

Incapacity Planning Information Your Clients Need to Know

Why Your Clients Need to Worry About Incapacity Planning

Death is the elephant in the room when it comes to talking about estate planning with clients. To avoid causing undue distress, we often edge around it, referring to *heirs* and *beneficiaries* or using terms like *pass away* or *pass on*.

This is something of a professional courtesy. Clients do not need to be reminded of death's inevitability. It is why they engage in estate planning in the first place. They know they will not be around forever and need to plan for the future of their families, businesses, and legacies.

Advisors get clients to face hard facts head-on and come up with solutions for them, albeit using a gentle touch at times. This duty extends to discussing another sensitive but important topic—what clients want to happen if they are alive but no longer able to manage their own affairs (sometimes referred to as being *incapacitated*).

Everyone dies. Not everyone becomes incapacitated. But the odds—and consequences—of suffering incapacity are higher than people might think.

What It Means to Be Incapacitated

Incapacity is the inability to manage one's affairs. It can arise from various causes, including illness, injury, and cognitive decline.

Although often conflated with disability, incapacity and disability are not the same. A disabled person can be incapacitated, but disability does not necessarily involve incapacity.

Someone who is in a serious car crash, for example, may have injuries that affect their mobility but not their cognition and communication. They might not be able to get around without assistance, but they can still make important decisions about their financial, property, legal, and healthcare affairs.

Most states, which have laws for determining incapacity in the context of adult *guardianship* proceedings or *conservatorship* proceedings (the term used may vary by state), statutorily define what it means to be incapacitated. These definitions typically include several components, including medical, functional, and cognitive elements.

Defining Incapacity in an Estate Plan

The legal standard for declaring someone incapacitated varies by state, but for the purposes of estate planning, it comes down to whether a person has a mental or physical impairment that renders them unable to make decisions for themselves and requires someone else to make decisions for them about their medical care and their finances.

Clients do not have to rely on their state's legal definition of incapacity to dictate when decision-making authority should be transferred to another person. Instead, they have the flexibility to define in their estate planning documents how incapacity is determined. Some clients want their loved ones, physicians, or a combination of the two to make the determination, while others prefer to require a disability panel or court to decide.

Some clients want to remain in control as long as possible, or have concerns about other people making decisions for them, and prefer a conservative standard. Others are more confident in their decision-makers and comfortable with a less rigorous process. The goal of an estate plan should be to strike the right balance between convenience, objectivity, and timeliness.

The crucial point to keep in mind during client discussions is that, without an estate plan, the determination of incapacity and the selection of a decision-maker could be left up to the court.

Incapacity Is a Real Risk

Financial advisors are accustomed to discussing disability with clients in the context of creating a plan for what happens if they are too sick or injured to work.

Around one in four 20-year-olds will become disabled before retirement,¹ and there is a roughly 70 percent chance that an adult age 65 and older will need long-term care in their remaining years.² Unfortunately, nearly three-quarters of Americans live paycheck to paycheck and are not financially prepared for disability.³

Here are some facts about incapacity that you and your clients may not know:

- One in nine adults age 65 and older has Alzheimer's disease, the leading cause of dementia and a common cause of incapacity.⁴
- Around 13 percent of all adults and 66 percent of adults age 70 and older are living with a cognitive disability, such as dementia, autism, or traumatic brain injury that may render them unable to make an emergency medical decision.⁵
- Incapacity can be permanent (e.g., due to dementia or a stroke) or temporary (e.g., because someone is unconscious or under anesthesia).
- Capacity is not all or nothing. A client could retain the capacity to handle their financial affairs but not to make healthcare decisions.
- Capacity can also fluctuate over time. Specific capacities may initially be lost and then recovered.
- Many different conditions can result in incapacity, such as substance abuse disorder, mental illness, postsurgical complications, and grief and bereavement.

¹ *Fact Sheet: Social Security*, Soc. Sec. Admin., <https://www.ssa.gov/news/press/factsheets/basicfact-alt.pdf> (last visited Dec. 18, 2024).

² *How Much Care Will You Need?*, LongTermCare.gov (Feb. 18, 2020), <https://acl.gov/ltc/basic-needs/how-much-care-will-you-need>.

³ *Uncomfortable truths about disability that may surprise you*, Mass Mut. (Sept. 15, 2023), <https://blog.massmutual.com/insurance/disability-surprising-facts>.

⁴ Michelle M. Mielke et al., *Considerations for widespread implementation of blood-based biomarkers of Alzheimer's disease*, 20 *Alzheimers Dement.* 8209 (2024), <https://pmc.ncbi.nlm.nih.gov/articles/PMC11567842>.

⁵ Joanne Tompkins, *Seize the Data: An Analysis of Guardianship Annual Reports*, *J. of Aging & Soc. Pol'y*, May 5, 2024, at 1, <https://www.tandfonline.com/doi/full/10.1080/08959420.2024.2349494#abstract>.

A client can not only name a decision-maker for a period of incapacity in their estate plan but also make provisions in their plan to compensate someone like an agent under a power of attorney.

In many cases, the agent is a family member who may not expect to be paid. However, by providing compensation or reimbursement to the agent for expenses incurred while managing their affairs, such as legal fees or accounting costs, as well as for their time, a client can provide incentives and resources to ensure that all of the necessary legwork (and paperwork) is performed during their incapacity.

Planning for Incapacity

If death is the elephant in the room in estate planning discussions—the obvious issue nobody wants to name—then incapacity is the issue that a client may never see coming.

Incapacity can happen at any age and have many causes. An estate plan that addresses only what happens to a client's assets after death without addressing who can make decisions about their personal affairs in the event they become temporarily or permanently incapacitated is missing a core piece.

The purpose of discussing incapacity should not be to scare clients but to point out its very real possibility and the need to be prepared through comprehensive estate planning.