By **Martin M. Shenkman**

# How Neurologic Conditions Affect Planning

## Aging and disease can create unique challenges

Planning for the challenges of aging and disability is an integral part of what every estate planner addresses. However, what exactly does this planning require? Too often, the steps are limited to Medicaid planning, drafting a fairly routine durable power of attorney (POA) and drafting a health care proxy. While these steps are vital, often they're insufficient.

To best address current and future client needs, practitioners must understand the incidence and nature of the challenges that aging and disease can create. Many practitioners plan under the misconceptions that: (1) physical disability means a client who's wheelchair bound, and (2) cognitive issues are typified by a client lacking any decision making capacity (that is, a black and white paradigm). Thus, many plans trigger springing durable POAs when a client is "disabled." In reality, only about 7 percent of those with disabilities use a walking aid (wheelchair or otherwise), and there are myriad shades of gray between being competent and completely lacking any decision making capacity. Further, disabilities often aren't triggered at a certain point in time, but wax and wane during the progression of a disease, and even during the course of a day, as the effects of medications may vary. So many may prefer a more refined or tailored trigger mechanism. Brain disease, in particular, presents a wide range of symptoms and planning challenges that affect a surprisingly large number of clients.

As the importance of planning to minimize estate tax has waned and the population continues to age, both the incidence and relative importance of planning for clients' brain disease or brain injury will increase substantially.

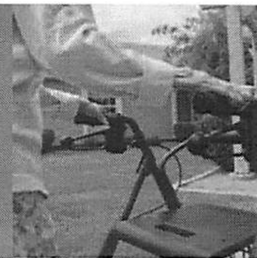
**Martin M. Shenkman** is an attorney in Paramus, N.J.

Not only should legal documents be tailored to address a client's specific challenges, but also the planning team collectively must educate clients to take practical steps to implement the planning. Bear in mind that the risks faced by those with neurologic disease may be broader than those faced by other clients. There's a greater risk that the client may be taken advantage of by those with access to the client's financial assets. There are many reports of clients whose offspring, caretakers or others have stolen nearly everything. While the steps to minimize these risks, as well as address other issues, may sometimes appear rather pedestrian, their importance can't be overstated.

### Brain Disease by the Numbers

Brain disease is far more prevalent and diverse than many realize. One in six people is affected by brain disease or brain injury. Consider a few of the many different brain diseases or injuries that may affect clients:

- In its 2012 annual report, the Alzheimer's Association (AA) estimates that 5.4 million people in the United States have Alzheimer's disease (AD). The risk of AD increases with age, so unless new treatments are discovered, this number will grow sharply as the baby boomer generation reaches old age. By 2050, the AA estimates that between 11 million and 16 million Americans will have the disease.[1] The U.S. National Institute of Mental Health estimates that about one in four American adults suffer from a diagnosable mental disorder in any given year, with nearly 6 percent suffering serious disabilities as a result.[2]
- In 2010, 2.5 million traumatic brain injuries occurred either as an isolated injury or along with other injuries.[3]
- 400,000 Americans are living with multiple sclerosis (MS).[4]



- 1 million Americans are living with Parkinson's disease (PD).[5]
- Autism now affects one in 68 children and one in 42 boys.[6]

## Impact of Neurologic Conditions

Neurologic conditions can result in a wide range of possible physical and cognitive symptoms, including: pain, fatigue, muscle weakness, paralysis, coordination issues, sensory distortions, seizures and disorientation. Some symptoms might significantly impact a client's life, but may not have a significant impact on how a practitioner should plan for that client. Impaired cognition, including poor judgment and planning, often develops insidiously. The individual or family may not recognize the problem, or worse, they may even actively conceal the deficits. Other symptoms, however, may have significant, even unexpected, impact on planning now or in the future.

## Effect on Planning

Neurologic conditions don't refer only to AD and PD. There are a wide range of different neurologic conditions that might affect clients and, in turn, the planning steps you should consider for those clients. Most people would not consider attention deficit hyperactivity disorder (ADHD), migraines or other neurologic conditions as planning issues, but for millions of Americans, those and other seemingly inconsequential conditions are anything but; hence they're vital to address. Remember, symptoms change with the progression of each disease or condition, and each patient's experience of any condition is unique. Often, simple steps may enable a practitioner to tailor planning that provides disproportionately significant benefits to the client affected. The list of conditions or diseases below is far from complete. I've noted only a point or two about each disease and possible planning steps. Practitioners should start discussing these matters with more clients and apply their expertise to help each affected client face their own challenges.

**AD.** The harsh reality is that AD will result in dementia and eventually death. In the early stages after diagnosis, a client may be fully capable of engaging in the planning process and signing any legal documents. That's the time to install safeguards to protect the client's person and finances. Most clients aren't aware that a degree of capacity is necessary to sign legal documents or that it can vary depending on the documents and circumstances involved. It's important for practitioners to ascertain what stage of disease the client has and what the anticipated rate of progression is, so that planning can be completed in time. Making this determination can be based on a letter from the client's neurologist. However, it may be helpful to engage a care manager to provide interpretive help and to create a care plan that can be integrated into the estate and financial plan and even into the documentation. This can also be important, as many clients may be in denial of the severity of their diagnosis and won't proceed with planning at an appropriate pace. Knowing that dementia will occur makes in imperative to implement safeguards in advance to minimize the likelihood of financial abuse in the future, as abilities decline. Merely signing a durable POA will often be insufficient. Consider having an independent person, such as a CPA or a trusted family member (but not the person named agent under the POA, and not a

It may be helpful to engage a care manager to provide interpretive help and to create a care plan that can be integrated into the estate and financial plan and even into the documentation.

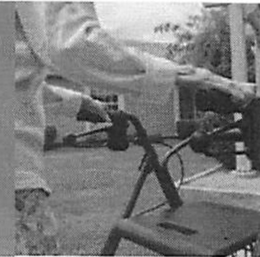
beneficiary), receive duplicate copies of monthly bank and brokerage statements. This person could even formally be named more formally to serve in a monitor position under the POA. Having an independent person review the statements can catch problems if your client's abilities decline faster than anticipated, and can serve as an important check and balance on client's your agent. An even better level of protection might be to have a funded revocable trust with a co-trustee or institutional trustee involved. That trust could incorporate a provision that mandates periodic evaluations by an independent care management firm to assure the client's physical safety and wellbeing.

> Empowering the client through proactive planning to remain in control in spite of a worsening of symptoms should be the goal.

**Multiple sclerosis (MS).** Many patients living with MS are concerned about the potential for an exacerbation. Researchers have confirmed that there's a "... significant increase in risk of exacerbation in multiple sclerosis after stressful life events."[7] If the client has experienced sporadic exacerbations, a springing provision in a durable POA and a disability clause for the client serving as trustee or co-trustee of his own revocable living trust should be tailored to reflect the on/off circumstances. Further, advanced MS impairs cognition, particularly frontal executive functions, functions necessary for planning, insight and judgment. Most revocable trusts provide that if the grantor is disabled, he's removed from serving as a trustee. How is "disability" defined? Some documents define it as being unable to manage one's own affairs. Will that vagueness suffice? If the client might experience an exacerbation and can't handle financial matters for several weeks because of optic neuritis, should he be removed as a trustee? But, what if it's anticipated that a few weeks later, when the symptoms subside, the client would again be fully able to handle his affairs? Should that occur, under the provisions of most trusts, the client would have to be reappointed as trustee. The on/off trustee status might create uncertainty for third parties endeavoring to rely on the validity of trustee actions. This situation might be mitigated if the trust instrument provided that the grantor wouldn't be deemed disabled unless he can't handle his financial affairs for more than 30 days. That window might suffice for most or all exacerbations. If during these periods a co-trustee could handle routine or ministerial matters, there may be no gap in trust administration.

**Neuropathy.** Patients living with peripheral neuropathy may, as a result of damage to the peripheral nervous system, experience balance issues, burning sensations, dizziness and hypersensitive skin that may make it too uncomfortable to don socks or shoes. If a client's condition is so severe that he may become housebound, financial and estate planning should be adjusted accordingly. Establish automatic bank deposits and billing so that most or all routine bills are automatically charged to the client's credit card or deducted from his checking account. Set up automatic deposits for revenue sources, such as dividends and wages. Educate the client as to how to take full advantage of online banking. Simplify and consolidate accounts. While these steps might sound simplistic, they're too often ignored. Creating a durable POA is fine, but the practical planning that might avoid the need to use it is better. Empowering the client through proactive planning to remain in control in spite of a worsening of symptoms should be the goal. These steps invariably fall between the cracks in the professional advisory team, with each advioer assuming that these steps aren't within their purview. It's less relevant whether the wealth manager, attorney or CPA guide the client, then that the appropriate steps be taken. These simple steps can minimize, or eliminate, the need for the client to leave home to conduct errands that are uncomfortable or worse.

**ADHD.** This is characterized by inattention, hyperactivity and impulsiveness. While presumed to be a challenge for children, a significant portion of children with ADHD mature into adults with ADHD. In fact, it's estimated that ADHD symptoms continue into adulthood for about 60 percent of those children living with ADHD. That's approximately 4 percent of the U.S. adult





population, or 8 million adults.[8] An adult client challenged by ADHD might easily become distracted, overlook details and forget responsibilities. Simple financial planning steps may mitigate the problems these issues pose. Advise the client to use an electronic checkbook program, like Quicken, and to take full advantage of many of its features. Automatic reminders can be set up to remind the client when to pay bills or to act on other important financial or legal matters, for example, when a lease matures. It's easy for your client to create a budget and compare actual expenditures to his budget to identify oversights. Many living with ADHD suffer from anxiety and depression that can be impediments to planning. Encourage the client to involve a close friend or family member in the process to help keep them on track. Set up regular short review meetings with these clients so that each meeting is limited in scope and focused on a finite number of tasks to complete. With the client's permission, selected advisors can be charged with following up on various tasks or pursuing a cancelled meeting with more vigor than might otherwise be common.

**PD.** Advisors must be cautious not to make assumptions about capacity. Parkinsonian masked faces (hypomimia) is a lack of facial expressions. But, while a client may appear unemotive, or even unresponsive, that lack of reaction may not correlate whatsoever with the client's understanding of a particular conversation. Visual appearances may have no correlation with cognitive abilities. Some with PD have handwriting that's very cramped and tiny (micrographia). The dramatic variations in a client's handwriting can result in a bank or other third party refusing to accept a signature on a check or other legal document because it may not match the signature cards on file. Consider preparing a document that confirms that the client is living with PD and that micrographia, in particular, is one of the client's symptoms. Such a document might include perhaps three or more different signatures of the client, done at different times to reflect most of the more significant variations in signatures. This might suffice to assuage the concerns of banks and others. Nearly 50 percent of PD patients develop an associated dementia. Some living with PD may experience apathy and depression from the disease. This can impede the planning process. Involving family, a social worker or care manager may be helpful to move the planning process to conclusion.

**Migraines.** Twenty-eight million Americans have migraine headaches.[9] This is more than just a bad headache. Migraines can be crippling and have a profound impact on the client. A migraine can last for days. Symptoms might include nausea, vomiting, light and/or sound sensitivity (photophobia and/or phonophobia) and even transient visual, sensory or language disturbances. A typical springing general POA might not suffice. The time and steps to trigger the agent's power may be excessive if there's a need to take immediate action, given the unpredictable and severe nature of some migraines. Further, for a client with capacity, there's no reason to relinquish authority over major decisions. As an alternative, consider a limited POA that's effective immediately. Most general POAs grant the agent broad authority to transact almost any legal, tax or financial matter your client could undertake. If your client faces the potential for unpredictable days of incapacity, he doesn't need to grant someone the authority to change an individual retirement account beneficiary. But, he may need someone to pay a mortgage, file a tax return or take other actions that, if delayed, could be costly or problematic.

> For clients who've had strokes, create additional financial safeguards such as a monitor, institutional trustee or living trust with a mandated periodic evaluation by an independent care manager.

**Epilepsy.** Epilepsy affects over 3 million Americans.[10] It's a disorder of the central nervous system that disturbs nerve cell activity in the brain, causing seizures during which abnormal behavior, symptoms and sensations may occur and consciousness may be lost. Depression is a common symptom of eplipesy, and high rates of suicide

can be associated with it. There's considerable ignorance and misconceptions concerning epilepsy. Although following a seizure, some individuals are disoriented, most individuals living with epilepsy have normal cognition. But, this condition could present a risk in the event of a will challenge. Before a client with epilepsy signs a will or other important legal document, it's advisable for counsel to corroborate with the client's neurologist when the last episode occurred and that there was no residual disorientation before the will was executed. Some states require patients living with epilepsy to notify automobile licensing authorities of their condition. If your client retains his license and drives, encourage the client to obtain the maximum personal excess liability insurance coverage (also called "umbrella" coverage) feasible. Also, discuss asset protection steps that might be appropriate.

**Stroke.** About 800,000 Americans have a stroke each year. About 185,000 strokes (or 1/4th) are suffered by people who've had one previously.[11] Neurologic symptoms of stroke include motor dysfunction, anxiety, panic attacks, apathy and even psychosis. The types and degrees of disability that follow a stroke depend on which area of the brain is damaged. Generally, stroke can cause five types of disabilities: (1) paralysis or problems controlling movement, (2) sensory disturbances including pain, (3) problems using or understanding language, (4) problems with thinking and memory, and (5) emotional disturbances. Those surviving a stroke have a 75 percent likelihood of their disabilities reducing their employability. Any of these factors could impact planning. But, because such a wide spectrum of symptoms is common, planning adjustments will have to be tailored to the individual situation. These adjustments might include extra precautions to demonstrate capacity to execute documents or take other planning steps. Create additional financial safeguards such as a monitor, institutional trustee or living trust with a mandated periodic evaluation by an independent care manager.

**Concussion.** This injury has received considerable attention as a result of sports injuries. Concussions can result in symptoms such as post-trauma amnesia and difficulty reasoning. Consider whether it's advisable for the client to have a psycho-social evaluation and neurological evaluation prepared to alert you to the consequences of the injury and long-term prognosis so you can pursue appropriate planning and determine if the client is competent to sign a will or other document. There can be significant variability in disability caused by concussion, and disability can change over time.

*—The author is grateful to Bruce Sigsbee, M.D., a neurologist practicing in Maine and the immediate past president of the American Academy of Neurology, for his comments.*

## Endnotes


1. *http://mcgovern.mit.edu/brain-disorders/by-the-numbers* (May 20, 2014).
2. *Ibid.*
3. *See http://www.cdc.gov/traumaticbraininjury/* (May 20, 2014), citing National Hospital Discharge Survey (NHDS), 2010; National Hospital Ambulatory Medical Care Survey (NHAMCS), 2010; National Vital Statistics System (NVSS), 2010. All data sources are maintained by the CDC National Center for Health Statistics.
4. *www.statisticbrain.com/multiple-sclerosis-statistics/* (May 20, 2014).
5. *www.pdf.org/en/parkinson_statistics* (May 20, 2014).
6. *www.autismspeaks.org/what-autism/facts-about-autism* (May 20, 2014).
7. "Association Between Stressful Life Events and Exacerbation in Multiple Sclerosis: A Meta-Analysis," *www.bmj.com/content/328/7442/731* (May 20, 2014)
8. "Attention Deficit Hyperactivity Disorder: ADHD in Adults," *www.webmd.com/add-adhd/guide/adhd-adults* (May 20, 2014), "
9. *http://askjan.org/media/Migraine.html* (May 20, 2014).
10. *www.epilepsy.com/node/986825* (May 20, 2014).
11. *See www.cdc.gov/stroke/facts.htm* (May 20, 2014), citing Go AS, Mozaffarian D, Roger VL, Benjamin EJ, Berry JD, Blaha MJ, *et al.*, "Heart disease and stroke statistics—2014 update: a report from the American Heart Association," *Circulation* (2014), at p. 128.