

Ethics Inquiry Question of the Month: October 2025 - Determining a Client's Decision-Making Capacity.

October 2025 – Determining a Client's Decision-Making Capacity. This month's questions highlight the delicate balance lawyers must maintain between respecting a client's autonomy and safeguarding them from potential harm, especially when representing clients who may be vulnerable due to cognitive decline, other physical or mental limitations, or social isolation. These questions also raise what steps lawyers can take to assess a client's decision-making capacity to determine that a client's directions are truly voluntary, and free from undue influence, coercion, or manipulation.

Scenario #1: Undue Influence in Estate Planning for Elderly Client

A 90-year-old client hired Lawyer to create an estate plan. Several months later after the plan was made, client is now calling Lawyer to revise that plan. Meanwhile, Lawyer is receiving calls from the client's daughter and grandson—each accusing the other of pressuring the client into making changes to the estate plan. Given the client's age and the potential for undue influence, what steps should Lawyer take to ensure the client's wishes are voluntary and legally sound?

Scenario #2: Potential Financial Exploitation of Vulnerable Client

Lawyer is representing a client in the sale of their home. After closing, the client is instructing lawyer to wire the sale proceeds to a bank account belonging to a man the client recently met online. The real estate broker and the client's bank have both contacted Lawyer, expressing concern that the client may be the victim of financial exploitation or fraud. Lawyer contacts Client to discuss concerns. Client dismisses Lawyer's concerns, declines the suggestion to discuss this with Client's family, and explicitly instructs Lawyer not to share any information with Client's family. What ethical and legal obligations does Lawyer have in this situation, and what steps should be taken before proceeding with the wire transfer?

Quick Answer:

Two scenarios— one involving family members seeking to influence an elderly client's estate planning decisions, and another concerning suspected financial exploitation of a client by a scam artist—highlight the ethical challenges lawyers face when representing vulnerable individuals. In both cases, the client's decision-making may be compromised by undue influence, requiring the lawyer to safeguard autonomy and ensure choices are informed and voluntary. When capacity is uncertain, lawyers must proceed with heightened care, thoroughly document their interactions with the client and any advice they give, communicate directly, and consider involving outside professionals when necessary to protect the client's interests.

Client Autonomy and Decision-Making Capacity: Rules 1.2, 1.4 and 1.14

The foundation of the client-lawyer relationship rests on the assumption that, when properly advised and supported, clients possess the capacity to make informed decisions regarding their legal matters. Central to this relationship is the lawyer's ethical obligation to communicate effectively and honor the client's informed choices.

Rules 1.2 and 1.4: Scope of Representation and Communication

This principle is stated in Rules 1.2 and 1.4 of the Illinois Rules of Professional Conduct. Rule

1.2(a) requires that “[a] lawyer shall abide by a client’s decisions concerning the objectives of the representation and, as required by Rule 1.4, shall consult with the client as to the means by which they are to be pursued...”

This rule underscores the lawyer’s duty to respect a client’s right to make decisions, even when they go against a lawyer’s advice, so long as those decisions are made competently and voluntarily. When concerns arise about a client’s ability to understand or act independently due to diminished capacity or undue influence, the lawyer must assess the situation carefully.

Comment [4] to Rule 1.2 directs lawyers to Rule 1.14 for guidance in such cases – “In a case in which the client appears to be suffering diminished capacity, the lawyer’s duty to abide by the client’s decisions is to be guided by reference to Rule 1.14.”

Rule 1.14: Clients with Diminished Capacity

Rule 1.14(a) provides that:

When a client’s capacity to make adequately considered decisions in connection with a representation is diminished... the lawyer shall, as far as reasonably possible, maintain a normal client-lawyer relationship with the client.

Comment [1] elaborates:

The ordinary client-lawyer relationship assumes the client can make decisions about important matters. However, when a client suffers from diminished mental capacity, maintaining this relationship may not be feasible in all respects. Severely incapacitated individuals may lack the ability to make legally binding decisions. Still, many clients with diminished capacity retain the ability to understand, deliberate, and make decisions affecting their well-being.

Protective Action Under Rule 1.14(b)

Rule 1.14(b) provides that if a lawyer reasonably believes that a client:

- Has diminished capacity,
- Is at risk of substantial harm (physical, financial, or otherwise), and
- Cannot adequately act in their own interest,

Then the lawyer may take protective measures. These may include consulting with individuals or entities capable of safeguarding the client’s interests, and in appropriate cases, seeking the appointment of a guardian *ad litem*, conservator, or guardian.

Assessing Capacity: Practical Guidance from Comment [6] to Rule 1.14

Lawyers should exercise caution when forming personal judgments about a client’s capacity to understand legal matters. Determining mental capacity in a clinical sense lies outside the scope of legal expertise. Comment [6] offers a framework for assessing diminished capacity:

[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.

Based on the considerations outlined in Comment [6], the following checklist offers a practical summary of the key questions to ask when assessing client capacity:

Checklist for Assessing Client Capacity

- **Ability to Communicate Choices**
 - Can the client clearly express a choice and the rationale behind it?
 - Have the client's choices been consistent over time?
- **Understanding of Relevant Information**
 - Does the client comprehend the facts and issues involved?
 - Can they grasp the nature and consequences of decisions?
- **Appreciation of the Situation and Its Consequences**
 - Does the client recognize how the information applies to their situation?
 - Do they understand the potential outcomes of their decisions?
- **Reasoning in Decision-Making**
 - Can the client compare options and weigh risks and benefits?
 - Is their reasoning logical and goal-directed?
- **Consistency with Long-Term Values and Preferences**
 - Are the decisions aligned with the client's known values or past choices?
- **Avoidance of Undue Influence**
 - Is the client free from coercion or manipulation?
 - Are they making decisions independently?

To the extent the lawyer needs to reach out to others such as family members, adult-protective agencies or other individuals or entities that have the ability to protect the client, Rule 1.14(c) provides that the lawyer is impliedly authorized under Rule 1.6(a) [the confidentiality rule] to reveal information about the client, but only to the extent reasonably necessary to protect the client's interests.

Before making such protective disclosures, it is incumbent on the lawyer to assess whether the person or entity consulted will act adversely to the client's interests. *See* Comment [8] to Rule 1.14.

Proposed ABA amendments to Model Rule 1.14

In an age of greater awareness around capacity, consent, and care, the American Bar Association (ABA) is evaluating proposed revisions to Rule 1.14. The Working Group on ABA Model Rule of Professional Conduct 1.14 published a memorandum regarding proposed amendments to Rule 1.14 and the comments. The latest discussion draft, dated July 2025, can be found [here](#).

One of the proposed changes would be substituting the term “diminished capacity” with “decision-making limitations” and introducing a formal definition for the new phrase. Under the ABA's draft language, a person has decision-making limitations “if the person has substantial difficulty receiving and understanding information, evaluating information, or making or communicating decisions even with appropriate supports or accommodations.”

This definition is intended to look beyond a medical diagnosis or initial impression and focus more on the client's functional abilities and any supports that may be available to them when determining the nature and scope of the client's limitations. The proposed change recognizes the modern understanding that capacity can be situational in nature and is not an all or nothing assessment.

Although this definition may offer clarity, it remains a proposal and has not yet been adopted into Illinois Rule 1.14. Illinois' Rule 1.14 is identical to the current Model Rule 1.14.

Suggestions for taking action in each scenario

Both scenarios call for careful documentation, direct communication with the client, and possibly involving outside professionals (e.g., medical experts or protective services) to ensure informed and voluntary decisions. Below are some suggested steps a lawyer could take in these situations.

Scenario #1 Estate Planning for an Elderly Client

When a 90-year-old client seeks to revise their estate plan amid allegations of undue influence by family members, the lawyer should proceed with heightened sensitivity and diligence. Key steps include:

- **Meet privately with the client** to confirm their wishes and assess capacity.
- **Screen for signs of coercion or manipulation** using open-ended, non-leading questions.
- **Consider requesting a medical or psychological evaluation** if capacity is in doubt.
- **Document all interactions and decisions** thoroughly to create a clear record of the lawyer's process and the client's expressed wishes.
- **Refrain from engaging with family members** unless the client has given informed consent or protective action is warranted under Rule 1.14. See Comment [3] to Rule 1.14 for guidance.
- **Clarify the scope of representation** to family members, emphasizing that the lawyer represents the client—not the family—and that ethical obligations run solely to the client. Attempting to represent a family member in place of, or alongside, the client can create conflicts of interest.
- **Evaluate the risks of protective disclosures.** Before consulting third parties or making protective disclosures, the lawyer must assess whether the person or entity involved may act contrary to the client's interests.

Scenario #2

When a client instructs a lawyer to wire proceeds from a real estate transaction to a stranger they met online—despite warnings from third parties—the lawyer must act with caution and diligence to protect the client and avoid complicity in potential fraud. Recommended steps include:

- **Pause the transaction and meet privately with the client** to discuss concerns. Clearly explain why the request raises concerns and outline the risks involved. Encourage the client to consult with a financial advisor, their bank, or a trusted friend or family member. Many scams rely on a manufactured sense of urgency and demands for secrecy; giving the client time to reflect and verify is often the most effective safeguard.
- **Provide written warnings** documenting the lawyer's advice against proceeding, the client's responses, and any steps taken to mitigate risk. If the client chooses to ignore the warnings, confirm in writing that they are acting against counsel's recommendation.

- **Assess the client's understanding of the situation**, including the nature of the transaction and the potential consequences.
- **Respect confidentiality**, but consider limited disclosure to trusted individuals (*e.g.*, family, adult protective services) under Rule 1.14 if the client appears to lack capacity and is at risk of substantial harm.
- **Delay the wire transfer** until the client has had time to reconsider or independent verification is complete.
- **Consider withdrawal from representation** if the client insists on proceeding with a fraudulent or illegal act. Under Rule 1.6(b)(1), a lawyer may disclose confidential information to prevent reasonably certain financial harm, particularly when the lawyer believes the client is being defrauded.

An excellent resource for estate and trust practitioners is the American College of Trust and Estate Counsel (ACTEC). ACTEC publishes guidance on the ABA Model Rules of Professional Conduct through its *Commentaries*, with the Sixth Edition (2023) available for free download on the ACTEC website (www.actec.org) or directly from [here](#).

ACTEC also provides sample engagement letters, which include optional provisions covering the client's wishes in the event of future incapacity or death to protect the client's interests, including ways the client could avoid the necessity of a guardianship or similar proceeding. ACTEC Engagement Letters (3rd ed. 2017) can also be found and downloaded from the ACTEC website or can be found [here](#).

Coming Soon: ARDC Webcast Series on Navigating the Ethical Challenges in Dealing with Clients, Judges and Law Firm Colleagues with Mental Health Impairments

The ARDC will soon feature on the ARDC website a new series of webcasts addressing the ethical challenges lawyers encounter when working with individuals affected by cognitive, psychological, or behavioral impairments. These sessions will explore complex situations involving not only clients, but also judges and law firm colleagues, offering practical guidance for navigating professional responsibilities with care, confidence, and professional integrity.

Have a question about professional responsibility? Contact the Ethics Inquiry Program at (312) 565-2600 or (800) 826-8625.