Does Your Aging Client Have Diminished Capacity?

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Reprint from https://marinbar.org/news/article/?type=news&id=400

It’s inescapable. Living in Marin County, California in the Bay Area will bring you into contact with older clients sooner or later. Our county has an increasing number of residents over the age of sixty-five, which means that lawyers in every area of practice will work with them. The county’s Civil Grand Jury projected in its Marin Is Aging report (2018) that nearly a third of our population will be over age sixty-five by 2020. What does this mean for lawyers?

One thing it means is that we must familiarize ourselves with one of the major risks aging folks face: diminished capacity. Not only does this affect our clients’ decision-making ability, it puts them at significantly increased risk for elder abuse, particularly financial abuse.

As I learned in my prior nursing career, loss of capacity is gradual, can be well hidden for some time, and its effects can be very dangerous. Lawyers need to be aware of the danger signs and know what to do when you see them. They didn’t teach us these nuances in law school.

Estate Plans Can Hurt or Help

The most competent estate planning attorneys understand this risk and build strategies into their documents to help keep aging clients safe. As a consultant
in the aging field now, I see many trust documents drafted by lawyers of varying skill levels. Typically, the reason my client—normally the adult child—seeks advice is that an aging parent has diminished capacity or has been diagnosed with dementia. The client needs to get the parent out of the position of trustee or stop the parent from continuing to make dangerous financial moves.

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Less creative lawyers put boiler-plate language into the trust, saying that if two physicians declare that the client no longer has capacity for financial decisions, the older person can be removed as trustee. This is presumed to be protective but often it is not. In reality, these lawyers have unwittingly set the elder up for refusing to see a doctor (“I feel just fine!”) and the family is stuck. The client shows obvious problems, such as serious short-term memory difficulty. The family doesn’t want to embarrass their loved one by going to court, but it doesn’t want Mom or Dad to lose all her or his assets by making bad decisions with an impaired brain. I see the consequences of this setup often. The elder is being abused by someone. Finances are being drained, stolen, or manipulated out of that person’s accounts. The lawyer-drafted paperwork does not help. The elder believes he or she is doing quite well and refuses to give up power.

Even if the elder sees a familiar physician, that doctor, typically receiving Medicare for payment, may spend less than ten minutes with the client. That is an insufficient basis to offer an opinion about diminished capacity for finances. So much for the “two physicians” notion as protective. It can easily fail and often does.

There are far better ways to draft a trust and I have seen skilled, very effective work product from creative lawyers. For example, the successor trustees named in the trust can vote the impaired elder out of the seat of power. Other trusts provide for a selected committee of family or friends who can remove the elder as trustee. Still others clearly specify that if a licensed mental health professional examines and tests the client and finds loss of capacity for financial decisions, that is enough for removal.

The Risks of Diminished Capacity
If you are not an estate planner, this may not seem important to you personally, but it is important. Diminished capacity can affect your work in any area of the law. And even well-drafted estate planning documents aren’t effective if no one is paying close attention. Successor trustees may be far away. Agents under a power of attorney may not be aware if they aren’t already managing accounts. There are many reasons an aging client may approach you and already be impaired. Perhaps the client wants to sell a business or give away a huge, unaffordable sum to a charity. The client may want to pursue a lawsuit no matter the cost. Or maybe the client just mentions in passing the great deal a new “friend” has urged action on and it sounds fishy. If the client is impaired for significant decisions like this, and you explain the consequences of what the client wants to do, he or she may not grasp your explanation.

Memory loss, being confused, “early dementia,” “mild cognitive impairment,” and other descriptors are other ways of saying progressive brain disease. It affects millions of Americans. It affects Marin residents. It can certainly affect your own aging clients. An alert, pleasant person can be very impaired for finances. The subtle signs are sometimes hard to spot at first.

Consider that an elder may ask you to do something. If it looks odd and you never question it because you believe it’s your job to do what the client pays you to do, you may be harming your client by going along. Red flags of diminished capacity exist. When you see them, it is unwise to proceed without taking more time, deeply questioning your client, or getting permission to speak to another family member. The point is that blindly following an odd-sounding elder client request can lead to serious harm. Be on the alert for the classic warning signs of diminished capacity. You may not see all of them but anyone should tell you to ask more questions, get more information, or perhaps involve someone else to assist your client in decision making.

Nine Domains of Diminished Capacity
Financial capacity is not a vague concept. It has been studied and divided into areas to watch. These defined areas of capacity are based on research data from the University of Alabama, Birmingham by Dr. Daniel Marson, a neuropsychologist and lawyer who has widely disseminated these findings. I drill down into all this more thoroughly in my book published by the ABA: Working With Aging Clients: A Guide for...
Legal, Business and Financial Professionals (2015). Briefly, here are the domains:

1. **Basic monetary skills**: Knowing the value and relationship of currencies.

2. **Financial conceptual knowledge**: For example, understanding what a loan is.

3. **Cash transactions**: Can the client calculate the tip at a restaurant?

4. **Checkbook management**: Can he or she keep track of spending and balances in an account?

5. **Bank statement management**: Can the client understand a statement or even your bill? Can the client spot an error and correct it?

6. **Financial judgment**: This is extremely important to lawyers. Can the client explain the consequences of a financial decision to you?

7. **Bill payment**: Can the client keep up with and keep track of bills as they come in?

8. **Knowledge of personal assets and estate**: Another one particularly important to lawyers. The client should know what he has, what he can afford, and where it all is.

9. **Investment decision-making**: This is a broad concept, not limited to an investment portfolio. It can mean investing in a lawyer’s work, hiring any expensive professional, or putting funds into any asset or expense.

### The Lawyer’s Duty of Loyalty

The question of how much the lawyer should get involved when a client seems to have diminished capacity can come up in any context. It raises the issue of what you think it means to be loyal. Does that mean taking steps to protect your client from predatory people? Does it mean asking the client if it’s okay to speak to a family member about a proposed transaction? Or does it mean you just stick to client confidentiality and let someone else worry about your client’s memory loss and confusion? As long as she’s paying the bill, do you need to consider anything else?

We as lawyers do need to figure out our own ethics on this. For me, protecting clients from harm is paramount. Most of them will trust us, and when we say we need another person to weigh in on an important decision, they are likely to listen. (Of course, some will not but that’s not most.) The American Bar Association advocates for what it calls “supported decision making.” It’s a sound concept: You allow your apparently impaired client to be there for everything needed, but you involve a watcher, a loved one who cares, a trustworthy other to ensure that what the elder is doing is truly in her best interests. Conservatorships can be avoided and the client can still remain safe.

I have expertise in spotting diminished capacity, yet I can tell you that I’ve spoken to many elders who sounded perfectly fine on the phone or even in person for at least twenty minutes. It was only when I questioned the client more or met with the client a second time that I saw cracks in the façade of “normal.”

### The Takeaways

**Diminished capacity** is a feeding ground for financial abuse. And any aging client is at risk for diminished capacity. Don’t move too fast with an aging client’s requests. Be aware. Look for signs. Get permission and talk to trusted others about the client. Every lawyer can develop a keener sense of loss of capacity. Every lawyer, no matter the area of practice, can step up and learn skills to help manage clients who are sliding downhill in their decision making. Let’s all keep our aging clients as safe as we can.

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Carolyn Rosenblatt is an RN and retired litigator who currently consults with families, lawyers, and financial advisors. She mediates family conflicts. She founded AgingParents.com in 2008 and frequently addresses the problem of dementia. She is a blogger at Forbes.com and has authored five books covering the topics of families, aging, financial issues, and long-term care.

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