



PROGRAM MATERIALS

Program #3093

May 12, 2020

Legal and Ethical Issues in Capacity and Mental Health Law

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Legal and Ethical Issues in Capacity and Mental Health Law

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Overview:

Lawyers should be familiar with the standards of capacity for specific legal transactions under relevant statutes and case law. This includes areas such as contracts, criminal law, executing advance directives and guardianship proceedings. We will discuss the “red flags” or signs of “diminished capacity” that a lawyer may observe in a client as well as the ethical guidelines for assessing capacity in accordance with ABA Model Rules of Professional Conduct, Section 1.14. Last, we will explore the “Mental Health Legal Tool Kit”, offering creative legal solutions to difficult mental health issues.

I. Capacity

Increasing Prevalence of Capacity Questions

- The incidence of cases in which capacity is an issue has increased substantially in the past few years:
 - Aging demographic;
 - Greater incidence of dementia;
 - Increasing number of cases involving serious mental illness, substance and/or alcohol abuse, autism spectrum disorders, dual diagnoses, Axis-II personality disorders and related mental health concerns.

Capacity vs. Competency

- **Capacity** is a medical determination. **Competency** is a legal term.
- Capacity is broadly used to describe a person’s ability to act in a legal matter, as well the level to which they are accountable or responsible for their actions.
- Competency refers to a person’s mental soundness that is necessary to make certain decisions or carry out specific acts.

Model Rule 1.14 of the ABA Model Rules of Professional Conduct

- Model Rule 1.14 of the ABA Model Rules of Professional Conduct concerns clients with “diminished capacity” and suggests a duty to make informal capacity judgments in certain cases.
- **Model Rule 1.14: Client with Diminished Capacity**
 - *(a) When a client's capacity to make adequately considered decisions in connection with a representation is diminished, whether because of minority, mental impairment or for some other reason, the lawyer shall, **as far as reasonably possible**, maintain a conventional 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.*

- **Comment 6 to Model Rule 1.14:**
 - In determining the extent of the client's diminished capacity, the lawyer should **consider and balance such factors** as: the client's ability to articulate reasoning leading to a decision, variability of state of mind and ability to appreciate consequences of a decision; the substantive fairness of a decision; and the consistency of a decision with the known long-term commitments and values of the client. In appropriate circumstances, the lawyer may seek guidance from an appropriate diagnostician.

II. Signs of Diminished Capacity

- “Red Flags”
 - Memory loss;
 - Communication problems (difficulty staying on topic, repetitive);
 - Lack of mental flexibility (unable to understand or acknowledge multiple options or viewpoints);
 - Calculation problems;
 - Disorientation (relative to space, time, or location);
 - Emotional inappropriateness (wide range of emotions, inappropriate laughter or crying);
- Consider whether mitigating factors (illness, bereavement, etc.) may explain recent changes.
- Pay attention to changes in the client over time.

III. Standards of Capacity for Specific Legal Transactions

- The law generally presumes that adults possess the capacity to undertake any legal task unless they have been adjudicated as incapacitated in the context of guardianship, or the party challenging their capacity puts forward sufficient evidence of incapacity to meet a requisite burden of proof.
- In many of the examples discussed below federal laws apply, however, you should be mindful of individual state laws as well.

Capacity to Enter into a Contract

- Under the principles of contract law, an individual lacks mental capacity to enter an agreement, and thus retain counsel, if:
 - (a) he is unable to understand in a reasonable manner the nature and consequences of the transaction, or
 - (b) he is unable to act in a reasonable manner in relation to the transaction and the other party has reason to know of his condition.

Restatement (Second) of Contracts § 15 (1981).

- In New York, “the standard used to evaluate a person’s capacity to contract focuses on whether the person is able to understand the nature and consequences of the transaction and make a rational judgment concerning it.” 22 *N.Y. Jur. 2d Contracts* § 26.

Capacity to Retain Counsel

- A retainer agreement falls within the scope of contracts and is governed by contract principles.
- An individual lacks the mental capacity to retain counsel if he lacks sufficient mind and reason for a full and clear understanding of the nature and consequences of making the contract at the time the contract is made.

See Restatement (Second) of Contracts § 15 (1981); 22 N.Y. Jur. 2d Contracts § 26.

Capacity to Execute a Health Care Proxy

- An individual’s decision to prepare and execute a Health Care Proxy (HCP) to appoint an agent to make decisions on his behalf does not involve understanding and consenting to medical treatment. Rather, it is very similar to the mental capacity required to enter into a contract.
- A **competent** adult may appoint a health care agent. An individual’s competency is presumed “unless such person has been adjudged incompetent or otherwise adjudged not competent to appoint a health care agent, or unless a ... guardian of the person has been appointed for the adult”. *N.Y. Pub. Health Law § 2981 (2012)*.
 - Each state may have a slightly different version of this standard.

Capacity to Execute a Power of Attorney

- The preparation and execution of a durable Power of Attorney (POA) is governed by state statutes.
- In New York, a valid POA necessitates the signature of a principal with capacity. *N.Y. Gen. Oblig. Law 5-1501B(1)(b) (2009)*.
 - “Capacity” means the ability to comprehend the nature and consequences of the act of executing and granting, revoking, amending or modifying a power of attorney, any provision in a power of attorney, or the authority of any person to act as agent under a power of attorney.
- The person executing a Power of Attorney must understand the document they are signing as well as the provisions contained in the document.

Capacity to Execute a Last Will and Testament

- In order for a will to be valid, the testator must have **testamentary capacity**.
- The degree of mental capacity required to sign a valid will is lower than it is to enter a contract.
- An individual has testamentary capacity if he is able to understand both the extent and nature of his property, the natural objects of his bounty, the disposition of that property, and is able to relate these elements to one another and form an orderly desire regarding disposition of the property. *Restatement (Third) of Property (Wills & Don. Trans.) § 8.1 (2003)*.

Diminished Capacity in Guardianship/Conservatorship Law

- The law starts with a **presumption of capacity**.
 - The **burden of proof** is on the party bringing the petition to establish sufficient diminished capacity to justify the appointment of a guardian.
- If you wish to act as a guardian or conservator for a loved one, you will need to prove that he or she is incapacitated according to the laws of that state.
- In New York, for example, “**Incapacity**” is defined by Article 81 of the New York Mental Hygiene Law:
 - “The determination of incapacity shall be based on clear and convincing evidence and shall consist of a determination that a person is likely to suffer harm because:
 1. The person is unable to provide for personal needs and/or property management; and
 2. The person cannot adequately understand and appreciate the nature and consequences of such inability. *N.Y. Mental Hyg. Law Article 81.02(b)*.

IV. Mental Health Legal Tool Kit

Advance Directives

- Advance directives are legal documents containing an individual’s prior expressed wishes regarding financial affairs or medical treatment that must be executed while the individual has the requisite mental capacity.
 - Capacity refers to the ability to understand the nature and purpose of the documents and the underlying decisions of designating an agent and directing treatment.
 - For the purposes of signing an advanced directive, a person is deemed to have capacity unless proven otherwise. *N.Y. Pub. Health Law § 2981 (1)*.
- *Durable* Power of Attorney.
- Health Care Proxy (or Power of Attorney for Health Care).
- As with a guardian, in many states there are certain aspects of a person’s care that may never be delegated to an agent such as the involuntary administration of psychiatric medication.

Guardianship / Conservatorship Statutes

- A guardianship (or conservatorship) is a legal proceeding by which a court appoints and oversees a legal decision maker for another adult, who due to incapacity or other disability, is unable to manage his/her own affairs.
- The court can appoint a Personal Needs Guardian to make decisions regarding medical care, residence, travel, etc. and/or a Property Management Guardian to make financial decisions, apply for benefits, etc.

Mental Health Warrants

- A Mental Health Warrant involves petitioning the court to issue a civil warrant to bring the individual to Court for a hearing.
- At the hearing the Court determines if he/she currently poses a danger to self or others and should be remanded to a psychiatric emergency room for immediate evaluation not to exceed 72 hours.
- In New York, this law can be found at: *N.Y. Mental Hyg. Law § 9.43*.

Psychiatric Hospitalization: Involuntary or Voluntary

- Each state has laws and/or regulations outlining the standards and procedures for the commitment of civil patients who require psychiatric inpatient care and treatment.
- An individual can be hospitalized voluntarily, or if an episode occurs where the individual poses a substantial risk of harm to self or others.
- Hospitalization would allow for a psychiatrist and/or other physician to evaluate any medical and mental health issues and figure out his/her diagnosis, if any.
- For example, in New York, these laws can be found in *New York Mental Hygiene Law Article 9*.

Psychiatric Intervention

- A team (case manager, security, psychiatrist, attorney) meets with the individual and family members with the goal of bringing him/her to the hospital and/or setting up private case management (case management would be on a voluntary basis).

Assisted Outpatient Treatment (AOT)

- Almost every state and Washington DC have enacted laws to authorize the use of AOT.
 - Known as “Kendra’s Law” in New York. *N.Y. Mental Hyg. Law § 9.60*.
 - Also known as “involuntary outpatient treatment” or “outpatient commitment”, depending on the state laws.
- AOT is a valuable tool for individuals who refuse mental health treatment and/or services in the community and are frequently hospitalized.
- AOT is court-ordered treatment for the person’s mental illness and supervision in the community with the goal of preventing a relapse or deterioration in their condition.
- To be eligible for AOT, the person must be eighteen years of age or older, suffering from a mental illness, unlikely to survive safely in the community without supervision, and have a history of lack of compliance with treatment for mental illness.
- AOT involves the creation of a treatment plan including case management, medication, individual and/or group therapy and other tools known to promote recovery and encourage compliance.

HIPAA and Signed Releases

- Due to state and federal confidentiality laws, treatment providers cannot release information about a patient or client without prior authorization from that individual.
- It is often helpful for the individual to sign a HIPAA release form or sign a state-specific authorization form to release private health information for a family member to speak with his/her treatment team.
- The authorization would permit a treatment provider to release any and all records pertaining to the individual's medical, financial, application(s) for benefits or psychiatric treatment records, among others.
- Clinical records or clinical information tending to identify mental health patients are protected under state laws as well. For example, *Sections 33.13 and 33.16 of the New York Mental Hygiene Law*.

Thank You!

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