

The Conundrum of Capacity Part 2:

**I Think My Client Has Diminished
Capacity.**

What Are My Ethical Obligations?

13 June 2024

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Presenter/Panelist Biographies

Brendan Corbalis, Esq.

Brendan Corbalis serves as SeniorLAW Center's Director of Guardianship, Grandfamilies, and Victim Services. Staffed by a team of twenty, the project consists of three separate units with distinct focuses and funding streams. It provides counsel, advice, brief services, and extended representation in various areas of civil law. In addition to supervising the project's work, Brendan represents clients in Bucks, Chester, Delaware, Montgomery, and Philadelphia counties. He is a graduate of NYU and Yale and received his law degree from Villanova University School of Law.

Judge Vito P. Geroulo

Judge Vito P Geroulo is a graduate of the Scranton Preparatory High School, and received a bachelor's degree in English from the University of Scranton in 1969. Judge Geroulo attended Fordham law School at Lincoln Center in New York City from which he received his Juris Doctorate Degree in 1972. He was engaged in the private practice of law from 1972 until 2002 when he assumed his duties on the bench of Lackawanna County.

Judge Geroulo served as an Assistant Public Defender and as Chief Public Defender for Lackawanna County. He was active in the Lackawanna Bar Association, serving two terms on the Board of Directors and as president of the Bar Association in 1996. Judge Geroulo currently serves as chairman of the Lackawanna County Criminal Justice Advisory Board and previously served as chair of the Prison Board of Lackawanna County.

He has served as a member of the Judicial Ethics Committee for the Pennsylvania Conference of State Trial Judges since 2007 and served as the chair of the Ethics Committee from 2015 to 2020. Judge Geroulo presides over the Mental Health Treatment Court of Lackawanna County which he co-founded in 2007. He has been married for more than 50 years to the former Elaine Mooney and they reside in the Hill Section of Scranton. Judge and Mrs Geroulo are the parents of Attorney Elaine Geroulo, Sara Rutledge, Rebecca Szymanski and Attorney Thomas Geroulo, and grandparents of six grandsons.

Nancy Barrasse, Esq.

Nancy Barrasse is a graduate of Scranton Preparatory High School, the University of Scranton, and the Villanova University School of Law where she earned both her JD and LLM. In private practice since 1995, she has also served as the City Solicitor for Scranton from 1994 to 1997. From 2002 to the present, she has served as the Solicitor for the Lackawanna County Area Agency on Aging. Attorney Barrasse has served on many local and state Boards and Committees including Serving Seniors and the NEPA Estate Planning Council. Nancy provides best practice lectures for Pennsylvania's 57 Area Agencies on Aging on various topics including the Older Adult Protective Services Act, investigative practices and preparing cases for litigation. She also represents Adult Protective Services throughout the Commonwealth and serves as a leader for the Northern Regional Collaboration Group providing community input to the Office of Elder Justice in the Courts to ensure access to due process for adults who are alleged incapacitated, promote alternatives to guardianship and improve guardianship monitoring.

Virginia Speicher Barrett, Esq.

Attorney Barrett is a graduate of the Pennsylvania State University and the Widener University School of Law. Attorney Barrett currently sits as the Lackawanna County Orphan's Court Master where she is responsible for conducting and overseeing guardianship proceedings, adoption proceedings, and Orphans' Court proceedings as authorized by the Orphans' Court Judge of Lackawanna County. Prior to her appointment as Master, Attorney Barrett was the Senior Law Clerk to the Honorable Vito P. Geroulo. She is a member of the Lackawanna Bar Association and prior Board Member of the Young Lawyer's Division of the Lackawanna Bar Association.

SCHEDULE:

Introduction / Housekeeping:

Pamela C. Janus, Esq.
Special Projects Coordinator
Lackawanna Pro Bono, Inc

Presentation of Rule 1.14 on Diminished Capacity:

Brendan Corbalis, Esq.
Director of Guardianship, Grandfamilies, and Victim
Services
SeniorLAW Center, Philadelphia

Panel Discussion:

Moderator:

Virginia Speicher Barrett, Esq.
Lackawanna County Orphan's Court Master

Panel:

Judge Vito P Geroulo
Orphan's Court Judge, Lackawanna County Court of
Common Pleas
Nancy Barrasse, Esq.
Solicitor, Lackawanna County Area Agency on Aging
Brendan Corbalis, Esq.
Director of Guardianship, Grandfamilies, and Victim
Services SeniorLAW Center, Philadelphia

Questions / Wrap Up

Objective:

This CLE will explore the challenges lawyers may face in fulfilling their obligations under Rule 1.14, such as determining the extent of the client's impairment and balancing the client's autonomy with their best interests.

By the end of this CLE, participants understand the provisions of Pennsylvania Rule of Professional Conduct 1.14 regarding representing clients with diminished capacity, identify situations where Rule 1.14 applies, and apply the principles outlined in the rule to hypothetical scenarios.

Rule 1.14 Client with Diminished Capacity

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

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

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

Comment:

[1] The normal client-lawyer relationship is based on the assumption that the client, when properly advised and assisted, is capable of making decisions about important matters. When the client is a minor or suffers from a diminished mental capacity, however, maintaining the ordinary client-lawyer relationship may not be possible in all respects. In particular, a severely incapacitated person may have no power to make legally binding decisions. Nevertheless, a client with diminished capacity often has the ability to understand, deliberate upon, and reach conclusions about matters affecting the client's own well-being. For example, children as young as five or six years of age, and certainly those of ten or twelve, are regarded as having opinions that are entitled to weight in legal proceedings concerning their custody. So also, it is recognized that some persons of advanced age can be quite capable of handling routine financial matters while needing special legal protection concerning major transactions.

[2] The fact that a client suffers a diminished capacity does not diminish the lawyer's obligation to treat the client with attention and respect. Even if the person has a legal representative, the lawyer should as far as possible accord the represented person the status of client, particularly in maintaining communication.

[3] The client may wish to have family members or other persons participate in discussions with the lawyer. When necessary to assist in the representation, the presence of such persons generally does not affect the applicability of the attorney-client evidentiary privilege. Nevertheless, the lawyer must keep the client's interests foremost and, except for protective action authorized under paragraph (b), must look to the client, and not family members, to make decisions on the client's behalf.

[4] If a legal representative has already been appointed for the client, the lawyer should ordinarily look to the representative for decisions on behalf of the client. In matters involving a minor, whether

the lawyer should look to the parents as natural guardians may depend on the type of proceeding or matter in which the lawyer is representing the minor. If the lawyer represents the guardian as distinct from the ward, and is aware that the guardian is acting adversely to the ward's interest, the lawyer may have an obligation to prevent or rectify the guardian's misconduct. See Rule 1.2(d).

Taking Protective Action

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

[6] In determining the extent of the client's diminished capacity, the lawyer should consider and balance such factors as: 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. In appropriate circumstances, the lawyer may seek guidance from an appropriate diagnostician.

[7] If a legal representative has not been appointed, the lawyer should consider whether appointment of a guardian ad litem, conservator or guardian is necessary to protect the client's interests. Thus, if a client with diminished capacity has substantial property that should be sold for the client's benefit, effective completion of the transaction may require appointment of a legal representative. In addition, rules of procedure in litigation sometimes provide that minors or persons with diminished capacity must be represented by a guardian or next friend if they do not have a general guardian. In many circumstances, however, appointment of a legal representative may be more expensive or traumatic for the client than circumstances in fact require. Evaluation of such circumstances is a matter entrusted to the professional judgment of the lawyer. In considering alternatives, however, the lawyer should be aware of any law that requires the lawyer to advocate the least restrictive action on behalf of the client.

Disclosure of the Client's Condition

[8] Disclosure of the client's diminished capacity could adversely affect the client's interests. For example, raising the question of diminished capacity could, in some circumstances, lead to proceedings for involuntary commitment. Information relating to the representation is protected by Rule 1.6. Therefore, unless authorized to do so, the lawyer may not disclose such information. When taking protective action pursuant to paragraph (b), the lawyer is impliedly authorized to make

the necessary disclosures, even when the client directs the lawyer to the contrary. Nevertheless, given the risks of disclosure, paragraph (c) limits what the lawyer may disclose in consulting with other individuals or entities or seeking the appointment of a legal representative. At the very least, the lawyer should determine whether it is likely that the person or entity consulted with will act adversely to the client's interests before discussing matters related to the client. The lawyer's position in such cases is an unavoidably difficult one.

Emergency Legal Assistance

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

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

Hypotheticals to be used in Panel Discussion:

1. The Love Scam

A client you have represented in the past calls your office. He is 84 years old. He tells you that his grandson got him an iPad for Christmas so he could face time with his grandchildren. Instead, he used it to access a dating site. He tells you that he met a very nice woman who lives in a village in a rural part of Thailand with her 3 young children. She's a 25-year-old widow who dreams of coming to America and marrying your client. He has never met her in person. He is unable to speak to her via phone. He tells you her rural village has Wi-Fi, but no reliable phone service. He tells you he loves her, shows you pictures of her, and informs you that he needs your help to send her a large check. The check is to help her care for herself and her children while she makes plans to come to America to marry your client. He has sent small checks and gifts to her before, but he has decided to send her \$40,000, half the money in his bank account. The bank has determined that this is a scam and refuses to allow the withdrawal. He's looking for your help to get the money released.

Based on past representation of this client, you know that the Social Security Administration determined that he's mentally disabled and that he's currently confined to a mental health facility pursuant to a civil commitment proceeding.

2. The Opposing Party in Your Case May Have Diminished Capacity

You are working on a "Silver Divorce" for a woman who has been married for forty years. Both your client and her husband are senior citizens over the age of 75. While the wife, your client, has capacity, you are concerned that her soon to be ex-husband may not. Your client has shared that her soon to be ex-husband has been diagnosed with an early stage of dementia, that he is functionally illiterate, and that he may have depression.

3. Representing An Incapacitated Person Who Has a Court Appointed Guardian

A gentleman calls you from a nursing home where he has been a resident for the last year. He tells you that a few months earlier the Court determined that he was incapacitated and appointed a guardian of his person and his estate. He asks you to represent him because he is unhappy with the way that his guardian is handling his affairs. He is married, and his guardian told him that she intends to file to have the marriage annulled. The caller believes that the guardian just doesn't like his wife. He can't imagine any other reason that she would want to cause him so much unhappiness.

4. 2 Sister, A Brother and A Will

You have been representing two adult sisters, one of whom, Mary, has had serious memory problems for some time, although she does not suffer from Alzheimer's Disease. The sister with the memory problem, Mary, has signed a general power of attorney making her brother attorney-in-fact for purposes of carrying out her general business affairs. Some time ago, the two sisters came to your offices for the purpose of having Will prepared. In the Will, Mary's sister Ann was named executrix. The Will was routine and provided for an equal division of Mary's estate between siblings. More recently, the brother came into your office with the power-of-attorney, which Mary had executed in his favor. The brother advised you that Mary did not understand what was in her Will and that she wanted to be certain that Ann has nothing to do with her affairs. Accordingly, the brother asked you for a copy of her Will so that he may explain its contents to her.