

DIMINISHED CAPACITY – PROFESSIONALISM

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Professionalism calls for us to be mindful of the lawyer's roles as court officers, advocates, counselors, negotiators, and problem solvers. *See A Lawyer's Creed and the Aspirational Statement on Professionalism*, Chief Justice's Commission on Professionalism, <https://shorturl.at/Kq08O> (Last visited 08-26-24).

“When we interactively communicate with another person, listening for answers that confirm understanding, we are informally assessing capacities. We do it without realizing we are doing it. We become aware of capacity when concerned about mutual understanding or when capacity is the subject of the representation.” Godfrey, D. (2021) *Assessment of Older Adults with Diminished Capacities*, Journal of the ABA Commission on Law and Aging Volume 42, No. 6.

Diminished capacity can take many forms and can be temporary or permanent. “Diminished capacity” brings to mind aging adults; however, there are a myriad of other issues that cause diminished capacity in persons of any age such as mental health issues, brain injuries, medication, situational issues, dementia, and infections.

Potential Clients and/or Clients and Diminished Capacity

One suggested professionalism consideration is to begin assessing capacity by first assessing the client's ability to enter into a contract to hire a lawyer and determining the best method for making that assessment. A face-to-face meeting instead of a phone call or videoconference can be helpful to begin an assessment. Meeting in person, in-office with no outside influences can sometimes be helpful to develop a clearer picture of a client's capacity, and whether the client understands legal processes and decisions. Document the client's understanding of legal issues and decisions, noting their limitations. Consider how you will communicate with the client. Text messages or email may not be the best option if the client cannot use technology to communicate with you effectively. In some cases, the client cannot communicate verbally but may be able to communicate in other ways.

Example: A teenager with brain injury could not communicate verbally, but could text, although very slowly, which caused him some frustration. His thought process was delayed, but he was not non-decisional.

Examples from the Georgia Rules of Professional Conduct and from the Georgia Code and case law of standards of incapacity are as follows.

1. Georgia Rule of Professional Conduct: Rule 1.14(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.”
2. Guardianship: “Proposed Ward lacks capacity to make or communicate significant responsible decisions concerned his/her health and/or safety.” O.C.G.A. § 29-4-1(a).
3. Conservatorship: “Proposed Ward lacks sufficient capacity to make or communicate significant responsible decisions concerning the management of his/her property.” O.C.G.A. § 29-5-1(a).
4. Georgia Code § 53-4-11 provides that testamentary capacity exists “*when the testator has a decided and rational desire as to the disposition of property.*”
5. Under O.C.G.A. § 10-6B-2(5), “‘Incapacity’ means inability of an individual to manage property or business affairs because the individual: (A) Has an impairment in the ability to receive and evaluate information or make or communicate decisions even with the use of technological assistance....”
6. Under O.C.G.A. § 53-12-23, A person has capacity to create an inter vivos trust to the extent that such person has legal capacity to transfer title to property inter vivos. A person has capacity to create a testamentary trust to the extent that such person has the legal capacity to devise or bequeath property by will.
7. “The degree of mentality necessary for a party to execute a valid contract is that he or she must be possessed of mind and reason equal to a clear and full understanding of the nature and consequence of his or her act in making the contract.” *Tate v. Potter*, 216 Ga. 750, 119 S.E.2d 547 (1961).
8. “The testator possessed the mental capacity to make a will if he "understood that a will had the effect of disposing of [his] property at the time of [his] death, was capable of remembering generally what property was subject to disposition by will and remembering those persons related to [him], and was capable of expressing an intelligent scheme of disposition." *Quarterman v. Quarterman*, 268 Ga. 807, 493 S.E.2d 146 (1997).

A client may have capacity in some areas, but not in others.

Example: Client suffers from very early stages of dementia and some short-term memory loss, but was adamant that her house in Georgia be sold so that she could complete her long-term plan to move to Florida.

If you have concerns, should you request that the client undergo an assessment by a healthcare professional before taking on representation? In making this determination, two of the professionalism considerations might include: 1) the aspirational ideal of striving to represent your client as you would want to be represented and to be worthy of your client's trust; and 2) the aspirational ideal of making the law, the legal system, and other dispute resolution processes available to all. *See A Lawyer's Creed and the Aspirational Statement on Professionalism* at Lines 2-5, 60-61, Chief Justice's Commission on Professionalism, <https://shorturl.at/Kq08O> (Last visited 08-26-24). If the prospective client agreed to your request and the results indicated the client might have an issue with capacity, considering professionalism ideals, should you refuse the representation because of possible capacity issues? If the prospective client agreed to your request and the results indicated the client might have an issue with capacity, what considerations should you ponder before moving forward with the representation?

Should you allow the client to bring a trusted family member, friend, or advocate to meetings, if it were permissible under Georgia's Rules of Professional Conduct (i.e. our ethics rules)? If you allowed the client to bring a trusted person to the meetings, how do you guard against the client's trusted person from using the information gained in such meetings for purposes not intended, such as the trusted person initiating guardianship and/or conservatorship proceedings against your client. Another professionalism ideal encourages us to be diligent about maintaining confidentiality and privacy to build trust with the client being mindful to protect the client's best interests and advocating for their rights and needs within the legal system. *See A Lawyer's Creed and the Aspirational Statement on Professionalism* at Lines 93-95, Chief Justice's Commission on Professionalism, <https://shorturl.at/Kq08O> (Last visited 08-26-24).

Example: The client's daughter learns that client's attorney has concerns about diminished capacity and uses that information to file for guardianship and conservatorship.

Example: Client's family takes client to another attorney to change estate planning documents based on information obtained in client meeting with family.

In a litigation setting, a guardian ad litem can sometimes be helpful in representing a client's best interest; however, who should initiate a request to appoint a guardian ad litem? Filing a motion to appoint a guardian ad litem for your client could have a detrimental effect on your client's case, and may result in a denial of the motion.

Example: The attorney files motion for appointment of guardian ad litem regarding concerns about his client's capacity. Court denies the motion and directs the attorney to seek guardianship/conservatorship if capacity is an issue.

Witnesses and Diminished Capacity

“Suffering from a mental health condition is not one of the statutory exceptions to O.C.G.A. § 24-6-601 (2011)(Georgia general rule of competency of witnesses). See generally O.C.G.A. § 24-6-602 (2011), O.C.G.A. § 24-6-604 (2011) and O.C.G.A. § 24-6-605 (2011). Indeed, Rule 601 allows one not mentally competent to testify, and it assumes that jurors are capable of evaluating a witness's testimony in light of the fact that she is not mentally competent.” *Jefferson v. State*, 358 Ga.App. 297, 855 S.E.2d 43 (2021).

However, as a professionalism consideration, just because you can, does not mean you should. *Cf. A Lawyer's Creed and the Aspirational Statement on Professionalism* at Lines 103-104, Chief Justice's Commission on Professionalism, <https://shorturl.at/Kq08O> (Last visited 08-26-24)(To treat opposing [parties] in a manner consistent with the dignity of the search for justice). If a witness is suffering from diminished capacity, assess if his/her testimony would be helpful to the factfinder and how testifying may have a negative effect on the witness.

Example: Calling a proposed ward as a witness in a guardianship case can adversely affect the proposed ward's condition, quality of life, and not be helpful to the factfinder.

Example: In a financial exploitation case, an elderly adult with early dementia is competent to testify that he did not gift a large sum of money to his caregiver.

Conclusion

Georgia's Rules of Professional Conduct Rule 1.1 states: “A lawyer shall provide competent representation to a client. . . . **Competence requires the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation.**” (Emphasis supplied).

Nothing in the rule requires lawyers who work with clients who may have diminished capacity to stay informed on Mental Health issues. Moreover, lawyers – such as prosecutors for example – who presumably may never have a “client” with diminished capacity would not even need to consider the Georgia Rule of Professional Conduct Rule 1.1. Nevertheless, professionalism considerations should inspire us to do more than the bare minimum of legal competency. *See A Lawyer’s Creed and the Aspirational Statement on Professionalism* at Lines 48, 67, Chief Justice’s Commission on Professionalism, <https://shorturl.at/Kq08O> (Last visited 08-26-24)(As a lawyer, I will aspire to achieve the excellence of our craft).

Educate yourself on mental health issues and the implications for legal processes. Understanding the nuances of diminished capacity will enhance your ability to represent your client effectively and with professionalism.