By **Tara Anne Pleat, Bernard A. Krooks** & **Robert B. Fleming**

Planning for Your Client's Diminished Capacity

How to anticipate and avoid challenges

One of the most significant challenges estate planning and elder law professionals encounter in their practices is addressing the needs of individuals who have or are developing cognitive impairment. Many professionals are entering a less familiar world of making judgment calls on a client or beneficiary's capacity to understand the decisions they're making or are being asked to make.

There's an acute awareness that the members of the largest generation in American history are reaching their 70s, and many Americans are living well into their 80s and 90s. In fact, every day, over 10,000 people in the United States turn 65 years of age.[1] It's all but certain that most wealth planning and management professionals will have clients experiencing some sort of cognitive impairment during their time in practice.[2] Challenges for professionals abound.

Definitions

Impaired decision making in the context of older adults is often referred to as "diminished capacity" or "diminishing capacity." For attorneys, the Model Rules of Professional Conduct (Model Rules) Rule 1.14 discusses how to maintain appropriate professional relationships with individuals who have diminished capacity, but the rule itself doesn't define what "diminished capacity" *is*.[3]

(From left to right) **Tara Anne Pleat** is a partner at Wilcenski Pleat Law in Clifton Park, N.Y., **Bernard A. Krooks** is a partner at Littman Krooks LLP in White Plains, N.Y. and New York City and **Robert B. Fleming** is a partner at Fleming & Curti, PLC in Tucson, Ariz.



When estate-planning practitioners use the phrase "diminished capacity," they generally mean an individual whose intellectual abilities are impaired because of illness, condition or injury, such that the individual lacks the ability to make informed financial, medical or personal decisions.[4]

"Diminishing capacity" isn't as easy to define nor is it currently contemplated directly in the Model Rules. For purposes of this discussion, diminishing capacity refers to someone who's exhibiting signs of impaired decision making but who, in the opinion of the attorney/advisor, still could make informed decisions regarding their financial, medical or personal matters.

While not reserved for the senior population, the terms "diminished" and "diminishing" capacity are often used in reference to that population, implying that these are individuals who once had full decision-making capacity and are now experiencing or have experienced an erosion of it.

The American College of Trust and Estate Counsel (ACTEC) commentaries to Model Rule 1.14 suggest that a practitioner can consider:

> the client's overall circumstances and abilities, including the client's ability to express the reasons leading to a decision, the ability to understand the consequences of a decision, the substantive appropriateness of a decision, and the extent to which a decision is consistent with the client's values, long-term goals and commitments.[5]

It's reasonable to anticipate that in making these judgment calls, practitioners will also consider the legal standards of capacity applicable to the transactions, decisions and documents involved at the time. The ACTEC commentaries also contemplate

a practitioner seeking a "qualified professional" for assistance in making a capacity determination.[6]

Anticipating Challenges

One of the many charges for practitioners is to ensure that the informed decisions that clients make are carried out in their estate plans and can withstand the challenge of a disgruntled beneficiary or heir. Practitioners often have the opportunity to be proactive in this regard, especially when capacity challenges can be anticipated.

As a matter of common practice, estate planning and elder law attorneys who begin representation of a fully competent client will discuss planning for the possibility of diminished and diminishing capacity. Practitioners may frame the conversation to convey to the client that certain tools can ensure appropriate decision making if the client ever loses capacity (without the need for a costly and time-consuming guardianship proceeding). They may discuss the prudence of executing durable powers of attorney (POAs) for financial management and personal decision making, health care proxies and living wills, Health Insurance Portability and Accountability Act authorizations or even revocable trusts to create hurdles for an "objecting" heir. These are common discussions that are a part of any comprehensive estate-planning engagement and allow the client to anticipate and plan for the possibility of future incapacity.

Assessing Clients' Capacity

Most estate planning and elder law professionals don't have a secondary degree in psychology, neurology, gerontology or otherwise, yet they're tasked with making judgment calls on client capacity and informed decision making as part of their everyday practices. In a long-standing client engagement, a decline or an impairment in decision making may be easier for a practitioner to identify. New client engagements create a more significant challenge. Practitioners should have some process to uncover diminished or diminishing capacity.[7]

To address this growing challenge, the American Bar Association (ABA) Commission on Law and Aging, together with the American Psychological Association, created a handbook for attorneys to assist in assessing individuals for diminished and diminishing capacity.[8] Within that comprehensive guide, there's not only a robust discussion of clinical models and legal standards of capacity but also suggestions as to how practitioners can accommodate diminishing capacity and seek to enhance a client's capacity.[9] In addition, there's a sample "Capacity Worksheet for Lawyers."[10]

For the attorney preparing estate-planning documents, it's of paramount importance to ensure that the client can articulate what they want to do and why, as well as understand the likely result of their decision making. Further, practitioners must be reasonably certain that the decision is that of the client and is being made freely and without outside influence. It's for these reasons that attorneys and other professionals are incorporating some sort of formal or informal capacity assessment tool into their practices.

The "Capacity Worksheet for Lawyers" provides formality to an assessment process many practitioners knowingly and sometimes unknowingly are already conducting.

The "Capacity Worksheet for Lawyers" proposed by the ABA could be adapted to any discipline in which professionals are addressing these issues and may serve as a valuable tool if the practitioner, financial advisor or accountant finds themself embroiled in litigation after their client has passed on. The worksheet provides formality to an assessment process many practitioners knowingly and sometimes unknowingly are already conducting. The tool is segmented into observations about cognitive, emotional and behavior functions as well as mitigating or qualifying factors that may be impacting the client (for example, death of a spouse or a medical diagnosis).[11] In a segment that would be specific to estate planning and elder law attorneys, there's a

discussion of legal elements of capacity that are document and task specific.[12] The third segment sets forth questions to be answered by the practitioner regarding task-specific factors that are geared towards the clients' understanding of their decisions, ability to articulate those decisions and show an understanding of the consequences of their decisions.[13] Finally, there's a segment in which the practitioner makes preliminary conclusions about capacity and a decision tree for consideration when a practitioner feels that the client is evidencing diminished or diminishing capacity.[14] Whether a practitioner completes such an assessment with every client at every stage of representation or for new and existing clients over a specified age is a question of strategy as much as practice preference and practicality.

Medical Determination Request

The request for a medical determination of capacity isn't a new concept in the estate planning and elder law fields. For the purposes of health care decision making under a health care proxy or durable POA for health care,[15] agents aren't generally empowered to decide on behalf of a patient unless and until an attending physician determines the patient lacks the capacity to understand and appreciate the health care decision the patient is being asked to make or its consequences.[16] Springing durable POAs[17] are often predicated on a physician making a capacity determination for an agent to become empowered. Similarly, most revocable living trusts in which the settlor is also the trustee have provisions for the constructive resignation of the grantor/trustee if a physician or other medical professional deems that individual is no longer capable of managing their affairs.

The difference for practitioners of course is that these are all already functions of the law itself or incorporated into estate-planning documents that were executed when there was no concern about the client's capacity. When diminished or diminishing capacity is suspected at a time a client wishes to create or change their estate plan, modify an investment portfolio or make other changes that impact the client's wealth and the future distribution of that wealth, it's a new ballgame.

Whether to request a physician's[18] determination of capacity prior to completing or updating an estate plan can be as strategic as it will be uncomfortable. A client may be reluctant to go to their doctor and request a statement of capacity, believing that it's unnecessary and may be offended by such a request. The practitioner must consider why they're making the request. Is it a standard in the practitioner's practice? For everyone? For individuals over a certain age or with certain diagnoses? Is it a practice the practitioner employs when a decision is being made that will eliminate or significantly reduce an interested party from receiving under an estate plan? Is the practice of requesting a doctor's note evidence that the practitioner believed the capacity of the client was at issue? There are no easy answers here, but the point is that practitioners should develop a protocol for these requests and ensure their clients understand that the purpose is to reduce the risk of an aggrieved party's success in challenging a document or an action based in lack of capacity.

Establishing the practice of obtaining a doctor's note in any case in which an interested party is being disinherited, receiving a reduced share from a prior planning document or can be expected to be otherwise aggrieved is objective and can be relied on as a practitioner's "policy."

Notice of Changes

While it's often met with objection or consternation, consider advising a client to alert family members to changes in an estate plan, especially changes that result in the disinheritance or significant reduction in an inheritance.[19] A document in the client's own handwriting to the individual who's going to be adversely affected by the plan or a change to the plan that sets forth the reasoning for the client's decision both serves as evidence of intent and understanding and may help the adversely affected individual understand why the client made certain decisions. This can help head off future objections and will serve as evidence that a client knew exactly what they were doing and why.

While many clients want to keep these modifications confidential or don't wish to invite confrontation with a family member (or in some cases are estranged and don't know where the disinherited party is located), consider the practice of reasoning out in a separate personal writing that isn't encompassed in the four corners of the planning documents.

Consult With Litigation Counsel

Unfortunately, the increased prevalence of encountering clients with diminished and diminishing capacity will create the need for practitioners not only to protect their client and the integrity of the client's estate plan but also to protect themselves, their reputations and their ethical integrity.

In circumstances in which a practitioner reasonably believes the client is suffering from diminishing capacity yet is firm in their convictions regarding changes in their estate plan, practitioners should consider consulting with litigation counsel as part of the estate-planning process. Many smaller elder law and estate-planning practices don't have in-house litigation expertise, and while those practitioners can speak generally to the process of challenging an estate plan and the likelihood of success of those challenges, it may be beneficial to the client (and the practitioner) to have the insight of litigation counsel who would be expected to assist in defense of the client's plan from the claims of incapacity, undue influence or abuse by an aggrieved party in the future.

Lawyers are often referred to as "attorneys and counselors at law," and in the context of family dynamics, the counselor role often looms large. Family acrimony comes in all shapes and sizes and is often rooted in years of communication challenges, resentment and sibling rivalries.

Video/Audio Recordings

Use video or audio recording of document signings (or other client sessions) sparingly. Still, there may be circumstances in which such technology can prove beneficial. A practitioner might consider recordings in *all estate-planning engagements* in which an interested party is being disinherited or is otherwise adversely affected (whether or not there's any suspicion of incapacity). In this approach, the practitioner would record an interview with the client on the day of the signing appointment. The purpose would be several-fold. First, the attorney could ask questions of the client that address testamentary capacity or contractual capacity (depending on the nature of the documents being signed), discuss the terms of the estate plan and ask the client to explain "on the record" their understanding of the decisions they're making, why those decisions are being made and how the natural objects of their bounty are affected. Second, a discussion of the strategies being employed in the plan, whether those be tax minimization, business succession, long-term care planning or benefits eligibility would evidence the client's understanding of why they're proceeding with a particular plan and the likely impact of that plan. Third, and most importantly in the context of an anticipated challenge on capacity or other grounds, allowing an aggrieved party to "see" their family member explain why a particular individual is being disinherited or otherwise adversely affected may be a tool used early in litigation to reach a settlement or abandon an objection all together.[20] While this practice may not be for every practitioner, it's something to consider in developing objective practice policies to combat capacity-based objections to a client's plan.

Team of Advisors

Many clients of moderate-to-significant means have a team of advisors with whom they interface. These advisors likely include money managers, insurance professionals, accountants, business advisors and attorneys. Generally, over the course of a typical engagement, these advisors will speak to one another on behalf of and with the consent of their mutual client. When questions about the client's capacity surface in connection with decisions that the client now wishes to make, the ability of those team members to communicate with the client and with one another is of critical importance. Strategically, having the client meet independently with each member of their team of advisors and explain the changes they want to make and having the advisors document those changes will help build the record of consistency and understanding of thought at different times and in discussions with the client's trusted professionals. In addition to these separate communications, the team and the client will likely benefit from a joint discussion in which all parties are hearing the same advice from each other and the reactions of the client.[21] The records of these discussions will provide evidence useful in defending a client's estate plan. Attorneys will need to record their client's consent to these discussions in a writing, whether that be in an engagement letter or other document.

Law Office Environment

The ABA handbook referenced earlier has a segment devoted to techniques lawyers can employ in their practices to accommodate certain changes that become more prevalent as a client ages.[22] One important consideration that practitioners often overlook is the law office environment itself. What do your conference rooms look like, are they comfortable, inviting and accommodating, or are they formal and possibly perceived as intimidating? It's important for all professionals who are working with a population that's contemplating their mortality, family relationships, successes, failures and legacy to recognize that their clients need to feel and be comfortable.[23] A lack of comfort, trust or confidence could present as a capacity concern but could simply be a client's reaction to an unfamiliar and uncomfortable environment, making these real life and death decisions more difficult.

Framework for Professionals

These considerations are directed primarily at attorneys, but other professionals who encounter diminished and diminishing capacity can (and should) expect to adapt lawyers' techniques appropriately.

Approaches to navigating capacity concerns will necessarily vary by discipline, circumstance and training. What's clear is that estate planning and elder law professionals need to have protocols in place to address the challenges of aging and disability to ensure that a testator or trustor's intentions are carried out to the greatest extent possible. While not an exhaustive list of possibilities and considerations, the authors hope this discussion gives professionals a framework to begin adopting proactive and responsive practices that mitigate the arrival of the inevitable challenge to a particular estate plan.

— This article was initially prepared for the 55th Annual Heckerling Institute on Estate Planning sponsored by the University of Miami School of Law and published by LexisNexis. It's republished with the permission of the Heckerling Institute. For information about the Heckerling Institute visit www.law.miami.edu/heckerling.

Endnotes

1. *https://arc.aarpinternational.org/countries/united-states#:~:text=Every%20day%20in%20the%20United,of%20the%20population%20by%202050.*
2. According to the U.S. Census Bureau, by the year 2030, 20% of the American population will be 65 years or older. *See* Sandra L. Colby and Jennifer M. Ortman, *Projections of the Size and Composition of the United States Population 2014-2060, www.census.gov/content/dam/Census/library/publications/2015/demo/p25-1143.pdf.*
3. *See www.americanbar.org/groups/professional_responsibility/publications/model_rules_of_professional_conduct/rule_1_14_client_with_diminished_capacity/.*
4. *See generally Assessment of Older Individuals with Diminished Capacity,* American Bar Association Commission on Law and Aging and American Psychological Association, *www.apa.org/pi/aging/resources/guides/diminished-capacity.pdf.*
5. *See www.actec.org/assets/1/6/ACTEC_Commentaries_5th.pdf,* at p. 161.
6. *Ibid.*
7. *See* R. Zebulon Law, Shauna R. Anderson and Alyse Frederick, "Explore Best Practices for Clients with Diminished Capacity," *Estate Planning,* Vol. 46, No. 7 (July 2019), for an excellent and comprehensive article from the professionals' perspectives in working with clients who have diminished capacity and practice suggestions to protect oneself and a client's testamentary intentions; *see also supra* note 4.
8. *See supra* note 4.
9. *Ibid.,* at pp. 28-30.
10. *Ibid.,* at p. 23.
11. *Ibid.,* at pp. 23-24.
12. *Ibid.,* at p. 25.
13. *Ibid.*
14. *Ibid.,* at p. 26.
15. Depending on state law, the terms "health care proxy," "durable power of attorney for health care" and "designation of health care surrogate" are used to define the document wherein a client proactively appoints an agent to make health care decisions for themself in the event they shall become incapable of making them on their own in the future.
16. *See* Robert B. Fleming and Lisa Nachmias Davis, *The Elder Law Answer Book,* at p. 10-2 (2021 Supp).
17. *Ibid.,* at p. 9-8 (2021 Supp).
18. Of course, the actual evaluation in a given circumstance might be completed by a psychiatrist, a psychologist, a neuropsychologist, a nurse practitioner or other medical professional. Selection of the proper type of evaluation is important and may add to the value of the engagement.
19. *See* Law et al., *supra* note 7.
20. *Ibid.*
21. *Ibid.*
22. *See supra* note 4.
23. Some practitioners choose to arrange their officers to have large open conference rooms set up to look like more of a home environment with dining room-style tables, chandeliers with calming colors and artwork.