

Pro Bono/Partnerships in Law and Aging

Promoting *Pro Bono* Service of Low-Income Elders Through Creative Linkages

By Karen C. Buck, Esq.

Philadelphia has one of the largest and poorest concentrations of senior citizens in the United States—the largest percentage of seniors among the country's ten largest cities. Almost one in four of Philadelphia's senior citizens live in poverty. Philadelphia's senior citizens experience a higher poverty rate than their peers in other parts of Pennsylvania and the nation. They are overwhelmingly women and minorities, living alone. The demand for legal services for seniors in our community has exploded, at a time when resources—including *pro bono* services—are in limited supply and competitively sought.

Philadelphia also has one of the strongest public interest legal communities in the nation, including more than 25 legal services organizations and a bar association committed to *pro bono*. With the support of the ABA Commission on Law and Aging and the Borchard Foundation Center on Law and Aging, SeniorLAW Center of Philadelphia launched a *pro bono* Internet matching project with the Section on Probate and Trust of the Philadelphia Bar Association and partner law firms. The goal was to enhance SeniorLAW Center's ability to provide direct individual legal representation and services to the elderly poor needing fiduciary and advance planning assistance, services which have historically been thought only necessary for those with wealth. These types of legal services help low-income elderly clients—over half of whom live below poverty level—access the same dignity, peace of mind, and decisionmaking to which wealthier elders have

Continued on page 26

Karen C. Buck, Esq., is the executive director of SeniorLAW Center in Philadelphia.

New Resource for Attorneys

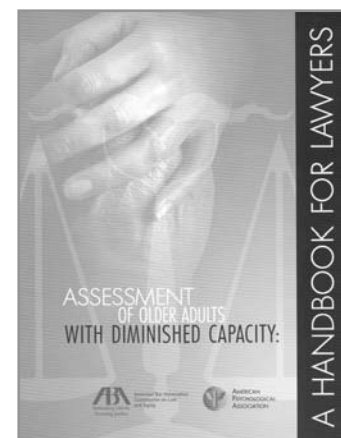
Assessment of Older Adults With Diminished Capacity: A Handbook for Lawyers

ABA Commission on Law and Aging and American Psychological Association

With the coming demographic avalanche as the Boomers reach their 60s and the over-80 population swells, lawyers face a growing challenge: older clients with problems in decision-making capacity.

While most older adults will not have impaired capacity, some will. Obvious dementias impair decision-making capacity—but what about older adults with an early stage of dementia or with mild central nervous system damage? Such clients may have subtle decisional problems and questionable judgments troubling to a lawyer.

Assessment of Older Adults with Diminished Capacity: A Handbook for Lawyers offers elder law



Continued on back page

INSIDE

- 27 Inside the Commission: Director Nancy Coleman Leaves ABA Commission; Tribute
- 29 Twenty-Five Years, and Counting, of Advocacy for Elders
- 31 State Elder Bar Updates

Promoting Pro Bono Services

Continued from page 25

access. It allows them to plan for their future health care, financial survival, housing arrangements, and critical life decisions—and to establish the person they trust most to make those decisions. SeniorLAW Center sought to bolster the work of its legal staff and volunteer panel by accessing attorneys who were less likely to be involved in *pro bono* work and to streamline the *pro bono* referral process by using technology tools.

Many of SeniorLAW Center's clients face the difficult situation of being exploited or abused by their own family members. This includes physical abuse, threats of injury, intimidation, deceptive transfers of property, abuse of power of attorney, and financial exploitation by adult children and grandchildren. Thus, having the opportunity to select an individual to make critical life decisions for them and to assist in their care, to be able to gain legal title to their homes, to revoke abused powers, and to distribute property according

to their wishes has a significant impact on the quality of their lives, especially when they are most vulnerable.

For the past twenty-five years, SeniorLAW Center (formerly Senior Citizen Judicare Project) has been dedicated to protecting the legal rights and interests of the elderly in need in Philadelphia. The center's clients include the most needy and vulnerable: those with low or modest incomes, averaging less than \$750 per month, at least 60 years of age, and living in the city of Philadelphia. The center provides a wide array of legal services, all free of charge, to low-income elders, including legal representation, counsel, community education, outreach, information and referral services, and advocacy. The center also features focused programs for Asian, Hispanic, and other limited-English speaking seniors, elderly homeowners, kinship caregivers, the homebound and disabled, those at risk of Alzheimer's and dementia, and victims of elder abuse, domestic violence, and financial exploitation.

SeniorLAW Center was founded in 1978 by members of the Philadelphia Bar Association to help meet the legal needs of elders in specific impoverished neighborhoods of the city. Today, as a wholly independent 501(c)(3) nonprofit agency, SeniorLAW Center serves over 8,000 elders each year. Since its founding, the center has provided free legal services to more than 200,000 seniors in need.

Goals of this project were to provide direct legal services and legal education to low-income elderly clients needing fiduciary and advance planning legal assistance and counsel through a matching program using the resources of SeniorLAW Center staff and to engage attorneys who have historically not participated in the service of the poor, but who have skills direly needed by low-income elders. The project was aimed not only to serve more elders, but also to build a new corps of volunteers and to educate more attorneys about the needs and the plight of elders in the community facing hardships and extreme poverty.

This project linked SeniorLAW Center's clients with private attorneys who specialize in wills, special needs trusts, execution and revocation of powers of attorney, advance health care directives, administration and probate of estates of low-income elders, and transferring title of homes into a client's name so that they can obtain tax rebates, home repair assistance, and other resources dedicated to elderly homeowners.

One of the project's aims was to remove many of the obstacles identified by attorneys who have not participated in *pro bono* service in the past. SeniorLAW Center staff, who are well-versed in the service of low-income elders, met with

Continued on page 28

BIFOCAL

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NEWSLETTER OF THE AMERICAN BAR ASSOCIATION
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Inside the Commission

Nancy Coleman Leaves the Commission After 25 Years

Nancy Coleman has been the director of the ABA Commission on Law and Aging (formerly the Commission on Legal Problems of the Elderly) since its inception more than 25 years ago. She has led the ABA Commission's efforts to provide policy makers and the general public with guidance and assistance on innumerable legal issues affecting older persons, including Social Security due process, elder abuse, and health and financial planning for the elderly. She leaves the ABA Commission to become the program director for aging of the Harry and Jeannette Weinberg Foundation, which provides more than \$100 million in grants to programs in aging and related fields each year.

Another staff departure was **Naomi Karp**. Ms. Karp, who had been with the ABA Commission since 1988, joined the staff of AARP, where she will continue her work in the areas of guardianship, elder abuse, and health care decision-making.

Charles P. Sabatino, who has been with the ABA Commission since 1984, will be the new director. Mr. Sabatino has been, and will continue to be, responsible for research and project development in the areas of health law, long-term care decisionmaking, and legal services delivery for the elderly.

Erica Wood, who has been with the ABA Commission since 1980, will become the new assistant staff director. Ms. Wood works on issues concerning adult guardianship, legal services delivery, dispute resolution, long-term care, and access to court.

Finally, **Ellen VanCleave**, who came to the ABA Commission on a fellowship from Case Western University School of Law, has recently joined the staff as a researcher.

A Tribute to Nancy Coleman

By Esther F. Lardent

Like everyone who has had the opportunity to meet Nancy Coleman, I have a very vivid memory of our first encounter more than 25 years ago. As chair of the ABA Section of Individual Rights and Responsibilities, whose mandate included legal issues affecting the elderly, I was invited to serve as one of the original members of the newly-formed ABA Commission on Legal Problems of the Elderly. At our first meeting, I was surprised to find that the Commission's director was a young woman. My assumption was that issues affecting the elderly would attract a "senior" staff person. I was equally shocked that she was not an attorney. As we proceeded through the agenda, however, I came quickly to understand and appreciate Nancy's passion for the issues impacting older persons and her depth of understanding and expertise with respect to these issues.

How can one person make such a difference? With intelligence, a relentless passion for justice, a talent for hiring and retaining high-quality staff, an uncanny ability to get the most out of volunteer leaders, and a contagious desire to do the right thing.

As the demographics of our nation—and the world—shift, and as advances in medicine, technology, and the social sciences transform the way we age and how we retire, the legal issues surrounding aging have become more pivotal and more complex. Fortunately, with Nancy's vision and leadership, the ABA Commission and, through its work, the legal profession, has not only kept pace with, but has indeed led creative, original thinking concerning the legal issues of older persons, developing both the essential theoretical framework and, as well, fashioning practical solutions.

Nancy's ability to address existing issues while looking ahead to future trends has enabled the ABA Commission and its talented and dedicated staff to lead the way in so many critical areas: legal services to economically and socially disadvantaged elders, reverse mortgages, guardianship and conservative issues, palliative care and end-of-life, to mention only a few. Her leadership has impacted not only the ABA, but the public interest community, the National Academy of Elder Law Attorneys, groups focused on the intersection of law and health issues, the executive branch and Congress, and so many more.

How can one person make such a difference? With intelligence, a relentless passion for justice, a talent for hiring and retaining high-quality staff, an uncanny ability to get the most out of volunteer leaders, and a contagious desire to do the right thing. Nancy, we will miss you!

Esther F. Lardent is president and chief executive officer of the Pro Bono Institute at Georgetown University Law Center in Washington.

Promoting *Pro Bono* Services

Continued from page 26

each client personally to assess capacity, disabilities, mobility issues, chronic illnesses, language and cultural sensitivities, and other special needs. Center staff also assessed special legal or family issues or complexities presented.

Center staff prepared descriptions of clients, their needs, and the opportunities immediately available to provide *pro bono* service. The Probate and Trust Section's Public Service Committee, whose focus is to engage its members in *pro bono* service, disseminated the information about potential *pro bono* matters on which their members could volunteer. Client needs and descriptions were circulated widely on the section's listserve, and many volunteers registered on-line through the center's Web site.

Using the expertise of volunteers in the area in which they practice eliminates the substantive concerns that face many *pro bono* attorneys, who may be asked to represent a client in a wholly new area of law, or with courts or procedures with which they are unfamiliar. Eliminating obstacles to an enriching client-volunteer relationship is key to a successful *pro bono* program and was a hallmark of this project.

The project got off to a slower start than expected, due primarily to the competition for *pro bono* attorneys and the selection of some law firms that focus their attorneys' *pro bono* efforts on a particular project or population, despite the attorneys' inherent skills and interests. It was also discovered that some firms had new policies requiring that all assignments be coordinated through a point person, who was most often not a part of the group we were targeting, adding another layer of coordination and administration, and counteracting the directness and efficiency of this appeal. These facts revealed a curious irony: the efforts of some firms to strengthen their *pro bono* programs had the impact of frustrating ours. Internal firm listserve communications were being given precedence over external section *pro bono* requests.

We adapted to this obstacle by focusing on section members whose firms had not directed their *pro bono* efforts in a specific direction, and by actually expanding the original project goals in 2004 to use the listserve to orchestrate a community-based public service project. This project recruited, registered, and matched volunteers electronically with individual pre-screened elderly clients, who were served on designated service dates in their own neighborhoods. Twenty-six volunteer attorneys traveled into the neighborhoods of Philadelphia to serve seniors at three senior centers in West, South, and Center City Philadelphia on six different dates, including first meetings to interview clients and second dates to execute advance planning documents. Clients were served in comfortable, familiar settings in their own communities, making this an ideal project for those who faced the greatest obstacles in obtaining legal services: those who were frail, disabled, ill, facing early stages of cognitive loss, and those with mobility and transportation problems.

The chair (and former chairs and officers) of the section participated in this project, setting strong examples for the membership. Just as importantly, partners eagerly participated, rather than simply recruiting younger or less experienced associates to do the firm's *pro bono* work. The participation of senior firm leaders is an ongoing challenge to those of us who work in *pro bono*, and we were delighted at the large number of partners who not only encouraged, but also undertook, service of elderly clients in this project.

In the end, individual advance planning services were provided to more than 40 low-income elderly clients. In addition, educational workshops were provided to more than 100 seniors at ten venues. New volunteer attorneys were recruited and exposed to the legal needs of elders, and the needs and struggles of those living poverty. It is hoped that this exposure will encourage their future participation, and that their stories and positive experiences will also encourage their colleagues to participate, further bolstering the center's efforts to meet the growing number of Philadelphia seniors who need and deserve their attention.

National Aging and Law Conference

Reminder: The 2005 National Aging and Law Conference has been rescheduled for Spring 2006 to avoid conflicts with the White House Conference on Aging, which convenes for several days in October 2005. There is no date set yet, but we will let you know as soon we have it, so that you can make your plans. We are working hard to make the next conference worth the wait. If you liked Washington in October, you'll love it in the spring!

Reflections on a Quarter Century, and Counting, of Advocacy

By Nancy Coleman

The ABA Commission has been an excellent place to work for the last 25 years. There has been a vast expansion in what one might consider the field of law and aging, which now encompasses the delivery of legal services by not only the legal services bar and the probate and trust bar, but by the elder law bar. Certainly, the issues have expanded as well.

Life for most of us is much more complicated now than it was 50, or even 25, years ago. Methods of communication and the exposure that we all have to new technologies have made the legal issues facing our aging population even more complex.

These changes have been reflected in the type of work that I have done over the years.



Think-tank symposiums involve getting some very smart people to write some original papers or articles. Using the “Erica Wood/Jeanne Dooley” methodology, you bring together a diverse group of experts to work through the issues and come up with a set of recommendations. These recommendations are then taken to the ABA House of Delegates (after being refined and vetted) for ABA policy. In the meantime, a law review publishes the papers and the recommendations in order to have an historical and academic authoritative reference point. These symposiums are considered to be at the edge of law and social policy and tend to push the boundaries beyond the current thinking. The ABA Commission has done this in a number of areas:

1. National Judicial Guardianship Conference (1986)
2. Social Security Due Process Conference (1983)
3. Medicare Due Process Conference (1985)
4. Wingspread Guardianship Conference (1988)
5. Court Related Needs of the Elderly and Persons with Disabilities (1991)
6. Fordham Ethics Conference (1993)
7. Borchard Dementia Conference (2000)

8. Wingspan Guardianship Conference (2001)
9. Medigap Congressional Roundtable
10. Managed Care Alternative Dispute Roundtable (1997)
11. Health Care Decision-making for the Unbefriended Elderly (2002)

And numerous others.

My first meeting with Arthur Flemming became the first of many. I called his secretary, Marguerite, and asked where I was to meet him on the appointed day. His table, of course, at the Hay Adams Hotel, she stated. Dr. Flemming and I spent hours talking about the issues of the day—me, complaining about the Reagan White House, and he, giving examples of similar complaints from years before. One day we were discussing the mining of the bay off of Honduras. I said how horrible it must be, from the perception of the rest of the world, that the United States would do such a thing in order to “combat the spread of communism in Central America.” Dr. Flemming then told me about the time he was speaking to President Eisenhower and he, the president, seemed distracted. President Eisenhower later told Dr. Flemming that he had been preoccupied with thinking about the world’s perception as to whether the United States should intervene in the blockage of the Suez Canal. Dr. Flemming was not bragging about his relationship with the president, but, rather, making an analogy as to how something the United States might or might not do would impact world opinion. Our breakfasts went on for fifteen years. Dr. Flemming later moved his table to the Capitol Hilton because the stairs into the Garden Room at the Hay Adams were too difficult and he did not want to make a scene. He told those who asked about the change of venue that the Hilton had been the first to integrate and that it had an excellent labor policy. Both factors were correct. Marguerite and I also developed a wonderful relationship over the years. She had been Dr. Flemming’s secretary since he had been Secretary of the U.S. Department of Health, Education, and Welfare in the late 1950s. After his death in 1996, Marguerite and I went to lunch at the Capitol Hilton. The wait staff came up to our table and each expressed their condolences, as if we had been his family. The maitre d’ picked up our check for lunch, saying that it was the least he could do for those who were so

Reflections on 25 Years of Advocacy

Continued from page 29

close to Dr. Flemming. Marguerite may have been that close, but I was touched that they would have considered me in the same category.

John Pickering was another very important person for the Commission. He chaired the Commission for over 10 years. The rule in the ABA was that one may chair for a maximum of three years, but Mr. Pickering had extraordinary clout and found our work inspirational. Mr. Pickering came to Washington to clerk for Supreme Court Justice Frank Murphy, who he says inspired him to care about the needs of the vulnerable. It was this commitment that carried through in his leadership at the Commission. We were able to help Mr. Pickering with the specifics of the legal issues affecting the constituency that we represented and he was able to convince the ABA House of Delegates or the Board of Governors to accept policy so that the ABA would be a leader in the law and aging field. Mr. Pickering taught himself Social Security law in order to write an *amicus* brief in a case where the Supreme Court ruled 9 to 0 in our favor quoting his brief.

Mr. Pickering advocated that physician-assisted suicide was not a natural extension of a person's right to privacy and autonomy to make health care decisions, but, rather, until every person had a "right and access" to quality health care, society could not extend the right to physician assisted suicide to a society. Mr. Pickering may have personally chosen such an act for himself, but he articulated the argument that he had first heard from one of the physician members of the Commission. Mr. Pickering recently died, ironically the weekend that Congress passed the emergency legislation to "save Terri Schiavo" that he would have been vocally opposed to. He left us all with a hole in our hearts, but a glow from having had his counsel for the last twenty years.

I have never been afraid to ask the question that everyone in the room is thinking, yet no one asks. I also have not let a speaker give me a rebuff when a follow-up question is needed. I am told that staff at the ABA would call the Commission to find out which informational session I would be attending so that they could be assured that the hard questions would be asked.

When I accepted the position as the staff director of the Commission there were no other staff to direct. Within the year, Erica Wood joined the Commission as a consultant and we were able to hire a part-time secretary. As the staff grew, and the Commission began

to look at the ways that the ABA could be used as a vehicle for advocating on behalf of older persons, it became apparent that we would grow together. Together—staff and commissioners—we began to define our role as bringing the legal and the aging communities together.

My goal was to do the networking, but also the advocacy that would put the Commission at the edge of law and social policy. Not long after I arrived, I perceived that it was not simply work outside the ABA with the aging and legal communities, but also within the association, that needed spurring. The ABA has for many decades had a unique role in reviewing the qualifications of prospective federal judges. While it has been changed in the current administration, the qualifications and rankings for the federal bench in the late 1970s included a disqualification based on age. Archibald Cox had been nominated for the bench and the ABA found him to be not qualified based on the fact that he was over 60 at the time. The Commission discussed this situation and wrote to the ABA Board of Governors as well as its Federal Judiciary Committee and asked that the "age disqualification" be removed. At the same time Rep. Pepper held a hearing and invited the chair of the ABA Federal Judiciary Committee as a witness. The U.S. Senate followed the publicity of the House hearing by passing a resolution 97 to 0 asking the ABA and the U.S. Justice Department to remove the "age disqualification." A *Washington Post* editorial, a statement in the *Congressional Record*, and others called on decision-makers to remove the age disqualification policy, saying that pressure was mounting from within the ABA from the newly formed Commission on Legal Problems of the Elderly and from the Congress. The ABA relented and the Commission had its first victory.

It is hard to believe that I have spent 25 years at the ABA. I could not have done it without the excellent and dedicated staff. Charlie Sabatino, the Commission's new director, joined the staff over 20 years ago thinking that he would come as a sabbatical from legal services. His sabbatical was supposed to be five years, not 20. Erica Wood started as a consultant and soon moved into a staff position more than 24 years ago. Lori Stiegel, Stephanie Edelstein, and Leslie Fried remain committed to the Commission. We lost Naomi Karp earlier this year to a full-time position with, more importantly, permanent funding at AARP. Jamie Philpotts, as editor and researcher, has added a new level of professionalism, as well as dedication to the Commission. Sonia Arce and Trisha Bullock round out the staff with a commitment to the goals of the work of the Commission. While we have had other staff, many who have been at the Commission for years, it has always been a team effort.

State Elder Bar Updates

The **Oregon State Bar Elder Law Section** has updated its state bar's practitioners' guidebook entitled *Elder Law*. The soon-to-be-released 1,000+ page handbook includes forms, and is printed in a loose-leaf format, as well as made available online.

In the past year, the 500-member section has also sponsored legislation in the areas of small estate administration, conservatorship administration, and trustee standing to file elder abuse actions.

According to chair **Mark Williams**, the section annually sponsors an elder law CLE, alternating each year between advanced and basic programs. This year's program will be an advanced program entitled "Elder Law Connections." It is anticipated that the program will attract between 200 to 300 practitioners, mostly section members. The section's other CLE is a practice-oriented program entitled "UnCLE," which is geared to the exchange of practical concerns and solutions, and is limited to 75 section members.

The **South Carolina Bar's Elder Law Committee** is just a little over one-year-old. The very first meeting was held on January 9, 2004. Since that time, the committee has sponsored a full-day CLE program on elder law for the state bar, and is planning to present another one in fall 2005. Currently, the committee is working on revisions to South Carolina's statutory health care power of attorney.

According to chair **Franchelle Millender**, the committee also is developing an outreach program to recruit members to speak to church groups about various issues in elder law. The group is in the process of identifying churches in the Columbia, South Carolina, area and offering to speak on the subject of wills, powers of attorney, health care directives, and long-term care planning.

The **New Mexico State Bar Elder Law Section** is presenting two CLE's this year. The first was entitled "Dementia, Capacity and Undue Influence of the Elderly," and was held April 1. The Dementia CLE featured faculty from the University of Maryland speaking about causes of dementia, an expert psychologist speaking on undue influence and capacity, and a district court judge speaking on handling cases involving dementia, undue influence, and capacity.

The second CLE, entitled "Emerging Issues in Elderlaw," is tentatively scheduled for September at the state bar's annual meeting. The program will address new issues with housing, capacity, and ethics that are emerging in the legal field due to increasing numbers of seniors and increasing lifespans.

Finally, according to chair **Kevin Hammar**, the section provides a scholarship to send a representative to the National Academy of Elder Law Attorneys' annual conference.

The **Nebraska State Bar Elder Law Section's** vice chair **Lynne Fees** met with a committee from the Nebraska Unicameral Legislature to discuss the impact of rising nursing care costs. This meeting included a consultant hired by the Health and Human Services Committee of the Unicameral to formulate a plan to increase long-term care insurance in the state, as well as to consider other methods of keeping elder health care costs down.

In addition, each year the section sponsors a seminar at the state bar's annual meeting. In 2004, that seminar focused on driving issues for the elderly. The section distributed and discussed a brochure entitled "We Need to Talk—Family Conversations with Older Drivers." The brochure was developed by the Massachusetts Institute of Technology AgeLab, in partnership with the Hartford Company.

The National Academy of Elder Law Attorneys is pleased to announce the publication of the *NAELA Journal*, the successor periodical to the *NAELA Quarterly*. The *NAELA Journal* is distributed to NAELA's 5,000 members and to law libraries throughout the country.

The *Journal* addresses key elder law topics, including: preservation of assets, Medicaid, Medicare, Social Security, disability, health insurance, tax planning, conservatorships, living trusts and wills, guardianships, estate planning, probate and administration of estates, trusts, long-term care placement, housing and nursing home issues, elder abuse, fraud recovery, age discrimination, retirement, health law, and mental health law.

The *Journal's* Editorial Board invites the submission of manuscripts with the following guidelines:

1. Conform text and citations to: *The Association of Legal Writing Directors (ALWD) Citation Manual: A Professional System of Citation* or *The Bluebook: A Uniform System of Citation*. Citations submitted in *Bluebook* will be converted to *ALWD*.
2. Include a cover letter containing the title of the manuscript, author's professional affiliation or school, and address, telephone, and e-mail address.
3. Manuscripts can be submitted electronically to the attention of Executive Articles Editor at editor@naela.com or by mail to:

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

ABA Commission on Law and Aging and American Psychological Association

Continued from front page

attorneys, trusts and estates lawyers, family lawyers, and general practitioners a conceptual framework and a practical system for addressing problems of client capacity, in some cases with help from a clinician.

Lawyers are increasingly faced with capacity issues in a rising number of cases involving specific legal transactions and, in some instances, guardianship. Whether they intend to or not, lawyers are making judgments about capacity. Even the notion that “something about the client has changed” or a decision to refer a client for a formal professional evaluation represents a preliminary assessment of capacity.

This handbook represents a unique collaboration of lawyers from the ABA Commission and psychologists from the APA. It offers ideas for effective practices and makes suggestions for attorneys who wish to balance the competing goals of autonomy and protection as they confront the difficult challenges of working with older adults with diminished capacity.

Questions that this handbook answers include:

1. What are legal standards of diminished capacity?
2. What are clinical models of capacity?
3. What signs of diminished capacity should a lawyer be observing?
4. What mitigating factors should a lawyer take into account?
5. What legal elements should a lawyer consider?
6. What factors from ethical rules should a lawyer consider?
7. How might a lawyer categorize judgments about client capacity?
8. Should a lawyer use formal clinical assessment instruments?
9. What techniques can lawyers use to enhance client capacity?
10. What are the pros and cons of seeking an opinion of a clinician and how can a lawyer identify an appropriate clinician to make a capacity assessment?

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