

"MENTAL CAPACITY: ISSUES & IMPLICATIONS"

presented by
THE ELDER LAW COMMITTEE,
RANDALL CRAIG, CHAIR

The Evansville Bar Association
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Evansville IN 47708

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MENTAL CAPACITY: ISSUES AND IMPLICATIONS

Introduction

- I. **Issues relating to mental capacity arise in a number of different situations.**
 - A. Is an individual "capable" of consenting to the individual's own health care or to the health care of another?
 1. Pursuant to the Indiana Power of Attorney Act, the granting of health care powers does not prohibit an individual "capable" of consenting to the individual's own health care, or to the health care of another, from consenting to health care administered in good faith under the religious beliefs and practices of the individual requiring health care. IC 30-5-5-16.
 2. Likewise, under IC 35-5-7-3, whenever a health care provider believes that a patient may lack the "capacity" to give informed consent to health care the provider considers necessary, the provider is required to consult with the attorney-in-fact who has the power to act for the patient under the Indiana Power of Attorney Act, the Indiana Health Care Consent Act, or the Indiana Living Wills and Life Prolonging Procedures Act. IC 30-5-7-3.
 - B. Does a testator or testatrix have the testamentary "capacity" to make a will?
 - C. Is a person "incapacitated" to the extent that he or she is unable to manage his or her property and in need of a guardianship?
- II. **Expansion and increasing frequency of incapacity issues.**
 - A. The aging of the population is causing attorneys to be called upon to counsel families with greater frequency where an individual has mental or physical impairments.
 1. These situations raise ethical issues of representation and conflict of interest.
 2. We must ask "who is the client" and whether we can represent the "family".

- B. We wonder how we can represent someone who does not have capacity and continue to represent the client who can no longer make decisions.
 - 1. The ethical issues "disappear" if client capacity exists as the client can engage us or waive conflicts of interest that may exist within the family that seeks our advice.
 - 2. Different states have different rules regarding these ethical issues.

III. Ethical considerations applicable to attorney.

- A. Capacity has been referred to as the black hole of legal ethics; many questions find their way into the capacity category, but few answers ever emerge.
 - 1. Neither the Model Code of Professional Responsibility, the Model Rules of Professional Conduct nor the Restatement of the Law Concerning Lawyers are very helpful to guide the attorney in assessing a client's capacity.
 - 2. Both the Model Rules and the Restatement note that capacity is a flexible concept and that clients can be incapacitated for some purposes but not others.
 - 3. The Restatement also cautions attorneys that they should not confuse incapacity with eccentricity or lack of prudence.
- B. The approach taken by the Model Rules and the Restatement are fairly close to the "functional approach" as a school of thought which has developed concerning the manner of capacity.
 - 1. Rather than relying on supposedly "objective" tests, the functional approach asks how people cope in their regular environment.
 - 2. For example, instead of asking a senior to name the date, and viewing him/her as dangerously disoriented if he/she cannot, the functional view asks whether the senior has a newspaper, magazine or video source available if he/she wishes to answer this question.
- C. The Model Code, the Model Rules and the Restatement allow lawyers to make decisions for clients in some situations.

1. The Model Rules use the loaded term "de facto guardian" and the Model Code and the Restatement use terminology that offer very little guidance about when the attorney should make decisions for the client.
 2. Essentially, the Model Code and the Restatement allow the attorney to make decisions when emergencies exist.
- D. In Indiana, Rule 1.14 of the Rules of Professional Conduct sets the standard for representation of the client under a disability:
1. The attorney is required to maintain a normal client relationship to the extent possible.
 2. The attorney may seek the appointment of a guardian or take corrective action only when the attorney believes that the client cannot act in the client's own interest.
- E. The attorney cannot reveal information, without the client's consent, unless impliedly authorized to carry out the representation requested.
1. If protective action is necessary and appropriate, the attorney should do so without exposing confidential communications.
 2. If some disclosure is unavoidable, it should be strictly limited to that which is absolutely necessary.

IV. Determining Incapacity.

- A. There are various standards and testing devices used to assist the physician and attorney in deciding whether a particular individual has capacity.
1. Many of these commonly used tests are not new and have been used for years.
 2. Tests used to measure capacity or the ability to give informed consent have been historically an important aspect of guardianship proceedings.

3. As states modernize their guardianship laws, they are moving away from a purely medical approach to a more functional approach in which the medical diagnosis becomes less important.
 4. Indiana's 1988 Guardianship Act, effective July 1, 1989, reflects the nationwide trend:
 - (a) The availability of protective proceedings and single transaction situations when full guardianship may not be deemed necessary.
 - (b) Referring to the prospective ward as an incapacitated person.
 - (c) Recognizing that an alleged incapacitated person may knowingly and voluntarily consent to the appointment of a guardian or knowingly and voluntarily waive notice of the hearing.
 - (d) Giving the court the authority to limit the scope of the guardianship.
 5. While the medical diagnosis and prognosis continues to be relevant, it is the ability or inability of the alleged incapacitated person to perform specific tasks that is the issue before the court.
 - (a) The test is no longer classic medical "incapacity" but real life disfunctioning.
 - (b) For example, if the person cannot sign checks, balance the checkbook or pay bills that are due, that fact, supported by independent evidence that may or may not be medical evidence, may be sufficient to support the appointment of a guardian.
- E. Unfortunately, physicians and attorneys speak different languages and often do not understand each other.
1. We need to move toward a functional approach and develop ways to accomplish the goal of a better understanding of how attorneys, working in partnership with physicians, social

workers and psychologists, can reach more informed decisions and provide better services to our clients and patients.

2. It is important that we not rely on outmoded or relatively useless tests in the broader context of the client's ability to act, decide and give consent.
 - (a) We need to take into consideration the importance of lucid intervals.
 - (b) We need to take into account the awareness on the part of the possibly incapacitated person of his or her need for assistance and support as indicating sufficient capacity to execute a power of attorney at least for the limited purpose of financial management.
 - (c) In other words, we need to analyze the components of the legal devices the client is being asked to execute and develop a set of general standards of functional ability that the client might possess to be deemed to be able to utilize those devices.
 - i. That is, the levels of functional ability and comprehension needed to execute various legal devices may vary widely.
 - ii. Should not let a lesser level of understanding be needed to execute a will or power of attorney, or to retain counsel, than ought to be required to execute a living trust or a "living will"?
 - (d) We need to exercise balance in defining the concept of capacity and avoid adopting a paternalistic view of capacity based on the substance of the individual's decisions.
 - (e) In other words, we should not determine that because the decisions appear "right", the individual possesses capacity, or that because the decisions appear "wrong", that the individual lacks capacity.

3. Attorneys and others need to keep several concepts in mind when assessing client capacity:
 - (a) Remember that the client has the right to be wrong; the client's "autonomy" and the ethical rules permit a client to make an unwise decision.
 - (b) What is important is that the client can understand the attorney's advice and arguments, and then give reasons for rejecting the advice.
 - (c) Be careful about the source of evidence on which you rely, i.e., reports of family members or friends (such as how a person is eating) may reflect an over-protective or paternalistic attitude or a particular bias.

such person may wish to obtain independent representation. Care must be taken to assure that the individual understands that, when there is such adversity of interest, the lawyer for the organization cannot provide legal representation for that constituent individual, and that discussions between the lawyer for the organization and the individual may not be privileged.

Whether such a warning should be given by the lawyer for the organization to any constituent individual may turn on the facts of each case.

Derivative Actions

Under generally prevailing law, the shareholders or members of a corporation may bring suit to compel the directors to perform their legal obligations in the supervision of the organization. Members of unincorporated associations have essentially the same right. Such an action may be brought nominally by the organization, but usually is, in fact, a legal controversy over management of the organization.

The question can arise whether counsel for the organization may defend such an action. The proposition that the organization is the lawyer's client does not alone resolve the issue. Most derivative actions are a normal incident of an organization's affairs, to be defended by the organization's lawyer like any other suit. However, if the claim involves serious charges of wrongdoing by those in control of the organization, a conflict may arise between the lawyer's duty to the organization and the lawyer's relationship with the board. In those circumstances, Rule 1.7 governs who should represent the directors and the organization.

RULE 1.14 CLIENT UNDER A DISABILITY

(a) When a client's ability to make adequately considered decisions in connection with the representation is impaired, whether because of minority, mental disability or for some other reason, the lawyer shall, as far as reasonably possible, maintain a normal client-lawyer relationship with the client.

(b) A lawyer may seek the appointment of a guardian or take other protective action with respect to a client, only when the lawyer reasonably believes that the client cannot adequately act in the client's own interest.

COMMENT

The normal client-lawyer relationship is based on the assumption that the client, when properly advised and assisted, is capable of making decisions about important matters. When the client is a minor or suffers from a mental disorder or disability, however, maintaining the ordinary client-lawyer relationship may not be possible in all respects. In particular, an incapacitated person may have no power to make legally binding decisions. Nevertheless, a client lacking legal competence often has the ability to understand, deliberate upon, and reach conclusions about matters affecting the client's own well-being. Furthermore, to an increasing extent the law recognizes intermediate degrees of competence. For example, children as young as five or six years of age, and certainly those of ten or twelve, are regarded as having opinions that are entitled to weight in legal proceedings concerning their custody. So also, it is recognized that some persons of advanced age can be quite capable of handling

routine financial matters while needing special legal protection concerning major transactions.

The fact that a client suffers a disability does not diminish the lawyer's obligation to treat the client with attention and respect. If the person has no guardian or legal representative, the lawyer often must act as de facto guardian. Even if the person does have a legal representative, the lawyer should as far as possible accord the represented person the status of client, particularly in maintaining communication.

If a legal representative has already been appointed for the client, the lawyer should ordinarily look to the representative for decisions on behalf of the client. If a legal representative has not been appointed, the lawyer should see to such an appointment where it would serve the client's best interests. Thus, if a disabled client has substantial property that should be sold for the client's benefit, effective completion of the transaction ordinarily requires appointment of a legal representative. In many circumstances, however, appointment of a legal representative may be expensive or traumatic for the client. Evaluation of these considerations is a matter of professional judgment on the lawyer's part.

If the lawyer represents the guardian as distinct from the ward, and is aware that the guardian is acting adversely to the ward's interest, the lawyer may have an obligation to prevent or rectify the guardian's misconduct. See Rule 1.2(d).

Disclosure of the Client's Condition

Rules of procedure in litigation generally provide that minors or persons suffering mental disability shall be represented by a guardian or next friend if they do not have a general guardian. However, disclosure of the client's disability can adversely affect the client's interests. For example, raising the question of disability could, in some circumstances, lead to proceedings for involuntary commitment. The lawyer's position in such cases is an unavoidably difficult one. The lawyer may seek guidance from an appropriate diagnostician.

RULE 1.15 SAFEKEEPING PROPERTY

(a) A lawyer shall hold property of clients or third persons that is in a lawyer's possession in connection with a representation separate from the lawyer's own property. Funds shall be kept in a separate account maintained in the state where the lawyer's office is situated, or elsewhere with the consent of the client or third person. Other property shall be identified as such and appropriately safeguarded. Complete records of such account funds and other property shall be kept by the lawyer and shall be preserved for a period of (five years) after termination of the representation.

(b) Upon receiving funds or other property in which the client or third person has an interest, a lawyer shall promptly notify the client or third person. Except as stated in this Rule or otherwise permitted by law or by agreement with the client, a lawyer shall promptly deliver to the client or third person any funds or other property that the client or third person is entitled to receive and, upon request by the client or third person, shall promptly render a full accounting regarding such property.

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