VOLS
VOLUNTEERS of LEGAL SERVICE

Pro Bono Practice: Serving Aging and Disabled Clients – Overcoming Implicit Bias, Assessing Capacity and Accommodating Disabilities

May 4, 2022
1pm to 2pm

Peter Kempner
Legal Director

Elisa Tustian
Staff Attorney

Implicit Bias: Ageism and Ableism

Ageism - prejudice or discrimination against a particular age group and especially the elderly

Ableism - prejudice or discrimination against individuals with disabilities

Legal services and pro bono attorneys serving the aging community inevitably encounter clients who live with a myriad of disabilities. The language we use when talking to and about these clients can reveal implicit bias about the aging population and people with disabilities. An implicit bias is a bias or prejudice that is present but not consciously held or recognized.

Ibram X. Kendi in his acclaimed text "How to be an Antiracist" says "the only way to undo racism is to consistently identify and describe it – and then dismantle it". He says the words we use are an important part of that process. These same principles can be applied to agism and ableism.

"Aging isn't a problem or disease. Aging is living." -Ashton Applewhite

Disability is "a form of human diversity rather than deficiency and otherness." - Beth E. Jörgensen

Reframing Language

The elimination of ableist and ageist language is an important first step towards combating implicit age and disability bias in your legal practice. Search your written documents for any of the language listed below. For example, rather than writing that the client suffers from a disability, you can write the client has a disability.
Ableist and ageist language can also come from the clients themselves. Our older adult

clients speak of not wanting to be a burden on their loved ones.

"I don't want to be a burden on my daughter, for her to have to take time to care for me."
Does the client know for sure it will be a burden on her daughter? Did the client consider it a burden to care for her daughter when she was a baby?

Reframing the language we use in our work is a step towards shifting the conversation. We can take Kendi's instruction and identify the ableist and ageist language that we and our clients use and seek to eliminate that language.

Ableist and ageist words/phrases:

"Insane," "psycho," moronic," "crazy," "nuts," "crippled," "senior moment," "spastic or spaz," "stupid," "retarded," "lame," "falling on deaf ears," "blind leading the blind," "geriatric," "over the hill," "cougar," and so many more.

In discussing a client's abilities and limitations, including but not limited to mobility or vision:

Mobility:
Avoid "homebound," try requires a home visit; avoid "limited to a wheelchair", try "uses a wheelchair"

Vision:
Avoid "suffers from a vision impairment," try "has a vision impairment."

Diagnosis specific bias

To help us in accommodating clients with diminished capacity we can try to increase our awareness of our own diagnosis specific biases. A person and their individual capacity cannot be defined by a diagnosis. As an example of a potential pit fall – one person with Dementia may understand the life planning documents while another with Parkinson's may not. Parkinson's Disease can cause client's trouble finding the right word or forming complex sentences as well as causing comprehension difficulties. People with this disease often have trouble understanding what others are saying to them. One possible way to assess whether the client can comprehend is whether they are able to respond to a written question or a question with multiple choice answers. Either way be aware that the name of a condition alone does not determine capacity. Don't fear a diagnosis like Dementia or Autism as a generalization or stereotype, assess the individual.

Age and Disability as Protected Classes Under New York Law

Law offices' obligation to combat implicit bias against disabled and older clients is not

only a moral imperative but is also potentially a legal obligation. Implicit bias can cross the line into discriminatory conduct when a law office fails to offer reasonable accommodations or engages in other conduct that could be considered discriminatory. While various federal statutes offer protections against discrimination based on both disability and age, state and local statutes in New York offer additional and heighten protections as well. Here we will focus on the New York State Human Rights Law (Article 15 of the New York State Executive Law) and the New York City Human Rights Law (Title 8, Chapter 1 of the New York City Administrative Code).

The New York State Human Rights Law

The term "disability" is broadly defined in the statute as "a physical, mental or medical impairment resulting from anatomical, physiological, genetic or neurological conditions which prevents the exercise of a normal bodily function or is demonstrable by medically accepted clinical or laboratory diagnostic techniques" N.Y. Exec. Law § 292 (21).

Under the New York State Human Rights Law "it shall be an unlawful discriminatory practice for any person, being the owner, lessee, proprietor, manager, superintendent, agent or employee of any place of public accommodation, resort or amusement, because of the . . . disability . . . of any person, directly or indirectly, to refuse, withhold from or deny to such person any of the accommodations, advantages, facilities or privileges thereof . . . or that the patronage or custom thereat of any person or purporting to be of any particular . . . disability . . . is unwelcome, objectionable or not acceptable, desired or solicited." New York State Exec. Law § 296 [2] [a]. While the public accommodations section of the statute does not include "age" as a covered class, many of the conditions we are discussing in this program would clearly fall under the definition of "disability."

In *Cahill v Rosa*, 89 NY2d 14 (1996), the Court of Appeals espoused a wide-ranging reading of the term "public accommodation" and in applying that ruling the Court in *Petty v. Law Office of Robert P. Santoriella, P.C.* stated that "it seems that a law firm can generally be considered a place of public accommodation." *Petty v. Law Office of Robert P. Santoriella, P.C.*, 2020 N.Y. Slip Op. 33908 (N.Y. Sup. Ct. 2020).

The New York City Human Rights Law

The New York City Human Rights Law prohibits unlawful discriminatory practices in public accommodations and covers entities including any person who is the owner, franchisor, franchisee, lessor, lessee, proprietor, manager, superintendent, agent or employee of any place or provider of public accommodation. N.Y.C. Admin. Code § 8-107(4). The statute defines term "disability" to mean "any physical, medical, mental or psychological impairment, or a history or record of such impairment." N.Y.C. Admin Code § 8-102.

While much of the language of the City Human Rights Law mirrors that of the State statue, the New York City Human Rights Law "mandates that courts be sensitive to the

distinctive language, purposes, and method of analysis required by the City Human Rights Law (City HRL), requiring an analysis more stringent than that called for under … the State Human Rights Law " *Williams v. N.Y. City Hous. Auth*, 61 A.D.3d 62, 65 (N.Y. App. Div. 2009).

Again, in *Petty v. Law Office of Robert P. Santoriella, P.C.* the Court held that "[i]f a law firm may generally be considered a public accommodation under the broader New York State Executive Law, then it seems logical that a law firm may also be considered to be a public accommodation under the New York City Administrative Code." 2020 N.Y. Slip Op. 33908 (N.Y. Sup. Ct. 2020).

An Attorney's Ethical Obligations

While serving aging clients, we should keep in mind what the ABA terms the "Four C's of Elder Law Ethics." Which are 1) client identification; 2) conflicts of interest; 3) confidentiality; and 4) capacity.

When clients have diminished capacity, it is sometimes their relatives who make first contact with the law office on their behalf. Despite the relative being the first to contact the lawyer, the person who you are drafting documents for is your client. This is true regardless of whether, rather than a free pro bono service, it is a billable situation where the relative, not the client, is paying the attorney fees. The relative should be excluded from the initial client contact so that you can determine capacity, establish an attorney client relationship, avoid a conflict of interest, ensure there is no undue influence, and protect the client's confidentiality. Often the client will then give consent to include the relative and they are usually very helpful in moving the matter along.

These same principles are born out in the New York Rules of Professional conduct as outlined below.

Applicable New York Rules of Professional Conduct and Commentary:

Rule 1.4: Communications

(b) A lawyer shall explain a matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation.

Comments:

[1] Reasonable communication between the lawyer and the client is necessary for the client to participate effectively in the representation.

Rule 1.6: Confidentiality of Information

1. A lawyer shall not reveal information relating to the representation of a client

unless the client gives informed consent....

2. A lawyer may reveal information relating to the representation of a client to the extent the lawyer reasonably believes necessary:
   (1) to prevent reasonably certain death or substantial bodily harm
3. A lawyer shall make reasonable efforts to prevent the inadvertent or unauthorized disclosure of, or unauthorized access to, information relating to the representation of a client.

Comments:

[19] When transmitting a communication that includes information relating to the representation of a client, the lawyer must take reasonable precautions to prevent the information from coming into the hands of unintended recipients.

Rule 1.7: Conflict of Interest: Current Clients

(a) Except as provided in paragraph (b), a lawyer shall not represent a client if the representation involves a concurrent conflict of interest. A concurrent conflict of interest exists if:

(1) the representation of one client will be directly adverse to another client; or

(2) there is a significant risk that the representation of one or more clients will be materially limited by the lawyer's responsibilities to another client, a former client or a third person or by a personal interest of the lawyer.

Comments:

[1] Loyalty and independent judgment are essential elements in the lawyer's relationship to a client. Concurrent conflicts of interest can arise from the lawyer's responsibilities to another client, a former client or a third person or from the lawyer's own interests.

[3] A conflict of interest may exist before representation is undertaken, in which event the representation must be declined, unless the lawyer obtains the informed consent of each client....

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.

Comments:

[1] The normal client-lawyer relationship is based on the assumption that the client, when properly advised and assisted, is capable of making decisions about important matters. When the client is a minor or suffers from a diminished mental capacity, however, maintaining the ordinary client-lawyer relationship may not be possible in all respects. In particular, a severely incapacitated person may have no power to make legally binding decisions. Nevertheless, a client with diminished capacity often has the ability to understand, deliberate upon, and reach conclusions about matters affecting the client's own well-being.

[2] The fact that a client suffers[1] a disability does not diminish the lawyer's obligation to treat the client with attention and respect.

[3] The client may wish to have family members or other persons participate in discussions with the lawyer. When necessary to assist in the representation, the presence of such persons generally does not affect the applicability of the attorney-client evidentiary privilege. Nevertheless, the lawyer must keep the client's interests foremost and, ... must look to the client, and not family members, to make decisions on the client's behalf.

[8] Disclosure of the client's diminished capacity could adversely affect the client's interests. For example, raising the question of diminished capacity could, in some circumstances, lead to proceedings for involuntary commitment. Information relating to the representation is protected by Rule 1.6. Therefore, unless authorized to do so, the lawyer may not disclose such information. When taking protective action pursuant to paragraph (b), the lawyer is impliedly authorized to make the necessary disclosures, even when the client directs the lawyer to the contrary. Nevertheless, give the risks of

[1] The drafters of the official comments to the New York Rules of Professional Conduct chose the term "suffers." "Suffers" can bring to mind unpleasantness and aversion and can sound contrary to disability inclusivity. We would suggest using "lives with" or "has" as an alternative.

disclosure, paragraph (c) limits what the lawyer may disclose in consulting with other individuals or entities or in seeking the appointment of a legal representative. At the very least, the lawyer should determine whether it is likely that the person or entity consulted will act adversely to the client's interests before discussing matters related to the client.

Disability Accommodations and Capacity Standards

Directing another to sign on your behalf:

Power of Attorney

In consideration of physical disability, in 2021 New York amended the General Obligations Law to allow for a principal to direct another person to sign the Power of Attorney at their direction. If someone else is signing for the principal, they should sign by writing or printing the principal's name and printing or signing their own name as well. Note this person cannot also sign as a witness. The statute states:

> (b) Be signed, initialed and dated by a principal with capacity, or in the name of such principal by another person, other than a person designated as the principal's agent or successor agent, in the principal's presence and at the principal's direction, in either case with the signature of the person signing duly acknowledged in the manner prescribed for the acknowledgment of a conveyance of real property and witnessed by two persons who are not named in the instrument as agents or as permissible recipients of gifts, in the manner described in subparagraph two of paragraph (a) of section 3-2.1 of the estate, powers and trusts law in the presence of the principal. The person who takes the acknowledgement under this paragraph may also serve as one of the witnesses. When a person signs at the direction of a principal he or she shall sign by writing or printing the principal's name and printing and signing his or her own name. N.Y. General Obligations Law Sec. 5-1501B. [emphasis added]

Health Care Proxy

NY Public Health Law States that:

> (a) A competent adult may appoint a health care agent by a health care proxy, signed and dated by the adult in the presence of two adult witnesses who shall also sign the proxy. Another person may sign and date the health care proxy for the adult if the adult is unable to do so, at the adult's direction and in the adult's presence, and in the presence of two adult witnesses who shall sign the proxy. The witnesses shall state that the principal appeared to execute the proxy willingly and free from duress. The person appointed as agent shall not act as witness to execution of the health care proxy.

N.Y. Public Health Law Sec. 2981(2). [emphasis added]

Last Will & Testament

NY Estates, Powers and Trusts Law states that your client must sign their name or ask someone else to do so on their behalf, on the signature line at the end of the body of the will. If someone else signs on the client's behalf, they should also complete an affidavit of signing. The person who signs on behalf of the testator should also sign his own name and affix his residence address to the will. That person must also not serve as a witness. N.Y. Estates, Powers and Trusts Law Sec. 3-2.1(a)(1)(c).

Capacity standards:

It is important to note that separate and distinct legal definitions of capacity exist for the creation/execution of various advance directives.

Power of Attorney

"Capacity" means the ability to comprehend the nature and consequences of the act of executing and granting, revoking, amending or modifying a power of attorney, any provision in a power of attorney or the authority of any person to act as agent under a power of attorney." NY GOL § 5-1501(3).

Health Care Proxy

"For the purposes of this section, every adult shall be presumed competent to appoint a health care agent unless such person has been adjudged incompetent or otherwise adjudged not competent to appoint a health care agent" (or unless a court has appointed a guardian of the person under Article 81 of the NY Mental Hygiene Law or Article 17-A of the Surrogate's Court Procedure Act). NY PHL § 2981(1)(b).

Last Will & Testament

N.Y. Estates, Powers and Trusts Law Sec. 3-1.1 states that a person must be "of sound mind and memory" to execute a Last Will and Testament. Which means that a Testator must:

(1) Understand the nature and consequences of executing a will;
(2) Know the nature and extent of the property being disposed of; and
(3) Know the natural objects of their bounty and relationship to them.

See *In re Estate of Kumstar*, 66 N.Y.2D 691, 692 (1985), citing *In re Will of Slade*, 106 A.D.2D 914, 915 (4th Dep't 1984).

Capacity Assessment Tools:

As a pro bono attorney, an organization like ours will generally assess the client's capacity before you do and so this may not be as much of a problem at initial engagement of a client, but capacity can change. If you find yourself in a position where capacity has changed suddenly due to a medical procedure or other situation you may need to make a capacity assessment.

Conversational Capacity Assessment and Client Identification:

For clients who can have a conversation-based capacity assessment, ask them how they've been during the pandemic and about their day-to-day life. Make conversation with the client not their relatives. Ask any relatives present ideally to leave the room or at least not to participate. Remind your client's relatives and your client who your client is and therefore who you have a duty to. Ask your client about why they have chosen a particular person as their agent and note the relationship details. When asking them about the pandemic, talk to them about how they feel about the vaccination or mask requirements. Your conversation will give you an idea of clients' awareness of current events and societal issues.

Fluctuations in Capacity:

Capacity is a continuum that can change with time and circumstances. Voluntary choice of a competent adult is a core value and ethic in law, medicine, and other realms of life, and the validity and enforceability of your client's documents requires your client to have the required level of capacity to execute each document they are seeking to obtain. In the "Assessment of Capacity for Everyday Decision-Making" (ACED) developed by Dr. Jason Karlawish, MD and Dr. James Lai, MD, capacity is described as consisting of four decision-making abilities: Appreciation, Understanding, Reasoning, and Expressing Choice. Chronologic age or a medical diagnosis may be relevant, but nondeterminative of an individual's actual abilities and functional capacity. Other short-term and long-term factors that can produce signs of incapacity include anxiety, grief, depression, bereavement, pain, side effects of prescription medications, time of day, hearing or vision loss, low education level, etc.

Further Reading:

Why am I left in the waiting room? Understanding the Four C's of Elder Law Ethics
https://www.americanbar.org/products/inv/brochure/211008886/

ABA Implicit Bias Guide - Implicit Biases & People with Disabilities
https://www.americanbar.org/groups/diversity/disabilityrights/resources/implicit_bias/