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The tricky task of clarifying mental competency

The responsibilities of settling on individuals' stability

By KRISTEN D'ANDREA

Last week, a U.S. District Judge declared Jared Lee Loughner, the man accused of killing six people and wounding Rep. Gabrielle Giffords in Arizona in January, mentally incompetent to stand trial. He will now return to a federal facility for several months as doctors medicate him and attempt to restore his competency so he can understand the charges against him.

By law, individuals who are mentally incompetent cannot retain an attorney, file a lawsuit, defend themselves or stand trial. What if, however, the legal water is muddy when it comes to determining whether or not someone is mentally competent? Clients struggling with dementia or other mental impairments causing diminished capacity present unique challenges for attorneys.

Attorney John Ray, of John Ray & Associates in Miller Place, has represented his fair share of such clients. There was the divorce case involving two Italian immigrants in their 80s who had been married for more than 50 years, he said. The husband, who was suffering from dementia, accused his wife of committing adultery. In New York state, an individual cannot get divorced if he or she is determined to be incapacitated, Ray said. The case ended up being resolved without going to trial.

Then there was the drug addict Ray defended who was falsely accused of rape. "Initially we questioned whether we could defend him or not because he was a bad heroin addict," Ray said. "He was high on heroin even when I spoke with him." Ultimately, Ray determined the defendant could make decisions even when stoned. He was found not guilty.

Another client came to Ray regarding landlord and tenant matters and patent problems. An inventor, he had hallucinations and delusions – even going so far as to accuse one of Ray's assistants of being a spy – but he was able to make informed legal decisions.

People don't have to be coherent, Ray added. "They just need to have a full grasp of the consequences of their own actions and circumstances," he said. "That's the real issue."

Lawyers have an ethical obligation to ascertain whether clients can understand what they're asking an attorney to do and if they can comprehend documents that will be executed and signed. So said Carolyn Reinach Wolf, senior partner in the law firm of Abrams, Fensterman, Fensterman, Eisman, Greenberg, Formato & Einiger and director of the firm's mental health law practice.

"In law, people are assumed to have the legal capacity to execute a living will, for example, or a health care proxy, unless they're acting strange or asking strange questions," Reinach Wolf said. If an attorney is concerned about an individual's mental capacity, she recommends seeking advice from a mental health attorney or clinician who has expertise in assessing someone's mental health.

A subsequent step may be to engage with the individual's family members to determine if there is a need for a legal guardian or the establishment of a trust.

Ironically, in guardianship proceedings, when an attorney states that an individual does not have the mental capacity to represent himself and needs a guardian, that individual has the right to an attorney to dispute their need for a guardian. "It's circular," said John Morken, trusts and estates partner at Farrell Fritz. "The law says that everyone has the right to defend themselves." In that situation, ultimately, the court will rule.

With some regularity, Morken will question the mental capacity of a client who comes into his office in need of a will. If a client's capacity is questionable, he gets family members involved to determine if a power of attorney is already in place, and asks lots of questions.

"It's usually a lot more work," he said. "You have to probe, ask questions and make sure [the will] would reflect his intent and he understands it. I won't have someone sign a document unless they understand it."

Subjects Morken may inquire about to determine mental capacity include recent medical procedures or medications, general interests, history, business associations, and hobbies.

If, for instance, an 89-year-old decided to suddenly disown one of his children in a will, it could be challenged. "You want to make sure it's well-thought out and protected," Morken said.

"Many times, people with [mental] problems like that can do a will if they're represented by someone who is patient and willing to work with them," Morken said.