I. Importance of Lawyer Assessment of Client Capacity

A. Capacity Judgments and Legal Practice

Although lawyers seldom receive formal training in capacity assessment, they make capacity judgments on a regular basis whether they realize it or not. In the context of litigation, capacity may be the sole issue in controversy—such as in a guardianship action or a challenge to a will, trust, or donative transfer based on an allegation of legal incapacity. In this context, the lawyer’s role is fairly straightforward—to advocate fairly but zealously for the conclusion that represents the interests of the party he or she represents.

In non-adversarial situations, such as estate planning or the handling of specific transactions, issues of capacity are confronted more informally in the daily practice setting. In this setting, legal practitioners by necessity make implicit determinations of clients’ capacity at least two points. First, the lawyer must determine whether or not a prospective client has sufficient legal capacity to enter into a contract for the lawyer’s services. Failing this, representation cannot proceed.

Second, the lawyer must evaluate the client’s legal capacity to carry out the specific legal transactions desired as part of the representation (e.g., making a will, buying real estate, executing a trust, making a gift, etc.). Fortunately, for the typical adult client, the presence of adequate capacity is obvious. Moreover, as a legal and ethical matter, capacity is presumed. It is only when signs of questionable capacity present themselves that a capacity determination becomes a conscious mental process—either one deliberately undertaken or haphazardly muddled through.

Such a practice reality may seem foreign and perhaps a bit alarming to the legal professional not readily familiar with mental health concepts. Lacking training in capacity assessment or other aspects of mental health, the average practitioner may argue that lawyers do not and should not perform capacity assessments. Instead, lawyers should refer any cases of questionable capacity to mental health professionals for assessment. The assertion is true as far as it goes—but it only goes so far. To decide whether a formal assessment is needed, the lawyer is already exercising judgment about the client’s capacity on an informal or preliminary level. The exercise of judgment, even if it is merely the incipient awareness that “something is not right,” is itself an assessment. It is better to have a sound conceptual foundation and consistent procedure for making this preliminary assessment than to rely solely on ad hoc conjecture or intuition.

B. Increasing Prevalence of Capacity Questions

The incidence of cases in which capacity is an issue will increase substantially in the coming years because of the aging demographic bulge and because of the greater incidence of dementia that accompanies the aging process. The label dementia implies no specific cause, nor does it represent an inevitable part of normal aging. However, the prevalence of dementia is estimated to double every five years in the elderly, growing from a disorder that affects 1 percent of persons 60 years old to a condition afflicting approximately 30 percent to 45 percent of persons 85 years old.1 A wide range of diseases affecting the brain cause dementia, some entirely reversible.2 Alzheimer’s disease is the most common cause, accounting for 60 percent to 70 percent of dementia cases.3 New drug therapies are emerging to slow the progress of Alzheimer’s, but it remains incurable and irreversible. For more information on dementia, see Appendix 4.
C. Model Rule 1.14

The ABA's Model Rules of Professional Conduct (MRPC), as revised in 2002, acknowledge the lawyers’ assessment functions, and indeed, suggest a duty to make informal capacity judgments in certain cases. For the first time, the revised rule attempts to give some guidance to lawyers faced with that task. Rule 1.14: Clients with Diminished Capacity, recognizes: first, the goal of maintaining a normal client-lawyer relationship; second, the discretion to take protective action in the face of diminished capacity; and third, the discretion to reveal confidential information to the extent necessary to protect the client’s interests.

As set forth above, the trigger for taking protective action in part (b) of the rule is threefold, requiring: the existence of diminished capacity; a risk of substantial harm; and an inability to act adequately in one’s own interest. Lawyers are familiar with assessing risk and identifying what is in one’s interest, but usually they are neither familiar with nor trained in evaluating diminished capacity. Even though taking protective action is permissive (“may”) and not mandatory, inaction due to uncertainty puts the lawyer uncomfortably between an ethical rock and a hard place.

D. Legal Malpractice

Legal malpractice is another risk factor that points to the need for a more deliberate attention to capacity issues. The failure to assess a client’s capacity has been asserted as grounds for legal malpractice by would-be beneficiaries of a client’s largess. For example, a disinherited child may allege in a will contest that a lawyer did not exercise proper care in that he or she failed to determine the testator’s capacity to execute a will.

Traditionally, the courts have been reluctant to find lawyers liable for malpractice in these circumstances for two reasons: one, the lack of “privity of contract” between the lawyer and the disinherited third party (i.e., the lack of a legal relationship under which a duty arises); and two, the fact that lawyers’ conduct is judged by a standard of care established by the knowledge, skill, and ability ordinarily possessed and exercised by other members of the bar in similar circumstances. Historically, most lawyers did not attempt to assess capacity, so consequently, the standard of practice was quite minimal.

However, the principle of privity has been eroded significantly over the years in case law, and standards of practice continue to evolve as the prevalence of incapacity rises and as a greater awareness of the need to address capacity issues has emerged. Legal malpractice for failure to address capacity questions in appropriate cases is no longer a remote possibility.

This is not to say that every client should be referred out for clinical evaluation. Indeed, there are potentially serious negative consequences to such referrals, including increased costs and time delays and increased mental and emotional stress for the client. However, if there are any signs of diminished capacity, the lawyer is far better off consistently documenting the process of determining that the client does or does not have capacity to engage in the transaction.

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2002 Revision of 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 impairment 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 interests.
E. Lawyer Assessment of Capacity

How do lawyers properly address capacity issues? The Comment to new Rule 1.14 for the first time gives some guidance in assessing capacity, although the rule itself does not define capacity:

Comment 6 to Rule 1.14
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.

These factors blend quite naturally with the normal client interview and the counseling conversation. Yet the factors appear in the Comment without any conceptual, clinical, or practical explanation.

The purpose of this handbook is to fill in the conceptual background and to offer systematic steps in making assessments of capacity. The process does not plunge lawyers into the task of clinical assessment. Indeed, these guidelines recommend against conducting clinical psychological screenings, such as the Mini-Mental Status Exam (MMSE), unless one is professionally trained in such testing. Clinical screening tests such as the MMSE are often given too much weight. They do not in themselves provide sufficient evaluation of capacity.

This handbook recommends instead a systematic role for lawyers in capacity screening at three levels. The first level is that of “preliminary screening” of capacity, the goal of which is merely to identify capacity “red flags.”

The process leads in most cases to one of four conclusions:

1. There is no or very minimal evidence of diminished capacity; representation can proceed.
2. There are some mild capacity concerns, but they are not substantial; representation can proceed.
3. Capacity concerns are more than mild or substantial and professional consultation or formal assessment may be merited.
4. Capacity to proceed with the requested representation is lacking.

The second level of involvement, if needed, involves the use of professional consultation or referral for formal assessment. Such consultation or referral is best accomplished after the lawyer has fine-tuned the referral questions.

The third level of involvement requires making the legal judgment that the level of capacity is either sufficient or insufficient to proceed with representation as requested. Regardless of whether a clinical assessment is utilized, the final responsibility rests on the shoulders of the attorney to decide whether representation can proceed as requested or not, or whether in appropriate cases, protective action under MRPC Rule 1.14(b) is merited.

The lawyer’s assessment of capacity is a “legal” assessment. It involves:

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.