

Assessing Legal Capacity: Strategies for an Elder Rights-Centered Approach

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ABA Commission on Law and Aging

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

1. Legal capacity is the ability to give informed consent, which is based on an understanding of the issue, the options, the risks and benefits of the options, how to make a choice, and the consequences of that choice.
2. The Model Rules of Professional Conduct provide guidance on understanding capacity and on representing a client with diminished capacity.
3. Great care needs to be taken to avoid stereotypes and unconscious bias.
4. Assessment should be systematic and based on an understanding of the signs of diminished capacity.

Defining Legal Capacity

Legal capacity is the ability to give informed consent. For the consent to be informed, the person needs to be able to understand the issue or question, know that there are options, comprehend the risks and benefits of those options, make a choice, and understand the consequences of the choice being made. The ability or capacity to make choices is a spectrum that spans on one end with a person who is comatose and unable to communicate in any meaningful way, and on the other end, a genius who is able to understand very complex issues. Capacity is transient—it can come and go. Capacity can be diminished by learning difficulties, by illness, injury (especially brain injury), pain, substance use or abuse, depression, grief, lack of sleep, or time of the day. Capacity may return with healing or when diminishing conditions pass. Legal capacity is task or question-specific. A person's inability to make one choice does not mean that the person is unable to make other choices.

We assess capacity every time we communicate interactively with another person. Unconsciously we are verifying understanding and agreement. By consciously and systematically integrating the elements of decision-making into our routine interactions with clients, we can improve the quality of our understanding of the client's ability to understand and give informed consent. When we are concerned about whether another person understands our communication or when something triggers a concern about the person's ability to understand or give informed consent, we consciously take additional steps.

Decision Supports in Capacity Evaluations

Supported decision-making, and the related concepts of decision supports have broadened understanding of legal capacity in recent years. The core principle of decision supports is that every person seeks support or help with understanding and making some choices. Lawyers and legal advocates are essentially supporters on

complex legal issues with nearly every client when they explain the issues in a way the person can understand, offer options, explain the risks and benefits of the options, make a recommendation, ask the person to make a choice, and verify that the client understands the consequences of the choice they are making. The role of Counselor at law, is in essence, being a decision supporter for our clients. A review of existing decision supports and consideration of additional supports should be included in all capacity assessments.

Decision supports can include assistance with communication, language, hearing, or vision, and includes anything that enhances or enables the person's ability to understand and communicate. A recent article on capacity evaluations described it this way:

*"Finding that the client is incapable of, or limited in, the ability to have meaningful receptive or expressive communication that is not correctable by any means, may indicate an inability to make or carry out decisions. But sometimes there are barriers that may be corrected if discovered and properly addressed. Barriers to communication may include: language fluency, a need for sign-language, deficits in client hearing or vision, difficulty using writing instruments, and difficulty producing speech. Interpreters, glasses, hearing aids, amplifiers, written questions, and other interventions may overcome such problems."*¹

Implicit Bias and Capacity Assessment

When people meet, they form initial impressions that are shaped by visible characteristics such as sex, age, race, and bodily appearance. These traits tend to be associated with cultural stereotypes and with bias. Certain stereotypes are so deeply ingrained in our culture that people do not realize that they shape perceptions and behavior. Consequently, people may feel and exhibit implicit bias toward people of a different race or ethnicity, women, people with disabilities, persons who are older or appear frail, or members of other groups. Indeed, implicit bias can take hold even for individuals who consciously reject stereotypes, racism, ethnocentrism, and so on.

There is growing understanding that unconscious or implicit bias changes how we communicate and interact with others and often negatively impacts our assessment of capacity. This can start with simple things like tone of voice and how we communicate with a person that we perceive to have diminished capacity. Researchers tested this by recording caregivers of older adults, and then played the recordings for other listeners, asking them to guess the age of the person being talked to. Three-quarters of listeners believed that the person being spoken to in the recording was a child, not an older adult.² While explaining complex issues in smaller parts is helpful, talking to an adult like a child can be demeaning and interferes with effective communication.

Standardized testing also presents challenges of bias. Some of the standardized assessment tools assume that a person of particular age and educational attainment will have a set of skills such as math skills or an understanding of history. But not all education systems are equal, and the differences can adversely impact the scoring.³ Capacity assessments must be person-centered to avoid negative impacts of assumptions. Commentary on one of the most commonly used screening tools warns:

*"Culture, native language, level of education, literacy, and social factors such as sleep deprivation, hunger, or other stressors must be taken into account when interpreting the examination, because these factors can affect performance."*⁴

- 1 John M. Halphen, Carmel B. Dyer, Jessica L. Lee, Carlos A. Reyes-Ortiz, Cristina C. Murdock, Julia A. Hiner & Jason Burnett (2020) Capacity evaluations for adult protective services: videoconference or in-person interviews, *Journal of Elder Abuse & Neglect*, 32:2, 121-133, DOI: 10.1080/08946566.2020.1740127 To link to this article: doi.org/10.1080/08946566.2020.1740127.
- 2 *The Problem of Alzheimer's: How Science, Culture, and Politics Turned a Rare Disease into a Crisis and What We Can Do About It*, Jason Karlawish, page 199, St Martins Press, 2021.
- 3 Id at page 38.
- 4 *The Mental Status Examination*, David R. Norris, Md; Molly S. Clark, PhD; and Sonya Shipley, MD, aafp.org/afp/2016/1015/p635.html.

PRACTICE TIPAccommodate Cognitive Impairments:⁵

- Begin the interview with simple questions requiring brief responses to assess client understanding and optimal pace.
- Conduct business at a slower pace.
- Allow extra time for responses to questions, as “word-finding” can decline with age.
- Break information into smaller, manageable segments.
- Discuss one issue at a time.
- Repeat, paraphrase, summarize, and check periodically for accuracy of communication and comprehension.
- If information is not understood, incompletely understood, or misunderstood, provide corrected feedback and check again for comprehension.
- Provide summary notes and information sheets to facilitate later recall. Include key points, decisions to be made, and documents to bring to next meeting.
- Schedule appointments for times of the day when the client is at peak performance.
- Provide time for rest and bathroom breaks.
- Schedule multiple, shorter appointments rather than one lengthy appointment.
- Whenever possible, conduct business in the client’s residence. This often makes the client more relaxed, optimizes decision-making, and provides the attorney with clues about “real-world” functioning.

Capacity and Legal Ethics

The definition of capacity is inferred by looking at several of the Model Rules of Professional Conduct (MRPC):

- Informed consent is defined in the terminology or definitions section of Rule 1.0 as: *“Informed consent” denotes the agreement by a person to a proposed course of conduct after the lawyer has communicated adequate information and explanation about the material risks of and reasonably available alternatives to the proposed course of conduct.*”
- The obligations to communicate are defined in Rule 1.4 as: *“A lawyer shall: keep the client reasonably informed about the status of the matter. A lawyer shall explain a matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation.”*
- Model Rule 1.2 obligates a lawyer to seek the client’s consent regarding the objective of the representation.

Considering these rules together, a client has capacity when the lawyer is able to communicate in a way that the client can understand to the degree necessary for the client to give informed consent regarding the objectives (goals) of the representation. If this is not possible, the client lacks capacity, or more likely has diminished capacity. Rule 1.14 and the comments to that rule guide a lawyer’s actions in representing a client with diminished capacity. This rule starts out with an admonition that to the extent possible, the lawyer must maintain a normal attorney client relationship.

⁵ Assessment of Older Adults with Diminished Capacity, 2nd edition, ABA Commission on Law and Aging, 2021; americanbar.org/products/inv/book/411701219/

Capacity Evaluation Elements

The following chart includes Capacity Evaluation Elements (Adapted from “Assessment of Older Adults with Diminished Capacity: A handbook for Lawyers, 2nd edition 2021) to consider when evaluating a client's capacity:

Capacity Evaluation Elements	Examples
Cognitive Functioning	<ul style="list-style-type: none"> » Short-term memory problems » Repeats questions frequently » Forgets what is discussed within 15-30 min » Cannot remember events of past few days
Language/Communication Problems	<ul style="list-style-type: none"> » Difficulty finding words frequently » Vague language, disorganized » Trouble staying on topic » Bizarre statements or reasoning » Difficulty using phone, email and/or other forms of communication
Comprehension Problems	<ul style="list-style-type: none"> » Difficulty repeating simple concepts » Repeated questioning
Lack of Mental Flexibility	<ul style="list-style-type: none"> » Difficulty comparing alternatives » Difficulty adjusting to changes
Disorientation	<ul style="list-style-type: none"> » Trouble navigating office » Gets lost coming to office » Confused about day/time/year/season
Difficulty calculating	<ul style="list-style-type: none"> » Everyday arithmetic » Sum of loose change » Feet to inches conversion » Tip in a restaurant
Decreased Understanding of Financial Concepts	<ul style="list-style-type: none"> » More difficulty understanding health care concepts like medical deductible and terms like interest rate, lien, and joint liability » Decreased comprehension of ordinary financial documents » Identifying a bill that is overdue and needs prompt attention » Finding details in a bank statement » Completing sections of a check register » Diminished awareness of financial risks » Trouble identifying key risk in investment proposal » Overly focused on benefits/return, not risk
Emotional Distress	<ul style="list-style-type: none"> » Anxious » Tearful/distressed » Excited/pressured/manic

Emotional Lability	<ul style="list-style-type: none"> » Moves quickly between laughter and tears » Feelings inconsistent with topic
Delusions	<ul style="list-style-type: none"> » Feels others out “to get” them or spying or organized against them » Fearful, feels unsafe
Hallucinations	<ul style="list-style-type: none"> » Appears to hear or talk to things not there » Appears to see things not there » Misperceives things
Poor Grooming/Hygiene	<ul style="list-style-type: none"> » Unusually unclean/unkept in appearance » Inappropriately dressed
Markedly Inappropriate Social Behavior	<ul style="list-style-type: none"> » Loss of empathy and interpersonal skills » Lack of judgment; Loss of inhibition » Lack of interest (apathy), which can be mistaken for depression

It is important to consider the following factors when observing an individual to determine capacity:

Factors to Consider	Ways to Mitigate
Mitigating/Qualifying Factors Affecting Observations	<ul style="list-style-type: none"> » Think of ways to address/accommodate stress, grief, depression, recent events affecting stability of client » Ask about recent events, losses » Allow some time » Refer to a mental health professional » Help find support persons or groups
Medical Factors	<ul style="list-style-type: none"> » Ask about nutrition, medications, hydration » Refer to a physician
Time of Day Variability	<ul style="list-style-type: none"> » Ask if certain times of the day are best » Try mid-morning appointment
Hearing and Vision Loss	<ul style="list-style-type: none"> » Assess ability to read or repeat simple information » Adjust seating, lighting » Use visual and hearing aids
Social/Environmental Factors	<ul style="list-style-type: none"> » Try meeting in a familiar environment for the client » Meet with the client alone when it seems like others are causing stress or anxiety » Help identify personal/social supports
Educational/Cultural/Ethnic Barriers	<ul style="list-style-type: none"> » Be aware of race, ethnicity, education, long-held values and traditions, and your own implicit biases » Help find peer supporters
What are the Legal Task(s) at Issue?	<ul style="list-style-type: none"> » What are the Capacity Elements of the Task(s)? » This requires your state-specific research

Overall Summary

Concern Level of Capacity	Action Options
No or minimal evidence of diminished capacity.	» Proceed with representation and transaction
Mild concerns: some evidence of diminished capacity, but less than substantial.	» Proceed with representation/transaction » Explore decision support strategies to reinforce capacity » Consider medical referral if medical oversight lacking » Consider consultation with mental health professional » Consider referral for formal clinical assessment to substantiate conclusion, with client consent
More than mild concerns about capacity, even with decision supports, or decision-support is not available.	» Explore decision support strategies further to reinforce capacity » Medical referral if medical oversight lacking » Consultation with mental health professional » Refer for formal clinical assessment, with client consent
Severe concerns: client lacks capacity to proceed with representation and transaction	» Referral to mental health professional to confirm conclusion » Do not proceed with case; or withdraw, after careful consideration of how to protect client's interests » If an existing client, consider protective action consistent with MRPC 1.14(b)

Conclusion

We assess capacity every time we interactively communicate by checking for understanding. Capacity is the ability to give consent based on understanding the issue, the options, the risks, the consequences and being able to make a choice. It is critical that we don't allow bias or cultural assumptions to interfere with communications. Assessment should be systematic. Lawyers are ethically obligated to ensure understanding or to use strategies that take into consideration the client's diminished capacity.

Additional Resources

- American Bar Association: [Capacity Assessment Resources](#)
- [National Center on Law & Elder Rights Chapter Summary: Issues in Capacity: Balancing Empowerment and Protection](#)
- [National Center on Law & Elder Rights Chapter Summary: Decision-Making Supports: The Role of the Supporter or Advocate](#)
- [National Center on Law & Elder Rights Tip Sheet: Recognizing and Addressing Legal Capacity Issues on Helplines](#)
- [The Problem of Alzheimer's](#)

- Sue Bryant & Jean Joh Peters, [Five Habits of Cross Lawyering](#), Yale Univ. (1999).
- [Project Implicit](#), Harvard University. [More information about Project Implicit](#).

Case consultation assistance is available for attorneys and professionals seeking more information to help older adults. Contact NCLER at ConsultNCLER@acl.hhs.gov.

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