
**REFORM THAT UNDERSTANDS OUR SENIORS:
HOW INTERDISCIPLINARY SERVICES CAN HELP
SOLVE THE CAPACITY RIDDLE IN ELDER LAW**

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As individuals age, they face an increased likelihood of diminished capacity, which can pose significant challenges in establishing and engaging in attorney-client relationships.¹ The US Department of Health and Human Services projects that the number of individuals age eighty-five and older will increase by more than fifty percent, from 4.2 million in 2000 to 6.6 million in 2020.² Furthermore, nearly half of all individuals who live to eighty-five years old will experience some form of dementia.³ Although dementia is not an inevitable consequence of aging, an expanding elderly population⁴ will likely lead to greater numbers of diminished legal capacity questions.⁵ In light of this, attorneys need to adopt effective strategies for assessing legal capacity in their everyday practices. Such policies should seek to preserve a client's autonomy without creating an extraordinary risk of malpractice liability.

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1. See Jan Ellen Rein, *Clients with Destructive and Socially Harmful Choices—What's an Attorney to Do?: Within and Beyond the Competency Construct*, 62 *FORDHAM L. REV.* 1101, 1103, 33–36 (1994) (surveying overall conflicts that elderly clients may pose regarding model rules that deal with diminished client capacity).

2. U.S. CENSUS BUREAU, POPULATION DIVISION, PROJECTIONS OF THE POPULATION BY AGE AND SEX FOR THE UNITED STATES: 2010 TO 2050 tbl.12, (Aug. 14, 2008), available at http://aoa.gov/AoARoot/Aging_Statistics/future_growth/future_growth.aspx#aging (follow “By Age and Gender: 1900–2050” hyperlink; then follow “Persons 85 and over” hyperlink).

3. Cf. ALZHEIMER'S ASSOCIATION, 2011 ALZHEIMER'S DISEASE FACTS AND FIGURES, 7 ALZHEIMER'S & DEMENTIA 1, 12 (2011), available at www.alz.org/downloads/Facts_Figures_2011.pdf (last visited Feb. 17, 2012) (Alzheimer's disease is considered to be the most common type of dementia, and 43% of people age 85 and older have been diagnosed with this disease.).

4. ABA COMM'N ON L. & AGING & AM. PSYCHOLOGICAL ASS'N, ASSESSMENT OF OLDER ADULTS WITH DIMINISHED CAPACITY: A HANDBOOK FOR LAWYERS 1 (2005) [hereinafter A HANDBOOK FOR LAWYERS] (“[D]ementia is estimated to double every five years in the elderly, growing from a disorder that affects 1 percent of persons 60 years old to . . . 30 percent to 45 percent of persons 85 years old.”).

5. See *id.*

It is critical that attorneys ensure the accuracy of capacity evaluations because findings of incapacity have the potential to significantly compromise a client's autonomy.⁶ However, attorneys may arrive at erroneous conclusions because of personal biases or concerns about malpractice liability. Indeed, subcomponents of elder law, such as life planning, are often rife with opportunities for miscommunication and misinterpretation.⁷

Attorneys often lack the proper professional guidance in determining legal capacity. Not only is capacity an abstract concept, but the Model Rules of Professional Conduct (the Model Rules) also do not provide practical guidelines for attorneys.⁸ Rather, the Model Rules charge attorneys with the responsibility of making this determination while giving them little guidance with which to navigate a sea of contradictory duties.⁹

Against this backdrop, elder law attorneys looking to assess legal capacity are better served by seeking guidance from a combination of non-legal professionals.¹⁰ This approach allows an attorney to gain professional insight into a client's conditions while also fulfilling the client's holistic needs. However, this solution is hindered

6. Findings of legal incapacity can limit a client's decision-making rights and lead to guardianship proceedings. See Nancy J. Knauer, *Defining Capacity: Balancing the Competing Interests of Autonomy and Need*, 12 TEMP. POL. & CIV. RTS. L. REV. 321, 29 (2003) ("Under a guardianship, an individual is declared incapable of engaging in a wide range of transactions and making all but a few significant life decisions. A guardian is appointed to act on behalf of the incapacitated person or ward, and the declaration of incapacity extends until a court finds that the individual has regained capacity.").

7. See Jan Ellen Rein, *Ethics and the Questionably Competent Client: What the Model Rules Say and Don't Say*, 9 STAN. L. & POL'Y REV. 241, 249 (1998). For example, if an elderly client makes estate-planning decisions that are unpopular with either the family or an experienced estate planner, a lawyer might misconstrue this as evidence of diminished capacity, particularly if the disgruntled heirs use this as a basis to claim malpractice. An attorney will be more likely to make inaccurate capacity evaluations when influenced by these third-party perspectives.

8. See Peter Margulies, *Access, Connection, and Voice: A Contextual Approach to Representing Senior Citizens of Questionable Capacity*, 62 FORDHAM L. REV. 1073, 1082-84 (1994) (summarizing commentators' critique of the ambiguous definitions of "legal capacity" in legal doctrines); Rein, *supra* note 7, at 242 (reemphasizing the burden placed on attorneys to assess legal capacity because of its ubiquitous yet elusive nature).

9. Compare MODEL RULES OF PROF'L CONDUCT R. 1.14 (2009) (requiring an attorney to form a reasonable belief concerning a client's diminished capacity) with *id.* R. 1.6 (limiting the attorney's ability to disclose client information when consulting with third parties).

10. Specifically, these professionals include health care professionals and social workers. See Heather A. Wydra, Note, *Keeping Secrets Within the Team: Maintaining Client Confidentiality While Offering Interdisciplinary Services to the Elderly Client*, 62 FORDHAM L. REV. 1517, 1525-27 (1994) (arguing that addressing a client's legal needs naturally entails consulting other professionals).

by current ethical rules as well as attorney-client privileges in some states.¹¹

This Note suggests an interdisciplinary approach to assist in determinations of legal capacity. It also urges an amendment to the Model Rules and current law firm business models, so attorneys can better approach capacity challenges. While this Note does not presume to resolve the problems faced by capacity determinations, the purpose is to offer functional alternatives to the current working models.

Part I reviews the Model Rules' treatment of capacity issues, detailing attorneys' conflicting ethical duties and the ambiguous methodology for capacity evaluations. Part II examines the customary processes that attorneys presently follow for seeking diagnostic evaluations and highlights their embedded potential for legal challenges. Part III calls for states to adopt an amended version of the Model Rules to allow for the full use of interdisciplinary services in client capacity evaluations. Additionally, Part III proposes several models that offer administrative guidance for legal capacity evaluations. These reforms would better shield elder law attorneys from malpractice liability while preserving the client's autonomy and privacy.

I. BACKGROUND: THE INTERSECTION OF LEGAL CAPACITY AND THE MODEL RULES

Generally, capacity for decision-making is defined as having “(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.”¹² However, this explanation falls short in practice, as capacity is a “flexible, elusive, and ultimately indefinable concept.”¹³ The following Section details the Model Rules' instructions regarding legal capacity assessment.

11. See *id.* at 1527 (highlighting common clashes between the pragmatic needs of a client and the restrictions imposed by the Model Rules); *infra* Part II.C.

12. PRESIDENT'S COMM'N FOR THE STUDY OF ETHICAL PROBLEMS IN MEDICINE AND BIOMEDICAL AND BEHAVIORAL RESEARCH, MAKING HEALTH CARE DECISIONS: THE ETHICAL AND LEGAL IMPLICATIONS OF INFORMED CONSENT IN THE PATIENT-PRACTITIONER RELATIONSHIP 57 (1982) (footnote omitted).

13. See Rein, *supra* note 7, at 241–42 (explaining how capacity can largely depend on context).

*A. Ethical Duties: A Lawyer's Responsibility Regarding
Legal Capacity Evaluations*

The Model Rules fail to provide a working definition of incapacity, offering only abstract factors by which to make a determination.¹⁴ This places a dangerous burden on attorneys who may be ill-equipped to evaluate such concepts. Following a brief outline of the Model Rules' standard determination of legal capacity, this Section will show how questions of partial legal capacity plague elder client counseling, particularly during the establishment of an attorney-client relationship. This Section concludes by examining the legal quandary elder law practitioners face when confronted with conflicting ethical duties.

1. Model Rule Requirements and Challenges When
Forming the Attorney-Client Relationship

Model Rule 1.14 holds the attorney responsible for determining the capacity of the client. The Rule states:

- (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, conservator or guardian.
- (c) Information relating to the representation of a client with diminished capacity is protected by Rule 1.6. When taking protective action pursuant to paragraph (b), the lawyer is impliedly authorized

14. Cf. MODEL RULES OF PROF'L CONDUCT R. 1.14 cmt. 1 (2009) ("[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.").

under Rule 1.6(a) to reveal information about the client, but only to the extent reasonably necessary to protect the client's interests.¹⁵

First, the attorney must evaluate competency before the attorney-client relationship can be formed.¹⁶ Additionally, the attorney must reassess the client's legal capacity with respect to any ensuing decisions.¹⁷ Commentators generally agree that the most fundamental question for an elder law attorney is whether a client has the legal capacity to establish or continue an ongoing attorney-client relationship.¹⁸ The Model Rules, however, are particularly ambiguous regarding this matter. For example, the Scope section states that "whether a client-attorney relationship exists for any specific purpose can depend on circumstances and may be a question of fact."¹⁹ However, Model Rule 1.14 does not define the specific circumstances that are necessary for the formation of such a relationship.²⁰

The authority for an attorney to act stems from the formation of a principal-agent relationship.²¹ In line with this theory, Model Rule 1.2(a) requires attorneys to "abide by a client's decisions concerning the objectives of representation."²² This is further supported by Model Rule 1.14(a) which states that "the lawyer shall, as far as reasonably possible, maintain a normal client-lawyer relationship with the client," even when the client is suffering from a cognitive impairment.²³ But if a principal becomes permanently incompetent, he or she can lose the ability to authorize legal

15. MODEL RULES OF PROF'L CONDUCT R. 1.14 (2009).

16. Although the Model Rules do not state this explicitly, it is a prerequisite to an attorney-client relationship for the lawyer to determine if the client has sufficient functional or decisionmaking ability. *Cf., e.g., id.* R. 1.14, Scope (17) (explaining that "for purposes of determining the lawyer's authority and responsibility, principles of substantive law external to these Rules determine whether a client-lawyer relationship exists").

17. *See id.* R. 1.14 cmt. 1 ("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.").

18. *See Rein, supra* note 7, at 245.

19. MODEL RULES OF PROF'L CONDUCT Scope (17).

20. *See id.* R. 1.14. Several commentators have criticized this language for its lack of clarity. *See, e.g., Rein, supra* note 1, at 1133 ("[The scope section of the Model Rules] cryptically states 'whether a client-attorney relationship exists for any specific purpose can depend on circumstances may be a question of fact.'" (citing John E. Donaldson, *Ethical Considerations in Advising and Representing the Elderly* 10, undated) (unpublished manuscript) (on file with the author)).

21. *See Rein, supra* note 1, at 1133.

22. MODEL RULES OF PROF'L CONDUCT R. 1.2(a) (2009).

23. *Id.* R. 1.14(a).

decisions.²⁴ Thus, an attorney who represents a client in such a scenario without a legal representative or guardian may violate ethical rules in certain jurisdictions.²⁵

The lawyer is fundamentally bound by a duty of loyalty to the client and should not be influenced by the interests of third parties.²⁶ However, this notion has been challenged occasionally by commentators who have suggested a counseling style that accounts for perspectives other than the client's.²⁷ For example, Justice Louis Brandeis proposed that lawyers offer legal advice tailored to the situation instead of to the individual.²⁸ Likewise, Professor Sidney Watson suggested lawyers look to the family as one unit, as opposed to looking to a specific individual.²⁹

While the debate concerning competing theories of representation is beyond the scope of this Note, it is important to highlight how the Model Rules and elder law attorneys have tackled counseling issues. Elderly clients often seek legal advice while

24. RESTATEMENT (THIRD) OF AGENCY § 3.08 (2006). However, it is important to note that temporary loss of capacity because of a mental disease does not terminate the principal-agent relationship nor does it automatically end the agent's actual or implied authority. This is contrary to the earlier view, where loss of capacity was equated to the principal's death. Compare RESTATEMENT (SECOND) OF AGENCY § 122 (1958) with RESTATEMENT (THIRD) OF AGENCY § 3.08 cmt. b (2006) (arguing that the prior rule in § 122 should no longer be followed because "loss of legal capacity, unlike death, is not always final and its occurrence is often not precisely associated with a particular moment or event").

25. See, e.g., TEX. R. DISCIPLINARY P. 1.02(g) ("A lawyer shall take reasonable action to secure the appointment of a guardian or other legal representative for, or seek other protective orders with respect to, a client whenever the lawyer reasonably believes that the client lacks legal competence and that such action should be taken to protect the client.").

26. MODEL RULES OF PROF'L CONDUCT R. 1.14 cmt. 3 (2009) ("[T]he lawyer must keep the client's interests foremost and . . . must to [sic] look to the client, and not family members, to make decisions on the client's behalf."). This principle has historically been recognized as far back as the early nineteenth century. 2 Trial of Queen Caroline 8 (J. Nightingale ed. 1821) ("[A]n advocate . . . knows but one person in all the world, and that person is his client. To save that client . . . at all hazards and costs to other persons . . . is his first and only duty . . .").

27. See Patricia M. Batt, *The Family Unit as Client: A Means to Address the Ethical Dilemmas Confronting Elder Law Attorneys*, 6 GEO. J. LEGAL ETHICS 319 (1992); Sidney D. Watson, *When Parents Die: A Response to Before Guardianship: Abuse of Patient Rights Behind Closed Doors*, 41 EMORY L.J. 863, 870 (1992) (recommending a lawyer look to the dynamics of the family unit when counseling a client regarding guardianship: "Only knowing the family as a unit, and, above all, by searching for their common interests, can the lawyer advise a family member on the appropriate steps to take.>").

28. When questioned before the U.S. Senate on legal transactions that involved potential conflicts of interests, Mr. Brandeis explained that he was a "lawyer for the situation." Hearings Before the Subcomm. of the Senate Comm. on the Judicial on the Nomination of Louis D. Brandeis to be an Associate Justice of the Supreme Court of the United States, 64th Cong., 1st Sess. 287 (1916). See also Geoffrey C. Hazard, *Lawyer for the Situation*, 39 VAL. U. L. REV. 377 (2004) for a more detailed analysis of this lawyering perspective.

29. See Watson, *supra* note 27, at 870 ("Only knowing the family as a unit, and, above all, by searching for their common interests, can the lawyer advise a family member on the appropriate steps to take.>").

accompanied by family members who might want the attorney to do what is best for the family as a whole instead of the individual client.³⁰ Further complicating the matter, Comment 3 to Model Rule 1.14 specifically permits family members to be included in a client's legal conversations³¹ if there is client consent or implicit authorization. However, Comment 3 also instructs lawyers "to look to the *client*, and not family members, to make decisions on the client's behalf."³²

Pressure from family members may influence attorneys to ignore a client's wishes. For example, a client might not always make his motives apparent while making legal decisions. As a result, attorneys will examine the client's legal decision through generic cognitive screens or family consultations.³³ However, normative considerations of what a 'good decision' is may lead an attorney to overlook a client's personal wishes. Furthermore, when family members are strongly opposed to the elderly client's legal decisions, the attorney may rely on these third-party interests or mischaracterize the client's goals in order to avoid a malpractice suit by the family.³⁴ Thus, taking into account family objectives can lead to an inaccurate determination of a client's legal capacity.

2. Remaining Ambiguities: Model Rule 1.14's Collision with Model Rule 1.6's Duty of Confidentiality

Model Rule 1.6(a) impedes effective client representation when counseling sessions lead an attorney to seek guidance from third-party professionals for capacity determinations.³⁵ While Comment 6

30. See Batt, *supra* note 27, at 324 ("These [familial] relationships can trigger conflict of interest issues . . . [W]hat may be the best legal alternative for the elderly client may not be the most attractive alternative for the heirs or the financially dependent spouse.").

31. See MODEL RULES OF PROF'L CONDUCT R. 1.14 cmt. 3 (2009).

32. *Id.* (emphasis added).

33. Generic cognitive screens are customary mental exams or questionnaires, such as the Baird Brown Legal Capacity Questionnaire and the Mini Mental State Examination. See Charles P. Sabatino, *Representing a Client with Diminished Capacity: How Do You Know It and What Do You Do About It?*, 16 J. AM. ACAD. MATRIMONIAL L. 481, 498–99 (2000); see also *infra* notes 95–100 and accompanying text for a more detailed explanation of these specific tests.

34. See Rein, *supra* note 7, at 248–49 (drawing hypothetical scenarios where attorneys might be misled in evaluating a client's goals in order to escape malpractice suits from dissatisfied third parties).

35. Compare MODEL RULES OF PROF'L CONDUCT R. 1.6(a) (2009) ("A lawyer shall not reveal information relating to the representation of a client unless the client gives informed consent . . .") with *id.* R. 1.14 cmt. 6 (for questions of capacity, "the lawyer may seek guidance from an appropriate diagnostician"); see also Wydra, *supra* note 10, at 1525 ("[The] Model Rules themselves make interdisciplinary communications necessary to serve potentially incapacitated clients Yet, it is virtually impossible for an attorney to procure a

to Model Rule 1.14 permits attorneys to seek guidance from diagnosticians, Model Rule 1.6 restricts disclosure of client information relating to legal representation without consent except when “the disclosure is impliedly authorized.”³⁶ Clients will often withhold consent to such third-party assessments because they fear this will lead to the loss of autonomy through involuntary guardianship.³⁷ However, even when consent is obtained, attorneys may question the validity of such consent *because of signs of possible impairment*.³⁸

In cases where a client fails to grant or refuse explicit consent to a diagnostic consultation, it remains unclear when Model Rule 1.6(a)'s “impliedly authorized” language permits elder law attorneys to speak with such third parties.³⁹ In an effort to clarify this language, the ABA stated that “if the client is in the midst of litigation, the lawyer should be able to disclose such information as is necessary to obtain an assessment of the client’s capacity in order to determine whether the representation can continue in its present fashion.”⁴⁰ However, because this directive only references litigation, it is ill-suited for the transactional practice of elder law.

In 2002, an amendment to Model Rule 1.6(b) added an exception to disclosure when a lawyer wishes “to secure legal advice about the lawyer’s compliance with these Rules.”⁴¹ While this exception recognizes concern over ambiguity in the Model Rules and

mental health professional to make the assessment without disclosing secret or confidential client information.”).

36. MODEL RULES OF PROF'L CONDUCT R. 1.6(a) (2009). Rule 1.14(c) does not solve this dilemma because it only renders implied authorization when an attorney takes protective action. In order to pursue such protective action, Model Rule 1.14(b) requires an attorney to have a reasonable belief that a client's capacity is significantly diminished. However, the Model Rule offers an attorney no implied authorization to undertake investigative measures beforehand in order to form such a “reasonable belief” regarding a client's capacity. Put differently, Model Rule 1.14's exception to disclosure under Model Rule 1.6 does not seem to take effect until after an attorney has determined capacity. Adding to the confusion, Comment 6 to Model Rule 1.14 fails to state who qualifies as an appropriate diagnostician. See Rein, *supra* note 1, at 1147–48 (“The Model Rules’ Terminology section should define who qualifies as a diagnostician for the purpose of helping the lawyer determine whether the client needs a formal representative.”).

37. See Rein, *supra* note 7, at 247. For a more general discussion regarding the impact of de facto guardianship on a client's autonomy, see Paul R. Trembaly, *Impromptu Lawyering and De Facto Guardians*, 62 FORDHAM L. REV. 1429, 1444–45 (1994).

38. See Rein, *supra* note 7, at 248 (highlighting that a legal advisor has “no assurance the consent is valid because only the court can make an adjudication of competency”).

39. Cf. Burnele V. Powell & Ronald C. Link, *The Sense of a Client: Confidentiality Issues in Representing the Elderly*, 62 FORDHAM L. REV. 1197, 1236–37 (1994) (offering hypothetical examples demonstrating the ambiguity and confusion regarding a lawyer's permission to access third-party consultation opinions).

40. ABA Comm. on Ethics & Prof'l Responsibility, Formal Op. 96-104 (1996).

41. Compare MODEL RULES OF PROF'L CONDUCT R. 1.6 (2002) with MODEL RULES OF PROF'L CONDUCT R. 1.6 (1998).

the potential benefit of collaborating with other attorneys, states have failed to expand their disclosure rules to allow lawyers to seek advice from non-legal professionals.⁴²

Aside from the consent requirement, communications between an attorney and third parties can be adverse to a client's interests if such communications are not protected by attorney-client privilege.⁴³ In light of this, an attorney who obtains consent may confer with a doctor or social worker only if he takes care not to reveal the client's identity because of the potential harm to the client's interests.⁴⁴ However, without conducting physical observations or tests, a diagnostician will likely have difficulty determining the degree to which the client is able to make decisions for herself.⁴⁵ Thus, the confidentiality provisions of the Model Rules prevent diagnostician consultations from being fully effective and discourage attorneys from routinely seeking assistance from other professionals.

B. Guidance: What to Look For in a Legal Capacity Evaluation

The evaluation of client capacity is a difficult task for both legal and medical professionals who must make such determinations frequently. A common cause of incapacity in elderly clients is dementia, which develops incrementally and leads to mental impairment.⁴⁶ As dementia progresses, a client may scale back his daily activities to eliminate tasks that have become mentally over-demanding, such as shopping, traveling, or paying bills. When a client with dementia attempts to mask underlying cognitive

42. See, e.g., OHIO RULES OF PROF'L CONDUCT R. 1.6 cmt. 5 (2007).

43. See, e.g., *Jones v. Superior Court*, 372 P.2d 919, 921-22 (Cal. 1962) (holding that where an attorney sent the client to a doctor to assist in defense matters, the attorney-client privilege was extended). For a more general discussion of circumstances when conversations with third parties are protected by the attorney-client privilege, see Marcia M. Boumil et al., *Multidisciplinary Representation of Patients: The Potential for Ethical Issues and Professional Duty Conflicts in the Medical-Legal Partnership Model*, 13 J. HEALTH CARE L. & POL'Y 107, 119-20 (2010).

44. MODEL RULES OF PROF'L CONDUCT R. 1.8(b) (2009).

45. Because capacity is contextual, physical observations are critical in elderly client cases to evaluate what daily tasks she is unable to perform safely. For example, objective tests such as the MMSE will not reveal to an attorney whether a client will likely forget to turn the stove off when living alone. See Lois M. Brandriet & Brian L. Thorn, *Determining Capacity: Is Your Older Client Competent?*, 14 UTAH B. J. 21, 23 (2001) ("To increase the accuracy of a capacity evaluation, it is essential that the proposed protected person . . . be assessed 'holistically' as opposed to consideration of only their mental or cognitive status."); Wydra, *supra* note 10, at 1526-27 ("Mental health professionals would need to . . . be present to facilitate the client interview.").

46. See Peter V. Rabins, *Issues Raised by Research Using Persons Suffering from Dementia Who Have Impaired Decisional Capacity*, 1 J. HEALTH CARE L. & POL'Y 22, 30-31 (1998).

difficulties, it is often challenging for the attorney to detect the early warning signs of diminished capacity.

In addition to identifying these warning signs, diagnosticians must determine at which point capacity is considered lost.⁴⁷ Because people with dementia are likely to exhibit signs of partial capacity, dementia is commonly measured on a continuum, as with pain or anxiety.⁴⁸ However, dementia differs from other continuum assessments because the responsibility for gauging capacity rests solely with the evaluator.⁴⁹ This allows for a high degree of subjectivity in the analysis, and attorneys must be mindful not to confuse incapacity with eccentricity or imprudence.⁵⁰ Both legal and medical experts have continually attempted to devise a more objective and practical examination with little success.⁵¹ Indeed, some commentators have compared seeking a fair and workable client capacity test to the “search for the Holy Grail.”⁵² When evaluating client capacity, Comment 6 to Model Rule 1.14 recommends that a lawyer balance various factors: “[1] the client’s ability to articulate reasoning leading to a decision; [2] variability of state of mind and ability to appreciate consequences of a decision; [3] the substantive fairness of a decision; and [4] the consistency of a decision with the known long-term commitments and values of the client.”⁵³ These factors were proposed under Peter Margulies’ contextual paradigm model for legal capacity evaluations.⁵⁴ Because lawyers judge client capacity in a task-specific manner, this approach has been popular in part due to the flexibility of its application.⁵⁵ How-

47. See *id.*

48. See Brandriet & Thorn, *supra* note 45, at 23.

49. See *id.*

50. See, e.g., *Gentry v. Briggs*, 573 P.2d 322, 325 (Or. 1978) (holding that a testator was not mentally incompetent or under undue influence merely because he chose to disinherit his daughter in his final will).

51. See, e.g., Rein, *supra* note 1, at 1128 (theorizing that efforts to develop a pragmatic definition of the elusive competency concept have produced only greater confusion).

52. Loren H. Roth et al., *Tests of Competency to Consent to Treatment*, 134 AM. J. PSYCHIATRY 279, 283 (1977).

53. MODEL RULES OF PROF'L CONDUCT R. 1.14 cmt. 6 (2009).

54. The contextual model was adopted in the 1994 recommendations of the Fordham Conference on Ethical Issues in Representing Older Clients. See generally Margulies, *supra* note 8, at 1085–90 (highlighting six important factors in capacity diagnosis: (1) ability to articulate reasoning behind decisions, (2) variability of state of mind, (3) appreciation of consequences of decisions, (4) irreversibility of decisions, (5) substantive fairness of transaction, and (6) consistency with lifetime commitments).

55. See LINDA S. ERSHOW-LEVENBERG, INST. FOR CONTINUING LEGAL EDUC. & N.J. STATE BAR ASS'N, REPRESENTING CLIENTS WITH DIMINISHED CAPACITY: ASSESSMENT, ASSISTANCE AND ADVOCACY 5 (2009); Michael Levelle, *Minimum Capacity to Consent or Act: What's the Standard?*, ELDER LAW NEWSLETTER (Or. State Bar), July 2006, at 5, available at <http://www.bennettblummd.com/id12.html>. Instead of referring to capacity as a static con-

ever, the Model Rules have historically offered minimal guidance regarding how such factors should be measured in practice.⁵⁶ Because of this lack of rigor, evaluation methods of client capacity remain inconsistent and susceptible to inaccuracies.⁵⁷

1. Functional Factors

The first two factors in Comment 6 to Model Rule 1.14 evaluate a client's adaptive abilities.⁵⁸ Because the client must knowingly employ the lawyer's services, these factors are deemed to be prerequisites to the formation of an attorney-client relationship.⁵⁹ Model Rule 1.4(b) requires the lawyer to "explain a matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation."⁶⁰ When assessing the functional factors of capacity, an attorney looks for a client's ability to communicate and understand transmitted information and her ability to reason and make decisions regarding the information.⁶¹

A functional approach was originally recommended in 1996 by the ABA Standing Committee on Ethics and Professional Responsibility⁶² and was later adopted in the Ethics 2000 Commission Report.⁶³ In contrast to strictly objective testing, this

cept, the contextual model recognizes capacity as a "shifting network of values and circumstances." Margulies, *supra* note 8, at 1083.

56. See, e.g., Elizabeth Laffitte, Note, *Model Rule 1.14: The Well Intended Rule Still Leaves Some Questions Unanswered*, 17 GEO. J. LEGAL ETHICS 313 (2004) (summarizing the history of Model Rule 1.14's revisions while highlighting issues that remain unresolved).

57. See *infra* notes 72, 80–81, 84, 90, and accompanying text.

58. MODEL RULES OF PROF'L CONDUCT R. 1.14 cmt. 6 (2009) (evaluating "the client's ability to articulate reasoning leading to a decision, variability of state of mind and ability to appreciate consequences of a decision . . .").

59. See ERSHOW-LEVENBERG, *supra* note 55, at 4 ("There is no attorney-client relationship unless there are two willing and able parties to the relationship. The client must have some ability to tell the attorney what the problem is, ask for help, and understand & agree to the course of action.").

60. MODEL RULES OF PROF'L CONDUCT R. 1.4(b) (2009).

61. See ERSHOW-LEVENBERG, *supra* note 55, at 4–5 (evaluating "The client's ability to understand the transmitted information is one threshold issue. The ability to make decisions regarding the information is the other. Both form the lynchpin to the ability to initiate and sustain the lawyer-client relationship.").

62. ABA Comm. on Ethics & Prof'l Responsibility, Formal Op. 404 (1996) ("Rule 1.14(b) does not authorize the lawyer to take protective action because the client is not acting in what the lawyer believes to be the client's best interest, but only when the client 'cannot adequately act in the client's own interest.'") (citing MICHEL SILBERFIELD & ARTHUR FISH, *WHEN THE MIND FAILS: A GUIDE TO DEALING WITH INCOMPETENCY* (Univ. of Toronto Press, 1994)).

63. AM. BAR ASS'N ETHICS 2000 COMMISSION, REPORT ON THE MODEL RULES OF PROFESSIONAL CONDUCT RULE 1.14 (2002), available at http://www.americanbar.org/groups/professional_responsibility/policy/ethics_2000_commission/e2k_report_home.html.

approach assesses how easily clients are able to function in their environments.⁶⁴ This philosophy gained popularity among legal professionals who sought capacity tests which could scrutinize more than just the substance or effect of a client's legal decisions.

It is important for his attorney to be particularly mindful of such a philosophy when evaluating the functional factors included in Comment 6 to Model Rule 1.14. For example, when weighing the "ability to appreciate consequences of a decision,"⁶⁵ an attorney should be cautious in his assessment to not disregard the client's right to autonomy. The heart of this factor scrutinizes the "risk of harm posed by the likely outcome of the individual's decision."⁶⁶ Attorneys must be aware that a client's risky conduct does not necessarily imply or provide proof of incompetence.⁶⁷ In light of this, if the client has demonstrated an understanding of the potential consequences of the available legal options,⁶⁸ then the attorney is obligated as the client's agent to pursue the objectives he chooses.⁶⁹

2. Substantive Factors

The other factors listed in Comment 6 to Model Rule 1.14 focus exclusively on the outcome of a client's decision. These factors are subjective in nature, and they may be inaccurately measured because of society's ageist bias.⁷⁰

Substantive fairness is perhaps the most ambiguous of the factors suggested by Comment 6 to Model Rule 1.14 and Margulies'

64. See Daniel L. Bray & Michael D. Ensley, *Dealing with the Mentally Incapacitated Client: The Ethical Issues Facing the Attorney*, 33 FAM. L.Q. 329, 335 (1999); Margulies, *supra* note 8, at 1083. For example, a functional approach assesses whether a client would be able to obtain the information from an available source, such as a newspaper or magazine.

65. MODEL RULES OF PROF'L CONDUCT R. 1.14 cmt. 6 (2009).

66. Sabatino, *supra* note 33, at 497.

67. Sabatino notes that "Silberfeld and Fish remind us: 'Incompetency is the inability to make choices. A competent person *chooses* to run risks; an incompetent person simply *happens* to run them.'" *Id.* (quoting SILBERFELD & FISH, *supra* note 62, at 65).

68. It is important not to confuse an understanding of the consequence of legal options with justification for one's choices. In order to satisfy the functional prongs, Margulies suggested attorneys evaluate if clients *are able* to articulate reasoning for their choices. For example, saying "because I feel like it" will not be sufficient. The focus is on the client's *ability* to communicate his comprehension, and the attorney need not personally *agree* with the client's reasons. See Margulies, *supra* note 8, at 1087.

69. See MODEL RULES OF PROF'L CONDUCT R. 1.2 (2009) ("[A] lawyer shall abide by a client's decisions concerning the objectives of representation.").

70. See generally Linda S. Whitton, *Ageism: Paternalism and Prejudice*, 46 DEPAUL L. REV. 453 (1997) (examining how prejudice against the elderly affects results in the courts and legislatures).

contextual approach.⁷¹ While substantive fairness concerns may allow for the intrusion of the attorney's subjective bias in a client's assessment,⁷² Margulies argues that this concept of fairness is important because it keeps track of whether "people are being taken advantage of or are being unduly influenced in ways that defeat the autonomy and voice rationale behind deferring to client decisions."⁷³ In other words, substantive fairness emphasizes an attorney's duty to guard against the exploitation of her client.

This approach to determining client capacity reflects underlying societal values that can often conflict with ideals of individualism. Traditionally, attorneys are bound by a professional duty to concern themselves with a client's legal interests.⁷⁴ However, attorney-client tension may arise when a client's decisions place his long-term assets at risk, thereby threatening his future financial autonomy.⁷⁵ While this tension may be found in an array of attorney-client relationships, it often appears in elder law because of the attorney's failure to appreciate the full range of factors that influence a client's decision-making process.⁷⁶

Some commentators suggest that this misunderstanding in capacity determinations is a result of a broader disconnect between society and its senior population.⁷⁷ For example, when lawyers question legal capacity and make decisions inconsistent with their clients' wishes and values, the clients' sense of control is likely to be undermined. However, people need to feel in control,⁷⁸ and

71. See Margulies, *supra* note 8, at 1088; Sabatino, *supra* note 33, at 496-97 ("The one factor . . . that is perhaps not self-explanatory is that of 'substantive fairness.'").

72. See Sabatino, *supra* note 33, at 496 ("On first impression, it appears to invite the intrusion of the assessor's own value judgment of the outcome of the client's decision.") However, Sabatino suggests this threat can be minimized because the concept of substantive fairness serves as a lever for capacity determinations: as substantive fairness becomes more difficult to determine, an attorney will instead demand a higher level of functional factors. See *id.* at 497.

73. Margulies, *supra* note 8, at 1088.

74. See MODEL RULES OF PROF'L CONDUCT R. 1.2 (2009).

75. See Rein, *supra* note 7, at 243 ("[T]here are tensions between that client's need for autonomy now and the need to preserve the resources the client will need to have autonomy in the future."); Margulies, *supra* note 8, at 1073 ("Senior citizens need freedom of action. Yet, they sometimes seem to act in ways that defeat their other needs, whether financial, medical, or legal.")

76. See Rein, *supra* note 7, at 243.

77. See, e.g., Robert Rubinson, *Constructions of Client Competence and Theories of Practice*, 31 ARIZ. ST. L.J. 121, 135 (1999) ("[W]hen counseling an elderly client, lawyers often assume that idiosyncratic decisions are the result of incompetence. Another interpretation might seem less obvious when interacting with the elderly: idiosyncrasy might be idiosyncrasy. After all, many non-elderly lead lives in ways that stray from the norm, and these non-elderly might well be seen not as incompetent, but as original or bold.")

78. See, e.g., Nina A. Kohn, *Elder Empowerment as a Strategy for Curbing the Hidden Abuses of Durable Powers of Attorney*, 59 RUTGERS L. REV. 1, 27 (2006).

psychological tests have indicated that an individual's perceived sense of independent control is positively correlated with one's mental and physical health.⁷⁹ Unfortunately, in cases where capacity is ambiguous, lawyers are prone to go beyond traditional fiduciary duties and make decisions that are inconsistent with their clients' preferences.⁸⁰ Framing the problem solely as a capacity conflict can thus disguise overarching issues that are left unresolved by current methods of capacity evaluation.⁸¹

Society's interest in allowing individuals to make their own decisions is generally afforded great weight.⁸² In assessing the law's stance on substantive fairness in capacity diagnoses, it is important to remember the underlying ageism of modern society.⁸³ Common mental and physical disorders associated with old age can lead the public to have misgivings over the competency of senior citizens.⁸⁴ Senior citizens are thus routinely faced with significant questioning regarding decisions that would likely not be challenged if made by young or middle-aged individuals:

Like many younger individuals, an elderly man or woman may choose to . . . spend money in ways others deem frivolous. For example, he or she may choose to buy companionship by lavishing funds on a companion whose friendship is motivated at least partly by avarice However frivolous the expenditures or distasteful the motives of the companion, the individual may derive a great deal of pleasure from the arrangement.⁸⁵

79. See, e.g., Ellen J. Langer & Judith Rodin, *The Effects of Choice and Enhanced Personal Responsibility for the Aged: A Field Experiment in an Institutional Setting*, 34 J. PERSONALITY & SOC. PSYCHOL. 191 (1976).

80. See, e.g., Kohn, *supra* note 78, at 32 ("The lack of clarity as to decision-making rules undoubtedly contributes to agents' willingness to make decisions that are inconsistent with principals' wishes and values.").

81. See Rein, *supra* note 7, at 243 (recognizing the importance of preserving an elderly client's feeling of independence and criticizing capacity methods for ignoring this concept).

82. See, e.g., Rein, *supra* note 1, at 1164.

83. See generally Linda S. Whitton, *Ageism: Paternalism and Prejudice*, 46 DEPAUL L. REV. 453 (1997) (examining how prejudice against the elderly affects results in the courts and legislatures). For a definition of ageism, see *The Image of Aging in Media and Marketing: Hearing before the S. Special Comm. on Aging*, 107th Cong. 12 (2002) (statement of Robert N. Butler, President and Chief Exec. Officer, Int'l Longevity Ctr.), available at http://frwebgate.access.gpo.gov/cgi-bin/getdoc.cgi?dbname=107_senate_hearings&docid=f:83476.wais (defining ageism as "a systematic stereotyping of and discrimination against people simply because they are old").

84. See Whitton, *supra* note 83.

85. Jan Ellen Rein, *Preserving Dignity and Self-Determination of the Elderly in the Face of Competing Interests and Grim Alternatives: A Proposal for Statutory Refocus and Reform*, 60 GEO. WASH. L. REV. 1818, 1874 (1992).

Ageism may specifically influence Model Rule 1.14's fourth factor of an attorney's capacity evaluation, which measures whether a client's decisions are made in correspondence with the client's life-long values.⁸⁶ This guideline is generally effective, but it does not take into consideration the possibility that a client's life values may change over time. In such a case, an attorney may view a change in a client's values as a sign of incompetency even if these changes are reasonable to the client. For example, an elderly client's choice to give a large donation to her faith group may trigger capacity inquiries. However, such charitable donations may be caused by many other factors, like loneliness.⁸⁷ As an indirect result of society's ageism, current legal capacity guidelines for diagnosis may lack objectivity and accuracy.

II. CURRENT INTERDISCIPLINARY APPROACHES: ASSISTING LEGAL CAPACITY EVALUATIONS REMAINS IMPRACTICAL UNDER CURRENT LAW

The ethical obligation to screen a client's legal capacity leads the lawyer down a path of ambiguous diagnosis standards, offering limited practical guidance. Although the revised Model Rules aim to recognize the challenge of capacity determinations by suggesting a contextual approach, a critical question remains: How does the lawyer reach a reasonable and confident belief that the client has diminished capacity?

Diagnostician consultation is arguably the most effective and accurate way of assessing capacity. However, attorneys routinely struggle with this method because in many states, local laws have discouraged the establishment of legal models that allow professional interdisciplinary teams.⁸⁸ In light of this, Part II will first

86. See MODEL RULES OF PROF'L CONDUCT R. 1.14 cmt. 6 (2009) ("In determining the extent of the client's diminished capacity, the lawyer should consider . . . the consistency of a decision with the known long-term commitments and values of the client.").

87. Many other reasons may account for a senior citizen to make decisions that seem unwise. As he ages, it may become more personally important to make peace with people, find or maintain spiritual health, or have a sense he personally contributed to something of interest. See Rein, *supra* note 7, at 243.

88. See, e.g., *Zimmerman v. Nassau Hospital*, 429 N.Y.S.2d 262, 264 (N.Y. App. Div. 1980) (holding that an attorney's requested medical examination of a client, whose case did not result in litigation until twelve years later, was not privileged); *In re Estate of Wood*, 818 A.2d 568, 571-72 (Pa. Super. Ct. 2003) (holding that comments made and reports given by a patient's physician to his attorney were not protected by attorney-client privilege). In addition to case-law, many state model rules of professional conduct hinder work models that incorporate third-party client services. See, e.g., KAN. RULES OF PROF'L CONDUCT R. 5.4 (2007); Boumil et al., *supra* note 43, at 119-20.

briefly look at how diagnostic consultations naturally complement legal capacity decisions. This Section will then highlight the challenges of a current law firm model that routinely incorporates such services: the general multidisciplinary firm.

A. Diagnostician Consultations

Consultation with a professional diagnostician is said to be one of a lawyer's most helpful tools in assessing legal capacity because it provides an independent and objective assessment.⁸⁹ This method limits the inevitable subjectivity of an attorney's capacity evaluation by including more objective testing that is subject to more consistent documentation.⁹⁰ It is important to note that such consultations are meant to be strictly advisory, and are without legal force, because *legal* capacity is a largely context-specific determination that is judged with respect to the specific decision confronting the client.⁹¹ A medical or social worker consultation is not meant to provide conclusive evidence for an attorney's capacity evaluation, because capacity for informed legal decision-making is not necessarily the same thing as capacity to *engage* in the attorney-client relationship.⁹² Thus, it is the professional role of the attorney to translate the scientific advisory opinions into legal judgments.

Unfortunately, a lack of medical or scientific training leaves attorneys ill-equipped to make formal capacity evaluations using the current objective evaluation tests.⁹³ By working regularly with other professionals, lawyers can better understand an elderly client's mental and lifestyle needs. In an interview with the Director of the Colorado Coalition of Legal Services Programs, Dr. Leonard Hellman said: "[S]ocial workers and psychologists have a better handle

89. See, e.g., A HANDBOOK FOR LAWYERS, *supra* note 4, at vi, 31.

90. Professor Rein argues that the Model Rules' lack of guidance for objective assessment of legal capacity may lead lawyers to apply their own life experiences, values, and stereotypes. See Rein, *supra* note 1, at 1127; ERSHOW-LEVENBERG, *supra* note 55, at 4 of R.P.C. 1.14: REPRESENTING THE CLIENT WITH DIMINISHED CAPACITY (However, as one commentator cautions, "in representing elderly clients situations arise with increasing frequency that challenge the attorney's ability to react on a 'gut' instinct alone.") (citing Edwin Boyer, *Representing the Client with Marginal Capacity: Challenges for the Elder Law Attorney—A Resource Guide*, 12 NAELA Q. 3, 7 (Spring 1999)).

91. See A HANDBOOK FOR LAWYERS, *supra* note 4, at vii, 5 ("The ultimate question of capacity is a legal—and in some cases a judicial—determination, not a clinical finding.")

92. See ERSHOW-LEVENBERG, *supra* note 55, at 5.

93. Cf. A HANDBOOK FOR LAWYERS, *supra* note 4, at v ("Some might argue that without training in mental disorders of aging methods of formal capacity evaluation, lawyers should not be making determinations about capacity. Yet lawyers necessarily are faced with an assessment or at least a screening of capacity in a rising number of cases . . .").

on competency than most physicians I can't imagine an attorney, no matter what his background is, in a legal office trying to determine competence."⁹⁴ Psychological tests can provide objective cognitive and behavioral data that attorneys do not have the skills to interpret.⁹⁵

Mainstream capacity tests often yield incomplete data and serve as warning signals rather than diagnostic tools. For example, the Baird Brown legal capacity questionnaire (LCQ)⁹⁶ is a commonly used questionnaire that tests for cognitive impairment, but has been criticized for its lack of reliable data.⁹⁷ In situations where the client has indicated she is functioning at a borderline or low capacity, attorneys ought to investigate capacity further and should seek expert consultation.⁹⁸ Additionally, the Folstein examination, often referred to as the Mini Mental State Examination (MMSE), evaluates certain mental abilities⁹⁹ but has questionable accuracy in assessing legal capacity.¹⁰⁰ To properly interpret the results' implications, attorneys should use the LCQ or the MMSE in conjunction

94. *Health Care Options for the Elderly: NCPL Seminar Probes Attorney Dilemma in Determining Competency of Client*, PREVENTIVE L. REP., Dec. 1988, at 22, 24 (edited transcript) (statement of Dr. Leonard Hellman of the Mercy Senior Health Clinic of Denver, Colorado, who is also an attorney).

95. See A HANDBOOK FOR LAWYERS, *supra* note 4, at 31.

96. The test is divided into true/false, multiple choice, and short answer questions. Client capacity is scored into three categories: high (attorney can proceed "with confidence"), borderline (attorney can proceed "with caution"), and low (attorneys should exercise "extreme caution"). See Daniel C. Marson et al., *Testamentary Capacity and Undue Influence in the Elderly: A Jurisprudential Therapy Perspective*, 28 LAW & PSYCHOL. REV. 71, 89–90 (2004).

97. *Id.* at 90 ("Limitations from a psychological science standpoint include the lack of an underlying conceptual psychological model, the absence of reliability and validity data, and the failure of the LCQ to address the element of understanding a will . . .").

98. ARTHUR C. WALSH ET AL., MENTAL CAPACITY: LEGAL AND MEDICAL ASPECTS OF ASSESSMENT AND TREATMENT, 159–68 (1994) (summarizing typical age-related brain changes and highlighting the value of medical tests to confirm such changes are ordinary vs. serious).

99. The MMSE is a thirty-point questionnaire that tests for word recall, attention/calculation, language abilities, and visuospatial abilities. Additionally, a client will be asked questions regarding time orientation, such as the current year, season, or date. See, e.g., Marshal F. Folstein et al., "Mini-Mental State": A Practical Method for Grading the Cognitive State of Patients for the Clinician, 12 J. PSYCHIATRIC RES. 189 (1975).

100. The test is not designed to measure executive functions, which concern the capacity to consider options and their consequences, as well as planning, monitoring, and stopping inappropriate behavior. Furthermore, current research has begun to question its accuracy in assessing legal capacity. See Arun Aggarwall & Emma Kean, *Comparison of the Folstein Mini Mental State Examination (MMSE) to the Montreal Cognitive Assessment (MoCA) as a Cognitive Screening Tool in an Inpatient Rehabilitation Setting*, 1 NEUROSCIENCE & MED. 39 (2010).

with other assessment tools because they serve only to indicate a need for further assessment by an independent source.¹⁰¹

In sum, while these types of standardized screenings are popular among attorneys for their ease of use and clear structure, they can often be difficult to adapt to a client's specific cognitive task,¹⁰² and interpreting their results may require specialized training. Thus, such assessment tools should be complemented by working alongside third-party professionals.

B. The Multidisciplinary Practice Model

The legal field has failed to establish a working model that effectively utilizes diagnostician consultations. Ethical and procedural standards hinder firms from routinely working with non-legal teams and exposing confidential legal information in capacity evaluations. This Section presents the example of a model currently endorsed in Washington, D.C.,¹⁰³ which remains the only jurisdiction that provides a pragmatic structure for law firms to follow regarding interdisciplinary client services.

During the past decade, the legal community has seen an increase in support for a more expansive legal services model, known as multidisciplinary practice.¹⁰⁴ This form of practice can more effectively respond to the needs of an elder client, whether they stem from legal, medical, social, or financial circumstances. The benefits of multidisciplinary practice are particularly salient to the capacity diagnosis problem because they offer a means to regularly request professional third-party examinations.

101. See Donald D. Vanarelli, *Client Capacity—Assessment and Advocacy*, N.J. LAW., Aug. 2010, at 9. For an additional example, see HANDBOOK FOR LAWYERS, *supra* note 4, at 13–30 (structuring the lawyer's diagnostic role as a series of systematic screenings at separate stages and emphasizing that its results should not be considered sufficient proof of diminished capacity). According to this guidebook, the first stage is a preliminary screening of client capacity. If necessary, the second stage involves a referral for professional consultation. Finally, the third stage involves a legal judgment of whether a client's capacity is sufficient to warrant continuing the attorney-client relationship as requested. See *id.* at 31–41.

102. These cognitive legal tasks may include marrying, divorcing, property division, etc. See Sabatino, *supra* note 33.

103. Cf. Matthew W. Bish, *Revising Model Rule 5.4: Adopting a Regulatory Scheme That Permits Nonlawyer Ownership and Management of Law Firms*, 48 WASHBURN L.J. 669, 679–80 (2009) (stating that D.C.'s equivalent to Model Rule 5.4 is the only state-adopted rule that has allowed for lawyer-nonlawyer partnerships).

104. See, e.g., Stacy L. Brustin, *Legal Services Provision Through Multidisciplinary Practice—Encouraging Holistic Advocacy while Protecting Ethical Interests*, 73 U. COLO. L. REV. 787, 790–91 (2002) (examining the current debate on multidisciplinary practice in the context of legal services in a non-profit setting).

Despite its benefits, the multidisciplinary model remains controversial because of the long-standing debate over combining legal assistance with other professional services.¹⁰⁵ Since the 1980s, major efforts have been made to urge the ABA to amend its ethical rules to allow for a multidisciplinary legal model.¹⁰⁶ In 1998, the ABA created the Commission on Multidisciplinary Practice, which held public hearings in order to develop its recommendations regarding the regulation of such enterprises. On June 8, 1999, the Commission recommended that the ABA revise the Model Rules to allow lawyers and non-lawyers to engage in limited forms of multidisciplinary practice.¹⁰⁷ But on July 11, 2000, the ABA voted to maintain the Model Rules' ban on fee sharing between lawyers and non-lawyers, and on non-lawyer managerial control over law firms.¹⁰⁸ Moreover, the ABA urged states to resist the adoption of multidisciplinary firms in order to "preserve the core values of the legal profession."¹⁰⁹

*C. Current Confidentiality and Ethical Regulations Hinder
Mass Adoption of Both Multidisciplinary Firms and
the General Use of Third-Party Consultations*

Working simultaneously with legal and non-legal professionals can potentially lead to confusion regarding professional ethical

105. See, e.g., Janine Robben, *Protecting Mom and Dad: Lawyers Take Different Approaches to Elder Law*, 71 OR. ST. B. BULL. 18 (2011) (highlighting the current debate on adopting multidisciplinary practices in Oregon and its impact on elder law).

106. See, e.g., Mary C. Daly, *Choosing Wise Men Wisely: The Risks and Rewards of Purchasing Legal Services From Lawyers in a Multidisciplinary Partnership*, 13 GEO. J. LEGAL ETHICS 217, 241-42 (2000) (summarizing the Kutak Commission's criticism of the ABA's ban on multidisciplinary practice).

107. AM. BAR ASS'N, COMM'N ON MULTIDISCIPLINARY PRACTICE REPORT TO THE HOUSE OF DELEGATES: RECOMMENDATION (2000), available at http://www.americanbar.org/groups/professional_responsibility/commission_multidisciplinary_practice/mdprecommendation.html.

108. AM. BAR ASS'N, REVISED RECOMMENDATION 10F (2000), available at <http://www.americanbar.org/groups/leadership/2000dailyjournal10.html> (last visited Oct. 28, 2011).

109. The core values referenced include:

- (a) the lawyer's duty of undivided loyalty; (b) the lawyer's duty competently to exercise independent legal judgment for the benefit of the client; (c) the lawyer's duty to hold client confidences inviolate; (d) the lawyer's duty to avoid conflicts of interest with the client; (e) the lawyer's duty to help maintain a single profession of law with responsibilities as a representative of clients, an officer of the legal system, and a public citizen having special responsibility for the quality of justice; and (f) the lawyer's duty to promote access to justice.

obligations.¹¹⁰ This variance of ethical duties across professions can threaten client privacy.¹¹¹

1. A Lawyer's Duties and Restrictions

In general, a lawyer may not reveal information relating to a client's representation to any other party unless the client gives the lawyer explicit or implicit permission to do so.¹¹² Once permission is provided and disclosure is made to an outside party, protection from civil discovery may no longer be absolute.¹¹³

The application of the attorney-client privilege to professional third-party consultations is context-specific.¹¹⁴ For example, in a case where a doctor was consulted to assist a lawyer for upcoming litigation, the court extended the attorney-client privilege to the client's statements to the doctor and the resulting diagnosis.¹¹⁵ However, a court may not extend protection to medical consultations if the client sought a medical consultation before obtaining legal services.¹¹⁶ This case-by-case analysis poses risks to an elderly client because it raises uncertainty as to whether such information may be exposed in future proceedings. As a result, lawyers and clients are likely to exercise extreme caution when working with outside parties to determine legal capacity.¹¹⁷

110. Tamara L. Vergara, *Multidisciplinary Practice: The Debate Goes On*, MOMKUS & McCLUSKY LLC, <http://www.momlaw.com/articles/employment-law/multidisciplinary-practice> (last visited Oct. 28, 2011).

111. See *supra* Part I.A.2.

112. While this is the general rule, MODEL RULES OF PROF'L CONDUCT R. 1.6 (2009) lists several exceptions when a lawyer is authorized to disclose client information without consent. Further restrictions may also apply under FED. R. EVID. 502.

113. See A HANDBOOK FOR LAWYERS, *supra* note 4, at 31.

114. See Michele D. Beardslee, *The Corporate Attorney-Client Privilege: Third-Party Consultations*, 62 SMU L. REV. 727 (2009) for a general discussion of the law's inconsistent application of attorney-client privilege regarding third-party consultations.

115. See *Jones v. Superior Court*, 372 P.2d 919, 921-22 (Cal. 1962) (holding that the attorney-client privilege was extended where the client was sent to the physician by an attorney to assist in his defense).

116. *In re Estate of Wood*, 818 A.2d 568, 571-72 (Pa. Sup. Ct. 2003) (attorney-client privilege was not extended to comments made by a patient's doctor to his attorney). This particular scenario often arises in the multidisciplinary legal model. See Boumil et al., *supra* note 43, for a further discussion as to how this inconsistency specifically occurs in medical-legal partnerships.

117. Some may argue that this dilemma could be solved with a boilerplate contract that holds an outside party to the same ethical obligations as the lawyer. However, this depends on the lawyer and offers no guarantee of it being universally followed. See *infra* Part III for a further discussion of implementing a uniform reform.

2. A Doctor's Duties and Restrictions

Medical duties and regulations affect a multidisciplinary firm when attorneys seek access to a client's medical information and when such information needs to be protected from pretrial discovery. In 1996, the Health Insurance Portability and Accountability Act of 1996 (HIPAA) was enacted, enforcing a doctor's duty to protect patient confidentiality.¹¹⁸ HIPAA governs the use and disclosure of protected health information, which includes names, dates pertaining to an individual's health care, phone and fax numbers, social security numbers, medical record numbers, account numbers, and license numbers.¹¹⁹ Because HIPAA plays a significant role in regulating the disclosure of a client's medical information when lawyers seek the consultation of medical professionals, it is pertinent to this Note's analysis of obstacles facing elder law practitioners.

When evaluating a client's legal capacity, a doctor generally must obtain the client's written authorization to disclose her health information to her lawyer.¹²⁰ However, HIPAA permits disclosure of protected health information to a covered entity, such as a patient's lawyer, without a patient's consent if the information is to be used for treatment, payment, or health care operations.¹²¹ The law remains unclear as to if and when a multidisciplinary practice team may fall into the treatment exemption.¹²² Regardless, full disclosure should be made to elderly clients of any potential differences in professional obligations between the lawyer and doctor before obtaining consent to third-party consultations.

118. Health Insurance Portability and Accountability Act of 1996 § 201, 42 U.S.C. § 1320a-7c (A) (3) (B) (ii) (2006).

119. 42 U.S.C. § 1320d (4) (2006); 45 C.F.R. § 164.514 (2009).

120. See, e.g., Celia B. Fisher & Matthew Oransky, *Informed Consent to Psychotherapy: Protecting the Dignity and Respecting the Autonomy of Patients*, 64 J. CLINICAL PSYCHOL. 576, 584–85 (2008).

121. 45 C.F.R. § 164.506 (2002). Disclosure is defined as “the release, transfer, provision of, access to, or divulging in any other manner of information outside the entity holding the information.” *Id.* § 160.103. Use is defined as “the sharing, employment, application, utilization, examination, or analysis of such information within an entity that maintains such information.” See *id.* HIPAA governs the disclosure to covered entities and business associates (e.g. lawyers). *Id.*

122. See Boumil et al., *supra* note 43, at 133 (citing JERRY TICHNER, INTRODUCTORY FREQUENTLY ASKED QUESTIONS REGARDING HIPAA, PRIVILEGE AND CONFIDENTIALITY IN THE MEDICAL-LEGAL PARTNERSHIP MODEL (2008), available at [http://www.medical-legalpartnership.org/sites/default/files/page/FAQ\(2\).pdf](http://www.medical-legalpartnership.org/sites/default/files/page/FAQ(2).pdf)). But see Powell & Link, *supra* note 39, at 1234–35 (“[W]ithout E’s authorization, L is no more entitled to information from E’s physician about their consultations than the physician would be entitled to consultative information from L’s meetings with E.”).

Aside from limiting a lawyer's access to patient records, a doctor's ethical duties might not protect confidentiality when it is unclear if a true patient-doctor relationship is formed.¹²³ Although a doctor's notes might still be protected from adverse third parties under the lawyer's work product doctrine,¹²⁴ such notes will only be protected if they are made in the course or anticipation of litigation.¹²⁵ However, the extent of protection in this scenario will vary by state and circumstance, and it affords limited relevance in the largely transactional practice of elder law.¹²⁶

3. A Social Worker's Duties and Restrictions

Elderly clients may be reluctant to seek legal advice when they are required to be interviewed by social workers who are obligated to report certain findings to the state.¹²⁷ For example, even if a client tells his attorney that a family member is abusive, the client may wish to seek counseling instead of criminal sanctions. While a lawyer may not disclose an elderly client's explicit communication of abuse without the client's permission,¹²⁸ social workers' mandatory disclosure duties could interfere with a client's wishes. Clients and their lawyers would then need to take care to avoid full disclo-

123. See Powell & Link, *supra* note 39 at 1236–37 (analyzing the ambiguity of doctor-patient relations when lawyers request medical exams).

124. See FED. R. CIV. P. 26(b)(3). The work product doctrine protects an attorney's written material, mental impressions, opinions, and theories made in anticipation of and during the course of litigation. The Supreme Court originally recognized this doctrine in *Hickman v. Taylor*, 329 U.S. 495, 510–11 (1947) (“This work is reflected, of course, in interviews, statements, memoranda, correspondence, briefs, mental impressions, personal beliefs, and countless other tangible and intangible ways—aptly though roughly termed by the Circuit Court of Appeals in this case (153 F.2d 212, 223) as the ‘Work product of the lawyer.’ Were such materials open to opposing counsel on mere demand, much of what is not put down in writing would remain unwritten.”).

125. This assumes that the client has consented to the examination. FED. R. CIV. P. 26(b)(3).

126. Subsequent litigation may stem from transactional counseling with elderly clients, and it remains unclear how the work product doctrine will protect a client's past interdisciplinary consultations in this context. See generally Boumil et al., *supra* note 43, at 120–23 for further details and examples of this inconsistency.

127. Similar stipulations may also exist for doctors and other mental health providers. See Wydra, *supra* note 10, at 1527–30 (“Confidentiality is jeopardized when some professionals in the team are obligated by statute to report suspected incidents of abuse that the lawyer is not obligated to report.”). For example, in some states social workers have a duty to report explicit or implied communications of elder abuse. See, e.g., CONN. GEN. STAT. § 17b-451 (2010). See also Gerald L. Jogerst et al., *Domestic Elder Abuse and the Law*, 93 AM. J. PUB. HEALTH 2131 (2003) (presenting a statistical analysis of the differing elder abuse state laws and their effect on national elder abuse).

128. See Sarah S. Sandusky, Note, *The Lawyer's Role in Combating the Hidden Crime of Elder Abuse*, 11 ELDER L.J. 459, 472–73 (2003).

sure in collaborative work sessions. The increased threat to confidentiality and the varying levels of disclosure between the client and her professional team members limit the efficacy of multidisciplinary service models.

Social workers are “ethically bound to evaluate the totality of circumstances and protect what *they* believe to be the client’s best interest.”¹²⁹ In contrast, lawyers are trained to fully represent a client’s legal interests as generally defined by the *client*. Elderly clients seeking legal assistance should be made aware of these differing obligations before consent is given to any third-party consultations for capacity tests. It has been suggested that having this conversation near the beginning of a legal relationship where capacity is questionable can inhibit a client’s personal connection to the attorney or other professionals.¹³⁰ A resulting lack of trust may lead clients to divulge only minimal amounts of information, but this risk should be weighed against the chance that a client reveal damaging confidential information to a mandatory reporter.¹³¹

III. TWO-PART REFORM: REVISING LEGAL RULES AND INTRODUCING NEW MODEL STRUCTURES TO MAKE MULTIDISCIPLINARY SERVICES A PRACTICAL OPTION FOR ATTORNEYS

This Section suggests multiple reforms to assist attorneys in seeking independent professional assistance for determining a client’s legal capacity. This can be accomplished by amending the Model Rules as well as states’ procedural rules in order to preserve confidentiality in interdisciplinary communications. Furthermore, this Section proposes that states consider the legalization of two alternative service models: lawyer/non-lawyer partnerships and state-sponsored consultation panels. These reforms both expand pragmatic legal counseling solutions for attorneys and preserve the privacy of clients.

129. Brustin, *supra* note 104, at 862 (emphasis added).

130. *Id.* at 842 (“Some suggest that having this conversation at such an early stage can inhibit the building of rapport between the client and the lawyer and the client and the social worker. Clients may not be able to understand the distinction between lawyers’ obligations and social workers’ obligations and the client may decide that the safest course of action is not to divulge much information.”).

131. *See id.*

A. Legal Revisions: Ethical and Procedural Rule Changes

Reform options for assessing legal capacity should not only provide ease of access between attorneys and third-party diagnosticians, but they should also be mindful of elderly clients' autonomy needs. For an interdisciplinary approach to be effective, communication among the team must remain privileged, enabling team members to exchange information freely.¹³²

States should adopt a disclosure exception to their respective Model Rules that would authorize inter-professional communications made for the purpose of evaluating a client's mental capacity.¹³³ Attorneys are currently deterred from utilizing independent professional services in part because of client confidentiality restraints.¹³⁴

In order to encourage states to amend their respective rules, the American Bar Association should approve the addition of such a disclosure exception to the Model Rules. Because states often look to the Model Rules for guidance when amending their respective rules, amendments to Model Rules 1.6 and 1.14 will make a significant impact and will likely persuade states to follow suit.¹³⁵

A potential criticism of this reform is that it fails to address the concern that clients will be unlikely to consent to third-party evaluations.¹³⁶ Without the explicit consent of their clients, lawyers are limited to hypothetical case analyses that are of minimal use.¹³⁷ In order to address this, new state ethical and procedural rules should be enacted to limit the specific use of exam results in future litiga-

132. Wydra, *supra* note 10, at 1542.

133. States should also consider adopting their procedural and evidentiary rules to protect client confidentiality and incentivize clients to consent to third-party collaboration. *See infra* notes 136–138 and accompanying text.

134. Rule 1.6(a) forbids a lawyer from revealing client information without informed consent. MODEL RULES OF PROF'L CONDUCT R. 1.6(a) (2009). Model Rule 1.14 only permits an exceptions to this rule after an attorney has formed a reasonable belief that the client has diminished capacity. *Id.* R. 1.14. Thus, a lawyer is not afforded a disclosure exceptions during the assessment of a client's capacity. *Cf.* A HANDBOOK FOR LAWYERS, *supra* note 4, at v ("[Rule 1.14] triggers protective action when an attorney reasonably believes that a client has diminished capacity, that there is a potential for harm to the client, and that the client cannot act in his or her own interest. However, the critical question is: how does the lawyer reach a reasonable belief that the client has diminished capacity?").

135. The Model Rules are made in part to offer guidance to states. *See, e.g.*, AM. BAR ASS'N, STATE IMPLEMENTATION OF ABA MJP POLICIES (2010), available at <http://www.americanbar.org/content/dam/aba/migrated/cpr/mjp/recommendations.authcheckd.am.pdf> (last visited Apr. 24, 2011) (listing states' implementations of the ABA's multijurisdictional practice of law policies).

136. Clients may be unlikely to consent out of fear that the results may restrict their legal freedoms. *See infra* Part I.A.

137. *See supra* note 45.

tion or involuntary legal proceedings.¹³⁸ For example, if the client has voluntarily consented to consultation, an exception should be added that insulates the disclosure of third-party consultation results in future proceedings.

Some may argue that a more pragmatic solution would be to use a boilerplate contract that would hold third-party professionals to the same confidentiality rules as the attorney. But this alone would not provide an adequate enforcement effect because it would rely entirely on the legal practitioner to implement such solutions.¹³⁹ In contrast, complementing such contracts with amendments to the Model Rules would raise further awareness and offer a uniform solution to a broader audience.¹⁴⁰

B. Proposed Model Structures That Better Foster the Utilization of Interdisciplinary Services

In addition to revising ethical rules and legal disclosure exceptions, states should allow for realistic business models where lawyers may utilize interdisciplinary teams. Currently, the Model Rules offer minimal guidance for lawyers who seek outside professional consultations. The explicit incorporation of both lawyer/non-lawyer partnerships and state-sponsored advisory panels into the Model Rules would provide elderly clients with streamlined access to a variety of professional services.

1. Lawyer/Non-lawyer Partnerships

The Model Rules, as well as state ethical rules, should be amended to foster the formation of lawyer/non-lawyer partnerships. This structure is particularly beneficial to clients because it adds convenience and simplicity through a multidimensional problem solving approach.¹⁴¹ For instance, working for a single entity

138. Professor Rein has proposed that states prohibit “the use of any information about the client’s condition gained by anyone as a result of lawyer-diagnostician cooperation from being used as a basis for, or evidence of, incompetency in any subsequent proceeding.” Rein, *supra* note 1, at 1152–53.

139. This would also do little to protect against discovery. *See infra* Part III.B.1 for a further discussion involving reform of the interdisciplinary firm model.

140. *Cf.* Rein, *supra* note 1, at 1150 (“Cooperation between medical and legal professionals in making competency assessments will ultimately depend on the extent to which the drafters of the ethics rules for each profession can themselves cooperate in developing an inter-disciplinary approach to the problem.”).

141. *See supra* Part II.B.

would improve teamwork, efficiency, and strategic planning among attorneys and non-attorneys alike.¹⁴²

In this working relationship, third-party professionals would be offered an opportunity to serve as partners.¹⁴³ This structure can be a more attractive option than an employee relationship because a partnership model offers a greater sense of prestige and decisionmaking power.¹⁴⁴ Furthermore, because partner status traditionally includes ownership interest in the company, non-lawyers would become more motivated and dedicated to maximizing company efficiency.¹⁴⁵

States should amend their Rules of Professional Conduct to allow for interdisciplinary partnerships by following the language of D.C. Rule 5.4. While state legal policies have generally been consistent with the ABA's ban on non-lawyer partnerships,¹⁴⁶ the District of Columbia is currently the only jurisdiction that has expressly authorized a more flexible approach.¹⁴⁷ D.C. Rule 5.4(b) explicitly allows lawyers to "practice law in a partnership or other form of organization in which a financial interest is held or managerial authority is exercised by an individual non-lawyer who performs professional services which assist the organization in providing legal services to clients."¹⁴⁸ Comments 2 and 4 to D.C.'s Rule 5.4(b) note that lawyers are permitted to work with non-lawyers to meet the growing complexity of client demands.¹⁴⁹

142. See Carolyn L. Abramowitz, *Multidisciplinary Practice: Will We Vote Ourselves out of the Competition*, 54 WASH. ST. B. NEWS 20, 24 (2000).

143. While it is up to the firm's ultimate discretion to decide how many third-party professionals to hire, in some circumstances a firm might need to hire more than the partnership structure could allow. In this exceptional scenario, firms would likely initially hire these professionals as employees or associates with the prospect of eventually earning partner status.

144. This assumes that the third-party professional would serve as a partner rather than an employee for the entity. A partner is given equity in the firm, access to financial data, and an opportunity to be regarded with senior status. See Susan Gilbert & Larry Lempert, *The Nonlawyer Partner: Moderate Proposals Deserve a Chance*, 2 GEO. J. LEGAL ETHICS 383, 394 (1988).

145. Matthew W. Bish, Note, *Revising Model Rule 5.4: Adopting a Regulatory Scheme That Permits Nonlawyer Ownership and Management of Law Firms*, 48 WASHBURN L.J. 669, 684–86 (2009) (noting that distribution of stock options inspires employee recipients to believe they have an ownership stake in the company, which will then encourage them to monitor other coworkers and superiors).

146. Compare MODEL RULES OF PROF'L CONDUCT R. 5.4 with, e.g., MICH. RULES OF PROF'L CONDUCT R. 5.4 (2009). See also Bish, *supra* note 145, at 670.

147. See Brustin, *supra* note 104, at 807–10 (explaining that D.C. is the only jurisdiction that expressly permits lawyer/non-lawyer partnerships).

148. D.C. RULES OF PROF'L CONDUCT R. 5.4 (2007). See subsections 1–4 under 5.4(b) for further requirements.

149. See D.C. RULES OF PROF'L CONDUCT R. 5.4 cmt. 2, 4 (2007).

The greatest criticism of permitting lawyer/non-lawyer partnerships is that a mix of professionals could have clashing interests and duties. State bar associations fear that lawyers' ethical duties could be compromised in a company with non-lawyer partners because of the assumption that the partnership's focus would shift towards profit-maximizing initiatives.¹⁵⁰ For example, the New York State Bar Association's total rejection of the multidisciplinary practice model reflected the concern that lawyers' professional judgment and legal independence would become compromised if non-lawyers exercised control at higher echelons of the law firm or business structure.¹⁵¹ The report expressed concern that non-legal professionals were exempt from stringent professional rules of conduct governing lawyers and would be guided by economic motives.¹⁵² Moreover, some commentators warn that if multidisciplinary firms were legalized, they would emulate the size of many of today's mega firms because of the potential breadth of the interdisciplinary workforces.¹⁵³ The effect could be a monopoly of the elder law client base, excluding many smaller firms and solo practitioners.¹⁵⁴

Such criticism of interdisciplinary partnerships is based on unproven and arguably flawed assumptions. When considering this argument, it is critical to address the underlying question: Can ethical, competent representation coexist with a profit-driven focus? The D.C. Bar's Special Committee on Multidisciplinary Practice found no evidence that D.C. Rule 5.4 resulted in public harm when lawyers shared fees with non-attorneys who strictly advised in legal counseling matters.¹⁵⁵ A large portion of today's lawyers would likely discontinue the practice of law if they did not receive

150. *Cf. supra* notes 108–109 and accompanying text (stating the ABA's reasoning for not allowing Model Rule exceptions for multidisciplinary firms).

151. N.Y. STATE BAR ASS'N SPECIAL COMM. ON THE LAW GOVERNING FIRM STRUCTURE AND OPERATION, PRESERVING THE CORE VALUES OF THE AMERICAN LEGAL PROFESSION: THE PLACE OF MULTIDISCIPLINARY PRACTICE IN THE LAW GOVERNING LAWYERS (2000). However, New York has since lessened its opposition to multidisciplinary practices. The New York State Bar Association went on to adopt provisions that supported "side by side" collaboration arrangements between lawyers and non-lawyers. While the state still rejects fully integrated multidisciplinary practices, these subsequent revisions now provide more flexibility regarding the matter. *See* N.Y. COMP. CODE R. & REGS. CODE OF PROF. RESP. 1200.5-b(a)–(b) (2002).

152. *Id.* *See also* Brustin, *supra* note 104, at 818–19 for an analysis of this report, as well as a comparison to D.C.'s Rule 5.4.

153. *E.g.*, Brustin, *supra* note 104, at 812.

154. *See infra* Part III. B.2. for a publicly-funded solution that eliminates this concern.

155. *See* REPORT AND RECOMMENDATION OF D.C. BAR SPECIAL COMM. ON MULTIDISCIPLINARY PRACTICE 7 (Oct. 23, 2001).

a profit.¹⁵⁶ In order to maximize profits, firms seek repeat clients. Thus, firms motivated by profits have an incentive to refrain from self-dealing.¹⁵⁷ Finally, clients deserve a lawyer who has access to the most accurate information available by trained professionals, and this justifies legalizing a consolidated interdisciplinary model.

2. State-Sponsored Advisory Consultation Panels

In conjunction with, or as an alternative to, legalizing lawyer/non-lawyer partnerships, this Note proposes that states establish public interdisciplinary panels to assist elder law attorneys and capacity diagnosticians. Lawyers would be able to call upon these panels for consultations regarding legal capacity inquiries. The panel would consist of professionals trained to evaluate an elderly client's mental capacity, and would include physicians, mental health specialists/therapists, gerontologists, social workers, and lawyers.¹⁵⁸

It is critical that this panel remain dedicated to serving as an advisory board, and that states not render its recommendations mandatory. In other words, the panel should be an interdisciplinary consulting service where lawyers or clients may voluntarily seek an independent and objective analysis in legally ambiguous contexts, such as client capacity assessment. It would be ill-advised to make such consultations mandatory because of the undue infringement on a client's rights.

Like other interdisciplinary models, this advisory panel would offer a one-stop shop of resources for attorneys of elderly clients.¹⁵⁹ If adopted alongside the reform suggested in Part III.A., confidentiality rules would not be a concern because all members of the

156. See Patrick J. Schiltz, *On Being a Happy, Healthy, and Ethical Member of an Unhappy, Unhealthy, and Unethical Profession*, 52 VAND. L. REV. 871, 895–903 (1999) (depicting lawyers to be largely trapped in a competitive quest for higher income).

157. See Bish, *supra* note 145, at 694 (“[I]f, in order to achieve a higher profit on a client's current project, a firm delivered sub-par services . . . then that client would not become a repeat customer, and the firm would forfeit the potential premium a client would pay for quality service.”).

158. Lawyers would have to be conscious of potential conflicts of interests with current clients. Thus, it would be more pragmatic to offer the position to a lawyer whose practice and client base are no longer active. See generally MODEL RULES OF PROF'L CONDUCT R. 1.7–1.11 (2009) for ethical restrictions regarding legal conflicts of interests.

159. Depending on the state's plan, these resources could expand beyond legal counseling including recommendations to counseling, prescription monitoring, social assistance, nutritional consultation, and physical therapy. See Corinne N. Lalli, Note, *Multidisciplinary Practices: The Ultimate Department Store for Professionals*, 17 ST. JOHN'S J.L. COMM. 283 (2003) for a description of potential resources offered under the private one-stop shop model.

diversified panel would be held to the same rules of nondisclosure.¹⁶⁰ This would preserve the personal trust and rapport that is essential to a healthy attorney-client relationship.

While offering many of the same potential benefits as the lawyer/non-lawyer partnership model, this advisory panel could avoid the fears of profit-driven management. Governmental control would serve a critical role in this respect. Because this option would be at least partially publicly funded, the panel's consultation would remain objective and not motivated by extraneous financial factors.¹⁶¹ Although some clients and attorneys may have the resources to afford this service, this panel should be a publicly funded resource with sliding scale fees in order to both maintain an objective focus and not financially exclude any part of the community. Additionally, this solution would better preserve the solo practice of elder law because these resources would be publicly accessible.¹⁶²

Unlike lawyer/non-lawyer partnerships, the biggest potential obstacle to this reform would be its financial cost. The projected start up costs for this option would likely be minimal, covering mainly experts' compensation. The structure would demand relatively no overhead costs because the professionals would not necessarily need to be physically located in one location. This solution would allow for the panel to convene on a case-by-case basis, and could individually evaluate clients on a flexible schedule. Additionally, any lab equipment use could be contracted with local facilities. However, if the caseload grows substantially, operating and fixed costs may become more substantial. For example, each case would include the hourly rates for board members as well as the necessary cognitive or neurological tests. Additionally, an administrative system would need to be implemented to identify panel participants, assign cases to willing participants, and establish procedural guidelines for the teams. Finally, if the growing caseload overwhelms

160. If the client has voluntarily consented to consulting this panel, then the reform described in Part III.A. would prevent disclosure of these results in future guardianship proceedings. Essentially, these state run panels are a publicly funded version of the lawyer/non-lawyer partnerships.

161. Public control may not completely eliminate the possibility of a private profit motive. However, government-sponsored non-profit entities are arguably more likely to offer services for a social purpose with less concern for a profit gain. *Cf.* BERNICE A. PESCOLIDO ET AL., *HANDBOOK OF THE SOCIOLOGY OF HEALTH, ILLNESS, AND HEALING: A BLUEPRINT FOR THE 21ST CENTURY* 262 (2011) ("Nonprofit organizations are legitimate providers because they are not motivated by profit. Nonprofit organizations can be trusted to protect consumers.").

162. *See* text accompanying notes 153–154.

local diagnostic centers, the panel would need to invest in its own test equipment.

In response, states will need to consider creative ways to fund-raise or reconfigure their finances in order to absorb these added costs. Although there is a significant range in state budgets, a slight increase in state court filing fees could serve as one example of an easily administered source of funding.¹⁶³ While this might chill litigation because of higher costs, states have the ultimate discretion to adjust fees where they see fit so that the burden is not imposed on the greater community.

The cost of investing in this reform is justified from the perspectives of the elderly, their attorneys, the government, and taxpayers. Implementation of this panel offers seniors access to public health resources and attorneys access to professional third-party resources. This advisory panel might also reduce confusion when determining legal capacity and relieve overloaded court dockets.¹⁶⁴ In sum, despite the potential increase in government expenses, this reform would help solve the riddle of evaluating legal capacity while avoiding a clash with legal ethics.

CONCLUSION

In reality, no one reform will completely remove the challenges presented by capacity determinations. While the burden of assessing client capacity ultimately rests on the lawyer's shoulders, interdisciplinary resources offer invaluable assistance. The revised Model Rules reflect the general consensus that diagnostician consultation is a highly recommended outlet for forming "a reasonable belief" of a client's diminished decisionmaking capabilities.¹⁶⁵ Despite this, more reform is needed for this option to become a pragmatic alternative that can actually be implemented by elder law attorneys. State ethical and procedural rules, as well as the Model Rules, should be revised to permit attorneys' disclosure of client information for the purpose of examining capacity. Additionally, states should strongly consider legalizing multidisciplinary

163. It is ultimately up to the states to decide a financial structure regarding this option. State legal policies may play a role in determining whether the attorney or client should pay such a fee. For example, if the state's rules of professional conduct specifically authorized an attorney to seek outside consultations regarding a client's questionable capacity, then the attorney could arguably charge this fee to the client. *See supra* Part III.A.1-2.

164. Ambiguity regarding client legal capacity may lead to malpractice suits from disgruntled family members, guardianship proceedings, etc. *See supra* Part I.

165. *See* MODEL RULES OF PROF'L CONDUCT R. 1.14(b) (2009).

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firm structures or publicly funded advisory boards so that lawyers will have more accessible guidance for such matters.