



When Capacity Fluctuates: Estate Planning for Clients With Mental Illness

By Sarah A. Chussler and Julia L. Santo

Elder law and estate planning practitioners are frequently asked to determine whether a client has sufficient legal capacity to execute important planning documents. While many practitioners are accustomed to conducting capacity assessments for clients with age-related cognitive decline, evaluating the capacity of clients living with mental illness presents unique challenges. This article examines both the ethical and practical obligations of attorneys representing clients with mental illness, with a particular focus on assessing legal capacity and implementing effective estate planning strategies.

The Reality of Mental Illness

Mental illness affects millions of Americans. Approximately one in five adults in the United States lives with a mental illness, and more than half of adults with a mental illness received some form of mental health treatment in 2022.¹ Mental health conditions are generally categorized as Any Mental Illness (AMI), encompassing all recognized mental health disorders, and Serious Mental Illness (SMI), which results in “serious functional impairment.”²

Importantly, neither an AMI nor an SMI diagnosis determines legal capacity. Many individuals living with mental illness retain full decision-making ability. Unlike progressive neurocognitive disorders, however, many psychiatric illnesses are episodic, with alternating periods of stability and impairment. Accordingly, attorneys should avoid automatically equating a psychiatric diagnosis with diminished legal capacity or decision-making limitations. The relevant inquiry is whether the client possesses sufficient functional ability to understand and make the particular legal decision at issue at the time of execution. Elder law and estate planning practitioners are therefore uniquely positioned to encourage clients to execute foundational estate planning documents during periods of stability, before a future mental health crisis occurs and capacity wanes.

Consider a client with bipolar disorder who experiences periods of mania followed by months of complete stability. During a manic episode, the client may lack the ability to appreciate the consequences of appointing an agent under a power of attorney. Several months later, the same client may fully satisfy New York’s legal standard for executing a Power

of Attorney. The diagnosis has not changed, rather only the client's functional ability at the time of execution.

Ethical and Professional Responsibility Considerations

Attorneys representing individuals living with mental illness must balance their ethical duty to protect vulnerable clients with the equally important obligation to preserve client autonomy.³ The first step in meeting with any client is to determine whether the client has capacity to execute legal documents. To make this determination, practitioners are guided by New York State Professional Rules of Conduct Rule 1.14, which provides that when evaluating capacity practitioners must consider: "(i) the client's ability to articulate reasoning leading to a decision, (ii) variability of state of mind and ability to appreciate consequences of a decision; the substantive fairness of a decision, and (iii) the consistency of a decision with the known long-term commitments and values of the client."⁴

If, after completing this evaluation the attorney determines the client lacks capacity, they may take protective measures. Any protective action, such as consulting family members or other professionals, is appropriate only when the attorney reasonably believes the client is at risk of substantial physical, financial, or other harm.⁵ Even then, any intervention should be narrowly tailored, limiting the involvement of others while preserving the client's decision-making authority to the greatest extent possible.⁶

Moreover, in seeking protective action of a client with diminished capacity, an attorney should seldomly include disclosure of the client's condition.⁷ Diagnostic information is protected under New York State Professional Rules of Conduct 1.6.⁸ If disclosures must be made, a practitioner should first consider whether the disclosures may result in individuals or entities acting adversely to the client's interests.⁹

Similarly, when practitioners consult with a client's family members or others at the client's request, they should bear in mind the rules of confidentiality. This can be particularly challenging when developing a client's medical directives, which naturally may include a discussion of the client's mental health history, or an estate plan where a family member may stand to benefit. The attorney "must look to the client, and not family members, to make decisions on the client's behalf."¹⁰

Legal Capacity: A Task-Specific Analysis

Capacity is not a single legal concept. Likewise, "[t]he conventional client-lawyer relationship is based on the assumption that the client, when properly advised and assisted, is capable of making decisions about important matters."¹¹ As such, it is essential that all practitioners have a clear understanding of not only how to assess capacity, but also what the applicable legal standards of capacity are for different estate planning documents.

Of the core estate planning documents, advance medical directives, such as a healthcare proxy, require the lowest level of legal capacity. Every competent adult has the right to determine his or her own medical treatment, and New York Public Health Law presumes that an individual has the capacity to appoint a healthcare agent.¹² That presumption is rebutted only where the individual has been adjudicated incompetent or lacks authority to appoint an agent because of a guardianship.¹³ By contrast, a Power of Attorney requires the principal to understand the nature and consequences of granting authority to an agent, as defined by General Obligations Law.¹⁴

The standards become more nuanced for testamentary and trust planning. To execute a valid last will and testament, the testator must understand the nature and extent of their property, the natural objects of their bounty, and the dispositions being made.¹⁵ A prior adjudication of incapacity does not, alone, preclude testamentary capacity.¹⁶ Trust agreements require a contractual standard of capacity, requiring the client to understand the nature and consequences of the transaction, and to make a rational judgment concerning it.¹⁷

While the levels of capacity for key estate planning documents appear absolute, capacity is not always linear in practice. Individualized, document-specific assessments are essential. Practitioners should consider not only whether the client has capacity generally, but whether the client has capacity to execute a particular document on the date and time of execution.

Psychiatric Advance Directives

Practitioners advising clients with mental health impairments should include a discussion of a Psychiatric Advance Directive (PAD). A PAD is "a legal document that details a person's preferences for future mental health treatment decisions and names an individual to make treatment decisions if the person is in a crisis and unable to make decisions."¹⁸ The Office of Mental Health (OMH) recognizes that "[p]sychiatric Advance Directives promote stronger therapeutic alliances and are empowering."¹⁹ Although PAD legislation has been proposed in New York over the years, no statutory framework has been enacted. Nevertheless, OMH regulations formally recognize the importance of person-centered planning and PADs as collateral information to be considered in Comprehensive Psychiatric Emergency Programs (CPEPs) and inpatient units and discussed with mental health patients.²⁰

In states recognizing PADs, individuals may express treatment preferences, consent to or refuse medications, identify preferred hospitals, and appoint a decision-maker specifically for psychiatric care during future periods of incapacity. Until New York enacts a statutory PAD, practitioners can comfortably work within the state's existing planning framework by evaluating a client's capacity to execute traditional estate planning documents under the applicable legal standards discussed

above. The absence of a dedicated PAD makes proactive planning during periods of psychiatric stability particularly important, allowing clients to appoint trusted healthcare and financial decision-makers, communicate their treatment preferences through existing legal instruments, and establish a comprehensive plan before a future psychiatric crisis may impair their ability to do so.

In Practice

As with any client, practitioners should counsel the client regarding the importance of appointing trusted individuals to serve as a power of attorney or healthcare proxy agent. This counseling is particularly important for clients who are likely to experience recurring periods of diminished decision-making capacity during their lifetime. Periods of mistrust and paranoia may place strain on once healthy relationships. Therefore, in certain cases, a trusted, neutral third party may be better positioned to carry out the fiduciary responsibilities objectively and effectively.

Trust planning likewise provides significant protection for clients experiencing periods of instability. A properly drafted trust offers continuity in the management of assets while preserving the client's estate plan during periods of incapacity.

A trust may authorize a co-trustee or successor trustee to seamlessly assume responsibility for trust administration if the client becomes temporarily unable to manage financial affairs because of an acute psychiatric episode, without the delay, expense, or public nature of a guardianship proceeding, while also protecting assets from impulsive spending or financial exploitation.

Trusts may also authorize trustees to expend trust assets for psychiatric treatment, supportive housing, case management services, or other resources that promote the beneficiary's health and independence and incentivize adherence with mental health treatment. Clients may also wish to nominate preferred guardians in the event a future Article 81 guardianship proceedings become necessary. Although such nominations are not binding upon the court, they provide valuable evidence of the client's preferences when the client possessed capacity.

Importantly, careful documentation of the capacity assessment is one of the most effective ways to protect both the client and the estate plan itself. Practitioners should document the client's functional abilities at the time planning strategies are discussed and again when documents are executed. Detailed contemporaneous notes regarding the client's under-



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standing of the nature and purpose of the documents, the assets involved, the natural objects of the client's bounty, and the reasons for creating the underlying estate plan may become invaluable if the plan is later challenged.

Conclusion

Fluctuating decision-making capacity resulting from mental illness is not a barrier to estate planning, but rather an opportunity for thoughtful and proactive planning. By recognizing that capacity is task-specific, respecting client autonomy, and implementing appropriate planning strategies during periods of stability, practitioners can help ensure that their clients' wishes are honored while providing meaningful protection during future periods of mental health crisis.



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Endnotes

1. *Mental Health Information Statistics: Mental Illness*, National Institute of Mental Health (last updated September 2024), <https://www.nimh.nih.gov/health/statistics/mental-illness> [<https://perma.cc/C78L-J7SW>].
2. *Id.*
3. N.Y. Rules of Pro. Conduct, r. 1.14, cmt. 2 (N.Y. State Bar Ass'n 2025) ("The fact that a client suffers a disability does not diminish the lawyer's obligation to treat the client attentively and with respect.").
4. N.Y. Rules of Pro. Conduct, r. 1.14, cmt. 6 (N.Y. State Bar Ass'n 2025).
5. *Id.*
6. N.Y. Rules of Pro. Conduct, r. 1.14, cmt. 5 (N.Y. State Bar Ass'n 2025).
7. N.Y. Rules of Pro. Conduct, r. 1.14, cmt. 8 (N.Y. State Bar Ass'n 2025).
8. *Id.*
9. *Id.*
10. N.Y. Rules of Pro. Conduct, r. 1.14, cmt. 3 (N.Y. State Bar Ass'n 2025).
11. N.Y. Rules of Pro. Conduct, r. 1.14, cmt. 1 (N.Y. State Bar Ass'n 2025).
12. N.Y. Pub. Health Law § 2981.
13. N.Y. Pub. Health Law § 2981(1)(b).
14. N.Y. Gen. Oblig. Law § 5-1501 (2)(c).
15. Restatement (Third) of Property (Wills & Donative Transfers) § 8.1.
16. *In re Est. of Donaldson*, 38 Misc. 3d 841, 956 N.Y.S.2d 840, 842-43 (Sur. 2012) (quoting *Matter of Goldberg*, 153 Misc.2d 560, 582 N.Y.S.2d 617).
17. *Murphy v. Hollins-Reid*, 237 A.D. 839, 232 N.Y.S.3d 518 (2d Dept. 2025).
18. *Guidance Regarding the Use of PRN and STAT Medications in OMH-Licensed Inpatient and Emergency Settings*, N.Y. State Off. of Mental Health (last updated Aug. 2024), <https://omh.ny.gov/omhweb/guidance/prn-stat-meds.pdf> [<https://perma.cc/6L3J-558K>].
19. *Id.*
20. 14 N.Y.C.R.R. § 590.1(b); 14 N.Y.C.R.R. § 590.8(e)(7); 14 N.Y.C.R.R. § 580.3(b).

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