



by James H. Pietsch

Introduction

Too many times older persons are disappointed at the end of their lives. Some thought they had planned well. Others did not do much planning at all. Most were hoping for the best but got the worst. One just has to read the newspaper or watch the news to see examples of high-profile cases in which matters seemed to

have turned out badly for an older person. These cases include fights over an older person's desire for autonomy and self-determination over one's own property decisions,¹ allegations of fraud theft or at least improper use of an older person's assets,² efforts to change the medical treatment choices of an older person at the end of life, and cases where individuals are fearful of extreme pain and suffering at the end of life.³ Just as often, it seems, entire families are disrupted by conflicts involving the care or the assets of an older person toward the end of life or disappointment over an inheritance or lack of an inheritance. Very often lawyers are involved too, whether they represent the older person, the family member or caregiver or, maybe, themselves.

At the University of Hawai'i Elder Law Program ("UHELP")⁴ we hear many stories about disappointment from the rich (or more likely the children or grandchildren of the rich), the formerly rich, the not so rich and those in-

The Role of Laws and Lawyers in Helping Avoid Disappointment at the *End of Life*

between. Sometimes the stories are told to us by the older person and sometimes by a caregiver or by a disappointed heir. This is a two-part series of articles about some of the experiences, challenges and disappointments clients, families, caregivers, and attorneys may have in planning for the future, including incapacity and death or in the aftermath, and the role that laws and lawyers

can play in avoiding disappointment. Not all persons will experience incapacity or will be subjected to undue influence, but many of the stories of disappointment involve such individuals. For this reason, this two-part series will review some of the information in the "dementia-capable" attorney's article about aging and dementia previously published in the *Hawaii Bar Journal*.⁵ UHELP receives a number of calls from attorneys who are worried about their own capabilities and responsibilities in representing a growing population of older persons with dementia. This series will only touch peripherally on the issue concerning the increasing number of "unbefriended" and underrepresented individuals in our community vexing both health care providers and the legal system.⁶ Part 1 of this two-part series will set the stage about aging, dementia, and several medical-legal theories and ethical considerations relating to capacity, incapacity, undue influence, and abuse.

Part 2 of this series will provide an overview of some of the Hawai'i statutes that are commonly applicable to

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proxy decision-making on behalf of a person who lacks capacity, or who may have limited capacity, or who may be unable to make decisions, or unable to make critical decisions on a timely basis. For the most part, individuals whose proxy decision-maker is trustworthy, existing laws may provide enough protection to those individuals facing important decisions toward the end of life. For others, there is little protection. A few statutes have provisions that appear to be inconsistent with protections afforded in other statutes and may even include what some may fear as a “license to steal” or a “license to kill” to put it dramatically. Part 2 will also provide an overview of Hawaii’s recent Our Care, Our Choice Act (H.B. 2739, 29th Leg. (Haw. 2018)) relating to medical aid in dying, which, some may sense as having both positive and negative characteristics.

The Cuckoo’s Nest⁷

Working at the university certainly has its privileges, and one such privilege is to be able to learn many new things. One example comes from a call UHELP received in which the caller asked if we knew about cuckoo birds and how they nest. Without much prompting, he described, in some detail, that the cuckoo bird is an avian brood parasitic animal

that has been observed by scientists as well as philosophers for thousands of years because of its behavior.⁸ It turns out that the cuckoo lays its eggs in other birds’ nests to spare itself the effort of raising its own young and, as it grows, the young hatchling will often shove any other hatchling of the host bird out of the nest.⁹ Some cuckoos will even ravage their hosts’ nests out of revenge when the hosts do not accept their eggs.¹⁰

Getting to the point, the caller said that his family may have had a cuckoo in its family nest too, and she took almost everything. He explained that when he and his two siblings (brother and sister) were young, they lived in a household in which their mother and father always seemed to have a strained relationship. His sister, who continued to live with their parents in the old but large family home, even after she married and had her own children, always seemed to need money. The sister obtained powers of attorney from both of their parents, and she was on each of their accounts held in joint tenancy with rights of survivorship. Upon their mother’s death, his sister became the trustee of their father’s trust as well as the personal representative of his will.

More detail about this story will be included in Part 2 but, as a preview, the



family was disrupted at the end of their parents' lives. Their sister had refused all of the brothers' requests to talk and refused to cooperate in mediation initiatives regarding their father.¹¹ Before their father's death, the brothers had reported allegations of abuse against their father to the lawyer who prepared the documents for their father and to Adult Protective Services, but to no avail. At the end, the caller said, their widowed father died most suddenly. He did not survive even six months in the nursing home in which their sister placed him. Their sister submitted an obituary to the newspaper, stating that their father died of Alzheimer's disease at 94 years old.

The family home had little equity value since a reverse mortgage had taken most of its value. What little was left in the trust was divided among the three siblings. Their sister, along with her "dead-beat husband," eventually moved to the mainland and bought a house in a gated community. The two brothers lamented that she never shared anything with them—not even the planning of their father's funeral. At the funeral, she told everyone, including her brothers, that she was following their father's explicit instructions to her "about everything." She said he had shown her certain documents that she was "not to share with the boys." She also lashed out and told her brothers that their father "was nuts" and that "he was nothing to me and I am glad he is gone." Then she said she would not talk about either of the parents "ever again." The brothers knew that their father was troubled and that he seemed to have some memory loss, but they did not really know what their father was thinking or what he really wanted. All that the brothers knew was that their father seemed miserable at the end of his life, their sister excluded them from their father's affairs, and they were hurt and disappointed. Their sister had disrupted their lives—whether on her own or at the direction of



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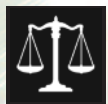


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their father, they may never know. The two brothers have not communicated with their sister in over two years.

Aging and Dementia

Over the next 20 years, the number of persons age 65 and over is expected to increase from 15.2 percent of the population in the year 2016 to about 21.7 percent by the year 2040. U.S. DEPARTMENT OF HEALTH AND HUMAN SERVICES, 2017 PROFILE OF OLDER AMERICANS (2018), <https://www.acl.gov/sites/default/files/Aging%20and%20Disability%20in%20America/2017OlderAmericansProfile.pdf>.

By the year 2060, the number of persons age 65 and older is estimated to be 98 million. *Id.* While the aging population is diverse, their longevity and the pressing need for health care and legal advocacy is summarized by a sobering Administration on Aging report. *Id.* Since 1900, the percentage of Americans 65 years old and older has more than tripled and the number has increased almost 15 times. *Id.* In 2016, the older population (persons age 65 and older), numbered 49.2 million which represented 15.2% of the United States population. *Id.* In other words, over one out of every seven Americans is 65 years of age or older. *Id.* The year 2030 marks an important demographic turning point in U.S. history according to the U.S. Census Bureau's 2017 National Population Projections. U.S. CENSUS BUREAU, OLDER PEOPLE PROJECTED TO OUTNUMBER CHILDREN FOR FIRST TIME IN U.S. HISTORY (2018), <https://www.census.gov/newsroom/press-releases/2018/cb18-41-population-projections.html>. By 2030, all baby boomers will be older than age 65. *Id.* This will expand the size of the older population so that 1 in every 5 residents will be retirement age. *Id.* By 2035, there is expected to be 78 million people that are 65 years of age and older compared to 76.7 million under the age of 18. *Id.* This projected growth of the older population

in the United States will challenge families, businesses, health care providers, and policy makers and programs, such as Social Security and Medicare. *Id.*

The State of Hawai'i Executive Office on Aging reports that the growth in the number of older adults ages 85 years or older is even more dramatic for Hawai'i than in other states. *See STATE OF HAWAII DEPARTMENT OF HEALTH: EXECUTIVE OFFICE ON AGING, PROFILE OF HAWAII'S OLDER ADULTS AND THEIR CAREGIVERS* (2006), <http://health.hawaii.gov/ea/files/2013/07/Profile-of-Hawaiis-Older-Adults-and-Their-Caregivers-2006.pdf>. In 1980, there were 113,944 adults age 60 and older, representing 12% of the population. *Id.* Over a twenty-year period (1980-2000), Hawai'i's older adult population increased over three times faster than its total population. *Id.* at 2. Over this twenty-year period, the number of older adults increased by 82% while the total population increased by only 26%. *Id.* As Americans continue not only to age but also to live for longer periods, the number of individuals needing services—including legal services—will increase, which has been anticipated for years.¹²

Age is the primary risk factor for developing dementia and, for that reason, the number of people living with dementia could double in the next 40 years.¹³ Dementia is the loss of cognitive functioning—the ability to think, remember, or reason—to such an extent that it interferes with a person's daily life. These functions include memory, language skills, visual perception, problem solving, self-management, and the ability to focus and pay attention. Some people with dementia cannot control their emotions, and their personalities may change. Dementia ranges in severity from the mildest stage, when it is just beginning to affect a person's functioning, to the most severe stage, when the person must depend completely on others for basic activities of

daily living.¹⁴ It worsens over time, and there is no cure for this devastating disease.¹⁵

Alzheimer's disease is the most common cause of dementia in older adults.¹⁶ According to the Alzheimer's Association, approximately 5.8 million Americans of all ages have Alzheimer's disease in 2019, and 5.6 million of those Americans are over the age of 65.¹⁷ The Alzheimers Association notes:¹⁸

...some individuals have dementia-like symptoms without the progressive brain changes of Alzheimer's or other degenerative brain diseases. Common causes of dementia-like symptoms are depression, untreated sleep apnea, delirium, side effects of medications, thyroid problems, certain vitamin deficiencies and excessive alcohol consumption. Unlike Alzheimer's and other dementias, these conditions often may be reversed with treatment.

"Dementia," is a term many people fear, and it may be stigmatizing. In order to address stigmatization, the American Psychiatric Association is reducing the use of the term "dementia" in favor of major or minor neurocognitive disorder.¹⁹

Before an individual reaches the point of having dementia, there may be a period of time in which an individual may be experiencing moderate or mild cognitive impairment ("MCI").²⁰ An individual with MCI may still have substantial ability to pursue appropriate legal, financial, and personal planning for future incapacity.²¹ This is also the area best suited for an attorney to provide essential counsel, advice, and document preparation to enhance, preserve, or continue an individual's autonomy and self-determination and to set into place decision-makers with authority to act on behalf of the client when needed. It is also a good time to suggest that the client consider creating a "what matters to me" statement about their lives for future use

in times when family, fiduciaries, courts and the attorney may wonder "What would they have wanted?"²²

Capacity, Incapacity, Undue Influence and Abuse

When working with older clients or other clients suspected of having diminished capacity, it is imperative that an attorney determine whether his/her client has the mental capacity to make informed decisions.²³ Not only can lack of mental capacity affect the client's daily living activities, safety, and ability to live independently, it can also impact the client's ability to execute valid legal documents and make personal health care decisions.

It should be noted that capacity and incapacity are sometimes used interchangeably with the terms competence and incompetence, but they may be distinguished.²⁴ The concept of capacity or lack of capacity is more activity-specific than the concept of competency or incompetency.²⁵ Often it is helpful to simply ask, "capacity for what?" For example, each specific activity that involves a decision, such as the provision of informed consent for medical treatment or the execution of a will, trust, advance directive, or power of attorney, may have a different required level of decisional capacity to be considered "valid."²⁶

As more is learned about mental function and greater attention is paid to preserving individuals' rights, emphasis is placed by professionals on identifying, in functional terms, specific mental tasks and skills people retain and lose.²⁷ Understanding a client's mental capacity can help care providers meet the vulnerable person's needs while avoiding unnecessary, restrictive, or intrusive interventions.

The premier resource for lawyers, judges, and health care professionals with respect to capacity is a series of handbooks produced through a collaborative effort of members of the American Bar



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Association (“ABA”) and the American Psychological Association (“APA”).²⁸ According to its executive summary, the specific goal of these handbooks is to review psychological assessment of six civil capacities of particular importance to older adults, namely, medical consent capacity, sexual consent capacity, financial capacity, testamentary capacity, capacity to drive, and capacity to live independently.

The handbooks also propose several ways that attorneys can promote and maintain client capacity. There are recommendations in the handbooks focused on decisional abilities rather than cooperativeness or affability.²⁹ This helps to separate a client’s possible decision-making relating to diminished capacity from the client’s own personality style. In addition, the handbooks address the important topic of undue influence and introduce emerging areas of interest, such as the capacity to mediate, the capacity to participate in research, and the capacity to vote.³⁰

Individuals with dementia, such as Alzheimer’s disease, may be more susceptible to abuse, neglect, and exploitation.³¹ Since most individuals who suffer from dementia are 65 and older, the laws, policies, procedures, and structures established to protect older persons from abuse, neglect, and exploitation can often be used to protect individuals with dementia. Some states have specific elder protective services laws or programs;³² other states, like Hawai‘i, do not have such programs, although there are many laws and interventions that can provide protection of older adults, including an Adult Protective Services law, the Penal Code, consumer protection laws, and laws establishing oversight agencies for long-term care facilities.³³

Attorneys working with older persons need to know the basics of Hawai‘i’s Adult Protective Services statute³⁴ as individuals with dementia may fit one or more criteria for protection although it

does not make specific provisions based on age.³⁵ The statute uses the term “vulnerable adult,” which means a person eighteen years of age or older who, because of mental, developmental, or physical impairment, is unable to communicate or make responsible decisions to manage the person’s own care or resources, to carry out or arrange for essential activities of daily living or protect oneself from abuse. HAW. REV. STAT. § 346-222 (2009) (Definitions). “Abuse” may be physical, psychological, and sexual abuse as well as financial exploitation, caregiver neglect or self-neglect. *Id.*

Intervention is initiated by a report that a vulnerable adult has suffered abuse or is in danger of abuse if immediate action is not taken. *See* HAW. REV. STAT. § 346-223 (2009) (Jurisdiction; Venue) The report is sent to the Adult Protective Services Unit of the Department of Human Services (“DHS”) for investigation. HAW. REV. STAT. § 346-227 (2009). However, DHS must have the consent of the victim before an investigation or protective action can commence, unless the department obtains court authorization to provide necessary services. HAW. REV. STAT. § 346-230 (2009).

Questions often arise whether attorneys should report abuse. The Hawai‘i Adult Protective Service Act provides mandatory reporting for certain persons.³⁶ Lawyers are not on the list of mandated reporters, but there are conditions under which a lawyer may report.³⁷ The concepts of undue influence and mental capacity often intersect but not always. Capacity is defined as “the ability to understand and appreciate the nature and consequences of making decisions concerning one’s person or to communicate such decisions.” HAW. REV. STAT. § 346-222 (2014).

Undue influence refers to questions whether the individual is acting freely and knows what he or she is doing. Undue influence is often seen in questions relating

to contracts,³⁸ but is also seen as a process or method used to commit financial or sexual exploitation through manipulation or deceit. For example, perpetrators use various techniques and manipulations to gain power and compliance, exploiting the older person's trust, dependency, and even fear of harm. Over time, the perpetrators gain control over the decision-making of their unwitting victims.

Inducing someone to sign a legal document or to give a gift, for example, may constitute abuse if the person does not fully understand the transaction, appreciate the value of what they are giving away, or comprehend the implications of what they are doing. One of the first questions often raised is "Did this person understand what he or she was doing when he or she gave a gift or transferred property? Was coercion,

trickery, or undue influence employed?" Undue influence may exist without evidence of mental incapacity, and mental

People are more vulnerable to manipulation when they have certain psychological or medical conditions or difficult personal circumstances, such as depression, stroke, dementia, and social isolation among many others.

incapacity may exist without undue influence. People are more vulnerable to manipulation when they have certain

psychological or medical conditions or difficult personal circumstances, such as depression, stroke, dementia, and social isolation among many others.³⁹

Hawai'i law recognizes that exploiting a vulnerable adult through undue influence may constitute abuse under the statute.⁴⁰ Finally, under the Penal Code, if a person commits a crime against an older or handicapped person, the act can be prosecuted as a crime and the perpetrator may receive an extended sentence. See HAW. REV. STAT. § 706-662 (2014).

Ethical Issues

Ethical issues abound for attorneys as well as for other professionals in working with their older patients/clients who may be an attorney's client. Understanding differences in ethical considerations can be important. As an example,



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health care professionals have ethical requirements to maintain confidences and to respect privacy, especially relating to their patients and the patients' caregivers.⁴¹

For attorneys, the Hawai'i Rules of Professional Conduct impose ethical requirements on Hawai'i-licensed attorneys in their practice of the law. Additional requirements may be required or suggested by affiliation with such groups as the National Academy of Elder Law Attorneys ("NAELA")⁴² and the American College of Trust and Estate Counsel ("ACTEC"),⁴³ which have additional standards beyond those of the ABA Model Rules and state-specific Rules of Professional Conduct.⁴⁴

One obvious question that an attorney needs to ask is "Who is my client?" Rule 1.18 of the Hawai'i Rules of Professional Conduct imposes a duty to prospective clients. HAW. RULES OF PROF'L CONDUCT R. 1.18 (amended 2013). The identification of the client is a fact-specific inquiry and is the first step in representation and, if the attorney is not court-appointed, it requires that the individual to be represented have sufficient capacity to retain the attorney. This decision may very well take the attorney in one direction or another.⁴⁵ Depending on the circumstances, the client may be the individual with dementia, a family member, a friend, a caregiver or other interested individual or entity.⁴⁶

Rule 1.1 of the Hawai'i Rules of Professional Conduct imposes a duty to provide competent representation to a client. HAW. RULES OF PROF'L CONDUCT R. 1.1 (amended 2013). This rule requires the attorney to have the legal knowledge, skill, thoroughness, and preparation reasonably required for the representation. This rule may come into play when an attorney is new to dealing with some of the potential complexities of dementia-related issues. See footnote 5.

Rule 1.2 requires an attorney to

abide by a client's decisions concerning the objectives of the representation but this may be problematic if the client's ability to make decisions becomes impaired. HAW. RULES OF PROF'L CONDUCT R. 1.12 (amended 2013). Rule 1.4 requires an attorney to communicate with the client. HAW. RULES OF PROF'L CONDUCT R. 1.4 (amended 2013). For a client with dementia, section (b) of this rule is noteworthy: "A lawyer shall explain a matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation." Comment 6 to the rule provides: "Ordinarily, the information to be provided is that appropriate for a client who is a comprehending and responsible adult." HAW. RULES OF PROF'L CONDUCT R. 1.4 (amended 2013). However, the next comment provides, "fully informing the client according to this standard may be impracticable, for example, where the client is a child or suffers from diminished capacity." HAW. RULES OF PROF'L CONDUCT R. 1.14 (amended 2013). When the client is an organization or group, it is often impossible or inappropriate to inform every one of its members about its legal affairs; ordinarily, the lawyer should address communications to the appropriate officials of the organization. HAW. RULES OF PROF'L CONDUCT R. 1.13 (amended 2013). "Where many routine matters are involved, a system of limited or occasional reporting may be arranged with the client." HAW. RULES OF PROF'L CONDUCT R. 1.4 cmt. 6) (amended 2013).

Rule 1.6 imposes a duty of confidentiality on lawyers, allowing them to disclose information related to representation of a client only in very limited circumstances, such as when the client gives informed consent or the disclosure is "impliedly authorized in order to carry out the representation. HAW. RULES OF PROF'L CONDUCT R. 1.6 (amended 2013). This rule allows lawyers

to keep third parties out of their consultations with their clients, including family members of the client. Maintaining the confidentiality of lawyers' communication with their clients can help safeguard against outside parties unduly influencing their clients' legal decisions because, under this rule, lawyers cannot reveal what was discussed one-on-one with their clients or the particulars of the legal documents drafted for their clients. However, there may be times when an attorney feels that it is necessary to report to the authorities, such as to adult protective services. Rule 1.6 provides in part:

(a) A lawyer shall not reveal information relating to the representation of a client unless the client gives informed consent, the disclosure is impliedly authorized in order to carry out the representation or the disclosure is permitted by paragraph (b).

(b) A lawyer may reveal information relating to the representation of a client to the extent the lawyer reasonably believes necessary: (1) to prevent reasonably certain death or substantial bodily harm...

Id.

Rule 1.14, which will be mentioned later, provides additional exceptions and if a lawyer has questions about these ethical standards, the lawyer may wish to consult with the Office of Disciplinary Counsel.⁴⁷

Rule 1.7 provides that a lawyer shall not represent a client if the representation involves a concurrent conflict of interest. HAW. RULES OF PROF'L CONDUCT R. 1.7 (amended 2013). Addressing issues relating to multiple representations, the rule provides that when representation of multiple clients in a single matter is contemplated, the consultation shall include an explanation of the implications of the common representations, including both the advantages and the risks involved. HAW. RULES OF PROF'L CONDUCT R. 1.7(c) (amended 2013). As to the duty of confidentiality, there are several consider-

ations with respect to multiple or common representation. HAW. RULES OF PROF'L CONDUCT R. 1.7 cmts. 30-31 (amended 2013).

Rule 1.8 addresses conflicts which may arise when dealing with families and caregivers when someone other than the client is paying for the legal services.⁴⁸ Additionally, Rule 1.14 strengthens the lawyer's obligation to the client who may be incapacitated. HAW. RULES OF PROF'L CONDUCT R. 1.14 (amended 2013). Just because the client may have some kind of disability does not end the lawyer's obligation to the client. Rule 1.14 provides as follows:

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

As mentioned in Comment 3 to the rule, the lawyer must keep the client's in-

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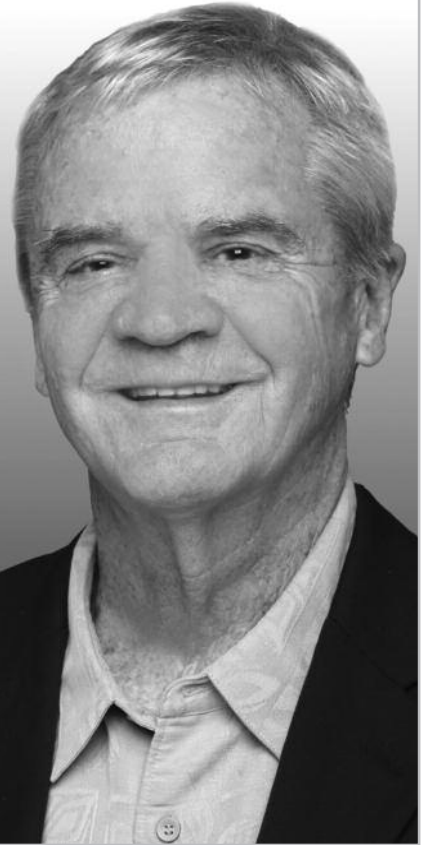
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terest as the lawyer's main priority at all times, even when family members or other persons participate in discussions with the lawyer. This rule also gives the lawyer the option to take protective action if the lawyer believes that the client has diminished capacity and is at risk of substantial physical or financial harm. Some suggested actions listed in the commentary to this rule include the following: "consulting with family members . . . using voluntary surrogate decision-making tools such as durable powers of attorney or consulting with support groups." *Id.* at Comment 5. However, it is important to remember the "guiding principle for the lawyer should be to take the least restrictive action."⁴⁹ Furthermore, the language of Rule 1.14 explicitly states that the "lawyer may take reasonably necessary protective action. . ." The problem is that there is no definition of "reasonably necessary," leaving it up to the lawyer to define.⁵⁰

Comment 6 to Rule 1.14 mentions the following factors in determining the extent of the client's diminished capacity:

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.

The NAELA Comment on Aspirational Standard G, Section 5 (regarding Rule 1.14) provides additional guidance:

Attorneys should be aware of the potential conflict between the client's best interests and the attorney's duty to advocate for the client's wishes (e.g., when the client wishes to age in place and it is in the client's best interests to be placed in long-term care). This conflict often occurs when the client has diminished capacity and needs protection, thus requiring the attorney to choose between advo-

cating for the client's wishes or acting against those wishes in order to protect the client.⁵¹

Further discussion of powers of attorney, advance directives, provider orders for life sustaining treatment, and aid-in-dying will be analyzed in Part 2 of this two-part series.

¹ See, e.g., Hawaii's 'Last Princess' Fights for Control of Her Fortune <https://www.civilbeat.org/2018/02/hawaiis-last-princess-fights-for-control-of-her-fortune/>; Let Kawanakoa spend her money; Letters to the Editor, F-2, *Honolulu Star-Advertiser*, May 26, 2019.

The author has no information about the cases except what is reported and makes no judgment about the respective situations except that the older persons involved seem disappointed at what happened to them.

² See, e.g., Katherine Kealoha's Grandmother, 99, Finally Gets to Tell Her Story, <https://www.civilbeat.org/beat/katherine-kealohas-grandmother-99-finally-gets-to-tell-her-story>. Ailing grandma, 99, is a key witness in Katherine and Louis Kealoha corruption case, *Honolulu Star-Advertiser*, March 28, 2019, <https://www.staradvertiser.com/2019/03/28/breaking-news/grandma-99-is-key-witness-in-kealoha-corruption-case/>. Her statement about her granddaughter is telling:

"She promised that she'd help me and I believed her," Puana said.
"She said to trust her. She said, 'Grandma, don't worry.' She said, 'I'm the attorney and you can trust me.'"

³ See, e.g., Dr. David Grube and Dr. Chuck Miller, Medical aid in dying shows progress Editorial, p. F3, *Honolulu Star-Advertiser*, May 26, 2019, regarding Our Care, Our Choice Act, H.B. 2739, 29th Leg. (Haw. 2018).

⁴ See www.hawaii.edu/uhelp.

⁵ See James H. Pietsch, *Becoming a 'Dementia-Capable' Attorney—Representing Individuals with Dementia*, 1 *Hawaii Bar Journal*, Vol. 17 No. 13 (2015).

⁶ See, e.g., Thaddeus M. Pope, *Unbefriended and Unrepresented: Better Medical Decision Making for Incapacitated Patients Without Healthcare Surrogates*, 33 *Ga. St. U. L. Rev.* 923 (2017).

⁷ The story is a representative tale of calls received at UHELP and the characters bear no resemblance to any actual family.

⁸ See, e.g., Maria R. Servedio, and Russell Lande *Coevolution of An Avian Host and Its Parasitic Cuckoo*, *Evolution*, 57(5), 1164-1175, (1 May 2003).

⁹ *Id.*

¹⁰ See, e.g., Max-Planck-Gesellschaft. "Cuckoo mafia: Host birds only tolerate parasitic eggs in their nests when they fear retaliation." *ScienceDaily*. *ScienceDaily*, 18 May 2016. www.sciencedaily.com/releases/2016/05/160518094714.htm.

¹¹ For example, the Mediation Center of the Pacific has a *Kūpuna Pono* program designed to help families talk about difficult issues and develop plans to support elderly family members. See, <https://www.mediatehawaii.org/kupuna-pono>.

¹² See William E. Adams & Rebecca C. Morgan, *Representing the Client Who Is Older in the Law Office and in the Courtroom*, 2 *ELDER L.J.* 1, 2 (1994) ("The recognition of this impact on the legal profession is becoming evident as organizations are being formed for lawyers interested in practicing "elder law.").

¹³ See NAT'L INST. ON AGING, *The Dementias, Hope Through Research* <https://order.nia.nih.gov/sites/default/files/2018-01/the-dementias-hope-through-research.pdf>.

¹⁴ *Id.*

¹⁵ *Id.*

¹⁶ *Id.*

¹⁷ 2019 ALZHEIMER'S FACTS AND FIGURES, <https://alz.org/media/Documents/alzheimers-facts-and-figures-2019-r.pdf> at 17.

¹⁸ *Id.* at 8.

¹⁹ James Siberski, *Dementia and DSM-5: Changes, Cost, and Confusion*, 5 *AGING WELL* 12 (2012) ("It was believed that the word dementia was stigmatizing toward older individuals and not well accepted by younger individuals with HIV dementia. The new term focuses on the decline from a previous level of functioning as opposed to a deficit.") (Aging Well Magazine was rebranded in 2013 as "Today's Geriatric Medi-

chine.”) For more information about the classification of mental disorders such as dementia, see AMERICAN PSYCHIATRIC ASSOCIATION, THE DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS, 5th ed. (2013), available at <http://www.psychiatry.org/practice/dsm>.

²⁰ Am. Psychological Ass’n, *Guidelines for the Evaluation of Dementia and Age-Related Cognitive Change*, 67 AM.PSYCHOLOGIST 1 at 2 (2012) available at <https://www.apa.org/pubs/journals/features/dementia-age.pdf> (“Some older adults have memory and cognitive difficulties that are greater than those typical of normal aging but not so severe as to warrant a diagnosis of dementia.”)

²¹ Ronald C. Petersen, *Early Diagnosis of Alzheimer’s Disease: Is MCI Too Late?*, 6 CURR ALZHEIMER RES. 324 (2009), available at <http://www.ncbi.nlm.nih.gov/pmc/articles/PMC3098139/pdf/nihms193364.pdf> (“The field of aging and dementia research is advancing rapidly toward the stage of earlier identification... [T]he construct of mild cognitive impairment (MCI) has come to represent an intermediate clinical state between the cognitive changes of aging and the very earliest features of Alzheimer’s disease.”).

²² As with other initiatives in the legal world, the “what matters to me” types of documents have its roots in the medical profession. See, e.g., Tom Cramer, *Veterans Adding Life Story to Medical Records*, available at <https://www.va.gov/HEALTH/NewsFeatures/2015/June/Veterans-Adding-Life-Story-to-Medical-Records.asp>, regarding the Department of Veterans Affairs “My Life, My Story” program.

When you’re meeting your new doctor for the first time, do you want her to know that you were wounded during the Tet Offensive in 1968 while trying to pull a wounded comrade out of harm’s way? And that a month later you accidentally shot that same guy in the leg and crippled him for life?

Such documents for the legal world will be discussed in Part 2 of this series.

²³ The first practical question for an attorney may very well be whether the potential client has the capacity to enter into a contract with the attorney, regardless of the general presumption that an adult is competent to do so. See generally 17B C.J.S. *Contracts* § 933 (2015). “[T]he presumption that every adult who executes a contract is mentally competent to enter into a contract may be refuted by clear and convincing evidence that such a party was incapable of un-

derstanding the nature and consequences of his or her acts, or more exactly, that such party’s mental powers had become so far affected as to make him or her incapable of understanding the character of the transaction in question.”

²⁴ Jennifer Moye et al., *Assessment of Capacity in an Aging Society*, 68 AM. PSYCHOL. 158 (2013), available at <http://www.ncbi.nlm.nih.gov/pmc/articles/PMC4160021/pdf/nihms620600.pdf>.

²⁵ See e.g., 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 (1999-2000); Charles P. Sabatino and Erica Wood, *The Conceptualization of Legal Capacity of Older Persons in Western Law*, BEYOND ELDER LAW 35 (2012).

²⁶ Lawrence A. Frolik, “Sufficient” Capacity: The Contrasting Capacity Requirements for Different Documents, 2 NAELA J. 303, 316 (2006) (“[T]estamentary capacity does not include the more stringent requirement that the ‘person possesses sufficient mind to understand, in a reasonable manner,’ which reflects the Anglo-American legal tradition of demanding a higher degree of capacity to enter into a valid contract”).

²⁷ See, e.g., Marson et al., *Assessing Financial Capacity in Patients with Alzheimer Disease*, 57 ARCHIVES OF NEUROLOGY 877 (2004) (“As our society ages, clinical assessment of higher order functional capacities has become increasingly important. In areas like financial capacity, medical decision-making capacity, medication compliance, and driving, society has a strong interest in accurately discriminating intact from impaired functioning”).

²⁸ A.B.A Comm’n. on L. & Aging & Am. Psychological Ass’n, *Assessment of Older Adults with Diminished Capacity: A Handbook for Lawyers* (2005), available at <http://www.apa.org/pi/aging/resources/guides/diminished-capacity.pdf> [hereinafter *Handbook for Lawyers*]. This handbook was the first product of the ABA/APA Assessment of Capacity in Older Adults Project Working Group, established in 2003 under the auspices of the interdisciplinary Task Force on Facilitating APA/ABA Relations. This handbook offers a conceptual framework and practice tips for addressing problems of client capacity, in some cases with help from a clinician. The second product, *Judicial Determination of Capacity of Older Adults in Guardianship Proceedings: A Handbook for Judges* was published in 2006. This handbook overviews capacity determination, examines the role of judges, provides judges with a summary of the kinds of functioning assessed, and suggests a five-step model for assessment. Copies of both handbooks are available online at

www.apa.org/pi/aging and www.abanet.org/aging. *Assessment of Older Adults with Diminished Capacity: A Handbook for Psychologists* was published in 2008 and is available at <http://www.apa.org/pi/aging/programs/assessment/capacity-psychologist-handbook.pdf>. “Formal collaborative efforts between the ABA and the APA began in 1995 with the establishment of the interdisciplinary Task Force on Facilitating APA/ABA Relations. Since that time, the task force has identified, developed, and pursued productive interdisciplinary projects and relationships. Interactions between the APA and the ABA have resulted in collaboration on a number of activities and facilitated useful forums for the exchange of views about critical issues and concerns affecting psychology and the law.”

²⁹ See generally *id.*

³⁰ *Id.* at 16.

³¹ See e.g., Lichtenberg, P. A. (2016). Financial exploitation, financial capacity, and Alzheimer’s disease. *American Psychologist*, 71(4), 312-320.

³² See, e.g., <https://www.stetson.edu/law/academics/elder/home/statutory-updates.php> Stetson University College of Law, by and through the Center for Excellence in Elder Law and the Elder Consumer Protection Program, produces certain statutory monitoring and update materials for the use by and the benefit of the public and professional communities. These statutes vary widely based on who may be eligible for services and the types of abuse that may be actionable. At the same time, federal laws, such as the Older Americans Act, do little more than authorize funds for local awareness and coordination endeavors.” See 42 U.S.C. § 3002 (2006 and Supp. 2012). Unlike federal laws on child abuse and domestic violence, which fund services and shelters for victims, there was no comparable federal law on elder abuse although the Elder Justice Act enacted on March 23, 2010 as part of the Patient Protection and Affordable Care Act (ACA, P.L. 111-148, as amended) is now making some strides in coordinating efforts to combat elder abuse.

³³ See, e.g., James H. Pietsch *Elder Abuse and Laws to Protect Older Persons in Hawaii*, 93 *Hawaii Bar Journal*, Vol. 16 No. 13 (2013).

³⁴ HAW. REV. STAT. Chap. 346 Part X (2009).

³⁵ *Id.* Section I, modifying HAW. REV. STAT. § 346-221:

While advanced age alone is not sufficient reason to intervene in a person’s life, the legislature finds that many elders have become subjects of abuse, neglect, and ex-

ploitation. Substantial public interest exists to ensure that this segment of the population receives protection.

³⁶ See HAW. REV. STAT. § 346-224 (2009). Mandated reporters include licensed or registered professionals of healing arts, physicians, nurses, pharmacists, employees or officers of any public or private agency or institution providing medical services, law enforcement, and employees or officers of any adult residential care home or similar institution.

³⁷ HAW. REV. STAT. § 346-223 (2012). Although the list does not include attorneys, any person may report, and the reports are confidential. However, see *infra* discussion on HAW. RULES OF PROF'L CONDUCT R.1.6 regarding confidentiality.

³⁸ RESTATEMENT (SECOND) OF CONTRACTS § 177 (1981). "Undue influence is unfair persuasion of a party who is under the domination of the person exercising the persuasion or who by virtue of the relation between them is justified in assuming that that person will not act in a manner inconsistent with his welfare."

³⁹ See, e.g., Ann Stanyer, *Financial Abuse of Older Clients: Law, Practice and Procedure*, Bloomsbury Publishing, 2017.

⁴⁰ HAW. REV. STAT. § 346-222 (2014) ("Financial exploitation may be accomplished through coercion, manipulation, threats, intimidation, misrepresentation, or exertion of undue influence."). See *In re Estate of Herbert*, 90 Haw. 443, 979 P.2d 39 (1999), as amended on denial of reconsideration (Apr. 15, 1999). The Hawai'i Supreme Court held that Carmen Herbert had been unduly influenced when she executed her third and final will, and which was denied probate.

⁴¹ See, e.g., AM. PSYCH. ASS'N, COMMON ETHICAL ISSUES, <http://www.apa.org/pi/about/publications/caregivers/practice-settings/ethical-issue/index.aspx?tab=1> ("Issues of privacy, informed consent, access to hospitalized or residential care patients, access to medical records or inclusion in conferences with healthcare staff, competency and decision making about care, especially end-of-life care may lead to complex, ethical conflicts or concerns when treating family caregivers.")

⁴² See <https://www.naela.org>.

⁴³ See <https://www.actec.org>.

⁴⁴ See Mary F. Radford, A Comparison of the 2016 American College of Trust and Estate Counsel Commentaries With the 2017 NAELA Aspirational Standards, NAELA Journal Special Edition 71, 2018. "Both the ACTEC Commentaries and the NAELA Aspirational Standards have one important feature in common. Neither is intended to be used to 'define or establish a legal or community standard nor are they intended to be used to support a cause of action, create a presumption of a breach of a legal duty, or form a basis for civil liability.'" However, the NAELA Aspirational Standards, unlike the ACTEC Commentaries, "not only build upon and support the Model Rules of Professional Conduct relevant to each NAELA member but also, as a condition of membership, require every NAELA member to support the Aspirational Standards."

⁴⁵ Issues of autonomy and self-determination vs. protection and the best interest of an individual may arise, especially relating to contentious issues of impaired driving or emotional issues such as withholding and withdrawing life-sustaining treatment at the end of life. Such issues are not unique to the elder law or estate planning or family law attorney. See, e.g., Josephine Ross, *Autonomy Versus a Client's Best Interests: The Defense Lawyer's Dilemma*, 35 AM. CRIM. L. REV. 1343, 1343 (1998) (A defense attorney articulates the difficulty with choosing between raising the defense of nonresponsibility against the client's wishes, when the attorney believes the client is suffering from a mental illness, and therefore is unable to follow sound advice.)

⁴⁶ See, Robert C. Anderson and Whitney A. Gagnon, *Client Identification: Foundational and Unique to the Ethical Practice of Elder and Special Needs Law*, 113 NAELA Journal Special Edition, 2018.

⁴⁷ <https://www.dbhawaii.org/about-odc>
As part of its educational outreach, ODC spends time answering questions on ethical matters regarding prospective conduct. ODC attorneys provide informal guidance to Hawai'i-licensed attorneys, however, as described in more detail in its website, the informal guidance is not binding against ODC.

⁴⁸ HAW. RULES OF PROF'L CONDUCT R. 1.8(f) (amended 2013) "A lawyer shall not accept compensation for representing a client from one other than the client unless: (1) the client consents after consultation; (2) there is no interference with the lawyer's independence of professional

judgment or with the client-lawyer relationship; and (3) information relating to representation of a client is protected as required by Rule 1.6."

⁴⁹ Elizabeth Laffitte, Note, *Model Rule 1.14: The Well-Intended Rule Still Leaves Some Questions Unanswered*, 17 Geo. J. Legal Ethics 313, 328 (2004).

⁵⁰ *Id.*

⁵¹ The National Academy of Elder Law Attorneys Aspirational Standards for the Practice of Elder and Special Needs Law with Commentaries Second Edition, April 24, 2017.

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