Pursuing Justice for People with Cognitive Disabilities

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Partners in Justice dedicates this presentation to the memory of Deborah Greenblatt, Esq., a tireless advocate for people with disabilities and charter member of the Partners in Justice Advisory Committee.

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INTRODUCTION

Every day, North Carolina lawyers and their staff meet and serve persons with disabilities of body and mind. All people have the right to equal access to justice irrespective of individual variations in their ability to encounter, observe or comprehend the legal system. As lawyers, we are required to ensure competent and understandable legal advice and zealous representation to every client. A necessary first step is to educate ourselves about the special challenges to zealous representation we may face with some of our clients

One of the goals of the Partners in Justice Project, and of this presentation, is to improve communication between lawyers and judges and people with cognitive disabilities who encounter the court system as victims, witnesses, or criminal defendants. Many professionals in our justice system lack a basic understanding of mental retardation and related disabilities; and do not know of referral sources, training, and technical assistance to help people with cognitive disabilities obtain justice. Writing in 1992, Justice Exum described the problem as a "great need to know" about mental retardation, a problem his "eyes opened to" at an ABA meeting:

> "An ABA speaker eloquently described how it is almost impossible to accord people with mental retardation due process in our courts, although that is a constitutional guarantee for all of us. . . The judiciary has a need for more information, more knowledge, and more understanding. We need lawyers who understand the difficulties and can present rich, meaningful, and detailed evidence like that in [*State v*.] *Moore,* [321 N.C. 327, 364 S.E. 2d 648 (1988)] for the edification of both the trial court initially and the appellate court ultimately."[1]

The term cognitive disability is used to describe limitations in intellectual functioning and the way a person is able to adapt to various social and practical situations. People with mental retardation have cognitive impairments and deficits in adaptive behavior which may limit meaningful interactions with people in the justice system. We hope to help you learn how to recognize when a person has a cognitive disability, and then learn how to accommodate that disability so that, especially in the criminal process, due process is ensured.

The presence of cognitive disabilities raises many opportunities for miscommunication, misinformation and inadequate representation. Some communication difficulties may adversely affect the rights of persons with cognitive disabilities and the integrity and functioning of the judicial process, such as:

- Incriminating, but inaccurate "confessions" because the individual is confused or wants to please authority figures;
- Incompetence to stand trial;
- Inability to assist the defendant attorney; and

[1] *The Criminal Justice System And Mental Retardation Defendants And Victims* by Ronald W. Conley, Ruth Luckasson and George N. Bouthilet, published by Paul H. Brookes Co., Baltimore, MD. (1992), Chapter 1, Points of View, Perspectives on the Judicial, Mental Retardation Services, Law Enforcement and Corrections Systems.

- Unknowing waiver of rights in the face of required warnings.

Unfortunately, clients with cognitive disabilities may fail to understand the legal proceeding they are involved with *not* just because of their limited reasoning capacity, but also because their lawyers do not take the time to explain the different stages of the trial in a manner they can comprehend. Gaps of communication between attorney and client can lead to scenarios that are not merely unfair, but also present a serious risk of error. Lack of knowledge and training means that justice professionals often (a) fail to recognize the disability entirely; (b) confuse mental illness with mental retardation; (c) fail to grasp and convey the significance of the disability in the adjudication process; and (d) fail to provide appropriate accommodations from the time of arrest through adjudication, sentencing and rehabilitation.

The 1990 Census estimates between 6.2 and 7.5 million people in the U.S. have mental retardation. Studies suggest between 2 and 10 percent of the prison population has mental retardation. The classification *mental retardation* is the only one for which data is available. *Cognitive disabilities* include traumatic brain injury, acquired brain injury, Alzheimer's disease and other intellectual disabilities that occur after age 18. Therefore, the numbers of people with cognitive disabilities in the U.S. is far higher than the figures stated above. Chances are you already work with people who have cognitive disabilities. Your likelihood of successful representations will increase by learning how to recognize when a client might have a cognitive disability and how to accommodate that disability.

WHAT IS MENTAL RETARDATION?

Mental retardation is defined as follows:

- **Significantly sub-average general intellectual functioning,**
- An onset before 18 years, and
- Substantial limitations in **adaptive functioning.**

The first diagnostic criteria for mental retardation is **"significantly sub-average general intellectual functioning,"** as measured by an intelligence quotient (IQ) test.

> "Significantly sub-average" requires an IQ score of two standard deviations below the mean, or an IQ score of 70 or below. The average range is 90 to 109, with the average IQ score being 100.
>
> "General" intellectual functioning refers to measures of both verbal and non-verbal intelligence.
>
> The IQ test must be:
>
> - professionally accepted/scientifically recognized,
> - individually administered,

- standardized, and
- administered by a licensed psychiatrist or psychologist.[2]

Adaptive functioning refers to how effectively an individual copes with common life demands and how well he or she meets the standards of personal independence expected of someone in his or her particular age group, sociocultural background, and community setting. More specifically, adaptive behavior looks at the following skills and asks:

- *Communication:* Can a person participate in social conversations, understand and respond appropriately to verbal and/or written communications, and write or dictate items on an application?

- *Self-care:* Can a person perform all grooming and hygiene activities and select appropriate clothing for the occasion and weather without assistance?

- *Mobility:* Can a person get in and out of bed, transfer as needed, and get in and out of his/her place of residence independently and safely?

- *Capacity for independent living:* Can a person prepare healthy meals, perform housekeeping chores, be left alone for up to 24 hours, utilize community resources and self-medicate safely, without verbal reminders or physical assistance?

- *Learning:* Can a person acquire and retain new information in a reasonable amount of time and use the information to carry out functional activities in a variety of appropriate settings?

- *Self-direction:* Can a person establish and maintain personal relationships, make independent decisions, protect him/herself from exploitation or personal harm by others, initiate and follow through with a daily schedule and manage personal finances?

- *Economic self-sufficiency:* Can a person demonstrate appropriate skills required in an employment situation and use several approaches to finding a job?

A person with mental retardation has significant limitations in **at least two** of these adaptive skill areas, and often persons with mental retardation show limitations in many, if not all, of these areas.

[2] Several commonly used IQ tests are: the Wechsler Adult Intelligence Scale, the Weschler Intelligence Scale for Children, the Stanford-Binet Intelligence Scale, and the Kaufman Adult and Adolescent Intelligence Test.

Mental retardation and mental illness are often confused.

Mental retardation is not a disease or illness, but rather is a cognitive disability characterized by a limited ability to learn and difficulty processing information. **Mental illness** refers to medical conditions, symptoms of which vary among individuals but generally include disturbance of thought processes or emotions.

Mental Retardation is a lifelong, permanent condition which results in:

- below average intellectual functioning,
- slow thought processes, and
- difficulty learning.

In contrast, mental illness is a disease or illness that:

- may be temporary or episodic,
- is unrelated to intelligence, and
- affects moods and thoughts.

MILD MENTAL RETARDATION

A person with mild mental retardation may have no physical deformities and may converse normally. The term "mild" is often misleading, as mental retardation - regardless of its severity - has a profound impact on an individual's life. A person with mild mental retardation has substantial deficits in intellectual and adaptive skills and has academic skills approximating those of a **sixth grader**. Approximately 87% of people with mental retardation have mild mental retardation. Thus, the vast majority of people with mental retardation are not easily recognized as having a cognitive disability.

"Mild" is used to differentiate from persons with severe or profound mental retardation who cannot be left alone, but mild mental retardation still significantly impairs an individual's functioning. Other degrees of mental retardation, in order of increasing severity, are:

- Moderate: a person with moderate mental retardation has IQ scores ranging from 35-55 and may achieve a second grade educational level.

- Severe: A person with severe mental retardation has IQ scores from 20-50. As adults, most adapt well in group homes or continue to live with their families.

- Profound: A person with profound mental retardation has IQ scores below 20-25, lacks effective sensorimotor functioning and requires 24-hour supervision.

CHARACTERISTICS OF PEOPLE WITH COGNITIVE DISABILITIES

Many characteristics will set a person with a cognitive disability apart from his or her normally functioning counterparts. Although some may seem obvious at first glance, the severity of the characteristic is exacerbated by the level of cognitive disability. For example:

Inability to move from concrete to abstract thought: People with cognitive disabilities lack abstract thinking skills. Telling time, understanding the consequences of their actions or seeing another person's point of view is often difficult for them to grasp. Individuals may have incomplete or immature concepts of blameworthiness and causation and may be unable to distinguish between an incident resulting from culpable behavior and an unforeseeable accident resulting from a situation beyond an individual's control. A person with cognitive disabilities will always choose the concrete meaning of a word. The term "right," for example, will always mean "right vs. left" or "right vs. wrong" - not "right" as in legal entitlement, or write as in using a pen.

Abhorrence of the term "mental retardation": Few people with cognitive disabilities identify themselves as disabled when arrested. Instead, many individuals mask their disability to avoid the social stigma and shame associated with the label. A person with cognitive disabilities is an expert at reading body language and picking up cues from authority figures. To pass as "average," persons with mild cognitive disabilities often develop what experts call a "mask" or "cloak" of competence by:

- feigning comprehension when confused,
- overrating their own skills,
- learning street jargon, and
- mimicking the behavior of others.

Real memory gaps: Often, individuals with cognitive disabilities have short term memory deficits and may be unable to recall a question that was just posed to them. These memory gaps decrease the reliability and accuracy of responses. Inappropriate questioning techniques create a serious risk of biased responses.

Problems with expressive and receptive language: *Receptive* language deficits affect the ability to understand questions, whereas *expressive* language limitations create difficulties in verbalizing an answer. Often there is a large difference between the ability to understand and the ability to speak. People with cognitive disabilities can mimic expressive language although they may not understand what is being said.

Short attention span and eagerness to please: People with cognitive disabilities often display inappropriate behavior because they lack understanding of social norms, have shorter attention spans, and may act impulsively. Inability to focus attention and control impulses may also make it difficult for a person with cognitive disabilities to attend to questions, especially those that are complicated or sequential. People with cognitive disabilities are unusually susceptible to suggestion and to the perceived wishes of authority figures. They have learned that life is easier if they agree with whatever is being said.

CRIMINAL LAW ISSUES

These common characteristics of cognitive disabilities have significant effects on the criminal process and the rights of people with cognitive disabilities. For a defendant with

cognitive disabilities, many of the most important issues in the criminal justice system turn on the question of competence. Below we examine each of the areas in which competency issues are likely to arise in more detail.

Competency To Stand Trial

The N.C. Court of Appeals in *State v. McClain*, __ N.C. App. __, 610 S.E. 2d 783, 787 (N.C. App. 2005) recently restated the law regarding competency to stand trial in North Carolina:

> "N.C. Gen. Stat. 15A-1001(a) sets out the test for competency of a defendant to stand trial. The test is 'whether a defendant has capacity to comprehend his position, to understand the nature of the proceedings against him, to conduct his defense in a rational manner and to cooperate with his counsel . . .' *State v. Pratt*, 152 N.C. App. 694, 697, 568 S.E.2d 276, 278 (2002), *appeal dismissed and cert. denied*, 357 N.C. 168, 581 S.E.2d 442 (2003) (quoting *State v. Jackson*, 302 N.C. 101, 104, 273 S.E.2d 666, 669 (1981)). The defendant bears the burden of demonstrating he is incompetent. *Id*. If the trial court's findings of fact are supported by competent evidence, they are deemed conclusive on appeal. *Id*. Furthermore, the trial court's decision that defendant was competent to stand trial will not be overturned, absent a showing that the trial judge abused his discretion. *Id.* at 698, 568 S.E.2d at 279. Evidence that a defendant suffers from mental retardation is not conclusive on the issue of competency. See *id*. at 697, 568 S.E.2d at 278. A defendant need not be 'at the highest stage of mental alertness to be competent to be tried.' *Id*. at 697, 568 S.E.2d at 279 (citing *State v. Shytle*, 323 N.C. 684, 689, 374 S.E.2d 573, 575 (1989)."

If an attorney has a good faith doubt regarding the competency of their client, that attorney has an obligation to raise the question about his client's capacity. Likewise, if a judge has a *bona fide* doubt about a defendant's competency, the judge has an obligation to examine the question.[3] These obligations apply at all stages of the judicial proceeding.

Cognitive disabilities affect functioning in several ways that may render a defendant incompetent to stand trial:

- Due to receptive and expressive language deficits, a defendant may lack the communicative capacity to stand trial.
- Similarly, a limited vocabulary and low general intelligence may impair a defendant's ability to participate in trial preparation with his or her attorney.
- Often, persons with cognitive disabilities are unable to differentiate crucial from trivial aspects of testimony, which hinders their ability to assist counsel in developing strategy.
- Many persons with cognitive disabilities demonstrate a lack of ability for abstract reasoning and analytical thinking, crucial when attempting to consider legal defense

[3] N.C. Gen. Stat. 15A-1002; *State v. Staten*, ___N.C. App. ___, 616 S.E. 2d 650 (N.C. App. 2005) ("A trial court has a constitutional duty to institute, *sua sponte*, a competency hearing if there is substantial evidence that the accused may be mentally incompetent.")

strategies and choose between alternatives. It hinders the ability to offer suggestions or make counter-arguments and forces defendants to rely on others uncritically.

An unresolved issue is the degree of cognitive disability necessary for finding a defendant incompetent to stand trial. Courts tend to rely solely on IQ scores to determine whether a defendant has mental retardation and is incompetent and usually neglect to take adaptive functioning into account. Persons with IQ scores in the 50's are routinely found competent to participate in criminal proceedings.

The Difference Between The Competence To Stand Trial/ Enter A Guilty Plea, And A Voluntary And Knowing Waiver Of Rights

The Supreme Court case of *Godinez v. Moran*, 509 U.S. 389 (1993) is frequently cited to hold that there is no difference between the competence required to stand trial and the competence required to plead guilty:

> "In *Dusky v. United States*, 362 U.S. 402, 4 L. Ed. 2d 824, 80 S. Ct. 788 (1960) (per curiam), we held that the standard for competence to stand trial is whether the defendant has 'sufficient present ability to consult with his lawyer with a reasonable degree of rational understanding' and has 'a rational as well as factual understanding of the proceedings against him.' Ibid. (internal quotation marks omitted). Accord, *Drope v. Missouri*, 420 U.S. 162, 171, 43 L. Ed. 2d 103, 95 S. Ct. 896 (1975) ('[A] person whose mental condition is such that he lacks the capacity to understand the nature and object of the proceedings against him, to consult with counsel, and to assist in preparing his defense may not be subjected to a trial'). . .
>
> . . .*all* criminal defendants -- not merely those who plead guilty -- may be required to make important decisions once criminal proceedings have been initiated. And while the decision to plead guilty is undeniably a profound one, it is no more complicated than the sum total of decisions that a defendant may be called upon to make during the course of a trial. (The decision to plead guilty is also made over a shorter period of time, without the distraction and burden of a trial.) This being so, we can conceive of no basis for demanding a higher level of competence for those defendants who choose to plead guilty. If the *Dusky* standard is adequate for defendants who plead not guilty, it is necessarily adequate for those who plead guilty."

As noted by John T. Philipsborn in *Cover Story: Updating Approachs To Client Competence: Understanding The Pertinent Law And Standards Of Practice*, 29 Champion 12 (2005), "[t]he breadth of the abilities and capacities that the court attributes to a competent accused come as a surprise to numerous lawyers and mental health professionals:

> 'In sum, all criminal defendants -- not merely those who plead guilty -- may be required to make important decisions once criminal proceedings have been initiated . . . these decisions include whether to waive the privilege against self incrimination, whether to take the witness stand, whether to waive the right to trial by jury. . .whether to decline to

> cross-examine certain witnesses, whether to put on a defense, and whether to raise one or more affirmative defenses.' Godinez, 509 U.S. 389, 398."

Dr. Thomas Grisso has also noted that the *Godinez* Court included decision making abilities within the *Dusky* standard in his book Evaluating Competencies: Forensic Assessments And Instruments, (2d. ed.) Kluwer Academic Publishers (2003).

However, the *Godinez* Court also noted that a criminal defendant "may not waive his right to counsel or plead guilty unless he does so 'competently and intelligently,' *Johnson v. Zerbst*, 304 U.S. 458, 468, 82 L. Ed. 1461, 58 S. Ct. 1019 (1938); accord, *Brady v. United States*, 397 U.S. 742, 758, 25 L. Ed. 2d 747, 90 S. Ct. 1463 (1970)." *Id*. at 396.[4] Therefore, the Supreme Court held, **a two-part process is required before a guilty plea may be accepted**:

> "A finding that a defendant is competent to stand trial, however, is not all that is necessary before he may be permitted to plead guilty or waive his right to counsel. In addition to determining that a defendant who seeks to plead guilty or waive counsel is competent, a trial court must satisfy itself that the waiver of his constitutional rights is knowing and voluntary. *Parke v. Raley*, 506 U.S. 20, 28-29, 121 L. Ed. 2d 391, 113 S. Ct. 517 (1992) (guilty plea); *Faretta,* supra, at 835 (waiver of counsel). **In this sense there is a "heightened" standard for pleading guilty and for waiving the right to counsel, but it is not a heightened standard of competence."**

Id. at 401. (emphasis added.)

The Supreme Court explained the difference between the "competency" inquiry and the "knowing and voluntary" inquiry in note 12 of the *Godinez* opinion:

> "The focus of a competency inquiry is the defendant's mental capacity; the question is whether he has the *ability* to understand the proceedings. See *Drope v. Missouri*, supra, at 171 (defendant is incompetent if he "lacks the *capacity* to understand the nature and object of the proceedings against him") (emphasis added). The purpose of the 'knowing and voluntary" inquiry, by contrast, is to determine whether the defendant actually *does* understand the significance and consequences of a particular decision and whether the decision is uncoerced. See *Faretta v. California*, supra, at 835 (defendant waiving counsel must be 'made aware of the dangers and disadvantages of self-representation, so that the record will establish that 'he knows what he is doing and his choice is made with eyes open') (quoting *Adams v. United States ex rel. McCann*, 317 U.S. 269, 279, 87 L. Ed. 268, 63 S. Ct. 236 (1942)); *Boykin v. Alabama,* 395 U.S. at 244 (defendant pleading guilty must have "a full understanding of what the plea connotes and of its consequence)."

A panel of the N.C. Court of Appeals noted this distinction in a 2004 unpublished opinion: "In *Godinez v. Moran*, . . .the Supreme Court explained the difference between

[4] *Brady v. United States*, 397 U.S. 742 (1970) ("Waivers of constitutional rights not only must be voluntary but must be knowing, intelligent acts done with sufficient awareness of the relevant circumstances and likely consequences.")

competency to stand trial and competence to plead guilty or waive counsel.. ." *State v. Cassell*, 2004 N.C. App. LEXIS 35 (N.C. Ct. App. Jan. 6, 2004)*, review denied*, 593 S.E.2d 784, 2004 N.C. LEXIS 327 (N.C., Mar. 4, 2004). See also *Simpson v. Polk*, 129 Fed. Appx. 782, 2005 U.S. App, LEXIS 6974 (4th Cir. 2005).

Waiving Miranda Rights

The behavioral characteristics of people with cognitive disabilities generally undermine their ability to enter voluntary, knowing and intelligent waivers. Although the person with a cognitive disability may sign a statement that they have read and understood the Miranda warning, they usually fail to understand their rights – or even that they have rights – and therefore do not know what it means to waive them.

Due to limited cognitive and linguistic abilities, a suspect with cognitive disabilities may have difficulty comprehending the concepts and vocabulary contained in the warning. Thus, persons with cognitive disabilities may not realize that a waiver of rights involves possible self-incrimination. Studies have found the Miranda warning to be at a seventh grade level of reading and listening difficulty; and, as mentioned previously, even persons functioning at the mildest end of mental retardation, with IQs around 70, may have a reading level of sixth grade or below.

The Miranda warning raises a host of issues in cases involving persons with cognitive disabilities. Attached to this manuscript is "Debbie's Words", a list of important words used in the Miranda warning and what they meant to a person with an I.Q. of 62. To meet the knowing and intelligent standard, the defendant must understand the vocabulary and concepts related to the waiver. For this reason, a defendant's reading level and language skills are significantly related to competency to waive this right. Attorneys should ascertain their client's reading level, linguistic abilities and intellectual functioning.

In North Carolina, subnormal mental capacity is one factor to be considered when determining whether a knowing and intelligent waiver of rights has been made. *State v. Jones*, 153 N.C. App. 358, 366, 570 S.E.2d 128, 135 (2002) (quoting *State v. Fincher*, 309 N.C. 1, 8, 305 S.E.2d 685, 690 (1983)); see also *State v. Massey*, 316 N.C. at 575, 342 S.E.2d at 821 (mildly mentally retarded 18-year-old defendant with a mental age of ten or eleven gave voluntary confession); *State v. Thompson,* 287 N.C. 303, 319, 214 S.E.2d 742, 752 (1975) (finding a 19-year-old defendant with an I.Q. of 55 capable of waiving his rights). With persons with mental retardation, our Courts "pay particular attention to the defendant's personal characteristics and the details of the interrogation." *State v. Brown,* 112 N.C. App. 390, 396, 436 S.E.2d 163, 167 (1993), aff'd, 339 N.C. 606, 453 S.E.2d 165-66 (1995). [5]

[5] The Court in *Tennessee v. Blackstock*, 19 S.E. 3d 200 (2000) noted that Miranda decisions involving defendants with mental retardation tend to be fact specific, and that courts have considered: "the defendant's age, background, level of functioning, reading and writing skills, prior experience with criminal justice system, demeanor, responsiveness to questioning, possible malingering, and the manner, detail, and language in which the Miranda rights are explained." Note 4 in this case is a collection of cases regarding waivers from persons with mental retardation.

False Confessions

These same characteristics are also related to an increased incidence of false confessions by persons with cognitive disabilities. The unusual susceptibility of persons with cognitive disabilities, combined with the propensity to acquiesce to people in authority, makes the voluntary aspect of confessions especially important, as such persons are:

- more likely to respond to coercion and pressure than the average individual, increasing the likelihood that a confession is not truly voluntary;
- highly suggestible to leading questions and false information provided by accusers, and
- particularly vulnerable to an atmosphere of threats and coercion, as well as one of friendliness, designed to induce cooperation and confidence.

Incomplete concepts of blameworthiness and culpability, combined with a strong desire to please others, particularly those in authority, may lead persons with cognitive disabilities to assume blame in an attempt to please their accuser or escape the situation. Chief Justice Exum found these characteristics relevant in *State v. Moore*, 321 N.C. 327, 364 S.E. 2d 648 (1988), where the issue was whether an indigent defendant with an IQ of 51 had a constitutional right under *Ake v. Oklahoma* to psychiatric assistance to dispute the voluntaries of his confession. In holding that the trial court erred, Chief Justice Exum made the following observations about people with mental retardation and confessions:

> "Through the detailed testimony of a forensic psychiatrist, defendant demonstrated that he is 'easily led and easily influenced' by those exercising authority. Family and friends testified to the same effect. Through these same witnesses defendant demonstrated he is unable to understand subjects with the least decree of complication, this indicating that defendant very well may not have grasped the implications of that he was saying in his inculpatory statement.
>
> The retarded are particularly vulnerable to an atmosphere of threats and coercion, as well as to the friendliness designed to induce confidence and cooperation. A retarded person may be hard put to distinguish between the fact and the appearance of friendliness. If his life has been molded into a pattern of submissiveness, he will be less able than the average person to withstand normal police pressures. Indeed they may impinge on him with greater force because of their lack of clarity to him, like all unknowns, renders them more frightening. Some of the retarded are characterized by a desire to please authority: if a confession will please, it may be gladly given. 'Cheating to lose,' allowing others to place blame on him so that they will not be angry with him, is a common pattern among the submissive retarded. . . President's Panel on mental Retardation Report of the Task Force on Law 33 (21963). See also Ellis & Luckasson, Mentally Retarded Criminal Defendants, 53 Geo. Wash. L. R. 414, 451-52 (1985).
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> Research reveals 'that even when a mentally retarded suspect's responses appear normal, his answers may not be reliable. . .' [M]any people with mental retardation are predisposed to 'biased responding' or answering in the affirmative questions regarding

behaviors they believe are desirable, and answering in the negative questions concerning behaviors they believe are prohibited. The form of a question can also directly affect he likelihood of receiving a biased response. . .' Ellis and Luckasson, [supra.] . . . Responses by the mentally retarded to 'yes-no' questions posed by person in authority present special problems. According to one study, the danger of response bias in this situation is so great that questioners should abandon altogether the use of 'yes-no' questioning techniques.

Expert testimony could 'alert the court to the possibility that defendant's affirmative responses to Detective Crawford's questions were more the product of fear and a desire to please than an intelligent weighing of the choices before him.'"

Considerations Regarding Plea Bargaining

Modern criminal justice systems depend on a substantial number of plea bargains to function smoothly, and, for many defendants, plea bargaining is the best choice for reducing their sentence. Thus, in the modern system there exist numerous incentives for parties to plea bargain to avoid trial. A plea of guilty must be knowingly and voluntarily entered, since it involves a waiver of a number of the defendant's constitutional rights. A plea is involuntary if the defendant does not understand the nature of the constitutional protections that are being waived, or if the defendant does not have a complete understanding of the consequences of the plea. Given the communication difficulties of persons with cognitive disabilities, they are susceptible to entering guilty pleas when they have little or no understanding of the terms involved or the consequences at stake. They have an inherent inability to make cost/benefit analyses.

The imperfect match between competence to stand trial and competence to plead guilty is a problem. There are likely to be a number of defendants with cognitive disabilities who have memory of the relevant events, can communicate with counsel, understand the proceedings of the trial, and are therefore competent to stand trial, but who nevertheless are incapable of weighing the choices necessary to enter a guilty plea.

The question of competence to stand trial is quite different from an inquiry into the defendant's appreciation of the consequences of entering a guilty plea and the defendant's ability to assess its desirability in his own unique circumstances. Defendants with cognitive disabilities have difficulty comprehending the notion of long-term consequences and must be made to understand that once a plea is entered, they cannot change their minds later. Thus, the attorney must take special care to explain such matters carefully, thoroughly and understandably.

The ultimate decision to enter a plea of guilty raises additional issues of client autonomy. The attorney must ascertain whether the client has made a truly voluntary and reasoned choice among alternatives, or whether the attorney is substituting his own choice about the best course of action in an attempt to compensate for his client's limited reasoning ability -- has the client agreed to plead guilty simply because the attorney suggested it, out of an eagerness to please authority figures or a reluctance to admit confusion?

Sentencing

In *Atkins v. Virginia*,536 U.S. 304 (2002), the Supreme Court ruled it is a violation of the 8th Amendment to execute mentally retarded persons. This was in part based on the characteristics of persons with mental retardation that reduce their culpability:

> "Mentally retarded persons frequently know the difference between right and wrong and are competent to stand trial. Because of their impairments, however, by definition they have diminished capacities to understand and process information, to communicate, to abstract from mistakes and learn from experience, to engage in logical reasoning, to control impulses, and to understand the reactions of others. n23 There is no evidence that they are more likely to engage in criminal conduct than others, but there is abundant evidence that they often act on impulse rather than pursuant to a premeditated plan, and that in group settings they are followers rather than leaders. n24 **Their deficiencies do not warrant an exemption from criminal sanctions, but they do diminish their personal culpability."**

Id. at 318. (emphasis added.)

Judges and Magistrates have expressed to PIJ staff a "need to know" about defendants with mental retardation that come before them. Mitigating factor No. 4 under the Structured Sentencing Act applies when the defendant's limited mental capacity significantly reduces the defendant's culpability for the offense. N.C. Gen. Stat. 15A-1340.16(e)(4). "Extraordinary mitigation" is allowed under certain circumstances pursuant to N.C. Gen. Stat. 15A-1340.13(g), permitting an intermediate punishment when usually an active punishment would be required.

COMMUNICATING WITH YOUR DISABLED CLIENT

People with disabilities often have special communication needs and accommodations must be made in order to communicate effectively. A disability expert can be valuable in educating attorneys, judges, juries and others about the affects of the disability. These tips are good interview techniques to be used when questioning or interviewing anyone, regardless of disability. It is critical, however, to pay attention to these when speaking with a person with a cognitive disability who may not understand the word or the meaning of the word as it is being used.

- Ask the person to read something out loud – a form, perhaps. Difficulty reading can be the first sign that the person may have a cognitive disability.

- If a person automatically answers in the affirmative when asked if he/she understands what you are saying, ask him/her to repeat back to you what you just said.

- A person with a cognitive disability is an 'expert' at reading body language and non-verbal signals and will often try to give the answer he/she thinks the questioner wants.

- Modify your language and manner of questioning.

    - Avoid legal jargon. For example, rather than asking, "Were you coerced?", ask, "Did someone scare you?"
    - Simplify your language - divide complex ideas into subparts, and give explanations in "bite-size chunks".
    - Ask open-ended questions, avoiding "yes" or "no" questions and leading questions.
    - Rather than asking, "Do you understand?" have the person repeat in his/her own words what he/she understands, and do so periodically - do not wait until the end of a 20 minute explanation to determine the person's comprehension.
    - Allow the person extra time to process questions/comments.

Other simple exercises to ascertain the client's academic knowledge and thinking processes include:

- Requesting to see the client's driver's license – an individual with mental retardation may have the skills to drive but not those necessary to obtain a license.
- Ask for the client's address and telephone number - difficulty recalling basic personal information is an indicator of cognitive disabilities.

ETHICAL CONSIDERATIONS

Risks of inadequate representation increase when the client has cognitive disabilities. Therefore, N.C. Rules as well as the ABA Model Rules now include 1.14: Client under a Disability. The rule for this special category of client was necessary because clients with cognitive disabilities may be unable to monitor the attorney's performance, and studies have found that attorneys spend less time interviewing clients with cognitive disabilities than other clients. In addition, the tendency of attorneys to usurp decisions that should be left to the client increases when the client has cognitive disabilities.

Pursuant to the model rules, a lawyer must maintain a "normal" relationship with client as far as reasonably possible and make special efforts to accommodate the needs of the client, which includes ensuring that the client understands the consequences of his/her decisions.

Attorneys face a dilemma when representing a client with cognitive disabilities. They must use their best professional judgment to balance between accommodating the autonomy of individuals with disabilities by allowing them to make their own decisions affecting their lives, and protecting individuals with cognitive disabilities from the adverse consequences of potentially unwise, ill-informed, or incompetently made decisions.

RULE 1.14: Client with Diminished Capacity

Rule 1.14: *Client with Diminished Capacity* provides some guidance about how to represent a client with diminished capacity. [6] The rule's first command is that the lawyer should "as far as reasonably possible, maintain a normal client-lawyer relationship with the client." [7] Comment 1 to the Rule notes that "[t]he normal client-lawyer relationship is based on the assumption that the client, when properly advised and assisted, is capable of making decision about important matters, [and that] a client with diminished capacity often has the ability to understand, deliberate upon, and reach conclusions about matters affecting the client's own well-being." Often however, achieving that "normal" relationship will require additional effort on the part of an attorney to represent a person with diminished capacity.

Comment 2 directs the client with diminished capacity should be treated with attention and respect. The normal attorney client relationship requires the lawyer to make sure the client understands the legal issues so the client can make meaningful decisions. With a client who has diminished capacity, the lawyer has a heightened duty to try to communicate so as to allow the client to decide the scope and objectives of the representation. Lawyers should be clear from the beginning who the client is and of the ethical implications of that relationship in terms of loyalty, confidentiality, and decision making. Meeting one-on-one with the client during the initial interview will help define the parameters of the relationship, as well as provide an opportunity, if necessary, to assess capacity.

There is no universal definition of "decision making capacity." The Comments to the Rule do not provide explicit help, but rather offer a laundry list of factors to "consider and balance" when determining the extent of the client's diminished capacity, including: "the client's ability to articulate reasoning leading to a decision, variability of state of mind and 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."[8] Comment 6 gives the lawyer the option of seeking guidance from an appropriate diagnostician.

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[6] As one commenter noted, the Rule is "laudable because it recognizes the rights of a client with a mental disability and requires that a lawyer maintain a traditional attorney-client relationship with such clients," but "the rule fails to provide much guidance to lawyers in carrying out this endeavor." See "I'm OK-*You're OK" Educating Lawyers To "Maintain A Normal Client-Lawyer Relationship" With A Client With A Mental Disability*. David A. Green, The Journal of the Legal Profession, Vo. 28, p.65 (2003-2004).

[7] Rule 1.14 (a): "When a Client's capacity to make adequately considered decision in connection with a representation is diminished, where because of minority, mental impairment or for some other reason, the lawyer shall as far as reasonably possible maintain a normal client-layer relationship with the client."

[8] The articulation of decision making capacity reached in the medical field by the President's Commission for the Study of Ethical Problems in Medicine and Biomedical and Behavioral Research includes, 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. Vol.1, Report: *Making Health Care Decisions: The Ethical and Legal Implications of Informed Consent in the Patient-Practitioner Relationship* 57 (1982). Another approach is a "functional approach," which recognizes that the capacity of a person varies over time with each decision. Another suggestion for a more objective approach is a basic orientation test to determine if the client is capable of understanding time, date, and place.

Rebecca C. Morgan, in her article *Clients with Diminished Capacity*, 16 Journal of the American Academy of Matrimonial Lawyers 463 (2000), notes that capacity deserves to be judged under the best circumstances possible, and suggests ways a lawyer might optimize capacity. She suggests adjusting the interview environment to enhance communication. Speak slowly in a quite well lit area. Be willing to spend extra time explaining the nature and consequences of options. Resist the temptation to equate the speed of the client's ability to process information with a level of capacity – the speed of cognitive processing may not be what you are accustomed to, but given more time, clients may be able to understand the nature and consequences of options. Meet a client more than once to acquire a truer sense of the client's decision making capacity. As a client's comfort level increases and there is greater confidence and trust in the attorney, the client's ability to function optimally is enhanced. Repeated meetings also allow the attorney to observe the client at different times when additional factors impacting capacity can be evaluated (time of day, length of meeting, fatigue, etc.)

Comment 3 recognizes that the client may wish to have family members or other persons participate in discussions with a lawyer. It states that "when necessary to assist in the representation, the presence of such other persons generally does not affect the applicability of the attorney-client evidentiary privilege." The Comment restates that the lawyer is to look to the client, and not family members, to make decisions about the representation. A lawyer should be careful that family members, possibly guided by their own interests, do not make decisions on the client's behalf.

Sometimes, clients have a legal representative who can make decisions on the client's behalf. Comment 4 to our Rule states that "[i]f a legal representative has already been appointed for the client, the lawyer should ordinarily look to the representative for decisions on behalf of the client." North Carolina has *limited* guardianships as well as general guardians, guardian of the person, and/or guardian of the estate. The lawyer should check the legal documents to determine what the nature of the legal representative is. See: N.C. Gen. Stat. 35A, *Incompetency and Guardianship*.

Rule 1.14 recognizes that there may be situations in which a normal client-lawyer relationship is impaired, or, perhaps, impossible, because of a client disability. Rule 1.14(b)[9] grants a lawyer additional flexibility 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 the client cannot adequately act in the client's own interest. Rule 1.14(b) permits the client-lawyer relationship to continue and authorizes the lawyer to initiate protective action appropriate to the circumstances, 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 or guardian." Comment 5 suggests some "protective measures" including:

[9] Rule 1.14 (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 or guardian."

- 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.

Further, "in taking 'protective measures' the attorney should be guided by 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." [10] (emphasis added.) Comment 7 cautions that "in many circumstances . . . appointment of a legal representative may be more expensive or traumatic for the client than circumstances in fact require. . . In considering alternatives. . . the lawyer should be aware of any law that requires the lawyer to advocate the *least restrictive action* on behalf of the client." Both the *Olmstead v. Zimring,* 527 U.S. 581 (1999) decision of the U.S. Supreme Court and the American with Disabilities Act of 1990, 42 U.S.C. S 12131, require least restrictive alternatives be pursued, and this should be a guiding principle for the lawyer.

Ordinarily, Rule 1.6 protects information relating to the representation from disclosure and unless authorized to do so, the lawyer may not disclose such information. Rule 1.14(c)[11] addresses this dilemma and states that "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." Comment 8 states that the lawyer may make necessary disclosures when taking protective action *even* when the client directs the lawyer to the contrary. *Permitting consultation outside of the attorney-client relationship is a legally significant addition to the Rules because it explicitly allows an attorney to reveal confidences without the client's consent and authorizes the attorney to act on behalf of the individual without his or her permission*.

The Comments also address an emergency situation where the health, safety or financial interest of a person with "*seriously* diminished capacity" is threatened with imminent and irreparable harm and the attorney is consulted by the person or one acting in good faith on the person's behalf. In this situation a lawyer may take legal action on behalf of the person even if no client-lawyer relationship is established so long as the attorney reasonably believes that no other lawyer, agent or representative is available. The Comment directs that action taken in this circumstance should be limited to that necessary to maintain the status quo or otherwise avoid imminent and irreparable harm.[12]

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[10] N.C. Rule of Civil Procedure 17 should be reviewed where there is a question about the capacity of a party to bring or defend litigation.

[11] Rule 1.14(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."

[12] Comment 9, *Emergency Legal Assistance*.

Conclusion

The threshold problem is identification of a person's disability. Too often, criminal justice professionals lack training causing them to miss signs of cognitive disabilities or to attribute those signs to a lack of education.

It is important for the attorney to identify any disability as early as possible. At the initial meeting, a lawyer should take the opportunity to measure the client's cognitive ability. If the lawyer suspects that a client has cognitive disabilities, the attached Assessment Form may be used as a pre-screening tool. It is important to remember, however, that only a mental health professional may diagnose cognitive disabilities. [13]

[13] Many other cognitive disabilities have organizations for family members, professionals or advocates for people with the specific disability.

- NC Autism Society
- NC Alzheimer's Association
- Muscular Dystrophy Association
- NC Chapter of the National Association for the Mentally Ill

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"Effectively Communicating with Offenders with Handicaps" © 1990, 1993, 1996, 1997 by the Research Foundation of the State University of New York, College at Buffalo

"First Response to Victims of Crime Who Have A Disability" © 2002. Office for Victims of Crime

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"Pathways To Corrections Future: NC Department of Correction Strategic Development Plan 1998-2020", March 1998

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"In Pursuit of Justice: A Report on the Justice System's Response to People with Developmental Disabilities" April 1994 – Report from the Council on Developmental Disabilities sponsored Justice Task

"Justice System Needs Assessment Task Force" A Needs Assessment of the Criminal Justice System (in North Carolina) with Regard to Individuals with Developmental Disabilities – December 1993

"Report to the President: Citizens with Mental Retardation and the Criminal Justice System © 1991, Presidents Committee on Mental Retardation

"Assisting Victims and Witnesses with Disabilities in the Criminal Justice System: A Curriculum for Law Enforcement Personnel" © 2002 produced by End the Silence – A Project of National Significance at The Institute on Disabilities, Pennsylvania's University Center for Excellence at Temple University.

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"Understanding Mental Retardation: Training for Law Enforcement (1998)"The Arc of the United States.

"Stay Safe and Right Rules" –© 1998 The National Advisory Group for Justice and Back to Life – Administration on Developmental Disabilities

"JUSTICE NOW! Criminal Justice/Human Service Training Curriculum" © 1998 ARCIL, Inc. & Back to Life, A project of National Significance from the Administration on Developmental Disabilities.

Seattle Police Department in-service training material for officers encountering individuals with developmental disabilities.

ASSESSMENT FORM

DURING THE INTERVIEW:

- Speak directly to the person. Make eye contact before you speak and say his/her name often.
- Keep sentences short.
- Use simple language. Speak slowly and clearly.
- Break complicated instructions or information into smaller parts.
- Be patient and take time giving or asking for information.
- Treat adults as adults regardless of their disability.
- If you are unsure if the person really understands what you are saying, ask him/her to repeat it in his/her own words.
- If the person does not seem to understand what you are asking, ask the question in another way.

REMEMBER THESE KEY CHARACTERISTICS OF MENTAL RETARDATIOIN:

- The inability to move from abstract to concrete thought. Most people can move from concrete to abstract thinking without effort. For people with MR, this is often difficult, if not impossible. If a word has both a concrete and an abstract meaning, the person will say they understand, referring to the concrete meaning, even when you are using the abstract meaning, for example: wave vs. waive.

- Abhorrence for the term "mental retardation." The hurt and stigma associated with this term is strong. People will deny having mental retardation, even when it is against their best interest.

- Real memory gaps. Memory impairment is a basic symptom of brain damage. People with mental retardation are more likely to have memory gaps than others.

- Problems with receptive and expressive language. Often a large difference between ability to understand and ability to speak exists. People with mental retardation can mimic expressive language even though they have minimal understanding of what is being said. They may pick the wrong meaning of a word that can be used in different contexts, e.g. "right" could mean:
  - right / wrong
  - right / left
  - having rights
  - knowing how to write.

- Short attention span. Like memory gaps, people with mental retardation are more likely to have difficulty staying focused.

- Eagerness to please. People with mental retardation do not communicate on equal footing. They have learned that life is easier if they say "yes" to people seen to be authority figures.

HISTORY QUESTIONS

1. Did you ever attend special classes in school?
   Yes_____ No_____Comment:_____
2. Have you ever received Mental Health or DD services?
   Yes_____ No_____Comment:_____
3. Do you get any kind of social security check?
   (SSI=blue envelope; SSDI = brown envelope)
   Yes_____ No_____ Comment: _____
4. Did you ever participate in Special Olympics? Yes_____ No_____
   Comment:_____
5. Have you ever had a job? Yes_____ No_____
   Where?_____
   How many hours per day/week, Comment:_____
6. Do you ever hear voices or see things other people don't see or hear?
   Yes_____No_____Comment:_____

RESPONSE QUESTIONS

7. Where are you now?
   Correct_____Incorrect_____Doesn't know____
   Comment:_____
8. What season is this?
   Correct_____Incorrect_____ Doesn't know____
   Comment:_____
9. How many months are there in a year? Correct_____ Incorrect_____ Doesn't know__
   Comment_____
10. What does "Waive your rights" mean? Correct_____
    Incorrect_____ Doesn't know_____
    Comment_____
11. What is the difference between a plea of "guilty" and a plea of "not guilty"?
    Correct_____ Incorrect_____ Doesn't Know_____
    Comment:_____
12. What does it mean to "serve time"?
    Correct_____ Incorrect_____ Doesn't know_____
    Comment:_____
13. How many minutes are there in one and one and a half hours?
    Correct_____ Incorrect_____ Doesn't know_____
    Comment:_____
14. Explain to me what "rights' are. Correct____Incorrect___ Doesn't know____
15. Explain how a lawyer can help you. Correct___Incorrect___Doesn't know___
16. Explain why you don't have to talk to me. Correct_____ Incorrect_____
    Doesn't know_____
17. Ask the individual to identify the following coins as you put them on the table: Nickel,
    Quarter, Penny, Dime. Correct:_____ Incorrect_____

18. Ask the person to identify the coin worth the most and the coin worth the least.
    Correct_____ Incorrect_____
19. Ask the person to write the following after you say it: "Call mom at home."
    Correct_____ Incorrect_____
20. Set out two quarters, three dimes, four nickels and seven pennies. Ask the person to count out $.86. Correct_____ Incorrect_____
21. Ask the person to read the following: "Go to the store and buy bread, milk and sugar.
    Correct_____Incorrect_____.

OBSERVATION QUESTIONS

22. Does the person act or talk in a strange manner? Yes_____No_____
23. Does the person seem unusually confused or preoccupied? Yes_____ No_____
24. Is the person's speech hard to understand? Yes_____ No_____
25. Does the person's vocabulary seem limited? Yes_____ No_____
26. Does the person have difficulty expressing him/herself?
    Yes_____ No_____
27. Is the person's appearance unkempt or inappropriate for the weather? Yes_____
    No_____

Other
Comments:_____
_____
_____
_____
_____
_____
_____
_____

Choosing Words the "People-first" Way

In choosing words about people with disabilities, the guiding principle is to refer to the person first, not the disability. Instead of saying "the disabled," it is preferable to say "people with disabilities." Putting the word "people" first places emphasis on the person instead of the disability. The disability is no longer the primary, defining characteristic of an individual but merely one aspect of the whole person. It is still all too common in our society to come across labels for disabilities that either have negative connotations or are misleading. For this reason, some words should be completely avoided, such as: afflicted, bleeder, crazy, defective, deformed, invalid, lame, maimed, pitiful, retard, spastic, unfortunate. All of these words devalue the person they attempt to describe. Avoid them when speaking to or about persons with disabilities. Here are some suggestions on how to incorporate people-first language into your written and verbal communications.

AVOID: "afflicted with" a particular condition, such as polio or multiple sclerosis
USE: "someone who had polio" or "person with multiple sclerosis"

AVOID: crippled, confined to a wheelchair, wheelchair bound, wheelchair user
USE: person with a physical disability, person who uses a wheelchair

AVOID: deaf and dumb, deaf mute
USE: person who does not hear or hear well, person who does not speak, person who uses an alternative communication device. Note: Many people who are deaf advocate for the term "deaf person" to symbolize the pride they feel as part of the deaf community.

AVOID: epileptic
USE: person with epilepsy, person with a seizure disorder

AVOID: cerebral palsied, spastic
USE: person with cerebral palsy

AVOID: stricken with..., a victim of ..., suffering from ...
USE: person with ...

AVOID: mongoloid
USE: person with Down syndrome

AVOID: handicapped person, the handicapped, handicapped
USE: person with a disability, people with disabilities

AVOID: physically challenged, intellectually challenged, retarded
USE: person with a disability, people with intellectual disabilities

AVOID: brain injured person, brain dead, "not right", "off a little", "not cooking on all burners"
USE: survivor of a brain injury, person with a brain injury, person who has sustained a brain injury

North Carolina Rule of Professional Conduct 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, 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 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.

Comment

[1] 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. When the client is a minor or suffers from a diminished mental capacity, however, maintaining the ordinary client-lawyer relationship may not be possible in all respects. In particular, a severely incapacitated person may have no power to make legally binding decisions. Nevertheless, a client with diminished capacity often has the ability to understand, deliberate upon, and reach conclusions about matters affecting the client's own well-being. For example, children as young as five or six years of age, and certainly those of ten or twelve, are regarded as having opinions that are entitled to weight in legal proceedings concerning their custody. So also, it is recognized that some persons of advanced age can be quite capable of handling routine financial matters while needing special legal protection concerning major transactions.

[2] The fact that a client suffers a disability does not diminish the lawyer's obligation to treat the client with attention and respect. Even if the person has a legal representative, the lawyer should as far as possible accord the represented person the status of client, particularly in maintaining communication.

[3] The client may wish to have family members or other persons participate in discussions with the lawyer. When necessary to assist in the representation, the presence of such persons generally does not affect the applicability of the attorney-client evidentiary privilege. Nevertheless, the lawyer must keep the client's interests foremost and, except for protective action authorized under paragraph (b), must to look to the client, and not family members, to make decisions on the client's behalf.

[4] If a legal representative has already been appointed for the client, the lawyer should

ordinarily look to the representative for decisions on behalf of the client. In matters involving a minor, whether the lawyer should look to the parents as natural guardians may depend on the type of proceeding or matter in which the lawyer is representing the minor. If the lawyer represents the guardian as distinct from the ward, and is aware that the guardian is acting adversely to the ward's interest, the lawyer may have an obligation to prevent or rectify the guardian's misconduct. See Rule 1.2(d).

Taking Protective Action

[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.

[6] In determining the extent of the client's diminished capacity, the lawyer should consider and balance such factors as: the client's ability to articulate reasoning leading to a decision, variability of state of mind and 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. In appropriate circumstances, the lawyer may seek guidance from an appropriate diagnostician.

[7] If a legal representative has not been appointed, the lawyer should consider whether appointment of a guardian ad litem or guardian is necessary to protect the client's interests. Thus, if a client with diminished capacity has substantial property that should be sold for the client's benefit, effective completion of the transaction may require appointment of a legal representative. In addition, rules of procedure in litigation sometimes provide that minors or persons with diminished capacity must be represented by a guardian or next friend if they do not have a general guardian. In many circumstances, however, appointment of a legal representative may be more expensive or traumatic for the client than circumstances in fact require. Evaluation of such circumstances is a matter entrusted to the professional judgment of the lawyer. In considering alternatives, however, the lawyer should be aware of any law that requires the lawyer to advocate the least restrictive action on behalf of the client.

Disclosure of the Client's Condition

[8] Disclosure of the client's diminished capacity could adversely affect the client's interests. For example, raising the question of diminished capacity could, in some circumstances, lead to

proceedings for involuntary commitment. Information relating to the representation is protected by Rule 1.6. Therefore, unless authorized to do so, the lawyer may not disclose such information. When taking protective action pursuant to paragraph (b), the lawyer is impliedly authorized to make the necessary disclosures, even when the client directs the lawyer to the contrary. Nevertheless, given the risks of disclosure, paragraph (c) limits what the lawyer may disclose in consulting with other individuals or entities or seeking the appointment of a legal representative. At the very least, the lawyer should determine whether it is likely that the person or entity consulted with will act adversely to the client's interests before discussing matters related to the client. The lawyer's position in such cases is an unavoidably difficult one.

Emergency Legal Assistance

[9] In an emergency where the health, safety or a financial interest of a person with seriously diminished capacity is threatened with imminent and irreparable harm, a lawyer may take legal action on behalf of such a person even though the person is unable to establish a client-lawyer relationship or to make or express considered judgments about the matter, when the person or another acting in good faith on that person's behalf has consulted with the lawyer. Even in such an emergency, however, the lawyer should not act unless the lawyer reasonably believes that the person has no other lawyer, agent or other representative available. The lawyer should take legal action on behalf of the person only to the extent reasonably necessary to maintain the status quo or otherwise avoid imminent and irreparable harm. A lawyer who undertakes to represent a person in such an exigent situation has the same duties under these Rules as the lawyer would with respect to a client.

[10] A lawyer who acts on behalf of a person with seriously diminished capacity in an emergency should keep the confidences of the person as if dealing with a client, disclosing them only to the extent necessary to accomplish the intended protective action. The lawyer should disclose to any tribunal involved and to any other counsel involved the nature of his or her relationship with the person. The lawyer should take steps to regularize the relationship or implement other protective solutions as soon as possible.

History Note: Statutory Authority G. 84-23

Adopted July 24, 1997; Amended March 1, 2003.

ETHICS OPINION NOTES

CPR 314. An attorney who believes his or her client is not competent to make a will may not prepare or preside over the execution of a will for that client.

RPC 157. A lawyer may seek the appointment of a guardian for a client the lawyer believes to be incompetent over the client's objection if reasonably necessary to protect the client's interest.

RPC 163. A lawyer may seek the appointment of an independent guardian ad litem for a child whose guardian has an obvious conflict of interest in fulfilling his fiduciary duties to the child.

98 FEO 16. Opinion rules that a lawyer may represent a person who is resisting an incompetency petition although the person may suffer from a mental disability, provided the lawyer determines that resisting the incompetency petition is not frivolous.

98 FEO 18. Opinion rules that a lawyer representing a minor owes the duty of confidentiality to the minor and may only disclose confidential information to the minor's parent, without the minor's consent, if the parent is the legal guardian of the minor and the disclosure of the information is necessary to make a binding legal decision about the subject matter of the representation.

"DEBBIE'S WORDS"*

* The following is from "Assisting People with Mental Retardation in the Criminal Justice System", manuscript of a curriculum for training attorneys and judges. This was prepared by Deborah Greenblatt, Esq., Executive Director, Carolina Legal Assistance, *A Mental Disability Law Project.*

"From the colloquy between Detective Crawford and Billy Moore in S. v. Moore, I made a list of words that I thought would present comprehension problems for someone with mental retardation. I wrote the words out on two sheets of ruled yellow paper and gave the sheets to someone I know who has mild mental retardation. This person has an IQ of 62 and can read and write. This person maintains a job in the mainstream economy and can converse with you about many topics (including ACC basketball) in a way such that you would not necessarily identify them as mentally retarded, although you would know that they were not a highly educated person.

"I asked this volunteer to copy each word on the same line next to where I wrote the word. My instructions were to then, underneath each word, tell what the word meant. If they did not know the meaning of the word, my instructions were to write "I don't know".

"The attached sheets are copies of that person's responses. Res Ipsa Loquitur."

Deborah Greenblatt

Note: The individual transcribing the words was not given the type written page.