Interacting with Clients with *Possible* Impairments

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**Fundamental Dilemma:**

All adults are presumed competent to make decisions for themselves. The degree of impairment necessary to contradict that state differs in accord with the sort of decisions being made. The determination of impairment is sometimes left up to the attorney. The choice of remedies is often uncertain.

**The Basics**

Prob. Code **§ 810. “**The Legislature finds and declares the following:

“(a) For purposes of this part, there shall exist a rebuttable presumption affecting the burden of proof that all persons have the capacity to make decisions and to be responsible for their acts or decisions.” \*\*\*\*

Prob C 812 "Except where otherwise provided by law, including, but not limited to, Section 813 and the statutory and decisional law of testamentary capacity, a person lacks the capacity to make a decision unless the person has the ability to communicate verbally, or by any other means, the decision, and to understand and appreciate, to the extent relevant, all of the following:

(a) The rights, duties, and responsibilities created by, or affected by the decision.

(b) The probable consequences for the decision maker and, where appropriate, the persons affected by the decision.

(c) The significant risks, benefits, and reasonable alternatives involved in the decision

**Contract Capacity**

**Sullivan v Dunne (1926) 198 Cal 183.** Client must have contract capacity to employ an attorney. If capacity is lost during the relationship, the power of the attorney to act also terminates.

Civ C 1556 Minors and persons of unsound mind are not capable of entering into contracts.

Fam C 6501: an adult is a person over age of 18.

Civ C 1557(b) Capacity of people with unsound mind governed by Civ C 38, et seq

Civ C 38 "A person entirely without understanding has no power to make a contract of any kind"

Civ C 39(a) a contract made a person who has some understanding, but is of unsound mind, may be rescinded

Civ C 39(b) A person is of unsound mind "if the person is substantially unable to manage his or her own financial resources or resist fraud or undue influence."

**Testamentary Capacity**

Prob C 6100(a): An adult of sound mind may make a will

Prob C 6100(b) A mentally competent conservatee may make a will

“The attorney who is persuaded of the client's testamentary capacity by his or her own observations and experience, and who drafts the will accordingly, fulfills that duty of loyalty *to the testator.* In so determining, the attorney should not be required to consider the effect of the new will on beneficiaries under a former will or beneficiaries of the new will..” *Moore v. Anderson Zeigler (2003)*, 109 Cal. App. 4th 1287, 1299.

**Client’s Capacity**

Sullivan v Dunne (1926) 198 Cal 183 (supra)

Magee v. State Bar(1964) 58 Cal. 2d 423. Client's advanced age of 81 years was ground for requiring attorney to justify inter vivos and testamentary gifts by client to him, but was not in itself sufficient basis for assuming that attorney abused confidence of client.

Conservatorship of Chilton (1970) 8 Cal App 3rd 34. Boyfriend brings woman to attorney. She is the client. Attorney’s opposition to conservatorship used as evidence that boyfriend took advantage of her, and therefore denied fees to attorney.

Caldwell v State Bar (1975) 13 Cal 3rd 488, once the client was declared incompetent, it was misconduct for attorney to use the client’s power of attorney to deplete client funds.

In re R. S. (1985) 167 Cal.App.3d 946, 979, the court recognized that in dependency and in criminal cases , “… we must rely upon trial counsel, acting in the best interests of his client, and upon the court itself, acting to preserve the integrity of the judicial proceedings, to assure that no person incompetent or otherwise incapable of understanding the proceedings against him be forced to participate in a proceeding at which significant rights are at stake.” See also In re Sara D. (2001) 87 Cal. App. 4th 661, 672-73.

Drabick v Superior Court (1988) 200 Cal App 3rd 185. Family sought to disconnect life support. Court appointed counsel for the patient. Counsel concurred. Held, when the client is in a coma, the attorney must be guided by the attorney’s best understanding of what the client would want.

Moore v. Anderson Zeigler (2003), 109 Cal. App. 4th 1287, 1299. (supra)

**Witness Capacity**

Ev C 177 Dependent person includes anyone person who has a physical or mental impairment that so they cannot protect their own rights.

Prob C 810 (c) “A judicial determination that a person is totally without understanding, or is of unsound mind, or suffers from one or more mental deficits so substantial that, under the circumstances, the person should be deemed to lack the legal capacity to perform a specific act, should be based on evidence of a deficit in one or more of the person's mental functions rather than on a diagnosis of a person's mental or physical disorder.”

Cal. Penal Code § 1127g : Although, because of his or her level of cognitive development, a person with a developmental disability, or cognitive, mental, or communication impairment may perform differently as a witness, that does not mean that a person with a developmental disability, or cognitive, mental, or communication impairment is any more or less credible a witness than another witness.

**Undue Influence**

Civ C 1575: Undue influence consists:

1. In the use, by one in whom a confidence is reposed by another, or who holds a real or apparent authority over him, of such confidence or authority for the purpose of obtaining an unfair advantage over him;

2. In taking an unfair advantage of another's weakness of mind; or,

3. In taking a grossly oppressive and unfair advantage of another's necessities or distress.

Under Civ C 1575(1), a presumption of undue influence arises upon showing the advantage. Under Civ C 1571(2), no presumption arises, so the burden of proof is on the person making the allegation. Buchmayer v Buchmayer (1945) 68 Cal App 2nd 462, 466.

**And Yet . . .**

Prob C 810(b) “A person who has a mental or physical disorder may still be capable of contracting, conveying, marrying, making medical decisions, executing wills or trusts, and performing other actions.”

Prob C 6100 (b) \*\*\*\* Nothing in this section shall impair the right of a conservatee who is mentally competent to make a will from revoking or amending a will made by the conservator or making a new and inconsistent will.

**Medical-legal Evaluations:** Factors that an expert may consider

*Adapted from “legal mental capacity: a psychiatrist’s perspective” by Patrick Fitzsimons, M.D., San Francisco Attorney article, Winter 2009*

Mental disorders such as dementia, depression, schizophrenia, bipolar disorder, and substance abuse.

History of medical or neurological disorder that may cause mental impairment, e.g. stroke;

Report by caregiver of symptoms or signs of a disorder;

Marked decline in functioning; marked personality change;

Troubling actions or decisions out of the ordinary;

Suspicious circumstances such as potential exploitation of client;

Client confusion on interview, beyond normal memory loss.