

Practice Tips for Dealing with Clients (and Prospective Clients) with Diminished Capacity

by Sabrina E. Morrissey

At some point in our practice, most of us will have a client, or speak with a prospective client, who has diminished capacity. This is particularly true for those of us who work in the area of trusts and estates.

Possible causes of diminished capacity include traumatic brain injury,* Alzheimer's disease, or dementia from other causes. The issue might be mild or severe. Depending on the severity, lawyers may need to take special steps to protect the interests of such vulnerable clients. Although working with such clients presents unique challenges for attorneys, it can also be deeply rewarding.

The ethical rules that govern our conduct as attorneys provide some guidance for dealing with clients with diminished capacity. Rule 1.14 of the New York Rules of Professional Conduct addresses this issue directly. The Rule states that the first principal for dealing with such clients is "to maintain a conventional relationship with the client," to the extent that it is "reasonably possible" to do so. Rule 1.14(a). If, however, the lawyer believes her client 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 "protective action" that is "reasonably necessary" to protect the client. Rule 1.14(b). This action may include "seeking the appointment of a guardian ad litem, conservator or guardian." *Id.* The Rule further recognizes that, due to the special needs of such clients, a lawyer may need to reveal confidential information in order to take protective action. See Rule 1.14(c). Even then, the attorney may only reveal such information as is "reasonably necessary to protect the client's interests." *Id.*

Based on my two decades of experience in the field of elder law, I have formulated the following six practice tips for determining whether and how to work with a client with diminished capacity.

First, use your own common sense and experience. What is the person's outward appearance? Are they dirty or disheveled? Are they fearful, paranoid or anxious? Do they have a short attention span? Were they able to find your office without a problem? Did they have help? Are they able to answer basic questions? Do they repeat themselves? Do they forget what you said just a few minutes before? These questions are important to the threshold issue of whether the person has capacity to make a contract for legal services. In my experience, those with paranoia are the hardest to help. Their trust issues often result in a failure to provide complete information, and their contacts are likely to be sporadic.

Second, determine whether the prospective client is capable of participating in the attorney-client relationship. This question is largely dependent on the complexity of the legal issue. For example, if a prospective client needs sophisticated estate planning but is unaware of asset information, or cannot understand explanations of the planning to be done, this will negatively impact your ability to effectively prepare the appropriate estate plan. Conduct your own tests of whether the prospective client can participate in the process. Meet more than once, and ask the prospect to provide you with information or to complete tasks related to the legal work to be done, such as: to bring relevant documents, send information by e-mail, or call you at a set time and date with additional details.

Third, consider reaching out to other attorneys for a second opinion. Utilize peers or other law firm members to talk things through and, if appropriate, to also meet with the client or prospective client. In some cases, it may be appropriate to retain the services of a Geriatric Care Manager for guidance in this area. As noted in comment 3 to Rule 1.14, however, when inviting others to participate "[t]he lawyer should consider whether the presence of such persons will affect the attorney-client privilege." Further, as noted in comment 8, Rule 1.14(c) "limits what the lawyer may disclose in consulting with other individuals or entities or in seeking the appointment of a legal representative." Absent express authorization, the lawyer should reveal only such information as is "reasonably necessary to protect the client's interests." Rule 1.14(c).

Fourth, enlist the help of a family member or friend who might assist the client or prospective client in being able to better manage the attorney-client relationship. This might be a spouse, child, friend or home health aide. Be sure to confirm (a) that the client wants the helper involved, and (b) that the helper does not have an agenda adverse to the client's best interests. If this is not possible, work with the client alone in a way that makes it possible for the client to understand and participate to the extent required. It may be necessary to repeat explanations, provide written directions, and to have multiple meetings before the client is able to move forward. Note: This fourth recommendation is a corollary to the third point, in that if you need to seek assistance to ensure the client's ability to proceed with the matter, it has the same caveats as above regarding confidentiality.

Fifth, if you decide to represent a client who has some level of diminished capacity, break the work down into manageable parts, with an eye toward

completing each element required for the matter before moving on. This helps ensure that the client comprehends each element of the matter, and ensures an orderly progression in the event that the client decides at some point to end the relationship, or it becomes clear that he simply cannot continue. In this way, you will protect the client to the extent possible and also receive payment for your work in stages. I once had an elderly client who was very upset about pending litigation brought against him by a family member. He was aware of his situation and was able to talk with me intelligently about how he wanted to respond; however, he was extremely suspicious, and I was concerned that he might prematurely terminate our relationship. In order to protect his interests, I acted quickly to file an answer to the pending petition. As noted in Comment 2 to the rule, "[t]he fact that a client suffers a disability does not diminish the lawyer's obligation to treat the client attentively and with respect."

Sixth, help the client plan for the future. Whether you are representing a client with existing diminished capacity, or one who has the expectation of diminished capacity in the future (in the case of an early Alzheimer's diagnosis), do what you can to make sure the client has an appropriate estate plan, Power of Attorney and Health Care Proxy. If the client does not have a family member to take care of funeral and burial arrangements, prepare an Appointment of Agent for Disposition of Remains. If the client has a business, confirm that there is a succession plan for management and that the plan for ownership of stock or LLC interests, post-death, is clear. If this is not your area of expertise, make an introduction to a competent elder law or estate-planning attorney.

*The most common type of traumatic brain injury I have personally encountered has been the result of stroke. Stroke survivors often complain of memory loss, an inability to concentrate, along with impetuosity, depression and anxiety, each of which can impact interpersonal and business relationships.

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