THE ETHICS OF CAPACITY

What lawyers need to understand when dealing with mental health issues.

BY MICHAEL H. WALD

In the next 15 years, the number of Americans over age 65 with Alzheimer's disease is expected to increase from around 5 million to nearly 8 million. And Alzheimer's is only one of many forms of dementia. As the population ages, attorneys need to be equipped to assess capacity issues.

Texas courts have not settled on a single, authoritative definition of "capacity." The assessment is a fact-dependent one[1] that even mental health professionals have difficulty making and about which they frequently disagree.

CONTRACTS, FINANCIAL TRANSACTIONS, AND WILLS

Persons may bind themselves to contractual duties if they: 1) appreciate the effect of their acts; 2) understand the nature and consequences of their acts; and 3) understand the business they are transacting.[2]

In determining legal capacity in the area of contracts, courts refer to the individual's "mental capacity." A more complicated transaction requires a higher degree of mental capacity, so someone who cannot understand a highly complex transaction may still have the requisite capacity to engage in simpler contracts.[3] The courts have said that we can look to certain *circumstantial* evidence to assess mental capacity to contract, to wit, including a person's outward conduct, manifesting an inward and causing condition; any pre-existing external circumstances tending to produce a special mental condition; and the prior or subsequent existence of a mental condition from which a person's mental capacity (or incapacity) at the time in question may be inferred.[4]

Case law doesn't seem to rigorously apply these factors, however. For instance, in a 2008 bankruptcy court decision[5] involving a man who was an alcoholic, had a brain injury, and did not faithfully take medication for his mood disorder, the court looked to his medical records around the time he entered into the contract. It determined that he was not incapacitated as he had not been abusing alcohol or failing to take his medication. This case is typical of the loose way courts apply these factors.[6]

Testamentary Capacity. In order to sign a will, testators need to be of "sound mind,"[7] meaning that they understand the will and the effect of making a will; know the general nature and extent of their property, the person or persons to whom they wish to give their property, and the person or persons dependent upon them for support; and collect all the above information and hold it long enough to perceive the obvious relationship of one to each other and to be able to form a reasonable judgment.[8] The proponent of a will bears the burden to prove the testator's capacity.[9]

Testamentary capacity is a lower standard than contractual capacity.[10] As in other states, Texas law does not require testators to be capable of managing all of their affairs or daily business transactions. A testator may lack capacity immediately before and immediately after signing a will, but not at the time of execution[11]—referred to as a "lucid interval."[12] The capacity of a testator can also be negated by a showing of an "insane delusion"—an irrational perception of particular persons or events—if the delusion materially affects the will.[13] Testators must "know" and "understand" facts, and their knowledge or understanding must be based on reality if material to the disposition.

Donative Capacity. While no reported Texas case exists about donative capacity, other jurisdictions have articulated the requirements as understanding the nature and purpose of the gift, the nature and extent of the property given, the natural objects of the donor's bounty, and the effect of the gift. Sometimes the donor must also know that the gift is irrevocable and that it reduces the donor's assets or estate.[14] Donative capacity seems, then, to require a *higher* degree of cognition and understanding than contractual capacity. This is because, unlike a contract, it is hard to judge if a donation is "fair."

Power of Attorney. Texas courts appear to use the contract standard for powers of attorney.[15] A minority of states require only testamentary capacity.[16] With powers of attorney, the burden shifts to the challenger who must show that the signer "did not understand the nature or consequences of his act at the moment the power of attorney was executed."[17]

Health Care Decisions. Capacity in health care is based on "informed consent." This concept dictates that patients have the ultimate right to prevent unauthorized contact with their body, and the health care provider has a duty to disclose relevant information to allow the patient to make an informed decision. Consent to treatment must be competent, voluntary, and informed. Though persons may have mental capacity, if their decisions were either involuntary or unknowing, they may not meet the standard. No reported Texas case exists to guide us.

Guardianships. The Texas Estates Code defines an incapacitated person for guardianship purposes as an adult individual who, because of a physical or mental condition, is substantially unable to provide food, clothing, or shelter for himself or herself, to care for the individual's own physical health, or to manage the individual's own financial affairs.[18] Proof must be based on recurring acts or occurrences within the preceding six-month period.[19] The courts regularly recognize that clients may be unable to care for themselves physically but are still able to handle finances and vice versa (called "partial incapacity").

ETHICAL DILEMMAS

When attorneys have clients or potential clients with capacity issues, they are cast into treacherous ethical waters. The "general obligation" of a Texas lawyer to an incompetent client is provided for in Texas Disciplinary Rule of Professional Conduct 1.02(g):

> A lawyer *shall* [emphasis added] 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 …

The American Bar Association 2010 Model Rules of Professional Conduct take a seemingly different approach. Rule 1.14(b) states:

> … the lawyer *may* [emphasis added] 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.

The ABA approach does *not* suggest that lawyers should proceed in the representation without taking protective action, although an ABA committee stated that it would often be the best choice for the lawyer to "stay with the representation and seek appropriate protective action on behalf of the client."[20] These rules leave open what to do with a *potential* client. Over time, the law will, no doubt, catch up with these issues.

Referring In or Out. When an expert becomes involved, should you refer in or refer out? Many clients, especially elderly clients, would take offense to any suggestion that they need a mental examination or assessment. If this is handled improperly, the client will not only refuse to see the expert, but the lawyer may also lose the client. If the lawyer hires the expert and uses fees to pay for the expert's services (refers in), the work product of that expert is clearly covered by attorney-client privilege just as would be the case with the work of an accountant hired by the attorney. But if the lawyer spends the client's funds on determining capacity, the lawyer would be obligated to inform the client.[21] Referring out raises other issues. Either way, if the client is not on board with the referral in the end, the expert may not be able to get the client's consent to report examination results back to the attorney. Further, clients who lack capacity cannot legally obligate themselves to make payments because incapacitated persons only enter voidable contracts.

If the lawyer thinks that the client may not have capacity and chooses to have that issue resolved by an expert, the lawyer may find that the client did not have the capacity to enter a contractual agreement with the lawyer either. And an incapacitated client may have no obligation to pay the attorney under the engagement agreement. Interestingly, a lawyer who prepares a will for such a client may have created a valid testamentary disposition yet still is unable to enforce payment of fees given the different situational definitions of capacity for a will versus a contract. The safest but highly impractical course of action is for the lawyer to seek the appointment of a guardian.[22]

Comments to Texas Rule of Disciplinary Conduct 1.02(g) serve to only muddy the waters by saying, "Unless the lawyer is legally authorized to act for a person under a disability, an attorney-client relationship does not exist for the purposes of this rule." Thus while the rules state that a lawyer must abide by a client's decisions about the representation (Rule 1.02(a)), the comment says that if the client turns out to have been disabled, the rule doesn't apply because no attorney-client relationship was established.

Instead, the lawyer is instructed by further comment to either seek appointment of a guardian or to "take other protective steps when it *reasonably* appears *advisable* to do so in order to serve the client's best interests" [emphasis added], which also offers little guidance, and the lawyer is the one whose judgment will be questioned as to what was reasonable and advisable under the circumstances. It

is best to get paid up front and charge what is clearly not an unreasonable fee in case it is subject to question later.

Interestingly, ABA Rule 1.14(a) again takes an entirely different approach than Texas, advising that "the lawyer shall, as far as reasonably possible, *maintain a normal client-lawyer relationship with the client* [emphasis added]. Perhaps the Texas rules should include a similar provision. It would give lawyers clearer authority to act in the best interests of their most vulnerable clients without worrying that they have no authority at all or, worse, are acting unethically.

In convincing clients to consent to evaluation, lawyers may be tempted to tell "white lies" or omit facts. While white lies (like "I have all my clients take this test") are acceptable in polite society, they are anathema to the legal profession.

What Can the Lawyer Tell the Expert? Texas Rule of Disciplinary Conduct 1.05(c)(4) specifically authorizes a lawyer to reveal confidential information "when the lawyer has reason to believe it is necessary to do so in order to comply with a court order, a Texas Disciplinary Rule of Professional Conduct, or other law." Outside a court procedure for guardianship or other orders (see Comment 17 to Rule 1.05), it is unclear whether lawyers may tell experts why they are making the referral without risking violating confidentiality rules. The best approach, of course, would be to find a way to get the client to consent to the process. Although it may be obvious, it may also be advisable to establish an understanding with an expert *in advance* that whenever the lawyer refers a client to the expert it is because the lawyer is concerned about the client's capacity.

ABA Rule 1.14(b) specifically addresses the difficult balancing act between keeping client confidences and getting help for the client, favoring disclosure when the lawyer believes the client's interests will be protected by doing so. Comment 8 to the rule attempts to clarify the lawyer's position, stating that the lawyer should try to determine whether the expert "will act adversely to the client's interests before discussing matters related to the client."

Perhaps more helpfully, according to ABA Formal Op. 96-404, "If the client is in the midst of litigation, the lawyer would be able to disclose such information as is *necessary* to obtain an assessment of the client's capacity in order to determine whether the representation can continue in its present fashion" [emphasis added].

Should a Report be Written? When a lawyer refers a client to an expert, the lawyer may tell the expert not to prepare a written report or to make a telephonic report. Note that experts may be required by medical standards to make a "note in the chart" about procedures. If the expert is a physician, these notes are generally covered by the patient-doctor privilege, but there are exceptions.

Having the expert deliver the report by phone may provide a way for lawyers to both attain the information they need and direct any future examination. Failure to produce a physical document does have its drawbacks. If the examination results are favorable, a written medical record would be desirable.

Lawyers should beware the inferences that may be drawn if they request written reports only when they want to document a favorable result. If out of 100 examinations, the doctor has written 75 reports, all of them finding the clients to have capacity, one may reasonably infer that the other 25 remained unwritten because those clients lacked capacity.

Is the Expert's Opinion Discoverable? Under Texas Rule of Civil Procedure 192.3(e), "the identity, mental impressions, and opinions of a consulting expert whose mental impressions and opinions have not been reviewed by a testifying expert are not discoverable." Rule 192.7 defines a *testifying expert* as one who may be called to testify as an expert witness at trial and a *consulting expert* as one who has been "consulted, retained, or specially employed by a party in anticipation of litigation or in preparation for trial, but who is not a testifying expert." The rules, however, do not address situations when no litigation is involved.

Texas courts have been protective of the right to keep expert testimony private. In a 1997 personal injury case in San Antonio,[23] the plaintiff had accidentally designated a physician as a testifying expert but the court allowed de-designation. If there is anticipated litigation, lawyers may use consulting experts without their reports being disclosed as long as any testifying expert does not know about the consultation.

What Must the Client be Told? In convincing clients to consent to evaluation, lawyers may be tempted to tell "white lies" or omit facts. While white lies (like "I have all my clients take this test") are acceptable in polite society, they are anathema to the legal profession. But what can lawyers refrain from saying? For instance, can you recommend a doctor without telling your client that the doctor will be reporting back to you? What if the client knows that the doctor will be reporting back you, but you don't tell the client that the doctor will be test-

ing for dementia? Texas rules require attorneys to err on the side of disclosure. After conceding that whenever a "lawyer reasonably believes a client suffers a mental disability or is not legally competent, it may not be possible to maintain the usual attorney-client relationship,"[24] the comments to Rule 103 go on to say that "the client may have the ability to understand, deliberate upon, and reach conclusions about some matters affecting the client's own well-being."[25] Thus a client may not be able to contract, but may still have sufficient capacity to be a client, invoking all of the ethical restrictions of that relationship.

Hopefully with these guidelines, both attorneys and experts will best be able to assist clients in achieving their goals while minimizing the likelihood of successful challenges from third parties. **TBJ**

NOTES

1. *In re Estate of Vackar,* 345 S.W.3d 588, 597 (Tex. App.—San Antonio 2011, reh'g overruled).
2. *Mandell & Wright v. Thomas,* 441 S.W.2d 841, 845 (Tex. 1969).
3. *In re Jack,* 390 B.R. 307, 321 (Bankr. S.D. Tex. 2008).
4. *Bach v. Hudson,* 596 S.W.2d 673, 675-76 (Tex.Civ.App.—Corpus Christi 1980, no writ).
5. *In re Jack* 390 B.R. 307 (Bankr. S.D. Tex. 2008).
6. *See Lerer v. Lerer,* 2000 WL 567020, (Tex.App.—Dallas May 3, 2000, pet. denied) (not designated for publication).
7. TEX. EST. CODE ANN. §251.001.
8. *See Tieken v. Midwestern State Univ.,* 912 S.W.2d 878 (Tex.App.—Fort Worth 1995, no writ) (*citing Prather v. McClelland,* 12 S.W. 543, 546 (Tex. 1890)).
9. *In re Estate of Vackar,* 345 S.W.3d 588, 595 (Tex. App.—San Antonio 2011, reh'g overruled)(citing *Seigler v. Seigler,* 391 S.W.2d 403, 404 (Tex.1965)).
10. *See Rudersdorf v. Bowers,* 112 S.W.2d 784 (Tex.Civ.App—Galveston 1937, writ dism'd w.o.j.); *Hamill v.Brashear,* 513 S.W.2d 602 (Tex.Civ.App.—Amarillo 1974, writ ref'd n.r.e.).
11. *See Carr v. Radkey,* 393 S.W.2d 806, 814 (Tex. 1965).
12. John Parry & F. Phillips Gilliam, *Handbook on Mental Disability Law* (2002) at 147-148.
13. *Supra.*
14. Louis A. Mezzullo & Mark Woolpert, *Advising the Elderly Client* §32.11 (2004).
15. *See In re Estate of Vackar,* 345 S.W.3d 588, 597 (Tex. App.—San Antonio 2011, reh'g overruled).
16. John J. Regan et al., *Tax, Estate & Financial Planning for the Elderly* (2003).
17. *In re Estate of Vackar,* 345 S.W.3d 588, 597 (Tex. App.—San Antonio 2011, reh'g overruled)(*citing Tomlinson v. Jones,* 677 S.W.2d 490, 492-93 (Tex.1984); *Mandell & Wright v. Thomas,* 441 S.W.2d 841, 845 (Tex.1969)).
18. TEX. EST. CODE ANN. §1002.017.
19. *See* TEX. EST. CODE ANN. §1101.101 and §1101.102.
20. ABA Formal Op. 96-404. (1993).
21. TEX. DISCIPLINARY R. PROF'L CONDUCT 1.03.
22. TEX. DISCIPLINARY R. PROF'L CONDUCT 1.02(g).
23. *In re State Farm Mut. Auto. Ins. Co.,* 100 S.W.3d 338 (Tex. App.—San Antonio 2002, orig. proceeding).
24. TEX. DISCIPLINARY R. PROF'L CONDUCT 1.03 Cmt. 5.
25. *Id.*

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