ETHICAL CONSIDERATIONS IN ELDER LAW PRACTICE

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CHAPTER 2
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IRC §501(c)(3): An Inadvertent Dampener on Efforts of American Churches to Fulfill Their Missions?, State Bar of Texas Religious Liberty CLE, Austin, TX, March 31-April 1, 2005
Elder Law Issues in Mediation, South Plains Association of Governments Seminar, Lubbock, TX, February 8, 2003.
The New IRC Section 1022: Headaches and Nightmares for Estate Planners, Midland Estate and Business Council, Midland, TX, June 12, 2002.

Other Presentations
The African-American Church and Political Activism, Universidad de Alcala de Henares, Siguenza, Spain, 2005.
Where There’s a Will, It Should be Done Right!, Texas Tech University Benefits for Champions, 2005.
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Caring for Aging Parents, Texas Tech Health Sciences Center Aging Seminar, 2004.

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# Ethical Considerations In Elder Law Practice

## Chapter 2

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Vaughn E. James*

THE SAGA OF AMY BROWNE

Attorney Elder is a solo practitioner in Lubbock, Texas. One afternoon, his receptionist buzzes him: “Attorney Elder,” she says, “there’s a Mrs. Amy Browne on the phone for you. She will not tell me what her call is about, but insists that she speaks to you.”

“Put her through,” Attorney Elder grunts.

“Hello,” he hears. “This is Amy Browne. Your secretary is so rude! Wants to push her nose in my business!”

“Hello,” he replies, “Can I help you?”

“Yes, this is Amy Browne. I need to see a lawyer about some matters.”

“And what matters could these be?”

“Well, I’m an old woman, and old people have issues. I need to see you. What do you charge?”

“My initial consultations are free, then if I accept you as a client, we talk about my fees.”

“That’s fine with me. Are you free on Wednesday at 2:30?”

“Yes, I am, but…."

“Fine, then; Wednesday at 2:30 it is. I got your address in the Yellow Pages. See you on Wednesday at 2:30.”

Before Attorney Elder can respond, Mrs. Browne hangs up.

Wednesday afternoon comes by. At 2:30, Attorney Elder’s receptionist buzzes through: “Attorney Elder, Mrs. Browne is here.”

“Thank you,” Attorney Elder responds.

Attorney Elder moves to the door, but just as he is about to open it the door knob turns and Mrs. Browne steps in, accompanied by a young man. “This is my nephew Randolph,” she states. “Randolph,” she says to the young man, “say hello to Attorney Elder.”

Randolph complies. “Now take a seat, boy,” Mrs. Browne says to Randolph, as she settles into the sofa Attorney Elder indicated to her.

Concerned about Randolph’s presence at the meeting, Attorney elder inquires as to his identity, his relationship to Mrs. Browne, and the reason or reasons for his being at the meeting. In response, Mrs. Browne confesses that she “forgets things.” She states that Randolph is her only living relative – her husband Mortimer having died two years ago. Randolph helps her manage the ranch. She has brought Randolph along to help her “remember things.”

Despite having some misgivings, Attorney Elder proceeds with the meeting. During the first fifteen minutes, he observes two trends: first, Mrs. Browne very quickly forgets the things he has just told her. Although she has an

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amazing memory concerning things she says happened several years ago, she is apparently having great difficulty remembering the things she and Attorney Elder just spoke about. Randolph has to constantly keep her on track.

Second, Mrs. Browne apparently cannot remember the attorney’s name! Although he told her he is Attorney Elder – and she referred to him as such when she introduced him to Randolph – she frequently calls him Benjamin Franklin, sometimes even shortening the name to “Ben” and “Benny.”

INTRODUCTION

The year 2006 is a very important one in American history. Why? Well, in 2006, the first of the baby-boomers, having attained the age of 60, will retire! Accordingly, for the next several years, the number of retirees in America will increase significantly. In fact, whether measured by an increase in percentage or in absolute numbers, more Americans in 2006 are age sixty-five or older than at any other time in our history. The U.S. Census Bureau reports that in the year 2000, over 35 million Americans were aged sixty-five or older, representing 12.4 percent of the American population. The Bureau’s projections maintain that by the year 2030, 70.3 million Americans – 20 percent of the population – will be sixty-five or older. This represents a significant increase over a 30-year period.

This growth in the elderly population has given rise to the rapid development of a relatively new legal specialty termed “Elder Law.” This specialty encompasses various other legal specialties and sub-specialties, including estate planning, property management, health care planning, and public benefits. Indeed, the practice of Elder Law typically goes beyond traditional legal issues and whether by rendering advice or referring the client to some other professional, attempts to address problems in securing health care, social services and other forms of assistance for the nation’s elderly population.

Accordingly, for the practitioner, representing an elderly client often requires recognizing situations the client has not appreciated as legal problems, among them appeals of eligibility


3 A definition of the term “elderly” is beyond the scope of this paper. However, the author concedes that chronological age merely measures the passage of time, and is not a true indicator of one’s status as being “elderly.” That said, for purposes of this paper, the author will adhere to the current definition of “elderly” as being someone aged 65 and over.

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An elderly person is accompanied by at least one child (or niece or grandchild), who has made the appointment and might provide much of the information the attorney receives about the client, the client’s property, and the proposed plan to sell the house or distribute corporate stock and securities in order to avoid long-term care costs or a costly probate. The elderly subject of the plan (and property owner) may say very little, apparently acquiescing to the arrangements proposed by the others, though the plan may leave that individual little control and few future options. The attorney might doubt that there is real agreement between the generations.5

Not only that, but the situation can become more complex when, following the office visit, the new client’s other adult children or family members contact the attorney by phone or in person to question or challenge some aspects – if not all – of the plan, or to question the involvement of the adult child or relative who accompanied the elderly client to the office.

This takes us back to The Saga of Amy Browne. With Randolph present in the room, Attorney Elder needs to identify the client. Is it Mrs. Browne, the elderly individual? Is it Randolph, the nephew? Or does Attorney Elder – if he accepts the representation – now jointly represent Mrs. Browne and Randolph? Of course, Attorney Elder can verify the identity of his client or clients by simply asking some pointed questions. He will need to determine Randolph’s precise role and the true reason for his presence at the office visit. In the final analysis, Attorney Elder’s client (or clients) will be the person or persons whose interests he will be serving.

The Professionalism and Ethics Committee of the National Academy of Elder Law Attorneys (“NAELA”) has published some Aspirational Standards for Elder Law attorneys as they grapple with this issue of client identification. These Standards call on the Elder Law attorney to:

1. Gather all information and take all steps necessary to identify who the client is at the earliest possible stage and communicate that information to the persons immediately involved.

2. Meet with the identified prospective or actual client in private at the earliest possible stage so that the client’s capacity and voice can be engaged unencumbered. If the attorney determines that it is clearly not in the best interest of the elder client for the attorney to meet privately with the client, the attorney should take other steps to ensure that the client’s wishes are identified and respected.

3. Utilize an engagement agreement, letter or other writing(s) that:
   (a) identifies the client(s);
   (b) describes the scope and objectives of the representation;
   (c) discloses any relevant foreseeable conflicts among the clients;
   (d) explains the attorney’s obligation of confidentiality and confirms that the attorney will share information and confidences among the joint clients;
   (e) sets out the fee arrangements (i.e., hourly, flat fee, or contingent); and
   (f) explains when and how the attorney-client relationship may end.

4. Oversee the execution of documents that directly affect the interests of an individual only after establishing an attorney-client relationship with the individual.6

In keeping with the provisions of the Aspirational Standards, Attorney Elder in The Saga of Amy Browne can decide to represent either Mrs. Browne only, Randolph only, or Mrs. Browne and Randolph jointly. If he chooses to represent only Mrs. Browne, he must explain to Randolph – and any other interested family members – that Mrs. Browne – and Mrs. Browne only – is his client, and that his representation of her will impose limitations on his interactions with them, especially as that pertains to the confidentiality of the attorney-client relationship.7

II. MULTIPLE-PARTY REPRESENTATION

If Attorney Elder, after carefully questioning Mrs. Browne and Randolph, determines that he should represent them jointly, he will be entering the realm of multiple-party representation and the potential conflicts of interests it poses. Addressing this issue, the Texas Disciplinary Rules of Professional Conduct (“the Rules”) state:

(a) A lawyer shall not represent opposing parties to the same litigation.

(b) In other situations and except to the extent permitted by paragraph (c), a lawyer shall not

5 Id. at 52.

6 Professionalism and Ethics Committee of the National Academy of Elder Law Attorneys, NAELA Aspirational Standards, 1 NAELA J. 197, 212 (2005).

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represent a person if the representation of that person:

(1) involves a substantially related matter in which that person’s interests are materially and directly adverse to the interests of another client of the lawyer or the lawyer’s firm; or

(2) reasonably appears to be or become adversely limited by the lawyer’s or law firm’s responsibilities to another client or to a third person or by the lawyer or lawyer’s firm’s own interests.

c) A lawyer may represent a client in the circumstances described in (b) if:

(1) the lawyer reasonably believes the representation of each client will not be materially affected; and

(2) each affected or potentially affected client consents to such representation after full disclosure of the existence, nature, implications, and possible adverse consequences of the common representation and the advantages involved, if any.8

Because the representation of an elderly client in the contexts discussed in this paper will seldom involve litigation, the paper will here focus on Rule 1.06 subsections (b) and (c). These subsections do allow attorneys to engage in multiple-party representation in non-litigation situations. However, the attorney must early on determine whether the multiple-party representation would lead to any conflict of interest. In some instances, this would be easy to determine. For example, if Mrs. Browne and Randolph owned a joint bank account and they had agreed in writing several years ago that, upon Mrs. Browne’s death, the funds in the account would go to the Texico Conference of Seventh-day Adventists, no conflict of interest would exist and Attorney Elder could, pursuant to the Rules, engage in this multiple-party representation. If, on the other hand, in the absence of any written agreement, Mrs. Browne insists that the funds were to go to the Texico Conference, but Randolph insists that they had agreed that he should receive the funds, Attorney Elder is faced with an obvious conflict of interest and would be well-advised to not accept the multiple-party representation or to withdraw if he had already begun the representation.

Between these two clear-cut extremes, however, lies a vast field of gray where the attorney will have to make his own assessment and thus determine whether he should represent the various clients. The Rules provide no guidance in this area. However, the comments list the following relevant factors:

- The duration and intimacy of the attorney’s relationship with the client or clients involved;
- The functions being performed by the attorney;
- The likelihood that actual conflict will arise; and
- The likely prejudice to the client from the conflict if it does arise.9

In the final analysis, though, the decision is the attorney’s; if he or she reasonably believes that no conflict exists, the multiple party representation would not be violative of the Rules.10 Moreover, even if the attorney believes a conflict of interest exists between the various parties, she may represent them so long as she discloses to them the potential for a conflict and they all consent to the representation.11 This author cautions, however, that although the Rules do not require it, the attorney should obtain the parties’ written consent to the multiple-party representation.

In addressing this issue of multiple-party representation and the potential conflicts of interests it raises, the NAELA Aspirational Standards acknowledge that Elder Law attorneys are frequently approached by families seeking legal counsel or representation on behalf of one or more persons. If the attorney can discern no apparent conflict of interest, she may well choose joint representation of the family members if that would further shared goals, family harmony, common interests, economic efficiency, consistency of action, and an enhanced likelihood of the attorney serving the best interests of the client. However, because the potential for conflicts always exists whenever an attorney represents two or more persons, the Standards urge the Elder Law attorney to:

1. Ensure that the family members understand who are the clients and whether the representation is Joint (i.e., confidences are shared) or Separate.
2. Undertake joint representation, as permitted by the state rules of professional conduct, only after obtaining the consent of the parties after having reviewed with them the advantages and disadvantages of such representation – including the relevant foreseeable conflicts of interests and risks of such representation – in a manner that will be best understood by each person represented.

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8 Tex. Disciplinary R. Prof. Conduct § 1.06.
11 See In re Allen, Not Reported in S.W.3d, 2003 WL 21299981 (Tex. App.—Houston (1 Dist.)).
3. Treat family members who are not clients as unrepresented persons but accord them involvement in the client’s representation so long as it is consistent with the client’s wishes and values, and the client consents to the involvement.

4. Accept payment of client fees by a third party only after determining that payment by the third party will not influence the attorney’s independent professional judgment on behalf of the client, inform the client who consents to the payment by a third party, and ensure that the parties understand and agree to the ethical ground rules for third party payment (i.e., non-interference by the payer, independence of judgment by the attorney on behalf of the client, and confidentiality).

5. Serve – at the attorney’s option – as a fiduciary for the client, if it is in the client’s best interest and if the client gives informed consent after full disclosure.

6. In representing a client who is a fiduciary under a power of attorney, trust, or conservatorship/guardianship, ensure that the client understands that the duties of both the fiduciary and the attorney ultimately are governed by the known wishes and best interest of the principal.12

III. CONFIDENTIALITY AND WITHDRAWAL

By accepting the multiple party representation, the attorney is opening herself to another ethical consideration – confidentiality and withdrawal. Indeed, these are among the most difficult issues facing Elder Law practitioners, particularly where the joint or multiple party representation involves spouses.

A. Confidentiality

Whether an Elder Law practitioner is representing two elderly spouses or an elderly individual and a relative or friend, the attorney must be concerned with the issue of confidentiality. The attorney is obligated to respect the confidentiality of any information garnered from either of these clients. The Rules clarify the type of information covered, explaining that confidential “information includes both privileged information and unprivileged client information.”13

While privileged information refers to the client’s information protected by the lawyer-client privilege, “[u]nprivileged client information means all information relating to a client or furnished by the client, other than privileged information, acquired by the lawyer during the course of or by reason of the representation of the client.”14

Pursuant to this broad rule, the attorney is obligated to maintain the confidentiality of any information she acquires during the course of the representation. In The Saga of Amy Browne, therefore, if, while Mrs. Browne takes a rest room break, Randolph reveals to Attorney Elder that he is assisting his aunt only so that he will obtain a large inheritance in her will, Attorney Elder has a problem – a huge one! Under the confidentiality rules, he must reveal this information to Mrs. Browne; yet, under these same rules, he must maintain the confidentiality of the information he has received from Randolph!

While it is true that the Rules allow an attorney to reveal confidential information if the client consents after consultation,15 it is very unlikely in our hypothetical that Randolph would consent to the disclosure of the information he shared with Attorney Elder. Attorney Elder would be well-advised to withdraw from the representation.

Of course, Attorney Elder could have avoided this outcome by practicing the NAELA Aspirational Standards on the matter:

1. Carefully explain the obligation of confidentiality to the client and involved parties as early as possible in the representation to avoid misunderstanding, and to ascertain and respect the client’s wishes regarding the disclosure of confidential information.

2. Establish as a prerequisite to any joint representation a clear understanding and agreement that the attorney shall keep no client secrets from any other client in that joint representation.

3. Strictly adhere to the obligation of client confidentiality, especially in representation that may involve frequent contacts with family members, care takers, or other involved parties who are not clients.16

B. Withdrawal

If an attorney determines that his further representation of a client would cause him to violate one or more of the Rules, he should consider withdrawing. The Rules provide for both mandatory and optional withdrawal. As pertinent here, the attorney must withdraw if she knows that her continued representation will result in a violation of another

12 Professionalism and Ethics Committee of the National Academy of Elder Law Attorneys, supra note 6, at 213.

13 Tex. Disciplinary R. Prof. Conduct § 1.05(a).

14 Id.

15 Tex. Disciplinary R. Prof. Conduct § 1.05(c)(2).

16 Professionalism and Ethics Committee of the National Academy of Elder Law Attorneys, supra note 6, at 214.
ethical rule—such as the requirements of confidentiality.17 Notwithstanding the attorney’s withdrawal, however, he or she must take reasonable steps to mitigate the consequences of such withdrawal to the client.18

As regards optional withdrawal, the Rules permit the attorney to withdraw if:

- The client persists in a course of action that the attorney reasonably believes is criminal or fraudulent. The comment points out that even in these cases, the attorney is not required to withdraw until he or she knows the conduct will be illegal or in violation of the Rules, at which time the attorney is mandated by paragraph (a)(1) to withdraw.
- The client has used the attorney’s services to perpetrate a crime or fraud.
- The client insists on pursuing a repugnant or imprudent objective or one with which the attorney has fundamental disagreement.
- The client refuses, after being duly warned, to abide by the terms of the agreement relating to the representation, such as an agreement concerning fees or court costs or an agreement limiting the objectives of the agreement.
- The representation will result in an unreasonable financial burden on the attorney.
- Other good cause for withdrawal exists.19

Few of these circumstances would be germane to multiple representation in the Elder Law context. Suffice it to say, however, that an attorney who initially fails to discern a conflict of interest in a multiple party representation setting should consider Rule 1.15(a)(1) and (b) on withdrawal when a conflict becomes apparent and the attorney would either have to reveal confidences entrusted to her or labor on knowing that a conflict of interest exists.

C. Spousal Representation

Elder Law practitioners often have to counsel spouses. In fact, spouses often seek counsel from the same attorney, with both spouses being present at the initial office visit. These demands for joint spousal representation can pose problems relating to confidentiality and conflicts of interests which would eventually lead to the attorney having to withdraw from the representation. Yet, while the Rules cover the issues of confidentiality, conflicts of interests and withdrawal in the general sense and setting, neither the Rules themselves nor any currently existing ethics or court opinions directly address these issues in the context of spousal representation. Two writers have described the issue in this way:

There is little in either ethics opinions or case law speaking directly to husband-wife joint representation, but similar conflicts between business partners have been more fully considered. The leading ethics opinion on the disclosure of confidences among partners is itself divided. The majority opted for protecting one partner’s confidence and withdrawing from the representation, despite the nature of the disclosure and its potential for significant harm to the other partner. The minority made the opposite choice, viewing the lawyer’s loyalty to the nondisclosing partner (and consequent duty to inform) as higher than any duty of confidentiality that the disclosing partner may have had the right to expect. Other ethics opinions tend to follow the majority, nondisclosure scenario, but the minority view has found a few followers.

In the absence of a clear rule, a balancing test has been suggested: L should weigh the known harm from nondisclosure (at least a partial defeat of H’s testamentary intentions) against the uncertain harm flowing from disclosure—at the extreme, a possible marital rupture or divorce. The balancing test may be useful in situations where L knows his clients fairly well and may be able to gauge the possibility of marital rupture rather precisely. Here, however, L does not have any longstanding relationship with either H or W. Should L decide against disclosure, when deciding to withdraw L will also need to consider whether his inability to serve H loyally outweighs the possibility of disclosure inherent in an unexplained withdrawal.20

This balancing test may indeed work well for joint spousal representation. In the absence of any clear-cut guidance from the Rules, however, each attorney is left to chart his or her own course.

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17 Tex. Disciplinary R. Prof. Conduct § 1.15(a).
18 Tex. Disciplinary R. Prof. Conduct § 1.15, cmt. 9.
19 Tex. Disciplinary R. Prof. Conduct § 1.15(a) and cmt. 7.
IV. CLIENT COMPETENCY AND CAPACITY

As people age, they begin to have memory problems. Some lose their short-term memory; others lose their long-term memory; still others suffer from Alzheimer’s disease and other forms of dementia. These tendencies bring into focus the issues of client competency and client capacity.

A. Legal Capacity and Legal Competency – Definitions

In everyday practice, the term capacity is usually used interchangeably with competence or competency. In actuality, the two terms are not completely synonymous. Black’s Law Dictionary defines capacity as “A legal qualification ... that determines one’s ability to sue or be sued, to enter into a binding contract, and the like.” Black’s illustrates this definition by explaining that, for example, testamentary capacity is “[t]he mental ability a person must have to prepare a valid will.” On the other hand, Black’s defines competency as “The mental ability to understand problems and make decisions.”

As these definitions indicate, capacity refers to an individual’s ability to perform a particular task. Hence, one may possess the requisite testamentary capacity to execute a will, the requisite contractual capacity to enter into a contract, or the capacity necessary to execute a durable power of attorney. For either of several reasons – or even a combination of these reasons – an individual may lack the requisite capacity for performing either of those tasks. One of these reasons is impaired memory.

Competency, on the other hand, is a broader concept. An individual is either legally competent or he is not. This incompetence may be due to one or more of several reasons: insanity, an individual’s existence in a coma or vegetative state, or his or her impaired memory, particularly if he is stricken with Alzheimer’s disease or some other form of dementia.

In Texas, both terms appear – and are used interchangeably – in both statutory and case law. This paper will maintain the distinction between the terms and will use capacity to refer to the individual’s ability to perform specific tasks or functions, while reserving competency or competence to refer to the individual’s general mental condition.

B. The Memory-Impaired Client, Legal Incapacity and the Consequences Thereof

For the memory-impaired elderly person, the question of legal capacity arises when he wishes – or is made to wish – to execute certain documents or to enter into certain transactions. Indeed, anyone wishing to enter into transactions such as conveying property, executing a will, giving informed consent to medical care, entering into a contract, executing advanced directives, or creating a durable power of attorney must first possess the requisite legal capacity for each transaction. For each of these transactions, the law has established a threshold level of mental or legal capacity required by an individual before he enters into the transaction. For example, the capacity required for entering into a legally binding contract is not the same as the capacity required for executing a will.

While in some circumstances the requisite capacity may simply be a matter of whether the individual has reached a certain requisite age, for transactions entered into by an elderly individual suffering from memory impairment, these requisites typically implicate some form of mental capacity. This subsection will discuss the requisite mental capacity for two types of transactions likely to be entered into by elderly clients: (1) entering into a legally binding contract, and (2) executing a durable power of attorney.

1. Capacity to Contract

For the Elder Law attorney, the question of client capacity to contract is a very important one. After all, if the client lacks contractual capacity, he or she will not be able to consent to the representation. Thus, it is important that the attorney determine whether his potential client has the legal capacity to enter into a contract.

As an initial matter, for a contract to be valid, one party thereto must be capable of contracting and the other must be capable of being contracted with. In short, a contract is valid and legally binding only if all parties thereto possessed the requisite legal and mental capacity at the time the contract was consummated.

Now, a person may not be bound by a contract if he does not have the legal capacity to incur at least contractual duties. Generally, a person lacks full capacity to incur contractual duties — and thus enter into a valid, legally binding contract — if that person is:

(1) under guardianship;
(2) an infant;
(3) mentally ill or defective; or
(4) intoxicated.

In adding its voice to the question of contractual capacity, an Illinois court has stated that capacity to contract requires that a person entering into a contract

21 Black’s Law Dictionary 199 (7th ed. 1999)
22 Id.
23 Id. at 278.
24 Restatement (Second) Contracts § 12(1).
25 Restatement (Second) Contracts § 12(2).
should possess sufficient mental ability to appreciate the effect of what he is doing. At least two other courts have held that contractual capacity requires that the contracting party understand in a reasonable manner the nature and consequence of his or her transactions.

Both the case law and the Restatement hold great significance for memory-impaired clients. No one would deny that a Stage II or III Alzheimer’s patient, for example, most likely lacks the capacity to enter into a valid, legally binding contract. Indeed, courts have held that where a contracting party suffers from a disability – like Alzheimer’s disease or some other memory impairment -- that would preclude him or her from exchanging promises that would give rise to an enforceable agreement, the contract is, though not automatically void, voidable by the diseased or at the election of someone authorized to act on his or her behalf.

When the client is suffering from Alzheimer’s disease, the ethical problems are multiplied. After all, the nature of the mental defect caused by the disease is such that while the patient may lack legal capacity at one particular moment in time, he or she may well possess the requisite capacity at some other point. This poses a problem for both the Alzheimer’s patient and the ones with whom he may seek to contract. As regards the patient, the general rule is that if a person possesses legal capacity at the time of entering into a contract, his later incapacity generally does not affect the validity of the contract. Hence, an Alzheimer’s patient who, during a period of lucidity enters into a contract, would appear bound by the terms thereof.

As regards the other party to the contract, the Restatement provides that where the contract is made on fair terms and the other party is unaware of the patient’s condition, the patient will not be able to easily void the contract. Rather, where the performing party has performed in whole or in part or the circumstances have so changed that contract avoidance would be unfair, a court would be authorized to grant relief as justice required.

It is safe to conclude, then, that memory-impaired persons do not always possess the requisite capacity to enter into valid, legally binding contracts. Moreover, in the case of a person suffering from Alzheimer’s disease, the nature of the disease makes it difficult – if not impossible – for an onlooker to know whether the person possesses capacity at any particular moment in time. This being the case, attorneys should tread cautiously when they suspect a client or potential client has some form of memory impairment. After all, the retainer agreement, as a contract, is at least voidable if, at the time he signed it, the client lacked the capacity to contract.

2. Executing a Durable Power of Attorney

A durable power of attorney is a written instrument that grants someone – an agent or “attorney in fact” – the power to act on behalf of another – the “principal.” Under Texas law, all acts done by the agent pursuant to this durable power of attorney during any period wherein the principal is incapacitated “have the same effect and inure to the benefit of and bind the principal and the principal’s successors in interest as if the principal were not disabled or incapacitated.”

The durable power of attorney remains in effect even if the principal becomes disabled. In fact, it remains in effect until the principal dies, regardless of his state of health, unless he revokes it.

Texas law provides for two types of durable powers of attorney. The first type becomes affective from the moment it is signed and turned over to the agent. The second type, called a “springing power of attorney,” becomes effective upon the principal’s disability or incapacity. In either case, during the duration of the power of attorney, a second party will be authorized to make financial decisions for and on behalf of the principal.

As to the creation of the power itself, the statute requires few formalities. Essentially, the principal must (1) write out his instructions, including naming the agent, (2) sign the instrument, (3) date it, and (4) have it notarized. The written instructions should indicate the principal’s intent that the authority conferred on the agent should be exercised notwithstanding the principal’s subsequent disability or incompetency. The statute makes no requirement that the document should be witnessed.

The statute also makes no mention of the requisite legal capacity for creating a durable power of attorney. Hence, should Mrs. Browne in our hypothetical create a durable power of attorney naming Randolph as her

27 In re Ellis, 822 S.W.2d 602 (Tenn. App. 1991); In re Estate of Erickson, 608 N.W.2d 181 (Minn. App. 1993).
30 Restatement (Second) Contracts, § 15.
31 Id.
33 Texas Probate Code § 482(3) (Vernon 2004).
34 Id. Note that the statute here uses the term “incapacity” in the sense that this paper use the term “incompetency.”
35 See generally Texas Probate Code § 482 (Vernon 2004).
agent to make all financial decisions on her behalf, the statute gives no guidance as to whether the power is valid if, at the time she signed it, Mrs. Browne was not lucid.

However, because a durable power of attorney creates an agency relationship, it stands to reason that, as the Tennessee Court of Appeals has stated, “The mental capacity required to execute a general durable power of attorney, revocable living trust and warranty deed are essentially the same and equate to the mental capacity to enter into a contract.” Accordingly, the discussion in subsection (1) pertaining to capacity to contract applies to capacity to execute a durable power of attorney.

Regardless of the document being executed or the transaction being conducted, the issue of legal capacity has serious implications for the elderly memory-impaired person. For those stricken by Alzheimer’s disease, in particular, this author notes that Alzheimer’s patients typically possess functional abilities that are not characterized appropriately by unambiguous, discrete, either-or categories. Further, while many Alzheimer’s patients retain decisional capacity at the onset of their illness, they tend to lose such capacity after several years of being afflicted with the disease. In between those two points, they might have decisional capacity in some respects, yet lack it in others. Moreover, Alzheimer’s patients vary in mental capacity as the day wears on. While they are typically alert and lucid during the mornings, they are the exact opposite in the evenings. Hence, while a patient may possess legal capacity during the morning, she may not possess such capacity later in the day.

With all this in mind, then, the attorney providing services to a memory-impaired person must tread carefully in having the client execute documents or enter into transactions. After all, should the client lack capacity at the time of document execution, the instrument may well be invalid or voidable and the transaction be of no consequence.

C. Legal Competency (or Lack Thereof) and Its Consequences

While an individual’s lack of capacity to perform certain functions or to execute certain documents will affect only that particular function or document, a determination that he lacks legal competency has far-reaching effects. As an initial matter, only a court can determine that an individual is legally incompetent. Once the court has made this determination, the adjudicated incompetent loses more rights than the typical prisoner. After all, while the prisoner enjoys a presumption of innocence and the state has the heavy burden of proving the individual’s guilt beyond a reasonable doubt, an adjudicated incompetent has his rights virtually stripped away and he is put under the care of a court-appointed guardian. This guardian will then make each and every decision for the incompetent individual. If the adjudicated incompetent individual wants to contest the appointment of the guardian, he will have to retain the services of an attorney and submit to the adversarial process practiced in American courts.

Understandably, therefore, a judicial determination that an individual is legally incompetent would not be welcome news to that person. Someone who is still lucid may well wish to challenge such a determination. This has serious implications for the Elder Law attorney. After all, it is the attorney who first makes a determination that the client or prospective client is incompetent. But just how does the attorney make this determination? The following subsection of this paper will attempt to provide an answer.

1. Determining Legal Competency

No standardized procedure exists for determining legal competency. The President’s Commission for the Study of Ethical Problems in Medicine and Biomedical and Behavioral Research has proposed the following standard:

Decision-making capacity requires, to a greater or lesser degree:

1. possession of a set of values and goals;
2. the ability to communicate and to understand information; and
3. the ability to reason and to deliberate about one’s choice.

The decision maker must, in addition, have an emotional state consistent with the task.

To help attorneys and others faced with this problem, one medical practitioner has advocated the use of the “mental status examination,” whereby a physician would look for abnormalities in the individual’s motor behavior, listen for disruptions in the coherence of speech, and ask specific questions designed to reveal disturbances in mood, belief (i.e., delusions) perception

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36 Conservatorship of Davenport, 2005 WL 2533299 (Tenn.Ct.App.).

(hallucinations and/or illusions), and cognition.\textsuperscript{38} Another medical practitioner has disagreed, calling instead for observations and knowledge of the client’s personality – and changes thereto – as the core element of any competency assessment.\textsuperscript{39}

Regardless of which method the attorney chooses to adopt to assess the client’s competency, NAELA advises attorneys representing clients with diminished capacity/competency to:

1. Respect the client’s autonomy and right to confidentiality even with the onset of diminished competency.
2. Develop and utilize appropriate skills and processes for making and documenting preliminary assessments of client capacity and/or competency to undertake specific legal matters at hand.
3. Adapt the interview environment, timing of meetings, communications and decision-making processes to maximize the client’s capacities.
4. Take appropriate measures to protect the client when the attorney reasonably believes that the client: (1) has diminished competency, (2) is at risk of substantial physical, financial or other harm unless action is taken, and (3) cannot adequately act in the client’s own interest.
5. When taking appropriate measures to protect the client:
   (a) be guided by the wishes and values of the client and the client’s best interests;
   (b) respect the client’s family and social connections;
   (c) consider a range of actions other than court proceedings and adult protective services;
6. Disclose client confidences only when essential to taking protective action and to the extent necessary to accomplish the intended protective action.
7. Recommend guardianship or conservatorship only when all possible alternatives will not work.\textsuperscript{40}

V. CONCLUSION

The specialty of Elder Law is still a developing one. Accordingly, little case law exists to guide Elder Law practitioners as they represent and counsel their clients. Yet, because of the vulnerability of the clients they serve, Elder Law attorneys must be ever vigilant to perform their duties with the highest ethical standards. If these practitioners can succeed in this task, the Elder Law specialty – and the entire legal profession – will reap the benefits.


\textsuperscript{39} Steve Fox, \textit{Is It Personal Autonomy or a Personality Disorder?}, 3 Elder’s Advisor, 63-65 (Summer 2001).

\textsuperscript{40} Professionalism and Ethics Committee of the National Academy of Elder Law Attorneys, \textit{supra} note 6, at 214. Like Texas courts and statutes, NAELA uses “capacity” and “competency” interchangeably. To maintain this paper’s use of the terms separately, the author has sometimes changed the word “capacity” to “competency” in the passage here paraphrased, and has sometimes added the word “competence” when it was not found in the original passage.