ETHICAL CONSIDERATIONS IN WORKING WITH AGING CLIENTS

BY STEVE A. BRAND AND JOSHUA B. STROM
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In the March 2017 issue of Bench & Bar, readers learned from Courtney Sebo's article "Try to Remember: Estate Planning for Clients with Dementia" about how a client's diminished capacity can confound estate planning. In addition to complicating the underlying legal services, a client's diminished capacity can also create ethical challenges for the client's lawyer. As people live longer and the nation's population increasingly ages, more attorneys will encounter clients with dementia and will need to be aware of some of the ethical considerations associated with representing those clients. Discussed below are some statistics about the aging population and the relationship between age and diminished capacity. Next we discuss the lawyer's task of assessing a client's capacity. And we end with a discussion of a hypothetical representation that illuminates some of the ethical issues an attorney might face when representing a client with diminished capacity.

AN AGING NATION

The U.S. population is aging. In 2010, those aged 65 and older made up 13 percent of the U.S. population.[1] Baby boomers (those born between mid-1946 and mid-1964) began turning 65 in 2011.[2] By 2030, the 65-and-older demographic is estimated to make up to 20 percent of the population. As people age, they become more susceptible to a variety of disorders that can impair cognitive ability. For example, the risk of Alzheimer's disease doubles approximately every five years after the age of 65.[3] By age 85, one in three adults suffers from Alzheimer's disease.[4] Statistically, then, many in this growing population of aging adults will have some form of diminished capacity when they need legal services. As a result, more attorneys will encounter the ethical concerns associated with representing aging clients with diminished capacity and will have to navigate their ethical obligations and client relationships thoughtfully to provide competent, ethical representation.

ASSESSING DIMINISHED CAPACITY

Even though few lawyers have been formally trained to assess a client's capacity, it is incumbent on the lawyer to assess the client's ability to enter transactions contemplated by the representation. Whether a client has sufficient capacity often depends on the type of transaction contemplated. Depending on the state, the capacity required to execute a will may be different from the capacity required to donate assets, to enter a contract, or to convey real property.

Clients are presumed to have legal capacity. The question of capacity arises when signs of questionable capability present themselves. Some telltale signs of diminished capacity may include: short-term memory lapses, disorganization, arithmetic errors, confusion, and impaired judgment.[5] If the attorney suspects the client has diminished capacity, the lawyer must assess the client's capacity to complete the contemplated transaction. Lawyers must typically make the assessment without the benefit of a clinical diagnosis or assessment, usually on the basis of their own experience and judgment.

It may be easier for a lawyer to assess the capacity of a long-time client and more difficult to assess

the capacity of a new client, where there is no baseline from which to identify any changes in the client over time. If you are uncertain, you may wish to solicit a professional evaluation of the client.[6] While capacity is a legal concept, not a clinical concept, a clinical evaluation may be quite useful in evaluating legal capacity. But if you are uncomfortable asking your client to submit to an evaluation—or the client refuses and you are unclear whether the client has the requisite capacity—you may need to decline the representation.[7]

In some circumstances, the attorney may be able to use techniques to increase the client's capacity to understand legal advice and make legal decisions. For example, lawyers can use a technique known as gradual counseling in which the lawyer counsels the client incrementally over time to allow the client sufficient time to comprehend the transaction and its legal effects. Lawyers can also meet with the client when the client is likely to be most alert (in the morning, for example, or when they are not medicated). The attorney might also consider offering to meet with the client in the client's home, where they may be more comfortable and less overwhelmed by stresses such as the exertion of traveling to the lawyer's office.

SAM AND SADIE

Consider the hypothetical case of Sam and Sadie, a married couple for whom you prepared estate-planning documents, including their wills, revocable trust agreements, powers of attorney, and health-care directives. Sam and Sadie never authorized you to discuss their estate planning with their children. You have not spoken with Sam or Sadie for several years. Then one day you receive a phone call from Sam and Sadie's oldest child, the child whom Sam and Sadie had designated for a number of fiduciary positions in their documents. The child says that Sam has had a stroke and that Sadie is suffering from dementia. Sam is in a transitional care facility for therapy following the stroke. Sadie is living in the apartment in which she and Sam have lived for the past decade. The child asks you to let her see copies of Sam and Sadie's estate planning documents.

What should you do? MRPC 1.6 says that a lawyer must not "reveal information relating to the representation of a client unless the client gives informed consent [or] the disclosure is impliedly authorized in order to carry out the representation."[8] Sam and Sadie did not give you "informed consent" to disclose the documents. But did Sam and Sadie "impliedly authorize" you to disclose the estate planning documents to the child they appointed to a number of fiduciary duties?

You decide to call Sam and Sadie. Sadie confirms that Sam had a stroke and is living in an assisted care facility and that she was recently diagnosed with what she describes as "a mild form of early dementia." But Sadie assures you that she is self-sufficient and "has all her marbles." You tell Sadie about her child's request. Sadie instructs you to not to share the documents and, in fact, says that she wants to revoke those fiduciary appointments because the daughter is trying to control Sadie and move Sadie into an assisted care facility against Sadie's wishes.

You ask Sadie for a number where Sam can be reached so you can discuss the matters with Sam. You talk with Sam, who is recovering from the stroke well and says that he, too, is concerned for

Sadie's well-being as her dementia is progressing rapidly. Sam tells you to disclose the documents to their child and hopes the child can help make living arrangements for Sadie. Sam says that he is recovering well mentally from the stroke but that he has fairly severe physical limitations and is not sure he will be able to care for Sadie himself.

What do you do? If you have satisfied yourself that Sadie has diminished capacity, your ethical obligations to Sadie are governed by MRCP 1.14, which says that you may disclose confidential information "to the extent reasonably necessary to protect the client's interests." If you believe it is necessary to divulge the estate-planning documents to the child to protect Sadie's interests, you can likely divulge the documents even though Sadie instructed you not to.[9] This decision also involves the nature of your relationship with Sam and Sadie, which is customarily a joint representation.

What do you do if Sam agrees with Sadie and asks that the daughter's fiduciary appointments be revoked? Do you simply abide by Sam's wishes knowing that Sam is unable to care for himself, much less Sadie? Does your analysis change if you have been close to the family and you believe that the daughter is in fact looking out for her parents' best interests?

Unfortunately, there is little, if any, case law or ethics opinions which offer guidance in dealing with these issues. As such issues become more prevalent, perhaps we will find more guidance to assist the practitioner in making the necessary choices.

Until then, the practitioner will need to carefully select the path she or he wishes to follow even if it is outside the existing ethical opinions and case law.

CONCLUSION

As the nation's population ages, more lawyers will represent aging clients and, therefore, clients with diminished capacity. We will have to become comfortable making more assessments of our clients' capacity and counseling our clients accordingly. If we believe a client's capacity is diminished, our obligations will not necessarily be clear. Instead, we will need to navigate between the ethical rules, our sense of responsibility to our client, and the potential future risks from the choices we make.

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1. Jennifer M. Ortman, et al., "An Aging Nation: The Older Population in the United States," Current Population Reports, U.S. Department of Commerce (2014)
2. Id.
3. American Bar Association Voice of Experience newsletter, "How Much Do Lawyers Need to Know about Alzheimer's Disease?" (Spring 2016).
4. Id.
5. Id.
6. Id.
7. Id.
8. Model Rule Prof'l Conduct R. 1.6
9. MRCP 1.14, comment 8.

STEVE A. BRAND is a partner in the trusts and estates practice at Robins Kaplan LLP, where he focuses his practice on estate planning and trust and estate administration. Mr. Brand is a fellow of the American College of Trust and Estate Counsel. SBrand@RobinsKaplan.com

JOSHUA STROM is an associate at Robins Kaplan LLP, where he focuses his practice on trusts and estates and fiduciary litigation, as well as general commercial litigation. JStrom@RobinsKaplan.com

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