

# Now You See It, Now You Don't:

## The Elusive Issue of Capacity

by Jennifer Nolan

*Every lawyer should know how to assess a client's capacity, as well as deal with instances of diminished capacity.*

As we all know, lawyers are called on not only to understand the law, but to understand real-life issues and apply the law to the real world—where many shades of gray exist between the bands of black and white. Capacity is a challenging issue for estate planners and elder-law lawyers. Capacity is required in a variety of contexts and in the continuing lawyer-client relationship. Clients must have varying degrees of capacity when executing estate-planning documents. In other matters, clients must possess the capacity to sign contracts, engage in transactions and understand and interact meaningfully with their lawyer. A lawyer may have a client whose capacity diminishes over the course of the lawyer-client relationship. Every lawyer should know how to assess a client's capacity, as well as deal with instances of diminished capacity.

In most cases, it is clear the client has the capacity to execute a particular document, understand a matter or continue in the relationship. The gray cases are those where a client may or may not possess the requisite capacity at a given moment or a client's capacity diminishes during the

course of representation. A lawyer must know how to assess a client's capacity, understand the level of capacity required and deal with a client who is disabled. The first section of this article discusses how a lawyer can assess a client's capacity, the second section discusses the various levels of capacity required and the final section addresses the ethical considerations we all face in dealing with a person with diminished capacity.

### Identifying Diminished Capacity

Diminished capacity can be due to dementia, substance abuse, medication and depression and other mental illnesses. Dementia is a serious and growing concern. According to recent studies, nearly one-half of all persons aged eighty-five or older suffer from some form of dementia. The problems with dementia will compound when the baby boomers begin to hit retirement age starting in 2011. A dramatic increase in the elderly population is projected. Currently, persons aged sixty-five or older constitute about 12 percent of

the population in the United States. This is expected to grow to 20 percent of the population in 2030.<sup>1</sup> The commonwealth will feel the impact of this aging population, as well. It is projected that Virginians aged sixty and over will increase to 25 percent of the population by 2025, and the number of Virginians aged eighty-five and older will increase five times faster than the state's total population growth.<sup>2</sup>

The most common form of dementia is Alzheimer's Disease (Alzheimer's). Currently, scientists estimate that four million Americans suffer from Alzheimer's<sup>3</sup> and a new study suggests that the prevalence of the disease is increasing and could affect 13.2 million older Americans by 2050.<sup>4</sup> Alzheimer's is a debilitating disease that impairs a person's ability to carry out activities of daily living. The disease typically begins after age sixty and the risk increases with age. It affects that part of the brain vital to memory and other mental abilities. In its early stages, Alzheimer's causes mild forgetfulness. For example, a person will have trouble remembering recent events, activities or family members.<sup>5</sup> In the middle stage of the disease, a person afflicted with Alzheimer's will be unable to think clearly and can have problems with speaking, understanding, reading or writing. In the most advanced stage, the person will be unable to care for himself or herself and may be anxious or aggressive, or wander away from home.

In many cases, capacity of the client is not an issue. Lawyers, however, should be aware of the signs of Alzheimer's, other forms of dementia, depression, other mental illness, substance abuse or the effects of medication that may affect his or her client's capacity. A lawyer can form a preliminary opinion about a client's capacity based on his or her personal observations and discussions with the client's family, or through a more formalized mini-mental exam in the lawyer's office. If the circumstances warrant further evaluation, the lawyer should obtain a more formal opinion from a medical professional.

Personal observations can help provide the lawyer with a quick assessment of a

client's mental state. Some things that may alert a lawyer to a capacity issue include a disheveled appearance; poor hygiene; a low level of alertness; a depressed, anxious or suspicious mood; inability to concentrate, forgetfulness; rambling or disorganized thought processes; confusing pronouns and proper names; inability to reason; a frail physical condition; or inability to follow instructions and keep appointments. Of course, a few instances of forgetfulness or disheveled appearance may be normal. Who among us hasn't had a bad day? A pattern of behavior over a period of time, however, would be a concern.

It is important to document your personal observations. Some practitioners use a capacity screening form routinely to document their personal observations in determining their client's capacity. In cases where capacity could be an issue, documenting personal observations is imperative. Videotaping a client is another method to document a client's capacity; however, this is risky. Videotaping can further disorient a person, and even those of us who possess mental acuity can appear disorganized or confused on camera.

Another approach is one advanced by Professor Peter Margulies. He suggests a contextual approach to assessing capacity and identifies six factors that should be considered in making capacity determinations.<sup>6</sup> The first three factors focus on the client's ability to articulate reasoning behind a particular decision, whether he or she consistently expresses the same desires over time and in the presence of family members, and whether he or she understands and appreciates the consequences of a decision. The second set of factors focus on the substantive nature of the decision and whether it is irreversible, whether it is fair and whether it is consistent with other lifetime commitments.<sup>7</sup> Again, the lawyer should document his or her observations related to these six factors in supporting his or her opinion about a client's capacity at a given time.

Professor Margulies also suggests the lawyer can and should optimize the

client's capacity by providing the right environment. The client should be cast in the best light before making a determination about capacity. First, the lawyer should schedule time to meet with the client alone even if others accompany the client to the lawyer's office. Second, the environment should enhance communication. Keep in mind the noise level and any glare that could cause problems for clients with impaired vision or hearing. Speak slowly and provide extra time for the client to process the information. Meet with the client more than once to provide ample opportunity to observe the client under varying circumstances. Third, know your client. The better you know your client, the more likely you are to know the client's standard behavior. Margulies suggests that the standard for capacity is the individual's own behavior and not conventional standards. What may seem bizarre to one person may be perfectly acceptable to another. Finally, presume capacity. Raising the issue of capacity can be hurtful and damaging to the relationship.<sup>8</sup>

One of the most familiar tests that measure capacity is the Folstein Mini-Mental State Exam (MMSE). The MMSE is a widely used for assessing cognitive status by medical and legal professionals. Through a series of short questions and tasks, a lawyer can assess a client's orientation, immediate and short-term recall, language and the ability to follow simple verbal commands. It can be completed in the lawyer's office in about ten minutes. The client's score is then compared to others within the same age range and educational level. The MMSE is usually sufficient for most legal proceedings.<sup>9</sup> It is only a general guideline, however, and should be used with some caution.

The 7-Minute Screen is another diagnostic tool and can detect Alzheimer's at an early stage. This test is a battery of four tests that can be administered in less than ten minutes. It is not a certain diagnosis of Alzheimer's; however, it does identify impairments in memory, reasoning and other mental tasks due to dementia.<sup>10</sup> There are many other diagnostic tools

available, including a *Legal Capacity Questionnaire* developed by an elder-law attorney. The questionnaire is designed to measure capacity for estate planning purposes and is written in legal terms.<sup>11</sup>

In some cases, a more formal assessment of a client's capacity is required. In these cases, clients should be referred to members of the medical profession, whether medical or psychiatric for further evaluation. Most people do not like to be confronted with the possibility of their own diminished capacity. This difficult task should be undertaken with great professionalism, consideration and tact. Disclosing a client's disability to third-party health-care providers also raises ethical issues.

## Level of Capacity Required

A person is presumed to have capacity and can only be found incapacitated upon a showing of clear and convincing evidence.<sup>12</sup> Once we've presumed capacity, however, how much is enough? The level of capacity required depends on the document to be executed or the action to be taken. There are varying degrees of capacity required to sign a will, a trust document, a durable power of attorney and an advance medical directive.

The capacity to sign a will is referred to as testamentary capacity. The query is whether the testator is capable of recol-

lecting his property, recalling the natural objects of his bounty and their claims upon him, knowing the business in which he is engaged and knowing how he wishes to dispose of his property.<sup>13</sup> The focus is on the testator's mental state at the

time the will is executed.<sup>14</sup> Testamentary capacity is seen as the lowest level of capacity. A person can be seriously ill and otherwise physically incapacitated and still possess testamentary capacity.<sup>15</sup>

There is some dispute regarding the level of capacity required to sign a revocable trust. The revocable trust can be viewed either as a contract between the trustor and trustee or as a will substitute. If the revocable trust is viewed as a will substitute, testamentary capacity is required. If the trust is viewed as a contract, capacity to contract is required. Contract capacity is a higher level of capacity than testamentary capacity and usually requires the contractor to be able to understand the nature and effect of the contract.

The Uniform Trust Code provides that the trustor possess only testamentary capacity to create and sign a revocable trust.<sup>16</sup> Very few states have adopted the Uniform Trust Code. In Virginia, one circuit court has stated that a trustor must have contract capacity to execute a trust document.<sup>17</sup> In *Martone*, the issue was not whether the trustor had capacity to create the trust, but whether he had capacity to revoke it. According to the court, a valid trust can be created only where the trustor has the legal competence to make a contract and the same standards apply to determine the competency to revoke the legal relationship.<sup>18</sup> In Virginia it appears a trustor must have contract capacity to both create and revoke a trust.

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pal possesses contract capacity if he understands the nature and character of the agreement and its consequences.<sup>20</sup> The level of capacity required will vary in relation to the type of power of attorney being executed. A relatively simple power of attorney, which delegates management of financial assets to the agent, will typically require less capacity than a more complex power of attorney that may include more sophisticated powers such as gifting powers, estate planning powers, trust powers or waivers.

The final document typically used in estate planning is the advance medical directive. A person, referred to as the declarant, must be capable of making and communicating an informed decision to execute an advance medical directive.<sup>21</sup> A declarant is incapable of making an informed decision if he or she has a mental illness, mental retardation or any other mental or physical disorder that precludes communication or impairs judgment and that has been diagnosed and certified in writing by a physician. Those who may be seriously ill but are still able to make and communicate an informed decision apparently can execute an advance medical directive.

## Ethical Considerations

Under the *Virginia Rules of Professional Conduct*, lawyers must strive to maintain a normal lawyer-client relationship with a client whose ability to make decisions is impaired.<sup>22</sup> The lawyer may seek appointment of a guardian or take other protective action only when the client is at risk of financial, physical or other harm unless action is taken and the lawyer reasonably believes that the client cannot adequately act in the client's own best interest.<sup>23</sup> The comments to the *Rules* also provide that the lawyer often must act as a *de facto* guardian if the client has no guardian or legal representative.<sup>24</sup> Lawyers have a great deal of responsibility in determining the course of action to be taken for a client with diminished capacity.

A lawyer may seek guidance from an appropriate diagnostician in the event

capacity becomes an issue. This area is a sensitive one and the American Bar Association modified the commentary to its Model Rule 1.14 to provide more guidance to the practitioner. The situation must constitute an emergency that threatens the health, safety or financial interest of the person under a disability, and the lawyer may only act to the extent necessary to maintain the status quo. The lawyer cannot reveal confidential information except to the extent necessary to achieve the intended action.<sup>25</sup> According to the commentary, lawyers may consider consulting with family members, using a reconsideration period to permit clarification or improvement of circumstances, using voluntary surrogate decisionmaking tools, such as durable powers of attorney or consulting with support groups, professional services, adult-protective agencies or other individuals or entities that have the ability to protect the client.<sup>26</sup> The lawyer should be guided by such factors as the wishes and values of the client to the extent known and the client's best interests, along with the goals of intruding into the client's decision-making autonomy to the least extent feasible, maximizing client capacities and respecting the client's family and social connections.<sup>27</sup>

## Conclusion

In summary, capacity is an important, but sometimes elusive, issue when dealing with clients, and the lawyer is a key person in helping a client successfully navigate through the gray area of capacity issues. We should approach the issue with an understanding and appreciation of the myriad causes of diminished capacity. We should know how to identify the behaviors or signs and identify those clients who may have diminished capacity. Our office environments and demeanors should provide a safe haven for assessing capacity. Any personal observations or exams should be well documented. We need to keep in mind the various levels of capacity, whether they are testamentary, contract or informed decisions. If it becomes necessary to seek outside assistance from a medical professional, great care should



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be taken in dealing with the client and protecting his or her interests. ☞

### Endnotes:

- 1 [www.aoa.gov/prof/statistics/statistics.asp](http://www.aoa.gov/prof/statistics/statistics.asp).
- 2 [www.aging.state.va.us/demographic.htm](http://www.aging.state.va.us/demographic.htm).
- 3 Alzheimer's Disease Education and Referral Center. [www.alzheimers.org/generalinfo.htm](http://www.alzheimers.org/generalinfo.htm).
- 4 "New Prevalence Study Suggests Dramatically Rising Numbers of People with Alzheimer's Disease," NIA News Release, Monday, August 18, 2003 ([www.alzheimers.org/nianews/nianews59.htm](http://www.alzheimers.org/nianews/nianews59.htm)).
- 5 [www.alzheimers.org/pubs/adfact.html](http://www.alzheimers.org/pubs/adfact.html).
- 6 See Peter Margulies, "Access, Connection, and Voice: A Contextual Approach to Representing Senior Citizens of Questionable Capacity," 62 *Fordham L. Rev.* 1073 (1994). The factors are ability to articulate reasoning behind a decision, the variability of a client's state of mind, appreciation of consequences of a decision, irreversibility of a decision, substantive fairness of a transaction, and consistency with lifetime commitments.
- 7 See also Charles P. Sabatino, "Representing a Client with Diminished Capacity: How Do You Know It And What Do You Do About It," *Journal of American Academy of Matrimonial Lawyers*, 481, Vol. 16 (2000).
- 8 Id. at 487-490.
- 9 For more information on the MMSE and to order forms, see [www.minimental.com](http://www.minimental.com).
- 10 See [www.memorylossonline.com/pastissues/winter2000/7minute.html](http://www.memorylossonline.com/pastissues/winter2000/7minute.html).
- 11 B.B. Brown, "Assessment of Capacity, §§5.01-5.06, in *Mental Capacity: Legal and Medical Aspects of Assessment and Treatment*" (A.C. Walsh et al., 1994).
- 12 An incapacitated person is defined as an adult who has been found by a court to be incapable of receiving and evaluating information effectively or responding to people, events, or environments to such an extent that the individual lacks the capacity to meet the essential requirements for his health, care, safety or therapeutic needs without the assistance or protection of a guardian or manage property or financial affairs or provide for his or her support or for the support of legal dependents without the assistance or protection of a conservator. A finding that the individual displays poor judgment, alone, is not to be considered sufficient evidence that the individual is an incapacitated person within the meaning of this definition. *Va. Code* §37.1-134.6.
- 13 *Tabb v. Willis*, 155 Va. 836, 859, 156 S.E. 556, 564 (1931).
- 14 *Fields v. Fields*, 255 Va. 546, 550, 499 S.E.2d 826, 828 (1998).
- 15 See *Thomason v. Carlton*, 221 Va. 845, 276 S.E.2d 171 (1981) (holding an eighty-eight year old woman who suffered from a stroke possessed testamentary capacity).
- 16 U.T.C. §601.
- 17 *Martone v. Martone*, 43 Va. Cir. 155, 158, 1997 Va. Cir. LEXIS 345, 346 (1997).
- 18 Id. at 157.
- 19 Id. at 158, 1997 Va. Cir. LEXIS at 346. See also, *Lohman v. Sherwood*, 181 Va. 594, 607, 26 S.E.2d 74, 79-80 (1943).
- 20 Id.
- 21 Health Care Decisions Act, Va. Code §§ 54.1-2981 *et seq.*
- 22 *Va. Rules of Professional Conduct*, Rule 1.14, Client With Impairment (2003).
- 23 *Va. Rules of Professional Conduct*, Rule 1.14(b) (2003).
- 24 *Va. Rules of Professional Conduct*, Rule 1.14, Cmt. 2. (2003).
- 25 *ABA Model Rules of Professional Conduct*, Rule 1.14, Client With Diminished Capacity, Cmt. 5 (2003).
- 26 Id.
- 27 Id.

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