

CLIENT CAPACITY
ESTATE PLANNING
AND
REPRESENTING
THE MENTALLY IMPAIRED CLIENT

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I. Introduction

This presentation's design is to promote discussion and comment regarding the circumstances under which a practitioner should rely on his own estimation of a client's capacity, should involve a clinician in that evaluation, and when liability might be imposed of the practitioner working with the incapacitated client. There are no clear answers. With the enactment of California Probate Sections 811-813 and Section 2356.5 in 1997 and their amendment in 1998, there are no longer any specific legal rules. Rather a medical test of evaluation and objective presentation of condition is to be used in evaluating capacity. Now lawyers will rely more and more on professional advice from physicians and psychologists to determine if clients have capacity to undertake any action.

II. Levels of Capacity

A. Legal Capacity: the law presumes all persons have the capacity to make decisions and to be responsible for their acts and decisions. (Cal. Prob. Code §810). Even a person who has a mental or physical disorder may still be capable of contracting, conveying, marrying, making medical decisions or executing wills or trusts. (Id). The presumption of capacity is rebuttable. (Id).

B. Incapacity: requires a judicial determination that the person is so totally without understanding, or of unsound mind, or suffers from one or more mental deficits in one or more mental functions, that under the circumstances the person should be deemed to lack legal capacity to perform the specific act. (Cal. Prob. Code §810(c)). Therefore, whether a person lacks capacity to perform an act, also depends upon the act involved.

1. Testamentary capacity (Cal. Prob. Code §6100.5)

- a. understand the nature of the testamentary act
- b. understand and recollect the nature and situation of the individual's property

- c. remember and understand the individual's relations to living descendants, spouse and parents and those whose interests are affected by the will.

2. Capacity to Contract (Cal. Prob. Code §810 to 812)

- a. must have the ability to communicate verbally or by other means the decision
- b. and to understand and appreciate:
 - (1) the rights, duties and responsibilities created or affected by the decision
 - (2) the probable consequences for the decisionmaker and the persons affected by the decision
 - (3) the significant risks, benefits and reasonable alternatives involved in the decision.

3. Capacity to give informed medical consent (Cal. Prob. Code §813)

- a. A person that has capacity to give informed consent, has the capacity to refuse to consent to that treatment
- b. to have capacity, the patient must be able to do all of the following:
 - (1) the person must be able to respond knowingly and intelligently to queries about that medical treatment and
 - (2) participate in that treatment decision by means of a rational thought process and
 - (3) understand:
 - i. the nature and seriousness of the illness
 - ii. the nature of the medical treatment that is being recommended by the health care provider
 - iii. the probable degree and duration of benefits and risks of the medical treatment
 - iv. the nature, risks and benefits of alternatives and

