



Who Has the Capacity to Vote?

By Charles P. Sabatino and Sally Hurme

In case you have not watched television or read a newspaper in the past several months, there was a national election this fall. Among all the issues debated was one that has been in the shadows for decades but now is receiving a bit more attention—the right of persons with cognitive disabilities to vote.

The right to vote has evolved over time—not without a struggle—from landowning white men to include women and blacks. Poll taxes and literacy tests have been removed from our country's way of thinking about who should have access to the ballot box. Today, under federal election law, there are only two groups that states may exclude from voting—felons and persons categorized in some way as having mental impairments.

Why should we now care about eliminating barriers for older persons and others with mental disabilities who want to vote and who have the threshold ability to vote but for many reasons are excluded from the polling booth?

Some striking numbers illuminate the problem:

- **Elections may be decided by very small margins.** In 2000, George W. Bush officially won the Florida vote over Al Gore by a margin of 930 votes (out of 6 million), a virtual statistical tie.

- **Older persons vote.** Persons over sixty-five have a higher rate of participation than any other age group. In the 2004 presidential election, 71.8 percent of citizens age fifty-five and older reported voting. The next highest voting group were those age forty-five to fifty-four years old (68.7 percent reported voting). Even in the oldest age category tracked (age seventy-five and older), 68.5 percent reported voting.
- **The number of older persons is growing rapidly.** Between 2000 and 2030, the population over the age of sixty-five in the United States is projected to more than double from 35 million to 71.5 million, with the cohort of persons age eighty-five and over increasing at the highest percentage rate.
- **The number of older persons with dementia and other disabilities will similarly expand.** The prevalence of disabilities significantly increases with increasing age. The total number of people with dementia in the United States is not known with certainty, but in 2000, researchers estimated 4.5 million people age sixty-five and over had Alzheimer's disease. A more recent statistical report of the Alzheimer's Association estimates that number to

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be 4.9 million as of 2007, with another 200,000 individuals younger than sixty-five with early onset Alzheimer's. By 2030, those numbers are expected to increase by more than 50 percent. Alzheimer's disease comprises 50 to 70 percent of all cases of dementia, so estimates of the total population with dementia of any type could be as much as double the above figures.

Beyond dementias, there are many diseases and conditions that result in impairment of brain function, including amyotrophic lateral sclerosis (ALS), brain tumor, epilepsy, HIV (AIDS), Huntington's disease, multiple sclerosis, and traumatic brain injury. The Family Caregiving Alliance estimates that the total prevalence of brain impairments of all types, including dementias, ranges from 13 to 16 million Americans. By comparison, voting restrictions on persons with criminal convictions deny 5.3 million individuals the right to vote.

The convergence of these numbers brings into focus a variety of questions about whether persons with brain impairments who have a fundamental right and the threshold ability to vote are being disenfranchised, although they may need assistance. What kind of assistance may be needed and what kind is appropriate? Can technology help? And who makes decisions about capacity to vote, and by what criteria? Conversely, concerns abound about the potential for fraudulent exercise of the franchise by unscrupulous persons or political organizations taking advantage of individuals and groups within this population, especially those living in group settings such as nursing homes.

To address these issues, the ABA Commission on Law and Aging joined together with the Borchard Foundation Center on Law and Aging and the Capital Government Center on Law and Policy at the Pacific McGeorge School of Law in Sacramento in March 2007 to host a working symposium. Invited participants included national experts in law and aging, medicine, long-term care, voting technology, and elections administration to discuss the topic *Facilitating Voting as People Age: Implications of Cognitive Impairment*.

The symposium addressed how aging

and cognitive impairments fit into broader issues of access to voting and specifically examined issues in absentee balloting, voting in long-term-care settings, defining and assessing capacity to vote, and the implications of voter technology for those with cognitive impairments. The symposium culminated with the adoption of a number of recommendations intended to protect voting rights of people with legal capacity and provide necessary assistance in voting while protecting the integrity of the voting process. The *McGeorge Law Review* published recommendations, a keynote essay, and the six background papers in a special issue of the law review (See vol. 38, no. 4, available at www.mcgeorge.edu/x762.xml).

Protecting the right to vote from unjustified forfeiture is one of the key objectives of the recommendations. While the numbers of individuals in jeopardy of being categorically excluded from voting due to some form of cognitive impairment are significant, the human stories are more telling.

- Steven Prye was a law professor who developed schizo-affective disorder. Professor Prye's illness caused personal care and money management problems that led an Illinois court to appoint the Illinois Office of State Guardian as his guardian. Wards in Illinois do not lose the right to vote. So the issue of whether he should or could vote was never raised. When he moved to Missouri, he tried to register to vote. His registration was denied because under Missouri law persons under guardianship cannot register or vote. The Missouri court gave him the option of returning to an Illinois court to get the right to vote, which he already had, or petition for a new limited guardianship in Missouri that included his right to vote, which had never been taken away.
- William Sarmiento is in a Rhode Island state mental hospital because he was found not guilty of murder by reason of insanity. He has been voting by absentee ballot for years. He reads the paper just about every day and says he is aware of what's going on in the world and he cares about voting. The chairman of his local election board wants to bar him and

another inmate. He stated in the *New York Times*, "Some people are calling these two clowns disabled persons. Is insanity a disability? I have an answer to that: no. You're insane, you're nuts."

- Sebastian is under guardianship because of bipolar disorder, Asperger's syndrome, and brain injury. His guardian says he needs someone to manage his money and make his medical decisions. He tried to register to vote because he considers voting his duty as an American citizen. "I have an opinion on the outside world, on who's governor, who's senator, who's president. And my one vote could count." Because he is under full guardianship, and because the court made no effort to determine if he retained the ability to vote, his voter registration is being challenged in the courts.
- Jane Doe lives in a nursing home. She's not voting because no one has asked her if she wants to vote, gotten her an absentee ballot, or encouraged her to change her voting registration to the new precinct. Even if she was registered, she has no way to get to the polls. If she got to the polling station, she would face barriers in reading the ballot and using the computerized voting machine.

Many reasons prevent older persons and persons with mental disabilities from voting, but basically they fall into two categories—legal restrictions and practical barriers. The legal barriers can be a convoluted assortment of laws, including:

- state constitutional provisions on voter eligibility or disqualifications;
- state election laws on voter eligibility or disqualifications;
- state guardianship and mental health laws;
- case law interpreting those provisions.

One of the background research articles of the *McGeorge* symposium reviewed these authorities and found that the mathematical possibility of 153 variations—at least three variables in each of the fifty states and the District of Columbia—was pretty close to the mark. Why the confusion? Constitutional provisions, election

laws, and guardianship codes often use different wording excluding different categories of persons. Indefinite terms such as "idiot," "unsound mind," or "non compos mentis" are still found in fourteen constitutions. Other state constitutions bar those involuntarily committed to a mental hospital or those with mental illness. Seventeen states bar those adjudged mentally incompetent or incapacitated and four exclude those "under guardianship."

If you just look at state constitutions with their antiquated vocabulary excluding sweeping categories of those who are idiots, insane, non compos mentis, or incompetent, the picture is pretty bleak. Thirty-nine states bar persons with some kind of mental impairment from voting.

When you look at election laws, the picture gets more clouded but seems to open up the franchise to more persons. Only twenty-two state election laws address voter eligibility based on mental status. Many of these appear to narrow the exclusion that might be expected by reading the constitution. In all but fourteen states, the election laws use different terminology than their constitutions to define who can't vote. Typically, but not always, election laws may use less antiquated terms because they have been written or amended more recently when there was better understanding of mental disabilities. Two examples are:

- The Nevada Constitution excludes "idiots" while the state's election law excludes those whose insanity or mental incompetence has been legally established.
- The West Virginia Constitution uses "mentally incompetent" while the state's election law uses person of "unsound mind."

Does the terminology refer to the same or different persons? Ultimately, the burden falls upon the courts to answer that question.

Guardianship laws play a crucial role in the capacity to vote quandary. The guardianship court is generally regarded to be the most likely forum for the issue of capacity to vote to be raised and determined. But is it? As with any other facet of guardianship law in the states, it depends on a wide variety of factors. Because of the reforms to guardianship laws focusing more on functional abil-

ity and limiting the rights removable from the ward, there's more than a fair chance—at least on paper—that the ward's voting rights may be addressed. Definitions of incapacity have moved from rigid categorization to a more nuanced examination of specific cognitive and functional abilities. Many states now fashion limited guardianship orders, removing decision-making rights from the individual only in clearly specific areas of incapacity.

Nineteen states have specific statutory provisions which provide that persons under full or limited guardianship retain all legal and civil rights not explicitly removed—which would include the right to vote. By giving the most favorable and expansive reading to guardianship laws, the Hurme and Appelbaum review found that forty-four states *could* allow a judicial determination of retaining the right to vote. Moreover, some statutes and case law specifically articulated a *requirement* for the court to determine capacity to vote. Yet, there are a host of caveats and exceptions to this reading of the statutes.

Some illustrative guardianship and mental health law examples include the following:

- Washington, Florida, Iowa, Minnesota, North Dakota, and Wisconsin: Persons under guardianship retain the right to vote unless the court specifically removes it.
- Alaska: Wards retain all rights unless specifically removed, and the guardian may not prohibit a ward from registering or voting.
- Idaho: Every person with mental illness or mental retardation has a statutory right to vote, unless taken away.
- Connecticut: A detailed process encourages voting opportunities for persons in institutions, including notice to guardians of their wards' voting opportunities.

In reviewing the far-flung landscape shaping voting rights and incapacity, the *McGeorge* recommendations sought to reinforce a strong presumption of capacity to vote, require clear due process protections, limit exclusions from voting only if based on a specific determination by a court, and focus primarily on edu-

cating election officials and the public on how to assist persons with cognitive impairment. Those who assist individuals under guardianship need clear guidance about the limits of assistance. Incapacity to vote manifests itself at a practical functional level. If, with assistance, a voter indicates a desire to vote and communicates his or her choice on ballot questions, then the process moves forward. But if the helper is unable to determine the voter's intent, then the helper must decline to mark the ballot, and the process stops. Thus, incapacity to vote is in a functional way self-limiting, as long as the helper knows the proper limits of assistance.

An underlying principle at play here is that people should *not* be treated any differently in voting rights based on any perceived impairment or other personal characteristic. People whose mental capacities are clearly intact may vote for candidates based on any whim or reason, rational or irrational, profound or frivolous. Similarly, for persons with some level of cognitive impairment, if they can indicate a desire to participate in the voting process and can indicate a choice among available ballot selections, their reasons for such choice are not relevant.

The ABA House of Delegates adopted a modified version of the symposium recommendations in August 2007, addressing not only the question of capacity to vote, but also calling for:

- improved access to voting by residents of long-term-care facilities;
- expanded access to absentee or "vote at home" ballots;
- universal voter-friendly voting systems, so that persons with any impairment, including physical, sensory, cognitive, intellectual, or mental can vote privately, independently, and with ease;
- training of election workers to address the needs of voters with disabilities.

Not surprisingly, some of these recommendations address the practical rather than legal barriers faced by persons with varying forms of disability. In many ways, the practical barriers are far more daunting and merit a discussion for another time. In the meantime, the

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of care facilities for elders, and the lack of experience with mediation by administrators, we see an opportunity for attorney mediators to provide leadership in dispute resolution in these facilities. Little is written on this subject, as mediation in any kind of health care setting, outside lawsuits, is new. To date, social workers seem to be the ones attempting to address conflicts in elder care settings.³ They lack the sophistication and legal knowledge that may be essential to viewing the entire conflict and its ramifications. When a facility faces a disgruntled consumer, fighting residents, or caregiver disputes, legal issues are part of the picture. Lawyers skilled in dispute resolution can offer information and assistance no other professional can.

A forward-thinking attorney mediator established in the community where he or she resides can seek out opportunities in organizations, senior centers, or other groups to offer the service of conflict resolution to those for whom it may be unfamiliar. Estate planning attorneys can be a helpful source of referrals to elder mediation. Whether people engaged in conflict are represented by counsel or not, it is certainly better to address their elder disputes with a mediator's skill before thousands of dollars are spent and the parties are entrenched in their anger. We believe that lawyers in mediator roles can do much to bring preventive action to the world of elder conflicts. The court need not be the first to suggest mediation. Even when it is, it is clearly worth the effort to persuade those who have a choice to choose mediation of these matters. Educating the facility owners and administrators of ALFs is essential. Making connections in the "elder community" is a primary marketing tool.

Besides resident-on-resident disputes, we anticipate facility-resident contract matters, caregiver conflicts, level-of-care conflicts, and unrealistic family expectations of nonmedical ALFs to also be filled with mediator opportunities in these facilities. With 79 million baby boomers in our society, the boomers in their sixties may be choosing assisted living sooner rather than later. Currently, it is their parents populating these facilities. Next, it will be the boomers themselves. Our profession has an oppor-

tunity to lead the way to a broadened concept of mediation in elder disputes, in general, and in ALFs in particular. ■

Endnotes

1. Kenneth Cloke, *MEDIATING DANGEROUSLY* (Jossey-Bass 2001) 171.
2. William Cone, Ph.D., *CAREGIVER'S BIBLE* (Matteson Books 2004) 15.
3. Patricia Bertschler & Laurette Cocklin, *TRUCE! USING ELDER MEDIATION TO RESOLVE CONFLICT AMONG FAMILIES, SENIORS, AND ORGANIZATIONS* (NCS Publishing 2004) 55.

Leading Remarks

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all the Commission's rights, titles, and interests in this project to the SLD for further administration and development. The Commission's logo will continue to appear on the Web site, and it has reserved the right to utilize the materials.

This is an exciting and important historical project as women pioneers in the legal profession are now in their seventies and eighties. Despite many hardships along the way, their achievements are outstanding. The SLD expects to post some of these interviews on its Web site for easy access.

The SLD welcomes this important addition to its programs and looks forward to working on the WTLF for years to come. ■

Vote

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ABA Commission on Law and Aging is mounting a new project to identify promising practices in voter assistance across the country, and, with the help of the University of Pennsylvania, launched a pilot project to bring "mobile polling" to residents of nursing homes and assisted living facilities in the state of Vermont during the 2008 presidential elections.

Disability issues in voting are not new but the challenges of ensuring the accessibility and integrity of voting by those with cognitive or other brain impairments are only now beginning to come more closely into public view. And it is about time. ■

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