Estate Planning and Cognitive Impairment: Capacity, Ethics, and Risk Management

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This article outlines the legal standards for capacity, the ethical responsibilities of practitioners when there is a question about capacity, some strategic documentation practices that can help the client retain autonomy and reduce the risk of litigation.

INTRODUCTION

A diagnosis of Alzheimer's disease or another form of cognitive impairment introduces profound personal and legal challenges. Clients and their families often assume that such a diagnosis renders someone incapable of participating in estate planning. However, this is a legal misconception. In fact, estate planning can and should be pursued—if legal capacity is present—even after cognitive decline has begun. The attorney's role is pivotal in evaluating capacity, safeguarding client intent, and preemptively mitigating the risk of future challenges.

This article outlines the applicable legal standards for capacity, ethical responsibilities of estate planning practitioners, and strategic documentation practices designed to uphold client autonomy while reducing the likelihood of litigation.

LEGAL CAPACITY: A FUNCTIONAL AND TEMPORAL STANDARD

Legal capacity in estate planning is not a static or binary determination. Rather, capacity is assessed at the specific moment a legal document is executed. Importantly, a diagnosis of cognitive decline does not by itself establish incapacity. People with conditions such as Alzheimer's may experience fluctuating cognitive states; for example, a client may lack clarity during the evening due to "sundowning," yet be fully lucid in the morning.

Estate planning attorneys must be attuned to these fluctuations and consider whether the client demonstrates sufficient understanding at the time of signing. Courts focus on functionality rather than diagnosis—evaluating whether the person grasps the nature and implications of the legal act being undertaken.

Different legal instruments impose varying thresholds of capacity:

- *Testamentary Capacity* requires that the person understands the extent and nature of their property, recognizes the natural objects of their bounty, and comprehends the effect of the testamentary document.
- *Contractual Capacity* is required for the execution of trusts, powers of attorney, and other agreements. This involves a more nuanced understanding of terms and consequences.
- Other capacities, such as criminal or medical decision-making capacities, are governed by separate standards and are generally outside the scope of estate planning but may be relevant in holistic capacity assessments.

These standards are not mutually exclusive. A client may possess testamentary capacity but lack contractual capacity, depending on the complexity of the legal decisions involved.

ETHICAL DUTIES OF ESTATE PLANNING COUNSEL

Estate planning attorneys serve in a dual capacity: as facilitators of client intent and as guardians of legal and ethical integrity. Counsel must balance two imperatives:

1. Faithfully executing the client's wishes, provided those wishes are legally valid and voluntarily made;[1] and
2. Safeguarding against undue influence or incapacity, particularly where the client's vulnerability is apparent or may invite future challenges to the estate plan.[2]

If an attorney harbors reasonable doubt regarding capacity or perceives evidence of coercion, they are ethically compelled to suspend or terminate representation. Conversely, if the client exhibits sufficient capacity and independence, the attorney is not required to second-guess their objectives—even if unconventional.

Rules of Professional Conduct.

There are three important rules of professional conduct when it comes to clients with diminished capacity.

Even if a client has diminished capacity, ABA Model Rules of Professional Conduct Rule 1.14(a) states clearly that, if possible, the attorney should maintain a normal client-lawyer relationship. Rule 1.2(a) further states that the lawyer shall abide by a client's decision.

However, this is tempered by ABA Model Rule 1.14(b) which states that if the client is at risk of physical or financial harm, the lawyer may take reasonably necessary protective action. Like Subsection (a), this is further bolstered by Rule 1.2(d) which states that a lawyer shall not assist in conduct that is criminal or fraudulent, which by extension includes fraud, duress, and undue

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influence. Furthermore, Rule 1.14(b) and Rule 1.6(b)(1) and (3) provide an exception to attorney-client privilege in order to seek outside help or prevent abuse.

Balancing Professional Judgment with Client Autonomy.

When an attorney harbors reasonable doubt about a client's capacity or identifies red flags of undue influence, they are not only permitted but ethically required to pause or decline representation under the circumstances. However, there is a difference between diminished capacity and a total lack of capacity, and the attorney's role is not to impose a preferred outcome, but to ensure that the client's true, voluntary, and legally competent wishes are documented and defensible.

UNDUE INFLUENCE

Undue influence is a legal doctrine that arises when one party exerts excessive pressure on another, undermining a person's free will and resulting in a transaction or decision that benefits the influencer. Typically, undue influence involves a relationship of trust and confidence, where the dominant party manipulates the vulnerable party, through coercion, manipulation, or exploitation of emotional dependency.

Undue influence remains one of the most commonly litigated grounds for invalidating a will or trust—particularly when estate planning occurs during periods of cognitive decline. While direct evidence of undue influence is rare, courts rely heavily on circumstantial evidence to evaluate whether a testamentary document truly reflects the free and voluntary intent of the decedent. Factors commonly considered by the court include:

- Vulnerability of the testator, including their mental or physical state.
- Opportunity for the influencer to exert pressure due to proximity or control.
- Motive, which is typically tied to substantial financial benefit.
- Deviation from prior or expected testamentary patterns.
- Unnatural dispositions, such as disinheriting family and leaving everything to the caregiver.
- Suspicious circumstances.

Other red flags include social isolation, beneficiary involvement in selecting the attorney, and repeated insistence on certain distributions. These factors collectively inform a court's determination of whether the client acted of their own volition. Attorneys should be especially vigilant when these indicators are present and ensure that the planning process remains untainted by improper influence.

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Arguably the most detailed court decision on undue influence is *In re Estate of Carpenter*,[3] which laid out seven factors that could indicate undue influence:

1. Presence of the beneficiary at the execution of the will.
2. Presence of the beneficiary on those occasions when the testator expressed a desire to make a will.
3. Recommendation by the beneficiary of an attorney to draw the will.
4. Knowledge of the contents of the will by the beneficiary prior to execution.
5. Giving of instructions on preparation of the will by the beneficiary to the attorney drawing the will.
6. Securing of witnesses to the will by the beneficiary.
7. Safekeeping of the will by the beneficiary subsequent to execution.

The Dutiful Child or Helpful Friend.

Many of the actions that could be interpreted as exerting undue influence could also be interpreted as simply the acts of caring, dutiful offspring or a helpful friend. Such actions could be desirable and not raise the same level of concern as an outsider undertaking the same actions, and a court could just as easily determine that the assistance provided to their parents is merely that of a dutiful child.

As such, subsequent court decisions have acknowledged that undue influence cannot be reduced to a checklist,[4] rather, the circumstances need to be evaluated, such as the testator's mental state or advanced age, an unnatural disposition or a disposition that deviates from prior estate plans, the testator's dependency on the beneficiary, and isolation of the testator from other friends or family.

ANTICIPATING AND MANAGING FUTURE CONTESTS

Estate plans executed by people with cognitive impairments are inherently more susceptible to post-mortem challenge, and if undue influence is established, that can render a legal instrument voidable. Florida even goes so far as to shift the burden - if undue influence is an issue, the proponent of the Will needs to prove that there was no undue influence.[5]

Accordingly, attorneys must approach such engagements with heightened diligence. This consists of asking further questions to determine that the vulnerable is acting of their free Will, and preparing contemporaneous notes in preparation of a challenge – the more detailed the better, as the attorney's notes may be the strongest defense.

The attorney should establish, to the extent possible, and document the following:

- *Independent Legal Counsel:* Ideally, clients should initiate contact and attend meetings without the presence of potential beneficiaries. How did the client find and select the attorney, who was present during any meetings, was the client able to travel to the attorney independently – or if meeting remotely, to what extent did anyone help establish the connection.
- *Show Independence:* Demonstrate that the testator made the decisions on their own initiative. In addition, further showing of the independence of the testator and control of the testator's daily life, including the ability to continue to manage their own affairs subsequent to requesting and executing their estate planning documents helps.

- *Assess and Demonstrate Capacity:* Ask clients to describe relationships, such as how they know their caregiver, elicit memories related to their beneficiaries, or the most recent times they were in contact with particular relatives. Have the client identify assets in detail, which could mean drawing a map of a tract of land that includes distinguishing features, describing artwork, or providing the back story to how or when an item was acquired.
- *Explicit Intent and Clear Understanding:* The law doesn't require a good reason, or any reason at all, for a testator's intent, but especially in cases of disinheritance or unusual distributions, the attorney should try to establish that the testator has clear reasons for their decisions, shows no ambiguity, and demonstrates a clear understanding of the effect of the estate plan.
- *Rejection of Influence or Questionable Assistance:* Note any instance in which the client rejects suggestions, assistance, or other requests, which can go a long way in showing that the beneficiary did not exert undue influence.
- *Dutiful Child / Faithful Friend:* To the extent that a beneficiary does help a client find or travel to the attorney, or the presence of other indicators of undue influence, the attorney's notes should provide details to help establish that the child is acting as a caring, dutiful offspring, or that the nonrelative is acting as a friend and not out of self-interest.
- *Involvement of Others:* While ultimately the distribution pattern and choice of fiduciaries is the client's decision, financial or testamentary changes that don't only benefit, directly or indirectly, the alleged influencer, or the appointment of separate and unrelated fiduciaries can indicate a lack of undue influence.
- *Transparent Communication:* An informed beneficiary is both less likely to challenge a Will, and less likely to succeed. Keeping other family members or friends informed of the planned distributions further protects against a charge of incompetence or undue influence.

THE ROLE—AND LIMITS—OF MEDICAL PROFESSIONALS IN CAPACITY DETERMINATIONS

Medical professionals play an important role in the estate planning process when cognitive impairment is suspected. However, attorneys must be cautious not to conflate medical diagnoses with legal determinations. While a physician's input can inform a capacity analysis, it is not dispositive. Legal capacity is a functional assessment tied to specific tasks and moments—not a diagnosis-driven conclusion.

Attorneys should collaborate with medical professionals selectively and strategically. When appropriate, counsel may request that a treating physician provide observations about the client's orientation, memory, and communication abilities. However, the ultimate responsibility for determining whether the client meets the relevant legal standard rests with the attorney.

In more complex cases, a formal capacity assessment by a neuropsychologist or geriatric psychiatrist familiar with legal contexts may be warranted.

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In practice, over-reliance on medical opinions can present several risks:

- *Misalignment of Standards:* Physicians are trained to assess cognitive function from a clinical or therapeutic standpoint, not a legal one. A diagnosis of "mild cognitive impairment" or even "early-stage Alzheimer's" does not automatically imply a lack of testamentary or contractual capacity. Conversely, a clean bill of cognitive health does not guarantee legal capacity in complex decision-making.
- *Lack of Legal Context:* Many medical professionals are unfamiliar with the specific legal thresholds relevant to wills, trusts, or powers of attorney. A doctor's note stating that a person is "competent" or "incompetent" may not align with the legal definitions required under state law, potentially misleading counsel or the court.
- *Ethical and Evidentiary Concerns:* In some cases, attorneys may request a physician's letter solely to "paper the file" without a true evaluation of legal standards. If that letter is later introduced in probate litigation, it may be subject to challenge—especially if the physician lacked direct engagement with the legal context of the planning.

Even then, the attorney must integrate the findings with their own direct observations of the client's understanding, decision-making, and autonomy.

THE USE OF VIDEO RECORDINGS: BENEFITS AND RISKS

Video recordings can be a powerful tool for documenting a client's intent and capacity, especially when cognitive impairment is a concern. When done properly, they provide compelling evidence of a client's understanding and voluntariness. However, they come with potential risks that must be carefully managed.

Benefits of Video Recordings.

Clear Evidence of Capacity: The client's ability to articulate their wishes on video can substantiate the assertion that they understood the nature and effect of their decisions.

Client's Own Words: Unlike secondhand testimony that may be subject to misinterpretation or manipulation, a video recording preserves the client's exact words and expressions, offering a firsthand account of their intentions.

Enhanced Clarity: Videos can counter claims of undue influence, fraud, or incapacity by showing the client affirming their wishes clearly and voluntarily.

Risks and Considerations.

Perceived Manipulation or Coercion: The presence of others—family, caregivers, or even attorneys—may suggest undue influence.

Perceived Manipulation or Coercion: The client's frailty or hesitation could create the impression that the client is not fully in control, and the mere presence of others, family, caregivers, or even attorneys, may suggest undue influence.

Technical Flaws: Poor video quality, lighting, sound, or technical malfunctions can undermine the clarity and impact of the recording, rendering it less useful as evidence,

False Sense of Security: While a video recording can be a helpful tool, it should not be the sole method of documenting a client's capacity or intent.

Privacy Concerns: Clients may feel uncomfortable being recorded, which could affect their demeanor. Consent must be informed, and recordings securely stored.

Best Practices for Using Video Recordings

To maximize the value of video recordings while minimizing the associated risks, attorneys should consider the following best practices:

- *Obtain Informed Consent:* Clearly explain the purpose, obtain written consent, and allow questions.
- *Use a Neutral Setting:* The Record in a quiet, distraction-free space with only the client and attorney present.
- *Ensure High Quality:* Use reliable equipment, with clear audio and video, and avoid interruptions – if the client needs a break, keep the camera rolling.
- *Supplement with Documentation:* The video recording should be part of a larger defensive file that includes notes, assessments, and other records.

GUARDIANSHIP, DURABLE POWERS OF ATTORNEY, AND HEALTH CARE PROXIES

For clients with cognitive impairments, estate planning often intersects with questions about who has legal authority to make decisions on the principal's behalf. Ideally, proactive planning through instruments like a *durable power of attorney* and a *health care proxy* can prevent the need for more intrusive court-appointed solutions like guardianship or conservatorship.

Durable Power of Attorney.

A durable power of attorney (DPOA) allows a person to appoint an agent to manage financial and legal affairs. The "durable" designation ensures that the authority remains in effect even after the principal loses capacity, and typically allows the agent to act as an owner would, but only in a fiduciary capacity on behalf of the principal.

However, certain estate planning actions, such as creating, amending, or revoking a Trust, making gifts, or changing beneficiary designations typically require explicit authority in the written instrument. Some attorneys have a tendency to always include such authority, but doing so without discussing the potential ramifications with the client may be a violation of the rules of professional conduct, as the attorney is substituting their judgment for that of the client, the client may not be comfortable granting nearly limitless power to their agent, and such authorization creates vulnerabilities that an unscrupulous agent could use to exploit the principal.

Health Care Proxy.

A health care proxy (or medical power of attorney)[6] allows an agent to make health care decisions for the principal if they become unable to do so. These decisions include consenting to or refusing treatment, choosing providers, and may include the authorization to make end-of-life decisions.

Living Will.

A Living Will allows a person to clearly state their wishes regarding life support, resuscitation, and other end-of-life treatment options. This can include the desire to cease treatment under certain conditions, or an insistence that treatment must be continued to the extent possible, and may include desires regarding organ donations. Note that many state laws differentiate between a Health Care Proxy and a Living Will.

Guardian or Conservator.

In some cases, clients with significant cognitive impairments may lack the legal capacity to manage their financial or personal affairs. If a client has not executed valid advance directives or if existing instruments are challenged or deemed insufficient, it may be necessary to petition the court for guardianship (or conservatorship) to obtain legal authority to act on the client's behalf.

The terms "guardian" and "conservator" are often used interchangeably but can have different meanings depending on jurisdiction. Generally, the difference depends on what the person is appointed to manage:

- *Guardian:* A guardian is appointed to manage personal affairs, such as medical decisions, living arrangements, and day-to-day care, when someone is deemed incapable of making those decisions themselves. Guardianship may be limited (for specific tasks) or plenary (for all decisions).
- *Conservator:* A conservator is typically appointed to manage financial matters, such as managing assets, paying bills, and overseeing investments. A Conservator may even be granted powers that could impact their estate plan.

Merely petitioning the court can be embarrassing for the client, and may result in significant costs, aggravation, or strained relationships, and should really be a matter of last resort.

CONCLUSION

Cognitive impairment is not synonymous with legal incapacity. Estate planning remains not only possible but critically important for clients experiencing cognitive decline. Attorneys must navigate this terrain with legal precision, ethical care, and proactive foresight. By adhering to elevated standards of documentation and client engagement, estate planning professionals can protect their clients' autonomy while preserving

the integrity—and enforceability—of their plans.

End Notes

[1] See Model Rules of Professional Conduct (ABA) Rule 1.14(a).

[2] See Model Rules of Professional Conduct (ABA) Rule 1.14(b).

[3] 253 So.2d 697 (Fla. 1971).

[4] See e.g. *Matter of Walther*, 6 NY2d 49 (N.Y.Ct. App. 1959) and *In re Olsson*, 344 SW2d 171 (Tex. Civ.App. 1961).

[5] Fla. Stat. Ann. § 736.0406. See also Cal. Prob. Code § 21380.

[6] Note: official terminology varies by state.