

“The Challenges of Aging: Proactive or Reactive Response -- Legal & *Ethical Considerations for the Bench and Bar*”



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AGING IN AMERICA: The Profession & Beyond

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Overview

Aging in America: The Impact on the USA and our entire Legal System

The Critical Importance of Capacity

Common Issues Across States

AARP Principles on Elder Law

- 1. Protection against discrimination**
- 2. Freedom from exploitation and abuse**
- 3. Safeguarding rights**
- 4. Choice - Independence**
- 5. Enforcement**
- 6. Redress and support for victims**

Source: 2015-2016 AARP Policy Book

Aging in America



"Really, I'm fine. It was just a fleeting sense of purpose—I'm sure it will pass."

Aging in America: Inside the Numbers

78MM Baby Boomers

(1946-1964)



Oldest Boomers started turning **70** in 2016

65MM Gen Xers

(1965-1981)



Oldest Gen Xers have been turning **50** since 2015

74.5MM Millennials

(1982-2004)



Oldest Millennials will be **35** in 2017

NB: 1MM people turning 60 every day across the globe (Help Age Int'l)

Source: 2015 Pew Research Center – Social & Demographic Trends (United States only)

Aging in America: Inside the Numbers

20% of Americans 65+ have been victimized by financial fraud

Estimated financial fraud losses exceed \$3.0B+ annually

Only 2% of elder fraud claims are every reported (i.e., shame factor)

Knowledge gap and inadequate resources by law enforcement to combat overlapping crimes (e.g., financial fraud typically tied to physical or emotional abuse, etc.)

Victims suffer cognitive impairment

The Downside of Caregiving and Consent

Sources: 2011 New York State Elder Abuse Prevalence Study (“Under the Radar”); 2011 MetLife Mature Market Institute Study; 2010 Investor Protection Trust Elder Fraud Survey

Aging in America: Our Legal Profession

1.3MM Licensed Attorneys

65% Male; 35% Female

Median Age: 49 (up from 39 in 1980)

75% in private practice

- 49%: solo practitioners
- 14%: 2-5 attorneys
- 16%: 101+ attorneys

RACE / ETHNICITY

	<u>2000*</u>	<u>2010*</u>
White, not Hispanic	89%	88%
Black, not Hispanic	4%	5%
Hispanic	3%	4%
Asian Pacific American, not Hispanic	2%	3%
American Indian, not Hispanic	<1%	-
Native Hawaiian or Pacific Islander, not Hispanic	<1%	-

*Source: 2000, 2010 U.S. Census, Bureau of the Census
NOTE: U.S. Census considers Hispanic an ethnicity, not a race.
Persons of Hispanic origin can be of any race.

Law Firm Size

- 76%: 2-5 attorneys
- 13%: 6-10 attorneys
- 1%: 101+ attorneys

4% retired/inactive (down from 5% in 1980-2000)

3% Judiciary (roughly the same since 2000)

Source: 2015 ABA National Lawyer Population Survey

Brain Health is the #1 Fear

Virtually all adults believe it is important to maintain or improve brain health; however, many are not currently engaging in activities that promote brain health.

3/4s of adults age 40+ are concerned about their brain health declining in the future.

Most adults have not noticed a change in their mental capacities

- 1/3 say their ability to remember things has decreased over the last five years.
- “forgetfulness” rises to 45% among Americans age 65+

Activities seen as important to brain health (e.g., sleep, diet, exercise, managing stress, reading, challenging the brain, etc.)

Aging Disproportionately

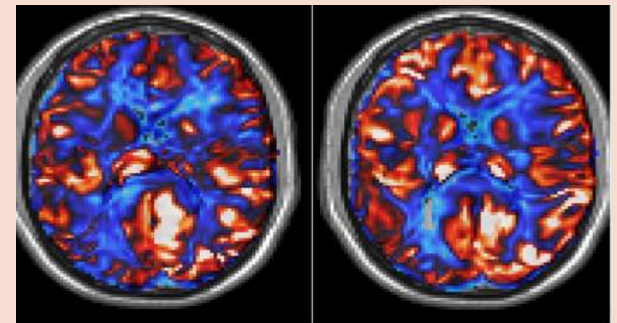
World's aging population is growing disproportionately

Expected lifespan has reached all time high of over **78 yrs.**

Previous shows cognitive decline may begin in **early 40's**

New research shows neuroplasticity can be harnessed to enhance brain performance and improve mental capacity

- A study found that 12 hours of directed brain training can alter brain function, stimulating increased blood flow, enhanced information communication across key brain regions, and expansion of the structural connections between brain regions related to new learning



Capacity v. Competency

Competency is a legal finding.

- Competency proceedings, including guardianship and conservatorship hearings, are conducted to allow the court to determine an individual's mental capacity.
- **Incompetency** is the lack of ability to discharge or understand either health care or financial management decisions.
 - An individual is incompetent when declared by the court to be in need of a guardian or conservator.
 - **GUARDIANSHIP STANDARD:** To have decision-making capacity that is so impaired that the person is unable to care for his/her own personal safety or to attend to or provide for necessities, such as food, shelter, clothing or medical care, without which physical injury or illness may occur. Iowa Code § 633.3(23)(a).
 - **CONSERVATORSHIP STANDARD:** To have decision-making capacity that is so impaired that the person is unable to make, communicate or carry out important decisions concerning the individual's financial affairs. Iowa Code § 633.3(23)(b).

Searching for **Capacity?**



What is Capacity?

Capacity. The ability to understand the nature and effect of one's acts.

- Fluid concept
- an individual may have the requisite capacity in one moment and lack capacity in another
- Whether an individual has the ability to understand the nature and effect of his or her acts in a specific moment in time

The level of capacity needed to enter into legal documents, such as a durable power of attorney, contract, or a will, differs based upon the type of transaction. **NB: these are “transactional decisions” that occur daily without any Court involvement.**

Source: DC Code Ann. §§ 21-2201 *et seq.*

Capacity: ADLs & IADLs

Activities of Daily Living (ADL)

Activities of daily living (ADL) are routine activities that people tend to do everyday without needing assistance. There are **six** basic ADLs:

1. eating
2. bathing
3. dressing
4. toileting
5. transferring (walking)
6. continence.

Instrumental Activities of Daily Living (IADL)

Instrumental activities of daily living (IADLs) are not necessary for fundamental functioning, but they let an individual live independently in a community.

- *cooking
- *shopping
- *preparing meals
- *driving
- *managing medication
- *using the telephone

Capacity: The Legal Standard

The petitioner bears the burden of proving that the subject of the petition is **incapacitated** as defined by the law in the District of Columbia by **clear and convincing evidence**.

An "incapacitated" person is defined in D.C. Code Ann. § 21-2011(11), as an adult, age 18 or older, "**whose ability to receive and evaluate information or to communicate decisions is impaired to such an extent that he or she lacks the capacity to manage all or some of his or her financial resources or to meet all or some essential requirements for his or her physical health, safety, habilitation, or therapeutic needs without court-ordered assistance or the appointment of a guardian or conservator.**"

Unless the subject is found by the Court to be incapacitated, no guardian or conservator will be appointed, and no protective order will be entered.

Rule 1.14: Client with Diminished Capacity

(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 some other 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, including 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, conservator or guardian.

(c) Information relating to the representation of a client with diminished capacity is protected by **Rule 1.6**. When taking protective action pursuant to paragraph (b), the lawyer is impliedly authorized under Rule 1.6(a) to reveal information about the client, but only to the extent **reasonably** necessary to protect the client's interests.

Implications of Rule 1.14

- Importance of a lawyer's judgment
- Client autonomy v. what is in their best interest
- Moral v. legal implications
- Common sense v. requirements of being a lawyer
- Advocate v. "adverse" to client

How to assess whether client has diminished capacity?

- Client's ability to articulate reasoning for a decision.
- Variability of state of mind and ability to appreciate consequences.
- Substantive fairness of a decision.
- Consistency of the decision with the known long-term commitments and values of the client.

ABA Comment to Model Rule 1.14

Legal Competence per Rule 1.14

Incapacitated person may lack “power to make legally binding decisions.”

Regardless, they may still have the “ability to understand, deliberate upon, and reach conclusions about matters affecting the client’s own well-being.”

Furthermore, recognition of degrees of competence

Comment [6]: Ordinarily, the information to be provided is that appropriate for a client who is a comprehending and responsible adult. However, fully informing the client according to this standard may be impracticable, for example, where the client is a child or suffers from diminished capacity

Assessing the Client

If the attorney cannot assess on his or her own, permissible to consult with others.

Attorney may seek to talk with a diagnostician. Limit disclosure to what is necessary to carry out the representation.

Also permissible to consult with family or other interested person who can assist with lawyer's assessment.

ABA Formal Ethics Opinion 96-404 (1996)



Rule 1.14: State Ethics

- An attorney for a disabled client will be held to a higher standard of responsibility: "As the difficulty of the situation increases, so too does the lawyer's responsibility. 'For every degree that [the lawyer] by his testimony and evidence proved a less than normal mental and functional capacity on the part of his client...he raised by an equivalent degree the standard of conduct which the Court must require of him in his dealings with the client,"

In re Witte, 615 SW2d 421, 422 (Mo. 1981), Alabama Ethics Opinion RO-95-03.

- Rule 1.14(b) does not authorize the lawyer to take protective action because the client is not acting in what the lawyer believes to be the client's best interest, but only when the client cannot act in the client's own interest. A client who is making decisions that the lawyer considers to be ill-considered is not necessarily unable to act in his own interest, and the lawyer should not seek protective action merely to protect the client from what the lawyer believes are errors in judgment.

Conn. 96-404.

IT THE GOAL IS A LONG LIFE, NOBODY IS IMMUNE FROM AGING

1. Attorneys (**reputation matters**)
2. Clients (**capacity is everything**)
3. Judges (**to recuse or not to recuse**)
4. Court Personnel (**who's minding the store**)
5. "Influential" Third Parties (**e.g., friends, family, creditors, etc.**)

Common Issues Across States



Common Issues Across States

Typically a Bi-Partisan Issue

Issue isn't "hot"...UNLESS there's a crisis or tragedy (e.g., Mickey Rooney; BB King; Brooke Astor; Sumner Redstone, etc.)

No One-Size-Fits-All Solution

Lack of Data still a problem

Policy wonks aren't necessarily the same as on the frontline workers and vice versa – **New Partnerships are required**



Resources

AARP – Fraud Watch Network <http://www.aarp.org/money/scams-fraud/fraud-watch-network/>

Consumer Financial Protection Bureau - www.consumerfinance.gov/

ABA Commission on Law and Aging - <http://www.n4a.org/>

National Academy of Elder Law Attys - www.naela.org

National College of Probate Judges - www.ncpj.org

National Guardianship Association - www.guardianship.org

Folstein Mini Mental State Exam - <http://enotes.tripod.com/MMSE.pdf>

Nat’l Assn of Area Agencies on Aging - <http://www.n4a.org/>

University of Texas, Dallas - http://www.brainhealth.utdallas.edu/blog_page/study-finds-brain-training-enhances-brain-health-of-adults-over-50

As Our Parents Age - <https://asourparentsage.net/2009/12/17/adls-and-iadls-whats-the-difference/>



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