



**AMC 2025**

**Session 1**

**Working with Clients Who  
May Have Diminished  
Capacity**

**Presented by:**

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## About the Presenter...

**Gregory J. Banchy** grew up in Eau Claire, Wisconsin and went on to study at the University of Wisconsin-Eau Claire, receiving his Bachelor of Business Administration degree in 1981 with majors in Information Systems and Business Administration. Greg studied law and received his law degree, magna cum laude (class rank 6 of 149), from the Marquette University Law School in 1987. Greg received a number of awards during his time at Marquette, and was selected for membership in the Alpha Sigma Nu National Jesuit Honor Society. Greg is currently a member of the Eau Claire County Bar Association and the Wisconsin Bar Association. He is also certified as an Elder Law Attorney by the National Elder Law Foundation. His practice primarily involves estate planning and elder law. Greg has been active in the elder law community for many years, serving on the Board of Directors for the Elder Law and Special Needs Section of the State Bar of Wisconsin, and is a past President and current member of the Board of the WI Chapter of the National Association of Elder Law Attorneys (NAELA). Greg also previously served on the Board of Directors for Wispact, an organization which serves the needs of the special needs community in Wisconsin.

## WORKING WITH CLIENTS WHO MAY HAVE DIMINISHED CAPACITY

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### 1. Working with clients with suspected legal capacity issues.

- A. Legal capacity refers to an individual's ability to understand information and make informed decisions in specific areas, such as:
- Financial decisions: Managing assets, entering contracts, or handling finances.
  - Health care decisions: Making informed choices about medical care.
  - Estate planning: Executing legal documents, including wills, living trusts, financial powers of attorney, advance directives, transfers on death deeds, etc..
  - Often associated with the elderly, but can apply to persons of any age.
  - Can be (and often is) confused with physical issues like deafness.
  - Can be effected by factors like time of day (sundowners).
- B. Ethical Considerations for Attorneys.
- Lawyers representing clients with potential diminished capacity must balance:
    - The duty to respect the client's autonomy.
    - The need to protect the client from harm or exploitation.
- C. Formal assessment tools, such as Mini-Mental Status Examination (MMSE), probably should be avoided.
- Lack of training.
  - Limited usefulness.
  - False positives/negatives.
- D. **Supreme Court Rule 20:1.14 Client with diminished capacity.** In any case where diminished capacity is suspected lawyers should review these rules.

(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. (Emphasis supplied)

(c) Information relating to the representation of a client with diminished capacity is protected by SCR 20:1.6. When taking protective action pursuant to par. (b), the lawyer is impliedly authorized under SCR 20:1.6(a) to reveal information about the client, *but only to the extent reasonably necessary to protect the client's interests*. (Emphasis supplied).

Comments to 20.1.14 (in each case emphasis supplied)

- 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.*
- Comment [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.
- Comment [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).
- Comment [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 decision-making autonomy to the least extent feasible, maximizing client capacities and respecting the client's family and social connections.
- Comment [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.

- But see Comment [8] (Disclosure of the Client's Condition). **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. (Emphasis supplied)

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#### Some Issues relating to 20:1.14

- Comments [2] and [4] appear to be in conflict with each other. If there is a legal representative, like an agent under a POA, is the lawyer supposed to look to them to make decisions even if the client is capable of acting on their own behalf?
  - The ABA is considering amending rule 1.14 – the request for comments points out the internal inconsistency between the comments.
- 20:1.14 does not actually define what it means to be a “client with diminished capacity.”
- What is meant by having family members “participate”?
- Does not specifically mention alcohol or substance abuse, but refers to “some other reason.”
  - § 54.01(22) (definitions – “other like incapacities”) – “means those conditions incurred at any age that are the result of accident, organic brain damage, mental or physical disability, *or continued consumption or absorption of substances*, and that produce a condition that *substantially impairs* an individual from providing for his or her own care or custody.” (Emphasis supplied)

- Diminished capacity can result from a number of causes, including, for example, developmental disabilities or dementia.
  - Dementia is not itself a disease but rather the symptom of some underlying issues such as Alzheimer's Disease, the incidence of which increases with age but there are younger sufferers.
- The ABA recently released a memorandum outlining a number of proposed changes to model rule 1.14 based on a number of perceived problems, including those referred to herein.

E. General Rules for working with clients with suspected diminished capacity:

- The general definition of incapacity in Wisconsin (§ 54.01(15)): "Incapacity" means the inability of an individual effectively to receive and evaluate information or to make or communicate a decision with respect to the exercise of a right or power."
  - This same standard is frequently used to evaluate capacity for purposes of activating powers of attorney or changes in fiduciaries such as trustees.
- People are **presumed** to have capacity unless proven otherwise, often through medical evidence or court determinations.
- A finding of "incapacity" by medical professionals related to a power of attorney does *not* by itself establish *legal* incapacity.
  - Only used to activate a power of attorney – does not result in a determination of legal incapacity.
  - Legal incapacity determination requires a finding by a court.
  - Should put the attorney on notice that incapacity may be an issue.
- As discussed further below, the level of understanding required varies depending on the task. For example, creating a will requires "testamentary capacity," which is generally a lower threshold than executing complex financial transactions.
- The standard for "capacity" varies by context:
  - **Testamentary capacity** (wills): The individual must understand the nature of their assets, their beneficiaries, and the legal effect of the will.
  - **Contractual capacity**: Requires a higher level of understanding, including the ability to comprehend the terms and consequences of the particular contract.
    - Initially the lawyer may need to assess whether a client has sufficient capacity to enter into a contract for their services.
    - Traditionally the capacity to execute Financial Powers of Attorney has been considered as contractual capacity, but some courts have applied the same standards as used with respect to wills.

- F. Key statutes in Wisconsin related to capacity issues and guardianship:
- Wis. Stat. § 244: Financial Power of Attorney.
  - Wis. Stat. § 154: Advance Directives (includes authorization for final disposition).
  - Wis. Stat. § 155: Power of Attorney for Health Care
  - Wis. Stat. § 52: Supported Decision-Making Agreements
  - Wis. Stat. § 54: Guardianships and Conservatorships
  - Wis. Stat. § 55: Protective Service System.
- G. Resources for understanding and dealing with capacity issues - legal.
- American Bar Association (ABA) – Commission on Law and Aging
    - ABA/APA Handbook for Lawyers on Assessing Capacity and tools for drafting advance directives and handling elder abuse cases. (*See attached*)
    - See [https://www.americanbar.org/groups/law\\_aging/](https://www.americanbar.org/groups/law_aging/).
  - Legal Action of Wisconsin
    - Provides materials and legal services addressing elder law issues.
    - See <https://www.legalaction.org>.
- H. Resources for understanding and dealing with capacity issues - Medical and Psychological
- Alzheimer’s Association – Wisconsin Chapter
    - Offers research, statistics, and insights into dementia and cognitive decline, which often intersect with legal questions of capacity.
    - Website: <https://www.alz.org/wi>.
  - National Institute on Aging (NIA)
    - Information on aging-related cognitive conditions and decision-making impairments.
    - Website: <https://www.nia.nih.gov>.
  - American Psychological Association (APA)
    - Guidelines for assessing the capacity of older adults, including practical and ethical considerations.
    - Website: <https://www.apa.org>.

## **2. Signs of Diminished Capacity – what to look for when meeting with clients.**

- A. Lawyers need to be aware of and look for signs that an individual may lack capacity, including:
- Difficulty understanding or communicating decisions.
  - Memory loss or confusion about time, place, or identity.
    - Simple non-threatening questions about time and place may be appropriate.
  - Vulnerability to undue influence or coercion.
    - Who brought in the client – someone who stands to gain from the representation?
  - Diagnosed cognitive impairments (*e.g.*, dementia, Alzheimer's disease).

## **3. Powers of Attorney, Advance Directives, Supported Decision Making and Guardianship**

- A. Proper planning in advance is essential to address potential diminished capacity.
- Financial Power of Attorney (POA): Allows a trusted agent to manage financial matters if the elder loses capacity.
    - Powers are limited to the 4 corners of the document. Powers need for more advanced planning are often missing in general (state) forms.
  - Healthcare Power of Attorney (HCPOA): Designates someone to make medical decisions if the elder is unable to do so.
    - Generally allow agent to make all necessary decisions once activated. But separate authority needed for:
      - Nursing home/CBRF placement.
      - Authority for agent to make a feed tube decision.
  - Living Wills: Outline preferences for end-of-life care.
    - Sometimes referred to as “Advance Directives” or “Declarations to Physicians”
    - Limited in scope as compared to a HCPOA.
- B. Guardianship and Protective Placement Proceedings. If diminished capacity prevents an elder from making safe or informed decisions, guardianship may be necessary if no powers of attorney exist or if they are not adequate for the type of decision needed. Wisconsin courts can appoint:
- Guardians of the person: To make healthcare and personal decisions.
  - Guardians of the estate: To handle financial matters.



- Guardianship is a significant legal step and requires:
  - Evidence of incapacity, often provided by medical professionals.
  - Proof that less restrictive alternatives (*e.g.*, powers of attorney) are insufficient.

C. Supported Decision Making.

- A contract entered into by an adult with functional impairment to provide assistance in understanding “options, responsibilities, and consequences” related to life decisions.
- Not a surrogate decision maker – may not sign legal documents or bind the adult to any legal agreements.
- The supporter’s role is limited – cannot make decisions, but can assist in communicating decisions of the supported to the attorney, however the supporter may access legal information pertinent to an individual's decisions only if the individual has provided explicit consent.

#### 4. Undue Influence and Exploitation

A. Diminished capacity increases the risk of:

- Financial exploitation: Scams, fraud, or coercion into unfavorable transactions.
- Undue influence: Manipulation in decisions regarding wills, gifts, or property transfers.

B. IDEAL Model – signs which may indicate undue influence.

- Isolation
- Dependency
- Emotional manipulation and/or exploitation of a vulnerability
- Acquiescence, and
- Loss

C. Wisconsin courts assess undue influence by considering:

- The elder’s vulnerability.
- The presence of a dominant or manipulative party.
- Unusual or unexplained changes to legal documents.

## **5. Role of Medical and Psychological Evaluations**

- A. Expert evaluations are sometimes needed to assess capacity. Courts and attorneys rely on:
- Cognitive assessments and medical records.
  - Statements from psychologists or neurologists regarding the elder's ability to understand and manage decisions.

## **6. Advocacy and Safeguards**

- A. Elder Abuse reporting system – legal framework set out in Wis. Stats. § 46.90.
- B. Legal professionals, family members, and community resources can advocate for individuals with diminished capacity by:
- Pursuing legal remedies for exploitation or abuse by POA.
    - Wis. Stat. § 244.16 (Judicial relief) – allows certain individuals to petition the circuit court to, among other things, “review the agent’s conduct, and grant appropriate relief.”
  - Ensuring that decisions made on behalf of the elder align with their preferences and best interests.
  - Leveraging Wisconsin’s Elder Abuse Reporting System to report concerns.
    - Wisconsin Elder Abuse Hotline: 1-833-586-0107
    - [ReportElderAbuseWI.org](https://www.wisconsin.gov/ReportElderAbuseWI.org)
    - County agencies, including Adult Protective Services
- C. Wis. Stat. § 244.17 – Agent Liability. An agent violating the standards of conduct required by law may be required to do the following:
- Restore the value of the principal’s property to what it would have been had the violation not occurred. (§ 244.17(1))
  - Reimburse the principal or the principal’s successors in interest for the attorney fees and costs paid on the agent’s behalf. (Wis. Stats. § 244.17(2))
- D. Who can report? Anyone suspecting abuse. Mandated reporters include:
- Licensed health care providers.
  - Employees of entities licensed, certified, or approved by the Department of Health Services.
  - Social workers, professional counselors, and marriage and family therapists certified under Wis. Stat. ch. 457.

2025 Annual Meeting & Conference  
Working With Clients Who May Have Diminished Capacity  
Gregory J. Banchy, Banchy Law Center, Eau Claire  
Additional Resource

ABA Commission on Law and Aging, American Psychological Association. (2021). Assessment of Older Adults with Diminished Capacities: a Handbook for Lawyers. (pp.43-46).

<https://www.apa.org/pi/aging/resources/guides/diminished-capacity.pdf>