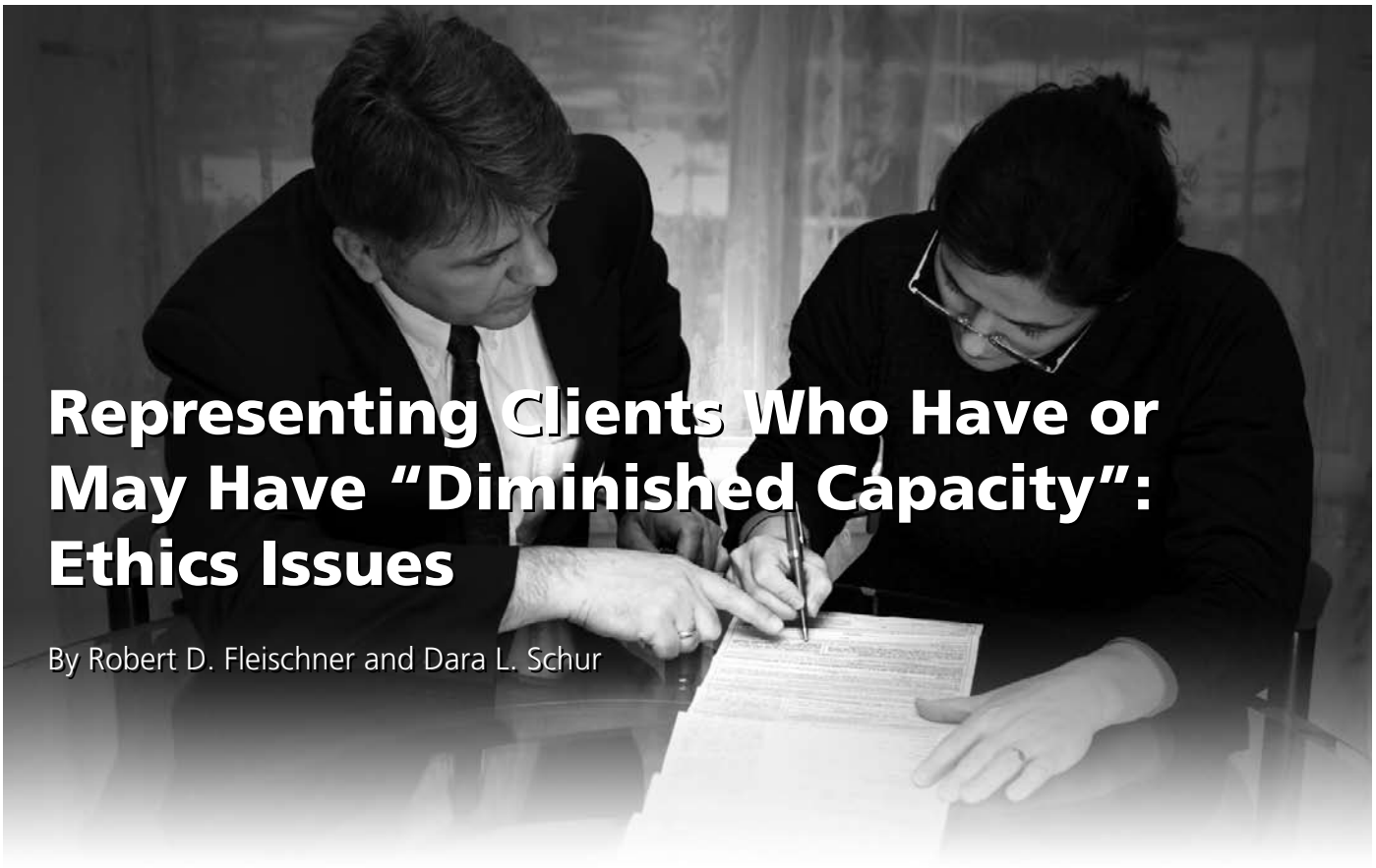
Clearinghouse REVIEW
Journal of Poverty Law and Policy
September–October 2007
Volume 41, Numbers 5–6

LEGAL RESOURCE FOR PEOPLE WITH DISABILITIES

SHRIVER CENTER
Sargent Shriver National Center on Poverty Law



Representing Clients Who Have or May Have "Diminished Capacity": Ethics Issues

By Robert D. Fleischner and Dara L. Schur

Robert D. Fleischner
Assistant Director

Center for Public Representation
22 Green St.
Northampton, MA 01060
413.587.6265
413.586-6024 (TDD)
RFleischner@cpr-ma.org

Dara L. Schur
Director of Litigation

Protection and Advocacy Inc.
1330 Broadway Suite 500
Oakland, CA 94612-2505
510.267.120
800.649.0154 (TDD)
dara.schur@pai-ca.org

Every day legal aid attorneys and advocates serve clients with disabilities in a variety of cases. Like other people with limited incomes, these clients face eviction, have custody disputes, are abused, are wrongly denied government benefits, and struggle for access to adequate health care. Many also face legal problems that are unique to their disability—pervasive discrimination, physical-access barriers, threats of involuntary institutionalization, and forced treatment.

Although most people with disabilities are fully able to participate with their attorneys in the pursuit of their cases and claims, some, particularly people with mental or cognitive disabilities, may be less able to do so.[1] Some may be unable to appreciate or understand fully their situation and the consequences of their actions. Others may have unrealistic, even delusional, beliefs that affect their ability to act in their own interests. Others may have difficulty articulating their preferences. The attorney then

[1]Defining "mental disability" and "cognitive disability" is complex. The American Psychiatric Association defines a "mental disorder" as "a clinically significant behavioral or psychological syndrome or pattern that occurs in an individual and that is associated with present distress (e.g., a painful symptom) or disability (i.e., impairment in one or more important areas of functioning) or with a significantly increased risk of suffering death, pain, disability, or an important loss of freedom." American Psychiatric Association, Diagnostic and Statistical Manual of Mental Disorders xxi (4th ed. 1994). This manual, which is the standard text and reference for psychiatric diagnosis, classifies more than 300 disorders and categorizes them into groups that include the following most likely to be relevant here: psychoses (e.g., schizophrenia); dementias; mood disorders (e.g., the bipolar disorders); dissociative disorders (e.g., what was once known as multiple personality disorder); anxiety disorders; personality disorders; and mental retardation. Christopher Slobogin, *Rethinking Legally Relevant Mental Disorder,* 29 Ohio Northern University Law Review 497, 500 (2003). The American Association of Intellectual and Developmental Disabilities defines "mental retardation" as "a disability characterized by significant limitations both in intellectual functioning and adaptive behavior as expressed in conceptual, social, and practical adaptive skills. This disability originates before age 18." American Association of Intellectual and Developmental Disabilities, Definition of Mental Retardation, www.aamr.org/Policies/faq_mental_retardation.shtml (last updated July 5, 2007). The association has stopped using the words "mental retardation" in its publications and, indeed, in its own name, suggesting that "intellectual disability" is a less stigmatizing and demeaning term for cognitive disabilities. See Press Release, American Association of Intellectual and Developmental Disabilities, Mental Retardation Is No More—New Name Is Intellectual and Developmental Disabilities (July 25, 2007), www.aamr.org/About_AAIDD/MR_name_change.htm (on file with Robert D. Fleischner). However, as the U.S. Supreme Court acknowledged, clinical definitions may vary widely from legal definitions of mental illness, mental retardation, or related terms. *Kansas v. Hendricks,* 521 U.S. 346, 359 (1997) (internal citation omitted). Moreover, just because a person has a diagnosis, or even that a person is institutionalized, does not necessarily mean that the person is not capable of deciding on that person's own behalf. *Rogers v. Commissioner of Department of Mental Health,* 458 N.E.2d 308, 312–13 (Mass. 1983) (involuntarily institutionalized person with mental illness may be competent to refuse treatment with psychotropic medication).

must determine how to represent a client who cannot fully engage in a typical client-attorney relationship.[2]

The legal profession's ethics codes offer some, albeit incomplete, guidance. Here we discuss the applicable American Bar Association (ABA) Model Rule of Professional Conduct—Rule 1.14—and survey some interpretations of Rule 1.14 by commentators, ethics boards, and courts.[3] We present two representational models for people with limited capacity, examine client capacity, suggest ways to interview people with "diminished capacity," and outline some possible approaches to representing people with questionable capacity.[4]

I. ABA Model Rule 1.14

According to the ABA, every state except California, Maine, and New York has adopted, usually with modifications, the format of its Model Rules of Professional Conduct.[5] Rule 1.14, most recently amended in 2002, is entitled "Client with Diminished Capacity."[6] It reads:

> (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 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, and is at the 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.

---

[2]See Barry C. Taylor, *Practical Tips for Representing Clients with Mental Disabilities*, in this issue.

[3]The American Bar Association (ABA) adopted a "Model Code of Professional Responsibility" in 1969. It adopted the newly named "Model Rules of Professional Conduct" in 1983; this was the first time that Rule 1.14 appeared. The ABA amended Rule 1.14 in 2002. Although the ABA has periodically amended the Model Rules since 2002, it has not amended Rule 1.14. The most recent version of the Model Rules, which we primarily cite here, is dated 2007. States that have adopted the Model Rules have not necessarily incorporated every rule into their own codes. Most states amended many of the rules that they adopted. For a comparison of each state's rules to the ABA's Model Rules, see Legal Information Institute, Cornell University Law School, American Legal Ethics Library, Topical Overview—Index of Narratives, www.law.cornell.edu/ethics/comparative/ (last visited July 25, 2007). Attorneys in states that have not adopted a version of the Model Rules of Professional Conduct or of Rule 1.14 should look to their own state codes, statutes, and ethics opinions. Nevertheless, Rule 1.14 may provide guidance in interpreting local rules.

[4]Rule 1.14's Comment 6 suggests some criteria for determining if and to what extent a client has "diminished capacity": "In determining the extent of the client's diminished capacity, the lawyer should consider and balance such factors as: the client's ability to articulate reasoning leading to a decision, variability of state of mind and ability to appreciate consequences of a decision; the substantive fairness of a decision; and the consistency of a decision with the known long-term commitments and values of the client. In appropriate circumstances, the lawyer may seek guidance from an appropriate diagnostician." Model Rules of Professional Conduct R. 1.14 cmt. 6 (2007). The Supreme Court considered the extent of understanding necessary for people with "diminished capacities" to be executed. Some of the criteria noted by the Court apply to civil law situations as well: "Mentally 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." *Atkins v. Virginia*, 536 U.S. 304, 318 (2002) (execution of prisoners with mental retardation violates the Eight Amendment).

[5]See Center for Professional Responsibility, American Bar Association, ABA Model Rules of Professional Conduct, www.abanet.org/cpr/mrpc/model_rules.html (last visited July 24, 2007). According to the ABA, New York follows the format of the ABA's 1969 "Model Code of Professional Responsibility," and California and Maine have developed their own rules. See *id.*

[6]The 1983 version of Model Rule 1.14 was titled "Client Under a Disability." See James D. Gallagher & Cara M. Kearney, *Representing a Client with Diminished Capacity: Where the Law Stands and Where It Needs to Go*, 16 Georgetown Journal of Legal Ethics 597, 599 n.16 (2003) (Rule 1.14's 2002 revisions). The new title should help ensure against any misunderstanding that all people with disabilities are not competent.

> (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 1.6(a) to reveal information about the client, but only to the extent reasonably necessary to protect the client's interests.[7]

The most fundamental directive of Rule 1.14 is that even if a client has less than complete capacity, the attorney is obligated to maintain, as far as reasonably possible, "a normal client-lawyer relationship with the client."[8] This ethical imperative should underlie and inform interpretations of the remaining sections of Rule 1.14, all of which allow for some deviation from the normal lawyer-client relationship.

For example, paragraph (b) provides that if "reasonably necessary," the lawyer may take "necessary protective action" on behalf of the client. Such action, according to paragraph (b), includes the authority, notwithstanding the usual confidentiality rules, to consult with other individuals who can take action to protect the client.[9] Rule 1.14, which also permits the lawyer to seek appointment of a guardian ad litem, conservator, or guardian, has been criticized for its failure to provide any certainty or even guidance to the attorney as to when to exercise such authorities.[10]

Despite the apparent latitude granted the attorney by paragraph (b), Rule 1.14's Comments 9 and 10 limit attorney consultation with outside individuals.[11] The comments restrict the application of the consultation rule to clients with "seriously diminished capacity," as opposed to the mere "diminished capacity" standard in Rule 1.14.[12] Comment 5 provides the attorney the option of seeking assistance from a clinician in appropriate circumstances but does not give guidance as to what might those circumstances may be.[13]

Paragraph (c) of Rule 1.14 seems designed to apply the brakes to the authority granted in paragraph (b): "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 1.6(a) to reveal information about the client, but only to the extent reasonably necessary

---

[7]Model Rules of Professional Conduct R. 1.14 (2007).

[8]*Id.* R. 1.14(a).

[9]*Id.* R. 1.14(b).

[10]See Gallagher & Kearney, *supra* note 6, at 601–2. Although states use the terms differently, and sometimes interchangeably, "guardians," "conservators," and "guardians ad litem" are almost always court-appointed surrogates with authority over a person (often called "the ward") whom a court has determined to lack at least some degree of capacity or competence and to need the assistance and protection of a third party. The various forms of guardianship are, simply put, the legal substitution of one decision maker for another. Guardians may be plenary (having nearly complete authority over wards' lives and estates) or limited (having authority over only those aspects of wards' lives in which a court finds the wards to be incapable of handling themselves). Nearly every state has some statutory or case-law limits, e.g., in health care decision making, on the authority of guardians and conservators. Guardians ad litem are usually, although not always, appointed for the limited purpose of protecting the interests of a person who is or may be incompetent in litigation. Guardians ad litem often function as investigators for the court. Usually the guardian ad litem is required to advocate the individual's "best interest" rather than the individual's expressed preferences. For an overview of the several types of guardianships, a history of the development of guardianship law, and an analysis of the attorney's role in representing putative wards, see Joan L. O'Sullivan, *Role of the Attorney for the Alleged Incapacitated Person,* 31 Stetson Law Review 687 (2002). We discuss the "best interest" model in III.

[11]Model Rules of Professional Conduct R. 1.14 cmts. 9–10 (2007). Comment 3 encourages outside consultation with the client's permission, yet still preserving the privilege, as follows: "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) [of Rule 1.14], must look to the client, and not family members, to make decisions on the client's behalf." *Id.* R. 1.14 cmt. 3.

[12]Neither Rule 1.14 nor its comments define "seriously."

[13]*Id.* R. 1.14 cmt. 5; see Gallagher & Kearney, *supra* note 6, at 603 (ABA Model Rules "need to provide the practitioner with more explicit instructions of how to determine diminished capacity. The practitioner is a lawyer, not a doctor").

to protect the client's interests."[14]

Determining the precise parameters of the attorney's authority is left to the attorney.

Comment 7 requires that, in considering alternatives for the client, "the lawyer should be aware of any law that requires the lawyer to advocate the least restrictive action on behalf of the client."[15] Many disability advocates believe that, if provided with a real choice, almost all people with disabilities would choose programs and settings least intrusive on their freedom. Many of these advocates often apply this principle to their representation of clients who cannot make their own choices.[16]

II. Interpretations of Rule 1.14

The literature has both criticized and supported Rule 1.14's overall approach.[17] Nearly all commentators agree, however, that the rule does not resolve many situations that attorneys face in their day-to-day representation. As the Alabama State Bar noted in an interpretation of the 1983 version of Rule 1.14,

> [i]n practice, situations involving disabled clients do not neatly present distinct levels of disability, so that it is not clear whether Rule 1.14 has application.... Furthermore, even when it is clear that Rule 1.14(a) applies, it is difficult to say how far a lawyer may deviate from a 'normal' client-lawyer relationship in any given instance.[18]

Ultimately the Alabama Bar concluded that an attorney "cannot be disciplined for any action that has a reasonable basis and arguably is in his client's best interests."[19] The issues are difficult enough that some state ethics opinions conflict with one another. For example, California ethics opinions are split on whether protective action may include seeking appointment of a surrogate for apparently incapacitated adults.[20]

---

[14]Model Rules of Professional Conduct R. 1.14(c) (2007). ABA Model Rule 1.6 deals with confidential information. Rule 1.6(a) reads: "A lawyer shall not reveal information relating to the representation of a client unless the client gives informed consent, the disclosure is impliedly authorized in order to carry out the representation or the disclosure is permitted by paragraph (b)." Rule 1.6(b) lists circumstances (such as to prevent reasonably certain death or substantial bodily harm) in which a lawyer may reveal information relating to the representation of a client. *Id.* R. 1.6(b).

[15]*Id.* R. 1.14 cmt. 7. Although we are aware of no statute that specifically requires counsel to advocate "the least restrictive action on behalf of the client," scores of statutes and cases require courts to consider less restrictive alternatives before the court orders limitations of a person's liberty. E.g., like courts in most states, those in Massachusetts must determine whether there is a less restrictive available alternative to involuntary hospitalization before civilly committing a person with mental illness. Mass. Gen. Laws Ann. ch. 123, § 1 (West 2003); see Jan C. Costello & James J. Preis, *Beyond Least Restrictive Alternative: A Constitutional Right to Treatment for Mentally Disabled Persons in the Community*, 20 Loyola of Los Angeles Law Review 1527 (1987) (assessment of status of constitutionally based right to treatment in least restrictive alternative). The Massachusetts Supreme Judicial Court implied that the respondent's attorney shared with others the responsibility of advocating less restrictive actions. *Commonwealth v. Nassar,* 406 N.E.2d 1286, 1291–92 (Mass. 1980).

[16]This probably would be an application of "substituted judgment," which we discuss in VI.A.

[17]See, e.g., David A. Green, *"I'm OK—You're OK": Educating Lawyers to "Maintain a Normal Client-Lawyer Relationship" with a Client with a Disability,* 28 Journal of the Legal Profession 65 (2003–2004) (footnote in title omitted) (generally supporting Rule 1.14 but with recommendations for amendments); Gallager & Kearney, *supra* note 6 (criticizing Rule 1.14 for failure to provide sufficient guidance to lawyers); O'Sullivan, *supra* note 10 (same); James R. Devine, *The Ethics of Representing the Disabled Client: Does Model Rule 1.14 Adequately Resolve the Best Interest/Advocacy Dilemma?,* 49 Missouri Law Review 493 (1984) (criticizing Rule 1.14, particularly that it is incompatible with Rule 1.6 protecting client confidences). Although some articles were written before 2002, when the ABA amended Rule 1.14, much of the criticism (and the praise, for that matter) is still valid.

[18]Alabama State Bar Office of the General Counsel, Formal Op. 1995-06 (1995), www.alabar.org/ogc/fopDisplay.cfm?oneId=350 ("Lawyer may seek appointment of guardian for client under a disability, or take other protective action necessary to advance best interest of client").

[19]*Id.*

[20]Compare, e.g., San Diego County Bar Association, Formal Op. 1978-1 (1978), www.sdcba.org/ethics/ethicsopinion78-1.html, and Los Angeles County Bar Association Professional Responsibility and Ethics Committee, Formal Op. 450 (1988) (attorney may not seek appointment of conservator for his own client), with Bar Association of San Francisco Ethics Committee, Formal Op. 1999-2 (1999), www.sfbar.org/ethics/opinion_1999-2.aspx (attorney may seek appointment of conservator, trustee, or guardian ad litem but is not required to do so). California has not adopted Model Rule 1.14.

III. Representational Models

Two basic representational models for people with limited capacity, including people with disabilities, seniors, and minors, have been debated for years.[21] A familiar model—often called the "client autonomy" or "expressed wishes of the client" model—is linked to the adversarial system of justice and sees the attorney as the "systemic promoter and facilitator of client autonomy."[22] Autonomy is viewed as a "fundamentally moral concept" because it promotes dignity and freedom, universally held to be important values for people with disabilities.[23] Because autonomy has intrinsic worth, the attorney may be absolved from the moral consequences of the client's actions or the resolution of the dispute.[24]

Disability advocates are familiar with this paradigm in, for example, the representation of a person with mental illness in the exercise of the person's right to refuse treatment with psychiatric medication. The right and its exercise are expressions of the client's autonomy, dignity, and freedom to choose. That the outcome of successful advocacy could be that the client's mental health would deteriorate or not improve is of less consequence than the exercise of autonomy—a good in and of itself. Many clinicians and parent and family groups strongly disagree with this approach.[25]

The other representational model—usually called the "best interest" model—accords the attorney "considerable autonomy over both the means chosen and the ends pursued on behalf of a client."[26] It rejects the idea that a lawyer is merely a mouthpiece zealously advocating, without moral accountability, a client's wishes.[27] Rather, the lawyer has broader obligations such as to "confront the client about the moral implications of the client's actions and [to] actively seek justice."[28] In the case of people with disabilities, some proponents of this model argue that the lawyer's duty is to determine what is in the client's "best interest" and to pursue that end, even if it is not what the client says the client wants.

This model is also familiar to advocates of people with disabilities. An example is the too-common situation in civil commitment cases when an attorney, believing that the client will benefit from further hospitalization, decides not to advocate the client's expressed desire to be discharged. Perhaps the most egregious manifestation of this belief is when the lawyer is less than forthright to the client and to the court and mounts a feeble defense or acts in a manner that lets

---

[21]The Massachusetts Supreme Judicial Court analyzed both approaches in *Care and Protection of Georgette,* 785 N.E.2d 356 (Mass. 2003), but declined to endorse either and referred the issue to a rules committee. See also Katherine Hunt Federle, *The Ethics of Empowerment: Rethinking the Role of the Lawyers in Interviewing and Counseling the Child Client*, 64 Fordham Law Review 1655, 1657–72 (1996) ("Two Lawyering Models"). Some early discussions of issues in representing adults with mental disabilities included Neil H. Mickenberg, *The Silent Clients: Legal and Ethical Considerations in Representing Severely and Profoundly Retarded Individuals,* 31 Stanford Law Review 625 (1979); Stanley S. Herr, *Representing Clients with Disabilities: Issues in Ethics and Control,* 17 New York University Review of Law and Social Change 609 (1989–90); Steven J. Schwartz, Robert D. Fleischner, Marilyn J. Schmidt, Heather M. Gates, Cathy Costanzo & Nancy Winkelman, *Protecting the Rights and Enhancing the Dignity of People with Mental Disabilities: Standards for Effective Legal Advocacy*, 14 Rutgers Law Journal 541 (1983).

[22]Federle, *supra* note 21, at 1658–59.

[23]*Id.*

[24]*Id.* at 1659.

[25]E.g., a prominent psychiatrist is quoted as calling one right-to-refuse-treatment decision "an example of the mental health bar becoming so zealous that they have inadvertently gone too far: from protecting the rights of patients to not protecting their welfare." Nancy Rhoden, *The Right to Refuse Psychotropic Drugs,* 15 Harvard Civil Rights–Civil Liberties Law Review 363, 366 n.13, cited in Michael L. Perlin, 2 Mental Disability Law: Civil and Criminal 220 n.506 (2d ed. 1998). Perlin's treatise includes a survey of articles by clinicians criticizing zealous advocacy on behalf of people with mental disabilities. See *id.* at 215–24.

[26]Federle, *supra* note 21, at 1664.

[27]*Id.* at 1664–65.

[28]*Id.* (footnotes omitted).

the judge know that the lawyer is only going through the motions.[29]

IV. Client Capacity

Both representational models assume a degree of client competence. One who can make a choice is, in theory at least, an autonomous actor and can exercise freedom. Thus, regardless of which of the representational models an attorney adopts, the attorney must make some initial determination of the client's capacity to make the choices that guide and inform the representation.

The issue of capacity may arise when a legal aid attorney attempts to represent an individual who has a guardian. For example, when a ward contests the need for guardianship or complains about a guardian's actions, the guardian commonly objects to the very ability of the ward to retain counsel. A Massachusetts court rejected the appearance of an attorney purporting to represent an adult ward over the objection of his guardian.[30] The court assumed that in most circumstances the imposition of plenary guardianship was enough to leave decisions about representation to the guardian.[31] In better reasoned opinions, other states expressly recognized the rights of persons under guardianship to retain counsel.[32] The Supreme Court of Oklahoma, recognizing that guardianship is "a significant restriction of a person's liberty," held that there was a due process right to select one's own counsel in a guardianship proceeding.[33]

Even before being faced with a hostile court or guardian, however, attorneys may have to make their own judgments about the client's capacity. There is no clear standard to which an attorney can refer to decide whether a client or potential client has the capacity to enter into a client-lawyer relationship or to direct the course of the representation. Rule 1.14's Comment 5 provides some factors for the attorney to "consider and balance": "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."[34]

V. Interviewing People with Diminished Capacity

Although nearly all standards of good legal interviewing apply equally to people with diminished capacity, advocates should not forget that they may need to make accommodations for people with disabilities.[35] For example, a client with diminished capacity may not have as clear an understanding of the legal system or of the lawyer's role as do other adults. The client may be more passive, more suggestible, or less patient than other clients. The attorney is almost always a stranger to the client, and thus a person with a disability may distrust the attorney as just one more person claiming to want to help. Because of stigma, many clients may be less than forthcoming in describing or acknowledging their disabilities.

---

[29]Perlin called "the historic inadequacy of representation of persons with mental disabilities [in civil commitment cases] … an ineradicable blot on the legal profession's record…." Michael L. Perlin, 1 Mental Disability Law: Civil and Criminal 192–94 (2d ed. 1998) (citing studies demonstrating lack of clear definition of advocacy role in civil commitment cases).

[30]*Guardianship of Hocker*, 791 N.E.2d 302, 308–9 (Mass. 2003).

[31]*Id.*; see also *supra* note 10 (definition of "plenary guardian").

[32]See, e.g., *Phoebe G. v. Solnit*, 743 A.2d 606, 611–12 (Conn. 1999) (person under guardianship may bring action by next friend in exceptional circumstances); *Holmes v. Burchett*, 766 So. 2d 387, 388 (Fla. Dist. Ct. App. 2000) (trial court violated ward's due process rights by failing to conduct adjudicatory hearing before finding that ward did not have capacity to retain counsel of ward's choice); see also *Estate of Witt v. Missouri Protection and Advocacy Services*, 880 S.W.2d 380, 383 (Mo. Ct. App. 1994) (allowing intervention by protection and advocacy agency, in its own name, but on behalf of person with conservator, to contest sale of real estate).

[33]*Towne v. Hubbard,* 3 P.3d 154, 160–61 (Okla. 2000).

[34]Model Rules of Professional Conduct R. 1.14 cmt. 5 (2007).

[35]See Green, *supra* note 17, at 81–91.

The attorney should ask the client if the client is taking medication and should take the possible effects of the medication into account throughout the course of the interview.[36] Careful listening is the most critical interview skill and sometimes the hardest, most attorneys have learned. In particular, many institutionalized people are surprised that anyone takes the time to listen carefully. The attorney must be willing to work with the client to define the legal problem, determine the client's wishes, and seek a desired outcome. Several visits may be necessary to achieve this end. The attorney should advise the client of the potential consequences of the available choices and should feel free to advise about the wisdom of the client's choice and the possibility of success but should not manipulate the discussion to ensure the decision that the attorney would make.[37]

VI. Possible Approaches to Representing Clients with Questionable Capacity

David A. Green suggests that there are three parts of complying with Rule 1.14:

> [First,] the lawyer must have a clear understanding as to a "normal client relationship" and how it relates to the lawyer's responsibilities under the ethical rules. [Second], the lawyer has to discern when a client has a disability that triggers compliance with Rule 1.14. [Third, in] order for a lawyer to effectively represent a client with a disability, the lawyer has to be educated on the rights of clients with disabilities and the characteristics of people with mental disabilities.[38]

Two approaches have been proposed for attorneys to consider when representing clients of questionable capacity. Both approaches start with acknowledging certain basic ethics concepts that are inherent in "a clear understanding of the 'normal client relationship,'" which is Green's first part. Those basic concepts include the following:[39]

- The attorney's primary loyalty is to the client; the attorney must avoid conflicts in representation that may adversely affect the client's interests.[40]
- The attorney's task is to foster the client's interests by seeking the client's lawful objectives through reasonably available means permitted by law.[41]
- The attorney's duty is to act competently, diligently, and zealously.[42]
- The attorney's responsibility is to maintain communication with and advise the client.[43]
- The attorney's obligation is to maintain the client's confidences.[44]

Both approaches also recognize that, as uneasy as some attorneys may be about assessing their clients' capacity, case situations and Rule 1.14 often demand it. Most attorneys' decisions about capacity are based objectively on the client's ability to express a position or preference and subjectively on the attorney's assessment of whether the position is "reasoned."[45] "Reasoned positions," at least as we use the term in this context, are probably best measured by the person's ability to

[36]Jan C. Costello, *Representing the Medicated Client,* 7 Mental Disability Law Reporter 55, 56, 62 (1983).

[37]Federle, *supra* note 21, at 1692.

[38]Green, *supra* note 17, at 68 (footnotes omitted).

[39]*Id.*

[40]Model Rules of Professional Conduct R. 1.17 cmt. 1 (2007) (loyalty); R. 1.10, 1.17, 1.18 (conflicts of interest).

[41]*Id.* R. 1.2.

[42]*Id.* R. 1.1 (competence); R. 1.3 (diligence); preamble ¶¶ 2, 8, 9 (zealous advocate).

[43]*Id.* R. 1.4.

[44]*Id.* R. 1.6.

[45]See *id.* R. 1.14 cmt. 6.

know and understand the relevant facts, options, and probable outcomes of a particular decision. In other words, the process of decision making—not the outcome—is what is crucial. We believe that advocates should begin with a presumption that the client is competent, and, if errors are made, they should be made on the side of assuming capacity rather than incapacity.

Thereafter the two approaches diverge somewhat. The first, which we call a "layered" approach, was suggested in an amici brief in the *Georgette* case.[46] The second approach, suggested by Paul Tremblay, is actually a sequence of several possible approaches, ranging from the most client-centered to the more paternalistic.[47]

A. Layered Approach

Using this approach, the lawyer begins with the premise that there are three possible categories of clients of questionable capacity:

- Clients who are able to express a reasoned position regarding the issue presented.
- Clients who are unable to express any position regarding the issue presented.
- Clients who express a position, but the position, in the attorney's assessment, is not based on reasoned decision making.[48]

1. Capable Clients

When the attorney determines that the client is able to take a reasoned position, the attorney should advance the client's position regardless of the level of harm to which the client may be exposed if the position is achieved. This approach is the most compatible with the normal client-lawyer relationship and is consistent with the usual client-centered lawyering concepts. It allows a client, just like any other person, to make a "bad" decision.[49]

2. Incapable Clients

When the attorney determines that the client's expressed preferences are not based on reasoned decision making but, nevertheless, that the preference, if attained, would not cause any risk of substantial harm to the client, the attorney again advocates the expressed preference. However, if the client expresses a preference that is not the product of reasoned decision making and that position, if attained, would result in a risk of substantial harm, the attorney should zealously advance the expressed position but might also seek the appointment of a surrogate to recommend to the tribunal (if there is one) what is in the client's best interest.[50]

This category, while imperfect, preserves the client's right to a zealous advocate while allowing the attorney to take some indirect action for the client's protection. Those who are always uncomfortable with seeking a surrogate for their clients will find fault with this strategy.

For those clients who are unable to express any position on an issue, the attorney has two options, neither completely satisfactory. The first is to seek the appointment of a surrogate. The difficulty with this option is that it completely surrenders the client's decision making to a third party. A second option is for the attorney to gather as much information about the client as possible and, using a "substituted judgment" analysis, determine what the client would do if the client had the capacity to decide and then to advocate that position.[51] This determina-

[46]Amici Brief of Children's Law Center of Massachusetts, *Care and Protection of Georgette,* 785 N.E.2d 356 [hereinafter Amici Brief].

[47]Paul R. Tremblay, *On Persuasion and Paternalism: Lawyer Decisionmaking and the Questionably Competent Client,* 1987 Utah Law Review 515 (1987).

[48]Amici Brief at 16–36.

[49]See *id.* at 16–18.

[50]See *id.* at 29–36.

[51]For a description and an application of substituted judgment in a judicial context, see *Superintendent of Belchertown State School v. Saikewicz,* 370 N.E.2d 417, 431–32 (Mass. 1977) (declining to authorize life-prolonging chemotherapy for man with profound retardation; finding that, if competent, he would refuse the treatment).

tion is not necessarily what is "best" for the client but rather an attempt to determine what the client would choose, even if the choice is not the one most people would make. We suggest these possible factors for the attorney to consider:

- the client's legal interests, particularly any liberty-related interests;
- the client's unique personality and background;
- the available options and alternatives, particularly those options that are least intrusive or least restrictive;
- the consequences of each option; and
- the client's prior expressed preferences.

While this category attempts to maximize a client's individual dignity by avoiding a strict "best interest" approach, it requires the lawyer to enter into the largely fictitious process of divining what choices another person would make.

3. Clients Making Apparently Unreasonable Decisions

The third category actually has two subcategories. They are, first, those clients who express an "unreasoned" position that, if attained, would not place them at risk of serious or substantial harm, and, second, those whose position, if attained, would place them at risk of serious or substantial harm.[52] Regardless of into which category the client falls, we suggest that the attorney's goals should be to maximize adherence to the client's expressed wishes, to be compatible with Rule 1.14, to avoid conflicts, and to maintain as normal a client-lawyer relationship as possible.[53]

B. Tremblay's Sequential Approach

Paul R. Tremblay suggests four options when representing a client who is of questionable competence. He more or less eschews any categorization or grouping of clients, instead discussing the options when an attorney has concerns about a client's capacity. To some extent, these options mirror those of the layered approach described above, and each also has its advantages and disadvantages. The options are:

- treat the client as if the client were fully competent (even if the client is not) and accept the client's instructions;
- treat the client as if the client were fully competent (even if the client is not) but actively try to persuade, even manipulate, the client to make a "better" choice;
- act as a "de facto guardian" for the client and decide for the client; and
- seek the appointment of a surrogate, perhaps a guardian or guardian ad litem, for the client.[54]

1. Follow the Client's Instructions

The first option, following the client's instructions, is consistent with traditional ideas of client-centered lawyering, with the lawyer following the client's expressed instructions regardless of whether they are reasoned or whether they create a risk of harm. This option is premised on respect for the client's autonomy and dignity. The option is available only if the client is able to express a preference.

2. Use Persuasion

The second option, using persuasion or even manipulation, also works only if the client is able to express a preference and

[52]Amici Brief at 29–36. Serious or substantial harm, while subjective, is probably best thought of in this context as specific to the particular client's situation. The harm could be emotional, financial, or liberty-related and should have some relationship to the client's overall well-being.

[53]See *id. at 7–15.*

[54]Tremblay, *supra* note 47, at 517–20. Withdrawal from the case may also be an option. See *In re Rose Lee Ann L.*, 718 N.E.2d 623, 628 (Ill. App. Ct. 1999) (attorney acted appropriately by withdrawing when he could not advocate position with which he disagreed). Withdrawal is a less viable option where the client is not capable of fully participating and, as is the case with most clients of legal aid attorneys, no other representation is likely to be available. Tremblay suggests that withdrawal "may promote the lawyer's peace of mind, but it leaves unappealing consequences in its wake: either the client's cause is left abandoned (when successor counsel cannot be obtained), or the ethical problems are passed on to successor counsel, who repeats the process." Tremblay, *supra* note 47, at 520 n.20.

only if the client will engage in some sort of dialogue. Rule 1.14 implicitly countenances such an approach, appearing to allow attorneys to act contrary to their client's instructions if the client "lacks sufficient capacity" to make "adequately considered decisions" and the attorney believes that the client is "at risk of substantial harm, physical, mental, financial or otherwise."[55] If the attorney makes those two determinations, the attorney may even breach the confidential relationship to consult with others to protect the client if such breaches are allowed by the state's law and ethics code.[56]

3. Act as de Facto Guardian

Unlike the substituted-judgment approach, the acting-as-de-facto-guardian approach requires the attorney to try to determine the client's best interest.[57] Paragraph 2 of the pre-2002 Rule 1.14's comments suggested that an attorney might act as a de facto guardian for an incompetent client to ensure the client's "best interests." The ABA deleted that language from the 2002 version because it was unclear "not only what it means to act as a 'de facto guardian,' but also when it is appropriate for a lawyer to take such action and what limits exist on the lawyer's ability to act for an incapacitated client."[58] Although the intent was that the attorney could make decisions that the client would ordinarily make for himself, the scope of the authority was unclear. The scope might include, for example, authority to call witnesses or present evidence to which the client objects. However, might an attorney ethically enter into a favorable settlement without his incompetent client's permission? The most recent version of the comments (2007) does not include any reference to de facto guardian.

4. Seek Appointment of a Surrogate

Rule 1.14 allows the attorney to seek appointment of a guardian or other surrogate to act in an incompetent client's interest. However, in many circumstances the appointment of a legal representative may be traumatic, and guardianship brings with it losses of liberties. Seeking appointment of a guardian ad litem may be less onerous. The guardian ad litem could instruct the attorney but probably would not have access to the client's funds or the authority to make life decisions for the client as a plenary would or a limited guardian might. Nevertheless, the client may interpret the attorney's request for a guardian ad litem or a guardian to be a betrayal of the attorney-client relationship.

■ ■ ■

Advocates and attorneys should try to discover the representational approach that is consistent with ethics rules in their states and with their own values and reflects the values and principles of legal aid practice. Whatever the approach, we suggest that representation should give people with diminished capacity the maximum personal dignity and the fullest possible respect for their expressed preferences, should sparingly resort to seeking the appointment of a surrogate, and should always adhere as closely as possible to a typical client-attorney relationship.[59]

---

[55]Model Rules of Professional Conduct R. 1.14 (2007).

[56]The 2002 amendments to Rule 1.14 allow limited breaches of confidentiality. See *id.* R. 1.14(c); see also *supra* text accompanying note 7 for the content of Rule 1.14(c). California, by contrast, may not allow an attorney to breach the client's confidences even in some circumstances in which breach would be allowed by Rule 1.14. Cal. Bus. & Prof. Code § 6068(e) (West 2004) (permitting but not requiring attorney to reveal confidential information "to the extent the attorney reasonably believes the disclosure is necessary to prevent a criminal act that the attorney believes is likely to result in death of, or substantial bodily harm to, an individual"). Attorneys should carefully consult their state's rules about breaches of confidentiality.

[57]See *Commonwealth v. Nieves,* 846 N.E.2d 379, 386 (Mass. 2006) (in case seeking civil commitment of an alleged sexually dangerous person, attorney for an incompetent defendant should act as defendant's de facto guardian to decide whether to waive right to trial by jury).

[58]Model Rules of Professional Conduct R. 1.14 (2002) ("Reporter's Explanation of Changes").

[59]Portions of this article originally drafted for the Training and Advocacy Support Center at the National Disability Rights Network, with support from the Administration on Developmental Disabilities, the Rehabilitation Services Agency, and the Center for Mental Health Services, are used here with permission. For information about the National Disability Rights Network, see Joan Magagna, *The Protection and Advocacy Network—a Resource for Legal Aid Attorneys*, in this issue.

Practical Tips for Representing Clients with Mental Disabilities

Do Not Fall for the "Three Great Myths" About Mental Disabilities

- Immutability: What you are seeing is the way the client always presents, always has presented, and always will present.
- Overattribution: Everything you are seeing is due to the client's disability; the behavior could be due to the client's personality, the side effects of the client's medication, or the result of substance abuse.
- Permanence: Generalizing from one event or behavior to reach a conclusion about a client's permanent condition is not appropriate because interpersonal dynamics and environmental changes—such as weather, stress, or difficulty finding a parking place—can make significant differences in producing certain behaviors.

Ask More than Once and Consider Long-term Goals

Clients often direct their attorneys to take positions that may undermine their long-term goals. When getting the client's input on a strategic decision in a case, ask the client more than once and in different ways. For example, perhaps your client was experiencing disability-related difficulties when you first asked about a particular issue. Asking again at a different time may yield a more informed decision. Trying to get to know the client and gaining an understanding of the client's long-term goals will help you in counseling the client about how to proceed in the short term.

Learn About the Client's Disability

While everyone is unique, people with certain disabilities have some common characteristics. Understanding the client's disability and how it manifests itself will translate into more realistic expectations on how best to interact with and represent the client.

Inquire About Medication Side Effects and Amelioration

Clients with mental illness may experience side effects from their medications. Think about how to ameliorate those side effects. For example, if the client's medication makes the client drowsy in the morning, you should schedule the client's deposition for the afternoon. Understanding the client's medication's side effects and amelioration techniques may result in more effective representation.

Use Rehearsing and Role Playing

Instead of explaining to clients with mental illness how hearings or meetings proceed, consider using rehearsing and role playing. Try to make the rehearsal as close to possible to the real setting. For example, simulate the same environment as the hearing, rehearse during the same time of day, use someone of the same gender for the role of opposing counsel (most apt in a domestic violence case), visit the courtroom before the hearing, and sit in on another hearing in that courtroom. Many clients with mental illness experience anxiety, and helping them feel more in control and confident in a stressful situation can improve their performance at the hearing or meeting.

Use Written Communication Both to and from the Client

When communicating with the client, do not assume that the client understands even if the client appears to understand and does not ask questions. Confirm discussions in writing, but use simple language. Microsoft

or other language evaluation tools can help simplify the language. You may need to read letters to some clients. Ask clients who can write to put case-related information in writing. Explain that this allows them to express themselves in their own words rather than attorneys filtering their information. As a side benefit, this can limit the amount of time you spend on the telephone or transcribing voicemail messages.

Inform the Client of Conduct Rules

Inform clients of any conduct rules at the beginning of representation and confirm those rules in writing. Rules may be on how often clients may call, when they can expect a call from you, and their conduct when communicating. If the client gets upset and becomes abusive, stay calm and inform the client that abusive language is not permitted. If the client continues to be abusive, inform the client that the call or meeting will be terminated until the client is better able to engage in conversation without being abusive.

Use Alternatives to Accommodate the Client with a Mental Disability

Under antidiscrimination laws, attorneys have an obligation to provide clients with disabilities with reasonable modifications of their regular office policies and procedures (Americans with Disabilities Act of 1990, 42 U.S.C. § 12181(7)(F)). Many times these modifications can help both the client and the attorney. For example, setting up a separate voicemail box for particular clients allows them to give all the information that they believe is necessary. This may also benefit you by not having those clients fill up space on your voicemail.

Have a Suicide Policy in Place

If a caller or client threatens suicide, try to determine if the threat is real or is just a manipulation technique. If you perceive it to be a real threat, advise the caller that you are taking it seriously, that you are not trained to handle someone who is suicidal, and that you are prepared to connect the caller with a professional for assistance. Have a suicide hotline contact number at your desk for such emergencies.

Many of these tips are best practices that should be followed for all clients, not just clients with mental disabilities. (Susan Stefan, an attorney at the Center for Public Representation in Massachusetts, shared her insights on the "three great myths" and other suggestions for these practical tips.)

Barry C. Taylor
Legal Advocacy Director

Equip for Equality
20 N. Michigan Ave. Suite 300
Chicago, IL 60602
312.895.7317
800.610.2779 (TDD)
barryt@equipforequality.org