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Client Capacity—Assessment and Advocacy

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Among the more complex ethical issues surrounding the practice of law are the special considerations that must be made when assessing and addressing the needs of a client with questionable capacity. The issue is further complicated by the fact that the standards for determining legal capacity vary, depending upon the transaction to be entered into by the client.

Although an attorney may be precluded from representing a client who lacks capacity, the attorney may nevertheless engage in a meaningful attorney-client relationship with those who have less than full capacity.

Context-based Capacity Standards

An individual's mental capacity is judged based upon the transaction or act the person is undertaking. One commentator explains that legal capacity exists on a spectrum; a person's capacity may be insufficient to perform what is considered to be a more complex act (such as entering into a contract), but may be sufficient to perform what is considered to be a more simple act (such as making a will).[1]

Contractual Capacity

The capacity to enter a contract (a retainer agreement is a notable example) exists when "the person in question possesses sufficient mind to understand, in a reasonable manner, the nature, extent, character, and effect of the act or transaction in which he is engaged." Stated otherwise:

> To make a valid contract, each party must be of sufficient mental capacity to appreciate the effect of what he or she is doing, and must also be able to exercise his or her will with reference thereto. There must be a meeting of the minds to effect assent, and there can be no meeting of the minds where either party to the agreement is mentally incapable of understanding the consequences of his or her acts.[2]

Thus, to find that a person lacked capacity to enter into a contract, "[i]t is not necessary to show that [the] person was incompetent to transact any kind of business, but to invalidate his contract it is sufficient to show that he was mentally incompetent to deal with the particular contract in issue."[3]

Testamentary Capacity

Adults are generally presumed competent to execute a last will and testament.[4] Testamentary capacity is evaluated at the time of the execution of a will, and is summarized as follows:

> The gauge of testamentary capacity is whether the testator can comprehend the property he is about to dispose of; the natural objects of his bounty; the meaning of the business in which he is engaged; the relation of each of the factors to the others, and the distribution that is made by the will....[a]s a general principle, the law requires only a very low degree of mental capacity for one executing a will....A testator's misconception of the exact nature or value of his assets will not invalidate a will where there is no evidence of incapacity....[I]t is not ignorance of the kind or amount of property owned by the testatrix which invalidates [a] will, but ignorance resulting from a mental incapacity to comprehend the kind and amount of such property.[5]

Donative Capacity

New Jersey recognizes the general principle that an adult donor is presumed competent to make a gift. The test of an adult's capacity to make a gift is that "the donor shall have the ability to understand the nature and effect of the transaction."[6] According to *corpus juris secundum*, mental capacity to make a gift is judged by whether an individual has the ability to understand the nature of the transaction, the extent of his or her property, the objects of his or her bounty, and the manner in which the distribution is being made.[7]

> In sum, when examining capacity in the context of various types of legal transactions, courts have developed different legal standards for capacity for different legal documents. The tendency in the courts is to find that the more the client is willing to give up or the more complex the act, the more capacity the client must have.[8]

Representing the Client with Diminished Capacity

The New Jersey Rules of Professional Conduct provide a logical starting point for practitioners struggling with issues surrounding a client with less than full capacity. The representation of a client with diminished capacity is governed by R.P.C. 1.14, which provides as follows:

> (a) When a client's capacity to make adequately considered decisions in connection with the 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....

But how does the lawyer determine whether the client's capacity is, in fact, compromised? Unfortunately, R.P.C. 1.14 does not provide standards for determining client capacity (or the varying levels of capacity).[9] Indeed, as one legal treatise concurs:

> [t]here is a distressing lack of guidance for attorneys dealing with partially incapacitated clients. Yet, it is the attorney's role, despite lack of any formal medical training, to determine whether a client's capacity is sufficient to allow him or her to understand and consent to required legal activity.[10]

Capacity Assessment Tools

Given that lawyers are largely left to their own devices to formulate a method of determining a client's impairment, there is room for the attorney to "rely on instinct and experience" to make these assessments.[11] However, as one commentator cautions, "in representing elderly clients situations arise with increasing frequency that challenge the attorney's ability to react on a 'gut' instinct alone."[12]

Rather than relying solely on instinct or experience, the attorney may employ a number of different tests to inform the decision regarding a client's capacity. One assessment tool, which is popular because of its reliability and ease of use, is the mini mental state exam (MMSE). The MMSE consists of 30 questions, and a score below 24 suggests that cognitive impairment may exist.[13]

Another assessment tool is the Baird B. Brown legal capacity questionnaire, which is said to "combine[] medical and legal principals...to assess the conceptual knowledge required to demonstrate testamentary capacity...[while providing] insight into the client's mental state." The client capacity screen is a one-page assessment to assist the lawyer in making a capacity assessment.[14]

Another source of guidance in the assessment of client capacity, provided by the American Bar Association Commission on Law and Aging and the American Psychological Association (ABA-APA), is the 2005 publication titled *Assessment of Older Adults with Diminished Capacity: A Handbook for Lawyers*.

The ABA-APA handbook advocates the use of "markers," or indicators in the initial assessment of client capacity, which "should not be taken in and of themselves to be proof of diminished capacity," but instead "may indicate a need for further evaluation of capacity by an independent professional." The assessment encompasses examination of possible cognitive, emotional, and behavioral signs that may indicate incapacity, and compares the client's understanding in relation to the legal definition of capacity for the particular transaction in issue.

As the ABA-APA handbook opines, for "many, if not most clients,...clinical consultation or assessment will not be needed to reach a firm conclusion about capacity."[15] However, the lawyer's initial assessment of client capacity may be followed by the use of a clinical consultation or assessment, if the lawyer believes it necessary in order to make a capacity determination.

New Jersey courts support a lawyer's sparing use of referrals for clinical assessment. In *Lovett v. Estate of Lovett*, a client of advanced age and weakened memory executed a new will that was inconsistent with his longstanding testamentary plan. The legal malpractice claim that followed was based upon the estate planning lawyer's alleged failure to recommend a psychological evaluation to determine the client's testamentary capacity, given the client's age and weakened memory, prior to allowing him to execute the new will.

The court rejected this claim, stating:

> The fact that Lovett wanted a simple will in spite of having a substantial estate does not suggest incompetency; nor did his age. The fact that Lovett's memory was not as strong as it had been, although a factor to be considered, was far from sufficient to warrant [the lawyer's] refusal to act or to require him to insist that Lovett obtain a psychological exam. *Circumstances which would justify a suggestion from a lawyer that a client be psychiatrically evaluated as a prerequisite to signing legal documents would be rare.* This was not such a circumstance.[16]

Assistance and Advocacy

As a preliminary matter, the lawyer

should routinely counsel a competent client to take steps to protect him or herself in the event of future incapacity, such as through the use of durable powers of attorney, advance directives and healthcare proxies.[17] However, the attorney is often faced with a client who has not taken these protective steps, and who has reached a level of diminished capacity.

Ethics Opinion 625, Representation of Client Believed to be Incompetent, was issued in response to an attorney's inquiry regarding the continued representation of a client with questionable capacity in the context of general litigation.

In Opinion 625, the client arrived late to an administrative law hearing and displayed behavior that was "irrational, totally incapable of assisting counsel, agitated and potentially violent." The client's husband was attempting to have the client committed for her bizarre and paranoid behavior, and the client had threatened to file ethics charges against her attorney. The client had also rejected a settlement her attorney felt was in her best interests. Based upon these facts, the attorney inquired into whether, and in what manner, he should continue to represent the client.

The New Jersey Advisory Committee on Professional Ethics noted that "the difficulties which inhere in situations such as that presented here are obvious," and that "several of the lawyer's basic duties may conflict," including confidentiality rules and the attorney's obligation to exhibit candor toward the tribunal. The committee suggested a lawyer may terminate representation if withdrawal "can be accomplished without material adverse effect on the interests of the client," or if the client insists on a course of action "that the lawyer considers repugnant" or imprudent, or other "good cause for withdrawal" exists.

Cautioning that there can be "no hard, fast or inflexible rules" for resolving situations involving clients with diminished capacity, the committee concluded:

> the lawyer must attempt to effectively advise the client of the status of the case unless he soundly believes that she cannot comprehend or that the communication would adversely affect her health or well-being. If either exists, or, as here, she is incapable of effectively assisting in her own defense (based on a firm professional judgment), the appointment of a guardian should be sought. Counsel may continue to represent his client here unless he believes the course of action he is forced to take would be imprudent or if his continued representation would adversely affect his client. He would be required to continue his representation only if his withdrawal could prejudicially affect her.[18]

Advocacy of Client's Wishes vs. Promoting Client's 'Best Interests'

Implicit in entertaining a 'normal' relationship with a client with diminished capacity is the struggle between competing views: the lawyer as advocate for the client, on the one hand, and the lawyer promoting what he or she believes to be the 'best interests' of the client. However, the generally accepted view is that the lawyer should advocate the client's wishes, rather than what the lawyer determines to be in the client's best interests.[19]

The New Jersey Supreme Court addressed whether a "generally incompetent" individual must prove that he or she retains the capacity to choose where to live. During the course of its analysis, in which it emphasized the need to preserve an incapacitated person's right of self-determination to the extent possible, the *M.R.* Court examined the actions of M.R.'s court-appointed counsel. In contrasting the role of court-appointed attorney with that of a guardian *ad litem*, the *M.R.* Court quoted the Supreme Court Judiciary Surrogates Liaison Committee and Civil Practice Committee guidelines for attorneys, which stated:

> [t]he role of the representative attorney is entirely different from that of a guardian *ad litem*. The representative attorney is a zealous advocate for the wishes of the client. The guardian *ad litem* evaluates for himself or herself what is in the best interests of his or her client-ward and then represent[s] the client-ward in accordance with that judgment.

The *M.R.* decision was founded upon the recognition that "[a]dvocacy that is diluted by excessive concern for the client's best interests would raise troubling questions for attorneys in an adversarial system."[20]

Following the *M.R.* decision, Rule 4:86-4 of the New Jersey Rules of Court was amended to distinguish between the role of guardian *ad litem* and that of the court-appointed attorney in a guardianship action.

> (d) *Guardian Ad Litem.* At any time prior to entry of judgment, where special circumstances come to the attention of the court by formal motion or otherwise, a *guardian ad litem* may, in addition to counsel, be appointed to evaluate the best interests of the alleged incapacitated person and to present that evaluation to the court.[21]

Maximizing Client Capacity

In cases in which a client's capacity may be compromised, the lawyer may utilize a number of practical techniques to maximize that capacity. Physical surroundings may be adapted to maximize the client's capacity level. For example, because many clients with diminished capacity suffer from difficulties with

sight and hearing, the lawyer may compensate for these impairments by minimizing background noise and glare, directly facing the client, and speaking slowly. In addition, because many older adults function best at certain times of day (generally the morning), the attorney should determine the best time of day for a particular client, and arrange meetings to accommodate that schedule. The lawyer should also consider making appointments at the older client's home, where he or she is more comfortable and likely to function more fully.

It is also vital to avoid confusing physical frailty with mental impairment; the ABA-APA handbook advocates the importance of beginning a relationship with a client by presuming capacity, and avoiding a stereotypical attitude toward the older client, as such attitudes can "unconsciously obstruct communication with and perception of the client."[22]

Conclusion

R.P.C. 1.14 is the primary source of guidance for New Jersey attorneys representing clients with diminished capacity. However, as one scholar opines, the model rule, which was adopted as R.P.C. 1.14 in New Jersey,

> is one of the most well-intended and progressive of the Model Rules....The controversy...lies not in its spirit but rather in its vagueness. The resounding criticism is that lawyers are still plagued with many unanswered practical questions.[23]

It is likely that the reason for the seeming vagueness in R.P.C. 1:14 is that these issues are simply incapable of clear answers, given the infinite range of facts and nuances presented by a given case. The nature of incapacity itself is problematic; one commentator colorfully compares the concept of incapacity to "the lava lamp of the sixties—you can never really pin it down and it changes every time you look at it."[24]

As the New Jersey Advisory Committee on Professional Ethics correctly observed, "the determination of a lawyer's responsibilities to a client who suffers from a mental infirmity or disorder is not an easy one." Perhaps the admittedly vague framework of R.P.C. 1.14 is the best method for allowing the informed attorney to use his or her "firm professional judgment" in practice.[25]

Endnotes

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2. 17A C.J.S. Contracts §141.
3. *In re Schiller*, 148 N.J. Super. 168 (Ch. Div. 1977) (*quoting* 17 C.J.S. Contracts §1331(l)); *In re W.S.*, 152 N.J. Super. 298 (N.J. Juv. & Dom. Rel. 1977).
4. *Haynes v. First Nat'l State Bank*, 87 N.J. 163, 175-76 (1981).
5. *In re Liebl*, 260 N.J. Super. 519, 524-25 (App. Div. 1992), *certif. denied*, 133 N.J. 432 (1993) (citations omitted).
6. *Pascale v. Pascale*, 113 N.J. 20, 29 (1988) (*quoting Conners v. Murphy*, 100 N.J. Eq. 280, 282 (E. & A. 1926) (further citations omitted)).
7. 38A C.J.S. Gifts §12.
8. Boyer, E., Representing the Client with Marginal Capacity: Challenges for the Elder Law Attorney—A Resource Guide, 12-Spring *NAELA Q.* 3, 7 (Spring 1999).
9. *See* Regan, J., Morgan, R. and English, D., *Tax, Estate & Financial Planning for the Elderly*, §1.06[4] at 1-17 (Matthew Bender 2005).
10. Frolik, L. and Brown, M., *Advising the Elderly or Disabled Client*, §1.04 at 1-8 (2d ed. Warren, Gorham & Lamont 2003).
11. Laffitte, E., Model Rule 1.14: The Well-Intended Rule Still Leaves Some Questions Unanswered, 17 *Georgetown Journal of Legal Ethics* 313, 325 (Winter 2004) (further citation omitted); Regan, J., Morgan, R. and English, D., *supra*, §1.06[4] at 1-16.
12. Boyer, E., *supra*, at 5.
13. Regan, J., Morgan, R. and English, D., *supra*, §1.06[4] at 1-16; Boyer, E., *supra* at 6.
14. Boyer, E., *supra*, at 7.
15. http://www.apa.org.
16. 250 N.J. Super. 79, 88-89 (Ch. Div. 1991) (emphasis supplied).
17. American College of Trust and Estate Counsel (ACTEC), *Commentaries on the Model Rules of Professional Conduct* (4th ed. 2006), www.actec.org/public/Commentaries1.14.asp.
18. 123 *N.J.L.J.* 991, 1989 WL 375810 (N.J. Adv. Comm. Prof. Eth. April 20, 1989).
19. Laffitte, E., *supra*, at 327-28.
20. 135 N.J. 155 (1994).
21. *In re Mason*, 305 N.J. Super. 120, 126-7 (Ch. Div. 1997).
22. Boyer, E., *supra*, at 8.
23. Laffitte, E., *supra*, at 313.
24. Boyer, E., *supra*, at 3.
25. Ethics Opinion 625, Representation of Client Believed to be Incompetent, *supra*, 123 *N.J.L.J.* 991.

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