong, in totality, requires the maintenance of a normal client-lawyer relationship as much as possible, and allows the attorney to choose to take some affirmative actions to protect a client from harm when the client’s diminished mental capacity interferes with the otherwise normal relationship that the attorney is trying to maintain.

a. Maintenance of a “Normal” Client-lawyer Relationship

“(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

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59. Erin Sparks, *Attorney-Client Relationships: Ethical Dilemmas with Clients Battling Addictions*, 36 J. LEGAL PROF. 255, 256 (2011).

60. See, e.g., 755 ILL. COMP. STAT. 5/11a-2 (2015). While this part of the Illinois statutory definition might seem out of date, some states have similarly worded statutes, which until amended, legally define a person who might suffer from addictive behavior as a disabled individual who lacks mental capacity to make decisions for him or herself. *Id.*

lawyer shall, as far as reasonably possible, maintain a normal client-lawyer relationship with the client.”<sup>61</sup>

As far as *reasonably* possible, the attorney must maintain a *normal* client-attorney relationship. “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.”<sup>62</sup> “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.”<sup>63</sup> “[I]t is [also] recognized that some persons of advanced age can be quite capable of handling routine financial matters while needing special legal protection concerning major transactions.”<sup>64</sup> “The fact that a client suffers a disability does not diminish the lawyer’s obligation to treat the client with attention and respect.”<sup>65</sup>

Capacity exists on a continuum, and is normally not an all-or-nothing proposition. Clients may have the ability to make some decisions but not others. Certain strategies can improve the comprehension and decision-making ability of a person with diminished capacity. Even if the client has authorized or instructed the attorney to communicate with a third party, such as the client’s agent, the attorney should still keep the client informed by providing the client with copies of communications or by speaking directly with the client.<sup>66</sup>

The attorney acts as an agent for the client, and as such, directly impacts the client’s life and affairs.<sup>67</sup> Generally, a normal client-lawyer relationship presumes that the client communicates a story or a set of problems to the attorney, then the attorney communicates several legal paths available to the client, and then the client uses his or her personal set of goals and values to evaluate the benefits and risks of each path, and ultimately communicates back a specific course of action.<sup>68</sup> The attorney then follows the client’s direction, but uses his or her specific skill set to make use of the judicial system, draft the document, enter into negotiations, provide information to third parties, or whatever the attorney needs to do to zealously advocate on behalf of the client. If the client has sufficient mental capacity and

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61. MODEL RULES OF PROF’L CONDUCT r. 1.14(a) (AM. BAR ASS’N 2013).

62. MODEL RULES PROF’L CONDUCT r. 1.14 cmt. 1 (AM. BAR. ASS’N 2013).

63. *Id.*

64. *Id.*

65. *Id.* at cmt. 2.

66. French, *supra* note 20, at 19-20. The attorney must “[r]espect the client’s autonomy and right to confidentiality even with the onset of diminished capacity.” *Id.* at 19.

67. Dlugacz, *supra* note 24, at 344.

68. Robben, *supra* note 49, at 20.

properly communicates with the attorney, the attorney should proceed even if it is arguably or actually not in the client's best interests. The assumption inherent with sufficient mental capacity is that the client fully understands the risks associated with each choice, and in our society and legal system, all individuals with mental capacity have autonomy<sup>69</sup> and can make decisions that objectively are poor, stupid, or even harmful to that individual.

These two aspects of any client-lawyer relationship, autonomy of the client and the client's informed consent, need a little further attention. As to the autonomy, "a person with mental disability or illness 'often has the ability to understand, deliberate upon, and reach conclusions about matters affecting the client's own well-being.' That is, the attorney should not intrude upon the autonomy of a client with mental disability who is not showing deficits in decision-making simply because the client shows other symptoms of mental disability."<sup>70</sup> As to the informed consent, much like the physician who needs to determine the quantity and quality of communication needed for a patient to provide informed consent for a medical procedure, the attorney needs to gauge the quantity and quality of communication needed for a client to make an informed decision.<sup>71</sup> So, if the attorney follows the lead of the physician, then the attorney must communicate

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69. See, e.g., JEFFREY A. BLOOM ET. AL., 56 MASS. PRAC., ELDER LAW § 1:5 (2015).

70. See also Dlugacz, *supra* note 24, at 341. "[O]ur normative thesis is this: (1) [a]utonomy is the paramount value in client representation." *Id.* at 334. Where, for those attorneys working in these fields who practice "client-centered" lawyering, the aim is to empower the client by helping her attain her goals through the legal process, rather than further subjugating her desires to the interests and convenience of the other parties, the legal system, or her attorney. "(2) whenever the attorney believes the client is competent, the attorney should respect her choice." *Id.* at 334. Where the choice that should be respected is the one that the client makes after receiving from the attorney the information and counseling required to understand the options available and the consequences of choosing a specific course of action, assuming the attorney was careful in electing how to communicate. "(3) whenever the attorney believes the client's competency is limited, the attorney should intrude on the client's autonomy in the short term only to the extent necessary to achieve ends that facilitate the client's autonomy in the long term." *Id.* at 334-35. Where it is important to distinguish between a situation in which the attorney believes in a general sense that something is "not right" with the client, but can pinpoint no deficit in decision-making, and situations in which the client is showing difficulties with one of the four components of decision-making—in the former situation, no intervention is warranted. "(4) all of this should be undertaken with a healthy dose of self-doubt." *Id.* at 335. Where attorneys can err in one of two ways: resolving ethical dilemmas too much in favor of paternalism, and by emphasizing personal responsibility, attorneys might expect the client's views to conform to generally accepted norms or that the client should be made to "learn" from her "mistakes;" or, resolving ethical dilemmas too much in favor of rights-orientism, and by emphasizing that all people must seek to vindicate their rights to the greatest extent possible in all situations, attorneys might push the client to aggressively litigate (or enter into transactions) where she might wish to settle or acquiesce (or maintain the status quo).

71. *Id.* at 348. "In its modern formulation, the informed consent doctrine generally requires that a physician disclose to a patient 'what is reasonably necessary for a rea-

enough information, and in the right manner, so that a reasonable client can make an informed decision and direct the attorney on how to proceed.<sup>72</sup>

However, as each individual client might have different levels of competency, on top of different levels of education, language proficiency, and other socio-economic traits, the attorney might need to find different ways to communicate similar information to different clients, so that the likelihood that each individual client will be able to make an informed decision is maximized. “The lawyer who undertakes representation of a person with diminished capacity must be prepared to devote greater personal attention, provide more detailed and repeated explanations, consult with other important persons in the client’s life, accommodate the disabilities of the client, and consult professionals in other disciplines as appropriate.”<sup>73</sup> Overt actions of the attorney must convey respect and patience.<sup>74</sup> Further, attorneys who regularly interact with clients who have the potential of diminished capacity are advised to make their office space and meeting rooms as visually, audibly, and otherwise physically accommodating as possible.<sup>75</sup>

Different interviewing techniques may be used to maximize client capacity. These include changing the time and location of meetings, shortening the length of the interview, breaking the interview into a series of short interviews conducted over a period of time, using a different communication style, using visual aids, changing the amount of information provided to the client, and changing the process of reaching a decision, in order to maximize the client’s ability to participate in the representation and to make decisions.<sup>76</sup>

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sonable person to make an intelligent decision with respect to the choices of treatment or diagnosis.” *Id.*

72. *Id.* at 350. The attorney needs to be aware, in the process of communicating information, what he chooses to include and what he chooses to exclude; he needs to consider the manner and order in which information is presented; and he should remain mindful of the client’s individual characteristics by including everything he would be interested in knowing and being wary of how he addresses outlier possibilities that may be especially alarming to the client. As in other facets of the representation, there is no way to avoid attorney judgments in this regard. Self-monitoring and consulting with other attorneys is the best way to ensure that the client receives all the information she needs in a way that facilitates, rather than guides or determines, her decisions. *Id.*

73. Sisk, *supra* note 54, at 214.

74. *Id.*

75. Laura J. Whipple, *Navigating Mental Capacity Assessment*, 29 *TEMP. J. SCI. TECH. & ENVTL. L.* 369, 395 (2010).

76. French, *supra* note 20, at 22. The attorney “[a]dapt[s] the interview environment, timing of meetings, communications and decision-making processes to maximize the client’s capacities.” *Id.* (emphasis omitted).

b. Actions an Attorney Can Take

(b) When the lawyer reasonably believes that the client has diminished capacity, or 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 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.<sup>77</sup>

Once the attorney makes an assessment on his or her own, or relies on other professionals, and is convinced that the client does actually have some level of diminished capacity, then the lawyer is allowed to take protective actions under Model Rule 1.14, if and only if, he or she *reasonably* believes that the client is at risk of *substantial* harm (physical, financial, or other) *unless* action is taken by the attorney, *and* that the *client* cannot act in his or her own interests. If all of these emphasized thresholds are met, then the attorney is allowed (but is not mandated) to take *reasonably* necessary actions to protect the client, even in the absence of the client's consent, and arguably, even if against the express wishes of the client if the attorney believes that such client does not understand the consequences of objecting to the attorney's proposed actions.

One action an attorney might take is the consultation with individuals or entities that have the *ability* to take action to protect the client. In some client-lawyer relationships, the client is accompanied by family members or friends, or a surrogate or agent meets with the attorney on the client's behalf.<sup>78</sup> The attorney might believe that these are the very trusted individuals that the client would have given permission to consult with while the client had the mental capacity to express such permissions. However, the attorney now is in a position where there is no longer a normal client-lawyer relationship because of the client's diminished capacity and where the attorney believes that the client will suffer immediate harm unless action is taken. Does the attorney need to talk to all of these trusted family and friends who accompanied the client? If so, does he talk to them individually or as a single group? Can the attorney choose to talk to only a few but not others? If there are other family members who have not

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77. MODEL RULES OF PROF'L CONDUCT r. 1.14(b) (AM. BAR ASS'N (2013)).

78. MODEL RULES OF PROF'L CONDUCT r.1.14 cmt. 3 (AM. BAR ASS'N 2013). "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." *Id.*



physically accompanied the client to the attorney's office, does the attorney need to include them in these extra-ordinary situations? These are all decisions that the attorney must make, and document, since by complying with Model Rule 1.14, he or she is actually violating other rules, such as Model Rule 1.6. "Nevertheless, the lawyer must keep the client's interests foremost and, except for protective action . . . must look to the client, and not family members, to make decisions on the client's behalf."<sup>79</sup>

The comments to the Model Rules indicate that when consulting with family members, there can be a "reconsideration period to permit clarification or improvement of circumstances," and that the attorney can try to use "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[.]"<sup>80</sup> However, the attorney is cautioned that:

[I]n 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.<sup>81</sup>

[A]n attorney who unilaterally decides to rely on a client's family member to gain information about a client simply because the client has become difficult to work with has [arguably] acted inappropriately. He has intruded on short-term autonomy by breaching the duties of client confidentiality, client communication, and possibly client loyalty, but is not helping to support the client to maintain long-term autonomy.<sup>82</sup>

*Except* for disclosures and protective actions authorized under Model Rule 1.14, the lawyer *should* rely on the client's directions,

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79. *Id.* When the attorney chooses which family member(s) to talk to in the absence of properly prepared and clearly defined advanced directives, three potential problems present themselves. First, as to convenience, the client might inherently trust a child who lives in a different state, but simply uses the services of a local child who has the time and energy to accompany the client to the attorney's office. Second, taking it a step further, this local child might actually be exerting undue influence over the client, so any conversations the attorney has with that child about the actual client might specifically be against the client's best interests. Third, as parents sometimes know about disharmonious feelings among their children, they might only want a single and unanimous decision to be made, but if the attorney decides to have a conference call with all children, the infighting might complicate and delay the attorney's protective actions.

80. MODEL RULES OF PROF'L CONDUCT r. 1.14 cmt. 5 (AM. BAR ASS'N 2013).

81. *Id.*

82. Dlugacz, *supra* note 24, at 341.

rather than the contrary or inconsistent directions of family members, in fulfilling the lawyer's duties to the client.<sup>83</sup>

An alternative set of actions an attorney might take is to talk to other professionals rather than family members or trusted friends. Under Model Rule 1.14, however, just because attorneys are allowed to consult with other professionals, they should limit the pool to physicians, psychologists, psychiatrists, licensed social workers, or other professionals who have been trained to clinically assess individuals for legal capacity standards.<sup>84</sup> Attorneys are permitted to discuss a client's general demeanor and actions to such a trained professional, even without the client's affirmative consent, to determine if the client is capable of forming or maintaining a normal client-lawyer relationship, and if so, to make decisions, even if they are arguably not in his or her best interest.<sup>85</sup> However, if the client has some level of mental capacity, then the client should provide informed consent before the attorney talks to such other professionals about the client's mental capacity.

[T]he disclosure by the lawyer of information relating to the representation to the extent necessary to serve the best interests of the client reasonably believed to be disabled is impliedly authorized within the meaning of Model Rule 1.6 [Confidentiality of Information]. Thus, the inquirer may consult a physician concerning the suspected disability.<sup>86</sup>

In *appropriate* cases, when the attorney believes the client has diminished capacity and is at risk for immediate harm unless action is taken, the attorney can petition the appropriate court to seek the appointment of a guardian *ad litem*, or a conservator or guardian, over the client, but only if it "is necessary to protect the client's interests."<sup>87</sup> "In many circumstances, however, appointment of a legal rep-

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83. See ACTEC Commentaries, *supra* note 19.

84. Whipple, *supra* note 75, at 395 (noting that Comment 6 of Model Rule 1.14 "lacks sufficient guidance, creating potential liability for unnecessary or inappropriate consultations.").

85. ABA Comm. on Ethics & Prof'l Responsibility, Informal Op. 1530 (1989).

86. ACTEC Commentaries, *supra* note 19, at "Disclosure of Information." This advice was originally based on ABA Informal Opinion 89-1530. See *id.* n. 17, which was promulgated in 1989, under the original language of Model Rule 1.14. However, the 2002 amendments to Model Rule 1.14 seem to continue to be supported and bolstered by this earlier opinion.

87. MODEL RULES OF PROF'L CONDUCT r. 1.14 cmt. 7 (AM. BAR ASS'N 2013). "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." *Id.* Note that one of the major changes from the original version of this Model Rule to its currently amended version is that Model Rule 1.14(b) originally listed guardianship at the beginning of the list, as opposed to the end of the list. Even though the comments to the original version of Model Rule 1.14 indicated that guardianship should be thought of as a last resort, similar to the current comments, the physical switching of the term to the

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.”<sup>88</sup> “Guardianship is an action of last resort . . . . When guardianship is the last resort, the attorney should consider seeking a limited guardianship tailored to the client’s needs. The attorney should ensure that guardianship is in the client’s best interests and less restrictive alternatives are inadequate.”<sup>89</sup>

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.<sup>90</sup>

Even if the court appoints a guardian, a conservator, a guardian *ad litem*, or any other surrogate decision maker, “the attorney is not absolved of his responsibilities” and cannot rely blindly on that appointed individual’s direction.<sup>91</sup>

When the attorney does decide to take action under Model Rule 1.14, the attorney must remember that under a normal client-lawyer relationship, the attorney zealously advocates for the client’s position and avoids conflicts of interest. Any variance allowed under Model Rule 1.14, because of the client’s current risk of harm due to diminished capacity, is arguably designed to protect as much of the normal client-lawyer relationship as possible.

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end of the list surely de-emphasizes guardianship among the actions an attorney should consider. The other major changes were that the original version of Model Rule 1.14 was titled “Representing Clients With a Disability;” the word “ability” was used instead of “capacity;” and, the word “impaired” was used instead of the word “diminished.” The terms of art to note here include guardian, conservator and guardian *ad litem*, which are generally associated with guardianship statutes of the various states. A guardian is “[s]omeone who has the legal authority and duty to care for another’s person or property, [especially] because of the other’s infancy, incapacity, or disability. A guardian may be appointed either for all purposes or for a specific purpose.” *Guardian*, BLACK’S LAW DICTIONARY (10th ed. 2014). A conservator “is the modern equivalent of the common-law guardian. Judicial appointment and supervision are still required, but a conservator has far more flexible authority than a guardian, including the same investment powers that a trustee enjoys.” *Conservator*, BLACK’S LAW DICTIONARY (10th ed. 2014) (emphasis omitted). A guardian *ad litem* is a “guardian, [usually] a lawyer, appointed by the court to appear in a lawsuit on behalf of an incompetent or minor party.” *Guardian*, BLACK’S LAW DICTIONARY (10th ed. 2014).

88. MODEL RULES OF PROF’L CONDUCT r. 1.14 cmt. 7 (AM. BAR ASS’N 2013).

89. French, *supra* note 20, at 26. Guardianship or conservatorship is recommended only when all possible alternatives will not work.

90. ACTEC Commentaries, *supra* note 19.

91. Dlugacz, *supra* note 24, at 359.

The attorney should consider several factors to resolve the conflict, including the type of representation sought by the client, the forum in which the attorney's services are to be provided, and the involvement of other parties in the matter. Ultimately, the attorney should balance the client's need for decision-making assistance with the client's other interests. These other interests include the client's autonomy, safety, independence, financial well-being, health care, and personal liberty.<sup>92</sup>

If diminished capacity precludes the client from making decisions or taking action to protect himself or herself, the attorney should do no more than necessary to protect the client. Any protective action should be the least restrictive alternative and reflect the wishes and values of the client as well as the client's best interest. A number of protective actions may be more effective, less restrictive, and less intrusive than court proceedings or adult protective services.<sup>93</sup>

Most of the above situations and determinations are for an ongoing relationship, where the attorney has seen the client without any diminished level of capacity needed to understand or communicate, and then at some later point in time, determines that the client now lacks sufficient capacity to communicate or to make adequately considered decisions in connection with the representation. However, Model Rule 1.14 can also instruct an attorney on how to act for an individual with diminished capacity who is not currently a client or former client.

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.<sup>94</sup>

"The lawyer should take legal action on behalf of the person only to the extent reasonably necessary to maintain the status quo or oth-

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92. French, *supra* note 20, at 24. When taking appropriate measures to protect the client: the elder law attorney (a) is guided by the wishes and values of the client and the client's best interests; (b) seeks to minimize the intrusion into the client's decision-making autonomy and maximizes the client's capacity; (c) respects the client's family and social connections; and (d) considers a range of actions other than court proceedings and adult protective services. *Id.*

93. *Id.*

94. MODEL RULES OF PROF'L CONDUCT r. 1.14 cmt. 9 (AM. BAR ASS'N 2013) (emphasis added). "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." *Id.*

erwise avoid imminent and irreparable harm.”<sup>95</sup> In such emergencies, note that for an individual who is not a client, the attorney must determine that the individual has *seriously* diminished capacity. The lawyer “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” and “should take steps to regularize the relationship or implement other protective solutions as soon as possible.”<sup>96</sup> Although seemingly not a rule, “[n]ormally, a lawyer would not seek compensation for such emergency actions taken.”<sup>97</sup>

c. Limitations on Attorney’s Actions

(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.<sup>98</sup>

Model Rule 1.6 is therefore still controlling, but if Model Rule 1.14, paragraph (b), allows the attorney to take immediate and protective actions on behalf of a client with diminished capacity or a non-client with seriously diminished capacity, then there is some leeway to reveal confidential information about the client.

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.<sup>99</sup>

In order to minimize the risk of harming the client in any way, if the attorney determines the need to disclose information to third persons in order to protect the client in accordance with Model Rule 1.14, then the starting point should be “to describe the client and her issue in sufficiently general terms to prevent identification, but specific enough terms to permit comment on the client’s situation.”<sup>100</sup> This Article suggests that an attorney should, at a minimum, be guided by the principles of privacy under the Health Information Portability and

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95. *Id.* “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.” *Id.*

96. *Id.*

97. *Id.*

98. MODEL RULES OF PROF’L CONDUCT r. 1.14(c) (AM. BAR ASS’N 2013).

99. See MODEL RULES OF PROF’L CONDUCT r. 1.14 cmt. 8 (AM. BAR ASS’N 2013) (recognizing that “[t]he lawyer’s position in such cases is an unavoidably difficult one.”).

100. Dlugacz, *supra* note 24, at 350-51.

Accountability Act (“HIPAA”) and limit the amount of confidential client information communicated to a third party without the client’s consent to the minimum amount of information for that third party to provide information to the attorney, and the attorney should develop best practices to ensure such minimum disclosures.<sup>101</sup>

The linchpin of an effective client-lawyer relationship is the duty of loyalty to the client. Implicit in loyalty is the concept of confidentiality. But, when the client suffers from diminished capacity and needs protection, the attorney *may* need to disclose some confidential information to a third party. Even when the attorney is authorized to take protective action, the attorney may only disclose the least amount of information necessary.<sup>102</sup>

## 2. *The Second Prong – Mental Capacity to Enter Into a Transaction*

The requirement of competency by the attorney in any normal client-lawyer relationship,<sup>103</sup> combined with the jurisprudence questioning mental capacity of the individual when entering into certain transactions,<sup>104</sup> strongly suggest that Model Rule 1.14 has a second prong. As discussed, every attorney must determine if the client has enough mental capacity to understand the attorney’s legal advice and communicate back an answer, and if so, then a normal client-lawyer relationship can be established or maintained. That is what this Article refers to as the first prong of Model Rule 1.14, which is clearly stated within the current wording of that Model Rule. Only then can the attorney attempt to actually assist the client in some legal matter.

If the client seeks advice or assistance from the attorney in taking an action or entering into a transaction, then, at this point, this Arti-

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101. See Uses and disclosures of protected health information: general rules, 45 C.F.R. § 164.502(b) (2013); Other requirements relating to uses and disclosures of protected health information, 45 C.F.R. § 164.514(d) (2013). Under the HIPAA privacy rules, “individually identifiable health information” held or transmitted by a covered entity (health plans, health care providers and health care clearinghouses) and their business associates is generally protected and cannot be disclosed to a third party without the informed consent of the individual. However, even when properly using the information internally under the “Appropriate Uses” section of the Regulations, the doctrine of “minimum necessary use and disclosure” first requires the covered entity to make reasonable efforts to use, disclose, and request only the minimum amount of protected health information needed to accomplish the intended purpose of the use, disclosure, or request, and second, mandates a covered entity to develop and implement policies and procedures to reasonably limit uses and disclosures to the minimum necessary.

102. French, *supra* note 20, at 25 (emphasis added). The elder law attorney discloses client confidences only when essential to taking protective action and “to the extent necessary to accomplish the intended protective action.” *Id.* at n. 26.

103. See *supra* notes 26-32 and accompanying text.

104. See *infra* notes 139-145 and accompanying text.

cle posits, the attorney must make a separate assessment<sup>105</sup> as to whether the client has the requisite legal capacity to understand and communicate a decision for that specific legal matter at that specific moment of time,<sup>106</sup> which includes anything from executing and making a legal document viable upon affixing his or her signature (such as selling a house or entering into a marriage) to acquiescing in the attorney's suggested course of action (such as going into settlement negotiations for an ongoing civil action). The mental competence to understand and consent to a specific transaction at a specific point in time is what this Article refers to as the second prong of Model Rule 1.14, which can only be inferred from reading the actual words of the Model Rule, which this Article refers to as the first prong.

### III. DETERMINATION OF MENTAL CAPACITY

Within the larger medical community, there is still debate and discussion of what is mental capacity, who are the proper professionals to make these determinations, and what are the proper tools for making such determinations.<sup>107</sup> However, since most attorneys are not medically or clinically trained, this part of the article simply acknowledges such a debate, and suggests that going forward, as part of the attorney being competent to practice, all attorneys should at least casually visit such medical literature from time to time to see how to better interact with the medical community, especially when it comes

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105. See, e.g., ABA Handbook, *supra* note 18, at 1 (concluding that “*Second*, the lawyer must evaluate the client’s legal capacity to carry out the specific legal transactions desired as part of the representation . . . .”) (emphasis added). *Id.*

106. See, e.g., Charles P. Sabatino, *Assessing Clients With Diminished Capacity*, 22 BIFOCAL 4, 5 (2001), <http://www.americanbar.org/content/dam/aba/migrated/aging/publications/bifocal/summer01.authcheckdam.pdf>. The presence of some level of cognitive impairment does not tell us the degree to which individuals can still use their remaining limited abilities to act autonomously in their particular physical and social context and make decisions. Individuals adapt to limitations in countless creative ways. *Therefore, the lawyer needs to consider the client’s capacity related to the specific legal task at hand.* *Id.* (emphasis added). Please note that Mr. Sabatino is the long-serving Executive Director of the American Bar Association’s Commission on Law and Aging, and an adjunct professor of law at Georgetown University Law Center, and therefore, his opinions and observations, as cited throughout this Article, should be assumed to be credible, if not authoritative.

107. See, e.g., Edmund Howe, *Ethical Aspects of Evaluating a Patient’s Mental Capacity*, 6 PSYCHIATRY (EDGMONT) (ETHICS IN PSYCHIATRY) 7, 15 (2009), [http://www.ncbi.nlm.nih.gov/pmc/Articles/PMC2728941/pdf/PE\\_6\\_07\\_15.pdf](http://www.ncbi.nlm.nih.gov/pmc/Articles/PMC2728941/pdf/PE_6_07_15.pdf). (if a *psychiatrist* is making the determination, then ethically, each psychiatrist either uses the “fixed or sliding standard” and if the sliding standard, then “what clinical factors should be given the greatest weight.”); Cameron Stewart, Carmelle Peisah, and Brian Draper, *A test for mental capacity to request assisted suicide*, 37 J. MED. ETHICS 34, 1 (2011) (although the Article explores Australian laws and definitions); Peter Bartlett, *The United Nations Convention on the Rights of Persons with Disabilities and Mental Health Law*, 75 MOD. L. REV. 752 (2012) (although the Article explores British laws and definitions).

to the zealous advocacy of their clients who might currently or prospectively have plenary or temporary periods of diminished capacity.

Before the legal analysis, however, a few distinctions in vocabulary should be noted. First, there is a difference between mental capacity and mental cognitivity. Model Rule 1.14 focuses in on only the former. In some online dictionaries that purport to be medical dictionaries, simplistic definitions are provided: mental capacity is “sufficient understanding and memory to comprehend in a general way the situation in which one finds oneself and the nature, purpose, and consequence of any act or transaction into which one proposes to enter;”<sup>108</sup> whereas mental cognitivity is “of, relating to, or being conscious intellectual activity (as thinking, reasoning, remembering, imagining, or learning words).”<sup>109</sup> While they might seem similar, it is important for attorneys, judges, and legislators to respect the distinction made by our colleagues in the medical profession. It seems that cognitivity is having the physical attributes within the brain to perform reasoned evaluations; whereas, mental capacity, at a particular point in time for a particular contemplated transaction, is being able to properly utilize such biological and physical cranial systems. A second distinction in the discussions of mental illness, in general conversations, is that a person with a diagnosed mental illness or disorder (whether due to a developmental disability, traumatic injury, personality disorder, or substance abuse) does not mean, nor does it positively correlate with, a determination of diminished mental capacity, either at the time of the crime, at the time of providing informed consent, or at the time of entering into an action or a transaction.<sup>110</sup>

As to the legal analysis and base definitions of mental capacity that follow, there are three separate lines of cases which will be explored: first, criminal cases, where the mental capacities of defendants are at issue; second, medical malpractice cases, where the mental capacities of the patients when they gave informed consent are at issue; and third, what this Article refers to as transaction-specific cases, where the mental capacities of individuals at the time of entering into

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108. *Mental Capacity*, MIRRIAMWEBSTER.COM, <http://www.merriam-webster.com/medical/mental@apacity> (last visited May 11, 2016).

109. *Cognitive*, MIRRIAMWEBSTER.COM, <http://www.merriam-webster.com/medical/cognitive> (last visited May 11, 2016).

110. See, e.g., Henry F. Fradella, *From Insanity to Beyond Diminished Capacity: Mental Illness and Criminal Excuse in the Post-Clark Era*, 18 U. FLA. J.L. & PUB. POL'Y 7, 50 (2007). “What qualifies as a ‘mental disease or defect’ for insanity defense purposes is often quite different from what qualifies as a mental disorder for diminished capacity purposes.” *Id.* Unfortunately, the preferred term in current parlance is mental capacity, even though the courts seem to conflate “mentally retarded” and “insane,” or “insanity,” which are globally defining terms for an individual, with the much more specific inquiry as to whether the individual had mental capacity for a certain purpose at a certain point of time.



the various transactions are at issue. This Article does not suggest that any particular line of cases is more appropriate for any client at any point in time, but is meant to present a very basic set of ideas for a non-medically trained attorney to make a determination as to whether any individual client has sufficient mental capacity to enter into or maintain a normal client-lawyer relationship, and even if that threshold is met, then whether that client has sufficient mental capacity to enter into the transaction for which he or she is asking the attorney to assist. As will become clear, the assessment by an attorney, who is not a judge, is not legally binding on the client; rather, and as a reminder, it simply reflects on the attorney's competence in counseling or advocating on behalf of the client, and whether the attorney can face disciplinary hearings for failure to properly counsel or advocate on behalf of a client with diminished capacity. While the information contained herein might provide a roadmap for an attorney to use in making capacity determinations, this Article can only be seen as the start of the journey, and each individual attorney is expected to develop his or her own specific competence in making determinations for his or her unique client base.

#### A. MENTAL CAPACITY DETERMINATIONS IN CRIMINAL CASES

The mental state of a criminal defendant can affect whether or not the state can prove he had the mens rea at the time of the alleged criminal activity, whether or not the defendant can voluntarily offer a guilty plea or if he can properly communicate with his attorney if he offers a not guilty plea, and, if found guilty, whether or not he can receive the death penalty or otherwise is entitled to a reduced sentence. This Article only provides a cursory review of the issues with mental status in criminal actions, with a focus on how mental capacity is determined and adjudicated in the court system.<sup>111</sup>

##### 1. *Mens Rea at the Time of the Commission of the Crime*

The United States Supreme Court recently upheld a state's right to set its own statutory parameters on the mens rea needed to be

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111. For a more detailed discussion of diminished capacity in relation to a criminal defense, see *id.* Fradella provides a concise history of diminished capacity for criminal defendants, including more recent theories such as Battered Woman Syndrome and Black Rage, and concludes that there is rarely a legal answer to the questions of what constitutes mental disease or defect for the purpose of an insanity defense or what is the precise definition of mental disease or defect; but, rather, courts have generally "held that the issue of whether a person is suffering from a mental disease is a question of fact to be decided at trial." *Id.* at 40; see also MICHAEL L. PERLIN, MENTAL DISABILITY LAW: CIVIL AND CRIMINAL (3d ed. 2016) (a five-volume authoritative treatise); Michael L. Perlin, THE JURISPRUDENCE OF THE INSANITY DEFENSE (1994) (which seems to be very authoritative within the American Academy of Psychiatry).

proven in criminal cases and to limit evidence that the defendant is allowed to present at the criminal trial in that state's courts. Basically, the origins of excusing an individual with some sort of mental defect from punishment are found in an often-cited English case, commonly referred to as *M'Naghten's Case*.<sup>112</sup> There, alternate theories to establish an insanity defense were offered:

[Either] at the time of the committing of the act, the party accused was laboring under such a defect of reason, from disease of the mind, as not to know the nature and quality of the act he was doing; or, if he did know it, that he did not know he was doing what was wrong.<sup>113</sup>

So, aside from the requirement of a "disease of the mind," however that term might have been understood during the Victorian Era or how it might be understood today, it really boiled down to allowing a defense if the individual either did not understand the consequences of his actions, or if understood, the individual did not have a moral compass to understand that such consequences from his actions were wrong (again, a very nebulous term which can be itself debated even within the same time, place, and community).

The United States Supreme Court reviewed an argument made by a defendant, who was clinically diagnosed with paranoid schizophrenia at the time he shot and killed a police officer, that an Arizona statute, which only included the first prong of the *M'Naghten's* rule, but specifically excised the second prong, was a violation of Due Process. Basically, the Court found no violations with the Arizona statute, and noted that there are actually four varieties of insanity defenses found throughout the states and American history, so the two thresholds in *M'Naghten's* are just models and suggestions, and therefore, each state is free to choose from the menu to allow all four of these tests or for any permutation thereof.<sup>114</sup> The concurring and dissenting opinions in *Clark v. Arizona*<sup>115</sup> are filled with nuanced discussions of the rules of evidence, but this Article simply provides the majority's rationale for holding that Arizona's limitation on objective, non-clinical evidence the defendant could introduce at trial did not vi-

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112. 8 Eng. Rep. 718 (H.L. 1843).

113. *Clark v. Arizona*, 548 U.S. 735, 747 (2006) (quoting *M'Naghten's Case*, 10 Cl. & Fin. 200, 8 Eng. Rep. 718 (H.L. 1843)).

114. *Clark*, 548 U.S. at 749-50. The main variants are the cognitive incapacity, the moral incapacity, the volitional incapacity, and the product-of-mental-illness tests. The first two emanate from the alternatives stated in the *M'Naghten* rule. The volitional incapacity or irresistible-impulse test, which surfaced over two centuries ago (first in England, then in this country), asks whether a person was so lacking in volition due to a mental defect or illness that he could not have controlled his actions. And the product-of-mental-illness test was used as early as 1870, and simply asks whether a person's action was a product of a mental disease or defect. *Id.* (footnotes omitted).

115. 548 U.S. 736 (2006).

olate the Due Process Clause because “Arizona’s rule serves to preserve the State’s chosen standard for recognizing insanity as a defense and to avoid confusion and misunderstanding on the part of jurors. For these reasons, there is no violation of due process under *Chambers* and its progeny . . . .”<sup>116</sup>

So, for criminal attorneys, it becomes important to understand state-specific insanity defenses and evidentiary rules and protocol when alleging or defending mens rea. Mens rea, however, is different than mental capacity. Although relegated to a footnote, the *Clark* opinion does at least provide a legal definition of mental capacity that might be instructive for any attorney when ascertaining whether or not his or her client has diminished mental capacity, thus triggering Model Rule 1.14.<sup>117</sup>

## 2. *Mental Capacity for Pleading, Waiving Counsel, and Standing Trial*

A single United States Supreme Court decision is highlighted as being instructive for mental capacity issues for pleading, waiving counsel, and standing trial. “This case presents the question whether the competency standard for pleading guilty or waiving the right to counsel is higher than the competency standard for standing trial. We hold that it is not.”<sup>118</sup> “A criminal defendant may not be tried unless he is competent . . . and he may not waive his right to counsel or plead guilty unless he does so ‘competently and intelligently . . . .’”<sup>119</sup>

In 1960, the Court established what is now referred to as the “Dusky standard,” which holds that, in order for an individual to be deemed to be unable to stand trial:

[I]t is not enough for the district judge to find that ‘the defendant (is) oriented to time and place and (has) some recollection of events’, but that the ‘test must be whether he has sufficient present ability to consult with his lawyer with a reasonable degree of rational understanding-and whether he has a rational as well as factual understanding of the proceedings against him.’<sup>120</sup>

However, the *Godinez* Court revisited the Dusky standard after the Ninth Circuit held:

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116. *Clark*, 548 U.S. at 779. For a more detailed examination of this particular issue, see, e.g., 2 MOD. SCI. EVID. § 9:3 (2013-2014 ed.).

117. *Clark*, 548 U.S. at 749 n.7. “‘Capacity’ is understood to mean the ability to form a certain state of mind or motive, understand or evaluate one’s actions, or control them.” *Id.*

118. *Godinez v. Moran*, 509 U.S. 389, 391 (1993).

119. *Godinez*, 509 U.S. at 396.

120. *Dusky v. United States*, 362 U.S. 402, 402 (1960).

[C]ompetency to waive constitutional rights . . . requires a *higher level of mental functioning* than that required to stand trial . . . while a defendant is competent to stand trial if he has a rational and factual understanding of the proceedings and is capable of assisting his counsel . . . [a defendant] is competent to waive counsel or plead guilty only if he has the capacity for reasoned choice among the alternatives available.<sup>121</sup>

In reversing the Ninth Circuit's insistence of a higher standard, the *Godinez* Court held that the level of competency is the *same* for all aspects of a trial: communication of a guilty plea, an "intelligent and competent" waiver of counsel, and all decisions needed to be made if standing trial (such as whether to waive his privilege against compulsory self incrimination; whether to take the witness stand; whether to waive his right to trial by jury; whether to waive his right to confront his accusers; whether to decline to cross-examine witnesses; and other strategic choices, such as consulting with his attorney on whether and how to put on a defense and whether to raise one or more affirmative defenses).<sup>122</sup>

So, for purposes of relating this decision to compliance with Model Rule 1.14, the following rationale is instructive:

[W]hile the decision to plead guilty is undeniably a profound one, it is no more complicated than the sum total of decisions that a defendant may be called upon to make during the course of a trial . . . This being so, we can conceive of no basis for demanding a higher level of competence for those defendants who choose to plead guilty. If the *Dusky* standard is adequate for defendants who plead not guilty, it is necessarily adequate for those who plead guilty. Nor do we think that a defendant who waives his right to the assistance of counsel must be more competent than a defendant who does not, since there is no reason to believe that the decision to waive counsel requires an appreciably higher level of mental functioning than the decision to waive other constitutional rights.<sup>123</sup>

### 3. *Mental State as a Mitigating Factor During Sentencing*

The third mental state issue in the criminal law context revolves around punishment, such as mitigating factors to reduce a sentence and ensuring that the cruel and unusual punishment prohibition is not violated for any individual found guilty of committing a crime. As

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121. *Godinez*, 509 U.S. at 394 (emphasis added).

122. *Id.* at 398.

123. *Id.* at 398-99.

to the former, amendments to the United States Code allowing courts downward departure from existing sentencing guidelines “may be warranted if (1) the defendant committed the offense while suffering from a significantly reduced mental capacity; and (2) the significantly reduced mental capacity contributed substantially to the commission of the offense . . . .” However, the court may not depart below the applicable guideline range if the significantly reduced mental capacity was caused by the voluntary use of drugs or other intoxicants.<sup>124</sup> While the constitutionality of this federal statute is still being debated,<sup>125</sup> the United States Supreme Court has recently decided that it would be cruel and unusual punishment to execute an individual who, based on evidence presented at trial, is clinically defined as mentally retarded.<sup>126</sup>

#### B. MENTAL CAPACITY DETERMINATIONS IN MEDICAL MALPRACTICE CASES

Aside from analyzing mental capacity in regard to criminal activity, standing trial, and mitigating a potential sentence, it is instructive to analyze mental capacity of individuals, as patients in a medical setting, when they are supposed to provide affirmative acquiesce or affirmative denial to medical treatment by properly communicating informed consent to the health care provider(s). The very term itself, that of being informed, assumes adequate mental capacity within the individual at the time of the decision in understanding the choices as

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124. U.S. SENTENCING GUIDELINES MANUAL § 5k2.13 (U.S. SENTENCING COMM’N 2015), *declared unconstitutional* by *United States v. Detwiler*, 338 F. Supp. 2d 1166, 1182 (D. Or. 2004) (noting that the “court will construe the federal Sentencing Guidelines as advisory guidelines, not binding mandates, when imposing sentence[s] . . . .”).

125. *Detwiler*, 338 F. Supp. 2d at 1182. “The federal Sentencing Guidelines system is unconstitutional because it violates the separation of powers doctrine. The defects are not severable. This court will construe the federal Sentencing Guidelines as advisory guidelines, not binding mandates, when imposing sentence in this and all future cases.” *Id.* However, *certiorari* was not applied for, and there is negative treatment by sister circuits, including *United States v. Jones*, 143 F. App’x 230, 232 (11th Cir. 2005) (determining “[t]he Sentencing Guidelines do not violate the Separation of Powers doctrine.”); *United States v. McElheney*, 630 F. Supp. 2d 886, 898 (E.D. Tenn. 2009) (determining “the *Coleman* reasoning persuasive and finds no separation of powers problem with the restrictions on the district court’s ability to depart downward in the advisory Guidelines.”); *United States v. Salazar*, 185 F. App’x 484, 486 (6th Cir. 2006) (concluding that “the PROTECT Act [which amended the United States Code] has a severability clause that, in our judgment, would prevent the invalidation of the amendment to § 2251 even if the Feeney Amendment were found to be unconstitutional.”).

126. *Atkins v. Virginia*, 536 U.S. 304, 318 (2002) (determining “[m]entally retarded persons frequently know the difference between right and wrong and are competent to stand trial. Because of their impairments, however, by definition they have diminished capacities to understand and process information, to communicate, to abstract from mistakes and learn from experience, to engage in logical reasoning, to control impulses, and to understand the reactions of others.”).

associated risks, and then, within his or her own personal set of beliefs, goals, and desires, communicates such decision to the medical professionals.<sup>127</sup> The mental capacity of any individual is generally only challenged in court if the individual alleges medical malpractice or some other tort against the doctor or hospital, or if an interested party alleges a wrongful death claim on behalf of the now deceased individual.

The United States Supreme Court has affirmed the doctrine of informed consent as a Fourteenth Amendment Due Process protection. In a very important case, the Supreme Court first highlights the history of tort actions against physicians for medically invasive procedures, unless the patient had communicated informed consent,<sup>128</sup> and then provides that “[t]he logical corollary of the doctrine of informed consent is that the patient generally possesses the right not to consent, that is, to refuse treatment.”<sup>129</sup> The opinion also summarizes a line of cases that reinforce “the common-law doctrine of informed consent [which] is viewed as generally encompassing the right of a *competent* individual to refuse medical treatment.”<sup>130</sup> Here, the Court extends the right of refusal to be offered by a surrogate decision maker on behalf of an unconscious patient (or clearly incompetent patient) if that surrogate can prove to the appropriate state court that such patient had expressed the decision to refuse life sustaining procedures earlier, at a point where that patient was fully competent.<sup>131</sup>

“The doctrine of informed consent requires physicians to disclose to patients (without having been asked by the patient) the risks and

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127. See, e.g., Marc D. Ginsberg, *Informed Consent: No Longer Just What the Doctor Ordered? The “Contributions” of Medical Associations and Courts to a More Patient Friendly Doctrine*, 15 MICH. ST. U.J. MED. & L. 17, 23 (2010) (summarizing key definitions and variations of informed consent offered to medical professionals through the American Medical Association and the American College of Surgeons).

128. *Cruzan v. Dir., Mo. Dep’t of Health*, 497 U.S. 261, 269 (1990). This notion of bodily integrity has been embodied in the requirement that informed consent is generally required for medical treatment. Justice Cardozo, while on the Court of Appeals of New York, aptly described this doctrine: “Every human being of adult years and sound mind has a right to determine what shall be done with his own body; and a surgeon who performs an operation without his patient’s consent commits an assault, for which he is liable in damages.” The informed consent doctrine has become firmly entrenched in American tort law. *Cruzan*, 479 U.S. at 269 (citations omitted).

129. *Id.* at 270.

130. *Id.* at 277 (emphasis added).

131. *Id.* at 285. The specific issue in this case was whether enough evidence was offered at the Missouri state court to prove that Ms. Cruzan, now in a persistent vegetative state, had previously expressed her desire to not receive forced administration of life-sustaining medical treatment and artificially delivered food and water if she ever was in such a vegetative state, and concluding that “a State may apply a clear and convincing evidence standard in proceedings where a guardian seeks to discontinue nutrition and hydration of a person diagnosed to be in a persistent vegetative state.” *Id.*

benefits of, and alternatives to, proposed treatment. The doctrine may be based in common law or in statute.”<sup>132</sup>

Under the informed consent doctrine, unless therapists disclose certain information to patients before administering treatment or patients otherwise possess such knowledge, they are then entitled to damages even if treatment was performed correctly. In general, patients must be told about their diagnosis, the nature of the proposed treatment, the risks and benefits of the procedure, the available alternative procedures and their risks and benefits, and the consequences of not having the suggested treatment.<sup>133</sup>

Informed consent is therefore a defense put forth by a medical professional accused of medical malpractice or wrongful death, and the medical professional respondent must therefore prove that the patient, at the time of the discussions and decisions, had the proper mental capacity to communicate informed consent. Unless there is an emergency situation, the patient has the right to decide on whether to receive or refuse medical treatment, and if deciding to receive treatment, then has the right to receive substantial material information from the doctor, including associated risks, and then decide on his desired course of treatment, even if death or further complications are more likely to ensue.

Like all of the other aspects of mental capacity, informed consent by a patient is defined and colored by state statutes and cases.<sup>134</sup> The standard of assessing mental capacity to make medical decisions, however, seems to be similar to the standards used in assessing a criminal defendant's capacity or on assessing a party-to-a-transaction's capacity.<sup>135</sup>

Ordinarily, where the patient is in full possession of all [of] his mental faculties and in such physical health as to be able

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132. Ginsberg, *supra* note 127, at 19-20 (footnotes omitted). The article examines how various states view personal information about medical professionals and associated risks as being a subset of the total amount of information that the medical professional should disclose to the patient.

133. Bruce J. Winick, *The Macarthur Treatment Competence Study: Legal and Therapeutic Implications*, 2 PSYCHOL. PUB. POL'Y & L. 137, 149-50 (1996). This article focused in on the doctrine of informed consent and how it impacts the incidence of involuntary or voluntary hospitalization and treatment of those with mental illness.

134. *See generally*, Ginsberg, *supra* note 127; Michael Rohde, *Information Overload: How the Wisconsin Supreme Court Expanded the Doctrine of Informed Consent*, 46 JOHN MARSHALL L. REV. 1097 (2013); William J. McNichols, *Informed Consent Liability in A "Material Information" Jurisdiction: What Does the Future Portend?*, 48 OKLA. L. REV. 711 (1995).

135. *See, e.g.*, *Miller v. Rhode Island Hosp.*, 625 A.2d 778, 785 (1993). "Legal competence and medical competence are two different standards. That a person is legally competent does not, however, mean that the person is capable of making medical decisions." *Miller*, 625 A.2d at 785.

to consult about his condition without the consultation itself being fraught with dangerous consequences to the patient's health, and when no emergency exists making it impracticable to confer with him, it is manifest that his consent should be a prerequisite to a surgical operation.<sup>136</sup>

Because the consequences of consenting to a procedure are different from those of refusing to undergo it, a person can be competent to refuse to participate in research, but not to agree, and to consent to a treatment, but not to refuse. This aspect of the balancing approach seems to place a peculiar burden on the procedures for seeking consent. Whether or not a treatment decision is to be respected depends on the terms in which the question is couched.<sup>137</sup>

Once again, there is only a set of suggestions provided to physicians on how to determine the mental capacity of the patient giving informed consent.<sup>138</sup> All doctors and health care providers need to make assessments of the mental capacities of their respective patients by time and place, even those doctors who did not receive specialty training as clinical assessors of mental capacity. This Article, therefore suggests that attorneys might ultimately be held to a similar standard, and regardless of any attorney's individual expertise and training in the assessment of the mental capacities of the respective

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136. *Pratt v. Davis*, 79 N.E. 562, 564 (1906). The record does not disclose the circumstances under which the anesthetic was administered prior to the second operation. Appellant, however, contended that the appellee was so mentally unsound as to be incapable of consenting or of giving intelligent consideration to her condition, and that her husband authorized the second operation. Whether appellee was then mentally incapable of consenting was a question as to which the evidence was conflicting. *Pratt*, 79 N.E. at 564.

137. Alec Buchanan, *Mental Capacity, Legal Competence and Consent to Treatment*, 97 J. ROYAL SOC'Y MED. 415, 416 (2004) (differentiating between a "balanced approach," as quoted, where patient autonomy is being balanced against his or her best interests, and what is called the "leaving room for error approach," where knowing that any measurement of capacity is subject to error (false positive or false negative) and any corresponding legal judgment about that patient's capacity similarly will be subject to error).

138. See, e.g., Jeremy Sugarman, *Informed Consent, Shared Decision-Making, and Complementary and Alternative Medicine*, 31 J.L. MED. & ETHICS 247, 247-48 (2003). Although multiple conceptual models for informed consent have been proposed, there now seems to be a consensus that informed consent should be considered a process rather than a punctuated event consisting of the completion of an informed consent form. One accepted model involves three steps: threshold, information, and consent. *The threshold step requires that the person have adequate decision-making capacity, or competency, to provide informed consent and that he or she be in a position to make a voluntary choice.* The next step requires that the individual obtaining consent disclose information about the proposed intervention—its risks, benefits, and alternatives. Key to this step is that the information be provided in a manner that is understandable. Finally, once the individual has had an opportunity to consider this information and to have questions about it answered, he or she may then authorize agreement to proceed, typically by completing a consent document that summarizes the information provided during the disclosure. *Id.* (emphasis added) (footnotes omitted).



clients, every attorney will be expected to acquire such knowledge and training in order to comply with Model Rule 1.14.

### C. MENTAL CAPACITY DETERMINATIONS IN TRANSACTION-SPECIFIC CASES

As should be evident thus far, mental capacity exists on a spectrum, where an individual may have sufficient capacity to perform a simple act (such as executing a will), but insufficient capacity for a more complicated act (such as negotiating and agreeing to a complex contract).<sup>139</sup>

Consider, for example, the different capacities needed to complete these tasks: executing a power of attorney; executing a will; executing a trust agreement; marrying or divorcing; agreeing to a property division; executing a contract; donating a substantial asset or amount of money; agreeing to a new living arrangement; agreeing to the release of medical or other confidential records; or agreeing to or refusing a medical treatment.<sup>140</sup>

Outside of the criminal context, and outside of the United States Code, at the federal level, there are several definitions of mental capacity sprinkled throughout the Code of Federal Regulations. Three such regulations with a definition of mental capacity are:

[A]n applicant is adjudicated as lacking mental capacity if—  
 (1) [a] court, board, commission, or other lawful authority has determined that the applicant, as a result of marked subnormal intelligence, mental illness, incompetence, condition, or disease, is a danger to himself or herself or to others, or lacks the mental capacity to conduct or manage his or her own affairs . . . [which] includes a finding of insanity by a court in a criminal case and a finding of incompetence to stand trial; or a finding of not guilty by reason of lack of mental responsibility, by any court . . .<sup>141</sup>

“[A] mentally incompetent person is one who because of injury or disease lacks the mental capacity to contract or to manage his or her own affairs . . . .”<sup>142</sup>

139. Donald D. Vanarelli, *Client Capacity - Assessment and Advocacy*, 265 N.J. LAW. 8, Aug. 2010; see also Lawrence A. Frolik, Esq. & Mary F. Radford, Esq., *Sufficient Capacity: The Contrasting Capacity Requirements for Different Documents*, 2 NAELA J. 303, 304 (2006).

140. Sabatino, *supra* note 106, at 5.

141. See Mental capacity, 49 C.F.R. § 1572.109 (2007) (discussing Mental Incapacity, where the Transportation Security Administration and Department of Homeland Security will deny an application to a driver who will transport hazardous materials).

142. See Determinations of incompetency and competency, 38 C.F.R. § 3.353 (2016) (determining incompetency and competency, where the Department of Veterans Affairs determined the rates of special monthly compensation for impairments incurred during service).

[An individual is] adjudicated as [having] a mental [defect if there is:] (a) [a] determination by a court, board, commission, or other lawful authority that a person, as a result of marked subnormal intelligence, or mental illness, incompetency, condition, or disease: (1) [i]s a danger to himself or to others; or (2) [l]acks the mental capacity to contract or manage his own affairs. (b) The term shall include—(1) [a] finding of insanity by a court in a criminal case; and (2) [t]hose persons found incompetent to stand trial or found not guilty by reason of lack of mental responsibility . . . .<sup>143</sup>

Other sets of Federal Regulations mention mental capacity, but do not supply a definition.<sup>144</sup> So where definitions are actually provided at the federal level, they are quite ambiguous and open for interpretation by attorneys making initial assessments, and then by the courts or disciplinary bodies in reviewing the attorney's assessment.

Regardless of how an individual actually becomes afflicted with an impairment, the criminal law jurisprudence takes the view that one should seek treatment for an illness he brought upon himself, such as alcoholism and drug addiction, and should not seek excuse from the harm he has caused by failing to control his own behavior; whereas, the law assumes that no one chooses to be afflicted with a disease like schizophrenia.<sup>145</sup> This view does not necessarily or logically extend to voluntary legal transactions in which an individual desires to engage.

### 1. *A Sample of Mental Capacity Issues Within The State of Illinois*

Solely because of this author's familiarity with the laws of the state of Illinois, and his student research assistants' familiarity, this

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143. See Meaning of terms, 27 C.F.R. § 478.11 (2014) (discussing where the Bureau of Alcohol, Tobacco, Firearms, and Explosives ("ATFE") will deny an application to an individual for the commercial sale of firearms and ammunition); see also Meaning of terms, 27 C.F.R. § 555.11 (2015) (noting where the Bureau of ATFE will deny an application to an individual for the commercial sale of explosives).

144. See, e.g., 26 C.F.R. § 1.641, *et. seq.*, Department of Treasury (allowing income tax advantages to trusts established by grantors under a mental disability to change the terms of the trust); 29 C.F.R. § 525.1, *et. seq.*, Department of Labor (permitting the employment of individuals disabled for the work to be performed at special minimum wage rates below the rate that would otherwise be required by statute); 42 C.F.R. § 438, *et. seq.*, Department of Health and Human Services, Center for Medicare & Medicaid Services (prohibiting private insurance policies under Medicare Part C from the disenrollment of an individual because of diminished mental capacity, among other factors); Medical, psychiatric, and social evaluations, 42 C.F.R. § 456.170 (2012), Department of Health and Human Services, Center for Medicare & Medicaid Services, (requiring that "[b]efore admission to a mental hospital or before authorization for payment [from a Medicare Part C policy], the attending physician or staff physician must make a medical evaluation of each applicant's or beneficiary's need for care in the hospital; and appropriate professional personnel must make a psychiatric and social evaluation.").

145. Fradella, *supra* note 110, at 45-46.

part of the Article shows the different levels of mental capacity needed for different transactions or actions within the State of Illinois. As shown in the introduction to this Article, the different states will generally have similar thresholds for mental capacity for similar transactions, but if the nuances between and among incrementally more difficult transactions under the lens of Illinois jurisprudence can be recognized, then any attorney can do a similar analysis of his or her own state's mental capacity thresholds for different transactions.

[A]lthough the mind may be impaired by disease incident to old age, still, if the grantor in a deed be capable of transacting ordinary business—if he understands the nature of the business in which he is engaged and the effect of what he is doing and can exercise his will with reference thereto—his acts will be valid . . . .<sup>146</sup>

In discussing the mental capacity required at law to perform various tasks or to capably partake in diverse activities, “[t]he concept of incompetence is no longer an all or none status.”<sup>147</sup> In practice, it is quite often the case that “deciding whether someone is legally competent to make decisions . . . requires an [actual] assessment of their mental capacity;” and in general, “legal competence is specific to the task at hand.”<sup>148</sup> However, in Illinois, it is a long-standing requirement that “the law presumes every person sane until the contrary is proved, the burden rests on the party asserting the lack of testamentary capacity to prove it.”<sup>149</sup> “Evidence of physical impairment standing alone is insufficient to establish a lack of testamentary capacity.”<sup>150</sup>

The Illinois Supreme Court has long ago held that “the competency of the mind must be judged of by the nature of the act to be done,

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146. *Kelly v. Nusbaum*, 244 Ill. 158, 164 (1910) (citations omitted). The court determined that the petitioner, although “late in life, and perhaps to some extent at the time the deed was executed, was afflicted with certain delusions,” was not excused from honoring the executed deed, since

[f]rom an examination of this record we are satisfied that the sale made by [respondent] was not an improvident one; that [respondent] on [date of sale], had sufficient mental capacity to understand the nature of the transaction in which he was engaged when he made the sale to [petitioner]; that he had the advice of his wife and sons at the time he made the sale and at the time he executed the deed, and that the sale was consummated after due consideration and with deliberation and for the purpose of obtaining funds with which to reduce the indebtedness of [respondent]; that [respondent] had sufficient mental capacity to make the deed . . . .

*Kelly*, 244 Ill. at 164.

147. Paula E. Hartman-Stein, *Questions of Legal Competence Open up Consulting Niche for Geropsychologists*, 8 THE NAT'L PSYCHOLOGIST 4, 16-17 (1999).

148. Alec Buchanan, *Mental Capacity, Legal Competence and Consent to Treatment*, 97 J. ROYAL SOC'Y MED. 415, 416 (2004).

149. *Wisowaty v. Baumgard*, 629 N.E.2d 624, 629 (1994) (citations omitted).

150. *Wisowaty*, 629 N.E.2d at 629 (quotations omitted).

and from a consideration of all the circumstances of the case.”<sup>151</sup> While different acts may sometimes be grouped together as requiring the same mental capacity, they have been distinguished far more often than assimilated. For instance, one court held that “a less degree of mental capacity is [required] for the execution of a will than for the execution of contracts and the transaction of ordinary business. One may be capable of making a will yet incapable of disposing of his property by contract or managing his estate.”<sup>152</sup> Additionally, “mental strength to compete with an antagonist and understanding to protect his own interest are essential in the transaction of ordinary business . . . .”<sup>153</sup> However, even within the narrow realm of making a will in Illinois, a man “may not be competent to make a will of one kind and under some circumstances in relation to the estate, the number of objects, and the character of the disposition, when under other and different circumstances, requiring less mental effort, he might be.”<sup>154</sup>

Distinguishing between the capacity required to make a will and that needed to convey property, another Illinois case provides that “the mental capacity required to sustain the validity of a deed is of a higher degree than that required to enable a testator to make a will.”<sup>155</sup> In fact, to make a will, “it is sufficient for the testator to understand the business in which he is engaged, his property, the natural objects of his bounty and the distribution he desires to make of his property. To sustain a deed, however, he must have the ability to transact ordinary business.”<sup>156</sup> This suggests that the competency required for conveying property and transacting ordinary business are probably one in the same, but somewhat greater than that required to make a will.

Entering into a marriage is an interesting concept in that it includes a contractual relationship as well as a personal relationship. One Illinois appellate court held that “if the party possesses sufficient mental capacity to understand the nature, effect, duties, and obligations of the marriage contract into which he or she is entering, the marriage contract is binding, as long as they are otherwise legally competent to enter into the relation . . . .”<sup>157</sup> Furthermore, in Illinois:

[A] marriage contract . . . requires the mutual consent of two persons of sound mind, and if at the time . . . one . . . is men-

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151. *Campbell v. Campbell*, 22 N.E. 620, 622 (1889) (quotations omitted).

152. *In re Weedman's Estate*, 98 N.E. 956, 957 (1912).

153. *In re Weedman's*, 98 N.E. at 957.

154. *Trish v. Newell*, 62 Ill. 196, 205 (1871).

155. *Greene v. Maxwell*, 96 N.E. 227, 228-29 (1911).

156. *Greene*, 96 N.E. at 229.

157. *Larson v. Larson*, 192 N.E.2d 594, 597 (1963).

tally incapable of giving an intelligent consent to what is done, with an understandings of the obligations assumed, the solemnization is a mere idle ceremony . . . [they] must be capable of entering understandingly into the relation of marriage.<sup>158</sup>

With those comparisons in mind, it becomes more interesting when upon the latter half of the twentieth century, the Illinois Supreme Court seemed to take somewhat of a turn, providing that:

[Although various cases . . . examined by the court indicate the existence of a difference in tests for competency between one entering into a marriage, one executing a will, and one conveying real estate by deed, all of such authorities agree that a person who has sufficient mental capacity to transact ordinary business has mental capacity to perform all three of the aforesaid acts . . . .<sup>159</sup>

With this in mind, then perhaps the truth is that “there is no clear dividing line between competency and incompetency, and each case must be judged by its own peculiar facts; the parties must have sufficient mental capacity to enter into the status, but proof of lack of mental capacity must be clear and definite . . . .”<sup>160</sup> So, this is pretty much the framework within which attorneys licensed in the state of Illinois must assess the level of mental capacity for their respective clients when these clients enter into transactions or execute documents.

## 2. *A Sample of Mental Capacity Issues in Other States*

A national survey of various state laws, as consolidated in a single source, compares levels needed for testamentary capacity, donative capacity, contractual capacity, capacity to convey real estate, capacity to execute a durable power of attorney, decisional capacity in health care, capacity to mediate, and other legal capacities (to drive, to marry, to stand trial, to be sued, and to vote).<sup>161</sup> However, it is more of a review of secondary sources and uniform statutes, and is locked in time as the rules were in 2005. Therefore, this Article continues with state-specific jurisprudence guiding attorneys to the legal thresholds of various transactions.

In Wisconsin:

[T]he law recognizes the fact that there may be derangement of mind as to particular subjects, and yet capacity to act on other subjects . . . the proof which is necessary to invalidate a

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158. *Hagenson v. Hagenson*, 101 N.E. 606, 607 (1913).

159. *Greathouse v. Vosburgh*, 169 N.E.2d 97, 103 (1960).

160. *Larson*, 192 N.E.2d at 597.

161. ABA Handbook, *supra* note 18, at 5-7.

man's act by reason of his insanity must show inability to exercise reasonable judgment in regard to such act.<sup>162</sup>

Similar to Illinois, the Wisconsin Supreme Court stated that "[t]he law presumes competency rather than incompetency; it will presume that every person is fully competent until satisfactory proof to the contrary is presented."<sup>163</sup> Clarifying that point, the *Nennig* court also indicated that "[t]he test of competency is, did the person involved have sufficient mental ability to know what he was doing and the nature of the act done."<sup>164</sup> Again using the ability to execute a valid and effective will as somewhat of a baseline comparison, Wisconsin courts operate by the notion that to do so, "[t]he testator must have mental capacity to comprehend the nature, the extent, and the state of affairs of his property."<sup>165</sup> Again, like Illinois, Wisconsin courts decided that "[t]he central idea is that the testator must have a general, meaningful understanding of the nature, state, and the scope of his property but does not need to have in his mind a detailed itemization of every asset . . . ." <sup>166</sup> As for the tasks of getting married and entering into a contract, the Wisconsin Supreme Court holds similarly to Illinois in stating that to get married, "the test of mental capacity [is] not whether the parties [are] of sufficient mentality to measure up to the responsibilities incurred by bringing offspring into the world, but the true test [is] whether there [is] understanding and mental capacity sufficient to realize what [is] being done and consenting thereto."<sup>167</sup>

Indiana, however, appears to have a bit higher level of mental capacity when it comes to the baseline task of making a will. The Indiana Court of Appeals held that the testator must know: "(1) the extent and value of his property; (2) those who are the natural objects of his bounty; (3) and their deserts, with respect to their treatment of and conduct toward him."<sup>168</sup> It is this last requirement that seems to go above and beyond the mental competency requirements in Illinois and Wisconsin. But, Indiana does seem to align with Illinois and Wisconsin with regard to its requirement to enter into a contract, providing that "[t]he test for determining a person's mental capacity to contract is whether the person was able to understand in a reasonable manner the nature and effect of his act."<sup>169</sup> As for comparing the mental capacity requirements of civil proceedings with that required

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162. *Boorman v. Nw. Mutual Relief Ass'n*, 62 N.W. 924, 925 (1895) (quotations omitted).

163. *First Nat'l Bank of Appleton v. Nennig*, 285 N.W.2d 614, 620 (1979).

164. *First Nat'l Bank of Appleton*, 285 N.W.2d at 620.

165. *In re O'Loughlin's Estate*, 183 N.W.2d 133, 136 (1971).

166. *In Re Evans' Estate*, 265 N.W.2d 529, 536 (1978).

167. *Roether v. Roether*, 191 N.W. 576, 577 (1923).

168. *Gast v. Hall*, 858 N.E.2d 154, 165 (Ind. Ct. App. 2006).

169. *Gallagher v. Central Ind. Bank, N.A.*, 448 N.E.2d 304, 307 (Ind. Ct. App. 1983).

for criminal proceedings, the Indiana Supreme Court seems to have long ago aligned the two in holding that “where there is mental capacity sufficient to fully comprehend the nature and consequences of an act, and unimpaired will power strong enough to master an impulse to commit a crime, there is criminal responsibility.”<sup>170</sup> This holding seems to indicate that the mental competency requirement in Indiana for criminal action is the same to that of entering into a contract or getting married, and simply involves that extra inner-push of free will.

Outside of the Seventh Circuit, two other states’ baseline competency requirements seem to be similar to one another (and to the heightened threshold in Indiana law).<sup>171</sup> New York provides that to make a will, the testator must have “understood the consequences of executing the will, knew the nature and extent of the property being disposed of and knew the persons who were the natural objects of her bounty, and her relationship to them.”<sup>172</sup> In Florida, the courts have similarly held that executing an effective will depends upon sound mind, which means:

[T]he 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.<sup>173</sup>

Looking to yet another state, according to the California Probate Code:

(a) A determination that a person is of unsound mind or lacks the capacity to make a decision or do a certain act, including, but not limited to, the incapacity to contract, to make a conveyance, to marry, to make medical decisions, to execute wills, or to execute trusts, shall be supported by evidence of a deficit in at least one of the following mental functions, subject to subdivision (b), and evidence of a correlation between the deficit or deficits and the decision or acts in question:

- (1) Alertness and attention, including, but not limited to, the following:
  - (A) Level of arousal or consciousness.
  - (B) Orientation to time, place, person, and situation.
  - (C) Ability to attend and concentrate.
- (2) Information processing, including, but not limited to, the following:

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170. *Goodwin v. State*, 96 Ind. 550, 560 (1883).

171. *See supra* note 169 and accompanying text.

172. *Matter of Ruparshek*, 828 N.Y.S.2d 623, 623 (N.Y. App. Div. 2007).

173. *In re Wilmott’s Estate*, 66 So. 2d 465, 467 (Fla. 1953).

- (A) Short- and long-term memory, including immediate recall.
  - (B) Ability to understand or communicate with others, either verbally or otherwise.
  - (C) Recognition of familiar objects and familiar persons.
  - (D) Ability to understand and appreciate quantities.
  - (E) Ability to reason using abstract concepts.
  - (F) Ability to plan, organize, and carry out actions in one's own rational self-interest.
  - (G) Ability to reason logically.
- (3) Thought processes. Deficits in these functions may be demonstrated by the presence of the following:
- (A) Severely disorganized thinking.
  - (B) Hallucinations.
  - (C) Delusions.
  - (D) Uncontrollable, repetitive, or intrusive thoughts.
- (4) Ability to modulate mood and affect. Deficits in this ability may be demonstrated by the presence of a pervasive and persistent or recurrent state of euphoria, anger, anxiety, fear, panic, depression, hopelessness or despair, helplessness, apathy or indifference, that is inappropriate in degree to the individual's circumstances.<sup>174</sup>

Therefore, California's Probate Code "provides thorough, clear, and concrete examples of impaired mental function. Unfortunately, California is the only jurisdiction that has enacted such a useful statute."<sup>175</sup>

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174. CAL. PROB. CODE § 811 (West 1998). The rest of that provision is informative as well:

- (b) A deficit in the mental functions listed above may be considered only if the deficit, by itself or in combination with one or more other mental function deficits, significantly impairs the person's ability to understand and appreciate the consequences of his or her actions with regard to the type of act or decision in question.
- (c) In determining whether a person suffers from a deficit in mental function so substantial that the person lacks the capacity to do a certain act, the court may take into consideration the frequency, severity, and duration of periods of impairment.
- (d) The mere diagnosis of a mental or physical disorder shall not be sufficient in and of itself to support a determination that a person is of unsound mind or lacks the capacity to do a certain act.
- (e) This part applies only to the evidence that is presented to, and the findings that are made by, a court determining the capacity of a person to do a certain act or make a decision, including, but not limited to, making medical decisions. Nothing in this part shall affect the decision making process set forth in Section 1418.8 of the Health and Safety Code, nor increase or decrease the burdens of documentation on, or potential liability of, health care providers who, outside the judicial context, determine the capacity of patients to make a medical decision.

*Id.*

175. Whipple, *supra* note 75, at 392.



Finally, a quick sampling of holdings from Kentucky and Virginia underscores the general similarity in legal thresholds among and between states, but also underscores the specific nuances between jurisdictions. In Kentucky:

[I]t is well settled that mere imbecility or weakness of mind in a grantor, however great, does not affect his deed, unless such a degree be shown as rendered him incapable of understanding and protecting his own interests, and it has been declared that even mental capacity on the part of the grantor is not required for the execution of a valid deed.<sup>176</sup>

And, in Virginia, mental weakness alone will not invalidate an instrument because courts do not engage in measuring the size of peoples' understanding or capacities. Therefore, in the context of a suit like this based solely on lack of mental capacity to execute a deed, proof of great weakness of mind is insufficient to establish mental incapacity. In other words, a person may have great weakness of mind yet may possess sufficient mental capacity to understand the nature of the transaction and to assent to the provisions of the challenged instrument.<sup>177</sup>

The sampling of the jurisprudence and legislation of these states (Illinois, Wisconsin, Indiana, New York, Florida, California, Kentucky, and Virginia) seem to demonstrate, collectively, that the starting point is the notion that the mental capacity required to make a simple will is a minimum threshold level, which can often be used as a baseline in comparing the capacity requirements of other tasks, which appear to be seen as more complicated. In order for any individual attorney to comply with his or her state's professional responsibilities, especially if that state has adopted Model Rule 1.14 in an un-amended or slightly-amended form, current state law must be assimilated in some fashion that shows the minimum level of capacity for easy transactions (such as executing a simple will), and how that state adds further requirements as to the client's understanding at the time that more complex actions are taken or that more complex transactions are executed.

#### IV. SUGGESTED BUSINESS PRACTICES FOR ATTORNEYS

There is neither a clear nor even broadly ambiguous definition of a "normal attorney-client" relationship.<sup>178</sup> However, Model Rule 1.14

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176. *Revlett v. Revlett*, 118 S.W.2d 150, 154 (1938) (quotations omitted).

177. *Brown v. Resort Dev.*, 385 S.E.2d 575, 578 (1989) (citations omitted) (quotations omitted).

178. The only place the complete phrase "normal attorney-client relationship" appears in the Model Rules is in rule 1.14, and in some of its associated comments. In the published disciplinary opinions that discuss a normal relationship, the underlying issue

seems to suggest that even if a client has diminished capacity, the attorney should do everything reasonable to maintain this ill-defined normal relationship, and further, that the attorney can even break the cocoon of a normal client-lawyer relationship if the attorney reasonably believes that protective actions must be taken. This part of the Article offers some thoughts on how an attorney can establish best business practices for all of his or her normal client-lawyer relationships.

#### A. PROCESSES AND PHYSICAL ENVIRONMENT OF A LAW PRACTICE

One of the first things that a solo practitioner (or law firm partner) should do before establishing any client-lawyer relationship, or at the very least, before proceeding to offer services such as advising or counseling, is to purchase Errors and Omissions Insurance (“E&O”).<sup>179</sup> This is the perfect opportunity to talk with the carrier about Model Rule 1.14. Under Model Rule 1.14(b), the attorney *may* take protective action, but does not need to do so. Therefore, the insurer might have specific parameters within which the covered attorney can act with impunity.

Next, the attorney should set up billing mechanisms, engagement letter templates, and a general filing system status.<sup>180</sup> All of these aspects of the business of delivering legal services can assist the attorney in assessing a client’s mental capacity if thought out in advance. A standard statement might appear on any engagement letter such as:

Under the law, I, as your attorney, must conclude that you have the required level of mental capacity to provide me with informed consent to assist you in any transaction or in other legal matters. There might come a time when I will ask you to undergo a series of tests performed by outside professionals for objective confirmation of your mental capacity. There

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is generally limited to sexual intercourse between the attorney and the client, and even in those cases, there is no thoughtful description of what a normal relationship would be, and only cursory conclusions that a sexual encounter is generally outside of the bounds of a normal attorney-client relationship. *See, e.g.*, Chief Disciplinary Counsel v. Zelotes, 98 A.3d 852, 865 (Conn. App. Ct. 2014); Musick v. Musick, 453 S.E.2d 361, 365-68 (W. Va. 1994); Iowa Supreme Court Attorney Disciplinary Bd. v. Bowles, 794 N.W.2d 1, 5 (Iowa 2011).

179. While the purchase of insurance is not required under the *Model Rules*, it is generally beneficial to the attorney. For some of the pitfalls with Error and Omission (“E&O”) policies, *see, e.g.*, Andrew S. Hanen & Jett Hanna, *Legal Malpractice Insurance: Exclusions, Selected Coverage and Consumer Issues*, 33 S. TEX. L. REV. 75, 93, 141 (1992); A. Craig Fleishman, *Potential Perils of the Professional Liability Insurance Policy*, 24 COLO. LAW. 299, 299 (1995).

180. *See, e.g.*, Gary A. Munneke, *LAW PRACTICE MANAGEMENT: MATERIALS AND CASES* (West 3d ed., 2007).

might also come a time when, solely in the interest of protecting you from harm, I might consult with your network of family and friends.

Like some other statements, which might be on the engagement letter, if all potential clients are warned of this possibility, then if the time should ever come, there will less likely be a fight with the client or the client's family, friends, and supporters. Often times, the engagement letter and other communication templates are tied into the billing system. The attorney should therefore ensure proper coordination.

As to the filing systems, and the retention of all other confidential materials on behalf of clients, the attorney should prepare separate files for all clients where more general information is kept, which can more easily allow dissemination of the least amount of information to third parties should the attorney determine a client does have diminished mental capacity and the attorney chooses to take protective actions under Model Rule 1.14. This will also help mitigate the dissemination of confidential information to other professionals who might work with or in proximity to the attorney.<sup>181</sup>

The attorney should also think about the physical environment of the office space, as much as it is under his or her control. Individuals who are under suspicion of diminished capacity will likely be at their best when the environment has calming and trusting color schemes,<sup>182</sup> comfortable and supportive furniture<sup>183</sup> and design,<sup>184</sup>

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181. For example, many estate planning and elder law attorneys hire a non-attorney accountant or social worker. A concern with clients with diminished mental capacity is that under state law, some professionals, such as a licensed social worker, are mandatory reporters for suspected cases of elder abuse or abuse of adults with disabilities; whereas, the attorney witnessing the same indicators of abuse on that same client, are not required to report the reasonable suspicion of abuse. Separate filing systems from the beginning, one file with basic non-confidential information, and another with all of the information only the attorneys will see, is a precaution that can preserve the attorney's role in zealously advocating the client's wishes, which might be that suspicions of abuse, especially by a family member, should not be reported (even if that means that the client remains in physical or financial danger). As long as the client has mental capacity, then those wishes must be honored. *See, e.g.*, Adult Protective Services Act, 320 ILL. COMP. STAT. 20/2(f-5) (2015).

182. *See, e.g.*, *Office Colors: Choosing Your Office Colors to Enhance Your Office Space*, <http://www.empower-yourself-with-color-psychology.com/office-colors.html> (last visited Mar. 20, 2016); *see also Paint Your Home Office for Success: Match Your Wall Color to Your Job*, <http://www.forbes.com/sites/amymorin/2014/02/24/paint-your-home-office-for-success-match-your-wall-color-to-your-job/2/#43b5c49b1fb1>.

183. For example, the decision to use single chairs, as opposed to couches, that are not too deep, too low, or too angled, each with two arm supports, and all placed in a manner so that any client can easily access.

184. *See, e.g.*, Kim Geiger, *Chicago legal clinic a pioneer in office space design for people with PTSD*, CHICAGO TRIBUNE (July 5, 2013), [http://Articles.chicagotribune.com/2013-07-05/news/ct-met-ptsd-design-20130705\\_1\\_ptsd-clinic-post-traumatic-stress-disorder](http://Articles.chicagotribune.com/2013-07-05/news/ct-met-ptsd-design-20130705_1_ptsd-clinic-post-traumatic-stress-disorder).

and otherwise accessible and inviting for the largest number of diverse clients as possible. In addition, while thinking about the physical space within which all clients will generally communicate with the attorney, the attorney should understand some of the disabilities that might be associated with any human being, regardless of mental capacity, and the attorney should be prepared to respect and assist each client with his or her personal needs.<sup>185</sup>

Finally, initial thoughts when setting up a law practice should be with an eye towards ending normal client-lawyer relationships. If a client affirmatively terminates the relationship, then the attorney still owes a duty of loyalty and confidentiality to the former client.<sup>186</sup> If the attorney declines to establish an initial client-lawyer relationship or terminates an existing relationship, then the attorney must only do so under the prescribed rules and parameters.<sup>187</sup> However, other issues might come up, such as the attorney selling his or her law practice, and contingencies should be made that not only do the client's legal issues transfer to the receiving law firm, but also the frailties of each accompanying client, such as any mental capacity issues. Thus, an attorney should find a suitable potential successor firm based not only on technical expertise on the legal subject matters, but on communication skills to properly communicate with clients currently with, or potentially in the future, diminished mental capacity.<sup>188</sup>

This part of the Article, in summary, suggests that all aspects of establishing, maintaining, and transitioning out of a law practice integrate the real possibility that any individual client, at any point in time, might have diminished mental capacity. It is always inherent on the attorney to assess the level of mental capacity before agreeing to establish or maintain a normal client-lawyer relationship and before agreeing to take action or effectuate a transaction on behalf of the client. If the warning signs and assessments of mental capacity are subsumed within the normal business practices of the attorney, then there is a low chance of the attorney violating Model Rule 1.14, as it might actually be enacted in his or her licensing state, and a low

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185. In addition to compliance with accommodations under the Americans With Disabilities Act, Pub. L. No. 101-336, tit. III, § 301, 104 stat. 328, 301-310 (1990) § 301(7)(F), the "office of a . . . lawyer" is a "private entit[y]" which is "considered public accommodations for purposes of [Title III of the ADA], if the operations of such entities affect commerce," all attorneys, as business owners inviting individuals into their offices to be potential clients, are encouraged to educate themselves about the human condition. 42 U.S.C. §§ 12101-12213 (1990). One easy to read source is *Disability Etiquette: Tips on Interacting with People with Disabilities*, UNITED SPINAL ASSOCIATION, <http://www.unitedspinal.org/pdf/DisabilityEtiquette.pdf> (last visited Mar. 20, 2016).

186. MODEL RULES OF PROF'L CONDUCT r. 1.9 (AM. BAR ASS'N 2013).

187. MODEL RULES OF PROF'L CONDUCT r. 1.16 (AM. BAR ASS'N 2013).

188. MODEL RULES OF PROF'L CONDUCT r. 1.17 (AM. BAR ASS'N 2013).

chance that such instances will cause shocks to the allocation of time and generation of revenue during the normal course of operations of the law practice.

B. HOW AN ATTORNEY MIGHT THINK ABOUT THE ASSESSMENT OF MENTAL CAPACITY

There seems to be no singular, magical definition of capacity, yet academics continue to search for this “Holy Grail.”<sup>189</sup> In forensic contexts, the term decisional competence is generally accepted to mean “the capacity to: understand information relevant to the issue at hand; think rationally about alternative courses of action; appreciate one’s situation as a person confronted with a specific decision; and express a choice among alternatives.”<sup>190</sup>

Most contemporary accounts of the age-related changes in processing abilities that occur across the lifespan start with the view that there are two processes that people of all ages use to make decisions: first, there are deliberative processes where people carefully consider all of the details as outlined in the cognitive steps described (in the article); and second, there are affective processes wherein people will use their emotions as a diagnostic cue for the correct decision.<sup>191</sup>

There are some problems that an attorney might encounter when assessing an individual’s mental capacity: sometimes individuals with mental disabilities will, as a defensive mechanism, act like a jerk.<sup>192</sup> Capacity is not stagnant; rather, “[i]t can vary by mood, time of day, medication, [or] physical condition.”<sup>193</sup> As attorneys assess capacity in their clients, there is necessarily a high degree of subjectivity “and attorneys must be mindful not to confuse incapacity with eccentricity or imprudence.”<sup>194</sup>

Some problems with an attorney defining a normal client-lawyer relationship, which are specifically not addressed in this Article, are: does the attorney need to treat every client with similar legal issues in a similar manner; how does an attorney prove to a disciplinary board how he or she views a normal client-lawyer relationship; can the attor-

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189. J. Edward Spar, M.D., *Attorney’s Guide to Competency and Undue Influence*, 13 NAELA Q. 7, Summer 2010, at 10.

190. *Id.* at 7 (quotations omitted).

191. Debra Poggrund Stark et. al., *Complex Decision-Making and Cognitive Aging Call for Enhanced Protection of Seniors Contemplating Reverse Mortgages*, 46 ARIZ. ST. L.J. 299, 329 (2014).

192. Robben, *supra* note 49, at 21. “They would rather be thought of as mean or jerky than powerless or disabled[,]” quoting Alex Bassos, training director of Metropolitan Public Defender Services, Inc. in Multnomah and Washington Counties.

193. Whipple, *supra* note 75, at 370 (citations omitted).

194. Stasi, *supra* note 39, at 704.

ney's best practices in normal client-lawyer relationships evolve over time and adopt to new experiences; and, can the attorney's own description of how he or she views a normal client-lawyer relationship for purposes of compliance with the Rules of Professional Conduct ever be used in a civil malpractice claim against his or her legal services provided to this or any other client?

Under American law, generally, every adult beyond the age of majority for that state is presumed to have sufficient mental capacity to make all decisions that affect his health and property, unless another party challenges such capacity and a court adjudicates that adult as lacking sufficient capacity.<sup>195</sup> Therefore, the attorney must assume capacity, even when the individual seems cranky, depressed, scared, careless, or even unintelligent. The attorney must actually look for clues that might suggest that the individual has diminished capacity. If the client (or potential client) seems to have capacity, then the attorney is free to establish a normal client-lawyer relationship.

First, the attorney should master the art of listening and observing body language.<sup>196</sup> The author has suggested that when taking notes by hand, two-thirds of the width of the paper should be reserved for the facts, issues, questions, and statements that are expressed by the interviewee; however, that one-third column of empty space is a good place for notes on the attorney's perceptions of any aspects of communication that might suggest some level of diminished capacity. After all, the rules of Model Rule 1.14 do not demand that the attorney make a clinical determination of the client's mental capacity; rather, it supports the attorney in seeking input or formal evaluations from medical professionals who are trained in the clinical assessment of mental capacity.<sup>197</sup> If the attorney takes notes in this manner, then he or she must employ a system that keeps those body language cues as confidential client information.

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.<sup>198</sup>

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195. See, e.g., Charles P. Sabatino and Erica Wood, *The Conceptualization of Legal Capacity of Older Persons in Western Law*, BEYOND ELDER LAW: NEW DIRECTIONS IN LAW AND AGING, 46 (Israel Doron and Ann M. Soden eds., 2012).

196. See, e.g., Marcia Pennington Shannon, *Cultivating the Art of Effective Client Communications*, 37 LAW PRAC. 5, 58 (2011); Hal Ritter, Jr. and Patricia A. Wilson, *Developing the Fine Art of Listening*, 64 TEX. B.J. 36 (2001).

197. MODEL RULES OF PROF'L CONDUCT r. 1.14 cmt. 6 (AM. BAR ASS'N 2013).

198. *Id.*

However, some individuals with actual diminished mental capacity might appear to function well, especially if they are educated and have had previous discussions with attorneys for a variety of professional or personal matters. On the other hand, other individuals become “quite dysfunctional with relatively mild impairment.”<sup>199</sup>

Here are just a few examples of best practice stories and advice that might assist other attorneys:

I had previously done the estate planning for a particular client, and she had been accompanied and supported by one particular daughter in that previous engagement. Basically, the estate was to be distributed evenly among her several children. Several years later, a different daughter initiated a meeting where the client wanted to execute a new estate distribution plan, and when we discussed it, the earlier daughter who provided support was now to be totally cut out of the will. I asked the client a specific set of questions to get a sense of her goals, wishes and values, as well as her general capacity to understand the consequences of removing a single daughter as a beneficiary, hurt feelings on the part of that daughter, potential family disharmony, and a very good chance of litigation which will cause a good portion of the estate to evaporate in the form of attorney fees. At that meeting, I noted all of her responses. I then asked the client to return to my office a week later, at a different time of the day. I proceeded to ask her the same exact questions, and basically received the same exact answers. Still unconvinced that the client had complete mental capacity, I set up a third meeting, this time in her living room, and at yet a different time of the day. Upon asking the same set of questions for the third time and receiving the same set of responses, my professional conclusion was that this particular client, at this general point in her life, had sufficient mental capacity to maintain our attorney-client relationship, and that she had sufficient mental capacity to ask me to draft a revised estate plan and that she had sufficient mental capacity to execute the documents I prepared per her instructions.<sup>200</sup>

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199. Spar, *supra* note 189, at 10; see also Ann M. Soden, *Family Matters: Some Emerging Legal Issues in Intergenerational and Generational Relations*, BEYOND ELDER LAW: NEW DIRECTIONS IN L. AND AGING, 103 (Israel Doron and Ann M. Soden eds., 2012). Some clients might exhibit poor orientation regarding date or time, but be well aware of how they want to distribute their estates. Conversely, some clients with significant cognitive deficits might appear cognitively intact owing to their abilities to revert to over-learned behavior, such as appropriate social graces or past business experience. *Id.*

200. Ben Neiburger, Generation Law, Ltd., Elmhurst, Illinois, relaying this story in a presentation at the 2013 Illinois Institute on Continuing Legal Education Elder Law Short-Course conference held at Lisle, Illinois, as remembered by the author who was in the audience.

Before I agreed to represent a particular client in a foreclosure mediation, the volunteer organization through which I got the client had actually warned me through specific instances and emails that the client had exhibited thoughts and threats of suicide. The client was at risk of losing a house he had lived in for 40 years and, understandably, did not know how to deal with it. When I met the client, I noticed right away that he had a tendency to become very angry when trying to understand what his bank was requesting of him. He was visibly and emotionally unbalanced. During our mediation, there were instances where he would become incredibly agitated, and we had to leave the room a few times so that he could cool off and collect himself. Luckily, nothing violent ever happened and the parties were able to settle their dispute with dignity. Without getting into a lot of specifics regarding this individual, your article and the issues of diminished capacity reminded me of him. These issues remind me of him because perhaps he, and come to think of it, probably most clients in an adversarial dispute, will be more tense and emotional at some point during the lawyer-client relationship. I would regard this as somewhat different than a prototypical diminished capacity in which the client does not have the possibility of “coming out of” that diminished state. This situation seems to be more like a temporary state of diminished capacity. In a way, although we are not talking about murder, this seems to mirror the distinctions made in criminal law where the law makes a distinction between a “heat of passion” murder and a premeditated murder. Again, I think it is probably very common for a lawyer to witness his client experience various emotional states—depression, anger, confusion. The client can go in and out these emotional states, often unpredictably, without being clinically incapacitated. I believe this puts an added duty on the lawyer to be aware of when the client is stable enough to make decisions, sign documents, give property, etc., while at the same time maintaining a normal lawyer-client relationship, as Rule 1.14 directs us.<sup>201</sup>

Pornography and legal capacity have two things in common: (1) they are difficult terms to define, and (2) we tend to rely on the standard of “we know it when we see it” in making case-by-case determinations, as Justice Potter Stewart famously framed the issue of defining pornography in *Jacobellis v. Ohio*.<sup>202</sup>

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201. John U. Fehr, III, Fehr Law Group LLC, Chicago, Illinois, in a 2014 email to the author as a friend and reviewer of an early draft of this Article.

202. 378 U.S. 184 (1964); see also Kristi Vetri, “Representing Clients With Diminished Capacity; Capacity v. Competence,” presentation at 2014 Adult Protection and Advocacy Conference hosted by the Illinois Department of Aging (August 20-22, 2014,



One suggested solution to future challenges as to the state of mind of a client currently, at the time of the execution of a will that has received more attention in recent years is videotaping the will execution ceremony. However, the jury is still out on whether such actions are actually beneficial to the testator and whether, conversely, they may actually be detrimental to the defense of a will contest for incapacity. A videotape may be helpful when the client is articulate, and can clearly set forth the intent and reasoning behind his will provisions. But when the testator is uncomfortable, nervous, and has difficulty speaking, the videotape may actually give an impression of a greater lack of understanding and mental clarity than actually exists. The fact that many clients will feel nervous in front of the video camera, coupled with the nervousness that they may feel due to the formality of the process, makes the appearance of incompetence a possibility. Additionally, an attorney who decides to videotape a will may have to choose between two unfavorable alternatives: either videotaping every will execution and safely storing the tapes, or videotaping only the wills he believes might be contested. The first choice may be costly and time-consuming. The second may cause difficulty in explaining to the client why a videotape is needed and may be seen as evidence that testamentary capacity was questionable even to the testator's own attorney.<sup>203</sup>

Fortunately, for the typical adult client, the presence of adequate capacity is obvious. Moreover, as a legal and ethical matter, capacity is presumed. It is only when signs of questionable capacity present themselves that a capacity determination becomes a conscious mental process—either one deliberately undertaken or haphazardly muddled through. To decide whether a formal assessment is needed, the lawyer is already exercising judgment about the client's capacity on an informal or preliminary level. The exercise of judgment, even if it is merely the incipient awareness that "something is not right," is itself an assessment. It is better to have a sound conceptual foundation and consistent procedure for making this preliminary assessment than to rely solely on *ad hoc* conjecture or intuition.<sup>204</sup>

Finally, two interesting and succinct ways for attorneys to think about the mental capacity of each individual client:

[C]ommon principles emerge among the definitions of competence:

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Oak Brook, IL), slide 5, available at <http://cspl.uis.edu/illaps/doa/conferences/documents/Capacity.v.Competence.ppt>.

203. Angela Travis, *What Every Oklahoma Elder Lawyer Should Know About Testamentary Capacity*, (Dec. 1, 2003), <http://jay.law.ou.edu/faculty/jforman/elderlawbook2004/travisangela.doc> (footnotes omitted).

204. ABA Handbook, *supra* note 18, at 1 (emphasis omitted).

1. A presumption exists in favor of a person having capacity.
2. Competence means one possesses an ability to understand one's current medical condition, the possible treatments, the risks associated with those treatments, and their consequences.
3. One must possess the ability to use relevant information in a rational way to reach a decision.
4. One must be able to communicate one's decision.

As these principles indicate, a person may be found to possess mental capacity to make some decisions, but not others. A person may, for example, have the requisite mental capacity to decide to prefer strawberry ice cream to chocolate ice cream, but lack the requisite capacity to execute a will.<sup>205</sup>

The Ten Commandments of Mental Capacity and the Law[:]

1. Thou shalt presume capacity.
2. Thou shalt talk to the client alone.
3. Thou shalt take steps to maximize capacity.
4. Thou shalt not worship any *one* standard for capacity.
5. Thou shalt not covet the mini-mental status exam.
6. Thou shalt not end any query with only the word "capacity." The proper query shall be, "Capacity to do *What?*"
7. Thou shalt seek the big picture, with all its variability, intermittency, and nuance.
8. Thou shalt honor thy client's own considered or habitual standards of behavior and values, not standards and values held by you or others.
9. Thou shalt honor thy client's confidentiality and autonomy even in the face of incapacity.
10. Thou shalt plan ahead for incapacity to ensure that one's wishes are respected.<sup>206</sup>

In many long-standing client-lawyer relationships, where the attorney has never doubted the mental capacity of a particular client, there might be a specific point in time that the attorney immediately recognizes something different in the client's appearance, facial expressions, and communication. However, all that is discovered under this scenario is diminished capacity. Even at this point, the attorney

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205. Jonathan Herring, *Entering the Fog: On the Borderlines of Mental Capacity*, 83 IND. L.J. 1619, 1624-25 (2008) (footnotes omitted).

206. Charles Sabatino, *The Ten Commandments of Mental Capacity and the Law*, GEO. UNIV. L. CTR., available at <https://www.sec.gov/investor/seniors/tenccommandments.pdf>.

does not yet know if he or she can maintain a normal client-lawyer relationship, as is required under Model Rule 1.14(a), or if the client has enough mental capacity to enter into a desired transaction,<sup>207</sup> or if the client is in danger and the attorney will decide whether or not to take protective action under Model Rule 1.14(b) or (c).

C. TOOLS AN ATTORNEY MIGHT USE IN THE ASSESSMENT OF MENTAL CAPACITY

The attorney should follow a consistent and deliberate process to preliminarily screen clients for capacity. The attorney should document the observations that support the attorney's conclusion that capacity is an issue. A number of different tests may be used to assess capacity. The attorney's process should be followed and documented in every file.<sup>208</sup> However, the assessment portions of a client interview arguably should not grow to simply a boiler-plate set of questions for every client in every situation. Listed below are a sample of five commonly used exams that are seemingly easy to administer by attorneys, the first three are medical-models, and the final two are more in the realm of legal-models.<sup>209</sup>

Before undertaking to administer any of the tests discussed below, the attorney should be reminded of a few things. Regardless of opinions by medical or legal professionals, if a judge ever needs to make a final and binding decision about an individual's true mental capacity at a specific time and place for a specific transaction, then, "[a]s a practical matter it would seem that even a purely functional or behavioral test of capacity necessarily must rely on medical or clinical testimony to distinguish merely bad judgment or eccentricity from mental incapacity."<sup>210</sup> So, the attorney, when administering any of the following tests, or any others that make sense in his or her legal practice, is merely ascertaining whether a normal client-lawyer relationship can be maintained under the Model Rules, and whether the attorney chooses to take protective actions on behalf of a non-consenting client under Model Rule 1.14(b). Additionally, while administering any preferred mental capacity exam, the attorney, although not

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207. See *infra* Appendix A(d).

208. French, *supra* note 20, at 20. The Elder Law Attorney "develops and utilizes appropriate skills and processes for making and documenting preliminary assessments of client capacity to undertake the specific legal matters at hand." *Id.* (emphasis omitted).

209. For illustrative purposes, the medical models are discussed first.

210. Lawrence A. Frolik, *Science, Common Sense, and the Determination of Mental Capacity*, 5 PSYCHOL. PUB. POL'Y & L. 41, 47 (1999) (arguing that even though states, such as New Hampshire, are updating their guardianship statutes, moving away from the medical model of capacity to the functional model of capacity, at an adult guardianship hearing, expert testimony from at least one licensed physician is still mandatory).

clinically trained, should at least understand some of the body language and other visual indications of diminished capacity. For example, if the client demonstrates short-term memory loss, exhibits communication or comprehension problems, has a lack of mental flexibility, calculation problems or otherwise seems disoriented, then these cognitive signs might indicate potential diminished capacity;<sup>211</sup> if the client shows emotional distress, emotional lability, or is otherwise acting inappropriately, then those behavioral signs might indicate potential diminished capacity;<sup>212</sup> and, if the attorney observes delusions, hallucinations, or poor grooming, then those might be behavioral signs of diminished mental capacity.<sup>213</sup>

One of the most often cited medical-model tests is the Mini Mental Status Exam (“MMSE”).<sup>214</sup> It is a test where the assessor first asks the individual about orientation (What is today’s date? What hospital are we in? What floor are we on?); immediate recall (assessor says three simple words out loud and asks the individual to repeat); attention and calculations (count backwards from 100 in multiples of 7; and, spelling simple words backwards); delayed recall (repeat the three simple words from an earlier part of the test); language (assessor shows a very simple object and asks for the name of the object; assessor says a simple sentence and asks the individual to repeat; the assessor gives the individual a piece of paper and provides three successive commands to the individual; assessor holds up a pre-printed card ordering the individual to do a simple task); and finally, the assessor provides the individual with a piece of paper and a pen and asks the individual to first come up with and write a simple sentence and then asks the individual to look at a drawing of intersecting shapes and to repeat the drawing.<sup>215</sup>

Another similar medical-based exam is the Mini-Cog test<sup>216</sup> (the assessor chooses one of six sets of three words, depending on many factors, and asks the individual to repeat them; then asks the individual to draw a clock, assign numbers 1 through 12, and then draw the

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211. ABA Handbook, *supra* note 18, at 14-15.

212. *Id.* at 15.

213. *Id.* at 15-16.

214. In 1975, two psychiatrists, Marshal F. Folstein and Susan E. Folstein, published their test to measure mental cognitivity (i.e., the general functioning of the brain), but arguably, using the medical distinction, not to measure transaction-specific and time-specific mental capacity. *Folstein Mini-Mental State Exam*, available at <http://enotes.tripod.com/MMSE.pdf> (last visited Mar. 22, 2016); *see also* Marshal F. Folstein, Susan E. Folstein & Paul R. McHugh, “Mini-Mental State” A Practical Method for Grading the Cognitive State of Patients for the Clinician, 12 J. PSYCHIATRIC RES. 189 (1975), [http://www.journalofpsychiatricresearch.com/article/0022-3956\(75\)90026-6/pdf](http://www.journalofpsychiatricresearch.com/article/0022-3956(75)90026-6/pdf).

215. *Id.*

216. S. Borson, *Instructions for Administration & Scoring*, ALZHEIMERS ASSOCIATION (2016), [http://www.alz.org/documents\\_custom/minicog.pdf](http://www.alz.org/documents_custom/minicog.pdf).

hour and minute hand so that the time reads 10 minutes after 11:00; and then the assessor asks the individual to repeat those earlier three words).

A third commonly used medical-based exam (which is similar to the other two) is the Montreal Cognition test<sup>217</sup> (first the assessor instructs and monitors the individual's visuospatial and executive functions; then asks the individual to name some pre-drawn animals; then asks the individual to repeat a set of five words to test memory; then three exercises testing the individual's attention; two exercises testing the individual's language; some abstraction exercises; delayed recall; and then at the assessor's option, some questions on orientation).

While there are tests developed for attorneys to administer rather than medical professionals, they are based on the above medical models and therefore, can only be effectively administered by an attorney who at least has a comfort level with the medical terms and cognitive functions that indicate the individual's mental capacity.

One test is known as the Margulies approach (or paradigm),<sup>218</sup> which suggests six categories of questions and discussion points for the attorney to satisfy him or herself that the client understands all of the inherent risks and based on his or her internal value system, and is therefore communicating a rational decision back to the attorney.

Finally there is a different test developed by an attorney, called the Baird Legal Capacity Questionnaire,<sup>219</sup> which provides the assessor with open ended questions to ask of the client, and which seemingly provides an indication of testamentary capacity, which might be helpful if the client is looking to draft or amend a will or estate plan.

However, it is imperative that any assessor, including an attorney, receives proper training in using and administering any of these (or other suitable) examinations, in properly assigning a score to the exam, and most importantly, in understanding what the score indicates (and what it does not). Attorneys are cautioned about using the

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217. Available for health professionals only at <http://www.mocatest.org/>. The English version of the test is available to the public through [http://echo.unm.edu/wp-content](http://echo.unm.edu/wp-content/uploads/2014/07/clinic-dementia-MOCA-English.pdf)

[/uploads/2014/07/clinic-dementia-MOCA-English.pdf](http://echo.unm.edu/wp-content/uploads/2014/07/clinic-dementia-MOCA-English.pdf).

218. Peter Margulies, *Access, Connection, and Voice: A Contextual Approach to Representing Senior Citizens of Questionable Capacity*, 62 *FORDHAM L. REV.* 1073, 1098 (1994); see also ABA Handbook, *supra* note 18, at 18-19. "The factors contained in this Comment [6] to Rule 1.14 actually derive from a recommendation at the National Conference on Ethical Issues in Representing Older Clients, 62 *Fordham L. Rev.* (1994), and, in particular, from [the Margulies] Article prepared for the conference." *Id.* at 1075 n. 5.

219. Baird C. Brown, *The Legal Capacity Questionnaire*, KLEPS LAW OFFICE, <http://www.klepslawoffice.com/The%20Legal%20Capacity%20Questionnaire.pdf> (last visited Mar. 22, 2016).

medically-based cognitive screening tests: there is a limited yield of information to truly assist the attorney, the attorney might overly rely on the single test and its resulting score, as with all tests, there are risks of false positives and false negatives, individuals generally improve if some other professional assessed them with the same test in the past, and the results really do not clearly indicate whether the client has the requisite legal capacity to enter into various legal transactions.<sup>220</sup>

#### D. OTHER CONSIDERATIONS WHEN AN ATTORNEY ASSESSES MENTAL CAPACITY

So, as intelligent and observant, but not clinically trained professionals, this Article suggests that attorneys use their “gut” reaction with clients. On one end of the spectrum, based solely upon the client’s normal conversation, the attorney does not suspect any permanent or temporary diminishment of the client’s mental capacity, so the attorney can maintain a normal client-lawyer relationship without any concern of Model Rule 1.14. On the other end of the spectrum, the client is subjectively, objectively, and ostensibly lacking mental capacity, so the attorney must absolutely apply the rules, comments, any jurisprudence, and his or her own best practices of Model Rule 1.14. In the middle of the spectrum, however, is where the attorney, in his or her “gut,” thinks something is not right. This is the point in which the attorney is arguably on notice that there might be some level of diminished capacity, and that Model Rule 1.14 might control.<sup>221</sup>

Here, there are two stages of any assessment:<sup>222</sup> first, take steps to optimize capacity (interview the client alone, adjust the interview environment<sup>223</sup> to enhance communication, know the client’s value

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220. ABA Handbook, *supra* note 18, at 21-22.

221. See, e.g., Sandra Swantek, “Decisional Capacity” presentation at Prof. Kozak’s “Informed Consent” class at The John Marshall Law School, Chicago, IL (April 10, 2015) (copy of the presentation on file with the author). Although there is no single marker, there are some “red flags,” such as memory loss, communication problems, lack of mental flexibility, calculation problems, disorientation, getting lost in a familiar place, automobile accidents, and an increasing use of alcohol or other drugs. *Id.*

222. Sabatino, *supra* note 195.

223. See, e.g., Swantek, *supra* note 221. Some physical obstacles are: excessive noise, glare, an over-stimulating environment, poorly arranged furniture; some life changes include: grief, loss of physical ability, change in job/income, fatigue, depression; some medical issues include: any medications that have an effect on capacity, which can be temporarily stopped or modified to perform an accurate assessment, and other potentially reversible medical or psychiatric factors contributing to diminished capacity: waxing/waning of chronic conditions, depression, anxiety, schizophrenia, psychosis, delirium, or dementia; and any other environmental factors such as level of education, cultural or language barriers, low health care literacy, elder abuse, neglect, exploitation, and whether providing some supports or accommodations could possibly maximize capacity.

framework, and presume capacity),<sup>224</sup> and second, perform a preliminary assessment (obtain consent, do a physical exam, perform the standardized screen the attorney is properly trained to use, use communication skills to assess task-specific mental capacity, and then in borderline cases, use another professional for a consultation or referral). But, as an attorney, remember the three D's of mental capacity assessment: documentation, documentation, and documentation.

In cases in which a client's capacity may be compromised, the lawyer may utilize a number of practical techniques to maximize that capacity. Physical surroundings may be adapted to maximize the client's capacity level. For example, because many clients with diminished capacity suffer from difficulties with sight and hearing, the lawyer may compensate for these impairments by minimizing background noise and glare, directly facing the client, and speaking slowly. In addition, because many adults function best at certain times of day (generally the morning), the attorney should determine the best time of day for a particular client, and arrange meetings to accommodate that schedule. The lawyer should also consider making appointments at the older client's home, where he or she is more comfortable and likely to function more fully.<sup>225</sup>

As the population ages, all attorneys and firms should establish general business practices that red-flag any client who might have diminished capacity, but which will balance the presumption of capacity and the presumption of every client's respective autonomy with the risk of allowing a client with diminished capacity to be harmed and a risk of a resulting malpractice liability.<sup>226</sup> Attorneys should not react on a gut instinct alone when assessing a client's mental capacity, but they can use their gut to detect potential issues with diminished capacity that require further investigation.<sup>227</sup> Since an untrained attorney's assessment of capacity is subjective, an uninterested third party professional diagnostician can provide an independent and objective assessment; however, the attorney must always remember that task-

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224. *Id.* Some mitigating factors that might simply be discussed with the individual, or with consent, the individual's primary care physician, include: stress, grief, depression, reversible medical conditions, recent hearing or vision loss, education, language, socio-economic or cultural background.

225. Vanarelli, *supra* note 139, at 16-17.

226. *See* Stasi, *supra* note 39, at 696 (opining that each attorney must reconcile within himself or herself any personal biases of presumed capacity or fears of malpractice suits, otherwise, he or she might arrive at too many erroneous conclusions). Unfortunately, as the author elsewhere advocates for the elimination of ageism, the statement should more be about individuals losing mental capacity at various points in time throughout their life, regardless of chronological age as a primary indication.

227. Vanarelli, *supra* note 139, at 15.

specific capacity is different than the capacity needed to simply maintain a normal client-attorney relationship.<sup>228</sup>

In assessing diminished mental capacity, lawyers should develop a routine and normal method, which can be any of the standardized tests. However, as with all aspects of competency, any test is only good if the assessor is properly trained in administering it and in understanding the results.<sup>229</sup>

One of the barriers for attorneys is the way they set up their practices, as they are not allowed to “form a partnership with a nonlawyer if any of the activities of the partnership consist of the practice of law.”<sup>230</sup> This generally precludes an attorney from doing anything other than hiring an employee who might have an expertise in mental capacity assessments, especially if that professional envisions ownership interests in the practice. Some creative attorneys, after a great deal of planning and investigation into all of the state-specific rules of professional conduct, might have an ownership in a law practice, and then additionally ownership interests in a corporation that does all ancillary services (such as counseling and assessing mental capacity), but that does not offer any purely legal services.<sup>231</sup>

#### E. DOES UNDUE INFLUENCE CAUSE THE CLIENT TO APPEAR TO HAVE DIMINISHED CAPACITY?

One indication of an individual’s possible diminished capacity is his or her insistence on the inclusion of a family member, friend, or caregiver in all conversations and interviews, especially if that third person is the one who makes initial contact with the attorney on be-

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228. Stasi, *supra* note 39, at 710-11.

229. Whether or not some such training seminars count towards the attorney’s required continuing education requirements, attorneys should find time to learn from clinicians about these standardized tests. This author advocates that local and national bar associations should offer such programs.

230. MODEL RULES OF PROF’L CONDUCT r. 5.4(b) (AM. BAR ASS’N 2013).

231. See Whipple, *supra* note 75, at 400. Even though the rule in the District of Columbia specifically allows attorneys to set up a legal services firm where non-attorney professionals can be employed to practice their expertise, a staff member who is a psychologist or psychiatrist specializing in capacity assessments may cause potential clients to fear that there is a default presumption within that legal services firm that the client has diminished capacity, unless the individual can overcome that presumption. Note that this is similar to medical doctors who co-own a medical practice, and then also have ownership interests in a blood laboratory testing facility that employs non-licensed physicians, but which is physically in the same building as the medical practice. This Article is in no way advocating that all law practices turn into mental capacity assessment mills; rather, if the attorney wants to somehow retain fees for mental capacity assessments that would otherwise be lost to outside professionals when any individual is referred out for a mental capacity assessment, and if the attorney wants to better control the emotions that might spew forth when an individual is told that his or her mental capacity is at issue, then this might be one potential business path to investigate.



half of the elderly individual.<sup>232</sup> However, Model Rule 1.14 instructs attorneys on representing clients with diminished capacity and not representing clients under undue influence. Although the person unduly exercising influence over the client might only be doing so because of the client's diminished capacity, diminished capacity cannot be assumed.

There are two legal theories of undue influence: the susceptibility model, which assumes the person who has been unduly influenced is victimized by another person due primarily to mental weakness; and the presumption model, which focuses in on the relationship between the two individuals.<sup>233</sup> "[T]he first element to be proved in an undue influence claim is the testatrix's *susceptibility* to undue influence."<sup>234</sup>

"To prove undue influence, the person seeking to set aside the transfer [in a contested will hearing] must show that the undue influence was enough to 'overpower the will of the grantor to the extent that he [was] prevented from voluntary action and [was] deprived of free agency.'"<sup>235</sup> "The mere existence of motive and opportunity does not give rise to an inference that undue influence was exercised in fact . . . . He or she must show that a confidential relationship existed in fact, which includes circumstances making the donor susceptible to influence."<sup>236</sup>

Undue influence is the exercise of sufficient control over a person to destroy his free agency and make him do what he would not have

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232. Roberta K. Flowers, *Ethics and Elder Law: Teaching Students to Ask the Right Questions*, 40 STETSON L. REV. 133, 138-39 (2010).

233. Spar, *supra* note 189, at 9-10. In jurisdictions where the presumption model prevails, the mere existence of a confidential and trusting relationship, such as that between an elderly person with mental impairment and his or her primary caregiver, may be enough to shift the burden of proof that undue influence did not occur to the recipient.

234. Anonymous, *Disinherited Sons Fail to Show Mother was Susceptible to Undue Influence In Estate of Elliott*, 537 NW2d 660 (SD 1995), 113 BANKING L.J. 424, 425 (1996) (emphasis added). For a detailed history of undue influence, see Carla Spivack, *Why the Testamentary Doctrine of Undue Influence Should Be Abolished*, 58 KAN. L. REV. 245, 249-50 (2010). In England, the policy of contesting wills deemed to be the result of unfair or unconscionable dealing began as an equitable action available in the courts of Chancery, a twin to the idea of invalidating technically valid contracts deemed to be the result of overreaching. While ecclesiastical courts had jurisdiction over wills concerning personal property (until 1540 land could not be passed by will), there are no instances of will contests in ecclesiastical courts. Moreover, by the Reformation, Chancery and other equity courts had jurisdiction over probate matters and offered ecclesiastical courts competition in this area. Over time, jurisdiction over these cases gradually shifted from Chancery to law courts for a number of reasons: competition for business led law courts to become more willing to hear equitable causes of action; litigants in cases involving real property often found their way into Chancery; and, law and equity were finally officially merged in the nineteenth century. *Id.*

235. David W. Kirch, *Balancing Discretion to Give And Undue Influence Concerns*, 38 EST. PLAN. 28, 29 (2011) (quoting *Krueger v. Ary*, 220 P.3d 923 (Colo. App., 2007)).

236. *Id.* at 31.

done if such control had not been exercised. The degree of influence necessary to be exerted over the mind of the testator to render the influence improper must be from some cause or means as to induce him to act contrary to his wishes and to make a different disposition of his estate from what he would have done if left to his own discretion. “The elements of undue influence are: (1) a person subject to influence; (2) an opportunity to exert undue influence; (3) a disposition to exert undue influence; and (4) a result indicating undue influence.” No direct evidence is required to prove undue influence, but a foundation must be laid that can fairly and convincingly lead to that conclusion.<sup>237</sup>

The foundation [of undue influence] is established when it has been shown that a stranger-beneficiary has occupied the relation of religious adviser, guardian, attorney, or physician toward the testator. In such cases, the rule of procedure places the burden, often erroneously termed “duty,” upon the legatee of proving absence of undue influence.<sup>238</sup>

A court found no incidence of undue influence by a son included in the final version of his mother’s will, since evidence was presented that mom had continually expressed the fact that she had favorites among her sons, and that those included in the favorites category changed throughout mom’s life, and that the various iterations of her will named some sons and excluded others.<sup>239</sup>

Some caution that “[p]eople with dementia become much more susceptible to undue influence because they may have trouble understanding the risks of certain transactions to themselves.”<sup>240</sup> When individuals execute wills, the test for undue influence is whether the testator’s mind is so controlled by another person so that the executed

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237. *Opinion of the Connecticut Probate Court: In Re Julius B. Orsini, Deceased (Undue Influence)*, Probate Court, District of Water, 25 QUINN. PROB. L.J. 9, 10-11 (2011). However, some authors question the doctrine of undue influence. See, e.g., Spivack, *supra* note 234, at 246. The unsatisfactory doctrine of undue influence challenges us to decide what we, as a society, care about. If we care about protecting families, let legislatures institute forced heirship. If we value testamentary freedom over protecting families, let courts give it effect. If we care about the elderly, let us institute measures that will protect them more effectively than a doctrine that acts only after a testator’s death. Whatever our social priorities, the conclusion is clear: the doctrine of undue influence must be abandoned. *Id.*

238. *Wills—Undue Influence—Burden of Proof—Confidential Relationship*, 29 YALE L.J. 133, 133 (1919).

239. Anonymous, *Disinherited Sons Fail to Show Mother was Susceptible to Undue Influence In Estate of Elliott*, 537 NW2D 660 (SD 1995), 113 BANKING L.J. 424, 425 (1996) (holding that the mom therefore disposed of her property “exactly as she pleased” at the time the final will was executed).

240. Robben, *supra* note 49, at 21 (quoting Dr. Linda Ganzini, professor of psychiatry and medicine at Oregon Health & Science University).

document is actually the desires of the testator.<sup>241</sup> Although children's wishes and desires generally have some minor, and possibly even major, influence on the parent, it only rises to the level of undue influence when the elderly parent makes legal decisions or executes documents that are "contrary to [their] original intent or plan."<sup>242</sup>

## V. CONCLUSION

All attorneys and all of their respective clients must understand that currently, or over time, some of their clients, as individuals, might have permanent or temporary periods of diminished mental capacity. However, it is the attorney's responsibility to assess whether the client has enough capacity to establish or maintain a normal client-lawyer relationship, and then, if the client has adequate mental capacity to provide informed consent to the attorney. The attorney is also supposed to zealously advocate for the client, which allows the attorney to choose to take affirmative actions to protect the client during periods where the client lacks the capacity to give the attorney specific informed consent. These requirements are contained in the current version of Model Rule 1.14, its associated 10 comments, and in conjunction with all of the other Model Rules in 1.1 through 1.18, which, collectively, is titled "Client-Lawyer Relationship."

Although it would arguably benefit attorneys, as professionals, and each individual, as a prospective client with diminished capacity, if Congress would legislate a federal definition of mental capacity, or if the Uniform Law Commission or a similar body would promulgate a suggested normative legal definition for mental capacity to be universally adopted by all states. In so doing, it might be instructive to look at the successes and unintended consequences of England's decade-old Mental Capacity Act of 2005.<sup>243</sup> Until then, case law is the only way to understand how local courts, and assumedly those same local attorney disciplinary bodies, define mental capacity, and how attorneys can comply with their local version of Model Rule 1.14.

Appendix A provides the current wording of Model Rule 1.14, but red-lined indicating the amendments proposed by this author. Appendix B provides a fifty state comparison of each state's respective rule about representing a client with diminished capacity as it might differ from the exact wording of Model Rule 1.14. Finally, Appendix C pro-

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241. Spar, *supra* note 189, at 9.

242. Holten D. Summers, *Competency and Undue Influence: Issues for Elder Estate Planning*, 84 ILL. B.J. 18, 19 (1996) (emphasis added).

243. Mental Capacity Act of 2005, c. 9, §§ 1-69, schs. 1-7 (Eng.) available at, [http://www.legislation.gov.uk/ukpga/2005/9/pdfs/ukpga\\_20050009\\_en.pdf](http://www.legislation.gov.uk/ukpga/2005/9/pdfs/ukpga_20050009_en.pdf).

vides the current wording of the comments to Model Rule 1.14, but red-lined indicating the amendments proposed by this author.

## Appendix A

*ABA Model Rule of Professional Conduct Rule 1.14 – Current Version With Suggested Amendments.*

(a) When the lawyer reasonably believes that 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 the lawyer takes action ~~is taken and~~ because the client cannot adequately act in the client's to protect his or her own interests, then the lawyer may take reasonably necessary protective action, including consulting with individuals, medical professionals, mediators, or courts of law 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. Similarly, if any other Rules need to be violated to protect the client from harm, then those Rules can only be violated to the extent reasonably necessary to protect the client's interest.

(d) If the lawyer reasonably believes that the client has some level of diminished capacity, but finds a way to maintain a normal client-lawyer relationship under (a) and does not take protective actions on behalf of the client under (b) and (c), then the lawyer must determine whether the client has sufficient mental capacity at that time and at that place under appropriate state law, for the client to enter into the desired transaction, either by affixing his or her signature to a document prepared or reviewed by the lawyer or by affirmatively asking the lawyer to take the appropriate steps needed to legally bind the client to that transaction or decision.

## Appendix B

Comparison of *ABA Model Rule of Professional Conduct* Rule 1.14 with each state's respective version of the rule.

***Alabama Rules of Professional Conduct (effective June 23, 2008).*** ([http://judicial.alabama.gov/library/rules/cond1\\_14.pdf](http://judicial.alabama.gov/library/rules/cond1_14.pdf)).

**Rule 1.14. – Client With Diminished Capacity.**

(a) When a client's ~~capacity~~ ability to make adequately considered decisions in connection with a the 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.

***Alaska Rules of Professional Conduct.*** (<http://www.courtrecords.alaska.gov/webdocs/rules/docs/prof.pdf>).

**Rule 1.14 – Client With ~~Diminished~~ Impaired Capacity**

(a) When a client's capacity to make adequately considered decisions in connection with a representation is ~~diminished~~ impaired, 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~~ impaired capacity, that the client is at risk of substantial physical, financial, or other harm unless action is taken, and that the client 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~~ The confidences and secrets of a client with ~~diminished~~ impaired 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.

**Arizona Rules of Professional Conduct** (<http://www.azbar.org/Ethics/RulesofProfessionalConduct/ViewRule?id=33>).

**Rule 1.14 – Client With Diminished Capacity**

(a) When a client's capacity to make adequately considered decisions in connection with a the 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 ER~~ 1.6. When taking protective action pursuant to paragraph (b), the lawyer is impliedly authorized under ~~Rule ER~~ 1.6(a) to reveal information about the client, but only to the extent reasonably necessary to protect the client's interests.

**Arkansas Rules of Professional Conduct.** (<https://courts.arkansas.gov/rules-and-administrative-orders/%5Bcurrent%5D-arkansas-rules-of-professional-conduct>).

**Rule 1.14 – Client With Diminished Capacity**

(a) When a client's ~~capacity~~ ability to make adequately considered decisions in connection with a the representation is diminished, whether because of minority, mental ~~impairment~~ disability 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 actions to protect the client, and, in appropriate cases, seeking the appointment of a guardian ad litem, conservator or guard-

ian. Extreme caution must be exercised by a lawyer before nominating the lawyer, a member or employee of the lawyer's firm, or a relative within the third degree or relationship to serve as 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) [sic] to reveal information about the client, but only to the extent reasonably necessary to protect the client's interests.

**California Rules of Professional Conduct.** (<http://rules.calbar.ca.gov/Rules/RulesofProfessionalConduct/CurrentRules.aspx>).

**There is no corresponding rule**

(note, the Commission's Proposed Rule for Rule 1-14 – Clean Version, dated 2-27-10, can be found at <http://ethics.calbar.ca.gov/LinkClick.aspx?fileticket=qylq1fX2ngI%3D&tabid=2161>).

**Colorado Rules of Professional Conduct (effective January 1, 1993).** (<http://www.cobar.org/rulesofprofessionalconduct>).

**Rule 1.14. Client with Diminished Capacity.**

—adopted the exact wording of Model Rule 1.14.

**Connecticut Rules of Professional Conduct.** (<http://www.jud.ct.gov/publications/PracticeBook/PB.pdf>).

**Rule 1.14. Client with Diminished Impaired Capacity**

(a) When a client's capacity to make or communicate adequately considered decisions in connection with a representation is diminished impaired, 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 unable to make or communicate adequately considered decisions, ~~is at risk of likely~~ to suffer 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~~ legal representative.

(c) Information relating to the representation of a client with ~~diminished~~ impaired capacity is protected by Rule 1.6. When taking protective action pursuant to subsection (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.

***Delaware Rules of Professional Conduct (effective July 1, 2003).*** (<http://courts.delaware.gov/rules/DLRPCFebruary2010.pdf>).

**Rule 1.14. Client with diminished capacity.**

—adopted the exact wording of *Model Rule 1.14*.

***Florida Rules of Professional Conduct.***

([https://www.floridabar.org/TFB/TFBResources.nsf/Attachments/0A266C6138C4A15685256B29004BD617/\\$FILE/RRTFB%20CHAPTER%204.pdf?OpenElement](https://www.floridabar.org/TFB/TFBResources.nsf/Attachments/0A266C6138C4A15685256B29004BD617/$FILE/RRTFB%20CHAPTER%204.pdf?OpenElement)).

**Rule 4-1.14. Client with ~~diminished capacity~~ under a Disability.**

(note, this is the exact wording of the first iteration of the ABA *Model Rule 1.14*, before amendments in \*\*\*)

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

(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.~~

***Georgia Rules of Professional Conduct (effective January 1, 2001).*** (<http://www.gabar.org/barrules/handbookdetail.cfm?what=rule&id=107>).

**Rule 1.14. Client with Diminished Capacity.**

—adopted the exact wording of *Model Rule 1.14*

(note, immediately following the rule is the following statement: “The maximum penalty for a violation of this Rule is a public reprimand.”).

***Hawai'i Rules of Professional Conduct (effective January 1, 2014).*** ([http://www.courts.state.hi.us/docs/court\\_rules/rules/hrpcond.htm](http://www.courts.state.hi.us/docs/court_rules/rules/hrpcond.htm)).

**Rule 1.14. Client with ~~Diminished Capacity~~ Under a Disability.**

(a) When a client's ~~capacity~~ ability 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 of these Rules. 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.

***Idaho Rules of Professional Conduct (effective July 1, 2014).*** (<https://isb.idaho.gov/pdf/rules/irpc.pdf>).

**Rule 1.14 – Client With Diminished Capacity**

—adopted the exact wording of *Model Rule 1.14*

***Illinois Rules of Professional Conduct (effective January 1, 2010).*** ([http://www.state.il.us/court/supremecourt/rules/art\\_viii/artviii\\_new.htm](http://www.state.il.us/court/supremecourt/rules/art_viii/artviii_new.htm)).

**Rule 1.14 – Client With ~~Diminished Capacity~~**

—adopted the exact wording of *Model Rule 1.14*.

***Indiana Rules of Professional Conduct (effective January 1, 2013).*** ([http://www.in.gov/judiciary/rules/prof\\_conduct/](http://www.in.gov/judiciary/rules/prof_conduct/)).

**Rule 1.14 – Client With Diminished Capacity**

—adopted the exact wording of *Model Rule 1.14*

(note, immediately following the rule is the following: “(d) This Rule is not violated if the lawyer acts in good faith to comply with the Rule.”).

***Iowa Rules of Professional Conduct (effective September 2012).*** (<https://www.legis.iowa.gov/docs/ACO/CourtRulesChapter/12-31-2012.32.pdf>).

**Rule 32:1.14 – Client With Diminished Capacity**

—adopted the exact wording of *Model Rule 1.14*

(note, for internal cross-referencing purposes only, in paragraph (c), reference is made to Rule 32:1.6).

***Kansas Rules of Professional Conduct (effective July 1, 2007).*** (<http://www.kscourts.org/rules/Rule-Info.asp?r1=Rules+Relating+to+discipline+of+Attorneys&r2=41>).

**Rule 1.14 – Client With Diminished Capacity**

—adopted the exact wording of *Model Rule 1.14*.

***Kentucky Rules of Professional Conduct (effective July 15, 2009).*** ([https://c.ymcdn.com/sites/www.kybar.org/resource/resmgr/SCR3/SCR\\_3.130\\_\(1.14\).pdf](https://c.ymcdn.com/sites/www.kybar.org/resource/resmgr/SCR3/SCR_3.130_(1.14).pdf)).

**Rule SRC 3.130(1.14) – Client With Diminished Capacity**

—adopted the exact wording of *Model Rule 1.14*.

***Louisiana Rules of Professional Conduct (effective September 30, 2011).*** (<http://lalegaethics.org/louisiana-rules-of-professional-conduct/article-1-client-lawyer-relationship/rule-1-14-client-with-diminished-capacity/>).

**Rule 1.14 – Client With Diminished Capacity**

—adopted the exact wording of *Model Rule 1.14*.

***Maine Rules of Professional Conduct (effective January 1, 2012).*** ([http://mebaroverseers.org/regulation/bar\\_rules.html?id=88205](http://mebaroverseers.org/regulation/bar_rules.html?id=88205)).

**Rule 1.14 – Client With Diminished Capacity**

—adopted the exact wording of *Model Rule 1.14*.

***Maryland Rules of Professional Conduct (effective January 1, 2012).*** (<https://govt.westlaw.com/mdc/Document/N0467F940B79311DBB4ACEAAE7EB7386?viewType=fullText&originationContext>

=Documenttoc&transitionType=categoryPageItem&contextData=(Sc.Default)).

**Rule 1.14 – Client With Diminished Capacity**

—adopted the exact wording of *Model Rule* 1.14

***Massachusetts Rules of Professional Conduct (effective January 1, 2013)***. (<http://www.mass.gov/obcbbbo/rpc1.htm#Rule%201.14>).

**Rule 1.14 – Client With Diminished Capacity**

(a) When a client’s ~~capacity~~ ability 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 that prevents the client from making an adequately consider decision regarding a specific issue that is part of the representation, 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 connection with the representation, 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.

***Michigan Rules of Professional Conduct (effective August 1, 2013)***. (<http://courts.mi.gov/courts/michigansupremecourt/rules/documents/michigan%20rules%20of%20professional%20conduct.pdf>).

**Rule 1.14 – Client With ~~Diminished Capacity~~ Under a Disability**

(note, this is the exact wording of the first iteration of the ABA *Model Rule* 1.14, before amendments in . . . )

(a) When a client’s ~~capacity~~ ability to make adequately considered decisions in connection with a representation is ~~diminished~~ impaired, 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. 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.~~

~~(e) 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.~~

**Minnesota Rules of Professional Conduct (effective July 1, 2011).** (<http://prb.mncourts.gov/rules/Documents/MN%20Rules%20of%20Professional%20Conduct.pdf>).

**Rule 1.14: Client With Diminished Capacity**

—adopted the exact wording of *Model Rule 1.14*

(note, for internal cross-referencing purposes only, in paragraph (c), reference is made to Rule 1.6(b)(3)).

**Mississippi Rules of Professional Conduct (effective July 1, 1987).** ([https://courts.ms.gov/rules/msrulesofcourt/rules\\_of\\_professional\\_conduct.pdf](https://courts.ms.gov/rules/msrulesofcourt/rules_of_professional_conduct.pdf)).

**Rule 1.14: Client Under a Disability**

(note, this is the *exact* wording of the first iteration of the ABA Model Rule 1.14, before amendments in 2002, except for paragraph (c), which was added November 3, 2005)

(a) When a client's capacity ability to make adequately considered decisions in connection with a representation is diminished impaired, 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. 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.~~

~~(c) Information relating to the representation of a client with diminished capacity who may be impaired 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.~~

***Missouri Rules of Professional Conduct (effective July 1, 2007).*** (<http://www.courts.mo.gov/courts/ClerkHandbooksP2RulesOnly.nsf/c0c6ffa99df4993f86256ba50057dcb8/a7dad1ab9dee353b86256ca600521212?OpenDocument>).

**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 next friend, guardian ad litem, conservator or guardian.

(c) Information relating to the representation of a client with diminished capacity is protected by Rule 4-1.6. When taking protective action pursuant to Rule 4-4.14(b), the lawyer is impliedly authorized under Rule 4-1.6(a) to reveal information about the client, but only to the extent reasonably necessary to protect the client's interests.

***Montana Rules of Professional Conduct (effective April 1, 2004).*** ([https://www.law.cornell.edu/ethics/mt/code/MT\\_CODE.HTM](https://www.law.cornell.edu/ethics/mt/code/MT_CODE.HTM)).

**Rule 4-1.14: Client With Diminished Capacity**

—adopted the exact wording of *Model Rule* 1.14.

**Nebraska Rules of Professional Conduct (effective July 18, 2008).** (<http://supremecourt.ne.gov/supreme-court-rules/1842/§-3-50114-client-diminished-capacity>).

**Rule §3-501.14: Client With Diminished Capacity**

—adopted the exact wording of *Model Rule* 1.14.

**Nevada Rules of Professional Conduct (effective September 1, 2013).** (<https://www.leg.state.nv.us/CourtRules/RPC.html>).

**Rule 1.14: Client With Diminished Capacity**

—adopted the exact wording of *Model Rule* 1.14.

**New Hampshire Rules of Professional Conduct (effective September 1, 2013).** ([http://www.courts.state.nh.us/rules/pcon/pcon-1\\_14.htm](http://www.courts.state.nh.us/rules/pcon/pcon-1_14.htm)).

**Rule 1.14: Client With Diminished Capacity**

—adopted the exact wording of *Model Rule* 1.14.

**New Jersey Rules of Professional Conduct (effective January 1, 2004).** ([https://www.law.cornell.edu/ethics/nj/narr/NJ\\_NARR\\_1\\_14.HTM](https://www.law.cornell.edu/ethics/nj/narr/NJ_NARR_1_14.HTM)).

**Rule 1.14: Client With Diminished Capacity Under a Disability**

—adopted the exact wording of *Model Rule* 1.14

(note, for internal cross-referencing purposes only, in paragraph (c), reference is made to ~~Rule~~ RPC 1.6).

**New Mexico Rules of Professional Conduct (effective November 3, 2008).** (<http://swrtc.nmsu.edu/files/2014/12/16-114-Diminished-Capacity.pdf>).

**Rule 1.14 16-114: Client With Diminished Capacity**

—adopted the exact wording of *Model Rule* 1.14

(note, the following bolded sub-headings were added, and for internal cross-referencing purposes only, in paragraph (c), reference is made to ~~Rule 1.6~~ 16-106 NMRA of the Rules of Professional Conduct).

- (a) Client-Lawyer relationship.
- (b) Protective action.
- (c) Protected information.

**New York Rules of Professional Conduct (effective May 1, 2013).** (<http://nycourts.gov/rules/jointappellate/NY-Rules-Prof-Conduct-1200.pdf>).

**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~~ conventional 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.

***North Carolina Rules of Professional Conduct (effective January 1, 2003).*** (<http://www.ncbar.com/rules/rules.asp>).

**Rule 1.14 – Client With Diminished Capacity**

—adopted the exact wording of *Model Rule* 1.14

(note, in paragraph (b), the term “conservator” was removed from the list of appointments that the attorney may seek).

***North Dakota Rules of Professional Conduct (effective August 1, 2006).*** (<http://www.ndcourts.gov/rules/conduct/frameset.htm>).

**Rule 1.14 – Client With ~~Diminished~~ Limited Capacity**

(a) When a client's capacity to make adequately considered decisions in connection with a representation is ~~diminished~~ limited, 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~~ limited capacity, is at risk of substantial physical, financial or other harm unless action is taken, and the client 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.

***Ohio Rules of Professional Conduct (effective June 1, 2014).*** (<http://www.supremecourt.ohio.gov/LegalResources/Rules/ProfConduct/profConductRules.pdf>).

**Rule 1.14 – Client With Diminished Capacity**

—adopted the exact wording of *Model Rule* 1.14

(note, for internal cross-referencing purposes only, in paragraph (c), reference is made to ~~paragraph~~ division (b)).

***Oklahoma Rules of Professional Conduct (effective January 1, 2008).*** (<http://www.oscn.net/applications/oscn/DeliverDocument.asp?CiteID=448877>).

**Rule 1.14 – Client With Diminished Capacity**

—adopted the exact wording of *Model Rule* 1.14.

***Oregon Rules of Professional Conduct (effective January 1, 2014).*** ([https://www.osbar.org/\\_docs/rulesregs/orpc.pdf](https://www.osbar.org/_docs/rulesregs/orpc.pdf)).

**Rule 1.14 – Client With Diminished Capacity**

—adopted the exact wording of *Model Rule* 1.14.

***Pennsylvania Rules of Professional Conduct (effective April 1, 1988).*** (<http://www.pacode.com/secure/data/204/chapter81/subchapter81A.html#1.14>).

**Rule 1.14 – Client With Diminished Capacity**

—adopted the exact wording of *Model Rule* 1.14.

***Rhode Island Rules of Professional Conduct (effective April 15, 2007).*** (<http://www.courts.ri.gov/PublicResources/disciplinaryboard/PDF/Article5.pdf>).

**Rule 1.14 – Client With Diminished Capacity**

—adopted the exact wording of *Model Rule* 1.14.

***South Carolina Rules of Professional Conduct (effective September 1, 1990).*** (<http://www.sccourts.org/courtReg/displayRule.cfm?ruleID=407.0&subRuleID=RULE%201%2E14&ruleType=APP>).

**Rule 1.14 – Client With Diminished Capacity**

—adopted the exact wording of *Model Rule* 1.14.

***South Dakota Rules of Professional Conduct (effective January 1, 2004)***. ([https://www.law.cornell.edu/ethics/sd/code/SD\\_CODE.HTM#Rule\\_1.14](https://www.law.cornell.edu/ethics/sd/code/SD_CODE.HTM#Rule_1.14)).

**Rule 1.14 – Client With Diminished Capacity**

—adopted the exact wording of *Model Rule* 1.14.

***Tennessee Rules of Professional Conduct (effective January 1, 2011)***. ([http://www.tba.org/sites/default/files/2012\\_TRPC\\_1.pdf](http://www.tba.org/sites/default/files/2012_TRPC_1.pdf)).

**Rule 1.14 – Client With Diminished Capacity**

—adopted the exact wording of *Model Rule* 1.14

(note, for internal cross-referencing purposes only, in paragraph (c), reference is made to ~~Rule~~ RPC 1.6).

***Texas Disciplinary Rules of Professional Conduct (effective January 1, 2011)***. ([http://www.texasbar.com/AM/Template.cfm?Section=grievance\\_Info\\_and\\_Ethics\\_Helpline&Template=/CM/ContentDisplay.cfm&ContentFileID=96](http://www.texasbar.com/AM/Template.cfm?Section=grievance_Info_and_Ethics_Helpline&Template=/CM/ContentDisplay.cfm&ContentFileID=96)).

**There is no corresponding rule**

(note, however, that comments 12 and 13 of Rule 1.02, Scope and Objectives of Representation, are categorized under the subheading “Client Under a Disability”).

***Utah Rules of Professional Conduct (effective 2000)***. ([http://www.utcourts.gov/resources/rules/ucja/ch13/1\\_14.htm](http://www.utcourts.gov/resources/rules/ucja/ch13/1_14.htm)).

**Rule 1.14 – Client With Diminished Capacity**

—adopted the exact wording of *Model Rule* 1.14.

***Vermont Rules of Professional Conduct (effective September 1, 1999)***. ([https://www.vermontjudiciary.org/LC/Shared%20Documents/VermontRulesofProfessionalConduct\\_withamendments throughJune2011.pdf](https://www.vermontjudiciary.org/LC/Shared%20Documents/VermontRulesofProfessionalConduct_withamendments throughJune2011.pdf)).

**Rule 1.14 – Client With Diminished Capacity**

—adopted the exact wording of *Model Rule* 1.14 (however, paragraph (c) was modified very slightly and the following new paragraph (d) was added)

(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) or (d), 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.

(d) 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 the person even though the person is unable to establish a client-lawyer relationship or to make or express considered judgments about the matter, provided that the following conditions exist:

(1) The person or another person acting in good faith in that person's behalf has consulted with the lawyer.

(2) 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 acting under this paragraph has the same duties under these rules that the lawyer would have with respect to a client. The lawyer should take steps to regularize the relationship or implement other protective solutions as soon as possible.

***Virginia Rules of Professional Conduct (effective March 1, 2010)*** (<http://www.vsb.org/pro-guidelines/index.php/rules/client-lawyer-relationship/rule1-14/>).

**Rule 1.14 – Client With Diminished Capacity Impairment**  
—adopted the exact wording of *Model Rule 1.14*

(note, in paragraph (a), the word “for” was deleted from the following clause: for some other reason).

***Washington Rules of Professional Conduct (effective September 1, 2006)***. ([http://www.courts.wa.gov/court\\_rules/?fa=court\\_rules.display&group=GA&set=RPC&ruleid=garpc1.14](http://www.courts.wa.gov/court_rules/?fa=court_rules.display&group=GA&set=RPC&ruleid=garpc1.14)).

**Rule 1.14 – Client With Diminished Capacity**  
—adopted the exact wording of *Model Rule 1.14*.

***West Virginia Rules of Professional Conduct (effective April 15, 2016)***. (<http://www.wvdc.org/clientlawyer.htm>).

**Rule 1.14. – Client With Diminished Capacity Under a Disability.**

(note, this is the *exact* wording of the first iteration of the ABA *Model Rule 1.14*, before amendments in 2002)

(a) When a client's capacity ability to make adequately considered decisions in connection with a representation is diminished impaired, whether because of minority, mental disability 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. 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.~~

~~(e) 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.~~

***Wisconsin Rules of Professional Conduct (effective July 1, 2007).*** (<https://www.wicourts.gov/sc/scrule/DisplayDocument.html?content=html&seqNo=45322>).

**Rule SRC 20:1.14 – Client With Diminished Capacity**

—adopted the exact wording of *Model Rule 1.14*

(note, for internal cross-referencing purposes only, in paragraph (c), reference is made to ~~Rule~~ SCR 20:1.6).

***Wyoming Rules of Professional Conduct of Attorneys at Law (effective July 1, 2006).*** (<http://www.courts.state.wy.us/WSC/CourtRule?RuleNumber=62#634>).

**Rule 1.14 – Client With Diminished Capacity**

—adopted the exact wording of Model Rule 1.14 (however, paragraph (c) was modified very slightly and the following new paragraph (d) was added)

(c) Confidential 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.

(d) A lawyer appointed to act as a guardian ad litem represents the best interests of that individual, and shall act in the individual's best interests even if doing so is contrary to the individual's wishes. To the extent possible, however, the lawyer shall comply with paragraph (a) of this rule.

## Appendix C

Comments to ABA *Model Rule of Professional Conduct* 1.14 – Current Version With Suggested Amendments.

[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. Each attorney, therefore, based on legal services provided and diversity in the actual client base, should establish the parameters within which he or she can properly maintain normal client-lawyer relationships, even for clients with diminished capacity.

[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 to 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 decision making 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 decision making autonomy to the least extent feasible, maximizing client capacities and respecting the client's family and social connections. Attorneys can disclose to clients at the beginning of every client-lawyer relationship that there might come a time when the client's mental capacity might become an issue, and to ask the client for a list of potential friends and family members who can be consulted by the attorney at that moment in time, even if the client cannot, or refuses, to provide informed consent at that moment in time. Attorneys can also disclose the requirements under Model Rule 1.14 to the client at the beginning of a professional relationship, and that as part of the assessment, with or without the client's informed consent at that moment in time, the attorney might need to communicate with family or friends who are not on the list, medical professionals, or judges if needed to protect the client. However, the attorney can use this discussion to emphasize that in all cases, and even if there comes a time when the client lacks capacity to provide informed consent, that the attorney will do his or her best to zealously advocate for the client's goals and wishes.

[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 sub-

stantive 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. If the attorney uses any specific test to assess capacity, then it is assumed that the attorney is properly trained and has the requisite competency to administer the test properly and understand the results. Often times, it is obvious to the attorney that a client either has full capacity or has a very low level of capacity. Assessments of the client's decisional capacity is therefore appropriate when the attorney senses that the client might have a permanent or temporary period of diminished mental capacity.

[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.