

REPRESENTING CLIENTS WITH DIMINISHED CAPACITY: YOU JUST GOT HELP FROM THE NEW FLORIDA RULE 1.14.

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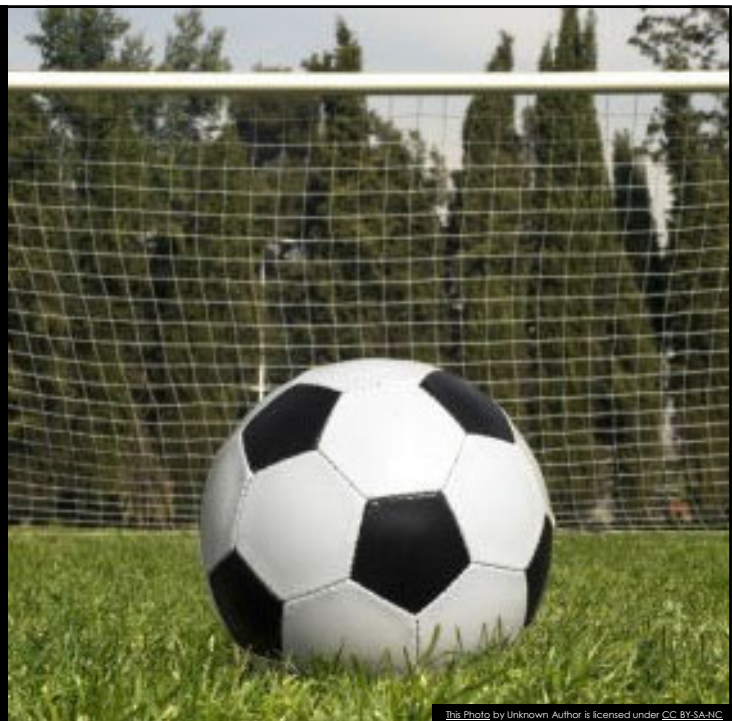


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GOALS: PARTICIPANTS WILL BE

- Understand the history of the changes to Florida Rule 1.14
- Describe the changes to the Florida Rule.
- List practical ways to assess capacity based on the guidance in the Comments
- Seek Protective Action when appropriate based on the guidance in the new Rule.



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LAWYER'S ROLE AS DEFINED BY: FLORIDA RULE 4-1.14 CLIENT UNDER A DISABILITY

(a) Maintenance of Normal Relationship.

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 must maintain a **normal client-lawyer relationship** with the client as much as reasonably possible.

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ASSESSING CAPACITY – WHAT QUESTIONS TO ASK?

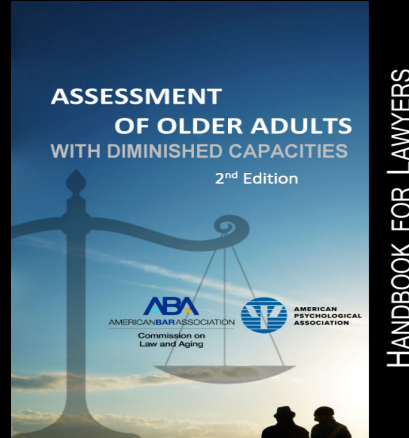
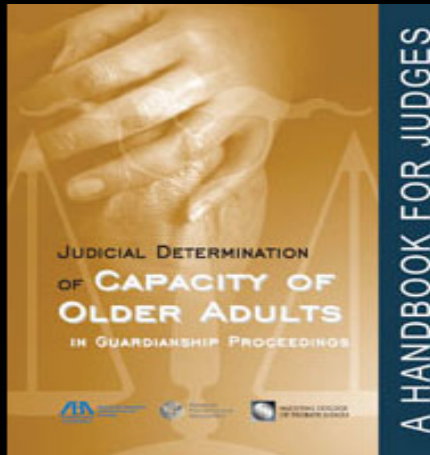
Comment to 4-1.14

Whether the client's capacity has diminished may be shown by such factors as:

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

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REFERENCE MATERIALS



HOW CAN I HELP CLIENT'S CAPACITY?

- Time of day of the interview
- Break the interview into multiple, shorter interviews-it may be difficult for a client to concentrate for long periods of time
- Change the physical environment-?
- Make physical environment as conducive to communication as possible.
- Document in detail conversations with client, time of day, those present, questions asked, etc.

NORMAL RELATIONSHIP

- Client decides the objects of representation (Status of client even if there is a legal representative)
- Confidentiality (Maintain secrets)
- Loyalty (Conflicts with other clients or third parties)
- Communications (Keep advised – Comment to Rule 1.4)

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PROTECTIVE ACTION

(b) A lawyer is **not required** to seek a determination of incapacity or the appointment of a guardian or take other protective action with respect to a client.

However, 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, such as, consulting with individuals or entities that have the ability to act to protect the client and, in appropriate cases, seek the appointment of a guardian ad litem or guardian. A lawyer must make **reasonable efforts to exhaust all other available remedies** to protect the client before seeking removal of any of the client's rights or the appointment of a guardian.

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PROTECTIVE ACTION

- Not Required
- Only if:
 - Diminished Capacity
 - Risk of Substantial Harm
 - Client cannot act for themselves.
- Exhaust other remedies before guardianship

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PRACTICAL CONSIDERATIONS

- Actions
 - Family members/Support groups
 - Time to improve
 - Power of Attorney
 - Professional Services
 - APS
 - Guardianship
- Considerations
 - Wishes and values of the Client
 - Client's best interests
 - Minimize the affect on autonomy and decision –making
 - Respecting clients social and family considerations
 - Maximizing Client Capacity

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CONFIDENTIALITY

(c) Information relating to the representation of a client with diminished capacity is protected by the rule on confidentiality of information. When taking protective action under this rule, the lawyer is **impliedly authorized** under the rule on confidentiality of information to reveal information about the client, but only to the extent reasonably necessary to protect the client's interests.

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QUESTIONS

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