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Capacity and Ethical Considerations When Representing Vulnerable Adults

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INTRODUCTION

The American population as a whole is aging. The Alzheimer's Association reports that:

> Millions of Americans have Alzheimer's or other dementias. As the size and proportion of the U.S. population age 65 and older continue to increase, the number of Americans with Alzheimer's or other dementias will grow. This number will escalate rapidly in coming years, as the population of Americans age 65 and older is projected to nearly double from 48 million to 88 million by 2050. The baby boom generation has already begun to reach age 65 and beyond, the age range of greatest risk of Alzheimer's; in fact, the first members of the baby boom generation turned 70 in 2016.[1]

It logically follows that as the population ages, so does the client base of lawyers serving that population. It is therefore incumbent upon lawyers to be cognizant of issues confronting the clients they serve. Clients with cognitive impairments are vulnerable to elder abuse. Such abuse can include, but is not necessarily limited to, financial exploitation.[2]

The National Council on Aging reports that:

> Approximately 1 in 10 Americans aged 60+ have experienced some form of elder abuse. Some estimates range as high as 5 million elders who are abused each year. One study estimated that only 1 in 14 cases of abuse are reported to authorities.
>
> In almost 60% of elder abuse and neglect incidents, the perpetrator is a family member. Two thirds of perpetrators are adult children or spouses.
>
> Recent studies show that nearly half of those with dementia experienced abuse or neglect.[3]

Social isolation and mental impairment (such as dementia or Alzheimer's disease) are but two of the (numerous) factors that can make an individual vulnerable to elder abuse.[4]

In 2011, Mickey Rooney testified before Congress and urged it to do something about elder abuse.[5] During the hearing he commented that if elder abuse

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[1] Alzheimer's Association, 2017 Alzheimer's Disease Facts and Figures. Alzheimers Dement 2017; 13:325-373, p. 18. Internal citations omitted.

[2] National Council on Aging, *Elder Abuse Facts*, https://www.ncoa.org/public-policy-action/elder-justice/elder-abuse-facts.

[3] *Id.*

[4] *Id.* For additional vulnerability factors, see Sandra D. Glazier, Thomas M. Dixon, and Thomas F. Sweeney, *What Every Estate Planner Should Know About Undue Influence: Recognizing It, Insulating/Planning Against It. . . . And Litigating It*, 56 Tax Mgmt. Memo., No. 11, at 185–209 (June 1, 2015), 40 Tax Mgmt. Estates, Gifts and Trusts J., No. 4, at 175–198 (July 9, 2015). *See also* Sharon L. Klein, Sandra D. Glazier, Thomas M. Dixon & Thomas F. Sweeney, *Confronting Undue Influence in Your Practice? Industry Experts Weigh in on How to Take an Increasingly Pervasive Issue*, Trusts & Estates, Wealth Management.com (June 25, 2015) at 33–37.

[5] Tom Cohen, ''Mickey Rooney tells Senate panel he was a vic-

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could happen to him, it could happen to anyone. He recalled being fearful, told to shut up, and denied food and medicine if he challenged his stepson (who was the individual he had entrusted with his finances). He poignantly indicated that elder abuse can take many forms, including physical, emotional, and financial abuse.

How Courts Have Ruled

Age alone, in some states, can render a person to be deemed unable to protect themselves from elder abuse and make them a vulnerable adult under a state's elder abuse statute.[6] In *Chapman v. Wilkinson*,[7] the Iowa Supreme Court held that an individual over 60 years old did not have to suffer from a mental or physical condition in order to qualify as a vulnerable elder, and the evidence supported finding that she was a vulnerable elder. It further held that under Iowa Code §235F.1(8) and §235F.1(14) a person does not need to be a caretaker to commit elder abuse because a person standing ''in a position of trust or confidence with the vulnerable elder'' can perpetrate elder abuse. In this particular case, Chapman conveyed her mobile home to her son, Wilkinson, telling him at the time she delivered title that the deed was so that there would be no question that he was to receive the mobile home when she died. By doing so, the court found Chapman retained a life estate. For years Chapman continued to reside in the mobile home and paid the taxes on it, but when one of Chapman's daughters started living with her in the mobile home, Wilkinson started eviction proceedings.

The court held that the elder abuse statute applied because ''a vulnerable elder means when a person stands in a position of trust or confidence with the vulnerable elder and knowingly and by undue influence, deception, coercion, fraud, or extortion, obtains control over or otherwise uses or diverts the benefits, property, resources, belongings, or assets of the vulnerable elder.''[8] According to the court, under the Iowa statute, when someone is at least 60 years old ''. . . age alone, without a mental or physical condition, makes someone unable to protect himself or herself from elder abuse, then that person is a vulnerable elder as defined in section 235F.1(17).''[9] The finding that Chapman, who was 69, was a vulnerable elder was bolstered by the fact that she had put all her property in the names of her children, which effectively wiped out her net worth. Wilkinson demanded $35,000 from Chapman after his sister began to live in the home if Chapman wanted to be able to remain in residence. The court found that these facts supported a finding that ''Wilkinson took advantage of Chapman due to her age and financial condition.''[10] In the dissenting opinion, Mansfield cited to cases where the person's advanced age substantially impaired her ability to adequately provide for her own care and protection as being the standard.[11] The dissent argued that the ''potential stigma [of elder abuse] provides an additional reason for not expanding the elder abuse law unduly. The elder abuse law was written to be, and should remain, a cause of action for persons who are unable to protect themselves 'as a result of age' and not merely have attained a certain age.''[12]

New FINRA Rules

On February 5, 2018, the Financial Industry Regulatory Authority's (FINRA) amendment to Rule 4512 and a new Rule 2165 became effective. These rules are intended to address situations when the broker has a reasonable concern that a vulnerable client is being or may be subjected to financial exploitation. For purposes of the FINRA rules, the vulnerable client is referred to as a ''Specified Adult,'' which is:

> (A) a natural person age 65 or older; or (B) a natural person age 18 and older who the member reasonably believes has a mental or physical impairment that renders the individual unable to protect his or her own interests.[13]

FINRA Rule 2165 defines ''financial exploitation'' to mean:

> (A) the wrongful or unauthorized taking, withholding, appropriation, or use of a Specified Adult's funds or securities; or
>
> (B) any act or omission by a person, including through the use of a power of attorney, guardianship, or any other authority regarding a Specified Adult, to:
> (i) obtain control, through deception, intimidation or undue influence, over the Specified Adult's

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tim of elder abuse,'' CNN (Mar. 2, 2011), http://www.cnn.com/2011/SHOWBIZ/03/02/rooney.elderly.abuse/index.html.

[6] *See* Iowa Code §235F.1(17); Ala. Code §13A-6-191(3); Col. Rev. Stat. Ann §18-6.5-102(3), (10); Conn. Gen. Stat. Ann. §17b-450(1)(7).

[7] 890 N.W.2d 853 (Iowa 2017).

[8] *Chapman* at 857.

[9] *Id.* at 857–858.

[10] *Id.* at 858. *But see* Justice Mansfield's dissent (joined by Waterman and Zager), at 860–861.

[11] *E.g., Farr v. Searles*, 180 Vt. 642, 910 A. 2d 929, 930 (2006). *Chapman* at 860.

[12] *Chapman* at 861.

[13] FINRA Rule 2165(a)(1).

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money, assets or property; or
(ii) convert the Specified Adult's money, assets or property.[14]

FINRA explicitly recognizes that even a person imbued with the power to transact business with regard to a client's account may be engaged in financial exploitation. When there is a reasonable basis to suspect that financial exploitation is taking place, the broker may now freeze the account on a temporary basis and alert others so that additional action may be taken to protect the client. Because these rules may impact clients, it can be helpful for estate planners to keep abreast of legislative and other initiatives intended to protect the elderly. More importantly, given the staggering statistics regarding elder abuse at the hands of the vulnerable adult's family members and trusted advisors, it is imperative that estate planners be cognizant of, and vigilant to, indicia of undue influence and financial abuse as they engage in representation of vulnerable clients. They also need to understand their ethical duties and responsibilities when representing vulnerable clients.

Rules of Professional Conduct

Even though the Model Rules of Professional Conduct (MRPC)[15] have not been adopted verbatim in every state, they may be instructive for purposes of assisting lawyers in the assessment of their ethical responsibilities and considerations when engaged in the representation of vulnerable adults. The ACTEC Commentaries are an additional aid in a lawyer's quest to balance the needs of a client with the lawyer's ethical responsibilities and considerations.[16] Despite the existence of these valuable reference materials, one should always consider, and generally give deference to, a pertinent jurisdiction's adopted rules of professional conduct and any available ethics opinions in that jurisdiction. For example, in Michigan, it is generally recognized that:

> In the nature of law practice,. . . conflicting responsibilities are encountered. Virtually all difficult ethical problems arise from conflict between a lawyer's responsibilities to clients, to the legal system, and to the lawyer's own interest in remaining an upright person while earning a satisfactory living. The Rules of Professional Conduct prescribe terms for resolving such conflicts. Within the framework of these rules many difficult issues of professional discretion can arise. Such issues must be resolved through the exercise of sensitive professional and moral judgment guided by the basic principles underlying the rules.[17]

IDENTIFY THE CLIENT

At the outset, it is important to identify the client. When dealing with an elderly or otherwise vulnerable client, it may be common for a family member to make the initial contact. Such contact may be particularly common when Medicaid planning is involved. However, if you are engaged to draft documents for a vulnerable client it is important to remember that the vulnerable individual is the client and not the family member who contacted you. It is also important to recognize that contact by a family member (as opposed to by the client) may be indicia of possible undue influence.[18] In fact, in some states, procurement is an element of the presumption of undue influence.[19] Consequently, it can be helpful to make and maintain a record of the initial contact (including references to who made the contact and the content of the communication). In addition, to the extent possible, encourage that all further contact be directly engaged in with the client.

Paragraph 4 to the preamble to the MRPC provides that:

> [4] In all professional functions a lawyer should be competent, prompt and diligent. **A lawyer should maintain communication with a client concerning the representation.** A lawyer should keep in confidence information relating to representation of a client except so far as disclosure is required or permitted by the Rules of Professional Conduct or other law.[20]

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[14] FINRA Rule 2165(a)(4).

[15] MRPC refers to the American Bar Association's (ABA) Model Rules of Professional Conduct in effect as of December 28, 2017.

[16] American College of Trust and Estate Counsel, Commentaries on the Model Rules of Professional Conduct (5th Ed. 2016) (hereinafter ACTEC Commentaries). Some of the recent revisions to the ACTEC commentaries reflect changed attitudes and perspectives with regard to the ABA's MRPC in the realm of estate planning.

[17] Michigan Rules of Profess'l Conduct- Preamble (Jan. 2, 2018).

[18] *See* Glazier, Dixon, and Sweeney, n.4, above.

[19] *See* Illinois Pattern Jury Instructions — Civil Jury Instruction on Will Contest — Undue Influence Based Entirely on Unrebutted Presumption Arising from Fiduciary Relationship §200.03 and Will Contest §200, ¶C.1.a. at 2–3, http://illinoiscourts.gov/CircuitCourt/CivilJuryInstructions/default.asp.

[20] Model Rules of Prof'l Conduct, Preamble, at ¶4 (2016)(emphasis added).

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COMMUNICATIONS WITH A CLIENT WITH DIMINISHED CAPACITY

Even when the client faces cognitive challenges, the MRPC requires that the lawyer maintain as normal a lawyer-client relationship as possible. MRPC Rule 1.14(a) provides that:

> (a) When a client's capacity to make adequately considered decisions in connection with a representation is diminished, whether because of minority, mental impairment or for some other reason, the lawyer shall, as far as reasonably possible, maintain a normal client-lawyer relationship **with the client**.[21]

Comments to MRPC Rule 1.14 expound upon the lawyer's responsibilities when the client suffers from diminished capacity. These comments provide, in pertinent part, that:

> [1] The normal client-lawyer relationship is based on the assumption that the client, when properly advised and assisted, is capable of making decisions about important matters. When the client is a minor or suffers from a diminished mental capacity, however, maintaining the ordinary client-lawyer relationship may not be possible in all respects. In particular, a severely incapacitated person may have no power to make legally binding decisions. Nevertheless, a client with diminished capacity often has the ability to understand, deliberate upon, and reach conclusions about matters affecting the client's own well-being. For example, children as young as five or six years of age, and certainly those of ten or twelve, are regarded as having opinions that are entitled to weight in legal proceedings concerning their custody. So also, it is recognized that some persons of advanced age can be quite capable of handling routine financial matters while needing special legal protection concerning major transactions.
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> [2] The fact that a client suffers a disability does not diminish the lawyer's obligation to treat the client with attention and respect. **Even if the person has a legal representative, the lawyer should as far as possible accord the represented person the status of client, particularly in maintaining communication.**
>
> [3] **The client** may wish to have family members or other persons participate in discussions with the lawyer. When necessary to assist in the representation, the presence of such persons generally does not affect the applicability of the attorney-client evidentiary privilege. Nevertheless, **the lawyer must keep the client's interests foremost** and, except for protective action authorized under paragraph (b), **must look to the client**, **and not family members, to make decisions on the client's behalf**.
>
> [6] In determining the extent of the client's diminished capacity, the lawyer should consider and balance such factors as: the **client's ability** to articulate reasoning leading to a decision, variability of state of mind and ability to appreciate consequences of a decision; the substantive fairness of a decision; and the consistency of a decision with the known long-term commitments and values of the client. In appropriate circumstances, the lawyer may seek guidance from an appropriate diagnostician.[22]

Assessing the Client's Capacity

It is incumbent upon the lawyer to ascertain the extent of the client's capacity. In doing so, the lawyer is not required to perform standardized psychological or neurological tests.[23] In fact, it is recommended that lawyers **not** engage in clinical assessments of a client unless they are professionally trained to engage in such testing.[24] It may also be noteworthy that tests such as the Mini-Mental Status Exam (MMSE) and neurological assessments or orientation may not be reflective of whether a client has or does not have sufficient capacity.[25]

The lawyer should carefully observe the client and consider the following factors identified by the 1993 National Conference on Ethical Issues in Representing Older Clients:

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[21] Model Rules of Prof'l Conduct R. 1.14(a)(emphasis added).

[22] Model Rules of Prof'l Conduct R. 1.14(a) cmts. 1, 2, 3, 6 (emphasis added).

[23] The ABA indicates that while lawyers should:

> . . . engage in the legal assessment of capacity and should do so in a systematic manner, for a variety of reasons . . ., it is generally not appropriate for attorneys to use more formal clinical assessment instruments, such as the MMSE. . . .Lawyers generally do not have the education and training needed to administer these tests. Many factors must be taken into consideration when administering and interpreting psychological tests.
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> ABA Commn. on L. & Aging & Am. Psychological Assn., Assessment of Older Adults with Diminished Capacity: A Handbook for Lawyers (2005), p. 21.

[24] *Id.* at 3.

[25] *See id. See also* Glazier, Dixon, and Sweeney, n.4, above.

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1. **The client's ability to articulate reasoning leading to a decision.** The client should be able to state the basis for his or her decision. The stated reasons for the decision should be consistent with the client's overall stated goals and objectives.

2. **Variability of state of mind.** Margulies defines this factor as the extent to which the individual's cognitive functioning fluctuates.

3. **Ability to appreciate consequences of a decision.** For example, does a client recognize that without a given medical decision, he or she may physically decline or even die — or without a legal challenge to an eviction, he or she may be without a place to live.

4. **The substantive fairness of the decision.** Margulies maintains that while lawyers normally defer to client decisions, a lawyer nonetheless cannot simply look the other way if an older individual or someone else is being taken advantage of in a blatantly unfair transaction. To do so could defeat the very dignity and autonomy the lawyer seeks to enhance, and thus fairness is one element to balance. Of course, judging fairness risks the interjection of one's own beliefs and values, so caution is required. Yet, the reality is that when the desired legal plan conforms to conventional notions of fairness — e.g., equitable distribution of assets among all children — or the plan is consistent with the lawyer's long-standing knowledge of the client and family, then capacity concerns wane proportionately. Capacity may be diminished but adequate for a legal transaction deemed to be very low risk in the context of conventional fairness.

5. **The consistency of a decision with the known long-term commitments and values of the client.** The decision normally should reflect the client's lifelong or long-term perspective. This will be easier to determine if the lawyer-client relationship is longstanding. At the same time, individuals can change their values framework as they age. The distinction is important.

6. **Irreversibility of the decision.** This factor is listed in the Margulies article but not in the Comment to Rule 1.14. Margulies notes that ''the law historically has attached importance to protecting parties from irreversible events,'' and that ''doing something that cannot be adjusted later calls for caution on the part of the attorney.[26]

In essence, lawyers generally observe and assess a client's cognitive, emotional, and behavioral functioning in initially determining whether the client has sufficient capacity to engage in the proposed estate planning transaction.[27] If questions remain after the assessment, the lawyer may wish to either consult with a qualified professional[28] or (with the client's consent) have a more extensive assessment performed by a qualified professional.[29] Even if a referral to a qualified professional occurs, it remains the lawyer's responsibility to determine, in the exercise of independent judgment, if the client has sufficient capacity to engage in the proposed transaction.[30]

What if the Lawyer Believes There is Diminished Capacity?

MRPC 1.14 provides that:

> (b) When the lawyer reasonably believes that the client has diminished capacity, is at risk of substantial physical, financial or other harm unless action is taken and cannot adequately act in the client's own interest, the lawyer may take reasonably necessary protective action, including consulting with in-

[26] Assessment of Older Adults with Diminished Capacity: A Handbook for Lawyers (2005)(hereinafter Handbook). Peter Margulies, *Access, Connection, and Voice: A Contextual Approach to Representing Senior Citizens of Questionable Capacity*, 62 Fordham L. Rev. 1073 (1994).

[27] Handbook, at 23–26, see n.23, above.

[28] Sometimes an attorney will seek a private consultation with a clinician to discuss and clarify specific capacity issues before proceeding further with representation. Disclosure of the attorney's concerns is private, at least at this stage of the process, and does not involve the client. Rule 1.14(b), cmt. 6, provides explicit recognition of such external consultations, indicating that it is proper for attorneys to seek guidance from an ''appropriate diagnostician'' in cases where clients demonstrate diminished capacity. But does the consultation trigger the need for additional ethical considerations? The ABA Joint Commission indicates that:

> One possible interpretation of the rule and comment is that, since consultation with an appropriate clinician is a very minimal protective action, the threshold for meeting the trigger criteria in Rule 1.14(b) is correspondingly low, thereby justifying very limited disclosure of otherwise confidential information. Unfortunately, authoritative resolution of the question is lacking. The lawyer needs to use good judgment and limit information revealed to what is absolutely necessary to assist with a determination of capacity. Whenever possible, the lawyer should seek to consult the assessor informally without identifying the client. In that case, the question of consent does not arise. The consultation is simply professional advice to the lawyer.

Handbook at 34, see n.23, above.

[29] If a referral is made to a qualified professional for assessment of capacity, it may be helpful to provide the professional with the legal standard to be applied to the proposed transaction.

[30] Handbook at 33–34, see n.23, above.

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> dividuals or entities that have the ability to take action to protect the client and, in appropriate cases, seeking the appointment of a guardian ad litem, conservator or guardian.
>
> (c) Information relating to the representation of a client with diminished capacity is protected by Rule 1.6. When taking protective action pursuant to paragraph (b), the lawyer is impliedly authorized under Rule 1.6(a) to reveal information about the client, but only to the extent reasonably necessary to protect the client's interests.[31]

Comment 5 to MRPC 1.14 illustrates what may constitute appropriate action by the lawyer, when a client with diminished capacity may be at risk of harm unless action is taken. It provides that:

> [5] . . .Such measures could include: consulting with family members, using a reconsideration period to permit clarification or improvement of circumstances, using voluntary surrogate decisionmaking tools such as durable powers of attorney or consulting with support groups, professional services, adult-protective agencies or other individuals or entities that have the ability to protect the client. In taking any protective action, the lawyer should be guided by such factors as the wishes and values of the client to the extent known, the client's best interests and the goals of intruding into the client's decisionmaking autonomy to the least extent feasible, maximizing client capacities and respecting the client's family and social connections.[32]

Consequently, just as brokers are now required to do under FINRA Rule 4512, perhaps lawyers might consider: (a) inquiring whether there is a family member or another trusted individual whom the client would like the lawyer to contact if concerns about the client later arise, and (b) obtaining authorization for such contact to occur should circumstances merit the same.

However, it merits caution and consideration before the lawyer takes action. Even barring specific authorization, the ACTEC Commentaries to MRPC Rule 1.14 reflect that while there may be an implied authority to disclose otherwise confidential information and take protective action under the circumstances identified in MRPC Rule 1.14, the lawyer must nonetheless consider the potential implications of such action and the risks and substantiality of harm. The ACTEC Commentary indicates that:

> . . . in deciding whether others should be consulted, the lawyer should also consider the client's wishes, the impact of the lawyer's actions on potential challenges to the client's estate plan, and the impact on the lawyer's ability to maintain the client's confidential information. In determining whether to act and in determining what action to take on behalf of a client, the lawyer should consider the impact a particular course of action could have on the client, including the client's right to privacy and the client's physical, mental and emotional well-being. In appropriate cases, the lawyer may seek the appointment of a guardian ad litem, conservator or guardian or take other protective action.
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> . . . For the purposes of this rule, the risk of harm to a client and the amount of harm that a client might suffer should both be determined according to a different scale than if the client were fully capable. In particular, the client's diminished capacity increases the risk of harm and the possibility that any particular harm would be substantial. If the risk and substantiality of potential harm to a client are uncertain, a lawyer may make reasonably appropriate disclosures of otherwise confidential information and take reasonably appropriate protective actions. In determining the risk and substantiality of harm and deciding what action to take, a lawyer should consider any wishes or directions that were clearly expressed by the client during his or her competency. Normally, a lawyer should be permitted to take actions on behalf of a client with apparently diminished capacity that the lawyer reasonably believes are in the best interests of the client[33]

Comments to Michigan's Rules of Professional Conduct caution that:

> If the lawyer seeks the appointment of a legal representative for the client, the filing of the request itself, together with the facts upon which it is predicated, may constitute the disclosure of confidential information which could be used against the client. If the

[31] Model Rules of Prof'l Conduct R. 1.14(b), 114(c).

[32] *Id.*, cmt. 5.

[33] ACTEC Commentaries, Commentary on MRPC 1.14, Risk and Substantiality of Harm, at 160–161.

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court to whom the matter is submitted thereafter determines that a legal representative is not necessary, the harm befalling the client as the result of the disclosure may be irreparable.

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. . .[D]isclosure of the client's disability can adversely affect the client's interests. For example, raising the question of disability could, in some circumstances, lead to proceedings for involuntary commitment. The lawyer's position in such cases is an unavoidably difficult one. The lawyer may seek guidance from an appropriate diagnostician.[34]

Additional ACTEC comments to MRPC Rule 1.7 further illuminate considerations under MRPC Rule 1.14 relative to clients with diminished capacity. It indicates that:

> [A] lawyer may take reasonable steps to protect the interests of a client the lawyer reasonably believes to be suffering from diminished capacity, including the initiation of protective proceedings. See ACTEC Commentary on MRPC 1.14 (Client with Diminished Capacity). Doing so may create a conflict of interest between the lawyer and the client. The client might, for example, oppose the protective action being taken by the lawyer and consider it a breach of the duty of loyalty. In such a circumstance, the lawyer is entitled to continue to take protective action, but where possible, should call the court's attention to the client's opposition and ask that separate counsel be provided to represent the client's stated position if the client has not already retained such counsel. A lawyer who is retained on behalf of the client to resist the institution of a protective action may not take positions that are contrary to the client's position or make disclosures contrary to MRPC 1.6 (Confidentiality of Information).[35]

What if the Lawyer Suspects Elder Abuse?

In some jurisdictions, if the lawyer suspects elder abuse (whether such abuse is physical or economic in nature), reporting or other action by the lawyer may be required. The ACTEC Commentaries to MRPC Rule 1.14 reflect, in regards to the reporting of elder abuse, that:

> Elder abuse has been labeled ''the crime of the 21st century,'' Kristin Lewis, *The Crime of the 21st Century: Elder Financial Abuse,* Prob. & Prop. Vol. 28 No. 4 (July/Aug. 2014), and the federal and state governments are responding with legislation and programs to prevent and penalize the abuse. The role and obligations of lawyers with respect to elder abuse varies significantly among the states. Some states have made lawyers mandatory reporters of elder abuse. *See, e.g.,* Tex. Hum. Res. Code §48.051(a)–(c) (2013) (Texas); Miss. Code Ann. §43-47-7(1)(a)(i) (2010) (Mississippi); Ohio Rev. Code Ann. §5101.61(A) (2010) (Ohio); A.R.S. §46-454(B) (2009) (Arizona); Mont. Code Ann. §52-3-811 (2003) (Montana) (exception where attorney-client privilege applies to information). Other states have broad mandatory reporting laws that do not exclude lawyers. *See, e.g.,* Del. Code Ann. Tit. 31, §3910. The exception to the duty of confidentiality in MRPC 1.6(b)(6), which allows disclosure to comply with other law, should apply, but disclosure would be limited to what the lawyer reasonably believes is necessary to comply. In states where there is no mandatory reporting duty of lawyers, a lawyer's ability to report elder abuse where MRPC 1.6 may restrict disclosure of confidentiality would be governed by MRPC 1.14 in addition to any other exception to MRPC 1.6 (such as when there is a risk of death or substantial bodily harm). In order to rely on MRPC 1.14 to disclose confidential information to report elder abuse, the lawyer must first determine that the client has diminished capacity. If the lawyer consults with other professionals on that issue, the lawyer must be aware of the potential mandatory reporting duties of such professional and whether such consultation will result in reporting that the client opposes or that would create undesirable disruptions in the client's living situation. The lawyer is also required under MRPC 1.14 to gather sufficient information before concluding that reporting is necessary to protect the client. *See* NH Ethics Committee Advisory Opinion #2014-15/5 (The Lawyer's Authority to Disclose Confidential Client Information to Protect a Client from Elder Abuse or Other Threats of Substantial Bodily Harm). In cases where the scope of

[34] Michigan Rules of Prof'l Conduct 1.14 cmt.

[35] ACTEC Commentaries at 108.

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representation has been limited pursuant to Rule 1.2, the limitation of scope does not limit the lawyer's obligation or discretion to address signs of abuse or exploitation (consistent with Rules 1.14 and 1.6 and state elder abuse law) in any aspect of the client's affairs of which the lawyer becomes aware, even if beyond the agreed-upon scope of representation.[36]

In some states, the failure to engage in mandatory reporting of suspected elder abuse can subject the mandatory reporter to criminal implications such as the conviction of a misdemeanor.[37]

CAPACITY AND DEFINING THE LAWYER'S ETHICAL RESPONSIBILITIES

As can be discerned from a review of the ethical rules and commentaries cited above, the issue of diminished capacity plays an integral role in defining the duties imposed upon lawyers.

An additional ethical conundrum may arise when the client is a new one, relating to the (potential) client's capacity to even engage the lawyer, as the level of capacity required to contract (or engage the lawyer's services) can be greater than the capacity required to engage in the planned transaction. Therefore, it is important that the lawyer understand and evaluate whether the client might have been subjected to undue influence and/or another form of abuse, as well as whether the client has the requisite capacity to hire the lawyer and engage in the proposed estate planning transactions.

While a diagnosis of ''dementia'' may reflect the existence of cognitive issues such as diminished capacity and vulnerabilities, it does not necessary reflect that a client lacks the capacity to hire the lawyer or engage in estate planning transactions.

The dementia spectrum can consist of five levels:[38]

Mild cognitive impairment. The person may experience memory problems, but is able to live independently. This person should have sufficient capacity to execute the customary estate planning documents.

Mild dementia. The person may experience impaired memory and thinking skills. The person may no longer be able to live completely independently and may require assistance with some Instrumental Activities of Daily Living (IADLs) and Activities of Daily Living (ADLs), and may become confused when in public.[39] This person will usually have sufficient capacity to execute the customary estate planning documents.

Moderate dementia. The person may experience severe memory loss and difficulty in communicating. The person cannot live alone and needs help with most IADLs and ADLs. The person needs assistance if out in the public. The capacity of such a person to execute the customary estate planning documents will likely be slipping away and will be lost by the time severe dementia occurs.

Severe dementia. The person may experience severe problems with communication, incontinence, require constant care and need hands on assistance with all ADL's, and is unable to perform any IADLs. This person will likely lack sufficient capacity to execute any estate planning documents.

Profound dementia. This person is usually bedridden and has insufficient capacity to execute any estate planning document.

Lawyers need to understand the legal standards for the specific transaction contemplated. ''The definition of 'diminished capacity' in everyday legal practice depends largely on the type of transaction or decision under consideration.''[40] While there are deviations and distinctions between the various standards for capacity (such as those to drive, marry, contract, make a will, donate or make a gift, mediate, or consent to medical treatment), for purposes of this article the focus will be on the general capacity precepts relating to testamentary, contractual, and donative capacity.

Because the lawyer must first determine if the client has the capacity to hire him or her, initially the lawyer will need to determine if the client has sufficient contractual capacity.

In determining an individual's capacity to execute a contract, courts generally assess

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[36] *Id.* at 161–162.

[37] By way of example, see Georgia Code §30-5-4 and §30-5-8(a)(2) (2015).

[38] Robert B. Fleming, *Dealing with the Aging Client*, 53rd Annual Probate and Estate Planning Institute, Institute of Continuing Legal Education, 2013, at 24-3 and 24-4. See also Glazier, Dixon, and Sweeney, n.4, above.

[39] IADLs include managing finances, handling personal transportation, shopping, preparing meals, using telephone and communication devices, and performing housework. ADLs include feeding, toileting, selecting proper attire, grooming, maintaining continence, dressing, bathing, walking and transferring. *See* Leslie Kernisan, M.D. and Paula S. Scott, *Activities of Daily Living: What Are ADLS and IADLs?* caring.com (Feb. 6, 2018), at https://www.caring.com/articles/activities-of-daily-living-what-are-adls-and-iadls.

[40] Handbook at 5, see n.23, above.

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> the party's ability to understand the nature and effect of the act and the business being transacted. Accordingly, if the act or business being transacted is highly complicated, a higher level of understanding may be needed to comprehend its nature and effect, in contrast to a very simple contractual arrangement.[41]

In Michigan, to enter into a business contract, settlement agreement, open a bank account, or change insurance policy beneficiaries, persons must:

> . . . generally, possess 'sufficient mind to understand in a reasonable manner the nature and effect of the act in which the person is engaged'. . . .[42]

To some, this may seem a nominal standard, however, it is generally perceived to require greater capacity than that which is required to create a will or a revocable trust.

Assuming the client has the requisite capacity to engage the lawyer, the obligation to assess capacity does not end there. The lawyer will then need to assess whether the client has the requisite capacity to engage in the planned transaction. While exploring all standards of capacity is beyond the scope of this article, lawyers may nonetheless wish to refer to other sources that might provide guidance on the capacity requirements[43] as well as statutory and case law standards established in the jurisdiction where the transaction is proposed to be accomplished. However, to provide an understanding of the ethical considerations covered by this article, some generalized references to capacity standards follow.

The ability to create and execute a will is generally the lowest standard of capacity.

> Typically, the testator at the time of executing a will must have capacity to know the natural objects of his or her bounty, to understand the nature and extent of his or her property, and to interrelate these elements sufficiently to make a disposition of property according to a rational plan. The terminology that the testator must be of ''sound mind'' is still commonly used. The test for testamentary capacity does not require that the person be capable of managing all of his or her affairs or making day-to-day business transactions.[44]

The Uniform Trust Code (UTC)[45] reflects that the capacity to make a revocable trust is the same as that required to make a will.[46] However, some trusts created to qualify individuals for Medicaid benefits or for tax planning (in order to take advantage of an individual's annual gift or lifetime exemptions) are irrevocable in nature. The standard for such trusts may require that the grantor meet a higher capacity standard. While the UTC does not specifically set forth the standard of capacity required for an irrevocable trust, the commentary to UTC §601 reflects that the differentiation in capacity standards are in recognition that *revocable* trusts are now commonly utilized as will substitutes. In this regard, the commentary reflects that:

> The revocable trust is used primarily as a will substitute, with its key provision being the determination of the persons to receive the trust property upon the settlor's death. To solidify the use of the revocable trust as a device for transferring property at death, the settlor usually also executes a pourover will. The use of a pourover will assures that property not transferred to the trust during life will be combined with the property the settlor did manage to convey. Given this primary use of the revocable trust as a device for disposing of property at death, the capacity standard for wills rather than that for lifetime gifts should apply.. . .
>
> The Uniform Trust Code does not explicitly spell out the standard of capacity necessary to create other types of trusts, although Section 402 does require that the settlor have capacity. This section includes a capacity standard for creation of a revocable trust because of the uncertainty in the case law and the importance of the issue in modern estate planning. No such uncertainty exists with respect to the capacity standard for other types of trusts. To create a testamentary trust, the settlor must have the capacity to make a will. **To create an irrevocable trust, the settlor must have the capacity that would be needed to transfer the prop-**

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[41] *Id.* at 6. Internal citations omitted.

[42] *Persinger v. Holtz*, 248 Mich. App. 499, 503 (2001), citing *In re Erickson* 202 Mich. App. 329, 332 (1993).

[43] See Handbook, n.23, above; American Bar Association, *Assessment of Older Adults with Diminished Capacity: A Handbook for Psychologists* (2008) ; and, American Bar Association, *Judicial Determination of Capacity of Older Adults in Guardianship Proceedings* (2006).

[44] Handbook, n.23, above, at 5.

[45] References to the UTC for purposes of this paper are to the Uniform Trust Code as revised or amended in 2010, National Conference of Commissioners on Uniform State Laws.

[46] *See* UTC §601. *See also* UTC §402, Comment at p. 60.

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erty free of trust. See generally Restatement (Third) of Trusts §11 (Tentative Draft No. 1, approved 1996); Restatement (Third) of Property: Wills and Other Donative Transfers §8.1 (Tentative Draft No. 3, approved 2001).[47]

Consequently, the requisite capacity for the creation of an *irrevocable trust* may be more akin to that required for donative capacity, than what is required to create a will or even enter into a contract. Donative capacity has been identified to require:

> . . . an understanding of the nature and purpose of the gift, an understanding of the nature and extent of property to be given, a knowledge of the natural objects of the donor's bounty, and an understanding of the nature and effect of the gift. Some states use a higher standard for donative capacity than for testamentary capacity, **requiring that the donor knows the gift to be irrevocable and that it would result in a reduction in the donor's assets or estate.**[48]

Other levels (or standards) of capacity may also be involved in effectuating the plan intended by a client. To execute a deed of conveyance, a person must have:

> sufficient mental capacity to understand the business in which he was engaged, to know and understand the extent and value of his property, and how he wanted to dispose of it, and to keep these facts in his mind long enough to plan and effect the conveyances in question without prompting and interference from others.[49]

With regard to durable financial powers of attorney and the potential ramifications that might be attendant to them, at least one court recognized that:

> . . . requiring the principal of a power of attorney to be mentally competent at the time of its execution advances important public policy concerns. We are hard pressed to conceive of a more effective and efficient means by which to devastate and destroy the estate of a vulnerable person than through a durable general power of attorney. Sanctioning the execution of a power of attorney by a mentally incompetent principal would give license to those who have the power or inclination to coerce, cajole, or dupe such a person into effectively relinquishing rights to their property, finances, and other assets with minimal effort. Considering the nature, breadth, and consequences of a power of attorney, public policy interests are served by the requirement that the principal have the ability to engage in thoughtful deliberation and use reasonable judgment with regard to its formation.[50]

While the standard for making informed medical decisions may be a consideration, the standard for creating a durable medical power of attorney differs from that required for the actual medical decision itself and is, instead, likely akin to that required to contract (discussed above).

CONFLICTS IN REPRESENTATION

Even if the lawyer determines that the client has all of the requisite capacities identified above, have all of the lawyer's ethical duties been satisfied? Perhaps not.

Beyond the ethical duties imposed regarding the representation of clients with diminished capacity, the lawyer must analyze (as with any client) if any conflicts of interest exist and whether any (actual or potential) conflicts identified may be waived. However, some conflicts of interest are so serious that even the provision of ''informed consent'' will not suffice in permitting the lawyer to undertake or continue the representation.[51]

Waiver itself perhaps contemplates yet another level of capacity — that which is required to provide ''informed consent.'' In this regard, ''informed consent'' represents the agreement by a person to a proposed course of conduct after the lawyer has communicated adequate information and explanation about the material risks of, and reasonably available alternatives to, the proposed course of conduct.[52]

If the lawyer represents (or is requested to represent) a couple or various members of the same family, it is incumbent upon the lawyer to determine if a possible or actual conflict of interest exists.

The existence of an improperly addressed conflict of interest in the estate planning arena can prove fatal to the enforceability of the plan. In *Haynes v. First National State Bank of New Jersey*,[53] where the decedent utilized her daughter's lawyer to drastically change her estate plan during a period when the dece-

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[47] UTC §601, Comment at p. 100–101 (emphasis added).

[48] Handbookn n.23, above, at 6 (emphasis added).

[49] *Persinger*, 248 Mich. App. at 503–504.

[50] *Persinger*, 248 Mich. App. at 506–507.

[51] ACTEC Commentaries at 104.

[52] ACTEC Commentaries at 105.

[53] 87 N.J. 163 (1981).

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dent was dependent and reliant upon her daughter, the presumption of undue influence was not only applied, but the burden imposed to rebut the presumption, in light of the attorney's ethical duties when a conflict of interest appeared to exist, required the proponent of the estate planning documents to rebut the presumption with clear and convincing evidence that the instruments were indeed reflective of the decedent's intent. In *Haynes*, the court found that:

> . . . it is our determination that there must be imposed a significant burden of proof upon the advocates of a will where a presumption of undue influence has arisen because the testator's attorney has placed himself in a conflict of interest and professional loyalty between the testator and the beneficiary. In view of the gravity of the presumption in such cases, the appropriate burden of proof must be heavier than that which normally obtains in civil litigation. The cited decisions which have dealt with the quantum of evidence needed to dispel the presumption of influence in this context have essayed various descriptions of this greater burden, *viz*: ''convincing,'' ''impeccable,'' ''substantial,'' ''trustworthy,'' ''candid,'' and ''full.'' Our present rules of evidence, however, do not employ such terminology. The need for clarity impels us to be more definitive in the designation of the appropriate burden of proof and to select one which most suitably measures the issue to be determined. Only three burdens of proof are provided by the evidence rules, namely, a preponderance, clear and convincing, and beyond a reasonable doubt. The standard in our evidence rules that conforms most comfortably with the level of proofs required by our decisions in this context is the burden of proof by clear and convincing evidence. Hence, the presumption of undue influence created by a professional conflict of interest on the part of an attorney, coupled with confidential relationships between a testator and the beneficiary as well as the attorney, must be rebutted by clear and convincing evidence.[54]

What if an existing client asks the lawyer to engage in estate planning for a vulnerable individual? The ACTEC commentaries reflect that:

> A lawyer should exercise particular care if an existing client asks the lawyer to prepare for another person a will, trust, power of attorney or similar document that will benefit the existing client, particularly if the existing client will pay the cost of providing the estate planning services to the other person. The lawyer would, of course, need to communicate with the other person and decide whether to undertake representation of that person as a new client, along with all the duties such a representation involves, before agreeing to prepare such a document. If the representation of both the existing client and the new client would create a significant risk that the representation of one or both clients would be materially limited, the representation can only be undertaken as permitted by MRPC 1.7(b). In any case, the lawyer must comply with MRPC 1.8(f) (Conflict of Interest: Current Clients: Specific Rules) and should consider cautioning both clients of the possibility that the existing client may be presumed to have exerted undue influence on the other client because the existing client was involved in the procurement of the document.[55]

In the context of multigenerational planning, it may be possible to meet ethical responsibilities through a knowing waiver and separate engagements.[56] However, when the conflict (or potential conflict) exists between spouses, the lawyer may not be able to engage in representation of both clients, especially when one spouse wishes the lawyer to persuade or advocate for the other spouse to engage in a particular course of conduct.[57]

The ACTEC commentaries cautions lawyers about attempting to represent spouses via separate engagements while still representing both.

> In that context, attempting to represent a husband and wife separately while simulta-

[54] *Haynes*, 181–184 (internal citations omitted).

[55] ACTEC Commentaries, at 102.

[56] The ACTEC commentary to MRPC Rule 1.7, p. 103, reflects that:

> . . . some experienced estate planners undertake to represent related clients separately with respect to related matters. Such representations should only be undertaken if the lawyer reasonably believes it will be possible to provide impartial, competent and diligent representation to each client and even then, only with the informed consent of each client, confirmed in writing. See ACTEC Commentaries on MRPC 1.0(e) (Terminology) (defining informed consent) and MRPC 1.0(b) (Terminology) (defining confirmed in writing). The writing may be contained in an engagement letter that covers other subjects as well.

[57] Sandra D. Glazier & Martin M. Shenkman, *Joint/Dual Representation — Add protections to your retainer agreements to reflect challenges involved*, Trust & Estates, WealthManagement.com (July 20, 2017), pp. 24–29.

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neously doing estate planning for each, is generally inconsistent with the lawyer's duty of loyalty to each client. Either the lawyer should represent them jointly or the lawyer should represent only one of them. See generally PRICE ON CONTEMPORARY ESTATE PLANNING, section 1.6.6 at page 1059 (2014 ed).[58]

When the lawyer represents both the vulnerable individual and his/her spouse or is engaged in multigenerational representation, assessing the ability of the client with diminished capacity (or who is otherwise vulnerable) to provide informed consent to waive conflicting interests, especially where the planning involved contemplates gifting or other forms of divestment, can place the lawyer in an ethical quandary. This may be particularly true when Medicaid planning is involved given that the net result may be the impoverishment of one client for the benefit of another.

Even if the client prefers to provide the benefit of their assets to another and ultimately rely upon government assistance (such as Medicaid), the client (with diminished capacity) may need to be able to not only understand that the plan will result in the permanent reduction of the assets that they control, but reliance upon Medicaid may:

1. Adversely affect the resources, facilities, and level of care available to them;
2. Result in future disruptions in accommodations or facilities, if the facility they initially enter does not qualify for Medicaid or they are hospitalized for a period of time where their bed at a Medicaid qualified facility is lost and no other bed at the same facility is then available;
3. For couples who move to the same senior care/living campus so that they can remain together, utilization of an irrevocable trust solely for the benefit of the community spouse (SBO) trust, can result in the ultimate separation of the spouses at a time when neither can easily be transported to visit the other;
4. Result in the little extras that make life more comfortable not being available, because there are no guarantees that the family member to whom a significant gift is provided will maintain and utilize those funds for the benefit of the vulnerable adult (as such is the very nature of an irrevocable gift); and
5. Make benefits available to the client unpredictable, given changing political positions, regimes, and stated intentions to limit or otherwise cut ''entitlement'' programs.

When someone other than the vulnerable client originates the idea to make lifetime gifts, create an irrevocable trust, or engage in Medicaid planning, the lawyer will have to navigate and assess:

- ethical responsibilities;
- the client's vulnerabilities (to potential undue influence and other forms of financial abuse);
- the client's capacity;
- the potential for client conflict; and
- the client's ability (should conflicts — whether actual or potential are identified) to engage in a knowing and voluntary waiver.

If the attorney is engaged by the client's agent (e.g. acting under a durable power of attorney with authority to gift property and/or modify the client's estate plan in order to engage in Medicaid planning), additional ethical considerations may come into play.

> The lawyer retained by a person seeking appointment as a fiduciary or retained by a fiduciary for a person with diminished capacity, including a guardian, conservator or attorney-in-fact, stands in a lawyer-client relationship with respect to the prospective or appointed fiduciary. A lawyer who is retained by a fiduciary for a person with diminished capacity, but who did not previously represent the person with diminished capacity, represents only the fiduciary. Nevertheless, in such a case the lawyer for the fiduciary owes some duties to the person with diminished capacity. See ACTEC Commentary on MRPC 1.2 (Scope of Representation and Allocation of Authority Between Client and Lawyer). If the lawyer represents the fiduciary, as distinct from the person with diminished capacity, and is aware that the fiduciary is improperly acting adversely to the person's interests, the lawyer may have an obligation to disclose, to prevent or to rectify the fiduciary's misconduct. See MRPC 1.2(d) (Scope of Representation and Allocation of Authority Between Client and Lawyer) (providing that a lawyer shall not counsel a client to engage, or assist a client, in conduct that the lawyer knows is criminal or fraudulent).
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> Whether the person with diminished capacity is characterized as a client or a former client,

[58] ACTEC Commentaries at 102-103, citing generally Price on Contemporary Estate Planning, §1.6.6 at p. 1059 (2014).

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the client's lawyer acting as counsel for the fiduciary owes some continuing duties to him or her. See Ill. Advisory Opinion 91-24 (1991) (summarized in the Annotations following the ACTEC Commentary on MRPC 1.6 (Confidentiality of Information). If the lawyer represents the person with diminished capacity and not the fiduciary, and is aware that the fiduciary is improperly acting adversely to the person's interests, the lawyer has an obligation to disclose, to prevent or to rectify the fiduciary's misconduct.

. . . A conflict of interest may arise if the lawyer for the fiduciary is asked by the fiduciary to take action that is contrary either to the previously expressed wishes of the person with diminished capacity or to the best interests of such person, as the lawyer believes those interests to be. The lawyer should give appropriate consideration to the currently or previously expressed wishes of a person with diminished capacity.[59]

While the indicia of undue influence and other forms of elder abuse are beyond the scope of this article, it remains important for lawyers to be vigilant to the indicia of undue influence as well as for the lawyer to understand their ethical duties and responsibilities when representing vulnerable individuals.

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[59] ACTEC Commentaries at 162–163.

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