

## Old New World: What is on the Horizon for LGBT Elders (and Your Future)

### The 2019 Lavender Law Conference & Career Fair

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Often times guardianships remove the last bit of a person's own perception of self-worth. A person loses youth, health, often money, friends, family, and are finally saddled with the prospect of losing their dignity and every basic right of citizenship. Basic rights, such as where to live, voting, and even who can visit or spend time with them are removed. A guardian has tremendous authority in controlling every aspect of the ward's life. As more than one client has said - "you might as well just shoot me."

"You took away everything he has and everything he's ever gonna have."

-Clint Eastwood, *Unforgiven* (a man pondering the taking of another's life.)

### Dealing with Clients with Diminished Capacity

#### Assessing a Client's Level of Capacity

- Considerations include:
  - Possible Cognitive Signs of Incapacity
  - Possible Emotional Signs of Incapacity
  - Possible Behavioral Signs of Incapacity
  - Functioning Beyond the Office
  - Undue Influence
  - Other Factors, such as recent stressful events, hearing and vision loss, and reversible medical conditions, and socio-economic factors
- Resource (source): ABA Commn. on L. & Aging & Am. Psychological Assn., *Assessment of Older Adults with Diminished Capacity: A Handbook for Lawyers* (2005), available at <https://www.apa.org/pi/aging/resources/guides/diminished-capacity.pdf>.

## Financial Exploitation – Resources

- According to the CDC, 1 out of 10 persons, age 60 or over and who live at home, experience elder abuse.
  - The CDC considers this number as underestimated because of fear or inability of the victim to report the crime.
  - *Elder Abuse Prevention*, Centers for Disease Control and Prevention, at <https://www.cdc.gov/features/elderabuse/index.html>
- States may have civil and criminal laws developed to protect vulnerable adults from financial exploitation and other forms of elder abuse.
- For a thorough discussion of financial elder exploitation, review the following:
  - Barry A. Nelson, *ESTATE PLANNING AND ASSET PROTECTION IN FLORIDA*, (Juris Publishing 2019) (Chapter 15: *Financial Elder Exploitation*)
  - *Education*, National Center on Elder Abuse, at <https://ncea.acl.gov/What-We-Do/Education.aspx>
  - *Diminished Capacity: What Every Financial Services Professional Should Know*, National Adult Protective Services Association, available at <https://www.sec.gov/divisions/marketreg/seniorinvestors.htm>

## Dealing with Clients with Diminished Capacity – Ethical Considerations

### **ABA Model Rule 1.14: Client with Diminished Capacity**

#### **Client-Lawyer Relationship**

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

(b) When the lawyer reasonably believes that the client has diminished capacity, is at risk of substantial physical, financial or other harm unless action is taken and cannot adequately act in the client's own interest, the lawyer may take reasonably necessary protective action, including consulting with individuals or entities that have the ability to take action to protect the client and, in appropriate cases, seeking the appointment of a guardian ad litem, conservator or guardian.

(c) Information relating to the representation of a client with diminished capacity is protected by Rule 1.6. When taking protective action pursuant to paragraph (b), the lawyer is impliedly authorized under Rule 1.6(a) to reveal information about the client, but only to the extent reasonably necessary to protect the client's interests.

## **Comments to ABA Model Rule 1.14**

[1] 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 diminished mental capacity, however, maintaining the ordinary client-lawyer relationship may not be possible in all respects. In particular, a severely incapacitated person may have no power to make legally binding decisions. Nevertheless, a client with diminished capacity often has the ability to understand, deliberate upon, and reach conclusions about matters affecting the client's own well-being. 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.

[2] The fact that a client suffers a disability does not diminish the lawyer's obligation to treat the client with attention and respect. Even if the person has a legal representative, the lawyer should as far as possible accord the represented person the status of client, particularly in maintaining communication.

[3] The client may wish to have family members or other persons participate in discussions with the lawyer. When necessary to assist in the representation, the presence of such persons generally does not affect the applicability of the attorney-client evidentiary privilege. Nevertheless, the lawyer must keep the client's interests foremost and, except for protective action authorized under paragraph (b), must look to the client, and not family members, to make decisions on the client's behalf.

[4] 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. In matters involving a minor, whether the lawyer should look to the parents as natural guardians may depend on the type of proceeding or matter in which the lawyer is representing the minor. 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).

### **Taking Protective Action**

[5] If a lawyer reasonably believes that a client is at risk of substantial physical, financial or other harm unless action is taken, and that a normal client-lawyer relationship cannot be maintained as provided in paragraph (a) because the client lacks sufficient capacity to communicate or to make adequately considered decisions in connection with the representation, then paragraph (b) permits the lawyer to take protective measures deemed necessary. Such measures could include: 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. In taking any protective action, the lawyer should be guided by such factors as the wishes and values of the client to the extent known, the client's best interests and the goals of intruding into the client's decisionmaking autonomy to the least extent feasible, maximizing client capacities and respecting the client's family and social connections.

[6] In determining the extent of the client's diminished capacity, the lawyer should consider and balance such factors as: the client's ability to articulate reasoning leading to a decision, variability of state of mind and ability to appreciate consequences of a decision; the substantive fairness of a decision; and the consistency of a decision with the known long-term commitments and values of the client. In appropriate circumstances, the lawyer may seek guidance from an appropriate diagnostician.

[7] If a legal representative has not been appointed, the lawyer should consider whether appointment of a guardian ad litem, conservator or guardian is necessary to protect the client's interests. Thus, if a client with diminished capacity has substantial property that should be sold for the client's benefit, effective completion of the transaction may require appointment of a legal representative. In addition, rules of procedure in litigation sometimes provide that minors or persons with diminished capacity must be represented by a guardian or next friend if they do not have a general guardian. In many circumstances, however, appointment of a legal representative may be more expensive or traumatic for the client than circumstances in fact require. Evaluation of such circumstances is a matter entrusted to the professional judgment of the lawyer. In considering alternatives, however, the lawyer should be aware of any law that requires the lawyer to advocate the least restrictive action on behalf of the client.

#### **Disclosure of the Client's Condition**

[8] Disclosure of the client's diminished capacity could adversely affect the client's interests. For example, raising the question of diminished capacity could, in some circumstances, lead to proceedings for involuntary commitment. Information relating to the representation is protected by Rule 1.6. Therefore, unless authorized to do so, the lawyer may not disclose such information. When taking protective action pursuant to paragraph (b), the lawyer is impliedly authorized to make the necessary disclosures, even when the client directs the lawyer to the contrary. Nevertheless, given the risks of disclosure, paragraph (c) limits what the lawyer may disclose in consulting with other individuals or entities or seeking the appointment of a legal representative. At the very least, the lawyer should determine whether it is likely that the person or entity consulted with will act adversely to the client's interests before discussing matters related to the client. The lawyer's position in such cases is an unavoidably difficult one.

### **Emergency Legal Assistance**

[9] In an emergency where the health, safety or a financial interest of a person with seriously diminished capacity is threatened with imminent and irreparable harm, a lawyer may take legal action on behalf of such a person even though the person is unable to establish a client-lawyer relationship or to make or express considered judgments about the matter, when the person or another acting in good faith on that person's behalf has consulted with the lawyer. Even in such an emergency, however, the lawyer should not act unless the lawyer reasonably believes that the person has no other lawyer, agent or other representative available. The lawyer should take legal action on behalf of the person only to the extent reasonably necessary to maintain the status quo or otherwise avoid imminent and irreparable harm. A lawyer who undertakes to represent a person in such an exigent situation has the same duties under these Rules as the lawyer would with respect to a client.

[10] A lawyer who acts on behalf of a person with seriously diminished capacity in an emergency should keep the confidences of the person as if dealing with a client, disclosing them only to the extent necessary to accomplish the intended protective action. The lawyer should disclose to any tribunal involved and to any other counsel involved the nature of his or her relationship with the person. The lawyer should take steps to regularize the relationship or implement other protective solutions as soon as possible. Normally, a lawyer would not seek compensation for such emergency actions taken.

### **Planning for Incapacity**

#### **Why important?**

- Provides opportunity to exercise the right to self-determination.
- Avoid guardianship/conservatorship
  - o Rights removed from a person and delegable rights given to someone
  - o Expensive Process
  - o Intrusive
- Give clarity and peace of mind to loved ones
  - o Avoid family conflict
  - o Family will not have to make emergency decisions – only honor your decisions

## Forms of Planning for Incapacity

The following items are various devices that can serve as an alternative to guardianship or conservatorship and to assist clients as they age. As will be discussed, petitions for appointment of a guardian/conservator can be very expensive and intrusive. Planning for incapacity allows a person to exercise their right to self-determination and assure that their needs are met and to avoid the indignity, intrusion, and cost of a proceeding to determine whether they are no longer able to care for themselves.

### **Advance Medical Directives**

#### Declaration of Health Care Surrogate

A Declaration of Health Care Surrogate informs the principal's physician, hospital or other health care providers that in the event the principal is unable to make medical decisions, the person named can make those decisions instead. Generally, this document contains a HIPAA release or waiver indicating that the principal allows the surrogate to have access to the principal's health records so they can make informed decisions. The attorney-in-fact may also make these decisions for the principal if granted that right, however, many physicians and hospitals prefer a form specifically designating a health care surrogate. This document only becomes effective if the principal cannot make his or her own decisions and terminates when the principal's capacity to make decisions returns. Capacity in this document has a slightly different meaning than legal capacity. No Court designation or physician's affidavit is required as the incapacity can be temporary such as being under anesthesia, under the effects of strong pain medication, in an induced coma, or other medically defined incapacities. In most cases, it is recommended that a principal name one or two surrogates who are to be contacted sequentially. It is also recommended that the principal provide copies of this document to family members or counsel and physicians and that they have a list of who has a copy in the document. This document terminates upon revocation, during capacity, or upon death.

#### Omnibus Advance Directive

This document incorporates the Health Care Surrogate and Living Will (discussed below). The individual provisions of each of these documents are incorporated into each section of the Omnibus document and can be as specific or broad as desired, even giving direction that if the principal is placed in a nursing home and unable to make their wishes known, such as a desire to have classical music played in their memory. While this document is convenient, it is also recommended that a principal has the individual documents as well. It might not be desirable for a physician or the hospital to have any more information in any one document than is necessary. Of course, the proxy designee may find it more convenient to have the two documents combined.

### Nomination of Preneed Guardian or Conservator

The Nomination of Preneed Guardian or Conservator is a legal document that is filed with the court. It is a document signed during capacity indicating who the signer wishes to serve as their Guardian (or conservator) of the person, property or both in the event that there are not separate documents in place or the documents cannot be located or in the case of a question or challenge to the nomination of a person named in the other documents. This document does not become effective until the person signing the document is adjudicated incapacitated through a court proceeding, at which time the Judge will consider the signer's wishes. The judge is not obligated to follow this nomination, but must look to the nominated individual as a first choice. This document can be revoked by the signer at any time during capacity. This can be a critical document because there is a higher burden of proof for a court to disregard this designation.

### Authorization for Release of HIPAA Information

There may be times when someone may wish to authorize others to obtain their protected medical information. This can be important in the case of a trustee, personal representative, prior medical provider, domestic partner, spouse or even a Health Care Surrogate or Living Will nominee if they are not granted this right in the document, or if the provider does not accept the authorization when it is incorporated into another document.

As children turn 18, it is important to obtain his or her authorization for the parent to receive their child's HIPAA information. A parent's right to secure medical information without their child's permission terminates at the child's attainment of age 18 in many states. An age when many teens are leaving home for college.

### Authorization for Medical Treatment

For those who have younger children, an Authorization for Medical Treatment will allow an outside party, such as a non-custodial parent, grandparent, day care center worker, principal, etc. to have the child treated in an emergency rather than forcing the hospital or medical provider to locate and speak with a parent. This document contains a limited release of HIPAA information that is restricted to information necessary for treatment decisions. It also gives on its face information regarding allergies, special medical conditions the child may have and a listing of any medications the child is taking.

## **Delegation of Financial and Contractual Rights**

### Durable Power of Attorney

A Durable Power of Attorney allows the party designated to act as the principal's attorney-in-fact during the principal's lifetime. This ability becomes effective on the date it is granted and terminates only by revocation or death. The person or institution who receives instruction from the designee is not required to look any further than the document for their authority to act. As such, a Durable Power of Attorney is a powerful document that allows a designee to 'stand in the shoes' of the principal and perform any actions the principal could perform with full authority of law. Many powers of attorney are generally not exercised by a designee except in certain circumstances such as by the principal's permission or in the event of incapacity. Additionally, a well-drafted power of attorney will enumerate those actions that a designee is permitted to exercise and those which the designee may not exercise and may limit the manner that a designee can exercise other actions. The benefit of durable power of attorney is that it is not affected by incapacity and will allow the designee to continue to act for the principal if the principal is found to be incapacitated. While it might be advisable to name a successor to the designee in the document, it is generally not recommended to name multiple attorneys-in-fact.

### Springing Power of Attorney

Some states allow a springing Power of Attorney, which only becomes effective upon the incapacity of the principal.

### Other Power of Attorney Designations

The principal can execute a Power of Attorney designation that becomes ineffective upon determination of incapacity. In addition, a principal can sign a power of attorney that gives limited authority. These are often executed to authorize certain sales of real property. The form can restrict the authority given to the agent.

### Trusts

Trust declarations are a written recognition of a legal relationship in which a grantor gives to a Trustee the right to control and manage property for the benefit of the trust's beneficiaries. Trusts are created during a person's life to hold assets for themselves or others. They can help avoid the probate process and can assist a person if that person is no longer able to manage his or her financial affairs.

If a person who has created and funded a trust is found to be incapacitated, any funds held in trust are managed by the successor Trustee. The individual creating the Trust, the grantor, has the ability to name in the document who becomes the trustee if that person is deemed incapacitated. Many Trusts include language to permit a successor Trustee to step in as Trustee if doctors write letters indicating that the grantor is no longer able to manage their own finances or make financial decisions. This eliminates the need for a successor Trustee to initiate Court proceedings to step in and manage the Trust assets. The Court in a guardianship/conservatorship has no authority over the Trust assets, so it maintains privacy and control over those finances. The Court recognizes the express wishes of the alleged incapacitated person from prior to their incapacity.

### Authorization for Final Rites

Many people express their burial wishes in their Wills. While this can be effective, a Will may not be located or opened until well after death and burial or final rites have taken place. An Authorization for Final Rites designates who may give direction for the disposal of the signer's remains, what ceremonies or services they desire and whether or not they wish cremation. This document can be given to a spouse, partner, loved one or friend and serves as a stand-alone document expressing the signer's wishes.

## **Do Not Resuscitate Orders and Organ Donation Considerations**

### Living Will

A Living Will informs physicians, hospitals, and family, of the signer's wishes in the event of a terminal illness. It is a document that signed during the principal's capacity, of their free will, and pertains to their wishes regarding life-prolonging procedures, medication, food, and/or hydration in the event of a terminal condition. Additionally, the signer selects at which time they want the document to become effective based on the degree of quality of life available to them. This document also names a surrogate to carry out the signer's wishes if the signer is unable to, and contains a HIPAA release; however, it allows the surrogate to act only within the confines of the stated wishes. A Living Will can be as broad or restrictive as desired. It can also contain provisions for anatomical gifts. In most cases, it is recommended that the Living Will name one or more surrogates who are to be contacted sequentially. It is also recommended that the signer provide copies of this document to family members or their attorney or physician and that they list who has a copy in the document. This document terminates with revocation during capacity or death.

### Organ Donation

Depending on state law, a person can designate their desire to make anatomical gifts in a Declaration of Health Care Surrogate and to designate themselves as an organ/tissue donor by joining registries, such as Florida's Joshua Abbott Organ & Tissue Donor Registry at [www.donatelifeflorida.org](http://www.donatelifeflorida.org). Neither action is intended to take the place of the designation on a driver's license, but these additional notifications of the donor's desires will allow medical providers to make timely arrangements to insure a successful harvest. These expressions of donation do not require any consent from the Health Care Surrogate and will be effective under any circumstances providing the medical providers check the Registry and/or have the document.

THE REST OF THIS PAGE IS FOR NOTES OR DOODLING  
(SHARE THE DOODLES THOUGH)