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Clients with Diminished Capacity: Rising to the Challenges of an Aging Clientele

Introduction

The United States Census Bureau estimates that the percentage of the American population age sixty-five or older will increase from 15% to 20% by 2030.[1] While the aging of the population is in many ways something to celebrate, it will present new challenges to working professionals, and attorneys are no exception.

As more people live longer and work longer, attorneys will encounter more clients who have reached an advanced age, whether they are seeking to purchase real estate, sell their business, pursue a personal injury claim, or get married. Engaging with a greater number of older clients also means, tragically, working with a greater number of clients at risk for Alzheimer's disease and other cognitive disorders.

Considering together an attorney's duties to provide competent representation, zealously advocate for a client's interests, and explain relevant issues in a manner the client understands, attorneys have a duty to recognize and respond to their clients' cognitive impairments. Given demographic trends over the coming years, attorneys are in a unique position to protect the interests of aging Americans, expand their client base and, if done properly, avoid any added professional liability risk.

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The Capacity Assessment

Capacity exists on a continuum: clients may be capable of handling their day-to-day affairs but lack the ability to appreciate their long-term financial wellbeing. Clients might also be able to participate in drafting a will but fail to fully grasp the consequences of a complex business transaction. Complicating matters further, the mental capacity of a cognitively impaired client is rarely static. People suffering from dementia are often more clear-headed earlier in the day,[2] and may endure symptoms that fluctuate on a daily or even hourly basis.[3]

An attorney, therefore, must assess a client's capacity not only at the outset of the representation, but also prior to significant decisions and transactions. The American Bar Association (ABA) Commission on Law and Aging recommends against standardized cognition exams and instead encourages attorneys to blend their assessment into their customary means of client communication.[4] This naturally requires an attorney to ask more questions and take more notes, but alleviates the need to confront a client with a formal test and prevents overreliance on metrics designed for the medical field.

While documentation is critical, attorneys should carefully consider whether videotaping a client is in the client's best interests. Even the sharpest client can seem nervous, shaky, and possibly impaired upon facing a camera, creating the appearance of a cognitive deficit which risks overshadowing other evidence indicating a sound mind. Similarly, referring a client for a clinical assessment can yield formal documentation of the client's perceived shortcomings as well as strengths and will allow a physician to take notes, and reach discoverable conclusions, outside of the attorney's control.

1 U.S. Census Bureau. ***An Aging Nation: The Older Population in the United States.***

2 Jonathan Graff-Radford, M.D. ***Sundowning: Late-day confusion.*** Mayo Clinic.
3 ***Learn About Lbd: Symptoms.*** Lewy Body Dementia Association.
4 American Bar Association Commission on Law and Aging. ***Assessment of Older Adults with Diminished Capacity: A Handbook for Lawyers.***

Red Flags vs. Red Herrings

In assessing a client's potential limitations, an attorney should begin from a presumption of full capacity, being careful not to mistake a social or physical impairment, particularly hearing or vision loss, for a mental one. Ultimately, attorneys may need to rely, at least partly, on instinct, but they should watch for red flags in the following areas:

- **Memory**–Difficulty recalling recently shared information, repeating statements or questions, or losing track of time, location, or purpose
- **Communication**–Mixing up simple words or phrases, or even delivering incomprehensible sentences
- **Comprehension**–Failing to understand abstract ideas and the consequences of certain actions
- **Mental Flexibility**–Beyond stubbornness; clinging to a specific position despite an inability to provide sound reasons for doing so
- **Calculation Ability**–Struggling to perform even simple addition or subtraction, or failing to appreciate relative values
- **Emotional State**–Rapid mood swings, emotions that do not correspond to the matter being discussed, or unwarranted resentment or paranoia
- **Hygiene**–Neglecting to brush teeth, bathe, shave, or change clothes, especially in contrast to past behavior

Responding Appropriately

ABA Model Rule 1.14, which has been adopted in an identical or substantially similar form by every state except California and Texas, addresses clients with diminished capacity. While subsection (b) of the rule authorizes an attorney to take action to protect the client from substantial harm and subsection (c) permits the attorney to reveal otherwise confidential information in doing so, subsection (a) requires the attorney to maintain a normal attorney-client relationship to the extent possible. In short, an attorney may take action to protect a cognitively impaired client, but that action must be proportional to the client's deficits and as minimally intrusive as possible.

Minimal Accommodations

Where a client has minimal cognitive impairments, minor adjustments to the customary relationship structure may be sufficient. If practical, the attorney can meet with the client at the client's home, and forgo long meetings for multiple, shorter ones to offset fatigue. Focusing on one issue at a time and providing written summaries of discussions will assist the client's comprehension and memory. Even speaking more slowly, ensuring adequate lighting, and minimizing background noise can enhance the client's ability to participate in the representation.

The client may insist upon, and the attorney can suggest, enlisting help from a spouse or trusted individual. The presence of a third party can be extremely helpful, but the attorney should be alert to signs of undue influence and schedule occasional one-on-one conversations with the client, especially if the third party was present at the initial client meeting.

Comment 3 to Model Rule 1.14 assures that "the presence of [a necessary third party] generally does not affect the applicability of the attorney-client evidentiary privilege," a conclusion consistent with case law and state evidentiary rules.[5] However, attorneys should add a signed addendum to their engagement agreements explaining the third party's assistive role, documenting the intent of all parties to preserve the confidentiality of communications, and clarifying that the third party is not the attorney's client.

Voluntary Decision-Making Tools

For a client with more serious impairments, or whose condition will further deteriorate, an attorney may suggest a durable power of attorney. A durable power of attorney formally empowers a trusted third party to make decisions on the client's behalf, but allows the client to dictate the level of authority conferred and designate the individual who will handle their affairs. Although the client must possess the capacity to consent to the terms of the agreement at the time it is executed, the agreement will remain in effect after the client lacks the capacity to make decisions.

Attorneys might also consider a springing power of attorney, which conveys authority only *after* the client has become incompetent. While many clients may be attracted to an option that lets them retain control of their affairs until absolutely necessary, waiting for a determination of incompetence often means waiting until the client has already suffered some kind of harm. Drafting a springing power of attorney thus requires a clear definition of the triggering event and ideally a prospective release form pursuant to the Health Insurance Portability and Accountability Act of 1996 (HIPAA) to enable a smooth transition. In any event, the attorney should ensure that the client understands the pros and cons of each type of agreement.

Guardianship

The most severe action an attorney can take is to petition the appropriate court for some form of guardianship. While some clients may require a general guardian, who handles all legal, financial and healthcare decisions for the client, the attorney should first consider whether a conservator, who can manage financial affairs, or a guardian ad litem, who can make decisions with respect to a specific litigation matter, would suffice.

5 *See, e.g.*, Ala. R. Evid. 502 ("A communication is 'confidential' if not intended to be disclosed to third persons other than those to whom . . . disclosure is reasonably necessary for the transmission of the communication."); Cal. Evid. Code § 952; *Witte v. Witte*, 126 So. 3d 1076 (Fla. Dist. Ct. App. 2012); *Stroh v. Gen. Motors Corp.*, 213 A.D.2d 267 (N.Y. App. Div. 1995).

Where appropriate, every state except California[6] allows attorneys to initiate guardianship proceedings against their clients independently and upon their own authority. Representing a third party in filing such a petition, however, would likely constitute a non-waivable conflict of interest.[7] Even with good intentions, an attorney who initiates guardianship proceedings against a client must first verify the client's need for a guardian. Blind reliance on a third party's representations, or the initiation of proceedings for mere convenience, can result in disciplinary action.[8]

Risk of a Misstep

To date, courts that have addressed the issue have declined to find an attorney liable to third parties for failing to assess a client's capacity before executing a transaction or making a decision, absent some accompanying fraud or intentional misconduct.[9] An attorney's failure to recognize a client's diminished capacity can lead to other claims, however, related to challenges in communication or comprehension to which the attorney has failed to adapt. Even a well-intentioned attorney who fails to take adequate precautions when enlisting a third party for assistance or executing a power of attorney may have to defend against claims alleging undue influence or conflicts of interest, in addition to the specter of a disciplinary hearing.

6 *See* C.O.P.R.A.C. Formal Op. 1989-112; L.A. County Bar Formal Op. 450 (1989); S.D. County Bar Formal Op. 1978-1.
7 *See* ABA Formal Opinion 96-404 (1996) (explaining that although "Rule 1.14(b) clearly permits the lawyer himself to file a petition for guardianship . . . nothing in the rule suggests that the lawyer may represent a third party in taking such action," and doing so would establish a representation directly adverse to the client in contravention of ABA Model Rule 1.7(a)(1).).
8 *E.g., In re Disciplinary Proceeding Against Eugster*, 166 Wash. 2d 293 (2009).
9 *See Moore v. Anderson Zeigler Disharoon Gallagher & Gray*, 109 Cal. App. 4th 1287 (2003); *Francis v. Piper*, 597 N.W.2d 922 (Minn. Ct. App. 1999); *Logotheti v. Gordon*, 414 Mass. 308 (1993); *Morgan v. Roller*, 58 Wash. App. 728 (1990).

Conclusion

The aging American population presents many new challenges, but attorneys already possess the tools needed to confront them. With greater empathy, patience, and an understanding of their ethical duties, attorneys can meet the demands of their evolving clientele and ensure that their practice adapts to our nation's shifting demographic landscape.

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