Oregon State Bar CLE Seminars

Social Security Disability: Recent Trends and Tips

Cosponsored by the Disability Law Section

Friday, June 1, 2018
9 a.m.–4:30 p.m.

5 Access to Justice credits and 1 Ethics credit

SECTION PLANNERS

Juhi Aggarwal, *Metropolitan Public Defender Services Inc, Portland*
Tiffany Hendrix Blackmon, *Cascadia Disability Law LLC, Portland*
Risa Davis, *Risa Davis Attorney at Law LLC*
Terisa Page Gault, *Harris Law Firm PC, Hillsboro*
Gordon Magella, *Disability Rights Oregon, Portland*
Bill Spiry, *Attorney at Law, Eugene*

OREGON STATE BAR DISABILITY LAW SECTION EXECUTIVE COMMITTEE

OREGON STATE BAR
16037 SW Upper Boones Ferry Road
P.O. Box 231935
Tigard, OR 97281-1935

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SCHEDULE

8:00 Registration

9:00 Social Security Disability: Best Practices

- ✦ Understanding the process
- ✦ Facilitating a decision
- ✦ Effective communication

William Lesselyoung, *Disability Determination Services, Salem*

10:00 Break

10:15 Cross-Examination Tips

Scott Stipe, *Career Directions Northwest, Portland*

11:15 Federal Court Appellate Brief Writing

- ✦ Reviewing an unfavorable decision and identifying issues
- ✦ Structure of a brief—thorough, concise, tailored
- ✦ Voluntary remands and their implications
- ✦ Reply briefs

Lindsey Craven, *Schneider Kerr & Robichaux, Portland*

12:15 Lunch

1:15 Preparing for Medical Expert Testimony: Hearing Level Practice and Appellate Issues

- ✦ Preparing for a hearing with a medical expert
- ✦ Pre- or post-hearing requests for use of a medical expert
- ✦ Cross examination of a medical expert in the hearing
- ✦ Appellate issues related to medical experts

Kevin Kerr, *Schneider Kerr & Robichaux, Portland*

2:15 Break

2:30 Roundtable: Common Roadblocks to Obtaining Social Security Benefits and How to Overcome Them

- ✦ Common issues in cases and tips for handling them
- ✦ Clients who work after the alleged onset, DAA, transferable skills, and CDIU investigations
- ✦ Open discussion of ideas and issues

Facilitators:
Jeremy Bordelon, *Evergreen Disability Law, Portland*
Tiffany Hendrix Blackmon, *Cascadia Disability Law LLC, Portland*

3:30 Ethically and Effectively Representing Clients with Diminished Capacity

- ✦ Diminished capacity and ethical duties under ORCP 1.14
- ✦ Case preparation: 5-day rule; normal attorney-client relationship unavailable
- ✦ When in doubt—sources for ethics guidance
- ✦ Meeting clients—active and effective listening; client empathy; rapport building

Terisa Page Gault, *Harris Law Firm PC, Hillsboro*
Andy Gilles, *Choices for a Better Future, Keizer*

4:30 Adjourn

FACULTY

Tiffany Hendrix Blackmon, *Cascadia Disability Law LLC, Portland.* Ms. Blackmon represents clients at the hearing and appeal levels. She is a member of the Oregon State Bar Disability Law Section Executive Committee, the Oregon State Bar Pro Bono Committee, and the Multnomah Bar Association Public Service Committee. She has worked for Disability Determination Services, where she adjudicated initial applications for Social Security benefits.

Jeremy Bordelon, *Evergreen Disability Law, Portland.* Mr. Bordelon founded Evergreen Disability Law to focus on ERISA benefits claims for workers, including long-term disability, accidental death, and similar non-ERISA bad faith claims. He is certified as a Social Security Disability Specialist by the National Board of Social Security Disability Advocacy, and he represents select clients at both the administrative and federal court levels. He is a member of the Oregon State Bar Disability Law Section Executive Committee, the Oregon Trial Lawyers Association, the Washington State Association for Justice, and the American Association for Justice (AAJ), and he is past chair of the AAJ Social Security Section. Mr. Bordelon is admitted in Oregon, Washington, and Tennessee.

Lindsey Craven, *Schneider Kerr & Robichaux, Portland.* Ms. Craven has led the Appellate Department at Schneider Kerr & Robichaux for six years.

Terisa Page Gault, *Harris Law Firm PC, Hillsboro.* Ms. Gault represents claimants in Social Security and workers' compensation claims. During law school, she studied abroad in China where she received a Certificate in Chinese Comparative Law and obtained a certificate in Alternative Dispute Resolution.

Andy Gilles, *Choices for a Better Future, Keizer.* Mr. Gilles is a counselor who teaches soft skills to a wide variety of clients. He encourages a person-centered approach to best work with the client. He previously worked as a youth transition program specialist through a school district, helping students with disabilities transition to workplace settings. Mr. Gilles holds an MS in Rehabilitation Counseling from Western Oregon University.

Kevin Kerr, *Schneider Kerr & Robichaux, Portland.* Mr. Kerr focuses his practice on Social Security Disability cases and is also accredited by the Veterans Administration to represent veterans on compensation and pension claims. He is admitted to practice in Oregon and Washington.

William Lesselyoung, *Disability Determination Services, Salem.* Mr. Lesselyoung is the Professional Relations Officer for Disability Determination Services (DDS). His primary responsibility is recruiting, hiring, and overseeing the medical consultants DDS utilizes for consultative exams (CEs). Mr. Lesselyoung reviews the work of consultants and provides feedback and guidance. He also handle complaints about CEs made by claimants, third parties, attorneys, and others.

Scott Stipe, *Career Directions Northwest, Portland.* Mr. Stipe is a Certified Rehabilitation Counselor, vocational evaluator, and forensic vocational expert. He provides forensic vocational services in many venues for both plaintiff and defense. He also provides vocational rehabilitation and career counseling services. He is on the board of the American Board of Vocational Experts. He is past president of the Oregon Association of Rehabilitation Professionals, has held a national board position with the International Association of Rehabilitation Professionals (IARP), and is a founder of the IARP SSVE Section. Mr. Stipe was a vocational expert under contract to Social Security from 1986 to 2017. He has mentored several other vocational experts and spoken at the national ALJ conference as well as other conferences. He holds a Masters in Rehabilitation Counseling from the University of Northern Colorado and four national board certifications (CDMS, LPC, IPEC, and D-ABVE) as well as state licenses/certification.

Chapter 1

Cross Examination Tips

Scott Stipe
Career Directions Northwest
Portland, Oregon

Contents

Cross Examination Tips

Scott T. Stipe MA,CRC,CDMS,LPC,IPEC,D/ABVE
Vocational Expert

Background

- 42 years of experience in the field of Vocational Rehabilitation and Vocational Evaluation
- Initiated expert work in early 80s, SSVE in 1986
- Founder of largest national group representing SSVE in US with IARP many years ago
- Mission for our group: Market Rates for VEs. Lower than market rates will guarantee lower qualified VEs over time/ damage to profession
- SSA is negligent in paying artificially low rates guaranteeing decline in VE quality over time
- ALJs are being "trained" to ask VEs ridiculously complex questions (which VEs have limited foundation to answer)

- Unlike most other professions there has been some resistance to a required credential, license or training in order to be "inclusive" (a very illogical position in terms of turf)
- Wide range in relation to Education, Experience, Certification
- Most attorneys do little or limited comparison of VEs and assume we all have about the same stuff. They are wrong
- If the expert does not compare favorably to other experts he/she is an outlier and makes your case vulnerable
- Upshot: Most VEs have very similar stuff, a growing number don't (your target)

What makes a VE

Most all VEs locally and nationally had the "right stuff"

- Masters or higher in Rehab Counseling or closely related field
- National Credentials (CRC, ABVE, etc)
- Many years VR experience
- Active practice outside of SSA work
- Substantial experience and expertise regarding occupational analysis

The Old Days

More "experts" with:

- Bachelors Degree or Less
- Masters in unrelated field
- No graduate coursework in vocational
- No or limited vocational work exp.
- No national certification/testing
- More "employee" type full time SSVE

New Days

- Results important to attorneys:
  - 93% have Masters or higher
  - 87% have related degrees (RC, VE, Psych, etc.)
  - 80% have one or more certifications (most often CRC, CDMS, ABVE which require test)
- 23.8 years of vocational experience
- 88% do other vocational practice
- Source: Stipe, S., Dunleavy, T., Broadbent, E., Shiro-Geist, C (2008). *The Rehabilitation Professional 16(1)*

VE SURVEYS

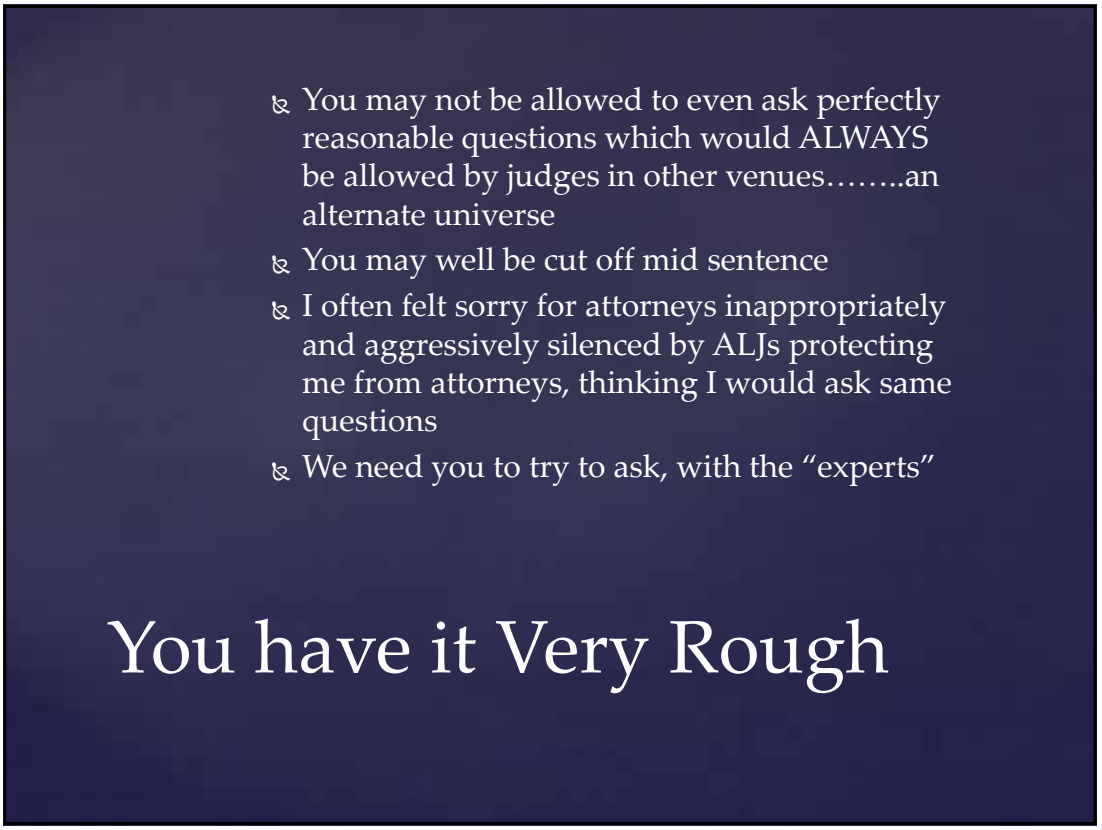
- A fundamental consideration in evaluating access to occupations is a decision that the individual possesses the same or similar skills, training and experience as most others.
- Vocational experts survey the labor market and measure such. Some don't pass the test.
- Attorneys often fail to determine if the retained or opposing expert compares favorably to the norm
- This survey and others resulted in our White Paper. It is supported by the largest vocational associations (ABVE, IARP) USE IT!
- Both provide attorneys with excellent information for cross examination

Survey Takeway

- Maxim: The more highly experienced, specifically VR educated, nationally credentialed, and busy (with other practice) the less likely they will spew junk with no foundation to appease judges
- Why: They belong to associations and have credentials both of which REQUIRE adherence to Standards of Practice and ethics.
- They have been trained and tested and steeped in standard methods and have agreed to use them
- They have actually assisted hundreds/thousands of people, placed people, analyzed real jobs
- These VEs (the majority) are not your problem. Cross them too much and they will make your case worse.

Unsupported testimony


Men/women with no country are dangerous
No national credential or association = No entity to complain to for unsupported junk
No graduate VR training= More likelihood of limited knowledge of proper methods
No or limited VR/placement/LMS/Job Analysis experience= ignorance (and great vulnerability under specific questioning)
No other work= Higher tendency to appease "employer"
The other "experts" among us


You may not be allowed to even ask perfectly reasonable questions which would ALWAYS be allowed by judges in other venues……..an alternate universe
You may well be cut off mid sentence
I often felt sorry for attorneys inappropriately and aggressively silenced by ALJs protecting me from attorneys, thinking I would ask same questions
We need you to try to ask, with the "experts"
You have it Very Rough

- Attorneys taught to roughly tear into every expert with the same script are laughed at and tend to get nowhere fast with ALJs
- Talk to experts
- Get to know them
- Most like attorneys or would not be in VE
- Forget the us/them. It's silly
- Ask them about their experience and practice
- Notice if they are there every day

Know your target

- He is there every day: " Mr. X, do you do vocational assessment, voc. rehab or placement outside of SSA?".
- She seems to identify occupations with transferable skills that seem a stretch: " Tell us about what a transferable skill is and standard methodology based upon the CFRs". Prepare for deer in headlights look
- He seems to always use the same unusual jobs: " How often do you look at job orders and job descriptions by employers? When was the last time you reviewed one for X?"

The vulnerable expert and Cross

- She seems tentative or seems to use no method: "Tell me about your education". " So you have a Bachelors in Sociology, isn't it true that based upon surveys of VEs > 90% have Masters?" " So you have a Masters in Education, tell me about the specific vocational classes you completed". "Isn't it true that over 85% of VEs have more specific training?"
- He seems so formulaic and doesn't seem up to date " What professional organizations do you belong to?" "Do you have a national credential like CRC or ABVE/D?" " Do you do continuing ed?"
- " So you don't go to conferences, don't do any vocational work outside this office or with clients, don't do job placement, Job Analysis, and don't have any certifications…your are different from most VEs aren't you?

Cross (continued)

- Her numbers seem high: " Explain to us how you arrived at that number" Many VEs do not quite understand how to disaggregate numbers….they use the entire numbers for SOC or do the bad "science" of division. " So are you aware that the SOC code that includes small product assembler has over 1500 other DOTs, help me understand……?
- He answers ALJs ridiculous hypotheticals. " Could you go through for me how you identified the occupations you did taking into consideration need to an understanding boss, 2 days absence, work using mainly one UE, only 80% productivity and limited contact……is there a kind of math or science to that?

Cross (cont)

- He says 2 or more days absence are fine: "Have you seen government publications or HR studies? Would you be surprised to know that on average workers are absent 7-9 days per year. So 24 days per year is twice or three times worse than average, right?" "Do lots of employers have a probation period first few months of employment? If absence was 2-3 times worse than average how would that work?

Cross (continued)

- He can just work one handed: " Does DOT say reaching is required only one handed?" "Productivity is important in work, right? Would someone with one arm produce less or work slower than one with two good arms?
- 80% Productivity " People are all different aren't they. You are familiar with the bell curve. The employer might want someone to do 100 items per day, but he will accept 80 and has some rock stars who do 120 or more. How do you know George was a 100 before his injury?

Cross cont.


CONTACT: SCOTT (503)234-4484
sstipe@careerdirectionsnw.com
Questions

The International Association of Rehabilitation Professionals (IARP) represents the largest group of Vocational Experts in the United States, including those specializing in Social Security disability cases. To ensure the highest quality of services provided to the Office of Disability Adjudication and Review (ODAR) we offer the following definition of a Vocational Expert contracted with the Social Security Administration.

Per the 2011 AG 11-12 Disability Blanket Purchase Agreement (BPA) SSA-RFQ-11-1206, the definition of a Social Security Vocational Expert (SSVE) is "an individual who is trained and skilled to render impartial opinions relevant to evidence at the hearing level of the Social Security disability claims process. Areas of expertise should include current knowledge of: working conditions and physical demands of various occupations; transferability of skills; knowledge of the existence and numbers of jobs *at all exertional levels* in the national economy; and involvement in or knowledge of placing adult, handicapped workers into jobs."

In line with the Rehabilitation Counseling Coalition's (RCC) Statement of Professional Qualifications and Credentials, IARP embraces the following statement: Vocational Experts (VEs) are rehabilitation professionals who possess specialized expertise in business, employment, the workforce, and working with people with disabilities from diverse backgrounds. VEs are professionals committed to performance accountability and continuous improvement through emerging and best practices. Competencies include, but are not limited to: (a) counseling and guidance, (b) knowledge and application of the medical and psychological aspects of disability, (c) knowledge and implementation of vocational testing, assessment strategies and application of transferable skills, (d) working knowledge and integration of labor market data and disability employment policy, (e) working knowledge and application of data from government publications such as the Dictionary of Occupational Titles (DOT), Standard Occupational Classification System (SOC) and Selected Characteristics of Occupations (SCO) (f) skills and ability to match business workforce needs with the evaluee's skills and talents, (g) current working knowledge of exertional and non-exertional demands of occupations in the labor market, (h) providing services required to develop and implement individualized career plans that assists persons with disabilities in successful employment in a competitive, integrated work environment.

The above knowledge and experiential domains are achieved through education and ongoing professional experience. IARP supports the knowledge and experiential domains identified above as well as the following minimum standards and qualifications for work as a Vocational Expert contracted with the Social Security Administration (SSA) to provide testimony at administrative law hearings.

1. A Master's degree in Rehabilitation Counseling or other related Master's degrees such as Counseling, Psychology, Education, Human Services or another behavioral science. National certification as identified in #4 below will demonstrate that one has met educational standards.

Ver. 8/31/16

2. At least five years of direct experience providing vocational rehabilitation services to individuals with disabilities. IARP recognizes that no one can be an expert without direct experience in the field.
3. Employment as a principal, employee or private consultant in vocational counseling, vocational assessment, or job placement of people with disabilities including labor market research and communicating with employers regarding the physical and mental demands of occupations.
4. National certification including the Certified Rehabilitation Counselor (CRC), the American Board of Vocational Experts (ABVE) Fellow or Diplomate status, or the Certified Vocational Evaluator (CVE). National certification assures that one has met educational standards, passed an examination, and is bound to a scope of practice and ethical code. Individuals with related degrees may require additional coursework to obtain national certification. All four certifications require passage of a national certification examination, adherence to an ethical code, and continuing education requirements.
5. An SSVE who is teaching in the vocational rehabilitation field at the university or college level or administrators in the field of rehabilitation should also possess the required credentials or qualifications.
6. IARP recommends ongoing membership in a professional organization that provides regular updates in the body of knowledge required of the Vocational Expert.

IARP is aware that the Social Security Administration has extended contracts to some rehabilitation professionals that do not possess or meet all of the above standards but who have provided expert testimony for many years. We acknowledge experience providing vocational rehabilitation services, including job placement and vocational assessment qualifies these individuals to provide vocational expert services to the Social Security Administration. It is IARP's position that from this point forward, it is imperative that new Social Security VEs meet the minimum standards indicated by points 1-6 above.

In closing, to assure competent and appropriate testimony in Social Security administrative law hearings, IARP supports these minimum standards. These standards protect the public by ensuring the provision of ethical and culturally competent professional services. With the implementation of these standards and qualifications, there are mechanisms in place to sanction and/or remove those who fail to meet the required standards of the national certifications, through ethics violation of any certifying body or professional organization to which the party holds a current membership.

Ver. 8/31/16

Chapter 2

Federal Court Appellate Brief Writing

Lindsey Craven
Schneider Kerr & Robichaux
Portland, Oregon

Contents

Federal Court Appellate Brief Writing

Lindsey Craven

The job of an appellate lawyer

- We are the ALJ police
- We are not re-analyzing the claimant's disability, just whether the ALJ messed up.

- "The filing of an appeal should never be a conditioned reflex. About half the practice of a decent lawyer consists in telling would-be clients that they are damned fools and should stop." – Judge Richard Posner, *Hill v. Norfolk & Western Railway Co.* (1987)

Reviewing a case for viability

- Using a template
- Data of the case
- The 5-step process
- Opinion evidence
- Credibility
- Harmless errors

USDC –

ALJ VE ME?	**Client** SSD/SSI **AGE:** (DOB) **PIA** **PFD** **AOD** **DLI**	**Step 1:** **Step 2:** **Severe** – **Non-severe** – **Step 3:** none met, considered __ B criteria: • U/R/A Info – • Interact – • CPP – • A&M oneself – **RFC:** • • **Step 4:** **Step 5:** **Credibility:**
Issues: •		

Doctor	Type	Notes	Ex
	Treating		
	CE		
	Psych CE		
	DDS		
	Psych DDS		

5-step process: Things to think about

- Step 1: Do you want to appeal a case that has work problems?
- Step 2: Did the ALJ account for all diagnoses? Does it make a difference what the ALJ labels as "severe"? If mental health was found non-severe, did the ALJ analyze the B Criteria?
- Step 3: Does the ALJ discuss each listing that could potentially apply? Do you have a plausible argument that a listing is met?

5-step process continued…

- RFC: Does the RFC contain limitations for each impairment that was found severe? Is the RFC phrased in quantified functional terms?
- Step 4: Does the past work satisfy all three parts of the definition of PRW (within 15 years, SGA, SVP met)? Are there composite job issues? Did the ALJ find the claimant can perform the work as actually performed or as generally performed, and are those findings correct?
- Step 5: Did the ALJ identify significant numbers? Are the step 5 jobs consistent with the RFC, and if not, did the VE address the deviation and did the ALJ resolve it in the decision? If some of the jobs are inconsistent and can be eliminated, do the remaining jobs exist in significant numbers?

Opinion evidence

- Look at each opinion in the file, and note what it is, how much weight the ALJ gave it, and if it was rejected, what reasons were given.
- Did the ALJ leave out any parts of opinions that were given great weight?
- Reasons for rejection insufficient: toughest thing to argue, as it will largely depend on the USDC judge and how the ALJ actually articulated it. Just because we disagree and read the record differently does not mean the ALJ was wrong.

"Credibility"

- It may not be called that any more, but that's what it is, functionally.
- What reasons were given? Are they factually correct? Is there "substantial evidence" to support the interpretation, or "no more than a scintilla of evidence"? *Trevizo* and *Popa*
- "Bad facts" and ultimate viability of case

Harmless errors

- The “so what?” part of the analysis
- Does the error make any difference? If the ALJ hadn’t made the mistake, would the outcome have been any different? Did the judge make alternative findings?
- Think like an OGC attorney – but remember the court is limited to what’s in the record!

Structure of the brief

- Statement of Case
- Procedural History
- Statement of Facts
- ALJ Findings
- Standard of Review
- Statement of Issues
- Arguments
- Conclusion

Clear, concise, to the point

- Most sections of the brief can be very short, straight to the point.
- Statement of facts – paint a picture vs. set the scene
- One sentence header for each argument
- Stock statements of the law / briefing bank

Basic briefing tips

- Raise all issues – reply briefs are limited to the issues raised, as is any circuit court action.
- EDIT!
- Consistency in how you refer to your client (Plaintiff or Mr. Smith?)
- Minimize extraneous medical terminology (upper extremity can just be “arm”).

Voluntary Remands

- Briefing for benefits is not going to be possible in every case, so remand might be the best outcome.
- You do not have to accept the first offer of terms for remand – there is room to negotiate with OGC if the RVR does not address all issues.
- If you have a straight-face argument to be made for immediate payment, make it! The court will pay cases in the right circumstances. The worst that will happen is you don't get EAJA fees for your reply brief (and even that is not certain).

Voluntary Remands continued…

- Consider what ALJ the case is going back to.
- A report done in 2016 said 15% of cases are resolved on RVRs: *https://www.acus.gov/report/report-study-social-security-litigation-federal-courts*

Reply Briefs

- Keep it short.
- Focus on the points of disagreement, but mention any time OGC conceded your point or didn't offer a response.
- Respond directly to their arguments and why they fail.
- Check OGC's cites – some of them cite cases that don't actually say what they say they say.
- Do not regurgitate your opening brief – summary at the most.

Questions?

Email me at lindseycraven@schneiderlaw.com
if there are other questions we didn't get to.

USDC –

ALJ VE ME?	**Client** SSD/SSI **AGE:** (DOB) **PIA** **PFD** **AOD** **DLI**	**Step 1:** **Step 2:** **Severe –** **Non-severe –** **Step 3:** none met, considered __ B criteria: • U/R/A Info – • Interact – • CPP – • A&M oneself – **RFC:** • • **Step 4:** **Step 5:** **Credibility:**
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	CE		
	Psych CE		
	DDS		
	Psych DDS		

Chapter 3

Cross-Examining Medical Experts—Presentation Slides

Kevin Kerr
Schneider Kerr & Robichaux
Portland, Oregon

Cross-Examining Medical Experts

Kevin S. Kerr
Schneider Kerr & Robichaux
Portland, OR

What makes me qualified to do a CLE on cross-examining medical experts?

???

- 9.5 years of exclusive SSD practice.
- Approximately 3500 ALJ hearings
- Approximately 300 hearings with medical experts.
- Listened to two CLEs by Luis Gracia
  - His CLE actually gave examples of how cases were won, rather than just be theoretical
- I work with 14 other great attorneys who gave me great input

Preparing for a hearing with a medical expert

- Knowing there is an ME on the case
- Who is the ME?
- What do we need the ME to say in order to establish disability under the rules?
- Know the record better than the ME
- Making sure the ME has the complete file prior to the hearing

Knowing there is an ME on the case

- Check Notice of Hearing
- Check Status Report/Master Docket
- Resume in the exhibit file

Who is the ME?

- Specialty?
- Research
  - Ask your peers. OSSCR Listserve. National Listserve.
  - Keep your own spreadsheet. Be able to contribute to our collective knowledge.
  - Does the ME have any disciplinary issues? Evidence of bias? Is he/she a contributor to alt-right news sites? Active licensure? Active practice?

What do we need the ME to say in order to establish disability?

- Is your theory of the case related to the Listings? To the Grids? Less than sedentary/ absenteeism/time off-task?
- Most MEs have no idea how the grids work.
- You need to focus on your theory of disability and getting to it; even hostile MEs will throw you limitations that help establish disability (without knowing it)

Know the record better than the ME!!!!!

- Most of the my successful cross-examination has been the result of me knowing what the ME doesn't know.
- You can't beat the medical expert in terms of medical expertise. You can beat the medical expert in terms of knowing the record.
- Have specific citations.
  - Know the dates and specifics of all procedures.
  - Imaging and objective testing.
  - Subjective complaints.
  - What do specialists say?

Making sure the ME has the complete file prior to the hearing

- Many MEs now have ERE access.
- Late submissions.
  - How does this work relative the 5-day rule?
- Call the ME and ask
- Portland OHO vs. Other Regional OHOs
- Did the ME receive and review the E section documents; teacher questionnaires.

- Have a copy of the applicable Listings in front of you; print-off, cell phone, etc.
- Make sure the ME is using the current Listings; the Listings have changed a lot in the last couple years.

Requesting that the ALJ use a medical expert

- Should you do it and should you do post-hearing or pre-hearing?
- Use of medical interrogatories.

Counsel, do you have any questions for the medical expert?

Two situations

1. Medical expert gave disabling testimony.
2. Medical expert gave non-disabling testimony.

Disabling testimony

- You probably don't want to ask any questions. You can only win the case once.
- What if it looks like the judge is not going to accept the medical expert testimony?
  - Specific examples of cases we have had paid by U.S. District Court. It is hard for the ALJ to win here. Think of the reasons used to give weight to bad ME testimony.
  - ALJ rejects opinion for "lack of explanation" while the ALJ never asks for any explanation.
  - Help the unprepared (but helpful) ME with leading questions and citations.
- Onset date issues – you may as well try to push it back.

Non-disabling testimony

- Frontal attack on the medical expert's opinion.
  - Probably futile.
- Asking the ME about other issues ("throw-away" limits, time off-task, etc.)
- Getting the ALJ to give less weight to the medical expert.
  - Do you have treating source opinion evidence? Should you ask the ME about it? Probably not.
- Giving yourself "outs."

Frontal attack

- Has this ever worked?
- ME will want to save face.
- ME says "light." What can you possibly say that will make him suddenly say "less than sedentary"?
- Exception: ME does not know the record.

Frontal attack when ME does not know the record

- Figuring out if the ME does in fact know the record
- Ask “Was there an MRI of his back in the file?” rather than “Did you see the MRI of his back?”
- Quiz the doctor. See if they have citations.
- I have had doctors change their testimony after they were called out for missing something in the record.
  - Not knowing where the imaging or test results were and directing them to it.
  - Tracy Gordy insisting that claimant was never treated by an AMS (when called out he still wouldn’t change his testimony).

Asking about other issues

- Throw-away limits; hostile ME may still be willing to give limitations that can help you prove disability or at least get you past Step 4 or preclude Step 5 jobs in combination with other limits
  - ME gives you occasional handling; DDS already gave you occasional public.
- Time off-task/absenteeism.
- “Would it be reasonable” to limit exposure to hazards?

Getting the ALJ to give less weight to the medical expert.

- Did the ME actually read the file? Did the ME even have the entire file and/or have the ability to open all the documents?
- "Polarize" the medical expert.
  - "He's malingering!"
- Get the medical expert to admit that they are not following SSA rules
  - "I don't give any consideration to subjective complaints." Conflating rules for establishing an MDI with evidence used to evaluate RFC.
  - "Based on what you said, could anyone ever be found disabled for fibromyalgia?" But the Agency clearly says they can.
- If the ALJ gives significant weight to the medical expert will it hold up on appeal?

Giving yourself "outs"

- "You didn't fully consider the orthopedic issues, right?"
- "You aren't a specialist in heart conditions, right?"
- "Did you consider the effects of chronic pain?"
- "Did you consider subjective complaints?"
- Whatever the doctor says was not considered can be a basis for the ALJ to give limitations in addition to the ME's RFC opinion.

Equaling the Listing and leading the medical expert towards an equals.

Equaling the Listing

- A big deal – many claimants can and are found disabled based on equaling (rather than strictly meeting the Listing)
- Surprisingly little agency guidance on the exact standard for "equaling" the Listing.
- Under SSR 17-2p, medical expert testimony is necessary for the ALJ to make a finding of medical equivalence.
  - Previously, while an opinion from an acceptable source was needed, it could be a treating doctor; now it must be an ME (or DDS doctor or AC medical consultant).

What standards does SSA give us as far as equivalence

- Possible sources
  - CFR
  - SSR
  - HALLEX
  - POMS
  - SSA Medical Expert Handbook
  - Case law

CFR

- Under SSA regulations, the impairment must be “at least equal” in both severity and duration to the listed requirement to be considered medically equivalent.
- Equivalence is determined on the basis of a comparison between the "symptoms, signs and laboratory findings" about the claimant's impairment as evidenced by the medical records "with the medical criteria shown with the listed impairment.“
- 20 C.F.R. § 404.1526(a).

3 situations for equaling the Listings under the SSR

- One impairment
- Impairment itself is not listed
  - Think of migraines being evaluated under the seizure listings.
- Combination of impairments

Specific questions to ask

- "Is it reasonable to interpret the record as" or "consistent with." Leading questions.
- "Is there any other treatment that you would recommend?" "Are there any tests or examinations that the judge should order?"
- Doctors are unlikely to say that there is malpractice. "Are you saying that Dr. _____ is committing malpractice?"

When should you ask the medical expert about treating or examining source opinions and when to stay silent; asking about your RFC form completed by treating doctor?

Appellate issues related to medical expert testimony:

- Preserving issues for appeal.
- Weight of reviewing doctors (medical experts) vs. treating or examining doctors. Consider new rules that potentially eliminate the distinctions.
- Appealing when the ALJ rejects helpful medical expert testimony.
- Situations where ALJ limits your cross-examination of the medical expert.

Chapter 4

Common Roadblocks to Obtaining Social Security Benefits and How to Overcome Them—Presentation Slides

Tiffany Hendrix Blackmon
Cascadia Disability Law LLC
Portland, Oregon

Roundtable Discussion

Common Roadblocks to Obtaining Social Security Benefits, and How to Overcome Them

5 Day Rule

What's really required v. what's being requested?

- **List of facilities**
  - List of providers' names, if known
  - List of what treatment was received, if known
  - List of dates of treatment, if known
- **When the records were originally requested**
- **What follow up attempts have been made**
- **Explanation of why the records have not been obtained, if it's a refusal issue, or cost, etc.**

5 Day Rule

Successes

- Most judges have accepted documents when there is a reasonable explanation for its delay, including receipt of questionnaires/letters late

Challenges

- A judge who found the explanation insufficient, when a client with severe mental health condition had not properly reported a facility name, so records were incomplete, and submitted late- they were refused
- A judge who provided no explanation at the hearing, behaved as if he was admitting the evidence, and then rejected
- Denying evidence for a rescheduled hearing
- Making a decision before all evidence is in, even when notified

5 Day Rule

HALLEX I-2-6-58

If a claimant or appointed representative informs an ALJ about evidence at least five business days before the date of the scheduled hearing, but does not submit the evidence at least five business days before the date of the scheduled hearing, the ALJ will follow the procedures in HALLEX I-2-5-13 and will consider the evidence regardless of whether the circumstances in 20 CFR 404.935(b) and 416.1435(b) apply. The ALJ will admit the evidence into the record if it is material to the issues in the case. See HALLEX I-2-5-13.

CFR §416.1435

(1) Our action misled you;
(2) You had a physical, mental, educational, or linguistic limitation(s) that prevented you from informing us about/submitting the evidence earlier;
(3) Some other unusual, unexpected, or unavoidable circumstance beyond your control prevented you from informing us about or submitting the evidence earlier. Examples include, but are not limited to:
(i) You were seriously ill, and your illness prevented you from contacting us;
(ii) There was a death or serious illness in your immediate family;
(iii) Important records were destroyed or damaged by fire or other accidental cause; or
(iv) You actively and diligently sought evidence from a source and the evidence was not received or was received less than 5 business days prior to the hearing.

Client late/missing hearing

- **Client tardy to hearing or missed it**
  - Right to appear?
    - Constructive Waiver of Right to Appear- no issuance for good cause required under HALLEX I-2-4-25
  - Good cause?
    - Getting lost, transportation issues
- **Good Cause (CFR 404.957(b)(2))**

"In determining good cause or good reason under this paragraph, we will consider any physical, mental, educational, or linguistic limitations (including any lack of facility with the English language) which you may have"

CDIU

- **Object.** Overbroad, beyond scope, fishing expedition, snapshot
- **Interrogatory.** Questions regarding: investigator background, education, experience. Compensation for working on cases. Quotas for investigations. Investigative tools. Amount of time observed claimant.
- **Request supplemental hearing** to discuss the report and/or cross the investigator.
- **Demand documents-** communications, the video, investigator's resume and employment record, other work product.

Past-AOD work or unemployment

- **Part-time, under SGA**
- **Over SGA:**
  - Work activity form (SSA-3033) to employer
  - Work activity form (SSA-821) to claimant
  - Unsuccessful work attempt
- **Receipt of unemployment benefits past AOD**
  - Looking for part-time work
  - Looking for accommodated work
  - Looking for work even though knew couldn't really work

Harmful Consultative Exam

- **What records did the examiner have?**
  - **What dates did the records encompass?**
  - **What diagnoses were they aware of?**
  - **Did it include relevant imaging, or other tests?**
  - **Were they only given records related to DAA?**
- **Was claimant having a "good" or "bad" day on exam day?**
- **How comprehensive was the exam?**
- **Did claimant take medication before exam?**
- **No diagnosis of malingering, yet opinion appears to indicate no formal dx**

DAA

- **There must be objective medical evidence from an acceptable medical source of substance abuse (SSR 13-2p(8)(b))**

"Evidence that shows only that the claimant uses drugs or alcohol does not in itself establish the existence of a medically determinable Substance Use Disorder. The following are examples of evidence that by itself does not establish *DAA*:

  - Self-reported drug or alcohol use.
  - An arrest for "driving under the influence".
  - A third-party report.
- **Materiality assessment**
  - Burden on claimant during DAA determination (POMS DI 90070.050)
- **When drug/alcohol-related condition results in death**

Skilled Past Work & Transferable Skills

- **Finding unskilled tasks to be "skills", including transferring skills from semi-skilled work:**
  - Math and cash handling
  - Reading and Writing
  - Customer service
  - Problem solving
    - Fast Foods Worker 2: DOT 311.472-010 - SVP 2, requires cashiering, taking orders, basic food preparation
- **What a skill is (SSR 82-41(2)(A)):**
  - A skill is knowledge of a work activity which requires the exercise of significant judgment that goes beyond the carrying out of simple job duties and is acquired through performance of an occupation which is above the unskilled level (requires more than 30 days to learn)
  - (d) "Even though semi-skilled occupations require more than 30 days to learn, the content of work activities in some semi-skilled jobs may be little more than unskilled."

Remote Date Last Insured

- **Is the DLI correct?** (FO uses tools available to them, like DIBWiz, to calculate DLI… but it can still be wrong; POMS DI 25501.320)
  - Was a **disability freeze** applied, if appropriate?
  - Was **self-employment** considered?
  - Is something just completely wrong?
  - If the DLI is wrong, did DDS adjudicate based on an incorrect DLI?
- **If DLI is correct, and is remote:**
  - Requesting an ME to infer onset
  - Doctor's questionnaires, third party statements regarding pre-DLI functioning
  - Requesting a CE, depending how old DLI is and nature of condition

Additional topics/questions

Chapter 5A

Ethically and Effectively Representing Clients with Diminished Capacity

Terisa Page Gault
Harris Law Firm PC
Hillsboro, Oregon

Contents

ssa.gov

Code of Federal Regulations § 405.331

(a) When you submit your request for hearing, you should also submit information or evidence as required by §§ 404.1512 or 416.912 of this chapter or any summary of the evidence to the administrative law judge. You must submit any written evidence no later than 5 business days before the date of the scheduled hearing. If you do not comply with this requirement, the administrative law judge may decline to consider the evidence unless the circumstances described in paragraphs (b) or (c) of this section apply.

(b) If you miss the deadline described in paragraph (a) of this section and you wish to submit evidence during the five business days before the hearing or at the hearing, the administrative law judge will accept the evidence if you show that:

(1) Our action misled you;

(2) You had a physical, mental, educational, or linguistic limitation(s) that prevented you from submitting the evidence earlier; or

(3) Some other unusual, unexpected, or unavoidable circumstance beyond your control prevented you from submitting the evidence earlier.

(c) If you miss the deadline described in paragraph (a) of this section and you wish to submit evidence after the hearing and before the hearing decision is issued, the administrative law judge will accept the evidence if you show that there is a reasonable possibility that the evidence, alone or when considered with the other evidence of record, would affect the outcome of your claim, and:

(1) Our action misled you;

(2) You had a physical, mental, educational, or linguistic limitation(s) that prevented you from submitting the evidence earlier; or

(3) Some other unusual, unexpected, or unavoidable circumstance beyond your control prevented you from submitting the evidence earlier.

[71 FR 16446, Mar. 31, 2006,as amended at 80 FR 14837, Mar. 20, 2015]

Oregon Rules of Professional Conduct

Rule 1.14 Client with Diminished Capacity

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

(b) When the lawyer reasonably believes that the client has diminished capacity, is at risk of substantial physical, financial or other harm unless action is taken and cannot adequately act in the client's own interest, the lawyer may take reasonably necessary protective action, including consulting with individuals or entities that have the ability to take action to protect the client and, in appropriate cases, seeking the appointment of a guardian ad litem, 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.

Adopted 01/01/05. This is the ABA Rule.

Note: The complete Oregon Rules of Professional Conduct are available online at http://www.osbar.org/docs/rulesregs/orpc.pdf

Comment on ABA Rule 1.14

Client-Lawyer Relationship
ABA Rule 1.14 Client With Diminished Capacity - Comment

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

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

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

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

Taking Protective Action

[5] If a lawyer reasonably believes that a client is at risk of substantial physical, financial or other harm unless action is taken, and that a normal client-lawyer relationship cannot be maintained as provided in paragraph (a) because the client lacks sufficient capacity to communicate or to make adequately considered decisions in connection with the representation, then paragraph (b) permits the lawyer to take protective measures deemed necessary. Such measures could include: consulting

with family members, using a reconsideration period to permit clarification or improvement of circumstances, using voluntary surrogate decisionmaking tools such as durable powers of attorney or consulting with support groups, professional services, adult-protective agencies or other individuals or entities that have the ability to protect the client. In taking any protective action, the lawyer should be guided by such factors as the wishes and values of the client to the extent known, the client's best interests and the goals of intruding into the client's decisionmaking autonomy to the least extent feasible, maximizing client capacities and respecting the client's family and social connections.

[6] In determining the extent of the client's diminished capacity, the lawyer should consider and balance such factors as: the client's ability to articulate reasoning leading to a decision, variability of state of mind and ability to appreciate consequences of a decision; the substantive fairness of a decision; and the consistency of a decision with the known long-term commitments and values of the client. In appropriate circumstances, the lawyer may seek guidance from an appropriate diagnostician.

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

Disclosure of the Client's Condition

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

Emergency Legal Assistance

[9] In an emergency where the health, safety or a financial interest of a person with seriously diminished capacity is threatened with imminent and irreparable harm, a lawyer may take legal

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

[10] A lawyer who acts on behalf of a person with seriously diminished capacity in an emergency should keep the confidences of the person as if dealing with a client, disclosing them only to the extent necessary to accomplish the intended protective action. The lawyer should disclose to any tribunal involved and to any other counsel involved the nature of his or her relationship with the person. The lawyer should take steps to regularize the relationship or implement other protective solutions as soon as possible. Normally, a lawyer would not seek compensation for such emergency actions taken.

SOCIAL SECURITY ADMINISTRATION

Refer To:

Regional Chief Administrative Law Judge
701 Fifth Avenue
Suite 2900, M/S 904
Seattle, WA 98104-7075

Date: July 27, 2017

AUG 0 3 2017

Dear Representatives:

Proper and timely development of the record is critical to our hearing process, because it ensures that when a case is heard, you, the claimant, the Administrative Law Judge, and any experts who are called have a completely developed record to review and reference.

As you are aware, SSA is facing a large number of cases pending adjudication. When cases are postponed based on underdeveloped records or untimely submission of medical evidence, those postponements add to the pending and delay other claimants who are waiting for their hearing. For claimants whose hearings are postponed, it means that after waiting many months for their hearing and a decision, he or she must wait longer and may have to appear at supplemental hearings before a decision can be made. We are committed to working on decreasing both the backlog and unnecessary postponements. I am, therefore, asking for your active cooperation in assisting the claimants you represent before SSA by working with us to reach the goal of a fairly and fully developed record for hearings. This action benefits the claimant, you and SSA.

The claimant is ultimately responsible for proving that he or she is blind or disabled under our rules. 20 CFR 404.1512. As part of the disability process, claimants must inform us about, or submit, all evidence known that relates to the issue of blindness or disability. *Id.* This duty is ongoing and requires the claimant to disclose any additional related evidence about which he or she becomes aware during the pendency of their matter. Claimants must provide the evidence described above *at least* five days before the date of the scheduled hearing. 20 CFR 404.935. While the regulation anticipates that evidence or information will be submitted at least five days before the hearing, we have found that last-minute submission of evidence or information can and is causing unnecessary postponements of hearings based on additional actions that must be taken.

20 CFR 404.1740 sets forth rules of conduct and standards of responsibilities for representatives who wish to represent claimants before the Social Security Administration. Affirmative duties expected of all representatives include provisions found in 20 CFR 404.1740 (a) (1), which requires representatives acting on behalf of a party seeking a statutory benefit to faithfully execute their duties as agents and fiduciaries of a party. Additionally, 20 CFR 404.1740(a) (2) specifies that all representatives be forthright in their dealings with us and comport themselves with due regard for the nonadversarial nature of the proceedings by complying with our rules and standards. These rules and standards are intended to ensure the orderly and fair presentation of evidence and argument.

Representatives are charged with conducting his or her dealings in a manner that furthers the efficient, fair and orderly conduct in the administrative decision making process. 20 CFR

404.1740 (b) (3) (ii). Assisting the claimant in developing their record for hearing is one of the most critical component of representation before SSA. 20 CFR 404.1740 (b) (2); HALLEX I-2-5-1. Representatives must act with reasonable diligence and promptness to help the claimants obtain the information or evidence he or she must submit. This includes assisting the claimants in providing prompt and responsive answers to our requests and must ensure that claimants forward the information or evidence to SSA for consideration as soon as practicable. 20 CFR 404.1740 (b) (1), (2).

The rules of conduct and standards of responsibility for representatives also include specific references to prohibited conduct by representatives. 20 CFR 404.1740(c) (4) prohibits representatives from unreasonably delaying or causing to be delayed the processing of a claim at any stage of the administrative decisionmaking process without good cause. Representatives are also prohibited from engaging in actions or behavior prejudicial to the fair and orderly conduct of the administrative process, including repeated absences from, or persistent tardiness at scheduled proceedings without good cause. 20 CFR 404.1740 (c) (7) (i).

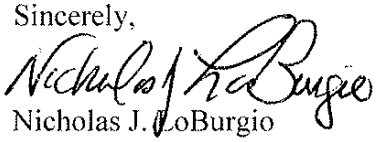
If a representative has a pattern of not submitting evidence that relates to a claim, or if a particular representative develops a pattern of not submitting evidence to us or not informing us of evidence that relates to their claim, an ALJ may consider whether the circumstances warrant a referral to OGC. HALLEX I-2-5-1 (Note 1). Representatives who delay or fail to submit evidence in a manner that leads to unnecessary postponements or who otherwise take, or fail to take actions that result in unreasonable delays of our hearings may also be subject to fee reduction requests under SEC. 206. [42 U.S.C. 406] (a) (3) (A) and HALLEX I-1-2-44-48.

As an added note, as we and you become more accustomed to the new 75 day notice rule, there may be times when we request that this period be waived in favor of holding a hearing with shorter notice or even with a change in location. Please give due consideration to such requests as the purpose is to ensure that your clients get a hearing on the earliest possible date.

I look forward to meeting with you in the future.

If you have any questions about our representative rules and standards of conduct, please feel free to review the information available at https://www.ssa.gov/representation/.

Sincerely,



Nicholas J. LoBurgio
Acting Regional Chief Administrative Law Judge
Seattle, Region X

Sources for Ethics Guidance

- The Oregon Rules of Professional Conduct
- Modeled after the ABA Model Rules of Professional Conduct
- Representing Clients with Diminished Capacity – Rule 1.14

- ORS 9.490(1) makes the Rules of Professional Conduct binding on lawyers and subject to discipling for violations

- Bar Resources
- Oregon Formal Ethics Opinions – https://www.osbar.org/ethics/toc.html
- Legal Ethics Hotline – 503-431-6475
- Download a Complete Set of the Oregon Rules of Professional Conduct https://www.osbar.org/docs/rulesregs/orcp.pdf
- Formal and Informal Ethical Advisory Opinions – They are NOT confidential

Oregon State Bar Bulletin — AUGUST/SEPTEMBER 2015

August/September Issu

Bar Counsel

Ethics Advisory Opinions:
What Are They and How Do I Get One?
By Helen Hierschbiel

One of the most highly valued services the Oregon State Bar provides to its members is the ethics assistance offered by its general counsel's office. We receive an average of 20-25 calls each day, most of which we answer the same day received. Some members refer to this service as the "Ethics Hot Line." In addition, our office receives about a dozen emails each week from members with ethics questions. We strive to (and generally do) respond to these written requests for assistance within three business days. Providing ethics advisory opinions is a bar service that dates back decades and, based on the informal feedback we receive, is extremely popular.

Although many Oregon lawyers take advantage of this service, questions about how exactly it works remain. We hope to answer the most common questions here.

Are my communications with the bar confidential?

No. The bar does not provide legal advice; instead we explain how the rules have been interpreted and offer guidance about how to steer clear of misconduct. As a result, communications between the general counsel's office and Oregon lawyers seeking ethics guidance are not subject to the attorney-client privilege. Moreover, the OSB is subject to the public records laws. Consequently, any records submitted to the bar or generated by the bar in the course of answering ethics questions may be subject to disclosure upon request. *See* OSB Bylaw 19.102.

By contrast, lawyers' conversations with the Professional Liability Fund about their own possible malpractice are confidential.

Does the bar keep a record of our conversation?

Yes, although our notes of telephone calls are relatively sparse. Generally, we record the date, name of lawyer (if provided), basic facts, the rule or rules discussed and a brief summary of the guidance provided. Telephone records and written informal advisory opinions are kept for five years. *See* OSB Bylaw 19.103.

Do I have to give my name?

No. We do not require that lawyers provide us with their names when requesting an advisory opinion.

Am I allowed to share confidential information with the bar?

Generally, no. Oregon RPC 1.6(a) prohibits lawyers from disclosing information relating to the representation of a client. "Information relating to the representation of a client" is defined to include both attorney-client privileged communications and all other information a lawyer gains during the course of representing a client that the client has asked be kept secret, or that likely would be embarrassing or detrimental to the client if disclosed. RPC 1.0(f).

Oregon RPC 1.6(a) permits disclosure of confidential information when "impliedly authorized to carry out the representation." ABA Formal Op No 98-411 (1998) interprets this rule "to allow disclosures of client information to lawyers outside the firm when the consulting lawyer reasonably believes the disclosure will further the representation by obtaining the consulted lawyer's experience or expertise for the benefit of the consulting lawyer's client."

In addition, Oregon RPC 1.6(b)(3) provides an exception to the general rule, allowing lawyers to reveal information relating to the representation of a client to the extent the lawyer reasonably believes is necessary to secure legal advice about the lawyer's compliance with the rules of professional conduct. Note, however, that this exception applies only when the lawyer is seeking legal advice; because the bar does not provide legal advice, and the communications between the bar and the lawyer are not privileged, this exception does not apply when a lawyer seeks ethics guidance from the bar.

In short, lawyers should definitely not disclose privileged communications when seeking an advisory opinion from the general counsel's office, and they should carefully consider whether disclosure to the bar of any other information relating to the representation would be detrimental or embarrassing to the client.

How do I protect my client's confidences and still get ethics guidance from the bar?

We recommend that lawyers pose their questions in the form of a hypothetical. For example, rather than referring to clients by name, refer to them as A, B or C. As noted in OSB Formal Ethics Op No 2011-184, however, "[f]raming a question as a hypothetical is not a perfect solution … Lawyers face a significant risk of violating Oregon RPC 1.6 when posing hypothetical questions if the facts provided permit persons outside the lawyer's firm to determine the client's identity. Where the facts are so unique or where other circumstances might reveal the identity of the consulting lawyer's client even without the client being named, the lawyer must first obtain the client's informed consent for the disclosures."

If you have a question that relates to a matter that is particularly sensitive, you may want to consider speaking with a private lawyer, with whom you can have a privileged conversation. In addition, some conflict questions require significant factual detail in order to provide the most helpful guidance. Again, consulting with a private lawyer in these situations may be the best course in order to both obtain an opinion you can truly rely on and to protect your client's confidentiality.

Do I have to make my request in writing?

No. Bar members can telephone the general counsel's office for reactions to ethics questions, but those verbal reactions do not qualify as a basis for mitigation of disciplinary sanctions under RPC 8.6(b) unless they are confirmed in writing.

What if I think I have made an ethical blunder?

Call a private lawyer, not the bar. Bar advisory opinions are intended for the lawyer's own prospective conduct, not as a means to resolve misconduct that has already occurred. If you disclose your own misconduct to the bar, we may feel compelled to open an investigation into the matter, particularly if we think it is serious misconduct.

Although we are aware of only one instance where the bar opened an investigation based on a lawyer disclosing misconduct in a detailed, written request for an advisory opinion, lawyers should be mindful when talking with general counsel's office that lawyers at the bar have the same obligation to report professional misconduct that other Oregon lawyers do under Oregon RPC 8.3.

What reporting obligation?

Except in limited circumstances, a lawyer who knows that another lawyer has committed a violation of the Rules of Professional Conduct that raises a substantial question as to that lawyer's honesty, trustworthiness or fitness as a lawyer in other respects must report the matter to the OSB Client Assistance Office. *See* RPC 8.3. For more information about your duty to report misconduct, see "Other People's Mistakes," by Amber Hollister, *OSB Bulletin (Oct.* 2014); www.osbar.org/publications/bulletin/14oct/barcounsel.html.

Is my reliance on an advisory opinion a defense to a disciplinary charge?

No. Oregon RPC 8.6(b), however, does allow the disciplinary board and Oregon Supreme Court to consider a lawyer's good-faith effort to comply with a written advisory opinion as a basis for mitigation of any sanction that may be imposed.

Is there a difference between a formal and an informal written advisory opinion?

Yes. An informal advisory opinion is issued by general counsel's office. Formal advisory opinions are drafted by the OSB Legal Ethics Committee and adopted by the Board of Governors. Informal advisory opinions are typically issued within three business days. Formal advisory opinions can take a year or more to complete, as they are drafted by volunteer lawyers and the Legal Ethics Committee only meets six times a year. Consequently, formal ethics opinions are limited to topics that are likely to benefit a large number of lawyers. The formal opinion process is described in more detail in Section 19.3 of the OSB Bylaws, here: www.osbar.org/_docs/rulesregs/bylaws.pdf.

May I call to find out whether an opposing lawyer's conduct violates the ethics rules?

Generally, no. Advisory opinions are provided only to lawyers seeking guidance about their own prospective conduct. *See* OSB Bylaw 19.102. On the other hand, we will assist lawyers with determining whether they have a duty under RPC 8.3 to report alleged misconduct by other lawyers.

How do I access this benefit?

You can call the main OSB main number, (503) 620-0222, and tell the receptionist that you are looking for ethics assistance, and the receptionist will connect you to an available lawyer. Alternatively, you can call the general counsel or deputy general counsel directly. Also, feel free to drop us a line, either by email or mail. More information about this service can be found on the legal ethics home page of the OSB website here: www.osbar.org/ethics.

ABOUT THE AUTHOR

Helen Hierschbiel is general counsel for the Oregon State Bar. She can be reached at (503) 620-0222, or (800) 452-8260, ext. 413, or by email at hhierschbiel@osbar.org.

Ethics opinions are published and updated on the bar's website here.

An archive of Bar Counsel articles is available here.

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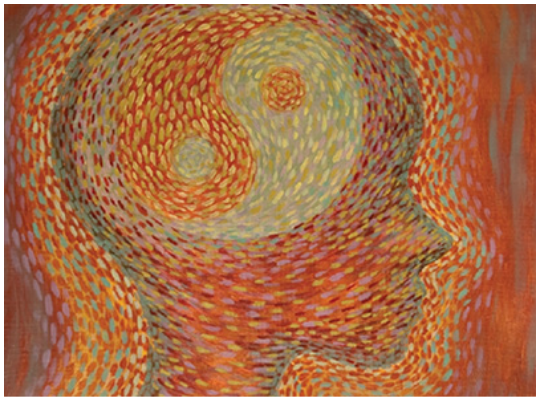
Oregon State Bar Bulletin — AUGUST/SEPTEMBER 2011



I'm OK, You're… ?

What Lawyers Should Know About Their Clients' Capacity to Make Decisions

By Janine Robben

Oregon death row inmate and convicted two-time murderer Gary Haugen just wants to be executed.

State law allows inmates like him to end their appeals and accept execution, he told *The Oregonian* in an interview in July. So he finds it ironic and absurd that people, including two of his court-appointed attorneys, question his mental competency to make that choice.

Needless to say, those attorneys disagree.

"The bottom line, with the criminal-justice system, is criminal practice is mental-health practice," one of his now-former lawyers, W. Keith Goody of Washington, told *The Bulletin*. "If you don't have a good foundation in mental health, you're not doing your job as a lawyer."

Experts on diminished capacity say that lawyers like Goody are doing the right thing when they press to have their clients evaluated. In fact, they say that lawyers should ask themselves whether their clients may have diminished capacity much more frequently than they do, given the increasing number of Middle East war veterans with diagnosed or undiagnosed brain injuries and aging baby boomers.

"Delusions and hallucinations are easy to spot," says Alex Bassos, training director for Metropolitan Public Defender Services, Inc. (MPD) in Multnomah and Washington counties and co-author of the book *Mental Health and Criminal Defense*. "It's tough to miss

when someone is adamant about aliens or distracted by conversations with people who aren't there. As a result, psychosis is likely to be identified by the defense attorney, acknowledged by the district attorney and understood by the judge."

"But," says Bassos, "many folks with delusions or hallucinations are still competent. So psychosis ends up being over-diagnosed in the criminal-justice system. What goes under-diagnosed are cognitive disabilities and head injuries. Traumatic brain injuries, for example, can be difficult for a lay person to identify. But if an attorney can identify the red flags, an expert can do some testing. You may find that the person is quite incapacitated."

With older clients, "About one-half of all 90-year-olds have some degree of dementia, says Dr. Linda Ganzini, professor of psychiatry and medicine at Oregon Health & Science University whose research interests include geriatric mental health. "It really increases after age 70 and is very common in the 80s and 90s. It also increases as people develop certain kinds of illnesses, such as strokes or other neurological disease. Primary-care providers, such as doctors and nurse practitioners, miss about one-half of the cases of early dementia."

What a Lawyer's Duty Is

Bassos' colleague Lane Borg, who is the executive director of MPD's Multnomah County office, also teaches ethics at Lewis & Clark Law School.

In that class, he says, "We start with duties to clients."

Under Oregon Rule of Professional Conduct 1.14, when a client's capacity to make "adequately considered" decisions is diminished because the client is under-age, mentally impaired or for some other reason, the lawyer is required to maintain a normal client-lawyer relationship "as far as reasonably possible." (*See* sidebar for actual text of ORPC 1.14.)

According to Oregon State Bar General Counsel Helen Hierschbiel, this means that "the lawyer owes the impaired client, just like any other client, the duty to communicate, the duty of zealous representation, the duty to preserve confidentiality and the duty of loyalty, to mention a few."

"In the normal lawyer-client relationship," she explains, "the lawyer acts as the client's agent to carry out the client's lawful wishes. The lawyer advises the client on the law, presents options and ultimately leaves the important decision-making to the client. The smooth operation of this relationship presumes the client is capable of understanding the options presented and of making important decisions. The lawyer should start with the assumption that the client is competent."

But with some clients, more than others, the lawyer cannot rely on this presumption.

In his ethics class, Borg says, he distinguishes between various kinds of diminished capacity.

"One thing we focus on a lot is when someone has permanent or sustained diminished capacity, such as Alzheimer's," he says.

"The next thing is evolving limited capacity, e.g., minors. At what point, between infant and teenager, can the lawyer say, 'I can rely on my client's decision?' "

Then there's diminished capacity caused by everything from substance abuse to undiagnosed cognitive disability.

"In my experience," says Borg, "the most common way to identify a client as potentially having a cognitive deficiency is that he can't read. I don't think that in itself is the type of impairment that would be diminished capacity, but today, if a person in his 20s or 30s can't read…"

"The more subtle client impairment issues are typically with clients who are out of custody," Borg continues. "You have to dig for their history: past psychiatric hospitalizations, etc. HIPAA (the federal Health Insurance Accountability and Portability Act) has certainly complicated that. And there are ethical implications in going to a potentially impaired client and asking him to sign a waiver."

In both the criminal and civil law arenas, OHSU's Ganzini says, "Lawyers should have a high degree of suspicion as clients gets older."

Ganzini also notes that some kinds of legal representation are more affected by diminished capacity than others.

"Look at the context in which the legal event — a change in a will or a trust — is occurring," she suggests. "People with dementia become much more susceptible to undue influence. They may have trouble understanding the risks of certain transactions to themselves."

What is the Required Capacity?

Context also is crucial to answering the question: What does my client need to have the capacity to do?'

For a criminal defendant (excluding the issue of whether he has a mental disease or defect that mitigates or negates his criminal culpability) the answer is: be fit to proceed.

Under ORS 161.360, a defendant may be found incapacitated before or during trial if, as a result of mental disease or defect, he is unable to understand the nature of the proceedings against him, assist and cooperate with his attorney or participate in his defense.

Inherent in these requirements is the defendant's ability to make decisions.

"There are certain decisions that a lawyer can't make for the client," says MPD's Bassos. "Whether to plead guilty, to have a jury trial, to testify, to assert a guilty-except-insane defense, to appeal."

On the civil side, Stephen Owen, a litigator with Fitzwater Meyer in Portland, says that "the first thing I ask myself is, 'What action am I taking on behalf of my client? What level of capacity is required?' "

Even within his own field, Owen notes that different levels of capacity are required for different client decisions.

"Capacity is a sliding scale," he says, "from testamentary (e.g., making a will) to contractual."

So, for making a will, "The statute [ORS 112.225] says that you need to be of a sound mind. The tests come from case law[1]: Do you know what a will does? Do you know what *your* will does? Do you know, generally, what you own? Do you know the natural objects of your bounty?"

Owen says that "one reason there is such a low level of capacity for making a will is it's not an adversarial process."

At the other end of the "sliding scale" for capacity in civil law are such things as entering into contracts and deeding over property.

"A person must possess greater competency to execute a deed than to execute a will," the Oregon Supreme Court stated in *First Christian Church v. McReynolds*, 194 Or 68, 72 (1952).

A deed, it pointed out, is irrevocable; a will is not.

How to Collect Client Information

Once a lawyer understands her ethical duty to clients with diminished capacity and has identified the standard for capacity appropriate to the case at hand, she should collect information from her client.

But that, says MPD's Bassos, requires some finesse.

"Your job as a criminal defense attorney," he says, "is as much about being a social worker as a legal advocate."

For example, Bassos says that "as an attorney, both in terms of exploring the person's illness and story, you don't want to accuse your client of being stupid. You want to do it without being insulting. Competent people make bad decisions all the time, and then rationalize them, and those explanations can be pretty bizarre. But you can't say, 'You know that's crazy, right?' So you explore the story. Anybody who's been in practice any period of years knows of bizarre stories that turned out to be true."

"Sometimes," says Bassos, "clients shade stories in ways that they think will sound better but actually are worse for their defense. Explore. Drop whatever judgment you may have about the client or the client's situation, and don't be accusatory in even subtle ways. If you sound judgmental or accusing, you get off on a bad foot and will have a completely different relationship with the client."

"I've definitely worked with attorneys who thought their clients were being jerks," Bassos continues. "I said to the attorneys, 'Here're some red flags.' After we did some investigation, we found out the clients were profoundly disabled. They were using the defense mechanism of being jerky. It pushes people away and they don't explore. They would rather be thought of as mean or jerky than powerless or disabled."

Bassos says the attorney also has to make sure his client understands the information the *attorney* is providing to the *client*.

"Factual understanding — the client's ability to understand facts — plays so prominent a role that it sometimes overwhelms everything else," says Bassos.

To make his point, Bassos recites a frequently heard courtroom exchange between a judge and a defendant.

"'Judge: 'Do you know who I am?'

Defendant: 'You're the judge; you're in control.'

Judge: 'Do you know who he is?'

Defendant: 'He's my attorney; he stands up for me.' "

"That's *factual* understanding," says Bassos. "That's really different from the ability to make a decision: to hold two abstract concepts and make a choice. Some people find it very difficult to hold two abstract possibilities in their mind and choose between them: 'If you go to trial, these kinds of things will happen but, more importantly, the result will be up in the air, and if you are convicted the judge can do whatever he wants to do within a fairly broad range.' That's really hard to understand because it is several abstracts down the road, versus a plea deal, where you *know* what kind of jail time you'll get, and that you'll be on probation."

But, as elder-law litigator Owen observes, "However you explain things, no matter what your client's capacity is, your explanation will influence his decision."

"Is your advocacy steering the client to make a decision he is unsure of?" he asks rhetorically. "Attorneys struggle with that all the time. We're fooling ourselves if we don't think how we put information out there influences people. You hope that when you lay it out as neutrally as possible, the client will make the right decision. Then he doesn't. Then you start shifting the emphasis of certain information. I think everybody does that. It's tough dealing with clients in general: adding in diminished capacity makes it that much harder."

Michelle R. Guyton, associate professor of psychology at Pacific University's Hillsboro campus, says that when a lawyer is collecting client information with an eye to diminished capacity, "One good test is to give a simple set of statements and ask the person to repeat it back."

"For example," she says, "the lawyer could give a simple definition of possible legal outcomes, based on current charges, and see if the person could repeat it back. If he cannot, that can signal attention or memory problems."

Guyton adds, "Another warning sign is the inability to switch topics mentally."

"Some folks with cognitive problems will keep talking about the same thing over and over, and have real trouble moving to new things," she says.

Finally, says Guyton, an individual with impaired cognition also may talk about things in a very vague and general way.

"He may use a lot of colloquial phrases to fill in his speech, but provide little data or substance," she says. "His language skills likely are not impaired, so he may sound fine, but the thoughts behind what he says may be very hazy and disorganized."

OHSU's Ganzini stresses that with an elderly client, it is important to "Let the client fully explain."

"Don't finish his sentences for him," she says. "Lawyers work hard to develop rapport with clients, but it means they end up doing all the talking. People with Alzheimer's often have pretty good language skills, but after about five minutes, you should ask yourself, 'Does what the client is saying completely make sense to me? Does this story make sense to me?' "

Ganzini says that a lawyer also should note whether his client has picked up information about what is going on in the world from outside sources.

"If he's not getting those clues," she says, "it's often a sign that something's wrong with his brain. A person who used to watch TV news or read the newspaper but no longer does may have changed his habit not because he's not interested, but because he no longer can understand the information."

Where to Get Help

An attorney who suspects that his client may have diminished capacity can get help from multiple sources, including the bar and mental-health professionals.

"Our office gets quite a few inquiries about dealing with clients with diminished capacity," says General Counsel Hierschbiel, whose office fields most such calls to the bar.

"Occasionally there are questions about representing children," she says, "but a typical call would be a lawyer who did estate planning for a now-elderly couple a number of years ago. One of the clients' children contacts the lawyer and says, 'We're worried about our parents. They're making bad financial decisions. We think they no longer are capable: what should we do?' The question is, 'What *can* the lawyer do about that?' "

What the lawyer would *like*to do, say Hierschbiel and her bar colleague Chris Mullmann, is represent the children to petition for conservatorship and/or guardianship.

But, says Mullmann, who is in charge of the bar's Client Assistance Office, "The lawyer has to act in his client's best interest. Representing the client's children is not in his client's best interest from the client's point of view, so someone else has to do it."

What we tell the lawyer is, "'Look at ORPC 1.14,' " says Mullmann. "Treat the client as much as possible like a regular client. Then, if the lawyer gets down the road and says, 'My client *really* needs a conservator,' someone else has to handle that."

In addition to providing ethical guidance, the General Counsel's Office refers lawyers to outside lawyers for practical advice.

Mullmann says that questions to the bar about diminished capacity and estate planning often come from general practitioners.

"We refer them to experts in that area at the bar's Lawyer Referral Service or to officers of the Elder Law Section," he says. "We aren't allowed to refer to specific lawyers."

Mullmann says that because of the job market, "We're now seeing more young lawyers hanging out shingles without mentors. We encourage them to call us."

Another practical resource is a professional who can consult with the attorney and/or evaluate the client.

"Some disabilities," notes the MPD's training director, Bassos, "are really hard to flesh out if you are not a professional."

While the Oregon State Hospital's Forensics Psychiatric Services Program provides court-ordered psychological and psychiatric evaluations, experts for evaluations that aren't court-ordered can be obtained privately and paid with public funds — even if the lawyer is retained — if the lawyer can establish the need for the evaluation, the reasonableness of the cost and the client's inability to pay for the evaluation himself.

Psychologist Guyton, who has a part-time practice doing lawyer consultations and criminal-defendant evaluations, says that recently she's had more than one case where the defendant's attorney said of his client, 'Something's not quite right. He can't weigh the information to make decisions.'

"It turned out his client is mentally disabled," she says.

Guyton says that she, Bassos and others are starting to look at ways to increase lawyers' ability to recognize potentially incapacitated clients, including training their legal assistants.

"We want to give them the correct language to voice their concerns," she says of legal assistants and attorneys, "rather than just 'There's something weird about this guy.' "

When Bassos would like a client to be evaluated by someone like Guyton without court order, he says he tells him, 'We need to get an evaluation to show that you are not mentally ill. This issue may come up at trial, and we have to be prepared for it.'

"Who knows?" he says. "Maybe the client is right and he's *not* ill."

Ganzini says that if a lawyer sees potential diminished capacity in an elderly or other client, he should arrange for the client's primary medical-care provider to test his cognition.

"Simply explain to the client that wills get challenged as people get older," she suggests. "Ask if you can have his primary medical-care provider do a simple cognition test. The client should ask the provider, but the lawyer should follow up with the provider to see that that happened and to get the results."

"The more cognitively impaired they are," Ganzini warns, "the more resistant they are going to be to testing. You'll maybe lose a client once in a while by requesting testing, but you'll save yourself a very difficult court battle."

Interacting With the Court

Representing a client with diminished capacity presents a criminal defense attorney with some unique challenges compared to estate-planning or other practitioners.

For example, says MPD's Borg, a criminal defendant may come to court while under the influence of alcohol or controlled substances.

"Some judges will ask a few questions to get at whether the defendant seems to be tracking," he says. "The dilemma for the criminal defense attorney is if he *knows* his client is impaired. He can't let the proceeding go forward: if the client is high, it seems like a good deal; then later he'll say, 'I didn't want to plead out.' "

Borg says that in such situations, "Often you'll hear the attorney say to the court, 'My client isn't feeling well; can we set this over?' "

"But," Borg continues, "if the judge makes an inquiry of the attorney, you can't make something up." Fortunately, he says, "Most experienced judges go right to the client for information. If he's impaired, he's taken into custody for detoxification."

Borg says a criminal-defense attorney also may face an ethical dilemma if his client's capacity is impaired by legal substances, such as prescribed anti-psychotics.

"I think I'm OK saying to the judge, 'Don't take my client into custody, he's been seeing a psychiatrist and had a recent change in medications,' " says Borg, "because I'm protecting my client from being taken into custody." (Under ORCP 1.14, if a lawyer reasonably believes that a client has diminished capacity, is therefore at risk of "substantial" physical, financial or other harm unless action is taken and cannot adequately act in his own interest, the lawyer is required to take reasonably necessary protective action and may reveal information about the client to the extent reasonably necessary to protect his interests.)

The trial court also may order a criminal defendant to undergo a "fitness to proceed" evaluation under ORS 131.360.

"'Fitness to proceed' is an emerging area," says Borg, noting, "There's been a change in terminology. In the old days it was whether you were unable to 'aid and assist' your lawyer. Now it's 'fitness to proceed': do you understand the nature of the proceedings?'

"'Aid and assist' *requires* the lawyer to bring the issue of diminished capacity to the attention of the court," Borg says. "In some ways, it's easier for criminal defense lawyers than for other lawyers because they have that obligation. What they struggle with is when a client is going to drop an appeal or proceed with a guilty but insane defense. It's within the client's purview to make those kinds of decisions. If you simply don't agree with the decision, but he is competent, you don't have much of an option. But if you believe the client is *in*competent, there may be ways to bring that issue to the attention of the court so the client's competency is addressed. That's where the client's constitutional rights get folded into the lawyer's ethical obligations. That's exactly what's

happening in the Haugen (death row) case." (See sidebar.)

Err on the Side of Caution

The bottom line, say the experts, is to err on the side of suspecting diminished capacity.

"It's critically important that the lawyer doesn't draw conclusions about a defendant and his mental health without doing his homework," says one of Haugen's former lawyers, Goody, a trial and appellate attorney with an interest in mental health issues.

"A great many people who appear to be entirely normal are profoundly ill," says Goody. "I have repeatedly seen lawyers come in — this is the exception rather than the rule — and say, 'He (the defendant) seems fine to me.' Lawyers are not trained to see mental illness. I'm not saying that *I* see it. I just know what I don't know."

Janine Robben has been a member of the Oregon State Bar since 1980 and is a frequent contributor to the Bulletin. She is legal director of the Oregon Crime Victims Law Center. She notes that quotations from OSB general counsel Helen Hierschbiel are from Hierschbiel's May 2004 Bulletin article, "Impaired Clients: Challenging and unique ethical considerations," and from an interview with her for this article.

Endnotes

1. *Kastner v. Husband,* 231 Or 133, 135-136 (1962)

ABOUT THE AUTHOR

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Chapter 5B

Simple Yet Effective Strategies to Best Work *With* Our Client—Presentation Slides

Andy Gilles
Choices for a Better Future
Keizer, Oregon

Simple yet effective strategies to best work *with* our client

Andy Gilles MS

Choices For a Better Future

Overview of these so called "effective" strategies

- Empathy
- Meeting clients where they are at emotionally
- Building rapport
- Listening effectively

Empathy for the client and their circumstances

- It is a mindset
- Test drive your clients shoes
- Different situations for different people
- Asking for help is not easy

Meeting clients where they are at emotionally

- A B C…. $ @ *
- Build on that Rapport
- Whose timeline are you on?

Building that all important rapport

- Why is rapport important?
- What does it look like?
- How do you get it?

Effective listening techniques

- What did you say?
- What did you mean?
- How did I understand it?


Wrapping up
It all starts with YOUR mindset…
…to best relate and work *with* your client…
…so you can build that rapport…
… to listen effectively…
To best serve your client