

Formal Ethics Opinion
KENTUCKY BAR ASSOCIATION

Ethics Opinion KBA E-440
Issued: November 18, 2016

The Rules of Professional Conduct are amended periodically. Lawyers should consult the current version of the rule and comments, SCR 3.130 (available at <http://www.kybar.org/237>), before relying on this opinion.

Question 1: What is Diminished Capacity for Purposes of Rule 1.14?

Answer: See Discussion on Page 2.

Question 2: When a client suffers from diminished capacity, what steps should the lawyer take to preserve a normal attorney client relationship?

Answer: See Discussion on Page 5.

Question 3: When a client suffers from diminished capacity how may a lawyer seek assistance from the client's family, other third parties or the courts without violating the duty of confidentiality under SCR 3.130(1.6)?

Answer: See Discussion on Page 7.

Question 4: May a lawyer refuse to represent a client with diminished capacity, withdraw from such a representation after the client suffers from diminished capacity, or accept the termination of the representation of a client with diminished capacity?

Answer: See Discussion on Page 8.

Question 5: When may or must a lawyer representing a client with diminished capacity seek the appointment of a surrogate decision-maker?

Answer: See Discussion on Page 9.

Question 6: When a lawyer represents a client in a criminal action and the client suffers from diminished capacity, what additional concerns will the lawyer have? Further, what responsibility does a prosecutor have if he / she has reason to believe the defendant suffers from diminished capacity?

Answer: See Discussion on Page 10.

References: RULES OF SUPREME COURT OF KENTUCKY

SCR 3.130(1.14); SCR 3.130(1.6); SCR 3.130, Scope, Para. XVIII; SCR 3.130(1.2)(a); SCR 3.130(1.4); SCR 3.130(1.6); SCR 3.130(6.2); SCR 3.130(1.16);

CASES

Pete v. Anderson, 413 S.W.3d 291, 296 (Ky. 2013); *In re Brantley*, 920 P.2d 433 Kan. 1996); *Cheney v. Wells*, 877 N.Y.S.2d 605 (N.Y. Surr. Ct. 2008); *In re Laprath*, 670 N.W. 2d 41 (S.D. 2003); *Cooper v. Oklahoma*, 517 U.S. 348, 116 S.Ct. 2680, 134 L.Ed.2d 498 (1996); *Johnson v. Commonwealth*, 887 S.W.2d 547 (Ky.1994); *Padgett v.*

Commonwealth, 312 S.W.3d 336 (Ky.2010); *Red Dog v. State*, 625 A.2d 245 (Del. 1993); *Drope v. Missouri*, 420 U.S. 162 (1975); *Brady v. Maryland*, 373 U.S. 83 (1963).

ETHICS OPINIONS

Ind. Ethics Op. 2-2001(2001); Or. Ethics Op. 2005-159(2005); ABA Formal Op. 96-404 (August 2, 1996); Mo. Informal Ethics Op. 990095 (1999); N. Y. City Ethics Op. 1997-2 (1997); N.D. Ethics Op. 00-06 (2000); Pa. Ethics Op. 87-214 (1988); Vt. Ethics Op. 2006-1 (2006); D.C. Ethics Op. 353 (2010); Mi. Informal Ethics Op. CI-882 (1983); Ma. Ethics Op. 2004-1 (2004); S. C. Ethics Op. 05-11 (2005); Mi. Informal Ethics Op. CI-1055 (1984); Virginia Ethics Op. 1769 (2003); Mo. Informal Ethics Op. 960048 (1996); Nassau County (N.Y. Ethics Op. 98-2 (1998).

Introduction

This opinion addresses ethical issues that arise when a lawyer believes that his/her client suffers from diminished capacity within the meaning of SCR 3.130(1.14).

A lawyer may need to consider whether a client's capacity to make adequately considered decisions is possible when the lawyer has reason to believe a client suffers from diminished capacity impairing his/her ability to make adequately considered decisions. When a client suffers from diminished capacity the lawyer must endeavor to maintain a normal attorney - client relationship so far as reasonably possible. If the lawyer believes the client's diminished capacity places the client at risk of substantial physical, financial, or other harm, the lawyer should consider whether it is necessary to take protective action to protect the client's interests. In taking protective action, the lawyer should be guided by the client's wishes and values, and the client's best interests. To the extent reasonably necessary to protect the client's interests, when taking protective action, the lawyer is impliedly authorized to disclose information relating to the representation that SCR 3.130(1.6) would otherwise forbid. The lawyer should take care to ensure that any disclosed information will not be used against the client's interests.

In order to assist the lawyer through the decision making process this Committee poses the following questions and analysis for the lawyer's consideration when determining the most appropriate course of action.

1. What is Diminished Capacity for Purposes of Rule 1.14?

SCR 3.130(1.14) imposes various duties upon an attorney who suspects or knows that a client suffers from diminished capacity. The lawyer who has reason to believe that the client suffers from diminished capacity should review Rule 1.14, the full text of which is as follows.

SCR 3.130(1.14) Client with diminished capacity

(a) When a client's capacity to make adequately considered decisions in connection with a representation is diminished, whether because of minority, age, mental impairment or for some other reason, the lawyer shall, as far as reasonably possible, maintain a normal client-lawyer relationship with the client.

(b) When the lawyer reasonably believes that the client has diminished capacity, is at risk of substantial physical, financial or other harm unless action is taken and cannot adequately act in the client's own interest, the lawyer may take reasonably necessary protective action, including consulting with individuals or entities that have the ability

to take action to protect the client and, in appropriate cases, seeking the appointment of a guardian ad litem, conservator or guardian.

(c) 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.

While Rule 1.14 and the Comments do not enumerate all of the causes or conditions which may result in a client's diminished capacity, Rule 1.14(a) indicates that a client's capacity may be diminished by reason of "minority, age, mental impairment or some other reason." Thus, any condition which appears to limit or interfere with the client's ability to make adequately considered decisions should be assessed by the lawyer.¹

A lawyer should consider the question of diminished capacity at the outset of a representation. As Rule 1.14(a) focuses on a client's decision-making ability "in connection with a representation," a lawyer's determination that a client is suffering from diminished capacity can only be made in the context of a specific representation. The degree of capacity necessary to make adequately considered decisions depends on the nature and scope of a specific representation, including the complexity of the factual and legal issues. Moreover, in some representations, a client may be able to decide routine factual and legal issues, but may have diminished ability to decide major issues.²

The formation of a client-lawyer relationship is a matter of contract law, and a client's capacity to enter into a contract presents a substantive legal issue. See SCR 3.130, Scope, Para. XVIII ("[F]or purposes of determining the lawyer's authority and responsibility, principles of substantive law external to these Rules determine whether a client-lawyer relationship exists."); *Pete v. Anderson*, 413 S.W. 3d 291, 296 (Ky. 2013). If a lawyer believes a prospective client may not have the capacity to enter into a valid attorney-client contract the lawyer should consider whether the prospective client's interests would best be served by the establishment of a conservatorship or guardianship with a family member or other person whose interests are aligned with the prospective client.³

So, at the initial stage of the representation the lawyer's first duty is to determine whether the client suffers from diminished capacity to the extent the client cannot legally consent to an attorney-client contract. Comment (6) suggests it is permissible for the lawyer to seek information and assistance from family members, or other interested persons⁴ or an appropriate diagnostician.⁵

¹ See Ind. Ethics Op. 2-2001 (2001) (failure to ascertain client's physical and mental condition and evaluate client's capacity violates Rule 1.14); Or. Ethics Op. 2005-159 (2005) (a lawyer should "examine whether the client can give directions that the lawyer must ethically defer to the client").

² See Rule 1.14, Comment (1).

³ See Rule 1.14, Comment (7). However, as noted in ABA Formal Ethics Op. 96-404 (1996), the appointment of a guardian is a "serious deprivation of a client's rights and ought not be undertaken if other, less drastic, solutions are available." See also *In re Brantley*, 920 P.2d 433 (Kan. 1996) (lawyer disciplined for filing involuntary conservatorship proceeding without meeting personally with the client to determine her state of mind or understanding of financial affairs).

⁴ See Rule 1.14, Comment (3). See also Mo. Informal Ethics Op. 990095 (1999) (a lawyer who believes a client shows signs of Alzheimer's disease may seek assistance from a social service agency); N. Y. City Ethics Op. 1997-2 (1997) (in forming conclusions about a client's capacity, a lawyer must take into account not only information and

ABA Formal Opinion 96-404 (August 2, 1996) notes that limited disclosures of a lawyer's observations concerning a client's capacity are implicitly authorized by Rule 1.6. However, ABA Opinion 96-404 cautions that a lawyer must limit such disclosures to information that is relevant to the assessment of the client's capacity because "this narrow exception in Rule 1.6 does not permit the lawyer to disclose general information relating to the representation." A lawyer must take steps to ensure that information disclosed in connection with assessing the client's capacity will not be used in a manner adverse to the client's best interests. Thus, such information should not be disclosed to persons whose interests are adverse or potentially adverse to those of the client.⁶

In a 2001 article by Charles P. Sabatino published by the ABA's Commission on Legal Problems of the Elderly, the author advises that, because lawyers seldom receive formal capacity assessment training, a lawyer may prefer to refer cases of questionable capacity to mental health professionals. This Committee, however, cautions that the lawyer should be aware of the possibility that a mental health review will show the presence of some level of diminished capacity in almost all older clients; thus, pursuing a capacity assessment may lead to a course of action, perhaps a proceeding in guardianship court that is inappropriate.

Sabatino cites a 1982 Report of the President's Commission for the Study of Ethical Problems in Medicine and Biomedical and Behavioral Research as stating that "Decision making capacity requires, to a greater or lesser degree: (1) possession of a set of values and goals; (2) the ability to communicate and to understand information; and (3) the ability to reason and to deliberate about one's choices." The client's values and goals may establish a benchmark against which the client's capacity can be assessed rather than by conventional standards held by others. Mr. Sabatino then offers four actions that a lawyer may find helpful to the lawyer's ultimate decision as to how to proceed.

1. Interview the Client Alone - Family, friends, or caretakers commonly accompany older or disabled individuals to the lawyer's office. These significant others may play an important role in providing essential background information relevant to the work to be done. However, the ethical starting point in the client-lawyer relationship remains the individual's competent choice to retain the services of the lawyer and to decide the overall objectives of the representation. Be clear from the beginning who the client is and the ethical implications of that relationship in terms of loyalty, confidentiality, and decision making. The initial interview should always include a time when the lawyer and client meet alone. This is important not only to confirm representation and its objectives, but also to provide an opportunity, if needed, to assess capacity. This one-

impressions derived from the lawyer's communications with the client, but also other relevant information that may reasonably be obtained from other sources, and the lawyer may also seek guidance from other professionals and concerned parties).

⁵ See Rule 1.14, Comment (6). See also ABA Formal Ethics Op. 96-404 (1996) ("... If a lawyer is unable to assess his client's ability to act or if the lawyer has doubts about the client's ability, ... it is appropriate for the lawyer to seek guidance from an appropriate diagnostician, particularly when a disclosure of the client's condition to the court or opposing parties could have adverse consequences for the client."); N.D. Ethics Op. 00-06 (2000) (a lawyer who believes a divorce client will accept an offer contrary to her best interests may consult with a professional to determine the nature and extent of the client's disability); Pa. Ethics Op. 87-214 (1988) (a lawyer who reasonably believes a client cannot handle her financial affairs and health care needs may seek court appointment of a physician to report to court on the threshold issue of her competence).

⁶ See Rule 1.14, Comment (8).

on-one meeting request may cause apprehension among family members, including the elderly client, but it is necessary to ensure that personal and environmental factors do not unduly influence the decision making process.

2. Adjust the Interview Environment to Enhance Communication – It is possible that the client has a hearing loss that is mistaken for diminished capacity, hence, the lawyer should try to optimize the interview environment for the client. Specific actions may include ...speaking slowly, conducting the interview in a quiet and well-lit area, arranging furniture so as to avoid glare, and providing any necessary audio or visual amplification to facilitate communication and functioning. Although their cognitive processing may not be as fleet as that of younger persons, given more time, partially impaired elders may be able to understand the ramifications of each action under consideration. Be willing to spend extra time explaining the nature and consequences of options and resist the temptation to equate the speed of the client’s ability to process information with level of capacity. If possible, meet with a client more than once to acquire a stronger sense of the client’s decision making capacity.

3. Know the Client’s Value Framework - The standard against which capacity is measured is the standard set by the individual’s standards of behavior and values, rather than conventional standards held by others. Without knowledge of the client’s personal frame of reference, capacity judgments have insufficient anchor and are liable to be based on someone else’s judgment. For the long-time client whose functioning appears to be slipping, the lawyer may be familiar with the client’s subjective frame of reference. Newer clients require a more thorough inquiry.

4. Presume Capacity - Merely raising the issue of capacity can be hurtful and damaging to the individual; therefore, as the process could ultimately result in a major intrusion into the client’s autonomy in the form of guardianship, the starting presumption should always be one of capacity.

If the lawyer concludes, after consultation with the client and/or with the assistance of a mental health professional, that the client may have diminished capacity, Comment (6) to SCR 3.130(1.14) provides a non-exhaustive list of factors that a lawyer should “consider and balance” in determining the extent of the diminished capacity: the client's ability to articulate reasoning leading to a decision; the client's variability of state of mind; the client's ability to appreciate consequences of a decision; the substantive fairness of a decision; and the consistency of a decision with the known long-term commitments and values of the client.

If the lawyer decides to proceed with the representation then the lawyer should consider the following portions of this Opinion, especially a need for the lawyer to document the client’s condition and the lawyer’s observations. See this Committee’s discussion under Question 3 of this opinion.

2. When a client suffers from diminished capacity, what steps should the lawyer take to preserve a normal attorney client relationship?

SCR 3.130(1.14)(b), provides the following guidance.

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.

Comment 5 provides additional guidance, as follows.

(5) If a lawyer reasonably believes that a client is at risk of substantial physical, financial or other harm unless action is taken, and that a normal client-lawyer relationship cannot be maintained as provided in paragraph (a) because the client lacks sufficient capacity to communicate or to make adequately considered decisions in connection with the representation, then paragraph (b) permits the lawyer to take protective measures deemed necessary. Such measures could include: consulting with family members, using a reconsideration period to permit clarification or improvement of circumstances, using voluntary surrogate decision making tools such as durable powers of attorney or consulting with support groups, professional services, adult-protective agencies or other individuals or entities that have the ability to protect the client. In taking any protective action, the lawyer should be guided by such factors as the wishes and values of the client to the extent known, the client's best interests and the goals of intruding into the client's decision making autonomy to the least extent feasible, maximizing client capacities and respecting the client's family and social connections.

Prior to taking any steps, the lawyer should consider the allocation of authority between lawyer and client and in this regard SCR 3.130(1.2)(a) provides the following guidance.

Subject to paragraphs (c) and (d), a lawyer shall abide by a client's decisions concerning the objectives of representation and, as required by Rule 1.4, shall consult with the client as to the means by which they are to be pursued. A lawyer may take such action on behalf of the client as is impliedly authorized to carry out the representation. A lawyer shall abide by a client's decision whether to settle a matter. In a criminal case, the lawyer shall abide by the client's decision, after consultation with the lawyer, as to a plea to be entered, whether to waive jury trial and whether the client will testify.

While Comment 4⁷ to SCR 3.130(1.2) refers to SCR 3.130(1.14), it does not offer any additional substantive guidance.

Lawyers should also be mindful of the requirements of SCR 3.130(1.4), as follows.

(a) A lawyer shall:

- (1) promptly inform the client of any decision or circumstance with respect to which the client's informed consent, as defined in Rule 1.0(e), is required by these Rules;
- (2) reasonably consult with the client about the means by which the client's objectives are to be accomplished;
- (3) keep the client reasonably informed about the status of the matter;
- (4) promptly comply with reasonable requests for information; and

⁷ (4) In a case in which the client appears to be suffering diminished capacity, the lawyer's duty to abide by the client's decisions is to be guided by reference to Rule 1.14.

(5) consult with the client about any relevant limitation on the lawyer's conduct when the lawyer knows that the client expects assistance not permitted by the Rules of Professional Conduct or other law.

(b) A lawyer shall explain a matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation.

We find additional guidance in Comments (1), (2), and (6) of SCR 3.130(1.4), as follows:

1) Reasonable communication between the lawyer and the client is necessary for the client effectively to participate in the representation.

2) If these Rules require that a particular decision about the representation be made by the client, paragraph (a)(1) requires that the lawyer promptly consult with and secure the client's consent prior to taking action unless prior discussions with the client have resolved what action the client wants the lawyer to take. For example, a lawyer who receives from opposing counsel an offer of settlement in a civil controversy or a proffered plea bargain in a criminal case must promptly inform the client of its substance unless the client has previously communicated to the lawyer that the proposal will be acceptable or unacceptable or has authorized the lawyer to accept or to reject the offer. See Rule 1.2(a).

6) Ordinarily, the information to be provided is that appropriate for a client who is a comprehending and responsible adult. However, fully informing the client according to this standard may be impracticable, for example, where the client is a child or suffers from diminished capacity. See Rule 1.14.

In ABA Formal Opinion 96-404 the ABA's Ethics Committee made the following comments.

Rule 1.14 recognizes that there may be situations in which a normal client-lawyer relationship is impaired, or, perhaps, impossible because of client disability. Rule 1.14(a) requires a lawyer, "as far as reasonably possible", to "maintain a normal lawyer client relationship" with a client who's "ability to make adequately considered decisions in connection with the representation is impaired." This obligation implies that the lawyer should continue to treat the client with attention and respect, attempt to communicate and discuss relevant matters, and continue as far as reasonably possible to take action consistent with the client's directions and decisions. (At page 2).

As explained above, the lawyer has an affirmative obligation to try to maintain a normal attorney-client relationship to keep the client informed and to allow the client to make her own decisions insofar as possible. Further, as the representation progresses the lawyer is obligated to maintain communication and to regularly reassess the client's decision-making capacity, as capacity may change and may be present for some decisions and not for others.

3. When a client suffers from diminished capacity how may a lawyer seek assistance from the client's family, other third parties or the courts without violating the duty of confidentiality under SCR 3.130(1.6)?

SCR 3.130(1.6) provides two exceptions to the basic requirement that a lawyer maintain a client's communications and/or actions confidential. The first exception to the confidentiality requirement is to prevent reasonably certain death or substantial bodily harm, and the second is to comply with other law or court order. A client who is threatening suicide or a violent act or

following an illegal course of action would be within these exceptions; hence, the lawyer could seek assistance from an emergency responder or other professionals or family members without violating SCR 3.130(1.6).

If the exceptions of SCR 3.130(1.6) do not apply, then SCR 3.130(1.14) provides additional exceptions. SCR 3.130(1.14(b)) allows for a lawyer to “take a reasonably necessary protective action” if the client “is at risk of substantial physical, financial, or other harm unless action is taken and cannot adequately act in his or her own interest”. The action allowed, as specifically stated in the Rule, includes “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.

The Comments to the Rule, particularly Comment 5, provides that those measures would also include consulting with family members, support groups, adult protective services, other professionals (such as therapists), or using powers of attorney. Based upon the Rule and the Comments, it appears that all of these options are available to the lawyer if the lawyer believes that the client is at risk of substantial physical, financial, or other harm and cannot protect his or her own interests.

Further, subsection (c) of SCR 3.130(1.14) allows the lawyer to reveal information that would otherwise be protected under SCR 3.130(1.6) if required, but “only to the extent reasonably necessary to protect the clients’ interests.” The lawyer has to walk a fine line and only reveal the information necessary to get the help needed and to protect the client’s interest - but not any more information than needed. Particularly, Comment 8 to the Rule discusses the fact that disclosure of the client’s diminished capacity could adversely affect the client’s interests. While the lawyer is probably impliedly authorized to reveal that information by SCR 3.130(1.14(b)), given the risks of disclosure a lawyer should proceed with caution and carefully document the facts and circumstances leading to the lawyer’s decided upon course of action. The lawyer’s documentation efforts would include the lawyer’s notes of conversations with the client, members of the client’s family, mental health diagnosticians, and then a recording of the lawyer’s own observations of the client would be a good place to start. Further, see “*Capacity Worksheet for Lawyers*,” in *Assessment of Older Adults with Diminished Capacity: A Handbook for Lawyers*, by the ABA Commission on Law and Aging and the American Psychological Association (2005), The completion of a worksheet along the lines indicated in the referenced material should be helpful to evidence the lawyer’s thought process in taking the appropriate course of action.

4. May a lawyer refuse to represent a client with diminished capacity, withdraw from such a representation after the client suffers from diminished capacity, or accept the termination of the representation by a client with diminished capacity?

Other than a lawyer’s obligation under SCR 3.130(6.2) to not seek to avoid appointment by a tribunal to represent a person except for good cause a lawyer may accept or refuse representation at will; however, once the representation commences, withdrawal presents ethical issues under SCR 3.130(1.16) as well as SCR 3.130(1.14).

In ABA Formal Opinion 96-404, the ABA Committee noted that, absent Rule 1.14, a lawyer whose client becomes incompetent would be acting without proper authority from the client and would be unable to carry out his or her responsibilities to the client. The ABA Committee stated that Rule 1.14 resolves this dilemma by permitting a lawyer to take protective

action, but the Rule does not compel a lawyer to take such action and many lawyers are uncomfortable with doing so. The ABA Committee stated that although Rule 1.16(b) permits a lawyer to withdraw if withdrawal can be accomplished “without material adverse effect on the interests of the client,” the lawyer should consider whether withdrawal in these circumstances may leave the impaired client without help at a time when the client needs it most. The ABA Committee concluded that even if withdrawal would not have a material adverse effect on the client, the better course of action, and the one most likely to be consistent with Rule 1.16(b), will often be for the lawyer to continue to represent the client and seek appropriate protective action.

Several state ethics committees have agreed with the ABA Committee that withdrawal from the representation of a client with diminished capacity is not favored. See Vermont Ethics Op. 2006-1 (2006) (if a client is not competent to protect the client’s own interests, “withdrawal should not be pursued, even if permissible”); District of Columbia Ethics Op. 353 (2010) (a lawyer should not withdraw from representation of a client with diminished capacity whose surrogate decision-maker’s actions create substantial risk that the client will lose her home; “it is difficult to imagine a circumstance under which permissive withdrawal causing substantial harm would be appropriate when representing a client with diminished capacity”). See also, *Cheney v. Wells*, 877 N.Y.S. 2d 605 (N.Y. Surr. Ct. 2008) (permission to withdraw conditioned upon lawyer commencing a limited property guardianship proceeding for client). Cf. Michigan Informal Ethics Op. CI-882 (1983) (the probability that the client would have the “same difficulties with any other lawyer retained ... does not bind the attorney to remain in a relationship which the client may have rendered unreasonably difficult for the attorney to continue”).

In summary, a lawyer contemplating withdrawal from the representation of a client with diminished capacity should proceed with caution and should carefully consider whether taking protective action would be the better choice.

Likewise, a lawyer should proceed with caution when a client with diminished capacity attempts to discharge the lawyer. As noted in Comment (6) to SCR 3.130(1.16), the client may lack legal capacity to terminate the client-lawyer relationship, and discharging the lawyer may be adverse to the client’s interests. The Comment further notes that “[t]he lawyer should make special effort to help the client consider the consequences and may take reasonably necessary protective action as provided in Rule 1.14.” See also, Massachusetts Ethics Op. 2004-1 (2004) (lawyer who believes discharge by elderly client was due to coercion by abusive adult child should ascertain client’s actual wishes and may consult with other family members); South Carolina Ethics Op. 05-11 (2005) (lawyer asked by both impaired client and client’s conservator to turn over client’s files may seek appointment of a guardian or take other protective action if client believes client cannot act in her own interest; conservator generally cannot make personal decisions for client); Michigan Informal Ethics Op. CI-1055 (1984) (lawyer asked to withdraw petition by client assessed as incompetent by examining psychiatrist may not withdraw if withdrawal is not in client’s interests).

5. When may or must a lawyer representing a client with diminished capacity seek the appointment of a surrogate decision-maker?

In ABA Formal Opinion 96-404, the ABA Committee advised that a lawyer may seek to have a guardian appointed for a client with diminished capacity, but such an appointment “is a serious deprivation of the client’s rights and ought not be undertaken if other, less drastic,

solutions are available.” *Accord*, Missouri Informal Ethics Op. 960095 (1999) (lawyer who believes that client shows signs of Alzheimer’s disease may seek appointment of a guardian as a last resort); Oregon Ethics Op. 2005-159 (2005) (before seeking appointment of a guardian, lawyer must maintain “as regular a lawyer-client relationship as possible and adjust representation to accommodate client’s limited capacity”); Restatement (Third) of the Law Governing Lawyers §24 cmt. b (2000) (appointment of a guardian “may be expensive, not feasible under the circumstances, and embarrassing for the client”). ABA Formal Opinion 96-404 further notes that even where seeking the appointment of a guardian is appropriate, a lawyer must consider whether the circumstances of the representation reasonably require the appointment of only a guardian ad litem for pending litigation, or a guardian for the client’s property and financial affairs but not the client’s personal affairs, or a general guardianship.

If a lawyer concludes that the appointment of a guardian would best serve the client’s interests, the lawyer herself may initiate the proceedings. Rule 1.14(b); ABA Formal Opinion 96-404; Nassau County (N.Y.) Ethics Op. 98-2 (1998); *Cheney v. Wells, supra*. The lawyer may not, however, represent a third party petitioning for a guardianship over the lawyer’s client. As explained by the ABA Committee in ABA Formal Opinion 96-404, “[s]uch a representation would necessarily have to be regarded as ‘adverse’ to the client and prohibited by Rule 1.7(a), even if the lawyer sincerely and reasonably believes that such representation would be in the client’s best interests, unless and until the court makes the necessary determination of incompetence.” *Accord*, Virginia Ethics Op. 1769 (2003); Missouri Informal Ethics Op. 990048 (1996). Further, except in “the most exigent of circumstances,” a lawyer “should not act as or seek to have himself appointed guardian” of a client with diminished capacity,” and even in such circumstances the lawyer should seek only a temporary appointment and “take appropriate steps for the appointment of a formal guardian, other than himself, as soon as possible.” ABA Formal Opinion 96-404. *Accord, In re Laprath*, 670 N.W. 2d 41 (S.D. 2003).

6. When a lawyer represents a client in a criminal action and the client suffers from diminished capacity, what additional concerns will the lawyer have? Further, what responsibility does a prosecutor have if he / she has reason to believe the defendant suffers from diminished capacity?

KRS 504.090 states that “[n]o defendant who is incompetent to stand trial shall be tried, convicted or sentenced so long as the incompetency continues.” “Incompetency to stand trial” means, as a result of a mental condition, lack of capacity to appreciate the nature and consequences of the proceedings against one or to participate rationally in one’s own defense.” KRS 504.060. Hence, by its very definition, one who is “incompetent” is not rational.

A defendant is presumed competent, and has the burden to establish incompetence by clear and convincing evidence. *Cooper v. Oklahoma*, 517 U.S. 348, 116 S.Ct. 2680, 134 L.Ed.2d 498 (1996). Nevertheless, “incompetency to stand trial” is not a defense which may be pursued or abandoned by the defendant or counsel as a matter of strategy:

First, unlike a true defense, the issue of competency is not for the defendant alone to raise; it can be raised by the trial court, on its motion, whenever the trial court has reason to believe that the defendant’s competency is in question. (See KRS 504.100(1), “[i]f upon arraignment, or during any stage of the proceedings, the court has reasonable grounds to believe the defendant is incompetent to stand trial, the court shall appoint at least one (1) psychologist or psychiatrist to examine, treat and

report on the defendant's mental condition;" see also *Johnson v. Commonwealth*, 887 S.W.2d 547 (Ky. 1994.)

Second, once the issue of competency has been raised, it cannot simply be waived and abandoned:

"[Kentucky's] statutory right to a hearing is not constitutional, and can be waived when there is not substantial evidence of incompetency in the record, because our long-standing rule is that defendants may generally waive statutory rights...[citations omitted]..."

If there is substantial evidence that a defendant is competent, and thus the constitutional right to a hearing attaches, the trial court must conduct a competency hearing (at trial or retrospectively) even if both counsel and the defendant waive it." *Padgett v. Commonwealth*, 312 S.W.3d 336 (Ky. 2010).

Finally, a person found incompetent under circumstances in which there is no substantial probability that he will attain competency in the foreseeable future is subject to involuntary hospitalization proceedings under KRS 202A or 202B. KRS 504.110(2). Thus, while an incompetent client may not have to withstand trial for his conduct, neither can he necessarily avoid some consequence for the conduct, based merely upon grounds of incompetency.

Whether and when an attorney should raise the issue of his client's competency is discussed in "The Decision to Challenge the Competency of a Marginally Competent Client: Defense Counsel's Unavoidably Difficult Position," *Ethical Problems Facing the Criminal Defense Lawyer: Practical Answers to Tough Questions*, Uphoff, Rodney J. (both author of article and editor of book), 1995. Uphoff concludes that while the attorney must first discuss the issue fully with the defendant, "counsel frequently will be required to raise the competency issue," but in some cases may conclude that raising competency concerns will be "highly detrimental to the client's best interests," and therefore may decline to raise the competency issue in a manner "consistent with counsel's assessment of the defendant's best interests." This analysis would seem to favor raising competency as an issue unless the attorney can document a reason why raising the issue would be "highly" detrimental. As part of that analysis, an attorney making the decision whether to raise the issue of competency should be aware that in so doing he may be subjecting the client to examination by a mental health professional who may or may not ask questions about the client's charges, or which would elicit facts pertaining to the client's charges. The client's answers to such questions may be reported in medical records or reports written by the mental health professional, and eventually may be shared with the court, the prosecutor, or both, and depending upon the damage that such answers could do to the defense of a case, the "highly detrimental to the client's best interests" standard may be met. Clearly, though, Uphoff intends this to be a high standard, and counsel should be prepared to explain to an ethics tribunal his or her reasons why competency was not raised when the client has given a clear indication that he is laboring under diminished mental capacity.

The *ABA/BNA Lawyer's Manual on Professional Conduct* is less equivocal about a criminal attorney's duty to raise competency as an issue:

If criminal defense counsel has a good faith doubt about a client's competency, the lawyer has a duty to raise the issue with the court. *Red Dog v. State*, 625 A.2d 245 (Del. 1993) [discussing Rule 1.14(b)]... As stated in *Drope v. Missouri*, 420 U.S. 162 (1975), "evidence of a defendant's irrational behavior, his demeanor at trial, and any prior medical opinion on competence to stand trial are all relevant in determining whether further inquiry is required, but even one of these factors standing alone may, in some circumstances, be sufficient."

The *Manual's* analysis seemingly would dispose of the issue, though it cites no Kentucky case.

As to a prosecutor's responsibilities, there appears to be no clear cut rule or Kentucky case detailing a prosecutor's responsibility to determine if a defendant suffers from diminished capacity. SCR 3.130(3.8) outlines the special responsibilities of a prosecutor:

(c) make timely disclosure to the defense of all evidence or information known to the prosecutor that tends to negate the guilt of the accused or mitigates the offense, and, in connection with sentencing, disclose to the defense and to the tribunal all unprivileged mitigating information known to the prosecutor, except when the prosecutor is relieved of this responsibility by a protective order of the tribunal.

If a prosecutor has knowledge that a defendant suffers from diminished capacity, and believes defense counsel may not have information of same, he/she should make the information available to defense counsel. Such information may be considered exculpatory. *Brady v. Maryland*, 373 U.S. 83 (1963).

In conclusion, an attorney who has a serious question as to whether his criminal client has diminished capacity to the point where his client may not be competent to stand trial is ethically authorized, and in fact may have a duty, to raise the issue of competency before the court. In so doing, the attorney should consider whether raising the issue will be highly detrimental to the client's legal interests. The attorney who decides to raise the issue should be aware that once raised, it cannot be waived, and that otherwise confidential information may be revealed. The attorney who decides NOT to raise the issue should be prepared to document why she did not raise the issue of diminished capacity / competency before the court, in the event a question is raised about the attorney's actions.