

IDENTIFYING CLIENT COGNITIVE IMPAIRMENT

A LONG AND WINDING ROAD

(Article written by Beth Ann Lawson, Esq.)

Over 1 billion people worldwide are age 60 or above, a number expected to grow to over 2 billion within 30 years. Longevity is too often accompanied by diminished capacity. Cognitive impairment, defined as a decreased ability to think and remember, can frustrate life and create legal and medical challenges for families, caregivers, and legal and financial advisors.

Early legal planning helps minimize the uncertainty of incapacity. Professional advisors are positioned to be watchdogs for their client's safety in areas under the Advisor's control. Early in the client relationship, agreed upon family members should be included in a family meeting to help advisors form a network of individuals who can legally share information pertinent to the wellbeing of the client through written authorization.

Every professional knows the associated risks of inadvertently working with an impaired client. The professional is open to possible attack from family members and even complaints to professional oversight institutions. Skillful Identification of early signs of cognitive impairment in a new or existing client prior to delivering professional services is an excellent skill for every advisor.

The following actions can increase a Professional Advisor's peace of mind and a client's personal safety;

1. Encourage each new client to work with an attorney to create a comprehensive Power of Attorney to begin your long-term relationship with the new client. Encourage your client to name two or three trusted successor agents who have the written authority to handle the client's affairs if needed. Make this Power of Attorney immediate. Authorize the agent to consult professional advisors as needed.
2. Create a Contact Authorization Form which the client signs at the first Advisor's meeting. This Authorization provides the Advisor with an "as needed" capability to contact individuals as authorized by the client. In addition to family members, ask the client to include someone outside the immediate family as an agent. This may prevent a concerted family effort to

financially abuse a senior. Most professional advisors already have these forms in their normal practice. Include the authorization of the Advisor to speak to the client's professional team, including CPAs, financial advisors and attorneys. Some clients are also willing to give their Advisor and their doctors the authorization to speak with one another, but this is frequently issue specific.

3. Encourage aging clients to work with their attorney to create a Revocable Living Trust and possibly an Irrevocable Trust to hold at-risk client assets. Name a trusted family member or an independent third party as Trustee. The Trustee will have all the powers named in the Trust to interface with legal and financial professionals while protecting the interests of the client.

Legal capacity is required to create legal protection. Carefully crafted documents steward assets during incapacity, thereby avoiding guardianships and conservatorships. Powers of Attorney, Advance Medical Directives and Trusts, both Revocable and Irrevocable, can be established. All these documents appoint an agent, i.e., a "Manager of the Client's Rights," immediately or in the future when the client cannot or should not act. The appointed individuals step into the client's legal and medical shoes.

Determining mental capacity and incapacity remains a slippery slope and is finalized by a doctor's or court's decision. An individual's right to legal and medical privacy is carved in stone. Yet when clients of 20 years tell you about their four children when they only have two, or are unable to tell you the date of their own birth, their address, or the current year, you begin to suspect cognitive decline. At what point in the conversation with another professional or family member are you protecting your client's rights or overstepping the bounds of private communications? It depends on the written authority you have created with your client.

As professional advisors, we should grow in the ability to recognize signs of cognitive decline. Your clients will hide these signs from you. Embarrassment and feelings of loss of control enter the picture. Advisors must be cognitive detectives for the protection of client rights.

If your client refuses to implement a Power of Attorney, how can you develop avenues of communication with individuals who might help your client without violating privacy restrictions? Trusted advisors do well in the early stages of client representation with seniors to meet some of the family members in client meetings if the client agrees to their presence. Clients are then often willing to sign permission documents for contact between an Advisor and back-up agents.

With Revocable Living Trusts, a Trustmaker can preplan for cognitive impairment and say who handles assets and how they are to be used. Assets are not adrift during your client's incapacity. Competent individuals are named to work with advisors.

With Irrevocable Living Trusts, a family can strategically pre-plan to protect the home and other assets from the cost of a family member's prolonged care. Pre-planning with trusts is an important factor in preventing a client and the client's spouse from going broke while one spouse is in a long-term care facility.

Life without mental clarity is a long and winding road for individuals, family members, and their professional advisors. Be prepared. Stay prepared. Help your clients pack their legal bags with a Power of Attorney, Authorization forms for Advisor contact with diverse agents of the client, an Advance Medical Directive, and Living Trust(s). Help your client travel safely.