What to do when you Notice Your Clients has Diminished Capacity

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At some point in your practice you may be confronted by the diminished capacity of a client. With the American population aging, the number of individual with diminished capacity is increasing. An attorney may be faced with a client in crisis from a mental illness and possibly challenged by one of the following scenarios:

Scenario 1

You have done the estate planning of a couple a few years ago, and then the wife comes to see you. She is concerned because her husband, who is suffering from dementia, has a new behavior of uncontrollable spending. The husband is continuously giving money or writing checks to whoever comes to their front door. The couple had executed a standard estate plan including Last Wills and Testaments, Healthcare Powers of Attorney, Durable Financial Powers of Attorney and Revocable Trusts. Now these documents may not be sufficient enough to protect the couple. In addition, you are faced with a conflict of interest since only the wife is coming to see you while you began the relationship as joint representation.

Scenario 2

The children of your client come to see you for a consultation, because they are concerned that their mom is being financially exploited by her housekeeper. Mom recently revoked their Power of Attorney and has signed a new Power of Attorney in favor of the housekeeper. What shall you do?

In both scenarios we are faced with a conflict of interest, however, we can see the need to protect the client.

One possible solution in scenario 1 would be to have a meeting with both the wife and the husband to address the issues. If all of the assets were titled in the Revocable Trust you will be able to recommend that the husband resign as trustee. In addition you can have a system where there are no other assets outside of the Trust that could fall under the umbrella of a new Power of Attorney. If this does not work, the wife could instead petition for guardianship. However you also have a client-attorney relationship with the husband, therefore you cannot represent the wife in this matter. This petition will require a doctor's evaluation. It will certainly be easy for the wife to contact the doctor because the husband should have signed a HIPAA Release on her behalf.

For the second scenario (action of the children), collecting a doctor's evaluation report will be more difficult. It is not certain that the mom has executed recent estate planning documents including a HIPAA Release and/or the children may not have access to their Mother's doctor. The best solution would be for the children to become more involved in their Mother's healthcare. They will need to accompany their Mother to her doctor's appointment and to try to have her execute a HIPAA Release. The children will have to outline their concerns with their Mother's doctor hoping the doctor will conduct an evaluation. If this is not possible, the only solution for the children will be to petition the court to request a doctor's evaluation or to wait for an incident where their Mother needs to be hospitalized.

Another option to both scenarios is to contact Adult Protective Services, and to address the concerns about safety or financial exploitation. Adult Protective Services will do an inquiry provided that they are permitted in the home when they knock at the front door. Their investigation may take time and you may want immediate action.

As the Attorney of a client with diminished capacity you also have a special duty to protect your client. Rule 1.14 (b) provides that an attorney should "take reasonably necessary protective action" when a client "is at risk of substantial physical,

financial or other harm." The American Bar Association suggests that the attorney may take action on behalf of a client under the following circumstances:

- It is an emergency situation that threats the health, safety or financial interest of the person under disability;
- Action is required only to the extent necessary to maintain the status quo or otherwise avoid immediate or irreparable harm; and
- Only confidential information necessary to achieve the intended action shall be disclosed by the attorney.

Although it seems that the attorney can make decisions in a proceeding on behalf of an impaired client, under no circumstance can an attorney perform any act, or make any decision, which the law requires the client to perform or make, if the client is legally incompetent.

From a legal stand point, incapacity is officially determined by the Court. Otherwise there is a presumption of capacity. However, the practitioner will always have to assess whether the client has the capacity to enter into a contract of representation, and whether the client has the capacity to execute a legal document. Even if the capacity is presumed, the practitioner must determine whether or not a prospective client has sufficient legal capacity to enter into a contract for the lawyer's services. Then, the lawyer will have to evaluate the client's legal capacity to carry out the specific legal transactions desired as part of the representation.

The failure to assess a client's capacity has been asserted as grounds for legal malpractice by would-be beneficiaries of a client. The standards of practice continue to evolve as the prevalence of incapacity rises and as a greater awareness of the need to address capacity issues has emerged. Legal malpractice for failure to address capacity questions in cases is no longer a remote possibility, and with Rule 1.14 (b) attorneys are also required to take steps to protect their clients.