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# Diminished Capacity: Potential Clients & Existing Clients

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## I. Introduction

Elder Law poses a challenge to practitioners. It is not unique to Elder Law practitioners, but on the other hand it is a persistent issue. Specifically, we have clients, or would-be clients that may or do suffer from diminished capacity. The purpose of this presentation is to discuss that issue in more depth. More particularly, it is intended to discuss first the ethical issues associated with the fact that the client may or does have diminished capacity. Second, the paper looks at the practical implications of that fact on various facets of the representation and the impact of this issue on common planning techniques.

## II. Crisis Cases

### A. Focus of Presentation

It is not often the case that elder law attorneys end up in a situation where they are faced with someone who has no one to help them and clearly is completely incapacitated. That is, the attorney can see that this is the case, even without relying on medical opinions. So, that is not the primary focus of this paper. However, the author would be remiss if we didn't at least touch on the attorney's responsibilities, in those rare instances.

### B. Lawyer Takes Action

The TDRPC offers guidance. Rule 1.02(g) provides that "a lawyer should take reasonable action to secure the appointment of a guardian or other legal representative for, or seek other protective orders, with respect to, a client whenever the lawyer reasonably believes that the client lacks legal competence and that such action should be taken to protect the client."

### C. Texas Estates Code Sec. 1102.003 Information Letter

One way for the attorney to fulfill that reporting obligation is to write a letter to the local court with Probate jurisdiction informing the court of the person in need of Guardianship. The necessary content of that letter is set forth in the Texas Estates Code Sec. 1102.003. (see Exhibit A)

### D. Report Abuse

The Texas Human Resource Code also plays a part in these issues. Section 48.02 of the Code, defines abuse of the elderly. Section 48.051 of the Code provides for an affirmative duty to report such abuse to the Texas Department of Human Resources. Further, Section 48.052 of the Code puts teeth in the reporting requirement. Failure to make the report is a Class A misdemeanor.

As mentioned, since it is rare that such crisis cases will walk in our doors, as elder law attorneys, that is not the focus of the remainder of the paper.

## III. Capacity

### A. Estates Code Definition of Capacity

There are obviously different definitions of capacity, or the lack thereof, for different contexts. Texas Estates Code 1002.017(2) defines legal capacity (in a roundabout way – it actually defines "incapacitated person") as the "ability to provide food, clothing and shelter for oneself; care for one's own physical health" and "manage one's own financial affairs." Thus, if someone lacks the abilities set forth in the statute, they would lack capacity. That last one will be of importance as we discuss the capacity to contract below.

B. Testamentary Capacity

Though this presentation is not necessarily about the capacity to sign a Will, testamentary capacity certainly is an important issue in elder law. In Bracewell v. Bracewell, 20 S.W.3d 14 (Houston [14th Dist.], 2000), the Court defined testamentary capacity as "the ability, at the time of making a Will, to: understand a Will is being made; understand the effect of making the Will; understand the nature and extent of the maker's property; know the maker's heirs and objects of their bounty; and recall and assimilate the preceding concepts and understand their relationship to each other enough to make a reasonable judgement as to each."

## IV. Contract

A. Meeting of the Minds

The capacity to contract is of particular important in the beginning of the legal relationship. We all like to get paid for our legal services. But, before that can happen, we need someone who can contract with us for those services. As all first year law students know, a contract is a meeting of the minds. If one of the minds cannot meet, that is an issue. Texas law agrees. KW Const. v. Stephens & Sons Concrete Contractors, Inc., 165 S.W.3d 874 (Tex. App- Texarkana 2005, pet. denied) stands for the proposition that to form a binding contract, a meeting of the minds on the essential terms of the contract is required.

B. Understanding Nature and Consequences

To have mental capacity to enter a contract in Texas, a person must have "appreciated the effect of what she was doing and understand the nature and consequences of her acts and the business she was transacting." Mandel & Wright v. Thomas, 441 S.W. 2d 841, 845 (Tex. 1969). Yes, I agree, that doesn't really create a bright line test, does it?

C. Is Attorney Engagement Possible

So what do you do if you suspect that capacity is an issue? For example, a couple comes to you and says they need your help with planning for long term care, but the husband has just been diagnosed with some form of dementia.

Rule 1.02 of the Texas Disciplinary Rules of Professional Conduct is not exactly explicit about entering into an engagement agreement with someone with diminished capacity. Rule 1.02(g) merely states that "a lawyer shall take reasonable action to secure the appointment of a guardian or other legal representative for, or seek other protective orders with respect to, a client whenever the lawyer reasonably believes the client lacks legal competence and that such action should be taken to protect the client.

However, comment 12. Is more explicit. It states that "paragraph (a) assumes that the lawyer is legally authorized to represent the client. The usual attorney-client relationship is established and maintained by consenting adults who possess the legal capacity to agree to the relationship. Sometimes the relationship can be established only be a legally effective appointment of the lawyer to represent a person. Unless the lawyer is legally authorized to act for a person under a disability, an attorney-client relationship does not exist for the purpose of this rule."

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