Powers of Attorney: Ascertaining Capacity?

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Introduction

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The Power of Attorney (POA) document is a cornerstone of even the most basic estate plan, and can often be critical in preserving an older adult's financial stability and independence. To function as a flexible and effective tool, the Power of Attorney provides a third party agent with wide-ranging powers over the principal's assets and income. While this can be (and often is) beneficial in allowing for substituted decision making without taking the more drastic step of an Article 81 Guardianship, it can also create vulnerability to financial exploitation. In our last article, we examined the importance of clearly establishing who the client is when a Power of Attorney is executed, and the ways in which taking time to establish an appropriate attorney-client relationship can minimize the possibility of a particular Power of Attorney becoming a tool of abuse. In this article, we will discuss the standard of capacity for executing a Power of Attorney, and the ways capacity can be addressed to maximize a client's safety.

1. Assessing Capacity—A Legal Perspective

Assessing client capacity is one of the many skills which attorneys are required to cultivate based on the realities of legal practice and ethical obligations to clients, despite their lack of formal education on the issue. While at first blush, mental capacity may seem to be the purview of a medical or psychiatric professional, determining that a potential client has the capacity to accept representation is an essential step in the formation of each and every attorney-client relationship. While capacity concerns are not unique to elderly clients, as a practical matter, an attorney is often called upon to assess whether a client or potential client has the requisite capacity to undertake a specific legal action. As opposed to a clinical setting, where capacity may be discussed in more general terms and associated with particular medical diagnoses, standards of legal capacity are task specific and based on the particular legal action contemplated. New York State's Rules of Professional Conduct indirectly acknowledge the critical role attorneys play in making capacity assessments, by stating that an attorney's ethical obligations to a client may change as a client's capacity becomes more compromised.[1] The implication is that a lawyer is obligated to make a judgment as to the capacity of the client and conduct the attorney client relationship accordingly, and as capacity fluctuates, this should be reflected in the attorney-client relationship and what, if any, direction an attorney is able to take from the client. This judgment should closely track the particular legal work in question.

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The specific standard for capacity to execute a Power of Attorney is described in the law's definitional section as "ability to comprehend the nature and consequences of the act of executing and granting, revoking, amending or modifying a power of attorney, any provision in a power of attorney, or the authority of any person to act as agent under a power of attorney."[2] This definition is discussed by the New York State Law Revision Commission Report on Powers of Attorney, which evaluates the extensive changes made to the POA law in 2009 and 2010. The report describes the capacity standard as "functional," citing to a leading treatise on the issue.[3] The treatise, Klipstein's Drafting New York Wills, elaborates on the nature of this functional capacity standard, stating that "it requires that the principal know what the principal is doing by creating (or revoking, amending, or modifying) a power of attorney...At the very least it seems to require that the principal understand at least in a general way the enormous range of the authority granted to the agent." Klipstein also states that this standard must be higher than the standard for testamentary capacity, since a will impacts the testator's finances only after death, whereas a Power of Attorney can significantly affect an individual's financial situation during that person's lifetime.[4] The report emphasizes that clients who cannot meet this standard are not able to execute a legally valid Power of Attorney. A closer look at legal capacity in general and the capacity standard for Powers of Attorney specifically therefore reveals that there is a somewhat rigorous and rather practical bar a client must pass in order to execute a valid POA document.

2. Client Capacity and Elder Abuse

Nationwide, older adults with diminished capacity suffer from staggering rates of mistreatment, with one

study finding that close to 50% of people with dementia have experienced elder abuse.[5] Financial abuse is cited by many studies as the most common form of abuse. According to a recent study by the New York State Office of Children and Family Services, the total monetary value of assets taken from older adults within the 12-month period may have ranged from a low of $352 million to a high of $1.5 billion, with this wide range due to the large percentage of financial exploitation incidents which go unreported.[6] Given these statistics, coupled with the extensive financial powers and discretion a Power of Attorney grants to an appointed agent, there is significant potential for abuse when a POA is executed where the principal's capacity is already in question. However, as capacity diminishes, a principal's need to grant POA to a trusted agent becomes even more acute, and attorneys are therefore likely to see clients who already have some degree of diminished capacity and are seeking to execute a POA. All too often it is only after the principal is experiencing some decline in their ability to manage their finances that a POA is sought. There is also a general misunderstanding within the community that POAs are only necessary after a significant cognitive decline, and they are not a tool for planning but rather a reactionary measure.

Managing the confluence of increased legal need and increased vulnerability created by diminished capacity issues so as to serve a client's best interests can be difficult. One telling illustration is the legislative history of the Statutory Gift Rider (SGR), a separate document granting an agent under a Power of Attorney the authority to make gifts on behalf of the principal in excess of $500 annually, including gifts to the agent. The SGR was created during the 2011 revision of the Power of Attorney law specifically to safeguard against potential financial abuse by the agent. However, the NYSBA's Working Group on Power of Attorney released a report recommending that the SGR be abolished and that the law revert back to a single simple document based on the fact that "the goal of heightened awareness has not been achieved by the new form whose increased verbosity only creates confusion for the principal."[7] It seems that the very same document created to protect clients in a vulnerable state is seen as lacking utility due to that same vulnerable state. While the ultimate fate of the SGR is still unknown the dilemma it highlights is clear. The challenge for an attorney who believes that a client requesting a POA has capacity deficits, is to strike a balance that fulfills a legal need while maintaining and even enhancing the client's safety.

3. POA and Diminished Capacity – Best Practices

When a lawyer assesses that a client is living with some degree of diminished capacity, the Rules of Professional Conduct require that the attorney "as far as reasonably possible, maintain a conventional relationship with the client."[8] Implied here is a duty for the attorney to maximize a client's capacity. Under the right circumstances and with appropriate assistance by counsel, "a client with diminished capacity often has the ability to understand, deliberate upon and reach conclusions about matters affecting the client's own well-being."[9] In a case where a client is seeking to name an agent under a Power of Attorney and diminished capacity is suspected, doing the utmost to maximize the client's capacity and screen the client for potential elder abuse will help the attorney to balance the utility and risk of the POA as an advance planning tool.

First and foremost, it is critical that an attorney meet with the client alone at the outset of the relationship, without family members, friends or caretakers. During this meeting, the attorney can explain the nature of the attorney-client relationship and the accompanying duties of loyalty,[10] diligence,[11] and competence.[12] The attorney can also generally explain the nature of the POA document, its purpose and potential pitfalls. There are a number of benefits to this practice. First, it will allow the attorney to gain a more thorough and accurate understanding of the client's functional capacity. If, in the attorney's professional judgment, a client is still capable of meeting the capacity standard for executing a POA despite some degree of capacity deficit, a private meeting is an opportunity to cultivate trust and confidence in the attorney-client relationship, a critical first step in maximizing client capacity. When an attorney takes the time to explain the legal transaction contemplated in a safe and comfortable environment, a client feels at ease and respected, allowing the client to participate in the transaction to the greatest extent possible.

An attorney can implement a number of other practices that accommodate for sensory deficits and play to cognitive strengths. Some examples are being mindful of lighting and acoustics, speaking slowly and clearly while positioned near the client without invading the client's personal space and ensuring that a client has all of the necessary assistive devices. Also, dehydration is common in older adults and can impact cognitive ability, so offer water or other hydrating beverages to your client. Interview techniques that can maximize cognitive capacity include scheduling multiple, shorter interviews, providing summaries of past discussions and scheduling appointments for the times of day most conducive to robust communication. The American Bar Association and American Psychiatric Association have co-authored a handbook, "Assessment of Older Adults with Diminished Capacity: A Handbook for Lawyers," which elaborates on these tactics at length.[13]

A private meeting also provides a good opportunity to discuss the vulnerability implicit in executing a Power of Attorney document. The attorney can provide the client with the space to disclose any concerns the client may have with regard to the trustworthiness of

potential agents or about executing a POA more generally. It is important when speaking alone with the client that an attorney gauges both the client's orientation to time and place as well as the client's general understanding of a Power of Attorney document, both at the outset, during the explanation of the document, and at the execution of the document. Common questions that can be used include:

1. What is today's date? (If unable to give exact date, ask for month/day of the week/year or season.)
2. Who is the current President?
3. Where do you live?
4. What is your date of birth?
5. Where are you now?
6. What brings you here today?
7. Do you know what a Power of Attorney is? If so, explain.
8. Why do you want one?

Asking these questions, especially those concerning the nature of a Power of Attorney, throughout the process, rather than just at the beginning or end of the execution, can go a long way in illuminating a client's capacity and is consistent with best practices when working with a client with diminished capacity. If, as a result of this conversation, an attorney believes that a potential agent is taking advantage of the client's cognitive deficits by pressuring the client to execute a Power of Attorney, the attorney can strategize with a client about other ways to effectuate legal goals or safeguards that might be put in place. If an attorney determines the client is being abused or is at risk of abuse, an attorney should provide the client with local resources such as police, the District Attorney or Attorney General, Adult Protective Services, local domestic violence or social service agencies and local elder abuse shelters. A list of elder abuse resources throughout New York State can be found at http://www.nysba.org/Sections/Elder/NYS_Elder_Abuse_Resources_Guide.html as well as on the website for the New York State Judicial Committee on Elder Justice at https://www.nycourts.gov/courts/family-violence/eji.shtml#comm.

Powers of Attorney are a critical part of the elder law attorney's toolkit and can provide significant benefits and peace of mind for clients. However, precisely because of their ubiquity and utility, it is critical that attorneys familiarize themselves with the appropriate capacity standard for executing a POA and be prepared to maximize a client's capacity and ensure a client's safety when that capacity is in question.

Endnotes

1. NY Rules of Professional Conduct, 1.14
2. N.Y. Gen. Oblig. Law § 5-1501(2)(c).
3. The New York State Law Revision Commission Report on Powers of Attorney, The New York State Law Revision Commission, January 1, 2012, pg. 28.
4. 2-19 Klipstein Drafting New York Wills 19.02.
5. A. Wiglesworth, A, Mosqueda, L, Mulnard, R, et al. (2010), Screening for Abuse and Neglect of People with Dementia. *Journal of the American Geriatrics Society*, Volume 58, Issue 3, 493-500.
6. New York State Office of Children and Family Services, The New York State Cost of Financial Exploitation Study, pg. 12, June 2016.
7. New York State Bar Association, Report and Recommendations of the Working Group on Power of Attorney, December 18, 2015, http://www.nysba.org/POAreport/ (last visited July 28, 2016.)
8. Id. At 1.14(a).
9. *Id*. Comment 1.
10. 22 NYCRR Part 1200 §1.7, Comment 1.
11. *Id*. at §1.3.
12. *Id*. at §1.1.
13. ABA Commn. on L. & Aging & Am. Psychological Assn., Assessment of Older Adults with Diminished Capacity: A Handbook for Lawyers (2005).

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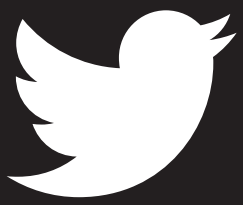

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