

MRPC 1.14 – Its Dimensions and Shortcomings and How it Affects Elder Advocacy

National Aging and Law Conference 2025

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Five Quandaries of Rule 1.14



- What is Diminished Capacity?



- Protective Action Guidance



- 3rd Parties –
Supporter/Exploiter?



- How Much Can I Disclose in
and out of Litigation?



- Meaningful Access to Counsel
when a Surrogate is in Place

Let's review MRPC 1.14

More Guidance
than Rule

1.14(a) Says Act Normal...

...as far as reasonably possible, maintain a normal client-lawyer relationship....

1.14(b) Except when you can't...

Lawyer may take reasonably necessary protective action,

But only if 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
- the client cannot adequately act in the client's own interest.

The Case of Ms. M - Part 1 -



- Lives alone in an apartment she has rented for years.
- Neighbor refers her because she has gotten an eviction notice due to 3 months past due rent and inability to maintain her apartment in safe condition.
- Comes in using a walker, disheveled, and **malodorous**.
- She has almost no understanding of problems with her apartment or her person. Does not remember exactly when she last paid rent.
- She's only here because neighbor insisted she needed to see you.

Does she have the capacity to hire you?

- A. Yes**
- B. No**
- c. I need more info.**

Quandary 1

Is this
adequate
guidance?

What is “Diminished Capacity”?

The Rule and its Comments refer to Diminished Capacity several times but do not define it, although Comment 6 provides some factors to consider:

- ▶ Ability to articulate reasoning leading to decision,
- ▶ Variability of state of mind & ability to appreciate consequences;
- ▶ Substantive fairness of decision; &
- ▶ Consistency of decision with known long-term commitments & values.

Does Contractual Capacity Help?

Does the person possess sufficient mind to understand, in a reasonable manner, the nature, extent, character, and effect of the act or transaction in which the person is engaged.

17 C.J.S. Contracts 45 (2000)

Compare:

Contract to buy a multi-state business vs. Contract to buy a cup of coffee

Consider: Accommodations needed to ensure access to justice

What else do we need to know about capacity?

- ▶ **Capacity can be fluid, situational, or misunderstood based on ableism or ageism.**
- ▶ **Factors that can cause capacity to decline may include:**
 - ▶ **Over-medication**
 - ▶ **Institutionalization**
 - ▶ **Trauma and grief**
- ▶ **Factors that can cause capacity to improve may include:**
 - ▶ **Access to treatment**
 - ▶ **Access to supports and accommodations**
 - ▶ **Continued practice with decision-making**

Capacity and older adults with disabilities

- ▶ There is empirical evidence that older adults with disabilities are excluded from decision-making even when they have decisional capacity.
- ▶ Disabilities, like dementia are not monolithic.
 - ▶ They are varied and can be impacted by environment.
- ▶ Professionals may assume that older adults with disabilities' conditions will only worsen.
- ▶ Older adults with disabilities often must navigate complicated and deficit-based public benefits systems to access the supports they need to stay in the community.

Attorneys' Obligations

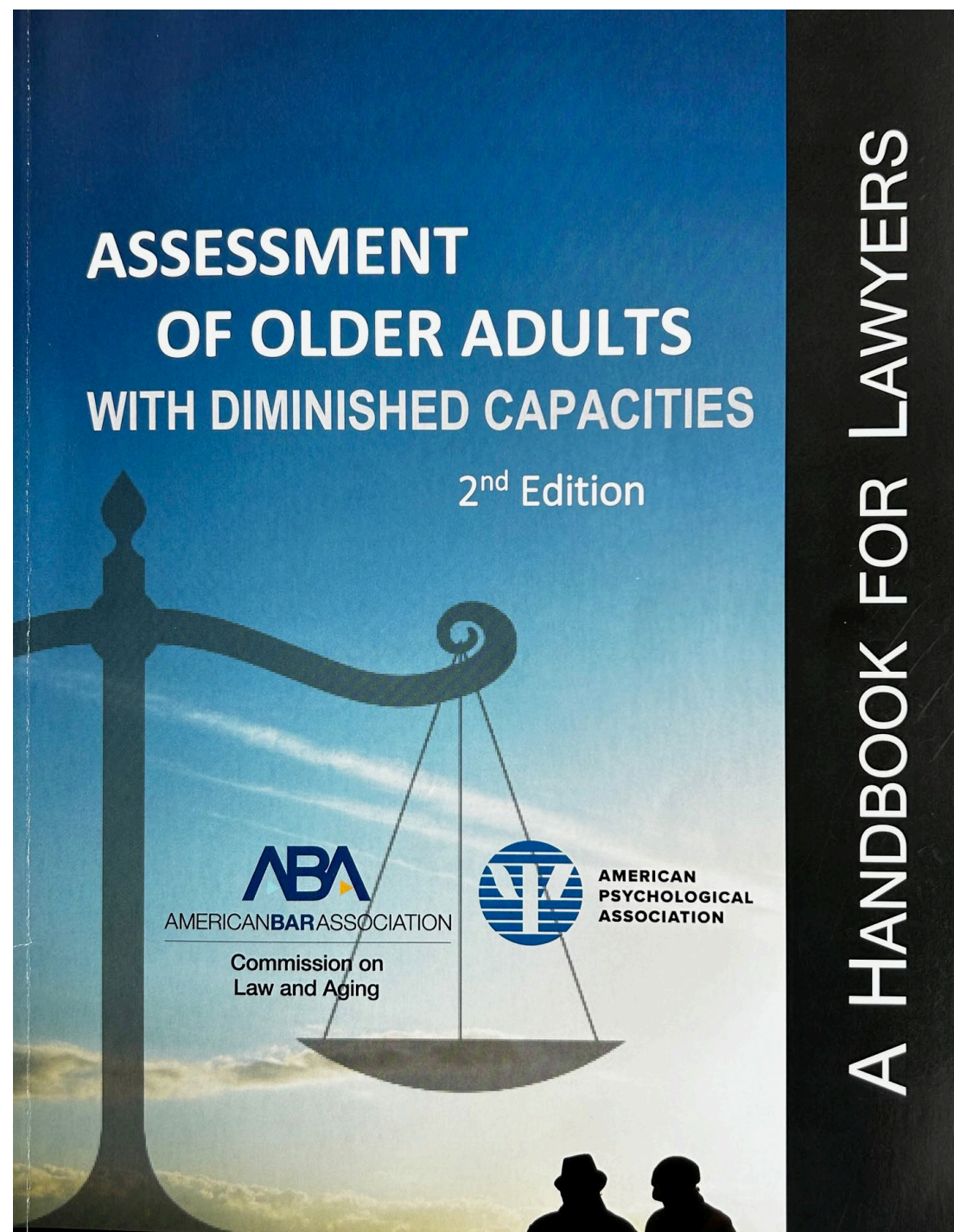
- ▶ **Title III of the Americans with Disabilities Act (ADA) requires that places of public accommodations, including law offices, provide people with disabilities an equal opportunity to access and benefit from their programs.**
 - ▶ **42 U.S.C. § 12182(b)(1)(A)(ii)**
- ▶ **An equal opportunity to access and benefit from a program includes a right to effective communication, which means:**
 - ▶ **Whatever is written or spoken must be as clear and understandable to people with disabilities as it is for people who do not have disabilities.**
- ▶ **These obligations are the floor, not the ceiling.**
- ▶ **See also Rule 8.4 Misconduct (Bias)**

Accommodations

- ▶ Qualified interpreters (including ASL and certified Deaf interpreters)
- ▶ Notetakers
- ▶ Screen readers
- ▶ Computer-aided real-time transcription (CART)
- ▶ **Augmentative and alternative communication (AAC) devices**
- ▶ Communication boards
- ▶ Visual descriptions
- ▶ **Modifications to in-take procedures**
- ▶ **Physical changes** to a courtroom or meeting space
- ▶ Proceedings or meetings at **certain times of day**
- ▶ Extra time or breaks or delays
- ▶ Assistance filling out forms
- ▶ **Plain language or easy read materials**
- ▶ Large print materials
- ▶ Materials in electronic format
- ▶ Remote or in-person participation
- ▶ **Supported decision-making**

Resource

www.americanbar.org/groups/law_aging/resources



ASSESSMENT OF OLDER ADULTS WITH DIMINISHED CAPACITIES

2nd Edition

ABA
AMERICAN BAR ASSOCIATION

Commission on
Law and Aging



AMERICAN
PSYCHOLOGICAL
ASSOCIATION

A HANDBOOK FOR LAWYERS

Additional Resources

- [ADA Best Practices Toolkit](#) for State and Local Governments, Chapter 3, General Effective Communication Requirements Under Title II of the ADA:
- DOJ Effective Communication [Toolkit](#) and [Guidance](#)
- National Center for State Courts Title II Court Accommodation [Toolkit](#)
 - [General Communication Tips for Working with People with Disabilities](#)
- Job Accommodation Network: [A to Z of Disabilities and Accommodations](#)
- Disability IN: [Disability Etiquette Guide](#)
- United Spinal Association's Disability Etiquette [Toolkit](#) and [longer guide](#)
- Disability Belongs: [Disability Etiquette Guide](#)
- Autistic Self-Advocacy Network: [Accessibility Guide](#)
- Autistic Self-Advocacy Network: [Identity-First Language](#)

Back to Ms. M - Part 2 -



- **You agree to assist and learn Ms. M actually has funds to pay the back rent which you pay. You connect her to a local money management service to help manage her bills. Eviction withdrawn - for time being.**
- **Shortly later, landlord informs you that she has twice left her stove's gas burner on heating a fry pan of food to cinders, setting off building smoke alarms. She says she forgot she was cooking something.**

Is Protective Action Justified?

- A. Yes, only with Consent**
- B. Yes, even if she does not consent**
- C. No**

Quandary 2

How does
Protective
Action fit into
my legal
repertoire?

MRPC 1.14(b) says:

...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.**

**Does the rule create a
slippery slope towards
guardianship?**

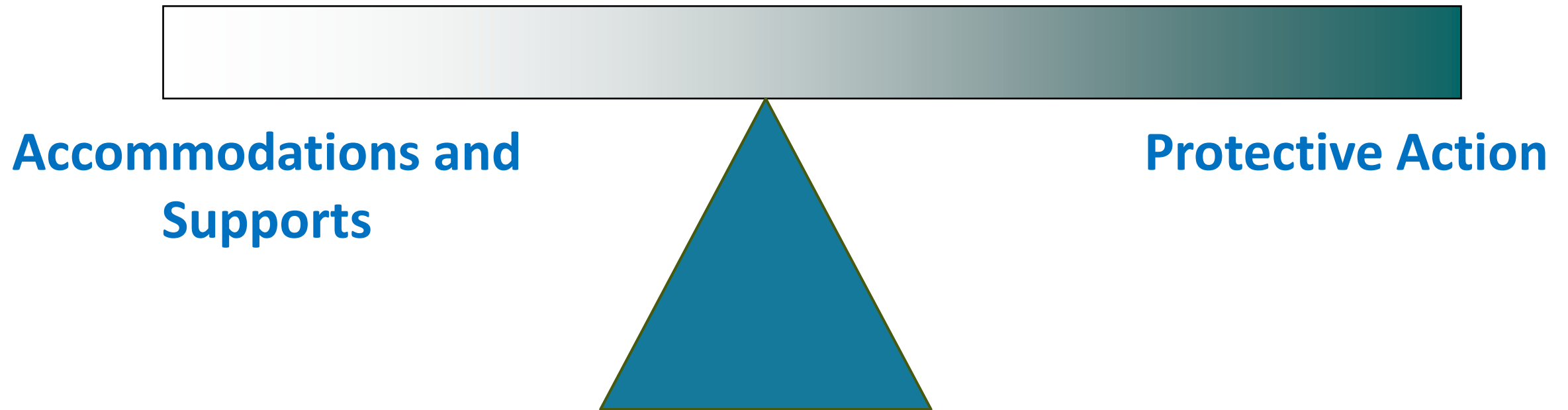
Protective
Action
Guidance in
COMMENT
[5]

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.

Protective
Action
Guidance in
COMMENT
[5]

- “... 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.”

Is this a Protective Action Problem or an Accommodation Challenge?



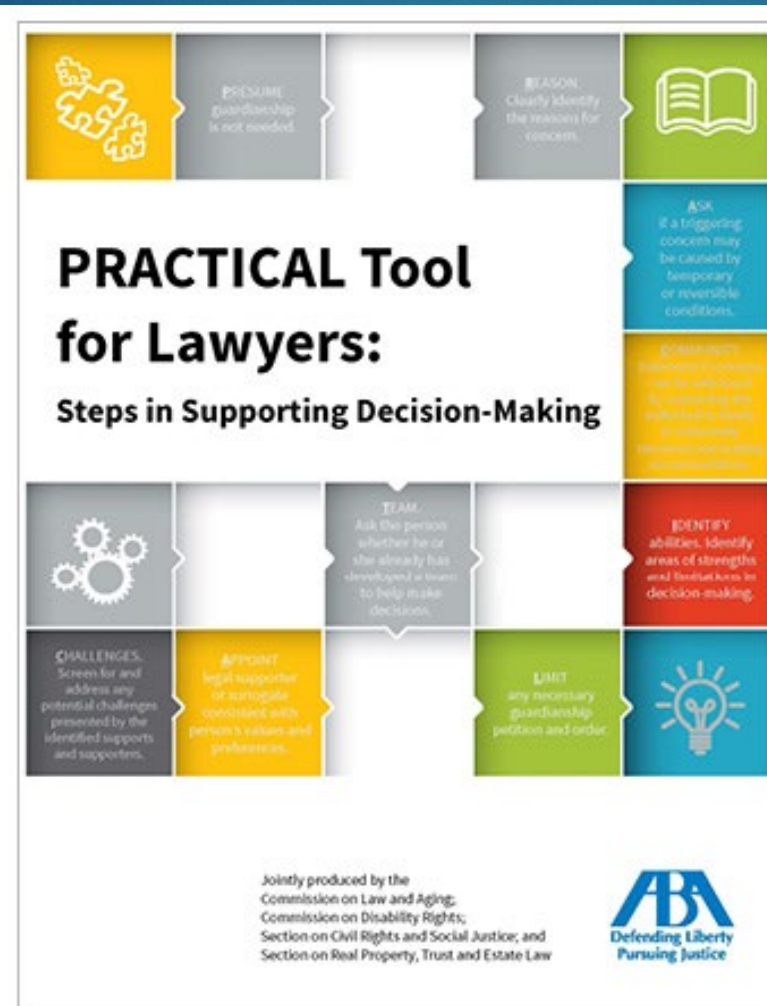
Supports and Accommodations: The Most Creative Part of Your Work

Will appropriate supports and accommodations improve situation:

- ▶ Evaluate whether accommodations like communication devices, health alerts, plain language instructions, alarms, timers, & other tools will help.
- ▶ Determine whether the person has available family, friends, and supporters (including from civic, religious, or social communities) who can help address the concerns.

- ▶ **Evaluate whether the client is amenable to referrals to available services. e.g.:**
 - ▶ Talk lines/Senior Call Check
 - ▶ Friendly outreach programs
 - ▶ Case managers
 - ▶ Delivery services
 - ▶ Visiting nurses
 - ▶ Senior centers
 - ▶ Credit monitoring/freeze
 - ▶ Direct deposit/automatic bill payment

ABA Supported Decision-Making Tool



www.americanbar.org/groups/law_aging/resources/guardianship_law_practice/practical_tool/

Additional Supported Decision-Making Resources

- ▶ **Center for Public Representation: Supported Decision-Making**
- ▶ **Morgan Whitlatch and Rebekah Diller: “Supported Decision-Making: Potential and Challenges for Older Persons” 72 Syracuse L. Rev. 165 (2022)**
- ▶ **Elizabeth Moran: “Something to Talk About: Supported Decision-Making and Access to Effective Communication for All” Bifocal Vol. 42 Issue 6 (2021)**

Back to Ms. M - Part 3 -



- **Two months later, Ms. M asks to see you. She comes in with her son, who moved in with Ms. M from out-of-state after losing his job.**
- **Son says Mom is increasingly frail and confused and needs him to manage things for her under a POA.**
- **Ms. M appears distraught and somewhat confused but tells you to do what her son thinks is best.**



Should you assist in preparing the POA?

A. Yes

B. No

C. Depends

Quandary 3

3rd Parties- Supporter or Exploiter?

How Helpful is Comment [3] which says:

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

**A non-Model Rule Rule:
Meet with your client alone if possible**

Why am I left in the waiting room?



Understanding the Four C's of Elder Law Ethics

Prepared by:
ABA Commission on Law and Aging
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Adapted with permission from:
Elder Law Clinic
Wake Forest University School of Law
<http://elder-clinic.law.wfu.edu/>

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www.americanbar.org/groups/law_aging/resources/ethics_and_counseling_older_clients/

-
- Client Identification**
 - Conflicts of Interest.**
 - Confidentiality.**
 - Capacity.**

Access to Accommodations

- ▶ **SDM recognized in law as a form of reasonable accommodation or auxiliary aid and service in at least 24 States. Also supported by recent federal rulemaking.**
 - ▶ **See: [U.S. Supported Decision-Making Laws - Supported Decision-Making](#)**
- ▶ **Don't presume that supporter will inherently unduly influence a client. Be mindful if their presence is requested as an accommodation.**
- ▶ **Everyone is "influenced" by the opinions and advice of those we know and trust. The question is whether it is undue, unwanted, or shows signs of malicious intent.**

Back to Ms. M - Part 4 -



- **Weeks later, Son contacts you. Mom received notice of termination of her Medicaid. You agree to help.**
(Pause: Who's the client?)
- **Termination based on failure to provide financial records. Probing, you discover Son is bilking Mom's bank account. He admits using "some" of it for gambling. Poor explanations for the rest. Unrepentant.**
- **Ms. M now unable to understand at all what's going on financially, but says: "I don't want you to get him in trouble, so please don't tell anyone!"**

Now that you know he's more of an Exploiter than a Supporter, what do you do?

- A. Tell him you will report him to APS, unless he seeks gambling addiction counseling and pays Mom back?**
- B. Tell him you will report him to APS, unless he resigns as Mom's agent?**
- C. File a petition for an accounting and removal of Son as agent?**
- D. File petition for guardianship?**
- E. Something else?**

Quandary 4

How much
can you
disclose?

Rule 1.14(c) states:

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.

+ Cmt. 8 - ...even when the client directs the lawyer to the contrary !!!

Response to Exploitation

- ▶ **Modern scholarship recognizes:**
 - ▶ **“a one-size-fits-all intervention for elder abuse is doomed to failure**
 - ▶ **Meaningful variations in culpability among elder abuse perpetrators**
- ▶ **Consider what you can do that falls under “protective action” not “retributive action”**
- ▶ **Consider how your client's desire to maintain a relationship with her son factors into your choices**

Back to Ms. M - Part 5 -



- **Lo and behold! A formerly estranged daughter shows up and tells you her brother is a scum bag and she is going to file for guardianship.**
- **Court appoints you to represent Ms. M who insists she does not need or want a guardian.**
- **Couple weeks before hearing, she tells you that she has very good news – she has won a Publishers Clearinghouse lottery for \$2 million, which she will get soon because she just paid \$10,000 to cover taxes and fees. You quickly confirm it's a scam, but she insists it's real.**

Quandary 4 variation

**In Litigation -
How much
can you
disclose?**

What would you do?

- A. Disclose to the petitioner, Court, GAL, or visitor?**
- B. Don't disclose. Your representation is directed by her goal of preventing guardianship?**
- C. Something else?**

Can You Reconcile Rule 1.14(c) allowing disclosure as protective action, even if client says no with...

- ▶ **Role of advocate:** “As advocate, a lawyer zealously asserts the client’s position under the rules of the adversary system”
Preamble to the MRPC
- ▶ **Maryland example: Comment 5 re Protective Action:**
“In litigation involving the capacity of the client, such as a guardianship proceeding, the attorney should advocate for the client’s expressed position when deciding what, if any, protective action should be taken.”

Quandary 5

Access to Counsel

Suppose Ms. M already had a guardian,

and

you first meet her when she calls you to ask your help to terminate the guardianship. Her serious health problems are now better. She informs you that the guardian will absolutely oppose ending the guardianship.



Can you agree to represent her?

A. Yes

B. No

c. Only if guardian consents?

Quandary 5

Access to Counsel

COMMENT 4 to Rule 1.14 states:

If a legal representative has already been appointed for the client, the attorney should ordinarily look to the representative for decision on behalf of the client.

But COMMENT 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.”

Making the case for representation...

Nina A. Kohn & Catheryn Koss, 91 Wash. L. Rev. 581 (June, 2016)

Makes the case: (1) agency principles do not bar such representation; (2) contract principles do not bar such representation; and (3) even if such representation were inconsistent with state law ..., constitutional due process protections would require that exceptions be made to permit representation of persons subject to guardianship, at the very minimum to challenge the terms or existence of their guardianships and arguably under a broader set of circumstances.

Four Quandaries Recap of Rule 1.14

(but not all the
possible issues)



- What is Diminished Capacity?



- Protective Action Guidance



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and out of Litigation?



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when a Surrogate is in Place

On the Horizon

- ▶ Proposed changes to MRPC 1.14
- ▶ Two Comment Periods for Drafts of Rule in 2025
- ▶ Final proposed version will go before the ABA House of Delegates in February 2026.
- ▶ If adopted, then it is up to the States to adopt.