

# ***Diminished Capacity & Ethical Issues in Elder Law***

**A Baker's Dozen Questions to Challenge Your  
Ethical Acumen**

**Maryland Legal Aid Bureau  
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ABA Commission on Law and Aging

# Unavoidable capacity determinations outside the courtroom:

- Does the client have the capacity to contract for my services?
- Does the client have the capacity to complete the legal transaction?
- Lawyers need a conceptually sound and consistent process for answering these questions. Rule 1.1 requires you to have “the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation.”

# **The lawyer's assessment of capacity is a "legal" assessment, involving:**

- 1. An initial assessment component and, *if necessary,***
- 2. Use of a clinical consultation or formal evaluation by a clinician, and,**
- 3. A final legal judgment about capacity by the lawyer.**

## **Become familiar with three facets of diminished capacity:**

- A. Ethical guidelines for assessing client capacity. (p. 2, 3, 8)**
  
- B. Approaches to capacity in state guardianship and conservatorship laws. (p. 7-8)**
  
- A. Standards of capacity for specific legal transactions. (p. 5-6)**

# A. Ethical Guidelines

## MRPC 1.14 -- Client with Diminished Capacity

### 1.14(a) Says Act Normal...

...the lawyer shall, “as far as reasonably possible, maintain a normal client-lawyer relationship....”

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

Lawyer may take reasonably necessary protective action, including ... seeking the appointment of a guardian....

But only if the “lawyer reasonably believes that

- the client has diminished capacity,
- is at risk of substantial physical, financial or other harm unless action is taken and
- the client cannot adequately act in the client's own interest.

# 1.14 Comment re: Diminished Capacity

[6] For attorney to determine extent of client's diminished capacity, consider & balance such factors as:

- client's ability to articulate reasoning leading to decision,
- variability of state of mind & ability to appreciate consequences of decision;
- substantive fairness of decision; &
- consistency of decision with known long-term commitments & values of client.

In appropriate circumstances, attorney may seek guidance from appropriate diagnostician.

# 1.14 Comment re Protective Measures

[5] ...Such measure could include:

- Consulting with family members
- using a reconsideration period to permit clarification or improvement of circumstances,
- using voluntary surrogate decisionmaking tools such as DPAs or consulting with support groups, professional services, professional services, adult protective agencies or other individuals or entities that have the ability to protect the client.

[6] Attorney should be guided... client's known wishes & values; client's best interests & goals of minimal intrusion into client's decisionmaking autonomy; maximizing client capacities; & respecting client's family & social connections.

# **B. Tests of Incapacity Under State Guardianship Law:**

## **Mix 'n Match Variations**

- 1. Disabling Condition (often long list)**
- 2. Functional Behavior Deficit (focusing on essential needs or endangerment)**
- 3. Cognitive Functioning Deficit**
- 4. Necessity for Court Intervention (or least restrictive alternative requirement)**

# Mix 'n Match

1997 UGPPA:

**Cognitive  
Test**

an individual who . . . is unable to receive and evaluate information or make or communicate decisions to such an extent that

+

**Essential  
Needs test**

the individual lacks the ability to meet essential requirements of physical health, safety, or self-care, even with appropriate technological assistance.

# Mix 'n Match

## Maryland Est. & Trusts Code § 13-705 (person)

### Cognitive

a person lacks sufficient understanding or capacity to make or communicate responsible decisions concerning his person,

+

### Essential Needs

including provisions for health care, food, clothing, or shelter,

+

### Disabling condition

b/c of any mental disability, disease, habitual drunkenness, or addiction to drugs, and

+

### Least Restrictive

that no less restrictive form of intervention is available which is consistent with the person's welfare and safety.

## C. Task Specific Legal Definitions

**Testamentary Capacity** requires that the client:

- (1) Understand the nature of the act of making a will.
- (2) Have a general understanding of the nature and extent of his or her property.
- (3) Have a general recognition of those persons who were "the natural objects of his bounty."
- (4) Understand the distribution scheme.
- (5) Appreciate all of the above elements in relation to each other.

# Contractual Capacity

The test of mental capacity to contract is whether the person in question possesses sufficient mind to understand, in a reasonable manner, the nature, extent, character, and effect of the particular transaction in which [he] is engaged, whether or not [he] is competent in transacting business generally.

In re McMillan 940 A.2d 1027, 1035 (D.C.,2008)

# Contractual Capacity

Thus, if the act or business being transacted is highly complicated, a higher level of understanding may be needed to understand its nature and effect, in contrast to a very simple contractual arrangement.

Walsh, A., et al., *Mental Capacity: Legal & Medical Aspects of Assessment & Treatment*, 2d ed. (1994)

## **Donative Capacity**

**The requisite capacity to make a gift is "an intelligent perception and understanding of the dispositions made of property and the persons and objects one desires shall be the recipients of one's bounty."**

**Degree of capacity required to make a gift or conveyance is less than that required for the conduct of ordinary business. However, the capacity required to make a gift may be held greater than that required for testamentary purposes because a gift operates in the present....**

**62 AMJUR POF 3d 197**

# Incapacity to Make a Healthcare Decision

## MD Health-Ge. Code §5-601

means the inability ... to make an informed decision about the provision, withholding, or withdrawal of a specific medical treatment or course of treatment b/c the patient is unable to understand the nature, extent, or probable consequences of the proposed treatment or course of treatment, is unable to make a rational evaluation of the burdens, risks, and benefits of the treatment or course of treatment, or is unable to communicate a decision.

## Uniform Health Care Decisions Act:

“Capacity” means an individual’s ability to understand the significant benefits, risks, and alternatives to proposed health care and to make and communicate a health-care decision.

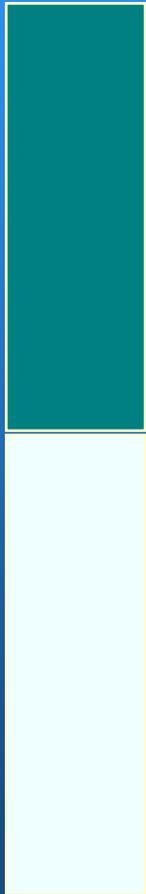
# Legal vs Clinical Models of Capacity

1. Legal definitions articulate conceptual principles: Can Mr. Jones understand the nature and effect of (fill in the transaction) and perform X task(s) necessary to implement the transaction.
2. Clinical assessment parses and measures the operational cognitive, behavioral, & emotional domains necessary to meet the legal standard.
3. Clinical incapacity is necessary but not sufficient to find legal incapacity in the context of guardianship. Must still find necessity or least restrictiveness.
4. The Legal model is binary; the clinical model continuous....

# Legal capacity

vs.

# Clinical capacity



Has capacity

Lacks capacity



Has capacity

Diminished capacity

Lacks capacity

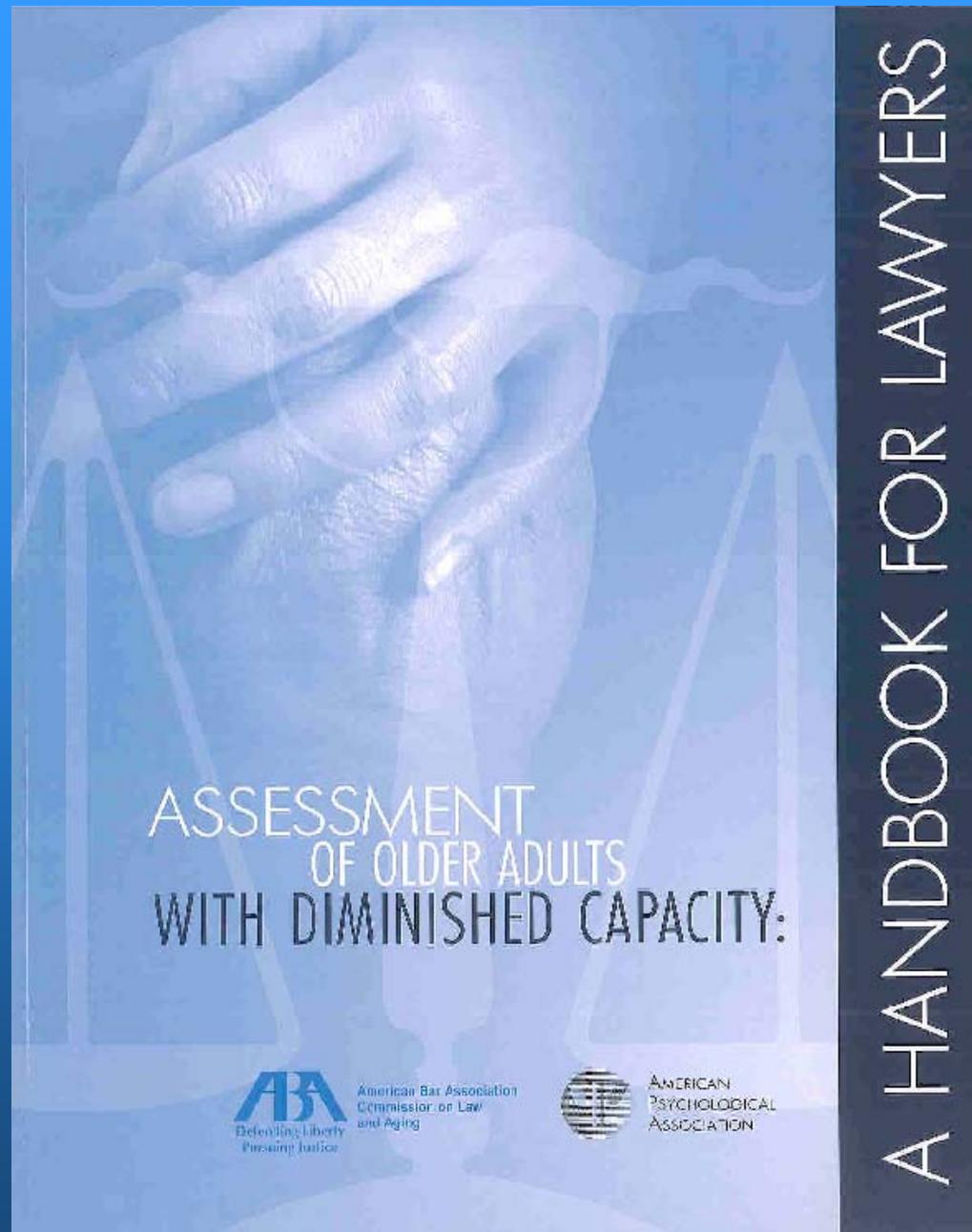
# Lawyer's Screening Process

Benchmark: *the client's own habitual or considered standards of behavior and values*

## Preliminaries:

1. Interview Client Alone, engender trust
2. Accommodate Sensory Changes
3. Accommodate Cognitive Changes
4. Presumption of Capacity must be overcome
5. Focus on decisional abilities, not cooperativeness or affability

A Process...



Available at:

[www.apa.org/pi/aging/diminished\\_capacity\\_part1.pdf](http://www.apa.org/pi/aging/diminished_capacity_part1.pdf)

## Part A of Worksheet

Observing possible **cognitive** signs of diminished capacity:

1. Short-term memory problems
2. Language/Communications Problems
3. Comprehension problems
4. Lack of mental flexibility
5. Calculation/Fin. Mgt. Problems
6. Disorientation

## Part A of Worksheet

Observing possible **emotional** signs of diminished capacity:

1. Emotional distress
2. Labile Affect – involuntary emotional swings

## Part A of Worksheet

Observing possible **behavioral** signs of diminished capacity:

1. Delusions
2. Hallucinations
3. Poor grooming/hygiene

# Part A of Worksheet

Also considers:

- Functioning beyond the office: ADLs and IADLs
- Signs of undue influence
- Mitigating Factors Important! e.g.
  - Stress, grief, depression
  - Medical
  - Time of Day
  - Hearing/Vision Loss
  - Educational/Cultural/Ethnic barriers

## Part B of Worksheet

Notes the Relevant Legal Elements  
of Task at Hand, **e.g....**

1. Testamentary capacity
2. Contractual capacity
3. Donative capacity

# Part C of Worksheet

## Task-Specific Factors

### *Margulies/Fordham Paradigm*

#### *Functional components*

1. Ability to articulate reasoning behind decision
2. Variability of state of mind
3. Ability to appreciate consequences of decision

#### *Substantive components*

4. Irreversibility of decision/Risk
5. Substantive fairness
6. Consistency with lifetime commitments of client

Almost identical to Model Rule 1.14 – Comment [6]

## Part D of Worksheet

### *Preliminary Conclusions about Client Capacity*

- [ ] **Intact:** No or very minimal evidence of diminished capacity
- [ ] **Mild problems:** Some evidence of diminished capacity
- [ ] **More than mild problems:** Substantial evidence of diminished capacity
- [ ] **Severe problems:** Client lacks capacity to proceed with representation and transaction

# Consultations & Referrals

## ***Consultation:***

A lawyer's conversation with a clinician to discuss concerns about the client's presentation. Usually client is not identified and consultation does not require client consent.

## ***Referral:***

A formal referral to a clinician for evaluation, which may or may not result in a written report. Requires client consent.

# Potential Uses of Clinical Opinion

- Expert testimony in a subsequent deposition or courtroom hearing.
- Clarification of the areas of diminished capacity and of retained strengths.
- Affirmation of the client's capacity.
- Justification of the attorney's capacity concerns to disbelieving clients and family members.
- Expert advice on strategies to compensate for identified mental deficits.
- Indication of the need for protective action.
- Recommendation for follow-up testing (anticipated restoration of capacity).

# **Who is an appropriate clinician?**

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

# Who is an appropriate clinician?

- Physician – Any MD ?
- Geriatrician ?
- Geriatric Psychiatrist/Gero-Psychologist – Mental health aging specialists?
- Forensic Psychologist/Psychiatrist?– MH specialist in law?
- Neurologist – MD specialist in brain function?
- Neuropsychologist – Psychol. Specialist in cognitive functioning?
- Geriatric Assessment Team – Multidisciplinary team?

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

# Checklist for Referral Letter

1. Client background
2. Reason client contacted lawyer, date, whether new or old client.
3. Purpose of referral:
  - Capacity to do what?
  - Nature of the legal task to be performed, elemental component.
4. Relevant legal standard(s).
5. Medical and functional information known.

# Checklist for Referral Letter

6. Living situation; family make-up and contacts; social network.
7. Environmental/social factors that the lawyer believes may affect capacity.
8. Client's values and preference to the extent known; client's perception of problem.
9. Whether a phone consultation is wanted prior to the written report.

# Clinical versus Legal Capacity Outcomes

The lawyer (or the court if the issue is before the court) makes the final determination of legal capacity.

**Alas, there is no *capacimeter!***

# Appendices

1. Capacity Assessment Algorithm (p.42)
2. Case Examples (p. 43)
3. Brief Guide to Psychological & Neuropsychological Instruments (p. 59)
4. Dementia Overview, by the Alzheimer's Association (p. 67)

*Assessment of Older Adults with Diminished Capacity:  
A Handbook for Lawyers*

available at:

[www.apa.org/pi/aging/diminished\\_capacity\\_part1.pdf](http://www.apa.org/pi/aging/diminished_capacity_part1.pdf)

# **Ethical Issues in Elder Law**

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**Charlie Sabatino, JD**

**ABA Commission on Law and Aging**

# Multiple Choice UnRules

- There may be more than one right answer
- You aren't limited to the choices given (You can make up your own)
- Depending on additional facts, the answer(s) may change
- Nobody gets graded
- Before you make up your own rules, take a look at what the ethics rules actually say -- always a good place to start.

# Selected Resources

- **State Rules of Professional Conduct, Ethics Opinions, & Ethics Hotline**
- **Model Rules of Professional Conduct (2006)**  
[http://www.abanet.org/cpr/mrpc/mrpc\\_toc.html](http://www.abanet.org/cpr/mrpc/mrpc_toc.html)
- **ABA Ethics Opinions & *EthicsSearch* (\$)**  
<http://www.abanet.org/cpr/pubs/ethicopinions.html>
- **NAELA – Aspirational Standards for the Practice of Elder Law**  
[www.naela.org/pdffiles/AspirationalStandards.pdf](http://www.naela.org/pdffiles/AspirationalStandards.pdf)
- ***ACTEC Commentaries on MRPC***  
[www.actec.org/public/CommentariesPublic.asp](http://www.actec.org/public/CommentariesPublic.asp)
- ***ACTEC Engagement Letters***  
[www.actec.org/public/EngagementLettersPublic.asp](http://www.actec.org/public/EngagementLettersPublic.asp)

# Scenario A

## FACTS:

- Son calls for widowed father.
- Will request, son will pay fee.
- Everything to son A and daughter B.
- A & B to be co-executors.

#1 Who is the client?

- A. A and B
- B. Father
- C. A only
- D. A, B and Father

# Scenario A

***In re Estate of Koch, 849 P.2d 977 (Kan. App. 1993):***

**“The scrivener’s representation of clients who may become beneficiaries of a will does not by itself result in a conflict of interest in the preparation of the will. Legal services must be available to the public in an economical, practical way, and looking for conflicts where none exist is not of benefit to the public or the bar.”**

# Scenario B

## FACTS:

- D caretaker (long-standing client) brings mom in.
- Mom asks you to do new will to give estate to D and disinherit her two other out-of-state children.

### #2. Can you rewrite the will?

- A. No- can't overcome conflict in loyalty b/t testator and beneficiary.
- C. Yes– if Mom evaluated for capacity/ undue influence first.
- D. Yes– if Mom gets separate counsel first.

# Scenario B - continued

- Instead, D simply asks you to prepare docs to transfer Mom's home to her.
- Home worth \$200,000

## #3. Can you draft these documents for D?

- A. No - possible undue influence/ financial abuse makes you potentially complicit.
- B. No – signor of document you prepare must be the identified client.
- C. Yes – if fee agreement identifies D as client and you communicate that fact to Mom.
- D. Yes – as long as you advise Mom in writing to seek separate counsel before signing.

# Scenario C

## FACTS:

- Two children and Dad come in.
- Seek Medicaid eligibility advice for Mom.
- Mom to go to NH next week.

#4. Who is the client?

- A. Mom.
- B. Dad.
- C. Dad and Kids.
- D. Mom and Dad

# Scenario C - continued

**#5. If joint representation, what kind of waivers should you obtain?**

- A. None – family is the client.**
- B. Written waiver from Mom only.**
- C. Written waivers from everyone.**
- D. Verbal waivers from everyone.**

# Scenario C - continued

**Same Facts continued but:**

- **Mom & Dad agree to your representing them.**
- **Children ask you advice re impact on them.**

**#6. Is it appropriate to advise children?**

- A. Yes— if all involved consent.**
- B. Yes— all are working toward a common goal.**
- C. No— potential conflict of interest is too great.**
- D. No— b/c potential for using information gained to the detriment of the other client(s).**

# Scenario D

## FACTS:

- Clerk sends over X, elderly, disheveled, confused.
- Hearing in 1 hour for \$20,000 repair claim.
- Doesn't want your help.
- She claims summons is Postal Service plot.

## #7. You should:

- A. Decline- X doesn't want assistance.
- B. Decline, but call APS.
- C. Appear, ask for extension and for appointment of GAL.
- D. Appear, ask for extension. Then, advise judge ex parte that GAL needed.
- E. Something else.

# Scenario E

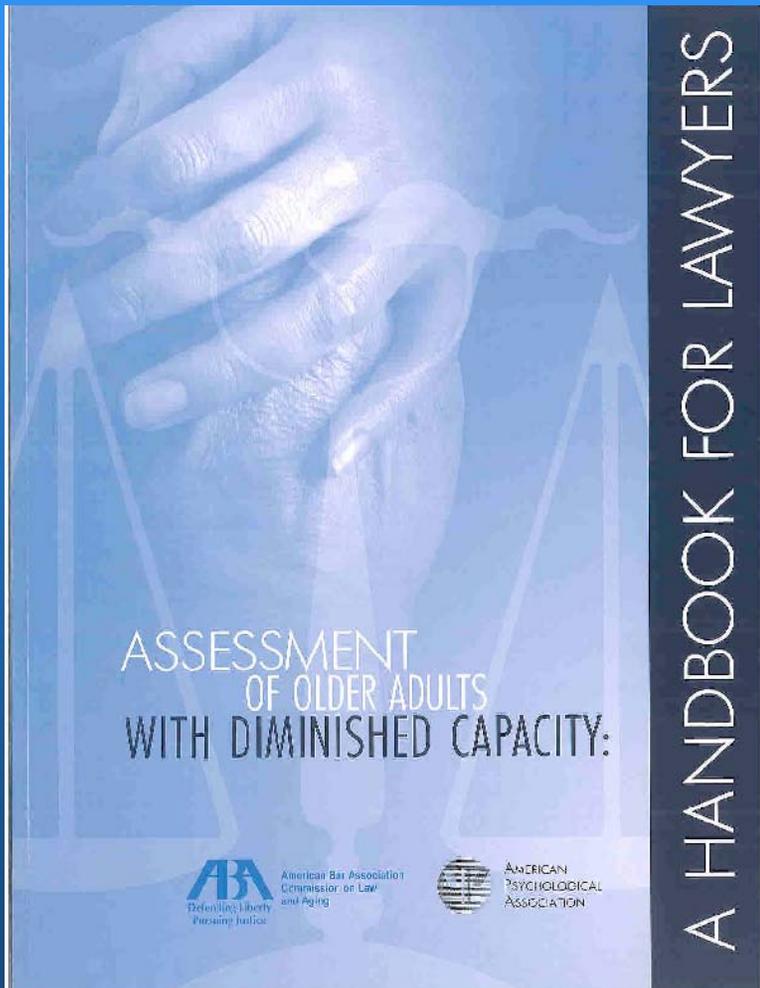
## FACTS:

- Mom longstanding client.
- You changed will year ago. Bulk goes evenly to S & D.
- Mom now wants entire estate to go to Rev. Jim.
- No animosity, knows children, knows value of estate, insists on change.

### #8. What should you do?

- A. Change the will per her request.
- B. Suggest she find another attorney.
- C. Call local abuse hotline and report.
- D. Notify S & D of your concerns before doing will.
- E. Insist on psychiatric evaluation first.

# Have a consistent process for preliminary screening of capacity



## *Assessment of Older Adults With Diminished Capacity: A Handbook for Lawyers (2005)*

ABA Commission on Law and  
Aging & American Psychological  
Association

**Free download:**

[www.apa.org/pi/aging](http://www.apa.org/pi/aging)

**Purchase:**

[www.abanet.org/aging](http://www.abanet.org/aging)

# Scenario E - continued

## Same Facts, but...

- S & D ask to meet with you to discuss concerns about mom before you do anything.
- S & D have not been clients.

### #9. You should:

- A. Let S & D talk but say nothing in return.
- B. Contact Mom. Meet with S & D only if Mom consents.
- C. Tell S & D about Mom's plans and your concerns, but make clear that Mom is client.
- D. Refer S & D to geriatric MH resources.
- E. Other?

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- using a reconsideration period to permit clarification or improvement of circumstances,
- using voluntary surrogate decisionmaking tools such as DPAs or consulting with support groups, professional services, professional services, adult protective agencies or other individuals or entities that have the ability to protect the client.

[6] In taking, attorney guided by factors, e.g., client known wishes & values, client's best interests & goals of minimal intrusion into client's decisionmaking autonomy, maximizing client capacities & respecting client's family & social connections.

# Scenario E - continued

## Same Facts, but...

- S & D inform you of facts that suggest serious delusions & inability to meet essential needs.
- S & D ask you to file for Guardianship.

### #10. What options may you pursue?

- A. Represent S & D in filing petition.
- B. Can't represent S & D, but may defend Mom.
- C. Can't represent son, daughter or Mom.
- D. Initiate petition on your own as protective action.
- E. Other?

# Scenario F – Representing Fiduciaries

- FACTS:** Drafting new will for Mrs. B. She suffers stroke before signing & is hospitalized in Philly.
- Daughter Beth -- agent under a springing general DPA -- comes in. Says mother is stable but insistent on getting will signed in case the worst happens. “I’ll get mom to sign it.”

#11. Can you give her the will to have signed?

- A. Yes -- Important to carry out client’s wishes.
- B. Yes -- Beth is mom’s fiduciary acting in good faith.
- C. No -- You have obligation to oversee signing to ensure it’s is done properly.
  - A. No -- Mom hasn’t given you permission.
  - B. Maybe -- Depends on whether Beth benefits.

# Scenario F – Representing Fiduciaries

## FACTS:

- Stanley, new client, referred by brother (client of yours).
- Wants help in dispute w/ contractor re work on father's home. Dad has been in nursing home 9 mo. w/ Alzheimer's.
- Stan shows you his general DPA over dad's affairs. Stan has rented home out for last 6 mo.s. "That rental income has been a lifesaver in covering the tuition bills of my 2 kids."
- The DPA doesn't authorize gifts. He knows but, "Dad wouldn't object."

**#12. Do you owe any obligation to Stanley's mother to ensure that she gets the rental income restored to her?**

- A. No, she's not your client, so no privity.**
- B. No, you are representing Stanley in his individual capacity, not fiduciary capacity, to handle construction dispute.**
- C. Yes, you are representing him in his fiduciary capacity over the home, so you have a derivative duty to mom.**
- D. Yes, since Stanley's act harms the inheritance interests of the other children (one of whom is already a client of yours), you have a duty to protect the interests of potential beneficiaries of the estate.**

**#13. ...**

## Final Observation

***"There are no short answers for any of these questions. Only essays."***

**Lawyer/ethicist Nancy Dubler  
Montefiore Medical Center, New York**