

# Diminished Capacity: Potential Clients & Existing Clients

## Presented by:

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1

## Introduction

- Unique Nature of Elder Law
- Sheer Volume
- Competing Goals

*“As humans in a free society,  
we have competing goals  
of autonomy and protection.”*

Debbie Pearson, Recognizing Incapacity in Your Client and Planning for Impaired Judgement

2

# Crisis Situations

- Duty to Act
- Take Reasonable Action (Rule 1.02 (g) TDRPC)
- Lawyers & Guardianship (In Re Thetford 62 Tex. Sup. Ct. J. 1126 (2019))
- Information Letter to Probate Court (TX Estates Code 1102.003)
- Report Abuse (Section 48.052 TX HR Code)

*“...a lawyer should take reasonable action to secure the appointment of a guardian or other legal representative...”*

TDRPC Rule 1.02 (g)

# Capacity in General

- Defined by the Texas Estates Code (1002.017 (2))
- Testamentary Capacity established in Bracewell v Bracewell (20 S.W.3d 14 (Houston [14<sup>th</sup> Dist.], 2000))

*Legal Capacity is the “ability to provide food, clothing and shelter for oneself; to care for one’s own physical health, and manage one’s own financial affairs.”*

Texas Estates Code 1002.017(2)

# Capacity to Contract

*To form a binding contract,  
a meeting of the minds  
on the essential terms of the contract  
is required.*

(KW Const. v. Stephens & Sons Concrete Contractors, Inc.,  
165 S.W. 3d 874 (Tex. App-Texarkana 2005, pet. Denied))

# Capacity to Contract

- Meeting of the Minds
- Understand the Nature and Consequences of the Act
- Establishment of Attorney-Client Relationship
- “Person Under a Disability”

*“The usual attorney-client relationship is established and  
maintained by consenting adults who possess legal  
capacity to agree to the relationship.”*

Comment 12 to Rule 1.02(g) TDRPR

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24<sup>th</sup> Annual Estate Planning, Guardianship and Elder Law Conference session  
"When Your Client May Have Diminished Capacity"