

ASSESSING CAPACITY:

A Requirement that Extends Beyond Estate Planners



BY KIRALYN LOCKE AND STEVEN SITEK

As we begin our way into “spooky season,” it is only appropriate to begin this article with some spooky legal jokes. What is a skeleton’s favorite type of legal work? Pro Bone-o. Who did the gourd leave their estate to? Their next of (pump)kin. How do ghosts settle their disputes? Through ar-boo-tration.

Here is another spooky thought for you – an estate planner is not the only type of lawyer who is required to assess their client’s capacity. All lawyers should be assessing their client’s capa-

city throughout the representation of their clients.

If you have never formally assessed your client’s capacity, have no fear. It is likely that you have been assessing your client’s capacity without even realizing it. And if you have not been assessing your client’s capacity, this article will provide some guidance on how to do so in the future.

What is Diminished Capacity?

While many people think diminished capacity relates to old age, that is

not always true. Yes, being of a certain age can increase the likelihood that someone is suffering from diminished capacity. But old age, by itself, is not indicative of diminished capacity. In fact, there are forms of diminished capacity that have nothing to do with old age.

While there is no clear-cut definition of diminished capacity in the Minnesota Rules of Professional Conduct, Rule 1.14 provides helpful guidance. Rule 1.14 states that capacity can be diminished due to “minority, mental impairment, or some other reason.”

“Minority” is a form of diminished capacity that is easy to comprehend. If you have a client who is a child, you have a client with diminished capacity.

“Mental impairment” is broader, but this is generally understood as something that prevents a person from thinking clearly. A mental impairment does not need to be a permanent impairment in order to rise to the level of “diminished capacity.” For example, if someone is under the influence of alcohol or drugs, they are likely experiencing diminished capacity. If someone is suffering through the tragic loss of their spouse, they may be experiencing diminished capacity by not thinking clearly.

The trick (or treat) to remember is – diminished capacity is not limited to old age.

How Do You Assess Capacity?

There are different ways to assess capacity, and how you choose to assess capacity may differ based on the circumstances.

For example, it may be reasonable for an estate planner to have formal conversations regarding capacity with each of their clients. The estate planner may choose to go through an official capacity questionnaire, such as the mini mental status examination. Through this questionnaire, the estate planner can get a better sense of their client’s capacity and view of reality. On the other hand, an estate planner may ask informal questions regarding current events or family history to determine if someone has the appropriate level of capacity.

For non-estate planners, it likely is not reasonable for you to have a formal conversation regarding capacity with

each of your clients. However, you can still assess capacity through everyday conversations with your client. If your client says something that leads you to question their capacity, it is your responsibility to reasonably investigate and ensure your client has an adequate understanding of what is going on.

Let’s pretend you are an attorney in Minneapolis. You are assisting a client in a real estate transaction regarding property on the North Shore. Your client mentions to you that the property should have a heightened insurance policy in case of earthquake or hurricane damage. This would be a strange comment, as Minnesota is not known for hurricanes or earthquakes. At this point, you should take a moment to intentionally assess whether your client is experiencing diminished capacity. Perhaps the client is new to Minnesota and is unaware that Minnesota does not experience earthquakes or hurricanes. This would excuse the strange comment. However, if your client is a lifelong Minnesotan, the comment may point to a greater problem, such as diminished capacity. Under the Rules of Professional Conduct, you have a responsibility to reasonably investigate your client’s capacity.

Regardless of whether you are formally assessing capacity or simply assessing capacity through everyday conversations, all attorneys should keep their client’s capacity in mind – no matter the type of representation.

Not Sure If Your Client Has Diminished Capacity?

If, after a reasonable investigation, you are still unsure whether your client

UNDER THE RULES OF PROFESSIONAL CONDUCT, YOU HAVE A RESPONSIBILITY TO REASONABLY INVESTIGATE YOUR CLIENT’S CAPACITY

is experiencing diminished capacity, there are resources available to you. First, you can call the Office of Lawyers Professional Responsibility to receive an advisory opinion on what you should do. This is a good tool to utilize if you need one-time advice on whether you are complying with the Rules of Professional Conduct.

Additionally, you can always retain an ethics attorney to provide you with guidance on compliance with the Rules of Professional Conduct. The Rules of Professional Conduct permit you to reveal confidential information to secure legal advice about your compliance with the Rules.

Conclusion

All lawyers should assess whether their client is of sound mind. If you suspect your client is suffering from diminished capacity and you are not sure how to proceed with the matter, you should reach out to the resources available to you. Not only will this protect your client, but it will protect your license and save you from a skele-TON of trouble in the future. Happy Halloween!



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