



UPDATE TO FLORIDA ETHICS RULE 4-1.14, “CLIENT WITH DIMINISHED CAPACITY” - WHAT ALL LAWYERS NEED TO KNOW

BROOKE BENZIO, ESQ.



Recently a colleague (“Atticus”) reached out for assistance with a novel ethical issue. Atticus represents a client in a personal injury matter, and although at the outset of the years-long representation there was no question of the client’s capacity to retain the firm and make decisions about his case, the client had begun to experience cognitive decline,

and disclosed to Atticus that he had been diagnosed with dementia. Atticus was concerned about whether or how the representation could continue as a result of his knowledge of the client’s diagnosis, and reached out to me, an estate planner, for guidance.

On May 3, 2022, Florida updated Ethics Rule 4-1.14 (now titled “Client with Diminished Capacity”), adopting provisions similar to ABA Model Rule 1.14.¹ Two great primers on the changes to Rule 4-1.14 were recently published in *ActionLine*² and *The Elder Law Advocate*³, but my call with Atticus made me realize that the discussion of serving clients with diminished capacity needed to expand outside the realm of Estate Planning and Elder and Disability Law.

Generally speaking, legal capacity is similar to “informed consent”, which is based on an understanding of the issue and available options, risks and benefits of those options, how to choose between the available options, and any consequences. Certain choices may require different “versions” of capacity; for example, “testamentary capacity” – the ability of a person to make a valid will in Florida – requires a general understanding of (1) the nature and extent of the property to be disposed of; (2) the maker’s relation to those who would be his natural beneficiaries; and (3) the practical effect of the document.⁴

For lawyers who may not have previously felt the need to

consult this rule, the major takeaways are:

1. Maintain a normal client relationship to the greatest extent possible (and employ reasonable supports to do so)⁵;
2. You are not required to seek appointment of a guardian, however, in certain circumstances, you may take “protective action” to avoid “substantial physical, financial, or other harm”⁶; and
3. You may reveal information which would otherwise be subject to attorney-client confidentiality if and only to the extent necessary to protect the client’s interests⁷.

I encourage you to read Rule 4-1.14 and the Comment, and offer the following practical insights:

1. **Assess Yourself.** As with classifications such as gender and race, care must be taken to recognize unconscious biases (e.g., it might be easy to assume Atticus’ client is elderly), and avoid stereotypes or assumptions to preserve client dignity and autonomy. People sometimes exhibit behaviors temporarily or as part of their nature that might evidence a lack of capacity in certain circumstances. There are a number of resources out there for unconscious bias training, but honest self-assessment is always available (and free!)
2. **Educate Yourself.** Stop (or do not start) thinking about capacity as a consideration only for interactions with older persons or individuals with disabilities. We automatically assess capacity whenever we communicate. Throughout a conversation, we are confirming understanding and agreement (or disagreement) and adjusting our contributions to the conversation accordingly. Legal capacity exists on a spectrum, and is affected by more than just age or illness; injuries, pain, substance use (including prescription medications) or abuse, interactions between medications and substances or foods, depression, grief and other extreme emotional situations, stress, lack of sleep, learning difficulties, and time of day can all affect capacity. Where appropriate, engage the assistance of the client’s health care providers, and seek outside resources to better

¹ See In re Amendments to R. Regulating Fla. Bar (Biennial Petition), Case No. SC20-1467.

² Justin A. Shifrin, Esq., Rule 4-1.14: Diminished Capacity Resolving Diminished Clarity, *ACTIONLINE*, Winter 2023, at Page 6.

³ Heather Boyer Samuels, Esq., New Rules: Updates to Florida Ethics Rule 4-1.14, now titled “Client with Diminished Capacity,” *THE ELDER LAW ADVOCATE*, Winter 2023, at Page 15.

⁴ *Raimi v. Furlong*, 702 So. 2d 1273, 1286 (Fla. 3d DCA 1998).

⁵ R. Regulating Fla. Bar 4-1.14(a).

⁶ R. Regulating Fla. Bar 4-1.14(b).

⁷ R. Regulating Fla. Bar 4-1.14(c).

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understand a specific diagnosis or situation.

My ultimate advice to Atticus (and you)? Think like a lawyer. First, consider all of the facts and circumstances available, and make a determination of the resulting level of concern regarding the client's capacity. Once you have determined your level of concern, determine and employ the appropriate supportive actions (such as involving a trusted family member with the client's permission) to proceed with the representation if possible, or if the representation cannot continue, take steps necessary to protect the client and their interests, and withdraw from the representation if it is not possible or appropriate to continue through the client's legal representative (such as an Agent under a Durable Power of Attorney or court-appointed Guardian). The National Center on Law & Elder Rights published an Issue Brief that provides an excellent primer on assessing legal capacity that I strongly recommend as a resource for capacity assessments for clients of any age, specifically the Overall Summary "quick reference" table on page 6.⁸

Finally, whatever action you take, ensure the client's best interests are at the forefront. Lawyers sometimes get a bad rap⁹, but consider the frequently omitted (and debatable¹⁰) context of that famous quote from Shakespeare's Henry VI: in order for the coup to prevail, the villain knew he would need to get rid of the defenders of justice and the people. With the lawyer's duty to society in mind, and modernization of important rules of professional conduct like the update to Rule 4-1.14, clients will be better served with respect to all legal needs and levels of capacity.

• Brooke Benzio, partner, Estate, Trust & Wealth
Preservation Practice Group, Quarles & Brady

⁸ David Godfrey, "Assessing Legal Capacity: Strategies for an Elder Rights-Centered Approach," NATIONAL CENTER ON LAW & ELDER RIGHTS (April 2021) [https://ncler.acl.gov/getattachment/Legal-Training/Capacity-Assessment-Ch-Summary.pdf.aspx?lang=en-US%20approach%20\(acl.gov\)](https://ncler.acl.gov/getattachment/Legal-Training/Capacity-Assessment-Ch-Summary.pdf.aspx?lang=en-US%20approach%20(acl.gov)).

⁹ In a Rasmussen Reports national telephone and online survey of 1,000 American adults conducted August 1-2, 2022, barely a third of respondents (35%) answered yes to the question "Do you trust lawyers?", 32% answered no, and 33% were unsure. Can You Trust a Lawyer?, RASMUSSEN REPORTS (Aug. 17, 2022), https://www.rasmussenreports.com/public_content/business/general_business/can_you_trust_a_lawyer#:~:text=Barely%20a%20third%20of%20Americans,33%25%20aren't%20sure.

¹⁰ Olivia Rutigliano, What did Shakespeare mean when he wrote "let's kill all the lawyers?," LIT HUB, (Jan. 25, 2023), <https://lithub.com/what-did-shakespeare-mean-when-he-wrote-lets-kill-all-the-lawyers/>.