


Making Sense of Sorensen

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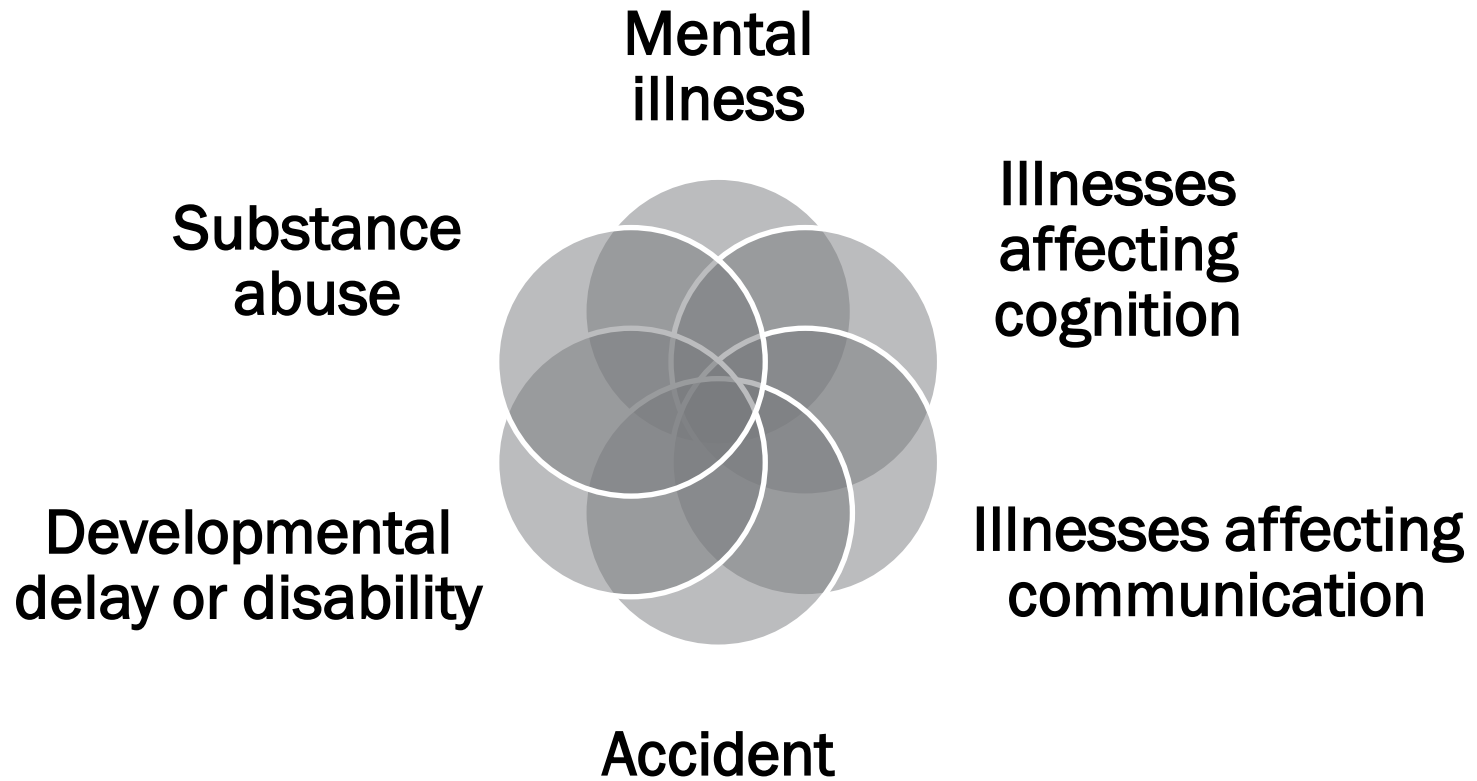
Office of the State Court Administrator



OBJECTIVES

- Recognize causes/indicators of DC or incompetence
 - Identify when appointment of GAL for an adult is appropriate
 - What may or must counsel do or not do?
 - Disclosure of confidential information re: DC client
 - Lawyer's duties of communication with DC clients
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CAUSES OF IMPAIRMENT?



WHO HAS DIMINISHED CAPACITY?

DIMINISHED CAPACITY?

young /
elderly

victims /
perpetrators

veterans/
civilians


addicts/
mentally ill

someone
getting
divorced?




**RECOGNIZING
DIMINISHED CAPACITY**

DIGGING DEEPER: STATEMENTS OF LITIGANT/OTHERS

- “ I was found NGBROI last week”
 - “Don’t understand”
 - “Have POA”
 - “Have conservator”
 - “Just got out of the hospital/rehab”
 - “I have a traumatic brain injury” or disclosure of medical condition that may affect cognition
 - “I get SSI. The check goes to my daughter.”
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OBSERVATIONS THAT MAY REQUIRE DIGGING DEEPER


- Delusions or hallucinations
 - Unresponsiveness to questions
 - Repetition of same question or statement
 - Unawareness of basics - name, date, place, etc.
 - Confusion - time, places, events – memory or information processing
 - Outbursts - disruptive behavior
 - Inability to communicate (i.e., on respirator or in a coma)
 - FTA – hospitalization/residence in medical, care or psychiatric facility
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**I'M SEEING SIGNS, MAYBE
NOW WHAT?**


**Is guardianship
or conservatorship
the answer?**




GUARDIANSHIP/CONSERVATORSHIP

- Access to Justice issue
 - Least restrictive option?
 - Legally applicable? (burden, standard of proof)
 - Duration of diminished capacity/incompetence?
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§15-14-311 GUARDIANSHIP FINDINGS


- CCE
 - Incapacitated, as defined in §15-14-102(5):
 - Not a minor
 - Unable to effectively receive or evaluate information or make or communicate decisions
 - Such that individual lacks ability to satisfy essential requirements for physical health, safety, or self-care, even with appropriate, reasonably available tech assistance.
 - Needs can't be met by less restrictive means (i.e., appropriate and reasonably available tech assistance)
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CRCP 17(C): INCOMPETENT PERSONS


- If an incompetent person does not have a duly appointed representative, or such representative fails to act, he may sue by his next friend or by a guardian ad litem.
 - The court shall appoint a guardian ad litem for an incompetent person not otherwise represented in an action or shall make such other order as it deems proper for the protection of the infant or incompetent person...
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§19-1-111: APPOINTMENT OF GUARDIAN AD LITEM

(2) (c) Court may appoint GAL:

- For parent, guardian, legal custodian, custodian, person to whom parental responsibilities are allocated, stepparent, or spousal equivalent**
 - in D&N proceedings**
 - who has been determined to have mental illness or developmental disability by court of competent jurisdiction;**
 - except if conservator has been appointed, conservator shall serve as GAL. If conservator does not , conservator shall be informed GAL was appointed.**
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PEOPLE IN THE INTEREST OF M.M. (COLO. 1986)


- Irrespective of statutory authorization, it is proper for court to appoint GAL for litigant when court is reasonably convinced that party is not mentally competent to effectively participate in proceeding.
 - “Incompetent” = “mentally ill,” “gravely disabled,” and those mentally impaired to degree of being incapable of effectively participating in termination proceeding and need the assistance of fiduciary representative
 - If RPC or private counsel, appointment of GAL under CRCP 17(c) discretionary
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PEOPLE IN THE INTEREST OF M.M. (COLO. 1986)

- Termination proceeding:
 - Lawyer's duty: provide parent legal advice on decisions (ex. whether to contest TPR and present particular defenses)
 - Parent's role: make those decisions
- Abuse of discretion not to appoint GAL:
 - To act for parent if parent incapable of making those critical decisions due to mental impairment
 - When clear that parent lacks intellectual capacity to communicate with counsel or is mentally or emotionally incapable of weighing advice of counsel on particular course to pursue in own interest.

IN INTEREST OF M.M., CONTINUED

Abuse of discretion not to appoint GAL:

- To act for and in the interest of parent if parent is incapable of making those critical decisions due to mental impairment.
 - When clear that parent lacks the intellectual capacity to communicate with counsel or is mentally or emotionally incapable of weighing advice of counsel on a particular course to pursue in her own interest.
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BUT...


If parent, although mentally disabled to some degree,

- Understands nature and significance of proceeding; and
- Is able to make decisions in own behalf; and
- Has ability to communicate with and act on advice of counsel,


Court may conclude that GAL could provide little if any service to parent that would not be forthcoming from counsel.

IN RE MARRIAGE OF SORENSEN, (COLO.APP.,2007)

Abuse of discretion not to appoint GAL when spouse:

- is mentally impaired...incapable of understanding nature and significance of the proceeding;**
 - is incapable of making critical decisions;**
 - lacks intellectual capacity to communicate with counsel; or**
 - is mentally or emotionally incapable of weighing advice of counsel on particular course to pursue in own interest.**
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IN RE MARRIAGE OF SORENSEN, (COLO.APP.,2007)

- Factual question clearly existed re: competence and ability to adequately direct counsel or otherwise understand nature of proceedings,
 - Evidentiary hearing required to determine whether wife met standard under M.M. and, thus, whether she needed a GAL.
 - Preferred procedure when substantial question regarding mental competence of spouse in DR proceeding: Trial court conduct hearing to determine whether spouse is competent so GAL may be appointed.
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WHO TELLS THE COURT?

Eyes and ears of judicial officer or staff

Court records from this or another case


Opposing party

Litigant/Litigant's attorney

Relative/Friend



RULE 1.14(A): CLIENT WITH DIMINISHED CAPACITY

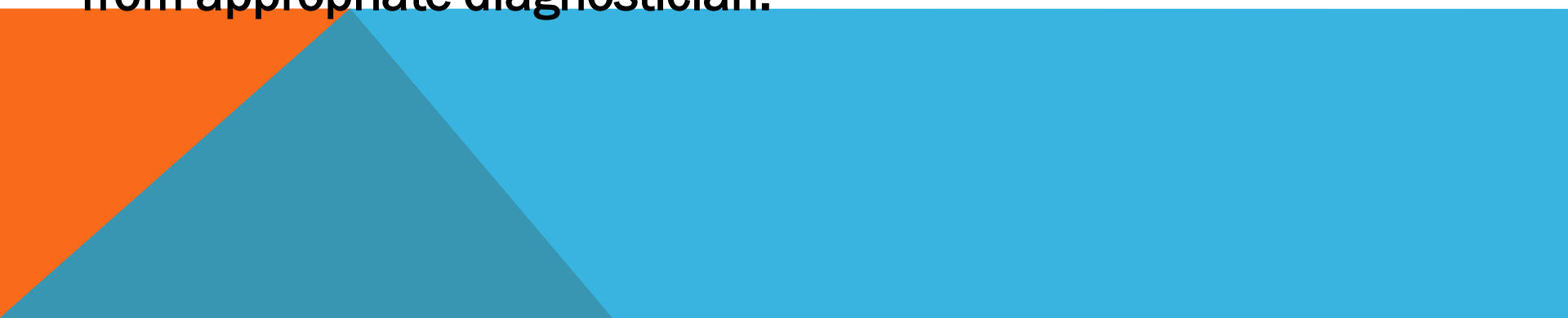
- When a client's capacity
 - to make *adequately considered decisions*
 - in connection with a representation
 - is diminished (because of minority, mental impairment or for some other reason)
 - the lawyer shall, as far as reasonably possible, maintain a normal client-lawyer relationship with the client.
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COMMENT 6

In determining the extent of client's diminished capacity, lawyer should consider:

- ability to articulate reasoning leading to decision;
- variability of state of mind and ability to appreciate consequences of decision;
- substantive fairness of decision; and
- consistency of decision with client's known long-term commitments/values.

“In appropriate circumstances, lawyer may seek guidance from appropriate diagnostician.



RULE 1.14(B): CLIENT WITH DIMINISHED CAPACITY

- When lawyer reasonably believes
 - client has diminished capacity;
 - client is at risk of substantial physical, financial or other harm unless action is taken; and
 - client cannot adequately act in own interest...
- Lawyer may take reasonably necessary protective action, including
 - consulting with individuals/entities that have ability to take action to protect client and
 - in appropriate cases, seeking appointment of GAL, conservator or guardian.

RULE 1.14(C): CLIENT WITH DIMINISHED CAPACITY

- Rule 1.6 protects information relating to representation of DC client
- When taking protective action, lawyer is impliedly authorized under Rule 1.6(a) to reveal information about the client, but only to extent reasonably necessary to protect client's interests.

RULE 1.6(A): CONFIDENTIALITY OF INFORMATION

Lawyer shall not reveal information relating to representation of client unless


- client gives informed consent
- disclosure is impliedly authorized to carry out representation or
- disclosure is permitted by para. (b)

RULE 1.6(B): CONFIDENTIALITY OF INFORMATION

Lawyer may reveal information relating to representation of client to extent lawyer reasonably believes necessary:

- (1) to prevent reasonably certain death or substantial bodily harm;
- (2) to reveal client's intention to commit a crime and information necessary to prevent the crime;
- (3) to prevent client from committing fraud reasonably certain to result in substantial injury to financial interests/property of another *and* in furtherance of which client has used or is using lawyer's services;
- (4) to prevent, mitigate or rectify substantial injury to financial interests or property of another that is reasonably certain to result/has resulted from client's commission of crime or fraud in furtherance of which client used lawyer's services;

RULE 1.6(B): CONFIDENTIALITY OF INFORMATION

- (5) to secure legal advice about lawyer's compliance with these Rules, other law or a court order;**
 - (6) to establish a claim or defense on behalf of lawyer in a controversy between lawyer and client, to establish a defense to a criminal charge or civil claim against lawyer based on conduct involving client, or to respond to allegations in proceeding concerning lawyer's representation of client; or**
 - (7) to comply with other law or court order.**
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RULE 1.4. COMMUNICATION

(a) Lawyer shall:

- (1) promptly inform client of any decision or circumstance requiring client's informed consent (See Rule 1.0(e));
- (2) reasonably consult with client about the means by which client's objectives are to be accomplished;
- (3) keep client reasonably informed about status of matter;
- (4) promptly comply with reasonable requests for information; and
- (5) consult with client about any relevant limitation on lawyer's conduct when lawyer knows that client expects assistance not permitted by Rules of Professional Conduct or other law.

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

WHAT NEXT?

Request evaluation?

Request appointment of GAL?

JDF 208

Payment? See CJD 04-05

Order of Appointment – JDF 209



WHO TO APPOINT?


CJD 04-05, Section III(B): Court shall maintain list of qualified persons to accept appointment as GAL.

CJD 04-05, Section VI: Attorneys shall possess knowledge, expertise, and training necessary to perform appointment and shall be subject to all rules and standards of legal profession.


- 10 hours CLE /other courses per CLE period relevant to appointment that enhance knowledge of issues.
- Proof of education, expertise, or experience must be on file with court at time of appointment.

DUTIES OF GALS APPOINTED OBO IMPAIRED ADULTS

CJD 04–5, Section VII:

- Diligently take steps deemed necessary to protect interests of person, consistent with order of appointment.
 - Perform all duties directed by court.
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REVIEW

- Tune in to indicators that litigant may be incompetent.
 - Lawyer/Client: Exercise caution to comply with Rule 1.14 regarding client with DC.
 - Lawyer/Client: Disclose confidential information only reasonably necessary to protect client's interests.
 - Lawyer/Client: To extent reasonably possible, maintain normal client-lawyer relationship (duty to communicate, duty of confidentiality, etc.).
 - Seek competency eval or GAL when warranted.
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THANK YOU FOR YOUR TIME!

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