Journal of Health Care Law and Policy

Volume 1 | Issue 1 Article 12

The Elderly Questionably Competent Client Dilemma: Determining Competency and Dealing with the Incompetent Client

Marilyn Levitt

Notes

THE ELDERLY QUESTIONABLY COMPETENT CLIENT DILEMMA: DETERMINING COMPETENCY AND DEALING WITH THE INCOMPETENT CLIENT*

I. INTRODUCTION

Many first year law students find the case of *Ortelere v. Teachers Retirement Bd. of N. Y.*[1] particularly puzzling. *Ortelere* deals with the competency[2] of a sixty year old teacher to enter into an agreement with her employer.[3] After 40 years of service as a New York teacher, Mrs. Ortelere took leave for mental illness and cerebral arteriosclerosis.[4] During her leave of absence, she was in a very depressed state and so easily upset that Mr. Ortelere testified that he was afraid to question her about why she went to the Retirement Board.[5] Mrs. Ortelere went to the Retirement Board and changed her choice of retirement options from one which paid Mrs. Ortelere or her surviving spouse in monthly installments from her accumulated reserves, to one which gave her twenty percent more monthly allowance but stopped all benefits upon her death.[6] Because Mr. Ortelere had retired from his job as an electrician to care for her, he and his wife were almost totally dependent on her retirement income.[7] The evidence tended to show that Mrs. Ortelere had a good relationship with her husband of thirty-eight years and cared about his welfare.[8]

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* The author wishes to thank Joan O'Sullivan, Visiting Assistant Professor, University of Maryland School of Law, for her thoughtful comments during the preparation of this paper.

1. 250 N.E.2d 460 (N.Y. 1969).

2. Throughout this paper, the term "competency" means legal capacity, which is generally understood to mean "an individual's capacity to understand the nature and effect of what he is doing." Warren F. Gorman, M.D., *Testamentary Capacity in Alzheimer's Disease*, 4 ELDER L. J. 225, 230 (1996) (citing 12A C.J.S. Capacity § 135 (1980)).

3. *Ortelere*, 250 N.E.2d at 462.

4. *See id.* at 462. Arteriosclerosis is a disease of the arteries resulting in the thickening and loss of elasticity of the arterial walls. MELLONI'S ILLUSTRATED MEDICAL DICTIONARY 27 (2nd ed. 1985).

5. *See id.* at 463.

6. *See id.* at 462-63.

7. *See id.* at 463.

8. *See id.* at 466.

Therefore, Mrs. Ortelere's decision appears to be inconsistent with her prior goals and values.

When she died shortly afterwards of cerebral thrombosis and Mr. Ortelere discovered that she had left him with no benefits, he argued that she was incompetent to enter into the agreement with the Retirement Board.[9] In support of this claim, her psychiatrist testified that she was incapable of making a decision of any kind because her particular mental disease affected her judgment process.[10] On the other hand, before her death Mrs. Ortelere had demonstrated that she understood the nature of the transaction she was considering by drafting a very detailed letter requesting information from the Board.[11] The court ruled that the agreement was void, rejecting a global definition of impairment in favor of the modern concept of capacity which recognizes that impairment may be present in a limited area here volition or conduct even while other cognitive skills appear unimpaired.[12]

Attorneys occasionally are confronted with a client like Mrs. Ortelere who is questionably competent and seeking legal services. This article grapples with the practical and ethical issues which face an attorney in that situation. Of particular concern is the dilemma arising from the conflicting obligations of the attorney, particularly the extent to which the guidelines for dealing with questionably competent clients under the Model Rules of Professional Conduct ("Model Rules")[13] and the Maryland Lawyers' Rules of Professional Conduct ("Maryland Rules")[14] conflict with the attorney's duty of confidentiality and loyalty under those same rules. How is the attorney to deter-

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9. *See id.* at 461-62. Cerebral thrombosis is the obstruction of a blood vessel of the brain by a thrombus (blood clot); it is one of the causes of stroke. MELLONI'S ILLUSTRATED MEDICAL DICTIONARY 479 (2nd ed. 1985).

10. *See id.* at 463. Mrs. Ortelere suffered from involitional melancholia. According to her psychiatrist involitional melancholia affects the judgment process:

> [Patients] can't think rationally, no matter what the situation is. They will even tell you, "I used to be able to think of anything and make a decision." Now, they say, "even getting up, I don't know whether I should get up or whether I should stay in bed." Or, "I don't even know how to make a slice of toast any more." Everything is impossible to decide, and everything is too great an effort to even think of doing. They just don't have the effort, actually, because their nervous breakdown drains them of all their physical energies.

Id. at 463.

11. *See id.*

12. *See id.* at 464-66.

13. MODEL RULES OF PROFESSIONAL CONDUCT (1992) [hereinafter MODEL RULES]. As of June, 1997, 41 states including Maryland, have based their lawyer ethics rules on the Model Rules. *See* ABA/BNA LAWYERS' MANUAL OF PROFESSIONAL CONDUCT, *Current Reports, News and Background* (June 25, 1997).

14. THE MARYLAND LAWYERS' RULES OF PROFESSIONAL CONDUCT [hereinafter MARYLAND RULES].

mine the competency of a client who, like Mrs. Ortelere, is not obviously incompetent, but rather questionably (or partially) incompetent? Furthermore, how is the attorney to proceed once a preliminary determination of incompetency has been made?

The first half of this paper, sections one and two, is concerned with the determination of competency. The first section discusses the attorney's obligations under the Model Rules and the Maryland Code. The second section discusses some practical considerations and methods for determining competency as suggested by legal and medical scholars. The second half of the paper, sections three and four, is concerned with the problems that arise once the attorney has made a preliminary determination of incompetency. The third section discusses the obligations and guidelines in the Model Rules and the Maryland Code for dealing with clients whom the attorney has determined to be incompetent. The fourth section examines recent relevant state and local ethics opinions, as well as opinions of the American Bar Association. Finally, survey results, presented in Appendix A to this article, illustrate how various Maryland attorneys deal with questionably competent clients. The survey addresses the manner in which attorneys determine competency, and the actions they take if they determine that a client is incompetent.

I. DETERMINING COMPETENCY AND THE MODEL RULES

Several legal scholars have noted that the Model Rules' guidelines on questionably competent clients conflict with the attorney's duty of confidentiality and loyalty toward his[15] client.[16] Rule 1.14[17] deals with a client under a disability and is directed to situations where the lawyer has made at least a preliminary determination that some disability affecting competency exists. This rule will be discussed in detail in Section III. Prior to such a determination, the attorney's

15. For the sake of brevity, I have used the masculine pronoun when referring to a generic attorney and the feminine pronoun when referring to a generic client.

16. *See, e.g.*, Paul R. Tremblay, *On Persuasion and Paternalism: Lawyer Decision Making and the Questionably Competent Client*, 1987 UTAH L. REV. 515, 540-47 (1987); Jan Ellen Rein, *Clients with Destructive and Socially Harmful Choices — What's an Attorney to Do? Within and Beyond the Competency Construct*, 62 FORDHAM L. REV. 1101, 1136-54 (1994); James R. Devine, *The Ethics of Representing the Disabled Client: Does Model Rule 1.14 Adequately Resolve the Best Interests/Advocacy Dilemma?*, 49 MO. L. REV. 495 (1984).

17. MODEL RULES 1.14, *supra* note 13; *see infra* notes 136-38 and accompanying text.

duty to his client is generally governed by Rules 1.6,[18] 1.7,[19] 1.2,[20] and 1.4.[21]

Under Rule 1.6, the attorney has a duty to maintain the confidentiality of a client or prospective client.[22] The attorney has an ethical obligation to keep all aspects of the attorney-client relationship confidential, including the client's conduct and appearance.[23] However, the duty of confidentiality may conflict with the attorney's desire to seek expert corroboration of his own suspicions as to the competency of his client. Absent certain exceptions, Rule 1.6(a) allows disclosure of confidential matters relating to the representation only with client consent after consultation.[24] Thus, if the attorney suspects that the client is incompetent, Rule 1.6 might prohibit the attorney from seeking information about the client from other sources.

Of course, as a practical matter, elderly clients are often brought to the attorney by younger relatives, and the initial phone call from the relative may afford the attorney an opportunity to inquire as to the prospective elderly client's capacity before confidentiality and loyalty become issues.[25] However, if the client self-presents, and refuses to authorize the attorney to consult with others, Rule 1.6 might impede the attorney's ability to gather information about the mental health of the client from family and/or other experts, such as mental health professionals and physicians. The duty to maintain confidentiality, therefore, may impose on the attorney sole responsibility for determining the client's competency.

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18. MODEL RULES 1.6(a), *supra* note 13; *see infra* notes 22-24, 139 and accompanying text.

19. *See infra* note 140.

20. *See infra* note 141.

21. *See infra* note 31.

22. MARYLAND RULES 1.6(a), *supra* note 14; *see infra* note 139. Comments to Rule 1.6 of the Maryland Rules define *information relating to the representation* to include "revelations made to a lawyer by a person seeking to engage the lawyer's services," whether or not the lawyer and the client agree to undertake the representation. *Id.* This definition is also mentioned in the Rules Preamble.

23. *See* MODEL RULES 1.6(a), *supra* note 13; *see also infra* note 139 and text accompanying notes 158-60.

24. MODEL RULES 1.6(a), *supra* note 13; *see infra* note 133 and accompanying text. The Maryland Rules expand the list of exceptions. The exceptions include disclosure to prevent both criminal and fraudulent acts that the lawyer believes are "likely to result in death or substantial bodily harm or *in substantial injury to the financial interests or property of another.*" MARYLAND RULES 1.6(b), *supra* note 14 (emphasis added).

25. Telephone Interview with Julia O'Brien, Partner, Furey, Doolan & Abell (January, 1997).

Equally important is Rule 1.7 which governs conflicts of interest.[26] Rule 1.7(b) provides in pertinent part, "A lawyer shall not represent a client if representation of that client may be materially limited . . . by the lawyer's own interests."[27] If an attorney, acting in what he believes to be his client's "best interest," acts in a manner which is contrary to her verbal instructions, he has arguably produced a conflict of interest. Furthermore, Rule 1.7, Comment 3 cautions, "A lawyer may not advocate against [his] own client . . . ."[28] Clearly, an attorney who takes steps which result in a showing that his client is incompetent is advocating against his client.[29]

Also relevant are Rules 1.2,[30] which says that the lawyer must abide by the client's decisions and cannot settle without her consent, and 1.4,[31] which requires that the lawyer keep the client fully informed to enable the client to make informed decisions. If the client seems unable to understand the information the attorney is providing, the attorney's ability to fulfill his obligations under these rules may be impaired.

II. DETERMINING COMPETENCY: PRACTICAL AND SCHOLARLY APPROACHES

The presumption that a person is competent is well settled in case law.[32] This presumption may be a challenge for the attorney when the client seems disoriented, uncommunicative, or even when the client's values conflict with the attorney's. Nonetheless, the attorney must make every effort to give the client the benefit of the doubt. For example, an attorney, particularly one with many elderly clients, can avoid mistaking some of the more common disabilities of old age with the symptoms of legal incapacity by structuring the interview en-

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26. A full consideration of the conflicts of interest in this situation is beyond the scope of this paper.

27. MODEL RULES 1.7(b), *supra* note 13.

28. *Id.*

29. *See infra* notes 66 - 68 and accompanying text.

30. Model Rule 1.2(a) states in pertinent part: "A lawyer shall abide by a client's decisions concerning the objectives of representation . . . and shall consult with the client as to the means by which they are to be pursued. A lawyer shall abide by a client's decision whether to accept an offer of settlement of a matter." MODEL RULES 1.2(a), *supra* note 13.

31. Model Rule 1.4 states: "(a) A lawyer shall keep a client reasonably informed about the status of a matter and promptly comply with reasonable requests for information; (b) a lawyer shall explain a matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation." MODEL RULES 1.4, *supra* note 13.

32. This may be true even where the client has been adjudicated incompetent for certain purposes. *See infra* note 85 and accompanying text.

vironment in a way that maximizes the capacity of elderly clients.[33] In addition, several legal commentators have suggested interviewing techniques designed to assist the lawyer in assessing competency.[34]

A. Easily Accommodated Physical Limitations

An attorney's failure to follow general guidelines for optimizing interviews and counseling of elderly clients could result in the attorney's mistaking a client with an easily accommodated impairment for an incompetent client. For example, the client's lack of expression when listening, inattentiveness, or inappropriate responses may be signs of hearing loss, rather than of mental disability.[35] While an attorney should not assume an age related disability,[36] he should, nevertheless, structure the physical environment and the interview itself in a manner which is sensitive to the possibility. For example, the attorney should take care to screen out background noise by closing doors and windows.[37] He should face the client to allow her to use visual clues from his face and lips and position himself to protect the client from glare caused by mirrors, vinyl or glass tabletops, and glossy magazines.[38] He should paraphrase or repeat the client's own statements to check for accurate communication.[39] Paraphrasing also tends to reduce needless repetition on the client's part because it assures the client that the attorney has understood her.[40] These are all good client-centered counseling skills which would be recommended practice with any client,[41] but they become especially critical where the client is physically impaired.[42]

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33. *See infra* notes 35-99 and accompanying text.

34. *See infra* notes 100-35 and accompanying text.

35. *See* COMMISSION ON LEGAL PROBLEMS OF THE ELDERLY, ABA LEGAL COUNSEL FOR THE ELDERLY, INC., EFFECTIVE COUNSELING OF OLDER CLIENTS: THE ATTORNEY-CLIENT RELATIONSHIP 7-8 (1995) [hereinafter ABA COMM'N].

36. *See* Martin, Lyon, and Levine, *Bibliography: Introduction: The Frame of Nature, Gerontology, and the Law*, 56 S. CAL. L. REV. 261, 270 (1982).

> [T]here is enormous variability as to the characteristics of older people of the same age. Age is a good predictor of characteristics of a six month old, but is a less useful one for a sixty-five year old. There is even greater variability between older persons of different ages . . . . Clearly, eighty-five year olds are vastly different from sixty-five year olds . . . .

Id.

37. *See* ABA COMM'N, *supra* note 35, at 7-8.

38. *See id.*

39. *See id.*

40. *See id.* at 19.

41. *See* DAVID A. BINDER ET AL., LAWYERS AS COUNSELORS: A CLIENT-CENTERED APPROACH 32-38 (1991).

42. *See* ABA COMM'N, *supra* note 35, at 6-7.

B. Accommodating Intellectual and Memory Problems

To accommodate the elderly client who may be "less efficient in remembering, in intellectual functioning and in problem-solving ability,"[43] the attorney should schedule meetings at a time of day when the elderly client is most likely to be alert, such as the morning.[44] The attorney should take care to give the client ample opportunity to answer a question without interrupting, and should guard against mentally filling in what the client has failed to say.[45] Because the elderly client may seem disoriented when she is away from home, the attorney should refrain from making any decision about her incompetency without first making a house call.[46] Where appropriate, the attorney should provide written summaries and follow-up material in large print, allowing ample white space.[47]

C. Emotional and Psycho-Social Issues

Many of the losses associated with old age (retirement, loss of spouse and/or friends) tend to exacerbate isolation and erode self-esteem.[48] In addition, the physical losses discussed above (hearing loss and vision impairment) can result in a sense of isolation.[49] As a result, the attorney must work harder at eliciting complete information. If the client lacks the confidence to reveal all of her thoughts to the attorney, the attorney is more likely to hear a story which elicits suspicions of incompetency.[50] Therefore, the attorney may have to devote more energy to developing trust and confidence.[51] The attorney should express a willingness to help from the very beginning and take more time to outline what will occur during the meeting and establish rapport.[52] He should also stress the confidential nature of the attorney-client relationship, taking care to explain that the client's concerns will not be shared with family members or others without explicit consent.[53]

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43. Linda F. Smith, *Representing the Elderly Client and Addressing the Question of Competence*, 14 J. CONTEMP. L. 61, 68 (1988).

44. *See id.* at 62.

45. *See id.* at 68.

46. *See* Peter Margulies, *Access, Connection and Voice: A Contextual Approach to Representing Senior Citizens of Questionable Capacity*, 62 FORDHAM L. REV 1073, 1092 (1994).

47. *See* ABA COMM'N, *supra* note 35, at 7-8.

48. *See id.* at 8-9.

49. *See id.* at 8.

50. *See id.* at 9.

51. *See id.*

52. *See id.* at 16.

53. *See id.*

Among other communication roadblocks is the fact that elderly clients may not want to admit a problem exists or may not want to acknowledge their inability to help themselves.[54] For example, the client may be reticent to admit her hearing or memory loss, or feel uncomfortable about discussing matters such as advance directives, which may remind her of her own mortality.[55] One approach is to be matter of fact, stressing the personal nature of the decision and the relationship of the decision to the client's personal goals.[56] Denial is a normal defense, found in all age groups, which may be part of a healthy adjustment to a person's situation.[57] Directly confronting a client's denial may strip her of its benefit as a "protective mechanism."[58] The attorney who has taken the time to understand the goals and values of his client, can suggest the proposed action as a way of achieving the client's stated goals or acting in a manner consistent with the client's values, and need not directly confront the denial.[59] For example, the attorney could suggest that the client execute an advanced directive as a way of preserving client autonomy. The attorney might say, "I'm worried that if we don't finalize this document while we have the opportunity and are thinking about it, a stranger will make this decision for you."[60] If the client persists in her denial, it is important for the attorney to point out to the client that a decision to do nothing is still a decision, deserving the same thought and attention as an affirmative action.[61]

If an elderly client has a memory impairment, she may compensate by inventing information.[62] Some tips for discouraging and addressing fabrication follow:

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54. *See id.* at 23.

55. *See* Shirley L. Patterson et al., *Durable Powers of Attorney: Issues of Gender and Health Care Decision-Making*, 21 J. GERONTOLOGICAL SOC. WORK, 161, 172-73 (1993).

56. Telephone Interview with Gary Altman, Estate Planning Attorney, Linowes and Blocher (July, 1996).

57. *See* ELISABETH KUBLER-ROSS, ON DEATH AND DYING, 16-17 (1969).

58. James Monroe Smith, *When Knowing the Law Is Not Enough: Confronting Denial and Considering Sociocultural Issues Affecting HIV Positive People*, 17 HAMLINE J. PUB. L. & POL'Y 1 at 38 (focusing on denial as a protective mechanism in people with HIV/AIDS).

59. *See, e.g.*, KUBLER-ROSS, *supra* note 57, at 37 (writing about one patient: "We never attempted to break her denial, we never contradicted her when she assured us of her well-being. We just reinforced that she had to take her medication and stick to her diet if she wanted to return home to her children.").

60. Smith, *supra* note 43, at 95.

61. *See* Tremblay, *supra* note 16, at 558.

62. *See id.* at 71.

- Explain why certain information is important, why clients hesitate to give accurate information, and why complete truthfulness actually helps the client's case.
- Point out inconsistencies and ask for clarification directly.
- Ask the client to help you overcome statements that contradict the client's version.
- Role-play cross-examination of your client to point out the client's inconsistencies.
- Say nothing, but maintain eye contact after giving nonverbal clues of your disbelief.[63]

The attorney should be aware that direct confrontation presents the greatest risk to the attorney-client relationship and may entrench the client further in the lie.[64]

D. Questionable or Partial Competence

As suggested by *Ortelere*, a questionably competent client may be one of the most difficult situations for an attorney.[65] This is a client who may appear competent enough to establish an attorney-client relationship but then appears to act in a manner inconsistent with her own interests. A consequence of the attorney's finding the client to be incompetent might be the appointment of a guardian.[66] A client for whom a guardian is appointed "would lose [among other things, her] right to make legally binding decisions, to vote, to own property, to choose [her] place and manner of living, [and] to make medical decisions . . . . Short of imprisonment or commitment, appointment of a guardian is the most serious restriction of a person's liberty."[67] Because a finding of incompetence is potentially so dehumanizing, stripping the client of all autonomy and dignity, it is not a step to be taken lightly.[68] Therefore, the attorney is obligated to avoid a finding of client incompetency where it is unwarranted.

While emotional and physical conditions may interfere with an elderly client's mental functioning, failing mental ability, itself, is not a normal part of the aging process.[69] In addition, "[c]ontrary to what may be a generally held belief, the elderly do not suffer from func-

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63. ABA COMM'N, *supra* note 35, at 24.

64. *See id.*

65. Ortelere v. Teacher's Retirement Bd. of N.Y., 250 N.E.2d 460 (N.Y. 1969); *see also supra* notes 1-12 and accompanying text.

66. *See generally* Joan L. O'Sullivan and Diane E. Hoffmann, *The Guardianship Puzzle*, 7 MD. J. CONTEMP. LEGAL ISSUES 11 (1995-96).

67. Tremblay, *supra* note 16, at 559-60.

68. *See id.*

69. *See* ABA COMM'N, *supra* note 35, at 9.

tional (nonorganic) mental illnesses any more than the population at large."[70] While the elderly do suffer from certain age-related organic dementias,[71] even this phenomena is not as widespread as commonly believed. Dementia severely affects only five percent of persons over sixty-five and only twenty percent over eighty.[72] Therefore, assuming that mental or other disabilities are present in all or most elderly would be ageism.

Nevertheless, the attorney must be sensitive and alert to the possibility that his client suffers from mental or other disabilities. An attorney who deals with elderly clients should familiarize himself with community resources so he can refer clients for a mental health evaluation.[73] If a referral is necessary, it is important for the attorney to emphasize that he is not rejecting the client, but merely lacks the skills to help with this particular problem and needs more information from a medical source before proceeding with the client's legal services.[74] It is helpful to know the name of a particular person to whom to refer the client, rather than an agency, and to allow the client to share her feelings about the referral.[75] The attorney might also stress that it is for the client's own protection to have a doctor's verification of competency to support the client's decisions if they are later questioned. If the client is willing and able to be reviewed by medical professionals, the attorney should offer to make the appointment with the client's consent.[76]

It is important to remember that a diagnosis of dementia or mental illness does not necessarily mean that the client's decision

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70. Smith, *supra* note 43, at 68-69.

> However, the elderly may develop suspicious or paranoid styles of thinking, and they are at high risk for depression . . . . It has been estimated that at any time between twenty to twenty-five percent of the elderly are clinically depressed, and sixty percent of the elderly suffer depression at some point during their old age.

Id.

71. *See id.* at 70.

72. *See* Robert P. Roca, *Determining Decisional Capacity: A Medical Perspective*, 62 FORDHAM L. REV. 1177, 1181 (1994).

73. *See* ABA COMM'N, *supra* note 35, at 29. The ABA recommends a "holistic approach," because the problems of elderly clients may be intertwined with problems that are non-legal in nature. For example, a client who is denied Medicare benefits may also need help in locating proper medical services, in meeting rent or mortgage payments, or in treating depression. Many elder law specialists work closely with social workers or geriatric care managers who have expertise in matching elderly clients with available community resources. *Id.*

74. *See id.* at 31.

75. *See id.*

76. *See* BINDER ET AL., *supra* note 41, at 408-09.

making capacity is impaired.[77] For example, even though Alzheimer's disease is irreversible and signals that the client will eventually lose decision making capacity during the course of the illness, the client may have necessary capacity in the early stages of the illness.[78] While depression, mania, and schizophrenia may undermine the ability of the client to realistically assess her best interests, such a diagnosis is not dispositive of the client's ability to decide the particular matter of the representation.[79] Even a client's score on a standardized test of cognitive functioning such as the Mini-Mental Status Exam[80] (MMSE) does not determine capacity, as it may be skewed by her level of education or depression.[81] Therefore, the attorney cannot rely too heavily on the client's score on such a test, but is better advised to consider information from many sources.[82] The attorney must always ascertain the client's "specific competence to make the actual decisions required in the case at hand."[83] For example, an Alzheimer client who suffers from short term memory loss may be perfectly capable of understanding what she is doing by identifying her assets and deciding on their disposition although she may not remember executing her will the next day.[84] Several jurisdictions, including Maryland, have held that even a prior adjudication of a client's mental incapacity to manage her affairs does not create an irrebuttable presumption of incapacity to execute a will on a subsequent date.[85]

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77. *See* Roca, *supra* note 72, at 1187-88.

78. *See id.*

79. *See id.* at 1187; *see also* Smith, *supra* note 43, at 84 ("The fact that a person suffers from some intellectual or emotional limitation is not determinative of his capacity to competently make a particular decision.").

80. *See* Roca, *supra* note 72, at 1182. The MMSE is the "most widely used brief 'bedside' test of cognitive functioning . . . . It tests orientation, memory, attention . . . concentration, . . . language use," and aptitude with numbers. *Id.* (citation omitted).

81. *See id.* at 1182-83.

82. *See id.* at 1183. Attorneys are also cautioned that the administration and particularly the interpretation of the MMSE require training; so the test should only be administered by medical or mental health professionals. Interview with Dan Malone, Ph.D., Neuropsychology Consultant, Baltimore, MD (July, 1997).

83. Smith, *supra* note 43, at 85.

84. Telephone interview with Jason Frank, Law Offices of Jason Frank, Lutherville, MD (July 1996); *see also* Estate of Rosen, 447 A.2d 1220, 1222 (Me. 1982) (stating that it is sufficient that a testator have the capacity to hold the particulars or elements of the business to be transacted in his mind long enough to perceive at least their obvious relations to each other, and to be able to form some rational judgment in relation to them); *see also* Matter of Congdon's Estate, 309 N.W.2d 261, 266 (Minn. 1981).

85. *See, e.g.*, Ritter v. Ritter, 689 A.2d 101 (Md. 1997); Will of Maynard, 307 S.E.2d 416 (N.C. 1983) (relying on the fact that even one who was found to be mentally incapacitated on dates prior and subsequent to the date in question may have had an intervening period of lucidity); Estate of Mann, 184 Cal. App. 3d 593, 602-03 (1986) (noting that a testator's guardianship status does not support a finding of lack of testamentary capacity without

Because an impaired client is less likely to direct an attorney to gather additional information when presented with a difficult or close choice, the attorney may be obligated to research a greater number of alternatives and make the client's choices as clear as possible.[86] On the other hand, while an attorney is under a duty to inform his client thoroughly,[87] an impaired client may have difficulty differentiating minor and major factors, and it may be necessary for the attorney to limit actual information to the most important factors to be considered regarding each of the client's choices.[88] A decision to limit information, however, carries with it a greater responsibility for understanding the client's goals and values.[89]

In assessing the competence of an elderly client, the attorney must take special care to ascertain the reasoning and values that underlie her decisions so that a difference in values is not mistaken for incompetence.[90] For example, the client's values may differ from a younger person's values because of the different life stage.[91] The elderly client may be more interested in relationships and in maintaining harmony than with maximizing her finances or asserting her rights.[92] The attorney's "most important task [in assessing] the legal standard of competency is to distinguish effectively between foolish, socially deviant, risky, or simply 'crazy' choices made competently, and compara-

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evidence that incompetence continues at the time of the will's execution); Matter of Congdon's Estate, 309 N.W.2d at 267 (finding that testator being subject to a conservatorship was not dispositive of her testamentary capacity); In re Estate of Hastings, 387 A.2d 865, 868 (Pa. 1978) (finding that evidence that testatrix was incompetent in handling business affairs was insufficient to show lack of testamentary capacity); Estate of Phillips, 269 Cal. App. 2d 656, 665 (1969) (holding that the weight of decisions in the United States favor the view that an adjudicated incompetent is capable of changing her legal domicile if she has sufficient mental capacity to choose and adopt a new domicile). *But cf.*, Syno v. Syno, 594 A.2d 307, 310 (Pa. 1991) (reasoning that one who is adjudicated incompetent either to manage her finances or to manage her personal life is incompetent for all purposes; and holding that because appellant had been adjudicated incompetent to manage his finances, he could only sue for divorce through a guardian or guardian ad litem). *See generally* Warren F. Gorman, *supra* note 2.

86. *See id.* at 89.

87. *See* MODEL RULES 1.4, *supra* note 13. Model Rule 1.4 states in pertinent part: "(a) A lawyer shall keep a client reasonably informed about the status of a matter and promptly comply with reasonable requests for information; (b) a lawyer shall explain a matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation." *Id.*

88. *See* Smith, *supra* note 43, at 94.

89. *See id.*

90. *See* Gorman, *supra* note 2, at 231; *see also* Smith, *supra* note 43, at 72.

91. *See e.g.*, Smith, *supra* note 43, at 72.

92. *See id.*

ble choices made incompetently."[93] Therefore, the attorney must consider the process the client uses to reach a decision and not just the final result.[94]

On the other hand, focusing on the process alone can lead to a mechanical view of capacity that may be just as divorced from reality.[95] Process and result are always related. When the client's decision itself is questionable, the attorney is justified in exploring the process by which the decision is derived.[96] Six factors that the attorney might consider when exploring the client's process are: (1) the client's ability to articulate the reasoning behind her decision; (2) variability of the client's state of mind; (3) the client's appreciation of consequences; (4) irreversibility of the client's decision; (5) the substantive fairness of the transaction; and (6) consistency with the client's lifetime commitments.[97] While the first three factors involve both substance and process, the latter three factors are concerned primarily with substance and inject a human rather than purely mechanical dimension into the competency determination.[98] Irreversibility, such as the client's decision not to fight an action that will result in the loss of her home, combined with evidence of the client's variable state of mind, might tip the scale toward deciding that the client is incompetent to make the decision in question. At that point, the attorney may justifiably refuse to follow the client's directions.[99]

E. Gradual Counseling and Persuasion

One legal scholar, Professor Linda Smith, recommends that the attorney patiently guide clients of questionable or partial competence to make their own legal decisions through a process called "gradual counseling and decision making."[100] The underlying goal of gradual

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93. Tremblay, *supra* note 16, at 537. As an example, consider the difference between a client's choice to forego foreclosure litigation because she cannot tolerate the stress of litigation, and the same choice made because the client believes that the party threatening foreclosure is Satan, against whom all are powerless.

94. *See id.* at 538.

95. *See* Margulies, *supra* note 46, at 1083.

96. *See id.* at 1085; *see also* Charles E. Schwartz, *Medical Decision Making for People with Chronic Mental Impairments*, *in* CHOICE AND RESPONSIBILITY: LEGAL AND ETHICAL DILEMMAS IN SERVICES FOR PERSONS WITH MENTAL DISABILITIES 135, 143 (Clarence J. Sundram ed., 1994) (proposing that physicians assessing patients for capacity to make medical decisions employ a risk/benefit ratio which requires more careful scrutiny of patient competency when their decisions appear more risky).

97. *See* Margulies, *supra* note 46, at 1085.

98. *See id.* at 1089.

99. *See id.* at 1087.

100. Smith, *supra* note 43, at 85-86.

counseling is the same as the goal of all client-centered counseling — "promoting client autonomy within the attorney-client relationship."[101] The attorney should be a good listener, use open-ended questions with narrower questions to fill in gaps, and practice reflective listening, "which tells the client she is being heard and understood."[102] Positive reinforcement can assure the nervous client that she is doing a good job.[103] In addition, the attorney can use "preventive interviewing," that is, asking the client about issues which the attorney knows to be related to the stated problem although the client has not raised them.[104] However, special care must be taken to avoid leading questions, which inherently carry pressure to agree.[105] Even a direct question as to why the client makes a particular statement or a request for factual details to support a statement, may be received as criticism of the client's statement and inadvertently influence the client's ability to arrive at her own decision.[106] Rather, the attorney should repeatedly restate, clarify, and summarize information provided by the client, as well as reflect the client's feelings as the attorney understands them.[107] "If the advisor can understand and enunciate the person's underlying concerns, the person may be helped to make a difficult choice."[108]

Gradual counseling requires the attorney to restate the client's problem at the beginning of each session, restate the most important value expressed by the client, and describe the best option for attaining the client's goal eliciting her feelings about that option.[109] The client's expression of normal concerns regarding an option, as well as the client's expression of consistent values, will be indications that the client is sufficiently competent to make the required choices.[110] To facilitate an understanding of the client's goals and values, it may be necessary to consult with mental health experts.[111] The attorney's goal would be either to affirm or disprove that the client is "following a rational decision-making process."[112]

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101. *Id.*; *see generally* BINDER ET AL., *supra* note 41.
102. Smith, *supra* note 43, at 85-86.
103. *See id.* at 84.
104. *Id.* at 86.
105. *See id.* at 87.
106. *See id.*
107. *See id.* at 87.
108. *Id.* at 90.
109. *See id.* at 93.
110. *See id.* at 93-94.
111. *See id.* at 82 (suggesting that the best use of expert assistance may be in the actual interviewing and counseling process).
112. *Id.* at 87.

Where the client's competence is questionable, but the attorney concludes that the client is competent to make the necessary legal decisions, Smith recommends that the attorney gather extrinsic evidence of competence.[113] The attorney might ask the client to write a handwritten letter explaining the considerations that underlie her will, or the attorney might obtain signed experts' statements, such as a doctor's certificate of competency, to protect his client's decisions from legal attack.[114] There are, of course, no guarantees that gradual counseling will be successful, but the process ensures that the attorney will only refuse to treat the client as competent after every effort has been made to respect client autonomy and presume competence in even the most limited client.

Even if the client is unable to reach a decision, the attorney may have learned enough about the client's values through gradual counseling to be able to infer what the client's decision would have been.[115] Whether the attorney can make decisions on behalf of his questionably competent client is the subject of some controversy. According to Smith, the attorney is well-positioned to make a "substituted judgment"[116] on behalf of the client if he is named court-appointed guardian or finds it necessary to act as "de facto guardian" under Model Rule 1.14.[117] In Smith's view, "applying the client's personal values to decide the issue at hand promotes the client's independence, individuality and autonomy and is, therefore, justified."[118] Smith suggests that "the attorney may make any necessary decisions on behalf of his client which maximize the client's options or which can be inferred from the client's values and goals."[119] On the other

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113. *See id.* at 74.

114. *See id.*; *see also* Interview with Jason Frank, *supra* note 85. Frank notes that while a doctor's determination of competency is not dispositive of legal competency, it will often dissuade prospective litigants from challenging a will. Id. *See also* Roca, *supra* notes 72, 81 and accompanying text.

115. *See* Smith, *supra* note 43, at 96.

116. *Id.* at 101 ("Making a 'substituted judgment' requires the lawyer to imagine the way in which the limited or incompetent individual would decide the issue if he were competent to decide it."). "The line separating an 'inferred decision' from a 'substituted judgment' is a very unclear one. The attorney who prepares to make a 'substituted judgment' for her limited client [through the gradual counseling process] may find that the client has made a reasoned decision himself." *Id.* at 103.

117. MODEL RULES 1.14, *supra* note 13. The comments to both Model Rule 1.14 and the Maryland Rule 1.14 state: "If the person has no guardian or legal representative, the lawyer often must act as *de facto guardian.*" *Id.* (emphasis added). Although this term is not defined in the rules, it seems to imply that the attorney may make decisions for the client without a formal guardianship proceeding.

118. Smith, *supra* note 43, at 104.

119. *Id.* at 82.

hand, some have argued that the attorney has no basis of authority to act when the client is incompetent and no legal representative has been appointed, and thus the attorney should be subject to both disciplinary action and personal liability.[120]

Another legal scholar, Professor Paul Tremblay, has recommended the use of non-coercive persuasion, a process of "mutual, interactive decision-making,"[121] which is somewhat more directive than Smith's gradual counseling.[122] The attorney would explain the consequences of the action or non-action suggested by the client and the perceived conflict between that action and the goals or values expressed by the client.[123] Like Smith, Tremblay recommends that the lawyer enlist the help of a mental health professional to understand the client's actions.[124] Tremblay acknowledges that the biggest criticism of persuasion is that it is paternalistic, but he argues that persuasion is less paternalistic than the alternatives — de facto guardianship,[125] proxy of family members, and guardianship itself.[126] In Tremblay's view, persuasion at least implies that the ultimate decision belongs to the client,[127] whereas a solution like de facto guardianship gives an attorney too much power "without imposing side constraints on lawyer bias and conflict of interest."[128] In addition, like gradual counseling, Tremblay's process of persuasion will help the lawyer determine whether the client's decision is sound so that if the attorney must resort to a more intrusive form of intervention, it will be a more considered decision on his part.[129]

The standard of competence applied in gradual counseling and persuasion is clearly subjective; it asks whether the client's internal set of values and goals, adhered to with some consistency, present a rational basis for the decision she reaches.[130] The difficulty of reaching a conclusion under this standard is illustrated in *Ortelere*, where the court reached its decision by reasoning that the change of contract

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120. *See* Rein, *supra* note 16, at 1139 (reasoning that under the law of agency, the attorney as agent can have no greater authority than his client as principal).

121. Tremblay, *supra* note 16, at 580.

122. *See supra* notes 100-20 and accompanying text.

123. *See* Tremblay, *supra* note 16, at 580.

124. *See id.* at n.280; *cf.* Smith, *supra* note 113-14 and accompanying text.

125. *See* MODEL RULES 1.14, *supra* note 13; *see also infra* notes 137-38.

126. *See* Tremblay, *supra* note 16, at 579.

127. *See id.* at 580-81.

128. *Id.* at 575.

129. *See id.* at 582.

130. *See supra* notes 109-29 and accompanying text.

was inconsistent with Mrs. Ortelere's long term values and goals.[131] On the other hand, the *Ortelere* dissent concluded that the evidence supported a finding that Mrs. Ortelere's motivation in executing the contract was her more recent, rational desire for higher monthly income to support two retired persons.[132] The conflict between the *Ortelere* majority and dissent is illustrative of the difficulty of determining competency where, as in many cases, more than one alternative decision has a rational basis. While it may be easier to attribute competency to a decision which is consistent with life long values, does the *Ortelere* decision suggest that the elderly lose their right to change their minds?

It has been argued that gradual counseling and persuasion are unreasonably time consuming and, in many circumstances, not cost effective.[133] Opponents advocate a policy of interference with client goals "where warranted to protect third party or societal interests when, in a particular situation, they are of higher social importance than untrammeled decision-making itself."[134] Mrs. Ortelere's decision, for example, threatened to impoverish her husband,[135] and perhaps to burden society by making her husband dependent on welfare. Gradual counseling may have supported Mrs. Ortelere's decision, whereas many opponents would override her autonomy to protect her husband.

III. MODEL RULES - AFTER THE CLIENT IS DETERMINED INCOMPETENT

As the Official Comments to Model Rule 1.14 suggest, the normal attorney-client relationship presumes client competence.[136] Consistent with the client-centered approach of legal scholars to the compe-

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131. Ortelere v. Teachers Retirement Bd. of N.Y., 250 N.E.2d 460, 466 (N.Y. 1969); *see supra* notes 1-11 and accompanying text.

132. *Id.* at 467.

133. *See* Rein, *supra* note 16, at 1114, 1164.

134. *Id.* at 1164 (arguing that not all attorneys have the perception and sensitivity to determine competency when the client's perspective differs from their own and that attorneys should therefore direct their inquiry to the effect of their client's decision). Although the pivotal question for Rein is whether the client's decision is "seriously unfair or detrimental to other individuals or society at large," she would distinguish between decisions that merely withhold a benefit and those which "affirmatively invade another's rights and resources by demanding that they confer a benefit or accept a detriment as the price exacted to accommodate the actor's untrammeled autonomy." *Id.* at 1165. Mrs. Ortelere's decision arguably could fall on either side of that line.

135. *See Ortelere*, 250 N.E.2d 460; *see also supra* notes 1-11 and accompanying text.

136. The Comments to Model Rule 1.14 state in pertinent part: "The normal client-lawyer relationship is based on the assumption that the client, when properly advised and assisted, is capable of making decisions about important matters." MODEL RULES 1.14, *supra* note 13.

tency inquiry and taking special notice of the law's recognition of intermediate degrees of competence, Rule 1.14(a) insists that the lawyer maintain a normal attorney-client relationship to the extent possible.[137] Furthermore, Model Rule 1.14(b) permits the lawyer to take protective action "only when the lawyer *reasonably* believes that the client cannot adequately act in the client's own interest."[138] Arguably, the reliance on *reasonable* belief demands the thorough inquiry discussed in Section II above. Even assuming a thorough evaluation of the client by the attorney, the attorney must still reconcile the permissive suggestion to appoint a guardian or take protective action under Model Rule 1.14 with the mandatory duties of confidentiality under Model Rule 1.6,[139] the mandatory duty to avoid conflict of interest under Model Rule 1.7,[140] and the duty to take client directed action under Model Rule 1.2.[141] It is no help to state that, because the client is incompetent, the attorney-client relationship has ended or never began. Under Rule 1.9, the attorney owes a duty of confidentiality to a former client[142] and under Rule 1.6, the lawyer's duty of confidentiality attaches when the lawyer agrees to *consider* whether an attorney-client relationship shall be established.[143]

Although seeking client consent to disclose her incompetency would be consistent with the requirement in Rule 1.14 that the attorney attempt to maintain a normal attorney-client relationship,[144] do-

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137. Model Rule 1.14(a) provides: "When a client's ability to make adequately considered decisions in connection with the representation is impaired, whether because of minority, mental disability or for some other reason, the lawyer shall, as far as reasonably possible, maintain a normal client-lawyer relationship with the client." *Id.*

138. Model Rule 1.14(b) states: "A lawyer may seek the appointment of a guardian or take other protective action with respect to a client only when the lawyer *reasonably* believes that the client cannot adequately act in the client's own interest." *Id.* (emphasis added).

139. Model Rule 1.6(a) and Maryland Rule 1.6(a) state in pertinent part: "A lawyer shall not reveal information relating to the representation of a client unless the client consents after consultation, except for disclosures that are impliedly authorized in order to carry out the representation . . . ." MODEL RULES 1.6(a), *supra* note 13; MARYLAND RULES 1.6(a), *supra* note 14. For a more thorough discussion of the conflict between Rule 1.14 and Rule 1.6, see Devine, *supra*, note 16.

140. The Comments to Model Rule 1.7 provide in pertinent part: "As a general proposition, loyalty to a client prohibits undertaking representation directly adverse to that client without that client's consent." MODEL RULES 1.7, *supra* note 13, Comment 3.

141. Model Rule 1.2 states in pertinent part: "A lawyer shall abide by a client's decisions concerning the objectives of representation . . . ." MODEL RULES 1.2, *supra* note 13.

142. Model Rule 1.9(c) states in pertinent part: "A lawyer who has formerly represented a client in a matter . . . shall not thereafter use information relating to the representation to the disadvantage of the former client . . . or reveal information relating to the representation . . . ." MODEL RULES 1.9(c), *supra* note 13.

143. *See* MODEL RULES 1.6(a), *supra* note 13, Official Comments; *see also supra* note 22.

144. *See supra* note 136.

ing so may not resolve the ethical dilemma; if the client is incompetent, consent itself may not be legally binding.[145] It is no wonder that capacity has been called the "black hole" of legal ethics.[146] The Comment to Rule 1.14 in the Maryland Rules note that "disclosure of the client's disability can adversely affect the client's interests, [f]or example, raising the question of disability . . . [which might] . . . lead to proceedings for involuntary commitment and concedes, not very hopefully, that "[t]he lawyer's position in such cases is an unavoidably difficult one."[147] This concession, however, is immediately followed by a statement advising that "[t]he lawyer may seek guidance from an appropriate diagnostician."[148]

IV. RELEVANT ABA, STATE, AND LOCAL ETHICS RULINGS

Recent state and local ethics rulings reflect some disagreement about how an attorney with a questionably competent client should balance his conflicting duties. A number of these opinions have held that the attorney may make limited contact with third parties to confirm a diagnosis of incapacity. For example, in 1990, State Bar of Arizona Opinion 90-12 held that an attorney may consult with an independent diagnostician about the client's disability without the client's consent, but cautioned that the attorney may only reveal confidences to the extent necessary to make an assessment of the client's disability.[149] In that same year, State Bar of Michigan Ethics Opinion No. RI-51 held that a lawyer should have independently corroborated the client's incapacity before declining her request regarding representation.[150]

Similarly, in 1988, Opinion 84 of the Maine Professional Ethics Commission held that an attorney may make limited necessary disclosures to the client's family regarding her incapacity where failure to disclose might result in an abrogation of the client's rights.[151] In so

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145. *See supra* note 109 and accompanying text; *see also* Tremblay, *supra* note 16, at n.213 (arguing that "consensual guardianship is something of an oxymoron").

146. Margulies, *supra* note 46, at 1082.

147. MARYLAND RULES 1.14, *supra* note 14, Official Comments.

148. *Id.*

149. *See* LAWYERS' MANUAL ON PROFESSIONAL CONDUCT 901:401. For two opinions which temper permission to allow disclosure with similar cautionary remarks, see North Carolina Opinion 157 (4/16/93), *digested in* LAWYERS' MANUAL ON PROFESSIONAL CONDUCT 1001:6608, and Nebraska Opinion 91-4 (undated), *digested in* LAWYERS' MANUAL ON PROFESSIONAL CONDUCT 1001:5501.

150. *See* 1990 WL 504872, *3 (Mich.Prof.Jud.Eth.).

151. *See* THE CENTER FOR SOCIAL GERONTOLOGY, INC., BEST PRACTICE NOTES vol. 4, Nos. 2 & 3, 7-8, (December 1990) [hereinafter CSG], (citing Main Professional Ethics Commission Opinion 84 (1988), *digested in* LAWYERS' MANUAL ON PROFESSIONAL CONDUCT,

holding, the Maine Ethics Commission gave weight to the fact that the client had not explicitly directed the attorney not to disclose the information, and reasoned that the harm caused by failure to disclose was greater than the harm caused by the disclosure.[152] However, in a contrary 1990 opinion, the Illinois State Bar Association Committee on Professional Responsibility held that a lawyer could not petition for guardianship for a client if doing so would require the revelation of a confidence or secret.[153] The Illinois committee stated that "the duty to preserve confidences of a client must still be of primary importance."[154] That same year, the Nassau County Bar Association Committee on Professional Ethics similarly held that preserving client confidences was of primary importance when it refused to permit a lawyer to disclose to the client's children evidence of the client's alleged incompetence.[155]

In a 1989 informal opinion, the American Bar Association (ABA) Standing Committee on Ethics and Professional Responsibility (the "Committee") considered the narrow question of whether an attorney may, without the client's consent, consult her physician concerning a suspected medical condition which might be interfering with the client's ability to communicate or make decisions concerning the representation.[156] In the case presented, the attorney, during the course of his representation, determined that the client was incapable of giving valid consent and became suspicious of medication abuse.[157] The Committee found that the client's behavior and the facts suggesting medication abuse constituted information relating to the representation within the meaning of Model Rule 1.6.[158] The Committee considered whether disclosure of this information might fall within the exception for disclosures impliedly authorized in order to carry out the representation,[159] but reasoned that the intent of this exception

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901:4205; *accord* New York City Opinion 81:32 (1981) (allowing disclosure about the client's condition to family members or the court to the extent absolutely necessary and citing LAWYERS' MANUAL ON PROFESSIONAL CONDUCT 801:6322).

152. *See* CSG, *supra* note 151, at 7-8 (citing LAWYERS' MANUAL ON PROFESSIONAL CONDUCT, 6 CURRENT REPORTS 166 (6/6/90)).

153. *See* Illinois State Bar Association Committee on Professional Responsibility Opinion 89-12 (1990); *see also* CSG, *supra* note 151, at 8.

154. CSG, *supra* note 151, at 9.

155. *See id.*

156. *See* ABA Comm. on Ethics and Professional Responsibility, Informal Op. 89-1530 (1989) [hereinafter ABA Informal Op. 89-1530].

157. *See id.*

158. MODEL RULES 1.6(a), *supra* notes 13 and 139; *see also* ABA Informal Op. 89-1530, *supra* note 156.

159. *See* MODEL RULES 1.6(a), *supra* note 13; *see also supra* note 139.

was to allow disclosures that are foreseeable from the mere fact that the client retained the attorney in the first place.[160] The Committee concluded that disclosure to determine competency was not foreseeable.[161] Nevertheless, the Committee found that consultation with the client's physician was impliedly authorized because (1) the Comment to Model Rule 1.14 encourages the attorney to seek guidance from an appropriate diagnostician; and (2) irreparable harm might result if the client fails to take any action, thereby waiving valuable rights, or insists that the attorney take an action adverse to the client's interests.[162] The Committee was also influenced by the fact that the attorney often lacks the expertise required to assess the extent of the client's impairment, as well as the fact that the client's physician is also subject to a duty of confidentiality.[163] Moreover, in reaching this conclusion, the Committee relied on the general rule of statutory construction which presumes that parts of the same body of law, here the Model Rules, are to be construed as consistent whenever possible.[164]

More recently, the Committee was asked to consider the broader ethical issues that arise when an attorney reasonably believes that his client has become incompetent to handle his own legal affairs.[165] The Committee recognized that maintaining a normal attorney-client relationship in this situation may be "difficult or impossible."[166] Nevertheless, it interpreted Rule 1.14's requirement to maintain a normal attorney-client relationship as implying that a lawyer should continue to "communicate and discuss relevant matters" with the client.[167] Furthermore, the Committee directed the attorney to "take action consistent with the client's directions and decisions" to the extent possible.[168] At the same time, the Committee recognized that the directives of an incompetent client are legally ineffectual to direct the attorney's actions under the principles of agency law.[169] While cau-

160. *See* ABA Informal Op. 89-1530, *supra* note 156.

161. *See id.*

162. *See id.*

163. *See id.*

164. *See id.*

165. *See* ABA Comm. on Ethics and Professional Responsibility, Formal Op. 96-404 (1996) [hereinafter ABA Formal Op. 96-404].

166. *Id.* In so reasoning the Committee relied on Comment 1 to Model Rule 1.14 which states that "a client lacking legal competence often has the ability to understand, deliberate upon, and reach conclusions about matters affecting the client's own well-being. Furthermore, to an increasing extent the law recognizes intermediate degrees of competence." *Id.* at n.3; *see, e.g.*, In re M.R., 638 A.2d 1274 (N.J. 1994); Ortelere v. Teachers Retirement Bd. of N.Y., 250 N.E.2d 460 (N.Y. 1969); *see also supra* notes 1-11 and accompanying text.

167. ABA Formal Op. 96-404, *supra* note 165.

168. *Id.*

169. *See id.*

tioning lawyers not to seek protective action "merely to protect the client from what the lawyer believes are errors in judgment,"[170] the Committee construed Rule 1.14(b)[171] to grant authority to seek protective action using the "*least restrictive*" means,[172] "consistent with the nature of the particular lawyer/client relationship and the client's needs."[173] Less restrictive means suggested included involvement of concerned family members; use of a durable power of attorney or a revocable trust, where the client has the capacity to execute these; and "referral to support groups or social services that could enhance the client's capacities or ameliorate the feared harm."[174] The Committee also noted that guardianship itself has *degrees* of restriction.[175] For example, appointment of a guardian ad litem for the purpose of a single litigation or appointment of a guardian over the client's property would be less restrictive than appointment of a general guardian to assume control over all aspects of a client's life.[176] On the other hand the Committee noted that Rule 1.14(b) appears on its face to permit an attorney with a "long-standing existing relationship with a client, but no specific present work," to take "appropriate" action to protect the client.[177] Moreover, the Committee ruled that, "in the extraordinary circumstances in which it applies," Rule 1.14(b) "clearly permits" the attorney to seek general guardianship.[178] The Committee drew a distinction between seeking guardianship and seeking to be a guardian, and cautioned that the attorney should only seek to have himself appointed guardian in "the most exigent of circumstances, that is, where immediate and irreparable harm will result from the slightest delay," (*e.g.*, where the client would otherwise be evicted).[179] Even

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170. *Id.*

171. MODEL RULES 1.14(b), *supra* note 13; *see also supra* note 138.

172. ABA Formal Op. 96-404, *supra* note 165, at n.9 (emphasis added). Significantly, this language imitates the principles imbedded in Congressional legislation covering accommodations for the disabled, most notably the Americans with Disabilities Act, 42 U.S.C. §§12101-12213 (Supp. III 1991) (barring discrimination on the basis of disability).

173. ABA Formal Op. 96-404, *supra* note 165, at n.9 (citing *inter alia* OREGON CODE OF PROFESSIONAL RESPONSIBILITY Rule 7-101 (permitting a lawyer to "seek the appointment of a guardian or take other protective action which is least restrictive with respect to a client . . . .")).

174. *Id.* at n.10 (citing *Working Group on Client Capacity*, 62 FORDHAM L. REV. 1003 (1994)).

175. *See id.* In fact, however, limited guardianships are rarely granted. *See* LAUREN BARRITT LISI ET AL., CENTER FOR SOCIAL GERONTOLOGY, NATIONAL STUDY OF GUARDIANSHIP SYSTEMS: FINDINGS AND RECOMMENDATIONS, 63 (1994); *see also* O'Sullivan and Hoffman, *supra* note 66, at 46.

176. *See generally* ABA Formal Op. 96-404, *supra* note 165.

177. *Id.*

178. *Id.*

179. *Id.*

where the attorney is forced by exigent circumstances to act as "de facto guardian,"[180] the Committee advised that he should take appropriate steps to seek appointment of another formal guardian to replace him as soon as possible.[181]

Citing Informal ABA Opinion 89-1530,[182] the Committee permitted the attorney to discuss a client's condition with a diagnostician.[183] The Committee added,

> Limited disclosure of the lawyer's observations and conclusion about the client's behavior seems clearly to fall within the meaning of the disclosures necessary to carry out the representation authorized by [Model] Rule 1.6. It is also implicitly authorized by [Model] Rule 1.14 as an adjunct to the permission to take protective action.[184]

Noting that the "narrow exception in Rule 1.6 does not permit the disclosure of more general information relating to the representation," the Committee cautioned lawyers to limit "disclosure to those [facts] pertinent to the assessment of the client's capacity and discussion of the appropriate protective action."[185]

However, the Committee discouraged the attorney's withdrawal from representation because, although it might solve the attorney's personal dilemma, "it may leave the impaired client without help at a time when the client needs it most."[186] The Committee also specifically ruled that the attorney shall "not attempt to represent a third party petitioning for guardianship over the lawyer's client."[187] The Committee reasoned that Rule 1.14 "creates a narrow exception to the normal responsibilities of a lawyer to his client," which although "adverse to the client," does not diminish the attorney's responsibilities to the client nor sever the attorney-client relationship.[188] The Committee emphasized that the attorney could consider and be responsive to the requests of family members and other interested persons, but only if he had made (1) an *independent determination* that guardianship was both *necessary* and the *least restrictive* alternative and (2) a "*good faith determination* that the third person with whom he is dealing is also act-

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180. MODEL RULES 1.14, *supra* note 13, Comment 2; *see supra* note 117.
181. *See* ABA Formal Op. 96-404, *supra* note 165.
182. *See supra* note 156-64 and accompanying text.
183. *See* ABA Formal Op. 96-404, supra note 165.
184. *Id.*
185. *Id.*
186. *Id.*
187. *Id.*
188. *Id.*

ing in the best interest of the client."[189] The Committee ruled that under these circumstances, "the lawyer may disclose confidential information to the limited extent necessary to assist the third person in filing the petition, and may provide other appropriate assistance short of representation."[190] Moreover, the Committee ruled that once the client is adjudged incompetent and a guardian appointed to act on the client's behalf, the attorney may represent the guardian.[191] However, if the attorney has any expectation of such future employment prior to the guardian's appointment, he is required to bring this to the attention of the appointing court.[192]

As reflected in the ABA opinions above, once the attorney has made a preliminary determination of incompetency, a decision to disclose confidences to outside diagnosticians or family members is arguably less offensive to the client's autonomy and confidentiality than the alternatives of acting as a de facto guardian or seeking appointment of a guardian. In contrast to these more drastic measures, outside consultation may even be viewed as a step which enhances the client's chances of autonomy because it may disprove the attorney's earlier incompetency determination or lead to a diagnosis of a reversible medical condition.[193] Given the lack of consensus among state ethics commissions, for whom ABA opinions do not represent controlling legal authority, the attorney's ability to take actions regarding questionably competent clients free from fear of disciplinary action should be clarified in relevant state law.[194]

V. CONCLUSION

Attorneys owe a duty of confidentiality and loyalty to their questionably competent clients. This may require an attorney to make a special effort to ensure that the autonomy of these clients is maximized. To be effective, attorneys need to accommodate any special physical and emotional needs of these clients.

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189. *Id.* (emphasis added).

190. *Id.*

191. *See id.*

192. *See id.* (citing the lawyer's duty of candor toward the tribunal under Model Rules 3.3 and 1.7 (b)). Similarly, the lawyer is required to inform the court of the client's preference for a particular guardian, where he has such knowledge. *Id.*

193. While the most common cause of dementia is Alzheimer's disease, there are other conditions that mimic dementia and may be completely reversible if caused, for example, by drug toxicity, depression, vitamin B12 deficiency, or hypothyroidism. Roca, *supra* note 72, at 1181.

194. For suggested changes to Model Rules 1.6 and 1.14, consistent with this reasoning, see *Proceedings of the Conference on Ethical Issues in Representing Older Clients*, 62 FORDHAM L. REV. 989, 992 (1994).

In this regard, Model Rules 1.6 on confidentiality, 1.7 on loyalty, and 1.14 on disabled clients have been thought to present conflicting attorney duties. However, if these rules are assumed to be consistent, they may be understood to require a reasonable effort by attorneys to inquire into the client's competency, first by making an independent determination, and, second, if still necessary, by seeking the help of an outside diagnostician. It can be argued that a disclosure of the client's confidences under these narrow circumstances actually serves to maximize the client's autonomy. Each State's rules of professional conduct should be amended to clarify a narrowly defined exception to the duty of confidentiality consistent with recent ABA opinions, which would allow the attorney to consult with an appropriate diagnostician when dealing with questionably competent clients.

As illustrated by the results of the survey presented in Appendix A to this article, a significant number of attorneys have felt the need to consult others regarding questionably competent clients. Attorneys seek outside consultations to acheive both a reliable determination of competency and a satisfactory disposition when the client is determined to be incompetent. The lack of a consistent approach among attorneys, however, may be an indication of the individuality of each case or may indicate some confusion as to the attorney's duty to communicate and consult with the incompetent client. Recent guidance from the ABA Committee may help to resolve some of this confusion, and it is this author's hope that the results of the survey presented in Appendix A will further highlight the alternatives which experienced attorneys find helpful.

MARILYN LEVITT

APPENDIX A TABLES

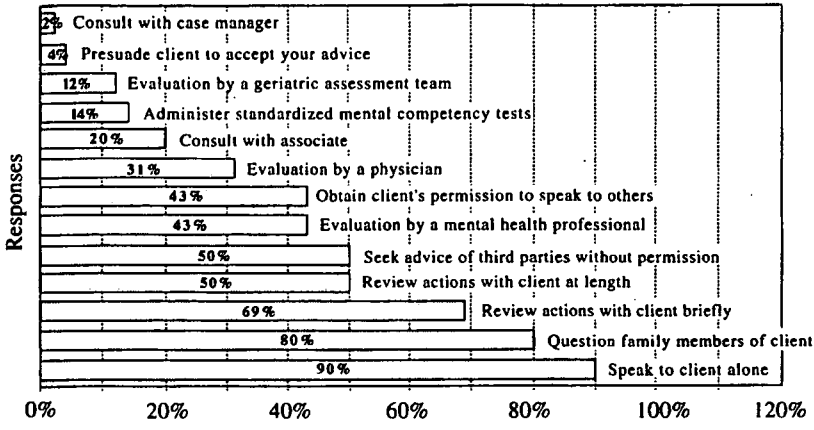

Table 1. Actions Taken to Determine Competency of the Elderly Client: Survey of 49 Maryland Attorneys.

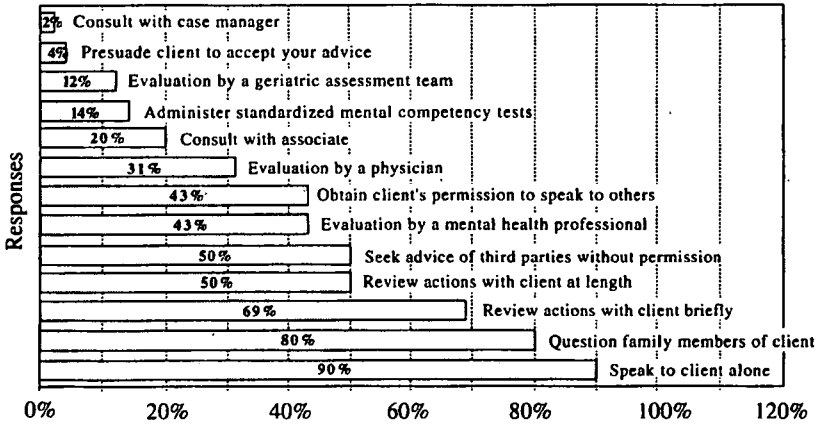

Table 2. Actions Taken after Determining that a Client is Incompetent: Survey of 49 Maryland Attorneys.

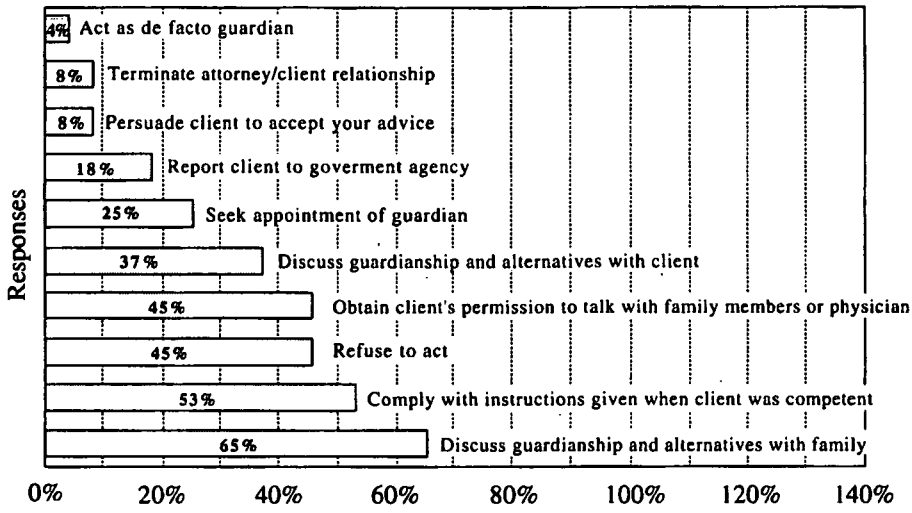

Table 3. Documenting Competency: Survey of 49 Maryland Attorneys.

APPENDIX B
LAWYER SURVEY: DEALING WITH THE QUESTIONABLY COMPETENT CLIENT

SURVEY METHODOLOGY

In December, 1996, over 300 surveys on how attorneys deal with the questionably competent client were distributed to Maryland State Bar Association Elder Law Section Newsletter subscribers.[195] Twenty-nine were returned by this group. An additional twenty surveys were distributed and collected at the beginning of a class on Elder Law sponsored by The Maryland Institute for Continuing Professional Education of Lawyers, Inc. (MICPEL) in February, 1997. Unless otherwise specified, the survey results presented here are the combined results of both groups which produced a total of 49 surveys.[196]

The mean years of experience among the survey takers was between ten and eleven years.[197] Seventy six percent of them indicated concentrations in the areas of Elder Law and/or Estate Planning, either exclusively or in addition to a variety of other practice areas. The remaining attorneys listed a variety of other concentrations, for example, general civil practice, real estate, personal injury, and domestic law.[198] Interestingly, five of the survey participants who listed only other areas of law had experienced between one and three questionably competent clients in the last year. This suggests that the need for information on how to deal with the questionably competent client is widespread.

About 43% of the respondents stated that 50% or more of their clients were sixty-five or older. About half of these attorneys (twenty-

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195. The survey was designed with advice from the Elder Law Section Council; Visiting Assistant Professor Joan O'Sullivan, University of Maryland School of Law; Dr. Sheryl Zimmerman, Associate Professor, Department of Epidemiology and Preventive Medicine, Associate Director, Division of Gerontology, University of Maryland Medical School; and Dr. Marvin Eisen, Ph.D., Principal Investigator, Johnson, Bassin and Shaw. The Geriatrics and Gerontology Education and Research Program (GGEAR) at the University of Maryland at Baltimore and the Maryland State Bar Elder Law Section funded the mailing of the survey. A copy of the survey appears in Appendix C to this article.

196. Because of the method and size of the sampling, any generalizations are restricted to the group of respondents rather than the total group which includes non-respondents.

197. Among the attorneys in the Elder Law Section [hereinafter the ELS group] the mean was eleven years; the mean years of experience of the attorneys in the MICPEL class [hereinafter the MICPEL group] was six years.

198. Interestingly, five of the survey participants who listed other areas of law had experienced between one and three questionably competent clients in the last year. This suggests that the need for information on how to deal with the questionably competent client is widespread.

four) reported seeing between one and three questionably competent clients in the past year; five attorneys reported seeing four or five questionably competent clients; eight attorneys reported seeing between six and ten questionably competent clients; only one attorney reported seeing more than ten; and seven reported seeing none. While most respondents see the majority of their clients in the attorney's office, a significant number conduct at least 10% of their interviews in the client's home and another 10% in institutions.[199]

SURVEY RESULTS

Determining Competency[200]

Considering how difficult it is to represent questionably competent clients, how do practicing attorneys determine competence? The survey asked participants to choose one or more actions (from among thirteen supplied choices) which they take in more than *half* of the cases where they *suspect* that a client is incompetent.[201] The most popular choice was speaking to the client without family members present to determine independent ability (90% of the attorneys who responded to the survey reported taking this action). Two other choices involved reviewing the proposed action with the client either *briefly* or *at length* to ensure the client's understanding of the meaning and intent of the proposed action. Sixty-nine percent of respondents indicated that they conduct a lengthy review with at least half of their questionably competent clients. Moreover, 80% of the attorneys with eleven or more years of experience opted for a lengthy review while only 42% of those with ten or less years of experience so opted. This may indicate that more experienced attorneys use time consuming techniques such as gradual counseling, as discussed in Section II of this article.[202]

Despite the purported dilemma regarding the violation of confidentiality,[203] about half the attorneys indicated that they seek advice from third parties in determining the competency of a client, but did

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199. Twenty-one attorneys reported that they had seen 10% of their clients in their client's home, and eighteen reported seeing clients in an institutional setting.

200. The results of this section are summarized in Table 1, which is reprinted in Appendix B.

201. The options for the multiple choice portion of the survey were taken from the answers to an open-ended version of the survey which was completed by members of the Elder Law Section Council.

202. *See supra* notes 100-20 and accompanying text.

203. *See supra* notes 14-19 and accompanying text.

not indicate that they seek permission from the client.[204] Only 43% indicated that they would obtain the client's permission to consult with others. Attorneys who consulted with a third party were most likely to consult with a family member; 80% marked this choice. However, 55% of the attorneys noted that they consult with other professionals in reaching their competency determination. Of professionals listed in the survey, social workers or other mental health professionals were the most likely to be consulted to determine the client's capacity. About 43% reported that they have these clients evaluated by a mental health professional.[205] Approximately one third of responding attorneys indicated that they have their questionably competent clients evaluated by a physician. Only six attorneys indicated that they have the client evaluated by a geriatric assessment program.[206] In addition, about 20% called on an associate to help with the assessment. Attorneys were least likely to consult a case manager, probably an indication of the economic status and/or family situation of their elderly clients.[207]

Only three attorneys indicated that they try to persuade the client to accept their advice. Another three attorneys expressed strong negative feelings about this choice by writing in, "No," "Never," etc. Only seven attorneys said that they themselves administer a Mini-Mental Status Exam[208] or other test of mental competency.[209] However, significantly and consistent with the reservations about this test,[210] of those who used the test, all but one also consulted with another professional.

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204. Some of these attorneys may speak with family members prior to meeting the client, obviating the need for permission. Four attorneys in the ELS group and one in the MICPEL group indicated that, in addition to the client, they only consult with family members.

205. Interestingly, one participant noted that frequently when she suggests that the client be evaluated by a diagnostician, the client seeks another attorney.

206. A geriatric assessment program is a comprehensive medical and psychiatric screening, often within a hospital setting, to assess the current functioning and needs of the patient. All six attorneys who chose this option were members of the Elder Law Section, possibly indicating that the Section has been successful in educating its members about the availability of outside resources to aid them in the evaluation process.

207. A case manager is a professional (most often a social worker), either hired privately or assigned through a government social service agency (such as the state's office on aging or the local health department), who coordinates needed services to the elderly person.

208. *See* Roca, *supra* notes 72, 81 and accompanying text.

209. All but one of the seven were members of the Elder Law Section, again perhaps indicative of the educational success of the Section.

210. *See supra* notes 81-83 and accompanying text.

Actions Taken After the Attorney Determines That the Client Is Incompetent[211]

The Survey also asked the participants to choose from a list of actions they might take once they are certain that a client is incompetent to direct an attorney in the legal matter at hand. Again, attorneys were asked to check only those actions they take in at least half of such cases. The most frequent choice, made by 65% of respondents, was to discuss guardianship and alternatives with the client's family, while only 37% indicated they would discuss guardianship and alternatives with the client, herself. This contrasts with 90% who choose to speak with the client alone in order to make the initial determination of competency. Thus, once they have determined the client to be incompetent, far fewer than half of the surveyed attorneys appear to make the effort to maintain a normal attorney-client relationship as suggested by the ABA Committee[212] and the Model Rules.[213]

Strangely, a greater percentage of attorneys (45%) indicated that they obtain the client's permission to talk with family members and/or professionals, an act which would seem to show greater deference to the client than merely informing her about guardianship and alternatives.[214] However, where a client has given instructions to an attorney prior to becoming incompetent, more than half of the attorneys said they comply with these instructions after the client has become incompetent.

Approximately 25% of the respondents indicated that they seek the appointment of a guardian for their client. However, there was a marked difference in responses from experienced and less experienced attorneys in relation to the appointment of a guardian. Forty two percent of attorneys with ten or less years sought guardianship while only 8% (only two) of attorneys with eleven or more years of experience did so. Thus, it would seem that more experienced attorneys are using less drastic measures consistent with the Committee's advice to seek protective action "using the least restrictive means."[215] Similarly, only three attorneys said that they report the client to the department of social services or aging,[216] an action which may eventu-

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211. The results of this section are illustrated in Tables 2 and 3 in Appendix 1.

212. *See* A.B.A. Formal Op. 96-404, *supra* notes 165-67 and accompanying text.

213. *See supra* notes 137-42 and accompanying text.

214. Presumably, this percentage does not include attorneys who seek the client's permission, but do not obtain it.

215. ABA Formal Op. 96-404, *supra* note 165 and accompanying text.

216. No MICPEL attorney reported doing this. *See supra* note 197. There was also one unsolicited indication of negative feeling about this choice.

ally lead to appointment of a guardian. On the other hand, only two attorneys indicated that they persuade the client to accept their advice, and just two attorneys indicated that they act as a de facto guardian,[217] actions far less extreme than seeking guardianship.

Forty-five percent of respondents said they refuse to act once they determine that a client is incompetent, but a majority of these made other choices as well, confirming that they probably meant this response to indicate their refusal to follow the incompetent client's directions. For example, they do not allow the incompetent client to sign a will or advance medical directive. This response, however, does not reflect a lack of respect for the client. Rather, as recognized by the Committee, it reflects the understanding that the incompetent client has no legal authority to direct the attorney's actions.[218] Also consistent with the recommendation of the Committee, 92% of the surveyed attorneys do not choose to terminate the attorney-client relationship when they have determined the client to be incompetent.[219]

Finally, attorneys were asked in what percentage of their cases in the last year they documented that their client was competent, and how they did so. Here there was a broad range of answers. A number of attorneys indicated that they always documented the client's file when competency was an issue; others suggested that documentation was necessary even where competency would not otherwise be an issue because selective documentation might otherwise become evidence that the attorney himself questioned the client's competency. On the other hand, nine attorneys indicated that they had never documented a client's competency in their file, even though eight of these same attorneys indicated they had dealt with between one and three questionably competent clients during the past year.

The most frequent method of documentation was a memo to the client's file stating what actions were taken to determine competency. Almost 60% said they did this. One attorney volunteered that the documentation consisted of her usual case notes; another indicated that she asked two separate staff persons to sign notarized statements evidencing a testator's competency. Roughly 25% of the attorneys indicated that they obtained certification of competency from a doctor; only 8% (four) attorneys said that they videotaped the execution of documents.

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217. Again, no MICPEL attorney made this choice.

218. *See* A.B.A. Formal Op. 96-404, *supra* note 165 and accompanying text.

219. *See supra* notes 186-88 and accompanying text. The four attorneys who indicated that they do terminate were in the MICPEL group.

APPENDIX C

Lawyer Survey: Dealing with the Questionably Competent Client

GENERAL DIRECTIONS: In answering all questions, please exclude guardianship cases. Where you answer "other", please specify.

1. How long have you been in practice? ____ years

2. What is/are your area(s) of practice? _____

3. In the last year, what percentage of your clients were over age 65? _____%

4. What percentage of these (over 65) clients did you see in your office, in their home, or in an institutional setting? office _____% home _____% institution _____%

5. In the past year, approximately how many of your clients or prospective clients were questionably competent? _____clients

6. If you suspect that a client is incompetent to direct you in the legal matter at hand, which of the following actions do you take? (Check only actions you take in at least half of such cases.)

____ Speak to client without family members to determine independent ability.
____ Review proposed action with client briefly to ensure client's comprehension of meaning and intent of proposed action.
____ Review proposed action with client at length to ensure client's comprehension of meaning and intent of proposed action.
____ Persuade the client to accept your advice.
____ Call in associate to help with assessment.
____ Administer a Mini-Mental Status Exam or other test of mental competency.
____ Question family members.
____ Obtain client's permission to consult with others.
____ Work with social worker or other mental health professional to determine client's capacity.
____ Check client's medical records.
____ Have client evaluated by a physician.
____ Have client evaluated by geriatric assessment program.
____ Have client evaluated by case manager.
____ Other (Please specify.)

over

7. In light of an attorney's duty of client confidentiality and loyalty, if you are certain that a client has become incompetent to direct you in the legal matter at hand, which of the following actions do you take? (Check only actions you take in at least half of such cases.)

____ Report the client to the department of social services or aging.
____ Refuse to act.
____ Terminate attorney/client relationship.
____ Persuade the client to accept your advice.
____ Act as a de facto guardian.
____ Seek the appointment of a guardian for your client.
____ Discuss guardianship and alternatives with client.
____ Discuss guardianship and alternatives with client's family.
____ Obtain client's permission to talk with family members and/or professionals.
____ Where applicable, comply with instructions given when client was competent.
____ Other (Please specify.)

8. In the past year, in approximately what percentage of your cases did you document in your file that your client is competent? _____%

9. In what ways did you do this? (Check all that apply.)

____ Memo to file with actions taken to determine competency.
____ Videotaping of execution of documents.
____ Certification by doctor.
____ Other (Please specify.)

Print Name (**optional**) _____Tel. No. (**optional**)_____

Would you be willing to talk to the researcher further about this topic? yes____ no____

Marilyn Levitt, *The Elderly Competent Client Dilemma: Determining Competency and Dealing with the Incompetent Client,* 1 J. HEALTH CARE L. & POLICY 202 (1998).

CORRECTIONS TO APPENDIX A TABLES
PAGES 227-28

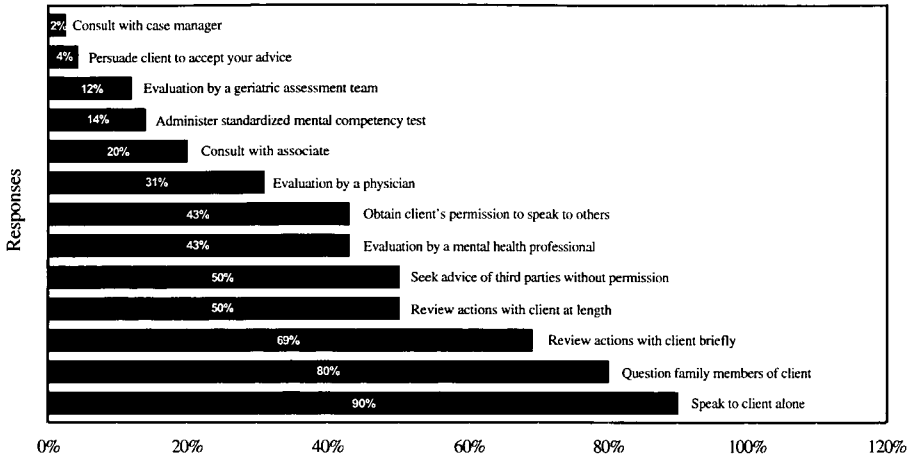

TABLE 1. ACTIONS TAKEN TO DETERMINE COMPETENCY OF THE ELDERLY CLIENT: SURVEY OF 49 MARYLAND ATTORNEYS.

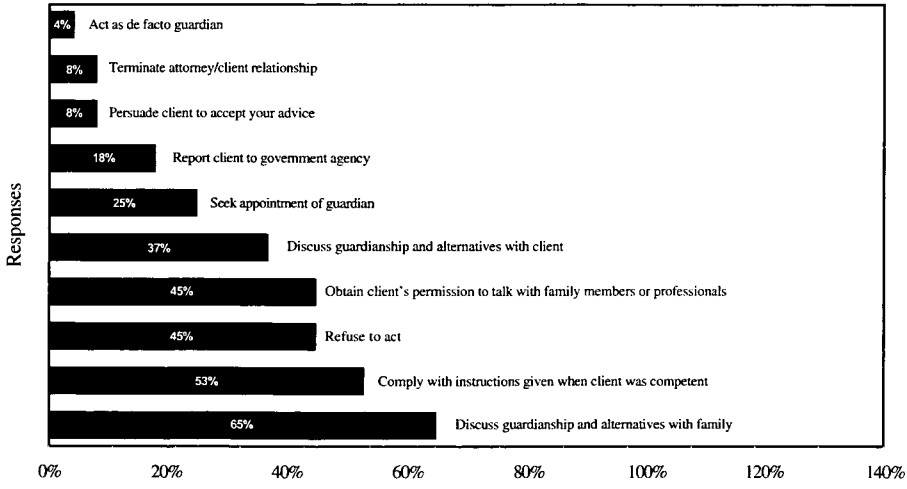

TABLE 2. ACTIONS TAKEN AFTER DETERMINING THAT A CLIENT IS INCOMPETENT: SURVEY OF 49 MARYLAND ATTORNEYS.

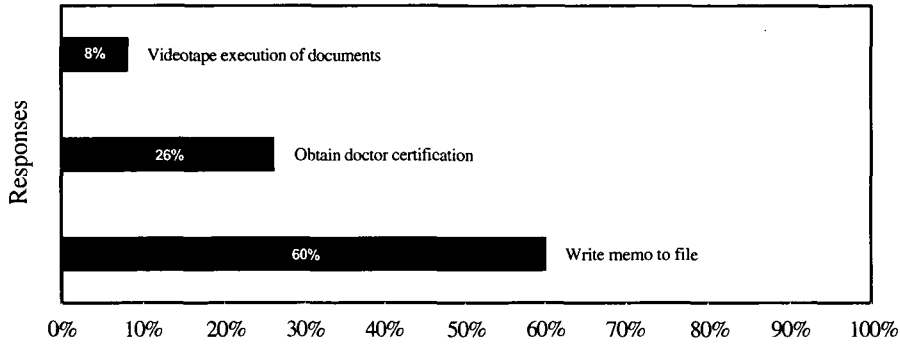

TABLE 3. DOCUMENTING COMPETENCY: SURVEY OF 49 MARYLAND ATTORNEYS.