

## CAPACITY: SPECIAL CONSIDERATIONS WHEN REPRESENTING ELDER CLIENTS

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**A**ttorneys who represent elderly crime victims in civil actions must consider how issues of capacity may complicate litigation. A review of basic issues prior to filing suit will enable attorneys to avoid both technical errors and potential ethical conflicts. These issues vary by jurisdiction and counsel should consult the controlling statutory authority in their state. The following are offered as general guidelines.

### Does the client have sufficient mental capacity?

As early in the litigation as possible, attorneys should determine whether there is any suggestion of a lack of mental capacity, particularly in cases where the attorney is contacted by the victim's family, or when the victim is in a nursing home. If the victim is unable to provide basic information on the facts of the case or if there is any indication of dementia, the attorney should inquire whether the victim has the requisite mental capacity to bring the case or if a family member has been granted the legal authority to act on the victim's behalf. Failure to do so can create potentially serious pitfalls for the case. Even if the victim has not been adjudicated incompetent, any evidence of dementia or diminished capacity can be exploited by the defense. Capacity must be established at the outset.

### Roadblocks created by lack of capacity

A plaintiff who lacks the mental capacity to handle her own affairs is unable to perform the most basic of functions needed to prosecute a claim for damages. She will be unable to execute answers to interrogatories, offer sworn testimony at deposition, or authorize the release of medical records. If the plaintiff fails to produce valid responses to requests for discovery, the defendant has a good chance of having the case dismissed. Moreover, a person suffering from diminished mental capacity probably lacks the legal ability to enter into a contract. This could call into question the validity of the retainer agreement under which the attorney is working. If the attorney entered into an agreement with anyone other than the victim, the agreement should state explicitly what legal authority the signatory has to act on the victim's behalf and clearly identify the person with final decision-making authority.

### Representative Suits


When an elderly victim lacks the capacity to bring a civil action on his own behalf, a family member or other person can file suit as a representative of the victim. There are several methods for others to acquire the legal authority to remedy a lack of capacity and allow the litigation to move forward.

- **Power of Attorney** – if prior to suffering diminished mental capacity, the victim executed a durable power of attorney authorizing a spouse or other individual to act on his behalf in the event of any such incapacity, the litigation may proceed. Once the victim has begun to experience diminished mental capacity, this method is no longer an option.

- **Guardianship** – if the victim is of diminished capacity, she may need to be adjudicated incompetent and have a guardian appointed prior to filing suit. In many states, neither a power of attorney nor guardianship is required to have a family member admitted into a nursing facility, so counsel should not assume that the person who had the victim placed in a nursing home has the ability to bring a civil action on the victim's behalf, absent some other authority.

- **Personal Representative** – often a family member can bring an action in her own name as the incompetent victim's "personal representative" or "next friend." Some jurisdictions allow individuals to file as personal representative with leave of the court, without first obtaining guardianship or a power of attorney. Other jurisdictions require leave of the court to proceed as a personal representative, even if that individual has been appointed guardian or holds a power of attorney for the victim.

### Conclusion

By making an initial assessment of capacity issues before beginning the representation of an elderly victim, an attorney can take the necessary steps to ensure that issues of diminished capacity will not interfere with his client's pursuit of civil justice. 

instances where nursing homes failed to provide the care for which they are reimbursed by the government. The U.S. Attorney's Office in Philadelphia has entered into two settlements in cases against nursing homes, for \$100,000 and \$500,000 respectively, in addition to

requirements for facility monitoring and significant quality of care improvements.<sup>6</sup>

Several states have enacted special elder abuse statutes that are useful in overcoming some of the challenges faced when common law remedies are sought. Perhaps best known is California's "Elder

and Dependent Adult Civil Protection Act" (EADACPA).<sup>7</sup> Its intent is to "enable interested persons to engage attorneys to take up the cause of abused elderly persons and dependent adults."<sup>8</sup> The law establishes a civil remedy for physical abuse, neglect, and fiduciary