Explore Best Practices for Clients With Diminished Capacity

Estate planners should implement procedures to protect the estate plans of elderly clients from being challenged for diminished capacity.

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A diagnosis of dementia is a reality becoming all too familiar in recent years. Dementia, however, is not a specific disease; it is a general term which "describes a group of symptoms associated with a decline in memory or thinking skills severe enough to reduce a person's ability to perform everyday activities."[1] A popular misconception is that dementia and Alzheimer's are the same disease. Yet, an individual may be diagnosed with dementia and never have Alzheimer's disease. Alzheimer's is a cause, rather than a result, of dementia. The Alzheimer's Association identifies a collective of eight independent diseases and syndromes which frequently result in dementia: Alzheimer's disease, Vascular dementia, Dementia with Lewy Bodies, Mixed Dementia, Fronto-temporal Lobar Degeneration (FLTD), Parkinson's disease, Creutzfeldt-Jakob disease, and Normal Pressure Hydrocephalus.[2]

Demographic trends

The statistics (and demographics) are staggering. As of 2018, 60% to 80% of all dementia diagnosis were in the form of Alzheimer's disease.[3] The U.S. Department of Health & Human Services: National Institute on Aging, defines Alzheimer's disease as an "irreversible, progressive disorder that slowly destroys memory and thinking skills."[4] According to the Alzheimer's Association, approximately 5.7 million Americans suffered from Alzheimer's dementia in 2018.[5] They also estimate that every 65 seconds, someone develops Alzheimer's disease.[6] It seems a virtual certainty that most professions dealing with wealth planning and management (attorneys, accountants, trust companies, financial planners) will have several clients experiencing some form of dementia throughout the course of their practice.

Another trend is that people are living longer. The longer the life expectancy, the more likely capacity-related issues will arise. In turn, this has led to an increase in trust and estate disputes revolving around diminished capacity and dementia.[7] For example, there has been an increase in reported elder abuse cases, which often involve a person with diminished capacity. In California, the number of investigated elder (and dependent) abuse cases increased from 54,776 cases in 2004-2005 to 77,812 in 2013.[8] Assuming this trend continues, the number of reported elder and dependent abuse cases could be expected to increase to over 100,000 cases per year over the next few years.

All of these demographic trends—longer life expectancies, increased diagnosed cases involving dimin-

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ished capacity and dementia, and increased knowledge and reporting of elder abuse cases—concern most advisors. When clients suffer from reduced capacity, the decisions made by the advisory team (whether involving financial decisions, legal decisions, testamentary decisions, accounting decisions, or others) later become "second-guessed" by family members. A disgruntled family member will almost always argue that the trustor or testator was unduly influenced (or worse, abused) into taking the action that resulted in reduced distributions or inheritance. Unfortunately, the disgruntled beneficiary's attorneys will often look into whether they can add the testator's close advisors to recover damages from the resulting fight over the decedent's final wishes.

Challenges for practitioners

Client situations involving reduced capacity or dementia present unique challenges that must be faced by each separate, professional community. For example, attorneys in most jurisdictions must keep their clients reasonably informed of significant developments in their case, and the attorney must generally receive the client's informed consent before acting.[9] How can an attorney obtain "informed" consent when the client is incompetent due to lack of capacity? Ethical dilemmas abound in this area.

One reason why diminished capacity cases are so difficult is that the complaining party is typically someone *other than* the actual client. For example, assume an elderly person decides shortly before death that he or she wants to disinherit a child who has not called in ten years. The older family member contacts his or her attorney to draw up the documents. After the documents are drawn up disinheriting the son or daughter, that non-client relative or heir may file a lawsuit, arguing that the parent had diminished capacity and the disinheriting documents were the result of undue influence, or were invalid due to lack of capacity, or even worse, the product of financial elder abuse. Because Mom or Dad are deceased by the time the disinherited relative/heir finds out, the disgruntled heir's attorneys often suggest suing all of the parties involved with the disinheriting documents and planning, including the attorney, accountant, financial advisor, etc.

Currently, this area of law is still being developed. Some states, like California (where the authors are located), have broad laws favoring plaintiffs in this area (see below). These broad laws have resulted in an increasing number of elder abuse case filings against professionals. The trend is expected to continue. This article includes references to the law of California for illustrative purposes, and readers should be sure to review the laws of the jurisdictions where they practice when counseling clients.

California Welfare & Institutions Code § 15610.30 defines financial elder abuse as occurring when a person "takes, secretes, appropriates, obtains, or retains real or personal property of an elder or dependent adult for a wrongful use with intent to defraud...." Section 15657.5 of the Welfare and Institutions Code adds that if a court finds, with a preponderance of the evidence, that a person is liable for financial elder abuse, the court should award attorneys' fees and costs. Finally, California Probate Code § 859 provides that if the court finds someone, in "bad faith" has taken, concealed, or disposed of property through the commission of elder abuse, that person is liable for twice the amount taken.

These California statutes make it relatively easy for a complaining heir to add an elder abuse claim along with any other, related probate claim (such as a petition for instruction, or a declaration of invalidity due to undue influence, lack of capacity, etc.). Other than the attorney's fees required to bring an elder abuse case, there is generally no real "downside" for plaintiff's counsel to add these claims—if the plaintiff loses, he or she is out just his or her own attorney's fees. If the plaintiff wins, however, he or she can receive double damages, as well as attorney's fees which are often not otherwise awarded in probate matters.[10]

Caveat for contesting. Those considering initiating a challenge to a will should be aware, however, that a potential downside could exist: a "disinheritance" or "no-contest" clause in the applicable instrument. A "no-contest" clause typically provides that if anyone, alone or in conjunction with another, files a pleading to challenge the applicable instrument, that beneficiary can be disinherited. These clauses are valid in California, and in many other states.[11]

1 Alzheimer's Association, "What is Dementia?," available at www.alz.org/alzheimers-dementia/what-is-dementia.

2 Alzheimer's Association, *2018 Facts and Figures*, pages 6-7, available at www.alz.org/media/HomeOffice/Facts%20and%20Figures/facts-and-figures.pdf.

3 *Id., at* page 6.

4 U.S. Department of Health & Human Services, National Institute on Aging, "Basics of Alzheimer's Disease and Dementia," available at www.nia.nih.gov/health/alzheimers/basics.

5 2018 Facts and Figures," *supra* note 2, at page 17.

6 *Id.*, at page 16.

7 In a recent presentation, Orange County probate judges referenced a growth of probate disputes that was 6% higher than the increase of non-probate cases. Conducting a Westlaw search, the author found 20 jury cases in Orange County elder abuse cases with damages exceeding $100,000 for 2017.

8 Source: www.ncbi.nlm.nih.gov/pmc/articles/PMC4675695/.

9 See e.g. American Bar Association Model (ABA) Rule of Professional Conduct 1.4 (which is carried over to the model rules of many states). California, for instance, adopted this rule (and many other model rules), effective 11/1/2018.

10 If the elder abuse case is successful, it may be possible to argue those attorney's fees are damages for a malpractice claim.

In California, and in states that follow the Uniform Probate Code, challenges can be brought if the challenging heir has probable cause. A civil action of elder abuse (which does not try to unwind the instrument), however, is not an action that is considered a "contest" for purposes of the no-contest clause statutes.[12]

In an interesting twist to the "no contest" provision law, a California appeals court recently found that a beneficiary/trustee who *defended* an amendment that was later declared invalid (due to the undue influence of the defending beneficiary/trustee) was "contesting" the trust, and could be disinherited under California's no-contest provision. The court reasoned that the defending beneficiary could not have had "probable cause" to defend the trust, since the court found the beneficiary had unduly influenced the trustor/testator.[13]

The trend in professional practices seems that professionals are integrating some procedure to identify factors of capacity into their meetings.

Practice tip. If a client has a capacity limitation, a practitioner is no longer merely providing the client with services such as drafting a testamentary document. Rather, the practitioner is now faced with the task of building a record so that if the document is challenged it will stand up against an elder abuse claim. Depending on the severity of the client's limitation, a practitioner must give serious consideration as to whether going forward with the representation is worth the threat of potential litigation and its expense. In most cases, the professional's fee is so miniscule compared to the risk of messy litigation that many professionals are changing their best practices and starting to decline the representation of a client with diminished capacity. The risk is too great.

Initial client meeting

During any initial contact with a client (especially elder clients), professionals should be on the lookout for signs of diminished capacity. Unfortunately, there is no single sign (or test) that a professional can see or use to identify whether a client is functioning with diminished capacity.

Therefore, it is essential for the professional to balance and consider the following factors when meeting with a new client:

1. The client's ability to articulate reasoning behind his or her decisions.
2. The client's ability to appreciate the consequence of his or her decision.
3. The fairness of the client's decisions
4. The consistency of the decisions.
5. The client's ability to understand the irreversibly of a decision.[14]

The authors' informal discussions with professionals about this have resulted in a wide range of suggestions. Some professionals ask the client to drive himself or herself to the professional's office (the ability to drive oneself is often associated with having capacity). Other professionals include questions addressing capacity in their questionnaire (i.e., "have you ever been diagnosed with dementia"). Still others may have a capacity worksheet, where they note key observations of the client.[15] In any event, the trend in professional practices seems that professionals are integrating some procedure to identify factors of capacity into their meetings.

One difficulty with dementia and diminished capacity cases is that it is often hard to distinguish whether the client has any capacity issues. Something as simple as letting the client's son or daughter talk in the initial meeting might be a sign of diminished capacity. Conversely, it could merely be that the son or daughter has an excellent knowledge of the family background and just wants to be helpful. What are the proper steps to be taken here? Ultimately, the professional needs to evaluate the situation as a whole and determine if further steps need to be taken to identify if there is a risk of diminished capacity and its severity.

In California, at least one case has held that the attorney has no duty to the trust's beneficiaries to perform a mental exam at the signing meeting to determine competency.[16] It would seem (by extrapolation) that attorneys, accountants, and other professionals should not be held to a standard of having to perform a mental exam every time a client walks in the door. For exam-

11 Cal. Prob. Code 21311. See also UPC § 2-517; and Challis and Zaritsky, "State Laws: No-Contest Clauses," available at www.actec.org/assets/1/6/State_Laws_No_Contest_Clauses_-_Chart.pdf.

12 See Cal. Prob. Code 21310.

13 Key v. Tyler, 2019 WL 1748577 (4/19/2019).

14 Model Rules of Prof'l Conduct r. 1.14 cmt. 6 (ABA, 2018).

15 ABA Commission on Law and Aging and Am. Psychological Ass'n., *Assessment of Older Adults with Diminished Capacity: A Handbook for Lawyers* (2005).

16 Moore v. Anderson Zeigler Disharoon Gallagher & Gray, P.C., 109 Cal. App.4th 1287 (2003).

17 In Re Rains, 428 F.3d 893 (CA-9, 2005). See also Sullivan v. Dunne 198 Cal. 183 (1926) (holding, a client must have capacity to enter into an attorney-client relationship).

18 Welfare and Inst. Code 15610.30.

19 Hamilton, "Is it Alzheimer's or Another Dementia? The Right Answer Matters," NPR (3/18/2019, 5:08 a.m.), www.npr.org/sections/health-shots/2019/03/18/703944116/is-it-alzheimers-or-another-dementia-the-right-answer-matters.

20 See Probate Code § 810, "a person who has a mental or physical disorder may still be capable of contracting … executing wills or trusts."

21 196 Cal. App.4th 722 (2011).

ple, it would seem a trust company would not need to conduct a mental exam every time an elderly client asked for a discretionary distribution of principal. Similarly, it would seem inappropriate to require a CPA to perform a mental exam every time an elderly client was asked to sign a tax return.

It is generally good practice to do some type of initial capacity screening if for no other reason than to prevent the client from being able to cancel the initial engagement agreement. There is long standing case law that provides a party is entitled to rescind a contract if the party is mentally incompetent.[17] If the client is entirely incompetent and requests the services of a professional, there is an increased risk that other family members will try to cancel the contract, if not take further action against the professional firm. For example, if a client was completely incompetent, and tried to hire a professional financial planner or trust company to assist the client in transferring funds to another party, not only is the professional put on notice that the client agreement might be canceled, but the professional advisor may also be held liable for elder abuse. A future plaintiff's attorney could argue the professional was "aiding and abetting" a hypothetical third-party to receive funds from an incompetent person.[18]

Duty to investigate

Often, the initial screening indicates the client generally has capacity. However, assume the initial screening indicates some kind of issue. Once the attorney, CPA, trust professional, or financial advisor has been put on any kind of notice that capacity is at issue, the professional is likely under a duty to investigate (at a minimum, that is what a subsequent plaintiff's attorney would argue if the action taken is later questioned by a family member).

What are the ways a professional can be put on notice? There are no "hard and fast" rules. However, if a client says he or she has been diagnosed with *a mild cognitive disorder, Alzheimer's, Parkinson's, etc.*, this is where things get tricky. Except for the few lawyers out there who are either doctors or have medical degrees, the name of an ailment does not matter. Anything that would lead a reasonable person to believe that the ailment could affect mental capacity is sufficient notice.

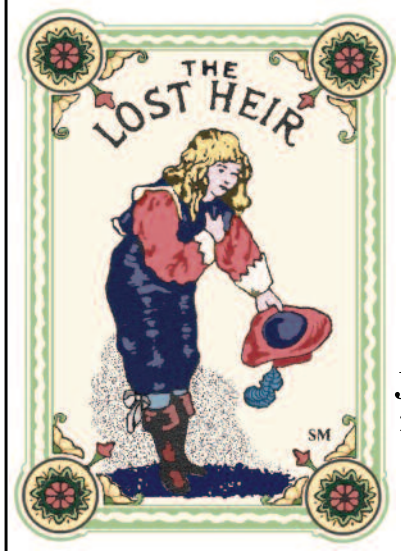
Even diagnoses of non-neurological diseases could be sufficient to put the professional on notice. New medical research from the National Institute of Neurological Disorders and Stroke, suggests that around one-third of individuals who experience a stroke will suffer from dementia.[19] Similarly, the treatment of an ongoing non-neurological illness may cause a client to become susceptible to diminished capacity. For example, the diagnosis of stage 4 cancer could lead a reasonable professional to ask if the client is taking some kind of pain medication which could diminish the client's capacity. Likewise, if the client is obviously impaired in some way (i.e., slowness of speech, inability to concentrate, difficulty remembering relatives, incapable of identifying people in the room, or unable to identify where bank accounts are situated), the professional is likely considered to be put on notice.

Just because a client has a diagnosis that may lead to diminished capacity, however, does not entirely preclude an attorney from advising/representing the individual.[20] Often, a client with diminished capacity retains the ability to understand, analyze, and determine what is in his or her own best interest.

Additionally, the level of the capacity standard applicable depends on the type of service provided. The court in *Anderson v. Hunt*,[21] provided that "the less stringent capacity standard set forth in Prob. Code § 6100.5 applicable to wills applies to trust amendments when a trust amendment closely resembles a will or codicil in content and complexity." Therefore, "when an amendment merely changes beneficiary designations the Prob. Code § 6100.5 standard will apply."

Doctor's note

What should professionals do in the initial meeting to screen for diminished capacity or lack of capacity? Experienced elder law



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attorneys use a variety of ideas. Some attorneys make every client over a certain age (70?, 80?) provide one or more doctor's notes prior to the attorneys drafting documents for the elderly client.

Asking a client to obtain one or more doctor notes raises several issues. First, clients are often reluctant to go to their doctor to get a note saying they are competent—they often feel like such a note is not necessary (or is just an unnecessary waste of time or money). It is important to remind the client that documents or actions can be subject to challenge, and obtaining one or more notes can significantly reduce this risk.

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Second, the simple act of asking a client to obtain a doctor's note might be used subsequently by the plaintiff as a fact to support an incapacity argument. In any subsequent litigation involving lack of capacity, clever plaintiff's attorneys will argue that if the client was completely competent, why did the drafting attorney recommend the client obtain a doctor's note in the first place? Basically, they will use the fact that the drafting attorney asked the client to get a doctor's note as a way to argue the drafting attorney had serious concerns as to the client's capacity. Essentially, this puts the drafting attorneys in a tough spot. On the one hand, they should ask the client to obtain a doctor's note to have evidence the client was of sound mind at the time of signing the will/trust/amendment. On the other hand, drafting attorneys might be concerned that their doctor's note recommendation could be used later as evidence that the drafting attorneys were concerned about the client's capacity.

Attorneys have developed different procedures to respond to the (potential) argument. Some have a "fixed" policy, such as asking every client over a certain age to obtain a doctor's note prior to implementing any estate planning documents. This requirement provides an attorney the option to respond that he or she did not have concerns about the client's competency; standardized procedures for all their clients over a certain age were being followed by requiring such a note. One possible downside of such a "fixed" policy is that a younger client who is incompetent could avoid being effectively screened. Another downside is that it might lead to unnecessary litigation discovery costs (i.e., fighting over the doctor's note) when a note technically was not necessary—the elderly client was perfectly fine.

Other attorneys ask the client to get a doctor's note in limited situations, such as cases involving blended families, or if the client has been diagnosed with any cognitive disorder. Obtaining a doctor's note on a case-by-case basis seems to be a rational approach. Additionally, firms generally implement a policy of requesting additional information where the firm has been put on notice of a capacity issue (i.e., obvious signs of incapacity, or the client indicates that he or she has been diagnosed with a neurological condition or the client admits to loss of short-term memory).

There does not appear to be any case law describing "best practices" for when a doctor's note should be requested. Again, this is an area where plaintiff attorneys will find experts who would likely attack any type of screening process. For example, retained experts might argue that because the attorney asked the client for a doctor's note, the attorney must have been put on notice of the degenerative condition. Conversely, an expert might also argue that the drafting attorney's work fell below the standard of care if the attorney failed to ask for such a note.

Although the above discussion involves attorneys, the client's other professional advisors should consider procedures for when to consider asking a client to obtain a doctor's note. This can lead to awkward, difficult discussions. Imagine a trust officer (or CPA) asking the client to get a doctor's note! Clients with large trust investments (or complicated tax returns) are generally used to getting their way when dealing with these advisors.

Other approaches

Asking a client to obtain a doctor's note is not the only possible way to manage a situation where a client may have reduced capacity. Another idea is to have the client meet with the other professional team members (e.g., the client's attorney, CPA, and financial planner) to discuss the client's situation prior to implementing changes. Having the client repeat his or her desired outcome to several different persons will often act as evidence in support of the client's desired outcome. Additionally, it is helpful if each member of the professional team has documented the client's desired outcome.

Attorneys practicing in this area of law often include special provisions in their engagement letters which permit the attorney to discuss the client's situation with the

22 Beneficiaries who are disinherited often feel that the decedent "would have told them" if the decedent had really felt strongly enough to disinherit the beneficiary. By getting a note written by the testator, the attorney helps to address that common response (and, in turn, might help lead to the plaintiff making a reduced demand in settlement discussions).

client's other professionals without violating attorney-client privilege. Essentially, these clauses ask the client for a limited waiver of the attorney-client privilege in order for the attorney to communicate with the client's other advisors.

Note to the family

On occasion, a client may want to completely disinherit a member or members of their family. In these cases, the estate planner should strongly encourage the client to contact the soon-to-be-disinherited family member, to tell the individual about the new plan. Most often, clients are hesitant to set up such a confrontation. When this is the case, the attorney may ask the trustor/testator to write a note explaining the disinheritance. Having the client document (in a letter or an email) why the client wants to make a particular change or implement a specific plan often serves as strong evidence as to the client's wishes. When used in this context, the letter should list the client's reasons for the disinheritance. Such a note will often go a long way to helping the disinherited family member (who is usually a son or daughter) understand why he or she is going to be disinherited.[22]

Estate planners are likely to encounter clients with blended families from second and third marriages. In cases where a spouse is leaving a substantial estate to the surviving spouse instead of to his or her children from a prior marriage, such a note can help explain why the testator spouse made such a plan. The note seems to help the disinherited family member realize the disinheritance was not a mistake but rather intentional.

Contemporaneous gifts

Some attorneys use an old method of having the testator make a gift to various family members around the same time that the testator is implementing changes to his or her estate plan. If the family member accepts a contemporaneous gift, that family member should (by implication) agree the testator had sufficient capacity at the time to make the gift. Therefore, both the gift and the new (or revised) testamentary instrument are valid. This technique can be helpful if the diminished capacity client knows a particular family member might challenge the plan later on. In that case, the testator should make a gift to that family member. When feasible, the more substantial the gift, the better.

Making a gift under these circumstances must be strategic, and care should be exercised. A small gift at Christmas time might not raise the attention of the potential later-challenging beneficiary. A relatively large gift of $2,000 or $100,000 (depending on the value of the testator's estate) should make it easier for defense counsel to argue that the applicable beneficiary who subsequently challenges the instrument was deemed to have accepted the testator's mental condition, or waived being able to argue the testator did not have contemporaneous capacity. Ideally, the gift would be accompanied with a written explanation that the testator is considering making changes to their estate.

Notices of proposed action

California permits a process referred to as a "notice of proposed action."[23] In a situation where a trustor serving as successor trustee may want to take an action that will affect future beneficial interests, this tool can be a helpful way to limit liability resulting from a future action. However, certain limitations do apply. For example, a trust notice of proposed action cannot be used to obtain approval regarding the final distri-

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bution to trust beneficiaries nor can it be used to seek approval for the sale of trust property to the trustee or the attorney for the trustee.[24]

A trustor is required to give notice of the proposed action no less than 45 days prior to the date on which the action is expected to take place.[25] Once a trustor provides notice, the beneficiaries may object only until the date specified in the notice of proposed action, or the date the proposed action is effectuated.[26] If a beneficiary fails to object within this time frame, the trustee cannot be held liable for taking the proposed action. It is important that practitioners assess the likelihood of an objection to a notice of proposed action. If it is relatively certain that a beneficiary will object, petitioning the court for instruction may be a more appropriate use of time and funds.[27]

If the family member accepts a contemporaneous gift, that family member should (by implication) agree the testator had sufficient capacity at the time to make the gift.

Videotaping

Some estate planners like to videotape clients in situations where diminished capacity might be at issue. Most experienced estate planners agree that not every situation calls for videotaping. While the use of videotape can be persuasive as to the client's mental capacity, a practitioner might want to reserve videotaping to clients who present well. On occasion the videotape may show the testator looking in one direction (often at the party who is later accused of being the influencer) for confirmation of a plan. Situations such as this put the use of a videotape at risk of being picked apart by experts.

Additionally, use of a videotape can be used by both sides questioning a change to an estate plan. One of the authors recently had a situation involving a testator who was videotaped by litigation counsel. The purpose of this video was to confirm why certain family members had been disinherited. The drafting attorney was present at the videotape session. The drafting attorney did make sure the testator knew his immediate family and could identify exactly who the testator wanted to disinherit. The drafting attorney then went over each individual page of the dispositive provisions in the trust. The drafting attorney explained that the document showed which relative was receiving how much (e.g., "on page 10, in this paragraph, your sister receives $250,000, etc.") The entire video lasted around 30 minutes, and at the end of the video, the testator signed the new trust.

However, at no time did the drafting attorney or the litigation attorney ask the testator what his wishes were (e.g., "who would you like to receive your estate?") they simply recited what some associate had drafted into the trust document the day before. Additionally, at no point during the videotape did either attorney reference the biggest beneficiary of the estate: *Uncle Sam*. The changes made to the estate plan resulted in an estate tax in the tens of millions of dollars. Yet, this significant change was never discussed at the signing. Arguably, the attorneys had just videotaped their own malpractice!

Thus, if a videotape is made, the practitioner should consider explaining "on the record" why the tape is being made. For example, record on tape that the client thinks a particular family member may challenge the estate or trust. In addition, the practitioner should ask questions to support the capacity standard at issue. In particular, California professionals might consider asking the testator questions to establish they have the requisite capacity to make a will under California Probate Code 6100.5. To illustrate, the professional would ask questions to demonstrate that the testator understands the nature of the "testamentary act," the nature and situation of the testator's property, and can identify his or her heirs at law. However, a testator modifying a trust may be held to a higher capacity standard.[28] Thus, if a trust is involved, the professional should incorporate more detailed questions to meet the heightened standard, if necessary. Accordingly, the seminal 2011 case of *Anderson v. Hunt*[29] provided, "more complicated decisions, and transactions thus would appear to require greater mental function; less complicated decisions and transactions would appear to require less function." *Anderson* further concluded that when a trust amendment closely resembles a will "in its content and complexity," the court should look to Probate Code § 6100.5. Thus, when modifying an estate plan, complicated provisions appear to require greater mental faculties (i.e., contractual capacity).

Attorneys and other professionals should note that one important ben-

23 Cal. Prob. Code § 16501.
24 See e.g., Cal. Probate Code § 16501 (notice of proposed action by trustee).
25 Cal. Prob. Code § 10586.
26 Cal. Prob. Code § 10587(c)(1)(2).
27 Cal. Prob. Code § 17200.
28 Cal. Prob. Code § 810-13.
29 Note 21, *supra*.
30 For example, Cal. Prob. Code § 800.
31 In some undue influence cases, the burden may actually shift to the defendant. See, e.g., Cal. Prob. Code § 21380.
32 Cal. Prob. Code § § 21380 and 21384.
33 Osornio v. Weingarten, 124 Cal. App.4th 304 (2004).

efit of a videotape is the psychological advantage it brings to negotiations with family members. In cases of disinheritance, upset heirs often cannot believe that the testator would disinherit them without telling them first. If they then file a lawsuit challenging the trust, the person holding the videotape (which shows the testator explaining why they are disinheriting the disgruntled family members) has helpful evidence that can be used early on to try to minimize the litigation. Often, just the threat of having the videotape will go a long way in bringing disgruntled family members to the negotiating table or convince them to call off the lawsuit.

Helping clients with diminished capacity

People are generally presumed competent.[30] However, in cases involving a trustor (or testator) with diminished capacity, when the document is challenged, the defendant is often left with the feeling of having the burden of proving competency.[31] This is because the accuser's attorneys often "embellish" the petition in their attempt to have the document declared invalid. Undue influence/incapacity/elder abuse cases often turn into a "battle of the experts," and the defendant often feels like he or she must depend on the testimony of his or her own experts.

This is where the estate planning professional must exercise great care. Most estate attorneys are hired to prepare (or amend) a valid trust or will. Many estate plans and other related services are provided for a flat rate. When receiving a flat fee for such a service, the professional should carefully weigh the potential risk of proceeding after having been put on notice. The potential fee received for preparing an estate plan (many attorneys charge between $1,000 to $5,000 for a package of documents) must be measured against the potential expense of defending against an accusation of elder abuse or malpractice.

Similarly, accountants (who typically charge to prepare annual tax returns, some on a flat-fee basis), and trust companies (who might charge a fee for a particular transaction) should weigh the costs and benefits before proceeding. For instance, imagine the liability to a trust company that complies with an incapacitated client's direction to distribute a large sum to a much younger spouse.

After being put on notice, some professionals might advise the client to obtain a doctor's note confirming the client's capacity. The authors have found that clients are never happy to do this. Other times, the professional might believe the best approach is to "slow the client down." This might mean sending drafts of documents to a client (or draft instructions for money transfers, or draft tax returns), and giving the client a few days to consider the impact of the documents before executing them. Alternatively, it might mean meeting with the client multiple times to confirm the client has not changed his or her mind regarding the planning.

Multiple meetings, in which the client reaffirmed the changes, should go a long way in confirming the client's wishes. If the client does not make any changes at any of the meetings, that would be good evidence the client really wanted that outcome in his or her estate plan. If there are major changes in the different meetings, the estate attorney may want to pause and make sure the client understands the changes. If there are minor changes between drafts (e.g., one beneficiary receiving an extra $1,000, or another beneficiary receiving $5,000 less), the drafting attorney should make sure the client understands what is happening in

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each document, but relatively minor changes should also support the client's having understood what was happening.

Now assume that a client seeks the help of an attorney to make a substantial change to an existing trust. Further, assume the attorney has received information that puts the attorney on notice of reduced capacity. Most elder law attorneys would suggest that the attorney recommend the client obtain one or more doctor's notes confirming capacity prior to proceeding. In California, for example, depending on the relationship of the person receiving the increased inheritance (e.g., a caregiver), the attorney may also recommend a certificate of independent review prior to implementing the change.[32]

Multiple meetings, in which the client reaffirmed the changes, should go a long way in confirming the client's wishes.

California's statutes create a presumption that gifts to certain classes of people (caregivers, drafters of the will, business partners, etc.) are the product of undue influence unless the presumption is overcome. Essentially, this presumption puts the burden on the defender of the instrument to prove the instrument is valid. One way to negate this presumption is for the testator or trustor to obtain a certificate of independent review. At least one California case authorized the caregiver beneficiary to sue the drafting attorney for failing to recommend the testator/decedent to obtain a certificate of independent review (which ultimately led to the gift to the caregiver failing).[33]

Safeguarding diminished capacity in an ongoing client relationship

A practitioner is under no duty to give his or her client a medical examination upon every meeting to check for competency changes. However, if a client exhibits any symptoms, the practitioner is considered put on notice. Thus, just as with an initial meeting, if an attorney suspects any changes in a client's capacity, the attorney needs to discuss the scope of the engagement and supplement the services with a record to protect against future financial elder abuse claims. Once a client becomes incompetent, ethical responsibilities may be put to the test. One precautionary step to take while a client is still competent is to obtain the client's permission to discuss the client's situation with other professionals involved, such as CPAs and financial planners. Obtaining permission prior to the development of capacity issues is crucial to safeguard against potential ethical violations of the duty of confidentiality. It is also good practice to explain to clients the potential permanence of their decisions should they become incompetent in the future (i.e., inability to change documents due to incapacity).

Furthermore, when a client becomes incompetent, the appointment of a conservator may be a necessary protective measure.[34] The Model Rules of Professional Conduct provide that an attorney may take protective action such as seeking the appointment of a conservator when the attorney believes a client has a diminished capacity.[35] The California Supreme Court, however, has yet to adopt this rule. Currently, attorneys practicing in California are still governed by CORPRAC 1989-112 which provides that "it is unethical for an attorney to institute conservatorship proceedings contrary to the client's wishes" *even if it is in the client's best interest* for that to happen.

CORPRAC 1989-112 further advises that it is not malpractice for an attorney to continue representing an incompetent client; however, it advises that the scope of the attorney's engagement should not substantially change. If the attorney of an incompetent client is asked to make a substantial change to the client's documents, or the scope of the engagement must substantially change (e.g., if the client gets sued), it may be necessary for the attorney to withdraw from representation. In particular, the attorney should withdraw if the "client's [incompetent] conduct interfere[s] with or unduly inhibit[s] the attorney's ability to carry out the purpose for which the attorney was retained."

Termination of the client relationship

Eventually, a client with diminished capacity may fire the attorney (or other professional). In extreme cases, the cause of the termination might be a result of the client's delusions. For instance, the client might believe that the attorney intends the client harm in some way, perhaps by taking the client's money or working with other family members.[36] Circumstances such as this can be extremely challenging on the attorney-client relationship. One difficulty that comes up when a client seeks to terminate an attorney-client relationship is determining whether the client actually wants to terminate the relationship, or whether the client is being influ-

34 Cal Prob. Code § 1801.

35 Model Rules of Prof'l Conduct r. 1.14 (ABA, 2018).

36 There is an excellent book, *Sweet & Low* by Rich Cohen, whose mother was disinherited, allegedly in part because his mother brought his grandfather to the hospital, and the doctors "killed" the grandfather (i.e., possibly under the delusion that his mother was in cahoots with the doctors to kill the grandfather).

37 Model Rules of Prof's Conduct r. 1.16(d) (ABA, 2018).

38 Model Rules of Prof's Conduct r. 1.4 (ABA, 2018).

39 Moore v. Anderson Zeigler Disharoon Gallagher & Gray, P.C., *supra* note 16.

enced into doing so. A typical scenario might involve the "former" attorney receiving a letter from the new attorney terminating the client relationship and asking for the client's file.

An attorney's obligation to forward a client file (or return the client file to the client) can be muddled. It is not uncommon for a client to reconnect with an influencing family member (e.g., the son or daughter who was previously being disinherited), after which the prior estate planning attorney receives the letter terminating the attorney-client relationship. The firing often occurs remotely (by way of letter or email). In situations such as this, it can be difficult for the former attorney to gauge whether the client is being unduly influenced. It is critical that the attorney act in conformity with the duty to respect the client's wishes and should send the estate planning file over to the new attorney.[37] Nevertheless, the former attorney also has a duty to communicate directly with the client to determine and confirm the client's motivations.[38]

This is certainly where things become challenging for the former attorney, as direct communication with the client can be difficult if the influencing family member is controlling contact with the client. When in doubt, it is always good practice to consult with one's own attorney on how to proceed with client records.

Potential secondary liability

While the attorney, financial advisor, or trust company might be held liable to an incompetent client or the client's conservator, it is unclear whether a professional advisor would be liable to other family members. There is at least one case holding that the attorney is not liable to any beneficiary of a will for failure to ascertain and document the capacity of a client.[39] Instead, the attorney may simply use his or her own experience to determine the level of capacity of the client. If in the professional's opinion, the client has sufficient capacity to sign an estate planning document, that should prevent a beneficiary from being able to hold the attorney liable for the dispute arising over capacity.

Conclusion

Today's reality is that professionals are faced with the growing challenge that older clients likely suffer or will eventually suffer from some degree of diminished capacity. As a result, it is imperative that professionals are prepared to navigate situations involving clients who have some degree of diminished capacity. By implementing policies and procedures into their practice, professionals will be able to safeguard the client as well as themselves from liability. ■

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