# "NORMAL"

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## I. INTRODUCTION

According to the American Bar Association ("ABA") Model Rules of Professional Conduct, when an attorney represents a client "with diminished capacity," counsel "shall, as far as reasonably possible, maintain

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a normal client-lawyer relationship with the client."[1] Many attorneys have traveled down the perilous path of providing legal representation to clients who manifest signs of having "diminished capacity," yet the ethical guidelines for the profession seek normality in the professional relationship. However aspirational such a goal might be, many areas of practice routinely present challenges that attorneys are often unprepared for, untrained to handle let alone to even identify, and frequently left with no alternative other than to seek the appointment of a third party to substitute their judgment for that of the client. For most of the history of the legal profession in this country, no ethical standards have ever been adopted.

The American Bar Association undertook a huge task by seeking to piece together a comprehensive statutory compilation, which state bar associations and state supreme courts were then free to modify, reject, or adopt.[2] As these ethical standards are applied to actual cases, the ABA may

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[1] MODEL RULES OF PRO. CONDUCT r. 1.14 (AM. BAR ASS'N 2002) [hereinafter Model Rule 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.

[2] *See generally* Lucian T. Pera, *Grading ABA Leadership on Legal Ethics Leadership: State Adoption of the Revised ABA Model Rules of Professional Conduct*, 30 OKLA. CITY U. L. REV. 637, 637–38 (2005) ("From 1997 through 2002, the American Bar Association undertook a thorough review and revision of the ABA Model Rules of Professional Conduct ('ABA Model Rules'), the ethics rules that serve as the primary model for the ethics rules governing the conduct and practice of the overwhelming majority of American lawyers. A thirteen member committee, appointed jointly by three consecutive ABA presidents, led this review of the ABA Model Rules. Chaired by Delaware Chief Justice E. Norman Veasey,

amend current provisions, eliminate others, or simply incorporate new comments to help apply the provisions. This piece seeks to continue the dialogue about the role of counsel who represent a client with "diminished capacity" and to question some of the language included in the ethics standards pertaining to the representation of clients who may lack the capacity to communicate with counsel or to engage in the decision-making process of their cases. This article will attempt to identify several areas in practice that create conflicts for counsel, attempt to propose additional protocols for counsel to follow when providing legal representation for clients when ABA Model Rule 1.14 ("MR 1.14")[3] might be invoked, and then conclude with a five-part proposal that includes appointing interdisciplinary professionals to assist in making the rule clearer and universally focused.

## II. COMPLICATIONS IN DRAFTING ETHICAL STANDARDS FOR DISPARATE PRACTICES

The American Bar Association initiated the dialog about how lawyers should engage with clients who might be unable to communicate or make legal decisions when it enacted MR 1.14,[4] but much has happened over the years since the original drafting of the Model Rule.[5] First and foremost, it may be helpful to acknowledge that exploring legal ethics standards as a

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the group was formally named the ABA Commission on the Evaluation of the Rules of Professional Conduct, but it was and is universally referred to as 'Ethics 2000,' in deference to the original target date for completion of the group's work. . . The effort was simply enormous, spanning five years and involving hundreds of people from around the country. It was completed in February 2002 at the conclusion of the second of two sessions of the ABA House of Delegates that considered the many revisions proposed by the Ethics 2000 Commission and decided whether to adopt or reject them.").

[3] Model Rule 1.14, *supra* note 1.

[4] Model Rule 1.14, *supra* note 1; *see* Ted Schneyer, *Professionalism as Bar Politics: The Making of the Model Rules of Professional Conduct*, 14 LAW & SOC. INQUIRY 677, 737 (1989).

[5] *See generally* A LEGISLATIVE HISTORY: THE DEVELOPMENT OF THE ABA MODEL RULES OF PROFESSIONAL CONDUCT, 1982–2013 (Arthur Garwin ed., 2013) [hereinafter A LEGISLATIVE HISTORY]; *see also* David R. Katner, *The Ethical Struggle of Usurping Juvenile Client Autonomy by Raising Competency in Delinquencies and Criminal Cases*, 16 S. CAL. INTERDISC. L.J. 293 (2007); *see also* Rachel Harp, *The Dangers of ABA Model Rule 1.14*, UNIV. OF CIN. L. REV. (Aug. 11, 2021), https://uclawreview.org/2021/08/11/the-dangers-of-aba-model-rule-1-14 [https://perma.cc/G8ZY-4WN3]; Henry Dlugacz & Christopher Wimmer, *The Ethics of Representing Clients with Limited Competency in Guardianship Proceedings*, 4 ST. LOUIS UNIV. J. HEALTH L. & POL'Y 331 (2011); Charles P Sabatino, *Maryland's Major Rethinking of Model Rule 1.14*, ABA (July 16, 2023), https://www.americanbar.org/groups/law_aging/publications/bifocal/vol44/bif-vol44-issue6/model-rule-rethinking.

collection of abstract principles leaves a great deal to be desired.[6] These are rules and provisions that seek to provide direction for actual practitioners who confront various conflicts, miscommunications,[7] problematic behaviors, and situations in litigation and transactions[8] in which attempting to rely on the lawyer's intuitive response is simply insufficient.[9] An understanding that these regulations must be viewed in the context of specific cases is crucial to any analytical review.[10]

First, the committees that pieced these statutes together included attorneys working from very different perspectives while representing various clients.[11] It is helpful to keep in mind that many clients were historically not legally entitled to representation by counsel, some—including many juveniles—as recently as 1967.[12] This discussion must

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[6] Interestingly, the ABA's first venture into defining ethical rules dates back to the thirty-two canons found in the ABA's 1908 Canons of Ethics. *See* James M. Altman, *Considering the A.B.A.'s 1908 Canons of Ethics*, 71 FORDHAM L. REV. 2395, 2399 (2003) ("[T]he Canons were the A.B.A.'s response to President Theodore Roosevelt's criticism of lawyers during a June 1905 commencement address at Harvard University, in which he disparagingly described lawyers as 'hired cunning' because they thwarted what he viewed as the public interest by their lucrative representation of corporations and wealthy entrepreneurs.").

[7] *See* Michele LaVigne & Gregory Van Rybroek, "*He Got in My Face So I Shot Him": How Defendants' Language Impairments Impair Attorney-Client Relationships*, 17 CUNY L. REV. 69, 75–76 (2013) (noting the prevalence—particularly among offenders—of undiagnosed and untreated language impairments that may impact attorney-client communications, stemming from causes such as auditory processing disorders, maltreatment, and neglect).

[8] *See, e.g.*, Benedict Sheehy, Clive Boddy & Brendon Murphy, *Corporate Law and Corporate Psychopaths*, 28 PSYCHIATRY, PSYCH. & L. 479, 479–80 (2021) (discussing Bernie Madoff's defrauding of investors of $50 billion and Enron CEO Kenneth Lay's bankruptcy, the largest in U.S. history that wiped out in excess of $40 billion including thousands of employees' pensions).

[9] Charles W. Wolfram, *Toward a History of the Legalization of American Legal Ethics—I. Origins*, 8 UNIV. CHI. L. SCH. ROUNDTABLE 468–69 (2001) ("The lawyer codes [of ethics] themselves, of course, were designed primarily, and indeed are most frequently used, to measure the propriety of a lawyer's conduct for the purposes of state sanctioned professional discipline. That type of legal enforcement takes place in almost all American jurisdictions through a governmental administrative agency that dispenses professional discipline subject to court review. Professional discipline itself is a process that in most jurisdictions is now under only the indirect control of lawyers and their bar associations. While lawyer discipline was once scandalously under enforced and is still criticized by many as lax, there is no doubt that its incidence has increased significantly in the past thirty years.").

[10] *See generally, e.g.*, *Representing Children: Standards for Attorneys and Guardians Ad Litem in Custody or Visitation Proceedings (with Commentary)*, 13 J. AM. ACAD. MATRIM. LAWS. 1 (1995). These standards were adopted specifically to be applied to custody and visitation cases. Such case-specific standards and perhaps ethics rules might better serve the needs of clients and the lawyers who represent them rather than the singular MR 1.14 language that covers a broad array of legal representation scenarios.

[11] *See generally* Schneyer, *supra* note 4.

[12] Martin Guggenheim, *Reconsidering the Need for Counsel for Children in Custody, Visitation and Child Protection Proceedings*, 29 LOY. U. CHI. L.J. 299, 301 (1998) (discussing *In re* Gault, 387 U.S. 1, 41 (1967)) ("Starting a process that has been evolving ever since, in [1967] the

recognize that creating ethical standards for lawyers representing clients with "diminished capacity" does not enjoy a particularly long history.

Creating an ethics rule drafted primarily by lawyers who represent elderly clients in need of a will, a trust fund, or some other legal instrument[13] might look very different from the ethics rule drafted from the perspective of lawyers who represent young children or adolescents.[14] The needs of these different groups of clients are dissimilar, and their abilities to communicate with their lawyers also may be dissimilar. Still, other ABA lawyer-drafters might represent clients who may have been involuntarily hospitalized, are unable to speak, or have temporary medical conditions that might be soon resolved with medication. Consequently, the creation of a single ethics rule that might apply to each of these dissimilar client conditions would be challenging.[15] The ABA is free to redraft the diminished capacity ethics rule[16] keeping in mind a contextual perspective

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Supreme Court held [in *Gault*] that children whose freedom could be curtailed in delinquency proceedings have the right to court-assigned counsel. Prior to 1967, children were rarely represented by counsel in American courts.").

[13] The ABA Commission on Legal Problems of the Elderly is noted to have proposed an amendment to Model Rule 1.14 in 1995, and later in 1997, the ABA Commission on Legal Problems of the Elderly, the Standing Committee on Ethics and Professional Responsibility, the ABA Senior Lawyers Division, and the ABA Section of Real Property, Probate and Trust Law all submitted proposed amendments to the rule. Interestingly, not one organization that represented the interest of child clients—such as the National Association of Counsel for Children—or any group which provided mental health services for children, parents, or patients is listed as having been participants or having submitted any proposed amendments to the rule. *See* A LEGISLATIVE HISTORY, *supra* note 5, at 337–52.

[14] *Compare* David R. Katner, *Raising Mental Health Issues—Other than Insanity—in Juvenile Delinquency Defense,* 28 AM. J. CRIM. L. 73, 74–75 (2000) (discussing how attorneys representing juveniles charged with delinquency offenses understand that "[s]imply interviewing a child client will not necessarily reveal to counsel that a child suffers from a mental disease or condition, especially in light of the attorney's lack of formal training in psychology, psychiatry, or medicine. If the child's counsel overlooks his mental health problems, then the court may never learn about issues that might otherwise alter the outcome of the proceedings."), *with* Laura J. Whipple, Comment, *Navigating Mental Capacity Assessment*, 29 TEMP. J. SCI. TECH. & ENV'T L. 369, 369–72 (2010). *See also* Katner, *supra* note 5.

[15] *See* Stanley Sporkin, *The Need for Separate Codes of Professional Conduct for the Various Specialties*, 7 GEO. J. LEGAL ETHICS 149, 149 (1993) ("Corporate and securities law is one of the specialty areas that needs better tailored rules. The general ethical standards of the existing rules often do not make much sense when applied to corporate and securities practitioners.").

[16] From time to time the ABA overhauls legal ethics rules, which occurred with the Model Rules of Professional Conduct. The Model Rules underwent a wholesale revision resulting from the work of the ABA's Commission on Evaluation of the Rules of Professional Conduct, which was established in the spring of 1997. *See generally* Margaret Colgate Love, *The Revised A.B.A.* Model Rules of Professional Conduct*: Summary of the Work of Ethics 2000*, 15 GEO. J. LEGAL ETHICS 441 (2002).

that rules applying to lawyers representing preverbal infants[17] might not readily apply to lawyers representing elderly clients in need of wills or trust instruments. Collaborating with mental health professionals trained to identify, assess and diagnose various mental conditions—including psychiatrists, psychologists, and social workers—would provide an interdisciplinary perspective during the drafting process that might better meet the needs of such diverse client conditions. In addition to using an interdisciplinary team to draft ethical standards, actually training lawyers to identify clients in need of interdisciplinary assessments of individual capacities would add greater clarity to current legal ethics rules which fail to recognize educational and training limitations of legal education. Interdisciplinary training programs for professionals are coming of age, but most lawyers have no such educational experience.[18]

This is not intended to cast aspersions on the ABA Model Rules, but rather it is intended to identify a limitation that resulted from drafting a legal ethics rule exclusively by attorneys with no formal training or education in medicine or behavioral science.[19] One anticipated goal from utilizing an interdisciplinary team to draft the ethics rule on diminished capacity should be to reconsider language that vests attorneys with discretion to determine when to apply a rule, whether to report a violation of the rule, or when to withdraw from the client's representation altogether,[20] often without having created any record or identifying any mental health professionals who may have been consulted during the representation.

Second, we may be left speculating as to why some ethics rules go relatively unenforced especially in light of a lack of empirical data on this

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[17] *See* AM. BAR ASS'N, CHILD WELFARE LEGAL REPRESENTATION: ABA ATTORNEY STANDARDS 3–4 (CTR. ON CHILD. & L. ed., 2018) (acknowledging the difficulties in representing preverbal children); *see also* Ann Marie Bingaman, Comment, *Pennsylvania's Need for Permanency: An Argument in Support of Workable Standards for Representing Children in Involuntary Termination of Parental Rights Proceedings*, 124 DICK. L. REV. 431, 457 (2020) ("[T]he Pennsylvania Supreme Court has established neither a bright-line age at which a court may presume that a child has the ability to profess a preferred outcome nor a definition of 'preverbal' to guide trial courts.").

[18] *But see* Amy T. Campbell, *Building a Public Health Law and Policy Curriculum to Promote Skills and Community Engagement*, 44 J. L. MED. & ETHICS 30, 30–31 (2016) (discussing an example of interdisciplinary training using the development of a multi-step project seeking to develop an interdisciplinary program of law and public health).

[19] For a discussion of the evolution over 800 years of the standards of conduct for culminating in the ABA Model Rules of Professional Conduct, see generally Carol Rice Andrews*, Standards of Conduct for Lawyers: An 800-Year Evolution*, 57 SMU L. REV. 1385 (2004).

[20] *See* Nathan M. Crystal, *The Incompleteness of the Model Rules and the Development of Professional Standards*, 52 MERCER L. REV. 839, 841, 843–44 (2001).

issue.[21] Working with professionals in social science might provide more reliable feedback on the efficacy of current legal ethics rules. The ABA nevertheless should be commended for identifying the unmet needs of clients with diminished capacity, but MR 1.14[22] as adopted must also be utilized, and if there is scant record of compliance, then we should commission a study to determine whether to re-examine the language of the rule and ultimately determine whether the rule serves its intended purpose.[23] Upon searching published decisions involving MR 1.14,[24] there is little in the way of advisory opinions or disciplinary actions against members of the Bar. One might conclude that this suggests that the rule has been successful, and that routine compliance results in no published bar complaints. One might just as easily conclude, however, that the lack of disciplinary actions might result from clients being unaware of the duties owed by their counsel under MR 1.14,[25] or it might reflect decisions by third-party lawyers to not report violations of MR 1.14.[26]

In any event, the current language of MR 1.14[27] gives sole discretion to a lawyer who may be untrained to even identify a client's diminished capacity.[28] Interdisciplinary training could help address this. Additionally,

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[21] *See* Ted Schneyer, *From Self-Regulation to Bar Corporatism: What the S&L Crisis Means for the Regulation of Lawyers*, 35 S. TEX. L. REV. 639, 666 (1994) ("[A]lthough the bar's traditional system of professional self-regulation—ethics rules formulated by the ABA, adopted with local amendments by the state supreme courts, and enforced through state disciplinary proceedings—takes the form of a regulatory system, it has left banking lawyers and other corporate lawyers substantially unregulated.").

[22] Model Rule 1.14, *supra* note 1.

[23] *See* Donald E. Campbell, *The Paragraph 20 Paradox: An Evaluation of the Enforcement of Ethical Rules as Substantive Law*, 8 ST. MARY'S J. ON LEGAL MALPRACTICE & ETHICS 252, 254–55 (2018) (noting that because the ABA Model Rules do not themselves give rise to causes of action against lawyers yet may be used as evidence of a lawyer's breach of legal duty, the Model Rules play some role in substantive disputes).

[24] Model Rule 1.14, *supra* note 1.

[25] *Id.*

[26] Mona L. Hymel, *Controlling Lawyer Behavior: The Sources and Uses of Protocols in Governing Law Practice*, 44 ARIZ. L. REV. 873, 880 (2002) ("Enforcement of state ethics codes is limited because the disciplinary process is rarely triggered until someone, usually a disgruntled client, files a grievance with the disciplinary authority. Without someone complaining, or significant publicity concerning a lawyer's misconduct, the misconduct will not come to light, let alone be sanctioned. The disciplinary process is traditionally reactive, not proactive. A lack of investigatory and prosecutorial resources partly explains the reactive nature of lawyer discipline. Even when complaints are filed about ninety percent of them are dismissed without investigation for lack of probable cause or agency jurisdiction.").

[27] Model Rule 1.14, *supra* note 1.

[28] Model Rule 1.14(b) ("When *the lawyer* reasonably believes that the client has diminished capacity . . .") (emphasis added); *id.* cmt. 6 ("In determining the extent of a client's diminished capacity, *the lawyer* should consider . . . such factors as: the client's ability to articulate reasoning . . . . [T]he lawyer *may* seek guidance from an appropriate diagnostician.") (emphasis added).

if lawyers had to comply with an ethics rule that strongly advised compliance with a protocol to identify clients thought to have diminished capacity, followed by consultations with licensed mental health professionals, then the ethics rule would provide lawyers with a means to identify conditions that they lack the training to fully appreciate. This would also create a system that permits clients to have affordable recourse if their attorney fails to involve trained mental health professionals to consult on issues involving client communications or legal decision-making.[29]

Third**,** applying the current one-size-fits-all ethical standard has some obvious limitations.[30] While it may be that middle-income and upper-income clients might be expected to generate sufficient funds for attorneys to become interested in providing representation despite some clients demonstrating "diminished capacity,"[31] it is certainly true that many

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[29]Altering the language of the ABA Model Rules may not be the only way to accomplish systemic change. Other mechanisms might be employed to sanction a lawyer for ethical misconduct or to provide direction for attorneys seeking to follow an ethical decision-making path. States may codify their own legal ethical duties, as the Alabama Bar Association did in 1887. *See* Walter Burgwyn Jones, *Canons of Professional Ethics, Their Genesis and History*, 7 NOTRE DAME L. REV. 483, 493 (1932). Judges have the power to discipline lawyers for ethical violations and have had that power even before the enactment of the ABA Model Rules. *See Ex parte* Secombe, 60 U.S. 9, 13 (1856) ("[I]t has been well settled, by the rules and practice of common-law courts, that it rests exclusively with the court to determine who is qualified to become one of its officers, as an attorney and counsellor, and for what cause he ought to be removed."); *see also* ORRIN N. CARTER, ETHICS OF THE LEGAL PROFESSION 79 (1915) (explaining that courts have exercised the power to discipline attorneys by suspension or disbarment "from the earliest times").

[30] *See* Lonnie T. Brown, Jr., *Symposium—Ethics 2000 and Beyond: Reform or Professional Responsibility as Usual: Foreword*, 2003 U. ILL. L. REV. 1173, 1178 (2003) (questioning the extent to which the 2002 Model Rules overhauls represented "meaningful change or reform" as opposed to well-intended but substantively inadequate "changes in language (or decisions to leave existing rules intact), with little hope of significant professional impact"); *see also generally* James R. Devine, *The Ethics of Representing the Disabled Client: Does Model Rule 1.14 Adequately Resolve the Best Interests/Advocacy Dilemma?*, 49 MO. L. REV. 493 (1984).

[31] High-profile corporate CEOs may be charged with surprising acts of misconduct, including resume fraud or high risk financial behavior. *See, e.g.*, Julianne Pepitone, *Yahoo Confirms CEO Is Out After Resume Scandal*, CNN MONEY (May 14, 2012, 10:00 AM), https://money.cnn.com/2012/05/13/technology/yahoo-ceo-out/index.htm [https://perma.cc/2RVE-J5RL]. The American Academy of Arts and Sciences suffered similar embarrassment when its president's resume fraud was exposed. *See* Todd Wallack, *No Record of Academy Head's Doctoral Degree*, BOS. GLOBE (June 4, 2013, 12:00 AM), https://www.bostonglobe.com/metro/2013/06/03/leader-cambridge-prestigious-academy-arts-and-sciences-inflated-resume-falsely-claiming-doctorate/kWvnF95OTkI0HCVvBHe9XJ/story.html [https://perma.cc/DF6A-VKXY]; *see also* MICHAEL C. ROSS, ETHICS & INTEGRITY IN LAW & BUSINESS: AVOIDING "CLUB FED" 15 (2011) (noting that 500,000 people falsely listed college degrees they did not earn and 43% of resumes had significant inaccuracies); *see also* Renee M. Jones, *The Irrational Actor in the CEO Suite: Implications for Corporate Governance*, 41 DEL. J. CORP. L. 713, 747–48 (2017). Narcissistic personality disorder is a form of psychopathy. *See* AM. PSYCHIATRIC ASS'N, DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS 670 (5th ed. 2013) [hereinafter DSM-5]; *see also*

indigent clients who cannot generate funds require representation despite their "diminished capacity" or vulnerability.[32] The need for interdisciplinary consultation is not restricted to those clients with sufficient finances or insurance that enable the hiring of mental health professionals in civil matters. In criminal matters, challenges to a client's competency should trigger a lawyer's concerns about compliance with MR 1.14.[33] In criminal cases, in which counsel does not believe competency needs to be challenged, the American Bar Association Standards for Criminal Justice spells out options involving decision-making responsibility.[34] The listed standards are cited with approval in the Supreme Court's landmark

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PSYCHOPATHOLOGY: FROM SCIENCE TO CLINICAL PRACTICE 287 (Louis G. Castonguay & Thomas F. Oltmanns eds., 2013) (describing narcissistic personality disorder as overlapping with borderline personality disorder).

[32] *See* Martha Albertson Fineman, *The Vulnerable Subject: Anchoring Equality in the Human Condition*, 20 YALE J.L. & FEMINISM 1, 8 (2008) (describing researchers' tendency to label persons living in poverty as a "vulnerable population[]").

[33] Model Rule 1.14, *supra* note 1. The inquiry into a client's competency to stand trial implicates issues central to whether a successful attorney-client relationship can develop:

> When considering communication dysfunction in the context of the attorney-client relationship, the question of competency to stand trial inevitably comes to mind. Courts have long relied on some variation of the *Dusky* [*v. United States*, 362 U.S. 402 (1956)] standard, which requires that a criminal defendant have "sufficient present ability to consult with his lawyer with a reasonable degree of rational understanding" and "a rational as well as factual understanding of the proceedings against him." In 1996, in *Cooper v. Oklahoma*, [517 U.S. 348 (1996),] the Supreme Court made the language and competency link more explicit by defining the ability to consult with counsel as the ability to "communicate effectively with counsel." By that definition, language impairments are as relevant to a client's competency to stand trial as mental illness or intellectual disability.

LaVigne & Van Rybroek, *supra* note 7, at 78 (internal footnotes omitted).

[34] *See* CRIM. JUST. STANDARDS FOR THE DEF. FUNCTION 4-5.2 (AM. BAR ASS'N 2017) (tracking the language of MODEL RULES OF PRO. CONDUCT r. 1.2(a)). Certain decisions relating to the conduct of the case are ultimately for the accused and others are ultimately for defense counsel. The decisions which are to be made by the accused after full consultation with counsel include: (i) what pleas to enter; (ii) whether to accept a plea agreement; (iii) whether to waive jury trial; (iv) whether to testify in his or her own behalf; and (v) whether to appeal. Strategic and tactical decisions should be made by defense counsel after consultation with the client where feasible and appropriate. Such decisions include what witnesses to call, whether and how to conduct cross-examination, what jurors to accept or strike, what trial motions should be made, and what evidence should be introduced. If a disagreement on significant matters of tactics or strategy arises between defense counsel and the client, defense counsel should make a record of the circumstances, counsel's advice and reasons, and the conclusion reached. The record should be made in a manner which protects the confidentiality of the lawyer-client relationship. *See also* Steven K. Hoge, Richard J. Bonnie, Norman Poythress & John Monahan, *Attorney-Client Decision-Making in Criminal Cases: Client Competence and Participation as Perceived by Their Attorneys*, 10 BEHAV. SCIS. & L. 385, 389–90 (1992).

decision, *Strickland v. Washington*.[35] But even criminal lawyers may still be second-guessed about their representation strategies,[36] and they can be held accountable for violating a client's Sixth Amendment right to effective assistance of counsel.[37] Such legal reviews of the decisions made by counsel are far less common in civil matters but still possible: clients retain the right to file a malpractice action—an expensive and unlikely development.[38] An ethics rule might increase the Bar's review of counsel's actions in both civil and criminal matters and help ensure that lawyers are including mental health professionals in assessing client capacities when appropriate. This would relieve the clients of the burden of funding a malpractice action and should reassure the public that the legal profession takes seriously the charge of self-regulation through the enforcement of legal ethics rules.

Clients who might raise MR 1.14[39] issues are widespread. In other fields of practice, including estates and trusts, counsel may encounter some family efforts to secure more favorable treatment in the handling of an elder's last will, testament, or their estate, especially when the client might exhibit difficulties, confusion, or other complications with communication or legal decision-making. Today, indigent clients with unmet mental health needs benefit from the creation of publicly funded agencies that provide them with legal representation, and these attorneys currently face many MR 1.14[40] concerns.[41] Family law practitioners frequently encounter

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[35] Strickland v. Washington, 466 U.S. 668, 688 (1984).

[36] Deciding whether to advise a client with diminished capacity to testify in different stages of criminal proceedings—such as suppression hearings—can be complicated. *See* Virginia G. Cooper & Patricia A. Zapf, *Psychiatric Patients' Comprehension of* Miranda *Rights*, 32 LAW & HUM. BEHAV. 390, 391–92 (2008).

[37] Emily Hughes, *Mitigating Death*, 18 CORNELL J.L. & PUB. POL'Y 337, 339 (2009) (noting that trial counsel's failure to conduct extensive mitigation investigation in death penalty cases may constitute ineffective assistance of counsel in violation of the Sixth Amendment to the U.S. Constitution) (citing Wiliams v. Taylor, 529 U.S. 362 (2000); Rompilla v. Beard, 545 U.S. 374 (2005); and Wiggins v. Smith, 539 U.S. 510 (2003)).

[38] The constitutional mandates encompassed in criminal law often distinguish it from other areas of law in which no constitutional right to representation exists. Nevertheless, such client remedies rarely have an impact on the quality of representation for many due to the lack of adequate resources for public defenders and the excessive caseloads they are assigned. *See* Richard Klein, *The Emperor* Gideon *Has No Clothes: The Empty Promise of the Constitutional Right to Effective Assistance of Counsel*, 13 HASTINGS CONST. L.Q. 625, 663–79 (1986).

[39] Model Rule 1.14, *supra* note 1.

[40] *Id.*

[41] This includes agencies such as the Mental Health Advocacy Services or other agencies affiliated with the U.S. Dept. of Health & Human Services, Center for Mental Health Services, and the Division of State & Community Systems Development. *See generally* SUBSTANCE ABUSE & MENTAL HEALTH SERVS. ADMIN, EVALUATION OF THE PROTECTION AND ADVOCACY FOR INDIVIDUALS WITH MENTAL ILLNESS (PAIMI) PROGRAM: PHASE III: EVALUATION REPORT (2011), https://store.samhsa.gov/sites/default/files/pep12-evalpaimi.pdf

emotionally distraught clients whose goals and expectations might trigger "diminished capacity" concerns under MR 1.14.[42] Domestic violence cases create their own unique issues in which some victims may wish to disregard a lawyer's best advice due to the nature of the relationship or a victim's potential dependence on their perpetrator.[43] Immigration attorneys routinely confront language barriers or other issues of capacity with some clients.[44] In some instances, these issues may appear (whether correctly or incorrectly) to impact a client's decisional abilities.[45] Even securities attorneys, labor law professionals, or in-house corporate counsel might see clients presenting MR 1.14[46] issues.[47]

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[https://perma.cc/U4KW-YEVV]; *see also* David Udell, *The Civil Legal Aid Movement: 15 Initiatives That Are Increasing Access to Justice in the United States*, *in* 2 IMPACT: COLLECTED ESSAYS ON EXPANDING ACCESS TO JUSTICE (2016).

[42] *See* Janet Weinstein & Ricardo Weinstein, *"I Know Better Than That": The Role of Emotions and the Brain in Family Law Disputes*, 7 J.L. & FAM. STUDS., 351, 363–68 (2005).

[43] *See* Peter Margulies, *Representation of Domestic Violence Survivors as a New Paradigm of Poverty Law: In Search of Access, Connection, and Voice*, 63 GEO. WASH. L. REV. 1071, 1088, 1095 (1995); *see also* Sara R. Benson, *Beyond Protective Orders: Interdisciplinary Domestic Violence Clinics Facilitate Social Change*, 14 CARDOZO J.L. & GENDER 1, 4, 6–7 (2007).

[44] *See* SANA LOUE, IMMIGRATION BRIEFINGS: ISSUES OF CAPACITY IN THE CONTEXT OF IMMIGRATION LAW PART I: EVALUATION AND ETHICS, 1, 4–10 (2009) (discussing common issues), https://www.justice.gov/sites/default/files/eoir/legacy/2014/08/15/09-7_IMMIGRBRIEF_1.pdf [https://perma.cc/2EDP-F77L].

[45] *Id.* at 9 (noting that a given behavior may be pathologized in one culture but a social norm in another). At the same time, many immigrants with mental illnesses are routinely denied access to counsel in immigration matters, with devastating results:

> Mentally ill immigrants face unique and enormous challenges in immigration proceedings. Not only is it difficult for the mentally ill to effectively represent themselves in their removal cases, but their mental illness makes it difficult to obtain counsel. Thus, they are more likely to appear pro se, to lose their cases even when they have colorable claims for relief, to be detained, to have their mental illness exacerbated, and to be wrongfully removed. The frequent appearance of mentally ill respondents pro se presents serious challenges for already overburdened [immigration judges]. It also often leads to unjust outcomes for the mentally ill, threatening the integrity of the immigration system.

Amelia Wilson & Natalie H. Prokop, *Applying Method to the Madness: The Right to Court Appointed Guardians* Ad Litem *and Counsel for the Mentally Ill in Immigration Proceedings*, 16 U. PA. J.L. & SOC. CHANGE 1, 3 (2013) (internal footnotes omitted).

[46] Model Rule 1.14, *supra* note 1.

[47] *See* Jones, *supra* note 31, at 747–48. Commentators have lamented corporate attorneys' complicity with corporate fraud:

> When there is corporate malfeasance or nonfeasance, we often hear the familiar question: "Where were the lawyers?" We heard this question time and time again concerning corporate scandals; for example, the savings and loan banking failure of the

Nevertheless, some practice areas will have greater exposure to clients with MR 1.14[48] concerns than others, and the literature has become more sophisticated in identifying unanticipated issues that also contribute to the types of issues clients present that could suggest "diminished capacity."[49] Gathering empirical evidence on the nature and manner of attorney-client relationships and communications, however challenging, is another benefit of interdisciplinary collaborations.[50]

Fourth, any ethical standard that requires "normality" in a professional relationship without identifying whether the perspective measured is that of the client or that of the lawyer simply invites confusion or at least inconsistency in the application of the rule.[51] In each of the varied legal scenarios identified, counsel must first attempt to establish a "normal" attorney-client relationship. How would that occur if counsel has been appointed by a court to represent the interests of a pre-verbal minor,[52] or if a client facing the death penalty advises that they wish to be put to death?[53]

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> 1980s, resulting in losses to taxpayers of approximately $124 billion; the Enron scandal that emerged in 2001, which led to huge losses to Enron's employees and investors; the General Motors (GM) cover-up of its ignition switch failures, which killed 124 persons and led to hundreds of additional injuries before the 2014 recall of the defective switches; and the opioid crisis, which resulted in approximately 450,000 people dying of overdoses from 1999 to 2018. In each instance, lawyers were complicit in some way, often for what they failed to do rather than what they did.

Peter A. Joy*, Ethical Duty to Investigate Your Client?*, 11 ST. MARY'S J. ON LEGAL MALPRACTICE & ETHICS 414, 417–18 (2021) (internal footnotes omitted); *see also* John K. Villa*, What Can You Ethically Do When You Don't Know What Ethically to Do?*, ACC DOCKET, May 2009, at 106; *see also* Sporkin, *supra* note 15, at 149.

[48] Model Rule 1.14, *supra* note 1.

[49] LaVigne & Van Rybroek, *supra* note 7, at 73 n.19 ("[L]anguage impairments and their effects are highly relevant for attorneys who practice in civil areas such as family, consumer, landlord-tenant, employment, and disability, as well as quasi-criminal areas such as immigration and child protection.").

[50] *See generally* Brenda Danet, Kenneth B. Hoffman & Nicole C. Kermish, *Obstacles to the Study of Lawyer-Client Interaction: The Biography of a Failure*, 14 LAW & SOC'Y REV. 905 (1980).

[51] *See* Robert B. Fleming & Rebecca C. Morgan, *Lawyers' Ethical Dilemmas: A "Normal" Relationship When Representing Demented Clients and Their Families*, 35 GA. L. REV. 735, 740 (2001).

[52] *See* Brenda Salley, Nancy Brady, Lesa Hoffman & Kandace Fleming, *Preverbal Communication Complexity in Infants*, 25 INFANCY 1, 4 (2020).

[53] Despite the Supreme Court's decisions in Jones v. Barnes, 463 U.S. 745 (1983) and Rock v. Arkansas, 483 U.S. 44 (1987) and the MODEL RULES OF PRO. CONDUCT r. 1.2(a) (AM. BAR ASS'N 2002), all of which concluded that the defendant determines whether to testify in a criminal case, in People v. Harris, 236 Cal. Rptr. 680, 684 (Cal. Ct. App. 1987) the California court called defense counsel "astute[]" for keeping his client off the witness stand in an effort to avoid the death penalty because the defendant wanted to confess, despite the lawyer's violation of the defendant's personal right to testify); *see also* Hughes, *supra* note 37, at 387–88 (noting the conflict in death mitigation teams between counsel and social workers responding to a client's decision to die by execution).

If a client has been diagnosed with latter stage Alzheimer's[54] or dementia[55] and is unable to recognize family care providers, how would counsel attempt to create a "normal" attorney-client relationship?[56] The language of the current ethics rule has limited application for many attorneys who routinely face clients unable to communicate or seemingly unable to engage in rational legal decision-making.

Clients who have already been diagnosed with mental health conditions might appear to raise MR 1.14[57] issues; however, that can be misleading. It might be completely inappropriate for counsel to presume that any diagnosed mental health condition[58] would necessarily impede the

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[54] Alzheimer's disease is a neurocognitive disorder associated with a genetic mutation and characterized by:

> a. Clear evidence of decline in memory and learning and at least one other cognitive domain[;] . . .
> b. Steadily progressive, gradual decline in cognition, without extended plateaus[; and]
> c. No evidence of . . . other neurodegenerative or cerebrovascular disease, or another neurological, mental, or systemic disease or condition likely contributing to cognitive decline[].

DSM-5, *supra* note 31, at 611.

[55] Dementia is:

> [A] clinical syndrome characterized by loss of cognitive function sufficient to impair performance of everyday activities. The label *dementia* implies no specific cause or pathological process, nor does it represent an inevitable part of normal aging. A wide range of diseases affecting the brain causes dementia[—]actually more than 55 diseases, some entirely reversible. However, Alzheimer's disease is the most common cause, accounting for 60 to 70 percent of dementia cases.

Charles P. Sabatino, *Representing a Client with Diminished Capacity: How Do You Know It* and *What Do You Do About It?*, 16 J. AM. ACAD. MATRIM. LAWS. 481, 481–82 (2000) (internal footnotes omitted); *see also* David S. Geldmacher & Peter J. Whitehouse, *Evaluation of Dementia*, 335 NEW ENG. J. MED. 330, 330 (1996); *see also generally* ALZHEIMER'S ASS'N & NAT'L CHRONIC CARE CONSORTIUM, TOOLS FOR EARLY IDENTIFICATION, ASSESSMENT, AND TREATMENT FOR PEOPLE WITH ALZHEIMER'S DISEASE AND DEMENTIA, https://www.alz.org/documents/national/CCN-AD03.pdf [https://perma.cc/M6F2-5752].

[56] For an elder law attorney's perspective on the application of ABA Model Rules 1.14 and 1.6, see Garth A. Molander, *Do Elder Law Practitioners and the American Legal Profession Need an Ethical Confidentiality Rule or Can Both Do Without ABA Model Rule 1.6?*, 16 NAELA J. 1, 31–32 (2020) (critiquing the National Academy of Elder Law Attorneys' Aspirational Standards, which were promulgated to help elder law attorneys comply with ABA Model Rules 1.14 and 1.6, as lacking empirically sufficient bases for prioritizing client confidentiality when clients require protective action).

[57] Model Rule 1.14, *supra* note 1.

[58] As late as the 1970s, an individual in the U.S. who was diagnosed with epilepsy could be involuntarily committed to a mental institution, and many individuals continued to believe that epilepsy was a form of "mental retardation." T.J. Murray, *Epilepsy, the Devil and Immigration*, 116 CANADIAN MED. ASS'N J. 963, 963–64 (1977).

client's decisional capacity.[59] If a client has a diagnosed mental health condition and is potentially in treatment, has been medicated, or has an intermittent condition, then the presumption would be erroneous. In addition, lawyers with seemingly high functioning clients—some who have amassed great wealth or power[60]—may also face MR 1.14 challenges.[61] This could involve seemingly competent individuals who may not have been assessed by a professional or been diagnosed yet with mental illness. It might be argued that the seventeen lawyers who have been disbarred or sanctioned following their representation of former president Donald Trump[62] would have been well advised to consider whether MR 1.14[63] issues needed to be considered during the representation of individuals identified as dangerous by multiple mental health professionals. Tens of thousands of mental health professionals questioned President Trump's

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[59] Dilip V. Jeste & Elyn Saks, *Decisional Capacity in Mental Illness and Substance Use Disorders: Empirical Database and Policy Implications*, 24 BEHAV. SCIS. & L. 607, 607 (2006) ("Several studies have shown that, while there are replicable differences among certain diagnostic groups, there is also considerable heterogeneity within each group. It is thus inappropriate to draw conclusions about an individual person's capacity for meaningful consent based solely on her or his diagnosis.").

[60] *See* Jones, *supra* note 31, at 720–21 (discussing studies finding that managers from large companies met the clinical definition for psychopathy, a severe and destructive personality disorder, at a rate four times higher than that of the general public and that corporate executives have a higher rate of certain personality disorder traits than psychiatric patients and the "criminally insane" and research showing that "a sub-category of so-called 'successful psychopaths' may be more adept at climbing the corporate ladder than most others").

[61] *See* Alex B. Long, *Imposing Lawyer Sanctions in a Post-January 6 World*, 36 GEO. J. LEGAL ETHICS 273, 275 (2023) (discussing the "remarkable" number of lawyers, many of whom are well-connected, involved with the Watergate scandal and the attempts to overturn the 2020 election); *see also* Kristina Lykke, *On Nixon's Madness: An Act or Reality?*, JOHN HOPKINS UNIV. PRESS (Apr. 4, 2023), https://www.press.jhu.edu/newsroom/nixons-madness-act-or-reality [https://perma.cc/93GX-VNYD]; Michael S. Roth, *President Richard Nixon and LSD Guru Timothy Leary, Crazy in Their Own Ways*, WASH. POST (Jan. 12, 2018, 2:27 PM), https://www.washingtonpost.com/outlook/president-richard-nixon-and-lsd-guru-timothy-leary-crazy-in-their-own-ways/2018/01/12/76220fa4-ebf2-11e7-b698-91d4e35920a3_story.html [https://perma.cc/ZJ6E-6VH6]; Olivia B. Waxman, *An Anonymous Trump Official Claims Insiders Are 'Thwarting' Him. That May Have Happened to Nixon Too*, TIME (Sept. 6, 2018, 2:28 PM), https://time.com/5388648/watergate-nixon-anonymous-op-ed [https://perma.cc/8FKW-6XBW].

[62] Jacob Shamsian, *Trump's Lawyers Keep Getting in Trouble with Judges. Here Are the 17 Sanctioned So Far*, BUS. INSIDER (Mar. 14, 2023, 11:36 AM), https://www.businessinsider.com/trump-lawyers-sanctioned-by-courts-election-lawsuits-2022-12 [https://perma.cc/KF2C-TMYP] ("Seventeen different lawyers have been sanctioned over failed lawsuits brought on the former president's behalf. Their attempts include litigation seeking to overturn the results of the 2020 presidential election and pushing a conspiracy theory blaming the Russia investigation on a smattering of Democratic party operatives.").

[63] Model Rule 1.14, *supra* note 1.

serious mental illness.[64] It is likely that each of the seventeen sanctioned lawyers assumed they had a "normal" attorney-client relationship with President Trump,[65] only to now second guess that issue.[66] Mental illness

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[64] The mental health professionals raised their concerns in several ways:

> Over 70,000 health professionals even signed a petition, saying "Donald Trump manifests a serious mental illness that renders him psychologically incapable of competently discharging the duties of President of the United States." And a book written by over two dozen mental health experts also argued that Trump, whether due to his personality or mental health issues, is not fit to be the president. Last, in December 2019, several hundred mental health professionals sent a statement to the House Judiciary Committee members to express their concerns that due to his "brittle sense of self-worth," Trump may act more dangerously as his impeachment approaches.

Arash Emamzadeh, *Diagnosing Trump with a Mental Illness*, PSYCH. TODAY (Jan. 5, 2021), https://www.psychologytoday.com/us/blog/finding-new-home/202101/diagnosing-trump-mental-illness; *see also* Eli Merritt, *Could Trump Have a Reality-Distorting Mental Condition?*, L.A. TIMES (Jan. 9, 2021, 3:21 PM), https://www.latimes.com/opinion/story/2021-01-09/donald-trump-mental-state-25-amendment [https://perma.cc/R5LK-8D9M] (discussing the possibility that Donald Trump has a condition called "delusional disorder," which causes a person to strongly hold a single non-bizarre fixed false belief—even despite overwhelmingly strong evidence that it is untrue—but does not otherwise cause the person to function abnormally).

[65] It is possible that MR 1.14 issues might have been germane for the various lawyers who once provided representation to the former president. Perhaps these attorneys would have been better informed of potential Model Rule 1.14 issues prior to the representation of Trump had they known about the mental health assessments that various prominent members of the mental health profession sought to warn the public about concerning the former president. Sharon Begley & STAT, *Psychiatrists Call for Rollback of Policy Banning Discussion of Public Figures' Mental Health*, SCI. AM. (June 28, 2018), https://www.scientificamerican.com/article/psychiatrists-call-for-rollback-of-policy-banning-discussion-of-public-figures-mental-health [https://perma.cc/34S5-84EE] ("Twenty-two psychiatrists and psychologists, including some of the field's most prominent thinkers, are calling on the American Psychiatric Association . . . to substantially revise its controversial Goldwater rule, which bars APA members from offering their views of a public figure's apparent psychological traits or mental status."); *see also generally* THE DANGEROUS CASE OF DONALD TRUMP: 27 PSYCHIATRISTS AND MENTAL HEALTH EXPERTS ASSESS A PRESIDENT (Bandy X. Lee ed., 2017).

[66] *Nine Pro-Trump Lawyers Ordered to Pay $175,000 for Sham Election Lawsuit*, THE GUARDIAN (Dec. 3, 2021, 10:45 AM), https://www.theguardian.com/us-news/2021/dec/03/donald-trump-lawyers-election-lawsuit-sanctions [https://perma.cc/92DX-9ZBY]; Alison Durkee, *Ex-Trump Lawyer Jenna Ellis Censured for Helping Him Overturn 2020 Election—Here Are All the Former President's Lawyers Now Facing* Consequences, FORBES (Mar. 9, 2023, 4:59 AM), https://www.forbes.com/sites/alisondurkee/2023/03/09/ex-trump-lawyer-jenna-ellis-censured-for-helping-him-overturn-2020-election-here-are-all-the-former-presidents-lawyers-now-facing-consequences/?sh=7700a7a6d01e [https://perma.cc/K2V2-HKEF]; Michael S. Schmidt, Maggie Haberman & Charlie Savage, *Judge Orders Trump and Lawyer to Pay Nearly $1 Million for Bogus Suit*, N.Y. TIMES (Jan. 19, 2023), https://www.nytimes.com/2023/01/19/us/politics/trump-clinton-lawsuit-fine.html [https://perma.cc/66BB-EKQN] (noting that Trump's lawyers are increasingly under scrutiny because of the inadequacy of their legal arguments); Timothy Bella, Julie Vitkovskaya & Adrián Blanco, *The Dozens of Attorneys Who Have Defended Trump Since*

manifests in different ways,[67] and lawyers are generally ill-prepared and not trained to properly assess such conditions.[68]

Fifth, however confusing as this may seem, mental illness alone—even diagnosed mental illness—does not necessarily trigger the need to resort to MR 1.14[69] to chart a path consistent with the lawyer's ethical obligations. A client might demonstrate confusion based upon lack of sleep, consumption of contraindicated medications, or recovery from a head injury, but any of these causes might not render the client incapable of communicating or engaging in legal decision-making in the long-term, especially if the condition is short-lived. The client's perspective—from the viewpoint of what may be an unmedicated or undiagnosed client—might be radically different from the perspective of a licensed lawyer in terms of what constitutes a "normal" attorney-client relationship. Perhaps rephrasing this ethics provision and focusing exclusively on the client's capacity to participate in the legal representation or to articulate preferences in the legal decision-making would better serve the public's interest and eliminate some confusion by members of the Bar. More importantly, changing the language of MR 1.14[70] to encourage the utilization of professionals from other disciplines to help assess the client's decision-making capacities[71] would help avoid some of the complications of representing a client who has not been diagnosed with any conditions that might otherwise alert counsel to a MR 1.14[72] concern. It might also become necessary for those clients who have already been diagnosed, but whose decisional capacities seem intact and do not require additional or further engagement with third-party mental health professionals.

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*2016*, WASH. POST (June 16, 2023, 7:00 AM), https://www.washingtonpost.com/politics/2023/06/16/trump-lawyers-legal-cases-explained [https://perma.cc/M6YE-XB7P] (noting multiple high-profile resignations from Trump's representation team).

[67] *See generally* Georgia F. Spurrier, Kai Shulman, Sofia Dibich, Laelia Benoit, Kenneth Duckworth & Andrés Martin, *Physical Symptoms as Psychiatric Manifestations in Medical Spaces: A Qualitative Study*, 13 FRONTIERS PSYCHIATRY 1 (2023).

[68] *See* Whipple, *supra* note 14, at 370.

[69] Model Rule 1.14, *supra* note 1.

[70] *Id.*

[71] Interdisciplinary perspectives are not without their own complications. *See* Kathleen Coulborn Faller & Frank E. Vandervort, *Interdisciplinary Clinical Teaching of Child Welfare Practice to Law and Social Work Students: When World Views Collide*, 41 U. MICH. J.L. REFORM 121, 164–66 (2007).

[72] Model Rule 1.14, *supra* note 1.

## III. MOVING TOWARD CLIENT-CENTERED REPRESENTATION

As legal representation paradigm shifts have attempted to give greater weight to the stated goals of representation as articulated by the client—rather than the paternalistic or substituted judgment of the attorney[73]—a new goal-oriented manner of practicing law has emerged.[74] By defining the limits of the attorney's usurpation of client autonomy,[75] new generations of lawyers have incorporated practices in interviewing clients and client decision-making[76] that may have once been thought unnecessarily burdensome, for counsel at least.[77] "Client-centered" representation is not a stagnant concept that originated and manifested in law school clinical programs: it has changed over time and has incorporated different meanings among different fields of law, but all using the same term of art today.[78]

Much of the rationale of the evolving client-centered paradigm was in response to what was seen as attorneys substituting decisions for their clients without meaningful informed consent by clients, or attorneys determining what they believed was in the best interest of the client,[79] once again without weighing in with the client.[80] In various legal settings involving representation of children, attorneys would frequently substitute their judgment for that of the client or assume that because of the client's age, lack of experiential background, or naivety,[81] that counsel's

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[73] *See* Robert D. Dinerstein, *Client-Centered Counseling: Reappraisal and Refinement*, 32 ARIZ. L. REV. 501, 513 (1990).

[74] *See* Julie D. Lawton, *Who is My Client? Client-Centered Lawyering with Multiple Clients*, 22 CLINICAL L. REV. 145, 147 (2015).

[75] *See* Katner, *supra* note 5, at 295.

[76] *See* Katherine R. Kruse, *Fortress in the Sand: The Plural Values of Client-Centered Representation*, 12 CLINICAL L. REV. 369, 370 (2006).

[77] *See* David Binder, Paul Bergman & Susan Price, *Lawyers as Counselors: A Client-Centered Approach*, 35 N.Y. L. SCH. L. REV. 29, 33 (1990) ("[W]ith respect to the many decisions that typically must be made, you usually must give a client the opportunity to make the final choice.").

[78] *See* DAVID F. CHAVKIN, CLINICAL LEGAL EDUCATION: A TEXTBOOK FOR LAW SCHOOL CLINICAL PROGRAMS 51 (2002) (endorsing a client-centered approach while acknowledging the changing use and meaning of the term).

[79] *See* DONALD N. DUQUETTE, BRITANY ORLEBEKE, ANDREW ZINN, ROBBIN POTT, ADA SKYLES & XIAOMENG ZHOU, CHILDREN'S JUSTICE: HOW TO IMPROVE LEGAL REPRESENTATION OF CHILDREN IN THE CHILD WELFARE SYSTEM 20 (2021) (ebook) (criticizing the "best interest" model of representation, especially when "attorneys lack expertise required to adequately determine children's interests, because legal training does not prepare a person to make the nuanced judgments the determination requires").

[80] *See* Kruse, *supra* note 76, at 378.

[81] *See* Barbara A. Atwood, *Representing Children Who Can't or Won't Direct Counsel: Best Interest Lawyering or No Lawyer at All?*, 53 ARIZ. L. REV. 381, 408–10 (2011) (describing the

prerogative under MR 1.14[82] permitted such practices. A client-centered perspective also owes a debt to the evolution of considerations stemming from older people facing long-term care settings. "Protecting the 'autonomy' of older people has recently gained greater attention among policy makers, legal commentators, medical ethicists, psychologists and others."[83]

## IV. LAW SCHOOLS FAIL TO TRAIN THE IDENTIFICATION OF CLIENTS WITH "DIMINISHED CAPACITY"

Few, if any, law school curriculums provide any training to help lawyers identify clients who may exhibit mental illness,[84] let alone what protocols might be required once counsel becomes aware of a client's issues. This can be especially revealing when lawyers interact with very high-functioning clients.[85] High-functioning clients with psychopathy[86] may be found in any number of settings:[87] in criminal court faced with murder charges; in contentious family litigation; in corporate takeover attempts; or in mergers and acquisition scenarios.[88] High-functioning clients may have no apparent deficiency in speaking or communicating, but

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"protracted process" of child development and explaining that "[l]egal representation of a child—an individual who is in a state of becoming—is challenging precisely because of the fluid nature of children's identities").

[82] Model Rule 1.14, *supra* note 1.

[83] William M. Altman, Patricia A. Parmelee & Michael A. Smyer, *Autonomy, Competence, and Informed Consent in Long Term Care: Legal and Psychological Perspectives*, 37 VILL. L. REV. 1671, 1671–72 (1992) ("Given psychology's immediate relevance to the complex conceptual and diagnostic issues involved, it is surprising that the law has not drawn more explicitly upon psychological perspectives in evaluating autonomous decisionmaking under the informed consent doctrine.").

[84] *See* Sabrina Weber, Ute Habel, Katrin Amunts & Frank Schneider, *Structural Brain Abnormalities in Psychopaths—A Review*, 26 BEHAV SCIS. & L. 7, 24–25 (2008); *see also* Michael E. McCabe, Jr., *What They Didn't Teach You in Law School: Representing Client with Diminished Capacity*, McCabe Ali LLP, https://ipethicslaw.com/what-they-didnt-teach-you-in-law-school-representing-client-with-diminished-capacity [https://perma.cc/2JLB-3WVE].

[85] *See* Sarah Francis Smith, Ashley L. Watts & Scott O. Lilienfeld, *On the Trail of the Elusive Successful Psychopath*, BRIT. PSYCH. SOC'Y (July 23, 2014), https://www.bps.org.uk/psychologist/trail-elusive-successful-psychopath [https://perma.cc/W2E5-ZSPB].

[86] *See generally* Donald R. Lynam, Avshalom Caspi, Terrie E. Moffitt, Rolf Loeber & Magda Stouthamer-Loeber, *Longitudinal Evidence That Psychopathy Scores in Early Adolescence Predict Adult Psychopathy*, 116 J. ABNORMAL PSYCH. 155 (2007).

[87] *See* Clive R. Boddy, *Psychopathic Leadership a Case Study of a Corporate Psychopath CEO*, 145 J. BUS. ETHICS 141, 143 (2017) (estimating that 3.5% of senior-level employees and up to 13.5% of CEOs and lawyers are psychopaths).

[88] Rashawn Ray & Joy Anyanwu, *Why Is Elon Musk's Twitter Takeover Increasing Hate Speech?*, BROOKINGS (Nov. 23, 2022), https://www.brookings.edu/articles/why-is-elon-musks-twitter-takeover-increasing-hate-speech [http://perma.cc/X4WW-NFK7].

may routinely engage in manipulation or the falsification of information to achieve a desired outcome. Inexperienced lawyers often remain clueless and unaware of their client's condition.

With no formal training to assess client capacity to make legal decisions,[89] lawyers often presume that their clients have the capacity[90] to make their own decisions adequately.[91] The ABA adopted the Standards for Imposing Lawyer Sanctions ("Standards") in 1986.[92] Since the adoption of the Standards, there have been no systematic reviews or changes made in over thirty years despite dramatic societal events that have influenced the legal profession.[93] Lawyers untrained to recognize various limitations of clients could open the door to a lagging enforcement mechanism[94] that gives lawyers wide latitude in deciding when and how to usurp client autonomy when clients manifest signs of lacking decision-making capacity.[95] Of course, the conclusion that clients with whom we have "normal" attorney-client relationships have the decisional capacity that precludes applying the

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[89] Richard J. Bonnie referred to this phenomenon as "under-identification." He suggested that despite the lack of empirical data to support this, attorneys and courts may not recognize that criminal defendants with so-called "mental retardation" expend a great deal of effort to prevent the discovery. Richard J. Bonnie, *The Competence of Criminal Defendants with Mental Retardation to Participate in Their Own Defense*, 81 J. CRIM. L. & CRIMINOLOGY 419, 420–21 (1990); *see also* DSM-5, *supra* note 31, at 33 (noting how "mental retardation" is now referred to as "intellectual disability" or "intellectual developmental disorder").

[90] This presumption is in fact codified in several areas of law:

> The presumption of capacity has been incorporated into the Uniform Health Care Decisions Act (1993), § 11 ("An individual is presumed to have capacity to make a health-care decision, to give or revoke an advance healthcare directive, and to designate or disqualify a surrogate."). The Uniform Guardianship and Protective Proceedings Act (1977) § 310 also reinforces a presumption of capacity by requiring "clear and convincing evidence" of incapacity and need before a guardian may be judicially appointed.

Sabatino, *supra* note 55, at 490 n.26.

[91] *Id.* at 482–83 ("Although lawyers seldom receive formal capacity assessment training, they make capacity judgments on a regular basis. Practitioners by necessity make an initial determination of each client's capacity to engage in an attorney-client relationship, although for the typical adult client, capacity will be presumed.").

[92] MODEL RULES FOR LAW. DISCIPLINARY ENF'T r. 10 cmt. (AM. BAR ASS'N 1989).

[93] *See* Long, *supra* note 61, at 308 (citing the corporate fraud scandals of the early twenty-first century, the impeachment of two presidents, increased governmental surveillance following the 9/11 attack, the Bush-era "torture memos," acts of prosecutorial misconduct, the murder of George Floyd, and lawyers' involvement in attempts to overturn the 2020 presidential election).

[94] Peter K. Rofes, *Ethics and the Law School: The Confusion Persists*, 8 GEO. J. LEGAL ETHICS 981, 981 (1995) ("[T]wo decades after the culmination of Watergate, the law school remains confused about the role ethics plays in its mission of preparing students for practice.").

[95] *See* Model Rule 1.14, *supra* note 1, at (b), cmt. 6.

language of MR 1.14[96] may still be flawed.[97] Therefore, these determinations must be done on a case-by-case or client-by-client basis.[98] Including interdisciplinary training during law school might increase the skill sets of the next generation of lawyers to recognize client behaviors that trigger MR 1.14[99] issues.

Once the MacArthur Foundation published their groundbreaking competency study of adolescents with developmental immaturity[100] in delinquency cases, yet another factor had to be considered in how lawyers for children were being trained. Rather than tacitly assuming that all adolescent clients were legally competent, lawyers were put on notice that normal developmental stages of thinking—often with no impact from mental illness[101]—might be reason enough to challenge a juvenile's competency to stand trial.[102] Some have suggested that altogether eliminating the legal presumption that juveniles are competent to stand trial should be considered rather than keeping the current procedural rules that presume competency.[103]

In addition to juveniles whose capacity to make decisions can be affected by developmental immaturity,[104] current studies have identified large numbers of juveniles who were already convicted of offenses, but later

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[96] *Id*.

[97] *See* Molander, *supra* note 56, at 93–95 (highlighting the conflicts over reporting cases of elder abuse while complying with both the ABA Model Rules, which prioritize client confidentiality, and state mandatory reporting statutes, especially given the increasing number of Americans over the age of sixty-five: 50.9 million in 2017, a 34% increase).

[98] *See* Jeste & Saks, *supra* note 59, at 608 ("A notion that normal subjects without psychiatric disorders have normal decision-making capacity is not necessarily valid. Studies show that variable proportions of [normal subjects] have deficits in decisional capacity.").

[99] Model Rule 1.14, *supra* note 1.

[100] Thomas Grisso, Laurence Steinberg, Jennifer Woolard, Elizabeth Cauffman, Elizabeth Scott, Sandra Graham, Fran Lexcen, N. Dickon Reppucci & Robert Schwartz, *Juveniles' Competence to Stand Trial: A Comparison of Adolescents' and Adults' Capacities as Trial Defendants*, 27 LAW & HUM. BEHAV. 333, 336 (2003).

[101] *See* David R. Katner, *The Mental Health Paradigm and the MacArthur Study: Emerging Issues Challenging the Competence of Juveniles in Delinquency Systems*, 32 AM. J. L. & MED. 503, 507 (2006).

[102] *See* Elizabeth S. Scott & Thomas Grisso, *Developmental Incompetence, Due Process, and Juvenile Justice Policy*, 83 N.C. L. REV. 793, 796 (2005).

[103] *See* David R. Katner, *Eliminating the Competency Presumption in Juvenile Delinquency Cases*, 24 CORNELL J.L. & PUB. POL'Y 403, 404 (2015); *Raise the Minimum Age for Trying Children in Juvenile Court*, NAT'L JUV. JUST. NETWORK, https://www.njjn.org/our-work/raise-the-minimum-age-for-trying-children-in-juvenile-court-- [http://perma.cc/Z7SN-K8BR].

[104] *See* Laurence Steinberg & Elizabeth Cauffman, *Maturity of Judgment in Adolescence: Psychosocial Factors in Adolescent Decision Making*, 20 LAW & HUM. BEHAV. 249, 267–68 (1996).

diagnosed with fetal alcohol spectrum disorder ("FASD").[105] Even trained physicians often fail to diagnose FASD, so the initial step of correctly identifying clients afflicted with this prenatally caused condition is challenging. This amplifies the call for interdisciplinary assessments of clients who appear to have "diminished capacity."[106] High rates of underdiagnoses of FASD often result "because of the poor reliability of self-reported maternal drinking histories, an absence of sensitive biomarkers, and the infrequency of diagnostic dysmorphic facial features among individuals with fetal alcohol spectrum disorder."[107] Absent an expansion of interdisciplinary training for law students or significant efforts to provide specific Continuing Legal Education training for lawyers on how to identify FASD clients, it would be unreasonable to expect lawyers to be adequately prepared to identify developmental immaturity, mental illness, or other prenatal conditions that might seriously impact a client's decision-making capacity or ability to assist counsel in a meaningful way. Appreciating the limits of our professional training as lawyers is not a weakness, but a reason to increase our working relationships with other professionals trained to recognize and make assessments of clients who raise MR 1.14[108] concerns.[109]

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[105] Jacqueline Pei, Katherine Flannigan, Sarah Keller, Michelle Stewart & Alexandra Johnson, *Fetal Alcohol Spectrum Disorder and the Criminal Justice System: A Research Summary*, 2 J. MENTAL HEALTH & CLINICAL PSYCH. 48, 49 n.4 (2018) (comparing U.S. and Canadian research on the prevalence of FASD in juvenile justice-involved youth).

[106] *See generally* Jerrod Brown, Alec Jonason, Erik Asp, Valerie McGinn, Megan N. Carter, Vanessa Spiller & Amy Jozan, *Fetal Alcohol Spectrum Disorder and Confabulation in Psycholegal Settings: A Beginner's Guide for Criminal Justice, Forensic Mental Health, and Legal Interviewers*, 40 BEHAV. SCIS. & L. 46 (2022) (providing an introductory guide for individuals working in criminal justice settings).

[107] Jeffrey R. Wozniak, Edward P. Riley & Michael E. Charness, *Clinical Presentation, Diagnosis, and Management of Fetal Alcohol Spectrum Disorder*, 18 LANCET NEUROLOGY 760, 760 (2019).

[108] Model Rule 1.14, *supra* note 1.

[109] Healthcare providers often cite to the lack of uniformity in a legal definition of "capacity":

> "[D]ecisionmaking capacity is a precondition to informed consent. Given the complexity of the determination, it is not surprising that no standard legal definition of capacity has emerged. Instead, each state develops its own definition through limited judicial precedent and, in some instances, by statute. Courts have spoken in vague generalities to make consistent application difficult at best."

Altman et al., *supra* note 83, at 1678 (internal footnotes omitted).

### A. WHAT IS A "NORMAL" ATTORNEY-CLIENT RELATIONSHIP?

If counsel is employed by a public service organization that exclusively represents minors and adults alike who have been identified as coping with mental illness or other disabilities,[110] then a routine representation might involve struggles over the simplest of communications.[111] Nothing about this process would likely be thought of as a "normal" attorney-client relationship to many other lawyers in different fields of the law, yet this issue occurs daily from coast to coast for hundreds of attorneys.[112] For such lawyers, the "normal" attorney-client relationship would be quite different from that of colleagues practicing in other fields. Would the "normality" of the relationship be defined from the attorney's or the client's perspective? Focusing on a "normal" relationship serves little purpose as the type of law an attorney practices should have little or nothing to do with assessing a client's ability to engage in communication or legal decision-making.

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[110] *See* Theresa Glennon, *Walking with Them: Advocating for Parents with Mental Illnesses in the Child Welfare System*, 12 TEMP. POL. & C.R. L. REV. 273, 296–98 (2003); *see also generally* JOANNE NICHOLSON, KATHLEEN BIEBEL, BETSY HINDEN, ALEXIS HENRY & LAWRENCE STIER, CRITICAL ISSUES FOR PARENTS WITH MENTAL ILLNESS AND THEIR FAMILIES (2001), https://fbaum.unc.edu/lobby/_107th/120_Disabled_TANF/Organizational_Statements/NMHA/critical_Issues_for_Parents.pdf [https://perma.cc/RJU3-D39K].

[111] Occasionally, lawyers handling civil cases will represent impaired clients, while criminal defense lawyers may routinely represent impaired clients:

> A significant number of prisoners in state and federal jails and prison suffer from some form of severe mental illness. Today, two of the nation's largest mental health providers are the Los Angeles County Jail and the Cook County (Chicago) Jail. The shift in the United States from the institutionalization of the mentally ill in mental hospitals to the incarceration of the mentally ill in jails and prisons has been well-documented. In 1955, the institutionalization rate of people in mental hospitals was 339 per 100,000; today, the number is fewer than 20 people per 100,000. Where did those vast populations of the mentally ill go? To jails and prisons.

John D. King, *Candor, Zeal, and the Substitution of Judgment: Ethics and the Mentally Ill Criminal Defendant*, 58 AM. U. L. REV. 207, 211–12 (2008) (internal footnotes omitted).

[112] As noted previously, elder law is another such area:

> However, even when not confronted with a client suffering from apparent diminished capacity, the subjective circularity imposed by ABA Model Rule 1.14 and NAELA Aspirational Standard G requires elder law practitioners to assess capacity continually when dealing with elder clients. Not surprisingly, capacity assessments are a daily exercise for elder law practitioners, particularly when there is a reasonable suspicion of elder abuse.

Molander, *supra* note 56, at 37.

For those attorneys who work with geriatric clients[113] or clients with mental disabilities,[114] including Alzheimer's[115] or dementia,[116] once again the simplest of communications with such clients can present major challenges.[117] Counsel may have to wait until the client is lucid enough[118] to discuss the legal issues requiring the client's decision,[119] if that ever occurs.

In other instances, passage of time may not improve the client's ability to communicate and might make things worse.[120] Clients who are afflicted with degenerative diseases such as Alzheimer's would not be expected to function better over a period of time.[121] On the other hand, if a client's communication skills or ability to make informed decisions about legal options are limited due to developmental immaturity, then the passage of

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[113] S*ee* Peter Margulies, *Access, Connection, and Voice: A Contextual Approach to Representing Senior Citizens of Questionable Capacity*, 62 FORDHAM L. REV. 1073, 1082, 1085 (1994) (introducing the contextual capacity model, which incorporates the following six factors, to resolve the ethical black hole dilemma: "(1) ability to articulate reasoning behind decision; (2) variability of state of mind; (3) appreciation of consequences of decision; (4) irreversibility of decision; (5) substantive fairness of transaction; and (6) consistency with lifetime commitments").

[114] "Mental disabilities" involves a large number of clients, and court decisions have often identified specific forms of mental health issues, such as bipolar disorder, to qualify as a disability under the coverage of the Americans with Disabilities Act. *See, e.g.*, Den Hartog v. Wasatch Acad., 129 F.3d 1076, 1081 (10th Cir. 1997) ("[E]very appellate court which has considered the question has held or assumed that 'bipolar disorder' is a mental disability covered under the ADA . . . .").

[115] *See* Fanny Gaubert & Hanna Chainay, *Decision-Making Competence in Patients with Alzheimer's Disease: A Review of the Literature*, 31 NEUROPSYCHOLOGY REV. 267, 269 (2021).

[116] *See* WORLD HEALTH ORG., GLOBAL STATUS REPORT ON THE PUBLIC HEALTH RESPONSE TO DEMENTIA vii (2021) ("By 2050, around two billion people globally will be aged 60 years or over. Dementia is currently the seventh leading cause of death among all diseases and one of the major causes of disability and dependency among older people globally. It can be overwhelming not only for the person living with dementia, but also for carers, families and society as a whole.").

[117] *See generally* Timothy A. Salthouse*, Commentary: A Cognitive Psychologist's Perspective on the Assessment of Cognitive Competency*, *in* OLDER ADULTS' DECISION-MAKING AND THE LAW (Michael Smyer et al. eds., 1996).

[118] *See* Daniel L. Bray & Michael D. Ensley, *Dealing with the Mentally Incapacitated Client: The Ethical Issues Facing the Attorney*, 33 FAM. L.Q. 329, 336 (1999) (noting "windows of lucidity").

[119] Kenneth I. Shulman, Ian M. Hull, Sam DeKoven, Sean Amodeo, Brian J. Mainland & Nathan Herrmann, *Cognitive Fluctuations and the Lucid Interval in Dementia: Implications for Testamentary Capacity*, 43 J. AM. ACAD. PSYCHIATRY & L. 287, 287 (2015) ("[T]he clinical phenomenon of cognitive fluctuations has been considered a common element of several neurodegenerative disorders (dementias), including Alzheimer Disease, but is especially prevalent in vascular dementia and dementia with Lewy bodies.").

[120] The World Health Organization estimated that thirty-six million people live with neurodegenerative diseases worldwide, resulting in loss of identity and causing significant downstream consequences for healthy relationships with caregivers. Nina Strohminger & Shaun Nichols, *Neurodegeneration and Identity*, 26 PSYCH. SCI. 1469, 1477 (2015).

[121] *See* Gaubert & Chainay, *supra* note 115.

time might well result in the client's improved ability to engage in decision-making on their own.[122] Each scenario must be addressed on a client-specific basis as there are no one-size-fits-all ethical solutions.

Still, other clients who qualify for protections under the Americans with Disabilities Act ("ADA") might be among those attorney-client relationships in which MR 1.14[123] issues should be presumed by their lawyers.[124] This is not as clear as one might otherwise assume, and diagnostic assessments might be complicated. There is a lack of consensus as to what psychological tests and metrics might help identify a client's decisional capacity.[125] In addition, qualifying for protection under the ADA may lead to a conclusion that the client lacks the ability to engage in communication with their lawyer or lacks decision-making capacity in connection with the legal issue.[126] Collaborating with a mental health professional as a baseline ethical approach would better protect the client's rights and help to prevent the lawyer from blindly moving forward.[127]

While some family members might assume that a parent's memory loss or confusion is common for the elderly,[128] some forms of cognitive

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[122] Laurence Steinberg, *Should the Science of Adolescent Brain Development Inform Public Policy?*, 64 AM. PSYCH. 739, 748–50 (2009) (raising the question as to whether public policy relating to children in particular should incorporate the revelations of the recent past about juvenile brain development).

[123] Model Rule 1.14, *supra* note 1.

[124] When the Act was created in 1990, forty-three million Americans had one or more disabilities. 42 U.S.C. § 1210(a)(1) was repealed by the ADA Amendment Act of 2008 (at 29 U.S.C. § 705) because Congress did not want the estimated number of beneficiaries to limit the number of eligible disabled Americans. RUTH COLKER, THE LAW OF DISABILITY DISCRIMINATION 2 (7th ed. 2009).

[125] Jeste & Saks, *supra* note 59, at 613–15 ("Despite the growing attention to the need for evaluating decisional capacity in potentially vulnerable individuals who are candidates for research or treatment, no consensus exists regarding how best to assess capacity. . . . We searched the medical and legal literature from 1980 to 2004 for instruments designed to assess capacity to make research or treatment decisions. [Of the] [e]ighteen instruments [that] were identified . . . the MacCAT-CR has been the most widely utilized comprehensive tool for assessing capacity to consent for research, and has thus garnered the most empirical evidence for its reliability and validity.") (internal citations omitted).

[126] Altman et al., *supra* note 83, at 1679 ("[C]ourts have recognized that although a patient may be declared legally incompetent to handle her affairs—for example, in a guardianship proceeding—she may nevertheless retain cognitive capacity to decide whether to have her leg amputated." ) (citing Lane v. Candura, 376 N.E.2d 1232, 1233–34 (Mass. App. Ct. 1978)).

[127] *See* 1 PRESIDENT'S COMM'N FOR THE STUDY OF ETHICAL PROBS. IN MED. & BIOMEDICAL AND BEHAV. RSCH., MAKING HEALTH CARE DECISIONS: THE ETHICAL AND LEGAL IMPLICATIONS OF INFORMED CONSENT IN THE PATIENT-PRACTITIONER RELATIONSHIP 15 (1982).

[128] Altman et al., *supra* note 83, at 1673–74 ("The salience of autonomy and competency concerns in nursing homes becomes clear when these lifetime risks are considered together with depictions of the functional capacities of nursing home residents. Nursing home residents present a complex

dysfunction might result from "overmedication, toxic combinations of medications, poor diet, vitamin deficiencies, depression, infectious diseases, head trauma, poor eyesight, or other treatable conditions."[129] Consequently, counsel should first rule out treatable physical or mental health conditions[130] before deciding that appointing a third-party guardian is the only available option. If the language of MR 1.14[131] included a duty to create a written record documenting due diligence efforts by attorneys to rule out one or more often treatable conditions, then the need to consider substituted judgment might be reduced. If after ruling out treatable conditions, communications between the lawyer and client have not improved and a client's decision-making capacity continues to be deficient, counsel might then consider the MR 1.14's[132] solution of requesting a guardian[133] to be appointed on behalf of the client.[134] Even with a third-

constellation of physical, psychiatric, psychological and functional limitations that call into question the capability of many to meaningfully participate in decisions about their care.").

[129] AM. BAR ASS'N COMM'N ON L. & AGING, AM. PSYCH. ASS'N & NAT'L COLL. OF PROB. JJ., JUDICIAL DETERMINATION OF CAPACITY OF OLDER ADULTS IN GUARDIANSHIP PROCEEDINGS 43, https://www.apa.org/pi/aging/resources/guides/judges-diminished.pdf.

[130] Sabatino, *supra* note 55, at 491.

[131] Model Rule 1.14, *supra* note 1.

[132] *Id.*

[133] States often have statutory duties assigned to guardians, but there is no uniformity in these requirements:

> Colorado, for example, requires guardians *ad litem* to present all available evidence concerning the child's best interests. *See In re* Marriage of Barnthouse, 765 P.2d 610, 612 (Colo. Ct. App. 1988). Florida law sets forth a long list of duties of guardians *ad litem*, including investigating, interviewing, petitioning the court to inspect records, requesting the court to order medical examinations, assisting the court in obtaining impartial expert examinations, making recommendations, filing pleadings, motions, or petitions, participating in depositions and hearings, and compelling the attendance of witnesses. *See* FLA. STAT. ANN. § 61.403 (West Supp. 1997). Similarly, in Maine, the duties of guardians *ad litem* are "to evaluate the parties, their children, and any other appropriate individuals and to provide a report and recommendations to the Court as to an appropriate disposition of the parental rights and responsibilities" regarding the child. Gerber v. Peters, 584 A.2d 605, 606 (Me. 1990).

Guggenheim, *supra* note 12, at 307 n.37.

[134] *See* Betsy J. Grey, *Aging in the 21st Century: Using Neuroscience to Assess Competency in Guardianships*, 18 WIS. L. REV. 735, 736 (2018) (noting that by 2030, more than seventy-one million Americans will be older than sixty-five, accounting for about twenty percent of the U.S. population).

party guardian appointment, the attorney-client relationship may continue to be problematic,[135] and such an approach is not without complications.[136]

Some courts automatically appoint lawyers to act as guardians when needed,[137] sometimes hoping to expedite cases on their docket. If a lawyer functions as the lawyer for an incapacitated client, then counsel must know whether they are bound by the ethics rules for licensed attorneys in that jurisdiction, as such rules may conflict with the legal duties imposed on guardians[138] who are called to substitute their judgment for that of the represented party.[139] The Virginia Supreme Court's Executive Secretary describes the role of the GAL as:

> Guardian ad litem (GAL) means "guardian for the suit." A guardian ad litem in Virginia is an attorney appointed by a judge to assist the court in determining the circumstances of a matter before the court. It is the responsibility of the

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[135] Kelly Crowe, *Statutory Provisions for Guardians Ad Litem*, 39 A.B.A. COMM'N ON L. & AGING (2018), https://www.americanbar.org/groups/law_aging/publications/bifocal/vol--39/issue-6--july-august-2018-/statutory-provisions-for-guardians-ad-litem ("Specifically, guardians ad litem are typically attorneys and are able to inform the respondent about their rights during the guardianship proceeding. Court visitors, however, typically have a background in medicine or social work, and their statutory duties are geared more toward determining whether the basis for guardianship has been met by the petition. However, state requirements vary, and not all statutory provisions treat these positions in the same way. Guardians ad litem are often required to be attorneys, which leads to confusion regarding their role—are they assigned to defend the respondent's rights and wishes, or to act in the respondent's best interests? Those are not always the same thing.").

[136] *See* STEPHEN J. ANDERER, DETERMINING COMPETENCY IN GUARDIANSHIP PROCEEDINGS 4 (Elissa C. Lichtenstein & John Parry eds., 1990).

[137] Some of the more common duties statutorily required of court-appointed guardians, keeping in mind that state laws vary widely, include: advising the respondent of their rights (four states); interviewing the respondent prior to the hearing (twelve states); informing the respondent orally or in writing of the contents of the petition for guardianship (seven states); recommending whether the respondent should be represented by legal counsel in the proceeding (four states); investigating the respondent's circumstances (five states); eliciting the respondent's position concerning the proceedings and the proposed guardian (three states); inquiring of such person's physician, psychologist, or care provider (three states); interviewing prospective guardian by telephone or in person (four states); advocating for the respondent's best interest (five states); and compiling all information into a report for the court (nine states). Crowe, *supra* note 135.

[138] *See* Robert H. Aronson, *Introduction: The Bounds of Advocacy*, 9 J. AM. ACAD. MATRIM. LAWS. 41 (1992). In 1992, the American Academy of Matrimonial Lawyers developed standards to guide family law practitioners, which were followed, in 1995, by standards for attorneys and guardians in custody and visitation proceedings. *See also Representing Children: Standards for Attorneys and Guardians Ad Litem in Custody or Visitation Proceedings (with Commentary)*, 13 J. AM. ACAD. MATRIM. LAWS. 1 (1995).

[139] *See* Edward D. Spurgeon & Mary Jane Ciccarello, *Lawyers Acting as Guardians: Policy and Ethical Considerations*, 31 STETSON L. REV. 791, 794 (2002) ("Lawyers have always served in other fiduciary roles, including that of guardian. There are no ethical rules or laws that prohibit a lawyer from acting as a guardian, and lawyers often serve as guardians.").

> guardian ad litem to provide independent recommendations to the court about the client's best interests, which can be different from advocating for what the client wants, and to bring balance to the decision-making process. The GAL may conduct interviews and investigations, make reports to the court, and participate in court hearings or mediation sessions.
>
> The Office of the Executive Secretary, Supreme Court of Virginia, maintains lists of attorneys who are qualified guardians ad litem. There are two separate guardian ad litem programs: one for children and one for incapacitated persons. The children's program qualifies attorneys for appointment as guardians ad litem for children in juvenile and domestic relations district courts and circuit courts. The incapacitated persons program qualifies attorneys for appointment as guardians ad litem for incapacitated persons (adults) pursuant to Chapter 20 of Title 64.2 in guardianship and conservatorship proceedings in the circuit courts.[140]

Sometimes, the appointing judge knows the attorneys who are appointed as guardians. Regardless of the attorney's possible connections with the judge, the question must be asked: What would qualify an attorney to substitute their judgment for that of a client with "diminished capacity"?[141] Is there some training lawyers have received in law school to prepare them to substitute their decision-making for that of their clients?[142] That is unlikely.[143]

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[140] *Guardians Ad Litem (GAL)*, VA.'S JUD. SYS., https://www.vacourts.gov/courtadmin/aoc/cip/programs/gal/home.html [https://perma.cc/328G-PMWL].

[141] *See* Clifton B. Kruse, Jr., *Ethical Obligations of Counsel in Representing Clients Petitioning to Be Appointed as Guardians of Others or of Their Estates, or Both*, 21 ACTEC NOTES 49, 50 (1995).

[142] For a discussion of the need for interdisciplinary training, see Kim Diana Connolly, *Elucidating the Elephant: Interdisciplinary Law School Classes*, 11 WASH. U. J.L. & POL'Y 11, 13–14 (2003).

[143] A recent study concluded that law schools fail to prepare students to work with clients effectively. Students lack abilities to: gain a client's trust; gather relevant facts; identify a client's goals; communicate regularly with clients; convey information and options in terms that a client can understand; choose a strategy; manage client expectations; break bad news; and cope with difficult clients. DEBORAH JONES MERRITT & LOGAN CORNETT, BUILDING A BETTER BAR: THE

Considering the questionable appropriateness of lawyers serving as guardians or substituting their judgment for that of their clients,[144] it might be helpful to take a look at the rates of divorce, alcohol abuse, or addiction and the frequency of self-reported depression among lawyers in the community when weighing the question as to what training or qualifications should prepare lawyers for the task of substituting their judgment for that of incapacitated clients. Lawyers are no less susceptible to behavioral misconduct or poor judgment than any other group, so why assume that their judgment is any better? Divorce rates, alcoholism,[145] and addiction disorder may be high among lawyers.[146] Although these statistics may have various causes, none of them support the argument that lawyers are better suited to substitute their own judgement for that of their clients, ever.

When lawyers invoke the language of MR 1.14[147] seeking to have a third party appointed to substitute their judgment for that of the client, there is no compelling reason for courts to appoint lawyers unless the local statutory provisions require this. Perhaps courts believe legal training and the convenience for the court to contact and easily communicate with lawyers have resulted in their preference to appoint other lawyers to serve as guardians. The original lawyer working with the client presumably has the legal knowledge necessary to communicate with an appointed guardian,[148] so having a second lawyer involved in the matter serves little purpose.

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TWELVE BUILDING BLOCKS OF MINIMUM COMPETENCE 52 (2020), https://iaals.du.edu/sites/default/files/documents/publications/building_a_better_bar.pdf [https://perma.cc/U2BV-36ES].

[144] It would be short-sighted to overlook the communications some clients might disclose during the representation of substitution of judgment, including possible violent threats directed at third parties. If lawyers are appointed as guardians, do they owe a duty of absolute confidentiality to the represented party, or has that paradigm been altered following the *Tarasoff* decision? *See generally* D.L. Rosenhan, Terri Wolff Teitelbaum, Kathi Weiss Teitelbaum & Martin Davidson, *Warning Third Parties: The Ripple Effects of* Tarasoff, 24 PAC. L.J. 1165 (1993); *see also generally* Vanessa Merton, *Confidentiality and the "Dangerous" Patient: Implications of* Tarasoff *for Psychiatrists and Lawyers*, 31 EMORY L.J. 263 (1982).

[145] *See* Michael A. Bloom & Carol Lynn Wallinger, *Lawyers and Alcoholism: Is It Time for a New Approach?*, 61 TEMP. L. REV. 1409, 1413 (1988) (noting how alcoholism is three to thirty times higher in professional groups than in the general population, which ranges from ten to thirteen percent).

[146] *See* Blane Workie, *Chemical Dependency and the Legal Profession: Should Addiction to Drugs and Alcohol Ward Off Heavy Discipline?*, 9 GEO. J. LEGAL ETHICS 1357, 1363 (1996).

[147] Model Rule 1.14, *supra* note 1.

[148] ABA Model Rule 1.1 mandates that "A lawyer shall provide competent representation to a client. Competent representation requires the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation." MODEL RULES OF PRO. CONDUCT r. 1.1 (AM. BAR ASS'N 1983).

Interdisciplinary drafters of any legal ethics rule should make an effort to coordinate any new protocol[149] required by state ethics codes with the existing statutory requirements imposed on lawyers who function as fiduciaries.[150] The seemingly interchangeable language of client capacity, client competency, diminished capacity, and impaired judgment should be coordinated so as to decrease confusion presently caused by varying definitions in a single jurisdiction. If the ethics rule points counsel in one direction to seek the appointment of a guardian ad litem, but the judicial decisions in that jurisdiction disfavor guardian appointment or greatly restrict the discretion given to guardians, then the new ethics rule must address these statutory discrepancies. Otherwise, counsel will have to decide which enactment controls when determining how to best represent a vulnerable client.[151] Needless to say, if the client's case is a criminal matter, then the drafting process must also coordinate the constitutional protections afforded to citizens charged with offenses to help ensure uniformity in the language when it is applied to a client seemingly unable to demonstrate the capacity to make legal decisions.[152] If the interdisciplinary drafters conclude that they must retain multiple language use, then the comments of the ethics rules should reflect the rationale for retaining the original language.

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[149] Despite this Article's support for the inclusion of protocols to create specific duties and order when lawyers confront the clients who exhibit "diminished capacity," there are critics who reject the notion of incorporating protocols into legal ethics code. *See, e.g.*, Hymel, *supra* note 26, at 873–74 ("Over the last fifty years, increasingly specific ethical rules—or protocols—have been developed to regulate lawyer and law firm conduct. Many lawyers are now expected to conform to protocols that prescribe behavior in a particular field of law practice or legal arena. For example, tax lawyers must abide by Circular 230, a detailed set of regulations issued by the United States Treasury Department to govern all professionals—nonlawyers as well as lawyers—who practice before the Internal Revenue Service (IRS). The number of lawyers subject to such protocols is increasing, as is the number of protocols themselves.") (internal footnotes omitted).

[150] For a discussion on rulemaking and the regulation of lawyers, competence assumptions about the rules governing lawyers, and the validity of such rules, see Ted Schneyer, *Legal Process Scholarship and the Regulation of Lawyers*, 65 FORDHAM L. REV. 33 (1996) (paying tribute to David B. Wilkins, *Who Should Regulate Lawyers?*, 105 HARV. L. REV. 799 (1992)).

[151] Whipple, *supra* note 14, at 372 ("In difficult ethical situations, however, the rules [Model Rules of Professional Conduct] can also serve to confuse. Lawyers may also use various capacity assessment tools that are available. Still, lawyers may not be comfortable with their assessment of their client's or potential client's capacity and may want to consult others to assist them in their assessment. A lawyer is required to make tough ethical decisions with the constant realization that he may open himself up to a malpractice suit if he does not hurdle the capacity question correctly.")

[152] *See* Barry Rosenfeld & Alysa Wall, *Psychopathology and Competence to Stand Trial*, 25 CRIM. JUST. & BEHAV. 443, 457–58 (1998).

### B. DECISIONAL CAPACITY ACROSS A CONTINUUM

It would be helpful for counsel confronted with client decision-making that raises MR 1.14[153] issues to consider their client's condition on a continuum: clients with mild or occasional conditions or disabilities,[154] those with more prolonged conditions,[155] and those who appear to have no ability to communicate with counsel (for example, clients in a coma or those unable to communicate for any number of reasons).[156] Examining decisional capacity from a medical perspective would be helpful since a patient's informed consent is the cornerstone to most medical decisions.[157] Consultation with a forensic psychiatrist or a forensic psychologist would be the optimal resource professional with whom counsel should consult; however, with an unmet need for more mental health providers throughout the country, such professionals might not be readily available to assist counsel attempting to assess a client's capacity to communicate and engage in legal decision-making.[158] This might also present a financial burden that

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[153] Model Rule 1.14, *supra* note 1.

[154] For instance, giving support to elderly individuals with mild Alzheimer's Disease showing cognitive impairment and reduced executive functions improves the quality of highly risky life decisions. *See* Silke M. Mueller, María García Arias, Gema Mejuto Vázquez, Johannes Schiebener, Matthias Brand & Elisa Wegmann, *Decision Support in Patients with Mild Alzheimer's Disease*, 41 J. CLINICAL & EXPERIMENTAL NEUROPSYCHOLOGY 484, 492 (2019). Making assumptions about an Alzheimer's patient's decisional-making capacity should probably not be left to an untrained individual who might easily attempt to usurp the autonomous decision-making of such a client based solely on the Alzheimer's diagnosis.

[155] *See* Kaitlyn McLachlan, Ronald Roesch, Jodi L. Viljoen & Kevin S. Douglas, *Evaluating the Psycholegal Abilities of Young Offenders with Fetal Alcohol Spectrum Disorder*, 38 LAW & HUM. BEHAV. 10, 10–11 (2013).

[156] In a Florida study, 58% of youths with intellectual disability diagnoses were found to be incompetent, compared with 6% of adults with intellectual disability diagnoses in the same jurisdiction. Annette McGaha, Randy K. Otto, Mary Dell McClaren & John Petrila, *Juveniles Adjudicated Incompetent to Proceed: A Descriptive Study of Florida's Competence Restoration Program*, 29 J. AM. ACAD. PSYCHIATRY & L. 427, 427 (2001).

[157] *See* Marshall B. Kapp & Douglas Mossman, *Measuring Decisional Capacity: Cautions on the Construction of a "Capacimeter,"* 2 PSYCH., PUB. POL'Y, & L. 73, 73 (1996) ("In their work on the MacArthur Treatment Competence Study, Paul Appelbaum, Thomas Grisso, and their colleagues warn that their 'experimental measures' of decisional capacity 'should not be interpreted as though they provide determinations of legal incompetence to consent to treatment.'").

[158] Overlooking the steps involved in finding support for some clients who may have improved decision-making capacity would underestimate the client's abilities in many instances. *See* Weiyi Sun, Teruyuki Matsuoka & Jin Narumoto, *Decision-Making Support for People with Alzheimer's Disease: A Narrative Review*, 12 FRONTIERS PSYCH., May 2022, at 1 (2021) ("Since feedback has a significant effect on decision-making capacity, a series of suggestions may be helpful to improve this capacity, such as explicit advice, simple options, pleasant rewards, the Talking Mats approach, memory and organizational aid, support by caregivers, cognitive training and feedback. Thus, in providing decision-making support for people with AD, it is important to identify the internal and external factors that impair this process and to deal with these factors.").

a client might be unable to shoulder, or it could cause a conflict of interest should the forensic mental health provider already be treating the client.[159]

For the client whose care providers indicate that there are lucid periods and that meaningful communication continues, then the least amount of intervention should be the rule for counsel's interactions with the client.[160] For clients with substance-related and addictive disorders,[161] the 5th Edition of the American Psychiatric Association's *Diagnostic and Statistical Manual of Mental Disorders* ("DSM-5") identifies ten classes of drugs that when taken in excess cause direct activation of the brain's reward system which reinforces behaviors and produces memories so intense that "normal activities may be neglected."[162] Depending on the stage of the addiction disorder or recovery process, these clients may appear unable to engage in decision-making or meaningful participation in their legal affairs.[163]

A great deal of literature is now developing about FASD[164] following early publications that identified neurological limitations in young children, adolescents, and adults afflicted with this disorder.[165] This disorder is

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[159] *See* Sara Gordon, *Crossing the Line:* Daubert*, Dual Roles, and the Admissibility of Forensic Mental Health Testimony*, 37 CARDOZO L. REV. 1345, 1351–52 (2016).

[160] *See* James D. Gallagher & Cara M. Kearney, *Representing a Client with Diminished Capacity: Where the Law Stands and Where It Needs to Go*, 16 GEO. J. LEGAL ETHICS 597, 601 (2003) (noting the ABA Mode Rule's failure to differentiate what characteristics encompass "diminished capacity" as opposed to "seriously diminished capacity," thus creating a dilemma for an attorney deciding whether a client's capacity is so seriously diminished as to warrant violating attorney-client confidentiality).

[161] *See* Sarah M. Hartz, Carlos N. Pato, Helena Medeiros, Patricia Cavazos-Rehg, Janet L. Sobell, James A. Knowles, Laura J. Bierut & Michele T. Pato, *Comorbidity of Severe Psychotic Disorders with Measures of Substance Use*, 71 JAMA PSYCHIATRY 248, 249 (2014).

[162] DSM-5, *supra* note 31, at 481.

[163] For a discussion about some research limitations of the DSM-5 and changes made from the DSM-IV, see generally Gordon Cochrane, *The DSM-V and the Law: When Hard Science Meets Soft Science in Psychology*, 85 N.Y. STATE BAR ASS'N J. 20 (2013).

[164] *See generally* Carol Bower, Rochelle E. Watkins, Raewyn C. Mutch, Rhonda Marriott, Jacinta Freeman, Natalie R. Kippin, Bernadette Safe, Carmela Pestell, Candy S. C. Cheung, Helen Shield, Lodewicka Tarratt, Alex Springall, Jasmine Taylor, Noni Walker, Emma Argiro, Suze Leitão, Sharynne Hamilton, Carmen Condon, Hayley M. Passmore & Roslyn Giglia, *Fetal Alcohol Spectrum Disorder and Youth Justice: A Prevalence Study Among Young People Sentenced to Detention in Western Australia*, BMJ OPEN, Feb. 2018.

[165] *See* Jennifer D. Thomas, Kenneth R. Warren & Brenda G. Hewitt, *Fetal Alcohol Spectrum Disorders: From Research to Policy*, 33 ALCOHOL RSCH. & HEALTH 118, 121 (2010) ("The neuropathology associated with FASD leads to a range of behavioral effects. Early studies demonstrated general impairments in intelligence (although there is quite a range of IQ scores among individuals exposed to alcohol prenatally), impaired reflex development, deficits in motor coordination, and hyperactivity. More recent studies suggest that deficits in attention, learning, and memory, emotional dysregulation, and executive functioning are core deficits, likely

defined in the DSM-5[166] as Neurobehavioral Disorder Associated with Prenatal Alcohol Exposure and is characterized by symptoms such as "marked impairment in global intellectual performance (IQ) or neurocognitive impairments in any of the following areas: executive functioning, learning, memory, and/or visual-spatial reasoning."[167] The condition is difficult to accurately assess[168] and generally requires waiting until a child is at least three years of age to diagnose.[169] FASD is often significantly underdiagnosed.[170]

For those clients who appear completely unable to engage in decision-making concerning their legal affairs, counsel might seek court approval to appoint a guardian who is related to the client, preferably an actual care provider who is aware of the client's condition and who has been providing support for the client.[171] Even for these clients, there is an ongoing need to acknowledge the stigma or embarrassment that raising the client's incompetence in a public court proceeding might cause immediately and in the future for the client.[172]

In addition, a client might seek recourse against counsel in the form of a malpractice action for revealing otherwise confidential information[173] in those situations in which clients regain their ability to communicate for themselves following disclosures shared by their legal counsel.[174]

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reflecting the dysfunction of the frontal lobe. . . . Moreover, prenatal alcohol-induced alterations in cognitive functioning and stress responses may contribute to secondary disabilities, including psychiatric comorbidities and vulnerability to addiction.").

[166] DSM-5, *supra* note 31.

[167] DSM-5, *supra* note 31, at 799.

[168] *See* Mansfield Mela, Linnea Wall, Pam Buttinger, Andrea DesRoches & Andrew J. Wrath, *Rates and Implications of Fetal Alcohol Spectrum Disorder Among Released Offenders with Mental Disorder in Canada*, 40 BEHAV. SCIS. & L. 144, 150 (2022).

[169] *See* David R. Katner, *Juvenile Competency Restoration*, 27 LEWIS & CLARK L. REV. 657, 671 (2023).

[170] Wozniak et al., *supra* note 107, at 760.

[171] *See* Jeste & Saks, *supra* note 59, at 607. ("Several studies have shown that, while there are some replicable differences among certain diagnostic groups, there is also considerable heterogeneity within each group. It is thus inappropriate to draw conclusions about an individual person's capacity for meaningful consent based on her or his diagnosis.").

[172] *See* Bruce J. Winick, *The Side Effects of Incompetency Labeling and the Implications for Mental Health Law*, 1 PSYCH., PUB. POL'Y, & L. 6, 12–13 (1995).

[173] *See* Laurence A. Steckman & Richard Granofsky, *The Assertion of Attorney-Client Privilege by Counsel in Legal Malpractice Cases: Policy, Privilege, and the Search for Truth in Cases Involving Implied Waivers*, 45 TORT TRIAL & INS. PRAC. L.J. 839, 849–50 (2010).

[174] *See* Fred C. Zacharias, *Rethinking Confidentiality II: Is Confidentiality Constitutional?*, 75 IOWA L. REV. 601, 648 n.234 (1990).

### C. USURPING CLIENT AUTONOMY?

Although most lawyers would likely be reluctant to usurp their clients' autonomous decision-making abilities, there are a number of circumstances in which no alternatives are available.[175] For a comatose patient in a hospital who is represented by counsel, when medical decisions must be made, some third party will be placed in a position to provide goals and instruction to medical providers.

It should be noted that states have enacted Do Not Resuscitate ("DNR") laws that create consensual agreements entered into by patients that might prevent medical providers from engaging in limited life-saving procedures. These agreements are seen as maintaining patient autonomy,[176] rather than eliminating patient involvement in implementing advance directives. "Most individuals with advance directives share similar characteristics: chronic illness, regular access to healthcare, higher income, higher education, and older age."[177]

While state legislation varies in the provisions and requirements of these DNR agreements, this medical practice that anticipates a patient's inability to have a voice in medical decision-making serves as a guide for lawyers who confront similar scenarios, although not always scenarios involving life-sustaining decisions. The current ethical rule for most attorneys is to attempt to maintain a "normal" attorney-client relationship, but the circumstances that require consideration of these rules suggest that normality may no longer be possible, however legal practitioners choose to define it.[178] For lawyers who primarily represent clients with disabilities, the daily challenges of their practice might seem far outside the scope of what other attorneys think constitutes a "normal" attorney-client relationship. Would the provisions of MR 1.14[179] then shift to the subjective "normality" of the specialized attorney who daily represents clients who may be unable to communicate or clients who may be heavily medicated for mental illness conditions?

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[175] *See generally* Katner, *supra* note 5.

[176] *See* JOSEPHINE VRANICK, DEVANG K. SANGHAVI, KLAUS D. TORP & MONICA STANTON, DO NOT RESUSCITATE (2022), https://www.ncbi.nlm.nih.gov/books/NBK470163 [https://perma.cc/U8ML-VPS7].

[177] *Id.*

[178] *See* Thomas E. Spahn, *Aging Clients and Lawyers: Ethics Implications*, 22 EXPERIENCE 47, 47 (2013).

[179] Model Rule 1.14, *supra* note 1.

We should differentiate decision-making that a lawyer might consider inappropriate for personal—rather than professional—reasons,[180] such as a client's stated wish to avoid presenting a defense when faced with criminal charges when sentencing might expose the client to the death penalty or to life imprisonment.[181] Clients might prefer a death sentence to spending the remainder of their lives incarcerated.[182] Recorded cases reflect client decisions of not wanting their counsel to present any defense witnesses or even having the client testify in their own defense.[183] Judges and defense counsel may be uncomfortable with such a client's stated goal, and there are instances in which judges have compelled defense lawyers to remain present during trials, despite the client's stated waiver of representation.[184] While the medical profession has sought to create protocols to communicate with patients about end-of-life decision-making, the legal profession has yet to incorporate any similar protocol in any legal ethics rule.[185]

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[180] *See* Bruce A. Green, *The Role of Personal Values in Professional Decisionmaking*, 11 GEO. J. LEGAL ETHICS 19, 39 (1997) (drawing a distinction between restricted and grounded discretion).

[181] *See* Rodney J. Uphoff & Peter B. Wood, *The Allocation of Decisionmaking Between Defense Counsel and Criminal Defendant: An Empirical Study of Attorney-Client Decisionmaking*, 47 U. KAN. L. REV. 1, 2 (1998) ("[C]ountless criminal defendants and defense lawyers struggle daily making a host of strategic choices both before and during trial based largely on defense counsel's assessment of the risk involved and of the potential costs and benefits of taking particular action.").

[182] *See* Moeller v. Weber, No. 04-4200, 2012 WL 5289331, at *2–4 (D.S.D. Oct. 23, 2012) (allowing a convicted defendant to dismiss his lawyer from representing him further—despite counsel's motion that under ABA Model Rule 1.14 and South Dakota's Ethics Rule 1.14, counsel was obligated to take reasonable, protective measures on the client's behalf if counsel reasonably believed the client had "diminished capacity" and was at risk of substantial physical, financial or other harm— and dismissing a § 1983 civil right action seeking to block the defendant's execution. The defendant wanted the petition dismissed over his lawyer's objection.); *see also* Chapman v. Commonwealth, 265 S.W.3d 156, 175–76 (Ky. 2007) (holding that "[a]dhering to a defendant's choice to seek the death penalty honors the last vestiges of personal dignity available to such a defendant").

[183] *See* Frank R. Baumgartner & Betsy Neill, *Does the Death Penalty Target People Who Are Mentally Ill? We Checked*, WASH. POST (Apr. 3, 2017, 8:00 AM), https://www.washingtonpost.com/news/monkey-cage/wp/2017/04/03/does-the-death-penalty-target-people-who-are-mentally-ill-we-checked [https://perma.cc/HX5A-RWVN] ("Most Americans oppose the death penalty for the mentally ill, a category that ranges from mild to severe. But our research suggests that the death penalty actually targets those who have mental illnesses. . . . Since 1976, the United States has executed 1,448 inmates; 141 of these have been 'volunteers,' those who waive appeal. If suicidal tendencies are evidence of mental illness, then death penalty states actively assist suicide.").

[184] *See generally* Charles J. Ogletree, Jr., *Beyond Justifications: Seeking Motivations to Sustain Public Defenders*, 106 HARV. L. REV. 1239 (1993) (discussing how public defenders routinely confront many challenges while trying to embrace client-centered representation).

[185] *See generally* Mark Spiegel, *Lawyering and Client Decisionmaking: Informed Consent and the Legal Profession*, 128 U. PA. L. REV. 41 (1979) (analyzing the informed consent doctrine in the medical field and arguing in favor of its application to the lawyer-client relationship).

This would be a difficult topic of conversation with any client, but avoiding the discussion does not resolve the dilemma if a client suffers from a deteriorating medical condition, thereby making the opportunity to establish powers of attorney or the client's wishes regarding the handling of legal affairs fleeting. Consulting medical models and medical professionals could help break any impasse.[186] Perhaps the creation of consensual agreements between clients and attorneys in such situations could provide still-competent clients with the autonomy to direct their wishes[187] before they lose the ability or comprehension to appreciate and identify legal goals.[188] This is only one scenario involving a client's representation that might trigger MR 1.14[189] issues.

In any event, identifying fiduciary obligations that befall legal counsel[190] and establishing a protocol that mandates transparency in all legal proceedings could be incorporated into legal ethics requirements for all attorneys engaged with such clients. If transparency in most governmental decision-making is intended to reassure the public and to minimize corruption or self-dealing, surely transparency serves a similar purpose for an attorney interacting with clients in their most vulnerable conditions or states.

Interestingly, a study that attempted to identify decisional capacities among patients with mental illness and substance use disorders found that "[a] notion that normal subjects without psychiatric disorders have normal decision-making capacity is **not** necessarily valid."[191] Clearly, each client's case must be considered on its own merits, not by applying some generalized rule regarding decision-making capacity. Nevertheless, creating a protocol that requires lawyers to ensure that a client's medical history has been obtained, care providers have been interviewed, and a decision has been made after consulting with mental health professionals would create greater protections for client autonomy and build a record

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[186] *See* John R. Murphy, *Older Clients of Questionable Competency: Making Accurate Competency Determinations Through the Utilization of Medical Professionals*, 4 GEO. J. LEGAL ETHICS 899, 916–17 (1991) (discussing incapacity under medical models and incompetency under legal models).

[187] *See* Altman et al., *supra* note 83, at 1676–78.

[188] *See* Marilyn Levitt, *The Elderly Questionably Competent Client Dilemma: Determining Competency and Dealing with the Incompetent Client*, 1 J. HEALTH CARE L. & POL'Y 202, 220 (1998).

[189] Model Rule 1.14, *supra* note 1.

[190] *See generally, e.g.*, James M. Parker, Jr., Thomas H. Watkins & Rachel L. Noffke, *A Rose Is a Rose Is a Rose—or Is It? Fiduciary and DTPA Claims Against Attorneys*, 35 ST. MARY'S L.J. 823 (2004).

[191] Jeste & Saks, *supra* note 59, at 608 (emphasis added).

documenting the efforts counsel made while representing a client of "diminished capacity." No such ethical standard exists currently.[192]

### D. FIDUCIARY DUTY OBLIGATION AND FULL TRANSPARENCY OBLIGATION

In an effort to identify potential reforms to the language of MR 1.14,[193] including duties often required of fiduciaries[194] along with transparency obligations, some of the ambiguities of MR 1.14[195] could be decreased or eliminated entirely.[196] Compelling lawyers to create a record in contested court proceedings in which counsel for clients of "diminished capacity"[197] would be required to identify information shared with them by third parties (other than the client) could help make both the third parties and counsel

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[192] Some argue that extending the tort of legal malpractice—not creating new ethics standards—might force lawyers to allow client control over virtually every aspect of lawyer decision-making. *See* Robert F. Cochran, Jr., *Legal Representation and the Next Steps Toward Client Control: Attorney Malpractice for the Failure to Allow the Client to Control Negotiation and Pursue Alternatives to Litigation*, 47 WASH. & LEE L. REV. 819, 867–77 (1990).

[193] Model Rule 1.14, *supra* note 1.

[194] *See* Gregory H. Shill, *The Golden Leash and the Fiduciary Duty of Loyalty*, 64 UCLA L. REV. 1246, 1287–90 (2017).

[195] Model Rule 1.14, *supra* note 1.

[196] *See* Barry Kozak, *The Forgotten Rule of Professional Conduct—Representing a Client with Diminished Capacity*, 49 CREIGHTON L. REV. 827, 827 (2016) ("All attorneys who maintain client-lawyer relationships must continually, or at least periodically, assess each client's mental capacity. Under the Model Rules of Professional Conduct, this assessment is a two-step process. First, the attorney must ensure that an individual has enough mental capacity to establish or maintain a normal client-lawyer relationship, and second, the attorney must ensure that the individual has enough mental capacity to legally bind him or herself in the desired transaction or intended course of action. If the attorney determines that at any point in time, a particular client has diminished capacity, then Model Rule 1.14 requires the attorney to take whatever extra steps are required to maintain a normal client-lawyer relationship. However, if the client does have diminished capacity and such diminished capacity puts the client at risk of substantial harm, then the attorney is allowed under Model Rule 1.14 to take certain protective actions on behalf of the client, even though the diminished capacity means that the client cannot consent to those actions, and even if the attorney's actions permitted under this rule actually violate other canon rules governing the client-lawyer relationship.").

[197] Legal proceedings might follow the example of medical proceedings. In medical or mental health proceedings in which patients' decision-making capacity might be questioned, full transparency has been offered as a mechanism to preserve the record and to provide the patient with a means of holding those third parties accountable. Jeste & Saks, *supra* note 59, at 618 ("The determination of decision-making capacity should be documented in each patient's medical record. This may be done by including a copy of the relevant materials in the chart—e.g.[,] a copy of the record form from the standardized instrument (including the patient's responses to each item), a copy of the post-test with the patient's answers to each item, or relevant documents from any other procedure employed sufficient to permit a third-party reviewer to evaluate the patient's responses and judge the presence of decision-making capacity.").

more accountable,[198] especially for those clients whose capacity is regained over the passage of time.[199] Currently, counsel attempt to maintain a "normal" client-attorney relationship without a great deal of direction regarding how that might be accomplished. If counsel represents a pre-verbal infant or an older Alzheimer's patient,[200] that attorney will likely seek information and assistance from the client's care providers or family members[201] in how to best represent the client.[202] None of that information needs to be part of any court proceeding for many transactional proceedings. If counsel sought to have the court appoint a guardian to substitute their judgment for that of the client, then even less information may appear in the record of any court proceeding explaining or documenting how and why decisions impacting the client's life have occurred.[203]

Transparency is not currently a component or requirement of MR 1.14,[204] but if lawyers are going to give themselves permission to substitute their judgment or to appoint other lawyers to substitute their judgment for that of the client, then creating a duty of transparency would help protect the client's interests as much as possible.[205] The legal profession could

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[198] *See* Spencer Rand, *Hearing Stories Already Told: Successfully Incorporating Third Party Professionals into the Attorney-Client Relationship*, 80 TENN. L. REV. 1, 32–42 (2012).

[199] Fiduciaries as agents owe a "duty to act loyally for the principal's benefit in all matters connected with the agency relationship." RESTATEMENT (THIRD) OF AGENCY § 8.01 (AM. LAW INST. 2006).

[200] *See* James H. Pietsch, *Becoming a "Dementia-Capable" Attorney—Representing Individuals with Dementia*, 19 HAW. BAR J. 1, 1–2 (2015) (arguing that Alzheimer's disease and related disorders or dementias are growing proportionately with America's aging population and are becoming a global problem that will require legal professionals to be trained to recognize the signs of these dementias and to address the problems they cause).

[201] *See* W. Overman, Jr. & A. Stoudemire, *Guidelines for Legal and Financial Counseling of Alzheimer's Disease Patients and Their Families*, 145 AM. J. PSYCHIATRY 1495, 1496 (1988) (citing Schloendorff v. Soc'y of N.Y. Hosp., 105 N.E. 92 (N.Y. 1914)).

[202] *See* Margaret F. Brinig, *Parents: Trusted but Not Trustees or (Foster) Parents as Fiduciaries*, 91 B.U. L. REV. 1231, 1234 (2011) (discussing trust within family and community relationships).

[203] As the court noted in NBC Subsidiary (KNBC-TV), Inc. v. Super. Ct., 980 P.2d 337, 360 n.28 (Cal. 1999), "[t]he public has a legitimate interest in access to . . . court documents . . . . If public court business is conducted in private, it becomes impossible to expose corruption, incompetence, inefficiency, prejudice, and favoritism. For this reason[,] traditional Anglo-American jurisprudence distrusts secrecy in judicial proceedings and favors a policy of maximum public access to proceedings and records of judicial tribunals." (footnote omitted) (quoting Estate of Hearst, 136 Cal. Rptr. 821, 824–25 (Cal. Ct. App. 1977).

[204] Model Rule 1.14, *supra* note 1.

[205] *See generally* Lynn M. LoPucki, *Court-System Transparency*, 94 IOWA L. REV. 481, 483 (2009) (discussing the benefits of electronic filing systems in federal courts and the proposed transparency rules expanding access to millions of court proceedings, with "transparency" meaning "when all relevant aspects of its operation are revealed to policymakers, litigants, and the public in forms that they can readily comprehend").

permit the inclusion of sealed records in any court proceeding in which the client might be lacking capacity to make reasoned decisions in their best interest.[206] This would include additional information that might not otherwise be present in the court records.

If the ABA Model Rules include specific rules that must be followed for contingent client fee arrangements,[207] then there is no reason to not amend the Rules to require compliance with fiduciary duties or agency law, including requirements to take steps to provide greater transparency for those proceedings in which a client's judgment might be substituted by counsel or by a third party or to consult with a forensic mental health professional before taking any further steps in the representation.[208] While

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[206] *See* David R. Katner, *Confidentiality and Juvenile Mental Health Records in Dependency Proceedings*, 12 WM. & MARY BILL RTS. J. 511, 511–12 (2004) ("Children rarely participate in deciding whether and how much of their mental health records gets disclosed in dependency proceedings in juvenile courts As these children are often separated from their parents and families, they rarely have concerned adults involved in their daily lives advocating their privacy interests when they have been involved in mental health evaluations, assessments, treatment, or therapy. Learning that the information supplied to a mental health professional may find its way into a court record, or may become the subject of discussion in a court proceeding, is more than a little overwhelming. For a child in a dependency case, such disclosures are not simply embarrassing. Such disclosures may easily cause the child to forego any further communications with an otherwise trusted mental health professional.") (footnotes omitted).

[207] MR 1.5(c) requires:

> A contingent fee agreement shall be in a writing signed by the client and shall state the method by which the fee is to be determined, including the percentage or percentages that shall accrue to the lawyer in the event of settlement, trial or appeal; litigation and other expenses to be deducted from the recovery; and whether such expenses are to be deducted before or after the contingent fee is calculated. The agreement must clearly notify the client of any expenses for which the client will be liable whether or not the client is the prevailing party. Upon conclusion of a contingent fee matter, the lawyer shall provide the client with a written statement stating the outcome of the matter and, if there is a recovery, showing the remittance to the client and the method of its determination.

MODEL RULES OF PRO. CONDUCT r. 1.5(c).

[208] The role of forensic mental health professionals has been described as follows:

> Psychiatrists, psychologists, and other mental health professionals are often asked to give testimony in legal proceedings ranging from family law to civil litigation, civil commitment, and criminal proceedings. For example, a mental health professional might be asked to testify about the custodial fitness of a parent or the degree of trauma suffered by a civil plaintiff in a claim for assault. Similarly, a mental health professional might give testimony about whether a defendant is competent to stand trial or criminally culpable for a charged offense, or whether a respondent meets civil commitment criteria. Often, a neutral psychiatrist or psychologist, one with no previous relationship to the evaluee, is retained to conduct an evaluation and provide testimony in a court proceeding. In some cases, however, when an individual clinician assumes

these steps might add to counsel's responsibilities, these additional duties serve a worthy purpose: protecting the public's interests while preventing the attorney's monopolistic control over access to representation in most legal matters.[209]

## V. THE PROPOSAL

### 1. *Use an interdisciplinary team to draft the legal ethics rule.*

The ABA has invested a great deal of time and energy into drafting and then re-drafting an ethics rule that was intended to provide guidance for attorneys with clients who appear to have "diminished capacity."[210] The current rule, however, provides very little pragmatic guidance for attorneys who have such clients. Few published decisions by state disciplinary boards have applied the language of MR 1.14,[211] or else those boards have not circulated the decisions or interpretations. It may be that because the rule's language is aspirational in nature, it would be unlikely to find a great deal of interpretation based on disciplinary hearings. Lawyers alone simply lack the professional training to properly identify clients who might require an

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> both a treatment and a forensic role in the context of a single case, a dual-role relationship is created.
>
> Dual relationships between clinicians and patients in the forensic context can arise for a variety of reasons. In the civil setting, if a patient already has a therapist and later becomes involved in litigation, the patient may prefer to have her original therapist testify and avoid the expense and inconvenience of visiting a separate mental health professional. Some patients may also prefer not to share personal information with a new clinician when they have already shared the information with their existing therapist. If the therapist does not typically serve in a forensic role, she may not be aware of the conflict or the ethical guidelines advising against it, and may simply be trying to assist her patient. Similarly, attorneys may not be aware of the conflict dual relationships create and may send a client to the same clinician for both treatment and evaluation. In the criminal setting, dual relationships often occur in criminal competency proceedings, especially in public hospitals where the same staff often perform both a therapeutic and forensic role. Finally, many parts of the country lack enough mental health professionals to perform separate forensic and clinical roles for every patient.

Gordon, *supra* note 159, at 1350–52 (footnotes omitted).

[209] *See Why Americans Don't Fully Trust Many Who Hold Positions of Power and Responsibility*, PEW RSCH. CTR. (Sept. 19, 2019), https://people-press.org/2019/09/19/why-americans-dont-fully-trust-many-who-hold-positions-of-power-and-responsibility [https://perma.cc/7EE4-5MHA].

[210] A LEGISLATIVE HISTORY, *supra* note 5, at 337–52.

[211] Model Rule 1.14, *supra* note 1.

assessment to determine whether they have diminished capacity.[212] There are other professionals, however, including organizations[213] such as The American Academy of Forensic Psychology who have developed guidelines for their members on how to make assessments of patients who may be lacking the capacity to engage in decision-making.[214] Rather than directing lawyers to speak with family members and third parties, engaging with these other professionals who make a living providing mental health services might result in drafting a more concrete ethics rule that would provide counsel a clearer path to take in attempting to define their role with such clients.[215]

The manner by which the current version of MR 1.14[216] was drafted appears to be very democratic, involving votes among state delegates as to whether to accept the proposed rule or to consider amendments to the rule. The question that might be addressed is whether this is the optimal manner of drafting an ethics rule for a highly specialized client problem that may be difficult to properly identify. The discussion of the complexity involved in diagnosing clients with FASD would suggest that there is merit in collaborating with mental health professionals who are actually trained to identify, assess, and diagnose various conditions that may elude the average licensed attorney. Identifying the client should be the first step in the process, but imposing this responsibility on lawyers with no educational

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[212] This suggests that rethinking law school training would also contribute to the improvement of legal services. *See* Cynthia L. Dahl, *Teaching Would-Be IP Lawyers to "Speak Engineer": An Interdisciplinary Module to Teach New Intellectual Property Attorneys to Work Across Disciplines*, 19 LEWIS & CLARK L. REV. 361, 362–63 (2015) ("If we expect new lawyers to succeed, we must give them tools and experience to bring about that success. This includes team building and good communication skills across disciplines. Law students do not even team with each *other* in the typical law school class. Yet to prepare the transactional lawyer of tomorrow, we need to offer practice in collaborating, especially with the other professionals they will join in the workforce. And to do that well, we need to employ methods of truly interdisciplinary study.") (internal footnotes omitted).

[213] The MacArthur Foundation is heavily invested in identifying competency of clients in many arenas. *See, e.g.*, Grisso et al., *supra* note 100. The MacArthur competency study of juveniles was the result of a multi-year interdisciplinary team project. The re-drafting of MR 1.14 could follow the approach that MacArthur applied when studying client competency to stand trial.

[214] *See, e.g.*, American Psychological Association, *Specialty Guidelines for Forensic Psychology*, 68 AM. PSYCH. 7, 15–16 (2013). Specifically, Section 10 on Assessment and Guidelines 10.01 through 10.08 would be especially helpful in drafting a protocol that would apply to lawyers attempting to make an assessment of a client's capacity to communicate and make decisions or to evaluate the ability of a forensic psychologist to properly make such an assessment of a client.

[215] *See* Janet Weinstein, *Coming of Age: Recognizing the Importance of Interdisciplinary Education in Law Practice*, 74 WASH. L. REV. 319, 320 (1999) ("Society cannot expect lawyers to have the knowledge or skills that would allow them to identify each aspect of, and certainly not solve, problems from a multi-dimensional perspective. However, it can expect lawyers to know how to work with people who together have the knowledge and skills required to assist a client in this way.").

[216] Model Rule 1.14, *supra* note 1.

background in properly identifying such clients leads to the conclusion that attorneys should be addressing this issue within interdisciplinary teams. This might better inform attorneys as to when—if ever—it might be appropriate to refer the client (or the client's care providers) to a forensic professional who might utilize psychometric tests to make a professional assessment of the client's capacities. Psychometric tests need not be a universal approach, as psychiatrists might wish to undertake a mental status evaluation and social workers might wish to follow their profession's recommended assessment protocol. But the drafting of the ethics rule itself should first be informed by the guidelines and protocols currently in use by forensic mental health professionals.

2. *Counsel for the "diminished capacity" client should build a record.*

The objective of representing a "diminished capacity" client is to reassure clients that their best interests are included in the process, even if we are unable to communicate with them.[217] If communication is at issue,[218] then taking the steps required of a fiduciary to attempt to identify the interests of the represented party will have occurred.[219] Eliminating the possible reasons for a client's inability to communicate effectively—including overmedication, head trauma, complications from eyesight or hearing deficiencies, or developmental immaturity[220]—might reduce the need to appoint third-party guardians to substitute their judgment for that of

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[217] *See* Sarah Worthington, *Fiduciaries Then and Now*, 80 CAMBRIDGE L.J. s154, s167 (2021).

[218] Communication complications take on many forms. *See generally, e.g.*, Joan B. Kessler, *The Lawyer's Intercultural Communication Problems with Clients from Diverse Cultures*, 9 NW. J. INT'L L. & BUS. 64 (1988).

[219] The Law of Agency can provide some guidance overall:

> *See* RESTATEMENT (SECOND) OF AGENCY § 14 (1958) (giving a principal the right to control the conduct of an agent); *see also id.* § 369 (forbidding an agent to act contrary to a principal's wishes); *id.* § 385 (giving agent "a duty to obey all reasonable directions in regard to the manner of performing a service that he has contracted to perform"). As the comment to subsection (1) of section 385 indicates, although "an attorney is in complete charge of the minutiae of court proceedings" and may be permitted to withdraw if not allowed to act as counsel thinks best, the attorney still is under a duty not to act contrary to the directions of the principal. *Id.* § 385(1) cmt. a.

Uphoff & Wood, *supra* note 181, at 14 n.54.

[220] Bill Hutchinson, *More than 30,000 Children Under Age 10 Have Been Arrested in the US Since 2013: FBI*, ABC NEWS (Oct. 1, 2019, 6:31 AM), https://abcnews.go.com/US/30000-children-age-10-arrested-us-2013-fbi/story?id=65798787 [https://perma.cc/5FGJ-YDE6].

the client. This would require a departure from the current language of MR 1.14,[221] but it would create a protocol for all counsel to follow as opposed to simply substituting our own judgment for that of the client.[222]

There is no reason why our ethics rules require that the specifics of all contingent fees be reduced to writing,[223] but we are permitted to substitute our judgment and decision-making for that of a client with no written or oral record indicating what factors counsel considered before making a decision that the client presumably was unable to make on their own. There might be a trade-off with respect to client privacy interests, but that could be resolved by closing court proceedings, clearing the courtroom, or conducting hearings *in camera*[224] in order to minimize public disclosures about personal information clients might find embarrassing or compromising.[225]

In many contested hearings in which client competency has been challenged, courts do not appear reluctant to take protective measures to help ensure client confidentiality of medical or mental health conditions. Even if a court elects to permit public exposure to the court's ruling that a client may lack competency or decisional capacity, the details and specifics for that ruling need not be open to public consumption. Satisfying the public curiosity[226] is not one of the defining components of our criminal justice system.

Incorporating language in MR 1.14[227] that compels attorneys to build a record of their efforts to communicate with their client allows for future third-party review of the thoroughness and competency of the lawyer's efforts to communicate and inform the client who appears to lack the capacity to engage in decision-making in connection with the legal representation. If the client's counsel or friends and family members do not

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[221] Model Rule 1.14, *supra* note 1.

[222] Indeed, Richard A. Posner compared the legal profession in the U.S. to a medieval crafts guild cartel seeking to outlaw any competition and hold on to its monopoly of goods or services. *See* Richard A. Posner, *The Material Basis of Jurisprudence*, 69 IND. L.J. 1, 6–11 (1993).

[223] *See* MODEL RULES OF PRO. CONDUCT r. 1.5(c) (AM. BAR ASS'N 2002).

[224] BLACK'S LAW DICTIONARY (2d ed. 1910) defines "in camera" as in chambers; in private. A cause is said to be heard in camera either when the hearing is had before the judge in his private room or when all spectators are excluded from the court-room.

[225] *See Stigma, Prejudice and Discrimination Against People with Mental Illness*, AM. PSYCHIATRIC ASS'N, https://www.psychiatry.org/patients-families/stigma-and-discrimination [https://perma.cc/9ZBK-D9S2].

[226] *See* Christopher K. Hsee & Bowen Ruan, *The Pandora Effect: The Power and Peril of Curiosity*, 27 PSYCH. SCI. 659, 664–65 (2016); *see also* Steinberg & Cauffman, *supra* note 104, at 250.

[227] Model Rule 1.14, *supra* note 1.

wish the public to have access to the documents prepared by counsel,[228] such information could be sealed and attached to the court record, requiring a court order for third-party access.[229] This would be similar to how court proceedings involving parental surrender of children for placement in adoptive homes[230] or dependency proceedings in general[231] may be sealed from public inspection to protect the privacy rights of the parent and the child,[232] which encourages parents who feel they are unable to provide for the needs of their children to avoid public scrutiny, thus protecting the child's welfare.

By including language in the ethics rule that calls upon counsel to build a record of their effort to provide competent representation and explain what processes they employed in selecting the guardian, the client or client's representatives would find greater protection and accountability in comparison to the current ethics standard which provides no mention of either of these requirements. Currently, guardians may be appointed with no public disclosures concerning the background of the guardian or the qualifications of the individual to serve in the capacity that empowers them to substitute their own judgment for that of the client.[233] Requiring lawyers to build a written record about how they determined that the client lacked the capacity to engage in legal decision-making would help to establish a

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[228] Amendments and comments recommended during the Ethics 2000 Commission and filed for the ABA annual meeting in August 2001 included Comment 3 to MR 1.14. A LEGISLATIVE HISTORY, *supra* note 5, at 345 ("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 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.")

[229] *See generally* Richard L. Marcus, *Myth and Reality in Protective Order Litigation*, 69 CORNELL L. REV. 1 (1983) (discussing the use of court protective orders to protect trade secrets and party privacy issues in federal litigation); *see also* Brian T. FitzGerald, Note, *Sealed v. Sealed: A Public Court System Going Secretly Private*, 6 J.L. & POL. 381, 383 (1990).

[230] *See* Christopher G.A. Loriot, *Good Cause Is Bad News: How the Good Cause Standard for Record Access Impacts Adult Adoptees Seeking Personal Information and a Proposal for Reform*, 11 U. MASS. L. REV. 100, 109–10 (2016).

[231] *See* Jennifer Flint, *Who Should Hold the Key? An Analysis of Access and Confidentiality in Juvenile Dependency Courts*, 28 J. JUV. L. 45, 80–81 (2007).

[232] *See* Richard F. Storrow, *The Policy of Family Privacy: Uncovering the Bias in Favor of Nuclear Families in American Constitutional Law and Policy Reform*, 66 MO. L. REV. 527, 536–39 (2001) (discussing the history and evolution of family privacy rights recognition dating back to Meyer v. Nebraska, 262 U.S. 390 (1923)).

[233] Lawyers have broad discretion currently. Requiring lawyers to state on record the reasons for requesting appointment of a guardian restricts decision-making based on the lawyer's personal beliefs about the client's best interest. The record might not reflect any rationale as to why a client's decisions were disregarded.

uniform protocol[234] in every jurisdiction that adopts the ABA Model Rules. This would also help to protect the client's assets.

If a client has been diagnosed with an illness or condition in the DSM-5,[235] but the client's condition does not interfere with their decision-making abilities, then counsel should affirmatively state this in the record. If the client's condition is temporary, and the client is expected to regain their decision-making ability, then counsel should also indicate this in the written record. In the event that a client demonstrates problems with basic communication[236] or appears to be delusional,[237] then the ethics rule should

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[234] Guggenheim identified the Bar's movement toward uniformity in defining the role of counsel for children over two and a half decades ago:

> To achieve uniformity, the Bar adopted principles aimed at reducing the exercise and range of discretion by lawyers when determining what outcome to advocate in order to fulfill their responsibilities as a child's lawyer. The Bar employed three basic strategies to reduce lawyers' discretion, two of which focus on the duties of lawyers when representing children. The first strategy emphasizes that, whenever a child client is old or mature enough to express a preference on the outcome of the case, the child should control the choices of the lawyer by being empowered to set the objectives of the litigation. The second strategy dictates that when lawyers are required to choose which position to advocate on their client's behalf, lawyers may only advocate for a particular result that clearly appears as the correct result. When more than one result could reasonably be reached, lawyers are expected to present these multiple options to the court. . . . [A] third strategy has gathered momentum . . . . Fearing more the random power of lawyers for children to advocate for results the lawyers want than that children might go unrepresented, this strategy rejects the concept that lawyers for children are necessarily good, and requires that the purpose for the use of a lawyer be clearly stated before a lawyer is assigned to represent a child.

Guggenheim, *supra* note 12, at 311–12 (footnotes omitted).

[235] DSM-5, *supra* note 31

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[236] LaVigne & Van Rybroek, *supra* note 7, at 86 ("Studies have repeatedly shown that older juveniles and adults with language impairments are less likely to have developed a skill set which would enable to them to assume the 'directive role' with an attorney. Individuals with language impairments will have achieved lower levels of education, will be more likely to be dependent on parents, siblings, and—in more severe cases—social services, and will have increased levels of anxiety and social phobia. This will leave them greatly diminished in any situation where language is power.").

[237] *See* Thomas E. Simmons, *Testamentary Incapacity, Undue Influence, and Insane Delusions*, 60 S.D. L. REV. 175, 183 (2015) ("The assessment of an individual's testamentary capacity takes place in a kind of abstract vacuum and considers the individual's ability to grasp their assets and family and express a testamentary plan. An insane delusion considers certain circumstances external to the testator's mental state. The factual focus widens when one moves from a consideration of testamentary incapacity to insane delusions. An insane delusion exists when a testator maintains an irrational belief which is not susceptible to correction and which affects a provision of his will. Because an element of an insane delusion is whether the belief was susceptible to correction, courts consider whether the testator was presented with evidence which would lead a reasonable person to reconsider their delusion in light of that evidence.").

compel lawyers to consult with mental health professionals and to obtain their advice and suggestions on how to appropriately interact with the client and under what circumstances, from a medical or mental health perspective, that the lawyer should seek the appointment of a third-party guardian to substitute their judgment for that of the client or simply continue a working relationship with the healthcare provider who presumably is more experienced in working with patients with a similar behavior to that of the lawyer's client.[238] Thinking about a client's capacity to communicate or engage in decision-making as a continuum in which the client's condition ranges from mild to severe disability can also help the lawyer decide what efforts should be made to include the client in all communications and decisions.

3. *Protect the client's interests as much as possible by limiting counsel's discretion and attempting to increase client involvement in decision-making whenever possible.*

Imposing the state rules associated with agencies or fiduciaries—utilizing legal solutions such as durable powers of attorney[239]—would add an additional layer of protection for clients who may be impaired, unable to adequately communicate, or simply developmentally immature and not demonstrate the capacity to make legal decisions[240] or to communicate with their lawyers.[241] If counsel finds it necessary to make decisions on behalf of their client, then appointing a guardian to substitute judgment for their

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[238] *See* Stacy L. Brustin, *Legal Services Provision Through Multidisciplinary Practice—Encouraging Holistic Advocacy While Protecting Ethical Concerns*, 73 U. COLO. L. REV. 787, 832–33 (2002).

[239] *See* Andrew H. Hook & Lisa V. Johnson, *The Uniform Power of Attorney Act*, 45 REAL PROP. TR. & EST. L.J. 283, 290 (2010).

[240] LaVigne & Van Rybroek, *supra* note 7, at 92–93 ("As the Supreme Court observed in *Padilla v. Kentucky*, '[i]t is quintessentially the duty of counsel to provide her client with available advice about an issue[.]' Where problems arise, however, are in those many instances in which an ostensibly 'competent' client lacks the linguistic ability to process and apply even the best advice and the clearest explanation from counsel. In these instances[,] many of the lawyers we spoke with see judges abandoning their obligation to due process and quality control.").

[241] Medical ethicists have laid out models to assess competency for Alzheimer's patients, and these might serve as helpful talking points to revise MR 1.14 should the ABA consider drafting a more specific protocol that might culminate in applying to have a third party appointed to substitute judgment for a client. These medical assessment factors include: (1) whether the patient has a clear choice with respect to the proposed diagnostic or treatment procedures; (2) whether the choice that a patient has made is reasonable; (3) whether the choice is rational; (4) whether the patient possesses the ability to make a reasonable decision; (5) whether the patient is able to comprehend and understand the relevant information required to make a rational choice. Overman, Jr. & Stoudemire, *supra* note 201, at 1496 (citing M.J. MILLS, M.L. DANIELS, *Medical-Legal Issues*, *in* PRINCIPLES OF MEDICAL PSYCHIATRY (A. Stoudemire & B.F. Foegel eds., 1987)).

client should include creating a record to demonstrate the credentials, background, and prior training or education of the guardian. This might help reduce the possible influence of nepotism in the appointment process and would provide identifying information to the client or to those concerned about the client's welfare (for example, family members and loved ones). But drafting an ethics rule that restricts the lawyer's role of substituting their own decision-making for that of the client should be limited to the most exceptional of circumstances in order to avoid clear conflicts of interest if the lawyer is empowered to spend the client's funds or to make life-altering decisions on behalf of the incapacitated client. The current language of MR 1.14 vests a great deal of discretion in counsel, rather than restricting as much as possible counsel's exercise of that discretion.[242] Maintaining client autonomy should be incorporated into the language of MR 1.14.[243]

4. *Expand the Comments to provide counsel with specific directions as to when consultation with mental health professionals is recommended.*

In addition to this proposed protocol, the Comments to the ABA Model Rules should, at the very least, provide concrete suggestions that might assist counsel in knowing how and when to seek out a professional evaluation or assessment for their client to determine whether a third-party guardian is actually necessary or would serve a useful purpose and if so, how long and what limitations should be imposed on the guardian's ability to control the client's money, life, or legal decisions.[244] If an effort to redraft this provision in the ABA Model Rules comes about, then utilizing an interdisciplinary team[245] consisting of lawyers, physicians, psychologists, social workers and other health care providers would bring to the table a

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[242] For a discussion about lawyer discretion under the Model Rules, see generally Nathan M. Crystal, *Developing a Philosophy of Lawyering*, 14 NOTRE DAME J.L. ETHICS & PUB. POL'Y 75 (2012).

[243] Model Rule 1.14, *supra* note 1.

[244] In some jurisdictions, guardians may be appointed to serve limited duties, such as managing the represented parties' financial matters, but nothing more. *See* Nina Kohn & David English, *Protective Orders and Limited Guardianships: Legal Tools for Sidelining Plenary Guardianship*, 72 SYRACUSE L. REV. 225, 228 (2022).

[245] In 2022, the Association of American Law Schools sponsored a six-part training series on incorporating the new ABA Standards on professional identity, cross-cultural competency, and well-being resources for students in an effort to provide instruction on how future lawyers, by drawing from other professions including social work and counseling, can be trauma-informed lawyers. *See An Interdisciplinary Approach to Professional Identity Formation*, AALS (June 15, 2022, 4:00 PM), https://www.aals.org/sections/list/balance-well-being-in-legal-education/an-interdisciplinary-approach-to-professional-identity-formation [https://perma.cc/Q7N2-JFWN].

group of professionals who hopefully have different perspectives[246] on how to identify individuals who present MR 1.14[247] issues. With no medical training and credentials to identify various mental health problems, lawyers are left to their own experiential exposure to properly determine when mental health experts must be consulted.[248]

These proposals will not solve all ambiguities in the ethics requirements for lawyers representing clients with diminished capacity,[249] but they should help to establish clear goals attached to the representation to ensure that the client's objectives remain the focal point of the representation,[250] to create a clear record of all factors that counsel considered—including consultation with mental health professionals[251]—before taking steps to substitute the client's decision-making, and to restrict the application for a guardian to only the most exceptional of circumstances and cases. The Comments should include steps and precautions a lawyer might take in order to determine when consultation with mental health

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[246] *See* Charity Scott, *Collaborating with the Real World: Opportunities for Developing Skills and Values in Law Teaching*, 9 IND. HEALTH L. REV. 411, 423–24 (2012).

[247] Model Rule 1.14, *supra* note 1.

[248] Weinstein, *supra* note 215, at 337–38.

[249] The legal community remains limited to what the medical community consensus is able to inform us about, and there is much we do not know. *See* Ira J. Chasnoff, Anne M. Wells & Lauren King, *Misdiagnosis and Missed Diagnosis in Foster and Adopted Children with Prenatal Alcohol Exposure*, 135 PEDIATRICS 264, 264–67 (2015).

[250] For a specific criticism of the ABA Model Rules and their "incompleteness" see Crystal, *supra* note 20, at 847 ("Model Rule 2.3 specifies when a lawyer may evaluate a matter for a client to be used by a third person, but it provides no standards for that evaluation. Instead, tax lawyers must turn to regulations issued by the IRS to determine their obligations. Similarly, a lawyer who represents a child finds little guidance in Model Rule 1.14 on his ethical obligations. The reality of specialization in the practice of law, coupled with the generality of the Model Rules, produces a need for standards that deal with the specific problems of lawyers practicing in particular specialty areas.").

[251] *See* Jennifer Cox, David DeMatteo & Stephanie C. Doran, *Choosing a Competent Forensic Mental Health Expert: A Guide for Legal Practitioners*, 45 CHAMPION 20, 20–21 (2021) (indicating no uniformity in the assessment instruments or protocols followed in the field) ("[T]here remains considerable variation in practitioner approach to FMHA [forensic mental health assessments]. For example, Neal and Grisso surveyed over 400 forensic mental health evaluators throughout the United States, Canada, Australia, New Zealand, and Europe regarding the psychological assessment tools used in their two most recent evaluations as well as their rationale for including each tool. Almost 75 percent of evaluations included a structured assessment tool, with over 280 different assessment measures included across all evaluations. This international snapshot is consistent with aggregated mental health survey data (as reported by Neal and colleagues), which identified 364 distinct psychological assessment tools rated as 'acceptable' for use by clinicians in forensic settings.") (footnotes omitted).

professions would be appropriate,[252] balancing the potential embarrassment of creating a public record that suggests that the client is incapacitated against the demands of the legal proceeding that compelled the client to need legal counsel in the first place.[253] Rather than searching for or defining a "normal" attorney client relationship, a newly drafted ethics rule could focus attention solely on the client's capacity to make legal decisions in the context of the legal case in which counsel has been retained or appointed. Building a protocol that can be applied in every jurisdiction will bring uniformity to the process attorneys engage in whenever they confront a client who might demonstrate confusion, lack of comprehension,[254] inability to communicate,[255] or just developmental immaturity.[256]

Recognizing that many conditions clients exhibit may be temporary or easily resolved without resorting to the appointment of third-party guardians would create an ethical goal of making every effort to preserve client autonomy as the attorney's highest priority. By creating a protocol that could be utilized in every jurisdiction, some of the uncertainties indicated by counsel handling cases might be significantly reduced or

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[252] *See* Anthony J. Luppino, *Minding More Than Our Own Business: Educating Entrepreneurial Lawyers Through Law School-Business School Collaborations*, 30 W. NEW ENG. L. REV. 151, 157 (2007) ("A rich body of literature strongly supports the conclusion that modern legal education must, for contextual and other practical reasons, involve interdisciplinary elements.").

[253] *But see generally* Wilson & Prokop**,** *supra* note 45.

[254] *See* Jennifer Gerstenzang, *Counseling the Addicted Client: A Responsible and Restorative Practice*, 42 CHAMPION 40 (2018) ("Diminished capacity is defined as 'an unbalanced mental state that is considered to make a person less answerable for a crime and is recognized as grounds to reduce the charge.' In cases with a client who is struggling with an addiction, quite often this information can be a source of mitigation when negotiating the case and humanizing the client to the court and opposing counsel. Rule 1.14 allows lawyers to consult with individuals or entities that have the ability to take action to protect clients when clients are unable to adequately act in their own best interests. Understanding the different treatments that are available and knowing who to consult is an important aspect of representing the client to the best of the lawyer's ability.").

[255] *See* Lisa Kelly & Alicia LeVezu, *Until the Client Speaks: Reviving the Legal-Interest Model for Preverbal Children*, 50 FAM. L.Q. 383, 383 (2016) ("[The] best-interest method of advocacy has been widely criticized for allowing attorneys' implicit biases to dominate legal proceedings, fostering a lack of accountability, allowing inconsistency, assuming nonexistent expertise, serving state prosecutorial functions, and violating the ABA Model Rules of Professional Conduct. The legal rights of preverbal children must be protected without falling prey to the drawbacks of the best-interest advocacy model.").

[256] This does not suggest that the creation of ethical protocols will resolve all issues confronting counsel who represents clients seemingly unable to communicate or participate in legal decision-making. As is the case with clients with FASD, the condition can be very difficult to correctly identify, even for trained physicians. *See* Wozniak et al., *supra* note 107, at 760 ("[D]iagnosis remains challenging because of the poor reliability of self-reported maternal drinking histories, an absence of sensitive biomarkers, and the infrequency of diagnostic dysmorphic facial features among individuals with fetal alcohol spectrum disorder.").

eliminated altogether.[257] This might also allow jurisdictions to look to sister jurisdictions to see how ethics complaints have been resolved elsewhere, especially if no such complaints have yet been recorded in some jurisdictions.[258] Promoting respect for client autonomy and giving legal practitioners clarity in the guidelines that govern their ethical duties would allow members of the Bar to serve the public interest and be held accountable for noncompliance, which is also in the public good,[259] while providing a mechanism to protect the legal rights of some of the most vulnerable clients we represent.[260] But lawyers need not attempt to draft a protocol for making client assessments for purposes of applying MR 1.14[261] analytical considerations, but rather should work in consultation with

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[257] LaVigne & Van Rybroek, *supra* note 7, at 102–03 ("A forensic evaluation that includes an evidence-based 'second-generation adjudicative competency measure,' such as the MacArthur Competence Assessment Tool[—]Criminal Adjudication (MAC-CAT-CA) or the Evaluation of Competency to Stand Trial[—]Revised (ECST-R), combined with a specialized language assessment by an SLP, provides the best chance for accurate, reliable information about an individual's actual abilities to consult with counsel, comprehend information, and make rational decisions.") (footnotes omitted).

[258] We must think of developing any protocols in a manner that does not overtly conflict with the provisions of the Model Rules in the same fashion that Crystal identified the need to adopt Standards for specialized fields of law that similarly should not conflict with the Model Rules.

> [A] violation of a rule of professional conduct is a basis for discipline in all jurisdictions, [so] drafters of standards must take care that their standards are consistent with the Model Rules. Normally, standard drafters will accept the Model Rules as the basis for their analysis, but sometimes standard drafters in particular areas of practice may disagree with the approach of the Model Rules or may attempt to validate a practice that varies from the Model Rules. If drafters propose a standard that deviates from the Model Rules, they should warn practitioners of the substantial risks of this approach.

Crystal, *supra* note 20, at 849–50 (footnotes omitted).

[259] It was focusing on the public good and rehabilitating the legal profession's tarnished reputation that gave rise to much of the effort to create and enforce the ABA Model Rules:

> As a result of Watergate, disciplinary proceedings were brought against at least twenty-nine lawyers, which resulted in disciplinary action against at least eighteen of them. Their misconduct included aiding and abetting burglary, obstruction of justice, perjury, violation of campaign laws and conspiracy to violate citizens' constitutional rights, among other charges. As a result of lawyers' involvement in Watergate, the American Bar Association (ABA) worked to improve ethical standards for lawyers to rehabilitate the profession's tarnished reputation. The ABA's reform efforts included the enactment of the Model Rules of Professional Conduct ("Model Rules") in 1983.

Laurel A. Rigertas, *Post-Watergate: The Legal Profession and Respect for the Interests of Third Parties*, 16 CHAP. L. REV. 98, 98 (2012) (footnotes omitted).

[260] *But see* Kathryn E. Miller, *The Myth of Autonomy Rights*, 43 CARDOZO L. REV. 375 (2021).

[261] Model Rule 1.14, *supra* note 1.

mental health professionals who have already adopted specific ethics rules addressing assessment of patients in court-involved issues.[262] Whether counsel seeks to attempt an assessment of the client's competencies on their own or retain a forensic expert to obtain an assessment of the client, the Specialty Guidelines for Forensic Psychiatry[263] would be an invaluable aid to create a record of the process employed to determine whether a client has sufficient ability to engage in decision-making on the legal issue.[264]

5. *Stop searching for a "normal" attorney-client relationship.*

"Normal" is such a subjective concept that it serves very little purpose. For those attorneys who routinely serve clients with mental disabilities, conditions, or cognitive limitations, seeking a "normal" relationship would be entirely different from attorneys who routinely handle different types of legal work, such as transactional drafting, tax work, or other fields in which client encounters might be sporadic or more limited. Focusing the ethics rule on the client's abilities to instruct counsel on what the client seeks or aspires to is far more important than achieving a "normal" relationship. The ethics rule should be designed to promote client autonomy as much as possible. Lawyers should be required to create a record. Documents from mental health or medical professionals should be included while employing a uniform protocol that promotes transparency, preserves the decision-making process, and seals records to maintain client privacy as much as possible. This will alter current legal ethics rules that view lawyers solely as "independent professionals."[265] As understanding and information about how to best interact with clients lacking the capacity to engage with counsel

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[262] *See generally Specialty Guidelines for Forensic Psychology, supra* note 214.

[263] *Id.* at 15–16.

[264] But a proposal for a new protocol for client assessment is not unopposed on broader grounds. *See* Hymel, *supra* note 26, at 873–74 ("Over the last fifty years, increasingly specific ethical rules—or protocols—have been developed to regulate lawyer and law firm conduct. Many lawyers are now expected to conform to protocols that prescribe behavior in a particular field of law practice or legal arena. For example, tax lawyers must abide by Circular 230, a detailed set of regulations issued by the United States Treasury Department to govern all professionals—nonlawyers as well as lawyers—who practice before the Internal Revenue Service (IRS). The number of lawyers subject to such protocols is increasing, as is the number of protocols themselves. As the perceived need for more specific guidance increases, protocols also come from more sources.").

[265] This proposal to include other disciplines to help draft the ethics rules dealing with clients with "diminished capacity" may conflict with the Bar's insistence on exclusive " 'self-regulation' [as] the only enforcement system compatible with the fact that lawyers are 'independent professionals.' " Wilkins, *supra* note 150, at 812–13.

continues to develop,[266] these rules may be amended to incorporate some of the recommendations from counsel seriously invested in representing such clients along with other professionals in mental health or medicine who provide services for the very same population, despite not having been invited to help draft our previous legal ethics rule on this sensitive subject. Let the dialogue on this issue continue, at least until we get it right. Until then, we should at least agree that lawyer-client relationships may be described in many ways, but few clients would likely call them "normal."

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[266] LaVigne & Van Rybroek suggest that language impairments can destroy or at least severely limit the attorney-client relationship in ways that go unmeasured or not considered in client competency examinations in criminal settings:

> Most defendants with language impairments will be found or presumed competent, not because they are able to competently assist counsel, but because of the nature of the entire competency enterprise. While forensic scholars consider competency to stand trial to be 'the most significant mental health inquiry pursued in the system of criminal law,' as a statistical and practical matter it is only of marginal relevance in the actual operation of the juvenile and criminal justice systems. The constitutional threshold for a finding of competency is low and inconsistently applied. Legal practitioners regard the whole process with skepticism, and rarely raise it, even when they have doubts about a client's ability to adequately communicate. The fact that a client clears the competency bar in no way means that the attorney-client relationship can operate as it should.

LaVigne & Van Rybroek *supra* note 7, at 81–82. There is much that we are missing when it comes to identifying and properly assessing a client's diminished capacity.