

Issues in Capacity: Balancing Empowerment and Protection

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Housekeeping

- All on mute. Use Questions function for substantive questions and for technical concerns.
- Problems getting on the webinar? Send an e-mail to NCLER@acl.hhs.gov.
- Written materials and a recording will be available at NCLER.acl.gov. See also the chat box for this web address.

About NCLER

The National Center on Law and Elder Rights (NCLER) provides the legal services and aging and disability communities with the tools and resources they need to serve older adults with the greatest economic and social needs. A centralized, one-stop shop for legal assistance, NCLER provides Legal Training, Case Consultations, and Technical Assistance on Legal Systems Development. Justice in Aging administers the NCLER through a contract with the Administration for Community Living's Administration on Aging.

About ABA COLA

The ABA Commission on Law and Aging is a collaborative and interdisciplinary leader of the American Bar Association's work to strengthen and secure the legal rights, dignity, autonomy, quality of life, and quality of care of aging persons.

The Commission accomplishes its work through research, policy development, advocacy, education, training, and through assistance to lawyers, bar associations, and other groups working on issues of aging.

Key Lessons

- Capacity is the ability to make an informed choice.
- Informal capacity assessments happen every time we communicate with a client, and consists of listening for cues that indicates the other person understands the message.
- Formal capacity assessments should be recommended when advocates are unsure of the client's ability to understand or when the capacity of the person is being challenged.
 - Formal assessments should be done by professionals with specific training in memory and cognitive assessment.
- Decision supports work to maximize the capacity of the person by helping them to understand issues and options, and helping the person reach a personal choice.
- Dementia refers to decline in memory or cognitive ability as a result of illnesses such as Alzheimer's.

Understanding Capacity

Poll #1: Training

- Have you been trained in assessing capacity?
- A: Yes
- B: No
- C: Yes, but I'd like to know more

Capacity

- Capacity is the ability to make and communicate an informed choice.
- Making choices, either directly, by preference, or by eliminating other options, is fundamental.
- Choice can be communicated by: action, selection, or expressly.
- An informed choice is one made based on understanding options and the impact of different options.

Situational, Spectrum, Transient

- Situational = Capacity to do what?
 - Different skills
 - Memory—short and long term
 - Time, space, calculation, organization, comparison, person, place
 - Capacity to make one choice is capacity to make one choice
- Spectrum
 - Not an on/off switch
 - From none to high
- Transient
 - Can increase, improvements in health, learning, or experience
 - Can decrease – injury – illness – medication- pain – stress
 - Can return after it has decreased

Capacity in Legal Ethics

- Capacity is not defined in the Model Rules of Professional Conduct
 - Rule 1 (e): defines informed consent
 - Rule 1.4: must communicate the matter in a way that the client can understand
 - Rule 1.2: allocates to the client determining the goal of the relationship
 - Rule 1.1: requires competence
- All of this infers that we must communicate the matter in a way the client can understand to give informed consent on the goal of the representation
 - Rule 1.14 offers guidance on representing a client with diminished capacity

Assessing Capacity

Assessing Capacity

- There is no simple test for capacity
- Simple tests give incomplete answers
- Properly administering and interpreting tests requires training
- Informal assessment (in a moment)
- Formal assessment (just after informal)

Poll #2: Bobbie

- Bobbie scored 20 on the Mini-Mental State Examination (MMSE) out of a possible 30.
- A: This is an indication of mild impairment
- B: The score may need to be adjusted based on age or educational attainment
- C: The score tells me little about Bobbie's ability to consent to the sale of her home
- D: All of the above

Informal Assessment (1 of 2)

- We assess capacity every time we engage in interactive communication
- Cues of understanding (verbal, non-verbal, actions)
- Questions that confirm understanding
 - How do you feel about that? What does that mean to you?
- Restatements that infer understanding
- Choices that infer understanding

Informal Assessment (2 of 2)

- We don't even know we are doing it
- Look for:
 - Understanding
 - Consistency
 - Emotional state

Decision Supports

Goals of Decision Supports

- The goal of decision supports is to leverage the person's ability to make choices through
 - Enhanced communication
 - Empowerment
 - Technology that reminds or reduces the need for memory or repeated choices

Decision Supports (1 of 2)

- Break big issues into smaller parts
- Restate
- Explain options
- Explain risks and benefits
- Offer input, recommendations
- Ask for choices, preferences
- Help as asked or needed

Decision Supports (2 of 2)

- Some ability to communicate is needed
- People communicate in different ways
- One of our challenges is to understand how others communicate
- Communicating takes time and effort
- Persons with very serious illnesses or injuries may be unable to communicate in any meaningful way

Communicating with Persons with Diminished Capacity (1 of 2)

- Practice listening skills. Listening is more than hearing.
- Before you start, make sure the person knows you are talking with them. Make and maintain eye contact if possible.
- Eliminate background noise.
- Watch facial expressions and gestures for added meaning.
- Use a normal voice & short, simple sentences. A lower register or tone of voice may be easier to hear.

Communicating with Persons with Diminished Capacity (2 of 2)

- Allow extra time for the person to understand and respond.
- Maintain an adult conversation & try to be at the person's eye level and face-to-face.
- Communication is a two-way street. Just as we try to confirm that the person is understanding our message, we need to ensure that we understand what the person is telling us.

Poll #3: Zoom!

- 2020 has brought all kinds of challenges with communicating. Have you? (select all that apply)
- A: Interviewed someone by video call that you would have normally interviewed face to face
- B: Answered questions by email, that you would have preferred to do face to face.
- C: Replaced face to face meetings with phone/video calls
- D: Had someone's video feed freeze or fail

Formal Assessment

Formal Assessment Overview

- Needs to start with the question: Capacity to decide what?
- Should be recommended when there are significant concerns and you are unsure
- Significant decisions are being considered
- When capacity is challenged

Formal Assessment Continued

- Requires specialized training
 - Physicians
 - Gerontology, neurology, psychiatry
 - Psychologists
 - Social Workers
 - Other professionals with specialized training
- Payment
 - Screening is often billed routine health care
 - Detailed formal assessments may be done as part of diagnosis & treatment and billed as such
 - Other circumstances—payment can be problematic
 - Community mental health, public service programs, private pay

Formal Evaluation

- Interview
- Testing for Memory
 - Long term
 - Short term
- Standardized assessment tools
- Medical imaging
- Lab tests
- Rapidly evolving area of medical science

Consent to Formal Evaluation

- The person can consent, as long as the professional conducting the evaluation believes the person understands what the evaluation is.
- A health care surrogate may consent as long as state law requirements are met for the health care surrogate to consent.
- A guardian may consent, if within the scope of the appointment.
- Courts may order an evaluation – generally as part of a civil or criminal case.

Common Misperceptions in Capacity

- Failure to follow advice is not proof of lack of capacity.
- Failing to act in one's "best interest" is not proof of lack of capacity.
- Agreeing with one family member, and not others, is not proof of lack of capacity.
- Making gifts or spending "foolishly" are not proof of lack of capacity.
- The capacity to decide one issue does not assure capacity to decide a different question.
- A diagnosis with dementia does not revoke an adult's legal capacity.

Poll #4: Zanni

- You have been asked to represent Zanni in defending against a guardianship. The Court file includes an evaluation signed by a family practice physician, based on a 15-minute office visit two weeks ago, recommending appointment of a guardian.
- Do you request a second expert evaluation?
 - A. I want to talk with Zanni before I make a decision.
 - B. No, I will focus on cross examining the expert.
 - C. Yes, because the evaluation was done by a family practice doctor.

Dementia and Capacity

Dementia and Capacity Overview

- Dementia is a decline in memory or cognition caused by illness or disease.
- Dementia is chronic or terminal and progressive.
- Currently there is no cure.
- The most effective treatments delay the progression of symptoms for some people with some forms of dementia.
- Early diagnosis is important for treatment.
- Early diagnosis also allows for personal and legal planning.

Alzheimer's and Other Causes

- Alzheimer's is the most commonly recognized form or cause of dementia
 - Alzheimer's causes changes in the structure of the brain.
- There are many other forms or causes.
- Each one impacts different parts of the brain in different ways.
- Understanding the ways that a person's memory, cognitive ability, and behavior have changed is key to identifying many causes.

Why is it Important to Know the Form or Cause?

- Changes in memory, cognition, and behavior differ based on cause.
- Support and protections should be customized to fit the needs of the person.
- One-size does not fit all
- For many, knowing the cause increases the ability to predict the future course.

Impact

- A decline in long- or short-term memory, and declines in cognitive ability.
- Dementia is progressive – how far and how fast are difficult to predict.
- Legal rights are not ended by a diagnosis.
- A person living with early to mid-stage dementia can and should still make most decisions with appropriate support.
- Lawyers and other advocates need to assess capacity and understand dementia.

Balancing Empowerment & Protection

- Empowerment improves
- Happiness
- Quality of life
- Improves ability or slows the decline of ability
- There is “dignity in choice”

Poll #5: Your Choice

- Do you prefer:
- A: Coffee
- B: Tea
- C: Water
- D: Apple Juice

Seemingly Random

- Some choices can be made randomly
- We all do
- We all should

What are the Impact of Choices

- Some choices are literally life and death
- Some choices have significant financial impact
- The level of concern over decision-making needs to be balanced against the nature of the decision

Who Are We Protecting From What?

The Person

- From physical harm
- From significant financial loss
- From avoidable injury

Ourselves

- From needing to rescue
- Inconvenience
- Embarrassment
- Future loss

Least Restrictive Manner

- Protection should always be the least restrictive possible
- There is always some risk
- Protection from unreasonable risk but not all risk
- Falls reduction or falls prevention

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