THE TWILIGHT ZONE: DEALING WITH THE CLIENT /PROPOSED CLIENT WHO IS (OR ISN'T) COMPETENT

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Trusts and Estates Law (including estate and business succession planning, trust and estate administration, guardianship, and probate and trust litigation) and Taxation Law

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I. Introduction

Between fully competent and totally incapacitated is the world of diminished or diminishing capacity. The title refers to this world as the "twilight zone." For the lawyer representing the client in this world, change is the norm. In fact, it might be more accurate to refer to the lawyer as the person in the "twilight zone." Change may happen rapidly or move at a snail's pace, but counsel may rest assured that it is occurring. How the practitioner deals with the change in the client and the changes within the client's family is critical.

Total incapacity has its own set of problems and solutions but is much more straightforward. The rules of the game are well known. The totally incapacitated person may no longer legally act for himself; someone must act for him, whether it be a guardian, agent, trustee or spouse and as long as the fiduciary acts appropriately and conflicts are minimized, all is well. In the twilight zone the client is usually still legally in charge his affairs, but may not be fully able to comprehend the nature and extent of his diminished abilities and is vulnerable to a multitude of legal problems and potential abuses arising from his diminished ability. To compound the problem, the Texas Disciplinary Rules provided little guidance.

The outline will attempt to assist the practitioner in identifying clients with diminished capacity, present some of the potential problems involved, discuss the ethical issues, and outline some possible solutions under differing fact patterns. Specific preventive planning and drafting solutions have been discussed in a number of prior papers and will therefore not be the emphasis of this paper. (See, Stefnee D.Ashlock, Twlight Planning: Using Advanced Techniques to Plan for Incapacity, 31st Annual Advanced Estate Planning and Probate Course, State Bar of Texas 2007; Sarah Patel Pacheco and Sharon B. Gardner, Planning for Clients With Possible Impairments and Related Litigation Issues, 14th Annual Advanced Estate Planning Strategies Course, State Bar of Texas, 2009). Similarly, there have been a number of articles written regarding the degree of capacity required to execute certain documents and this related topic will also not be covered. (See, e.g. Georgia Akers, "Mind"ing Your Business: Estate Planning Documents and the Levels of Capacity Required for Execution, Estate Planning and Community Property Journal, Volume 3, Book 1, Fall 2010). The focus here will be on issues involved in the representation, whether to continue or undertake a particular engagement, when to seek professional assistance and how to deal with third parties, including family and others.

My thanks to Bob Rosepink for kindly allowing me to incorporate his prior outline identified below for use in this presentation.

II. Identifying and Assessing Diminished Capacity (Based on Assessment of Older Adults with Diminished Capacity: A Handbook for Lawyers (2005), ABA Product Code 4280025 and Synopsis Prepared by Robert J. Rosepink, Rosepink & Estes, PLLC, Scottsdale, Arizona)

A. Importance of lawyer assessment of client capacity

1. Lawyers need a conceptually sound and consistent process for answering these unavoidable capacity determinations.

   a. Does the client have the capacity to contract for the lawyer's services?

   b. Does the client have the capacity to complete the legal transaction contemplated?

2. The lawyer's assessment of capacity is a "legal" assessment. It involves:

   a. An initial assessment component and, if necessary,

   b. Use of a clinical consultation or formal evaluation by a clinician, and

   c. A final legal judgment about capacity by the lawyer.

B. Legal Standards of diminished capacity

1. Lawyers need to be familiar with three facets of diminished capacity:

   a. Standards of capacity for specific legal transactions. The definition of "diminished capacity" in everyday legal practice depends largely on the type of transaction or decision under consideration.

   b. Approaches to capacity in state guardianship and conservatorship laws.

   c. Ethical guidelines for assessing client capacity.

2. There are four varying tests of incapacity under state guardianship law:

   a. Disabling condition.

   b. Functional behavior as to essential needs.

   c. Cognitive functioning.

   d. Finding that guardianship is necessary and is the "least restrictive alternative." Also, limited forms of guardianship,

rather than plenary guardianship, may be permitted or even preferred under state guardianship laws.

C. Clinical models of capacity

1. Key points:

a. In most cases it will not be necessary to consult with a clinician.

b. General clinical model of capacity.

i. Causal component

- This is the actual cause of the incapacity (*eg* Alzheimer's disease or schizophrenia).
    - The diagnosis will be made by a clinician
    - It will almost always be found in the *Diagnostic and Statistical Manual of Mental Disorders-IV (DSM IV)* (American Psych. Ass'n, 4th ed. 1994), which lists and describes currently recognized psychiatric disorders.

- Knowing the diagnosis helps answer:
    - What is causing the problem?
    - Is it temporary or permanent?
    - Will it get better or worse?
    - Could it improve with treatment?
    - What treatment could help?
    - Is there really any clinical impairment or illness at all?

ii. Cognitive functioning

- These are problems with attention, memory understanding or expressing information, reasoning, organizing, and planning.

- Cognitive symptoms are assessed by clinicians through a clinical interview and/or formal testing.

iii. Functional behavior

- Information about cognitive and functional performance *together* explains the person's capacity for the transaction in question.

- Functional behavior is assessed through the reports of family members, direct observation and/or performance based testing.

- More and more clinicians have turned to functional instruments-also called "capacity instruments"- to do such assessments.

iv. Interactive component

- This takes into account personal, physical, psychosocial, and situational demands placed on the individual.

- It also incorporates the resources available to the individual, risks of the specific situation, and the person's values and preferences.

- Assessment is through direct question (of the client and, if appropriate, the family) about the situation, the person's resources, history, values, preferences, and knowledge of the services and clinical interventions tried.

D. Specific domain models of capacity

1. Consent capacity. The functional abilities needed for medical decision making capacity are:

   a. **Understanding**, which is the ability of an individual to comprehend diagnostic and treatment-related information.

   b. **Appreciation**, which refers to the ability to relate the treatment information to one's own situation.

   c. **Reasoning** is the ability to evaluate treatment alternatives by comparing risks and benefits in light of one's own life.

d. **Expressing a choice** is the ability to communicate a consistent decision about treatment.

2. Financial capacity

a. **Knowledge** involves the ability to describe facts, concepts, and events related to financial activities, such as knowledge of currency, bank statements, investments, and other personal financial data.

b. **Skills** involves the ability to demonstrate practical procedures and routines important for financial management, such as making change and writing checks.

c. **Judgment** is the ability to make reasonably sound financial decisions in novel or ambiguous social situations, such as being sensitive to fraud, vulnerability to coercion, and prudence in making investments.

3. Independent living

a. **Skills** important to demonstrate for independent living have been described as "instrumental activities of daily living" ("IADL"), IADLs involve the ability to manage home, health, money, transportation, meals and communication.

b. **Judgment** relates to insight and decision-making essential to independent living, such as the ability to handle emergencies, to compensate for areas of incapacity, to exhibit motivation for daily life, and to minimize risk to self and others.

E. Lawyer assessment of capacity

1. Observe and interpret signs of diminished capacity.

a. Focus on decisional abilities, not cooperativeness or affability.

b. Pay attention to changes over time; history is important.

c. Beware of age stereotypes.

d. Consider whether mitigating factors could explain the behavior.

2. Evaluate understanding in relation to the specific legal elements of capacity for the transaction at hand.

   a. Note the legal elements of capacity for the task at hand – *e.g.* testamentary capacity, contractual capacity, and donative capacity.

   b. Compare the client's understanding, appreciation, and functioning with the relevant legal elements.

   c. The client's decisional process will be implicit and intuitive, as well as explicit and conscious. The attorney's role is to present information, answer and ask questions, gently probe and query, and weight client responses and thought processes.

3. Consider the degree of risk to the client and the ethical factors set out in the Comment to Model Rule 1.14.

   a. The factors addressed in the Comment derive from recommendations of the 1993 National Conference on Ethical Issues in Representing Older Clients [62 Fordham L. Rev. 5 (March 1994)] and, in particular, from an article prepared by Peter Margulies for that conference.

   b. The Margulies/Fordham criteria are:

      i. Ability to articulate reasoning behind the decision.

      ii. Variability of state of mind.

      iii. Appreciation of consequences.

      iv. Substantive fairness of decisions.

         - A lawyer cannot look the other way if a client is being taken advantage of in a blatantly unfair transaction.

         - Judging fairness necessarily risks the interjection of the lawyer's own beliefs and values, so caution is required.

         - 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.

v. Consistency with lifetime values [Author's note: what are "lifetime values"?]

- The lawyer may only know the client's lifetime values if the attorney-client relationship is one of long standing.
- Individuals can change their values framework as they age.

vi. Irreversibility of the decisions.

- This factor is listed in the Margulies article but not in the Comment to Model Rule 1.14.
- But a client doing something that cannot be changed later probably calls for caution on the part of the lawyer.

4. Complete legal analysis.

a. The conclusion is ultimately a professional judgment that is aided by the systematic consideration of signs of incapacity, the client's understanding of the legal transaction, and the factors enunciated in Model Rule 1.14 (or other applicable state ethical rule).

b. The Handbook contains a capacity assessment worksheet to assist the lawyer.

c. Capacity conclusions:

i. **Intact**- no or very minimal evidence of diminished capacity.

ii. **Mild problems**-some evidence of diminished capacity, but insufficient in attorney's judgment to preclude representation or proposed transaction.

iii. **More than mild problems**- substantial evidence of diminished capacity sufficient to warrant attorney consultation with mental health professional, or referral of client for a formal professional assessment of capacity.

iv. **Severe problems**- client lacks the capacity to proceed with the transaction and the representation.

d. If the attorney feels uncertain as to whether the observed problems represent "mild" versus "more than mild" issues, this would be an indication to consult with a clinician.

5. Documenting capacity observations.

a. The attorney should document his or her observations and assessment regarding client capacity.

b. Videotaping.

ii. Experience practitioners have come to different conclusions.

ii. In selected cases videotaped evidence of a client explaining his or her reasons behind a particular dispositive provision can be a deterrent to a contest.

iii. However, there are multiple arguments against videotaping a client's execution of a document.

- Videotaping may, in fact, exaggerate the client's deficits in decisional capacity.

- Unless the attorney videotapes all clients, the fact of videotaping itself may be used to raise doubts of capacity.

- The videotape cannot be edited to remove portions for any reason without risking ethical or legal violation of evidence-tampering prohibitions.

6. Take appropriate actions in response.

7. Caution against lawyer use of psychological instruments.

a. Several brief mental status questionnaires have been developed, the most popular of which is the 30-item Mini-Mental Status Examination (MMSE).

b. While recognizing that lawyers regularly engage in the legal assessment of capacity and should do so, the Handbook concludes that it is generally NOT appropriate for attorneys to use more formal clinical assessment instruments, such as the MMSE.

c. The reasons cited are:

i. Lack of training.

ii. Limited yield.

iii. Over-reliance.

iv. False negatives and false positives.

v. The effects of a client's practice taking the test.

vi. Lack of specificity to legal incapacity.

F. Techniques lawyers can use to enhance client capacity.

1. Attorneys must be sensitive to age-related changes without losing sight of the individuality of each older person.

2. Engendering client trust and confidence.

a. Break the ice. Do not simply dive right into business.

b. Interview the client alone, but consider including any support person for a portion of the interview. *Be sure to talk to the client rather than past the client to the others.*

c. Stress the confidentiality of the relationship.

d. Encourage maximum client participation, making the client feel respected and valued.

e. Use encouragement and verbal reinforcement liberally.

f. Take more time with older clients.

g. Conduct business over multiple sessions.

3. Accommodating sensory changes.

a. To address hearing loss:

i. Minimize background noise.

ii. Look directly at the client.

iii. Speak slowly and distinctly.

iv. Do not over-articulate or shout.

v. Use a lower pitch of voice.

vi. Sit close to the client.

vii. Focus more on written communication to compensate for problems in oral communication. Provide written summaries and follow-up material.

viii. Have auditory amplifliers available.

b. To address vision loss:

i. Increase lighting.

ii. Reduce impact of glare.

iii. Do not use glossy print materials.

iv. Format documents in large print (*e.g.* 14- or 16- point font).

v. Give clients additional time to read documents.

vi. Give the client adequate time to refocus his or her gaze when shifting between reading and viewing objects at a distance.

vii. Be mindful of narrowing field of vision.

viii. Have reading glasses and magnifying glasses available in conference rooms.

ix. Arrange furnishings so walking pathways are clear.

4. Accommodating cognitive impairments.

   a. Begin the interview with simple questions.

   b. Conduct business at a slower pace.

   c. Allow extra time for responses to questions.

   d. Break information into smaller, more manageable segments.

   e. Discuss one issue at a time.

   f. Provided cues to assist recall rather than expecting spontaneous retrieval of information.

   g. Repeat, rephrase, summarize and check periodically for accuracy of communication and comprehension.

   h. If information is not understood, incompletely understood, or misunderstood, provided corrected feedback and check again for comprehension.

   i. Provide summary notes and information sheets to facilitate later recall.

   j. Schedule appointments for times of day when the client is at peak performance. For many older adults, mornings are often best.

   k. Provide time and rest and bathroom breaks.

   l. Schedule multiple, shorter appointments rather than one lengthy appointment.

   m. Whenever possible, conduct business in the client's residence.

5. Strengthening client engagement in the decision making process.

   a. In her seminal article, *Elderlaw: Representing the Elderly Client and Addressing the Question of Competence,* 14 J. of Contemporary L. 61 at 90 & 92 (1988) Linda F. Smith describes the technique of *gradual counseling* as follows:

      The attorney for the limited client should engage the client in the process of gradual decision-making, which will involve clarification, reflection, feedback and further investigation.... Gradual counseling requires the attorney to repeatedly refer to the

client's goals and values in assessing each alternative and in discussing the pros and cons of an alternative. This will involve a great deal of clarifying and reflecting of the client's thoughts and feelings.... The attorney should proceed to explain each relevant option and elicit the client's reactions.

b. Gradual counseling involves:

i. Identifying the client's goals.

ii. Obtaining feedback from the client to ensure he or she agrees with the lawyer's statement of the problem.

iii. Ascertaining the most important values the client expresses.

iv. Describing the best option for attaining the client's goal.
v. Explaining each relevant option.

vi. Giving the client feedback.

vii. Looking for capacity for a limited decision in the client's reactions during the course of a session.

G. Referrals for consultation or formal assessment.

1. **Consultation**: a lawyer's conversation with a clinician to discuss concerns about the client's presentation.

a. Usually the client is not identified.

b. Consultation does not require client consent.

2. **Referral:** a formal referral to a clinician for evaluation.

a. May or not result in a written report.

b. Referral requires client consent.

3. Reasons for consultation or referral in transactional legal representation:

a. Concern about client capacity.

b. Concern about preempting future litigation.

4. Risks associated with capacity evaluations and formal written reports.

a. Potential adverse use against the client.

b. Physician-patient privilege and attorney-client privilege are variable under state law and subject to exceptions and interpretations.

c. The lawyer may want to instruct the clinician to conduct the evaluation and then call the lawyer with preliminary unwritten conclusions, after which the lawyer can state whether or not the clinician should commit the clinical opinion to writing.

5. Potential uses of clinical opinion regarding client capacity.

a. Expert testimony in a subsequent deposition or courtroom hearing.

b. Clarification of the areas of diminished capacity and of retained strengths.

c. Affirmation of the client's capacity.

d. Justification of the attorney's capacity concerns to disbelieving clients and family members.

e. Expert advice on strategies to compensate for identified mental deficits.

f. Indication of the need for protective action.

g. Recommendation for follow-up testing (anticipated restoration of capacity).

6. Selecting a clinician.

a. Who is appropriate?

i. The most important criterion is the clinician's experience and knowledge in the assessment of older adults.

ii. Asking about qualifications of clinicians.

- How long have you conducted such assessments?
- How many older adults have you assessed?
- What assessment approach and tools do you generally use?
- How may visits are usually required and of what duration?
- What is the likely cost of the assessment?

b. Elements of a lawyer's referral to a clinician. Remember, ultimately, the judgment about the client's capacity for the legal transaction at hand is the lawyer's to make.

i. Preliminary consultation.

- Questions for the lawyer to ask in an informal consulation:
    - What should I look for?
    - What else might I ask?
    - What could I do to enhance capacity?
    - What am I overlooking?
    - What does it seem like to you?
    - Is a formal assessment indicated?

- Consultation can save the lawyer and the client time, money, and angst if it avoids an unnecessary formal assessment.

- Uses of informal consultation.
    - Clinical interpretation of problem
    - Informal clinical opinion on capacity
    - Suggestions for enhancing capacity
    - Additional questions to ask the client
    - Reassurance that a formal assessment is indeed the right step.

- Client consent.
    - If the client's identity is not disclosed by the lawyer, the question of the client's consent does not arise. The consultation is simply professional advice from the clinician to the lawyer.
    - Since consultation is a very minimal protective action, the threshold for meeting the trigger criteria in Model Rule 1.14 is correspondingly low, thereby justifying very limited disclosure of otherwise confidential information.

- Who should pay the cost of consultation?
    - If the client is identified in the consultation and has given consent, the lawyer can then bill the client for the consultation, as well as for the tie spent by the lawyer in speaking with the clinician.
    - If the client is not identified, the consultation is a service provided for the lawyer to be paid for by the lawyer.

ii. Formal Assessment

- Key points in discussing with client possible referral for formal assessment include:
    - My job as a lawyer is to do everything possible to ensure that your action (*e.g.* writing a will, executing this contract) cannot successfully be challenged now or at a later time.
    - This kind of action can be legally challenged in the future on the grounds of legal incapacity.
    - The likelihood of a challenge is higher when a family member (or other interested party) is cut out of a will (or contract) or given a significantly lesser benefit than that which he/she might have expected.
    - A key preventative step is to have an assessment of capacity as close as possible to the time the legal transaction is completed . [Author's note: read John Grisham's *The Testament.*]
- Client consent
    - There can be no referral unless the client at some level agrees to have an appointment with a clinician and to participate in the interview and the selected assessment tests.
    - If the client seems unable to give consent, the lawyer could wait until the client is stabilized to seek the client's assent.
    - Once the client has contacted the clinician, the clinician will need to ensure there is sufficient informed consent to conduct the evaluation.
    - The clinician must also get the client's consent to provide the test results to the lawyer under the requirements of the Health Insurance Portability and Accountability Act (HIPPA).
- Payment for formal consultation

- If the assessment is related to a diagnosis of the client's condition or can be directly tied to his/her medical care, then the assessment may be paid for or reimbursed under medical insurance or Medicare.

- If the assessment is strictly for a legal purpose and the client has given consent, the lawyer should disclose the likely cost of the assessment and confirm the client's payment obligation before proceeding.

iii. Lawyer communication with the clinician.

- The care with which the lawyer crafts the referral request will bear on the usefulness of the results.

- Checklist of lawyer referral letter elements. (Appendix 2 of the Handbook contains an example of referral letter).

  - Client background: name, age, gender, residence, ethnicity, and primary language if not English.

  - Reason client contacted lawyer; date of contact; whether new or old client.

  - Purpose of referral: assessment of capacity to do what? Nature of the legal task to be performed, broken down as much as possible into its elemental components.

  - Relevant legal standard for capacity to perform the task in question.

  - Medical and functional information known: medical history, treating physicians, current known disabilities; any mental health factors involved; lawyer's observations of client functioning, need for accommodations.

  - Living situation, family make-up and contacts; social network.

  - Environmental/social factors that the lawyer believes may affect capacity.

  - Client's values and preference to the extent known; client's perception of problem.

- Whether a phone consultation is wanted prior to the written report.

- It is important for the lawyer to communicate with the clinician orally, as well as in writing.

H. Understanding and using the capacity assessment report.

1. Elements of the capacity report.

a. Demographical information.

b. Legal background and referral.

c. History of present illness.

d. Psychological history.

e. Informed consent.

f. Behavioral observations.

i. Behaviors demonstrated by the client during the course of the evaluation need to be set forth in the report.

ii. These can include:

- Client's appearance and presentation.
- Speech and communication abilities.
- Mood and range of emotional expression.
- Insight and judgment.
- Sense of humor.
- Test-taking approach.

iii. Indications of neurologic or psychiatric illness should be noted, such as:

- Short-term memory loss (during interview).
- Inability to follow task directions.
- Confusion.
- Perseverative behaviors or answering.
- Paranoid or delusional thinking.
- Hallucinatory events.
- Flat affect and morbid ideation characteristic of depression.

g. Tests administered.

i. A listing of the full range of tests administered should be included in the report. (This would include tests that the client discontinued or was unable to complete.)

ii. Tests should cover the following general areas: cognitive abilities; personality and emotional functioning; and relevant functional abilities.

iii. The functional category is particularly significant in a capacity evaluation, as it will include, if available, measures of the specific capacities at issue in the legal transaction.

iv. When is the use of objective tests indicated?

- Psychologists are more prone to use objective tests and to use more of them than physicians.
- The more mild, subtle, and complex a client's presentation, the more useful objective tests are likely to be. By contrast, a client with clear and obvious incapacity, such as in the late stage of Alzheimer's disease, is unlikely to need or even be able to complete most objective tests.

- The more likely it is that the findings of the report will be disputed, the more important it will be to use standardized tests as these are more defensible as representing objective findings versus subjective opinion.

h. Validity statement.

i. The validity of test results can be altered by factors such as low effort, frank attempts to exaggerate deficits, or unstable medical status.

ii. The validity statement focuses on effort and motivation as they influence test performance.

i. Summary of testing results.

j. Diagnostic and clinical interpretation.

i. This section of the report integrates all of the evaluation information into a set of clinical and capacity findings.

ii. One effective approach is to report the diagnostic, cognitive, and personality impressions first, in a separate section, as prelude to clinical interpretation of the psycho-legal capabilities. The diagnostic statement may appear in "five axis" format; the first being the primary psychiatric diagnoses; the second, the personality diagnosis (if any); the third, the medical conditions affecting axis I and II; the fourth, a description of psychological and environmental problems; and the fifth, a "global assessment of functioning" number 0-100. The next section can set forth the clinician's opinion of the client's psycho-legal capacities.

iii. The capacity outcomes depend primarily on the fit, as judged by the clinician, between the individual client's current functional abilities and the demands of the capacity in question, within the client's life context.

2. Clinical capacity opinions versus legal capacity outcomes.

a. Capacity opinions in a report are often presented in terms of the client being "capable" or "incapable" with respect to the particular capacity in question.

b. These findings are clinical opinions, which although highly relevant to the legal capacity question at issue, are distinct.

c. Capacity evaluations should not (but in some cases may) present capacity opinions as actual findings of legal capacity.

d. Clinical findings are evidence which must be adduced by the attorney to support, along with other evidentiary sources, his or her judgment concerning the legal capacity issue at hand. (In guardianship proceedings, judges use capacity evaluations as one form of evidence, albeit highly relevant and probative, in determining the need for guardianship or conservatorship.) In short, the final call on the issue of legal capacity rests with the lawyer (or judge).

3. Using the capacity report

a. Follow-up with clinician.

i. Identification of other issues needing attention or factual inaccuracies needing correction.

ii. Clarification of the meaning of technical language or abbreviations used in the report.

b. Use as evidence

i. If the clinician is not to be designated as an expert witness in a hearing or trial, the report will in most instances not be subject to discovery.

ii. The application of physician-patient privilege and attorney-client privilege varies among the states and may not protect the report from discovery.

iii. In some cases the lawyer will have sought the capacity evaluation and report specifically for the purpose of inclusion in the record to substantiate or refute the client's ability concerning a legal transaction or for presentation as evidence, as in the case of a guardianship proceeding.

c. Limited guardianship and the least restrictive alternative.

i. The report should be used to support an outcome consistent with the least restrictive alternative, thereby reserving to the client rights and powers in all areas in which he or she still retains decisional abilities.

ii. The report may also substantiate the client's capacity to execute a durable power of attorney or a health care directive that may preclude the need for appointment of a guardian.

d. Protective actions under Model Rule 1.14

i. Model Rule 1.14 requires that in situations of diminished capacity the attorney take "reasonably necessary protective action."

ii. Having a thorough and profession capacity evaluation and report will likely make the lawyer more comfortable in taking such actions, if indicated.

e. Clinical interventions

i. A capacity assessment may result in specific recommendations for clinical interventions that may be recommended by the lawyer and pursued by the client and family to improve or stabilize the client's functioning.

ii. Such interventions may result in the client eventually becoming able to purse the legal transaction originally contemplated.

f. Re-evaluation over time. Capacity status can fluctuate over time and in some instances a capacity that was initially lost will be recovered.

III. Acting Within the Ethical Rules

A. Statutory Authority

Diminished capacity is the subject of Rule 102(g) of the Texas Rules of Disciplinary Conduct and Rule 1.14 of the proposed rules recently voted on and defeated by the State Bar membership. Rule 1.02(g) and its pertinent commentary reads as follows:

> A lawyer *shall* take reasonable action to secure the appointment of a guardian or other legal representative for, or seek other protective order with respect to, a client whenever the lawyer reasonably believes that the client lacks legal competence and that such action should be taken to protect the client. (emphasis added).

The official commentary to the rule states the following:

> 12....The usual attorney-client relationship is established and maintained by consenting adults who possess the legal capacity to agree to the relationship. Sometimes the relationship can be established only by a legally effective appointment of the lawyer to represent a person. *Unless a lawyer is legally authorized to act for a person under a disability, an attorney-client relationship does not exist for the purpose of this rule.*
>
> 13.*If a legal representative has already been appointed for the client, the lawyer should ordinarily look to the representative for decisions on behalf of the client. If a legal representative has not been appointed, paragraph (g) requires a lawyer in some situations to take protective steps, such as initiating the appointment of a guardian.* The lawyer should see to such appointment or take other protective steps when it reasonably appears advisable to do so in order to serve the client's best interests. (emphasis added).

Texas Attorneys recently defeated a proposal which would have adopted new rules similar to the Model Rules of Professional Conduct (MRPC). Although not currently the rule in Texas the MRPC and the Commentaries to the MRPC published by the American College of Trust and Estate Counsel (ACTEC) are helpful guidance in determining the nature and extent of attorney action (or lack thereof) in decision making with clients with diminished capacity. The Model Rules of Professional Conduct and the ACTEC commentaries dealing with a client with diminished capacity are as follows:

MRPC 1.14: CLIENT WITH DIMINISHED CAPACITY

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

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

ACTEC COMMENTARY ON MRPC 1.14

Preventive Measures for Competent Clients

As a matter of routine, the lawyer who represents a competent adult in estate planning matters should provide the client with information regarding the devices the client could employ to protect his or her interests in the event of diminished capacity, including ways the client could avoid the necessity of a guardianship or similar proceeding. Thus, as a service to the client, the lawyer should inform the client regarding the costs, advantages and disadvantages of durable powers of attorney, directives to physicians or living wills, health care proxies, and revocable trusts. A lawyer may properly suggest that a competent client consider executing a letter or other document that would authorize the lawyer to communicate to designated parties (*e.g.* family members, heath care providers, a court) concerns that the lawyer might have regarding the client's capacity. In addition, a lawyer may properly suggest that a durable power of attorney authorize the attorney-in-fact, on behalf of the principal, to give written authorization to one or more of the client's health care providers and to disclose information for such purposes upon such terms as provided in such authorization, including health information regarding the principal, that might otherwise be protected against disclosure by the Health Insurance Portability and Accountability Act of 1996 (HIPPA.) If the client wishes the durable power of attorney to become effective at a date when the client is unable to act for him-or herself, the lawyer should consider how to draft that power in light of the restrictions found in HIPPA.

Implied Authority to Disclose and Act

Based upon the interaction of subsections (b) and (c) of MRPC1.14, a lawyer has implied authority to make disclosures of otherwise confidential information and take protective actions when there is a risk of substantial harm to the client. Under those circumstances, the lawyer may consult with individuals or entities that may be able to assist the client, including family members, trusted friends, and other advisors. However, 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.

Risk and Substantiality of Harm

For the purpose 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.

Disclosure of Information

ABA Informal Opinion 89-1530 (1989) stated the authority of the attorney to disclose confidential and non-confidential information as follows:

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

The 2002 amendments to MRPC 1.14 support this conclusion.

Determining Extent of Diminished Capacity

In determining whether a client's capacity is diminished, a lawyer may consider the client's overall circumstances and abilities, including the client's ability to express the reasons leading to a decision, the ability to understand the consequences of a decision, the substantive appropriateness of a decision, and the extent to which a decision is consistent with the client's values, long-term goals, and commitments. In appropriate circumstances, the lawyer may seek the assistance of a qualified professional.

Lawyer Representing Client with Diminished Capacity May Consult with Client's Family Members and Others as Appropriate

If a legal representative has been appointed for the client, the lawyer should ordinarily look to the representative to make decisions on behalf of the client. The lawyer, however, should as far as possible accord the represented person the status of client, particularly in maintaining communication. In addition, the client who suffers from diminished capacity may wish to have family members or other persons participate in discussions with the lawyer. The lawyer must keep the client's interests foremost. Except for disclosures and protective actions authorized under MRPC 1.14, the lawyer should rely on the client's directions, rather than the contrary or inconsistent directions of family members, in fulfilling the lawyer's duties to the client. In meeting with the client and others, the lawyer should consider the impact of a joint meeting on the attorney client evidentiary privilege.

Testamentary Capacity

If the testamentary capacity of a client is uncertain, the lawyer should exercise particular caution in assisting the client to modify his or her estate plan. The lawyer generally should not prepare a will, trust agreement, or other dispositive instrument for a client who the lawyer reasonably believes lacks the requisite capacity. On the other hand, because of the importance of testamentary freedom, the lawyer may properly assist clients whose testamentary capacity appears to be borderline. In any such case the lawyer should take steps to preserve evidence regarding the client's testamentary capacity.

In cases involving clients of doubtful testamentary capacity, the lawyer should consider, if available, procedures for obtaining court supervision of the proposed estate plan, including substituted judgment proceedings.

Lawyer Retained by Fiduciary for Person with Diminished Capacity

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 disabled person, represents only the fiduciary. Nevertheless, in such a case the lawyer for the fiduciary owes some duties to the disabled person. 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 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) (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).

As suggested in the Commentary to MRPC 1.2, a lawyer who represents a fiduciary for a person with diminished capacity or who represents a person who is seeking appointment as such, should consider asking the client to agree that, as part of the engagement, the lawyer may disclose fiduciary misconduct to the court, to the person with diminished capacity, or to other interested persons.

Persons With Diminished Capacity Who Was a Client Prior to Suffering Diminished Capacity and Prior to the Appointment of a Fiduciary

A lawyer who represented a client before the client suffered diminished capacity may be considered to continue to represent the client after a fiduciary has been appointed for the person. Although incapacity may prevent a person with diminished capacity from entering into a contract or other legal relationship, the lawyer who represented the person with diminished capacity at a time when the person was competent may appropriately continue to meet with and counsel him or her. Whether the person with diminished capacity is characterized as a client or a former client, the lawyer for the fiduciary owes some continuing duties to him or her. See III. Advisory Opinion 91-24 (1991) (summarized in the Annotations following the ACTEC Commentary on MRPC 1.6 (Confidentiality and 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.

Wishes of Person With Diminished Capacity Who Is Under Guardianship or Conservatorship When the Fiduciary is the Client

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 the 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.

May Lawyer Represent Guardian or Conservator of Current or Former Client?

The lawyer may represent the guardian or conservator of a current or former client, provided the representation of one will not be directly adverse to the other. See ACTEC Commentary on MRPC 1.7 and MRPC 1.9. Joint representation would not be permissible if there is a significant risk that the representation of one will be materially limited by the lawyer's responsibilities to the other. See. MRPC 1.7(a)(2). Because of the client's, or former client's, diminished capacity, the waiver option maybe unavailable. See MRPC 1.0(e) (defining informed consent).

B. Interpretation of the Texas Rule. Texas Rule 1.02(g) as currently written is obviously narrower in scope and more limited that Rule 1.14 of the MRPC. In essence, Rule 1.02(g) allows a lawyer to take reasonable steps to secure the appointment of a guarding or other legal representative for, or such protective orders with respect to a client he reasonably believes lacks legal competence and that such actions should be taken to protect the client. Rule 1.02(g) provides very little or limited guidance in the "middle ground" of diminished capacity.

A Texas court held that an attorney acted properly in filing an application for guardianship on behalf of the client's daughter when the attorney reasonable believed that the client was incompetent and a guardian should be appointed to protect the client's interests. (Frank v. Roades, 2010 Tex App, Lexis 2769 (Tex. App. Corpus Christi)

Rule 1.02(g) when read with the commentary does not appear to require the attorney to take action but does not seem to require or even allow the attorney to become the legal representative. Although the Roades case authorizes the attorney to represent an applicant for guardianship at least under the facts of that case, the best practice might be consider proceeding under Texas Probate Code Section 683A by submitting an information letter to a court with appropriate jurisdiction. Although MRPC Rule 1.14 is vague in many respects (as discussed below) it provides more guidance to the attorney in the "middle ground" situation. A Texas attorney dealing with a client with diminished capacity is not given sufficient guidance. Unless the attorney believes the client is "incompetent" at which time Rule 1.02(g) would apply, the attorney must proceed under the Rules and take direction from the client as to how to proceed. The MRPC allows for more flexibility.

C. Diminished Capacity Under the Model Rules. The following is based upon by Elizabeth Laffitte in Volume 17, Number 2, The Georgetown Journal of Legal Ethics, Winter 20004, entitled " Model Rule 1.14: The Well Intended Rule Still Leaves Some Questions Unanswered." MRPC 1.14 forces the lawyer to consider his role in the representation of a client or potential client with diminished capacity. The problem with the rule is its vagueness. The rule encourages the lawyer to formulate an intermediate

position; otherwise the attorney might simply be forced to withdraw or never undertake an engagement. Some of the problems are summarized as follows:

1. **Determining Impairment.** Rule 1.14 offers little practical guidance in making a determination of impairment which leaves the lawyer to make his own determination. The rule does provide that impairment occurs when the client show an inability to make "adequately considered decisions in connection with the representation." A lot of responsibility is placed on the lawyer.
2. **Defining a Normal Relationship.** A normal relationship assumes there can be effective communication between the lawyer and client and the client can then make a considered decision. The lawyer's decision is deciding between what is in the client's best interest and what the client instructs him to do. The traditional view is that the lawyer is an advocate and client autonomy is paramount. Another view is the best interests model. The Model Rules are not clear on which approach to take. Courts and commentators have rejected the best interests model for the most part.
3. **What Happens if Normal Relationship Cannot Be Maintained.** If the lawyer determines that a "normal" relationship cannot exist the lawyer can take "reasonably" necessary protective action. Were it not for the rule, incapacity would most likely terminate the attorney client relationship. On the other hand, the rule does not give a broad license to the attorney to act on the client's behalf. The lawyer should take the least restrictive action. E.g. consult with family members.
4. **Application to Elderly.** "Elder Law Attorneys enter an uncertain realm when they represent senior citizens of questionable capacity. Extra guidance will not erase the circles under a good lawyer's eyes. However, it may, if it succeeds in anything, provide a more organized way of thinking about problems the keep Elder Law attorneys awake at night." (Peter Margulies, Access, Connection and Voice: A Contextual Approach to Representing Senior Citizens of Questionable Capacity, in Aging and the Law, 656 1999.)
5. **People With Mental Disabilities.** Our system assumes competent parties with adept representation. "The Model Rules applied to the representation of a client with dementia fail to provide sufficient guidance to an attorney on how to effectively evaluate and represent a demented client. Although the Rules admonish the attorney to maintain as normal a relationship as possible with an incapacitated client, the Rules fail to tell an attorney how to do so. (Robert B. Fleming & Rebecca C Morgan, Lawyers' Ethical Dilemmas: A "Normal" Relationship When Representing Demented Clients and Their Families, 35 GA. L. Rev. 735 (2001)

IV. Observations and Suggestions

A. Limit the scope of each engagement and clearly establish the conclusion of the engagement.

B. Do not establish an engagement without making a reasonable effort to determine capacity.
C. Encourage all clients to properly prepare for diminished capacity.
D. If the client's capacity becomes an issue during the engagement, assess the nature and degree of diminished capacity; continue to represent the client directly; obtain input from family only with the informed consent of the client.
E. There may be a different approach with long term clients than with recent engagements.
F. There may be a different approach with helpful, cooperative families as opposed to dysfunction families.
G. Explore practical alternatives.
H. Remember ethical obligations might require you to withdraw which may or may not be in the client's best interests.
I. Don't hang on too long but don't bail out to quickly.
J. Always be wary of non-clients asking for documents on behalf of someone else.
K. In Texas, we can't rely on the more flexible MRPC rules; so it's even more important to accurately assess capacity.
L. Some typical red flag scenarios:
    a. The successful self-made patriarch or matriarch business person whose capacity is slipping
    b. You get the call from the kids or one of the kids and not the client
    c. Caretaker becomes beneficiary
    d. Kids are fighting
    e. Long time cordial client becomes combative, demanding and belligerent
    f. The second spouse comes in with the long term client with changing on his or her mind.
M. Always remember your engagement is with the client. As long as you the client is legally competent, continue with the client.
N. Long time joint spousal representations are especially problematic when one of the partners is having problems with diminished capacity.
O. Switching from the client to the client's agent. Do you have continuing direct duties to the client or does the agent step into the shoes of the client?
P. Always remember that it is ultimately a court that decides capacity.
Q. Always remember that you're not a doctor. (unless you really are)
R. Document your file.