

Clients with Diminished Capacity: Ethical Issues, Challenges and Considerations



**Illinois Department of Aging
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TOPICS



1. Facts & figures - ARDC
2. Identifying the client
3. Determining level of capacity
4. Rule 1.14
5. Ethical considerations
6. Related disciplinary cases



2020 ANNUAL REPORT HIGHLIGHTS



 The Full 2020
ARDC Annual Report

2020 ARDC Annual Report and Highlights

Posted April 30, 2021 on the ARDC website at www.iardc.org

Snapshot of the legal profession in 2020 and the activities
of the ARDC in protecting the public and advancing the
integrity of the legal profession in Illinois.

Investigations in 2020

3,875 grievances docketed

Chart 14

Investigations Docketed* and Concluded: 2016-2020
 * includes reopened investigations

Year	Pending January 1 st	Docketed During Year [*]	Concluded During Year	Pending December 31 st
2016	1,826	5,401	5,496	1,731
2017	1,731	5,199	5,102	1,828
2018	1,828	5,029	4,958	1,899
2019	1,899	4,867	4,802	1,964
2020	1,964	3,875	4,284	1,555

Classification of Charges Docketed in 2020 by Area of Law*

<i>Area of Law</i>	<i>Number</i>
Criminal/Quasi-Criminal	991
Domestic Relations.....	528
Tort (Personal Injury/Property Damage)	380
Real Estate/Landlord-Tenant.....	308
Probate.....	239
Labor Relations/Workers' Comp.....	140
Contract	132
Immigration	93
Bankruptcy	78
Civil Rights.....	67
Local Government Problems	45
Corporate Matters.....	43
Debt Collection.....	37
Tax.....	11
Patent and Trademark.....	10
Social Security.....	10
Adoption	4

* Does not include charges classified with no area of law indicated or alleged misconduct not arising out of a legal representation.

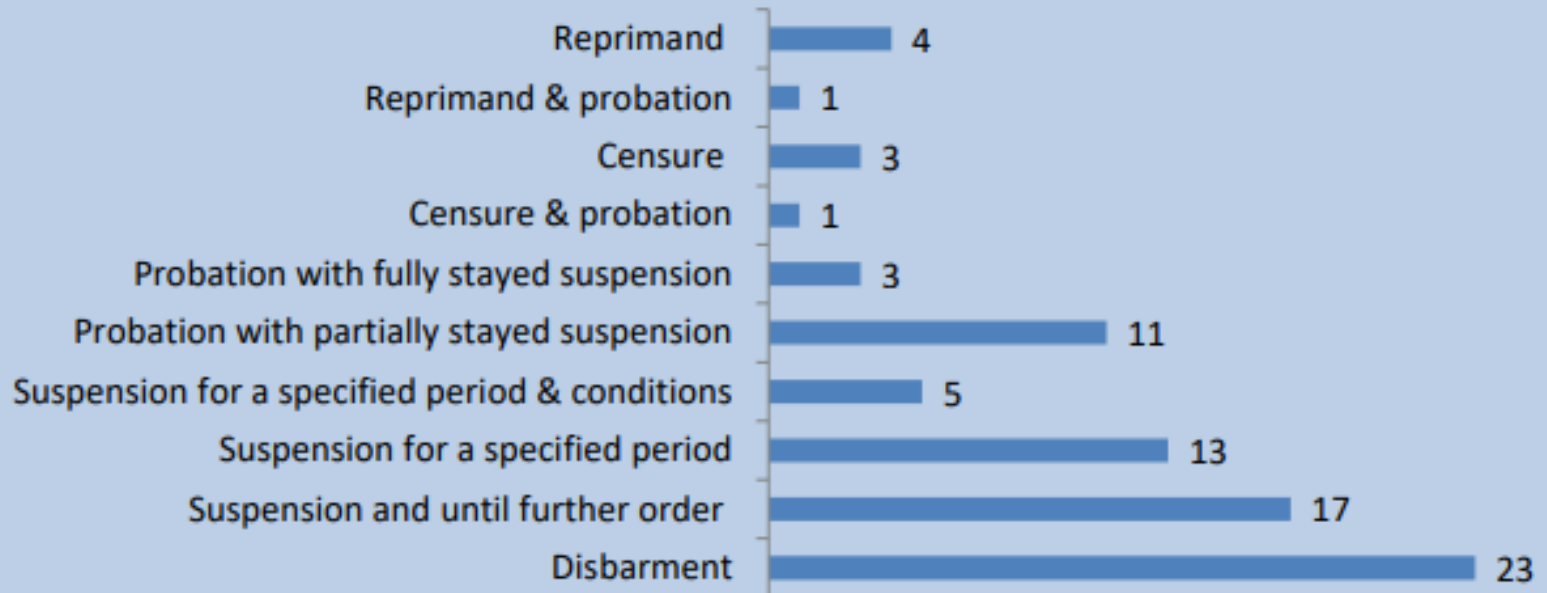
Prosecutions in 2020

Proceedings Filed Directly with the Illinois Supreme Court: 2016-2020

<i>Type</i>	2016	2017	2018	2019	2020
Rule 762(a) Motion for Disbarment on Consent	12	13	12	7	6
Rule 763 Petitions for Reciprocal Discipline	15	24	20	31	26
Rule 757 Transfer to Disability Inactive Status	0	0	2	1	0
Total	27	37	34	39	32

Sanctions in 2020

Disciplinary Sanctions Ordered by the Supreme Court in 2020



Types of Misconduct Alleged in the 37 Disciplinary Complaints* Filed Before Hearing Board in 2020

<i>Type of Misconduct</i>	<i>Number of Cases*</i>	<i>% of Cases Filed**</i>	<i>Type of Misconduct</i>	<i>Number of Cases*</i>	<i>% of Cases Filed**</i>
Fraudulent or deceptive activity (8.4).....	30	81%	Misrepresentation to third persons (4.1) or using means to embarrass or delay (4.4) ...	3	8%
Criminal conduct/conviction of lawyer (8.4)...	9	24%	Excessive or unauthorized legal fees (1.5).....	3	8%
Improper handling of trust funds (1.15).....	8	22%	False/reckless statement about a judge (8.2) ...	2	5%
Failure to communicate with client (1.4).....	8	22%	Unauthorized practice after removal from Master Roll for failure to register and comply with MCLE requirements (5.5).....	1	3%
Neglect (1.3).....	7	19%	Assertion of frivolous pleadings (3.1).....	1	3%
False statement or failure to respond in disciplinary matter (8.1).....	6	16%	Failure to provide competent representation ...	1	3%
Misrepresentations to a tribunal (3.3).....	6	16%	Improper agreement limiting client's right to pursue ARDC charge (8.4(h)).....	1	3%
Improper withdrawal from employment, incl. failure to refund unearned fees (1.16) ...	5	14%			
Failure to report criminal conviction (761(a))...	4	11%			
Conflicts of interest.....	3	8%			
Rule 1.7: concurrent conflicts	1				
Rule 1.9: former client	2				

* Based on complaint initially filed and not on amended charges.

**Totals exceed 37 disciplinary cases and 100% because most complaints allege more than one type of misconduct.

Subject Area Involved in the 37 Disciplinary Complaints Filed Before Hearing Board in 2020

<i>Subject Area</i>	<i>Number of Cases*</i>	<i>% of Cases Filed*</i>	<i>Subject Area</i>	<i>Number of Cases*</i>	<i>% of Cases Filed*</i>
Criminal Conduct/Conviction.....	8.....	22%	Tort	3	8%
Real Estate	7	19%	Contract.....	2	5%
Probate.....	5	14%	Workers' Comp/labor Relations.....	2	5%
Criminal	5	14%	Bankruptcy.....	1	3%
Domestic Relations	4.....	11%	Civil Rights.....	1	3%

*Totals exceed 37 disciplinary complaints and 100% because many complaints allege several counts of misconduct arising in different areas of practice.

REGULATORY ACTION



Investigations in 2020

3,936 grievances docketed in 2020;

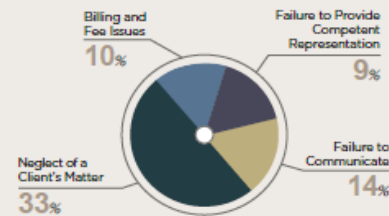
20.3% or 1,001 fewer investigations than in 2019 ;

3,027 different attorneys, representing 3.2% of all registered attorneys;

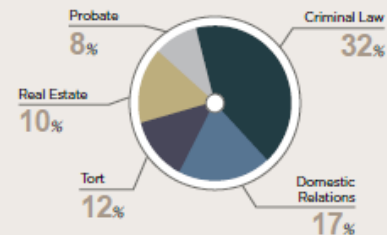
464 or 15.3% of these 3,027 attorneys were the subject of more than one investigation; and

420 or 13.9% had been disciplined by the Court in the past.

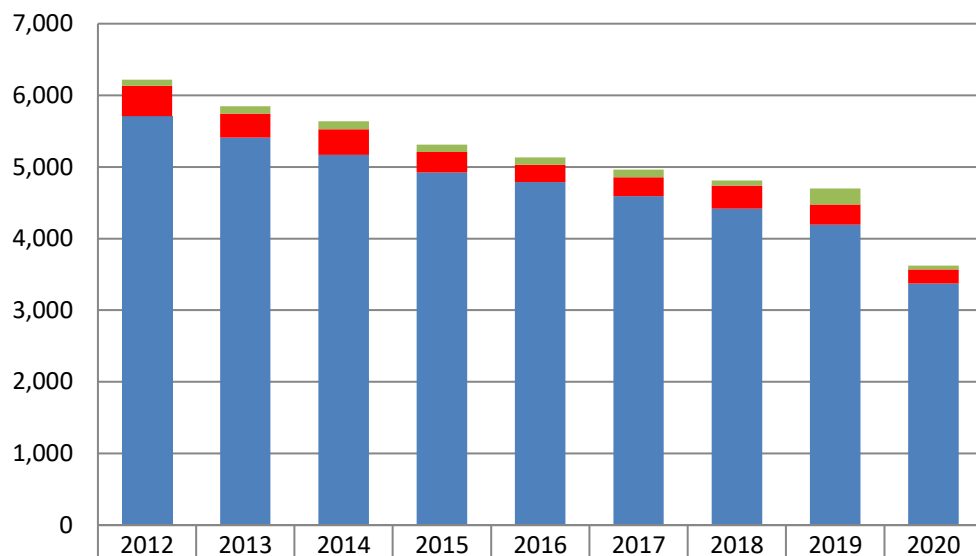
Top areas of alleged misconduct in grievances are:



Top five practice areas involved in grievances are:



Trend of Top Three Categories of Investigations: 2012-2020

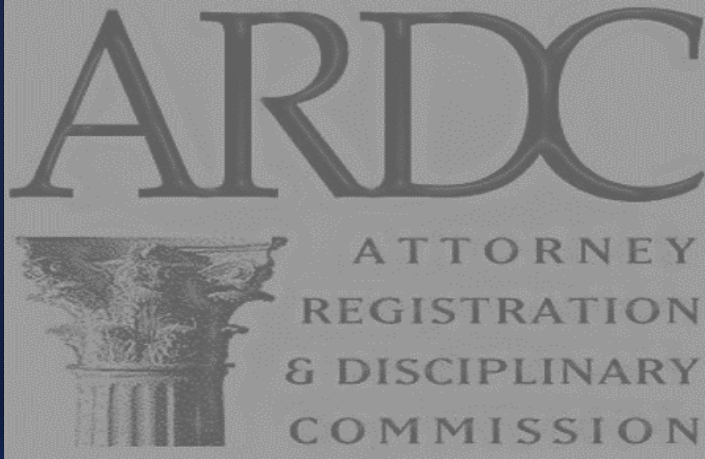


■ UPL	86	105	112	104	104	105	74	224	56
■ Overdraft Notification	421	336	357	283	241	265	321	282	194
■ Disciplinary Charge	5,712	5,410	5,168	4,925	4,788	4,592	4,419	4,195	3,375

Hearing Board Activity

Hearing Board Caseload	Pending 1/1/20	Filed	Concluded	Pending 12/31/20
2020	61	40	46	55
2019	81	51	71	61
2018	81	64	64	81
2017	90	79	88	81
2016	97	83	92	88

- 46 matters concluded in 2020: 43 disciplinary cases and 3 reinstatement petitions during 2020;
- 26.1% or 12 cases contested; and
- 73.9% or 34 cases uncontested: 23 discipline on consent; 7 defaults; and 4 dismissals or closure prior to hearing.



Hearing Board Dispositions

2020 Disciplinary Cases: Rules 553 & 761(d)	43
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Case closed by filing of petition for discipline on consent other than disbarment	19
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Recommendation of discipline after contested hearing	10
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Recommendation of discipline after default hearing	7
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Case closed by filing of motion for disbarment on consent	3
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Case closed by administration of a reprimand to respondent by consent	1
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Complaint dismissed before hearing	1
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Case closed by death of respondent	2
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2020 Reinstatement Petitions: Rule 767	3
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Recommendation of denial after contested hearing	2
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Petition stricken	1
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Review Board Activity

Review Board Caseload	Pending 1/1/20	Filed	Concluded	Pending 12/31/20
2020	9	7	11	5
2019	7	19	17	9
2018	17	12	22	7
2017	17	23	24	16
2016	18	21	22	17

ARDC



ATTORNEY
REGISTRATION
& DISCIPLINARY
COMMISSION

Chart 20E


Activity Before the Review Board in 2020

Cases filed in 2020	7
Exceptions filed by Respondent	5
Exceptions filed by Administrator	1
Exceptions filed by both	1

Cases concluded in 2020	11
Hearing Board reversal on findings or sanction	6
Hearing Board affirmed	3
Notice of exceptions withdrawn	1
Proceedings dismissed	1

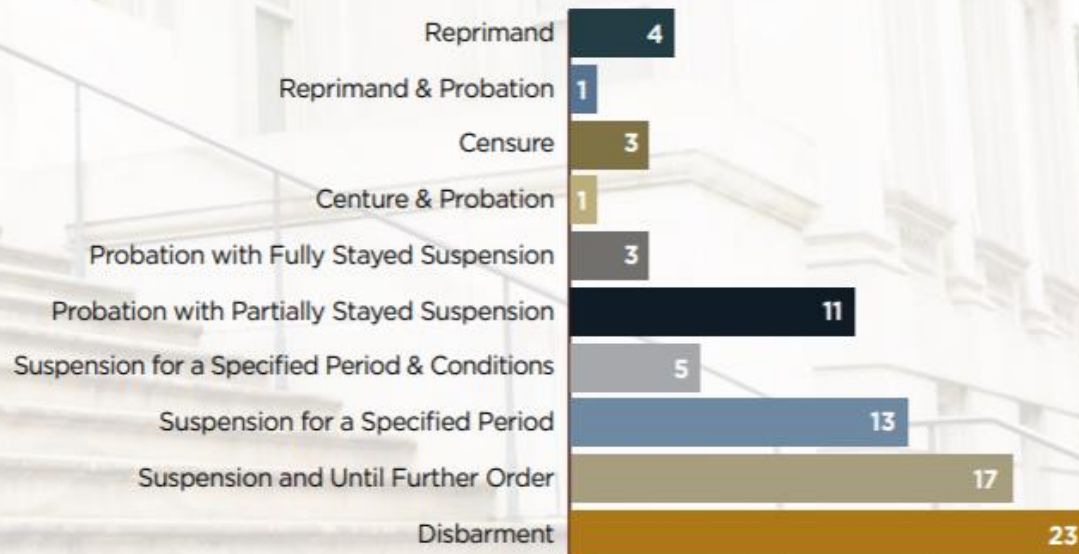
IL Supreme Court

Filings in the Supreme Court	Total Filings	Direct Filings in the Court: 762(a), 763 & 757	Disciplinary Proceedings Awaiting Disposition by the Court	Permanent Retirement Petitions Filed	Petitions for Reinstatement Awaiting Disposition by the Court	Sanctions Entered
2020	95	32	55	4	4	81
2019	111	41	60	0	10	96
2018	116	38	70	2	6	75
2017	137	41	89	2	5	118
2016	136	34	90	5	7	104

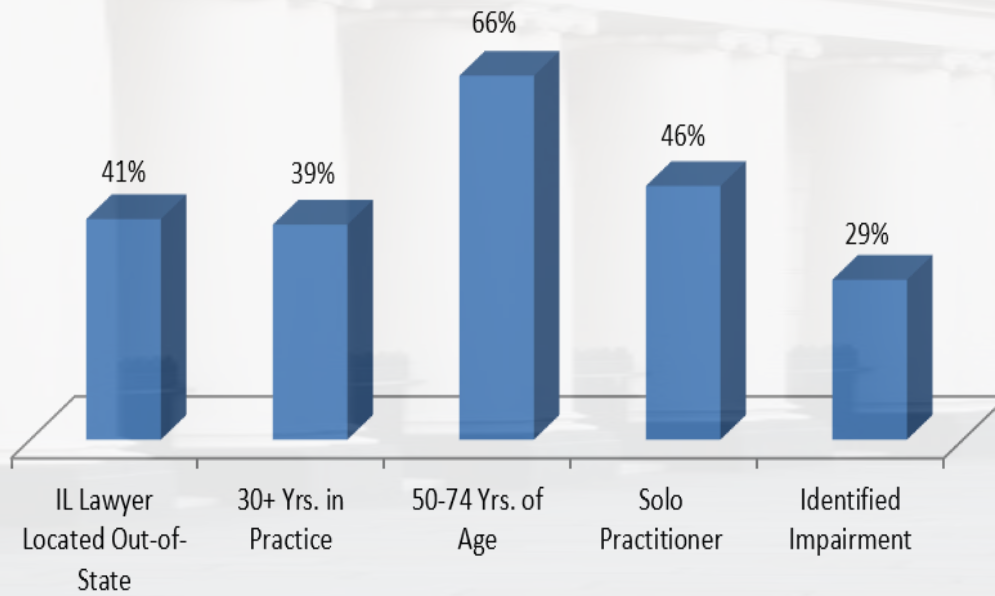
The seal of the State of Illinois Supreme Court is visible on the right side of the table. It features a central figure, likely a personification of Justice, holding a scale and a sword. The figure is surrounded by a circular border containing the text "OFFICE OF THE CLERK OF THE SUPREME COURT" and "STATE OF ILLINOIS".

Sanctions in 2020

Disciplinary Sanctions Ordered by the Supreme Court in 2020



Lawyers Sanctioned in 2020



Client Protection Program in 2020

- 128 claims filed;
- 81 claims approved;
- \$1,094,454 paid out;
- 18 lawyers basis for payouts;
- 1 approval was for the \$100,000 maximum, and 51 were for \$10,000 or less;
- \$699,096 on 46 claims involving one lawyer; and
- 76 claims denied.

Type of Misconduct:

Intentional misappropriation of client funds..	61
Failure to refund unearned fees.....	20

Area of Law

Tort.....	55
Bankruptcy.....	7
Domestic Relation.....	6
Labor/Workers' Comp.....	3
Corporate.....	3
Real Estate/Loan Modification.....	2
Criminal/Quasi criminal.....	2
Probate/Trusts.....	2
Immigration.....	1

Diversion & Probation in 2020

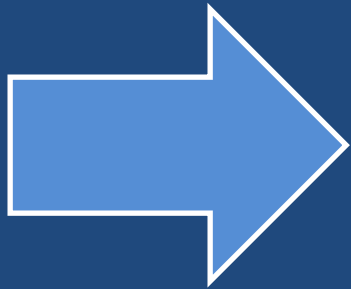
2020 Monitoring	Probation Conditions Imposed by Reciprocal Jurisdiction	58
	Suspension Pending Restitution	42
	Probation Conditions Imposed by ILSCt	20
	Conditional Admission	5
	Conditional Reinstatement	4
	Com. R. 108 Supervision	21
	Com. R. 56 Diversion	15

- 52 referrals to LAP;
- 21 lawyers with Com. R. 108 conditions;
- 15 lawyer entered com. R. 54 & 56 diversion;
- 13 lawyers referred to ARDC Intermediary Program since June 2019; and
- 2 lawyers transferred to permanent retirement status.

Conditions Monitored in 2020

Type of Matter	Substance Abuse or Mental Illness Conditions	Law Office Management Conditions	Both Substance Abuse and Law Office Management Conditions	Restitution	Total
Probation/conditional admission/conditional reinstatement	16	9	1	3	29
Commission Rule 108 Supervision	17	4	0	0	21
Commission Rule 56 Deferral of Investigation	9	3	2	1	15
Total					65

Who is your client?



Why important??

- Identifying the client and establishing the scope of representation at the outset of the attorney-client relationship is crucial.
- Issues can arise when a lawyer attempts to represent a family as opposed to individual member of the family

How Do You Identify Your Client?

- Who called for the appointment?
- Who came to the meeting?
- Who is paying the bill?
- Whose interests are being protected?
- Who is signing the documents?

Legal Capacity vs. Diminished Capacity

- Capacity is not an “all or nothing condition”
- A client lacking legal competence may still have the ability to understand, deliberate upon and reach conclusions about matters affecting the client’s own well-being.
- Lawyers challenges involve distinguishing between lack of capacity and diminished capacity.

Legal Competence

- 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. (Rule 1.14 – comment 1)

Testamentary capacity:

- Know and remember the natural objects of their bounty
- Comprehend the character/nature extent of their property
- Know they are making a will
- Make the disposition of the property according to a plan formed in their own mind

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.
- 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.

Rule 1.14

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

Rule 1.14

(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 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.

Can you communicate with family members to assist in the representation of a client with diminished capacity?

- Yes. Comment 3
- If the client wishes to have family members or other persons participate in discussion with the lawyer the presence of such person generally does not affect the applicability of the attorney-client evidentiary privilege.
- The lawyer **MUST** keep the client's interests foremost and, except for protective action authorized under Rule 1.14, must look to the client, and not family members, to make decisions on the client's behalf.

Rule 1.14

(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.

Rule 1.14

Protective measures

➤ Comment 5

- Consult with family members;
- Use a reconsideration period to permit clarification or improvement of circumstances;
- Use voluntary surrogate decision making tools. i.e. durable powers of attorney;
- Consult with support groups, professional services, adult protective agencies;
- Consult with other individuals or entities that have the ability to protect the client; or,
- Seek guidance from an appropriate diagnostician

To determine the extent of the client's diminished capacity, consider and balance the following factors in Comment 6 of Rule 1.14

- Client's ability to articulate reasoning leading to a decision
- Variability of state of mind and ability to appreciate consequences of decision
- Substantive fairness of decision
- Consistency of decision with known long-term commitments and values of client

Guidance from outside help regarding assessment of capacity

- You may consult with a diagnostician under appropriate circumstances.
- Impliedly authorized to carry out the representation.
- Limit disclosure to what is necessary to assess client's capacity and appropriate protective action.

Medical Evaluation

- Generally start with client's attending doctor as they may have records indicating client's condition and changes over time.
- Advise physician of purpose of exam
- May need to seek evaluation from psychiatrist or neurologist

ABA Formal opinion 96-404

- If attorney determines that client is incompetent to handle own affairs:
 - Attorney may take protective action on behalf of client
 - Petition for appointment of guardian
 - Protective action should be least restrictive under circumstances
 - Take least drastic measure available.

Other Ethical Considerations



Rule 1.6 – Confidentiality of Information

- 1.6(a) A lawyer shall not reveal information relating to the representation of a client unless the client gives informed consent, the disclosure is impliedly authorized to carry out the representation or the disclosure is permitted by paragraph (b) or required by paragraph (c)

Rule 1.6(b)

A lawyer may reveal information relating to the representation of a client to the extent the lawyer reasonably believes necessary.

(1) to prevent the client from committing a crime in circumstances other than those specified in paragraph (c);

(2) to prevent the client from committing fraud that is reasonably certain to result in substantial injury to the financial interests or property of another and in furtherance of which the client has used or is using the lawyer's services;

(3) to prevent, mitigate or rectify substantial injury to the financial interests or property of another that is reasonably certain to result or has resulted from the client's commission of a crime or fraud in furtherance of which the client has used the lawyer's services;

Rule 1.6(b) cont.

(4) to secure legal advice about the lawyer's compliance with these Rules;

(5) to establish a claim or defense on behalf of the lawyer in a controversy between the lawyer and the client, to establish a defense to a criminal charge or civil claim against the lawyer based upon conduct in which the client was involved, or to respond to allegations in any proceeding concerning the lawyer's representation of the client; ~~or~~

(6) to comply with other law or a court order; or

(7) to detect and resolve conflicts of interest if the revealed information would not prejudice the client.

Rule 1.6(c)

(c) A lawyer shall reveal information relating to the representation of a client to the extent the lawyer reasonably believes necessary to prevent reasonably certain death or substantial bodily harm.

Rule 1.6(d)

(d) Information received by a lawyer participating in a meeting or proceeding with a trained intervener or panel of trained interveners of an approved lawyers' assistance program, or in an intermediary program approved by a circuit court in which non-disciplinary complaints against judges or lawyers can be referred, shall be considered information relating to the representation of a client for purposes of these Rules.

Rule 1.7 – Conflict of Interest – current clients

1.7(a) Except as provided in paragraph (b), a lawyer shall not represent a client if representation involves a concurrent conflict of interest.

Rule 1.7(a) – A concurrent conflict of interest exists if:

- (1) Representation of 1 client will be directly adverse to another client;
or
- (2) There is a significant risk that the representation of 1 or more clients will be materially limited by the lawyer's responsibilities to another client, a former client or a third person or by a personal interest of the lawyer.

Rule 1.7(b)

Notwithstanding the existence of a concurrent conflict of interest under paragraph (a), a lawyer may represent a client if:

Rule 1.7(b) cont.

- (1) the lawyer reasonably believes that the lawyer will be able to provide competent and diligent representation to each affected client;
- (2) the representation is not prohibited by law;
- (3) the representation does not involve the assertion of a claim by one client against another client represented by the lawyer in the same litigation or other proceeding before a tribunal; and
- (4) each affected client gives informed consent.

Rule 1.18 – Prospective Clients

- Prospective Client = Person who consults with lawyer about the possibility of forming client-lawyer relationship
- Even where no relationship ensues a lawyer who learned information from a prospective client shall not use or reveal information except as 1.9 permits

Relevant Cases – Illinois

- *In re Kubiowski*
- *In re Landry*
- *In re Patterson*
- *In re Bascos*



Relevant Cases – other jurisdictions

- *In re Meyer* (Louisiana)
- *In re Petition of Runge v. Disciplinary Board of North Dakota*
- *In re Dayton Bar Association v. Parisi* (Ohio)
- *In re M.R.* (New Jersey)

