HOW TO NOT LOSE YOUR MIND WHEN YOUR CLIENT IS LOSING HIS: OPERATING IN THE GRAY ZONE OF DIMINISHED CAPACITY

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I. INTRODUCTION

As our population ages, it is increasingly important for estate planning professionals not only to assist clients with planning for eventual death, but also to aid clients with developing a plan to deal with potential diminished capacity and incapacity.[1] The increasing frequency of incapacity in our

1. *See* Candice A. Garcia-Rodrigo, *Tips for Representing a Client with Diminished Capacity*, A.B.A. (Jan. 29, 2016), https://www.americanbar.org/groups/litigation/committees/solo-small-firm/practice/2016/tips-representing-client-diminished-capacity/ [perma.cc/U26R-9SGW].

society has caused many issues for estate planning attorneys and the manner in which he or she counsels and represents their clients.[2] Attorneys must be aware of the possibility of client incapacity, and the proper steps for determining and handling a client's diminished capacity or incapacity.[3]

The estate planning attorney must understand substantive tax techniques, distribution mechanisms, and probate laws that accompany an estate planning and administration practice; however, the attorney cannot stop there.[4] He or she must also embrace the human side of estate planning—the side involving a client's emotions, mental and psychological state, and relationships amongst family members and friends.[5] This article will discuss the awareness surrounding applicable legal standards of capacity, the legal and ethical rules important to estate planning attorneys with respect to capacity and undue influence, and the practical steps that an estate planning attorney can undertake when representing a client with diminished capacity or incapacity.[6] This article will not spend a great deal of time discussing drafting for incapacity.[7] For detailed discussion in that regard, the reader is encouraged to see Wesley L. Bowers' article "Mind the Gap: Advanced Planning Techniques for Incapacity" presented to the State Bar of Texas 2016 Estate Planning & Probate Drafting Course.[8]

II. AWARENESS OF DIMINISHED CAPACITY AND INCAPACITY

The author had a colleague in the past who had a colloquial definition of incapacity: "When your client can hide his own Easter eggs, it is probably too late."[9] Although witty, there is a stark bit of truth in this definition—estate planning attorneys are often not consulted until it is too late.[10] In those cases, there is usually little substantive help that the attorney can offer (without court intervention) to the client and his family and friends, largely because the client lacks the capability to communicate his wishes to the attorney and execute the corresponding legal documents.[11]

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2. *See id.*

3. *See id.*

4. *See* Julie Garber, *What to Look for in an Estate Planning Lawyer*, THE BALANCE, https://www.thebalance.com/what-is-an-estate-planning-attorney-3505707 [perma.cc/S4B6-UCU2]. (last updated Dec. 24, 2018).

5. *See id.*

6. *See* Garcia-Rodrigo, *supra* note 1.

7. Author's personal statement.

8. *See* Wesley L. Bowers, Mind the Gap: Advanced Planning Techniques for Incapacity, Presented During the State Bar of Texas 2016 Estate Planning and Probate Drafting Course, *in* ST. B. OF TEX. 2016 EST. PLAN. & PROB. DRAFTING COURSE (Oct. 2016).

9. Interview with author's previous colleague.

10. *See* W. Ryan Zenk, *Legal Competency: When Is It Too Late to Create a Will, Trust or POA?*, ELDER L. CTR. OF WIS. (Nov. 26), https://www.elderlawcenterofwisconsin.com/legal-competency-when-is-it-too-late-to-create-a-will-trust-or-poa/ [perma.cc/L2PD-KBA8].

11. *See Power of Attorney*, A.B.A., https://www.americanbar.org/groups/real_property_trust_estate/resources/estate_planning/power_of_attorney/ [perma.cc/U6WS-EBUH] (last visited Sept. 8, 2019).

On the other hand, situations may also arise with an attorney's longstanding and loyal client.[12] The client, once sharp and spry, may now be experiencing a decline in physical and mental health as he ages.[13] In a long-term attorney-client relationship where the attorney is present during the client's gradual decline, there are opportunities and steps that the attorney can take to ensure the client is cared for and protected.[14]

A. Initial Steps to Take

1. Basic Estate Planning Documents

Prior to any hint of diminished capacity or incapacity, attorneys should be proactive and consider whether the client has the appropriate testamentary and incapacity planning documents in place, which include:

(i) a will or revocable (i.e., management/living) trust plan that appropriately coordinates disposition of the client's probate assets (along with proper beneficiary designations for non-probate assets);
(ii) a Statutory Durable (i.e., business and financial) Power of Attorney naming a primary and alternate agent(s) to act for the client with respect to business and financial matters;
(iii) a Medical Power of Attorney naming a primary and alternate agent(s) to make medical treatment decisions for the client if he is unable to communicate with his physicians;
(iv) a Specific Power of Attorney for HIPAA permitting the client's medical agent(s) to have access to what would otherwise be protected health information;
(v) a Directive to Physicians evidencing the client's intention to have medical procedures withheld in the event of a terminal condition and/or irreversible condition wherein medical procedures are being administered only to postpone the client's moment of death by artificial means;
(vi) a Declaration of Guardian in the event of later incapacity or need of guardian, designating a guardian of the client's person and estate in the event a guardianship was ever needed (very unlikely if the above-described documents are in place);
(vii) a Declaration of Appointment of Guardian for minor children in the event of death or incapacity, designating a guardian of the person and estate for any minor children if the client is unable to care for his children (due to death or incapacity); and

12. *See* MODEL RULES OF PROF'L CONDUCT r. 1.14 (AM. BAR ASS'N 1983).
13. *See id.*
14. *See id.*

(viii) a Declaration for Mental Health Treatment under Chapter 137 of the Civil Practice and Remedies Code, declaring the client's preferences or instructions regarding mental health treatment.[15]

Unfortunately, these documents may not always be available for execution due to the extent of a client's diminished capacity.[16] Section III of this article will provide a more in depth discussion of this problematic situation.[17]

2. Education

When executing the appropriate documents, the second natural step for the attorney to consider is education—tactfully broaching the reality with clients that death is inevitable and diminished capacity is quite possible.[18] Although this seems obvious given the nature of estate planning, countless clients have no idea what to do once their loved one has become incapacitated or has passed away.[19] Many times family members or friends will contact an attorney whose business card or letterhead was found within the home, in hopes that the attorney has knowledge of the relevant documents.[20] Such a scenario is most often the result of a lack of communication between the client and their loved ones regarding the client's estate planning intentions.[21] Encouraging clients to have simple (albeit admittedly difficult) conversations with their family members, fiduciaries, and beneficiaries about their testamentary and incapacity planning documents and wishes, can save heartache and confusion when the client is no longer able to communicate his or her desires.[22]

3. Indicators of Diminishing Capacity and Resources

Perhaps a third step that the estate planning attorney can take with respect to a client's decline in mental health centers on the attorney's role as

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15. *See* JONATHAN POND, PERSONAL FINANCIAL PLANNING HANDBOOK: WITH FORMS AND CHECKLISTS ¶ 12.04, Westlaw (2d ed. 2019) (providing a general layout of the basic estate planning documents).

16. *See id.*

17. *See* discussion *infra* Section III.

18. *See* MODEL RULES OF PROF'L CONDUCT r. 1.4 (AM. BAR ASS'N 1983).

19. *See* Pond, *supra* note 15.

20. *See* David Gage & John Gromala, *Mediation in Estate Planning: A Strategy for Everyone's Benefit*, MEDIATE (Nov. 2002), https://www.mediate.com/articles/gromala7.cfm [perma.cc/5TSA-8DCW].

21. *See id.*

22. *See id.*

counselor (as opposed to legal expert or tax technician).[23] Some estate planning engagements are one-off arrangements where the attorney prepares documents for a client who then goes on his way and the attorney never hears from the client again.[24] However, other engagements are long-standing relationships wherein the client and attorney maintain interaction on a regular (e.g., monthly or yearly) basis.[25] In such case, the attorney has the opportunity to get to know the client on a more personal level and is able to stay abreast of the client's current family dynamics and financial situation.[26] During this long-term relationship, the attorney can become someone who is a confidant to the client and in a unique position to assess the client's potential decline in mental faculties.[27]

Assessing a client's capacity or lack of capacity may not be a determination that many attorneys desire to do or feel equipped to assess.[28] Still, it is inherent in the role of the estate planner to confirm that the client has the requisite capacity to make decisions and sign documents.[29] Thankfully, there are resources to help attorneys recognize the signs of diminishing capacity.[30] For instance, the Alzheimer's Association has provided ten early signs of dementia that may merit a visit to a doctor for further testing, which include:

> (1) memory loss that disrupts daily life; (2) challenges in planning or solving problems; (3) difficulty completing familiar tasks [at home, at work, or at leisure]; (4) confusion with time or place; (5) trouble understanding visual images and spatial relationships; (6) new problems with words in speaking or writing; (7) misplacing things and losing the ability to retrace steps; (8) decreased or poor judgment; (9) withdrawal from work or social activities, [and]; (10) changes in mood and personality.[31]

Although incapacity is a medical condition often involving medical professionals, the ultimate determination of incapacity is a legal

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23. *See* Jill Roamer & Marchesa Peters, *Lawyering and the Diminished Capacity Client*, ELDER COUNS. BLOG (July 24, 2018), https://blog.eldercounsel.com/lawyering-and-the-diminished-capacity-client [perma.cc/62AY-VA62].

24. *See id.*

25. *See Family Dynamics in Estate Planning*, BUS. RESOURCES, https://businessresources.peoples.com/SBR_template.cfm?Document=IndustryMarkets/legal-legal_practicearearesources-8.html [perma.cc/ANL9-SQW7] (last visited Sept. 8, 2019).

26. *See* Roamer & Peters, *supra* note 23.

27. *See id.*

28. *See id.*

29. *See* Gerry W. Beyer, *How to Conduct a Modern Texas Will Execution*, ESTATE PLANNING DEV FOR TEX. PROFS, 2015 (Oct. 20, 2015).

30. *See, e.g.*, *10 Early Signs and Symptoms of Alzheimer's*, ALZHEIMER'S ASSOCIATION, https://www.alz.org/alzheimers-dementia/10_signs [perma.cc/SUF3-BH4U] (last visited Sept. 4, 2019).

31. *See id.*

determination—not a medical determination.[32] For this reason, the attorney must, at the very least, be cognizant of certain indicators of a client's diminishing capacity and incapacity.[33]

If it appears that the client's mental capabilities are in fact slipping, the attorney must be willing under the appropriate circumstances to gently counsel the client as to his best options and resources.[34] Additional options, resources, and practical steps that an attorney can consider taking with respect to client capacity are discussed in Sections IV, V, and VI.[35]

III. STANDARDS OF CAPACITY

In an estate planning practice, perhaps more than any other specialty practice, understanding the various standards of capacity is critical to acting in the client's best interest and ensuring that the client's intentions are carried out.[36] It is not enough to vaguely remember (possibly from one's law school or bar exam days) that there is a minimum standard of mental competency required to engage in different legal transactions.[37] Rather, the estate planner should regularly familiarize his or herself with the various standards and have best practices in place to ensure that each client meets the applicable standard.[38]

Oftentimes the initial contact is by a concerned spouse or family member of a client, rather with the client who is beginning to experience signs of impairment.[39] The reasoning from the spouse or relative is that the client did not feel up to the meeting or was too fatigued to get out of the house that particular day.[40] In these situations, the estate planning attorney must determine whether or not the client has the capacity to continue moving forward with the signing of documents.[41]

Whether or not a person has legal capacity to execute a document depends largely on the type of document in question.[42] U.S. courts have determined that every conscious adult has a certain degree of legal capacity.[43] The relevant question becomes whether or not the client has the required

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32. *See Assessment of Older Adults with Diminished Capacity: A Handbook for Lawyers*, A.B.A. COMM'N ON L. & AGING AM. PSYCHOLOGICAL ASS'N (2005) https://www.americanbar.org/content/dam/aba/administrative/law_aging/2012_aging_capacity_hbk_front_matter.pdf [perma.cc/NV5W-CXCG].

33. *Id.*

34. *Id.*

35. *See infra* Parts IV–VI.

36. *See* Wesley L. Bowers, Mind the Gap: Advanced Planning Techniques for Incapacity, Presented During the State Bar of Texas 2016 Estate Planning and Probate Drafting Course, *in* ST. B. OF TEX. 2016 EST. PLAN. & PROB. DRAFTING COURSE (Oct. 2016).

37. *Id.*

38. *Id.*

39. *Id.*

40. *Id.*

41. *Id.*

42. *Id.*

43. *Id.*

degree of capacity to perform the act in question..[44] Texas recognizes two distinct types of capacity, contractual and testamentary; however, there is broad overlap between the two, particularly as to contractual agreements which have little to no impact on the client, such as the execution of a beneficiary designation or a revocable trust.[45]

It is important to note, for all of the acts later discussed, the law requires that the person be "capable" of making rational decisions.[46] However, the law does not require a person to actually make rational decisions.[47] Every competent person has the right to make seemingly foolish or unreasonable decisions (and all of us have likely done so at some point).[48] Thus, for clients who are experiencing mental decline, it can sometimes be difficult for outsiders to distinguish between decisions and actions that stem from their diminishing capacity as compared to their mere foolishness or stubbornness.[49]

When seeking to determine if a person has capacity, one must consider the act in question and whether the person possesses the minimum degree of capacity required for that particular act.[50] Texas law provides a different standard of capacity for the various testamentary and lifetime acts described below.[51]

A. Testamentary Capacity

1. Statutory Provision

Texas has established a two part test for determining testamentary capacity, as set forth in Section 251.001 of the Texas Estates Code.[52] The first part being an age requirement which provides that an individual: "(i) be at least eighteen years or older; (ii) be or have been lawfully married; or (iii) be a member of the U.S. armed forces, an auxiliary, or the U.S. Maritime Service" when the will is drafted.[53] The objective nature of this test rarely creates controversy.[54]

Section 251.001 further requires that the testator be "of sound mind" in order to have testamentary capacity[55] Unlike the age requirement, this factor's subjective nature is often the topic of frequent discussion and

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44. *Id.*
45. *Id.*
46. *See Assessment of Older Adults with Diminished Capacity*, *supra* note 32.
47. *See id.*
48. *See id.*
49. *See id.*
50. *See* Bowers*, supra* note 36.
51. *Id.*
52. TEX. EST. CODE ANN. § 251.001.
53. *Id.*
54. *Id.*
55. *Id.*

controversy.[56] While the two parts are equally weighted, the discussion oftentimes focuses only on the "sound mind" component, failing to mention the age and status of the client.[57]

2. Judicial Development of the "Sound Mind" Requirement

a. Current Rule

In 1890, the Texas Supreme Court held, in *Prather v. McClelland*, in order for an individual to be deemed "sound of mind" a jury must be able to find the individual possesses the following characteristics:

(i) Sufficient ability to discern the practices in which he is engaged;
(ii) Sufficient ability to discern the effects of making the will;
(iii) The capacity to know the results of his bounty;
(iv) The capacity to understand the general essence and extent of his estate; and
(v) "[M]emory sufficient to collect in his mind the elements of the business to be transacted, and to hold them long enough to perceive, at least their obvious relation to each other, and to be able to form a reasonable judgment as to them."[58]

b. Previous Rule – The Four Part Test

Other court decisions have established a shortened definition of testamentary capacity that ignores the sufficient "memory requirement."[59] However, a lawyer should not attempt to rely on these cases because, while a sufficient memory may not be listed as a necessary element of testamentary capacity, its absence may indicate that the testator "is probably not competent to make a will."[60] Failure to include the sufficient memory requirement can present an argument for appeal.[61] Recent cases have consistently used the five-part test.[62]

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56. *Id.*

57. *Id.*

58. *See* Wesley L. Bowers, Avoid the Guardianship Alternative, Presented During the State Bar of Texas 2016 Intermediate Estate Planning and Probate Course, *in* 43 TEX. TAX. LAWYER, June 2016 (internal quotations omitted); Prather v. McClelland, 13 S.W. 543, 546 (Tex. 1890).

59. *See, e.g.*, Gayle v. Dixon, 583 S.W.2d 648, 650 (Tex. Civ. App.—Houston [1st Dist.] 1979, writ ref'd n.r.e.).

60. William Marschall, *Will Contests*, TEX. EST. ADMIN. 204 (1975).

61. *See Gayle*, 583 S.W.2d at 650; GERRY W. BEYER, 9 TEXAS PRACTICE SERIES: LAW OF WILLS § 16.2 (4th ed. 2018).

62. Bracewell v. Bracewell, 20 S.W.3d 14, 19 (Tex. App.—Houston [14th Dist.] 2000, no pet.); Campbell v. Groves, 774 S.W.2d 717, 718 (Tex. App.—El Paso 1989, writ denied); Alldridge v. Spell, 774 S.W.2d 707, 774 (Tex. App.—Texarkana 1989, no writ); Broach v. Bradley, 800 S.W.2d 677, 680–81 (Tex. App.—Eastland 1990, writ denied); Kenney v. Estate of Kenney, 829 S.W.2d 888, 890 (Tex. App.—Dallas 1992, no writ); *but see* Hoffman v. Texas Commerce Bank, 846 S.W.2d 336, 340 (Tex.

c. Lucid Intervals & Admissibility of Lay Opinion Testimony

The only requirement for testamentary capacity is that it must have existed on the day the testator executed their will.[63] However, a showing of incapacity at times, other than during the execution of the will, is still generally considered relevant despite the requirement.[64]

A lay person's testimony of their observations of the testator's conduct during the days prior or subsequent to the will execution is admissible as evidence to demonstrate competency.[65]

d. The Presumption of Continued Insanity

A rebuttable presumption of continued insanity arises if a prior adjudication of insanity exists.[66] The presumption remains in effect until rebutted by a subsequent judgment that changes the affected party's mental status.[67] A prior adjudication of insanity or mental illness is admissible, but not conclusive.[68] In *Haile v. Holtzclaw*, the testator was found to have testamentary capacity despite having been committed to a mental hospital and appointed a temporary guardian by the court fifteen days before he executed his will.[69] *Haile* was decided under a Texas statute which has since been replaced by section 576.002 of the Health and Safety Code.[70] The current statute expressly states that the receipt of mental health services does not limit the patient's legal capacity.[71]

e. Subsequent Adjudication of Insanity

The Texas Supreme Court has held that a subsequent adjudication of insanity is inadmissible.[72] In *Stephen v. Coleman*, the testator was

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App.—Houston [14th Dist.] 1992, writ denied) (demonstrating the court opting to use the shortened definition of testamentary capacity).

63. Croucher v. Croucher, 660 S.W.2d 55 (Tex. 1983) (holding that medical evidence of incompetency could be considered to show a lack of capacity on the date of execution of the will).

64. Lee v. Lee, 424 S.W.2d 609, 611 (Tex. 1968) (stating that evidence of incompetency at times outside of the will execution is admissible only if it shows that the condition persists and has some probability of being present during the will execution).

65. *Kenney*, 829 S.W.2d at 890 (Tex. App.—Dallas 1992, no writ) (citing *Campbell*, 774 S.W.2d at 719).

66. Paul Butler et al., *The Anatomy of a Will: Practical Considerations in Will Drafting*, ST. B. OF TEX., 12th Annual Building Blocks of Wills, Estates and Probate Course, Ch. 1.6 (2011).

67. *Id.*

68. *Id.*

69. *See Haile v. Holtzclaw*, 414 S.W.2d 916, 926 (Tex. 1967).

70. *See* TEX. REV. CIV. STAT. ANN. art. 5547-83, § 83 (1957); *see also* TEX. HEALTH & SAFETY CODE ANN. § 576.002 (creating a statutory version of the rule articulated in *Haile*).

71. *See* TEX. HEALTH & SAFETY CODE ANN. § 576.002.

72. *See, e.g.,* Carr v. Radkey, 393 S.W.2d 806 (Tex. 1965) (holding that the appointment of a guardian twenty-one days after the execution of will is inadmissible as it is irrelevant to the showing of incompetency at the time the will was executed).

determined incompetent just three days after executing his will.[73] Without discussing whether it was proper for the trial court to admit the subsequent adjudication as evidence, the appellate court held that it did not raise a presumption that the testator was incompetent on the date the will was signed.[74] The trial court found that the testator had testamentary capacity and the appellate court affirmed.[75]

f. Insane Delusion

If the client meets the fundamental requirements of testamentary capacity, a will may still be held invalid if the testator exhibits signs of "insane delusion." Insane delusion has been defined, by the courts, as "the belief of supposed facts that do not exist, . . . which no rational person would believe."[76] Some courts have held that the second requirement may be satisfied by a showing of a functional disorder or an organic brain defect that existed at the time of the execution of the will.[77] While insane delusions could show a lack of capacity, the presence thereof does not per se affect the drafting of a will.[78] The fact that a client believes that his son had walked on the moon, his wife is actively planning his gruesome murder, or that his daughter murdered his mother's most beloved dog does not necessarily render him incapable of managing his business affairs or drafting a valid will.[79] For an insane delusion to invalidate a will, the delusion must affect the actual terms of the will.[80] Thus, even though a person may appear to suffer from a delusion, they could still be found to have the requisite testamentary capacity.[81]

B. Contractual Capacity

1. In General

Sections 41 and 42, *Contracts*, Texas Jurisprudence provides a concise summary of contractual capacity:

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73. Stephen v. Coleman, 533 S.W.2d 444, 447 (Tex. Civ. App.—Fort Worth 1976, writ ref'd n.r.e.).

74. *Id.*

75. *Id.*

76. Knight v. Edwards, 264 S.W.2d 692, 695 (Tex. 1954).

77. Spillman v. Spillman's Estate, 587 S.W.2d 170 (Tex. Civ. App.—Dallas 1979, writ ref'd n.r.e.).

78. Oechsner v. Ameritrust, 840 S.W.2d 131, 134, (Tex. App.—El Paso 1992, writ denied) (demonstrating the court decline to expand Texas' two-pronged test of insane delusion to incorporate a showing of "some organic defect in the brain or some functional disorder of the mind").

79. Lindley v. Lindley, 384 S.W.2d 676, 679 (Tex. 1964).

80. Bauer v. Estate of Bauer, 687 S.W.2d 410, 411–12 (Tex. App.—Houston [14th Dist.] 1985, writ ref'd n.r.e.).

81. Campbell v. Groves, 774 S.W.2d 717, 719 (Tex. App.—El Paso 1989, writ denied) (explaining, "A person could appear bizarre or absurd with reference to some matters and still possess the assimilated and rational capacities to know the objects of his bounty, the nature of the transaction in which he was engaged, and the nature and extent of his estate on a given date.").

> To establish mental capacity to contract, the evidence must show that, at the time of contracting, the person appreciated the effect of what the person was doing and understood the nature and consequences of his or her acts and the business he or she was transacting. Mere mental weakness is not in itself sufficient to incapacitate a person; and mere nervous tension, anxiety, or personal problems do not amount to mental incapacity to enter into contracts.
>
> The fact that one has a firm belief in spiritualism is not sufficient to incapacitate a person, especially where the belief is founded on reading and other evidence deemed by the person to be sufficient.[82]
>
> The provision of court-ordered, emergency, or voluntary mental health services to a person is not a determination or adjudication of mental incompetency, and does not limit the person's rights as a citizen, or the person's property rights or legal capacity. A person is presumed to be mentally competent, unless a judicial finding to the contrary is made. Absent proof and determination of mental incapacity, a person who signs a contract is presumed to have read and understood the document, unless the person was prevented from doing so by trick or artifice. In other words, it is presumed by law that every party to a valid contract had sufficient mental capacity to understand one's legal rights with respect to the transaction. The burden of proof with regard to overcoming this presumption rests on the person who asserts the contrary.
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> Elderly persons are not presumptively incompetent. On the contrary, the disposition of property and the conduct of business affairs will be upheld where a grantor, though old and infirmed physically and mentally, nevertheless, responds to tests that are applicable generally to people in the ordinary experiences of life.[83]

2. Testamentary Capacity v. Contractual Capacity

One must have a greater level of mental capacity required to enter into a contract than to execute a will.[84] While this statement is accurate, it is an oversimplification because it implies that contractual capacity is substantially different than testamentary capacity, which is not necessarily the case.[85]

A review of jurisdictions suggests the difference between the two is purely quantitative, not qualitative.[86] Essentially, each test examines the ability of an individual to appreciate and understand the nature and

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82. 14 TEX. JUR. 3 *Contracts* § 41 (2016).

83. *Id.* § 42.

84. Vance v. Upson, 1 S.W. 179 (Tex. 1886); Hamill v. Brashear, 513 S.W.2d 602, 607 (Tex. Civ. App.—Amarillo 1974, writ ref'd n.r.e.).

85. *See* Knight v. Edwards, 264 S.W.2d 692, 695 (Tex. 1954).

86. *See* U.S. v. Kozminski, 821 F.2d 1886, 1193 (6th Cir. 1987); *In re* Estate of West, 522 A.2d 1256, 1263 (Del. 1987).

consequences of the action he is taking.[87] It is the differing nature and consequences of entering into a contract and executing a will that create the disparity in the required level of mental capacity.[88]

Will execution has no legal effect on the testator's current circumstances; because it is only effective upon the testator's death and is, generally, revocable while the testator is living.[89] Therefore, the testator only needs to have the ability to understand the legal effect will execution will have upon his death, rather than on his current circumstances.[90] Note, execution of a valid will requires the testator to "know the objects of his bounty and the nature and extent of his property."[91] This is logical because in order for the testator to understand and appreciate the consequences of will execution (the distribution of property after death), he must know what property is his to be distributed and to whom the property will be distributed at his death.[92]

C. Executing a Trust

Viewing contractual and testamentary capacity as two points on a spectrum of legal capacity, not only, is consistent with Texas Property Code section 112.007, which provides that "[a] person has the same capacity to create a trust by declaration, inter vivos or testamentary transfer, or appointment that the person has to transfer, will, or appoint free of trust," but helps but the concept of capacity in perspective.[93] Similar to will execution or entering into a valid contract, it is the fundamental effect of trust creation that defines the required mental capacity.[94]

The standard for capacity for trust creation is unclear under section 112.007.[95] It seems to suggests the capacity: to create an inter vivos trust is equivalent to the capacity required to transfer; to create a trust by testamentary transfer is equivalent to the capacity required for will execution; and to create a trust by appointment is equivalent to the capacity required to appoint free of trust.[96]

Contractual capacity is required to transfer property; thus, it logically follows that contractual capacity is required to transfer property.[97]

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87. *See* Hairston v. McMillan, 692 S.E.2d 549, 553 (S.C. Ct. App. 2010).

88. *See Kozminski*, 821 F.2d at 1193; *In re* Estate of West, 522 A.2d at 1263.

89. *See* Leahy v. Old Colony Trust Co., 93 N.E.2d 238, 240 (Mass. 1950); Rudolph v. Rudolph, 69 N.E. 834, 838 (Ill. 1904).

90. *See* Burns v. Marshall, 767 So.2d 347, 353 (Ala. 2000).

91. *See id.*

92. *See id.*

93. TEX. PROP. CODE ANN. § 112.007.

94. *See* Charles F. Gibbs & Cindy D. Hanson, *Degree of Capacity Required to Create an Inter Vivos Trust*, 132 TR. & EST., 14, 16 (1993); George Taylor Bogert, TRUSTS & TRUSTEES, 2nd Ed. Revised § 44 (1984); AUSTIN SCOTT & WILLIAM FRATCHER, SCOTT ON TRUSTS § 18 *et. seq.* (4th ed. 1987).

95. TEX. PROP. CODE ANN. § 112.007.

96. *Id.*

97. *See* Goodell v. Rossetti, 859 N.Y.S.2d 770, 913 (N. Y. App. Div. 2008).

Testamentary capacity is required for will execution; thus, it logically follows that testamentary capacity is required to create a trust by will.[98]

There is no uniformity among commenters and case law regarding inter vivos or testamentary trust creation.[99] Recent Texas case law suggests contractual capacity is needed to validly create a trust, as opposed to testamentary capacity.[100]

D. Executing Powers of Attorney

Although not entirely clear under Texas law, an individual's capacity to properly execute a power of attorney is akin to the standard for contractual capacity.[101] This is because a power of attorney creates an agency relationship similar to the relationship created in a contract.[102] Therefore, the best practice under a Statutory Durable Power of Attorney is to ensure that the principal (1) understands that he is authorizing another person to handle his business and financial affairs without court supervision or approval and (2) knows to whom (i.e., the agent) this authority is being granted.[103] In the same way, under a Medical Power of Attorney, the principal must understand that he is giving a particular person or persons the authority to make health care decisions for the principal when the principal is unable to make those decisions for himself.[104]

E. Exercising Powers of Appointment

"The donee of a power of appointment must have capacity to exercise such power."[105] In order for an appointment to be valid, "the donee has capacity to exercise the power if the donee has capacity to make a similar transfer of owned property."[106]

F. Executing a Declaration of Appointment of Guardian

Under Texas Estates Code Section 1104.204, the declarant must appear "to be of sound mind," and witnesses must attest to this in the self-proving

98. *See* Baun v. Est. of Kramlich, 667 N.W.2d 672, 677 (S.D. 2003).

99. *See* Lindberg v. U.S., 164 F.3d 1312, 1317 (10th Cir. 1999).

100. *See* Harrell v. Hochderffer, 345 S.W.3d 652, 661 (Tex. App—Austin 2011, pet. ref'd).

101. TEX. EST. CODE § 751.001; UNIF. PROB. CODE § 5-501 (providing the Uniform Power of Attorney Act does not require the principal to have any particular level of capacity at the time of execution).

102. *See* Carolyn L. Dessin, *Acting as Agent Under a Financial Durable Power of Attorney: An Unscripted Role*, 75 NEB. L. REV. 574, 587 (1996).

103. *See* TEX. EST. CODE ANN. § 751.0021.

104. TEX. HEALTH & SAFETY CODE ANN. § 166.152(b).

105. TEX. PROP. CODE ANN. § 112.007.

106. RESTATEMENT (THIRD) OF PROPERTY: WILLS & OTHER DONATIVE TRANSFERS § 19.8.

affidavit.[107] Texas courts have held that "sound mind" is equivalent to "testamentary capacity."[108] Therefore, by inference, the capacity required to execute a declaration of appointment of guardian is testamentary capacity.[109]

G. Adjudicated Incapacity

As previously discussed, a past adjudication of insanity creates a general presumption of continued insanity.[110] Note that, even under prior law, a past adjudication of insanity or appointment of guardian does not necessarily render the person incapacitated for all purposes.[111] The past adjudication was merely evidence of a lack of capacity, very probative evidence.[112]

Texas guardianship statutes were significantly modified, effective September 1, 1993.[113] The current purpose of the guardianship law now mandates that a court only grant the guardian authority "as necessary to promote and protect the well-being of the person."[114] An appointment of a guardian application must specify "the nature and degree of the alleged incapacity, the specific areas of protection and assistance requested, and the limitation of rights requested to be included in the court's order of appointment."[115] The ward "retains all legal and civil rights except those designated by court order as legal disabilities by virtue of having been specifically granted to the guardian," when a guardian is appointment.[116]

After the changes, it appears that the effect of an adjudication is determined by the court order's contents.[117] For example, an order taking away the right to execute a will and trust or designate a beneficiary, would likely give rise to a strong presumption of incapacity.[118] However, an order listing disabilities, making no mention of testamentary capacity, will not give rise to a presumption of incapacity.[119] The fact that the court had the opportunity to rule on the individual's mental capacity and decided not to, could support that the individual had the requisite capacity.[120] The rules prior to September 1, 1993 likely still apply where an order gives the guardian full authority.[121]

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107. TEX. EST. CODE ANN. § 1104.204(b).
108. Bracewell v. Bracewell, 20 S.W.3d 14, 19 (Tex. App.—Houston [14th Dist.] 2000, no pet.); Tieken v. Midwestern State Univ., 912 S.W.2d 878, 882 (Tex. App.—Fort Worth 1995, no writ).
109. *See Bracewell*, 20 S.W.3d at 19.
110. *See* Evans v. Allen, 358 S.W.3d 358, 368 (Tex. App.—Houston [1st Dist.] 2010, pet. denied).
111. *See id.*
112. *See id.*
113. *See* H.B. 2685, 73rd Leg., Reg. Sess. ch. 957, § 1 (Tex. 1993).
114. TEX. EST. CODE ANN. § 1001.001.
115. *Id.* § 1202.052.
116. *Id.* § 1151.001.
117. *See* H.B. 2685, 73rd Leg., Reg. Sess. ch. 957, § 1 (Tex. 1993).
118. *See id.*
119. *See id.*
120. *See id.*
121. *See id.*

IV. ETHICAL CONSIDERATIONS REGARDING DIMINISHED CAPACITY

The remainder of this Article will focus largely on a client's diminished capacity (rather than incapacity) and the attorney's available options and resources.[122] As such, a working definition of diminished capacity is helpful.[123] The author is not aware of a Texas definition of "diminished capacity" in the context of estate planning, although there has been mention of diminished capacity in the context criminal law.[124]

Accordingly, whereas a client's incapacity—or failing to meet the requisite mental capacity (as described in Section III) when entering into a particular legal arrangement—generally results in the corresponding legal arrangement and/or documents being considered void and unenforceable; a client's diminished capacity presents significant uncertainty for both the client and the estate planning attorney regarding what can and should be done.[125] For purposes of this Article, the following definition of "diminished capacity" is used: an impaired mental state that may (or may not) result in a person's inability to understand the nature and effect of his acts.[126]

A. Texas Disciplinary Rules of Professional Conduct

1. Rule 1.02(g)

The Texas Disciplinary Rules of Professional Conduct (the "Rules") are rules of reason intended to define proper conduct for Texas attorneys for purposes of professional discipline.[127] Rule 1.02(g) imposes a duty on attorneys to seek assistance for clients they believe to have impaired faculties.[128] In addition, the comments to the rule bring into question whether an attorney who represents an impaired individual does in fact have an attorney client relationship with that individual.[129] As previously discussed, the capacity to contract requires that the client appreciates the effect of what he is doing and understands the nature and consequences of his acts and the business he is transacting.[130] If it is not clear that the client has capacity to contract, then other arrangements may need to be made, including having the

122. *See infra* Parts IV–VI.

123. *See Diminished Capacity*, BLACK'S LAW DICTIONARY (11th ed. 2019).

124. *See* Jackson v. State, 160 S.W.3d 568, 573–75 (Tex. Crim. App. 2005) (discussing briefly that Texas does not recognized diminished capacity in criminal cases).

125. *See* MODEL RULES OF PROF'L CONDUCT r. 1.4 (AM. BAR ASS'N 1983).

126. *See Diminished Capacity*, BLACK'S LAW DICTIONARY (11th ed. 2019).

127. *Texas Disciplinary Rules of Professional Conduct*, TEXAS CENTER FOR LEGAL ETHICS, https://www.legalethicstexas.com/Ethics-Resources/Rules/Texas-Disciplinary-Rules-of-Professional-Conduct.aspx [perma.cc/YZ34-8D6U] (last visited Sept. 10, 2019).

128. TEX. DISCIPLINARY RULES OF PROF'L CONDUCT r. 1.02(g) (1983).

129. *Id.*

130. *See supra* Part III.B.1.

court appoint a lawyer or another individual, such as a guardian, to represent the client's interests.[131] Rule 1.02(g) specifically states the following:

> 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 that the client lacks legal competence and that such action should be taken to protect the client.[132]

Thus, the lawyer must take action to protect the client if: (1) "the lawyer reasonably believes the client lacks legal competence," and (2) "the lawyer reasonably believes action should be taken to protect the client."[133] The comments to Rule 1.02(g) further provide that:

> 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 by 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.
>
> If a legal representative has already been appointed for the client, the lawyer should ordinarily look to the representative for decisions on behalf of the client. If a legal representative has not been appointed, paragraph (g) requires a lawyer in some situations to take protective steps, such as initiating the appointment of a guardian. The lawyer should see to such appointment or take other protective steps when it reasonably appears advisable to do so in order to serve the client's best interests.[134]

The argument can be made that the purpose of including subsection (g) of Rule 1.02 was to deal with the problem of what happens when a client loses contractual capacity and the attorney-client relationship ceases to exist.[135] The rule does not create a "bridge" relationship whereby an attorney can continue to represent an incapacitated former client; rather, it imposes a duty on the lawyer to take whatever action is necessary to see that a legal representative is appointed for the former client.[136] Nowhere does the rule state that the attorney can or should apply to become the legal representative of the former client.[137]

The comments to Rule 1.02(g) raise serious questions about the advisability of preparing estate plans for individuals who are already the

131. TEX. DISCIPLINARY RULES OF PROF'L CONDUCT r. 1.02(g) (1983).
132. *Id.* (emphasis added).
133. *Id.* at r. 1.02(g) cmt. 12.
134. *Id.* at cmt. 13.
135. *See id.*
136. *Id.*
137. *Id.*

subject of a guardianship.[138] The attorney must carefully weigh his or her abilities with those of the client.[139]

2. Proposed Rule 1.16

Notwithstanding the foregoing discussion, at the time of this Article, the committee on disciplinary rules and referenda (the "Committee") of the Texas Bar initiated a rule change proposal pertaining to Rule 1.02(g).[140] The Committee voted to recommend deletion of Rule 1.02(g), regarding a lawyer's duties to a client who may lack competency.[141] The Committee voted to recommend that Rule 1.02(g) be replaced with a new Rule 1.16, regarding a lawyer's duties to a client with diminished capacity.[142] Proposed Rule 1.16 is designed to give more guidance and flexibility to lawyers than Rule 1.02(g), and to be more detailed in what actions a lawyer is permitted to take when a client's mental capacity is significantly diminished.[143]

During the comment and public hearing process, the Committee received a variety of responses relating to the proposed changes.[144] Among the comments pertaining to Proposed Rule 1.16 and current Rule 1.02(g), included concerns: (1) that the term "diminished capacity" needed to be defined; (2) about the disclosure of confidential client information; (3) about the use of the permissive term "may" in Proposed Rule 1.16(b) and (c); (4) about the differing standards for and of action between current Rule 1.02(g) and Proposed Rule 1.16; (5) that Proposed Rule 1.16(b) should include additional actions a lawyer may take when applicable; (6) that changes should generally follow the American Bar Association Model Rules insofar as possible; and (7) that more explanation of proposed rule changes should be provided.[145]

These proposed changes were submitted to the State Bar of Texas Board of Directors in early 2019 and approved on April 26, 2019.[146] In accordance with section 81.0878 of the Texas Government Code, the Board of Directors will submit the proposed changes to the Texas Supreme Court and petition the Texas Supreme Court to order a referendum on the proposed

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138. *Id.*

139. *See id.*

140. *Committee on Disciplinary Rules and Referenda*, ST. BAR OF TEX. (Sept. 4, 2018), https://www.texasbar.com/Content/NavigationMenu/CDRR/Agendas_Minutes/Sept2018Packet.pdf [perma.cc/634W-Y55A] This Article was written May 2019.

141. *See id.*

142. *Id.*

143. *Id.*

144. *See id.*

145. *Id.*

146. *See* Lowell Brown, *State Bar of Texas Board Update*, ST. BAR OF TEX. (Apr. 16, 2019) https://blog.texasbar.com/2019/04/articles/state-bar/state-bar-of-texas-board-update/ [perma.cc/EZ9M-ZLLQ].

rules.[147] However, the Committee indicated to the author that because it is relatively expensive to hold a referendum, the Board of Directors and the Texas Supreme Court might prefer to wait for approval of additional proposed rules so that a package of several proposed rules can be included in the referendum. This process could take a number of months or even multiple years depending on when the Board of Directors petitions and when the Texas Supreme Court thereafter orders the referendum.

Proposed Rule 1.16 is nearly identical to the proposed version previously rejected by Texas lawyers in the 2011 referendum (which does not itself make Proposed Rule 1.16 ill-advised, but suggests that a new referendum-election strategy may be needed in order to gain support for the proposed changes this time around).[148] Given the current uncertain status surrounding Rule 1.02(g) and Proposed Rule 1.16 and the possibility of further changes prior to future adoption, this Article will provide a brief discussion on Proposed Rule 1.16.[149] Proposed Rule 1.16 reads as follows:

> (a) When a client's capacity to make adequately considered decisions in connection with a representation is diminished, whether because of minority, mental impairment, or for another reason, the lawyer shall, as far as reasonably possible, maintain a normal client-lawyer relationship with the client.
>
> (b) When the lawyer reasonably believes that the client has diminished capacity, is at risk of substantial physical, financial, or other harm unless action is taken, and cannot adequately act in the client's own interest, the lawyer may take reasonably necessary protective action. Such action may include, but is not limited to, 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, attorney ad litem, amicus attorney, or conservator, or submitting an information letter to a court with jurisdiction to initiate guardianship proceedings for the client.
>
> (c) When taking protective action pursuant to (b), the lawyer may disclose the client's confidential information to the extent the lawyer reasonably believes is necessary to protect the client's interests.[150]

Proposed Rule 1.16 generally follows American Bar Association Model Rule 1.14 except for adaptations to account for variations in Texas law.[151] Notably, Proposed Rule 1.16 adds options in section (b) concerning appointment of an attorney ad litem or amicus attorney and submission of an information letter.[152] Proposed Rule 1.16 also deviates slightly from Model

147. TEX. GOV'T. CODE ANN. § 81.0878.
148. *See Committee on Disciplinary Rules and Referenda*, *supra* note 140.
149. *See id.*
150. *Id.*
151. *See id.*
152. *See id.*

Rule 1.14 in section (c) by utilizing a different standard for the extent of disclosure authorized when a lawyer takes protective action on behalf of a client with diminished capacity.[153] The following (selected) Proposed Comments to Proposed Rule 1.16, which also generally correspond to the Comments for Model Rule 1.14, would offer additional guidance to Texas attorneys:

> (1) The normal client-lawyer relationship is based on the assumption that the client, when properly advised and assisted, is capable of making decisions about important matters. However, maintaining the ordinary client-lawyer relationship may not be possible when the client suffers from a mental impairment, is a minor, or for some other reason has a diminished capacity to make adequately considered decisions regarding representation. In particular, a severely incapacitated person may have no power to make legally binding decisions. Nevertheless, a client with diminished capacity often can understand, deliberate on, and reach conclusions about matters affecting the client's own well-being. For example, some people of advanced age are capable of handling routine financial matters but need special legal protection concerning major transactions. Also, some children are regarded as having opinions entitled to weight in legal proceedings concerning their custody.
>
> (2) In determining the extent of the client's diminished capacity, the lawyer should consider and balance such factors as the client's ability to articulate reasoning leading to a decision, variability of state of mind, and ability to appreciate consequences of a decision; the substantive fairness of a decision; and the consistency of a decision with the lawyer's knowledge of the client's long-term commitments and values.
>
> (3) The fact that a client suffers from diminished capacity does not diminish the lawyer's obligation to treat the client with attention and respect. Even if the client has a guardian or other legal representative, the lawyer should, as far as possible, accord the client the normal status of a client, particularly in maintaining communication. . . .
>
> (4) The client may wish to have family members or other persons participate in discussions with the lawyer; however, paragraph (a) requires the lawyer to keep the client's interests foremost and, except when taking protective action authorized by paragraph (b), to look to the client, not the family members or other persons, to make decisions on the client's behalf. . . .
>
> (5) Paragraph (b) contains a non-exhaustive list of actions a lawyer may take in certain circumstances to protect a client who does not have a guardian or other legal representative. Such actions could include consulting with family members, using a reconsideration period to permit clarification or improvement of circumstances, using voluntary surrogate decision-making tools such as existing durable powers of attorney, or

153. *See id.*

> consulting with support groups, professional services, adult protective agencies, or other individuals or entities that have the ability to protect the client. In taking any protective action, the lawyer should be guided by such factors as the client's wishes and values to the extent known, the client's best interests, and the goals of intruding into the client's decision making autonomy to the least extent feasible, maximizing client capacities, and respecting the client's family and social connections.[154]

3. Rule 1.05

If the individual is already a client, the attorney must also be mindful of their duties of confidentiality.[155] Rule 1.05 covers the ethics rules regarding client confidentiality.[156] "Confidential information" includes both "privileged client information" and "unprivileged client information."[157] The attorney-client privilege, as set forth in Texas Rules of Evidence 503 protects from disclosure confidential communications made for the purpose of facilitating the rendition of professional legal services to the client.[158]

Rule 1.05 provides that a lawyer is prohibited from knowingly revealing confidential information of a client or former client to "(1) a person that the client has instructed is not to receive the information; or (2) anyone else, other than the client, the client's representatives, or the members, associates or employees of the lawyer's law firm."[159] Additionally, the lawyer shall not use confidential information to the detriment of the client unless consent is given following the consultation.[160] The same rule applies to former clients; confidential information may not be revealed unless consent is given or the information has become generally known.[161] Finally, the attorney cannot use privileged client information for their own benefit or the benefit of a third person unless consent is given after consultation.[162]

However, Rule 1.05(c) provides specific instances which an attorney may reveal confidential information, which include:

> (1) When the lawyer is expressly authorized to do so to carry out the representation;
> (2) When the client consents after consultation;

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154. *Id.* at Proposed Rule 1.16 cmts. 1–5.

155. TEX. DISCIPLINARY RULES OF PROF'L CONDUCT r. 1.05 (1983).

156. *See id.*

157. *See id.* ("Privileged information refers to communications protected by the attorney-client privilege of Rule 503 of the Texas Rules of Evidence, Rule 503 of the Texas Rules of Criminal Evidence, and by the principles of attorney-client privilege governed by Rule 501 of the Federal Rules of Evidence for United States Courts and Magistrates. Unprivileged client information includes all non-privileged information relating to or furnished by the client that is acquired by the lawyer during the course or by reason of the representation of the client.").

158. *See id.*

159. *See id*. at r. 1.05(b)(1).

160. *See id.* at r. 1.05(b)(2).

161. *See id.* at r. 1.05(b)(3).

162. *See id.* at r. 1.05(b)(4).

(3) To the client, the client's representatives, or the members, associates, and employees of the lawyer's firm, except when otherwise instructed by the client;
(4) When the lawyer has reason to believe it is necessary to do so to comply with a court order, a Texas Disciplinary Rule of Professional Conduct, or other law;
(5) To the extent reasonably necessary to enforce a claim or establish a defense on behalf of the lawyer in a controversy between the lawyer and the client;
(6) To establish a defense to a criminal charge, civil claim or disciplinary complaint against the lawyer or the lawyer's associates based upon conduct involving the client or the representation of the client;
(7) When the lawyer has reason to believe it is necessary to do so in order to prevent the client from committing a criminal or fraudulent act;
(8) To the extent revelation reasonably appears necessary to rectify the consequences of a client's criminal or fraudulent act in the commission of which the lawyer's services had been used;[163] and
(9) To secure legal advice about the lawyer's compliance with the rules of professional conduct.[164]

4. Rule 1.05(d)

A lawyer may reveal *unprivileged* client information in several circumstances, including when "impliedly authorized to do so in order to carry out the representation" or "when the lawyer has reason to believe it is necessary to do so in order to carry out the representation."[165] Before communicating with any family member, doctor, or other professional advisor, the attorney must determine whether the information he seeks to disclose is "privileged" or "unprivileged" information.[166]

If the information is unprivileged, then the attorney is impliedly authorized to reveal such information in order to carry out the representation or when the lawyer believes it is necessary to do so in order to carry out the representation effectively.[167] If the information is privileged information, then the lawyer may reveal the information without the client's consent when the lawyer has reason to believe it is necessary to do so to comply with one of the Texas Disciplinary Rules of Professional Conduct or other law.[168]

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163. *Id.* at r. 1.05(c)(1)–(8).
164. *See Committee on Disciplinary Rules and Referenda*, *supra* note 140 at Proposed Rule 1.05(c)(9) (noting that item (9) is an additional exception recently proposed by the Committee and also currently under consideration for adoption).
165. TEX. DISCIPLINARY RULES OF PROF'L CONDUCT r. 1.05(d) (1983).
166. *See id.* at r. 1.05(a).
167. *Id.* at r. 1.05(d)(1)–(2)(i).
168. *Id.* at r. 1.05(c)(4).

If the lawyer is having difficulty communicating with a client regarding the scope and objectives of the representation due to the client's potential diminished capacity, then the lawyer may be required to take action to protect such person.[169]

B. Section 1102.001 of the Texas Estates Code

In line with the Rules, section 1102.001 of the Texas Estates Code provides that if a court has probable cause to believe a person in their county is incapacitated, the court shall appoint a guardian ad litem to investigate the person's condition to determine whether the person is incapacitated and if a guardian is necessary.[170] Probable cause can be established by an informational letter pursuant to section 1102.003 written by an interested person, or through a written letter or certificate from a physician who has examined the person.[171]

V. UNDUE INFLUENCE

The diminished capacity or incapacity of clients (with estates both large and small) can create difficult challenges to the ability of an attorney to comply with their professional ethical obligations.[172] In an attorney's role as counselor, an implicit responsibility is to protect the client from manipulation and exploitation.[173] This often means that the estate planner must be knowledgeable, mindful of possible abuse to particularly vulnerable clients, and willing to take the appropriate steps to protect the client from abuse.[174]

A common ethical issue that arises when representing clients with diminished capacity involves situations where the client is brought in by a third party, oftentimes a family member or close friend.[175] In such cases, the lawyer should be careful to guard against any undue influence by the family member or friend.[176] The attorney should always: (1) remember who she is representing, (2) make a point to speak with the client alone in person for an extended period of time, (3) ask open-ended questions to engage in discussion designed to gain the client's confidence and to reveal the client's

169. *Id.* at r. 1.02(g).

170. TEX. EST. CODE ANN. § 1102.001.

171. *Id.* §§ 1102.002–.003.

172. *Disciplinary Rules and Referenda of Proposed Rule Changes*, ST. BAR OF TEX. (Jan. 10, 2019), https://www.texasbar.com/Content/NavigationMenu/CDRR/Documents1/Rule101BdSubmission.pdf [perma.cc/6NJ4-YXWJ].

173. *See id.*

174. *See id.*

175. *See id; e.g.,* Rothermel v. Duncan, 369 S.W.2d 917, 922 (Tex. 1963).

176. *See Disciplinary Rules and Referenda of Proposed Rule Changes*, *supra* note 172; *Rothermel*, 369 S.W.2d at 922.

capacity, and (4) be reasonably alert to indicators that the client is incompetent or subject to undue influence.[177]

The existence of undue influence, much like the determination of capacity, is often a central issue in cases of possible financial elder abuse.[178] The legal definition of undue influence varies by state, but generally refers to the improper use of power or trust in a way that deprives a person of free will and substitutes another person's objective.[179] While the following discussion focuses on undue influence in the context of wills, the estate planning attorney must appreciate that undue influence can apply to almost any type of transaction intended to take effect during life or upon death.[180]

A. Undue Influence in Texas

1. Background and Definition

Although the estate planning professional should care about both the dispositive and technical provisions of a client's estate plan, most clients care primarily about who is in charge and who gets what.[181] Along those lines, fundamental to the modern American system of property and inheritance laws is the concept that a testator has free will.[182] "[I]t is the law of Texas that a citizen of this state may by his will dispose of his property without regard to the ties of nature and relationship, and may do so in defiance of the rules of justice or the dictates of reason . . . ."[183] Stated differently, a person is free to leave his property to anyone in any manner he pleases as long as he possesses the mental capacity and free agency required at the time of the act.[184] Courts, juries, relatives, or friends should not rewrite a will because they believe the testator made an ill-advised decision when distributing his property.[185] Therefore, undue influence poses a threat to a testator's free will and free agency by replacing the testator's desires for those of another.[186]

Texas courts have held that undue influence is a form of legal fraud and is defined as compelling the testator to do that which is against his will by fear, the desire of peace, or a feeling which he is unable to resist.[187] Although a finding of undue influence implies the existence of a sound mind, it does

177. *See 4 Tips to Identify Undue Influence*, POSTIC & BATES (Jan. 22, 2018), https://www.postic bates.com/blog/identify-undue-influence-in-estate-planning [perma.cc/3J7A-GMLG].

178. *See Rothermel*, 369 S.W.2d at 922.

179. *See Undue Influence*, BLACK'S LAW DICTIONARY (9th ed. 2010).

180. *See 4 Tips to Identify Undue Influence*, *supra* note 177.

181. *See id.*; In re Good's Estate, 274 S.W.2d 900, 902 (Tex. App.—El Paso 1955, writ ref'd n.r.e).

182. *See* Salinas v. Garcia, 135 S.W. 588, 591 (Tex. App. 1911, writ ref'd).

183. *See In re Good's Estate*, 274 S.W.2d at 902.

184. *See id.*

185. *See* Farmer v. Dodson, 326 S.W.2d 57, 61 (Tex. App.—Dallas 1959, no writ).

186. *See id*.

187. *See* Curry v. Curry, 270 S.W.2d 208, 214 (Tex. 1954); Long v. Long, 125 S.W.2d 1034, 1035 (Tex. 1939).

not require the existence of a sound mind.[188] Testamentary incapacity and undue influence are not necessarily mutually exclusive; one may be a factor in the existence of the other and it is plausible that a person may lack both testamentary capacity and face undue influence.[189]

The burden of proving undue influence is on the contestant, who must introduce tangible and satisfactory proof of each of the following elements:

> (1) the existence and exertion of an influence; (2) the effective operation of such influence so as to subvert or overpower the mind of the testator at the time of the execution of the testament; and (3) the execution of a testament which the maker thereof would not have executed but for such influence.[190]

However, not all influence is undue; undue influence arises when the free agency of the testator is destroyed and a testament is produced expressing the will of the influencer.[191] A person may request, importune, or entreat the testator to execute a favorable dispositive instrument, but unless these advances are shown to be so excessive as to subvert the will of the testator, they will not taint the validity of the instrument with undue influence.[192]

2. Factors

Not surprisingly, it is often the case that a beneficiary under a will occupies a close family or friend relationship with the testator.[193] In the context of undue influence, there also frequently exists a fiduciary or a close family relationship between the influencer-beneficiary and the testator.[194] A confidential or fiduciary relationship is not in itself proof of undue influence, although such relationship may certainly be a factor to consider.[195] Evidence that merely shows the opportunity to exert influence, the testator's susceptibility to influence due to age and physical condition, and an unnatural disposition do not establish that the testator's mind was in fact subverted or overpowered.[196]

The Texas Supreme Court has recognized that it is impossible to propagate hard and fast rules on exactly what constitutes undue influence.[197] Establishing undue influence generally involves inquiry into:

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188. Estate of Lynch, 350 S.W.3d 130, 135 (Tex. App.—San Antonio 2011, writ denied).
189. *See id.*
190. Rothermel v. Duncan, 369 S.W.2d 917, 922 (Tex. 1963).
191. *See id.*
192. *See id.*
193. *See id.* at 922.
194. *See id.*
195. *See* Dailey v. Wheat, 681 S.W.2d 747, 750 (Tex. App.—Houston [14th Dist.] 1984, writ ref'd n.r.e.); *see also* Estate of Willenbrock, 603 S.W.2d 348, 351 (Tex. App.—Eastland 1980, writ ref'd n.r.e.).
196. *Rothermel*, 369 S.W.2d at 922.
197. *See id.* at 923 (demonstrating that many forms and degrees of undue influence exist in Texas).

> (i) the circumstances surrounding execution of the instrument;
> (ii) the relationship between the testator and the beneficiary and any others who might be expected recipients of the testator's bounty;
> (iii) the motive, character, and conduct of the persons benefitted by the instrument;
> (iv) the participation by the beneficiary in the preparation or execution of the instrument;
> (v) the words and acts of the parties;
> (vi) the interest in and opportunity for the exercise of undue influence;
> (vii) the physical and mental condition of the testator at the time of the will's execution, including the extent to which he was dependent upon and subject to the control of the beneficiary; and
> (viii) the improvidence of the transaction by reason of unjust, unreasonable, or unnatural disposition of the property.[198]

Undue influence is not always brought on directly or forcefully, such as by gunpoint.[199] Undue influence is more often exercised by subtle and devious means, such as deceit and fraud, which may occur consistently over a long period of time or briefly right before the execution of the instrument.[200]

In any event, an inquiry into undue influence is largely circumstantial in nature, fact dependent, and rests ultimately on a finding that the testator's mind was undermined and overpowered by the influencer at the time the will was executed.[201] Perhaps the biggest takeaway for the estate planning attorney is to be cognizant that clients with diminished capacity are particularly vulnerable to undue influence and financial abuse.[202]

B. Vulnerable Clients and Financial Elder Abuse

As the U.S. population continues to age, the potential for elder and financial abuse increases.[203] The National Center for Elder Abuse defines elder abuse as "intentional actions that cause harm or create a serious risk of harm (whether or not harm is intended) to a vulnerable elder by a caregiver or other person who stands in a trust relationship to the elder."[204] Financial elder abuse includes a variety of circumstances where a disabled or elderly person is vulnerable to manipulation or exploitation by others.[205] Oftentimes

198. Mackie v. McKenzie, 900 S.W.2d 445, 449 (Tex. App.—Texarkana 1995, writ denied).

199. In re Olsson's Estate, 344 S.W.2d 171 (Tex. App.—El Paso 1961, writ ref'd n.r.e.).

200. *See id.*; *see also* Holcomb v. Holcomb, 803 S.W.2d 411, 415 (Tex. App.—Dallas 1991, writ denied).

201. *See Rothermel*, 369 S.W.2d at 922.

202. *See Olsson's Estate*, 344 S.W.2d at 177.

203. *See What We Do*, NAT'L CTR. FOR ELDER ABUSE, https://ncea.acl.gov/what-we-do/research/statistics-and-data.aspx [perma.cc/BJ4R-TWAQ] (last visited Sept. 12, 2019).

204. *See id.*

205. *See id.*

the vulnerable person is at risk because of any number of factors, such as: age, impaired mental or physical condition, dependency, isolation, and loneliness.[206] Given the attorney's duty to protect and advance their client's legitimate rights and interests, the attorney must be familiar with common tactics used in the manipulation or exploitation of vulnerable individuals.[207]

Six basic principles used in persuasion that can potentially lead to exploitation have been identified as follows:

(1) *Reciprocation*, where people often feel inclined to repay, in kind, what another person has provided to them;
(2) *Consistency*, where people have a nearly obsessive desire to be (and to appear) consistent with a choice or action previously taken and to respond in ways that justify an earlier decision;
(3) *Social Proof*, where people view behavior as more correct in a given situation to the degree they see others performing it (i.e., the greater the number of people who find an idea correct, the more correct the idea will be; similar to peer pressure);
(4) *Liking*, where people most prefer to say yes to the requests of someone who they know, like, and perceive as similar to themselves;
(5) *Authority*, where people have a natural tendency to believe and follow those with the outer appearance of authority, even to the extent of abandoning critical reasoning and placing total trust in the authority-influencer to make correct decisions; and
(6) *Scarcity*, where something that, on its own merits, might hold little appeal becomes decidedly more attractive simply because it would soon become unavailable (i.e., opportunities seem more valuable when their availability is limited).[208]

These six principles, used in persuasion, though not an exhaustive list, account for many of the tactics used by influencers in manipulating or exploiting vulnerable individuals.[209] The mere existence of persuasion by a third party over a vulnerable person in a given transaction does not alone rise to the level of undue influence.[210] In fact, nearly all of us receive benefits on a daily basis which may be construed as the product of persuasion.[211] Nevertheless, the estate planner will benefit by understanding the mental and emotional processes that go into a person's decision-making and having

206. *See id.*
207. *See id.*
208. *See* Dominic Campisi et. al, *Undue Influence: The Gap Between Current Law and Scientific Approaches to Decision-Making and Persuasion*, 43 ACTEC L.J. 359, 371–79 (2018).
209. *See id.*
210. *See id.*
211. *See id.*

awareness that vulnerable clients are particularly susceptible to undue persuasion and influence.[212]

C. Digital Era

In the digital age in which we live, more and more of our daily activities and interactions are conducted online.[213] As our communication habits continue to occur through electronic means, recognizing undue influence will become more difficult for attorneys.[214]

Over the past two decades, federal and state laws have been passed in order to streamline and regulate electronic commerce and communications.[215] Estate planning laws have lagged behind in this matter; however, some states have begun to adopt laws intended to address electronic estate planning documents, electronic signing practices, and remote notarization.[216] Nevada and Indiana have electronic will statutes in effect, and the same are being considered in Arizona, Florida, New Hampshire, Virginia, and the District of Columbia.[217] In recognition of constant advances in technology and the digitalization of routine business and personal transactions, the Uniform Law Commission has formed an electronic wills committee to develop a sample electronic wills law for states to consider adopting.[218] At the time of this article, the author is not aware of any pending electronic wills legislation in Texas, but such legislation should not be surprising if and when it comes up for consideration.[219]

As every estate planner knows, in order for a court to enforce a testator's will, the will must meet certain requirements regarding the document itself and the testator's mental capacity.[220] These modern requirements or formalities required in the will serve four primary functions:

(1) *Evidentiary function*, ensuring the existence of permanent reliable evidence of a testator's intent;
(2) *Channeling function*, ensuring that the testator's intent is expressed in a way that is understood by those who need to interpret it (courts, personal representatives, beneficiaries, government and tax authorities, etc.);

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212. *See id.*
213. *See* Ashlea Ebeling, *Electronic Wills Are Coming Whether Lawyers Like It Or Not*, FORBES (Jan. 17, 2019) https://www.forbes.com/sites/ashleaebeling/2019/01/17/electronic-wills-are-coming-whether-lawyers-like-it-or-not/#26b6c98771df [perma.cc/3AA4-D74V].
214. *See id.*
215. *See id.*
216. *See id.*
217. *See id.*
218. *See id.*
219. *See id.*
220. *See* SUSAN GARY ET. AL, CONTEMPORARY APPROACHES TO TRUSTS AND ESTATES LAW 466–47 (Aspen Publishers 2011).

(3) *Ritual function*, ensuring that the testator's intent to dispose of property is serious and purposeful; and
(4) *Protective function*, ensuring that the testator is protected from his own lack of capacity and from undue influence.[221]

Given the spirit and intention behind these will requirements, a key concern for electronic wills legislation is the protective function—to protect the testator from undue influence by maintaining the traditional formalities required in a will.[222]

There is no doubt that when an attorney is drafting and executing estate planning documents, the attorney can aid in the protective function by interacting with the client, assessing the client's capacity, and making a determination of the client's free agency and susceptibility to undue influences.[223] Attorney involvement in the client's estate plan does not in itself protect the client from undue influence; however, it can certainly help if the attorney is watchful on behalf of her client.[224]

The takeaway for estate planning attorneys in this digital age is to not rely too heavily on electronic communications, particularly email. The author has had numerous clients who, due to normal aging or communication preferences, allow a trusted relative, friend, or assistant to access or operate their email accounts and cell phones on their behalf. As the attorney, it is crucial to be aware of this reality and understand that you may not actually be communicating directly with the intended person—the client. Perhaps the best piece of advice the author has received is this simple action: *go meet the client, or at least pick up the phone and call*. Regardless of advances in technology, a face-to-face meeting (followed by a phone call) is the best way to communicate with clients, confirm mutual understanding, and detect undue influence.

VI. EVALUATING CAPACITY, UNDUE INFLUENCE, AND ADDITIONAL PRACTICAL STEPS FOR THE ATTORNEY TO TAKE[225]

A. Attorney's Response to Undue Influence

Aside from meeting with the client alone and in person on multiple occasions and engaging in conversation to confirm the client's capacity and free agency, what else can the attorney do to protect their client from potential undue influence? [226]

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221. *See id.*
222. *See id.*
223. *See id.*
224. *See id.*
225. Throughout the remainder of this article the author provides suggested best practices, based on his opinion, supported generally by the sources cited in the footnotes.
226. *Id.*

To start simply, the attorney must understand the difference between incapacity and undue influence.[227] Most attorneys are aware that they should decline to prepare an estate plan if they reasonably believe that the testator lacks requisite capacity, even if this means that the testator will visit another attorney who will comply.[228] In such case, the first attorney risks spending time and effort meeting with the client and drafting documents that will not get signed and for which they will not be paid.[229]

On one particular occasion the author had a client who appeared alert and competent during the initial visit, albeit with signs of diminishing capacity.[230] After proceeding with instructions and completing drafts of the estate plan, it came time for the execution meeting, where it became apparent that the client did not know his property or recognize his family members (the objects of his bounty).[231] In that particular case, the appropriate—although difficult—response for the author was to gently decline to allow the client to execute the documents on that day.[232] The client was free to try again on a "good day" or to visit with another attorney, but the client (or rather, the client's spouse and relatives) left that day frustrated and upset.[233] Needless to say, the author did not get paid for that engagement.[234] Nevertheless, the estate planning attorney would do well to understand the following commentary from the American College of Trust Estate and Counsel with respect to Model Rule 1.14 and testamentary capacity:

> If the testamentary capacity of a client is uncertain, the lawyer should exercise particular caution in assisting the client to modify his or her estate plan. The lawyer generally should not prepare a will, trust agreement or other dispositive instrument for a client whom the lawyer reasonably believes lacks the requisite capacity. On the other hand, because of the importance of testamentary freedom, the lawyer may properly assist clients whose testamentary capacity appears to be borderline. In any such case the lawyer should take steps to preserve evidence regarding the client's testamentary capacity.[235]

Even more problematic for an attorney than a client bordering incapacity is a client who is potentially subject to undue influence, especially since a skilled influencer does not necessarily need to be present in order to influence the testator.[236] In a case where the attorney suspects undue influence, it may

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227. *See* MODEL RULES OF PROF'L CONDUCT r. 1.14(b) (AM. BAR ASS'N 2018).
228. *See id.*
229. *See id.*
230. The author is describing a personal interaction with a client during an interview.
231. *Id.*
232. *Id.*
233. *Id.*
234. *Id.*
235. *See Commentaries on the Model Rules of Professional Conduct, ACTEC* (5th ed. 2016) http://www.actec.org/assets/1/6/ACTEC_Commentaries_5th.pdf [perma.cc/53UT-SX9C].
236. *Id.*

not be enough for the attorney to simply decline representation or prevent execution of the documents.[237] In such case, the influencer would most certainly help the testator find another attorney to assist or otherwise develop other means to carry out the undue influence.[238] Instead, the attorney should consider conducting a more robust client interview and investigation to determine the extent of the suspected undue influence and how to best protect the client from abuse.[239]

B. Initial Steps to Take

The Texas Disciplinary Rules of Professional Conduct provide additional practical steps that attorneys should consider in situations of possible diminishing capacity and undue influence.[240]

1. Be Aware

The attorney should be attentive to and document assessments related to issues of a client's capacity, vulnerabilities, and suspicious circumstances that may be present.[241] It may also be appropriate for the attorney to politely ask about any current or future health concerns of the client.[242] The attorney should keep contemporaneous notes of their observations and thought processes, understanding that they very well may be called as a witness in the event of future litigation.[243] In all events, the attorney should exercise independent judgment with respect to the client's capacity and susceptibility to undue influences.[244] The attorney should also make it a practice to send drafts of documents to the client for review in advance of execution and question the client regarding his rationale for major changes to his plan.[245]

2. Meetings and Confidences

The attorney should meet outside the presence of others—which certainly includes beneficiaries and may also include financial advisors, accountants, caregivers, and fiduciaries.[246] The attorney should listen to the client's wishes and take instructions directly from the client and not from an

237. *See Disciplinary Rules and Referenda of Proposed Rules Changes*, *supra* note 172.
238. *Id.*
239. *Id.*
240. TEX. DISCIPLINARY RULES OF PROF'L CONDUCT r. 1.02 cmt. 13 (1983).
241. *See id.* (providing an example of a suspicious circumstance: could be vulnerable person being constantly accompanied by another person).
242. *Id.*
243. *See id.*
244. *See id.*
245. *See id.*
246. *See 4 Tips to Identify Undue Influence*, *supra* note 177.

intermediary who purports to act on the client's behalf.[247] On the issue of confidences and keeping others out of the room, the client must understand from the outset that the attorney represents the client and not the client's family members or advisors.[248] Inevitably, the client will want a family member or financial advisor in the room, which may be appropriate in many circumstances, but likely not in the case of suspected undue influence.[249] When it is necessary to exclude others from the meeting or execution ceremony, the attorney may need to play the "bad guy" and blame it on firm policy or the attorney-client privilege.[250]

If the client insists on having a relative, friend, or advisor in the room, the attorney's notes should reflect who was present and that the client has waived confidences with respect to that person.[251] Keep in mind that allowing others to participate in the meeting or telephone call between the client and attorney may jeopardize the attorney–client privilege for those matters or engagements.[252] In the event the client requests the presence or involvement of others, the attorney should document their file regarding the client's instructions and confirm this in writing to the client, perhaps in the engagement letter or in a separate written Authorization to Communicate and Waiver of Confidentiality signed by the client (see the attached Appendix A for an example).[253]

3. Corporate Fiduciaries

The attorney should discuss the possibility of including a corporate or independent fiduciary or a trust protector in the client's planning documents, which may help the client withstand future influences and ensure that a neutral third party is always acting.[254]

C. Establishing Mental Capacity and Free Agency

If the attorney feels a client's capacity is diminishing or that the client is otherwise vulnerable to undue influence or abuse, additional precautions may be taken to protect the client and to defend against a possible challenge to the client's plan.[255] When the validity of a client's estate plan is at issue, whether from lack of testamentary capacity or undue influence, the client will

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247. *Id.*
248. *Id.*
249. *See id.*; *e.g.*, Rothermel v. Duncan, 369 S.W.2d 917, 922 (Tex. 1963).
250. *See 4 Tips to Identify Undue Influence*, *supra* note 177.
251. *Id.*
252. *Id.;* TEX. DISCIPLINARY RULES OF PROF'L CONDUCT r. 1.05 (1983).
253. *See 4 Tips to Identify Undue .Influence*, *supra* note 177.
254. *See Committee on Disciplinary Rules and Referenda, supra* note 140.
255. *See* Gerry W. Beyer, *Videotaping the Will Execution Ceremony – Preventing Frustration of the Testator's Final Wishes*, 15 ST. MARY'S L.J. 1, 6 (1983).

not be available to testify regarding his competency and free agency.[256] Accordingly, the attorney must (1) ensure that the client possesses the mental capacity and free will necessary to execute his estate planning documents and (2) preserve evidence of the client's capacity and free will.[257]

In an estate planning engagement, where there is a risk of future litigation, it is important to independently establish and memorialize the client's mental competency and free will regardless of whether the estate planning attorney personally believes that the client is competent and acting of his own accord.[258] In such scenario, the attorney will likely be called on at some point to testify regarding the client's competence and behavior.[259] The credibility of the attorney's testimony may largely depend on how well the attorney knew the client, focusing on the history and duration of their relationship.[260] In any event, the attorney's testimony may be questioned due to the attorney's natural interest in protecting the integrity of their work product and the attorney's relative inexperience in the fields of psychology and mental competency issues.[261] For these reasons, the attorney's testimony may not always be the ideal evidence to establish the testator's capacity and free agency; it may be beneficial to have an independent evaluation from a medical professional, trusted friend, advisor, or relative of the testator who is not a beneficiary under the estate plan.[262]

1. Testing by a Medical Professional

In cases where a challenge of undue influence or lack of mental capacity is anticipated, the attorney should consider recommending that the client be examined by a mental health professional contemporaneously with execution of the estate planning documents.[263] Such an examination is unrealistic and unnecessary in most instances, but the supporting testimony of a mental health professional may be the best evidence of a client's capacity and free agency (assuming, of course, that the examination does not reveal any impairments or suspicious influences) at the time of execution.[264]

If a mental health examination is appropriate for a client, a professional psychiatrist, a neuropsychologist, or other appropriate medical professional should perform the examination with a focus on the client's alertness and

256. *See id.*
257. *See id.*
258. *See id.*
259. *See* Krumb v. Porter, 152 S.W.2d 495, 497 (Tex. App.—San Antonio 1941, writ ref'd).
260. *See id.*
261. *See* Pamela Champine, *Expertise and Instinct in the Assessment of Testamentary Capacity*, 57 VILL. L. REV. 25, 31 (2006).
262. *Id.*
263. *Id.*
264. *Id.*

concentration.[265] The examination should conclude with a determination by the medical professional's regarding whether or not the client possesses the minimum degree of capacity required for the particular act.[266]

Ideally, the examination should occur on the same day that the documents are signed in order to establish the client's testamentary capacity on the day the will was executed.[267] The examination report should address the client's medical history and discuss the effect of any of the client's medications on the client's capacity.[268] The report should also be addressed to the attorney and include confidentiality and HIPAA waivers to allow the report to be provided to certain necessary parties as needed after the client's death.[269]

2. Videotaping

It may be advisable for the attorney to arrange for videotaping of the will execution ceremony, as evidence of the client's mental state, independence, free agency, and appearance at the time of execution.[270] In cases where videotaping is appropriate, a professional taping service should be used to ensure proper lighting and sound.[271] However, whether to videotape or not should be carefully considered, as videotaping can also demonstrate the client's lack of capacity or susceptibility to influences, possibly even both.[272] If the attorney does not videotape all client execution ceremonies, the fact of videotaping itself could raise questions about the client's capacity.[273]

As with a mental health examination, videotaping is not appropriate in most cases.[274] In the event that videotaping is preferred, the attorney and client should be confident in the client's capacity and ability to perform well in front of a camera.[275] In any event, rehearsals and re-takes should not be done in order to avoid claims of coaching the client or doctoring the video in the event of future litigation.[276]

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265. *See* In re the Estate of Blakes, 104 S.W.3d 333, 336 (Tex. App.—Dallas 2003) (suggesting that other factors to consider are attention, memory issues, ability to reason, understand, communicate with others, and orientation to time, place, and situation).

266. *See* Bracewell v. Bracewell, 20 S.W.3d 14, 22 (Tex. App.—Houston [14th Dist.] 2000).

267. *See* Lee v. Lee, 424 S.W.2d 609, 611 (Tex. 1968).

268. *See Bracewell*, 20 S.W.3d at 22.

269. 45 C.F.R § 164.525 (b)–(c).

270. *See* Beyer, *supra* note 255, at 5.

271. *Id.* at 45.

272. *Id.* at 47.

273. *Id.*

274. *Id.*

275. *Id.*

276. *See id*. at 46.

3. Witness Credibility and Questions

The witnesses to a will execution should be carefully chosen and the number of witnesses may need to be increased.[277] Many attorneys use professional witnesses from their office for convenience, but this may not always be appropriate.[278] Younger witnesses may be more capable of recalling specific details, while older witnesses may appear more credible.[279] In cases with the potential for litigation, people who have known the client for numerous years and who are aware of the client's background and personality may be better witnesses than professional witnesses.[280] However, professional witnesses may be more independent and better trained to testify concerning proper execution and mental capacity.[281]

During the execution ceremony, the attorney should speak with the client in the presence of the witnesses regarding the client's intentions and the content of the documents.[282] The attorney should ask questions of the client to establish that the client understands his family and beneficiary relationships, business or profession, and the extent of his.[283] The will or other document should be reviewed with the client and witnesses to confirm testamentary intent and understanding of the document.[284] Avoid using leading questions or questions that call for a "yes" or "no" answer, since many clients with diminished capacity tend to simply answer "yes" to any question.[285] Instead, ask open-ended questions to allow the client to explain their thoughts and desires.[286]

Also consider asking witnesses to sign an affidavit as to relevant facts (or otherwise preparing a "memo-to-the-file") to serve as a contemporaneous record of the questions the attorney asked, the client's responses, and why those questions and responses caused the witness to form the opinion that the client had mental capacity and free agency to execute the estate planning documents.[287] For certain incapacity planning documents, it may also be beneficial for the client and witnesses to execute a self-proving affidavit even if not required by statute.[288]

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277. *See* GERRY W. BEYER, 10 TEXAS PRACTICE SERIES: LAW OF WILLS § 52: 24 (4th ed. 2018).

278. *Id.*

279. *Id.* § 52:27.

280. *Id.* § 52:25.

281. *Id.* § 52:24.

282. TEX. EST. CODE ANN. § 251.051 (2017); *See* BEYER, *supra* note 61.

283. *See* TEX. EST. CODE ANN. § 251.001 (2017) (noting that questions do not need to be structured and interrogation-like, but which can come up in the normal course of conversation).

284. *See Assessment of Older Adults with Diminished Capacity: A Handbook for Lawyers*, *supra* note 32.

285. *See id.*

286. *See id.*

287. *See id.*; TEX. EST. CODE ANN. § 205.002.

288. *See Assessment of Older Adults with Diminished Capacity: A Handbook for Lawyers*, *supra* note 32; TEX. EST. CODE ANN. § 251.104.

4. Prior Wills and Consistency

After executing the will, the attorney and client should consider executing one or more new wills and codicils, keeping the substance the same while demonstrating a consistent desired plan of distribution and testamentary intent.[289] While not always realistic, such an approach makes potential challenges more difficult due to the necessity of overcoming multiple, consistent instruments evidencing the client's intentions, capacity, and free agency.[290] However, this approach should be exercised carefully, since any inconsistencies between wills could give rise to questions.[291] For instance, a prior will that required client initials on each page, followed by a new will that did not require initials, could suggest that the client was feeble or struggled to concentrate during execution of the new will.[292]

5. No Contest Clauses

A no contest clause or forfeiture clause generally provides that an interested person's unsuccessful contest of a testamentary instrument results in forfeiture of the contesting person's interests under the instrument.[293] Many lawyers feel that it is useful to include a no contest clause in the will since it causes a beneficiary to forfeit his bequest if he brings a challenge to the will.[294] From a practical standpoint, the beneficiary must receive something of value under the will in order for a no contest clause to be effective.[295] Beneficiaries who receive something under a will must do a cost-benefit analysis of what they stand to gain and lose if they bring a challenge, whereas a beneficiary who has nothing to lose will bring a challenge despite the no contest clause.[296]

No contest clauses are widely used in Texas, but they are not always effective.[297] Section 254.005 of the Texas Estates Code sets forth a "just cause and good faith" exception to enforcement of a no contest clause. If the contesting person establishes that just cause existed for bringing the contest and if the contest was brought and maintained in good faith, the no contest clause will not be enforced.[298] Section 112.038 of the Texas Trust Code contains a no contest provision, similar to section 254.005 of the Texas

289. *See Assessment of Older Adults with Diminished Capacity: A Handbook for Lawyers*, *supra* note 32.
290. *See id.*
291. *See id.*
292. *See id.*
293. *See* BEYER, *supra* note 277, § 52:8.
294. *See id.* § 52:1.
295. *See id.* § 52:9.
296. *See id.* § 51:1.
297. *See id.*; *e.g.,* Estate of Newbill, 781 S.W.2d 727, 728 (Tex. App.—Amarillo 1989, no writ).
298. *See* TEX. EST. CODE ANN. § 254.005.

Estates Code but applied in the context of trust instruments.[299] Section 254.005 was intended to clarify what was already Texas law: a no contest clauses will generally be enforced absent any pleading or proof that the contest was made in good faith and with just cause.[300]

Nevertheless, there are numerous Texas cases in which no contest clauses have not been enforced by courts, and the attorney should be aware that no contest clauses are strictly construed in Texas since there is no such thing as the "probate police."[301] No official government body or court investigates whether a testator's will is the product of incapacity or undue influence (except perhaps in the most egregious circumstances).[302] Rather, our probate system relies on those who have an interest (or a purported interest) in a person's estate to prevent the admission of defective instruments to probate.[303]

D. Additional Tools to Evaluate and Handle Incapacity

Determining whether a client has capacity can be very tricky, especially for an attorney who is not a licensed medical or healthcare professional.[304] Furthermore, the attorney must be cognizant that the client may be having a "good day" or a moment of clarity at the time of the consultation (which could call for follow-up meetings, possibly at varying times of the day, to help gauge true capacity).[305] Following are additional steps, resources, and options for the attorney to consider when dealing with a client with potential diminished capacity or incapacity.[306]

1. Setting of Meetings and Regular Follow-Up

It is important to remember that the time of day and overall setting of a client meeting could impact a person's performance or behavior, so the environment in which the attorney conducts her meetings should be accommodating to the client.[307] The attorney should be mindful of

299. *See* TEX. PROP. CODE ANN. § 112.038.

300. *See* BEYER, *supra* note 277, § 52:9; *e.g.*, Hammer v. Powers, 819 S.W.2d 669, 671 (Tex. App.—Fort Worth 1991, no writ).

301. *See* BEYER, *supra* note 277, § 52:9; *e.g.*, Matter of Estate of Hodges, 725 S.W.2d 265, 268 (Tex. App.—Amarillo 1986, writ ref'd n.r.e); Sheffield v. Scott, 662 S.W.2d 674, 676 (Tex. App.—Houston [14th Dist.] 1983, writ ref'd n.r.e).

302. *See* BEYER, *supra* note 277, § 52:9; *e.g.*, Stephen v. Coleman, 533 S.W.2d 444, 447 (Tex. App.—Fort Worth 1976, writ ref'd n.r.e) (where the court found that proof of testator incompetency three days post will execution did not give rise to testamentary incapacity).

303. *See* BEYER, *supra* note 277, § 52:9; *see, e.g.*, Estate of Newbill, 781 S.W.2d 727, 728 (Tex. App.—Amarillo 1989, no writ).

304. *See Assessment of Older Adults with Diminished Capacity: A Handbook for Lawyers*, *supra* note 32.

305. *See id.*

306. *See id.*

307. *See id.*

temperature settings, loud background noises, proper lighting, ease of access to meeting locations, etc.[308] For instance, a meeting location with difficult parking or security procedures for clients to navigate could potentially cause unnecessary stress and confusion for clients with borderline incapacity issues prior to the actual meeting.[309] Also, the attorney should remember to: (1) speak slowly and enunciate, (2) talk directly to the client, (3) gauge whether written communication or oral communication works best, (4) consider having an extra pair of reading glasses available, (5) start with simple concepts and build at a slower pace, (6) circle back to difficult material, and (7) check periodically that the client is retaining and understanding key concepts.[310]

Additionally, depending on the dynamic of the attorney-client relationship, it may be prudent for the attorney to make it a practice to follow-up with a client with potential diminishing capacity on a regular basis to check-in and evaluate if any new developments have occurred in the client's situation that might warrant proactive discussions with the client or protective action by the attorney.[311]

2. American Bar Association Resources

The American Bar Association has a detailed publication titled "Assessment of Older Adults with Diminished Capacity: A Handbook for Lawyers" that is a very helpful resource for attorneys to use as they work through various incapacity issues.[312]

The American Bar Association also published the "Judicial Determination of Capacity of Older Adults in Guardianship Proceedings", which provides a framework that judges may find useful in capacity determination.[313]

3. Physician's Certificate of Medical Examination in Guardianship Referral

The Harris County probate courts require a physician's mental status exam (called the Physician's Certificate of Medical Examination) of the proposed ward to accompany any guardianship referral form.[314] This

308. *See id.*
309. *See id.*
310. *See id.*
311. *See id.*
312. *See id.*
313. *See Judicial Determination of Capacity of Older Adults in Guardianship Proceedings: A Handbook for Judges*, A.B.A. COMM'N. ON L. & AGING AM. PSYCHOLOGICAL ASS'N (2006) https://www.apa.org/pi/aging/resources/guides/judges-diminished.pdf [perma.cc/5ARV-7W33].
314. *Guardianship Referral*, HARRIS COUNTY, https://probatecrt2.harriscountytx.gov/Documents/Guardianship%20Referral%20revised%2005.2017.pdf [perma.cc/C9DA-4TR3] (last visited Sept. 10, 2019).

Physician's Certificate of Medical Examination is a detailed form designed to enable the court to determine whether the proposed ward is "incapacitated according to the legal definition and whether the proposed ward should have a guardian appointed."[315] For purposes of the Physician's Certificate of Medical Examination, an "incapacitated person" is defined as "an adult who, because of a physical or mental condition, is substantially unable to: (a) provide food, clothing, or shelter for himself or herself; (b) care for the person's own physical health; or (c) manage the person's own financial affairs."[316]

The Physician's Certificate of Medical Examination only applies in the context of a guardianship referral and can only be completed by a licensed mental health professional, but the form can be instructive to an attorney with a client experiencing diminished capacity.[317] The form includes a list of possible deficits an incapacitated person may have, such as: "short-term memory, long-term memory, immediate recall, understanding, communicating, recognizing familiar objects and persons, solving problems, and reasoning logically."[318] In addition, the form lists decisions and actions that an incapacitated person might struggle with, which include to:

> Manage a personal bank account; safely operate a motor vehicle; vote in a public election; make decisions regarding marriage; administer own medications; attend to basic activities of daily living without assistance (e.g., bathing, grooming, dressing, walking, and toileting); and attend to instrumental activities of daily living without assistance (e.g., shopping, cooking, traveling, and cleaning).[319]

While the list is not exhaustive, the Physician's Certificate of Medical Examination form as a whole can offer guidance to an attorney seeking to determine whether or not her client is incapacitated, experiencing diminishing capacity, or susceptible to undue influence for purposes of representation and execution of estate planning documents.[320]

4. SAGE and Other Tests for Cognitive Impairment

A Self-Administered Gerocognitive Examination ("SAGE") is a brief, ten to fifteen minute, self-administered cognitive screening instrument designed to detect early signs of cognitive, memory, or thinking

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315. *See id.*
316. *See* TEX. EST. CODE ANN. § 1002.017.
317. *Guardianship Referral*, *supra* note 314; *see Assessment of Older Adults with Diminished Capacity: A Handbook for Lawyers*, *supra* note 32 .
318. *Guardianship Referral*, *supra* note 314.
319. *Id.*
320. *See id.*

impairments.[321] SAGE evaluates a person's thinking abilities and helps physicians to know how well a person's brain is functioning.[322] While SAGE does not diagnose any specific condition, the results can indicate whether or not a person has cognitive or brain dysfunction.[323] Additionally, "[i]t is normal for a person to experience some memory loss and take longer to recall events as the person ages," but SAGE can be a helpful tool to assess memory or thinking problems to determine if further evaluation is necessary.[324]

Other tools and tests to assess a person's cognitive impairment include the Mini-Mental State Examination ("MMSE"), the PARADISE-2 Protocol, and the CLOX: Clock Drawing Executive Test.[325]

5. Defining Incapacity in Estate Planning Documents

The author's experience is that most estate planning attorneys in Texas define incapacity based on the type of document in question and the identity of the incapacitated person.[326] For instance, a Statutory Durable Power of Attorney is most often drafted to take effect immediately upon execution and to be unaffected by the principal's subsequent incapacity.[327] However, in some cases the client may prefer a "springing" Power of Attorney, that "springs" into effect upon the principal's incapacity, in which case incapacity must be defined in the document.[328] One option in this situation is to define incapacity in a manner which requires a physician to certify in writing that the principal is mentally incapable of managing his own financial affairs based on the physician's medical examination of the principal.[329] Another option, which should be used carefully and only in non-controversial client-family-beneficiary situations, is to define incapacity based on an agent's affidavit of incapacity, wherein the principal is deemed incapacitated upon the agent's execution of an affidavit stating that the principal is incapacitated.[330]

Similarly, in a revocable trust plan, the trustee may be given the power to determine that a beneficiary is incapacitated if, in the trustee's sole discretion, the beneficiary is substantially unable to manage his own financial affairs.[331] The determination of incapacity with respect to a trustee is a bit

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321. *See SAGE: A Test to Detect Signs of Alzheimer's and Dementia*, THE OHIO ST. U. WEXNER MED. CTR., https://wexnermedical.osu.edu/brain-spine-neuro/memory-disorders/sage [perma.cc/85WF-6SB3] (last visited Sept. 10, 2019).

322. *Id.*

323. *Id.*

324. *See id.*

325. *See id.*

326. *See id.*

327. *Id.*

328. *Id.*

329. *See* TEX. EST. CODE ANN. § 751.00201.

330. *See SAGE: A Test to Detect Signs of Alzheimer's and Dementia*, *supra* note 321.

331. *Id.*

trickier.[332] If a trustee should become incapacitated, the remaining co-trustee or the successor trustee could be given the ability to make this judgment.[333] If there is no co-trustee or successor trustee, though, then the beneficiary could initiate this judgment by obtaining a written determination of incapacity from two licensed physicians.[334] If the beneficiary and trustee have a contentious relationship, the beneficiary should not have the ability to determine whether the trustee is incapacitated, as doing so could essentially allow the beneficiary to bypass any trusteeship restrictions placed on the beneficiary elsewhere in the trust agreement.[335]

The trend toward allowing an agent or trustee to determine incapacity, rather than requiring a physician's certification of incapacity as a default, provides flexibility for the parties, streamlined decision-making, and avoids the time, expense, and privacy intrusion of obtaining a physician's certification or a judicial determination of incapacity.[336] This approach acknowledges the reality that the agent or trustee likely knows the client's situation and capabilities better than a physician who merely spends a few hours examining the client.[337] Nevertheless, if the fiduciary has the ability to determine incapacity, the attorney should understand the potential for abuse in the extreme case where a fiduciary does not have the client's best interest in mind.[338] In such case, it may be prudent to require a written determination of incapacity from multiple licensed physicians.[339]

6. Occupational Living Will

The attorney might consider suggesting that the client develop an "Occupational Living Will," of sorts.[340] Just as a client might execute a Living Will to specify their preferences regarding end-of-life medical treatment, a client might also consider developing a formal plan for transition and conclusion of his professional career in the event of future cognitive impairment.[341] While many professionals may have the opportunity, desire, and drive to work into their 70s and 80s, a lack of self-awareness can cause some to continue their careers when they otherwise should retire (for instance, in the case of evidence of deteriorating mental capacity—which can

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332. *Id.*
333. *See id.*
334. *Id.*
335. *Id.*
336. *Id.* .
337. *Id.*
338. *Id.*
339. *Id.*
340. *See* Kirk R. Daffner, *Reflections of a Dementia Specialist: I Want to Stop Working Before I Embarrass Myself*, THE WASH. POST (Apr. 15, 2018) https://www.washingtonpost.com/ national/health-science/reflections-of-a-dementia-specialist-i-want-to-stop-working-before-i-embarrass-myself/2018/04/13/adb08158-3111-11e8-8abc-22a366b72f2d_story.html?noredirect=on [perma.cc/ED53-5FL4].
341. *See id.*

sometimes be difficult to detect in oneself but readily apparent to outsiders).[342] Preparing an Occupational Living Will can be an important, though often overlooked, endeavor to hold oneself accountable if cognitive or functional decline should ever signify the need to stop working.[343]

7. Family Driving Agreement

The Texas Department of Public Safety does not have different driver license standards due to age, but effective September, 1, 2007, Texas drivers aged seventy-nine or older are required to renew their license in-person at the DMV.[344] In addition, drivers aged eighty-five and older are required to renew every two years, rather than every six years.[345] During renewal, the person is required to pass a vision test and provide certain medical history information to determine if additional testing is required.[346]

These requirements recognize the reality that all licensed drivers should maintain good physical and mental health, which tends to decline with age.[347] A person who potentially should not be driving due to diminished physical or mental health may be reported to the Department of Public Safety by a physician, family member, or even a stranger if the person's driving capability is impaired.[348]

Although not needed in many circumstances, the attorney should consider suggesting that her aging client or client with diminished capacity sign a "Family Driving Agreement," a type of advance directive for driving decisions.[349] The driver agrees in writing to designate someone to advise him or her when it is time to "give up the keys."[350] In order to avoid potential unnecessary conflict or embarrassment should a client's physical or mental health decline to the point where driving is no longer safe, a Family Driving Agreement may help facilitate the decision-making process for the client to drive with certain restrictions or discontinue driving altogether.[351] For a sample Family Driving Agreement, see the attached Appendix B.[352]

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342. *See id.*

343. *See id.*

344. *See Drivers Age 79 or Older*, TEX. DEP'T OF PUB. SAFETY, https://www.dps.texas.gov/driverlicense/elderlydrivers.htm [perma.cc/M9GW-6Q9Y] (last visited Sept. 12, 2019).

345. *See* TEX. TRANSP. CODE ANN. § 521.2711.

346. *See* Daffner, *supra* note 340.

347. *See id.*

348. *See Driver Safety Information Medical Conditions and Traffic Safety*, ST. OF CAL. DEP'T OF MOTOR VEHICLES, https://www.dmv.ca.gov/portal/dmv/detail/dl/driversafety [perma.cc/NAC5-GMQC] (last visited Sept, 11, 2019).

349. *See id*.

350. *See id.*

351. *See Family Driving Contracts Between Older Drivers and their Relatives Gaining in Popularity*, HUFFPOST (Dec. 31, 2011), https://www.huffpost.com/entry/family-driving-contracts_n_1124499 [perma.cc/HF3J-JPTU].

352. *See* Appendix B.

8. Medical and HIPAA Concerns

The execution of a Medical Power of Attorney is imperative when planning for a client's incapacity.[353] An individual utilizes a Medical Power of Attorney to designate who will make his medical treatment decisions in the event of his incapacity or inability to communicate with his doctors.[354] A Medical Power of Attorney is only effective if the client is unable to make his own decisions and this fact is certified in writing by his attending physician.[355]

The Health Insurance Portability and Accountability Act (HIPAA) attempts to provide privacy of personal health information.[356] From an estate planning and personal care-taking perspective, it is difficult for a client's family members to receive information from a doctor or hospital about a loved one's medical condition.[357] One answer to this is a short HIPAA Power of Attorney that authorizes certain individuals, typically those also designated in a Medical Power of Attorney or a Statutory Durable Power of Attorney, to receive an individual's health care information.[358] The document would provide authorization by the individual to release medical information to certain individuals designated in the HIPAA Power of Attorney.[359] The document would also be especially helpful to a family member assisting with medical insurance matters.[360]

While it is often clear who the attorney is authorized to communicate with upon the client's incapacity or death, it is not always clear who the attorney can or should communicate with if the client's capacity is diminished or in question.[361] As a best practice, similar to when a client requests the presence or involvement of others in a meeting, the attorney should consider obtaining a written Authorization to Communicate and Waiver of Confidentiality signed by the client, in order to give the attorney guidance concerning who the client wants the attorney to communicate with and provide documents to in the event of the client's incapacity.[362] Again, see the attached Appendix A for an example.[363]

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353. *See HIPAA and Medical Power of Attorney*, TEX. MED. ASS'N, https://www.texmed.org/Template.aspx?id=26380 [perma.cc/D7XF-BJR4] (last visited Sept. 10, 2019).

354. *Id.*

355. *Id.*; TEX. HEALTH & SAFETY CODE ANN. § 166.52.

356. *See Personal Representatives*, U.S. DEP'T OF HEALTH & HUM. SERV., https://www.hhs.gov/hipaa/for-individuals/personal-representatives/index.html [perma.cc/S5CQ-RYX5] (last visited Sept. 12, 2019).

357. *Id.*

358. *Id.*

359. *Id.*

360. *Id.*

361. *Id.*

362. *Id.*

363. *See* Appendix A.

9. Financial Exploitation and Trusted Contact Authorization

Chapter 280 of the Texas Finance Code addresses financial exploitation of vulnerable adults (i.e., persons 65 years or older and persons with disabilities) and imposes certain requirements on financial institutions to investigate and report suspected financial exploitation of vulnerable adults to the Texas Department of Family and Protective Services.[364] The financial institution is also permitted to notify a third party who is reasonably associated with the vulnerable adult (i.e., a trusted contact) about the suspected financial exploitation so long as the third party is not a suspected wrongdoer.[365]

The Securities and Exchange Commission approved the adoption of FINRA Rule 2165 and amendments to FINRA Rule 4512 in February 2017 to address concerns of exploitation by senior investors.[366] Brokers may now place temporary holds on disbursements when there is a reasonable belief an account holder is being exploited.[367] Brokers are required to make efforts to secure the information of a "trusted contact" for senior account holders.[368] By agreement, the account holder can permit the broker to contact the trusted contact if the broker has concerns about the account holder's "health or welfare due to potential diminished capacity, financial exploitation or abuse, endangerment, and/or neglect."[369] The broker may reach out to the trusted contact if the broker "suspects that the customer may be suffering from Alzheimer's disease, dementia, or other forms of diminished capacity."[370]

The above authority, applicable to financial institutions and brokers, can be instructive to attorneys and their clients in the sense that it may be helpful for the client to name a trusted contact for the attorney and other advisors to notify in the event that the attorney or advisor suspects the client is being exploited or suffering from diminished capacity.[371] The trusted contact could be designated by the client in a modified version of the Authorization to Communicate and Waiver of Confidentiality.[372]

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364. *See* TEX. FIN. CODE ANN. § 280.

365. *Id.*

366. *See Senior Investors*, FINRA, https://www.finra.org/rules-guidance/key-topics/senior-investors [perma.cc/4UFG-XFMC] (last visited Sept. 13, 2019) (Financial Industry Regulatory Authority ("FINRA")).

367. *Id.*

368. *Id.*

369. *See id.*

370. *See id.*

371. *See id.*

372. *See* Appendix A.

E. Creation of a Guardianship

A guardianship can be an expensive and intrusive process.[373] As part of the 1993 Texas legislation, there was a fundamental shift regarding the philosophy of instituting a guardianship.[374] Now, the central objective is to avoid placing a full guardianship over an incapacitated person if a less intrusive guardianship can be employed.[375] A court may appoint a guardian with either full or limited authority over an incapacitated person, as indicated by the incapacitated person's actual mental or physical limitations and only as necessary to promote and protect the well-being of the incapacitated person.[376]

Section 1002.017 of the Texas Estates Code defines an "incapacitated person" for purposes of a guardianship proceeding to include "an adult who, because of a physical or mental condition, is substantially unable to: (a) provide food, clothing, or shelter for himself or herself; (b) care for the person's own physical health; or (c) manage the person's own financial affairs."[377] Additionally, under section 1001.003 of the Texas Estates Code, a "reference to any of the following means an incapacitated person:

(1) a person who is mentally, physically, or legally incompetent;
(2) a person who is judicially declared incompetent;
(3) an incompetent or an incompetent person;
(4) a person of unsound mind; or
(5) a habitual drunkard."[378]

Recent legislation in 2015 goes even further to expand the policy of avoiding a full guardianship if less intrusive options are available.[379] One goal behind exploring alternatives to guardianships is to allow the proposed ward to receive help but maintain as much independence and freedom from court supervision as possible.[380]

Before a guardianship proceeding is filed, the applicant must certify to the court that alternatives to guardianship have been explored.[381] The application must state whether alternatives and support services were considered, and whether any support services available to the proposed ward

373. *See Understanding Guardianships: There are Risks with Pursuing Guardianship*, HURLEY ELDER CARE L., http://hurleyeclaw.com/2018/03/07/understanding-guardianships-risks-pursuing-guardianship/ [perma.cc/K5RJ-7SNP] (last visited Sept. 10, 2019).

374. *See* TEX. EST. CODE ANN. § 1001.001.

375. *See id.* § 1101.001–.002.

376. *Id.* § 1001.001.

377. *Id.* § 1002.017(2).

378. *Id.* § 1001.003.

379. *See* Tex. S.B. 1881, 84th Leg. Reg. Sess. (2015).

380. *See Guardianship Reform*, COALITION OF TEXANS WITH DISABILITIES, https://www.txdisabilities.org/guardianship-reform [perma.cc/DH37-2R6C] (last visited Sept. 13, 2019).

381. *See* TEX. EST. CODE ANN. § 1107.007.

are feasible and would avoid the need for a guardianship.[382] In describing the alleged incapacity, the application should state whether the proposed ward's right to make personal decisions regarding a residence should be terminated.[383]

Before appointing a guardian, the court must find by clear and convincing evidence that alternatives and support services were considered but are not feasible.[384] A finding that the proposed ward lacks capacity to do some, but not all necessary tasks, requires the court to specifically state whether the proposed ward lacks the capacity, with or without support services, to make personal decisions regarding residence, voting, operating a motor vehicle, and marriage.[385] The order must include these findings and state the specific rights and powers retained by the ward either with or without the need for support services.[386]

Section 1002.0015 of the Texas Estates Code provides that "alternatives to guardianship *include* the:

(1) execution of a medical power of attorney;
(2) appointment of an agent under a durable power of attorney;
(3) execution of a declaration for mental health treatment;
(4) appointment of a representative payee to manage public benefits;
(5) establishment of a joint bank account;
(6) creation of a Chapter 1301 management trust;
(7) creation of a special needs trust;
(8) designation of a guardian before a need arises; and
(9) establishment of alternate forms of decision-making based on person-centered planning."[387]

Subtitle I of the Texas Estates Code (chapters 1351 through 1356) also sets various special proceedings and alternatives to guardianship, which include:

(1) Sale of minor's interest in property without guardianship[388]
(2) Sale of ward's property without guardianship of the estate[389]
(3) Mortgage of minor's interest in residence homestead[390]
(4) Management and control of incapacitated spouse's property[391]
(5) Receivership for estates of certain incapacitated persons[392]

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382. *See id.*
383. *See id.*
384. *See id.*
385. *See id.*
386. *See id.*
387. *See id.* § 1002.0015 (internal quotations omitted) (emphasis added).
388. *See id.* ch. 1351.
389. *See id.*
390. *See id.* ch. 1352.
391. *See id.* ch. 1353.
392. *See id.* ch. 1354.

(6) Payment of certain claims without guardianship (Chapter 1355)[393]

VII. CONCLUSION

As medical advances progress and as our population continues to age, developing a plan to deal with diminished capacity and incapacity will become ever-more important for estate planning attorneys and their clients.[394] Awareness of the possibility of diminished capacity, along with understanding the vulnerabilities of elderly persons and those with diminished capacity is a crucial first step for the attorney.[395] However, the attorney must also know the available options and appropriate actions to take when dealing with a client's diminished capacity and incapacity.[396]

Of course, there is no universal standard to follow since every client has unique circumstances, but an attorney would do well to know their client, understand the rules and exceptions, and recognize when to say "yes" or "no" to an engagement.[397] Estate planning attorneys who appreciate the legal standards, ethical rules, and practical steps to take with respect to capacity and undue influence are able to offer diligent, competent, and valuable representation to their clients.[398]

393. *See id.* ch. 1355.
394. *See supra* Sections III–VI.
395. *See supra* Sections III, V.B.
396. *See supra* Sections III, V.B.
397. *See supra* Sections III, V.B.
398. *See supra* Section VI.

APPENDIX A

Authorization to Communicate and Waiver of Confidentiality*

I, _____ [client], hereby authorize _____ [attorney/law firm] (collectively referred to as "my attorney"), to take the following actions with respect to my estate planning matters:

(i) Communicate with and deliver copies of any of my estate planning documents to any or all of the persons designated in such documents as an agent or personal representative of mine and to any or all of the persons named below regarding my financial and medical affairs, personal objectives, and any other relevant issues to my estate planning matters.

(ii) My attorney may share any confidential information (that may have been gained in the course of representing me) with the persons designated in my estate planning documents as an agent or personal representative of mine and with the following named persons, and I understand and acknowledge that I hereby waive the attorney-client privilege regarding any such shared information and communications, to the extent that it is shared with such persons named or described in this Authorization.

Name 1: _____
Name 2: _____
Name 3: _____

This Authorization is intended to permit my attorney to deliver and discuss my estate planning documents with the persons named or described in this document to ensure that my estate plan is carried out. If I wish to revoke this Authorization at any time, I must notify my attorney in writing of such revocation; otherwise, my attorney will act in good faith under and in reliance on this Authorization.

Signed: _____ Date: _____

*Provided by Rhonda H. Brink (Austin, Texas)

APPENDIX B

Family Driving Agreement

Dear Family:

As I continue through the aging process, I realize there may come a day when the advantages of my continuing to drive are outweighed by the safety risk I pose not only to myself, but also to other motorists.

I want to continue driving for as long as is safely possible, but when my driving is no longer safe, I will trust:

_____

(name of trusted friend or relative)

when he/she tells me that I need to discontinue driving, or to continue driving with certain restrictions.

I will maintain my integrity by listening to and accepting this individual's driving-related recommendations, thereby ensuring not only my safety, but also the safety of the motoring public.

Signed: _____ Date: _____

Witness: _____ Date: _____

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