VI. Referrals for Consultation or Formal Assessment

This chapter describes four key matters every lawyer needs to know: (A) the basic considerations relevant to seeking consultation or referral to a clinician for formal assessment; (B) how to select a clinician; (C) the elements or steps of any referral; and (D) how to communicate with the clinician doing the assessment.

A. Basic Considerations in Seeking Consultation or Referral

In transactional legal representations, two common scenarios can lead to the decision to seek professional consultation or to make a formal referral for assessment.

First, the attorney may have sufficiently strong concerns about the capacity of the client that it is important to seek clinical expertise and input on the issue before proceeding further or taking protective action as allowed in Rule 1.14(b). Second, in cases of ongoing or anticipated family or other conflict, the foresighted attorney may seek to preempt a future litigation (e.g., a will contest) by having the client undergo a capacity assessment prior to execution of the legal transaction (e.g., the will).46

Under the classification schema presented in Chapter IV for distinguishing clients with (1) intact capacity, (2) mild problems, (3) more than mild problems, and (4) severe problems, an attorney may find it helpful to contact a suitable clinician in situations where the client demonstrates more than mild problems with diminished capacity. For clients with only mild problems, further evaluation generally is not necessary, unless the attorney concludes that interested third persons may challenge the legal transactions at some point, based upon allegations of mental incapacity. In these situations, the attorney may want to recommend formal evaluation of the client as a defensive measure.

Sometimes an attorney will seek a private consultation with a clinician to discuss and clarify specific capacity issues before proceeding further with representation. Disclosure of the attorney’s concerns is private, at least at this stage of the process, and does not involve the client. 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.47

In other cases, an attorney may feel compelled by capacity concerns, litigation strategy, or other case circumstances to seek an independent formal capacity evaluation by a clinician. Such a decision is significant because it necessarily involves disclosure to the client of an attorney’s concerns or litigation strategy, and requires a client’s consent to be evaluated. It represents a significant step by the attorney that can impact the attorney-client relationship in both positive and negative ways.

Decisions of this type, thus, will sometimes necessitate lengthy and forthright discussions with clients and family members.

This being said, such capacity evaluations and written reports are usually quite valuable because when conducted properly, they furnish objective cognitive and behavioral data and professional expertise to the attorney and the case. The opinions of a clinician can serve as evidence or be advisory in a number of important functions, outlined in the box, next page.

At the same time, a formal assessment is not without danger, for there is always the potential adverse use of such an evaluation against the lawyer’s client. Though the report may be protected under physician-
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patient privilege and attorney-client privilege when the client refuses to consent to disclosure, these privileges are variable under state law and subject to a host of exceptions and interpretations. Their protection from discovery in civil litigation is not absolute.48

On this point it should be emphasized that the clinical evaluation need not result in a formal written report. The lawyer may instruct the clinician to do the evaluation, and then to 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.

B. Selecting a Clinician

Although the Comment to Rule 1.14(b) permits the lawyer to find an “appropriate diagnostician” it does not specify who is “appropriate.” Of note, although the Model Rule refers to “diagnostician,” a better term is clinician, as the process of capacity assessment involves more than a diagnosis, especially with the move away from merely making a diagnosis to describing cognitive and functional abilities.

Ideally, the most appropriate clinician would be a medical or mental health professional who is knowledgeable about the problems of late life, familiar with assessment approaches and instruments relevant to capacity issues, and has considerable experience conducting capacity assessments.

Types of professionals who are most likely to have such background include those listed in the box on the following page. In major metropolitan areas lawyers are more likely to be able to identify internists, psychiatrists, and psychologists with relevant background. The reality is, however, that the number of professionals with ideal credentials is small.

Lawyers in rural or smaller communities may find it difficult to locate a psychiatrist or psychologist within reasonable driving distance. In this case, the lawyer may need to rely on local professional resources even if they are not ideal. A respected medical internist with a geriatric clientele may be appropriate.

A critical step in making a referral is to articulate clearly the area of referral expertise needed. Consider whether the client’s impairment may stem from mental retardation or developmental disability, mental illness, Alzheimer’s or other type of dementia, or other possible medical cause. The expertise for examining these different etiologies can be quite different. For example, a neurologist may have expertise in problems associated with Alzheimer’s disease (a cognitive illness) while a psychiatrist is likely to have more expertise in schizophrenia (a psychiatric illness). The more closely the expertise is matched to the underlying impairment, the more likely the diagnostician can accurately assess the client and provide needed answers.

When considering a referral, the lawyer should ascertain the qualifications of the assessor. Most medical professionals are “boarded” or have “added qualifications” in one or several specialty areas. Being boarded or having added qualifications means that the individual has obtained required training and education and passed an exam. Relevant medical boarded specialties include geriatric medicine, psychiatry, neurology, geriatric psychiatry, and forensic psychiatry.

In psychology, there is increasing specialization although the boarding process has not been as important as in medicine. A small number of psychologists are boarded by the American Board of Professional Psychology (relevant boarded areas include neuropsy-
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Many times, the choice of the appropriate professional for capacity assessment will be made on the basis of your own assessment of the person's ability to understand the legal steps involved. In the absence of family or legal representatives, the lawyer is left to the interpretation of a fact-finding interview, often alone. Properly, therefore, a referral for consultation or formal assessment is often indicated. In the practice of law, the existence of such a referral can be an important tool to be used to make the determination about the client's capacity for the legal transaction at hand.

A. Key Professionals for Capacity Consultation or Referral

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Perhaps the most critical question is to *ascertain how much experience the professional has in the assessment of capacity of older adults*, or of clients with the type of presenting problem at hand.

When approaching the client’s regular physician to request an evaluation, it is also useful to ask how long the physician has known the client. Armed with this information the lawyer will not only be in a better position to make a judgment about whether the individual is an “appropriate diagnostician,” but also to convey in advance to the client what to expect as part of the evaluation.

Ideally, lawyers who have a large geriatric clientele will be able to recommend clinicians with whom they have had positive prior experience. Lawyers lacking those prior connections may wish to investigate resources through the local aging network. A good starting point is the local Area Agency on Aging for the county, city, or multi-county area in which the lawyer is located. Under the Older Americans Act, Area Agencies on Aging are responsible for planning and funding a wide range of services for older persons. They typically provide extensive information and referral services and may be able to identify health professionals with expertise in capacity assessment.

The American Psychiatric Association and American Psychological Association each have state and local affiliates. Sometimes these affiliates have referral lists based on area of expertise. State or local medical societies may be able to provide referral to geriatric medicine specialists or to physicians who identify themselves as having experience with older adults. University medical centers also may have geriatric or long-term care divisions with multi-disciplinary geriatric assessment teams.

For lawyers who see an increasing number of older adults in legal practice, it makes sense to develop referral resources in advance. In areas where there is a dearth of those with relevant specialty background, it might be possible to partner with a local health or mental health professional who is interested in gaining experience in this area.

C. Elements of a Lawyer’s Referral to a Clinician

Once a lawyer has identified good local clinical resources, the lawyer must consider the elements of an effective case referral. These elements are addressed below. The task of interpreting the assessment report is addressed in Chapter VII. Appendix 2 sets out a model letter requesting a client assessment.

In making a referral, it is important for the lawyer to recognize his or her own continuing role. Ultimately, the judgment about the client’s capacity for the legal transaction at hand is the lawyer’s to make. While the results of a clinical assessment gen-

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**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 many visits are usually required and of what duration?
- What is the likely cost of the assessment?
VI. Referrals for Consultation or Formal Assessment

Referral issues to consider:

1. Use of consultation preliminary to referral;
2. Client consent for formal assessment; and
3. Lawyer communication with the assessor.

The lawyer makes the final determination of capacity for the legal transaction.

generally will be a determining factor, client capacity is a legal decision and an inherent part of the lawyer-client relationship. Thus, the lawyer can use the assessment report as valuable—ideally conclusive—evidence, but still needs to “look behind” the report and make an independent judgment taking all factors into account.

Informal Consultation

A lawyer may consult a clinician either preliminary to or instead of making a client referral for a formal assessment. In such a consultation, the lawyer can outline client communications and reactions, as well as the legal transaction for which capacity is required. The lawyer can seek an informal opinion on the question of capacity—and on the question of whether a formal assessment is necessary. The clinician can raise questions the lawyer might have overlooked, allay or reframe the lawyer’s concerns, and suggest strategies for enhancing client capacity.

A preliminary up-front consultation on capacity can bring a lot of “bang for the buck”—in some cases saving the lawyer and the client a great deal of time, money, and angst if it avoids an unnecessary formal assessment. Or it may provide reassurance that a formal assessment is indeed the right step, as well as an indication about what kind of assessment might be optimal.

As discussed further below, communication of capacity concerns to clients and families can sometimes be a difficult and unsettling process, which occasionally may lead abruptly to termination of the representation. Thus, an attorney needs to be well-prepared before taking such a formal step, and a private consultation may be one of the preparatory steps.

Client Consent for Informal Consultation

Does such a preliminary consultation require client consent? If the lawyer identifies the client in the consultation, the lawyer would breach Model Rule 1.6 mandating confidentiality by failing to seek consent. Moreover, the lawyer should aim to involve the client to the greatest extent possible in all aspects of the representation. However, the Comment to Model Rule 1.14 on clients with diminished capacity provides that “in appropriate circumstances, the lawyer may seek guidance from an appropriate diagnostician” in determining client capacity.49 The comment does not address the question of consent for seeking such guidance. And on the question of disclosure of otherwise confidential information, the new Model Rule 1.14(c) provides that if the elements of Model Rule 1.14(b) are met (i.e., the lawyer reasonably believes the client has diminished capacity, is at risk of substantial harm, and unable to act adequately in his or her own interest), then the lawyer may “reveal information about the client, but only to the extent reasonably necessary to protect the client’s interest.” The obvious dilemma here is that the consultation may be needed prior to, and specifically, in order to determine whether the elements of Rule 1.14(b) are met—not after the lawyer has already come to that conclusion.

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.

Possible questions in an informal consult:

- 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?
Payment for Informal Consultation

What about payment? If the client is identified in the consultation and has given consent, the lawyer then can bill the client for the consultation, as well as for the time spent by the lawyer in speaking with the assessor. The lawyer should establish in advance the assessor fee for such consultations. However, if the client is not identified, the consultation is really a service for the lawyer, paid for by the lawyer.

Uses of informal consultation:
- Clinical interpretation of problem.
- Informal clinical opinion on capacity.
- Suggestions for enhancing capacity.
- Additional questions to ask client.
If client is not identified . . . no consent necessary and lawyer pays fee.

Client Consent for Formal Assessment

Client consent for referral for a formal assessment involves some of the same ethical considerations as client consent for an informal consultation, outlined above. On the one hand, the lawyer must not breach the confidentiality that is the hallmark of the client-lawyer relationship, and on the other hand, the lawyer knows that an assessment of capacity is necessary to assure the validity of documents or to proceed with the task at hand. If the client seems unable to give consent, the lawyer could wait until the client is stabilized, and then explain the need for referral and seek consent, or at least the “assent” of the client.

Once the client has made contact with the clinical assessor, the assessor will need to ensure there is sufficient informed consent to conduct the evaluation. Finally, the clinician must get the client’s consent to provide the test results to the lawyer under the requirements of the Health Insurance Portability and Accountability Act (HIPAA). But beyond the ethical dictates, as a practical matter, 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.

How, then, does the lawyer broach the topic of a formal assessment with the client? Suggesting an assessment seems like an ultimate judgment by the lawyer—an authority figure in whom the client has placed trust. The client may interpret it as “My lawyer thinks I’m crazy... can’t do things for myself... have dementia... am just an old woman.” Indeed, “merely raising the issue of someone’s competency [capacity] can be hurtful or damaging to them.” Moreover, the client may be intimidated by the very idea of a psychologist asking questions or of having to take a test.

Key points in discussing with clients possible referral for evaluation 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 they 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.

The referral is indeed trickier when the lawyer is not acting only to avoid later challenge, but because of genuine concern regarding the client’s decision-making abilities, particularly in the context of undue influence. It is important to alert the client to the benefits as well as the risks of a capacity assessment. The clinician is duty bound to the same disclosure.

The best approach in such situations is a compassionate but honest and direct explanation such as:

Mrs. Jones, I am concerned about how you are doing. I am a little worried about your memory. To be sure that everything is okay for us to make this change to your will, and to make sure no one would contest it later, I would like you to meet with a clinician to do some formal assessment of your thinking. Hopefully, the testing will show us that everything is okay. If not, hopefully the testing will show us how to help you to meet your goals. The testing could come out either way, but I
think it is a good idea to be sure. Is it okay if I set up an appointment for a specialist to talk with you and conduct the tests?

Payment for Formal Assessment
Payment will also be a primary concern in making a referral for assessment by a clinician. If the assessment is related to a diagnosis of the client’s condition or can be directly tied to his or her medical care, then the assessment may be billable under medical insurance or Medicare. However, when the assessment is strictly for a legal purpose and the client has given consent, the lawyer will need to disclose the likely cost of such assessment and confirm the client’s payment obligation or other payment arrangement before proceeding.

Communicating with the Clinician
The care with which the lawyer crafts the referral request will bear on the usefulness of the results. Setting out the full information, the legal standard, and questions up front will be more likely to yield a well-tailored assessment report. Conversely, a poorly crafted referral without a clear statement of the purpose may get results that are simply not meaningful, not understandable, or just not on target.

The referral letter will be of greatest use if it clearly sets out the reason for the request, sufficient information about the client and the circumstances, and any legal standard of capacity involved. See an example of a referral letter in Appendix 2. As noted in the U.S. Veterans Administration’s Practice Guidelines for Psychologists:

There is always a specific reason why the psychologist is being consulted, and it is often not clearly stated. The psychologist must also understand the circumstances under which the person is allegedly unable to function under legal standards for competency. What specific areas of skill and function are at issue? In what circumstances and places? What other resources does the patient have to assist him/her in this matter? Why is the question being asked now? Was there a critical incident? Are there any major changes (e.g., surgery, relocation) which have had or might have a significant impact on this individual’s ability to make decisions?53

It is important for the lawyer to communicate with the clinician orally, as well as in writing, to make sure the assessor understands the purpose for the referral and the elements outlined in the referral letter, as noted in the checklist on this page. The aim is to ensure a complete and well-targeted assessment that is worth the money spent. Having to fill in gaps or ambiguities afterwards is both costly and an inefficient use of everyone’s time.

Checklist of Lawyer Referral Letter Elements:
1. Client background: name, age, gender, residence, ethnicity, and primary language if not English.
2. Reason client contacted lawyer; date of contact; whether new or old client.
3. 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.
4. Relevant legal standard for capacity to perform the task in question.
5. 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.
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.