

Ethical Considerations When Representing Vulnerable Adults¹

Age-related issues, including diminished capacity, can be a significant indicator of the potential vulnerability of a client to undue influence, and also an indicator that our 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 2016.²

¹ Portions of this chapter were adapted from two articles published by BNA: Sandra D. Glazier, Esq., *Capacity and Ethical Considerations When Representing Vulnerable Adults*, 43 TAX MANAGE. ESTATES GIFTS TRUSTS J. (2018); and Bloomberg BNA, Sandra D. Glazier, Esq., Thomas M. Dixon, Esq., & Thomas F. Sweeney, Esq., *What Every Estate Planner Should Know About Undue Influence: Recognizing It, Insulating/Planning Against It . . . And Litigating It*, TAX MANAGEMENT MEMORANDUM (2015).

² Alzheimer's Association, *2017 Alzheimer's Disease Facts and Figures*, 13 ALZHEIMERS. DEMENT. 325–373 (2017).

To put the prevalence of Alzheimer’s disease—which is only one form of dementia—in perspective, a 2014 report indicates that in 2010, one in nine people aged 65 or older suffered from Alzheimer’s disease (or 11 percent of this population) and one-third of all people aged 85 or older (or 32 percent of this population) had Alzheimer’s.³ Further, as of 2014, it was estimated that 5.2 million persons of all ages had Alzheimer’s.⁴

It logically follows that as our population ages, so does our client base. It is therefore incumbent upon the lawyer to be cognizant of issues that confront the clients we serve. Clients who have cognitive impairments are vulnerable to elder abuse. Such abuse can include, but is not necessarily limited to, financial exploitation.⁵

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.⁶

In almost 60% of elder abuse and neglect incidents, the perpetrator is a family member. Two thirds of perpetrators are adult children or spouses.⁷

Recent studies show that nearly half of those with dementia experienced abuse or neglect.⁸

The 2015 True Link Report on Elder Financial Abuse placed losses experienced by the elderly as a result of all forms of elder financial abuse at a staggering \$36.48 billion per year.⁹

Today, the youngest members of the “greatest generation” are 94 years old, the youngest members of the “silent generation” are 73, and the

³ Alzheimer’s Association, *2014 Alzheimer’s Disease Facts and Figures*, 10 ALZHEIMERS. DEMENT. e47–e92, at e54 (2014).

⁴ *Id.* at e54.

⁵ *What Is Elder Abuse?* NATIONAL COUNCIL ON AGING, Home Page > Public Policy & Action > Elder Justice>Elder Abuse Facts, <https://www.ncoa.org/public-policy-action/elder-justice/elder-abuse-facts>.

⁶ *Id.*

⁷ *Id.*

⁸ *Id.*

⁹ *The True Link Report on Elder Financial Abuse 2015*, TRUE LINK FINANCIAL (January 2015), at 1, <http://documents.truelinkfinancial.com/True-Link-Report-On-Elder-Financial-Abuse-012815.pdf>.

“baby boomer generation” started to turn 70 in 2016. Members of these aging generations would be considered vulnerable adults under current legislation,¹⁰ without consideration of additional potentially compounding factors. In addition to age, how friendly the individual historically was, and mental impairment (such as dementia or Alzheimer’s disease) are two of the (numerous) factors that can make an individual vulnerable to elder abuse.¹¹

The Elder Law and Special Needs section of the New York State Bar Association (NYBSA) created an FAQ resource due to the widespread and growing problems of elder abuse, and in support of the NYBSA’s belief that attorneys are effectively positioned to identify and address incidents of elder abuse in clients and potential clients.¹² As estate planners, we often find ourselves on the front lines of dealing with this potentially devastating issue. Being able to identify, as counsel for a vulnerable adult, the indicia of undue influence, its processes, and the potential for litigation, is critical to the delivery of competent advice and appropriate service to our clients.

Some have defined elder abuse as:

an action or lack of appropriate actions, which causes harm, risk of harm, or distress to an individual 60 years or older and occurs:

- a. within a relationship where there is an expectation of trust; or
- b. when the targeted act is directed towards an elder person by virtue of age or disabilities.¹³

The adverse impact of financial elder abuse is not limited to a loss of funds. A single episode of abuse can tip the precarious scales of an otherwise self-sufficient older person. The worry, fear, embarrassment, and other ramifications of being a victim of elder abuse can be magnified in the elderly. As a consequence, a single incident of mistreatment can trigger a downward spiral that leads to loss of independence, serious complicating illness, and even death.

¹⁰ See, e.g., 42 U.S.C. § 1397j to 1397m(5) (2018); FINANCIAL INDUSTRY REGULATORY AUTHORITY (FINRA) MANUAL, r. 4512, 2165 (effective February 5, 2018); and Economic Growth, Regulatory Relief, and Consumer Protection Act, S.2155, 115th Congress (2017–2018), Title III § 303 (2018).

¹¹ *True Link Report on Elder Financial Abuse*, *supra* note 9, at 19–23.

¹² https://www.nysba.org/Sections/Elder/Elder_Abuse_FAQ.html.

¹³ *Id.*

According to a five-year mortality rate study conducted across five categories of substantiated elder abuse (which included caregiver neglect, physical abuse, emotional abuse, financial exploitation, and poly-victimization), elderly adults who were subjected to caregiver neglect and financial exploitation had the lowest survival rates.¹⁴

The 2015 *True Link Report on Elder Financial Abuse* also reported that an estimated 954,000 seniors were skipping meals as a result of financial abuse.¹⁵ The results of these studies should set off alarm bells among lawyers and financial advisors. The studies show that financial elder abuse is as dangerous for our clients as caregiver neglect (and more deadly than even physical abuse).

Elder abuse has been labeled “the crime of the 21st century.”¹⁶ Undue influence is just one form of such abuse.

Some say that they will know elder abuse, will be able to identify undue influence, and will recognize signs of deteriorating cognition when they see it. Even those who believe they are fully cognizant of the issues might benefit from greater training and education on these topics. The importance of such training and enhanced understanding has recently been recognized in a variety of forums.

In 2011, actor Mickey Rooney testified before Congress and urged it to do something about elder abuse.¹⁷ During that hearing, Rooney commented that if elder abuse 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). Rooney poignantly indicated that elder abuse can take many forms, including physical, emotional, and financial abuse.

It appears that the U.S. Congress and some states have finally begun to focus on this important area.

¹⁴ Five-year all-cause mortality rates across five categories of substantiated elder abuse occurring in the community, Jason Burnett, PhD, Shelley L. Jackson, PhD, Arup K. Sinha, MS, Andrew R. Aschenbrenner, BS, MS, Kathleen Pace Murphy, PhD, Rui Xia, PhD, & Pamela M. Diamond, PhD, *JOURNAL OF ELDER ABUSE & NEGLECT* Vol. 28, Issue 2 (2016).

¹⁵ *True Link Report on Elder Financial Abuse*, *supra* note 9, at 2.

¹⁶ Kristen M. Lewis, *The Crime of the 21st Century: Elder Financial Abuse*, 28 *PROB. & PROP.* 11–15 (2014).

¹⁷ Tom Cohen, *Mickey Rooney Tells Senate Panel He Was a Victim of Elder Abuse*, CNN (Mar. 2, 2011), <http://www.cnn.com/2011/SHOWBIZ/03/02/rooney.elderly.abuse/index.html>.

FEDERAL STATUTES AND DEFINITIONS

In 2018, amendments to the Public Health and Welfare Act via the Elder Justice Act¹⁸ attempted to address issues of elder abuse.

Section 1397j of the Elder Justice Act (2018)¹⁹ defines an “elder” as “an individual age 60 or older.” The Act attempts to address “abuse” that inflicts physical or psychological harm or deprivation of goods or services that are necessary to meeting the essential needs of an individual and avoidance of physical or psychological harm.²⁰ It indicates that Adult Protective Services (APS) is responsible for investigating reports of adult abuse, neglect, and exploitation made to APS.²¹ The Act defines “exploitation” as the “fraudulent or otherwise illegal, unauthorized, or improper act or process of an individual, including a caregiver or fiduciary, that uses the resources of an elder for monetary or personal benefit, profit, or gain, or that results in depriving an elder of rightful access to, or use of, benefits, resources, belongings or assets.”²²

Important to the application of the Act are the terms “fiduciary” and “caregiver.” For purposes of this Act, “fiduciary” is defined as:

- (A) . . . a person or entity with the legal responsibility—
 - (i) to make decisions on behalf of and for the benefit of another person; and
 - (ii) to act in good faith and with fairness; and
- (B) includes a trustee, a guardian, a conservator, an executor, an agent under a financial power of attorney or health care power of attorney, or a representative payee.²³

For purposes of this Act, the term “caregiver” means:

. . . an individual who has the responsibility for the care of an elder, either voluntarily, by contract, by receipt of payment for care, or as a result of the operation of law, and means a family member or other individual who provides (on behalf of such individual or of a public or private agency, organization, or institution)

¹⁸ 42 U.S.C. §§ 1397 (j) to 1397(m) (5) (2018).

¹⁹ 42 U.S.C. § 1397(j) (5).

²⁰ 42 U.S.C. § 1397(j) (1).

²¹ 42 U.S.C. § 1397(j) (2)(A).

²² 42 U.S.C. § 1397(j) (8).

²³ 42 U.S.C. § 1397(j) (9).

compensated or uncompensated care to an elder who needs supportive services in any setting.²⁴

While the Elder Justice Act is more general in its application, on February 5, 2018, the Financial Industry Regulatory Authority (FINRA) amendment to Rule 4512 and a new rule, Rule 2165, became effective. These rules are intended to address situations where 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.²⁵

FINRA Rule 2165 defines *financial exploitation* as:

(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 money, assets or property; or

(ii) convert the Specified Adult's money, assets or property.²⁶

FINRA, therefore, 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 freeze the account on a temporary basis and alert others so that additional action to protect the client may take place. Because these rules may affect our clients, it can be helpful for estate planners to keep abreast of legislative

²⁴ 42 U.S.C. § 1397(j) (3).

²⁵ FINRA Rule 2165(a) (1).

²⁶ FINRA Rule 2165(a) (4).

actions and other initiatives intended to protect the elderly. More importantly, given the staggering statistics regarding elder abuse occasioned at the hands of vulnerable adults' 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. Estate planners also need to understand their ethical duties and responsibilities when representing vulnerable clients.

On May 24, 2018, the Economic Growth, Regulatory Relief, and Consumer Protection Act²⁷ included a provision entitled "Immunity from Suit for Disclosure of Financial Exploitation of Senior Citizens." This provision essentially provides immunity from civil or administrative proceedings to trained individuals who are employed in supervisory, compliance, or legal roles (at credit unions, depository institutions, investment advisors, broker dealers, insurance companies, and transfer agencies) for disclosures made in good faith and with reasonable care relative to suspected financial exploitation of a senior citizen. The Act specifies that these individuals shall receive training in a number of areas, including but not limited to common signs that financial exploitation of a senior citizen may be occurring. The Act does not mandate reporting (nor does it set forth the action to take when financial abuse is reasonably suspected). However, the bill may facilitate protective action by eliminating concerns that reporting might be considered a breach of the financial institution's obligation to keep a client's information confidential when disclosure is required to address the suspected financial exploitation of seniors. Perhaps even more importantly, the training required under the Act may result in greater and more effective scrutiny of suspicious transactions.

ETHICAL RESPONSIBILITIES OF ATTORNEYS

Given the apparent increase in elder abuse (whether via awareness or occurrence or both),²⁸ some states have also undertaken initiatives

²⁷ Economic Growth, Regulatory Relief, and Consumer Protection Act, Title III § 303.

²⁸ See Rebecca C. Morgan, J.D., Pamela B. Teaster, Ph.D., & Randolph W. Thomas, M.A., *A View from the Bridge: A Brief Look at the Progression of Cases of Elder Financial Exploitation Prosecutions*, in STETSON UNIVERSITY COLLEGE OF LAW LEGAL STUDIES RESEARCH PAPER SERIES Research Paper No. 2018-2 (2017).

in an attempt to battle abuse of the elderly and other vulnerable adults.^{29,30,31,32} But what are our responsibilities as attorneys?

²⁹ In early 2018, San Diego County, California, developed a “Blueprint” for addressing abuse of elderly and other vulnerable adults. The Blueprint attempts to address abuse encountered by persons over age 65, as well as any person between 18 and 64 who has physical or mental limitations that restrict his or her ability to carry out normal activities or to protect his or her rights. The Blueprint defines a caretaker as any person who has the care, custody, or control of, or who stands in a position of trust with, an elder or dependent adult, whether or not the person is paid. The Blueprint addresses the importance of training dispatch and patrol units to recognize signs of abuse, and in dealing with Alzheimer’s and other forms of dementia. It notes that in an encounter, caregivers should be interviewed separately because in some situations the caregiver might be the abuser. The Blueprint stresses the importance of getting adult protective services involved in certain situations. Even prosecutors are encouraged to obtain ongoing training and education in the field of elder and dependent adult abuse. Among the mandatory reporters referenced in the Blueprint are persons who provide care, health practitioners, and all officers and employees of financial institutions. See *San Diego County Elder and Dependent Adult Abuse Blueprint 2018*, <https://www.sdcca.org/helping/elder-abuse-blueprint.pdf>. The Blueprint was in apparent response to law enforcement investigations of more than 3,000 claims of abuse of elders aged 65 years and older and a 39 percent increase in the elder abuse cases filed by the county’s District Attorney’s Office and the San Diego City Attorney’s Office. Adult Protective Services received 14,741 referrals between 2016 and 2017; financial abuse was the most common form of abuse in the county’s confirmed cases. See *Initiative to Better Protect Seniors from Elder Abuse*, COUNTY NEWS CENTER (March 1, 2018), <https://www.countynewscenter.com/initiative-to-better-protect-seniors-from-elder-abuse>.

³⁰ On March 22, 2018, West Virginia Attorney General Patrick Morrisey announced that the state had formed an elder abuse litigation and prevention unit. *West Virginia launches elder abuse litigation and prevention unit*, WVNS TV (Mar. 23, 2018), <http://www.wvnstv.com/west-virginia-news/west-virginia-launches-elder-abuse-litigation-and-prevention-unit/1073667078>.

³¹ On June 1, 2018, Louisiana’s governor signed “Granny cam” legislation into law. See *“Granny Cam” Nursing Home Bill Signed Into Law by Louisiana Governor*, CBS NEWS (June 1, 2018), <https://www.cbsnews.com/news/granny-cam-nursing-home-bill-signed-into-law-by-louisiana-governor-john-bel-edwards>. The law enacted under Louisiana HB 218 does not address the ability (or inability) to provide such protections to the elderly who continue to reside at home (or in a facility other than a nursing home). The ability of a guardian to authorize remote observation and recording might prove to be both a blessing and a curse. A cam might be used as a means of remote “chaperoning,” which could inhibit the type of communication necessary to alert others that financial exploitation or undue influence is occurring or has occurred. Other states are considering similar statutes.

³² In 2018, Louisiana also adopted Act No. 434 (HB 503). Like the Economic Growth, Regulatory Relief, and Consumer Protection Act, the Act provides financial

Although the Model Rules of Professional Conduct (MRPC)³³ have not been adopted verbatim in every state, they may be instructive for the purposes of helping the lawyer assess the lawyer's ethical responsibilities and considerations when engaged in the representation of vulnerable adults. Of additional aid in the lawyer's quest to balance the needs of a client with the lawyer's ethical responsibilities and considerations are the American College of Trust and Estate Counsel (ACTEC) Commentaries.³⁴ (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.)

In Michigan, it generally is recognized that:

[i]n 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.³⁵

institutions with immunity and guidelines for taking protective action when it is reasonably suspected that an individual over the age of 60 or otherwise defined as a person subject to the Adult Protective Services Act is being financially exploited. The Act defines "financial exploitation" to include acts taken in a representative capacity through a trust, power of attorney, or other means, including but not limited to obtaining control over or depriving an eligible adult from the ownership, use, benefit, or possession of his money, assets, or property by deception, intimidation, or undue influence.

³³ MRPC, for purposes of this book, refers to the American Bar Association (ABA) Model Rules of Professional Conduct, in effect as of December 28, 2017, https://www.americanbar.org/groups/professional_responsibility/publications/model_rules_of_professional_conduct.html.

³⁴ In 2016, the ACTEC Commentaries (5th ed. 2016) was published by the American College of Trust and Estate Counsel Foundation. Some of the recent revisions to the ACTEC Commentaries reflect a change in attitudes and perspectives with regard to the MRPC in the realm of estate planning.

³⁵ MICH. PROF'L CONDUCT R., *Preamble* (April 28, 2017).

IDENTIFYING THE CLIENT

At the outset, it is important to identify who the client is. When dealing with an elderly or otherwise vulnerable client, it is not uncommon for a family member to make the initial contact. Such contact may be common when Medicaid planning is involved. However, if you are engaged to draft documents for a vulnerable client, it remains 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. In fact, in some states, procurement is an element of the presumption of undue influence.³⁶ 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 all further contact to be directly engaged in with the client.

The attorney should encourage family members who are not clients (for purposes of that particular estate planning engagement) to wait outside when the attorney meets with the client. For some, this can be a difficult conversation, especially when other family members are clients under separate engagements (such as when the attorney provides intergenerational representation or business representation for a family business).³⁷ Being able to meet with the client away from others, whose mere presence might interfere with the free flow of information and a frank discussion of the client's desires and circumstances, is extremely important.

Paragraph 4 to the preamble to the Michigan Rules of Professional Conduct makes this provision:

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.³⁸

³⁶ See Illinois Pattern Jury Instructions § 200 *Will Contest* ¶ C.1.a. at 2, 3, § 200.03 *Will Contest—Undue Influence Based Entirely on Unrebutted Presumption Arising from Fiduciary Relationship*, <http://illinoiscourts.gov/CircuitCourt/CivilJuryInstructions/default.asp>.

³⁷ Using the ABA publication *Why Am I Left in the Waiting Room?: Understanding the Four C's of Elder Law Ethics* can be helpful. See <https://www.americanbar.org/products/inv/brochure/211008886>.

³⁸ MICH. PROF'L CONDUCT R., *Preamble* at ¶ 4 (emphasis added).

COMMUNICATIONS WITH A CLIENT WHO HAS DIMINISHED CAPACITY

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

(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*.³⁹

Comments to MRPC 1.4 expound on the lawyer's responsibilities when the client suffers from diminished capacity:

[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.

[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

³⁹ MRPC 1.14(a) (emphasis added).

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.⁴⁰

ASSESSING THE CLIENT'S CAPACITY

As indicated earlier, it is incumbent upon the lawyer to ascertain whether the client has sufficient capacity to engage in a proposed transaction. In doing so, the lawyer is not required to perform standardized psychological or neurological tests.⁴¹ 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.⁴² It also is 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.⁴³

Instead, the lawyer should carefully observe the client and consider factors like those identified by the 1993 National Conference on Ethical Issues in Representing Older Clients (relying, in part, on an article by Peter Margulies):

⁴⁰ MRPC 1.14 *Client with Diminished Capacity – Comment*, cmt. 1, 2, 3, 6 (emphasis added).

⁴¹ 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.

ABA COMM. ON L. & AGING & AM. PSYCHOLOGICAL ASSN., *ASSESSMENT OF OLDER ADULTS WITH DIMINISHED CAPACITY: A HANDBOOK FOR LAWYERS*, at 21 (2005).

⁴² *Id.* at 3.

⁴³ *Id.* at 3.

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 that 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, and 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 long-standing. 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."⁴⁴

In essence, the lawyer generally observes and assesses the client's cognitive, emotional, and behavioral functioning in initially determining whether the client has sufficient capacity to engage in the proposed estate planning

⁴⁴ ABA, A HANDBOOK FOR LAWYERS, *supra* note 42, at 18, 19.

transaction.⁴⁵ If questions remain after the lawyer performs their own assessment, the lawyer may either consult with a qualified professional^{46,47} or, with the client's consent, have a more extensive assessment performed by a qualified professional.⁴⁸ Even if a referral to a qualified professional occurs, it remains the lawyer's responsibility to determine, in the exercise of independent judgment, whether the client has sufficient capacity to engage in the proposed transaction.⁴⁹

Within the realm of "decision-making capacity" and "rational" or "free will" decision-making, there may be some important crossovers between legal and psychological analysis.⁵⁰ Things such as "priming" have been recognized by social psychologists as subliminal motivations to unconsciously influence behavior, and perhaps even influence working memory and executive functions.⁵¹

⁴⁵ *Id.* at 23–26.

⁴⁶ 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 it does not involve the client. The Comment to Rule 1.14(b) 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. *Id.* at 31.

⁴⁷ 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. *Id.* at 34.

⁴⁸ *Id.* at *iii*. 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.

⁴⁹ *Id.* at 33, 34.

⁵⁰ See Dominic J. Campisi, Evan D. Winet, & Jake Calvert, *Undue Influence: The Gap Between Current Law and Scientific Approaches to Decision-Making and Persuasion*, 43 ACTEC L. J. 359 (2018).

⁵¹ *Id.* at 361 (citing John A. Bargh, *Our Unconscious Mind*, SCI. AM. 34–37 (2014)).

IF DIMINISHED CAPACITY IS BELIEVED TO BE PRESENT

MRPC 1.14 provides:

(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 interests.⁵²

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:

[5] . . . Such measures could include: consulting with family members, using a reconsideration period to permit clarification or improvement of circumstances, using voluntary surrogate decision-making tools such as durable powers of attorney or consulting with support groups, professional services, adult-protective agencies or other individuals or entities that have the ability to protect the client. 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 decision making autonomy to the least extent feasible, maximizing client capacities and respecting the client's family and social connections.⁵³

Consequently, just as brokers are now required to do under FINRA Rule 4512, perhaps lawyers might consider: (1) inquiring whether there

⁵² MRPC 1.14(a) and (b).

⁵³ MRPC 1.14 *Client with Diminished Capacity - Comment*, cmt. 5.

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 (2) 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 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 1.14, the lawyer must nonetheless consider the potential implications of such action and the risks and substantiality of harm:

[I]n 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.⁵⁴

. . . 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.⁵⁵

⁵⁴ ACTEC COMMENTARIES, *ACTEC Commentary on MRPC 1.14*, at 160 (5th ed. 2016).

⁵⁵ *Id.* at 160, 161.

Michigan Rules of Professional Conduct comments on MRPC signify caution:

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 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.

* * *

[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.⁵⁶

Additional ACTEC commentaries on MRPC 1.7 further illuminate considerations under MRPC 1.14 relative to clients with diminished capacity:

[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).⁵⁷

⁵⁶ MICH. PROF'L CONDUCT R., cmt. at 1.14 *36 (April 28, 2017).

⁵⁷ ACTEC COMMENTARIES § 1.7 at 108.

WHAT IF ONE SUSPECTS ELDER ABUSE?

If one suspects elder abuse, further action may be required. In some jurisdictions, if the lawyer suspects that elder abuse has occurred (whether such abuse is physical or economic in nature), reporting or other action by the lawyer may be required. ACTEC commentary on MRPC 1.14 reflects:

Elder abuse has been labeled “the crime of the 21st century,”⁵⁸ 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

⁵⁸ MRPC 1.14 (citing Lewis, *supra* note 16, at 161, 162).

where the scope of 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.⁵⁹

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.⁶⁰

CAPACITY AND DEFINING THE LAWYER'S ETHICAL RESPONSIBILITIES

As can be discerned from a review of the ethical rules and commentaries cited, 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 client, relating to the (potential) client's capacity to even engage the lawyer. 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 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.

Assuming the client has the requisite capacity to engage the lawyer, the obligation to assess capacity does not end there. The lawyer then needs to assess whether the client has the requisite capacity to engage in the planned transaction.

CONFLICTS IN REPRESENTATION

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

⁵⁹ ACTEC COMMENTARIES § 1.14 at 161, 162.

⁶⁰ For an example, see Georgia Code § 30-5-4 and § 30-5-8(a) (2) (2015).