



ALBANY LAW SCHOOL

Institute of Legal Studies

Autonomy and Awareness: Exploring Ethical and Legal Issues in Disability Advocacy

February 27, 2019

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Government Law Review Symposium

Autonomy and Awareness: Exploring Ethical and Legal Issues in Disability Advocacy

February 27, 2019

Agenda

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| 12:30pm – 1:00pm | Registration |
| 1:00pm – 1:15pm | Opening Remarks |
| 1:15pm – 2:15pm | Keynote: Dr. Adam Cureton University of Tennessee |
| 2:15pm – 3:30pm | Panel Presentation Moderator: Alicia Ouellette, Esq. President and Dean, Albany Law School Panelists: Dr. Adam Cureton University of Tennessee Lawrence Faulkner, Esq. The Arc Westchester Prof. Nancy Maurer Law Clinic and Justice Center Albany Law School |
| 3:30pm – 3:45pm | Questions/Closing Remarks Light Refreshments – East Foyer |

**Autonomy and Awareness:
Exploring Ethical and Legal Issues in Disability Advocacy**

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SPEAKER BIOGRAPHIES

ADAM CURETON is an Associate Professor of Philosophy at the University of Tennessee. He did his graduate work at Oxford, as a Rhodes Scholar, and at the University of North Carolina at Chapel Hill. Professor Cureton specializes in ethics, political philosophy, Kant, and philosophy of disability. He has co-edited two collections with Oxford University Press, *DISABILITY AND DISADVANTAGE* and *DISABILITY IN PRACTICE*, and he is currently co-editing *THE OXFORD HANDBOOK OF PHILOSOPHY AND DISABILITY*. Professor Cureton is the President of the Society for Philosophy and Disability and chairs the American Philosophical Association Task Force on the Status of Disabled Philosophers in the Profession.

LAWRENCE FAULKNER, ESQ. is the General Counsel and Director of Corporate Compliance at The Arc Westchester. In that capacity he provides general legal advice to a large not-for-profit agency and supervises the agency's compliance program. In addition, he provides legal and legislative advocacy for the agency and the families and individuals it serves, coordinates special efforts concerning emerging issues, and provides training to agency staff. Mr. Faulkner has provided educational programs for families and attorneys in such areas as health care decision-making, guardianship, supported decision-making and end-of-life health care decision-making. He is the past chair of the New York State Bar Association Health Law Section and a member of the section's Committee on Ethical Issues in the Provision of Health Care. He is also a member of the Committee on Disability Rights. Mr. Faulkner was instrumental in the drafting and passage of the New York Health Care Decisions Act for Persons with Intellectual and Developmental Disabilities which gives the guardians of individuals with developmental disabilities the authority to make health care decisions, and guardians and family members the authority to make health care decisions concerned with end-of-life care. Mr. Faulkner has been actively involved for more than 20 years in efforts to reform guardianship in New York State, most recently as a member of the Governor's Olmstead Task Force on reform of guardianship, the OPWDD working group on reform, and efforts by the New York Law Revision Commission. Along with Hunter College and the New York Alliance for Inclusion and Innovation, The Arc Westchester is piloting a project on supported decision-making. Mr. Faulkner has a BS from Cornell University and a MS and JD from the State University of New York at Buffalo. Mr. Faulkner is admitted to practice law in New York State. Before coming to The Arc Westchester, he served as Deputy General Counsel at the New York State Office for People with Developmental Disabilities.

HON. KRISTIN BOOTH GLEN is a graduate of Stanford University and Columbia Law School, after which she clerked for the US Court of Appeals for the Second Circuit. She was in private practice, primarily as a constitutional litigator, taught at NYU, Hofstra and New York Law Schools, and, in 1980, was elected to the Civil Court of the City of New York. In 1986 she was elected to the New York State Supreme Court, and in 1992 appointed to the Appellate Term, First Department. In 1995 Judge Glen left the bench to become Dean of the City University of New York (CUNY) School of Law, where she served for a decade, returning to the judiciary in 2006 as Surrogate, New York County. She was mandatorily retired in 2012 and has returned to CUNY as University Professor, where she currently directs a five-year, grant-funded project, Supported Decision-Making New York (S.D.M.N.Y.), that is piloting the use of supported decision-making to divert persons with intellectual and developmental disabilities at risk of guardianship, and to restore rights to persons currently subject to guardianship. Judge Glen has served as Chair of the ABA Commission on Law and Aging, Commissioner on the ABA Commission on Disability Rights, Advisory Board member of both the National Resource Center on Supported Decision-Making and the CPR/Nonotuck Supported Decision Making Project, and writes and lectures widely on the topic. Her recent articles include, "Piloting Personhood: Reflections on the First Year of A Supported Decision-Making Project" in the *Cardozo Law Review*, "Introducing a "New" Human Right: Learning From Others, Bringing Legal Capacity Home" in the *Columbia Journal of Human Rights*, "What Judges Need to Know About Supported Decision-Making" in the *ABA Judges Journal*, and "What You Need to Know About Supported Decision-Making" in the *NYS Elder Law and Special Needs*, and *Health Law* journals, all available at www.sdmny.org.

NANCY M. MAURER is a Professor of Law and Director of Field Placement and Pro Bono Scholar programs at Albany Law School. She teaches a variety of clinical, skills, and interdisciplinary courses including Field Placement, Negotiating for Lawyers, and Legal Issues in Medicine. Professor Maurer founded and for many years directed Albany Law School's Civil Rights and Disabilities Law Clinic in which law students represented clients in discrimination, education, and other disability rights matters under faculty supervision. She co-developed Albany Law's Introduction to Lawyering program designed to introduce first-year law students to essential research, writing, lawyering skills, and professionalism in context throughout a yearlong simulation. Professor Maurer writes and lectures in areas of legal education and disability law. She is an editor and a chapter author of *LEARNING FROM PRACTICE: A TEXT FOR EXPERIENTIAL LEGAL EDUCATION*, West Academic (2016). She is co-editor and a chapter author of the New York State Bar Association's three books set *DISABILITY LAW AND PRACTICE*. Prior to joining the Albany Law faculty, Professor Maurer practiced law with Legal Services in Charleston, S.C. and later served as staff attorney for the New York State Commission on Quality of Care and Advocacy for People with Disabilities. She is a member of the New York State Bar Association Committee on Disability Rights and a former member and chair of the Board of Directors of Disability Rights New York, Inc. She is a graduate of Middlebury College and George Washington University Law School.

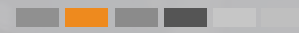
ALICIA OUELLETTE is the 18th President and Dean of Albany Law School. As Dean, she led the law school in the development, adoption, and implementation of a new strategic plan, led and consummated an institutional affiliation with the University at Albany, and has introduced to the law school innovative educational programs. Prior to her appointment as Dean, she served as Associate Dean for Academic Affairs and Intellectual Life and a Professor of Law. Her research focuses on health law, disability rights, family law, children's rights, and human reproduction. Her book, *Bioethics and Disability: Toward a Disability Conscious Bioethics*, was published in 2011 by Cambridge University Press. She has authored numerous articles published in academic journals such as the *American Journal of Law and Medicine*, the *Hastings Center Report*, the *American Journal of Bioethics*, the *Hastings Law Journal*, the *Indiana Law Journal* and *Oregon Law Review*. Before joining the law faculty, Dean Ouellette served as an Assistant Solicitor General in the New York State Attorney General's office. As ASG, Dean Ouellette briefed and argued more than 100 appeals on issues ranging from termination of treatment for the terminally ill to the responsibility of gun manufacturers for injuries caused by handguns. Before that, Dean Ouellette worked in private practice and served as a confidential law clerk to Judge Howard A. Levine on the New York State Court of Appeals. She has continued her advocacy work in select cases and was lead counsel on the law professors' brief submitted in support of same-sex couples who sought the right to marry in New York State. She earned her A.B. at Hamilton College and her J.D. at Albany Law School, where she was Editor-in-Chief of the *Albany Law Review*.



Accessible version at:
<https://tiny.utk.edu/cureton-entitlement>

Is it Ever Unjust to Exercise our Just Entitlements?

Adam Cureton



Three Examples

1. Using a disability parking space
2. Extra time on a test
3. Basketball tickets

In each case, it seems:

- I have a just legal entitlement to a disability accommodation.
- It is unjust of me to exercise or claim the entitlement.

Main Question

Do justice or fairness sometimes require or recommend that people not exercise privileges that are guaranteed by those same moral values?

- Other contexts in which this issue might come up: healthcare, employment and unemployment, retirement, taxation, welfare, affirmative action, price-setting and store return policies

Dangers of Focusing on Disability

- Establishing and enforcing fair rules and just laws for disabled people is arguably more important than quibbling about whether we should use accommodations.
- We risk “blaming the victims” by focusing on our supposed moral failings.
- Excessive scrupulousness may lead to a kind of ambivalence, or even servility, in which we do not use or press for accommodations we need and deserve.

Reflecting on how disabled people should or should aspire to act also shows us a kind of respect by treating us as full moral agents.

1. Initial Reactions to the Three Examples

It is unjust of me to use the accommodations.

Doing so would:

- Deny them to other disabled people who are more deserving.
- Diminish trust and confidence among non-disabled people in our systems for provisioning accommodations.

Responses:

- There were enough disability parking spaces, proctors and seating to go around.
- Almost no one knew that I did not need the accommodations on these occasions.

Having a just entitlement entails that exercising it is not unjust.

It is never unjust to act within our just legal rights.

Response:

- The moral compunction I had suggests that this is at least not a conceptual truth but rather a substantive moral claim that we can investigate.

It is not unjust of me to use the accommodations

Because:

- I actually need them.
- Failing to take them would make it more difficult for me or others to secure accommodations we may need in the future.
- The accommodations are, in part, forms of charity, economic redistribution or affirmative action for disabled people that I am thus permitted to accept as a matter of justice.

Response:

- I knew that the first two claims were not true.
- I have significant doubts about justifying all accommodations for disabled people on grounds of making up for past injustices.

General form of the examples

1. We are justly entitled to something.
2. Exercising this entitlement or not on a particular occasion will not interfere with others doing so or otherwise affect the nature, enforcement or support of our society's institutions.
3. But exercising the entitlement in those circumstances nonetheless seems unjust.

2. Entitlements of Justice

I was legally entitled to the accommodations.

- The ADA and IDEA, along with accompanying amendments, regulations, policies, procedures and court cases, determine the nature and scope of the legal entitlements that disabled people have to reasonable accommodations.
- In my case, having met the necessary legal qualifications, I had the legal right to:
 - Park in a disability space at the grocery store.
 - Take extra time on my exam.
 - Receive special basketball tickets.

These legal entitlements are just

1. Securing **equality of opportunity** is a fundamental concern of justice
 - Everyone should have equal opportunity to fully participate in all major aspects of society, including education, employment, culture, leisure, public accommodations, transportation, government services and politics.
2. Legally blind people face challenges moving safely from place to place, accessing educational and cultural resources, securing employment, engaging in leisure activities and otherwise participating actively in social life.
3. So, ensuring equal opportunity for us seems to justify affording me the specific legal entitlements I had to park in safe environments, take additional time on tests and sit close to sporting events.

Objection

1. Securing **equality of opportunity** is a fundamental concern of justice.
2. In my particular examples, I did not face obstacles to my equality of opportunity.
 1. I could just as easily and safely walk from a normal parking space as I could from a disability one.
 2. I already knew the test questions and my laptop was loaded with accessible software.
 3. I am no better seeing and enjoying a basketball game up close than far back in the stands.
3. So, ensuring equal opportunity for me in these examples does not justify affording me the specific legal entitlements.

Basic problem

Affording entitlements of various kinds to disabled people is **usually** or **generally** just.

But affording these entitlements is not just in rare cases when they are not needed to secure someone's equal opportunity to fully participate in society.

Response: Laws must be workable

Workable rules are rarely able to cover all possible cases to which they might apply. In order to serve their intended roles, rules must:

- Make generalizations
- Rely on approximations
- Include vague terms or artificially precise ones
- Exclude certain exceptions and qualifications

First alternative

Visually impaired people are legally entitled to certain accommodations only in circumstances in which they are necessary to secure our equal opportunity.

This law would be **unfeasible**:

- Provides little guidance about what equal opportunity means or what is 'necessary' to secure it.
- Difficulties determining what accommodations a particular disabled person needs in particular circumstances.
- Difficulties enforcing such a law.
- Especially liable to abuse by those who do not need the accommodations or who do not want to provide them.

Second alternative

Specify in the law exactly what accommodations are owed to what people in what circumstances in order to secure their equal opportunity.

This law would also be **unfeasible**:

- The law would be so complex and unwieldy that few, if any, people could fully understand, apply and enforce it.
- Even in the best case, the law would likely still be an imperfect approximation of what is required by equal opportunity.
 - Our available evidence about disabled people and the obstacles we face to equal opportunity is often generalized rather than specific to individual people and the many contexts we might face

Workable laws

Workable systems for implementing the value of equal opportunity for people with disabilities will inevitably include loopholes:

- False-negatives - a disabled person is not legally entitled to an accommodation that is needed to secure her equal opportunity.
- False-positives - a disabled person is legally entitled to an accommodation that is not needed to secure her equal opportunity.
 - My examples

Legislators attempted to devise a system for providing accommodations to disabled people that strikes the right balance between **full equality of opportunity** and **workability** .

Workability conflicts with justice

1. Justice requires that everyone be afforded equal opportunity to fully participate in all aspects of life.
2. Laws that have to “round some edges”, “cut some corners” and otherwise make concessions to concerns of feasibility are, at best, merely approximations of what justice requires and so not themselves fully just.
 - Justice is one thing and its practical implementation another.
3. So, the legal entitlements I had in my examples were not fully just because they are not actually required to ensure my equal opportunity.

Workability is part of justice

1. Laws and rules can, and often do, become part of morally valuable relationships of friendship, solidarity, community and humanity. They:
 - Regulate our behavior and our interactions with others.
 - Provide a basis for mutual-expectations about our actions and attitudes.
 - Are part of our shared activities, projects and goals.
 - Allow us to show respect to others.
 - Provide a way for us to communicate our moral commitments to one another.

Workability is part of justice

2. For laws and rules to serve these morally important social functions, they have to be workable in various ways:
 - They must be publicly known or knowable.
 - Limits how complicated the rules can be
 - They must be able to regulate our deliberations and behavior.
 - Limits how difficult they can be to follow and apply to particular cases
 - They must be enforceable.
 - Implies that we are generally able to tell when they are violated
 - They cannot be so broadly written as to invite too much abuse.

Workability is part of justice

1. Laws and rules can, and often do, become part of morally valuable relationships of friendship, solidarity, community and humanity.
2. For laws and rules to serve these morally important social functions, they have to be workable in various ways
3. So, workability is a value of justice itself.

Making laws about disability accommodations feasible, even when they contain some loopholes, is not sacrificing justice to mere expediency but rather expressing the value of these relationships as a part of justice itself.

Equal opportunity and **workability** are both constitutive values of justice.

My legal entitlements are just

Equal opportunity - does not, on its own, justify affording me an entitlement to park in the disability space, take the extra time or sit in the disability section.

Equal opportunity plus the value of workability - provide a strong case that my legal entitlements are just.

3. Duties of Justice

Assumptions

Let's suppose that my legal entitlements to park in the disability space, take the extra time on the exam and sit in the disability seats:

- Are not required to ensure equality of opportunity for me in those particular cases.
- Are all nonetheless justly afforded to me as part of a feasible legal system for implementing equality of opportunity.

How should we think about the morality of exercising these just legal entitlements?

Moral qualms arise from justice itself

It is apparently unjust or unfair for me to use these special privileges when they are not necessary to secure my equal opportunity.

Yet if my legal entitlements are just then how could I be unfairly exploiting the rules, taking unfair advantage of them or otherwise acting unjustly by exercising those entitlements?

Duties of justice

1. Comply with just laws and perhaps also with ones that are nearly just.
 - In my examples, however, compliance with the law is not relevant.
2. Take due care in applying just laws to particular cases
 - I knew the relevant laws clearly entitle me to the accommodations.
3. Understand and appreciate just laws and the positions they define
 - I understood and deeply valued my legal rights to accommodations

Duties of justice

4. Support, not undermine and further just institutions.
 - Mutual trust and confidence among citizens is an especially important ingredient in establishing and maintaining just institutions.
 - These attitudes tend to be undermined when we think others are taking advantage of inevitable loopholes in the law for the sake of their own interests.
 - So disabled people sometimes have reasons not to exercise our just legal rights because of the effects that doing so might have on those institutions.

Response

- In my examples, using the accommodations will not affect mutual trust and confidence, give rise to envy and jealousy or otherwise affect the existence or viability of just institutions then this duty does not determine whether or not justice prohibits me from exercising my entitlements.

No duty of justice not to use the accommodations

I did not have a strict duty of justice not to exercise my entitlements.

So, it is not unjust of me to use the accommodations.

There is still a lingering suspicion that it is still somehow unfair or unjust of me to use the accommodations when they are not needed to secure my equal opportunity.

Is there another way to explain this unease while also accepting that justice does not morally require me to forgo the accommodations in those circumstances?

4. Ideals of Justice

Duties and ideals

Duties and principles of right and wrong are not the only standards by which we can morally evaluate our actions.

How we act can also be, for example, base and sleazy as well as admirable and supererogatory. For example:

- We are not morally required to give most of our money to charity.
- Our commitment to a moral ideal of general wellbeing may lead some of us to do so.

Moral ideals can play a significant role in our lives

- Define goals to work toward.
- Specify standards for reform.
- Give us hope for a better future and combat cynicism and despair.
- Motivate us to go above and beyond the call of duty.
- Our shared commitment to them can bind us in morally valuable relationships of love, friendship and solidarity.
- Provide a basis for integrity and self-respect when we strive to live out in our own lives the moral ideals that we are most firmly committed to.

Moral ideals

- Defined and justified by moral values, such as those of human dignity, wellbeing, respect and justice.
 - Not merely personal ideals, such as ideals of art or sport.
- May not be possible or likely to come about.
- May need to be adjusted by other moral ideals into an overall ideal of a morally perfect world.

A realizable ideal of justice

A perfectly just society in which our basic institutions perfectly conform to the requirements of equal opportunity and everyone accepts and complies with them.

- Realizable because the workable principles, laws and rules that partially constitute it are adjusted to facts about human nature and the natural world.
- A society of this sort is the best we could achieve as a matter of justice, taking, as Rousseau says, people as they are and society as it can be.

An unrealizable ideal of justice

The value of equal opportunity is fully realized without any adjustments made for the sake of workability.

- This ideal abstracts from such concerns and defines a state of affairs in which equal opportunity is fully and completely realized.
 - All disabled people have the entitlements that she needs for her equal opportunity and no one has entitlements that she does not need for her equal opportunity.
- We imagine that people in such a world are, for instance, omniscient, morally perfect and otherwise not subject to the limitations and deficiencies that require us to ensure that laws are workable.
- This ideal is not realizable for human beings in the natural world.

Using the accommodations is less than fully just

1. I would not take the accommodations in an unrealizable world of perfect equality of opportunity because I would not be entitled to them in that world.
2. My commitment to justice and, in particular, to the unrealizable ideal of equal opportunity give me moral reasons to incorporate that ideal into my life.
3. Doing so involves attempting to act as I and others would in the unrealizable ideal world.
4. So, I have reasons of justice not to take the accommodations.

Using the accommodations is less than fully just

A fully just person would affirm the following claims:

1. I am justly entitled to park in the disability space, take the extra time on the exam and sit in the disability seating because these entitlements are part of the most just institutions that are possible for human beings in the natural world.
2. I am under no duty of justice not to exercise my entitlements so it is not unjust of me to do so.
3. Yet I will not exercise these entitlements in these circumstances because I would not have them in a perfectly just, but unrealizable, world of full equality of opportunity.

My moral compunction about exercising my entitlements is that doing so involves failing to fully realize an ideal that I am deeply committed to.

- Guilt is not the appropriate attitude for me to have
- Self-reproach, internal conflict and shame are closer to what I felt for missing opportunities to live out ideals that I and others share.

5. Fulfilling Entitlements

Implications for people who provide accommodations

If a fully just person would not use the accommodations I was entitled then a fully just person might not provide those accommodations in those circumstances either.

Would a police-officer, teacher and box-office official who is deeply committed to justice might write me a parking ticket, deny me the extra time and refuse to give me special seating if they knew that giving me these accommodations is not needed to secure my equal opportunity?

Conflict between duties and ideals

The police-officer, teacher and box-office official face a conflict between:

- Their duty of justice to provide the accommodation
- Their accepted ideal of justice, which gives them putative moral reasons not to do so.

The duty of justice should win in these cases:

- That duty is supported by the value of creating and maintaining morally valuable ties of solidarity among members of society, which justifies making our corresponding duties of justice feasible.
- Relationships of civic friendship and solidarity give the police officer, teachers and box-office officials sufficient reason to fulfill their moral duty to comply with just laws and so to provide me accommodations I am justly entitled to and ask for.

Other permissible acts recommended by the ideal

The police-officer, teachers and box-office officials might:

- Attempt to persuade me not to use the accommodations while nonetheless emphasizing that they stand ready to provide them if requested.
- They must not interfere with my just legal rights through pressure and undue influence.
- Often our friends, family and loved-ones are in the best positions to discuss these matters with us, so a favorite teacher might carefully broach the issue of whether the extra time on the test is appropriate in these circumstances.
 - It would usually be unjustly intrusive for a police-officer or box-office official I have never met to disapprovingly question me about whether I really need the parking space or special seating.

5. Conclusion

Conclusion

Ideals can play important roles in our lives by, in particular, sometimes leading us not to exercise our just entitlements.

Although it is not always ideal for disabled people to exercise our entitlements, it is rarely unjust to do so.

I, at least, should aspire to be the sort of person who refuses unnecessary accommodations, even ones that keep me from getting drenched, give me a leg-up on an exam and allow me to show my son a good time.



gettyimages
Lorado

Thank you



Expressing Respect for People with Disabilities in Legal Practice

Adam Cureton

Accessible version at:

<https://tiny.utk.edu/cureton-law>



Main Issue

All too often, the legal community expresses disrespectful attitudes about disabled people through the meanings attached to:

- the environments they create
 - inaccessible waiting room
- the policies they maintain
 - Ignoring the values and wishes of legally incompetent disabled people
- the manner in which they interact with disabled people
 - a high-pitched and reassuring tone toward a disabled adult

My aims

1. Describe a general way of thinking about respect, disrespect and expressions of those attitudes.
2. Use this model to explain how some people in the legal profession express disrespectful attitudes about people with disabilities.
3. Suggest some measures they can take to avoid or counteract those messages and to show disabled people positive signs of respect.

1. Respect and Disrespect

Attitudes

- An attitude, such as love, hope or fear, is a family of tendencies to think, feel and act in certain ways.
- Many of our attitudes can be assessed in moral terms as required or forbidden, admirable or base, virtuous or vicious and ideal or less than ideal.

Respect

Respect for persons paradigmatically involves understanding and appreciating one's own dignity and to the dignity of other people.

Values that are part of human dignity

Autonomy

Justice

Wellbeing

Community

Respect

Expressions of respect

Paradigmatic features of respect

Positive aspects

- When we respect someone, we tend to understand, notice and pay attention to her
- We also tend to esteem, venerate and cherish her.

Negative aspects

- A respectful person, it seems, is reluctant to make assumptions about other people without sufficient evidence
- She is disposed to afford them their privacy
- She tends not to intrude on them or their prerogatives and responsibilities

Respecting disabled people in legal practice

Those in the legal profession should:

- not regard disabled people as mere objects or non-human animals.
- understand and appreciate the basic moral and legal rights of disabled people as well as their special rights as, for example, adults, mothers or disabled people.
- within certain limits, not be judgmental about the basic values that their disabled people affirm or always expect them to be deferential to their opinions and values.
- not ignore, denigrate or brush aside the legitimate complaints of disabled people
- afford them privacy
- hold them responsible for their free actions;
- not regard the morally required assistance they give as mere charity

2. Expressions of Respect and Disrespect

Expressing Respect

Expressing or showing basic respect to someone paradigmatically involves making use of literal or figurative signs that have come to have the same meaning as a judgement we have that she has or lacks the value of human dignity.

Examples:

- Saying that someone lacks inner worth of this kind
- Heap insults on them by calling them 'vermin' or 'scum'.
- Shouting, laughing and sneering at others
- Using dismissive, haughty, disdainful or contemptuous tones of voice
- Spitting or rolling our eyes at them.

The Value of Expressing Respect

- Expressions of respect play a central role in morally valuable relationships of mutual trust, friendship, love and solidarity that we have moral reasons to develop and maintain with one another.
- Ideal relationships of various kinds among human beings, including relationships of mutual respect among all human beings, require that we not only respect one another but that we also communicate that we regard each other as having a vaunted moral status.

Expressing Respect – An Extended Sense

We can express respect and disrespect, in an extended sense, even when we do not have these attitudes ourselves.

When actions, mannerisms, symbols and other things mean or presuppose that someone has or lacks inner worth then making use of them can express respect or disrespect by reinforcing, undermining or otherwise leading ourselves or others to have attitudes of respect or disrespect

Examples:

- Practicing courtesy, manners, civility and politeness, even when we do not have the attitudes of respect that should accompany them
- Ridiculing others, portraying them as if they are mere objects or non-human animals, and bowing and scraping may tend to encourage attitudes of disrespect in ourselves and others.

The Value of Expressing Respect in the Extended Sense

Consequences

- Aristotle claimed that acting as if we are virtuous tends to lead us and others to become virtuous.

Ideals

- We might politely express respect that we do not yet have because we aspire to be the sort of person who has and shows respect to others and who stands in mutually-respectful relationships with them.

3. Symbolic Meanings in Legal Practice

Points from my Model of Expressing Respect

1. Expressing respect and disrespect involves making use of signs, symbols, gestures, actions or other things that have come to mean that someone has or lacks human dignity.
- We should be sensitive to the long and often dark relationship that disabled people have to the legal profession, including periods in which disabled people were mostly excluded, given inadequate legal representation, institutionalized, neglected, and treated unjustly.

Points from my Model of Expressing Respect

2. Different kinds of symbolic messages:

- We should not, for example, call anyone ‘human garbage’ or turn away from them in utter contempt.
- Other messages are inappropriate to convey about certain kinds of people, such as exclaiming ‘What are you, blind!?’ to a blind person or maliciously laughing when she bumps into things.
- There are some messages that it is especially important not to send to people in social and historical contexts of disrespect, such as calling someone ‘dumb’ because she is deaf.

Points from my Model of Expressing Respect

3. It's often difficult to know what attitudes we or others have.
4. It's often difficult to know exactly what the effects on attitudes of respect and disrespect would be in the general public, in legal practice or for the person herself.
5. There is an important moral and practical distinction between expressions of disrespect, such as mocking or talking down to others, and expressions of positive respect, such as doing small favors for them.

1. Environments

Features of some environments:

- A second-story law office lacks an elevator
- A waiting room is not wheelchair accessible
- Signs and forms are not in accessible formats
- Pictures and artwork do not portray disabled people or do so only in a negative light

1. Environments

Messages that these environmental features send:

- Disabled people are unwelcome
- Our legal interests are less important than others
- Our feelings and preferences are less important than others
- Our moral and legal rights are less important than others
- We are especially fortunate to have access to legal services at all

These messages are often magnified by how the legal system has treated disabled people in the past.

1. Environments

- By designing, maintaining or failing to change environments that have these meanings, legal staff express disrespectful attitudes toward disabled people, either because they harbor these attitudes themselves or because their actions reinforce disrespectful attitudes about us.
- Aside from the ways that legal environments may interfere with our rights, wellbeing or interest in justice, they are also vehicles through which legal staff send disparaging messages to us and others about our basic worth as persons.
- Dinner party analogy

1. Environments

Legal staff can arrange their environments in ways that diminish, counteract or eliminate some of the disrespectful messages that those environments send about disabled people.

Examples:

- Ensure that their office meets appropriate accessibility standards,
- Seek input from disabled people in ways that are consistent with their privacy
- Advertise their willingness to serve disabled people.
- Simply show that they are aware of the messages that their environments can send to disabled people.
- Universal Design

2. Policies and Procedures

When offices have practices in place that violate the legitimate legal or moral rights that disabled people have to accessibility and reasonable accommodations, these practices are not only unjust, but they can have a symbolic meaning that the rights of disabled people are unimportant.

2. Policies and Procedures

An office may satisfy the letter of the law regarding its treatment of disabled people but do so in ways that show that those who are part of it do not fully endorse the spirit of those laws.

- An office lacks a comprehensive, well-conceived and effective accessibility plan for disabled people and instead delivers accommodations on an ad hoc basis.

This can send the message that

- it is not worth the time and effort to organize and test procedures for securing the rights of disabled people,
- The office is simply doing what is minimally required in order to avoid legal consequences
- The rights of disabled people otherwise do not matter as much as the rights of others

2. Policies and Procedures

Other offices may exploit certain legal exceptions in ways that express the view that the moral rights of disabled people are less important than those of others.

- An office may have a policy of refusing to provide certain services to people with certain kinds of disabilities because of the risks involved to their staff members
- They may be located in older buildings that do not have to conform to accessibility standards
- They may not install accessible equipment because of the hardships or costs of doing so.

Send the message that the moral rights disabled people have to inclusion and accommodation are not as important as those of others.

2. Policies and Procedures

Competency assessments:

- Mannerisms, facial expressions and tone of those who are performing or deciding whether to perform these tests, whether formally or informally

Often send the message that:

- They have prejudged the case
- The test is a mere formality
- The person's values or commitments are irrational

2. Policies and Procedures

Even for people who are legally incompetent, law offices can affirm the person's dignity by, in part, instituting policies that require legal staff

- To patiently listen to her ideas and concerns
- Make an effort to explain relevant options in terms she can understand
- Earnestly ask questions about the person's values and commitments
- Give her a say in matters for which she is competent to decide

3. Legal Staff

Examples:

- Mocking, ridiculing, sneering at or making fun of disabled people
- Using slow, high reassuring tones, talking down to them and not shaking their hands or addressing them with proper titles.
- Showing special curiosity about a person's disability
- Sighing, rolling their eyes or acting as if they are put out when we inquire about accessibility issues, request accommodations or simply ask for help

Expressions of Respect

Avoiding or counteracting these disparaging messages is morally important, not simply as ways of preventing hurt feelings.

It is also as ways of striving for and living up to morally valuable relationships of mutual respect, care and trust that are part of the ideal of a shared moral community of human beings.

4. Practical Suggestions

Practical Suggestions

1. Solicit feedback from disabled people about whether the office's environment, policies and staff might be sending offensive messages.

Practical Suggestions

2. Organize ethics training programs that help legal staff to identify, avoid or mitigate disparaging messages about disabled people that they might be sending.
 - Highlight the nature and value of respect.
 - Emphasize the moral responsibilities that legal staff have to cultivate that attitude in themselves.
 - Show them how actions, mannerisms, gestures as well as policies and environments can come to have symbolic meanings.
 - Explain how they can express respect and disrespect through these things in ways they might not be aware of.
 - Most importantly, teach them how disabled people have historically fared in legal practice and the ways this history informs the symbolic messages of contemporary legal practice.



Handwritten signature in black ink, possibly reading 'Pimânçerôo'.

Thank you



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The Arc of Change:

**From Dependence to
Independence; From
Surrogate Decision
Making to Supported
Decision Making**

February, 2019

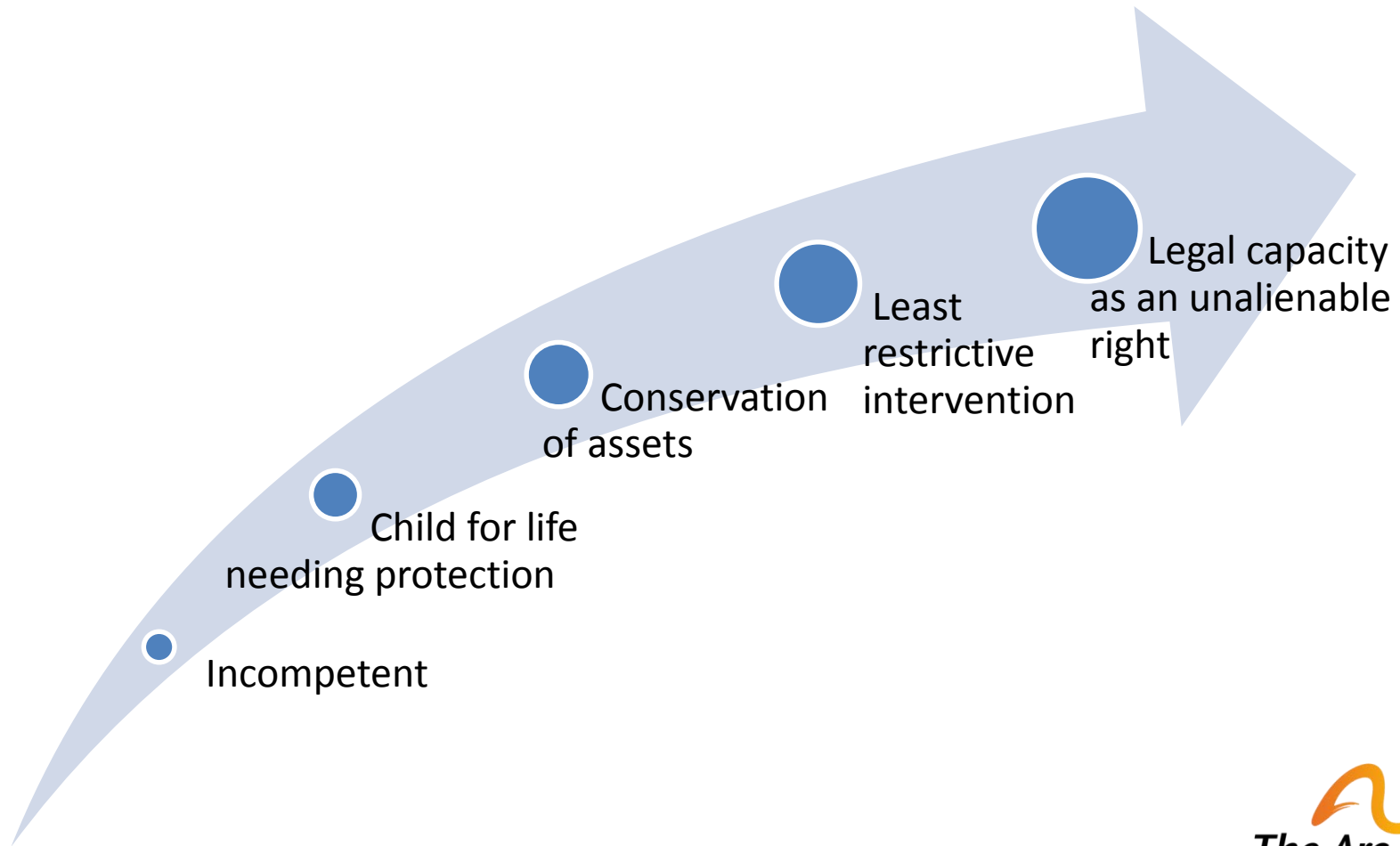
Lawrence R. Faulkner, Esq.

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Committee of the Incompetent

- Judicial finding of incompetence
- Loss of civil rights
- Person and property



Guardianship of Persons with “Mental Retardation,” 1969

- Now, *Persons Who Are Intellectually or Developmentally Disabled*.
- 17-A of Surrogate’s Court Procedure Act
- DD, Healthcare decisions - added later
- Sub-part of Article 17: Guardian of an Infant
 - Children for life
 - Determination of lack of capacity: medical diagnosis and best interest
 - No declaration of incompetence



Guardianship of Persons who are Intellectually or Developmentally Disabled

- Plenary appointment, some modification possible
- Limited “due process of law”
- Required reports limited to guardian of the property



Conservatorship 1972

- Statutory preference
- No declaration of incompetence
- Limited to property and finances



1975 - 1993

- MHL Article 78 – Committee of the Incompetent
- SCPA Article 17-A –Guardian of Persons Who Are Intellectually or Developmentally Disabled
- MHL Article 77 – Conservatorship



Guardianship

- MHL Article 81, 1993
 - repealed Committee of the Incompetent.
 - repealed Conservatorship.



Article 81 - Guardianship

- Tailored
- Least restrictive, other relief not adequate
- Appointment is “necessary” to provide for the personal needs of that person.
- Independent evaluation for court
- Not diagnosis-based
- Rights to counsel, hearing, etc.
- Limited appointment
- Annual reporting



1994 - Present

- SCPA 17-A: Guardianship of Persons Who Are Intellectually or Developmentally Disabled
- MHL 81: Guardianship



Rights, Perspective and Practice Have Changed

- Persons with disabilities, not disabled persons
- Adults, not special children or children for life
- Person-centered planning
- Council on Quality and Leadership (CQL)
- Choice
- Individuals are presumed to have all the rights of citizenship.



Paradigm Shift

- Individuals are presumed to have all the rights of citizenship.
- Shift from asking what the person cannot do to:
 - UN Convention on Rights of Persons with Disabilities.
 - what supports are necessary to enable the person to make a decision.
 - carry out that decision.
 - legal efforts to have decisions recognized by third parties.



SCPA 17-A

Proposed Reform Issues

- Person first language
- Removal of the two certifications of I/DD
- Standard of proof tailored to significant impairments exhibited in specific areas



SCPA 17 – A

Proposed Reform Issues

- Necessary findings:
 - last resort
 - tailored to actual impairment
 - consent or clear and convincing evidence of likely harm and failure to understand the likely consequences of the disability
- Alternatives to guardianship must have been considered.



Proposed Reforms

- Independent report to the court, possibly by MHLS
- Annual reports:
 - Person and Property



Not Available in 1969

- Health Care Proxy
- Family Health Care Decisions Act
- Health Care Decisions Act for Persons with DD
- Durable Power of Attorney
- Supported Decision Making



Supported Decision Making (SDM)

- Used when you make an important decision
- No single model
- Can be purely informal, done without legal sanction or legal enforceability. Many problems with this.
- Can be formalized through a legal agreement between the person with a disability and a trusted third party.
 - A pre-existing or new relationship given legal sanction



SDM: Elements

- Individual selects person(s) to provide support in an area(s) of decision making.
- Facilitator assists in this process.
- DM (Decision Maker):
 - seeks support and assistance in making specific decisions.
 - can change or discharge the “supporters.”



SDM Issues

- Issues to consider:
 - Insure informal or formal SDM does not substitute unregulated surrogate decision making for guardianship with oversight.
 - Need for individuals to perform the role(s) of support for the person, staffing, etc.
 - Does not eliminate need for oversight.
 - Funding



Supported Decision Making New York: www.sdmny.org

- Decision Maker
- Facilitator
- Supporters
- Decision Making Agreement
- Restoration and Diversion



SDMNY

- New York City: Hunter College
- Westchester: The Arc Westchester
- Rest of New York: New York Alliance for Inclusion and Innovation
- Disability Rights New York
- 5 year grant from NYS Developmental Disabilities Planning Council (DDPC)



SDMNY

- Now approaching year 4:
 - Facilitation model developed
 - More than 60 facilitators trained
 - Currently, 60 Decision Makers in facilitation proces.
 - 6 signed SDMA's
 - Expanding out of NYC and Westchester



SDM

“Don’t look at a person and ask what he/she cannot do, ask what it would take so he/she could do it.”

– Conceptual framework:

- All persons have the right to legal capacity.
- All persons have the right to help to exercise that right.
- All people can grow and develop and are entitled to conditions that foster their development.



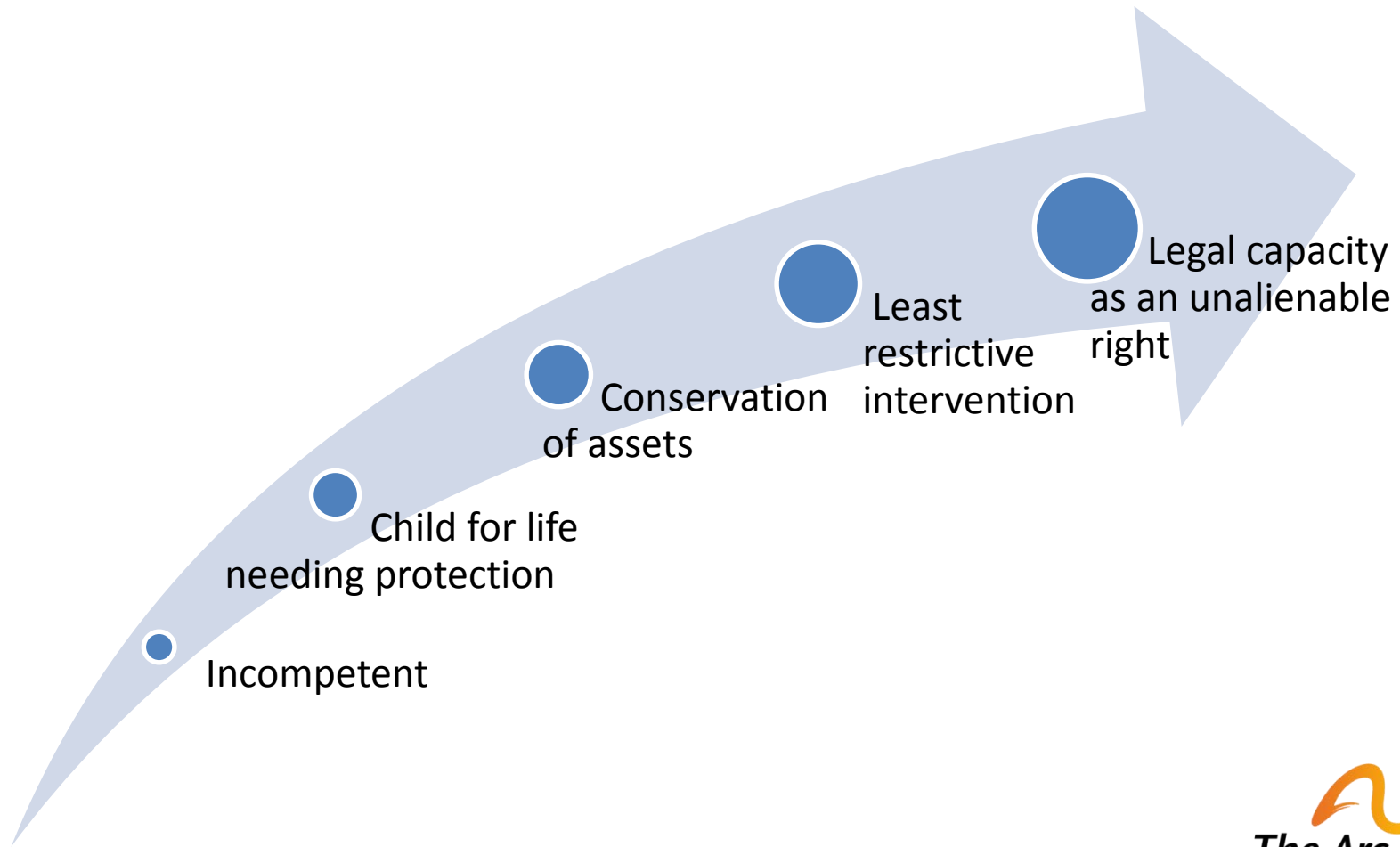
American Bar Association PRACTICAL Tool for Lawyers

- Presume guardianship is not needed.
- Reason identify reasons for concern.
- Ask if triggering concern is reversible or not.
- Community resources from family or others.
- Team to help make decisions.
- Identify abilities.
- Challenges need to be identified.
- Appoint a supporter or surrogate.
- Limit scope of guardianship.



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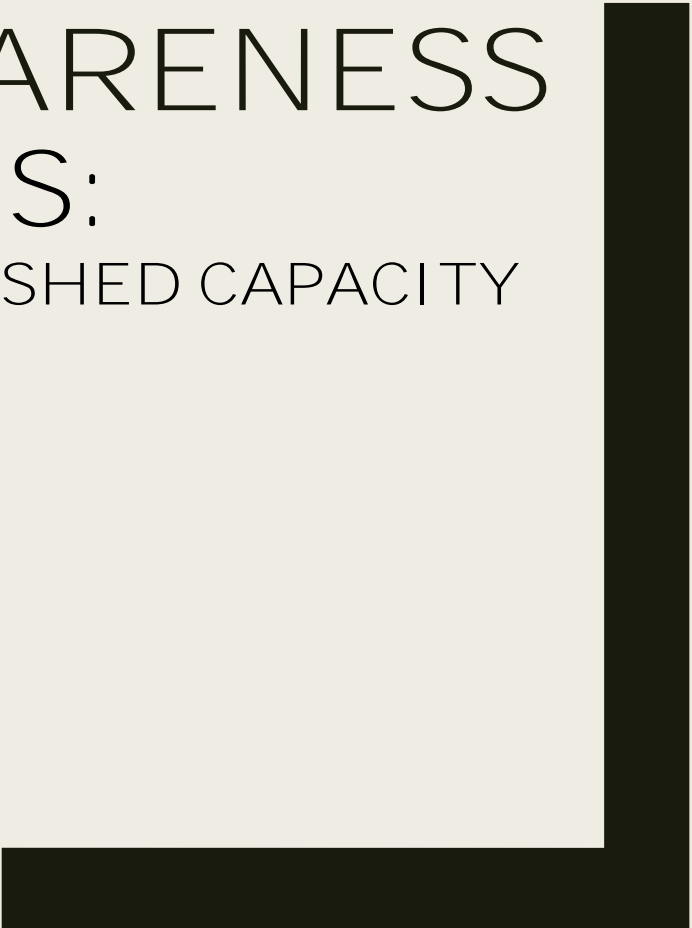
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AUTONOMY AND AWARENESS
ETHICAL ISSUES:
REPRESENTING CLIENTS WITH DIMINISHED CAPACITY

Professor Nancy Maurer
Albany Law School
February 27, 2019



OVERVIEW

- Access to Justice
- Making Law Practice Accessible
 - Legal obligations
 - Ethical obligations
- Representing Clients with Diminished Capacity
 - Conventional lawyer-client relationship;
 - Client autonomy
- Some Recommendations

HYPOTHETICAL CASE

- You have represented Jane, an elderly client, in a number of housing matters over the years. Jane is now in danger of being evicted from her apartment and is brought to your law office by a concerned neighbor. You would like to help.
- In the course of interviewing Jane, you observe that her responses are erratic and sometimes non-existent. She appears confused. You are concerned about her capacity to make decisions in connection with your representation.
- What do you do?

LAWYER'S DUTY TO PROMOTE ACCESS TO THE LEGAL SYSTEM

- NY Rules of Professional Conduct—preamble
- Pro Bono—Rule 6.1
- Persons with disabilities disproportionately under-served by the legal system
 - Census data
 - Income and Employment
 - Access to services
 - Bias

NON-DISCRIMINATION

- Law office as a public accommodation
 - Americans with Disabilities Act Title III
 - NY Human Rights Law
- Rules of Professional Conduct 8.4-misconduct
- **NY Ethics Op. 746**

Lawyer must take Client's capacity into account and provide client with information and explanations suitable to Client's understanding

LAWYER-CLIENT RELATIONSHIP

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 conventional relationship with the client.

CLIENT AUTONOMY

“Conventional” Lawyer/Client Relationship

- Client decision making authority (Rule 1.2)
- Communication and information from lawyer (Rule 1.4)
- Confidentiality of Communication (Rule 1.6)
- Independent judgment of lawyer, free from third party influence and other conflicts (Rule 1.7)

RULE 1.2: Scope Of Representation And Allocation Of Authority Between Client And Lawyer

- a **lawyer shall abide by a client's decisions concerning the** objectives of representation and, as required by Rule 1.4, shall consult with the client as to the means by which they are to be pursued
- Rule 1.2 comment [4]

In a case in which the client “appears to be suffering diminished capacity, the lawyer’s duty to abide by the client’s decisions is to be guided by reference to Rule 1.14.”

PROTECTIVE ACTION

RULE 1.14: Client With Diminished Capacity

(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.**

ASSESSING CLIENT CAPACITY

Rule 1.14 Comment[6]

In **determining the extent of the client's diminished capacity**, the lawyer should consider and balance such factors as:

- (i) the **client's ability to articulate reasoning leading to a decision**,
- (ii) variability of state of mind and ability to appreciate consequences of a decision; the substantive fairness of a decision, and
- (iii) the consistency of a decision with the known long-term commitments and values of the client.

In appropriate circumstances, the lawyer may seek guidance from an appropriate diagnostician.

CONFIDENTIALITY

RULE 1.14: Client With Diminished Capacity

(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.

Rule 1.6: Confidentiality

A lawyer shall not knowingly reveal confidential information . . . unless

- the client gives informed consent
- the disclosure is impliedly authorized to advance the best interests of the client and is either reasonable under the circumstances or customary in the professional community; or
- the disclosure is permitted by [this rule]

A lawyer may reveal or use confidential information to the extent that the lawyer reasonably believes necessary:

- to prevent reasonably certain death or substantial bodily harm;
- to prevent the client from committing a crime;
-

Recommendations

1. Presume competence and maintain a conventional lawyer-client relationship to extent possible
2. Consult with client even if “**legally** incompetent;” **client** may be able to make some decisions even if unable to fully participate in others.
3. Provide accommodations to maximize **the client’s** ability to fully participate in the lawyer-client relationship

Remember every client is different. Client is first source for identifying accommodations that may be helpful.

4. Be aware of bias including your own implicit biases

<https://implicit.harvard.edu/implicit/education.html>

5. Clarify relationships between client and family at the outset in a retainer agreement and letter of engagement.
6. Client controls the course of representation unless someone is a legally authorized representative acting in the interests of the client.
7. You may seek guidance from an appropriate diagnostician to help identify areas of functional capacity **and clarify client's wishes.**
8. Memorialize **the client's decisions** while the client has capacity. (e.g., goals of representation, boundaries of settlement, with whom the lawyer may consult)

9. Consider the least intrusive protective (or supportive) action possible
e.g., supported decision-making

10. Protective action should be guided by:
 - Wishes and values of the client to the extent known;
 - Maintaining **client's decision**-making autonomy to greatest extent possible;
 - Maximizing client capacities; and
 - Maximizing family and social connections and community resources.

11. Preserve all client confidences

Exceptions:

- life or death or a risk of serious bodily harm
- when the client is unable to make his or her own decisions and disclosure is necessary to protect the **client's interests and fulfill the purposes of the representation.**

12. Refer to the appropriate Protection & Advocacy agency which may have legal authority to protect the **client's rights and interests.**

CHAPTER ONE

ETHICAL ISSUES IN REPRESENTING CLIENTS WITH DIMINISHED CAPACITY

Nancy M. Maurer, Esq.*

* The author wishes to acknowledge Patricia W. Johnson, Esq., co-author of previous editions of this chapter.

[1.0] I. INTRODUCTION

Clients with diminished capacity are entitled to the same competent and diligent representation from their lawyers as are all clients. They have a right to confidentiality in communication and a right to the independent judgment of their lawyers. When a client's decision-making capacity is impaired by a disability, however, it may be more difficult for the lawyer to ensure these rights or to maintain a conventional lawyer-client relationship.¹

A lawyer representing a client with questionable capacity may be faced with ethical questions. When, if at all, should the lawyer substitute his or her judgment for that of an incapacitated or questionably capacitated client? To whom should the lawyer look for decision-making assistance when a client is impaired? May a lawyer seek assistance from the client's family, other third parties, or the courts without violating the duty of confidentiality to the client? Finally, is it legally or ethically permissible for a lawyer to refuse to represent a client with a disability or to withdraw from representation if a client becomes disabled?

This chapter focuses on some of the issues a lawyer may encounter in representing clients with diminished capacity² and examines the ways in which these issues are addressed in New York under the New York Rules of Professional Conduct (Rules) which became effective on April 1, 2009.³ The Rules, modeled on the ABA Model Rules of Professional Conduct now in effect in some form in every state other than California, replaced the prior Code of Professional Responsibility (Code). Although the Rules do not depart substantially from the prior Code in most areas, they do offer more specific guidance related to the representation of clients with diminished capacity.⁴

[1.1] II. ACCESS TO LEGAL SERVICES

The Preamble to the Rules recognizes that a lawyer "is a representative of clients and an officer of the legal system with special responsibility for the quality of justice . . . [E]ach lawyer has a duty to . . . promote access to the legal system and the administration of justice."⁵ The Rules address this premise by prohibiting discrimination on the basis of disability or other factors, and by encouraging pro bono activity.

[1.2] A. Nondiscrimination

[1.3] 1. N.Y. Rules of Professional Conduct

Lawyers and law firms are prohibited by the Rules, as well as by statute, from discriminating against people with disabilities. Rule 8.4, pertaining to misconduct, states that a lawyer shall not "unlawfully discriminate in the practice of law, including in hiring, promoting or otherwise determining conditions of employment on the basis of age, race, creed, color, national origin, sex, disability, marital status or sexual orientation."⁶ The prohibition against unlawful discrimination is broad in that it covers just about any aspect of law practice from client selection and representation to law firm hiring and employment practices. Rule 8.4(g) requires that a complaint of discrimination be brought before a tribunal with jurisdiction to hear such complaints. A final and enforceable determination by such tribunal "that the lawyer has engaged in an unlawful discriminatory practice shall constitute prima facie evidence of professional misconduct in a disciplinary proceeding."⁷ Examples of existing tribunals are the New York City Division of Human Rights; the New York State Division of Human Rights; the federal Equal Employment Opportunity Commission (EEOC); and courts of law with jurisdiction in accordance with N.Y. Executive Law §§ 290–301 (Human Rights Law), the Americans with Disabilities Act, or other statutes.

The New York State Bar Association and the courts have yet to address specifically claims of discrimination based on disability in the practice of law under Rule 8.4, including whether a lawyer's refusal to accept a client due to disability constitutes discrimination in violation of the Rules.⁸ Lawyers are advised

that legal representation should not be denied to any person “who is unable to afford legal services or whose cause is controversial or the subject of popular disapproval.”⁹ The Rules are otherwise silent with regard to client acceptance.¹⁰ Nevertheless, Rule 8.4 prohibiting discrimination suggests that traditional notions that lawyers have unfettered discretion to accept or refuse any client no longer apply.¹¹

Failure to provide accommodations to a client due to disability may constitute discrimination in the practice of law.¹² The Association of the Bar of the City of New York Committee on Professional and Judicial Ethics observed, for example:

[a] lawyer who represents a client with whom direct communications cannot be maintained in a mutually understood language, must evaluate the need for qualified interpreter service and take steps to secure the services of an interpreter, when needed for effective lawyer-client communications, to provide competent and zealous representation, preserve client confidences and avoid unlawful discrimination or prejudice in the practice of law.¹³

In response to an inquiry about the use of sign-language interpretation and the effect on attorney-client privilege, the NYSBA Committee on Professional Ethics observed that the use of an interpreter would not violate the requirement that a lawyer safeguard a client’s confidential information, and that such accommodation may be ethically required for effective communication and competent representation.¹⁴

The scope and application of the attorney-client privilege is a question of law beyond the jurisdiction of this Committee, but we note that courts have repeatedly held that the privilege is not waived by a lawyer’s use of an agent to facilitate communication with a client. If use of a sign-language interpreter is necessary for effective communication between the lawyer and client, it is ethically required.¹⁵

[1.4] 2. Statutory Prohibitions Against Discrimination

Since the 1980s, we have seen a growth of laws and regulations prohibiting discrimination and seeking to ensure equal opportunity and access to the benefits and services of society for people with disabilities. Some of these laws apply with equal force to lawyers and to law offices. Violations of anti-discrimination statutes implicate disciplinary Rule 8.4, which is based on “unlawful discrimination.”

[1.5] a. N.Y. Human Rights Law

The Human Rights Law in New York prohibits discrimination based on age, race, creed, color, national origin, sex, disability, marital status or sexual orientation in employment, housing, credit or places of public accommodation.¹⁶ Places of public accommodation include temporary abodes; places for eating, entertainment, recreation, medical treatment, amusement or exercise; transportation; and wholesale and retail stores and establishments dealing with goods or services of any kind.¹⁷ Lawyers and law offices, as both employers and public accommodations, are arguably prohibited from discriminating against people with disabilities. The courts have considered in the context of HIV/AIDS discrimination whether “public accommodation” includes private offices serving the public, such as physicians’ or dentists’ offices. In *Cahill v. Rosa*,¹⁸ the N.Y. Court of Appeals clarified that private dental offices are places of public accommodation under the Human Rights Law. On remand, the Court held that a dentist in private practice who failed to treat a patient perceived to have HIV was guilty of discrimination in violation of the Human Rights Law.¹⁹ However, in a subsequent case where a dentist conducted a complete oral examination and then referred the patient elsewhere for molar extraction—a procedure the dentist did not regularly perform—no violation was found.²⁰ The same reasoning can apply in the context of legal representation so that a lawyer or law office would likely violate the Human Rights Law (and be subject to discipline under Rule 8.4) by refusing to represent

a client due to HIV, but would not be liable if the refusal was based on the lawyer's lack of expertise in the field for which the client sought representation.

[1.6] b. Americans With Disabilities Act

[1.6] (ADA)

A lawyer's office is specifically covered by the Americans with Disabilities Act.²¹ Title III of the ADA prohibits discrimination "on the basis of disability in the full and equal enjoyment of the goods, services, facilities, privileges, advantages, or accommodations of any place of public accommodation."²² Certain private entities, including an "office of an accountant or *lawyer*," are considered public accommodations if the operations of such entities affect commerce.²³ A lawyer may not refuse to represent a client due to the client's disability unless the disability poses a "direct threat" to the health or safety of others.²⁴

In *Bragdon v. Abbott*,²⁵ a federal case also involving a dentist's refusal to treat a patient with HIV, the U.S. Supreme Court determined that individuals with asymptomatic HIV are disabled under the Americans with Disabilities Act. The Court remanded the case to decide whether the patient's HIV infection posed a significant risk to the health and safety of others.²⁶ The existence of a significant risk is to be determined from the standpoint of the person who refuses to treat or accommodate, and the risk must be assessed by medical or other objective evidence. On remand, the First Circuit Court of Appeals held that the dentist's performance of cavity-filling procedures on the patient did not pose a "direct threat" to others. The First Circuit left open the question of what constitutes a "direct threat," limiting its decision to the case-specific facts and recognizing the evolution of scientific knowledge.²⁷

[1.7] B. Withdrawal From Representation Based on Client Capacity

Once a lawyer undertakes representation, discretion to withdraw is limited. Rule 1.16, Declining or Terminating Representation, requires withdrawal in select circumstances such as avoiding representation that the lawyer knows is likely to result in a violation of the Rules, or for purposes of harassment or malicious injury to any person, or when "the lawyer's physical or mental condition materially impairs the lawyer's ability to represent the client."²⁸ Rule 1.16 otherwise allows withdrawal only when it "can be accomplished without material adverse effect on the interests of the client."²⁹ The Rules do, however, leave room for withdrawal from representation when a client makes it difficult for the lawyer to provide effective representation.

[A] lawyer may withdraw from representing a client when . . .

[T]he client insists upon taking action with which the lawyer has a fundamental disagreement;³⁰ [or]

. . . the client fails to cooperate in the representation or otherwise renders the representation unreasonably difficult for the lawyer to carry out employment effectively.³¹

A client's refusal or inability to comply with the advice of a lawyer may provide grounds for permissive withdrawal. For example, the Nassau County Bar Committee advised a lawyer representing a questionably capacitated client that when that lawyer was no longer able to provide effective representation, nothing in the Code would prohibit him from seeking permission to withdraw.³²

In a 1996 opinion, the ABA Standing Committee on Ethics and Professional Responsibility stated "withdrawal is ethically permissible as long as it can be accomplished without material adverse effect on the

interests of the client.”³³ The Committee observed, however, that when a client is impaired, such withdrawal leaves the client “without help at a time when the client needs it most.”³⁴ Therefore, “the better course of action . . . will often be for the lawyer to stay with the representation and seek appropriate protective action on behalf of the client.”³⁵

The Rules provide that “[e]ven when withdrawal is otherwise permitted or required, upon termination of representation, a lawyer shall take steps, to the extent reasonably practicable, to avoid foreseeable prejudice to the rights of the client . . .”³⁶

The Rules recognize the additional challenges of withdrawal where the client has diminished capacity.

If the client has severely diminished capacity, the client may lack the legal capacity to discharge the lawyer, and in any event the discharge may be seriously adverse to the client’s interests. The lawyer should make special effort to help the client consider the consequences and may take reasonably necessary protective action as provided in Rule 1.14.³⁷

Comments to Rule 1.14 add that “[p]rior to withdrawing from the representation of a client whose capacity is in question, the lawyer should consider taking reasonable protective action.”³⁸

[1.8] C. Pro Bono Obligations

The New York State Bar Association recognizes the need for pro bono assistance to make the legal system accessible to all people, including the poor and other disadvantaged populations. The Rules state that: “Lawyers are strongly encouraged to provide pro bono legal services to benefit poor persons.”³⁹ “Every lawyer should aspire to: (1) provide at least 50 hours of pro bono legal services each year to poor persons; and (2) contribute financially to organizations that provide legal services to poor persons.”⁴⁰

Pro bono services include civil or criminal legal services “to persons who are financially unable to compensate counsel; activities related to improving the administration of justice . . . and professional services to charitable, religious, civic and educational organizations in matters designed predominantly to address the needs of poor persons.”⁴¹ By suggesting a range of legal services and financial contributions that satisfy pro bono, the bar seeks to facilitate lawyers participating in pro bono services, including by government lawyers who otherwise face restrictions on outside practice.⁴²

A disproportionate number of people with disabilities are indigent and require pro bono assistance.⁴³ Access to legal services continues to be problematic.⁴⁴ At this writing, the Rules regarding pro bono assistance for attorneys already admitted to practice remain aspirational rather than mandatory.⁴⁵ Applicants for admission to the bar, however, are now required to provide 50 hours of law-related pro bono service as a condition of admission to practice.⁴⁶

[1.9] III. LAWYER-CLIENT RELATIONSHIP

[1.10] A. Client Autonomy

The Rules require a lawyer to “abide by a client’s decisions concerning the objectives of representation and . . . consult with the client as to the means by which they are to be pursued.”⁴⁷ A lawyer is expected to “explain a matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation.”⁴⁸ Specifically, a lawyer must abide by a client’s decision whether to settle a matter, or in a criminal case, after consultation, whether a client will enter a plea, waive a jury trial, or testify.⁴⁹ The client has the “ultimate authority to determine the purposes to be served by legal representation within

the limits imposed by law and the lawyer's professional obligations."⁵⁰ A lawyer "may exercise professional judgment to waive or fail to assert a right or position of the client, or accede to reasonable requests of opposing counsel, when doing so does not prejudice the rights of the client."⁵¹ However, if the lawyer seeks to exercise professional judgment in a manner "contrary to the client's instructions, the lawyer must consult with the client regarding the limitations on the lawyer's conduct."⁵²

When a client is incapable of making reasoned decisions, it may be challenging for the lawyer to assist the client or fully abide by the client's expressed wishes. In some instances it may be necessary for the lawyer to assume additional responsibilities to preserve the client's interests. "In a case in which the client appears to be suffering diminished capacity, the lawyer's duty to abide by the client's decision is to be guided by reference to Rule 1.14."⁵³ Rule 1.14: Client With Diminished Capacity with comments is attached to this chapter as an appendix.

[1.11] B. Lawyer's Responsibilities to Clients With Diminished Capacity

[1.12] 1. Rule 1.14

Rule 1.14 marks a significant departure from New York's prior Code of Professional Responsibility with regard to the lawyer's role in representing clients with questionable capacity. While Rule 1.14 requires the lawyer to maintain a conventional lawyer-client relationship where possible, the Rule also grants more direct authority for the lawyer to act on behalf of an incapacitated client than previously authorized by the Code.⁵⁴ Rule 1.14 allows the lawyer to take protective action when reasonably necessary to protect a client's interests, and in doing so, to reveal information about the client if necessary.⁵⁵ Because the Rules address the representation of clients with diminished capacity in obligatory terms rather than in the aspirational language of the Code, Rule 1.14 may now provide a basis for invoking the disciplinary process.

Rule 1.14: Client With Diminished Capacity provides:

- (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 conventional 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.⁵⁶

Rule 1.14(a) requires the lawyer to maintain a conventional lawyer-client relationship as far as reasonably possible.⁵⁷ Even a client with diminished capacity "often has the ability to understand, deliberate upon, and reach conclusions about matters affecting the client's own well-being."⁵⁸ Further, even where there are involved family members, the lawyer "must [sic] look to the client, and not family members, to make decisions on the client's behalf."⁵⁹ In any case, a client's disability "does not diminish the lawyer's obligation to treat the client attentively and with respect."⁶⁰

Rule 1.14(b), nevertheless, authorizes the lawyer to take “protective action” as necessary to preserve the client’s interests. The lawyer must reasonably believe that the client (1) has diminished capacity; (2) is at risk of substantial physical, financial or other harm unless action is taken; and (3) cannot adequately act in the client’s own interest. Such protective action may include consulting with other individuals or entities that may be able to protect the client, and, in appropriate cases, seeking appointment of a guardian *ad litem*, conservator or guardian.⁶¹

Comments to Rule 1.14, although non-binding, also provide guidance with regard to protective action and assessing client capacity. The comments stress client decision-making autonomy, maximizing client capacities, and respect for the client’s family and social connections.

Comment [5], for example, offers a list of protective measures, short of seeking appointment of a guardian or conservator over a client, that may be taken if the lawyer believes the client is at substantial risk of harm and the client “lacks capacity to communicate or make reasonable considered decisions” regarding the representation:

Such measures could include: consulting with family members, using a reconsideration period to permit clarification or improvement of circumstances, using voluntary surrogate decision-making tools such as durable powers of attorney or consulting with support groups, professional services, adult-protective agencies or other individuals or entities that have the ability to protect the client.⁶²

[1.13] 2. Other Guidance

ABA Model Rule 1.14 and ABA ethics opinions offer similar guidance. Commenting on ABA Model Rule 1.14(b), the ABA Standing Committee on Ethics and Professional Responsibility cautioned that “the lawyer should not seek protective action merely to protect the client from what the lawyer believes are errors in judgment.”⁶³ New York ethics opinions, including pre-2009 opinions based on the Code, may be considered as well. For example, in a 2001 opinion addressing whether an attorney may petition for the appointment of a guardian for a client with diminished capacity under EC 7-11 and 7-12, the NYSBA Ethics Committee relied in part on ABA Model Rule 1.14 as well as on ABA Formal Opinion 96-404 to articulate principles for attorney conduct.⁶⁴ The Committee advised that a lawyer serving as a client’s attorney-in-fact may not petition for the appointment of a guardian without the client’s consent unless the lawyer determines (1) the client is incapacitated; (2) there is no practical alternative, through the use of the power of attorney or otherwise, to protect the client’s best interests; and (3) there is no one else available to serve as petitioner. Subject to conflict of interest restrictions, if the lawyer petitions for the appointment of a guardian, the client does not oppose the petition, and the lawyer will not be a witness in a contested hearing, the lawyer may represent himself or herself in the proceeding.⁶⁵

[1.14] C. Determination of Client Capacity to Make Decisions

Clients with disabilities should be presumed capable of making decisions and participating in the lawyer-client relationship. This presumption of capacity applies even to clients residing in mental hygiene facilities.⁶⁶ Some clients, however, may in fact lack the ability to make judgments in their own interests.⁶⁷

The determination of a client’s capacity to make decisions is central to the lawyer-client relationship. The Rules recognize that there are varying degrees of disability, and that the lawyer’s responsibilities will vary depending on the level of the client’s decision-making capacity.⁶⁸ Even when a client lacks capacity to make legally binding decisions, the lawyer is reminded that the client may still have the “ability to understand, deliberate upon and reach conclusions about matters affecting the client’s own well-being.”⁶⁹ Most lawyers, however, are not trained to assess capacity.⁷⁰

Comments to the Rules now offer some guidance to help attorneys assess client decision-making capacity. The lawyer should balance the following factors:

(i) the client's ability to articulate reasoning leading to a decision, (ii) variability of state of mind and ability to appreciate consequences of a decision; the substantive fairness of a decision; and (iii) the consistency of a decision with the known long-term commitments and values of the client. In appropriate circumstances, the lawyer may seek guidance from an appropriate diagnostician.⁷¹

The following suggestions may further assist in assessing client capacity and determining whether a departure from the conventional lawyer-client relationship is appropriate:⁷²

1. Use a noncircular method to assess capacity. It is not enough to consider whether the client's decisions are unwise but, rather, whether the client can give reasons for specific decisions and understand the consequences. The lawyer should not "confuse eccentric with incapacity."⁷³
2. Review the sources of evidence relied upon in assessing capacity to determine if there is a bias or conflict which may cause the family or friends to exaggerate or misrepresent the client's problems.
3. Engage in a legal counseling process. In the course of providing information about the potential practical or legal outcomes of particular decisions, the lawyer will obtain information that will assist in determining client capacity. It is professionally appropriate for a lawyer, as an objective adviser, to help a client make fully informed, consistent and rational decisions and avoid potentially detrimental decisions.⁷⁴ The goal of counseling, however, is not to usurp the client's decision-making authority by obtaining client acquiescence in the lawyer's decision.
4. Client counseling should be ongoing to maintain communication and to regularly reassess decision-making capacity, recognizing capacity may change and may be present for some decisions and not for others.⁷⁵
5. Solicit client preferences and opinions. Client input will assist the lawyer in advocating on behalf of the client, even if the client is not fully able to make decisions.

As of this writing, New York has issued only one formal opinion based on Rule 1.14.⁷⁶ In that case, a lawyer who had previously represented an incapacitated client in connection with the appointment of a guardian for the client sought to later represent both the client and the guardian in a proceeding to terminate the guardianship. The Committee on Professional Ethics permitted the dual representation provided the lawyer reasonably believes that he or she will be able to competently and diligently represent both clients and obtains informed consent from each client, confirmed in writing.⁷⁷ The Committee noted that the lawyer "must take special care" in obtaining informed consent, and "must carefully assess Client's capacity to understand the conflict and to make a reasoned decision" because the client had been deemed incapacitated. The committee recognized, however, that "Rule 1.14 . . . our prior opinion in N.Y. State 746, and New York's Mental Hygiene Law—all support the conclusion that [the] Client may consent to this dual representation despite Client's present legal designation of incapacity."⁷⁸ The Committee further recognized a need to provide accommodations to maximize capacity: "Lawyer must take Client's capacity into account and provide client with information and explanations suitable to Client's understanding."⁷⁹

[1.15] D. Representing Incapacitated Clients in Emergency Situations

There may be circumstances in which an individual who is unable to establish a lawyer-client relationship needs legal intervention in order to prevent immediate harm. The N.Y. Rules are silent as to whether a lawyer may intervene in such situations.

The issue of whether a lawyer may act on behalf of a prospective or purported client who is incapacitated was first addressed by a working group of the Conference on Ethical Issues in Representing Older Clients.⁸⁰ The group recommended that, like implied consent for medical emergencies, a lawyer should be able to imply consent to act from a purported client,⁸¹ in the following circumstances:

- a. An emergency situation exists in which the purported client's substantial health, safety, financial, or liability interests are at stake;
- b. The purported client, in the lawyer's good faith judgment, lacks the ability to make or express considered judgments about action required to be taken because of an impairment of decision-making capacity;
- c. Time is of the essence; and
- d. The lawyer reasonably believes, in good faith, that no other lawyer is available or willing to act on behalf of the purported client.

The lawyer may take those actions necessary to maintain the status quo or to avoid irreversible harm even without express consent of the person.⁸²

In 1997, the ABA amended the comments, but not the text, of Model Rule 1.14 "to explain what a lawyer should do in an emergency that threatens the health, safety, or financial interest of a disabled person who is not yet a client."⁸³ The comments, which closely mirror the working group's recommendations, provide that in an emergency, a lawyer may take legal action on behalf of a person unable to establish a lawyer-client relationship.⁸⁴ Further, client confidences may be disclosed "to the extent necessary to accomplish the intended protective action."⁸⁵

Representing incapacitated clients in emergency situations, however, is controversial. The Committee on Professional Responsibility of the Association of the Bar of the City of New York (ABCNY) rejected the emergency provisions proposed by the working group and adopted by the ABA, stating that "[t]he very exigency of the situations contemplated by . . . [the] amendment would make the lawyer's 'good faith judgment' about the mental health of the purported client . . . inherently suspect."⁸⁶

The NYSBA declined to adopt the Model Rule Comments 9 and 10 regarding representation of purported clients in emergency situations basically for this reason, noting that these particular comments were controversial:

These Comments are controversial because they purport to authorize a lawyer to act on behalf of one who has not sought to employ the lawyer and with whom the lawyer has no relationship. Indeed, the Comments seem to go beyond the language of the Rule proper and have no other authority to support them.⁸⁷

Nevertheless, in considering whether or not to adopt the comments regarding emergency representation, the NYSBA Committee on Standards of Attorney Conduct observed that there may be situations that warrant such intervention:

[T]here may be situations where a person has such seriously diminished capacity so as to make it impossible for them to consult a lawyer and where outside forces will produce extensive and irreparable harm. An example might be a person with severe Alzheimer's disease who, without a lawyer's intervention, will be evicted and not be able to regain his or her tenancy. The extreme need represented by such cases is the justification for Comments [9] and [10].⁸⁸

Thus, the lawyer is left to make an individual determination whether to step in to assist in such cases. If a lawyer does act on behalf of a person with seriously diminished capacity in an emergency, such actions should be limited to those necessary to maintain the status quo or avoid irreparable harm. The lawyer should keep the confidences of the person as if dealing with a client, disclosing information only to the extent necessary to accomplish the intended protective action. The lawyer should disclose to any tribunal involved and to any other counsel involved the nature of his or her relationship with the incapacitated person. The lawyer should take steps to regularize the relationship or implement other protective solutions as soon as possible. Normally, a lawyer would not seek compensation for such emergency intervention.

[1.16] E. Protection and Advocacy Authority

There is also statutory authority pursuant to the federal Developmental Disabilities Assistance and Bill of Rights Act⁸⁹ and the Protection and Advocacy for Mentally Ill Individuals Act⁹⁰ for lawyers working in Protection and Advocacy (P&A) programs on behalf of individuals with disabilities to undertake such representation in the organization's name. As representative bodies charged under federal law with the authority to protect the rights of people with disabilities, P&A offices have standing to sue and may litigate to enforce the rights of people with disabilities regardless of individual client capacity to enter into such litigation.⁹¹

[1.17] F. Advocacy for Expressed Wishes Versus Best Interests

Rule 1.14 requires a lawyer to maintain a conventional relationship with a client with diminished capacity "as far as reasonably possible."⁹² This means advocating for the client's expressed wishes. At the same time, Rule 1.14 recognizes that a client's incapacity "casts additional responsibility on the lawyer" and that "protective action" may be necessary in order to protect a client's interests.⁹³ Thus, lawyers are asked to balance competing directives to advocate for the preferences of a client while protecting the client's best interests.⁹⁴ This can be difficult to do, and the temptation for the lawyer to impose the lawyer's own view of best interests on a client can be great when a client's judgment is impaired.

The trend in legislation and case law over the past 30 or more years has favored an advocacy or adversarial model in which the lawyer advocates for the client's wishes over a best interests approach in which the lawyer substitutes the lawyer's view of the client's interests.⁹⁵ The New Jersey case of *In re M.R.* illustrates the advocacy approach to representation and, although not binding in New York, offers persuasive guidance regarding the role of the lawyer.⁹⁶ In *M.R.*, the court specifically addressed the role of the attorney for a developmentally disabled adult in a contested guardianship proceeding. At issue was whether M.R., a "generally incompetent" adult woman, had capacity to choose where to live, and which party would bear the burden of proving capacity or incapacity for such decision making.⁹⁷ In defining the attorney's role in this case, the court began with the premise that all people, including people with developmental disabilities, should have the right of self-determination:⁹⁸

First, a declaration of incompetency does not deprive a developmentally disabled person of the right to make all decisions. The primary duty of the attorney for such a person is to

protect that person's rights, including the right to make decisions on specific matters. Generally, the attorney should advocate any decision made by the developmentally disabled person.⁹⁹

The *M.R.* court tempered the client's right to fully make decisions, however, with concern for best interests.¹⁰⁰ On perceiving a conflict between that person's preferences and best interests, the attorney may inform the court of the possible need for a guardian *ad litem*.¹⁰¹ Nevertheless, the role of the attorney, as distinguished from that of the guardian *ad litem*, should be to advocate for the client's preferences. As the court stated:

An adversarial role for the attorney recognizes that even if the client's incompetency is uncontested, the client may want to contest other issues, such as the identity of the guardian or . . . the client's place of residence. With proper advice and assistance, the developmentally disabled client may be able to participate in such a decision.¹⁰²

The adversarial role does not extend to advocating decisions that are "patently absurd or that pose an undue risk of harm to the client."¹⁰³ Thus, the court concluded that the attorney's role should be "to advocate [for the client's] choice, as long as it does not pose unreasonable risks for her health, safety, and welfare."¹⁰⁴ The court's reasoning is consistent with the N.Y. Rules, which provide that the lawyer "shall not intentionally fail to seek the objectives of the client through reasonably available means."¹⁰⁵

The advocacy versus best interests approach was long debated in the context of civil commitment and guardianship cases.¹⁰⁶ For example, in a frequently cited case from the state of Washington, *Quesnell v. State*,¹⁰⁷ the court set forth guidelines for lawyers representing clients in civil commitment hearings. *Quesnell* held that a lawyer appointed for the benefit of an alleged incompetent individual must act as an advocate and "submit to the court all relevant defenses or legal claims his client may have."¹⁰⁸ The court found it was inappropriate for the lawyer to waive any fundamental right over the objection of the alleged incompetent individual—in this case, the right to a jury trial.¹⁰⁹

The advocacy approach is based on the notion that having the lawyer decide what best serves the client's interests is unduly paternalistic and usurps the function of the courts. In addition, advocacy is more compatible with concepts of informed consent.¹¹⁰ If a questionably capacitated client chooses not to assert his or her rights or to challenge a proceeding such as a guardianship, however, the purely adversarial model may be less effective. The lawyer opposing such proceedings without client direction to do so may, in fact, be acting paternalistically.¹¹¹

[1.18] IV. EXERCISING INDEPENDENT JUDGMENT AND AVOIDING CONFLICTS OF INTEREST

The Rules advise a lawyer to look to the legal representative of an incapacitated client to make decisions that are normally the client's prerogative.¹¹² Often, it is a legal representative (such as a parent or guardian of a minor) or a nonlegal representative (such as a friend or family member) who retains a lawyer on behalf of an impaired client. The involvement of such third-party representatives can affect the lawyer's duty to exercise independent professional judgment on behalf of a client along with the duty to avoid conflicts of interest.¹¹³

[1.19] A. Determining Who Is the Client

At the outset, the lawyer must determine and clarify for all concerned who is the client.¹¹⁴ In public law offices such as those providing legal services on behalf of clients with developmental disabilities or mental illness (e.g., P&A offices), the person with a disability is presumed to be the client, regardless of who brings

the case to the attention of the lawyer. Who the client is may not always be as clear in private practice where the lawyer is retained by a third party to represent a questionably capacitated individual. To avoid confusion, the nature and limits of the representation should be articulated in a retainer agreement or otherwise documented.¹¹⁵ Where there is a potential conflict of interest, one (or both) of the parties should be referred to other lawyers.¹¹⁶

In some instances, a lawyer may owe a duty to the person with a disability, even though the lawyer is clearly retained to represent a third party. For example, a lawyer representing a guardian, as distinct from a ward, may owe a duty to protect the ward.¹¹⁷ This duty was underscored in a 1978 opinion of the NYSBA Committee on Professional Ethics where a lawyer representing a guardian sought advice regarding the lawyer's obligation to disclose guardian misconduct to the court. In this case, the guardian had refused to comply with a court order directing the disposition of funds to the infant ward. The Ethics Committee ruled that while the lawyer nominally represented the guardian, "in fact and legal theory" such representation was only to the extent that the guardian acted in a fiduciary capacity for the infant's benefit.¹¹⁸ The Committee stated:

The lawyer owes his allegiance to the infant whom he represents through the guardian. Hence, the lawyer is ethically bound to treat the infant as his client and to act in a manner consistent with the best interests of the infant when those interests appear to conflict with the actions of the guardian.¹¹⁹

The Committee recognized the court as the final arbiter of the infant's interests, since the guardian's powers were derived from the court and the guardian was required to account to the court.¹²⁰ The committee further noted that information regarding the guardian's fiduciary responsibilities could not be withheld from the court as confidential.¹²¹

Rule 1.14 comments similarly advise the lawyer for the guardian to protect the interests of the ward. If the lawyer "reasonably believes that the guardian is acting adversely to the ward's interest, the lawyer may have an obligation to prevent or rectify the guardian's misconduct."¹²²

[1.20] B. Interests of Third Parties

In most cases, the interests of third parties such as parents, guardians or friends will conform to those of the incapacitated or questionably capacitated client. Generally, such parties will assist the lawyer in articulating the client's needs and interests and in enforcing the client's rights.¹²³ In some instances, however, the interests of third parties may conflict with those of the client. *In re M.R.*¹²⁴ again illustrates this point. M.R., an adult who had been determined to be incapable of managing herself or her affairs and in need of a guardian, expressed a desire to reside with her noncustodial parent. The Court held that the burden was on the custodial parent to demonstrate by clear and convincing evidence that M.R. lacked the specific capacity to decide where to live. If the trial court determined she was incapable of making the decision, the burden would shift to the other parent to demonstrate that a change in residence was in M.R.'s best interests.¹²⁵ M.R.'s lawyer was directed, in any event, to advocate for his client's preferences.

The Rules require the lawyer to exercise independent judgment on behalf of the client, free from compromising influences and loyalties.¹²⁶ Thus, a lawyer representing a client in an ongoing real estate transaction was precluded from representing the client's relatives in a proceeding to have the client declared incompetent.¹²⁷ Even when a lawyer determines that protective action such as guardianship is necessary to preserve the interests of a client, the lawyer may not represent a third party in seeking a court-appointed guardian. Such representation would necessarily be adverse to the client.¹²⁸

The Rules repeatedly caution about potential conflicts that may arise from a third party paying for the legal services of another. For example, Rule 5.4(c) states:

Unless authorized by law, a lawyer shall not permit a person who recommends, employs or pays the lawyer to render legal service for another to direct or regulate the lawyer's professional judgment in rendering such legal services or to cause the lawyer to compromise the lawyer's duty to maintain the confidential information of the client under Rule 1.6.¹²⁹

Lawyers employed by organizations or agencies that provide services including legal assistance for people with disabilities must also take care to avoid the influence of their employers. This caution applies to service-providing organizations such as the ARC and mental health organizations, as well as to legal services offices, P&A offices and other not-for-profit agencies whose mission is to effect litigation and law reform in addition to providing individual representation.¹³⁰

[1.21] C. Appointment of a Guardian *ad Litem* in Court Proceedings

A guardian *ad litem* may be appointed by a court to articulate and protect the interests of a client with diminished capacity involved in litigation when there is no third party (e.g., parent or guardian) or when a third party is acting against the client's interests.¹³¹ It has been suggested that when there is a conflict of interest between the client and the interested third party, "an attorney's failure to secure an independent representative would subvert the ethical requirement that attorneys zealously represent their clients, and would violate the lawyer's fiduciary duties to the client."¹³²

In *In re Judicial Review of S.A.*,¹³³ the Vermont Supreme Court opined that counsel for a noncommunicating incompetent client should request a guardian *ad litem* in a proceeding to discharge a client to the community, notwithstanding the fact that the client's parents had been appointed as guardians of the person. In this case the parents/guardians had challenged the client's eligibility for community care and objected to the discharge. In reaching its decision, the Court may have been concerned with the possible conflicting interests of the client and guardians.¹³⁴

New York Civil Practice Law and Rules (CPLR) provides additional guidance for representation of incapacitated clients in court. Section 1201 of the CPLR addresses representation of infants, incompetent persons or conservatees in court proceedings, and provides that a person adjudicated incompetent shall appear by his or her committee or conservator. Presumably, a person found incapacitated pursuant to an Article 81 guardianship proceeding would appear through the designated guardian.¹³⁵ Civil Practice Law and Rules 1201 further provides that the court must appoint a guardian *ad litem* where a conflict of interest exists between the incompetent/incapacitated person and his or her fiduciary, or for other cause. The court also must appoint a guardian *ad litem* for a party who, although not adjudicated incompetent or incapacitated, is "incapable of adequately prosecuting or defending his rights."¹³⁶ A guardian *ad litem* may be appointed at any stage of a court proceeding.¹³⁷

Guardians *ad litem*, however, generally are not available in administrative matters or in informal legal contexts such as negotiations. As one commentator noted, "these informal legal actions are the heart of day-to-day representation of retarded persons [sic], and therefore particularly require some mechanism for providing qualified and objective persons to act as temporary representatives."¹³⁸

The decision to request a guardian *ad litem* on behalf of a client should be made based on the need to protect a client's interests. Comments to Rules 1.14 recognize that rules of procedure sometimes provide for the appointment of a guardian or next friend in litigation, but that such appointments can be unnecessarily expensive or traumatic for the client.¹³⁹

[1.22] V. CONFIDENTIALITY

Another principle of legal practice is the preservation of client confidences. Confidentiality of information is governed primarily by Rule 1.6, which provides in relevant part:

- (a) A lawyer shall not knowingly reveal confidential information . . . unless
 - (1) the client gives informed consent . . .
 - (2) the disclosure is impliedly authorized to advance the best interests of the client and is either reasonable under the circumstances or customary in the professional community; or
 - (3) the disclosure is permitted by [this rule]
- (b) A lawyer may reveal or use confidential information to the extent that the lawyer reasonably believes necessary:
 - (1) to prevent reasonably certain death or substantial bodily harm;
 - (2) to prevent the client from committing a crime;
 - (3) to withdraw a written or oral opinion or representation previously given by the lawyer and reasonably believed by the lawyer still to be relied upon by a third person, where the lawyer has discovered that the opinion or representation was based on materially inaccurate information or is being used to further a crime or fraud;
 - (4) to secure legal advice about compliance with these Rules or other law by the lawyer, another lawyer associated with the lawyer's firm or the law firm;
 - (5) (i) to defend the lawyer or lawyer's employees and associates against an accusation of wrongful conduct; or (ii) to establish or collect a fee; or
 - (6) when permitted or required under these Rules or to comply with other law or court order.¹⁴⁰

The definition of confidential information is quite broad. It "consists of information gained during or relating to the representation of a client, whatever its source, that is (a) protected by attorney-client privilege, (b) likely to be embarrassing or detrimental to the client if disclosed, or (c) information that the client has requested be kept confidential."¹⁴¹ It excludes the lawyer's legal knowledge, and research or information that is generally known in the community or profession.¹⁴² The distinction between client confidences and secrets found in the Code has been eliminated.¹⁴³

Rule 1.6 differs in several respects from the prior Code provision on confidentiality. Significantly, despite the breadth of confidentiality protection, the lawyer is given greater discretion under the new Rules to disclose information. While information relating to the representation of a client with diminished capacity is specifically protected by Rule 1.6 as well as Rule 1.14(c), the lawyer is "impliedly authorized under Rule 1.6(a) to reveal information about the client . . . to the extent reasonably necessary to protect the client's interests."¹⁴⁴ Two additional exceptions to confidentiality are recognized under Rule 1.6: to prevent reasonably certain death or serious bodily harm¹⁴⁵ and to secure legal advice about compliance with the Rules of Professional Conduct.¹⁴⁶

Ethical decisions under the prior Code as well as the ABA Model Rules had previously carved out confidentiality exceptions now adopted in large part in New York. For example, a lawyer was permitted to disclose a client's intent to commit suicide.¹⁴⁷ The NYSBA Committee on Professional Ethics indicated that the lawyer may take appropriate steps to prevent the act, including revealing client confidences. In this situation, society's concern for the preservation of human life was found to outweigh the duty to maintain confidentiality.¹⁴⁸

Under limited circumstances, a lawyer was also permitted to disclose confidential information regarding a client's disability in connection with guardianship or other protective proceedings. For example, one ethics committee ruled that a lawyer may petition for appointment of a conservator¹⁴⁹ for a client when the lawyer feels the client is no longer able to make decisions.¹⁵⁰ In that case, the lawyer believed that his client was unable to care for himself or his property due to alcoholism. The lawyer predicted that without a conservator, the client would meet financial, if not personal, ruin. The ABCNY found that under EC 7-12 of the prior Code of Professional Responsibility, if a lawyer determines that a client's disability is so severe as to compel the lawyer to make the decision regarding appointment of a conservator, and the lawyer concludes that the only way to safeguard the client's interests is to disclose information regarding the disability, the lawyer may ethically do so.¹⁵¹ Although it is preferable for someone other than the lawyer to petition for the conservatorship, an attorney is not barred from making such a petition.¹⁵² The lawyer was further instructed to take steps to minimize the risks to the client that might be caused by disclosure of confidences in connection with such proceedings. The lawyer was advised to seek judicial permission to make submissions containing client confidences in camera and to request that the file be maintained under seal.¹⁵³

In another opinion, the ABCNY ruled that a lawyer is permitted, but not obligated, to seek the appointment of a conservator if the lawyer "reasonably believes the client incapable" of making certain decisions.¹⁵⁴ Further, if an appointment is sought, it may be necessary to reveal aspects of the client's mental condition to relatives or the court.¹⁵⁵ The ABCNY cautioned, however, that "[t]he lawyer should be careful . . . to disclose no more than is absolutely necessary concerning the mental condition of the client to assure that the client's interest is adequately protected by the appointment of a conservator."¹⁵⁶

Other ethics committees have strictly applied the requirements of confidentiality where the concerns were purely financial and there was no danger to the client or others. For example, a lawyer was not permitted to discuss with the client's relatives the need for a conservatorship for an eccentric and possibly incapacitated client who had consulted with the lawyer about redrafting her will.¹⁵⁷ Significantly, confidences were construed broadly in this case to include the client's appearance and behavior as well as her statements.¹⁵⁸

Comment 6 to N.Y. Rule 1.14 states that "in determining the extent of the client's diminished capacity, the lawyer [may] . . . in appropriate circumstances . . . seek guidance from an appropriate diagnostician."¹⁵⁹ Such disclosure may be necessary to avoid irreparable harm to the client's interests and to carry out the representation itself.¹⁶⁰ ABA ethics opinions similarly imply authorization to consult with a client's physician concerning a medical condition, even without the client's consent.¹⁶¹ While such consultation may entail disclosure of confidential information, the diagnostician likely will be bound by confidentiality standards similar to those of the lawyer.¹⁶²

As with other principles of practice, the duty to preserve the confidential information of a client with diminished capacity may sometimes conflict with the duty to advocate for the client and advance the client's wishes and interests. Guidance regarding client confidentiality remains inconsistent. The fact that disclosure of a client's diminished capacity could adversely affect a client's interests is specifically recognized in comments to New York's Rule 1.14, which note that such disclosure could lead to involuntary commitment proceedings. Because of the possible negative impact, a lawyer may not disclose information about the

representation unless “authorized.” When taking protective action, however, disclosure is “impliedly authorized . . . even when the client directs the lawyer to the contrary.”¹⁶³ The lawyer is advised to “determine whether it is likely that the person or entity consulted will act adversely to the client’s interests before discussing matters related to the client.”¹⁶⁴

[1.23] VI. CONCLUSION AND RECOMMENDATIONS

The New York Rules of Professional Conduct explicitly prohibit discrimination by lawyers on the basis of disability and encourage pro bono assistance on behalf of indigent and underrepresented clients. The Rules and accompanying comments provide much-needed guidance to lawyers representing clients with diminished capacity. They reinforce the importance of maintaining a conventional lawyer-client relationship, respecting client autonomy, and protecting client confidences. At the same time, the Rules recognize that in some instances, clients may be unable to engage in the necessary decision-making process to protect their own interests. In such instances, a lawyer is authorized to consult with family or appropriate professionals to assist in determining client capacity and to effectuate the purposes of the representation.

It may be difficult at times to balance the competing demands of client autonomy, advocacy, and service in the client’s best interest. Nevertheless, it is important for lawyers to try to do so and to undertake affirmative efforts to provide representation to clients who have disabilities. Outlined below are some suggested steps lawyers may take to minimize the potential for ethical conflict in order to promote the rights of clients with diminished capacity and to ensure that both the client’s rights and the lawyer’s integrity are protected.¹⁶⁵

1. Presume the client is competent. To the greatest extent possible, the lawyer must maintain a conventional lawyer-client relationship. This requires:
 - a. competent and diligent representation;
 - b. independent judgment and counseling free from conflicting interests and influences of third parties;
 - c. respect for client autonomy which recognizes the client’s right to make poor but reasoned judgments; and
 - d. preservation of client confidences.
2. Consult with and advise the client regarding legal decisions even if the client is legally incompetent; recognize that there are varying degrees of capacity and that the client may be able to make some decisions even if unable to fully participate in others.
3. Take steps to maximize the client’s ability to fully participate in the lawyer-client relationship by providing reasonable accommodations to enhance client communication and understanding, as well as access to the legal assistance.¹⁶⁶ Provide ongoing counseling regarding decision making.
4. In dealing with family members or other third-party representatives, remember that the client controls the course of representation unless one of the third parties is a legally authorized representative acting in the interests of the client.
5. The relationships between the interested parties such as client and family members should be clarified at the outset in a retainer agreement and letter of engagement. With the client’s informed consent, the lawyer may confer with family, friends, professionals and other third parties. Such consent should be confirmed in writing.

6. Where the client's capacity is questionable, the lawyer may seek guidance from an appropriate diagnostician.¹⁶⁷ Consultation with the client's physician, nurse, psychologist or social worker may assist the lawyer in assessing the client's capacity and in determining the client's wishes. Since each such professional is bound by client privilege under New York law, such disclosures require client consent, but should otherwise remain confidential.¹⁶⁸
7. If possible, the lawyer should memorialize the client's decisions while the client has capacity. For example, the goals of representation, including the boundaries of settlement and with whom the lawyer may consult, should be committed to writing and acknowledged by the client.¹⁶⁹
8. If the client is incapable of making decisions in the client's own interests, is at risk of substantial harm, and is without a legal representative, the lawyer should consider the least intrusive protective action possible, including consulting with family and experts or entering voluntary surrogate decision making.
9. If the lawyer takes protective action, the lawyer's action should be guided by:
 - a. the wishes and values of the client to the extent known; otherwise, according to the client's best interests;
 - b. the goal of intruding into the client's decision-making autonomy to the least extent possible;
 - c. the goal of maximizing client capacities; and
 - d. the goal of maximizing family and social connections and community resources.¹⁷⁰
10. The lawyer should request the appointment of a guardian *ad litem* in court proceedings if necessary to protect the client's interests.
11. The lawyer must preserve all client confidences with the following exceptions:
 - a. when it is a matter of life or death or a risk of serious bodily harm (such as when a client discloses the intention to commit suicide); or
 - b. when the client is unable to make his or her own decisions and disclosure is necessary to protect the client's interests and fulfill the purposes of the representation. Care should be taken to limit the impact of disclosure by revealing only what is absolutely necessary to the court in camera (e.g., guardianship cases).
12. If a client becomes incapacitated and is no longer able to participate in the lawyer-client relationship, the lawyer should stay with the situation where possible and take the least intrusive protective action, rather than withdraw entirely from representation.
13. In emergency situations where a prospective client is unable to enter into a lawyer-client relationship due to seriously diminished capacity, substantial interests are at stake, and time is of the essence, the lawyer should consider taking action on the prospective client's behalf, even without express client consent, in order to preserve the status quo or prevent immediate and irrevocable harm to the prospective client.

Consider referring the matter to the appropriate Protection & Advocacy agency which may have legal authority to protect the client's rights and interests.

14. Recognizing that there may be potential ethical dilemmas, the lawyer should develop an individual plan for representation with each client. Decisions and the reasoning behind them should be documented to protect both the lawyer and the client.

Notes

- 1 This chapter provides an overview of some of the ethical considerations that may arise in the representation of clients with questionable capacity. It borrows from the work of numerous commentators, including Paul R. Tremblay, *A Primer on the Ethical Duties of a Lawyer Who Represents a Questionably Competent Client*, in *Ethical Lawyering in Massachusetts*, ETHLII MA-CLE C-1 (2009); Judith Kilpatrick, *Ethical Issues in Representing Clients With Diminished Capacities*, 2003 Ark. L. Notes 57 (2003); David A. Green, “I’m OK-You’re OK”: *Educating Lawyers to “Maintain a Normal Client-Lawyer Relationship” With a Client With a Mental Disability*, 28 J. Legal Prof. 65 (2003–04); Jan Ellen Rein, *Ethics and the Questionably Competent Client: What the Model Rules Say and Don’t Say*, 9 Stan. L. & Pol’y Rev. 241 (1998); Association of the Bar of the City of New York, Committee on Professional Responsibility, *A Delicate Balance: Ethical Rules for Those Who Represent Incompetent Clients*, 52 The Record of the Ass’n of The Bar of the City of N.Y. 34 (1997); Steven D. Pepe *et al.*, *Working with Questionably Competent Clients: Ethical Dilemmas in Lawyering—Parts I and II*, 4 Best Practice Notes on Delivery of Assistance to Older Persons Nos. 2 & 3 Center for Social Gerontology, Inc. (Dec. 1990); 5 Best Practice Notes on Delivery of Assistance to Older Persons No. 1 (Apr. 1991); Stanley S. Herr, *Representation of Clients with Disabilities: Issues of Ethics and Control*, 17 N.Y.U. Rev. L. & Soc. Change 609 (1989–90); Paul R. Tremblay, *On Persuasion and Paternalism: Lawyer Decisionmaking and the Questionably Competent Client*, 3 Utah L. Rev. 515 (1987); 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); *Client Under a Disability*, Laws. Man. on Prof. Conduct (ABA/BNA 1984); Neil H. Mickenberg, *The Silent Clients: Legal and Ethical Considerations in Representing Severely and Profoundly Retarded Individuals*, 31 Stan. L. Rev. 625 (1979); Michael Blinick, *Mental Disability, Legal Ethics and Professional Responsibility*, 33 Alb. L. Rev. 92 (1968).

For a comprehensive scholarly discussion of ethical issues in representing both prospective and actual clients with questionable capacity, see Bruce A. Green and Nancy Coleman, *Ethical Issues in Representing Older Clients*, 62 Fordham L. Rev. 961 (1994); Paul R. Tremblay, *Impromptu Lawyering and De Facto Guardians*, 62 Fordham L. Rev. 1429 (1994); Peter Margulies, *Access, Connection, and Voice: A Contextual Approach to Representing Senior Citizens of Questionable Capacity*, 62 Fordham L. Rev. 1073 (1994). See also Mark Falk, *Ethical Considerations in Representing the Elderly*, 36 S.D. L. Rev. 54 (1991).

For a discussion of the ethical obligations of an attorney representing an alleged incapacitated person in Article 81 guardianship proceedings, see Ira Salzman, *The Role of the Attorney for the AIP*, vol. 1, ch. 8, *Guardianship Practice in New York State* (NYSBA 1997). At the website www.guardianship.org, members of the National Guardianship Association can access an ethics hotline, and individuals and organizations may join the association.

For a case study of the ethical considerations in determining capacity and representing a client with questionable capacity, see Mark Spiegel, *The Story of Mr. G.: Reflections Upon the Questionably Competent Client*, 69 Fordham L. Rev. 1179 (2000).

- 2 Most people with disabilities, including mental disabilities, retain the capacity to make decisions. Physical or sensory impairments, for example, do not generally affect independent decision-making capacity, but may require accommodations. For an analysis of selected ethical issues in the representation of clients with AIDS or HIV infection, see Robert T. Begg, *Legal Ethics and AIDS: An Analysis of Selected Issues*, 3 Geo. J. Legal Ethics 1 (1989).
- 3 The New York Rules of Professional Conduct were adopted by the Appellate Division of the New York State Supreme Court, effective April 1, 2009, and are published as part 1200 of the Joint Rules of the Appellate Division (N.Y. Comp. Codes R. & Regs. pt. 1200 (N.Y.C.R.R.)). The Appellate Division did not adopt the Preamble, Scope, and Comments, which are published solely by the New York State Bar Association to provide guidance for complying with the Rules. They are also discussed in this chapter for guidance. Only the Rules may form the basis for disciplinary action. The New York Rules of Professional Conduct, as well as the Rules with Comments, can be accessed at www.nysba.org.
- 4 Case law and ethical opinions from New York State decided under the prior Code, as well as cases and opinions from other jurisdictions and the ABA Model Rules of Professional Conduct, are referenced where they provide additional guidance. Differences between the old and new provisions are noted as appropriate. Where possible, recommendations are regarding lawyer conduct.
- 5 Preamble, N.Y. Rules of Professional Conduct (2017) (N.Y. Rules). The Preamble, along with the Scope and Comments, was issued by the N.Y. State Bar Association and was not enacted with the Rules.
- 6 N.Y. Rules, Rule 8.4(g). The language of Rule 8.4 remains essentially unchanged from the prohibition against discrimination contained in the prior Code, Disciplinary Rule 1-102(A)(6).
- 7 *Id.*
- 8 However, see *infra* note 13 and accompanying text. See also Debra S. Katz & Richard Koffman, *Ethical Issues in Employment Law Practice: Discrimination in Client Selection—Can Attorneys Lawfully Reject Certain Classes of Clients?*, ALI-ABA CLE Course of Study Materials—Employment Law (1998) (discussing *Stropnick v. Nathanson*, 19 M.D.L.R. (Landlaw, Inc.) 39 (MCAD Feb. 25, 1997), in which the Massachusetts Commission Against Discrimination (MCAD) ruled that an attorney who refused to represent a man in divorce proceedings because of a law firm policy to represent only wives in such proceedings had violated a state statute prohibiting discrimination in places of public accommodation).

- 9 Rule 1.2 cmt. 5.
- 10 This is a change from the prior N.Y. Code of Professional Responsibility, which advised that “[a] lawyer is under no obligation to act as advisor or advocate for every person who may wish to become a client.” NY CLS Jud. Appx. EC 2-26. In fact, “a lawyer should decline employment if the intensity of personal feelings, as distinguished from a community attitude, may impair effective representation of a prospective client.” EC 2-30.
- 11 For a discussion of New York’s anti-discrimination rule and disability discrimination, see Robert T. Begg, *The Lawyer’s License to Discriminate Revoked: How a Dentist Put Teeth in New York’s Anti-Discrimination Disciplinary Rule*, 64 Alb. L. Rev. 153 (2000).
- 12 Accommodations may include the provision of interpreters, physical modifications of office space, or modifications of forms to meet the needs of the individual client such as simplification of written language; verbal, written or video explanations of terms and procedures, large print or Braille. See chapter 2 on law office accessibility.
- 13 Ass’n of the Bar of the City of New York Comm. on Prof’l and Judicial Ethics, Formal Op. 1995-12 (1995).
- 14 NYSBA Op. 1053 (2015).
- 15 *Id.*
- 16 N.Y. Executive Law §§ 290–301 (Exec. Law); see *Bantum v. Am. Stock Exch. LLC*, 7 A.D.3d 551, 777 N.Y.S.2d 137 (2d Dep’t 2004) (regarding federal preemption of New York Executive Law where Congress intended to preempt state interference with a self-regulating organization’s regulatory functions). *Id.* Exec. Law § 291.
- 17 Exec. Law § 292(9).
- 18 89 N.Y.2d 14, 651 N.Y.S.2d 344 (1996). See also *D’Amico v. Commodities Exch., Inc.*, 235 A.D.2d 313, 315, 652 N.Y.S.2d 294 (1st Dep’t 1997) (discussing with regard to a commodities exchange that “the hallmark of a ‘private’ place within the meaning of the Human Rights Law is its selectivity or exclusivity, and persons seeking the benefit of the exemption have the burden of establishing that their place of accommodation is ‘distinctly’ private”).
- 19 *Cahill v. Rosa*, 235 A.D.2d 534, 653 N.Y.S.2d 854 (2d Dep’t 1997).
- 20 *Lasser v. Rosa*, 237 A.D.2d 361, 654 N.Y.S.2d 822 (2d Dep’t 1997); see also *Schulman v. State Div. of Human Rights*, 239 A.D.2d 588, 658 N.Y.S.2d 70 (2d Dep’t 1997), *lv. to appeal denied*, 92 N.Y.2d 801, 677 N.Y.S.2d 71 (1998).
- 21 42 U.S.C. § 12181. The Americans with Disabilities Act (ADA) is set forth in 42 U.S.C. §§ 12101–12213. See *infra* regarding the ADA and chapter 2 regarding law office accessibility.
- 22 28 C.F.R. § 36.201(a).
- 23 42 U.S.C. § 12181(7)(F) (emphasis added).
- 24 28 C.F.R. § 36.208.
- 25 524 U.S. 624 (1998).
- 26 *Id.*; see also *Quick v. Tripp, Scott, Conklin & Smith, P.A.*, 43 F. Supp. 2d 1357 (S.D. Fla. 1999) (holding that hepatitis C virus satisfies the first element of a prima facie case under the ADA).
- 27 *Abbott v. Bragdon*, 163 F.3d 87 (1st Cir. 1998), *cert. denied*, 526 U.S. 1131 (1999); see *Doe v. Cnty. of Centre, PA*, 242 F.3d 437 (3d Cir. 2001) (reversing summary judgment and remanding for factual findings as to whether child with AIDS posed a direct threat to prospective foster children); *Powell v. City of Pittsfield*, 143 F. Supp. 2d 94 (D. Mass. 2001) (finding that issue of material fact existed whether or not the hepatitis C virus poses direct threat to the health and safety of other individuals).
- 28 Rule 1.16(b)(2).
- 29 Rule 1.16(c)(1).
- 30 Rule 1.16(c).
- 31 Rule 1.16(c)(7).
- 32 Nassau Co. Bar Ass’n Op. 34 (1987). This opinion is based on the prior DR 2-102(C)(1) and would likely hold up under the comparable Rule 1.16(c).
- 33 ABA Comm. on Ethics and Prof’l Responsibility, Formal Op. 96-404 (1996). Reprinted with permission of the American Bar Association, 321 North Clark Street, Chicago, IL 60654, 800-285-2221, www.americanbar.org.
- 34 *Id.*
- 35 *Id.* at 6. See *infra* III.A. (regarding client autonomy). See also ABCNY Op. 1997-2 (1997). *Brewster v. John Hancock Mut. Life Ins. Co.*, 280 A.D.2d 300, 720 N.Y.S.2d 462 (1st Dep’t 2001) (remitting to lower court for appointment of a guardian *ad litem* when attorney was granted leave below to withdraw on grounds of client incompetence).

- 36 Rule 1.16(e); *see also* ABCNY Op. 1997-2, www.nycbar.org (allowing withdrawal only on the basis of compelling circumstances).
- 37 Rule 1.16 cmt. 6.
- 38 Rule 1.14 cmt. 7A. *See* ABA Formal Op. 96-404, n.53; Connecticut Bar Ass'n Comm. on Prof'l Ethics Informal Op. 97-19 (1997) (Connecticut Op.); *see also* *Proceedings of the Conference on Ethical Issues in Representing Older Clients: Report of Working Group on Client Capacity*, 62 Fordham L. Rev. 1003 (1994) (*Representing Older Clients*); Restatement (Third) of The Law Governing Lawyers § 24 (2000) (discussing the law governing lawyers representing a client with a disability). In situations (such as when a lawyer discloses a client's diminished capacity to a tribunal against a client's wishes), the lawyer may be required to attempt to withdraw as counsel if the disclosure causes the client effectively to discharge the lawyer. *See also* 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. Matrimonial L. 481 (2000).
- 39 Rule 6.1 Voluntary Pro Bono (Rule 6.1 replaced the similarly aspirational Canon 2 of the N.Y. Code of Professional Responsibility which stated that lawyers "should assist the legal profession in fulfilling its duty to make legal counsel available").
- 40 Rule 6.1(a).
- By Joint Order of the Supreme Court, Appellate Division, Rule 6.1 was amended effective May 1, 2013, to increase the number of hours of pro bono legal services to which lawyers should aspire from 20 to 50 hours. The Court further specified the amount of financial contribution that lawyers should aspire to contribute annually. Contributions should be
- equivalent to (i) the amount typically billed by the lawyer (or the firm with which the lawyer is associated) for one hour of time; or (ii) if the lawyer's work is performed on a contingency basis, the amount typically billed by lawyers in the community for one hour of time; or (iii) the amount typically paid by the organization employing the lawyer for one hour of the lawyer's time; or (iv) if the lawyer is underemployed, an amount not to exceed one-tenth of one percent of the lawyer's income.
- 2013 N.Y. Court Order 0013.
- 41 Rule 6.1(b).
- 42 *See* Rule 6.1 cmt. 2B: "Paragraphs (a)(1) and (a)(2) recognize the critical need for legal services that exists among poor persons. Legal services under these paragraphs consist of a full range of activities, including individual and class representation, the provision of legal advice, legislative lobbying, administrative rulemaking and the provision of free training or mentoring to those who represent persons of limited means. The variety of these activities should facilitate participation by government lawyers, even when restrictions exist on their engaging in the outside practice of law."
- 43 A NYSBA study found that low-income members of certain population groups have legal needs that often go unserved because of unique barriers to their access to the legal system including shortages of lawyers with expertise in certain areas of the law (e.g., special education and discrimination), cultural and language differences, problems with physical access, and inadequate program resources for outreach. While the study research team identified many client populations with pressing unmet needs, those identified most often included children; people with disabilities; people with AIDS; elders; prisoners, particularly in county jails; farm workers; and homeless people. New York Legal Needs Study Final Report, Spangenberg Group NYSBA 81-118 (Oct. 1, 1989, revised 1993).
- Census data reveals a continuing poverty gap between individuals with and without disabilities. In 2013, the poverty rate of individuals with disabilities ages 18 to 64 years living in the community was 28.7%, while the poverty rate of individuals without disabilities ages 18 to 64 years living in the community was 13.6%—a poverty gap of 15.1 percentage points. *Rehabilitation Research and Training Center on Disability Statistics and Demographics*, 2014 Annual Disability Statistics Compendium at 53 (2014), www.disabilitycompendium.org.
- Recent Harris Interactive surveys commissioned by the Kessler Foundation and National Organization on Disability further show that individuals with disabilities continue to be disproportionately disadvantaged with regard to employment and poverty, as well as in other indicators of quality of life. The 2010 study found a 38% gap in employment. People with disabilities were also found to be less likely to socialize with friends or relatives or participate in leisure activities than people without disabilities. A 31% gap was noted in Internet access. The full survey report may be accessed at *2010 Kessler Foundation/NOD Surveys Conducted by Homes Interactive*, Nat'l Org. on Disability (Oct. 5, 2010), www.2010disabilitysurveys.org.
- 44 At least one commentator has noted that the lack of clear ethical guidance with respect to representation of mentally disabled clients (exacerbated by the fact that such clients are often poor) "may lead some lawyers to shun mentally disabled clients." Stanley S. Herr, *Representation of Clients With Disabilities: Issues of Ethics and Control*, 17 N.Y.U. Rev. L. & Soc. Change 609, 615 (1989-90). *See also* Michael L. Perlin, *Fatal Assumption: A Critical Evaluation of the Role of Counsel in Mental Disability Cases*, 16 Law & Hum. Behav. 39, 42 (1992) (stating that individuals with mental disabilities are "systematically underrepresented in all matters related to their disabilities"). Other commentators believe that disabled clients are often provided substandard representation. *See* Mark Falk, *Ethical Considerations in Representing the Elderly*, 36 S.D. L. Rev. 54, 71 (1991).
- 45 In fact, Rule 6.1(d) states: "This Rule is not intended to be enforced through the disciplinary process, and the failure to fulfill the aspirational goals contained herein should be without legal consequence."
- 46 Section 520.16 Pro Bono Requirement for Bar Admission was added to Part 520 of the Rules of the Court of Appeals for the Admission of Attorneys and Counselors at Law (22 N.Y.C.R.R. Part 520), effective January 1, 2013, which requires "[e]very applicant admitted to the New York State bar on or after January 1, 2015, other than applicants for admission without examination pursuant to section 520.10 of this Part, shall complete at least 50 hours of qualifying pro bono service prior to filing an application for admission with the appropriate Appellate

Division department of the Supreme Court.”

47 Rule 1.2 (Scope of Representation and Allocation of Authority Between Client and Lawyer).

48 Rule 1.4(b) (Communication).

49 Rule 1.2(a). Rule 1.2 references Rule 1.4 (Communication) requiring lawyers to reasonably inform and consult with clients. Rule 1.2 replaced Canon 7 and related ethical considerations requiring lawyers to zealously represent their clients within the bounds of the law, and recognizing that clients maintain decision-making authority after being informed of relevant considerations by the lawyer.

The following Rules are also relevant to the scope of client decision making: Rule 1.1 (Competence) states:

A lawyer shall not intentionally: (1) fail to seek the objectives of the client through reasonably available means permitted by law and these Rules; or

(2) prejudice or damage the client during the course of the representation except as permitted or required by these Rules.

Rule 2.1 (Advisor) states:

In representing a client, a lawyer shall exercise independent professional judgment and render candid advice. In rendering advice, a lawyer may refer not only to law but to other considerations such as moral, economic, social, psychological, and political factors that may be relevant to the client’s situation.

50 Rule 1.2 cmt. 1.

51 Rule 1.2(e); *see* New York County Lawyers’ Association Comm. on Prof’l Ethics, Op. 1993-698 (lawyer representing claimant in Social Security hearing may withhold medical information, provided no statute or regulation requires disclosure, no request is made for such information, and such information does not constitute knowledge that claim is false).

52 Rule 1.2 cmt. 13. *See also* Rule 1.4(a)(5) (requiring the lawyer to “consult with the client about any relevant limitation on the lawyer’s conduct when the lawyer knows that the client expects assistance not permitted by these Rules or other law”); Rule 1.4(b), which requires a lawyer to “explain a matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation.”

53 Rule 1.2 cmt. 4.

54 NYS CLS Jud. Appx. Ethical Considerations 7-11 and 7-12 were the only provisions of the Code of Professional Responsibility to directly address the representation of a client with a disability. Some language from EC 7-11 and 7-12 has been incorporated into the comments of Rule 1.14.

EC 7-11 provided that “[t]he responsibilities of a lawyer may vary according to the intelligence, experience, mental condition or age of a client, the obligation of a public officer, or the nature of a particular proceeding.”

EC 7-12 elaborated on the additional responsibilities a lawyer may assume. Under EC 7-12, the lawyer was required to first look to a guardian or other legal representative to make decisions for an incapacitated client. If there is no legal representative, the lawyer might then make decisions on behalf of the client who is incompetent but only in court proceedings. In such a case, the lawyer was instructed to obtain all possible aid from the client and to safeguard and advance the client’s interests. EC 7-12 further advised that while the disability of a client may compel the lawyer to make decisions for the client, obviously a lawyer would not be able to perform any act or make any decision that the law would require the client to perform or make, either by acting alone if competent, or by a duly constituted representative, if legally incompetent. There was disagreement among the cases and commentary as to what acts or decisions were covered by this provision.

55 Rule 1.14(c).

56 Rule 1.14 is almost identical to ABA Model Rule 1.14. The term “normal” lawyer-client relationship was changed to “conventional” to avoid any connotation of “abnormal.” *See* NYSBA Committee on Standards of Attorney Conduct, Proposed New York Rules of Professional Conduct, 96 (Feb. 1, 2008). There are differences, however, in the comments to New York and Model Rules 1.14, especially with regard to representation of prospective clients in emergency situations. *See* discussion *infra*.

57 Rule 1.14 cmt. 1 notes that the conventional client-lawyer relationship is based on the assumption that the client, when properly advised and assisted, is capable of making decisions about important matters.

58 Rule 1.14 cmt. 1.

59 Rule 1.14 cmt. 3.

60 Rule 1.14 cmt. 2.

61 Rule 1.14(b).

62 Rule 1.14 cmt. 5. *See also* Rule 1.14 cmt. 7.

63 ABA Formal Op. 96-404 at 4 (1996). Reprinted with permission of the American Bar Association, 321 North Clark Street, Chicago, IL 60654, 800-285-2221, www.americanbar.org.

64 NYSBA Op. 746, 2001 WL 901079 (2001) (Language from opinion 746 is incorporated into Rule 1.14 cmt. 7).

- 65 NYSBA Op. 746, 2001 WL 901079. *See also In re the Appointment of a Guardian for J.G.*, 8 Misc. 3d 1029(A), 806 N.Y.S.2d 445, (Sup. Ct., Bronx Co. 2005) (directing the referral of the individual with questionable capacity to Adult Protective Services rather than appoint a guardian). In *J.G.*, the attorney for the client's civil lawsuit brought the guardianship petition which, according to the court, created the potential for conflict.
- 66 *See, e.g.*, N.Y. Mental Hygiene Law § 33.01; *Rivers v. Katz*, 67 N.Y.2d 485, 504 N.Y.S.2d 74 (1986); *see also In re M.R.*, 135 N.J. 155, 638 A.2d 1274 (1994).
- 67 *See* Christopher Slobogin & Amy Mashburn, *The Criminal Defense Lawyer's Fiduciary Duty to Clients With Mental Disability*, 68 Fordham L. Rev. 1581 (2000) (discussing competency determinations and resulting ethical dilemmas in the representation of persons in the criminal law context).
- 68 Rule 1.14 cmt. 1. For a discussion of general guidelines regarding the responsibilities of an attorney representing a client with a mental disability, *see generally* Susan Stefan, *Fact Sheet on Ethical Obligations of Attorneys Representing Clients with Psychiatric Disabilities* (May 2003), www.centerforpublicrep.org/litigation-and-major-cases/litigation-issues/76-fact-sheet-on-ethical-obligations-of-attorneys-representing-clients-with-psychiatric-disabilities.
- 69 Rule 1.14 cmt. 1.
- 70 *See, e.g.*, Jan Ellen Rein, *Clients with Destructive and Socially Harmful Choices—What's An Attorney to Do? Within and Beyond the Competency Construct*, 62 Fordham L. Rev. 1101, 1107, 1138 (1994) (criticizing such capacity determinations). *But see* Paul R. Tremblay, *Response to the Conference: Impromptu Lawyering and De Facto Guardians*, 62 Fordham L. Rev. 1429, 1439 (1994) (noting that it is not clear that lawyers necessarily will make worse decisions regarding the question of capacity than would psychiatrists, who, according to many, view client symptoms through a distorted prism of mental health training); Peter Margulies, *Access, Connection, and Voice: A Contextual Approach to Representing Senior Citizens of Questionable Capacity*, 62 Fordham L. Rev. 1073, 1082 (1994).
- 71 Rule 1.14 cmt. 6. This comment, adopted from ABA Model Rule 1.14, was cited in an ABCNY ethical opinion in which a law firm was advised to consult with an appropriate diagnostician when the client's capacity and the influences of third parties were questioned. ABCNY Op. 41 (1982). *See also* ABA Formal Op. 96-404, 4-5 (suggesting that a lawyer may also wish to consult with the client's family to aid in assessing client capacity and that limited disclosure regarding the client's behavior is permissible to carry out the representation).
- 72 This approach borrows from Margulies, at 1085 (setting forth six factors to consider for capacity determinations: (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). *See also* Marilyn Levitt, *The Elderly Questionably Competent Client Dilemma: Determining Competency and Dealing With the Incompetent Client*, 1 J. Health Care L. & Pol'y 202 (1998). N.Y. Rule 1.14 comment 6, like the ABA Model Rule 1.14, now incorporates five of the six recommendations noted here. "Irreversibility of decision" is not specifically included in comment 6.
- 73 Paul R. Tremblay, *On Persuasion and Paternalism: Lawyer Decisionmaking and the Questionably Competent Client*, 3 Utah L. Rev. 515, 537 (1987) (*cited in* Margulies, at 1082).
- 74 *See* Rule 1.4(b); *see* Rule 2.1.
- 75 *See, e.g.*, *Rivers v. Katz*, 67 N.Y.2d 485, 504 N.Y.S.2d 74 (1986); Dr. Robert P. Roca, *Proceedings of the Conference on Ethical Issues in Representing Older Clients—Determining Decisional Capacity: A Medical Perspective*, 62 Fordham L. Rev. 1177, 1187-88 (1994); *In re M.R.*, 135 N.J. 155, 169, 638 A.2d 1274 (1994); Richard J. Bonnie, *Ferguson Spectacle Demeaned System*, 17 Nat'l L.J. A23 (1995) ("State is free to require a more demanding test of competence when a defendant wants to make very important decisions, such as waiving legal representation, than in routine cases in which the defendant is represented by counsel") (*citing Godinez v. Moran*, 509 U.S. 389 (1993) (when a defendant seeks to waive his right to counsel, a determination that he is competent to stand trial is not enough; the waiver must also be intelligent and voluntary before it can be accepted)). *See also* Frederic Paul Gallun, *The Sixth Amendment Paradox: Recent Developments on the Right to Waive Counsel Under Farretta*, 23 New Eng. J. on Crim. & Civ. Confinement 559 (1997).
- 76 NYSBA Op. 836 (Feb. 25, 2010), www.nysba.org/CustomTemplates/Content.aspx?id=5273.
- 77 *Id.*
- 78 *Id.*
- 79 *Id.* For example, depending on client needs, a lawyer might allocate additional time for interviewing and counseling, schedule client meetings during times of the day in which the client is generally most lucid, or hold meetings in settings which maximize client comfort and attention. The lawyer should provide written options to clients in clear, simple language and in accessible format.
- 80 *Representing Older Clients*, 62 Fordham L. Rev. at 1003.
- 81 A "purported client" is a person who has contact with a lawyer and who would be a client but for the inability to enter into an express agreement. *Id.* at 1012.
- 82 *Id.*
- 83 Model Rules of Professional Conduct 1.14, ed. note (1997).
- 84 ABA Model Rule 1.14, cmt. 9 states:

Emergency Legal Assistance:

In an emergency where the health, safety or a financial interest of a person with seriously diminished capacity is threatened with imminent and irreparable harm, a lawyer may take legal action on behalf of such a person even though the person is unable to establish a client-lawyer relationship or to make or express considered judgments about the matter, when the person or another acting in good faith on that person's behalf has consulted with the lawyer. Even in such an emergency, however, the lawyer should not act unless the lawyer reasonably believes that the person has no other lawyer, agent or other representative available. The lawyer should take legal action on behalf of the disabled person only to the extent reasonably necessary to maintain the status quo or otherwise avoid imminent and irreparable harm. A lawyer who undertakes to represent a person in such an exigent situation has the same duties under these Rules as the lawyer would with respect to a client.

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85 ABA Model Rule 1.14 cmt. 10 states:

A lawyer who acts on behalf of a person with seriously diminished capacity in an emergency should keep the confidences of the disabled person as if dealing with a client, disclosing them only to the extent necessary to accomplish the intended protective action. The lawyer should disclose to any tribunal involved and to any other counsel involved the nature of his or her relationship with the person. The lawyer should take steps to regularize the relationship or implement other protective solutions as soon as possible. Normally, a lawyer would not seek compensation for such emergency actions taken.

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86 Committee on Professional Responsibility, *A Delicate Balance: Ethical Rules for Those Who Represent Incompetent Clients*, 52 The Rec. of the Ass'n of The Bar of the City of N.Y. 34, 45–46 (1997).

87 Committee on Standards of Attorney Conduct Proposed N.Y. Rules of Professional Conduct Rules 1.14 Reporter's Notes at 206, <http://old.nysba.org/Content/ContentFolders/CommitteeonStandardsOfAttorneyConduct2/Rule1.14.pdf>.

88 *Id.*

89 Developmental Disabilities Assistance and Bill of Rights Act of 2000, 42 U.S.C. § 15001. *See also Albany Law School v. N.Y.S. Office of Mental Retardation and Developmental Disabilities*, 19 N.Y.3d 106, 945 N.Y.S.2d 613 (2012) (addressing P&A authority to access records on behalf of individuals with developmental disabilities in mental hygiene facilities).

90 42 U.S.C. ch. 114, § 10807, "Legal Actions"; *see Doe v. Stincer*, 175 F.3d 879 (11th Cir. 1999) (holding that the very purpose of PAMII was to confer standing on protection and advocacy systems, such as the Advocacy Center, as representative bodies charged with the authority to protect and litigate the rights of individuals with mental illness).

91 Comparable authority exists under the Protection and Advocacy of Individual Rights Act. To qualify for an allotment a state must "have in effect a system to protect and advocate the rights of individuals with developmental disabilities." This system has the authority to "pursue legal, administrative, and other appropriate remedies or approaches to ensure the protection of, and advocacy for, the rights of such individuals within the State." 42 U.S.C. § 15043. Additionally, under the Vocational Rehabilitation and Services Act, a state-run Client Assistance Program meeting the requisites to receive federal funding must have authority to "pursue legal, administrative, and other appropriate remedies to ensure the protection of rights of individuals with disabilities who are receiving treatments, services, or rehabilitation under this chapter within the State." 29 U.S.C. § 732, "Client assistance program."

92 Rule 1.14(a).

93 Rule 1.14(b); *see also* Rule 1.14 cmt. 1.

94 Rule 1.14(a), (b); Rule 1.14 cmt. 1 (borrowing language from EC 7-12).

95 *See, e.g.,* Stanley S. Herr, *Representation of Clients with Disabilities: Issues of Ethics & Control*, 17 N.Y.U. Rev. L. & Soc. Change 609, 618 (1989–90) (the Code "no longer reflects the state of the law or the realities of the mental disability law practice"). *See also* Paul R. Tremblay, *On Persuasion and Paternalism: Lawyer Decisionmaking and the Questionably Competent Client*, 3 Utah L. Rev. 515, 549 (1987); *see also* Neil H. Mickenberg, *The Silent Clients: Legal and Ethical Considerations in Representing Severely and Profoundly Retarded Individuals*, 31 Stan. L. Rev. 625, 633 (1979); *see also* Michael Blinick, *Mental Disability, Legal Ethics, and Professional Responsibility*, 33 Alb. L. Rev. 92, 115 (1968).

96 *In re M.R.*, 135 N.J. 155, 638 A.2d 1274 (1994).

97 *Compare with In re Jacobs*, 315 N.J. Super. 189, 717 A.2d 432 (Ch. Div., Mon. Co. 1998) (woman had insufficient capacity to change domicile).

98 *In re M.R.*, 135 N.J. 155.

99 *Id.* at 177–78.

100 *Id.* at 167.

- 101 *Id.* at 178.
- 102 *Id.* at 176 (citations omitted).
- 103 *Id.* at 176. *See* NYSBA Op. 742, 1977 WL 15700 (1977) (counsel not required to commence litigation he or she believes to be without merit).
- 104 *In re M.R.*, 135 N.J. at 178.
- 105 Rule 1.1(c)(1); *see supra* notes 47–52 and accompanying text; *see also* Rule 1.2(a), (e), Scope of Representation and Allocation of Authority Between Client and Lawyer.
- 106 Blinick summed up the lawyer’s role in civil commitment and release proceedings more than 25 years ago, stating, “[A]lthough he should be a counselor and negotiator in pre-hearing stages, he must be an adversary in the courtroom, for no other role there seems possible.” Michael Blinick, *Mental Disability, Legal Ethics, and Professional Responsibility*, 33 Alb. L. Rev. 92, 115 (1968).
- 107 83 Wash. 2d 224, 517 P.2d 568 (1974).
- 108 *Id.* at 236 (quoting *In re Estate of Manning*, 85 Neb. 60, 122 N.W. 711, 713 (1909)).
- 109 *Id.* at 242. *Quesnell* actually dealt with the role of a guardian *ad litem*. The court noted, however, the necessity of adversarial representation in a commitment hearing for a person alleged to be mentally ill, and stated that a guardian cannot take the place of counsel unless the role is restructured to be adversarial. *Id.* at 236, n.16 (citing *Lessard v. Schmidt*, 349 F. Supp. 1078 (E.D. Wis. 1972)).
- The debate continues. *See, e.g., In re Guardianship of L.H.*, 84 Mass. App. Ct. 711, *review denied*, 468 Mass. 1104 (2014). In *L.H.*, a Massachusetts court upheld the administration of psychotropic drugs to a patient with diminished capacity over her objection, finding that there was sufficient evidence under Massachusetts law to do so. A strong dissent, however, criticized counsel’s failure to adequately advocate for his client’s wishes stating “the integrity of the adversarial process is at risk when counsel’s deficiencies suppress the expression of his client’s interests.” *Id.* at 734.
- 110 Paul R. Tremblay, *On Persuasion and Paternalism: Lawyer Decisionmaking and the Questionably Competent Client*, 3 Utah L. Rev. 515, 549 (1987).
- 111 *Id.* at 551.
- 112 Rule 1.14 cmt. 4.
- 113 *See* NY Ethics Op 1069 (2015), allowing a lawyer to represent an immigrant child in federal administrative removal proceedings and simultaneously represent the proposed guardian in a state family court proceeding, “provided the lawyer reasonably believes he can competently and diligently represent both clients, and obtains informed consent from each client, confirmed in writing.” N.Y. Ethics Op. 1069 (2015). The Committee on Professional Ethics considered ways in which differing interests might arise in this context and noted that although “some courts and advocacy groups believe that the lawyer should not represent both the guardian and the child in the same proceeding,” such representation does not present a per se conflict under Rule 1.7. *Id.* The Committee noted that the lawyer must assess whether the child has the capacity to make a reasoned decision regarding the potential conflict, and in doing so “should consider and balance such factors as (i) the client’s ability to articulate reasoning leading to a decision, variability of state of mind and ability to appreciate consequences of a decision; and (ii) the consistence of a decision with known long-term commitments and values of the client. With a child, the age of the child will also be a factor.” *Id.* (citing Rule 1.14, cmt 6). Several Rules and comments touch on the lawyer’s duty to exercise independent professional judgment on behalf of a client. *See* Rule 5.4(c) Professional Independence of a Lawyer, Rule 5.4 cmt. 2, Rule 1.8(f) Current Clients: Special Conflict of Interest Rules, Rule 1.7 Conflict of Interest: Current Clients cmt. 1. *See also* Rules 5.8 Contractual Relationships with Non-Legal Professionals; *see also* Rule 7.2 Payment for Referrals.
- 114 *See* Michael Blinick, *Mental Disability, Legal Ethics, and Professional Responsibility*, 33 Alb. L. Rev. 92, 98 (1968).
- 115 *See* A. Kimberley Dayton et al., *Advising the Elderly Client* (Thomson/West 2010).
- 116 Michigan Op. RI-140 (1992) (where mother retained lawyer, child is the client in child’s malpractice claim against physician, and mother may not interfere with lawyer’s independent professional judgment. The better practice to safeguard the child’s interests is to petition for an independent guardian *ad litem*, although the lawyer has discretion).
- 117 NYSBA Op. 496 (1978).
- 118 *Id.*
- 119 *Id.*; *see also* NYSBA Op. 648 (1993).
- 120 NYSBA Op. 496 (1978).
- 121 *Id.*
- 122 Rule 1.14 cmt. 4; *see also* ABCNY Op. 269 (1933), cited in NYSBA Op. 496; Philadelphia Bar Ass’n Prof’l Guidance Comm. Op. 94-18 (1994) (Philadelphia Op.) (attorney must seek removal of guardian *ad litem* not acting in minor’s best interests).
- 123 *Compare* ABA Formal Op. 96-404, *and* Connecticut Informal Op. 97-19 (1997) (encouraging attorney consultation with family members), *with* Tennessee Bd. of Prof’l Responsibilities Formal Op. 96-F 140 (1996) (Tennessee Op.) (questioning consultation with family and others opposing minor’s choice of abortion).

- 124 135 N.J. 155, 638 A.2d 1274 (1994).
- 125 *Id.* at 171.
- 126 *See* Michigan Op. RI-140 (1992).
- 127 Nassau Co. Bar Ass’n Op. 29 (1987).
- 128 Connecticut Informal Op. 97-21 (reviewing lawyer’s authority under ABA Model Rule 1.14(b)).
- 129 Rule 5.4(c); *see also* Rule 1.8(f) (providing that a lawyer shall not accept compensation from a third party unless the client gives informed consent, there is no interference with the lawyer’s independent professional judgment or with the client-lawyer relationship, and confidentiality is maintained).
- 130 Rule 1.7 cmt. 9 (“In addition to conflicts with other current clients, a lawyer’s duties of loyalty and independence may be adversely affected by . . . the lawyer’s responsibilities to other persons, such as fiduciary duties arising from a lawyer’s service as a trustee, executor or corporate director.”).
- 131 Neil H. Mickenberg, *The Silent Clients: Legal and Ethical Considerations in Representing Severely and Profoundly Retarded Individuals*, 31 Stan. L. Rev. 625, 629 (1979).
- 132 *Id.* at 630.
- 133 155 Vt. 112, 582 A.2d 137 (1990).
- 134 *Id.* This case also addresses the procedural issue of whether the court should appoint the guardian *ad litem* before counsel, and whether the court erred by failing to give proper notice of the proceedings to the parents and/or guardians.
- 135 CPLR 1201 has not been amended to conform to Article 81 guardianship law. Committees and conservators appointed prior to the enactment of Article 81 continue until modified by a court. Wherever a statute uses the term *conservator* or *committee*, such statute shall be construed to include the term *guardian* notwithstanding the provisions of such article, unless the context otherwise requires. 1992 N.Y. Laws ch. 698, § 4, as amended by 1993 N.Y. Laws ch. 32, § 17.
- 136 CPLR 1201; *see Anonymous v. Anonymous*, 256 A.D.2d 90, 681 N.Y.S.2d 494 (1st Dep’t 1998) (appointment of guardian *ad litem* was necessary to protect husband’s interest in matrimonial action where court observed husband’s irrational and agitated state and consequent inability to assist his lawyers); *In re Weingarten*, 94 Misc. 2d 788, 405 N.Y.S.2d 605 (Ct. Cl. 1978) (residence in a mental hygiene facility creates a rebuttable presumption that the person is unable to adequately prosecute or defend his or her rights); *Brewster v. John Hancock Mut. Life Ins. Co.*, 280 A.D.2d 300, 720 N.Y.S.2d 462 (1st Dep’t 2001) (it is incumbent upon the attorney, and/or the court on its own initiative, to appoint a guardian *ad litem* for a client once the client’s “incompetence” is apparent).
- 137 CPLR 1202; *see, e.g., Bryant v. Riddle*, 259 A.D.2d 399, 687 N.Y.S.2d 108 (1st Dep’t 1999) (upholding denial of a motion to dismiss and granting appointment of a guardian *ad litem* for an “unadjudicated incompetent” plaintiff); *N.Y. Life Ins. Co. v. V.K.*, 184 Misc. 2d 727, 728–29, 711 N.Y.S.2d 90 (N.Y. City Civ. Ct., N.Y. Co. 1999) (establishing preponderance of the evidence as standard of proof necessary to establish grounds for appointment of guardian *ad litem* and requiring petitioner to bring the question of appointment to court’s attention); *Shad v. Shad*, 167 A.D.2d 532, 502 N.Y.S.2d 202 (2d Dep’t 1990) (noting that questions of fact as to the need for appointment of a guardian *ad litem* must be decided by hearing).
- 138 Neil H. Mickenberg, *The Silent Clients: Legal and Ethical Considerations in Representing Severely and Profoundly Retarded Individuals*, 31 Stan. L. Rev. 625, 632 (1979). Mickenberg also raises the issue of what is the responsibility of counsel when counsel disagrees with the course designated by the guardian *ad litem*. He suggests that the lawyer can seek judicial removal of the present guardian *ad litem* and the appointment of a new guardian *ad litem*, seek judicial resolution of the disagreement with the guardian *ad litem* or withdraw from the case. Mickenberg ultimately concludes that more scholarship is needed on the special problems of determining the proper representation for the non-communicating client and on the scope of authority of the guardian *ad litem*. *Id.*
- 139 Rule 1.14 cmt. 7.
- 140 Rule 1.6(a), (b).
- 141 Rule 1.6(a), 1.6(a)(3).
- 142 *Id.*
- 143 Code provision DR 4-101 Preservation of Confidences and Secrets of a Client, distinguished between client confidences (information protected by the attorney-client privilege) and secrets (other information gained in the professional relationship) (DR 4-101 was repealed as of April 1, 2009). Rule 1.6, Confidentiality of Information replaced DR 4-101 and does not distinguish between client confidences and client secrets. Rule 1.6(a)(3).
- 144 Rule 1.14(c); Rule 1.6(a)(2).
- 145 Rule 1.6(b)(1).
- 146 Rules 1.6(b)(4).
- 147 NYSBA Op. 486 (1978); *see also* ABA Informal Op. 1500 (283) (permits disclosure of a client’s intention to commit suicide).

- 148 NYSBA Op. 486 (1978).
- 149 Effective April 1, 1993, MHL conservator (article 77) and committee (article 78) provisions were replaced by Article 81, which authorizes the appointment of a guardian of an incapacitated person to address personal or financial needs.
- 150 ABCNY Formal Op. 1987-7.
- 151 *Id.*
- 152 *Id.*
- 153 *Id.*
- 154 ABCNY Formal Op. 32 (1981).
- 155 *Id.*
- 156 *Id.*
- 157 Nassau Co. Bar Ass'n Op. 17 (1990).
- 158 *Id.*
- 159 Rule 1.14 cmt. 6.
- 160 Rule 1.6(a)(2) authorizes disclosure of confidential information “to advance the best interests of the client.” *See also* Rule 1.6 cmt. 5.
- 161 ABA Informal Op. 1530 (1989). The ABA Committee on Ethics and Professional Responsibility would allow further consultation with “family members or other interested persons . . . to aid in the lawyer’s assessment of the client’s capacity as well as in the decision of how to proceed.” *See also* ABA Formal Op. 96-404 at 4–5.
- 162 For a discussion of the application of the Model Rules regarding confidentiality and clients with questionable capacity, *see generally* Bray and Ensley, *Dealing With the Mentally Incapacitated Client: The Ethical Issues Facing the Attorney*, 33 Fam. L.Q. 329, 343 (1999).
- 163 Rule 1.14 cmt. 8.
- 164 *Id.*
- 165 These suggestions represent the views of the author. They are drawn from the Rules of Professional Conduct, comments, ethics opinions, scholarship and anti-discrimination statutes.
- 166 Rule 1.4, ADA and HRL require lawyers to provide reasonable accommodation to individuals with disabilities.
- 167 Rule 1.14 cmt. 6.
- 168 *See* CPLR 4504, 4507, 4508 (2013) (physician- or nurse-patient privilege, psychologist-client privilege, and certified social worker–client privilege, respectively). *But see Keshecki v. St. Vincent’s Med. Ctr.*, 5 Misc. 3d 539, 785 N.Y.S.2d 300 (Sup. Ct., Rich. Co. 2004) (pre-empting CPLR 4504).
- 169 Under Joint Rules of the Appellate Division effective March 4, 2002, lawyers are required to provide certain clients with a “letter of engagement” which explains the scope of the legal representation, explains the lawyer’s fees and expenses and provides notice of the client’s right to arbitrate fee disputes. The Court Rule and sample Letter of Engagement are available at www.nysba.org/WorkArea/DownloadAsset.aspx?id=26647.
- 170 *See* Rule 1.14 cmt. 5.

APPENDIX**New York Rules of Professional Conduct****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 conventional 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.

Comment

[1] The responsibilities of a lawyer may vary according to the intelligence, experience, mental condition or age of a client, the obligation of a public officer, or the nature of a particular proceeding. The conventional client-lawyer relationship is based on the assumption that the client, when properly advised and assisted, is capable of making decisions about important matters. Any condition that renders a client incapable of communicating or making a considered judgment on the client's own behalf casts additional responsibilities upon the lawyer. When the client is a minor or suffers from a diminished mental capacity, maintaining the conventional client-lawyer relationship may not be possible in all respects. In particular, a severely incapacitated person may have no power to make legally binding decisions. Nevertheless, a client with diminished capacity often has the ability to understand, deliberate upon and reach conclusions about matters affecting the client's own well-being.

[2] The fact that a client suffers a disability does not diminish the lawyer's obligation to treat the client attentively and with respect.

[3] The client may wish to have family members or other persons participate in discussions with the lawyer. The lawyer should consider whether the presence of such persons will affect the attorney-client 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.

[4] If a legal representative has already been appointed for the client, the lawyer should ordinarily look to the representative for decisions on behalf of the client. In matters involving a minor, with or without a disability, the question whether the lawyer should look to the parents as natural guardians may depend on the type of proceeding or matter in which the lawyer is representing the minor. If the lawyer represents the guardian as distinct from the ward, and reasonably believes that the guardian is acting adversely to the ward's interest, the lawyer may have an obligation to prevent or rectify the guardian's misconduct. *See* Rule 1.2(d).

Taking Protective Action

[5] If a lawyer reasonably believes that a client is at risk of substantial physical, financial or other harm unless action is taken, and that a conventional client-lawyer relationship cannot be maintained as provided in paragraph (a) because the client lacks sufficient capacity to communicate or to make adequately considered decisions in connection with the representation, then paragraph (b) permits the lawyer to take reasonably necessary protective measures. Such measures could include: consulting with family members, using a reconsideration period to permit clarification or improvement of circumstances, using voluntary surrogate decision-making tools such as durable powers of attorney, or consulting with support groups, professional services, adult-protective agencies or other individuals or entities that have the ability to protect the client. In taking any protective action, the lawyer should be guided by such factors as the wishes and values of the client to the extent known, the client's best interest, and the goals of minimizing intrusion into the client's decision-making autonomy and maximizing respect for the client's family and social connections.

[6] In determining the extent of the client's diminished capacity, the lawyer should consider and balance such factors as: (i) the client's ability to articulate reasoning leading to a decision, (ii) variability of state of mind and ability to appreciate consequences of a decision; the substantive fairness of a decision, and (iii) the consistency of a decision with the known longterm commitments and values of the client. In appropriate circumstances, the lawyer may seek guidance from an appropriate diagnostician.

[7] If a legal representative has not been appointed, the lawyer should consider whether appointment of a guardian *ad litem*, conservator or guardian is necessary to protect the client's interests. Thus, if a client with diminished capacity has substantial property that should be sold for the client's benefit, effective completion of the transaction may require appointment of a legal representative. In addition, rules of procedure in litigation sometimes provide that a minor or a person with diminished capacity must be represented by a guardian or next friend if they do not have a general guardian. In many circumstances, however, appointment of a legal representative may be unnecessarily expensive or traumatic for the client. Seeking a guardian or conservator without the client's consent (including doing so over the client's objection) is appropriate only in the limited circumstances where a client's diminished capacity is such that the lawyer reasonably believes that no other practical method of protecting the client's interests is readily available. The lawyer should always consider less restrictive protective actions before seeking the appointment of a guardian or conservator. The lawyer should act as petitioner in such a proceeding only when no other person is available to do so.

[7A] Prior to withdrawing from the representation of a client whose capacity is in question, the lawyer should consider taking reasonable protective action. *See* Rule 1.16(e).

Disclosure of the Client's Condition

[8] Disclosure of the client's diminished capacity could adversely affect the client's interests. For example, raising the question of diminished capacity could, in some circumstances, lead to proceedings for involuntary commitment. Information relating to the representation is protected by Rule 1.6. Therefore, unless authorized to do so, the lawyer may not disclose such information. When taking protective action pursuant to paragraph (b), the lawyer is impliedly authorized to make the necessary disclosures, even when the client directs the lawyer to the contrary. Nevertheless, given the risks of disclosure, paragraph (c) limits what the lawyer may disclose in consulting with other individuals or entities or in seeking the appointment of a legal representative. At the very least, the lawyer should determine whether it is likely that the person or entity consulted will act adversely to the client's interests before discussing matters related to the client.

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Using Supported Decision-Making to Facilitate Autonomy for People with I/DD

Albany Government Law Review Symposium,
February, 2019



Kristin Booth Glen

University Professor and Dean Emerita

CUNY School of Law

SDMNY Project Director



Talking about Autonomy and Disability

- For people with intellectual and developmental disabilities (I/DD), guardianship is the starting place
- **PRACTICAL”** considerations (see the ABA PRACTICAL TOOL for Lawyers)
- Understanding the move from a medical to a social model
- Changing the conversation; applying a human rights lens
- What’s Supported Decision-Making (SDM) got to do with it?



Guardianship

- The legal process by which the right and power to make decisions and enter into legal relationships is taken away from one person because of his/her alleged incapacity, and given instead to another, the Guardian



17-A-Guardianship of People with Intellectual/Developmental Disabilities (I/DD) in NY

- Removes *all* legal rights, including the right to decide about health, money, education, work, where to live, with whom to associate; voting, marriage, making contracts of any kind
- Based solely on diagnosis and “best interest”
- Lasts for life, unless terminated by a court



Supported Decision-Making is an Alternative to Guardianship

- It is a “less restrictive means” to protect vulnerable persons
- It permits them to retain all their legal and civil rights
- It is increasingly recognized as a “less restrictive alternative” in statutes and court decisions, so should or must be considered/attempted before guardianship can be imposed

Increasingly, Judges Are Asking 17-A Petitioners to Consider SDM

Reporter
2013 NYLJ LEXIS 3334 *
Proceeding for the Appointment of a Guardian of the Person of Akiva Pursuant to SCPA § 17-A, Court, Kings County

respondent would resist participation in any supportive service he, or the petitioners, would identify as necessary or desirable simply strains credulity. The respondents' father has undertaken minimal efforts, if any, to create a supported environment for each respondent that adequately addresses each individual's needs and maximizes his opportunity for growth and self-determination. Nonetheless, the respondents have in place a system, however "narrow" or limited, of what might be characterized as "supported decision-making," by which they have managed themselves and their affairs for the entirety of their adult lives.

After a careful review of the record and the support of the request for appointment of a guardian ad litem, the factors to be considered in such fees (*Matter of Morris*, 57 Dep't 2008]), the Court has fixed at the fair and reasonable value of the legal services of the guardian ad litem, which fees are directed to be paid by the respondents' father.

This constitutes the decision and order of the Court.

Date: May, 2013

Brooklyn, New York

New York Law

Respondent of guardian of the person of Akiva Pursuant to SCPA § 17-A, Court, Kings County

respondent would resist participation in any supportive service he, or the petitioners, would identify as necessary or desirable simply strains credulity. The respondents' father has undertaken minimal efforts, if any, to create a supported environment for each respondent that adequately addresses each individual's needs and maximizes his opportunity for growth and self-determination. Nonetheless, the respondents have in place a system, however "narrow" or limited, of what might be characterized as "supported decision-making," by which they have managed themselves and their affairs for the entirety of their adult lives.

It has not been demonstrated to the court's satisfaction that either respondent is a person with a developmental disability originating prior to the age of 18.

Verified objections to both petitions have been filed by the respondents' sister, Simcha (the respondents' sister, or the sister), pursuant to which the court has determined that neither respondent is in

diagnosed, requires, visits, guardianship

interest, second wife, cross-examination, u

therapeutic, rabbinical, religious

petitions, funds, guardian

disorder, travel, guardian

yeshiva, guardian

of guardian

respondent

Core T

Pursuant to SCPA § 17-A, Court, Kings County

for the Appointment of a Guardian of the Person of Akiva Pursuant to SCPA § 17-A, Court, Kings County

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(Proceeding for the Appointment of a Guardian of the Person of Akiva Pursuant to SCPA § 17-A, Court, Kings County)



Changes since 17-A enacted

- People with I/DD live longer
- I/DD no longer a static diagnosis
- Changing laws and expectations: ADA, IDEA, etc.
- Availability of services to promote self determination and inclusion
- Least restrictive alternative a Constitutional imperative
- Move from a medical to a social model of disability



The Medical Model of Disability

- Disability a deficit to be medically ameliorated or cured
- Impairment is a *personal* tragedy
- As a deviation from the “norm”, it justifies marginalization or exclusion from society



The Social Model

- Developed largely out of the Disability Rights movement
- While people may have impairments that effect their mobility, sight, hearing, intellectual functioning, etc., they are *dis-abled* from living an independent, inclusive life on an equal basis with others by the barriers that society creates
- So society is responsible for removing those barriers



Imperatives to shift away from guardianship

- Decision making can be taught, improved; failure to utilize has negative impact, loss of capacity
- New 17-A (however reached) will place many additional burdens on the court
- No proposed bills provide for increased funding
- Aging caretakers, limited options
- Conceptual move from a medical model to a social model
- Legal capacity is a human right



What Is Supported Decision-making?

- Supported decision-making (SDM) is “a series of relationships, practices, arrangements and agreements of more or less formality and intensity designed to assist an individual with a disability to make and communicate to others decisions about the individual’s life.”
 - Robert Dinerstein



Where does SDM come from?

- Our common experience of how everyone makes decisions
- The human right of every person to make her/his own decisions regardless of disability



Everyone Uses Supports

- When you make an important decision, how do you do it? Consulting friends and/or family? Using experts (lawyers, accountants, etc.)? Doing and utilizing research?
- People with I/DD may just need more or different kinds of support



Kinds of Support

- Gathering necessary information
- Educating the person with I/DD, the Decision Maker (DM), about that information
- Identifying possibilities and alternatives
- Aiding the DM in weighing choices and understanding consequences
- Communicating the DM's decision to others
- Helping to implement the DM's decision



Supported Decision-Making can take many forms

- Completely informal (so often invisible)
- Circles of support
- Formalized through a facilitated process that may involve a written agreement/contract (SDMNY model)
- Legalized by statute (Texas, Delaware, Wisconsin, Alaska, District of Columbia)



Why Use SDM?

- Persons with I/DD **never lose important rights**: e.g., to contract, to vote, to work, to marry
- SDM allows a person to take some risks and **learn from “bad” choices**
- SDM helps to **form a network of supporters** that can protect against exploitation
- Persons with I/DD have a **human right to make their own decisions**



The “Human Right” of Legal Capacity

- All people have a right to make their own decisions, to have their decisions legally recognized, and to have whatever supports are necessary to enable them to exercise the right United Nations Convention on the Rights of Persons with Disabilities, Article 12



Who Supports SDM?

| | |
|-------------|---|
| 2018 | <ul style="list-style-type: none">• Wisconsin, Washington, DC and Alaska pass legislation recognizing SDMA |
| 2017 | <ul style="list-style-type: none">• American Bar Association adopts Resolution 113• Uniform Law Commission revises UGPPA• U.S. Dept. Educ. OSERS issues guidance on transition |
| 2016 | <ul style="list-style-type: none">• AAIDD & The Arc issue Joint Position Statement• Social Security Administration releases Issue Brief• National Guardianship Association issues Position Statement• Delaware passes legislation recognizing SDMA |
| 2015 | <ul style="list-style-type: none">• Texas passes legislation recognizing SDMA |
| 2014 | <ul style="list-style-type: none">• Administration for Community Living creates Supported Decision-Making Program |



Supported Decision-Making New York (SDMNY)

- SDMNY is a collaboration among Hunter/CUNY, the New York Alliance for Innovation and Inclusion, the Arc of Westchester, and Disability Rights NY
- SDMNY is the recipient of a 5 year grant from the NYS Developmental Disability Planning Council (DDPC) to create an educational campaign about Supported decision-Making (SDM) and to develop pilot projects to demonstrate SDM as an alternative to guardianship



The SDMNY Diversion and Restoration Pilots

- Facilitating persons with I/DD (who we call “the Decision Maker”) to choose a person or persons with whom they have trusting relationships to support them in making decisions in specified domains (i.e. health, finances, education, residence, etc.) and to enter into a written document, the SDMA, that incorporates the terms of their agreement



Diversion and Restoration Pilots. Cont'd

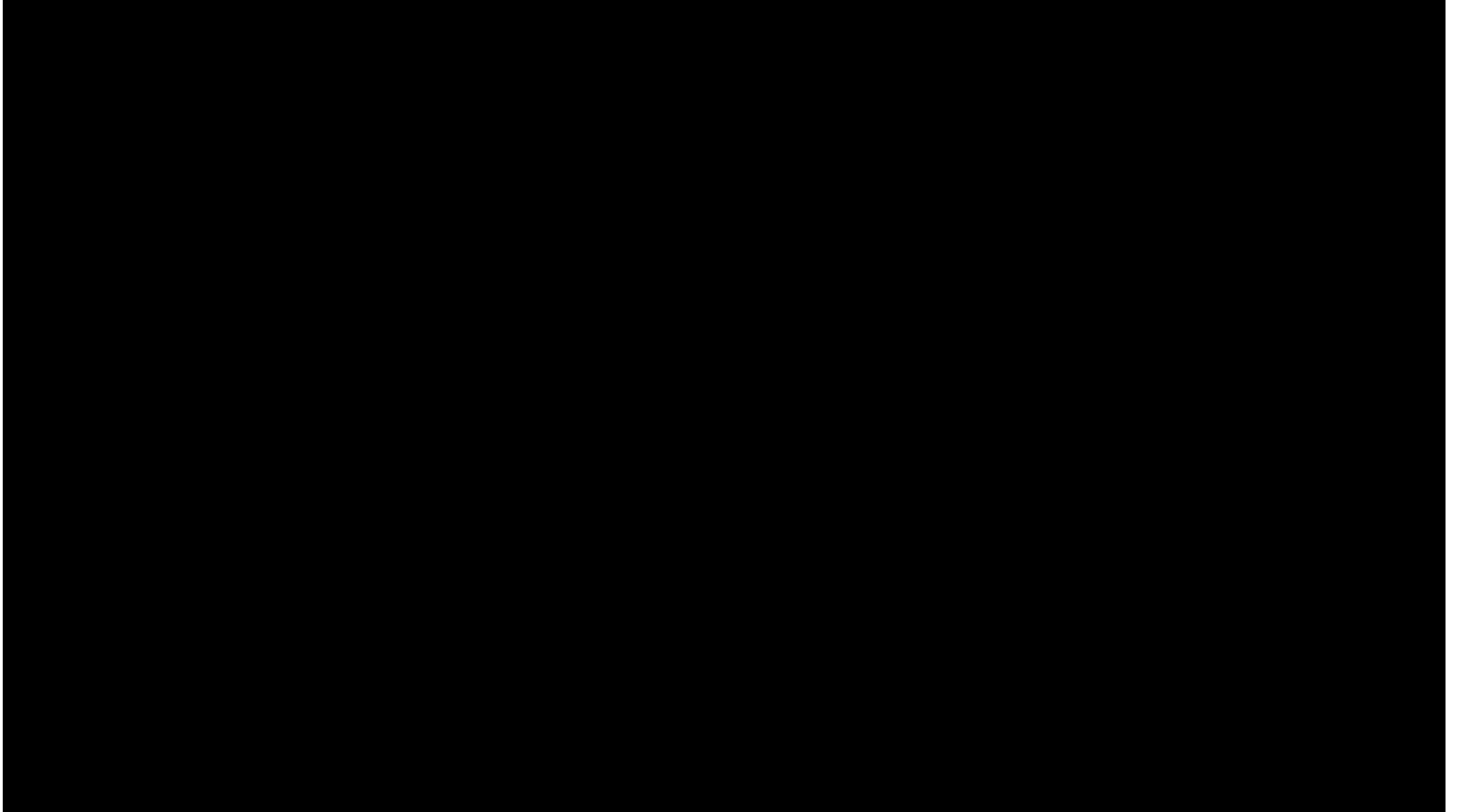
- Diversion: Utilizing the facilitation process and SDMA to make guardianship unnecessary
- Restoration: Utilizing the facilitation process and SDMA to persuade a court that guardianship is no longer needed or in the person's "best interest"



Approaching Year 4: Where we are today

- Facilitation model developed and refined with input from stakeholders, including people with I/DD
- More than 60 volunteer facilitators trained
- More than 60 persons with I/DD (who we call “Decision Makers, or DMs) currently in the facilitation process, with 6 having completed and signed Supported Decision-making Agreements (SDMAs)
- Original NYC and Westchester sites expanding to Rochester, Long Island and the Capital Region

Does it really work?





But What about Protection?

- SDM creates a circle of supporters with “many eyes” to protect against abuse, exploitation or undue influence
- SDM fosters self-determination which results in being “more independent, more integrated into [the] community, better problem solvers, better employed, healthier, and better able to identify and resist abuse” National Council on Disability, *Beyond Guardianship: Toward Alternatives That Promote greater self-Determination* (2018)



The National Council on Disability Report continues

- “People with intellectual and developmental disabilities learn through the process of making decisions...It’s not about protecting someone. It’s about teaching them how to best protect themselves”

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Supported Decision-Making: What You Need to Know and Why

By Kristin Booth Glen

Supported decision-making (SDM) has been described as “a newly emerging process” and that is true as a legal matter, especially where statutory recognition is concerned. But people with intellectual, developmental, psychosocial, and cognitive disabilities have been receiving support from family members, friends, professionals and providers for decades without ever denominating it SDM. A frequently quoted definition encompasses both ways in which support may be given, describing SDM as “[a] series of relationships, practices, arrangements, and agreements of more or less formality and intensity, designed to assist an individual with a disability to make and communicate to others, decisions about the individual’s life.”¹

That is, SDM can range from entirely informal, to more formal processes involving a written agreement, and even to legislation requiring recognition of such agreements by third parties. This range also reflects two very different sources from which SDM is derived.

The first is our common understanding that no one makes decisions, especially important decisions, entirely in a vacuum. Faced with a decision to pursue graduate education, rent an apartment, buy a car, propose marriage, accept or reject a major medical intervention, etc., we all seek information and advice—supports—from a variety of people and sources. SDM reflects the fact that this can and should be equally true for people with disabilities, except that they may require more or different supports to make their decisions. These may include someone providing assistance in gathering relevant information, explaining that information in simple language, considering the consequences of making a particular decision or not making it, weighing the pros and cons, communicating the decision to third parties, and/or assisting the person in implementing the decision.²

The second source from which SDM derives is the United Nations Convention on the Rights of Persons with Disabilities (CRPD),³ which locates SDM in Article 12’s enunciation of the human right of legal capacity. The CRPD states, as a general principle, “every person’s right to dignity, including the right to make his or her own choices.”⁴ Legal capacity, as guaranteed to all persons, regardless of disability, has been defined as both the right to “equal recognition... before the law,” and the right to legal agency, that is, to have “the power to engage in transactions and create, modify, or end legal relationships.”⁵

Although SDM is not specifically mentioned as such in the CRPD, it derives directly from Article 12, Section 3, which requires Member States to provide “such supports as are necessary” to enable a person to exercise her or his legal capacity. The First General Comment on the CRPD describes SDM as an important means to accomplishing that end. Notably, SDM is explained as including advance directives, as well as ongoing support by trusted people in the life of a person with a disability.⁶

The CRPD has been signed but not ratified by the US. It has, however, prominently entered the discourse around the rights of persons with intellectual and developmental disabilities (I/DD) as well as, to a lesser extent, persons with psychosocial (mental health) disabilities, and older persons with progressive cognitive decline, dementia, Alzheimer’s, etc. And, in a different vein, as discussed below, this discourse also challenges us to think very differently about how decisions are, or can be, made, and thus how existing systems that impose substituted decision-making on purportedly “incapacitated” individuals might be re-conceptualized and reformed.

Recognition of SDM

In a very short time, SDM has been recognized and embraced by a variety of stakeholders, including the U.S. Administration for Community Living (ACL)⁷, the American Bar Association, the Uniform Law Commission (ULC), the National Guardianship Association, and the Arc.⁸ ACL has funded a number of related projects including the National Resource Center on SDM.⁹ The ABA has passed a resolution promoting SDM, and similar official statements have been issued by the Arc¹⁰ and NGA.¹¹ The ULC’s recent revision of the Uniform Guardianship and Protective Proceedings Act (UGPPA, now the Uniform Guardianship, Conservatorship and Other Protective Arrangements Act, or UGCOPAA) specifically includes SDM as a “less restrictive alternative” that should be attempted before guardianship is sought or imposed.¹²

The National Council on Disability recently published a lengthy report, *Beyond Guardianship: Toward Alternatives that Promote Greater Self-Determination*,¹³ that describes and promotes SDM as a promising modality providing a practical solution for allowing persons with disabilities to

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maintain their autonomy. SDM has also been the subject of considerable scholarly attention, with law review articles and presentations at scholarly conferences,¹⁴ as well as at bar association meetings here in New York.¹⁵

One particularly notable instance of recognition has been the passage of state statutes specifically recognizing SDM and Supported Decision-Making Agreements (SDMAs), beginning with Texas in 2015, Delaware in 2017, and most recently Wisconsin, and the District of Columbia.¹⁶ Similar statutes are currently under consideration in a number of additional states.¹⁷

Although third parties are free to honor SDMAs, legislative recognition is critical to actualizing legal capacity. Without legislation, there is no obligation on private third parties to accept SDMAs. In our litigious society, fear of potential liability creates a powerful disincentive to do so. What use is the SDMA, no matter how much integrity went into the process of creating it, if the health care provider refuses to accept it as consent for treatment, or the banker for withdrawal from an account?

“What use is the SDMA, no matter how much integrity went into the process of creating it, if the healthcare provider refuses to accept it as consent for treatment, or the banker for withdrawal from an account?”

SDM in New York and How It Works

In 2016 the New York State Developmental Disabilities Planning Council (DDPC) funded a five-year project to create an educational campaign about SDM for a wide variety of stakeholders throughout the state. As well, the grantee was to design and run two pilot programs testing the use of SDM to divert persons with I/DD at risk of guardianship, and to restore rights to persons with I/DD currently subject to guardianship. The project to which the grant was awarded, Supported Decision-Making New York (SDMNY), is a consortium of Hunter/CUNY, the New York Alliance for Inclusion and Innovation (formerly NYSACRA), The Arc Westchester, and Disability Rights New York (DRNY).

Now in its third year, SDMNY has developed, and is implementing, a three-phase model for facilitating the use of SDM by persons with I/DD (denominated “Decision-Makers”) and their chosen supporters.¹⁸ Facilitators, who serve as volunteers (or, in the case of student facilitators, potentially for academic credit)¹⁹ receive a two-day training and are supervised by experienced mentors with expertise in the SDMNY facilitation process.

In Phase 1, the facilitator works with the Decision-Maker to determine what kinds of decisions she or he is already making, or is able to make on her or his own, in which areas or domains she or he needs and desires support, and what kinds of support she or he wants in each area. Some relevant domains include health care, finances, education, employment, relationships, community services, etc. The facilitator also assists the decision-maker in identifying trusted persons in her or his life to serve as her or his supporters.

In Phase 2, the facilitator works with those chosen supporters, educating them about SDM and getting their buy-in to its process. This phase is also about “repositioning” them from their prior roles of making decisions for the decision-maker, to truly supporting her or him in making her or his own decisions. When the supporters understand, accept and commit to this new role, the process moves to Phase 3.

In Phase 3, the decision-maker and supporters come together with the facilitator to negotiate their SDMA.

The agreement they reach spells out the areas for support, from whom the support in each area will be given, and the kinds of support to be provided. Each SDMA is individually tailored, but follows a template developed by SDMNY based on review of all existing SDMAs in the U.S. and elsewhere, and consultation with a variety of stakeholders, including self-advocates.

The SDMA is intended both to memorialize the parties’ agreement, and to provide an ongoing process that the decision-maker will be able to use for years to come. To that end, it is a flexible document that can be amended as circumstances change—when supporters move, “age out,” or new people become important in the decision-maker’s life; where she or he gains sufficient capability in an area such that support is no longer needed, or when a new area opens up.

There is currently no statute in New York requiring acceptance of SDMAs by third parties, although SDMNY is working on efforts to have state agencies, including the Office of People with Developmental Disabilities (OP-WDD) and the Department of Education, honor them.²⁰ One goal of the project is to create an evidence base that will support such legislation in the future.

As of June, 2018 over 50 volunteer facilitators have been trained, and nearly 30 decision-makers are actively participating, with a number soon to execute SDMA's.²¹ The Arc Westchester has already begun utilizing the facilitation model in that county and, in the third year of the project, new sites will be initiated in upstate locations (the Rochester and Capital areas) and hopefully in Long Island.

Implications of SDM for New York Law

A. Guardianship

The most obvious area to which SDM applies is that of guardianship, whether under Article 81 of the Mental Hygiene Law or Article 17-A of the Surrogate's Court Procedure Act. The former specifically requires consideration of less restrictive alternatives²² before guardianship may be imposed.²³ While 17-A lacks virtually all the procedural—and constitutionally mandated—protections of Article 81,²⁴ least restrictive alternatives should apply equally to guardianships for persons with intellectual and developmental disabilities as a constitutional imperative, premised in substantive due process,²⁵ and courts have so held.²⁶ SDM is clearly a less restrictive alternative, and is increasingly recognized as such in both case law²⁷ and in revisions to guardianship statutes, as with the revised UGCOPAA, and state statutes, like Maine's,²⁸ that have since followed UGCOPAA's lead.

As a less restrictive alternative, SDM derives conceptually from the statutory requirement that the state may not intervene in an "incapacitated" person's life, or deprive that person of liberty and/or property interests, unless such intervention is "necessary" to protect the person from harm.²⁹ Where a functioning system of supports for the "incapacitated" person's decisions is in place, there is adequate protection, and the necessity for more restrictive state intervention disappears. But, SDM also functions to interrogate and overcome the required finding that a person is "incapacitated."³⁰

Article 81 deliberately adopted a "functional" test of incapacity, rejecting the diagnosis-driven determination that characterized New York's previous conservator and committee statutes³¹ and that still controls guardianship under Article 17-A. Historically, in evaluating capacity, a person's ability to "understand and appreciate" the nature and consequences of a decision has been seen as occurring in a vacuum; the operative model is that of an isolated "rational" individual examining relevant facts and independently reaching her/his decision. Yet both our personal experience and new findings in psychology and neuroscience³² demonstrate how problematic this underlying premise really is. People without disabilities

do not generally make "rational decisions," and, as already discussed, seldom if ever make them entirely alone.

SDM provides the lens for a different and more realistic understanding of how most people make decisions, and thus the meaning of their "capacity" to make them. Instead of asking solely whether someone can "understand and appreciate" a decision entirely on her or his own, the better inquiry is whether that individual can "understand and appreciate" *with appropriate and adequate supports*. That is, capacity is not a singular capability possessed and exercised by a lone individual. Rather, capacity is grounded in relationships, inviting a new legal formulation: that the individual's own capability, *plus* the support of others, equals capacity. This re-conceptualization of capacity has important implications for other areas of health law and practice.

Surrogate Health Care Decisions in the Family Health Care Decisions Act and SCPA Article 1750-b

One example comes from current New York statutes and regulations providing for surrogate health care decision-making when a patient "lacks capacity." In another article in this special issue, Robert Swidler discusses efforts to harmonize New York's two separate laws, one specifically for persons with intellectual and developmental disabilities,³³ the second for all other adults who "lack capacity" to make health care decisions for themselves and who do not have advance directives or court appointed guardians.³⁴

Putting aside the differences—and complexities in application—in the two statutes, and the arguments for consolidation of some sort, both depend on a determination of "incapacity" to make health care decisions. For example, for major medical decisions not involving end of life treatment³⁵ for persons receiving services from the Office of Persons with Developmental Disabilities (OPWDD), surrogate decision-making is authorized "when the adult lacks capacity to understand appropriate disclosures required for proposed professional medical treatment,"³⁶ a determination dependent on the written opinion of a psychologist or psychiatrist.³⁷ Under the FHCDA, and where end of life decisions are to be made for persons with I/DD, that determination is made by the attending physician, who must confirm, to a "reasonable degree of medical certainty," that the person currently lacks capacity to make health care decisions.³⁸ Surely, given the move to a functional rather than medically/diagnosis-driven assessment in guardianship generally, and the abandonment of a medical model for a social model of disability, it is at the very least problematic to hold that decision-making capacity is something that can be determined by a physician with "medical certainty."³⁹

More to the point of this article, SDM and the reconceptualization it creates may be relevant to a determination of incapacity here in two different but complementary ways. First, as a practical matter, any statute(s) dealing with this issue should provide that, in addition to health care directives, the existence of a valid SDMA which specifically includes health care decisions⁴⁰ should preclude inquiry into incapacity and should be honored by the health care provider. Second, in the absence of an SDMA, but drawing from SDM's more generous and realistic understanding of capacity, the determination of "capacity to make health care decisions" should not be made in a vacuum, but rather should take into consideration the person's ability to make those decisions with support.

For example, imagine a person with I/DD, who does not communicate verbally, in an emergency room by herself or himself. Imagine that the attending doctor has no special training in I/DD and cannot communicate with the patient. Determination of lack of capacity is almost certain, yet if the patient had or were given appropriate communicative supports, her or his ability to make the necessary decisions might look very different. And it's not just about communicative supports; a trusted person who knows the patient well could explain the medical situation in ways the patient could understand, and help her or him weigh alternatives and reach her or his own decision.

There is also an argument, not specifically related to SDM, that the Americans with Disabilities Act (ADA)⁴¹ may require provision of such supports, both for persons carrying an I/DD diagnosis and for adults in a hospital setting⁴² whose "capacity" is in question. Both⁴³ may be entitled to have the health care provider offer appropriate accommodations to enable the patient to be treated equally with all others in making her or his own health care decisions and communicating her or his medical needs in order to receive necessary treatment.

Allowing trusted persons in the patient's life to support her or him in making the health care decision (especially if the person is a "supporter" under an SDMA), rather than insisting the patient may only do so on her or his own, is arguably a "reasonable accommodation" to enable the individual to participate in health care decision-making. Allowing a friend or supporter to remain in the recovery room with a patient with I/DD to enable that patient to communicate her or his choices and/or needs effectively would be a modification to a policy keeping third parties out that, as required by the ADA, neither imposes an undue burden on the hospital or health care provider nor represents a fundamental alteration to the nature of their services. Similarly, the hospital or health care provider may be required to provide

support by, for example, furnishing information slowly and in plain language, the same way that they may be required to provide sign language interpretation to ensure effective communication with deaf or hard of hearing patients.⁴⁴ Through its commitment to removing societally imposed barriers to equal treatment for persons with disabilities, the ADA resonates, and is consistent with, SDM as an "accommodation" for support that allows persons with disabilities to make their own health care decisions and articulate their health care needs like any other "competent adult."

Involuntary Administration of Antipsychotic Drugs

For more than three decades our courts have recognized that the state may not involuntarily administer antipsychotic drugs to persons with mental illness committed to psychiatric facilities. In *Rivers v. Katz*,⁴⁵ the Court of Appeals reiterated the general principle that competent adults have a right to control their own medical treatments, including refusing prescribed medication. The Court held that, without a finding of incapacity, persons with mental illness retain that right. Only a finding, by clear and convincing evidence, "that the individual to whom the drugs are to be administered lacks the capacity to decide for himself whether he should take the drugs" permits the court to consider and decide whether administration of those drugs is in the patient's best interest.⁴⁶

In this situation, the lens of SDM can provide a new and additional perspective. Here, it could be argued, "capacity" should be determined by assessing the ability of the person with mental illness to make a decision, not entirely alone, but *with the support* of a trusted person or persons in his or her life. When a psychiatric patient has an SDMA, honoring that agreement would both preserve her or his rights and integrity, and also avoid costly and unnecessary litigation.⁴⁷ In the absence of an SDMA, appropriate supports might also be offered as an ADA-required or inspired "accommodation."

The use of SDM—and a model for facilitating SDMA for persons with psychosocial disabilities—is, at this moment, undeveloped in the US. Such individuals often have a dearth of natural supports, including family members, from whom they may be estranged. Accordingly, SDM may operate somewhat differently for this cohort than it does for persons with I/DD. Peer support, which has been used for SDM by persons with psychosocial disabilities in other countries, seems a promising alternative.⁴⁸

Because SDM is also understood to include advance directives,⁴⁹ it also potentially encourages use of psychiatric advance directives (PADs)⁵⁰ and/or so-called "Ulysses

agreements.”⁵¹ The latter involve choices/decisions/instructions about treatment and medication that a person with a psychosocial disability makes, often with peer support, which are specifically intended to override his or her objections to such treatment or medication when he or she is in “crisis.”⁵² Honoring such agreements would avoid litigation and, as well, potentially preserve a respectful physician-patient relationship.

Conclusion

Supported decision-making is not only a process currently in use by, or being piloted for, persons with I/DD as an alternative to guardianship. It is also a new way of thinking about fundamental issues of “mental capacity” and “legal capacity” as those characterizations affect other groups of vulnerable people for whom substitute decision-making, with its concurrent denial of rights, has long been a default position. Where health law confronts and/or requires decision-making by adults with intellectual and developmental disabilities, psychosocial disabilities, traumatic brain injury (TBI) or older persons with progressive cognitive decline, dementia, and Alzheimer’s, SDM challenges the existing paradigm of substitute decision-making and rights deprivation. Instead, SDM presents an exciting opportunity both to promote self-determination and dignity and, at the same time, “to do no harm.”

Endnotes

1. Robert Dinerstein, Implementing Legal Capacity Under Article 12 of the UN Convention on the Rights of Persons with Disabilities: the Difficult Road from Guardianship to Supported Decision-Making, 19 Hum. Rts. Brief 8, 10 (2012).
2. For examples of how persons with intellectual and developmental disabilities make health care decisions with supports, see the informative video, *Making Healthcare Choices: Perspectives of People with Disabilities*, available at <http://www.aclu.org/other/supported-decision-making-resource-library?redirect=supported-decision-making-resource-library>.
3. G.A Resolution 61/106, Convention on the Rights of Persons with Disabilities (Dec. 13, 2006), available at www.un.org/disabilities/documents/convention/convoptprot-e.pdf (CRPD).
4. CRPD, *id.*, Article 3, General Principles (a).
5. CRPD, General Comment No. 1 (2014) Para. 11, available at <https://wgnusp2013.files.wordpress.com/2014/article-12-general-comment-1-11-april-2014-pdf>. The General Comment is a product of the Committee on the Rights of Persons with Disabilities, the body created under the Convention to interpret it, and to issue reports on compliance or noncompliance by member states that have ratified the Convention and its Optional Protocol.
6. General Comment, *id.*, Para. 17.
7. ACL is an agency within the U.S. Department of Health and Human Services (HHS) that includes the Administration on Aging and the Administration on Intellectual and Developmental Disabilities. It was an early supporter of SDM, partnering with two ABA Commissions in the first National Roundtable in 2012.

- See <https://www.americanbar.org/groups/disabilityrights/resources/article12.html>.
8. ARC of the United States is the national organization representing numerous ARC (formerly, the Association for Retarded Children) chapters around the country, and is the preeminent organization of parents of children with I/DD.
 9. The Center’s website is available at <https://www.supporteddecisionmaking.org>.
 10. The Arc, Position Statement, Autonomy, Decision-Making Supports and Guardianship (2016), available at <https://www.thearc.org/who-we-are/position-statements/rights/Autonomy-Decision-Making-Supports-and-Guardianship>.
 11. National Guardianship Association, Position Statement on Guardianship, Surrogate Decision Making and Supported Decision Making (2017), available at <https://guardianship.org/wp-content/uploads/2017/07/SDM-Position-Statement-9-20-17.pdf>
 12. UGCOPPA, available at <http://www.uniformlaws.org/Act.aspx?title=Guardianship,%20Conservatorship,%20and%20Other%20Protective%20Arrangements%20Act>.
 13. National Council on Disability, Beyond Guardianship: Toward Alternatives That Provide Greater Self-Determination (March 22, 2018), available at https://www.ncd.gov/sites/default/files/NCD_Guardianship_Report_Accessible.pdf(NCD Report).
 14. For example, there were presentations on SDM at the Association of American Law Schools (AALS) in 2014, the Law and Aging Section of the Law & Society Association in 2015, Cardozo Law School’s Symposium, Personhood and Civic Engagement by Persons with Disabilities in 2017, Columbia Law School’s Symposium, Localizing Human Rights in the New Era in 2017, etc.
 15. SDM was the subject of a presentation at the NYSBA Elder Law and Special Needs Section Fall Meeting in 2017, at an evening forum of the New York City Bar Association on June 14, 2018, and will be featured at a CLE at the NYSBA Annual Meeting in January, 2019.
 16. Tex. Est. Code Ann. §§ 1357.001–.003 (2015); Del. Code Ann. tit. 16, §§ 9401A–9410A (2017); D.C. Code §§ 21-2001 to 2077 (2018); Wis. Stat. §§ 52.01-.32 (2018).
 17. For the most recent updates, see <http://sdmny.org/sdm-state-map/>.
 18. For more information on the model see Kristin Booth Glen, *Piloting Personhood: Reflections From the First Year of a Supported Decision-Making Project*, 39 Cardozo L. Rev. 495 (2017)
 19. SDMNY is experimenting with Occupational Therapy Assistant (OTA) students at La Guardia Community College and Bachelor of Social Work (BSW) students at Hunter’s Silberman School of Social Work.
 20. There is precedent for this as the D.C. Board of Education has regulations specifically requiring recognition of SDMA’s; see Supported Decision-Making, D.C. Pub. Schools, <https://dcps.dc.gov/page/supported-decision-making>.
 21. It is particularly moving that one of these decision-makers in the Restoration Pilot, is a Willowbrook survivor.
 22. Under 81.02(a)(2), the court is mandated to consider the sufficiency of other vehicles set out in 81.03(e), which lists, without limitation, “available resources.” Notably, Article 81 was passed a quarter of a century ago, when SDM, as an articulated concept or process, was entirely unknown.
 23. See MHL 81.01 MHL (“The Legislature finds that it is desirable ... for persons with incapacities to make available to them the least restrictive form of intervention...”) 81.09(5)(xii), directing the court evaluator to report on “least restrictive form of intervention”

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- and MHL 81.15(b)(4 and 5), requiring a showing of necessity and requiring a guardian's powers to be limited to the "least restrictive." Although specific language requiring guardianship to be the least restrictive alternative is not used in the statute, the Law Revision Commission made clear that that imperative was fundamental to the entire statutory scheme ("The Legislature recognized that the legal remedy of guardianship should be the last resort for addressing a person's needs because it deprives the person of so much power and control over his or her life") (emphasis added), Rose Mary Bailly, *Practice Commentaries*, McKinney's Cons. Law of N.Y. Book 34A, Mental Hygiene Law Sec. 81.01 at 7 (2006 ed.).
24. See discussion in the Report of the NYC Bar Association Committees on Mental Health Law and Disability and the Law, reprinted as Karen Andrieasian *et al.*, *Revisiting S.C.P.A. 17-A: Guardianship for Persons with Intellectual and Developmental Disabilities*, 18 CUNY L. Rev. 287,301-317 and 301, n.65 (collecting comments on the statute's constitutional infirmities) (2015) and n. 65 (NYC Bar Committees Report)
 25. See, e.g., *Kesselbrenner v. Anonymous*, 33 N.Y.2d 161, 165(1973); *Manhattan Psychiatric Center v. Anonymous*, 285 A.D.2d 189, 197-98 (1st Dept. 2001)
 26. See, e.g., *In re D.D.*, 50 Misc. 3d 666, 668 (Sur. Ct., Kings Co. 2015); *In re Dameris L.*, 38 Misc. 3d 570, 578 (Sur. Ct., N.Y. Co. 2012)
 27. *Id.*
 28. Maine, "An Act to Recodify and Revise the Maine Probate Code," LD 123 (HP 91) signed 4/20/2018, www.legislature.maine.gov/LawMakerWeb/summary.asp?ID=280062616.
 29. See MHL 81.02(a)(1) and (b).
 30. See MHL 81.02(a)(2) and (b)(2).
 31. Unfortunately, and almost certainly unconstitutionally, Article 17-A, unchanged in this respect since enactment in 1969, retains this outmoded reliance on diagnosis as the basis for imposing a guardian. NYC Bar Committees Report, *supra* n. 24 at 303.
 32. See discussion of the recent work in behavioral economics, including that of the 2017 Nobel prize winner in economics, that "undermines the fundamental belief that our decisions are based in reason," NCD Report, *supra* n. 13 at 77.
 33. N. Y. Sur. Ct. Proc. Act Art. 17-B.
 34. FHCDA, N.Y. Pub. Health L. § 2994-a *et seq.*
 35. End-of-life decisions for persons with I/DD are covered by S.C.P.A. 1750-b, which provides a whole series of additional protections for that population.
 36. 14 N.Y. Comp. Codes R. & Regs. Sec. 633.11(a)(1)(iii)(b).
 37. *Id.* at 633.11(g)(2).
 38. FHCDA, *supra* n. 24 at Sec. 2994-c (2); SCPA 1750-b(4)(a).
 39. See NCD Report, *supra* n. 13 at 78 ("Medical doctors are simply not trained in the legal, functional and medical assessments that could lead to a reliable determination of an individual's "capacity").
 40. Because each SDMA specifies the areas/domains in which support is to be given, the existence of an SDMA per se would not take the patient out of the statute's purview.
 41. Americans With Disabilities Act, 42 U.S.C. Secs. 12161 *et seq.* (1990).
 42. Unlike 1750-b, the FHCDA only applies in hospital, hospice and nursing home situations. The ADA covers public hospitals under Title II, See 42 U.S.C. 12131(2), 28 C.F.R. 35.130, and private hospitals, under Title III, 42 U.S.C. 12181(7)(F); the latter also covers the professional office of a health care provider.
 43. Under Title II's "qualified individual" standard, both would be covered because they are eligible for the health care services they are seeking, while under Title II they are "individuals who are discriminated against on the basis of a disability in the full and equal enjoyment of the goods, services, facilities, privileges...of any place of public accommodation."
 44. The obligation to provide reasonable accommodations to enable communication with people with disabilities derives from the language of the ADA, Sec. 12132, and from DOJ regulations on auxiliary aids and services, specifically 28 CFR 35.160. The communication obligation has been applied to people with I/DD in, e.g. *Folkerts v. City of Waverly*, 707 F.2d. 975, 984 (8th Cir. 2017) and *Brooklyn Center for Independence of the Disabled v. Bloomberg*, 980 F. Supp. 2d 588, 650 (S.D.N.Y. 2013).
 45. 67 N.Y.2d 485(1986)
 46. *Id.* at 496-97
 47. Involuntary medication litigation is costly to the institution in the time of its employees, and, of course, to the court system. It is also often counterproductive to the patient's long-term relationship with health care providers and the use of potentially helpful medications.
 48. See Kristin Booth Glen, *Introducing a "New" Human Right: Learning From Others, Bringing Legal Capacity Home*, 49 Colum. Human Rts. L. Rev. 1, 38 (2018) ("Introducing").
 49. CRPD, General Comment No. 1, *supra* n. 3, at para.15.
 50. For a discussion of the status of PADs and the use of health care agents in New York, see Ronna Blau, Lisa Volpe, Christy Coe and Kathryn Strodel, *Psychiatric Advance Directives: A New York Perspective*, NYSBA Health Law Journal 25 (Spring 2017) and see Disability Rights New York, Mental Health Advance Directives Fact Sheet, *available at* <http://new.drny.or/docs/factsheet/mental-health-advance-directives-fact-sheet.pdf>.
 51. See, e.g., Judy A. Clausen, *Making a Case for a Model Mental Health Advance Directive Statute*, 14 Yale J. Health Pol'y L. & Ethics 1,3 (2014); Cuca, *infra* n. 52, at 1153.
 52. It should be noted that there is some debate about whether Ulysses agreements can appropriately be considered SDM as they privilege a "former self" over a "present self" in times of crisis, thus depriving that "present self" of legal capacity. For an example of SDM/peer support in making and utilizing Ulysses agreements in a pilot project in Nairobi, Kenya, see *Introducing*, *supra* n. 48, at 38. See Roberto Cuca, *Note: Ulysses in Minnesota: First Steps Toward a Self-Binding Psychiatric Advance Directive Statute*, 78 Cornell L. Rev. 1152,1152-53 (1993) (Cuca).