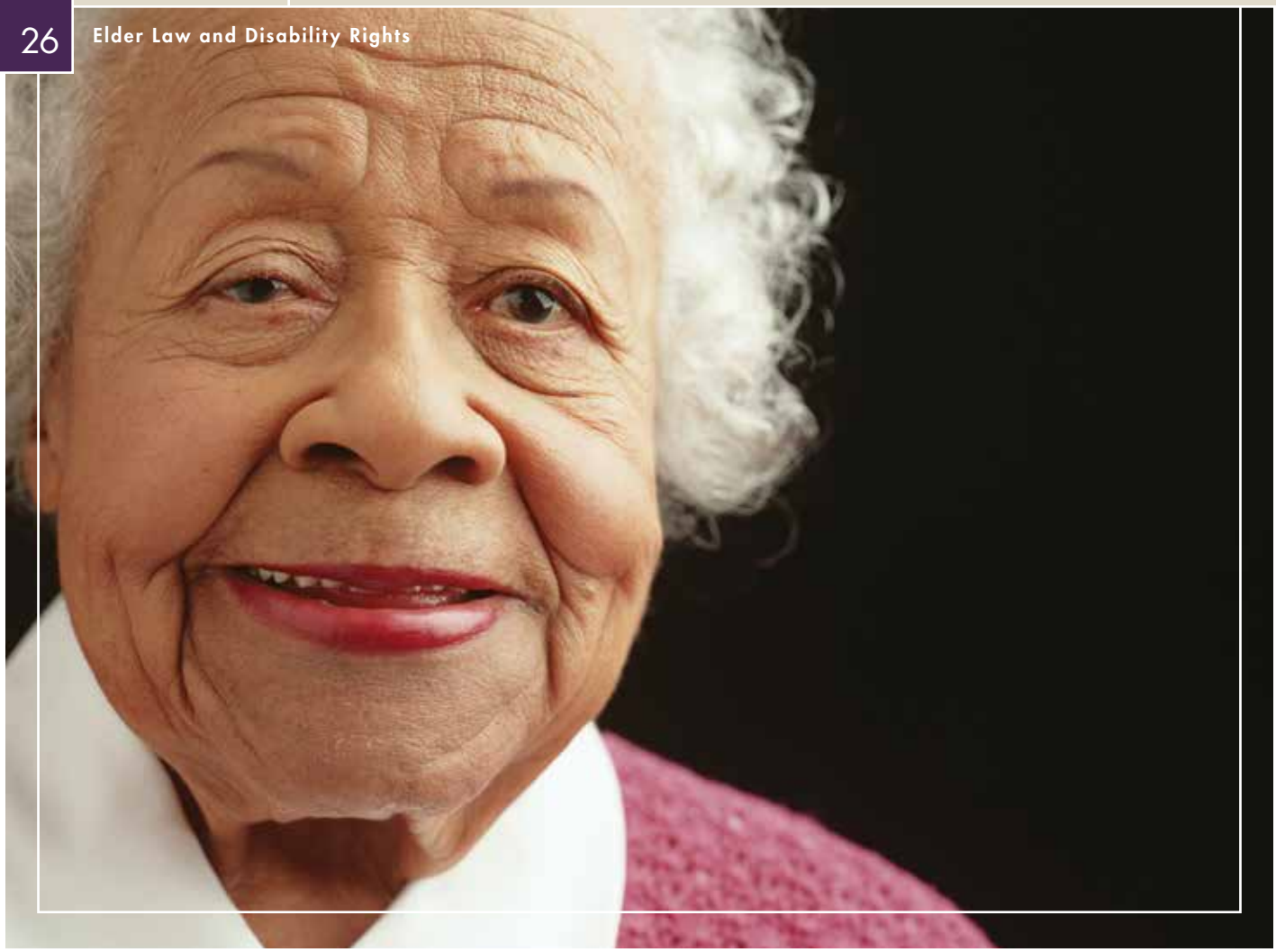

An Overview of Dementia and Competency

By Beth A. Swagman and Caroline M. Dellenbusch

Dementia is an overall term for diseases and conditions characterized by a decline in memory or other thinking skills that affect a person's ability to perform everyday activities.[1] It impairs cognitive, physical, and psychological functioning and is a terminal illness for which there is no cure. Dementia has a dramatic impact on family relationships, life satisfaction, medical costs, and even attorney-client relationships.

Alzheimer's disease is the most prevalent form of dementia, accounting for 60–80 percent of diagnosed cases.[2] Other forms include vascular dementia, dementia with Lewy Bodies, and Parkinson's disease dementia. Currently, 5.2 million Americans are living with Alzheimer's,[3] and by 2050, that number is estimated to almost triple to 13.8 million.[4]

In addition to the devastating psychological toll dementia takes on the individual and family member caregivers, it is one of the most expensive diseases in the nation, costing $214 billion a year including $150 billion from Medicare and Medicaid on healthcare and long-term care for patients.[5]

While mild memory loss eventually affects nearly everyone, dementia is usually a downward spiral with short-term memory gradually becoming irretrievable. Clients often repeat questions and cannot recall simple instructions. Failing to remember someone's name is not the same as forgetting how to write a check, when to remove food from the oven, or the way home from the grocery store. Elder law attorneys should pay careful attention to these symptoms because memory, organizational skills, and executive functions impact contractual capacity and competency.

Persinger v Holst[6] tells us that a lawyer has a duty to determine capacity to execute documents. But where should an attorney start when considering capacity? Michigan law presumes adults have capacity. Capacity is task specific and varies depending on time of day, medications, health, and surroundings. Every effort should be made to maximize the capacity of the client.

A number of tools exist for assessing capacity. Those intended for use by mental health professionals, such as the mini-mental state examination, should not be used by attorneys who do not have the training to properly analyze results. However, an excellent resource for attorneys is *Assessment of Older Adults with Diminished Capacity: A Handbook for Lawyers*[7] by the ABA Commission on Law and Aging and the American Psychological Association. Additionally, the understanding of dementia and how it affects capacity is evolving rapidly with the emergence of new assessment tools. It is important to stay educated on these tools to better assist clients in planning for and dealing with the issues associated with dementia.

Legal capacity

Statutes define capacity to execute various legal documents. Since April 2010, there has been one standard for wills, creating and funding revocable trusts, durable powers of attorney, and beneficiary designations.[8] Under the statutes, a person has sufficient mental capacity to make a will if:

(a) The individual has the ability to understand that he or she is providing for the disposition of his or her property after death.

(b) The individual has the ability to know the nature and extent of his or her property.

(c) The individual knows the natural objects of his or her bounty.

(d) The individual has the ability to understand in a reasonable manner the general nature and effect of his or her act in signing the will.[9]

To execute a durable power of attorney for healthcare decisions, a person must be "of sound mind at the time a patient advocate designation is made," pursuant to MCL 700.5506. However, MCL 5510(1)(d) allows revocation of a patient advocate designation "even if the patient is unable to participate in medical treatment decisions…."

When working with a client who has dementia, an attorney also needs to consider the Michigan Rules of Professional Conduct. Under MRPC 1.14, Client with Diminished Capacity, the directive is to "maintain a normal client-lawyer relationship with the client." The comments state that competence is not an "all or nothing" determination. Even if there is no capacity to make legally binding decisions, the client may be able to handle routine financial matters. If the client has a legal representative making decisions on his or her behalf, the lawyer should maintain normal representation to the extent possible, including communicating with the client.

FAST FACTS

The understanding of dementia and how it affects capacity is evolving rapidly.

Lawyers need to understand the interplay between dementia and the rules of professional conduct, Michigan statutes, and caselaw on capacity and competency.

The client with advanced dementia who at present seems to have capacity to revoke a durable power of attorney may not have capacity at a later time to execute another document.

It is also critical for attorneys to be familiar with the standards for appointment of a guardian of an incapacitated person and conservator or protective order for an individual under disability. These are found in Article V of the Estates and Protected Individuals Code. MCL 700.5306 authorizes appointment of a guardian "if the court finds by clear and convincing evidence both that the individual for whom a guardian is sought is an incapacitated individual and that the appointment is necessary as a means of providing continuing care and supervision of the incapacitated individual, with each finding supported separately on the record." MCL 700.5401 authorizes appointment of a conservator or protective order regarding property and affairs if the court determines both of the following:

(a) The individual is unable to manage property and business affairs effectively for reasons such as mental illness, mental deficiency, physical illness or disability, chronic use of drugs, chronic intoxication, confinement, detention by a foreign power, or disappearance.

(b) The individual has property that will be wasted or dissipated unless proper management is provided, or money is needed for the individual's support, care, and welfare or for those entitled to the individual's support, and that protection is necessary to obtain or provide money.[10]

Note that the policy underlying the statute is to encourage the individual to act as independently as possible and to use alternatives to guardianship or conservatorship when practicable.

Is there ever a time when the rules allow a lawyer to act as de facto guardian for a client? Where does the desire to protect collide with the rules of confidentiality and irreparable harm? This is the tension lawyers face in such situations. After considering all the previously mentioned caselaw, rules, and statutes, if the lawyer believes that the client does not have capacity and is in

need of protection, MRPC 1.14(b) provides direction and allows a lawyer to petition for appointment of a guardian or financial protection. The comments instruct the lawyer to "seek guidance from an appropriate diagnostician." This means getting an expert opinion from a psychologist, physician, social worker, or other appropriate geriatric-centered professional. This does not mean that a lawyer can represent a third party petitioning to be guardian or conservator, but it allows the lawyer to bring the situation to the court's attention.

To better serve their clients, lawyers need to understand the interplay between dementia and the rules of professional conduct, Michigan statutes, and caselaw on capacity and competency.

Examples

Consider Client A, a 75-year-old unmarried woman without children. She is referred to you by an investment adviser who recommends she execute an estate plan. During the initial consultation, Client A reveals she has recently been diagnosed with dementia, but her symptoms are mild. On occasion, she forgets to pay bills or places them in illogical places such as a cookie canister. Recently, Client A drove to the community bank and made several wrong turns, resulting in a 20-minute errand taking two hours. The client's physician encouraged her to see an attorney to plan for a future when symptoms would increase and worsen.

When counseling Client A, remember that a diagnosis of dementia is not synonymous with incapacity or incompetence. Client A has good recall of her assets and how she intends to distribute them upon her death. She understands the effect of her decisions and is competent to make an estate plan. You may suggest yearly meetings to review the plan and assess how the client is handling her dementia.

You could also assist Client A in selecting a fiduciary and patient advocate to carry out financial and medical decisions, respectively, when she is no longer able to do so. Because Client A does not have children, a family member or friend may carry out those duties depending on who will respect Client A's wishes and serve without temptation for self-dealing and financial exploitation. Key questions include: What makes that person a good choice? How has that person managed money or investments in the past? Can that person make a commitment to the time and duties required? Given current technology, an agent or advocate may live out of state with fewer problems than in the past.

Durable powers of attorney for financial decision-making can either go into effect immediately or after the principal is declared incapacitated. Because dementia progresses slowly and symptoms can vary, a springing durable power of attorney could result in the appointment of Client A's agent long after she begins to struggle with financial decision-making. With Client A's consent, you should begin discussions with her physician and financial adviser to collaborate on long-term care options and financial planning for that care.

Next consider Client B, an 82-year-old married man with two adult children. He has been a client of your law firm for 20 years since creating a revocable trust. The trust was modified as circumstances changed. Several years ago, Client B was diagnosed with dementia. He now resides in an independent living community where he stays physically fit, but his symptoms include difficulty recognizing family members or recalling recent visits with friends. Client B's gait is tentative and he falls frequently. When Client B comes to your office, he recognizes you and recalls your first meeting years ago. But once seated, he says little without your prompting. He looks to his spouse when you ask him questions. If his spouse responds, he nods his agreement and says, "What she said." You learn that Client B cannot balance the checkbook or account for cash he spends. Although he has maintained the same investment adviser for years, he no longer uses a phone, so he does not discuss his investments. He does not converse about current events because he cannot read a newspaper and gets frustrated trying to follow newscasts on television. Now he arrives in your office with a request to amend his trust and change the agent for his financial power of attorney.

The advanced progression of Client B's dementia presents distinct challenges for you, and family dynamics present different opportunities. A properly drafted revocable trust describes the circumstances when grantor/trustee becomes incapacitated or disabled. In conversations with Client B, you should assess whether he is capable of making estate planning decisions. You can then explain how the trust provides for an amendment when the grantor is incapacitated or disabled. If Client B's wife is also

You should pay careful attention to the possibility of exploitation or undue influence by the proposed agent. Dementia can add a layer of misunderstanding or confusion that either disguises exploitation or misinterprets innocent behavior as wrongdoing.

the grantor/trustee, you will want to include the spouse in the amendment discussion. However, if Client B's wife denies the presence or impact of dementia on her husband, the matter becomes more complex because you have the same professional responsibility and duty to each grantor as a client. You may need to review the letter of representation for its adequacy under these changing circumstances.

If the trust agreement requires both grantors to consent and sign for any amendments, you will have to assess Client B's capacity as previously mentioned. These steps take time, but they safeguard your ethical duty to a client.

Client B's decision to change his fiduciary agent is another complex issue. Client B has the power to revoke the durable power of attorney as well as any nominated fiduciary. The power to revoke, however, is impacted by the client's capacity. The client with advanced dementia who at present seems to have capacity to revoke either the document or an agent may not have capacity at a later time to execute another document. You should discuss Client B's reasons for wanting to remove an agent and appoint a successor. Are there allegations of wrongdoing? Has the relationship changed between the agent and the principal because of a family conflict? You should pay careful attention to the possibility of exploitation or undue influence by the proposed agent. Dementia can add a layer of misunderstanding or confusion that either disguises exploitation or misinterprets innocent behavior as wrongdoing. Before taking any action that might result in the client's losing control over his or her finances and decisions of daily living, you need evidence of harm, fraud, or exploitation. These issues may not be readily apparent and may emerge only in the context of a trusting attorney-client relationship. You then have to decide how quickly to act on a client's request for changes to an estate plan. But if a delay results in thwarting the client's plan, you may have violated your duty.

As Client B's attorney, you should establish relationships with his physician and financial adviser, if possible. As dementia progresses, Client B may transition through different levels of care. You can be an effective advocate for end-of-life decisions as well as for the level of care the client needs. A relationship with the financial adviser can ease the transition for successor agents and trustees to assume the mantle of financial decision-making that honors and continues the client's plan for distribution of his wealth.

Working with a client with dementia can be challenging, but through careful analysis of the Michigan Rules of Professional Conduct and other applicable state laws, an effective elder law attorney can provide invaluable counsel to the client at a time of great need. ■

Beth A. Swagman, MSW, ACSW, JD, of Beth A. Swagman, PLLC, in Grand Rapids, focuses her practice on estate planning and elder law. She is a member of the SBM Elder Law and Disability Rights Section Council and the steering committee of the Grand Rapids Bar Probate Section. She is a graduate of Calvin College, the University of Michigan School of Social Work, and the Thomas M. Cooley Law School.

Caroline M. Dellenbusch, of Caroline Dellenbusch, PLC, in Grand Rapids and Greenville, practices in the areas of elder law, estate planning, guardianship, trust administration, and probate. She has lectured on topics relating to her areas of expertise at continuing legal education programs and to the public, including frequent presentations for the Alzheimer's Association. She is a past chair of the SBM Elder Law and Disability Rights Section.

ENDNOTES

1. Alzheimer's Association, *2014 Alzheimer's Disease Facts and Figures*, Vol 10, Issue 2, p 5, available at <http://www.alz.org/downloads/facts_figures_2014.pdf> (accessed October 9, 2014).
2. *Id.* at 6.
3. *Id.* at 16.
4. *Id.* at 21.
5. *Id.* at 23.
6. *Persinger v Holst*, 248 Mich App 499; 639 NW2d 594 (2001).
7. ABA Commission on Law and Aging & American Psychological Association, *Assessment of Older Adults with Diminished Capacity: A Handbook for Lawyers* (2005), available at <https://www.apa.org/pi/aging/resources/guides/diminished-capacity.pdf> (accessed October 9, 2014).
8. See MCL 700.7601.
9. MCL 700.2501.
10. MCL 700.5401(3).