REPRESENTING CLIENTS WITH DIMINISHED CAPACITY : ASSESSMENT, ASSISTANCE AND ADVOCACY

Institute for Continuing Legal Education and NJSBA at the NJSBA Annual Meeting, May 14-15, 2009

PART ONE

ASSESSMENT OF MENTAL CAPACITY FOR DIFFERENT LEGAL TRANSACTIONS

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Introduction

The question of capacity appears regularly in the practice of law no matter what aspect of the practice one is in. The transactional attorney must be sure that the client who is signing a contract, renunciation, disclaimer, settlement agreement, commercial lease, real estate closing statement, Will, power of attorney or health care proxy, or wants to make a gift of property, has the requisite legal capacity to do so. The litigating attorney must be sure that the client who wants to initiate litigation, or must defend litigation or be deposed, has the legal capacity to do so. The criminal and municipal court attorney must be satisfied that the client has the legal capacity to stand trial or be sentenced. When the attorney is preparing to resolve a case, and needs the client's approval for any resolution, the attorney must be satisfied that the client has the

capacity to provide direction to the attorney and make the decision to accept or reject the resolution.

The challenge in assessing mental capacity arises when an individual appears to be able to function nicely within his limited sphere of familiar activity. The attorney may not realize that slowly and steadily, the individual has scaled back his activity to eliminate tasks that seem too daunting (such as shopping for new clothes, reading the newspaper or paying bills), since at the same time the client seems apparently capable of engaging in socially correct behavior and superficial conversation. The individual afflicted with certain kinds of dementia can present himself in a manner that masks the underlying cognitive difficulties, making the need for cognitive assessment more subtle. Often it is only by "digging deeper" and asking questions that do not suggest an answer that the attorney will realize that in fact the client is cognitively impaired.

This seminar is designed to provide guidance to attorneys in all practice areas to assist in the assessment of mental capacity and to represent the client with diminished capacity or enable the client's best interests to be protected.

Types of Cognitive Impairment[1]

A dementia process is almost always (99%) not reversible, and while it may progress slowly, it is inexorable. E.B. Larson, W.A. Kukull and R.L. Katzman, *Cognitive Impairment:*

[1] The material in this section is based on a lecture provided by Roy Steinberg, Ph.D., at the ICLE Elder Law Retreat April 9, 2009. A licensed psychologist, his specialty area over these last 15 years is in geropsychology, specializing in the assessment and psychotherapeutic services to older adults including mental capacity assessment and evaluation. He can be contacted at www.caregivingforcaregivers.com.

Dementia and Alzheimers' Disease. Annu. Rev. Public Health 1992, vol. 13:431-449; M.M. Breteler, J.J. Claus, C.M. van Duijn, L.J. Launer, and A. Hofman, *Epidemiology of Alzheimers' Disease*. Epidemiological Review 1992, vol. 14:59-82. On the other hand, delirium develops fairly quickly with an onset over hours or days; it shifts in appearance throughout the day, and is generally related to an acute medical condition such as a urinary tract infection or adverse reaction to new medication. Both dementia and delirium can cause impaired focus and attention, impaired cognition as to memory, orientation and language, and perceptual disturbance. The term "dementia" is a general term and relates to a number of disease processes, and it refers to a decline in cognitive functioning due to damage or disease of the brain. The condition affects expressive and receptive language, memory, problem solving and "executive functions," and attention.

Memory impairment involves deficits of learning (new information) or recall (of known information), and one or more of the following: Agnosia – difficulty recognizing or naming objects; Apraxia – inability to carry out motor activity not related to a motor condition; Anomia - Languiage Disturbance; Aphasia – inability to communicate (by mouth); Brocas' aphasia - inability to generate expressive speech; Wernick's aphasia - inability to process received speech; and difficulty in planning or carrying out activities.

Among the diseases that produce dementia are Alzheimers' Disease, vascular disease , Vitamin B-12 deficiency, Parkinson's Disease, and Huntington's Disease. Each of these dementias can present itself in different ways, although distinguishing between them is not straightforward. Additional types of dementia are Fronto-Temporal Dementia and Lewy-Body Dementia. Finally, individuals who have suffered traumatic brain injury (TBI) frequently are

left with significant residual impairment in their cognitive capability and decision-making capacity, although they may be physically capable of regular activities of daily living such as dressing, bathing, conversing, walking around or maneuvering a wheelchair, eating, shopping, and even taking public transportation.

Attorney's Informal Assessment of Decision-Making Capacity

An attorney is not in a position to perform a medical analysis of mental capacity. However, at the outset of any engagement, the attorney must determine whether s/he has a client, and who the client is.[2] There is no attorney-client relationship unless there are two willing and able parties to the relationship. The client must have some ability to tell the attorney what the problem is, ask for help, and understand & agree to the course of action. The client must be able to knowingly engage the attorney's services. This is the counterpart to the concept of "informed consent" within the health professions.

The attorney must be able to communicate with the client, and obtain the client's guidance and consent. RPC 1.2(a) specifies that "An attorney shall abide by a client's decisions concerning the scope and objectives of the representation ... and .. Shall consult with the client about the means to pursue them. ... A lawyer shall abide by a client's decision whether to settle a matter. In a criminal case, the lawyer shall consult with the client and, following consultation, shall abide by the client's decision on the plea to be entered, jury trial, and whether the client will testify." RPC 1.4(c) requires that the attorney "Explain a matter to the extent reasonably

[2] See also, A. Frank Johns, Esq., and Bernard A. Krooks, Esq., "Elder Clients with Diminished Capacity: NAELA's Response to Specific Case Applications and Its Development of Aspirational Standards that may Cross Professional Organizational Boundaries," NAELA

necessary to permit the client to make informed decisions regarding the representation." The client's *ability to understand the transmitted information* is one threshold issue. The *ability to make decisions regarding the information* is the other. Both form the lynchpin to the ability to initiate and sustain the lawyer-client relationship.

Fordham Law Review published a special issue on "Ethical Issues in Representing Older Clients" in March, 1994 (Volume LXII, number 5). There had been a Conference on this issue involving working groups from representatives of AARP, The American College of Trust and Estate Counsel (ACTEC), the National Academy of Elder Law Attorneys (NAELA), the American Bar Association (ABA) Commission on Legal Problems of the Elderly, the ABA Section on Real Property, Probate and Trust Law, and Fordham Law School's Center for Ethics and Public Interest Law. This volume of the Fordham Law Review was the proceedings of the conference.

The working Group on Client Capacity concluded "that a lawyer, by necessity, must accept responsibility for determining when to question capacity and how to respond appropriately to the situation," *ibid.* at p. 1005, because obtaining a medical opinion may not be feasible or appropriate, and capacity for informed medical decision-making is not necessarily the same thing as capacity to engage in the attorney-client relationship or the particular aspect of that relationship. The groups endorsed a paradigm set out by Peter Margulies in his article "Access, Connection, and Voice: A Contextual Approach to Representing Senior Citizens of Questionable Capacity," in this same edition of the Fordham Law Review at pages 1073-1099.

This working group endorsed the following guideline:

In questioning client capacity for any specific purpose, the lawyer should:

1. Consider and balance factors including but not limited to the following:
    a. The client's ability to articulate reasoning behind the decision;
    b. The variability of the client's state of mind;
    c. The client's ability to appreciate consequences of the decision;
    d. The irreversibility of the decision;
    e. The substantive fairness of the decision;
    f. The consistency of the decision with lifetime commitments of the client.
2. Speak with the client alone;
3. Avail himself or herself of educational opportunities to understand and address capacity issues.

Id. at 1007. The working group "further recognized the importance of assessing these factors without the confounding influence of family members or significant others." *Ibid.*

Codes of Conduct have been adopted within various professions to address the need to establish a professional-client relationship and be able to obtain something akin to informed consent as the relationship proceeds. *See, e.g.*, Code of Professional Responsibility of the Society of Financial Service Professionals ; American Institute of Certified Public Accountants AICPA) Code of Professional Conduct; National Association of Social Workers Code of Ethics; American Psychological Association's Ethical Principles and Code of Conduct; American Bar Association Commission on Law and the Elderly and American Medical Association's Code of Medical Ethics.

There are many signs that should prompt the attorney to investigate whether the client or potential client is exhibiting signs of cognitive impairment or dementia. Here is a sampling. Does the individual:

- ♑ Repeat or ask the same thing over and over?
- ♑ Repeatedly forget or mix-up appointments?

- Claim that s/he was never sent copies of letters, documents or requests for information by the attorney?
- Lose attention during discussions or refuse to continue the discussion?
- Seem to depend excessively on the family member whop is with them, for answers to questions or for help with decisions?
- Get flustered by seemingly simple explanations of the issues?
- Have difficulty making a choice among options presented?
- Have difficulty retrieving information that the attorney expects the client to know?
- Confuse people, places, things and events?
- Regularly fail to follow attorney's instructions?
- Appear suspicious of suggestions made by the attorney?
- Lack the ability to explain in his own words the transaction he is embarking on with the attorney, or its salient features?
- While able to express a choice, seem to lack the ability to express a reason for the choice?
- Lack the ability to answer open-ended questions starting with "what do you .." or "why do you want .." or "who is ..?"
- Ask repeatedly about issues that were already discussed in the same meeting?
- Be unable to recall at the end of the meeting what went on at the start of it?
- Make frequent jokes which actually are designed to mask an inability to understand what is happening?

A variety of tools are utilized to assess decision-making capacity. The attorney can carry out informal questioning of the client and reach the conclusion that the client is too confused to engage the attorney's services. This does not necessarily require that the attorney seek out the services of an evaluating physician to confirm the impression. The attorney may decline to establish the professional relationship at that point.

Should the client begin exhibiting signs such as the above, further inquiry is warranted, as the attorney may need to seek protective action such as guardianship or invocation of a prior power of Attorney, in accordance with RPC 1.14 "Client under a Disability."

Medical Assessment of Capacity

An attorney may want to arrange for a medical assessment of capacity without necessarily being headed towards an actual adjudication and appointment of a guardian. The legal conclusion that an individual is "incapacitated" – and perhaps requires court appointment of a legal Guardian if there is no functioning Agent under Power of Attorney already in place -- requires first the conclusion by two physicians, one of whom may be a psychologist, that the individual lacks decision-making capacity. N.J.R. 4:86. This is assessed by utilizing tools such as the Folstein Mini-Mental Examination (copyrighted), which requires the patient to perform certain tasks including to follow three-step instruction, remember a list of objects at 1, 3 and 5 minute intervals, copy a certain drawing, and draw a clock in a certain way. There are neuropsychological tests such as the Modified Boston Naming test (copyrighted) in which the patient is asked to look at simple pictures, and name the object with and without cueing. A series of questions is asked in which the individual needs to choose from among four adjectives

or verbs or occupations or nouns that pertain to the thing asked about. In these methodologies, the patient receives points for correct answers and modified points if the answer was correct with cueing. These tests can identify the most substantial levels of cognitive impairment, but imperfect scores may trigger the need for more in-depth testing to evaluate more subtle levels of impairment.

From the medical standpoint, health care practitioners concern themselves with the ability of the patient to give informed consent, and they are quick to remind that this ability is not the same as legal "competence." "There are four levels of decision-making capacity with regard to medical issues: 1) Evidencing a choice; 2) Factual appreciation of the issues, 3) Rational manipulation of the information, and 4) Appreciation of the nature of the situation.[3] "Decision-making capacity implies the ability to understand the nature and consequences of different options, to make a choice among those options, and to communicate that choice. ... When applied to medical decisions, this requires that a person understand a diagnostic or therapeutic intervention's significant benefits, risks and alternatives."[4] The ability to make the decision must be bolstered by the ability to demonstrate a reason for the decision. "Moreover, the standard for decision-making capacity varies with the complexity and consequences of the decision in question. The greater the complexity or the graver the consequences of the decision, the higher the standard, so that the same person may have the capacity to make one type of

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[3] *Evaluating Competence and Decision-making capacity in impaired older patients*, by Steven A. Levenson, MD, in The Older Patient, Winter 1990 p. 11-14, at p.13, citing Roth L.H., Meisel, A., and Lidz, CW: Tests of competency to consent to treatment, American J. Psychiatry 134:279-284 (1977).

[4] White Paper on Surrogate Decision-making and advance care planning in long-term care, March 2003, page one, issued by the American Medical Directors Association, Columbia, MD, www.amda.com.

decision and not another. An individual's decision-making capacity may also fluctuate over time, as a result of transient changes in a person's ability to comprehend or communicate. ..."[5]

The attorney who finds that a potential client is exhibiting signs such as are listed above needs to proceed with caution and may want to recommend that the client be medically evaluated. Certain individuals who are severely depressed may have difficulties with decision-making which may be correctable with proper medical care. Other individuals may have chronic cognitive impairment that will interfere with their ability to engage the attorney and provide direction to the representation. Clients who were apparently "fine" throughout a prior period of the lawyer-client relationship may develop impairments that could impede further representation.

A useful article concerning diagnosis of mental disorders and medical assessment of capacity can be found in "Determining Decisional Capacity: A Medical Perspective," by Robert P. Roca, M.D., M.P.H., Fordham Law Review, Vol. LXII, Number 5 (March 1994), pp.1177-1196.

Impaired Decision-making Capacity is Not Necessarily the Same Thing as Legal "Incapacity"

"Incapacitated Individual" is defined by statute as "an individual who is impaired by reason of mental illness or mental deficiency to the extent that he lacks sufficient capacity to govern himself and manage his affairs," including a person impaired by chronic illness, disability, inebriation or drug use to that same extent. N.J.S.A. 3B:1-2. An individual can be found incapacitated with regard to the capacity to do some, but not all, of the tasks necessary to care for himself. N.J.S.A. 3B:12-24.1. The legal conclusion that a person is incapacitated

[5]Ibid.

requires a medical basis from two licensed physicians, one of whom can be a licensed psychologist. The issue is triable to a jury, necessarily implying that there must be a strong factual support for a finding of legal incapacity.

There can be a broad distance between capacity to make all decisions, and legal incapacity to care for oneself. In the middle is the area called "diminished capacity." RPC 1.14 concerning a client under a disability uses the phrase "When a client's capacity to make adequately considered decisions in connection with the representation is diminished." Such a conclusion by the lawyer will trigger concern over the representation, and certain duties and obligations (see Don Vanarelli's materials, part 2).

Capacity to sign an Advance Directives for Mental Health Care

The statute creating the opportunity for individuals afflicted with mental illness to sign an advanced directive for health care so that there is a surrogate decision-maker to carry out their wishes during times of temporary incapacity can be found at N.J.S.A.C 26:2H-102 et seq. "Decision-making capacity" is defined in section 104:3 as "a patient's ability to understand and appreciate the nature and consequences of mental health care decisions, including the benefits and risks of each, and alternatives to any proposed mental health care, and to reach an informed decision. A patient's decision-making capacity is evaluated relative to the demands of a particular mental health care decision."

Capacity to Enter into a Contract

This level of capacity relates to everything from the ability to engage the attorney in the first place, since a retainer agreement is a contract, to the ability to sign a Power of Attorney appointing an agent; to buy or sell real estate; to take a loan or mortgage; to initiate litigation; to file for divorce; to sign a settlement of a lawsuit; to sign a partnership agreement or buy-sell agreement; to purchase a vehicle.

The question of capacity for contract-based transactions is necessarily fact-sensitive since it relates to the "nature" and "effect" of the specific transaction at issue. As noted above, superficial appearances can mask an underlying inability to understand the nature and effect of the business at hand. A plenary hearing is generally required to address the claim that a transaction should be voided due to the incapacity of a party to the transaction. The test has been expressed in this way: "a man shall have the ability to understand the nature and effect of the act in which he is engaged, and the business he is transacting ... If the mind be so clouded or perverted by age, disease or affliction, that he cannot comprehend the business in which he is engaging, then the writing is not his deed." Matthiessen & Weichers Refinging Co. Vs. McMahon's Adm'r, 38 N.J.S. 536, 546 (E & A 1876). See also, Wolkoff v. Villane, 288 N.J. Super. 282, 287 (App. Div. 1996) (involving a motion to vacate a settlement agreement in a personal injury case due to the alleged cognitive defects of the plaintiff; held, hearing required to inquire into whether she had the mental capacity to sign the settlement); Manufacturers' Trust Co. et al v. Podvin et al., 10 N.J. 199,204 (194_)(voiding sale of real estate because court found, after trial, that the purchaser was "utterly devoid of judgment or understanding of the meaning and effect of his acts.").

Real estate conveyances have occasionally been set aside on the grounds that the maker of the conveyance lacked the requisite mental capacity to enter into a contract. See, for example, Hutchinson v. Tindall, 3 N.J. Eq. 357 (N.J. Ch. 1835), in which the grantor sought to rescind the transfer of his 107-acre farm to a third party. He claimed that he was so intoxicated that he could not have known what he was doing, and he did not remember signing the deed. Trial was held.

The court found that the grantor-plaintiff "had been much in liquor about the time the deed was given, and some of the witnesses state that on the morning of the day they saw him stagger as he walked. He got into his brother's house by holding onto door posts, and could not get into his wagon without assistance. The witnesses differ in regard to his capacity for business at the time he made the deed, as is usual in cases of this kind." The Chancellor went on to say: "My own conclusion from the whole of the evidence is, that he was not so far intoxicated as to be rendered incapable of transacting every kind of business, but that he was, nevertheless, considerably under the influence and excitement of ardent spirits, and not competent to attend to his concerns with prudence and judgment. He was, at least, partially intoxicated, and to such a degree that the court must apply to this case the principles that apply to similar cases when a party comes to have a contract set aside on the ground of intoxication."

The court explained that "the fact of intoxication is not of itself sufficient to void a contract," citing Cory v. Cory, 1 Ves. Sen. 19; and "That to avoid the contract it must be shown, either that the intoxication was produced by the act or connivance of the person against whom the relief is sought, or that an undue advantage was taken of the party's situation," citing Cooke v. Clagworth, 18 Ves. 12 and other early cases." The Chancellor held that due to the

intoxication, the grantor was "entitled to the protection of the court, so far as to authorize an inquiry," but that the intoxication was voluntary. However, there was no consideration for the transfer and it was an unreasonable act for the grantor to have taken ("No one can presume that Hutchinson intended to give away all his farm"), and on that basis, finding the various defenses unsupported by the facts, the conveyance was set aside.

Another case involving suits to set aside conveyances of property on the grounds of incapacity was Collins v. Toppin, 20 Dickinson 439 (Ch. 1903). The plaintiff, by her next friend, was described by the court as of the time of the suit to be "a complete and incurable lunatic," illiterate, and widowed who handled her rental business for years but developed 'signs of insanity" by 1899. She was confined by her husband in the State Hospital at Morris Plains in July 1899. She was taken out of there for a year or so, then re-admitted. In December, 2000, a petition for appointment of a Guardian was filed. The treating physician testified to her incapacity; two other physicians testified that she was of sound mind; and the jury found her to be of sound mind. Widowed by this time, she was released in January, 2001 to live with the defendants in their home. By that time, having had treatment, "her delusions had all, or nearly all, vanished, and her mind became calm and apparently sensible." Id at 449. She allegedly had a "lucid interval" during that time period, but "relapsed" by August 1901 with evidence of dementia. The dispute at issue stemmed from the fact that a Deed was signed by Collins on June 4, 1901 conveying all of her valuable rental property to the defendant.

The onset of dementia in August 1901, according to the Chancellor, "compels us to look with great care at her condition during the period when it is alleged she was enjoying what is called a 'lucid interval,' namely, from February 1 to August 1, 1901. ... In examining her mental

capacity during that period, we naturally expect, after what she had suffered, to find her more or less enfeebled in all directions, but especially in the exercise of the higher mental function of reason and judgment. And we must bear in mind that a person may be quite capable of transacting the ordinary routine business affairs of life with accuracy and safety, and yet not be quite capable of taking care of himself or herself in more important and weighty matters, requiring careful examination and discernment, judicious consideration and sound judgment. Hence we may very well believe that the complainant was quite capable of receiving her rents from the real estate agents in charge of her property, and disbursing it with safety in the supply of her own needs and the gratification of her benevolent and friendly feelings, and yet conclude that she was incapable of making a complete and final disposition of her property, such as is here in question." Ibid.

The opinion is well worth reading in full because the Chancellor elaborately described the evidence taken at the trial, which as noted previously presented different portraits of the capacity of the grantor at the time of the Deed. Collins actually did have counsel, called "Mr. N." The Court had this to say about that:

"Now in support of the conveyance, it may be said that she did have independent advice, and that the effect of the conveyance was fully explained to her by Mr. N. But the fact remains that Mr. N., having the responsibility of his client on his shoulders, did permit her to make an absolute deed, without any trust expressed either in it, or signed by the grantee on a separate piece of paper; and I am entirely satisfied, I am sorry to say, that it was in the power of Mr. N. To have prevented that transaction in that shape, so far as he was concerned. I do not say that the complainant might not have gone to other counsel, and procured the deed to have been

prepared and executed; but I do say that Mr. N. could have declined to perform that task himself, or to have it done in his office." Id. At 467.

The court concluded that the conveyance should be voided because at the time of its signing, "the complainant was not in possession of her complete normal faculties. She was calm, and had her memory, and was competent to transact the ordinary affairs of life ... yet, owing to mental disease, she was not possessed of those higher faculties involving the contemplation and weighing of different considerations, and the exercise of judgment thereon, and she had not the mental power 'clearly to discern and discreetly to judge of all those matters and things which enter into a proper disposition of her property' (citation omitted by court)." Id. At 476-477.

Capacity to Execute a Settlement Agreement (Litigation)

A fact hearing was ordered to be held on a post-settlement motion to vacate a settlement of a personal injury case in Wolkoff v. Villane, 288 N.J. Super. 282 (App. Div. 1996). The trial court had denied the motion. The Court articulated the pertinent standard in the following way:

> The basic rule pertinent to our decision of that question was stated as follows in *Hillsdale Nat. Bank v. Sansone,* 11 *N.J.Super.* 390, 399, 78 *A.*2d 441 (App.Div.1951):
> [W]here there is not the mental capacity to comprehend and understand, there is not the capacity to make a valid contract. The rule is of long standing.[FN1] In somewhat more antique language, it was stated this way in *Eaton v. Eaton,* 37 *N.J.L.* 108, 113 (Sup.Ct.1874):
>
> > \\[The test of capacity to make an agreement ... is, that a man shall have the ability to understand the nature and effect of the act in which he is engaged, and the business he

> is transacting.... [I]f the mind be so clouded or perverted by age, disease, or affliction, that he cannot comprehend the business in which he is engaging, then the writing is not his deed.
> Furthermore, subject to exceptions which are inapplicable here, "transactions of third parties, which, under the circumstances, would be invalid if had directly with the principal, must be equally invalid though they be done with the agent." ***288***Matthiessen & Weichers Refining Co. v. McMahon's Adm'r,* 38 *N.J.L.* 536, 546 (E. & A. 1876).
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> Applying these principles, courts in other jurisdictions have recognized that a settlement in a personal injury case will be set aside, even after a release has been delivered, if the proofs show with sufficient clarity that the plaintiff was incompetent to authorize the settlement. For example, in *Pattison v. Highway Insurance Underwriters,* 292 *S.W.*2d 694 (Tex.Civ.App.1956),

The Court also quotes from a NJ Supreme Court decision involving a contract with an incapacitated person, *Manufacturers Trust Co. v. Podvin,* 10 *N.J.*199, 207 (1952). In that case, the Supreme Court wrote:

> The settled rule of law is that "contracts with lunatics and insane persons are invalid, subject to the qualification that a contract made in good faith with a lunatic, for a full consideration, *which has been executed* without knowledge of the insanity, or such information as would lead a prudent person to the belief of the incapacity, will be sustained." *Drake v. Crowell,* 40 *N.J.L.* 58 (Sup.Ct.1878).
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> [Emphasis added].

The use of the word "executed" in the quoted excerpt from *Podvin* is misleading. In contemporary usage, "executed" can signify, among other meanings, either "performed" or "signed." *See Black's Law Dictionary* 509 (5th ed. 1979); *Webster's Third New International Dictionary* 794 (1966). *Drake v. Crowell, supra,* which *Podvin* cites as the source of the rule, does not itself resolve the issue of which meaning is intended, but it cites two other cases

as its authority, *Matthiessen & Weichers Refining Co. v. McMahon's Adm'r*, 38 *N.J.L.* 536 (E. & A. 1876) and *Eaton v. Eaton*, 37 *N.J.L.* 108 (Sup.Ct.1874). These cases resolve the ambiguity and indicate that "executed" is used in the sense of "performed" or "carried out." *See* Matthiessen, supra, 38 *N.J.L.* at 543-545; *Eaton, supra*, 37 *N.J.L.* at 118.

> *That meaning accords with common sense. The alternative interpretation would be that an incompetent's executory contract is valid if the other party entered into it in good faith for full consideration without knowing of the incompetent's mental condition when the contract was signed. That interpretation would accord an unacceptably inconsequential significance to a promissor's incapacity to contract. Moreover, it should be noted that plaintiff in the present case claims that her settlement contract was not made for adequate consideration.*

Capacity to Change Domicile

To some degree, this subject was dealt with in Estate of Maria McIlvaine v. Kingsley, 101

N.J. Super. 77 (App. Div. 1968), in which the evidence established that the deceased testatrix was so advanced in senility at the time she moved from New York to New Jersey that she lacked requisite capacity to change domicile by choice; Guardian had been appointed, who moved her to New Jersey, so domicile changed by operation of law; no specific "test" of capacity set forth.

Capacity to make inter-vivos gifts, designate beneficiaries and create joint interests in property

The critical elements with regard to creation of inter-vivos gifts are knowing, voluntary,

and intentional irrevocable relinquishment of ownership and control to the donee. Farris v. Farris Engineering Corp., 7 N.J. 487, 500-501 (1951). The capacity of the donor is therefore of paramount concern, and, again, is fact-sensitive and should require a trial. The issue is discussed in depth in In re Dodge, 50 N.J. 192 (1967) in which the beneficiary of a major inter vivos gift by Geraldine R. Dodge sought to validate the gift. Mrs. Dodge had purportedly made a gift of her $1.7 million art collection to Elmira College in May, 1961. She was adjudicated incompetent (sic) in June, 1963. The issue was tried. The Supreme Court – in a 58-page opinion – set forth and discussed in detail the evidence on both sides of the issue. The Court explained that

> Our motive in reviewing, at the outset of this opinion, the testimony dealing with Mrs. Dodge's mental condition is not to indicate that the proof sufficiently shows incapacity to make a gift on May 16, 1961. The purpose is to project, as a proper backdrop for the evaluation of the evidence in the case, the fact that this elderly lady – over 79 years of age at the time of the extremely valuable and momentous gift, quite obviously larger than any she had ever given before – had a gradually progressive, insidious arteriosclerosis which apparently was not affecting her physical appearance, but which was lowering her mental acuity and moving her toward incapacity to handle her very substantial affairs.

50 NJ at 198. Ultimately, the Court held that the burden of proof was on the recipient of the gift, *see* In re Fulper's Estate, 99 N.J. Eq. 293, 302 (Prerog. Ct. 1926), and it did not establish by clear and convincing evidence that she had "intentionally and understandingly made a present gift of her art collection" to the College. Id at 241. The Court found that in the mix of facts, "Her age, loneliness, insidiously progressive arteriosclerotic disease, and loss of her trusted advisor made her respond with friendship and confidence to the synthetically effusive

attention and appearance of friendship pressed upon her by the representatives of the College. .." Id. at 240. Thus she was found to "not only [not] have the intention to transfer ownership of her art collection when she signed the alleged gift letter, but also did not understand that she was giving up her title upon affixing her signature to it." Ibid.

Capacity to Sign a Power of Attorney or Create an Agency Relationship

The level of capacity required to execute a power of attorney is the same as that required to enter an agreement or other valid contract. In the Matter of the Estate of Joseph J. Zaolino, unpublished, 1998 WL 34001287 (N.J. Super. A.D.), decided June 23, 1998. There are no published decisions directly on this point, and this decision relied upon cases in Ohio and Arizona, and on contract cases in New Jersey. The court stated the rule as follows:

> In order to have the competency to appoint an attorney-in-fact, the principal must be "capable of understanding in a reasonable manner, the nature and effect of his act." *Golleher v. Horton*, 715 *P.*2d 1225, 1228 (Ariz.Ct.App.1985). He or she must have the "ability ... to understand the nature, scope and extent of the business [he or] she is about to transact." *Testa v. Roberts*, 542 *N.E.*2d 654, 658 (Ohio App.Ct.1988); *see* Wolkoff v. Villane, 288 *N.J.Super.* 282, 287 (App.Div.1996) *(" 'The test of capacity to make an agreement ... is, that a man shall have the ability to understand the nature and effect of the act in which he is engaged, and the business he is transacting ...." ') (citation omitted); Kisselbach v. County of Camden*, 271 *N.J.Super.* 558, 564 (App.Div.1994) *("[Powers of attorney] should be construed in accordance with the rules for interpreting written instruments generally.") (citation omitted).*

The case involved an action in Chancery after the death of the grantor, to invalidate the Power of Attorney on the grounds that the maker was incompetent at the time he signed it, and

that it was procured by undue influence. The plaintiff also sought to undo certain transactions that had been done pursuant to the purported authority of the POA. Following trial, the court held that there was sufficient evidence of incapacity to invalidate the POA. Judgment was entered for the plaintiff, as well as counsel fees pursuant to R. 4:42-9. The counsel fee award was reversed on appeal because "we agree with the defendant that this case is not a probate action within the meaning of R. 4:42-9(a)(3) [and [t]he court was therefore without authority to award an attorney's fee to the plaintiff."

Testamentary Capacity: Capacity to Execute a Last Will and Testament

Testamentary capacity is tested at the time in which a Last Will and Testament is signed. In re Livingston's Will, 5 N.J. 65 at 73 (1950). The standard required to determine if a person has the mental capacity to execute a Last Will and Testament is "whether the testator can comprehend the property he is about to dispose of; the natural objects of his bounty; the meaning of the business in which he is engaged; the relation of each of these factors; and the distribution that is made by the will. Id. citing, In re Heim's Will, 136 N.J. Eq. 148. (1944).

In determining whether the testamentary capacity standard has been meet, one cannot solely consider the old age, failure of memory, absent-mindedness, or forget-fulness of the testator. Said characteristics of a testator do not, of themselves, take away a testator's capacity and thus, does not disclose a lack of testamentary capacity. In re Livingston's Will, 5 N.J. 65 at 77 (1950). "[A] moderate capacity is all that is required." Id.

Conclusion

It is clear from the cases going back 150 years, that trial of some kind is required when a party raises a colorable claim that a transaction was invalid due to the alleged incapacity of the

maker. Even in cases where there appears to be substantial evidence of incapacity in the form of medical records or certifications, the court must analyze capacity relative to the specific transaction at hand. An examination of the individual's surrounding life circumstances often becomes relevant as the court seeks to determine whether the individual had "sufficient capacity" for the act in question.

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MAY 13-15, 2009

ELDER AND ESTATE TRACK

REPRESENTING CLIENTS WITH DIMINISHED CAPACITY: ASSESSMENT, ASSISTANCE AND ADVOCACY

R.P.C. 1.14: REPRESENTING THE CLIENT WITH DIMINISHED CAPACITY

I. INTRODUCTION

Elder law practitioners may be confronted with a variety of unique and often complex ethical issues because of the nature of the practice itself. Among those issues are the special considerations that must be made when dealing with a client with questionable capacity.

The New Jersey Rules of Professional Conduct provide a logical starting point for practitioners struggling with issues surrounding a client with less than full capacity. The representation of a client with diminished capacity is governed by R.P.C. 1.14[1], the full text of which provides as follows:

[1] New Jersey adopted the Model Rules of Professional Conduct on July 12, 1984. www.abanet.org. New Jersey's R.P.C. 1.14 is entitled "Client Under a Disability," while Model Rule 1.14 is entitled "Client with Diminished Capacity." Otherwise, New Jersey's R.P.C. 1.14 is essentially identical to Model Rule 1.14.

Client Under a Disability

(a) When a client's capacity to make adequately considered decisions in connection with the representation is diminished, whether because of minority, mental impairment or for some other reason, the lawyer shall, as far as reasonably possible, maintain a normal client-lawyer relationship with the client.

(b) When the lawyer reasonably believes that the client has diminished capacity, is at risk of substantial physical, financial or other harm unless action is taken and cannot adequately act in the client's own interest, the lawyer may take reasonably necessary protective action, including consulting with individuals or entities that have the ability to take action to protect the client and, in appropriate cases, seeking the appointment of a guardian *ad litem*, conservator, or guardian.

(c) Information relating to the representation of a client with diminished capacity is protected by RPC 1.6 [addressing "Confidentiality of Information."]. When taking protective action pursuant to paragraph (b), the lawyer is impliedly authorized under RPC 1.6(a)[2] to reveal information about the client, but only to the extent reasonably necessary to protect the client's interests.

R.P.C. 1.14.

But how does the lawyer determine whether the client's capacity is, in fact, compromised? And what action, in particular, should the lawyer take if the client is found to have diminished capacity? Neither of these questions is easily answered; however, the guidelines discussed below may assist the practitioner in the representation of a client with diminished capacity.

[2] R.P.C. 1.6(a) reads, "A lawyer shall not reveal information relating to representation of a client unless the client consents after consultation, except for disclosures that are impliedly authorized in order to carry out the representation, and except as stated in paragraphs (b), (c) and (d)." Paragraphs (b), (c) and (d) are not applicable to this inquiry; these paragraphs address disclosure of information in connection with a crime or fraud, or a legal malpractice defense.

II. ASSESSMENT

As discussed below, New Jersey's Rules of Professional Conduct provide assistance to practitioners faced with a client with diminished capacity. Unfortunately, R.P.C. 1.14 provides the attorney with no standards for determining client capacity (or the varying levels thereof). See Regan, J., Morgan, R. and English, D., Tax, Estate & Financial Planning for the Elderly, §1.06[4] at 1-17 (Matthew Bender 2005). Indeed, as one legal treatise concurs,

> [t]here is a distressing lack of guidance for attorneys dealing with partially incapacitated clients. Yet, it is the attorney's role, despite lack of any formal medical training, to determine whether a client's capacity is sufficient to allow him or her to understand and consent to required legal activity.

Frolik, L. and Brown, M., Advising the Elderly or Disabled Client, §1.04 at 1-8 (2d ed. Warren, Gorham & Lamont 2003).

The dilemma caused by R.P.C. 1.14's lack of direction for attorneys making capacity assessments is compounded by the fact that client capacity must be determined in the context of the particular legal transaction involved:

> courts have developed different legal standards for capacity for different legal documents. The tendency in the courts is to find that the more the client is willing to give up or the more complex the act, the more capacity the client must have.

Boyer, E., Representing the Client with Marginal Capacity: Challenges for the Elder Law Attorney--A Resource Guide, 12 NAELA Q. 3, 7 (Spring 1999).

Given that lawyers are largely left to their own devices to formulate a method of determining a client's impairment, Laffitte, E., Model Rule 1.14: The Well-Intended Rule

Still Leaves Some Questions Unanswered, 17 Georgetown Journal of Legal Ethics 313, 325 (Winter 2004) (further citation omitted), there is room for the attorney to "rely on instinct and experience" to make such assessments. Regan, J., Morgan, R. and English, D., *supra,* §1.06[4] at 1-16. However, as one commentator cautions, "in representing elderly clients situations arise with increasing frequency that challenge the attorney's ability to react on a 'gut' instinct alone." Boyer, E., *supra*, at 5.

Rather than relying solely on instinct or experience, the attorney may employ a number of different tests to inform the decision regarding a client's capacity. One assessment tool, which is popular because of its reliability and ease of use, is the "Mini Mental State Exam" ("MMSE") (Folstein, Folstein and McHugh 1975). Regan, J., Morgan, R. and English, D., *supra,* §1.06[4] at 1-16 (*citing* Boyer, E., *supra,* at 8-9). The MMSE consists of thirty questions, and a score below 24 suggests that cognitive impairment may exist. Boyer, E., *supra*, at 6.

Another assessment tool is the "Baird B. Brown Legal Capacity Questionnaire," which is said to "combine[] medical and legal principals ... to assess the conceptual knowledge required to demonstrate testamentary capacity ... [while providing] insight into the client's mental state." Id. at 7.

The "Client Capacity Screen" is a one-page assessment to assist the lawyer in making a capacity assessment. Id.

Another source of guidance in the assessment of client capacity, provided by the American Bar Association Commission on Law and Aging and the American

Psychological Association ("ABA-APA"), is the 2005 publication entitled, Assessment of Older Adults with Diminished Capacity: A Handbook for Lawyers. [3]

The ABA-APA Handbook advocates the use of "markers," or indicators in the initial assessment of client capacity, which "should not be taken in and of themselves to be proof of diminished capacity," but instead "may indicate a need for further evaluation of capacity by an independent professional." ABA Comm. on L. & Aging & Am. Psychological Assn., *supra,* at 13.

In Part A of the ABA-APA Handbook's assessment, the attorney will examine possible cognitive, emotional and behavioral signs that may indicate incapacity. Those signs are considered in the context of possible mitigating factors, such as stress, grief, depression, reversible medical factors, normal fluctuations in mental status that affect older adults, and hearing and vision loss. Id. at 14-16. Part B of the assessment involves comparing the client's understanding in relation to the legal definition of capacity for the particular transaction in issue. Id. at 17-18. Part C of the assessment addresses the factors described in Comment 6 to Model Rule 1.14,[4] which Comment reads:

> In determining the extent of the client's diminished capacity, the lawyer should consider and balance such factors as: the client's ability to articulate reasoning leading to a decision, 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.

[3] http://www.apa.org/pi/aging/diminished_capacity_part1.pdf.
[4] Because New Jersey's R.P.C. 1.14 is essentially identical to Rule 1.14 of the Model Rules of Professional Conduct, commentaries discussing the Model Rule provide additional insight into this thorny issue.

ABA Comm. on L. & Aging & Am. Psychological Assn., *supra,* at 18-19. When performing Part C of the assessment, lawyers are advised by the ABA-APA Handbook to consider an additional factor: the irreversibility of the decision. Id. at 19.

The ABA-APA Handbook also recommends practical techniques that can be used by the lawyer to maximize a client's capacity, to "ensure that clients are judged under circumstances that support and enhance their capacity." Id. at 13. Such techniques include scheduling multiple, shorter sessions with the client at times of day that accommodate the client's peak performance, minimizing background noises, and providing summary information sheets to the client. Id. at 27-30.

As the ABA-APA Handbook opines, for "many, if not most clients, ... clinical consultation or assessment will not be needed to reach a firm conclusion about capacity." Id. at 13. However, the initial lawyer assessment of client capacity may be followed by the use of a clinical consultation or assessment, if the lawyer believes it necessary in order to make a capacity determination. Thus, as Comment 6 to Model Rule 1.14 continues,

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

(Emphasis supplied).

Although case law on client capacity issues is sparse, there is judicial support in New Jersey for allowing the lawyer to exercise discretion by utilizing clinical assessment only sparingly. In Lovett v. Estate of Lovett, 250 N.J. Super. 79 (Ch. Div. 1991), a client

with advanced age and weakened memory executed a new will, which was inconsistent with his long-standing testamentary plan. The legal malpractice claim that followed was based upon the estate planning lawyer's alleged failure to recommend a psychological evaluation to determine the client's testamentary capacity, given the client's age and weakened memory, prior to allowing him to execute the new will. 250 N.J. Super. at 88. The court rejected this claim, stating that,

> The fact that Lovett wanted a simple will in spite of having a substantial estate does not suggest incompetency; nor did his age. The fact that Lovett's memory was not as strong as it had been, although a factor to be considered, was far from sufficient to warrant [the lawyer's] refusal to act or to require him to insist that Lovett obtain a psychological exam. **Circumstances which would justify a suggestion from a lawyer that a client be psychiatrically evaluated as a prerequisite to signing legal documents would be rare.** This was not such a circumstance.

Id. at 89 (emphasis supplied).

III. ASSISTANCE AND ADVOCACY

As a preliminary matter, the lawyer should routinely counsel a competent client to take steps to protect himself or herself in the event of future incapacity, such as through the use of durable powers of attorney, advance directives and health care proxies. American College of Trust and Estate Counsel ("ACTEC"), Commentaries on the Model Rules of Professional Conduct (4th ed. 2006).[5] However, the attorney is often faced with a client who has not taken such protective steps, and who has reached a level of diminished capacity.

[5] http://www.actec.org/public/Commentaries1.14.asp.

As set forth *supra*, the representation of a client with diminished capacity is governed by R.P.C. 1.14, which begins as follows:

> **Client Under a Disability**
>
> (a) When a client's capacity to make adequately considered decisions in connection with the representation is diminished, whether because of minority, mental impairment or for some other reason, the lawyer shall, as far as reasonably possible, maintain a **normal client-lawyer relationship** with the client.....

(Emphasis supplied).

When a "normal" attorney-client relationship is strained by a client's diminished capacity, R.P.C. 1.14 goes on to instruct:

> (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 RPC 1.6 [the RPC addressing "Confidentiality of Information."]. When taking protective action pursuant to paragraph (b), the lawyer is impliedly authorized under RPC 1.6(a)[6] to reveal information about the client, but only to the extent reasonably necessary to protect the client's interests.

R.P.C. 1.14.

[6] As set forth in footnote 2, *supra,* R.P.C. 1.6(a) reads, "A lawyer shall not reveal information relating to representation of a client unless the client consents after consultation, except for disclosures that are impliedly authorized in order to carry out the representation, and except as stated in paragraphs (b), (c) and (d)." Paragraphs (b), (c) and (d) are not applicable to this inquiry; these paragraphs address disclosure of information in connection with a crime or fraud, or a legal malpractice defense.

This author's research revealed only one New Jersey Ethics Opinion addressing a lawyer's representation of a client with limited capacity. Ethics Opinion 625, Representation of Client Believed to be Incompetent, 123 N.J.L.J. 991, 1989 WL 375810 (N.J. Adv. Comm. Prof. Eth. Apr. 20, 1989). Opinion 625 predates the decision in M.R. discussed *infra*, but was issued after New Jersey adopted R.P.C. 1.14. Opinion 625 is in response to an attorney's inquiry regarding the continued representation of a client in the context of general litigation, as opposed to a guardianship action.

In Opinion 625, the client arrived late to an administrative law hearing and displayed behavior that was "irrational, totally incapable of assisting counsel, agitated and potentially violent." An *in camera* hearing in the case revealed that the client's husband was attempting to have the client committed for her bizarre and paranoid behavior, and that the client had threatened to file ethics charges against the attorney. The administrative law judge had recommended petitioning for the appointment of a guardian *ad litem*. The client had also rejected a settlement offer, which her attorney felt was in her best interests. Based upon these facts, the attorney inquired as to whether, and in what manner, he should continue to represent the client.

Opinion 625 made the following observation:

> The determination of a lawyer's responsibilities to a client who suffers from mental infirmity or disorder is not an easy one. That determination must be based upon a sound judgment of the facts and circumstances involved. Usually, the attorney-client relationship is grounded in an assumption that a client, properly advised, can reach an informed decision. On the other hand, a mentally incapacitated person may neither

> have the ability or the legal authority to make a decision. However, there are varying degrees of incapacity as well as different levels of ability. Thus, one who has mental dysfunction may not be able to make a myriad of other decisions affecting his or her welfare.

(*quoting* Model Rules of Professional Conduct Rule 1.14 Comment (Proposed Final Draft 1981)).

The Committee noted that "the difficulties which inhere in situations such as that presented here are obvious," and that "several of the lawyer's basic duties may conflict," including confidentiality rules (R.P.C. 1.6) and the attorney's obligation to exhibit candor toward the tribunal (R.P.C. 3.3). The Committee also noted that a lawyer may terminate representation under R.P.C. 1.16 if such withdrawal "can be accomplished without material adverse effect on the interests of the client;" or if the client insists on a course of action "that the lawyer considers repugnant" or imprudent; or other "good cause for withdrawal" exists. Id. (*quoting* R.P.C. 1.16). Cautioning that there can be "no hard, fast or inflexible rules" for resolving situations involving clients with diminished capacity, the Committee concluded that,

> the lawyer must attempt to effectively advise the client of the status of the case unless he soundly believes that she cannot comprehend or that the communication would adversely affect her health or well-being. If either exists, or, as here, she is incapable of effectively assisting in her own defense (based on a firm professional judgment), the appointment of a guardian should be sought. Counsel may continue to represent his client here unless he believes the course of action he is forced to take would be imprudent or if his continued representation would adversely affect his client. He would be required to continue his representation only if his withdrawal could prejudicially affect her.

Id.

Advocacy of Client's Wishes vs. Promoting Client's "Best Interests"

Implicit in entertaining a "normal" relationship with a client with diminished capacity is the struggle between competing views: the lawyer as advocate for the client, on the one hand, and the lawyer promoting what the lawyer believes to be the "best interests" of the client. Laffitte, E., *supra*, at 327-28. However, the generally accepted view, confirmed by our Supreme Court in the M.R. decision discussed *infra,* is that the lawyer should advocate the client's wishes, rather than what the lawyer determines to be the client's best interests. Id.

This view is supported by the November 21, 2005 Aspirational Standards for the Practice of Elder Law, developed by the Professionalism and Ethics Committee of the National Academy of Elder Law Attorneys, which states that the elder law attorney "respects the client's autonomy and right to confidentiality even with the onset of diminished capacity."

The Supreme Court of New Jersey provided additional guidance to the bar in its decision addressing whether a developmentally disabled and "generally incompetent" individual must prove that she retains the capacity to choose where to live. In re M.R., 135 N.J. 155 (1994). M.R., a developmentally disabled 21-year-old, had resided with her mother but, as she approached the age of majority, she began to express the desire to move to her father's home, which prompted the mother to seek guardianship of her daughter.

In M.R., after the daughter had been found to be "incapable of governing herself and managing her affairs," her father appealed the appointment of her mother as guardian, and sought to have the daughter reside with him. 135 N.J. at 159. During the guardianship proceeding, M.R. was represented by a court-appointed attorney. Id.

At trial, the court had concluded that the father bore the burden of proving that M.R. retained the specific capacity to decide where she wished to live. Id. at 163. On further appeal, however, our Supreme Court concluded that, because her mother was challenging M.R.'s capacity to decide her place of residence, her mother should bear the burden of proving that M.R. was specifically incapacitated with respect to this limited area by clear and convincing evidence. Id. at 168-9. As the Court reasoned,

> Unless they endanger themselves or others, competent people ordinarily can choose what they want, even if their choices are irrational or dangerous. Traditionally, however, courts have tempered the right of self-determination of incompetent people with concerns for their best interests. The paradox with incompetent people is to preserve as much as possible their right of self-determination while discharging the judicial responsibility to protect their best interests.

Id. at 167.

During the course of its analysis, the M.R. Court examined the actions of M.R.'s court-appointed counsel. M.R.'s father had claimed that the court-appointed counsel failed to zealously advocate M.R.'s stated preference to live with her father. The Court framed the resulting issue as "whether the role of appointed counsel for an incompetent is zealously to advocate the incompetent's position or simply to inform the court of counsel's perception of the incompetent's best interests." Id. at 172.

In contrasting the role of court-appointed attorney with that of a guardian *ad litem*, the M.R. Court quoted the Supreme Court Judiciary Surrogates Liaison Committee and Civil Practice Committee Guidelines for Attorneys, which stated that,

> [t]he role of the representative attorney is entirely different from that of a guardian *ad litem*. The representative attorney is a zealous advocate for the wishes of the client. The guardian *ad litem* evaluates for himself or herself what is in the best interests of his or her client-ward and then represent[s] the client-ward in accordance with that judgment.

Id. at 173-4.

The M.R. Court went on to conclude,

> Ordinarily, an attorney should "abide by [the] client's decisions concerning the objectives of representation," R.P.C. 1.2(a), and "act with reasonable diligence ... in representing [the] client," R.P.C. 1.3. The attorney's role is not to determine whether the client is competent to make a decision, but to advocate the decision that the client makes. That role, however, does not extend to advocating decisions that are patently absurd or that pose an undue risk of harm to the client.

Id. at 176.

Thus, while the attorney generally should advocate the client's preferences, "upon 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."* 135 N.J. at 178.

The M.R. decision was founded upon the recognition that,

> Advocacy that is diluted by excessive concern for the client's best interests would raise troubling questions for attorneys in an adversarial system. An attorney proceeds without well-defined standards if he or she forsakes a client's instructions for the attorney's perception of the client's best interests.

Id. at 176 (*quoting* Frolik, L., Plenary Guardianship: An Analysis, A Critique and A Proposal for Reform, 23 Ariz. L. Rev. 599, 635 (1981)).

Following the M.R. decision, R. 4:86-4 of the New Jersey Rules of Court was amended to distinguish between the role of guardian *ad litem* and that of the court-appointed attorney:

> (d) Guardian Ad Litem. At any time prior to entry of judgment, where special circumstances come to the attention of the court by formal motion or otherwise, a guardian ad litem may, in addition to counsel, be appointed to evaluate the best interests of the alleged incapacitated person and to present that evaluation to the court.

In re Mason, 305 N.J. Super. 120, 126-7 (Ch. Div. 1997). As set forth in Mason, "[t]he individual, the subject of the incompetency hearing, has rights, preferences and desires that are not wholly usurped because of the action concerning his or her alleged incompetency.... Perhaps the only limitation placed upon such representation is that the attorney advocate on behalf of the client 'unless the decisions are patently absurd or pose an undue risk of harm.'"

As the Mason court concluded,

> The court-appointed attorney thus acts as an "advocate" for the interests of his client and the GAL acts as the "eyes of the court" to further the "best interests" of the alleged incompetent. Court-appointed counsel is an independent legal advocate for the alleged incompetent and takes an active part in the hearings and proceedings, while the GAL is an independent fact finder and an investigator for the court. The court-appointed attorney, subject to the aforementioned concerns, thus subjectively represents the client's intentions, while the GAL objectively evaluates the best interests of the alleged incompetent.

Id. at 127.

When the attorney determines that guardianship is appropriate, the attorney may petition the court for guardianship of the client, but he or she may not represent a third party who is applying for guardianship of the client. Laffitte, E., *supra*, at 329. As the American Bar Association Formal Opinion 96-404 concurs,

> A lawyer who reasonably determines that his client has become incompetent to handle his own affairs may take protective action on behalf of the client, including petitioning for the appointment of a guardian. Withdrawal is appropriate only if it can be accomplished without prejudice to the client. The protective action should be the least restrictive under the circumstances. The appointment of a guardian is a serious deprivation of the client's rights and ought not be undertaken if other, less drastic, solutions are available. With proper disclosure to the court of the lawyer's self-interest, the lawyer may recommend or support the appointment of a guardian who the lawyer reasonably believes would be a fit guardian, even if the lawyer anticipates that the recommended guardian will hire the lawyer to handle the legal matters of the guardianship estate. However, a lawyer with a disabled client should not attempt to represent a third party petitioning for a guardianship over the lawyer's client.

Regan, J., Morgan, R. and English, D., *supra,* §1.06[4] at 1-19.

Disclosure of Information

With regard to disclosure of a client's confidential information, section (c) of R.P.C. 1.14 authorizes disclosure of such information "when reasonably necessary to protect the client's interests." However, the ACTEC Commentaries on Model Rule 1.14 cautions that, although the lawyer may consult with third parties in these circumstances,

> in deciding whether others should be consulted, the lawyer should also consider the client's wishes, the impact of the lawyer's actions on potential challenges to the client's estate plan, and the impact on the lawyer's ability to maintain the client's confidential information.... the lawyer should

> consider the impact a particular course of action could have on the client, including the client's right to privacy and the client's physical, mental and emotional well-being.

ACTEC Commentaries on the Model Rules of Professional Conduct, *supra.*

Maximizing Client Capacity

As set forth in Section II, *supra*, the ABA-APA Handbook suggests that the lawyer may utilize a number of practical techniques to maximize a client's capacity. ABA Comm. on L. & Aging & Am. Psychological Assn., *supra,* at 27-30. Physical surroundings may be adapted to maximize the client's capacity level. For example, because many clients with diminished capacity suffer from difficulties with sight and hearing, the lawyer may compensate for such impairments by minimizing background noise and glare, directly facing the client and speaking slowly. Boyer, E., *supra*, at 8. In addition, because many older adults function best at certain times of day (generally the morning), the attorney should determine the best time of day for a particular client, and arrange meetings to accommodate that schedule. The lawyer should also consider making appointments at the elder's home, where the elder is more comfortable and likely to function more fully. Id.

It is also vital to avoid confusing physical frailty with mental impairment; the ABA-APA Handbook advocates the importance of beginning a relationship with a client by presuming capacity, and avoiding a stereotypical attitude toward the elder client, as such attitudes can "unconsciously obstruct communication with and perception of the client." Id.

IV. CONCLUSION

R.P.C. 1.14 is the primary source of guidance for New Jersey attorneys representing clients with diminished capacity. However, as one scholar opines, the Model Rule, which was adopted as R.P.C. 1.14 in New Jersey,

> is one of the most well-intended and progressive of the Model Rules.... The controversy ... lies not in its spirit but rather in its vagueness. The resounding criticism is that lawyers are still plagued with many unanswered practical questions.

Laffitte, E., *supra*, at 313.

It is likely that the reason for the seeming vagueness in R.P.C. 1:14 is that these issues are simply incapable of clear answers, given the infinite range of facts and nuances presented by a given case. The nature of incapacity itself is problematic; one commentator colorfully compares the concept of incapacity to "the lava lamp of the sixties--you can never really pin it down and it changes every time you look at it." Boyer, E., *supra*, at 3.

As the New Jersey Advisory Committee on Professional Ethics correctly observed, "the determination of a lawyer's responsibilities to a client who suffers from a mental infirmity or disorder is not an easy one." Ethics Opinion 625, Representation of Client Believed to be Incompetent, *supra,* 123 N.J.L.J. 991. Perhaps the admittedly vague framework of R.P.C. 1.14 is the best method for allowing the thus informed attorney to use his or her "firm professional judgment" in practice. See id.

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Representing Clients With Diminished Capacity

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I. General Durable Power of Attorney

A. The Durable Power of Attorney is a simple and convenient alternative for a client to have another manage his affairs, in lieu of a living trust, conservatorship or future guardianship, provided that the client has sufficient contractual capacity to understand and execute that document..

1. N.J.S.A. 46:2B-8.2 (a) defines a power of attorney as "a written instrument by which an individual known as the principal authorizes another individual or individuals or a qualified bank within the meaning of P.L. 1948, c. 67, s.28 (C.17:9A-28), known as the attorney-in-fact, to perform specified acts on behalf of the principal as the principal's agent."

2. A "durable" power of attorney requires the written instrument to contain words that reflect the intent of the principal that the authority granted to the attorney-in-fact continues to be exercisable regardless of the subsequent disability or incapacity of the principal. N.J.S.A. 46:2B-8.2 (b)

(a) The words "this power of attorney shall not be affected by subsequent disability or incapacity of the principal, or lapse of time," create a durable power of attorney. It is effective upon the execution of the written instrument, unless drafted as a "springing power", and continues to be in effect.

3. N.J.S.A. 46:2B-8.2 (b) provides for a second type of durable power of attorney, a "springing" power of attorney, which includes the words, "this power of attorney shall become effective upon the disability or incapacity of the principal."

The statute provides that "a principal shall be under a disability if the principal is unable to manage his property and affairs effectively". N.J.S.A. 46:2B-8.2

(c) Since the statute fails to provide any guidance as to how to determine the disability or incapacity of the principal, it is advisable for the practitioner to include language in the document for a procedure similar to that used in a guardianship proceeding for determining the disability or incapacity of the principal in the instrument. Problems with a springing power include whether the disability if temporary or permanent and whether all or only some tasks cannot be performed by the principal.

4. Pursuant to N.J.S.A. 46:2B-8.7(a), "[u]nless the power of attorney expressly provides otherwise, all authority granted to multiple attorneys-in-fact may be exercised by the one or more who remain after the death, resignation or disability of one or more of the attorneys-in-fact." N.J.S.A. 46:2B-8.7 (b) and (c) respectively address that the power of attorney may provide for the attorneys-in-fact to act severally or separately or to act jointly. In the event there is no express provision for attorneys-in-fact to act severally or separately or to act jointly, N.J.S.A. 46:2B-8.7 (d) requires attorneys-in-fact to act *jointly.* N.J.S.A. 46:2B-8.7 (e), provides for successor attorneys-in-fact.

5. N.J.S.A. 46:2B-8.9 requires a power of attorney to be "in writing, duly signed and acknowledged in the manner set forth in R.S. 46:14-2.1."i.e., acknowledging a deed.

6. In order to protect a possibly vulnerable principal from abuse by the attorney-in-fact, a fiduciary relationship is created between the principal and the attorney-in-fact. N.J.S.A 46:2B-8.13(a), N.J.S.A. 46:2B-8.13(b) requires that the attorney-in-fact maintain accurate books and records of all financial transactions conducted on behalf of the principal. In the event the principal has been adjudicated an incapacitated person in a guardianship proceeding, the attorney-in-fact also has a fiduciary duty to the guardian of the property of the principal. N.J.S.A. 46:2B-8.13 (a). An attorney-in-fact also may be required to render an accounting under the various circumstances outlined at N.J.S.A. 46:2B-8.13(b).

7. The principal retains the right to revoke a power of attorney. See R.S. 46:14-2.1 N.J.S.A 46:2B-8.10. Pursuant to N.J.S.A. 46:2B-8.5(c), "[n]o person, other than the principal, shall revoke a durable power of attorney except upon a court order for good cause."

8. The principal sets forth and authorizes the specific powers that their attorneys-in-fact can exercise.

9. In 2004, there was an amendment to the Revised Durable Power of Attorney Act regarding the authority of the attorney-in-fact to make gifts. N.J.S.A. 46:2B-8.13a requires that express and specific authority to gratuitously transfer property of the principal to others, including the attorney-in-fact, be granted to the attorney-in-fact if the attorney-in-fact is to have authority to make gifts. That statutory amendment also provides that "[a]n authorization in a power of attorney to generally perform all acts

which the principal could perform if personally present and capable of acting, or words of like effect or meaning, is not an express or specific authorization to make gifts."

(a) The principal may choose from the following options with regard to gifting:

(1) No gifting at all-which is a poor choice because it can result in all of the principal's funds/property being used to pay for health care that might otherwise be paid by government benefits.

(2) Provide for gifting not to exceed the annual exclusion amount for federal gift tax purposes (presently $13,000/donee), but such a gifting provision still may be insufficient to protect the principal's assets if long term care is needed in the future.

(3) Provide for gifts into a trust, whether or not the grantor is a beneficiary thereof. For example, establishing a special needs trust for an adult disabled child. Such gifts are future interests and therefore, do not qualify for the annual exclusion.

(4) Provide for unlimited gifting by advising the client/principal that the $1,000,000 lifetime exclusion can be gifted in addition to the annual gift tax exclusion/donee.

(5) Provide for gifting that will not incur a gift tax by combining the $1,000,000 lifetime exclusion and annual exclusion per person.

(6) Provide for gifts in the same amounts that are consistent with the pattern of gifting the Principal established in the past.

(7) The principal must determine who can be given gifts, and whether all individuals in the same class must be treated equally.

(8) In making gift considerations, the practitioner should inform the principal that there is no requirement to make gifts to all donees equally.

(9) Provisions for the continued support of a spouse or a disabled individual (under age 65) may be appropriate, and those transfers will not deemed to be a gift by the IRS or create a Medicaid penalty period.

(b) Compensation to the attorney-in-fact is not a gift. Pursuant to N.J.S.A. 46:2B-8.12, attorneys-in-fact are entitled to reasonable compensation, through a provision in the power of attorney, in a separate written agreement regarding compensation, or in the absence of any such direction, an attorney-in-fact may apply to the court of competent jurisdiction for an award of reasonable compensation.

10. To avoid allegations of fraud, duress, and undue influence, it may be prudent to include a requirement in the power of attorney that the attorney-in-fact provide an annual formal or informal accounting to the individuals named by the principal, and to further provide that if the recipient has any exception, s/he must provide the attorney-in-fact with a statement of those exceptions within 60 days of their receipt of the accounting.

11. In order to protect the Power of Attorney from allegations of fraud, duress or undue influence, when the principal may have some degree of diminished capacity, it is prudent to go to the principal/client's physician with the client, review the power of attorney in the physician's presence and ensure that the client has sufficient capacity to sign the document. Have the physician do a Certification and be the witness on the document. See Exhibit A

II. Advance Directives for Health Care

A. In order to avoid a future guardianship or conservatorship proceeding for a person who may subsequently become unable to make their own health care decision, the New Jersey practitioner drafts Advance Directives for Health Care documents, specifically a Health Care Proxy Directive and a Health Care Instruction Directive. More mental capacity is required for the decisions required to be made in the Instruction Directive then the Health Care Proxy. These documents are activated when two physicians state that the individual is unable to understand their condition and make health care decisions. Advance Directives are designed to allow the client to document in writing the client's health care wishes along with the client's specific instructions about health care decisions.

B. New Jersey Advance Directives for Health Care Act, N.J.S.A. 26:2H-53, et seq.

1. The State of New Jersey recognizes "the personal right of the individual patient to make voluntary, informed choices to accept, to reject, or to choose among alternative courses of medical and surgical treatment." N.H.S.A. 26:2H-54 (a).

2. In order to further provide for that personal right of the individual patient, health care institutions in this State are required to adopt policies and practices to provide for routine inquiry concerning the existence and location of an Advanced Directive, at the time of admission and at other times as are appropriate under the circumstances. N.J.S.A. 26:2H-65 (a) (1). The attending physician must inquire about the document and enter a notation in the patient's medical records as to whether or not an Advance Directive exists as well as the name of the health care representative

designated by the patient, if any, and attach a copy of the Advance Directive to the patient's medical records. N.J.S.A. 26:2H-62(a).

3. An Advanced Directive for Health Care may be comprised of (a) a Proxy Directive that is "a writing which designates a health care representative in the event the Declarant subsequently lacks decision making capacity" and/or (b) an Instruction Directive that is "a writing which provides instruction and direction regarding the Declarant's wishes for health care in the event that the Declarant subsequently lacks decision making capacity." Under this statute, the term "Declarant" "means a competent adult who executes an Advance Directive. N.J.S.A. 26:2H-55.

4. Pursuant to N.J.S.A. 26:2B-56, a Declarant is permitted to execute an Advance Directive for Health Care at any time. Note that only one designated health care representative (Proxy) can serve at a time, though successors can be named, and no representative can serve as a witness on the Advance Directive.

The Declarant is required to (a) sign and date the document in the presence of two subscribing adult witnesses, who shall attest that the Declarant is of sound mind and free of duress and undue influence, or in the alternative, (b) the Advance Directive shall be signed, dated and acknowledged by the Declarant before a notary public, attorney at law, or other person authorized to administer oaths. A Declarant may direct the health care representative to consult with other specified individuals in the course of the decision making process. N.J.S.A. 26:2H-58 (a), (a)(1), (a)(3), and (a) (4).

5. Pursuant to N.J.S.A. 26:2H-59 (a), an Advance Directive becomes operative when sent to the attending physician or to the health care institution and *when there has been a determination, under the requirements set forth at N.J.S.A. 26:2H-60, that the patient lacks capacity to make a particular health care decision*. Under N.J.S.A. 26:2H-60 (b), one or more physicians must confirm the attending physician's determination of the patient's lack of decision making capacity, except that such confirmation is not required when the patient's lack of decision making capacity is clearly apparent and there is agreement by the attending physician and the health care representative that confirmation is unnecessary.

6. Under the Health Care Proxy Directive, a Declarant may appoint a competent adult to act as his health care representative, including, but not limited to, a Declarant's spouse, a domestic partner, a civil union partner, adult child, parent or other family member, friend, religious or spiritual advisor, or other person, and successors, setting forth a priority ordering, so that if the primary appointed health care

representative is unavailable, unable or unwilling to serve as the representative, or is disqualified from serving, the next appointed alternate shall serve as health care representative

7. Legal authority is conferred upon the health care representative to participate in the decision making process on behalf of the patient once there has been a determination that the patient lacks decision making capacity. N.J.S.A. 26:2H-61(a). The health care representative, in exercising the rights and responsibilities set forth in the Advance Directive, is required to "make the health care decision the patient would have made had he possessed decision making capacity under the circumstances, or, when the patient's wishes cannot adequately be determined, shall make a health care decision in the best interests of the patient." N.J.S.A. 26:2H-61(f).

8. In the course of the decision making process, if a patient who lacks decision making capacity clearly expresses or manifests a contemporaneous wish that medically appropriate life sustaining measures be provided, that wish takes precedence over any contrary decision by the health care representative and any contrary statement in the patient's Instruction Directive. Also, if a patient regains decision making capacity with respect to a particular health care decision, the patient retains the legal authority to make that decision. N.J.S.A. 26:2H-63(b).

9. Under the terms of an Advance Directive and the provisions of the New Jersey Advance Directives for Health Care Act, life sustaining treatment may be withheld or withdrawn when the treatment is experimental and not proven therapy, or is likely to be ineffective or futile in prolonging life, or is likely to merely prolong an imminent dying process; when the patient is permanently unconscious, and when the patient is in a terminal condition. Before life sustaining treatment is withheld or withdrawn when a patient is permanently unconscious or in a terminal condition, a second qualified physician must confirm the attending physician's determination. N.J.S.A. 26:2H-67.

10. It is recommended that an Advance Directive for Health Care include a HIPAA release authorization of all health care protected information to the health care representative so that the health care representative can make informed decisions.

III. Advance Directive for Mental Health Care

A. In many instances, an Advance Directive for Health Care is used by an individual to plan for "end of life" decision-making. An Advance Directive for Mental Health Care is a written planning tool that enables an individual with a mental illness to more actively participate in their own mental health care decision making by communicating their

preferences and instructions to their families, loved ones and mental health care professionals for their mental health treatment, medication and placement, if needed, at a time when the individual is not in crisis. An Advance Directive for Mental Health Care also allows an individual to appoint a mental health care representative to act as his proxy in the event that s/he subsequently lacks decision making capacity. Such a document may be useful when that individual has an acute episode of mental illness rendering him unable to make or communicate decisions concerning his need for treatment or care.

B. New Jersey Advance Directives for Mental Health Care Act, N.J.S.A. 26:2H-102

1. The State enacted a separate statute to govern Advance Directives for individuals with mental illness. These individuals often "find their civil rights and due process protections compromised; often lack resources, societal supports and self-esteem needed to make advance directives for health care work for them; and are disadvantaged by the fact that many physicians and attorneys are unaware of the specific issues that typically enter into the decisions that a person with mental illness may make for himself <u>when in crisis</u>;" (emphasis added) N.J.S.A. 26:2H-103(c).

2. The statute requires psychiatric facilities to adopt policies and practices to provide routine inquiry regarding the existence and location of an advance directive for mental health care when an individual is admitted to a facility and at other appropriate times. N.J.S.A. 26:2H-114(a). N.J.S.A. 26:2H-105 defines "Psychiatric facility" to include "a State psychiatric facility listed in R.S. 30:1-7, a county psychiatric hospital or the psychiatric unit of a county hospital, a short-term care facility, special psychiatric hospital or psychiatric unit of a general hospital or other health care facility licensed by the Department of Health and Senior Services…, or a hospital or community-based mental health center or other entity licensed or funded by the Department of Human Services to provide community-based mental health services." N.J.S.A.26:2H-104.

The responsible mental health care professional, who is "licensed or certified by the State to provide or administer mental health care who is selected by, or assigned to, the patient and has primary responsibility for the care and treatment of the patient, is also required to make an affirmative inquiry as to the existence of an advance directive for mental health care for that patient. N.J.S.A. 26:2H-104 and N.J.S.A. 26:2H-111(a). The procedures for the responsible mental health care professional to document whether or not such an advance directive exists are the same as the procedures for the

attending physician to document the existence of an advance directive for health care at N.J.S.A. 26:2H-62 (a).

3. An advance directive for mental health care is "a writing executed in accordance with the requirements of this act," which "may include a proxy directive or an instruction directive, or both. A Proxy Directive is a writing in which a mental health care representative is designated in the event that the Declarant subsequently lacks capacity. An Instruction Directive is a written document providing instructions and directions concerning the Declarant's wishes for mental health care at a later time if the Declarant then lacks decision- making capacity. A Declarant is "a competent adult who executes an advance directive for mental health care." N.J.S.A. 26:2H-104.

4. Pursuant to N.J.S.A. 26:2H-105(a), a Declarant is permitted to execute, reaffirm, modify, revoke or suspend an Advance Directive for Mental Health Care at any time, *except* when he or she is an inpatient in a psychiatric facility and it has been determined, in accordance with the provisions set forth at N.J.S.A. 26:2H-109, "that the patient lacks decision-making capacity to make the decision to modify, revoke or suspend the advance directive." N.J.S.A.26:2H-106 (f). When executing an Advance Directive for Mental Health Care, the Declarant is required to (a) sign and date the document in the presence of at least one subscribing adult witnesses, who shall attest that the Declarant is then of sound mind and free of duress and undue influence. It should be noted that a designated mental health care representative is not able to serve as a witness to the execution of the Advance Directive. N.J.S.A. 26:2H-105 (a) (1) and (b) (1). In the event one person acts as *the sole witness* to the execution of the document, that sole witness must be someone other than a relative of the Declarant, an operator, administrator, or employee of a rooming or boarding house or residential health care facility in which the Declarant resides, or a beneficiary of the Declarant's estate. N.J.S.A. 26:2H-105 (c).

5. Pursuant to N.J.S.A. 26:2H-108 (a) (1) and (2), an Advance Directive for Mental Health care becomes operative when sent to the responsible mental health care professional or to the psychiatric facility; and when there has been a determination, under the requirements set forth at N.J.S.A. 26:2H-109, that the patient lacks capacity to make a particular mental health care decision. Under N.J.S.A. 26:2H-109 (b), one or more mental health care professionals must confirm the responsible mental health care professional's determination of the patient's lack of decision making capacity.

6. Under the Mental Health Care Proxy Directive, a Declarant may appoint a competent adult to act as his mental health care representative, including, but not limited to, a Declarant's spouse, a domestic partner, a civil union partner, adult child, parent or other family member, friend, religious or spiritual advisor, or other person. A Declarant may appoint one or more alternate mental health care representatives, set forth in a priority ordering, so that if the primary appointed health care representative is unavailable, unable or unwilling to serve as the representative, or is disqualified from serving, the next appointed alternate shall serve as health care representative. A Declarant may direct the mental health care representative to consult with other specified individuals in the course of the decision making process. The Declarant is required to state any limitations to be placed upon the authority of the mental health care representative. *In addition, at the time the proxy directive is signed and witnessed, if a Declarant grants specific authorization to the mental health care representative to consent to the Declarant's admission to a psychiatric facility, the Declarant is required to separately initial each paragraph in which such authorization is granted. N.J.S.A. 26:2H-107 (a), (a)(1), (a)(3), (a)(4), (a)(5) and (a (6).*

7. Legal authority is conferred upon the mental health care representative to participate in the decision making process on behalf of the patient once there has been a determination that the patient lacks decision making capacity. N.J.S.A. 26:2H-110(a). The mental health care representative, in exercising the rights and responsibilities set forth in the Advance Directive, is required to "make the mental health care decision the patient would have made had he possessed decision making capacity under the circumstances, or, when the patient's wishes cannot adequately be determined, shall make a mental health care decision in the best interests of the patient." N.J.S.A. 26:2H-110(f). However, the responsible mental health care professional may be permitted to decline to follow the decision of a mental health care representative when those decisions (a) "violate the accepted standard of mental health care or treatment"; (b) require the use of a form of care or treatment that is unavailable to the responsible mental health care professional; (c) "violate a court order or provisions of statutory law; or (d) "endanger the life or health of the patient or anther person." N.J.S.A. 26:2H-110 (g).

8. Once the responsible mental health care representative possesses legal authority pursuant to an advance directive, and a patient regains decision-making capacity with respect to a particular mental health care decision, the patient must retain

the legal authority to make that decision. In that event, unless there is an objection by the patient, the mental health care representative is permitted to participate in the decision making process in an advisory capacity. N.J.S.A. 26:2H-112 (b) (2).

9. It is recommended that an Advance Directive for Mental Health Care include a HIPAA release authorization of all mental health care protected information to the mental health care representative so that the mental health care representative can make an informed decision.

10. Pursuant to N.J.S.A. 26:2H-106, an advance directive for mental health is valid for an indefinite period of time, if there is no date specified for its expiration.

IV. Conservatorships

A. Introduction

In New Jersey, a conservatorship is a mechanism designed to provide surrogate management for an individual who is no longer able to govern himself or herself fully, who has not effectively put a general durable power of attorney in place, and who has not been adjudicated incompetent. A conservatorship is a *voluntary* proceeding that requires the initial and continuing consent of the conservatee. N.J.S.A. 3B:13A-2; R.4:86-11(b) A conservatorship only permits management of the conservatee's *property*.

B. Usefulness of Conservatorship Proceeding

Often the process of commencing a conservatorship begins when some individual believes that an elder or disabled individual who by reason of advanced age, illness or physical infirmity, is no longer able to care for or manage his property. Conservatorships may be appropriate under the following circumstances: (i) an individual may have diminished capacity, but not to the extent that s/he should be declared mentally incapacitated in a guardianship proceeding; (ii) an individual, though sufficiently competent to execute a general durable power of attorney, may prefer a conservatorship where the family is not harmonious and there may be a concern about threats of asset mismanagement from others in the family, including from the elder or disabled individual himself or herself; (iii) an individual has no nearby and/or trusted caregivers and a non-family member, such as a private geriatric care manager, has been assisting an individual whose capacity has diminished, then such geriatric care manager may prefer court supervision in the management of the conservatee's funds, as opposed to acting as power of attorney and (iv) an individual has no family members or friends who can be relied upon and a bank or other institution or public agency may need to bring a conservatorship action and seek the supervision of the court.

C. By Whom Commenced

Pursuant to N.J.S.A. 3B:13A-5, an action for the appointment of a conservator on behalf of a conservatee may be commenced by the conservatee himself, or on his behalf by a spouse, which may include a civil union partner or domestic partner; adult children, persons closest in degree of kinship; any person having concern for the financial or personal well-being of the conservatee; a public agency; the chief administrator of a state licensed hospital, school or institution; and the chief administrator of a non-profit charitable institution in which the conservatee is a patient or from which he receives service.

D. Who May Be Appointed Conservator

N.J.S.A. 3B:13A-8 priority ranks those who may be appointed as a conservator, including (1) a person or financial institution nominated or designated by the conservatee; (2) the conservatee's spouse, civil union partner, or domestic partner; (3) one or more of the conservatee's adult children, or where none, (4) the person or persons closest in degree of kinship to the conservatee; or (5) some other person or financial institution as the court shall determine. The court may, in its discretion, deviate from the above priority ranking if the potential conservator is unable or unwilling to serve, or for other good cause.

E. Procedure

R.4:86-11 sets out the procedure for appointing a conservator. The conservatorship proceeding is commenced in a summary manner in the Superior Court (Chancery Division, Probate Part) on the filing of a Complaint. The Complaint must include the conservatee's age and residence; the names and addresses of the conservatee's heirs and all other persons entitled to notice pursuant to N.J.S.A. 3B:13A-6, and the nature, location and fair market value of all property, real and personal of the conservatee. As set forth in N.J.S.A. 3B:12A-6, notice of the action to appoint a conservator must be served upon the following individuals: (1) the conservatee, unless he is himself the plaintiff; (2) the spouse, civil union partner, domestic partner, and adult children of the conservatee, or if none, (3) the person or persons closest in degree of kinship to the conservatee; and (4) the person with whom the conservatee resided, or (5) if the conservatee resides in an institution, upon the chief administrator of that institution.

Pursuant to N.J.S.A. 3B:13A-4 and R. 4:86-11 (b), the court may appoint counsel to represent the conservatee if the court deems that counsel is necessary to protect the interests of the conservatee. N.J.S.A. 3B:13A-4 and R. 4:86-11(b) provide for the

appointment of a guardian ad litem to conduct an investigation to determine whether the conservatee objects to the conservatorship, in the event the conservatee is unable to attend the hearing because of physical or other disability. If counsel for the conservatee has been appointed by the court, that counsel for the conservatee may conduct the said investigation, and no guardian ad litem will be appointed under such circumstances. R. 4:86-11(b).

F. Hearing

A hearing will be held by the court, without a jury, wherein testimony will be taken in open court to determine whether the conservatee , by reason of advanced age, illness or physical infirmity, is unable to care for or manage his property or has become unable to reliably provide for himself or for others dependent upon him for their support. R. 4:86-11(b).

G. Acceptance of Conservatorship

R. 4:86-11(c) and N.J.S.A. 3B:13A-9 provide that after a judgment appointing a conservator has been entered, and before letters of conservatorship will be issued, the conservator must accept his appointment. In addition, pursuant to N.J.S.A. 3B:13A-13, the conservator must be required to post a bond in an amount that is based on the value of the estate. The conservator's duties, powers and liabilities are outlined in the statute at N.J.S.A. 13A-1 et seq., and particularly a N.J.S.A.3B:13A-17 through 3B:13A-32.

H. Accounting

Pursuant to N.J.S.A. 3B:13A-27, *an annual informal reports or accounting is required to be provided to the conservatee and filed with the court*. In accordance with R. 4:86-11(d), the court may order a full accounting by the conservator in Superior Court pursuant to R.4:87, insofar as applicable, for good cause shown. A conservator, like a guardian, may settle his first account within one year after appointment, or as soon thereafter as practicable. N.J.S.A. 3B:13A-25.

As with a general durable power of attorney, absent a restrictive court order, the conservatee is not deprived of access to his or her funds during the period of the conservator's administration. If the conservatee makes withdrawals and fails to keep appropriate records, the accounting process will become impossible for the conservator. It is prudent for the attorney for plaintiff to ask the court to segregate certain assets so that the conservator has sole access to those segregated assets, and be required to account for only those assets.

I. Compensation of Conservator

N.J.S.A. 3B:13A-36 provides for the conservator to be compensated for his services in the same manner as a guardian pursuant to N.J.S.A. 3B:18-23 et seq.

J. Conservatee and Competency

A conservatorship relates only to the *property* of the conservatee, and the conservatee must voluntarily consent to this proceeding. Accordingly, N.J.S.A. 3B:13A-16 provides that the appointment of a conservator *shall not be evidence of the competency or incompetency of a conservatee* and shall not transfer title of the conservatee's real and personal property to the conservator; and shall not deprive or modify any civil right of the conservatee, including, but not limited to, civil service status or rights relating to the granting, forfeiture or denial of a license, permit, privilege or benefits pursuant to any law.

K. Termination of the Conservatorship

The conservatorship terminates upon the death of the conservatee or upon his having been adjudicated to be an incapacitated person, in a separate proceeding, as provided by law. Such termination shall not affect the conservator's liability for prior acts nor his obligation to account for funds and property of the conservatee. N.J.S.A. 3B:13A-34.

In addition, the conservatee may make an application to the court to terminate the conservatorship, and the conservator, after the filing of his final account, "shall pay over and distribute all funds and property in his hands and under his control to the former conservatee." N.J.S.A. 3B:13A-35.

V. Guardianships

A. Introduction

Guardianship is involuntary court supervised decision making imposed on those who have lost all or most of their decision making capacity. Until recently, all guardianships were plenary and the imposition of a guardianship meant the loss of all decision making regarding an individual's personal and financial affairs. On January 11, 2006, the New Jersey legislature enacted major changes to Title 3B which resulted in the creation of three types of guardianship for incapacitated adults. N.J.S. A. 3B:12-24.1 is an entirely new section of the guardianship statutes entitled "Determination by the court of need for guardianship services, specific services," and provides for a general guardian, a limited guardian and a *pendent lite* temporary guardian. The current legislative trend is towards an enhanced respect of the rights of self-determination of the

incapacitated person and an attempt to give that individual a safe environment, while imposing the least possible restrictions, and limiting the role of the guardian wherever appropriate. The adjudication of a person's mental capacity and the appointment of a guardian for an alleged incapacitated person are governed by N.J.S.A. 3B:12-1 *et seq.* and New Jersey Court Rule 4:86.

B. When to Institute a Guardianship Proceeding

A plenary guardianship is commenced when an individual's disability is such that he or she is no longer sufficiently competent to plan for his or her property management by executing a General Durable Power of Attorney or to seek a conservatorship, or to plan for the management of his or her person by executing an Advanced Directive and Durable Medical Power of Attorney. Under a plenary guardianship, which remains the most common for elderly individuals, no rights of self determination over person or property are reserved. .

A guardianship may also be appropriate under circumstances in which an individual has executed a General Durable Power of Attorney, Health Care Proxy and/or Advance Directive, but those documents are not now functioning well, and the individual's capacity is now severely diminished. There may be allegations that the agents are not acting in the individual's best interests and/or the individual may be acting in a manner that threatens his or her own safety and welfare and refuses care.

Since 2006, New Jersey has authorized limited guardianships as well as plenary guardianships. A limited guardianship is appropriate for those individuals who may be able to manage some of their affairs, but lack the contractual level of capacity to execute a General Durable Power of Attorney and a Health Care Proxy. Limited guardianships tend to be appropriate for individuals who have a relatively stable mental incapacity—such as those suffering from Traumatic Brain Injury or high functioning mentally retarded individuals, rather than for individuals suffering from dementia or a degenerative neurological disease. In our firm's experience, when seeking a limited guardianship, it is more appropriate to use one physician and one psychologist, rather than two physicians, to establish mental incapacity because the psychologist is better able to establish what specific tasks and decisions the ward can make regarding his or her person or property.

C. Amendment to Title 3B

(1) If the court finds that an individual is incapacitated and lacks the capacity to do some, but not all, of the tasks necessary to take care of himself, the court may

appoint a limited guardian of the person, limited guardian of the estate or limited guardian of both the person and the estate pursuant to N.J.S.A. 3B:12-24.1 (b).

(2) A court when establishing a limited guardianship shall make *specific* findings regarding the individual's capacity, including, but not limited to which areas, such as residential, educational, medical, legal, vocational and financial decision making, the incapacitated person retains sufficient capacity to manage. N.J.S.A. 3B:12-24.1 (b) Examples - to make routine medical decisions, to manage a checking account with funds not to exceed $100.

(3) A judgment of limited guardianship may specify the limitations upon the authority of the guardian or alternatively may specify the areas of decision making retained by the individual.

(4) In accordance with the provisions of N.J.S.A. 3B: 15-1 et seq., the limited guardian of the estate shall furnish a bond, unless the requirement is waived by the court.

(5) Pursuant to N.J.S.A. 3B:12-37, the court has the power to limit the powers conferred on a guardian and those limitations must be set forth in the certificates of letters of guardianship.

(6) At some time after the initial guardianship hearing, the attorney should be cognizant that the limited guardian's powers may expand or contract. See N.J.S.A. 3B:12-24.1(g)

D. Filing the Petition

(1) The detailed requirements to file a guardianship action are set forth in R.4:86-1, and the practitioner should assure himself that all items required are addressed, including the affidavit of the estate, R. 4:86-2(a), and the affidavits (or certifications) of two physicians or one physician and one licensed practicing psychologist, R. 4:86-2(b), or when it is impossible to obtain the above required professional affidavits, the affidavit provided for under R. 4:86-2(c) under which a physician or psychologist must explain the circumstances of their attempt to have a personal examination of the alleged incapacitated person, but that the incapacitated person or those in charge of him or her refused or were unwilling to permit that examination. The guardianship papers must be filed with the Superior Court, Chancery Division, Probate Part within 30 days from the date of the first examination by the physicians and/or psychologist.

(2) The January 2006 revisions to the guardianship statutes reflect that physicians and psychologists preparing affidavits/certifications for guardianship hearings are not in breach of their duty of privacy to their client. Pursuant to N.J.S.A. 3B:12-24.1(d) entitled "Disclosure of Information," physicians and psychologists licensed in this State are authorized to disclose medical information regarding the alleged incapacitated person in affidavits/certifications filed pursuant to the Rules Governing the Courts of the State of New Jersey.

E. Court Proceedings – Court Appointed Counsel and Guardian ad litem

(1) The Court appoints counsel for the alleged incapacitated person, whose role is to address the appropriateness of the proposed guardian, and to represent the interests of the alleged incapacitated person. In *In re Mason*, 305 N.J.Super.120 (Ch.Div.1997), the court stressed that the court appointed attorney's role is not to determine whether the client is competent to make a decision, but to advocate the decision that the client makes.

(2) The foregoing emanates from *In re M.R.*, 135 N.J.155 (1994) wherein the New Jersey Supreme Court held that the primary duty of the court appointed counsel is to advocate the choices of the alleged mentally incapacitated person and to protect that person's rights. Where appointed counsel sees a conflict between the mentally incapacitated person's choices and his or her best interests, the trial court may consider the appointment of a guardian ad litem to function as the eyes of the court and evaluate the best interest of the alleged mentally incapacitated person and present that evidence to the court. And see R. 4:86-4(d), which has been revised to be in accord with *In re M.R.*

EXHIBIT A

Law Offices of Brenda McElnea
200 Executive Drive, Suite 100
West Orange, N.J. 07052
(973) 239-9595
Attorneys for (client)

PHYSICIAN'S CERTIFICATION

_____, M.D., hereby certify as follows:

1. I am a physician, duly licensed to practice medicine in the State of New Jersey. I currently maintain an office at _____

2. I have been the primary care physician for (patient's name) since (date) and have seen him/her for annual physical examinations for over the last _____ years.

3. I am not a relative of (patient's name) either through blood or marriage.

4. I acted as a witness to (insert name's) Health Care Instruction Directive /Health Care Proxy/General Durable Power of Attorney (annexed hereto as Exhibits "A" and "B.") Before doing so, I questioned him/her to assure myself that he/she comprehended the substance and consequences of the documents he/she was executing.

6. Thereafter, in my presence on _____, 2009, copy/copies of the Health Care Instruction Directive and copy/copies of the Health Care Proxy were executed in the form annexed hereto.

7. _____ and _____, the brother and sister-in-law of (patient's name), were also present at the time of the execution of the aforesaid documents.

8. I certify that the foregoing statements made by me are true. I am aware that if any of the foregoing statements made by me are willfully false, I am subject to punishment.

_____

M.D.

Dated: