

Addictions and Impaired Clients: Estate and Related Planning Considerations

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ChronicIllnessPlanning.org

Addictions and Impaired Clients: Estate and Related Planning Considerations

By: Amanda Koplin, LPC; Jonathan G. Blattmachr, Esq., and Martin M. Shenkman, Esq.



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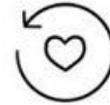
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Addictions Are a Systemic Problem and Affect YOUR Clients

- Drug use is on the rise in this country and 23.5 million Americans are addicted to alcohol and drugs. That's approximately one in every 10 Americans over the age of 12 (note 1). (Note that the Washington Post has reported that one in eight adult Americans is an alcoholic—see <https://www.washingtonpost.com/news/wonk/wp/2017/08/11/study-one-in-eight-american-adults-are-alcoholics/>) No estate planner can assume that a significant number of clients are not affected. The reality is that the practitioner must understand the commonality of these issues and guide clients, draft documents, and administer plans accordingly. And consider that this is only one of the many addictive behaviors that may affect planning.
- What does that mean for you?
 - ***YOUR CLIENTS ARE AFFECTED!***
- What does this mean as an Estate Planner?
 - Learn how to ask questions of clients to identify whether addiction issues may exist.
 - Learn and identify signs of addiction in clients, fiduciaries, beneficiaries and others.
 - Understand the resources available to you to assist in addressing the problems.
 - Learn how to take steps, from a legal and planning perspective, to protect family members and other beneficiaries from further harm, depleting family assets, and further damage to the whole “family” unit (however the client may choose to define that term).

What Is the Role of the Attorney in Planning for Addiction?

- Emphasize at the outset that the conversation and personal information will be kept confidential.
- The traditional role of the attorney was that of a family counselor. This evolved into the estate planning attorney being more focused on estate tax minimization. As exemptions have risen and technology has changed estate planning practices (e.g., document generation software, paperless, remote work, web meetings, etc.) the traditional role as family counselor can again emerge as paramount for many legal counsellors.
- As a family counselor exploring virtually all facets of the client and the client's family or loved-ones, including addiction issues, is vital. Counsel cannot plan for trusts, powers of attorney, fiduciary appointments, and other critical components of the estate plan without addressing addiction issues and implications.
- As estate planners, we cannot only be reactive. If the client informs counsel of any significant personal circumstance (e.g., religious beliefs that impact planning, LGBTQ relationships, use or possible use of assisted reproductive technologies) counsel should address those considerations. But we must be proactive and initiate such conversations with clients to identify addiction and other issues. The reality is that, if the practitioner does not initiate or ask direct questions, the client may not divulge the information out of discomfort, embarrassment, not understanding that planning can be modified, etc. Serving the role of a family adviser should make proactive inquiries.

Attorney Ethics Consideration: ABA Rule 1.14: Client with Diminished Capacity

- Client-Lawyer Relationship
- (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.

Attorney Ethics Consideration: ABA Rule 1.14: Client with Diminished Capacity - Comments

- Does the addictive behavior affect the client's capacity to make decisions with counsel? Some addictions (e.g., certain drugs) may. Others such as a sex or shopping addiction may not rise to this level but nonetheless be a significant problem for the client or the client's family.
 - 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.
- Counsel may take action if the model rules criteria is met. But what is, for example, "financial harm?" For a very wealth client, for example, does a gambling or shopping addiction rise to the level of harm sufficient to be "substantial?" For rich and famous people who've been caught shoplifting, see <https://www.youtube.com/watch?v=ipQojgiWl1c>
 - 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...[highlights added]."
- Counsel should be deliberate in determining what information can or cannot be disclosed if action is to be taken.
 - 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.

Attorney Ethics Consideration: ABA Rule 1.7: Conflict of Interest: Current Clients

- Client-Lawyer Relationship
- (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.
- (b) Notwithstanding the existence of a concurrent conflict of interest under paragraph (a), a lawyer may represent a client if:
 - (1) the lawyer reasonably believes that the lawyer will be able to provide competent and diligent representation to each affected client;
 - (2) the representation is not prohibited by law;
 - (3) the representation does not involve the assertion of a claim by one client against another client represented by the lawyer in the same litigation or other proceeding before a tribunal; and
 - (4) each affected client gives informed consent, confirmed in writing

Attorney Ethics Consideration: ABA Rule 1.7: Conflict of Interest: Current Clients - Comments

- If a wealthy client has a gambling or addiction issue might that client view interference with activities the client views as both enjoyable and their right as “adverse”?
 - “...the representation of one client will be directly adverse to another client...”
- If counsel believes that there may be a concurrent conflict because of the addiction and seeks to continue representation might the lawyer be embroiled in a claim by the addictive client against the client seeking to help address the addiction? Will the client with the addiction be willing to give informed consent confirmed in writing?
 - “...the representation does not involve the assertion of a claim by one client against another client represented by the lawyer in the same litigation or other proceeding before a tribunal...”
 - “...each affected client gives informed consent, confirmed in writing...”

Calling 911: How Counsel Should Respond to Addiction Issues

What you do:	What you don't do:
Identify there is a problem	Diagnose the problem
Ask relevant questions: Are you ok? Do you need help?	Fix it yourself
Know the relevant resources available to help	Ignore it
Take action	Walk away before appropriate resources are in place
Follow-up	Play the hero

How Do We Know Addiction Is A Problem?

Researchers Suniya Luther and Shawn Latendresse provide daunting data in the article, *Children of the Affluent (note 1)*:

Affluent individuals are reluctant to seek help because of concerns about privacy, reputation, and embarrassment.

- Affluent parents can feel more compelled than most to maintain a veneer of well-being, feeling that “those at the top are supposed to be better able to handle their problems than those further down the scale”
- There is a misconception among many that those of wealth don’t have the issues that those of much lesser means struggle with. Addiction issues are unfortunately perceived in some segments of society as being issues of those at the bottom of the economic spectrum. The realities are the opposite. *(note 2)*

How Do We Know Addiction Is A Problem? (cont'd)

- Parents, in general, tend to be aware when their children are depressed but tend not to seek professional help unless symptoms include those that inconvenience the adults involved.
- Professionals often hesitate to express concerns to high-income parents, anticipating resistance and sometimes even threats of lawsuits. Consequently (and paradoxically), wealthy youth can end up having less access to essential services than do students who are less well-off. *(note 1)*
- Other reasons linked to increased substance abuse in affluent populations pointed to both: *(note 2)*
 - Achievement pressures
 - Isolation from adults

What is the Correlation between *Wealth & Addiction*?

- Addicts and Alcoholics often don't change without massive consequences (e.g., interpersonal, intrapersonal, health, financial, legal, marital/family problems, spiritual, employment)
 - Multiple core areas of functioning typically become affected before changes are made by the affected person.
 - When a person suffers very few financial or employment consequences, they usually take much longer to recognize their problem. This is why the wealthy may be able to cope with and perhaps cover-up addictive behaviors longer than those of lesser means.
- Affluent individuals are typically able to evade consequences
 - Enabling by spouses, employees, family members, business partners, trusted advisors who benefit from the individual remaining sick. **Example:** A spouse may enjoy the financial and non-committal benefits of a dysfunctional marriage and thus not have an incentive to “rock the boat” or may fear the consequences of doing so.
 - Sometimes by the time the addictive behavior is addressed (or even identified) it is TOO Late!! (overdose, several DUIs, irreversible medical problems).

Family Relationships can be ruined by Addiction



Common Signs of Addiction

- Noticeable changes in self care
- Lack of purpose/ Identity
- Increased depression, fluctuating moods, lack of patience, irritability & agitation around not getting money quick enough
- Changes in communication
- Calls at odd hours seeking money for things which should not be urgent
- Reasons for needing money don't align with the facts
- Lack of accountability for their spending habits
 - Can't provide receipts for large purchases
 - Money disappearing
 - Can't account for spending and story about where the money went changes
- Trends of impulsive spending
- Irregular spending habits/ significant changes in spending habits
- Increased medical or legal expenses

What is the Practitioners Role: Actionable Take-Aways

- Identify the problem or ask questions to help the client identify the problem. The reality is that the client may be trying NOT to acknowledge a problem they suspect exists. Opening a discussion about issues that may affect prospective beneficiaries of a plan can be used to identify possible issues which may then be explored.
- Suggest an outside trustee who is familiar with addictive behaviors and how to respond to those issues.
 - When financial assets allow, keep family members outside of the role of trustee.
 - Family/friends as trustees may add additional emotional baggage or discomfort to the situation and thus prove detrimental.
 - Many family/friend trustees will not have the expertise to deal with addiction issues.
 - On the other hand, while a professional or institutional trustee may have the expertise to address these issues many are loath to accept certain responsibilities under governing legal documents (e.g., a trust) and may require an individual trustee be appointed to take certain actions.
- Involve a mental health professional, social worker, care manager, etc. as appropriate.
- Minimize power dynamics in family relationships by setting up clear boundaries and accountability measurements:
 - Daily/weekly breathalyzer tests
 - Weekly/monthly drug screening.
- Make sure expectations clear to all parties.

Be Proactive

- Create a process that helps you identify when these issues are present in a case.
 - Discovery questions in your estate planning questionnaire.
 - Discovery questions in the initial consultation with the client.
 - Learning to manage having difficult conversations.
- Create policies and procedures of how to handle these cases.
 - Beneficiaries with mental health (MH) or substance use disorders (SUD)
 - Family member with MH or SUD.
- Have resources and relationships built for access to help with appropriate client matters.
 - The earlier these resources are involved the higher likelihood they will be able to assist.

Discovery Questions for Client Organizers

- Are there any health, lifestyle, or other circumstances affecting you or any of those you contemplate naming as beneficiaries or fiduciaries under your plan?
- Might any fiduciaries or beneficiaries have addiction issues (alcohol, drug, gambling, sex, shopping or other) that should be addressed in your plan?

Discovery Questions For Client Intake Meeting

- What are some of your strengths and weaknesses when it comes to dealing with money?
 - Do you have any past or present medical or mental health issues we should budget and plan for right now?
 - Tell me about your living situation.
 - Tell me about your relationships with other family members.
 - What are the current stressors in your life?
 - What are some of the major obstacles in your life? How did you navigate those?
 - Who do you turn to for support?
-
- IT MAY WELL BE APPROPRIATE EXPRESSLY TO MENTION TO THE CLIENT THAT ALL DISCUSSIONS ARE CONFIDENTIAL AND WILL BE KEPT THAT WAY BY THE LAWYER

Questions Practitioners Should Ask Themselves While Meeting with Clients

- Do I feel like I have a solid baseline on this person and can recognize major changes in the future?
- Does this person have a solid support system?
- Are there discrepancies in what s/he is telling me and does her/his story make sense?
- Are there issues mentioned which require more investigation, planning, and a need for input from other parties?
- Is there an involvement of a care manager or other mental health professional, or do we need to involve one to protect the client and the assets?
- Is there an involvement of a trustee or do we need to involve one to protect the client and the assets?

Resources Practitioners Might Access

- Interventionists- a qualified individual who works with the family to motivate an addicted individual to enter into treatment
- In-home treatment- qualified professionals who enter the home to provide necessary counseling and support services
- Residential treatment centers- a home like setting with psychological and medical professional to treat addiction and mental health disorders
- Defense Attorneys familiar with addiction and drug court
- Local addiction counselors
- SoberLink – a breathalyzer connecting to your phone which sends results to your identified team (counselor, family members, etc.) (<https://www.soberlink.com/>)
- TrueLink- a credit/ debit card with financial, time, and purchase constraints (<https://www.truelinkfinancial.com/>)

Be Part of the Solution:

3 Effective Ways of Partnering with Clients with Addiction

- Normalize the discussion. Remember addiction is quite common, even among wealth, successful and highly educated clients.
- Ask direct questions to the client about the issues.
- Provide support by offering reassurance, resources, and respect.

Acting In The Moment: When You Suspect Active Addiction

- State facts/observations
 - “I noticed when you came in here you were stumbling and smelled like alcohol.”
 - “I noticed a lot of money disappearing and assets being sold since the last time we met.”
- Ask direct questions
 - “Are you ok?”
 - “Is there anything I can do to help you right now?”
 - “Can I give you a copy of the resource list again?”

Acting in the Moment (cont'd)

- Fall back on policy and procedures
 - **Trustee:** “Part of our policy is that we cannot provide disbursements without confirmation that you’re maintaining sobriety right now. Will you go to (name a testing center or doctor) and have them send me the test results?”
 - **Trustee:** “Part of our policy is we need 48 hours to approve or deny a disbursement. These requests are submitted during our business hours.”
- **Trustee:** Utilize accountability measures
 - SoberLink (a breathalyzer connecting to your phone which sends results out to your defined team)
 - TrueLink (a credit/debit card with financial and time constraints)
 - Psychiatric Evaluation (Done by a Psychiatrist for diagnostic and recommendation purposes)
 - Drug tests (hair, urine, blood, mouth swab). (Conducted by a lab, general practitioner, or 3rd party at home)

Actionable Take-Aways:

How do you start a conversation?

- **Trustee/Counsel:** Make it a part of your initial intake (on boarding) process.
- **All Involved:** Be direct in preparing them for your line of questioning and why it's important
- **All Involved:** Get agreement along the way by asking "is that okay with you?"
- **Counsel:** Tell current clients who are beyond the on boarding process that you have learned additional information on planning for addiction and now recognize the importance of improving your practice in this way.
- **Trustee/Counsel:** When addiction issues arise, use these questions and agreements as something to reference again in the future.

Drafting Considerations: Sample Language Courtesy of Interactive Legal - 1

- The following provisions apply to all trusts created under this Trust Agreement, except as expressly provided to the contrary in this Article entitled "Substance Abuse:"
 - Dependence. If the Trustee reasonably believes that: (1) a beneficiary of any trust created under this Trust Agreement (i) routinely or frequently uses or consumes any illegal drugs or other illegal chemical substance so as to be physically or psychologically dependent upon that drug or substance, or (ii) is clinically dependent upon the use or consumption of alcohol or any other legal drug or chemical substance that is not prescribed by a licensed medical doctor or psychiatrist in a current program of treatment supervised by that doctor or psychiatrist; and (2) as a result of such use or consumption, the beneficiary is incapable of caring for himself or herself, or is likely to dissipate the beneficiary's financial resources; then the Trustee must follow the procedures set forth below. **#Comment:** Institutional trustees may insist that this decision be handled solely by an individual trustee. **#Comment:** This provision only address drug, alcohol and substance abuse and not other types of addictions.
 - Testing. The Trustee will request the beneficiary to submit to one or more examinations (including laboratory tests of hair, tissue, or bodily fluids) determined to be appropriate by a licensed medical doctor or psychiatrist selected by the Trustee. The Trustee will request the beneficiary to consent to full disclosure by the examining doctor or facility to the Trustee of the results of all the examinations. The Trustee shall maintain strict confidentiality of those results and will not, without the beneficiary's written permission, disclose those results to any person other than the beneficiary. The Trustee may totally or partially suspend all distributions otherwise required or permitted to be made to that beneficiary until the beneficiary consents to the examination and disclosure to the Trustee. **#Comment:** Is the right for the trustee to suspend distributions but not a mandate sufficient? Will an individual trustee be strong enough to take this action? If the trust is discretionary in any event what does this add?
 - Treatment. If, in the opinion of the examining doctor or psychiatrist, the examination indicates current or recent use of a drug or substance as described above, the beneficiary must consult with the examining doctor or psychiatrist to determine an appropriate method of treatment for the beneficiary. Treatment may include counseling or treatment on an in-patient basis in a rehabilitation facility. If the beneficiary consents to the treatment, the Trustee may pay the costs of treatment directly to the provider of those services from the income or principal otherwise authorized or required to be distributed to the beneficiary, if the Trustee otherwise determines that the funds are available to do so and it is in the best interests of the beneficiary to do so.

Drafting Considerations: Sample Language Courtesy of Interactive Legal - 2

- **Mandatory Distributions Suspended.** If the examination indicates current or recent use of a drug or substance as described above, all mandatory distributions and all withdrawal rights from the trust estate with respect to the beneficiary during the beneficiary's lifetime (including distributions upon termination of the trust for reasons other than the death of the beneficiary) will be suspended until: **#Comment:** Is the mandate to suspend mandatory distributions optimal for the beneficiary involved? What if rent should be paid?
- in the case of use or consumption of an illegal drug or illegal substance, examinations indicate no such use; and
- in all cases of dependence, until the Trustee, in the Trustee's judgment, determines that the beneficiary is fully capable of caring for himself or herself and is no longer likely to dissipate his or her financial resources.
- **Discretionary Distributions.** While mandatory distributions are suspended, the trust will be administered as a discretionary trust to provide for the beneficiary according to the provisions of the trust providing for discretionary distributions in the Trustee's discretion (other than an Interested Trustee) and those provisions of the trust relating to distributions for the beneficiary's health, education, maintenance or support.
- **Resumption of Mandatory Distributions and Withdrawals.** When mandatory distributions to and withdrawals by the beneficiary are resumed, the remaining balance, if any, of the mandatory distributions that were suspended shall be distributed to the beneficiary at that time and the balance of any rights of withdrawal by the beneficiary shall be immediately exercisable by the beneficiary. If the beneficiary dies before mandatory distributions or rights of withdrawal are resumed, the remaining balance of the mandatory distributions that were suspended shall be distributed to the alternate beneficiaries of the beneficiary's share as provided herein.
- **Other Prohibitions During Mandatory Suspension of Benefits.** If mandatory distributions to a beneficiary are suspended as provided above in this Article, then as of such suspension, the beneficiary shall automatically be disqualified from serving, and if applicable shall immediately cease serving, as a Trustee, Trust Protector, or in any other capacity in which the beneficiary would serve as, or participate in the removal or appointment of any Trustee or Trust Protector hereunder.

Drafting Considerations: Sample Language

Courtesy of Interactive Legal - 3

- **Exoneration Provision.** It is not the Grantor's intention to make the Trustee (or any psychiatrist or other medical doctor retained by the Trustee) responsible or liable to anyone for a beneficiary's actions or welfare. The Trustee has no duty to inquire whether a beneficiary uses drugs or other substances. The Trustee (and any psychiatrist or other medical doctor retained by the Trustee) will be indemnified from the trust estate for any liability in exercising the Trustee's judgment and authority under this Article, including any failure to request a beneficiary to submit to medical examination and including a decision to distribute suspended amounts to a beneficiary.
- **Tax Savings Provisions.** Notwithstanding the provisions of the preceding subparagraphs or any other provision of this Trust Agreement, the Trustee shall not suspend any mandatory distributions required for a trust to qualify, in whole or in part, for any Federal or state marital deduction or charitable deduction or as a qualified subchapter S trust. Additionally, nothing herein shall prevent or suspend any distribution of Retirement Benefits mandated by the provisions of any trust created hereunder to which Retirement Benefits are payable. Finally, nothing herein shall prevent a distribution mandated by the provisions hereof relating to the Maximum Duration of Trusts.



Amanda Koplin, LPC

- Master's degree in mental health counseling
- Started 3 innovative mental health companies
- Present across the nation on topics related to mental health and wellness
- Consult on complex cases
- Provide training to trusted advisors on how to talk to clients about sensitive issues



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- Mr. Blattmachr graduated from Columbia University School of Law cum laude, where he was recognized as a Harlan Fiske Stone Scholar, and received his A.B. degree from Bucknell University, majoring in mathematics. He has served as a lecturer-in-law of the Columbia University School of Law and is an Adjunct Professor of Law at New York University Law School in its Masters in Tax Program (LLM). He is a former chairperson of the Trusts & Estates Law Section of the New York State Bar Association and of several committees of the American Bar Association. Mr. Blattmachr is a Fellow and a former Regent of the American College of Trust and Estate Counsel and past chair of its Estate and Gift Tax Committee. He is author or co-author of five books and more than 400 articles on estate planning and tax topics. Mr. Blattmachr served in the US Army rising to the rank of Captain and was awarded the Army Commendation Medal.
- Among professional activities, which are too numerous to list, Mr. Blattmachr has served as an Advisor on The American Law Institute, Restatement of the Law, Trusts 3rd; and as a Fellow of The New York Bar Foundation and a member of the American Bar Foundation.

Thank you for your time, attention, and taking the time to learn about estate planning for beneficiaries with addiction. Please reach out with any questions or comments.

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CLE Credits

- For more information about earning CLE credit for this program or other Martin Shenkman programs please contact Simcha Dornbush at NACLE. 212-776-4943 Ext. 110 or email sdornbush@nacle.com