Competency Issues

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Importance of Attorney Assessment of Client Capacities

- Lawyers seldom receive formal training, but they make capacity judgments every time they communicate with a client whether they realize it or not.

- Unavoidable capacity determinations:

  1. Does the client have the capacity to contract for my services?

  2. Does the client have the capacity to understand and complete the legal transaction?

  3. Are there supports and services that would address concerns about capacity and allow my client to contract for my services and/or complete the legal transaction?

Factors to Consider in Determining Client Capacity

- Ability to articulate reasoning behind decision
- Variability of state of mind
- Appreciation of consequences
- Consistency with long-term values
- Irreversibility of decision

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Key Cognitive Impairments – Red Flags

- Cognitive – Memory, language, comprehension, disorientation
- Emotional – Distress, instability
- Behavioral – delusions, hallucinations

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Competent People Make Bad Decisions All the Time

Factual understanding:

- Make sure the client understands the information the *attorney* is providing to the *client.*

Different from the ability to make a decision: to hold two abstract concepts and make a choice.

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Start at the Beginning

- To establish an attorney-client relationship with an adult, a client's legal competency to make and articulate decisions is a threshold question.
- The attorney should understand the standards for the capacity required to perform legal acts and what steps can be taken to maximize a client's decision-making ability.
- Finally, the ethical obligations of the attorney vary widely with the ability of the client to evaluate the attorney's advice and give the attorney direction.

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Standards for Capacity for Specific Legal Transactions

- In statutory and case law, legal capacity has multiple definitions.

Capacity – Various Tests

- Criminal: 161.360 *** (2) A defendant may be found incapacitated if, as a result of a qualifying mental disorder, the defendant is unable to:

  (a) To understand the nature of the proceedings against the defendant;

  (b) To assist and cooperate with the counsel of the defendant; or

  (c) To participate in the defense of the defendant.

Capacity – Various Tests

- To make a will: ORS 112.225: …who is of sound mind…
- That is defined in Oregon as the following – the person must be able to do three things:

a. They must be to identify "those persons who are the natural objects of their bounty" without being assisted or prompted.

b. They must be able to identify, generally, the nature and extent of their estate and can be prompted and assisted if necessary.

c. The person must be able to describe the nature of the testamentary act they are about to engage in and its effect on disposition of their assets. As with the second question, they can be assisted or prompted in answering this question.

Capacity – Various Tests

To contract: A person must possess greater competency to execute a deed than to execute a will. *Christian Church v. McReynolds*, 194 OR 868 (1952). Capacity to contract is determined with respect to the particular contract in issue, and not with respect to the transaction of business in general.

- Understands the general nature of this contract. (It is not necessary to understand every detail. Most of us do not understand, or even read, every detail of our phone contract or credit card contract).
- Understands the effect of the contract, i.e., generally what benefit they get and what obligations they assume.
- Has the level of understanding required for the degree of difficulty of the particular contract.
- Possesses the required level of understanding at the time the person signs the contract, not hours or days before or after the contract is made.
- Entered the contract voluntarily
- Can communicate the above, with or without assistance.

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Capacity – Various Tests

Guardianship statutes: ORS 125.005(5) "Incapacitated" means a condition in which a person's ability to receive and evaluate information effectively or to communicate decisions is impaired to such an extent that the person presently lacks the capacity to meet the essential requirements for the person's physical health or safety. "Meeting the essential requirements for physical health and safety" means those actions necessary to provide the health care, food, shelter, clothing, personal hygiene and other care without which serious physical injury or illness is likely to occur.

Capacity – Various Tests

Conservator statute: ORS 125.003(3) (3) "Financially incapable" means a condition in which a person is unable to manage financial resources of the person effectively for reasons including, but not limited to, mental illness, mental retardation, physical illness or disability, chronic use of drugs or controlled substances, chronic intoxication, confinement, detention by a foreign power or disappearance. "Manage financial resources" means those actions necessary to obtain, administer and dispose of real and personal property, intangible property, business property, benefits and income.

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Capacity – Various Tests

- To divorce?

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Lawyer Duty – Where to Begin

- The lawyer should start with the assumption that the client is competent. *Cloud v. U.S. Bank*, 280 Or 83, 90, 570 P2d 350 (1977).

- Even a client who has been appointed a guardian is not presumed to be incompetent. ORS 125.300(2).

- Whether representing adults with diminished capacity or minors who are considered under a legal incapacity, the lawyer should take the time to personally assess the client's actual mental capacity as well as the legal framework of the particular case. Oregon Rule of Professional Conduct 1.14, modeled after the ABA Model Rule of Professional Conduct 1.14 [comment 6] provides examples of factors for lawyers to consider in making the capacity assessment. The lawyer should keep in mind that the client's capacity may change depending on the client's condition or depending on the specific task presented

Hypothetical

- I have an initial divorce consultation with potential client, Fred. His daughter, Pebbles, brought him to the appointment. During the interview I develop concerns about Fred's capacity to understand his assets, his finances, and generally the history of his relationship with his wife, Wilma.
  - Can I take the case?
  - Can I even ethically have him sign an attorney client fee agreement? Isn't that a contract?

- A. First, I'm going to reread ORPC 1.14. Unless Fred has a conservator already appointed, then he has the legal ability to retain a lawyer because he has not been adjudicated to lack financial capacity. (Remember, he may exhibit concerning judgment, but until he has been declared financially incapable by a court he *retains his legal rights*.) Would I personally run up a huge bill following instructions of someone who is actively hallucinating? No, but perhaps the person is compromised and not fully capable (see ORPC 1.14) and they have a significant issue – like being abused by their spouse. Then I could petition to get them protection in some form and go from there. But as a general statement, the potential client has the ability to retain you absent something saying that they do not have that authority any longer. Whether that is a good idea under the circumstances is a question only you can answer.

Hypothetical

- Wilma files for dissolution. Fred is served and comes to you seeking representation. You have concerns about his capacity. What is your obligation to assess his capacity? Do you have a duty to seek a professional assessment? What do you tell Fred about your concerns regarding his capacity?

- Result: An attorney's duty under O.R.P.C. 1.14 is to reasonably maintain a normal attorney-client relationship with the client. The attorney's reasonable belief regarding the client's capacity is the standard. If the attorney believes that Fred is able to understand and direct representation, the attorney should continue to zealously represent Fred. If the attorney does not reasonably believe that Fred has capacity to direct the representation, the attorney may take reasonably necessary actions to protect Fred. This does not mean the attorney must seek out an independent or professional assessment of Fred. In fact, doing so may violate the attorney's duty of confidentiality to the client under O.R.P.C. 1.6 and the duty the attorney owes under O.R.P.C. 2.3 relating to the attorney's evaluation of a matter.

Hypothetical – With a Twist

- You are in an interview with Fred and Pebbles. Years ago, Husband Fred executed a power of attorney naming his daughter, Pebbles, as his agent for general legal purposes. Pebbles in the interview with Fred for a divorce consultation explains that Fred is very confused and has almost no short term memory. Pebbles' mother, Wilma, is refusing to take care of Fred and has filed a petition for dissolution. Pebbles asks you to represent *her as agent for Fred* under the power of attorney. Fred is unable to understand what assets he has and how a divorce will impact him. Can you proceed to represent Pebbles as agent for Fred?

- Result: Probably. But the best practice is likely for Pebbles to seek appointment as guardian, conservator, or guardian ad litem for Fred.

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If They Both Meet with You Together, Principal or Agent?

- Should you represent Fred as the principal or Pebbles as the agent?

- Depending on the circumstances of the initial consultation, it may be possible that you could choose to represent Fred as the principal or Pebbles as the agent. Be very clear in your retainer agreement that you are representing either the agent or the principal but as a general rule the suggestion is that you should represent the principal and that the agent has procured your services to assist the principal.
  - NB: If the agent (Pebbles) comes to you and says, "I need advice on my duties" then you are representing the agent.

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Hypothetical

- Wilma comes to talk to you about dissolution. Fred has always controlled the finances. In the last several years he has spent more time on the internet and has been sending money to companies that email him with prize offers. Wilma has tried to stop Fred, but Fred is growing increasingly angry with her attempts, and is acting increasingly paranoid. Wilma no longer wishes to be married to him but he is obviously incapable of understanding or managing the finances.

- Result: *Wilma* may need to pursue the appointment of a conservator for Fred as he appears to be unable to manage his financial affairs. However, the more functional Fred is, the more difficult it will be to manage a conservatorship and keep Fred away from the finances. Dissolution may be the appropriate choice, combined with the appointment of a conservator to manage Fred's finances into the future.

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- Follow up question: If you represent Wilma in filing for dissolution, and Wilma tells you that Fred won't understand the paperwork, what responsibility do you have to take further action, or can you seek a default judgment after the appropriate time elapses?

- Answer: Under ORCP 69C(1)(d), a motion for default must be accompanied by an Affidavit which states whether, to the best knowledge and belief of the party seeking the default, the party against whom the judgment is sought is incapacitated as defined by ORS 125.005. Therefore, if Wilma discloses that Fred is not likely to understand the proceeding, the attorney can't properly file the affidavit in support of the default.

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Communication With Client With Diminished Capacity

- Because a lawyer is obligated to maintain a normal relationship with the client, the duty of communication with an impaired client is heightened. *Stevens, Representing the Impaired Client,* OSB Bulletin 31 (May 1995).
- OSB Formal Op No. 2005-159 examines the lawyer's duties to a parent with diminished capacity in dependency and termination of parental rights proceedings. The opinion states, "[s]hort of a client's being totally noncommunicative or unavailable due to his or her condition, a lawyer can most often explain the decisions that the client faces in simple terms and elicit a sufficient response to allow the lawyer to proceed with the representation." Although the lawyer should be mindful when doing so, he may also look to third parties for assistance in understanding a client's wishes. See e.g., ABA Model RPC 1.14 [comment 3]. Ultimately, the lawyer should not substitute his judgment for the client's in decisions that the lawyer must ethically defer to the client.

Hypothetical – Helpful Support Person

- Wilma files for dissolution. You represent Fred, and Pebbles is involved to support Fred. Pebbles comes to meetings and contributes as appropriate. During the course of the matter, Fred's capacity rapidly declines. Pebbles calls you and tells you she is worried that Fred is no longer able to understand how to proceed. What is your duty to Fred? What can you tell Pebbles? Do you have to tell Fred about Pebbles' concerns?

- Result: The attorney should clarify their representation of Fred and make sure Pebbles does not believe the attorney-client relationship extends to her. The attorney should advise Pebbles to seek out her own, independent attorney and consider applying to become guardian ad litem for Fred if she believes it is necessary. The attorney's duty is to continue to represent Fred as normally as possible. The attorney should disclose to Fred that Pebbles called with concerns as part of the attorney's duty to keep Fred reasonably informed.

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Hypothetical – Concerning Support Person

- Wilma files a petition for dissolution against Fred. Fred comes to see you with Pebbles. Pebbles insists on answering most questions and Fred is passive. At successive appointments Fred becomes less and less involved. Pebbles continues to assert that Fred is just fine and can sign paperwork on his own. Fred tells you that he agrees with whatever daughter says. Who do you take directions from?

- Result: Fred is still the client and the attorney's duty is to him. If the attorney believes Pebbles is controlling Fred and making his decisions for him, the attorney will need to find a way to confirm with Fred that the actions are his wishes. O.R.P.C 1.14 (a) directs that the attorney, "as far as reasonably possible, maintain a normal client-lawyer relationship with the client."

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- Follow up Hypothetical: What if the lawyer representing Fred believes directions that Pebbles is giving are not in Fred's best interest? What if they, in fact, seem to benefit Pebbles over Fred in some way?

- Result: The lawyer may have a duty to seek the appointment of a guardian ad litem or a guardian or conservator for Fred if the attorney believes Fred has diminished capacity or is at risk of physical, financial, or other harm. ORCP 1.14(b)

- If the attorney believes the client is at risk of physical, financial, or other harm, the attorney may also contact Adult Protective Services to report abuse or neglect of any child or adult to the Oregon Department of Human Services.

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Rule 1.14 Instructions:

- To the extent possible, maintain a normal client-lawyer relationship

- 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.

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Protective Actions under Rule 1.14 – Client with Diminished Capacity

- 1.14(a) Says Act Normal…
- ….the lawyer shall, "as far as reasonably possible, maintain a normal client-lawyer relationship…"

- 1.14(b) Except When You Can't…
- Lawyer may take reasonably necessary protective action… but only if 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
  - The client cannot adequately act in the client's own interest.

Comment 6 to Rule 1.14

- 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
  - Ability to appreciate consequences of a decision;
  - The substantive fairness of a decision (will someone be harmed);
  - 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.

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Protective Action – When, What, and How

- RPC 1.14 provides
- A lawyer may seek the appointment of a guardian or take other protective action which is least restrictive with respect to a client only when the lawyer reasonably believes that the client cannot adequately act in the client's own interest, whether because of minority, mental disability or for some other reason.

- Such action may include consulting with family members, mental health professionals or other social service agencies that have the ability to protect the client. See e.g., ABA Model RPC 1.14 [comment 5]. The language of the rule makes clear that seeking guardianship should only be done as a last resort.

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Maintain Confidences to the Extent Possible

- When considering whether and what type of protective action to take, the lawyer must bear in mind the continuing duty to maintain client confidences and secrets pursuant to RPC 1.6.
- Whether and to what extent client confidences or secrets may be revealed in order to take protective action must be examined on a case by case basis with an eye on whether the person or entity to whom disclosure is being made will act adversely to the client. Not all ethics opinions which address this issue are in agreement about the disclosure of client confidences or secrets when seeking appointment of a fiduciary for the client. Cf. ABA Informal Op. No. 89-1530 (1989)(attorney may disclose to the court information necessary to show client's need for guardian).

Confidences – When/What to Reveal

- 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.

Guard Against Conflicts of Interest

- In considering protective action, the lawyer must also guard against conflicts of interest. For example, if dealing with unrepresented family members, the lawyer must be clear about who the client is or run the risk of creating the expectation that he is counsel for the family member. *In re Weidner*, 310 Or 757, 801 P2d 828 (1990).
- While the lawyer may act as the petitioner for appointment of a fiduciary for the client, the lawyer may not represent a third party petitioning for guardianship over the lawyer's client. *In re Snell*, 15 DB Rptr 166 (2001)(attorney representation of third party to file Petition for Appointment of Conservator/Guardian for a former client in estate planning matters resulted in actual or likely conflict of interest in violation of RPC 1.7; See also, ABA Formal Op. No. 96-404 (1996).
- The lawyer should not seek to have himself appointed guardian except in the most extreme circumstances. *Id.*

Hypothetical

- Question: If the attorney does not believe Fred is making appropriate decisions in light of the facts of the case, how does the attorney proceed? Can the attorney simply document their recommendations in the file? If the attorney believes a guardian ad litem is necessary but Fred objects, what can the attorney disclose to aid another person in proceeding with the appointment of the guardian ad litem?

- Answer: The attorney may take action the attorney reasonably believes necessary. But the rule does not create an affirmative duty to take steps to protect the client. The attorney is allowed to take action and is allowed to reveal information about the client to the extent reasonably necessary to protect the client's interests. See comment 8: to rule 1.14 "Disclosure of the client's diminished capacity would adversely affect the client's interests. 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 with the client directs the lawyer to the contrary. Nevertheless, given the risks of disclosure ***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."

Practice Tip: What Kind of Fiduciary?

- Appointment of a guardian or conservator is much larger in scope than the appointment of a guardian ad litem. If the decision making authority is limited only to the dissolution case (or other case), then appointment of a guardian ad litem is likely more appropriate. Appointment of the guardian ad litem will be limited in time and scope to only the action before the court, and any duties and responsibilities of the guardian ad litem will terminate when the case is closed and the guardian ad litem discharged.

- If, however, the person needs more significant (and likely long-term) substituted decision making, then a guardianship and/or conservatorship may be the most appropriate action. The guardianship will give the guardian permanent decision making authority regarding health care and placement decisions. The conservatorship will give the conservator permanent decision making authority regarding financial matters.

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Guardian Ad Litem

❖ Appointment of a guardian ad litem is authorized in ORCP 27 for a person who is a minor, or a person who is incapacitated even if that person has a guardian or conservator appointed for them already. If no guardian or conservator has been appointed, then the person shall appear through a guardian ad litem.

Basis: For a person who is incapacitated or financially incapable,

a. If the person is a plaintiff and does not have a guardian or conservator, the Court will appoint a guardian ad litem when a friend or relative, or any other interested person, applies.

b. If the person is a defendant and does not have a guardian or conservator, the Court will appoint a guardian ad litem when:

i. A friend or relative or any other interested person applies within the time period to appear and answer after a summons, or

ii. After the expiration of the time to appear and answer after service of a summons, upon the application of any party other than the person.

Your Client Objects to GAL Appointment

- Question: I as a lawyer have significant concerns about my client's competency, but my client instructs me to object to the appointment of a guardian ad litem. What do I do?

- Answer: ORPC 1.14 (a) The lawyer shall, as far as reasonably possible, maintain a normal client-lawyer relationship with the client. So, in a nutshell- if your client instructs you to resist the GAL then you have an obligation to do that so long as you have a factual and/or legal basis for doing so. It may well be that your response is "My client objects" and then if you have to appear at a hearing on it you try to resist the prima facia case as best you can through cross examination and present the best case you have. Which may be putting your client on the stand and having them tell the court why they are competent. But remember, just because your client may have diminished capacity doesn't mean that the client has NO capacity. They still have opinions about what they want to have happen. And you have an obligation to carry out those instructions to the best of your ethical responsibility.

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Hypothetical

- Wilma files a petition for dissolution against Fred. Fred's capacity is diminished, but he engages his own attorney. Pebbles files a petition to be appointed guardian ad litem for Fred. Does Fred's attorney now represent Pebbles? Should Pebbles seek out her own legal counsel? Does it matter if Fred opposes the appointment of a guardian ad litem?

- Result: Pebbles should seek out her own attorney to represent her in becoming guardian ad litem for Fred. Fred's attorney has a duty to him, which would likely include the duty to oppose the appointment of a guardian ad litem.

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Duty Once a Fiduciary is Appointed

- Once a fiduciary has been appointed, the lawyer must take direction from the fiduciary unless she is acting improperly or contrary to the client's best interests. See e.g., *Brode v. Brode*, 298 SE2d 443 (SC SupCt 1982) (improper for lawyer to appeal from decision authorizing sterilization of disabled minor where guardian ad litem did not choose to appeal).
- However, the appointment of a fiduciary does not absolve the attorney of the duty to act on behalf of the client's interests. Thus, the attorney should monitor the fiduciary to ensure he is asserting the client's interests and periodically question the client's continued incompetence and need for the fiduciary. OSB Formal Op.No. 2005-159.

Transitioning From Principal to Agent?

- If you start by representing Fred, but *later on* Pebbles is appointed as Fred's guardian ad litem in the divorce case, are you then just representing Pebbles?

- This is a gray area with not a lot of guidance. The statutes and the ethics rules seem to contemplate that you can file for a GAL in order to protect your client and do so in the case in which the client is the party. Which means that you are first representing your initial client. Obviously do not do this against the client's direct instructions as you run the risk of having to step completely out of the representation once the GAL is appointed, but it is at least arguable that the statutory scheme is set up so that you can act and continue representation. But there is no clear cut direction on this. If the client instructs you to oppose the GAL proceeding but you believe that they are compromised and you MUST act to protect them, it is likely you would be required to terminate your representation of the client once a fiduciary is appointed unless the client changes their mind.

Initial Representation of Agent

- Question: If you initially represent the guardian or conservator of a party to a case, what is your duty to the Protected Person?

- Answer: The attorney's duty is to the guardian/conservator, and *not to* the Protected Person. However, as the purpose of the guardianship/conservatorship is the protection of the protected party, your representation should be with the intent of what is in the best interest of the Protected Person.

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Payment of Attorney for Guardian/Conservator

Guardians and conservators appointed by the Court *and their attorneys* are typically entitled to have their fees paid from the funds of the Protected Person. Any fees paid to a guardian, conservator, or an attorney from the funds of the Protected Person generally must be approved by the Court in the probate matter in advance of payment per ORS 125.095. The guardian and conservator (and their attorneys) should make their requests in the Protective Proceeding. In most counties, a request for guardian/conservator fees and attorney fees are made once per year.

There is no statute or rule that provides for payment to a guardian ad litem or to an attorney for the guardian ad litem. If the attorney anticipates requesting fees for the guardian ad litem and/or their attorney, that should be disclosed to the Court in the dissolution case at the time the guardian ad litem is requested.

Practice Tip: Getting paid- any request to appoint a guardian ad litem should also include a request that the guardian ad litem and/or their attorney be paid and set forth the hourly rate for each. The request should also set forth who is going to pay the guardian ad litem and/or their attorney.

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ORCP 27 I

- Settlement. Except as permitted by ORS 126.725, in cases where settlement of the action will result in the receipt of property or money by a party for whom a guardian ad litem was appointed under section B of this rule, court *approval of any settlement must be sought and obtained by a conservator unless* the court, for good cause shown and on any terms that the court may require, *expressly authorizes the guardian ad litem to enter into a settlement agreement.*

- Approval for a settlement that will result in property or money must receive approval by a conservator for the person unless the court finds good cause to waive the requirement and expressly authorizes the guardian ad litem to enter into the settlement.

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Can I Just Withdraw?

- Withdrawal is generally disfavored because it leaves the client without assistance when assistance may be most needed. Nevertheless, withdrawal may be required under the principals of agency law if the client's disability is so extreme that it operates to revoke the attorney's authorization to act as the client's agent. ABA Formal Op. No. 96-404. If withdrawing, the attorney must ensure that client confidences are protected and that the withdrawal complies with the requirements found in RPC 1.16.

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Resources

- Oregon State Bar General Counsel

- The Ethical Oregon Lawyer, Chapter 18: Representing Clients with Diminished Capacity and Disability

- American Bar Association Assessment of Older Adults with Diminished Capacity: Handbook for Lawyers https://www.apa.org/pi/aging/resources/guides/diminished-capacity.pdf

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Thank you!

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