Now You See It; Now You Don’t: Capacity In The Planning Process

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A. Prologue

1. We all know that our society is getting older. The baby boomer generation, those people born between 1945 and 1965, is aging, and its numbers will, as they have always done, revolutionize our society. Consider these startling facts:

   a. The baby boomer generation numbers about 79 million, which is 27 million more than the generation that preceded it and about 10 million more than the one that comes after it.

   b. By 2020, one member of the boomer generation will reach 65 years of age every 5 seconds of every day of the year.

   c. By 2030, there will be 70 million persons over the age of 65, more than twice the number of such persons in 2000.

   d. The proportion of this population described as the very old (85+) will also double to about 9 million.

2. In addition, all of us, baby boomers or not, are living longer. Tables provided by the Internal Revenue Service indicate that the life expectancy of an individual age 65 is 21 years, or to age 86. See the Single Life Expectancy table set forth in Treas. Reg. §1.401(a)(9)-9, Q&A 1, also found as “Table I” in IRS Publication 590. But “life expectancy” is the mean of the expectancy for the persons in the cohort, so one-half of them can be expected to live longer than the stated figure. And if you consider a couple, as you would in planning for husband and wife, the results are even more expansive. Take a couple both

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age 65. There is a 50 percent chance that one of them will survive to age 92, and a 25 percent chance that one will live to age 97! In the time of King Tutankhamen of Egypt (1334 B.C.E.), life expectancy was about 25 years. Three thousand years later, in the 1400s, expectancy had increased to 30, a gain of 5 whole years! Between 1400 and 1800, expectancy rapidly increased to 37 years, and in the next 100 years, to 1900, it increased again to 47. In the next century, life expectancy rocketed ahead to 77. And in this the 21st century, the increase will be to ?????? See the discussion of this continuing saga and its impact on financial planning in Nick Murray’s article, *The Exponent of Life Expectancy*, Financial Advisor (March 2007), pp. 43–44.

3. To repeat, our society is getting older, which means our client base will also be older. As we go forward in our professions, we will be dealing with more and more people who live longer and longer. And we will increasingly deal with a series of five problems that characterize the attorney-client relationship with older clients:

a. Identifying the client;

b. Determining mental capacity;

c. Determining a course of action if capacity is lacking;

d. Handling the representation of multiple parties;


4. Of these problems, (b) and (c) are issues of capacity; the rest are issues arising from the representation of multiple parties.

5. Although all of these issues are worthy of our time and consideration, the focus of this paper is the issue of capacity—how to determine if our client has diminished capacity; if so, what do we do about it; and what are our ethical obligations and to whom do we owe them? These questions will be more frequently encountered in the course of estate and financial planning in the coming days, and we must be prepared.

6. Although this paper is written in terms of the practices of and ethical rules for attorneys, similar concerns are addressed by the codes of conduct of other professions, although sometimes with differing emphases. See, for example, the Code of Professional Responsibility of the Society of Financial Service Professionals and the American Institute of Certified Public Accountants Code of Professional Conduct.

**B. Why Do I Have To Deal With The Issue Of Capacity At All?**

1. “But,” you say, “I am not a mental health professional. I am an attorney, and I don’t have to make mental assessments of my clients.” Wrong! You do have to make such assessments, and you have done it every day you have practiced your profession.

2. First, the lawyer must determine if the proposed client has the contractual capacity to enter into an agreement for the lawyer’s services. Without such capacity, no attorney-client relationship can be cre-
ated. And if an attorney-client relationship is established and the client subsequently loses that capacity, the attorney loses the authority to act for the client. See, e.g., *In re Houts*, 7 Wash. App. 476, 499 P.2d 1276 (1972).

3. Second, the lawyer must determine that the client has the requisite capacity to enter into the transactions contemplated by the legal engagement—actions like executing a will, purchasing a life insurance policy, making an annual exclusion gift, etc.

4. Thus, every time you have entered into an attorney-client relationship, every time you have allowed a client to sign a contract or a will, every time you have followed client instructions in responding on his or her behalf, you have made an implicit decision as to the capacity of the client. Of course, you have been aided by the presumption of capacity extended by common and statutory law, but you have made these decisions nevertheless.

5. It must also be pointed out that there is risk of malpractice if decisions concerning capacity are not made or are made incorrectly. It has been said that the failure to determine a lack of capacity is one of the 10 most common triggers for estate planning malpractice actions. Kevin S. Rosen, *Avoiding Malpractice Claims Against Estate Planning Counsel: How Your Actions Can Exacerbate, Mitigate or Eliminate Your Exposure*, Chapter 7, 2007 University of Miami Heckerling Institute on Estate Planning. This also means that the attorney should document the process of determining whether the requisite capacity for each stage of the engagement is present, since questions may arise only years after the action takes place.

C. The Concept Of Capacity

1. The legal term “capacity” has no one definition. One commentator said, “Capacity is the black hole of legal ethics. Many questions find their way into the capacity category, but few answers ever emerge.” Margulies at 1082. Instead, capacity is measured by situation-specific standards. We talk about testamentary capacity, donative capacity, contractual capacity, medical capacity, etc. The standards for each of these “capacities” may differ from each other, and may differ from state to state.

2. The common law, and the statutory law of almost all states, is that a person who has reached the age of majority, usually 18 years of age, is presumed competent to make legally binding decisions unless and until declared incompetent by an appropriate tribunal. Because of this presumption, the discussions of capacity in the law are generally couched in terms of what constitutes the lack or diminution of that presumed capacity.

3. The Model Rules of Professional Conduct of the American Bar Association, which have been adopted in large part by many of the state bars or have formed the basis for the states’ own rules, in Rule 1.14, deal with ethical rules that apply when the client has diminished capacity. In seeking to articulate what diminished capacity is, Comment [6] to this Rule identifies the following factors to be considered:
   a. The client’s ability to articulate reasoning leading to a decision;
   b. Variability of state of mind;
   c. Ability to appreciate the consequences of a decision;
d. The substantive fairness of a decision;
e. The consistency of a decision with the known long-term commitments and values of the client.

4. A more specific, but no more helpful, definition of incapacity can be found in §102(5) of the Uniform Guardianship and Protective Proceedings Act of 1997:

“Incapacitated person” means an individual who, for reasons other than being a minor, is unable to receive and evaluate information or make or communicate decisions [relevant to the subject matter under discussion] . . . .

5. Neither of these statements is specific as to the factual circumstances that indicate a diminished capacity. This is by design. It is important to remember that we must focus on the client and the client’s desires.

6. The appropriate test is whether the client can make decisions for him- or herself, not whether the decisions made are those “society” would make or those the attorney would make. A Formal Opinion of the American Bar Association Standing Committee on Ethics and Professional Responsibility explains the test this way:

[T]he client’s capacity must be judged against the standard set by that person’s own habitual or considered standards of behavior and values, rather than against conventional standards set by others. ABA Standing Committee on Ethics and Professional Responsibility Formal Opinion 96-404, Client Under a Disability, August 2, 1996 (“Formal Opinion 96-404”), p.2 at Note 5, citing M. Silberfield and A. Fish, When the Mind Fails: A Guide To Dealing With Incompetency (University of Toronto Press 1994).

7. The separation of client values and societal values is difficult. To place this problem into a factual setting, one commentator poses this scenario:

An elderly man comes to see you about his house. A con man has procured a mortgage on the residence through fraud, and is now threatening to foreclose on the property. The man asks for your advice. After hearing your explanation of available remedies, he instructs you not to go to court because he does not want to be seen by his peers to have acted so foolishly. You know that his concerns about appearing foolish would soon pass while the loss of his house would be devastating for the balance of his life. Thus you might argue that his choice not to go to court is a sign of diminished capacity. “He is not thinking right!”

Alternatively, suppose the man after hearing the remedies instructs you to go forward with litigation, saying, “I want to save my house. It talks to me at night and I enjoy the conversation.” Here the reasoning is evidently more flawed than before and raises more questions about capacity, but you would probably jump to defend him without questions since the long term results are better for him.

Paul R. Tremblay, On Persuasion and Paternalism: Lawyer Decision-Making and the Questionably Competent Client, 1987 Utah Law Rev. 515. This fact pattern is also discussed in Margulies at pp. 1084–1085.

8. It is imperative to remember that oddness or eccentricity does not equal diminished capacity. The job of the attorney is to accomplish the desires of the client, not to force the client to do what the attorney thinks the client should do. See Linda F. Smith, Representing the Elderly Client and Addressing the Question of Competence, 14 J. of Contemp. L. 61 (1988). Smith describes a technique of “gradual counseling” in which the effects of age-related issues are reduced. The key, she argues, is to understand the client’s