

**CONTINUING LEGAL EDUCATION
FAMILY LAW SPRING UPDATE, APRIL 25, 2014**

SORENSEN ISSUES: REPRESENTING THE MENTALLY ILL OR EMOTIONALLY INCAPACITATED CLIENT IN SETTLING A DISSOLUTION OF MARRIAGE

A. The Issues and Questions

1. **Colorado Rules of Professional Conduct (CRPC), Rule 1.14**, sets forth the guidelines for attorneys representing a client under a disability, specifically permits the attorney to seek the appointment of a guardian ad litem when the attorney reasonably believes the client is unable to act in his or her own interests.
 - a. 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 reasonable possible, maintain a normal client-lawyer relationship with the client.
 - b. Not only can the mental, physical or other condition of the client impose additional responsibilities on the lawyer, the fact that a client is impaired does not relieve the lawyer of the obligation to obtain information from the client to the extent possible.
 - c. A lawyer may seek the appointment of a guardian or take other protective action with respect to a client only when the lawyer reasonable believes that the client cannot act in their own best interests.
 - d. Another protective action could be the lawyer's request for a competency evaluation from an appropriate diagnostician of the client.
2. How might concerns about a client's competence be brought to the attention of the client's attorney?
 - a. Concerning characteristics observed by the attorney.
 - b. Concerns brought to the attorney's attention by a third party, such as, the opposing counsel, the client's therapist, concerns expressed by a CFI or PRE.
3. What are the proper types of evaluations to address the client's competence in this circumstance?
 - a. First, a review of pertinent medical and psychiatric records.
 - b. A comprehensive psychological evaluation that might include a cognitive or neuropsychological evaluation.

- c. A comprehensive evaluation of the client's Functional Capacities/ Activities of Daily Living (ADLs)
- d. Psychiatric evaluation for medications

B. Necessary Distinctions Between Competency Evaluations and Medical, Psychological, Neuropsychological Evaluations, and Treatment Procedures:

1. In any type of competency evaluation, it is crucial to note and clarify the differences between the following three distinct categories: 1) various types of medical examinations and assessments by health care and treatment providers, 2) psychological and neuropsychological evaluations, and 3) competency evaluations that focus on a specific legal competency or capacity.
2. In the first two categories, various types of health care specialists and providers conduct medical examinations, evaluations, and assessments that are designed to identify the patient's problems and symptoms. Their findings will hopefully result in diagnoses that contribute to, if not determine the care and treatment they provide to the patient. Most often, in the first two categories, it is the patient who has initiated the contact with one or more health care providers based on medical complaints or questions regarding symptoms or problems they have experienced. The examinations, evaluations, and assessments are instigated because of the patient's symptoms, complaints, and/or questions. In these first two categories, the health care provider relies heavily on the patient's self-reports about their symptoms. In neuropsychological evaluations, the psychological tests utilized are designed to assess the individual's intellectual and neuro-cognitive abilities and how these abilities impact their functioning.
3. The third category, competency evaluations, employs forensic principles and strategies in the assessment of a client for the purpose of determining the individual's fitness or abilities to meet specific legal standards in the criminal, civil, or probate justice system. In competency evaluations, observations, structured interviews, information obtained from credible collateral sources, and specific forensic psychological testing instruments are utilized. Competency evaluations assess the individual's ability to understand and explain the concepts that pertain to the specific legal capacities in question. Many types of competency evaluations assess the client's adaptive and functional abilities by observing their ability to successfully demonstrate the necessary and required skills that define those specific legal capacities. A competency evaluation is designed to evaluate, draw conclusions, and often make recommendations, based on the referral questions that state the specific legal capacity or capacities that are to be evaluated. In competency evaluations, it is typically not the patient or client that initiates the referral but most often the referral is instigated by an attorney, a treatment provider, a family member, or the court to address questions about a client's specific legal capacities. In competency evaluations, the scope and purpose is defined in the Reason for Referral and that is the exclusive focus of the evaluation. Legal capacities identified in the Reason for Referral include questions regarding the client's Contractual Capacity, Testamentary Capacity, Decisional Capacity, and Functional/Adaptive Capacities. In criminal cases, Competence Stand Trial, Competence to Assist their Attorney, to Wave their 5th and 6th Amendment Rights, to be determined Insane, and Competence to be Executed are among the most common.

4. Most competency evaluations regarding an individual's Functional and Adaptive Capacities, i.e., their ability to satisfy essential requirements for physical health, safety, self-care, and to effectively manage their financial responsibilities, include the question of whether or not the individual meets the legal standard, specified in the *Colorado Revised Statutes*, under *Article 14, Persons Under Disability-Protection*, and particularly pursuant to C.R.S. §15-14-102(5). Incapacitated Person, who must meet the criteria under this Statute as a person in need of a guardianship and/or conservatorship. As a matter of fact, Colorado's Uniform Guardianship and Protective Proceedings Act ("CUGPPA"), which became effective January 1, 2001, has set forth a pragmatic definition of "incapacity" as the basis for guardianship and conservatorship proceedings. The CUGPPA statutory scheme requires evaluation of specific *functional* aspects of capacity and provides for the court-ordered evaluation of mental and physical conditions, educational potential, adaptive behavior, prognosis for improvement, and recommendations for rehabilitation. The law mandates qualifications for such an evaluator based on the statutory provision, "Professional Evaluation," pursuant to C.R.S. §15-14-306, in which the court requires that a physician, psychologist, or other individual is qualified to evaluate the individual's impairment specific to the legal capacity in question. This Statute specifies four elements that a Professional Report must contain. The CUGPPA effectively declares that the global opinions of health care providers are inadequate for this objective. CUGPPA set stringent legal requirements to make a finding that an individual is "Incapacitated" and needs the appointment of a guardian or conservator. For example, a doctor's summary report, or brief note on a prescription pad stating that an individual is not competent and needs a guardian is not sufficient.
5. In a competency evaluation, the forensic evaluator does not rely on the client's self-reports but places the most significance on direct observations of characteristics and abilities that relate to the capacities being evaluated. Other sources of data that are crucial in a forensic evaluation are the individual's personal circumstances, reports of credible collateral sources that are pertinent to the capacity or capacities in question, and information about the individual that would be considered 'facts of the case'. Another distinction between clinical practices and forensic psychological evaluations is; in clinical practice, the standards for rendering diagnoses, particularly those found in the *Diagnostic and Statistical Manual of Mental Disorders, Fourth Edition-TR (DSM-IV™)*, the *ICD-9-CM*, the *Diagnostic and Statistical Manual of Mental Disorders, Fifth Edition (DSM-5™)*[®] and the in the *ICD-10-CM* classification systems do not specify or require that credible verification must be confirmed. However, in forensic psychological evaluations, the standard of outside credible verification must be applied before a diagnosis in either of those classification systems can be stated.
6. It is important to note that in many competency evaluations; information from medical examinations, neuropsychological evaluations, and provider reports are relevant to the questions regarding an individual's competence; however, they do not, in and of themselves, answer the direct questions about the individual's legal competencies and capacities that are specified in the referral questions for a competency evaluation. When family members, attorneys, healthcare providers, and/or judges seek a competency evaluation to answer questions about an individual's competence relative to a specific legal capacity, a medical examination, a neuropsychological evaluation, or a physician's summary of their treatment and opinions about legal competencies cannot be used to

serve that purpose. Although certain information contained in a medical examination and in a neuropsychological evaluation may be relevant components of a capacity evaluation, they are far from sufficient to assist the court in making a determination about an individual's legal capacity or competence. Medical examinations, physicians' reports on their patients, and psychological or neuropsychological evaluations all lack the requisite of forensic/psychological principles applied to the functional and adaptive assessment that comprises the essence of a competency evaluation. In the absence of a forensic psychological assessment of the client's functional and adaptive skills and abilities that pertain to the legal competencies and capacities in question; it would be inappropriate to make any assumptions or to draw conclusions regarding whether a person could or could not demonstrate a specific legal capacity.

C. Psychological evaluations: Personality, cognitive, and neuropsychological

1. Personality testing: MMPI-2, MCMI-III, Rorschach
2. Cognitive testing: WAIS, Wechsler Memory Test, Cognistat (Neurobehavioral Cognitive Status Examination)
3. Neuropsychological testing

D. Competency evaluation of Functional Capacities/Activities of Daily Living (ADLs)

1. **C.R.S., Article 14—Persons Under Disability—Protection, §15-14-102(5)** Definition of "Incapacitated Person means an individual other than a minor, who is unable to effectively receive or evaluate information or both or make or communicate decisions to such an extent that the individual lacks the ability to satisfy essential requirements for physical health, safety, or self-care, even with appropriate and reasonably available technological assistance."
2. C.R.S., §15-14-306, Professional evaluation (Attached)
3. C.R.S., §15-14-115, Guardian ad litem (Attached)
4. C.R.S., §15-14-401, Protective proceeding (Attached)
5. C.R.S., §15-14-402, Jurisdiction over business affairs of protected person (Attached)
6. C.R.S., §15-14-403, Original petition for appointment or protective order (Attached)
7. C.R.S., §15-14-425.5, Authority to petition for dissolution of marriage or legal separation (Attached)

E. Evaluating Functional Capacities or Activities of Daily Living (ADLs)

1. *Anderten's Components and Subordinate Attributes for Caring for Self and/or One's Property"*
 - a. *Not Dangerous to Self or Others*
 - Absence of suicidal gestures

- Knows precautions to take to ensure personal safety—careful when alone, out at night, or carrying money
 - Values own life
 - Does not threaten others with physical harm
- b. *Ability to Acquire Minimum Amount of Money*
- Able to collect benefits—retirement, SS, Veterans benefits
 - Aware of agencies where could seek help if without money
- c. *Ability to Handle Emergencies*
- Knows what to do in the event of a fire
 - Knows what to do in case of medical emergency (doctor, ambulance)
 - Knows what to do in the event of natural disasters, such as tornado, earthquake, or flood
- d. *Ability to Compensate for Incapacities*
- Knows how to enlist the help of others to supply goods and services (repairmen, delivery services, housekeeper, nurse, community agents, lawyers, accountant)
 - Willing to enlist the help of others
- e. *Ability to Exercise Adequate Judgment*
- Able to evaluate the consequences of one's actions
 - Adequate awareness—in that individual needs can be assessed with regard to the situation
 - Capable of deciding on an appropriate plan of action in light of individual needs and the situation
 - Able to evaluate whether the plan of action is feasible in light of individual capacities
- f. *Ability to Take Care of Medical Needs*
- Able to follow doctor's orders—eating, sleeping, exercise, taking medication
 - Adequate awareness of body, realistic perception of health status
- g. *Ability to Maintain Proper Diet*
- Able to exercise safety in preparing foods—washes utensils, wary of sharp knives, careful with matches when lighting stove
 - Able to eat unassisted
 - Knows proper way to prepare food—refrigerates and cooks foods as required
 - Knowledge of special dietary needs

- Knows what to eat—rudimentary knowledge of nutrition
 - Able to prepare food unassisted—open cans, use stove
- h. *Adequate Mobility*
- Able to change position and reach for things in bed unassisted
 - Able to get out of bed and walk with assistance, or get out of bed and into a wheelchair with assistance
 - Able to use wheelchair unassisted
- i. *Adequate Communication Skills*
- Capable of understanding spoken language
 - Capable of communicating nonverbally—signing, if necessary
 - Understands use of the telephone—understands the concept of calling people
 - Capable of finding numbers and using the telephone to call people
 - Capable of speaking intelligibly
- j. *Ability to Manage Money Independently*
- Understands the need for money
 - Knows the value of money
 - Willing to spend money for necessary goods and services
 - Able to safeguard money—lock it up, utilize banks, invest
 - Wary of being cheated—counts change, checks bills, compares prices, keeps receipts
- k. *Adequate Personal Hygiene*
- Continent—able to go to the bathroom unassisted
 - Able to dress oneself
 - Knows what to wear—appropriately clothes in terms of weather and social norms (decency)
 - Knows bathing is important
- l. *Adequate Sensation*
- Able to visually distinguish people and placement of large pieces of furniture in room
 - Able to feel a hand touch skin on hand, arm, leg, and foot when eyes are closed so it cannot be seen
- m. *Motivation to Pursue Daily Life*
- Exhibits a positive attitude or outlook toward life—interested in living

n. *Adequate Memory*

- Remembers events occurring within the hour
- Remembers events of the present day
- Remembers events of the week such as major household duties attended to (shopping, laundry), personal needs (medication), visitors or visiting, major community, state or national events

F. Criminal Code

1. C.R.S., §16-8-102, Other definitions (Attached)
2. C.R.S., §16-8-103.5, Impaired mental condition - when raised - procedure - legislative intent (Attached)
3. C.R.S., §16-8-106, Examinations and report (Attached)
4. C.R.S., § 16-8.5-102. Mental incompetency to proceed - how and when raised (Attached)