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LAWYERS' OBLIGATIONS WHEN REPRESENTING CLIENTS WITH DIMINISHED CAPACITY

*Elissa Germaine*¹

Lawyers have a significant role to play in protecting clients with diminished capacity from financial exploitation. PIABA members, in particular, see the issue from a unique vantage point – usually after a person with diminished capacity (or a family member or concerned third party) notices a drop in value in his or her brokerage account and approaches the lawyer to help figure out what happened in the account and, if appropriate, to pursue a claim to recover damages. As such, members must understand their own obligations as lawyers to clients with diminished capacity, obligations that apply in the context of client representation during FINRA proceedings as well as in other areas of legal practice.

Clients with diminished capacity present significant challenges. As is the case for advisers in the financial arena, the existing rules for lawyers might not provide every answer. Of course, the relevant jurisdiction's ethical rules should always serve as a starting point, most likely at the jurisdiction's equivalent of ABA Model Rule 1.14, Clients with Diminished Capacity. Though laudable in its goal to balance the competing interests and concerns, Rule 1.14 leaves much unanswered. Moreover, it is not the only source of ethical considerations concerning clients with diminished capacity. Thus, attorneys should refer to the "Four C's" of legal ethics: (1) client identification, (2) conflicts of interest, (3) confidentiality, and (4) competence.² In addition, the National Academy of Elder Law Attorneys

1. Elissa Germaine is the Director of the Investor Rights Clinic at the Elisabeth Haub School of Law at Pace University and an Adjunct Professor of Law. The author would like to thank Benjamin P. Edwards, Jill I. Gross, Nicole G. Iannarone, Lance C. McCardle, and Teresa Verges for their suggestions and comments.

2. ABA COMMITTEE ON LAW & AGING, WHY AM I LEFT IN THE WAITING ROOM? UNDERSTANDING THE FOUR C'S OF ELDER LAW ETHICS (2015), *available at*: http://www.americanbar.org/content/dam/aba/administrative/law_aging/EthicsBrochure.authcheckdam.pdf (hereinafter "UNDERSTANDING THE FOUR C'S OF ELDER LAW ETHICS"); *see also* ABA COMMITTEE ON LAW & AGING & AMERICAN PSYCHOLOGICAL ASS'N., ASSESSMENT OF OLDER ADULTS WITH DIMINISHED CAPACITY: A HANDBOOK FOR LAWYERS (2005) (hereinafter "ABA-APA HANDBOOK").

(NAELA)³ created a set of guidelines in 2005 – the “Aspirational Standards for the Practice of Elder Law” – to assist attorneys practicing in the area of Elder Law.⁴ The Aspirational Standards aim to fill in the gaps and answer questions that might not be fully answered by the ABA Model Rules of Professional Conduct and each state’s professional responsibility rules.⁵

Lawyers should conduct an “integrated analysis” that addresses the issues of client identity, multiple representation and conflicts of interest, confidentiality, and the interests of third parties to determine how to best represent the interests of the identified client.⁶ This analysis should involve “a searching inquiry into the underlying attitudes, feelings, and circumstances of the individual clients to understand their respective interests.”⁷ This article provides an overview of the issues that attorneys must consider to meet their ethical duties to clients who may suffer from diminished capacity. Section I provides an overview of the Four C’s of client representation, unpacking the ethical obligations and choices the attorney must make. Section II outlines the guidelines for representing a client with diminished capacity, focusing on

3. NAELA is a professional association of attorneys dedicated to improving the quality of legal services provided to people as they age and people with special needs. ABOUT NAELA, https://www.naela.org/Public/About/Public/About_NAELA/About.aspx?hkey=3ae07a3c-c172-4565-a52b-091d49e31841 (last visited Sep. 13, 2016).

4. Professionalism & Ethics Committee of the National Academy of Elder Law Attorneys, *Aspirational Standards for the Practice of Elder Law with Commentaries*, 2 NAELA J. 5, 6-7 (2006), available at: https://www.naela.org/App_Themes/Public/PDF/Media/AspirationalStandards.pdf (hereinafter “NAELA *Aspirational Standards*”). NAELA is currently working to update these standards. See Roberta K. Flowers, *Practical Ethics: Confronting Ethical Questions that Practitioners Ask*, NAELA NEWS (Dec. 2014/Jan. 2015), available at: https://www.naela.org/Public/Library/Publications/Publications_Main/NAELA_News_Archive/NAELA_News_2014/Dec2014Jan2015/Practical_Ethics_Aspirational_Standards_News_.aspx.

5. NAELA *Aspirational Standards*, *supra* note 4, at 6-7; Gregory S. French, CELA, CAP, *Aspirational Standards for the Practice of Elder Law Distinguish NAELA Members from Other Attorneys*, NAELA NEWS (Feb./Mar. 2013), available at: https://www.naela.org/Public/Library/Resource_Database/Topics/1_Ethical_Issues/1_a_ASPIRATIONAL_STAND/Aspirational_Standards.aspx.

6. Joseph A. Rosenberg, *Adapting Unitary Principles of Professional Responsibility to Unique Practice Contexts: A Reflexive Model for Resolving Ethical Dilemmas in Elder Law*, 31 LOY. U. CHI. L. J. 403, 454 (2000).

7. *Id.* at 454-55.

keeping the relationship as normal as reasonably possible and, when protective action is needed, taking the least restrictive action possible.

I. SATISFYING THE FOUR C'S OF CLIENT REPRESENTATION

Lawyers owe all clients certain ethical duties, including client-centered representation, conflict-free representation, confidentiality, and competence. These so-called Four C's provide a baseline from which to evaluate many of the issues that arise in representing senior clients or those with some incapacity.

A. Ensuring Client-Centered Representation by Identifying the Client

As basic as it seems, identifying the client is a necessary yet often challenging step in situations involving the elderly or those with diminished capacity, as the client is not always easily identifiable because of the common presence of other people, such as family members.⁸ Family members may be very involved in the legal concerns of the person with diminished capacity, and they may have a stake in the outcome.⁹ Identifying the client at the outset of the relationship will help attorneys understand and identify whose interests are being addressed; understand and clarify the person to whom the lawyer has professional duties of competence, diligence, loyalty, and confidentiality; clarify what steps can and cannot be taken after an initial consultation if the client is not present; and arrange at the earliest possible time for private, direct, and personal (preferably face to face) communication with the client.¹⁰ In addition, clear early client identification will ensure that other involved parties are aware of the person in whose interest the lawyer is acting.¹¹

8. Roberta K. Flowers & H. Amos Goodall, Jr., *In Fear of Suits: The Attorney's Role in Financial Exploitation*, 2014 EMERGING ISSUES 7263, at 9 (Oct. 21, 2014). See also Rosenberg, *supra* note 6, at 405 ("The traditional concept of a solitary client making decisions about a legal problem isolated from the interests of others does not apply.").

9. UNDERSTANDING THE FOUR C'S OF ELDER LAW ETHICS, *supra* note 2; NAELA Aspirational Standards, *supra* note 4, at A-1 Comment.

10. NAELA *Aspirational Standards*, *supra* note 4, at 7.

11. For example, if the attorney is involved in drafting estate planning documents, family members may assume that the attorney represents their interests as well as the elderly client's interests. See Julia A. Lemke & Seymour Moskowitz, *Protecting the*

Client identification can be accomplished by gathering information, preferably via an intake form, as early as possible.¹² The responses on the intake form will indicate the responder's perception of who the client is.¹³ Nevertheless, there is not always a clear answer and attorneys should investigate beyond the form, thinking about how the representation may later evolve and the differing interests that might later appear, if they are not already present.¹⁴ This type of situation could occur at the beginning of a possible client engagement regarding losses in an investment account, when a prospective client brings an adult child or spouse who is not a joint account holder to an initial intake meeting. One possible response for a lawyer faced with such uncertainties is to always identify the client as the "vulnerable" or elderly person.¹⁵ However, while this may eliminate conflicts of interest issues, it may not yield a satisfactory result, as an adult child may still expect (and the parent may want) her child to be part of the initial interview meeting, as well as subsequent meetings and communications.¹⁶ In this situation, the lawyer may consider whether to identify the client as the vulnerable adult, as the adult child, as the adult child as a fiduciary for the vulnerable adult, or as

Gold in the Golden Years: Practical Guidance for Professionals on Financial Exploitation, 7 MARQ. ELDER'S ADVISOR 1, 5 (Fall 2005).

12. NAELA *Aspirational Standards*, *supra* note 4, at 7-8.

13. *Id.*

14. For example, if an adult child contacts a lawyer regarding legal advice on behalf of an elderly parent, and the adult child states she is seeking to schedule an appointment for her mother, the lawyer can easily determine that the client is the mother. Rosenberg, *supra* note 6, at 447. However, this determination may become more complex and troublesome if the adult child is seeking legal advice on behalf of her mother who has Alzheimer's disease (even before the attorney knows the mother's level of competence). *Id.* Additionally, situations that begin as a simple request for legal advice or services can often evolve into a more complicated set of facts. *Id.* at 448. Identifying the client may also depend upon the type of legal advice or services sought as well as the level of involvement of the adult child and other adult children or involved third parties. *Id.* For example, what if the adult child tells the lawyer that her mother wants to make a will that gives the mother's entire estate to this child and not her siblings? *Id.* Or, what if the adult child asks how she can become her mother's guardian, apply for Medicaid, and preserve the family home for herself? *Id.*

15. Rosenberg, *supra* note 6, at 448.

16. *Id.*

both parties through some form of joint or multiple representation.¹⁷ An intake form is only a first step, especially if the intended client did not fill out the form or did so with the assistance of another. In such a situation, the attorney should meet with the identified prospective or actual client in private to assess the client's capacity and voice directly.¹⁸ If the attorney determines that it is not in the best interest of the client to meet privately with the attorney, she should take other steps to ensure that the client's wishes are identified and respected.¹⁹

After identifying the client, the attorney should prepare a written engagement agreement that identifies the client and the scope and objectives of the representation. The agreement should also disclose any relevant foreseeable conflicts among the clients; explain the lawyer's obligation of confidentiality and confirm that the lawyer will share information and confidences among joint clients, if applicable; set out the fee arrangement; and explain when and how the attorney-client relationship may end.²⁰

Finally, ensuring client-centered representation includes taking steps to protect the client's objectives, including communicating the identity of the client to all involved parties.²¹ Identifying the client as a person with

17. *Id.* at 449-51.

18. NAELA *Aspirational Standards*, *supra* note 4, at 8. For example, if other family members accompany the client to an attorney meeting, the attorney should carefully explain why a confidential meeting with the client is important. In a private meeting with the client, the lawyer should try to ascertain whether the client is under any direct or indirect pressure to make particular decisions. This is especially important when family members may gain some advantage over others or when asset transfers are being considered. *Id.*

19. *Id.* at 8-9. These steps include making sure that the client understands the benefits of a confidential meeting but still rejects it, noting any indication of discomfort by the client or influence by another family member, noting the dominating tenor of another family member, and considering any inconsistencies with prior wishes. *Id.*

20. *Id.* at 9.

21. *Id.* at 7. *See also* Flowers & Goodall, *supra* note 8, at 9 (“[a]fter identifying the client and the other people ‘present’ in the representation, the attorney must then determine and adhere to the client’s objectives of the representation.”); MODEL RULES OF PROF’L CONDUCT r. 1.2 (AM. BAR. ASS’N 2016) (“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.”).

diminished capacity does not prevent the attorney from representing this person. Even when a client has diminished capacity, the attorney “must look to the client, and not family members, to make decisions on the client’s behalf,” except when protective action is necessary, as discussed more fully below.²²

B. Avoiding Conflicts of Interest and Determining the Best Type of Representation

Lawyers have an ethical obligation to avoid conflicts of interest, and owe their clients a duty of undivided loyalty.²³ Thus, lawyers must, at the outset of a potential engagement, identify any source of conflict and determine the type of representation that they will undertake, which could be the representation of one client, joint representation of multiple clients, sole representation of multiple clients, or representation of a client through a fiduciary.

1. The Vulnerable Individual as the Lawyer’s Sole Client

Perhaps the safest way to avoid conflicts of interest is to represent only the individual with diminished capacity. This is because bringing others into the representation risks “that the elder’s trust and confidence in the lawyer may erode, that a vulnerable client may be silenced by other clients, and that the client’s civil rights will be undermined.”²⁴

The sole representation scenario is not, however, without risk or other obligation. Family members are often intimately involved with the client’s affairs in a supportive and facilitating capacity. Attorneys should take care not to unintentionally treat third parties as clients, either by virtue of their physical presence, because they are potential beneficiaries of the client’s decisions, or because of their role in the client’s decision-making.²⁵ But as long as family members’ involvement is consistent with the client’s wishes and values, the attorney should continue to involve them while treating them as unrepresented

22. MODEL RULES OF PROF’L CONDUCT r. 1.14 cmt. 3 (AM. BAR. ASS’N 2016).

23. MODEL RULES OF PROF’L CONDUCT r. 1.7 cmt. 3 (AM. BAR. ASS’N 2016).

24. Rosenberg, *supra* note 6, at 455.

25. Flowers & Goodall, *supra* note 8, at 9.

persons.²⁶ If a family member or another third party offers to pay the vulnerable client's legal fees, the attorney should accept such payment only if the client gives informed consent, the third party will not influence the attorney's independent professional judgment, and information related to client representation is kept confidential as required by ABA Model Rule 1.6.²⁷

2. Joint Representation of Vulnerable Client and Others

At times, joint representation may be preferred if there is no apparent conflict of interest, as it can "further shared goals, common interests, family harmony, economic efficiency, consistency of action, and enhanced likelihood of serving the best interest of the clients."²⁸ For example, where spouses are joint account holders of an investment account at issue in a FINRA proceeding, lawyers may consider joint representation of a client with diminished capacity and his or her spouse.²⁹

Despite its positive aspects, however, joint representation can also produce misunderstandings among family members. Therefore, attorneys should inform both clients and family members about the type of representation being considered, especially with respect to the attorney's obligation to keep or share confidences.³⁰ In addition, the attorney should inform all clients of the

26. NAELA *Aspirational Standards*, *supra* note 4, at 11-12.

27. MODEL RULES OF PROF'L CONDUCT R. 1.8(f) (AM. BAR. ASS'N 2016). *See also* MODEL RULES OF PROF'L CONDUCT r. 1.7 cmt. 13 (AM. BAR. ASS'N 2016); NAELA *Aspirational Standards*, *supra* note 4, at 12. The attorney should communicate these standards to the client and to the non-client payor, and be sure that the third party understands that paying the attorney fees does not turn the third party into the client or allow access to otherwise confidential information.

28. NAELA *Aspirational Standards*, *supra* note 4, at 10.

29. Another example of a situation where lawyers often decide to enter a joint representation arrangement is when spouses struggling with dementia seek to create wills and other documents to address disability planning; long-term care financing (including the opportunity for Medicaid coverage); and the potential benefits of alternative plans that may involve trusts, transfers of property during life, and decisions about long-term care and living arrangements. Rosenberg, *supra* note 6, at 447. In this type of situation, joint representation provides cost savings with regard to attorney fees and honors "the primacy of relationships over individual interests." *Id.*

30. NAELA *Aspirational Standards*, *supra* note 4, at 10.

advantages and disadvantages, including the foreseeable conflicts of interest and risks, in a manner that will be understood by each potential client.³¹ Separate, private, and direct communications with each potential client may be called for to ensure that each potential client is candid and able to freely ask questions.³² Only after receiving educated consent and a waiver of conflicts by all parties should the attorney undertake joint representation. Further, if the attorney agrees to joint representation, she should establish a clear understanding and agreement that she will not keep client secrets from any other client in the joint representation.³³

3. Separate Representation of Multiple Clients

Sometimes attorneys will consider representing multiple clients in an individual (vs. joint) capacity if they can provide “competent and diligent representation to each affected client” and meet the other requirements of ABA Model Rule 1.7(b).³⁴ Where an attorney represents multiple clients, including one who suffers from diminished capacity, conflicts tend to arise not because the clients are directly adverse to each other, but because the representation of one client materially affects the representation of another.³⁵ This means that there is “a significant risk that a lawyer’s ability to consider, recommend or carry out an appropriate course of action for the client will be materially limited as a result of the lawyer’s other responsibilities or interests.”³⁶ Before undertaking this type of representation, lawyers should consider “the likelihood that a difference in interests will eventuate and, if it does, whether

31. *Id.* at 11.

32. *Id.*

33. *Id.* at 15.

34. MODEL RULES OF PROF'L CONDUCT r. 1.7(b) (AM. BAR. ASS'N 2016) (providing that notwithstanding the existence of a concurrent conflict, a lawyer may represent a client if: “(1) the lawyer reasonably believes that the lawyer will be able to provide competent and diligent representation to each affected client; (2) the representation is not prohibited by law; (3) the representation does not involve the assertion of a claim by one client against another client represented by the lawyer in the same litigation or other proceeding before a tribunal; and (4) each affected client gives informed consent, confirmed in writing.”).

35. Flowers & Goodall, *supra* note 8, at 12.

36. MODEL RULES OF PROF'L CONDUCT r. 1.7 cmt. 8 (AM. BAR. ASS'N 2016).

it will materially interfere with the lawyer's independent professional judgment in considering alternatives or foreclose courses of action that reasonably should be pursued on behalf of the client."³⁷

4. Representation Through a Fiduciary

Attorneys may sometimes represent a fiduciary (under a power of attorney, trust, or conservatorship/guardianship) of an individual with diminished capacity. In this situation, the attorney must ensure that the client understands that the duties of both the fiduciary and the attorney ultimately are governed by the known wishes and best interests of the principal (i.e., the person with diminished capacity).³⁸ The NAELA Aspirational Standards instruct that when representing a fiduciary for a person with diminished capacity, lawyers must "be guided by the known wishes and best interests of the person with diminished capacity, and may disclose otherwise confidential information, in the event a conflict arises between the fiduciary and the person with diminished capacity, if necessary to avoid substantial harm to the interest of the person with diminished capacity."³⁹ In this situation, both the lawyer and the fiduciary owe a duty to the principal, and both are bound by the principal's wishes, values, and best interests.⁴⁰ The NAELA Aspirational Standards also advise, however, that while there is well-reasoned authority for imposing a duty to the principal by the attorney who represents the fiduciary, state professional responsibility rules and opinions vary significantly in prescribing the extent of that duty, if any, to the principal.⁴¹

When a lawyer represents a client with diminished capacity, the conflicts of interest analysis requires that lawyers understand the individual circumstances of each potential client and the likely involvement of third parties – often well-meaning but sometimes not – in undertaking an integrated and considered analysis.

37. *Id.*

38. NAELA *Aspirational Standards*, *supra* note 4, at 14.

39. *Id.* at 27. When a fiduciary appears to be acting contrary to the client's previously expressed wishes when competent, the lawyer should determine whether the fiduciary is self-dealing to the detriment of the client. *See id.* at 27-28. (providing an example and explaining when protective action may be warranted).

40. *Id.* at 27.

41. *Id.* at 14.

C. Maintaining Confidentiality of Client Information

Lawyers have an obligation to keep information concerning the representation of a client confidential.⁴² Upholding this duty requires special care if a client has diminished capacity, due to the common involvement of family members, caregivers, or other third parties. Attorneys should carefully explain confidentiality to the client and ask whether the client wants to provide the lawyer with authority – limited or otherwise – to disclose confidential information to any third party, and for what objective.⁴³ When clients request disclosure, attorneys should help them understand the possible risks and consequences of disclosure (e.g., possible waiver of attorney-client privilege), and put this in writing. In cases of diminished capacity, however, if consultation with family members or other third parties is “necessary to assist in the representation,” such disclosure generally does not affect the applicability of the attorney-client privilege.⁴⁴

Some clients may consent to full disclosure of their discussions with the attorney to their family members, others may desire complete confidentiality, and others may prefer partial disclosure.⁴⁵ The lawyer should strive “to honor the client’s relationship with the third party while protecting the integrity of the attorney-client privilege.”⁴⁶

In addition to educating the client, attorneys should also explain the confidentiality obligations to other involved parties to avoid any misunderstanding.⁴⁷ This is especially important where a third-party family member pays the attorney fees. Communicating with family members or other interested parties about issues of client identification and confidentiality increases the likelihood that family members will understand if or when the attorney does not share confidential information with them or meets privately with the client.⁴⁸

42. MODEL RULES OF PROF'L CONDUCT r. 1.6 (AM. BAR. ASS'N 2016).

43. NAELA *Aspirational Standards*, *supra* note 4, at 15.

44. MODEL RULES OF PROF'L CONDUCT r. 1.14 cmt. 3 (AM. BAR. ASS'N 2016); NAELA *Aspirational Standards*, *supra* note 4, at 16-17.

45. Lemke & Moskowitz, *supra* note 11, at 7.

46. Rosenberg, *supra* note 6, at 449.

47. NAELA *Aspirational Standards*, *supra* note 4, at 15.

48. Lemke & Moskowitz, *supra* note 11, at 7.

D. Assessing Client Competence

The final “C” of elder law ethics – competence – addresses two issues: (1) assessing the client’s competence, and (2) the traditional legal ethics requirement of ensuring that the lawyer is competent.

1. Lawyer as Assessor of Competence

While most lawyers are not trained as medical professionals, a lawyer does not meet her duty of competence if she fails to assess a client’s competence. Thus, attorneys should develop and use skills for preliminary client competency assessments.⁴⁹ A lawyer’s assessment scale should weigh several balancing factors in evaluating her client’s competence: the client’s ability to articulate reasoning leading to a decision, the client’s variability of state of mind and ability to appreciate consequences of a decision, the substantive fairness of a decision, and the consistency of a decision with the known long-term commitments and values of the client.⁵⁰ Attorneys can assess these factors during a client interview and/or counseling conversation.⁵¹

The lawyer’s own assessment is only the first of three levels of potential capacity screening: (1) an initial assessment component and, if necessary, (2) use of a clinical consultation or formal evaluation by a clinician, and (3) a final legal judgment about capacity by the lawyer.⁵² At the initial assessment, the lawyer will often be able to conclude that: (1) there is no or very minimal evidence of diminished capacity and representation can proceed, (2) there are some mild but not substantial capacity concerns and representation can proceed, (3) capacity concerns are more than mild and merit professional consultation or formal assessment, or (4) capacity to proceed with the requested representation is lacking.⁵³

While lawyers may be concerned with making these assessments because they are not mental health professionals, there are resources available. For

49. NAELA *Aspirational Standards*, *supra* note 4, at 20. *See also* MODEL RULES OF PROF’L CONDUCT R. 1.14 (“acknowledg[ing] the lawyers’ assessment functions, and indeed, suggest[ing] a duty to make informal capacity judgment in certain cases.”).

50. MODEL RULES OF PROF’L CONDUCT r. 1.14 cmt. 6 (AM. BAR. ASS’N 2016).

51. ABA-APA HANDBOOK, *supra* note 2, at 2.

52. *Id.* at 3.

53. *Id.*

example, the ABA-APA Handbook guides the lawyer in working with a clinician on a consultation or referral for formal assessment as well as assisting the lawyer in understanding and using a capacity assessment report.⁵⁴ Moreover, the ABA Model Rules of Professional Conduct anticipate that a lawyer might need to obtain outside assistance when assessing the extent of the client's diminished capacity and expressly permits lawyers to seek guidance from an "appropriate diagnostician."⁵⁵

In making their assessment, lawyers should distinguish between incapacity and the inability to remember. That a client does not remember a decision does not mean that the client did not have the capacity to make the decision at the time it was made.⁵⁶ Thus, lawyers should be alert to changes in their clients' capacity over the course of the client-attorney relationship and within the bounds of a specific engagement.

2. Ensuring our Competence as Lawyers

Historically, most attorneys did not attempt to assess capacity and the standard of practice in this area was minimal.⁵⁷ Therefore, legal malpractice for failure to address capacity questions was uncommon.⁵⁸ Today, with the increased prevalence of diminished capacity and incapacity, attorneys should consider capacity issues not only to best serve their clients, but also to address possible legal malpractice issues as well. The ABA-APA Handbook notes that the failure to assess a client's capacity has been alleged as grounds for legal malpractice by would-be beneficiaries.⁵⁹ For example, a disinherited child could allege in a will contest that a lawyer did not exercise proper care or that the lawyer failed to determine the testator's capacity to execute a will.⁶⁰ In the securities arbitration context, a spouse or adult child could question the decision by a client with diminished capacity to settle for a perceived insufficient amount rather than proceed to arbitration. Thus, while lawyers

54. *Id.* at 31-41.

55. MODEL RULES OF PROF'L CONDUCT r. 1.14 cmt. 6 (AM. BAR. ASS'N 2016).

56. NAELA *Aspirational Standards*, *supra* note 4, at 22.

57. ABA-APA HANDBOOK, *supra* note 2, at 2.

58. *Id.*

59. *Id.*

60. *Id.*

should not refer every client for clinical evaluation, they should conduct and document a capacity assessment if there are any signs of diminished capacity.⁶¹

II. REPRESENTING THE CLIENT WITH DIMINISHED CAPACITY: KEEP THE RELATIONSHIP AS NORMAL AS REASONABLY POSSIBLE

If a lawyer determines that a client suffers from diminished capacity, the leading authorities agree on the lawyer's obligations to the client – keep the attorney's relationship with the client with as normal as reasonably possible.⁶² While maintaining the ordinary lawyer-client relationship may not be possible in all respects,⁶³ the goal of keeping the relationship as normal as possible stems from the underlying concept that the attorney must respect the client's autonomy and right to confidentiality even with the onset of diminished capacity.⁶⁴ Thus, a lawyer should take care in communicating with the client and keeping her informed of the relevant facts of the representation.⁶⁵ Moreover, if a lawyer must take some steps to protect the client, she should ensure that those steps are the least restrictive necessary. Finally, a lawyer should be aware that there are limits to the disclosure of information even if some action is needed to protect the client.

A. Approaches to Communicating with a Client Suffering from Some Diminished Capacity

Because “a client with diminished capacity often has the ability to understand, deliberate upon, and reach conclusions about matters affecting the

61. *Id.*

62. MODEL RULES OF PROF'L CONDUCT r. 1.14(a) (AM. BAR. ASS'N 2016); NAELA *Aspirational Standards*, *supra* note 4, at 19; ABA-APA HANDBOOK, *supra* note 2, at 2.

63. MODEL RULES OF PROF'L CONDUCT r. 1.14 cmt. 1 (AM. BAR. ASS'N 2016).

64. NAELA *Aspirational Standards*, *supra* note 4, at 19.

65. Comment 2 to ABA Model Rule 1.14 counsels that “[t]he fact that the client suffers a disability does not diminish the lawyer's obligation to treat the client with attention and respect. Even if the person has a legal representative, the lawyer should as far as possible accord the represented person the status of client, particularly in maintaining communication.” MODEL RULES OF PROF'L CONDUCT r. 1.14 cmt. 2 (AM. BAR. ASS'N 2016).

client's own well-being,"⁶⁶ diminished capacity does not extinguish the attorney's ethical obligation to keep the client informed and to sufficiently explain the matter so that the client can make an informed decision.⁶⁷ Thus, where a client signs an authorization permitting the lawyer to communicate with her child about the client's legal matter, the lawyer should still keep the client directly informed and provide the client with copies of any documents.⁶⁸

While ordinarily the attorney should provide to clients the level of information appropriate for a client who is a comprehending and responsible adult, it may be impracticable to meet this standard when the client suffers from diminished capacity.⁶⁹ In these circumstances, the amount and type of information the attorney should provide to the client will be governed by several factors, including the complexity of the matter, the client's ability to understand the information, and the impact of the information on the client.⁷⁰

The following approaches for client communication, building trust, and enhancing the client's decision-making ability can help keep the attorney-client relationship as normal as possible:

- Be sensitive to age-related changes without losing sight of the individuality of each older person.⁷¹
- Do everything possible to make your office and counseling approach "elder friendly" and accessible to individuals with a range of disabilities.
- Adapt the interview environment, timing of meetings, communications, and decision-making processes to maximize the client's capacities.⁷² This might mean taking more time or holding multiple sessions as needed to establish trust and put the client at ease.⁷³ Encourage maximum client participation to increase the client's sense of investment in the process.⁷⁴

66. MODEL RULES OF PROF'L CONDUCT r. 1.14 cmt. 1 (AM. BAR. ASS'N 2016).

67. MODEL RULES OF PROF'L CONDUCT r. 1.4(a)(3), 1.4(b) (AM. BAR. ASS'N 2016); NAELA ASPIRATIONAL STANDARDS, *supra* note 4, at F3 cmt.

68. NAELA *Aspirational Standards*, *supra* note 4, at 30.

69. MODEL RULES OF PROF'L CONDUCT r. 1.4 cmt. 6 (AM. BAR. ASS'N 2016).

70. NAELA *Aspirational Standards*, *supra* note 4, at 30-31.

71. ABA-APA HANDBOOK, *supra* note 2, at 27.

72. NAELA *Aspirational Standards* *supra* note 4, at 22.

73. ABA-APA HANDBOOK, *supra* note 2, at 27.

74. *Id.*

- Maintain direct communication with the client, even when the client chooses to involve others in the process, and especially when significant decisions are involved.⁷⁵
- Strive to address clients, whether in person, on the telephone, or through correspondence, in ways they can readily understand. Use plain English rather than legalese or terms of art and use examples that the client can apply to real life situations.⁷⁶
- Interview the client alone to ensure confidentiality and build trust, and consider the important role of support persons. If the client is more at ease with a friend or family member in the room, consider including the support person for a portion of interview or at least during the introductory phase. Talk to the client rather than past the client to others.⁷⁷
- Stress the confidentiality of the relationship, as some older adults may fear losing control of their affairs if they divulge information. Assure the client that information will not be shared with others without prior consent.⁷⁸

Additionally, to strengthen client engagement in the decision-making process, the ABA-APA Handbook suggests the use of Linda F. Smith's "gradual counseling" technique to compensate when a client has diminished capacity, or to compensate for age-related differences in memory and problem-solving ability.⁷⁹ To help a client with diminished capacity reach an informed decision, the gradual counseling technique provides a method for inquiring into and understanding the client's decision-making process and assists clients in thinking through their underlying concerns, goals, and values.⁸⁰ Ideally, clients are then able to choose a course of action consistent with those concerns, goals, and values.⁸¹ Specifically, the process of gradual counseling: involve[s] clarification, reflection, feedback, and further investigation.... Gradual counseling requires the attorney to repeatedly refer to the client's goals and values in assessing each alternative and in discussing the pros and cons of an alternative. This

75. NAELA *Aspirational Standards*, *supra* note 4, at 29.

76. *Id.* at 31.

77. ABA-APA HANDBOOK, *supra* note 2, at 27.

78. *Id.*

79. *Id.* at 29 (citing Linda F. Smith, *Representing the Elderly Client and Addressing the Question of Competence*, 14 J. CONTEMPORARY L. 61 (1988)).

80. *Id.*

81. *Id.*

will involve a great deal of clarifying and reflecting of the clients' thoughts and feelings....The attorney should proceed to explain each relevant option and elicit the client's reactions.⁸²

Using this method, attorneys can help clients identify their goals or problems to be solved, ascertain their values, evaluate the available options and compare to their goals, assess the clients' reaction to each option, and give clients feedback to help make a decision.⁸³ The gradual counseling approach respects the client's autonomy⁸⁴ and is consistent with the goal of keeping the relationship as normal as reasonably possible.

B. Taking the Least Restrictive Action Possible when Acting to Protect a Client

When it is not possible to maintain a normal client-attorney relationship, attorneys have the discretion to take protective action to protect a client with diminished capacity from financial (or other) harm. As ABA Model Rule 1.14(b) provides:

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...⁸⁵

Lawyers have great latitude in taking appropriate protective measures but must use the least restrictive tool required to act in the client's best interest. Protective 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

82. ABA-APA HANDBOOK. (citing Smith, *supra* note 79, at 90, 92).

83. *Id.* at 30. The ABA-APA Handbook cautions that if a client's capacity for the decision is questionable despite these techniques and accommodations, the lawyer may need assistance from a clinician. *Id.*

84. *Id.*

85. MODEL RULES OF PROF'L CONDUCT r. 1.14(b) (AM. BAR. ASS'N 2016); *see also* NAELA ASPIRATIONAL STANDARDS, *supra* note 4, at E-4.

agencies or other individuals or entities that have the ability to protect the client.⁸⁶

ABA Model Rule 1.14 is supplemented by the NAELA Aspirational Standards, which explain that capacity may be “task-specific” and the attorney should determine whether the client has the capacity to perform the task in question before taking any protective action.⁸⁷ An attorney may face a situation where, for example, the client visits the attorney to draft a new will and health care directive but seems unfocused and unable to stay on topic.⁸⁸ The attorney may believe that the client knows where she wants her money to go after death but may be confused about the meaning of a health care directive.⁸⁹ In this example, the NAELA Aspirational Standards instruct the attorney to consider asking the client additional questions to form an opinion about the client’s abilities, administering a mental capacity test, or creating the documents and meeting with the client again to see if the client is less confused after seeing the documents.⁹⁰ Similarly, an attorney may represent a client with some level of diminished capacity in a FINRA proceeding, but believe that the client is capable of making decisions related to the proceeding, such as whether to engage in mediation or accept a settlement offer. The NAELA Aspirational Standards would apply in this context as well.

While the ABA Model Rules permit lawyers to take protective measures, lawyers should defer to the client’s wishes and values to the extent known, keeping in mind the best interest of the client.⁹¹ Lawyers should avoid intruding into the client’s decision-making autonomy only to the least extent feasible, and should maximize client capacities while respecting the client’s family and social connections.⁹² Attorneys should look to two main factors when determining what is in the client’s best interest: (1) the client’s rights,

86. MODEL RULES OF PROF’L CONDUCT r. 1.14 cmt. 5 (AM. BAR. ASS’N 2016).

87. NAELA *Aspirational Standards*, *supra* note 4, at 23.

88. *Id.*

89. *Id.*

90. *Id.*

91. MODEL RULES OF PROF’L CONDUCT r. 1.14 cmt. 5 (AM. BAR. ASS’N 2016); *accord* NAELA *Aspirational Standards*, *supra* note 4, at 24.

92. MODEL RULES OF PROF’L CONDUCT r. 1.14 cmt. 5 (AM. BAR. ASS’N 2016); *accord* NAELA *Aspirational Standards*, *supra* note 4, at 24.

remedies, and economic interests, and (2) the extent to which the attorney knows what the client would decide if the client were capable of deciding.⁹³

Further, with the goal of taking the least restrictive protective action possible, the lawyer should consider a range of actions other than court proceedings and adult protective services.⁹⁴ Attorneys should be mindful of the potential conflict between the attorney's "zealous advocacy" and the client's wishes.⁹⁵ This conflict may arise where the attorney has concerns about the client's capacity for decision-making, and thus requires the attorney to choose between the client's wishes or the client's best interests, including client autonomy, safety, independence, financial well-being, healthcare, and personal liberty.⁹⁶ To balance these concerns, the attorney should consider several factors, including the type of representation sought by the client, the forum in which the attorney's services are to be provided, and the involvement of other parties in the matter.⁹⁷

In deciding what, if any, type of protective action is appropriate, the attorney should consider family and social connections, which may provide an alternative to protective action or serve as a source of information about the appropriate protective action.⁹⁸ Geographically close family and social connections may provide a level of protection for the client and result in less intervention.⁹⁹ Attorneys should keep in mind that there are many types of protective actions that may be more effective, less restrictive, and less intrusive than court proceedings or adult protective services, including a cooling-off period, family involvement, and the creation and use of planning documents.¹⁰⁰ The attorney should choose the least restrictive action available that provides the needed level of protection by tailoring the protective action to the degree of the client's incapacity.¹⁰¹

93. NAELA *Aspirational Standards*, *supra* note 4, at 24.

94. *Id.* at 25.

95. *Id.* at 24.

96. *Id.*

97. *Id.*

98. *Id.*

99. *Id.*

100. *Id.*

101. *Id.*

Finally, lawyers should view guardianship and conservatorship as actions of last resort and only recommend such actions when all other possible alternatives are insufficient.¹⁰² In line with this principle, even when guardianship is the last resort, lawyers should seek a guardianship that is limited and tailored to the client's needs.¹⁰³

C. Disclosing Client Confidences to Protect a Client

Lawyers must be aware of the risks of disclosing the client's confidences and condition and take affirmative steps to limit disclosure in the event that it is necessary. The client-attorney relationship is bounded by the duties of loyalty and confidentiality. Generally, information relating to client representation is protected by ABA Model Rule 1.6, and it may not be disclosed unless authorized.¹⁰⁴ When taking protective action, however, the lawyer is impliedly authorized to make necessary disclosures, even when contrary to the client's instructions.¹⁰⁵

When a client suffers from diminished capacity and needs some protection, the lawyer may need to disclose some confidential information to a third party.¹⁰⁶ Lawyers should be aware that any disclosure, even limited, could have serious negative consequences for the client, including possible involuntary commitment.¹⁰⁷ Before consulting with other individuals or entities or seeking the appointment of a legal representative, lawyers should determine the likelihood that the person or entity consulted will act adversely to the client's interests.¹⁰⁸

Therefore, lawyers should "disclose[] client confidences only when essential to taking protective action and to the extent necessary to accomplish the intended protective action."¹⁰⁹ For example, when a lawyer has concerns

102. *Id.* at 26.

103. *Id.*; see also MODEL RULES OF PROF'L CONDUCT r. 1.14 cmt. 5 (AM. BAR. ASS'N 2016).

104. MODEL RULES OF PROF'L CONDUCT r. 1.14 cmt. 8 (AM. BAR. ASS'N 2016).

105. *Id.*

106. NAELA *Aspirational Standards*, *supra* note 4, at 25.

107. *Id.* at E-6, E-6 cmt; MODEL RULES OF PROF'L CONDUCT r. 1.14 cmt. 8 (AM. BAR. ASS'N 2016).

108. MODEL RULES OF PROF'L CONDUCT r. 1.14 cmt. 8 (AM. BAR. ASS'N 2016).

109. NAELA *Aspirational Standards*, *supra* note 4, at 25; accord MODEL RULES OF

about a client's capacity and the client has previously included his or her children in meetings with the lawyer, and the lawyer has perceived that the children are supportive and interested in the parent's best interest, the lawyer should notify the children of a potential problem before seeking the appointment of a legal representative.

Despite the goal of taking the least restrictive action possible, state law may require lawyers to report misconduct or abuse on behalf of elderly or otherwise vulnerable clients. According to the 2013 Nationwide Survey of Mandatory Reporting Requirements for Elderly and/or Vulnerable Persons, all states have passed statutes requiring or permitting reporting of suspected abuse to the state's Adult Protective Services or law enforcement officials.¹¹⁰ While only a handful of states single out attorneys as individuals required to report suspected abuse, others require "any person" to report abuse.¹¹¹ Attorneys should be aware of the requirements in their jurisdiction, while at the same time being mindful of the duty of confidentiality owed to clients. Lawyers must consider when they have to take steps to protect confidentiality (e.g., through a motion for a protective order or by seeking clarification as to the limits of a mandatory reporting requirement) even in the face of a reporting requirement. This is a complicated and challenging area of law fraught with risk, and lawyers' decisions in this area are not likely to be straightforward.¹¹²

PROF'L CONDUCT r. 1.14(c) (AM. BAR. ASS'N 2016).

110. NEW YORK COUNTY DISTRICT ATTORNEY'S OFFICE & NATIONAL ADULT PROTECTIVE SERVICES ASSOCIATION (NAPSA) ELDER FINANCIAL EXPLOITATION ADVISORY BOARD, 2013 NATIONWIDE SURVEY OF MANDATORY REPORTING REQUIREMENTS FOR ELDERLY AND/OR VULNERABLE PERSONS, *available at*: <http://www.napsa-now.org/wp-content/uploads/2014/11/Mandatory-Reporting-Chart-Updated-FINAL.pdf>.

111. *Id.*

112. There are, however, resources available to lawyers in these situations. In addition to guidance from the ABA and NAELA, the SEC's Office of Investor Education and Advocacy and the Consumer Financial Protection Bureau's Office for Older Americans issued an investor bulletin to help investors understand the potential impact of diminished capacity on their ability to make financial decisions and to encourage investors to plan in advance for possible diminished financial capacity. *See* SECURITIES & EXCHANGE COMM'N, INVESTOR BULLETIN AND CONSUMER ADVISORY: PLANNING FOR DIMINISHED CAPACITY AND ILLNESS (June 1, 2015), *available at*: https://www.sec.gov/oiea/investor-alerts-bulletins/ib_illness.html. The bulletin includes links to several resources that lawyers may find helpful if they need to report suspected elder abuse, including appropriate adult protective services agencies, as well as links to resources that may be more familiar to PIABA

CONCLUSION

When working with clients with diminished capacity, lawyers – whether representing clients in FINRA proceedings or in other areas of their practice – must be mindful of their ethical and professional obligations to these vulnerable clients. Lawyers should begin with their jurisdiction’s rule on representing clients with diminished capacity, refer to the Four C’s of legal ethics, and look to NAELA’s Aspirational Standards for guidance, while keeping the relationship as normal as reasonably possible.

attorneys, such as the SEC, FINRA, and state securities regulators. *Id.*