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Reports of Working Groups on Client Capacity

REPORT OF WORKING GROUP ON CLIENT CAPACITY*

INTRODUCTION

As a starting point, the group spent time discussing each member's experiences, perspectives, personal inclinations, and biases with respect to the question of client capacity. The membership of the group included private practitioners, publicly-funded legal services lawyers, academics, a judge, a geriatric physician, and others. The three authors of conference papers on the topic then provided thumbnail summaries of their draft works.

I. HYPOTHETICALS AND QUESTIONS RAISED

A. *Hypotheticals*

The working group began with a brief review of the statement of the issues provided in the conference materials. The members did not identify any hypotheticals for inclusion in its report.

B. *Questions Raised*

The group raised a series of questions regarding client capacity:

1. How does diminished client capacity affect the lawyer-client relationship and the practice obligations of the attorney?
2. What are the circumstances in which a lawyer must consider questions of client capacity? For example, capacity issues may arise with respect to determining:
   a. whether a lawyer-client relationship can be created in the first place,
   b. the initial goals of representation,
   c. changes in the goals of representation,
   d. litigation settlements, and
   e. disclosures of confidences.
3. How does a lawyer determine capacity with respect to these, or other, determinations?
4. To what extent and how should a lawyer use the following factors:
   a. The consequence of the decision, or "substantive factors."[1]
      i. Should assessments of consequences replace assessments of capacity?
   b. Cognitive functioning tests, or "process factors."[2]

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1. *See* Peter Margulies, *Access, Connection, and Voice: A Contextual Approach to Representing Senior Citizens of Questionable Capacity, in* Ethical Issues in Representing Older Clients, 62 Fordham L. Rev. 1073, 1089 (1994).

2. *See id.*

c. Sliding scale wherein decisions of greater consequence demand higher cognitive functioning.
d. Medical diagnosis or evaluation.
i. Can a lawyer turn to outside resources to make these determinations without violating attorney-client ethical obligations regarding loyalty, confidentiality, or zealous advocacy?
e. Values history.
f. Other assessments by the attorney.

5. How does a lawyer's assessment of capacity factor into the way he or she counsels clients and makes key decisions?
a. How much persuasion can a lawyer use?
b. How much should a lawyer factor in the legitimate interests of others?
c. How should a lawyer respond to variable or intermittent levels of capacity?

6. What are a lawyer's options for identifying and acting in his or her client's best interest in spite of the client's stated wishes if the lawyer perceives the client to be of diminished capacity?
a. Are the lawyer's options different if the client is passive and voices no wishes at all?
b. Can a lawyer seek a guardian, consult the client's family, or act as *de facto* guardian?
c. Does a principle of "least restrictive alternative" apply to the choice of options?

II. DISCUSSION

One way the group organized these issues was to consider the points in time and the context in which they arise in actual cases. The first capacity-related question a lawyer faces is whether a potential client can even establish an attorney-client relationship. Without client capacity to enter into such a relationship, the conventional agency paradigm suggests that the relationship does not exist. Once an attorney-client relationship is established, capacity again becomes an issue if there is doubt about the client's capacity to determine the objectives of representation. Finally, capacity issues may arise at a later point in time, after the lawyer and client have had a relationship, if the client appears to be losing capacity.

The meaning of capacity and the lawyer's obligations or options may differ at each of these points in time. Moreover, at each of these points in time, the lawyer's obligations and options may also differ depending on the context of representation. Here, the group made the general distinction between litigation and transactional undertakings. The latter would include any non-litigative tasks, such as estate planning, contracts, or transfers of property. In litigation, the adversarial process and the present involvement of judicial authority may lend itself to different solutions than those available in a transactional context, where decisions are made outside the sphere of formal due process and judicial oversight.

Peter Margulies described three core values as the basis for analysis of

the lawyer's responsibility to older clients.[3] He identified access to legal assistance, connection to a web of relationships that define the individual, and the importance of letting the client's voice be heard. Margulies offered six interactive factors in a contextual approach to determining capacity. The first three factors are functional variables: ability to articulate reasoning behind a decision, variability of state of mind, and appreciation of the consequences of a decision. The latter three factors are substantive variables: irreversibility of a decision, substantive fairness, and consistency with lifetime commitments. During the course of the working group meeting, the members incorporated these factors into their recommendations.

Dr. Robert Roca described the physician's role in determining decisional capacity as the asking of two questions.[4] First, the physician should ask whether the client-patient has a mental disorder. Second, if so, the physician should ask whether the symptoms of this disorder specifically interfere with the capacity to make the decision at hand. Roca emphasized that both questions are critical. He noted that the diagnosis of a mental disorder does not by itself imply decisional incapacity—actual, impaired decision-making must be in evidence. An unwise or eccentric decision by itself, however, does not indicate incapacity. It must be shown that a poor decision is the product of a recognized disabling condition. Diagnosis is thus a critical anchor and validator in judgments about capacity.

Dr. Roca described the clinical methods by which physicians make diagnoses, reviewed the conditions that most often compromise decisional capacity in the elderly, and discussed the application of this approach to particular cases. Discussion of the Roca paper led the working group to articulate the predominant view that a lawyer cannot simply defer to a physician for judgments about capacity. While a physician may be able to render a valid judgment about the degree of interference with some activities, for example a health care decision, a physician cannot render a judgment about every relevant activity or decision of an individual. Moreover, a physician is not always available and, even if available, referral may not always be possible or prudent for a particular client. Thus, the working group generally felt that a lawyer, by necessity, must accept responsibility for determining when to question capacity and how to respond appropriately to the situation.

Jan Ellen Rein looked at a particular range of circumstances, specifically situations in which a client makes a decision that is arguably self-destructive or antisocial.[5] Rein sought solutions that do not require a

3. *See id.* at 1076.

4. *See* Robert P. Roca, *Determining Decisional Capacity: A Medical Perspective*, *in* Ethical Issues in Representing Older Clients, 62 Fordham L. Rev. 1177, 1187 (1994).

5. *See* Jan E. Rein, *Clients with Destructive and Socially Harmful Choices—What's an Attorney to Do?: Within and Beyond the Competency Construct*, *in* Ethical Issues in Representing Older Clients, 62 Fordham L. Rev. 1101 (1994).

lawyer to find client incompetency. She suggested that, both for reasons of public policy and to protect individual autonomy, the group should develop criteria for interfering with harmful client decisions or activities rather than rely on findings of incompetency to justify deviations from the normal attorney-client relationship. While the group did not generally accept the suggestion to eliminate incapacity as a justification for treating a client differently, Rein's suggestions to focus on characteristics of specific behavior rather than on characteristics of the person and to limit the degree of intrusion into individual autonomy and dignity heavily influenced the group's final recommendations.

During the course of discussion, the working group eventually distilled the issue of client capacity into two broad questions concerning the determination of incapacity and the range of permissible protective actions. A third question arose from the discussion of permissible protective actions involving situations in which an attorney-client relationship has not been clearly established, yet quick action is needed to protect an important client interest. The group also discussed the issue of client confidentiality as it relates to capacity questions. Finally, the group concluded that there is a need for a multi-disciplinary orientation to education and practice.

A. *Question One: What Are the Appropriate Standards and Processes for Determining Whether a Client's or Purported Client's Decision-Making Capacity Is Impaired?*

Discussion of the lawyer's role in making capacity determinations involved a sorting out of several, sometimes conflicting, realities. These included the important, but limited, role and expertise of physicians as described in Robert Roca's paper, the lack of training of most attorneys in gerontology and assessment of mental capacity, the fact that capacity is not global but involves innumerable gradations of capacity across many functions, the unavoidable necessity to make such judgments in accepting and representing clients, and the dual responsibility of the attorney to respect client autonomy and act in the client's best interest.

Because of the complexity of the attorney's role, the working group's recommendations on this question focused primarily on practice guidelines rather than disciplinary rules. Indeed, the group recommended no changes to the "trigger" language of Rule 1.14(b) of the Model Rules of Professional Conduct ("Model Rules"). The group discussed whether the word "may" in Rule 1.14(b) should be changed to "must" with the intended effect of turning the discretionary authority of Rule 1.14(b) into a mandatory duty. Some participants felt that the discretionary authority allows a lawyer to opt out of a difficult situation to the ultimate detriment of the vulnerable client. A clear majority of members maintained that discretion is essential in these circumstances and should be retained.

Ultimately, the group endorsed the existing language but added two separate recommendations to guide and reinforce the ethical discretion of

the attorney. The group drafted the first addition as a Comment to Model Rule 1.14(b) to discourage attorneys from opting out when capacity questions arise. The group recommended that "where capacity comes into question, preference should be given to staying with the situation and taking protective action over withdrawal from the case." The group intended the second addition as an amendment to Rule 1.14 itself. This recommendation reinforces the ethical imperative of staying with the situation by addressing the disciplinary consequences and calls for the addition of the following language as Model Rule 1.14(e): "The lawyer should not be subject to professional discipline for invoking or failing to invoke the permissive conduct authorized by 1.14(b) if the lawyer has a reasonable basis for his or her action or inaction."

In articulating practice guidelines for capacity determinations, the group generally endorsed the factors identified by Peter Margulies. The guideline endorsed by the group states:

> In questioning client capacity for any specific purpose, the lawyer should:
>
> 1. Consider and balance factors including but not limited to the following:
>
> a. The client's ability to articulate reasoning behind the decision;
> b. The variability of the client's state of mind;
> c. The client's ability to appreciate consequences of the decision;
> d. The irreversibility of the decision;
> e. The substantive fairness of the decision;
> f. The consistency of the decision with lifetime commitments of the client.
>
> 2. Speak with the client alone;
> 3. Avail himself or herself of educational opportunities to understand and address capacity issues.

The working group cited the six factors from the Margulies paper because they are clinically sound yet within the practical range of variables that an attorney can, with training and guidance, competently assess. They also have the advantage of recognizing both the functional and substantive elements which are vitally important in the real world to how judgments of capacity are made. This approach does not advocate the rightfully criticized outcome approach to capacity assessment which holds that if the decision is crazy, then the person must be crazy. Rather, it suggests that when the consequences of a decision are greater in terms of irreversibility, fairness to interested parties, and deviance from lifetime commitments of the client, then it is clinically and ethically appropriate to expect a higher level of functioning on the first three variables.

The working group further recognized the importance of assessing these factors without the confounding influence of family members or significant others. Thus, the guideline encourages the lawyer to talk to the client in private at some point or points early in this process to assess

capacity, to establish clearly the attorney-client relationship, and to identify the client's wishes and expectations. The guideline additionally emphasizes the lawyer's obligation to avail him or herself of educational opportunities to develop professional competence with respect to capacity issues.

Responding to the explanation of the physician's appropriate role as set forth by Dr. Roca, the working group also agreed upon a briefly stated practice guideline to guide the lawyer in his or her consultation with mental health professionals. The recommendations states that "it may be useful to consult with a mental health professional to determine whether the client has a diagnosable mental disorder and whether the client's psychiatric condition disables the client's decision making." This guideline refers to the two tasks of the mental health professional as elaborated upon by Roca.

B. *Question Two: What Interventions May a Lawyer Consider and, According to What Guidelines, When a Client's or Purported Client's Decision-Making Capacity Is Impaired?*

As with Question 1, the working group started with the language of Rule 1.14(b). This time, however, the group unanimously agreed upon a recommendation to change the language, albeit slightly. It was agreed that the phrase in existing Model Rule 1.14(b), "[a] lawyer may seek the appointment of a guardian or take other protective action," should be reversed to emphasize the priority of other protective actions over guardianship. Thus, the revised Rule 1.14(b) would read: "[a] lawyer may *take protective action or seek the appointment of a guardian* only when the lawyer reasonably believes the client cannot adequately act in the client's own interest."

The working group spent considerable energy debating the principles that should guide the attorney who determines that protective action is necessary and the range of options and priorities that the attorney may consider. Several consensus recommendations resulted from the discussion. As a threshold principle, the participants unanimously agreed that preventive action through advance planning for incapacity is the preferred course of action in all cases. The working group examined the Commentary to Rule 1.14 published by The American College of Trust and Estate Counsel ("ACTEC") and recommended adoption of the following ACTEC comment on advance planning as a practice guideline:

> As a matter of routine, the lawyer who represents a competent adult in estate planning matters should provide the client with information regarding the devices the client could employ to protect his or her interests in the event of disability, including ways the client could avoid the necessity of a guardianship or similar proceeding. Thus, as a service to a client, the lawyer should inform the client in a general way regarding the costs, advantages and disadvantages of durable powers of attorney,

directives to physicians or living wills, health care proxies, and revocable trusts.

If advance planning has not been done or, for whatever reason, has not worked, protective action on behalf of a client under Rule 1.14(b) then becomes a possibility. The working group developed a statement of fundamental principles to guide the action of the attorney who determines that protective action is needed and recommended it for inclusion in the Comment to Rule 1.14(b). It reads:

1. Where capacity comes into question, preference should be given to staying with the situation and taking protective action over withdrawal from the case.
2. If the lawyer takes protective action under Model Rule 1.14(b), the lawyer's action shall be guided by:
   a. The wishes and values of the client to the extent known; otherwise, according to the client's best interest.
   b. The goal of intruding into the client's decision-making autonomy to the least extent possible.
   c. The goal of maximizing client capacities.
   d. The goal of maximizing family and social connections and community resources.
3. If the lawyer decides to act as *de facto* guardian, he or she, when appropriate, should seek to discontinue acting as such as soon as possible and to implement other protective solutions.

The group also discussed Paragraph 1 in connection with the issue of determining client capacity because the preference for "staying with the situation" is directly relevant to both issues. Paragraph 2 articulates guiding principles that are rarely discussed in the legal literature but are familiar principles in the social science and gerontological literature. The Margulies paper provides a helpful discussion of the importance of these principles as guiding values in representation.

Paragraph 3 seeks to limit resort to the role of *de facto* guardian that the comment to present Rule 1.14 suggests the attorney may utilize. Despite recognizing that *de facto* guardianship is a troublesome concept because of the lack of clear authorization, oversight, and due process, the working group agreed that, in some circumstances, it may be the only role available to prevent harm to one's client and, in the long run, to maximize the client's choices and capacities. However, to prevent the *de facto* guardian role from becoming a long-term solution, this recommendation emphasizes the time-limited nature of this ethical imperative.

As to the role of formal guardianship and the lawyer's role in seeking guardianship, the working group strongly agreed that guardianship should always be the last option. The group, therefore, recommended as a practice guideline that "[t]he lawyer should refer or petition for guardianship of the client only if there are no other appropriate alternatives. The lawyer should act as petitioner only if there is no one else available

to act. The use of the guardianship system should be limited to the greatest extent possible."

Discussion of the range of possible protective actions that may be more appropriate than guardianship or *de facto* guardianship resulted in the group enumerating several options which it drafted in the form of practice guidelines. The first list of options, as follows, may apply to any client as appropriate:

> Examples of protective actions that the lawyer may take include:
>
> 1. Involve family members;
> 2. Use of durable power of attorney;
> 3. Use of revocable trusts;
> 4. Use of a "time out" to allow for cooling off, clarification, or improvement of circumstances;
> 5. Referral to private case management;
> 6. Referral to long-term care ombudsman;
> 7. Use of church or other care and support systems;
> 8. Referral to disability support groups;
> 9. Referral to social services or other governmental agencies, such as consumer protection agencies. The lawyer should weigh the appropriateness and risk of agency referrals.

The group emphasized that none of these options are automatic and that the principles for protective action articulated in the proposed Comment to Rule 1.14 above should guide a lawyer in their use.

The working group felt that referrals to social service or other agencies deserve special caution. While various agency services often prove crucial to maintaining client independence and capacity, referral to public agencies, such as Adult Protective Services, could, in some circumstances, lead to involuntary interventions, such as guardianship, that may be detrimental to the client's best interest.

The working group agreed upon a second practice guideline enumerating the following options for protective action that applies more specifically to representation involving litigation.

> Examples of protective actions that the lawyer may take in a litigation context include:
>
> 1. File for injunctive relief;
> 2. Request appointment of a guardian *ad litem*;
> 3. File for continuance;
> 4. File a petition for a protective order, or for limited or plenary guardianship;
> 5. Invoke regulatory or administrative remedies, for example, file a separate consumer protection complaint.

C. *Question Three: When Can a Lawyer Act on Behalf of a Purported Client If an Attorney-Client Relationship Has Not Been Established?*

In discussing protective actions, the working group repeatedly examined the basis of a lawyer's authority to act. Agency law is clearly the primary foundation of the attorney-client relationship. That authority is further imbued with fiduciary responsibilities and obligations to act as an officer of the court. When a client's capacity is impaired, the effect on the attorney's agency can be troublesome. The group discussed the notion of "implied authority" to act, particularly as cited in the ACTEC Commentary to Rule 1.14.

While the concept of implied authority is useful in many circumstances, the group felt that it did not apply well to circumstances where the attorney had no pre-existing relationship with a client. The group identified a fairly common scenario faced most often, although not exclusively, by publicly funded legal services attorneys. Often a social services agency or the court will refer a questionably impaired person to a legal office because of a legal emergency. Without quick action, the client will suffer great injury, such as an eviction, a judgment on an alleged debt, or the loss of title to property. Nevertheless, the putative client does not appear competent even to enter into an agency relationship with the attorney or perhaps is confused and questionably impaired and refuses the attorney's help by insisting that he or she is only in the office at the request of the court. Private attorneys in the working group acknowledged similar occurrences in their practices.

It was felt that the concept of "implied authority" clearly cannot apply to this scenario. Looking for an analogy, the group considered the parallel to medical emergencies and reliance on presumed consent as an exception to informed consent requirements. Participants found the analogy useful, but mainly for situations in which the client with the legal emergency is passive or non-responsive. It is less useful when the putative client, though confused, asserts that he or she does not want the attorney's help. Nowhere do the Model Code of Professional Responsibility or the Model Rules of Professional Conduct provide guidance in this situation.

The group felt that the issues raised in the emergency situation were unique and needed to be addressed by a separate recommendation. The working group established a sub-committee to draft a recommendation which the group adopted, with minor modification. It reads:

> The following language should be added as Model Rule 1.14(d) to address legal issues arising when the existence of an attorney-client relationship is not clearly established:
>
> 1. A lawyer is an agent who acts upon the authority of a principal. In many cases, the lawyer will have a pre-existing relationship with a person or that person's family. In the absence of such a pre-ex-

> isting relationship or a contractual agreement, express or implied, a lawyer generally may not act on behalf of a client.
> 2. In certain circumstances, a lawyer may act as lawyer for a purported client even without express or implied agreement from the purported client if:
>
> a. An emergency situation exists in which the purported client's substantial health, safety, financial, or liability interests are at stake;
>
> b. The purported client, in the lawyer's good faith judgment, lacks the ability to make or express considered judgments about action required to be taken because of an impairment of decision-making capacity;
>
> c. Time is of the essence; and
>
> d. The lawyer reasonably believes, in good faith, that no other lawyer is available or willing to act on behalf of the purported client.
>
> The lawyer may take those actions necessary to maintain the status quo or to avoid irreversible harm even without express consent of the person.
> 3. A "purported client" is a person who has contact with a lawyer and who would be a client but for the inability to enter into an expressed agreement.
> [4. A lawyer who acts pursuant to this rule may not seek a fee for services rendered in this capacity.]

Paragraph 1 of this recommendation reaffirms the agency basis of the attorney-client relationship. Read in conjunction with paragraph 3, which defines "purported client," the recommendation makes clear that protective actions under this proposed rule are permissible only when the attorney judges that the individual lacks the capacity to enter into an attorney-client agreement. If that threshold is crossed, then paragraph 2 identifies the special circumstances that must exist for the attorney to take action on behalf of the "purported client."

Paragraph 4, which is bracketed, was a very controversial element of this recommendation. On one hand, most of the working group felt that the opportunity for abuse by providing unwanted legal services to vulnerable "clients" was so great that the banning of a fee for the unconsented services was an appropriate prophylactic. At the same time, many felt that where an attorney expends substantial time and effort to protect a putative client's interest, especially where the client is financially able to pay, the lawyer should not be expected to swallow the costs of such service as a public service. Moreover, if the putative client later becomes lucid, and he or she wants to pay for the attorney's services, the attorney should not be banned from receiving remuneration.

Others argued that the language does not prevent the putative client from paying the attorney, but only prevents the attorney from seeking payment. This distinction led to further discussion over what conduct constitutes "seeking" payment. For example, the group asked whether an attorney who notifies the client about the cost of the services provided

is seeking payment. Despite the ambiguity in application, a majority of the working group endorsed paragraph 4 because of the perceived need to speak strongly against the potential for a new form of "ambulance chasing." While adopted by the working group, the Conference plenary session deleted paragraph 4 because a majority of conferees concluded that the question of whether and when a fee may be appropriate needed further study and deliberation.

D. *Confidentiality Issues Relating to Capacity*

Although another working group had primary responsibility for addressing confidentiality issues, this working group deemed the relationship between Model Rules 1.14 and 1.6 as essential to its discussion. The working group reached consensus and recommended that Rule 1.14(c) be amended to indicate that "[w]hile it might be necessary to disclose information, the disclosure should be strictly limited to that which is necessary to accomplish the protective purpose." This addition to Rule 1.14 would make explicit the authority that Rule 1.14(b) now implies, namely the authority to disclose otherwise confidential information when necessary for a protective purpose. A majority of working group members felt that this statement was needed to clarify the relationship between Rules 1.14 and 1.6.

At the same time, however, this view was tempered by the group's recognition that disclosure may also facilitate the premature use of interventions such as guardianship proceedings that are highly restrictive and not always in the client's best interests. As a result, the group unanimously felt that limiting language was needed in this recommendation to ensure that disclosures were "strictly limited to that which is necessary to accomplish the protective purpose."

E. *Education and Further Study*

The working group felt strongly that the recommendations of this Conference are directly related to the multi-disciplinary and holistic philosophy that characterizes the growing practice of elder law today. In this regard, the working group discussed and developed two recommendations regarding education and further study.

As to education, the working group perceived a serious deficit in the education of lawyers relating to issues of capacity due to inadequate collaboration among lawyers, physicians, and other health and social service professionals. The recommendation on education states that "[t]his body recommends collaboration among legal, medical, and allied professions to develop curriculum and materials focusing on incapacitating conditions and the impact of those conditions on the decision-making abilities of individuals."

With respect to further study, the group noted that other provisions in the Model Code and Model Rules restrict and regulate ancillary profes-

sional activities of the lawyer conducted in conjunction with a law practice. These provisions raise a variety of questions and issues that, while beyond the focus of the Conference, deserve attention in order to be consistent with the multi-disciplinary nature of elder law and with the related recommendations regarding the lawyer's responsibility to clients with impaired capacity. The group recommended that "[t]he Model Rules should accommodate in their interpretation multi-disciplinary approaches to providing services to the elderly. Further study should endeavor to identify appropriate ways to accomplish this goal."[6]

6. For the full text of the Recommendations of this working group, see Conference on Ethical Issues in Representing Older Clients, *Recommendations, in* Ethical Issues in Representing Older Clients, 62 Fordham L. Rev. 989 (1994).