Legal Professionalism: Utilizing Poverty Law's Theory of Client Empowerment for Elderly Clients with Diminished Capacity

Lauren E Palmer, Albany Law School

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Abstract

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Author: Lauren E. Palmer (J.D. Candidate 2011, Albany Law School)

Research shows that the elderly community in the United States is growing fast. In fact, people are living longer and requiring more diversified services as they age. As many are well aware, one problem that comes with advanced aging is the diminishment of cognitive ability.

This article will address several ethical questions that arise when attorneys attempt to balance their own interests with the interests of clients with diminished capacity. By using the theory of client empowerment, developed by Poverty Law scholars, I propose that this burden may be eased. A few years ago, I began to develop an interest in the ethical issues attorneys may face when counseling and advocating for clients with diminished capacity. I interviewed elderly people with diminished capacity, consulted experts in the fields of Poverty Law and Elder Law, and researched the Model Rules of Professional Responsibility, Poverty Law scholarship and Elder Law scholarship. As a result of completing the above procedure, I learned that attorneys and clients with diminished capacity can benefit from the use of the client empowerment theory. The move from traditional advocacy to a client-centered approach will be an arduous task, but it is this author’s opinion that a client-centered approach is the best option for attorneys advocating for elderly clients with diminished capacity.
Legal Professionalism: Utilizing Poverty Law’s Theory of Client Empowerment for Elderly Clients with Diminished Capacity

By: Lauren Palmer*

Introduction

A great concern for attorneys with elderly clients of diminished capacity is the maintenance of a normal attorney-client relationship, as required under the American Bar Association’s Model Rules of Professional Conduct (hereinafter referred to as “Model Rules”).¹ This concern largely stems from the frequent loss of mental capacity among the elderly and the growing number of professional malpractice suits arising from legal transactions involving incapacitated elderly clients.² The law has responded with a number of ways to assist incapacitated individuals and to provide guidance for attorneys.³ A majority of states model their ethics codes after the Model Rules.⁴ The widespread acceptance enables attorneys to consult ethic opinions for around the country. Additionally, Poverty Law scholarship provides some guidance to attorneys.⁵ The progressive theory of client empowerment aims to address the

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⁵ Poverty Law includes a broad range of legal and social science topics and issues. Poverty has been defined as the “deprivation of the basic necessities of life . . . . Poverty is also isolation, lack of access to resources and support systems.” Edgar S. Cahn, REINVENTING POVERTY LAW, YALE L.J., Vol. 103, No. 8, Symposium: The Informal Economy (June 1994) pp. 2133-2155 at 2135. Legal services which aim to help people escape from poverty and to expand rights to receive money, rights to consumer, and rights to share all fall under the topic of Poverty Law. Id.
concerns of both the attorney and the client in a more meaningful and efficient manner. To address the ethical concern above, the theory of client empowerment should be applied to the representation of elderly clients with diminished capacity.

For attorneys who represent people with diminished capacity, elderly clients are unique for several reasons. First, not all elderly clients are clients with diminished capacity; many people who are “advanced in age” have all their faculties and are clearly able to make rational and informed decisions on their own behalf. Thus, deciding when an elderly person has become incapacitated is often a very difficult task. Second, elderly people differ from children and developmentally disabled persons, who represent the majority of the disabled persons in the population. For the most part, elderly people have lived active and autonomous adult lives and have contributed to society and accrued wealth for their own use and enjoyment. Thus, taking away an elderly person’s independence is the equivalent of taking away long-held rights and expectations—those a child or long-time disabled adult have never experienced. Similarly, the past competent acts of currently disabled elderly clients may provide guidance to their attorneys in making decisions on the client’s behalf.

Not surprisingly, capacity assessments of elderly clients are often difficult and inconclusive. It has been said that capacity is the black hole of legal ethics because many questions find their way into the capacity category, but few answers ever emerge. Nowhere is this truer than when counseling elderly clients with diminished capacity. However, there is hope.

With the increasing number of malpractice suits, the theory of client empowerment may be utilized to balance elderly clients’ interests with the concerns of the attorney representing

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6 AGING AND THE LAW, supra note 3, at 232.
them. Client empowerment is the idea of working towards a more honest disclosure between client and attorney by imbuing power in the client. Poverty Law scholars are main proponents of this theory and view it as an ideal way to work with clients. They believe that decisions made for the client, as opposed to with the client, should only be made in the most extenuating of circumstances. Recent Poverty Law scholarship outlines how attorneys can empower their clients, but few works touch on the empowerment of elderly clients with diminished capacity.

This work will discuss how client empowerment practices would encourage attorneys to develop a relationship with elderly clients with diminished capacity in order to give clients greater control over their own legal decision-making process and uphold the client’s dignity to a greater degree.

I. The Special Problems Confronting the Senior Citizens Age Group

According to the American Law of Zoning, the senior citizen population is rapidly growing both in the United States and around the world. People are living longer and getting older—even the Rolling Stones are now considered senior citizens. Moreover, in twenty years it is estimated that the senior population will double in size. The Centers for Disease Control and Prevention (CDC) National Center for Health Statistics issued its report in August 2009: “Deaths: Preliminary Data for 2007,” and found that life expectancy rates in the United States have reached an all-time high as death rates have reached an all-time low.

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This increase in population has brought an increased awareness to the special problems confronting the senior citizen age group. Elder Law is a developing legal field that addresses the specialized needs of senior citizens.\(^{11}\) It covers a broad spectrum of advocacy, including but not limited to planning, advocacy, litigation, contract, tort, and property law.\(^{12}\) Many of the issues Elder Law addresses are related to cognitive impairments. This is especially true for nursing home resident clients, since cognitive impairment often precipitates institutionalization. Often in these situations, it is necessary for serious, sometimes life and death, decisions regarding medical treatment to be made. Attorneys should understand that the appointment of a proxy decision-maker for that individual is a grievous loss and should be imposed with care.

The above nursing home scenario illuminates the potential problems of assessing capacity to make decisions and the burden placed on decision-makers. First, an attorney must establish the level of capacity of the client—not an easy task. Then, an attorney must establish his or her client’s wishes, those of their loved ones, or that of the appointed surrogate decision-maker. Often these wishes conflict or the client is unable to articulate any wishes at all. Lastly, the attorney must advocate for his or her client. If the attorney disagrees with the client’s wishes, or that of the appointed surrogate decision-maker, an ethical issue arises. Guidance is provided by the Model Rules, to be discussed later.

One way for patients to maintain some control over the decision-making process and to gain empowerment is to state clearly in advance, through an advance directive, what their wishes are should they ever become incapacitated. Attorneys can help empower their clients by advocating the use of these documents. Though advance directives provide an individual with

\(^{11}\) In 1987 and 1988, the first and second Joint Conference on Law and Aging coined the term “Elder Law” as an area of legal concentration. \textit{WOOD, supra note 2, at 1-2.}

\(^{12}\) \textit{Id. at 1.}
the power of self-determination, for whatever reason, the greater majority of Americans do not have them.\textsuperscript{13} As a result, there have been many court cases in which the issue arises as to what the person’s wishes would have been.\textsuperscript{14} For those without advance directives, the theory of client empowerment may still offer the client a chance to be involved in the decision-making process rather than leaving the decision-making to a third party by incorporation into the process.

\section*{II. Poverty Law Scholarship on Client Empowerment}

Poverty Law came about as a result of the change in social theory to meet the failures of traditional advocacy and the pressure of a societal crisis.\textsuperscript{15} In the late 1980s and early 1990s, Poverty Law scholars began to promote the theory of client empowerment to alleviate and address the increasing need for a low-income client’s self-assertion.\textsuperscript{16}

Client empowerment is about the individual client and has become the bedrock for client-centered theories in Poverty Law scholarship. “We must mobilize time in a way that empowers the poor; that dramatically enhances our collective capacity to meet need, reduce suffering, and expand opportunity; and that renews, even for the less privileged among us, the promise of this land.”\textsuperscript{17} Poverty Law scholars continue to endorse the theory of client empowerment as an ideal way to lawyer in any field, given the success it has had in its particular application. Literature on this theory focuses intensely on the problem of lawyer domination as an “overwhelming menace stalking the most sophisticated and well-meaning efforts to respect autonomy.”\textsuperscript{18} In response, scholars offered the theory as an alternative to traditional advocacy as a way to represent clients more effectively and efficiently.

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\textsuperscript{13} \textit{AGING AND THE LAW}, supra note 3, at 343.
\textsuperscript{14} \textit{Id}.
\textsuperscript{15} \textit{Id}.
\textsuperscript{16} Simon, supra note 8, at 1099.
\textsuperscript{17} Cahn, supra note 5, at 2134.
\textsuperscript{18} Simon, supra note 8, at 1099.
\end{flushleft}
Empowerment is defined as giving power or authority to or enabling a person to control one's environment. Accordingly, attorneys practicing this theory should provide their clients with sufficient resources to enable them to make their own choices and gain more control. To help a disabled elderly client connect with needed resources, the relationship between the client and the lawyer needs to change. Some strategies used increase client information and communication channels, improve attorney personal skills, and develop collaboration between the attorney and client.

Poverty Law scholars provide to attorneys seeking to practice client empowerment a host of such strategies to utilize. According to Joel Handler, a professor of law at the University of UCLA, there must be an increase in client control over resources and the availability of alternative services. In order to do this, he states that “workers must change the definitions of their professional norms and tasks.” Professor Yeheskel Hasenfeld, an expert in social work, argues that empowerment must occur at all levels in the organization—meaning between the client and the attorney, and at the organizational and policy levels—the firm and the staff. He believes these structural changes utilized by client empowerment advocates may actually destabilize power relationships, structures, and roles—changing ideologies and beliefs about the attorney-client relationship.

Another Poverty Law scholar, Anthony V. Alfieri, suggests lawyers must first contain internal conflicts by explaining to his or her client the theory of traditional advocacy. This, he
says, will illuminate the hierarchical relationship between the supposed dependent client and the
dominant attorney roles.\textsuperscript{25} Next, a lawyer must convert his or her practices to client
empowerment by expanding client productive capabilities.\textsuperscript{26} Attorneys can accomplish client
productivity by “encourage[ing] the client to speak in a rambling fashion without lawyer
intrusion or, alternatively, to invite the client to present her own opening statement or conduct
portions of direct and cross examinations.”\textsuperscript{27} Though the attorney may have more legal expertise
than the client, no one knows more about the client’s position than the client himself. By
including a client in his own representation, it allows the client to contribute to the productivity
of his own case and to eliminate counterproductive restrictions formed by traditional routines
and relations.\textsuperscript{28}

\section*{III. The Model Rules of Professional Conduct and Client Empowerment}

The guidelines for professional conduct serve as a framework for lawyers and establish
the standards for ethical and professional conduct.\textsuperscript{29} The ABA Model Rules of Professional
Conduct (Model Rules) provide guidance to attorneys in nearly every state.\textsuperscript{30} The Rules are
rules of reason and many of a lawyer’s professional responsibilities are prescribed in them.\textsuperscript{31}
However, a lawyer is also guided by personal conscience. In essence, the Model Rules allow
flexibility and for attorneys to make professional judgments.

As is relevant here, Model Rule 1.2 addresses the allocation of authority between a client
and lawyer. Specifically, Model Rule 1.2(a) states that, “[A] lawyer \textit{shall} abide by a client’s
decisions concerning the objectives of representation and \ldots \textit{shall} consult with the client as to

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\begin{itemize}
\item \textsuperscript{25} \textit{Id.}
\item \textsuperscript{26} \textit{Id.}
\item \textsuperscript{27} \textit{Id.} at 844.
\item \textsuperscript{28} \textit{Id.}
\item \textsuperscript{29} Chair’s Introduction, \textit{note} 4, at 3.
\item \textsuperscript{30} \textit{Id.} at 2. Stashenko, \textit{supra} note 4.
\item \textsuperscript{31} \textit{MODEL RULES OF PROF’L CONDUCT, PREAMBLE} 7, 14 (2009).
\end{itemize}
the means by which they are to be pursued.” 32 Where a client does not have the ability to make a decision, the Model Rules has established Model Rule 1.14.

Model Rule 1.14 directly addresses legal professionalism for attorneys representing clients with diminished capacity, or clients with the inability to make decisions on their own behalf. Under Rule 1.14, a lawyer may substitute his or her own judgment for a client’s when he or she feels the client is unable to make a decision. 33 This Rule is important and sets out guidelines for attorneys to follow and empowers lawyers to perform certain legal services they would otherwise be unable to perform. “In the absence of Rule 1.14, a lawyer whose client becomes incompetent would have no choice but to withdraw, not only because a lawyer who continues the representation would be acting without authority, but also because the lawyer would be unable to carry out his responsibilities to the client under the Rules.” 34

While Model Rule 1.14 is well-intended, years later after its creation controversy still lies in its vagueness—lawyers are still troubled with many unanswered practical questions. 35 Professor Geoffry Hazard, who helped to create the rule, explained that the rule was created to recognize that a lawyer had a special responsibility when the client could not exercise the normal decision-making functions of ordinary clients. 36 This raises such questions as: When is it permissible to substitute judgment? Is it malpractice to not substitute judgment where the client’s best interests are at stake? The comments to Model Rule 1.14 suggest that substitution of judgment is not required and is only permissible 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

35 Id.
36 Id.
client-lawyer relationship cannot be maintained . . .”37 Still, there are questions that remain unanswered and several arguments against the ability to substitute judgment.

Critics of Model Rule 1.14 and proponents of the client empowerment theory would argue that citizens of the United States live in a constitutional system that prizes and protects individual liberties to make decisions. Under the law, a typical adult is presumed to have capacity to make decisions on their own behalf. The legislature has required that the determination of incapacitation must be a heavy evidentiary burden, a clear and convincing standard, due to the gravity of the liberty and property interests at stake.38 Attorneys must bear in mind these sentiments when making substituted decisions because of the importance in preserving a client’s right, whenever possible, to make their own decisions even if they are bad decisions.

Because our society places a high priority upon respect for individual autonomy and self-determination, courts and legislatures have struggled with the problem of decision-making for the incompetent and have developed a variety of alternatives that attempt to effectuate the right of personal choice.39 These alternatives include the election, by a competent individual, to advance their future desires should she or he become incurably ill and incompetent through vehicles such as living wills, advance directives, durable powers of attorney and other forms of judicial and less formal decision-making processes.40 In addition, Poverty Law theorists suggest client empowerment as a vehicle of self-determination.

The Model Rules and Poverty Law scholarship’s client empowerment theory are sometimes incompatible, as is the case with Model Rule 1.14. However, I believe these two

39 AGING AND THE LAW, supra note 3, at 337.
40 Id.
entities can be reconciled if modifications and clearer guidance are provided from the judicial system and the legislature regarding an attorney’s role in specialized situations of elderly clients with diminished capacity.

IV. Ethical Issues: Advocating for Elderly Clients with Diminished Capacity

Attorneys for disabled clients consistently battle with the balance of their client’s best interests and their client’s wishes. Capacity assessments are variables in this balancing equation. A mentally competent person is required to “reason and deliberate, hold appropriate values and goals, appreciate one's circumstances, understand information one is given and communicate a choice.” Thus, the more capacity someone has, the more likely that their autonomy will outweigh their best interests when making decisions. Attorneys must consider this balance during the representation of their clients with diminished capacity.

Capacity assessments act as a stopgap to an invasion of choice and help to uphold the dignity of a client. Most will agree, the integrity of the elderly should not be invaded and their freedom of choice should not be taken away from them simply because an attorney or family members believe that better decisions could be made by someone else. The test of capacity may be a legal one, but it is critically important to the preservation of free will and fairness that attorneys consider the client carefully and competently before jumping to an assessment of partial or total incapacitation. Consulting the discussed legal and medical standards of capacity can assist an attorney when making an initial judgment about her client.

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41 Id.
42 Id.
43 “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.” MODEL RULES OF PROF’L CONDUCT R. 1.14 cmt. 6 (2009).
Notably, advocating for elderly clients with diminished capacity presents a range of ethical issues and questions. These include, but are not limited to:

**a. Does the elderly client with diminished capacity have sufficient capacity to make a decision in this particular situation?**

“There is no mathematical scale for determining capacity of a client.”\(^{44}\) Instead, “it’s really a gestalt that you have to look at.”\(^{45}\) As a general rule, the level of capacity required at law varies according to the type of decision being made. Lawyers should evaluate each client based on the standards of capacity required for specific legal transactions. These include testamentary capacity, contractual capacity and donative capacity.

There are undoubtedly situations in which the presence or absence of capacity is clear. For example, if a person suffers from a severe mental illness, inhibiting the ability to understand his or her actions, then that person lacks the requisite capacity to make many legal (or medical) decisions.\(^{46}\) On the other hand, there are many situations where the determination of capacity is not entirely clear such as when a client has capacity to make one decision but not another; the client had capacity but now lacks it; the determination of capacity is on the borderline; as well as a host of other similar predicaments.

As a general guideline, the lawyer’s role is to respect his or her client’s interest and advocate as the client wishes.\(^{47}\) Lawyers must, however, balance this role with the fact that they may put themselves in danger of malpractice claims and ethical violations if they honor the decision of an incapacitated person.

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\(^{45}\) Id.


\(^{47}\) MODEL RULES OF PROF’L CONDUCT R. 1.2(a) (2009).
b. Who exactly is my client? Is it the person who comes to my office on behalf of a person with diminished capacity or is it the latter?

The question above depends on several factors such as the time of incapacitation, the person’s relationship to the incapacitated person and the attorney’s obligations to the incapacitated person. For many Elder Law practices, planning and information gathering will help determine the extent to which clients can, or will in the future be able to, meet their own needs. The attorney must carefully consider the ethics of representation for a client of diminished capacity and should document those findings.

Charles Sabatino, staff director of the ABA Commission on Law and Aging, suggests that attorneys first ask and answer two questions: “Does the client have the capacity to contract for my services?” and “Does the client have the capacity to complete the legal transaction?” The first question, if answered in the affirmative, establishes the requisite attorney-client relationship; the client must be competent on the outset to establish the agency. The second question is important to determine the level of capacity a client has to make a particular decision. A capacity assessment is essential to answering these questions. Though attorneys seldom receive formal capacity assessment training, many attorneys, particularly those in the field of Elder Law or disability law, make capacity judgments on a regular basis. And,

48 WOOD, supra note 2, at 22.
49 Id. at 34.
50 WOOD, supra note 2, at 34 (noting if the client becomes incompetent, the agency may end. The attorney might be authorized under Model Rule 1.6 which approves attorney actions that are ‘impliedly authorized’ based on decisions made before the client became incompetent).
c. If I do not honor the decision of a surrogate decision-maker for my client with diminished capacity, will I later face a malpractice suit or an ethical violation?

As many lawyers will agree, it can be difficult to know if and when substituting judgment is appropriate. Ethics Opinion 353 of the DC Bar directly addresses the question above.\(^{52}\) Citing Rule 1.2 (Scope of Representation), Rule 1.14 (Clients with Diminished Capacity) and Rule 1.16 (Declining or Termination Representation), the Opinion discusses when a lawyer should not substitute judgment. Lawyers representing incapacitated persons may not substitute their own judgment when an appointed surrogate decision-maker (1) is acting within the scope of the power afforded to her by law, (2) was appointed before the client became incapacitated and (3) is not engaged in conduct creating a risk of substantial harm or acting in a manner that would otherwise require a lawyer to withdraw from representation of a client acting in the same manner.\(^{53}\) Reversed, one may infer that lawyers may substitute their own judgment when an appointed surrogate decision-maker (1) is acting outside the scope of the power afforded to her by law, (2) was not appointed before the client became incapacitated or (3) is engaged in conduct creating a risk of substantial harm or acting in a manner that would otherwise require a lawyer to withdraw from representation of a client acting in the same manner. The opinion concludes by reminding attorneys that the “[r]epresentation of incapacitated clients can be difficult” and that the Rule is a rule of reason and is permissive.\(^{54}\)

V. Counseling Clients with Diminished Capacity: Utilizing Client Empowerment

Performing all the duties of representation is a difficult task when the client has limited or no competency. A great deal of scholarship is devoted to the question of who should make


\(^{53}\) Id.

\(^{54}\) Id.
decisions, or “play God,” on behalf of persons with diminished capacity. In Elder Law, the vulnerability of the client creates ethical risks and problems—already discussed above. In many cases, it is even difficult to tell who the client is. Undoubtedly this is sometimes a difficult task but it is certainly achievable.

Client empowerment may ease the burden on attorneys who counsel clients with diminished capacity. First, lawyers should remember what Poverty Law theorists believe: that “[c]ases are about clients, not lawyers.” Traditionally, client voices have been muted by the narratives that lawyers tell on their behalf. What client empowerment theory emphasizes is that a client has an important voice and attorneys should honor that voice, to the extent possible, by giving the client a role in their legal representation and in developing a case theory. Client empowerment strategies comprehend client life experience and recognize the expertise that both clients and attorneys can contribute. The key is recognizing the voice of a client to allow the client optimum choice and control over the presence or absence of particular case management functions at various points in time.

Reconciling client empowerment with the maintenance of a normal client-attorney relationship is a daunting task, especially when dealing with elderly clients of diminished capacity. Traditional advocacy involves the dominant and subordinate ideals while client empowerment practices charges advocates with mobilizing clients to act independently and with competence. A lawyer that utilizes the client empowerment theory will recognize that a client

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56 Id.
58 Id.
59 Id.
has a voice and that the client should be able to have a say in directing his or her own representation.

Lawyers representing elderly clients with diminished capacity must dispel the notion that traditional advocacy is more efficient than client empowerment advocacy. Many lawyers justify the ideals of traditional advocacy on the grounds of efficiency because they view the inclusion of disabled clients in the planning and conduct of hearing and litigation strategy as a drain on the pace and resources on their advocacy. Most often, this efficiency is measured in terms of a lawyer’s time and resources. However, what many disability lawyers fail to realize is that the inclusion of a client in the planning and conduct of a case actually increases efficiency.

The well-known story entitled Sunday Shoes, by Lucie E. White, is an excellent example of how client involvement can increase efficiency.61 In the story, Ms. White legally represents a single mother of five young girls in a public benefits matter. The woman, Mrs. G, is in the middle of a crisis and has come to Ms. White for help. Ms. White works on a tight-budget at a non-profit firm in a small town. Despite the stress this case would put on her caseload and the firm’s budget, she agrees to represent Mrs. G. Initially, Ms. White represents her in her normal way; she uses the traditional advocacy approach. In her view, the case is hopeless but she carries it through to a hearing because of her client’s persistence pursuing the case. During the hearing, Mrs. G, the client, unexpectedly speaks out about her troubling situation to the judge; her words are heartfelt and honest. The result is a favorable decision.

After reflecting on the outcome of this hearing, Ms. White realized the incorporation of her client at her hearing was essential to the case and vowed to employ this method of representation going forward. She had learned that her client was the only one capable of telling

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her story with the kind of compassion and truthfulness that could potentially win over a judge or jury in a seemingly hopeless case.

**Conclusion**

The ABA Model Rules of Professional Conduct establishes a national framework of ethical and professional conduct and provides guidance for attorneys. These Rules, combined with Poverty Law’s client empowerment, provide a basis for attorneys to navigate the often difficult path of representing clients of diminished capacity, especially elderly clients.

Model Rule 1.14, governing clients with diminished capacity, presents tough ethical questions for attorneys concerning both capacity assessments and the maintenance of a normal client-lawyer relationship. The Rule offers attorneys the power to make judgment calls in the best interest of their client when he or she lacks the capacity to make decisions. On the other hand, this power may affect the fiduciary relationship between the existing client and the attorney; a relationship that depends on trust and confidentiality. There is also a threat of undue influence and infringement on a client’s liberties.

Attorneys should practice client empowerment when representing elderly clients of diminished capacity to lessen the likelihood of such threats. Attorneys should make an effort to engage a client in his own representation to create a mutually beneficial relationship.

In the end, attorneys must recognize that they have the duty to advocate for their clients decisions, even if they feel they are bad decisions. The task of assessing capacity and conducting client-centered advocacy and client-empowerment is an onerous task, but important nonetheless.