

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

David Godfrey, ABA Commission on Law and Aging

Vivianne Mbaku, Justice in Aging

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Housekeeping

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- 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.

About Justice in Aging

Justice in Aging is a national organization that uses the power of law to fight senior poverty by securing access to affordable health care, economic security, and the courts for older adults with limited resources.

Since 1972 we've focused our efforts primarily on populations that have traditionally lacked legal protection such as women, people of color, LGBT individuals, and people with limited English proficiency.

Key Lessons

- 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 Model Rules of Professional Conduct provide guidance on understanding capacity and on representing a client with diminished capacity.
- Great care needs to be taken to avoid stereotypes and unconscious bias.
- Assessment should be systematic, based on understanding of the signs of diminished capacity.

What is Capacity?

- The ability to make an informed decision or choice



Capacity Is:

- A spectrum
 - From comatose to genius
- Transient
 - It can vary, becoming stronger or weaker, it can return and be developed
- Situational
 - The first question should always be capacity to decide what?

Capacity Can Be Adversely Affected By:

- Illness
- Pain
- Lack of Sleep
- Substance use or abuse
- Stress
- Time of the day
- Grief
- Depression
- Mental health

Capacity & Legal Representation

- An understanding that they have a legal problem, you are a lawyer, and they want you to help them.
- Considerations:
 - Does the client have the capacity to contract for my services?
 - Does the client have the capacity to complete the legal transaction?
 - Are there supports and services that would address concerns about capacity and allow my client to contract for my services and/or complete the legal transaction?
- Lawyers need a conceptually sound and consistent process for answering these questions.

Assessing Capacity

How Do We Assess Capacity

- We do it every time we communicate interactively.
- There is no simple test.
 - A caution on simple tests—many are not culturally adjusted.
- Look to the totality of the circumstances, the client's ability to communicate, and ability to give informed consent.
- When in doubt, seek guidance before proceeding.

Assessing Capacity: Lawyers

- Lawyers need to make an independent judgement on legal capacity.
 - Essential that you privately meet with the client.
 - Capacity is complex. When there are concerns, multiple meetings can help with understanding.
 - Confirm the client's ability to understand and make informed choices.

Capacity & Guardianship

- While other professionals make determinations of capacity, only a court order modifies or restricts legal capacity.
 - A person with a guardian or conservator may be able to communicate choices, preferences, beliefs, and values.
 - Learn More: [Representing a Person with a Guardian](#)

Develop a Process

- Meant to structure and record observations
- Systematic in process
- Accountable and documented
- Standardized intake and interview templates

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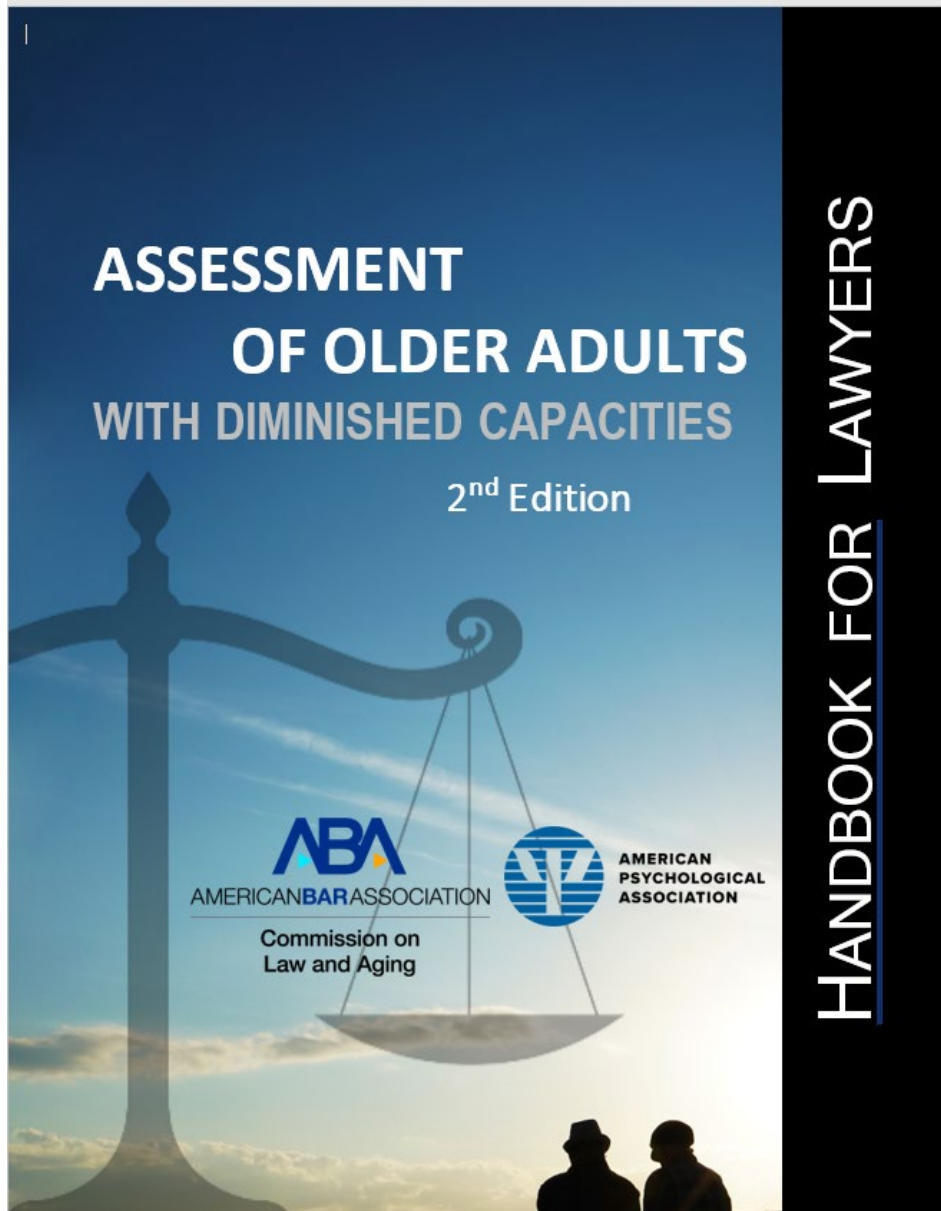
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HANDBOOK FOR LAWYERS

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A. Observational Signs

- Short-term memory problems
- Language/communication problems
- Comprehension problems
- Lack of mental flexibility
- Disorientation

Financial Management Abilities

- Problems with everyday arithmetic
- Decreased understanding of financial concepts
- Decreased comprehension of ordinary financial documents
- Diminished awareness of financial risks

Functioning

- Emotional Functioning
 - Emotional Distress
 - Emotional Lability
- Behavioral Functioning
 - Delusions
 - Hallucinations
 - Poor Grooming/Hygiene
 - Markedly Inappropriate Social Behavior
- Other Observations & Notes from 3rd Parties

Mitigating Factors

- Stress, grief, depression, recent events affecting stability of client
- Medical Factors
- Time of Day Variability
- Hearing and Vision Loss
- Social/Environmental Factors
- Educational/Cultural/Ethnic Barriers

B. Relevant Legal Elements

- What are the legal task(s) at issue?
- What are the capacity elements of the task(s)?
 - This requires your state-specific research
- Notes on client's understanding/
appreciation/functioning under elements

C. Task-Specific Factors in Preliminary Evaluation of Capacity

- The more serious the concerns about the following factors...
 - Is decision consistent with client's known long-term values or commitments?
 - Is the decision objectively fair? Will anyone be hurt by the decision?
 - Is the decision irreversible?
- The higher the function needed in the following abilities...
 - Can client articulate reasoning leading to this decision?
 - Is client's decision consistent over time? Are primary values client articulates consistent over time?
 - Can client appreciate consequences of their decision?

Preliminary Conclusions About Client Capacity

- Mild concerns
 - Some evidence of diminished capacity, but less than substantial
- More than mild concerns about capacity
 - Even with decision supports; or
 - decision-support is not available
- Severe concerns
 - Client lacks capacity to proceed with representation and transaction

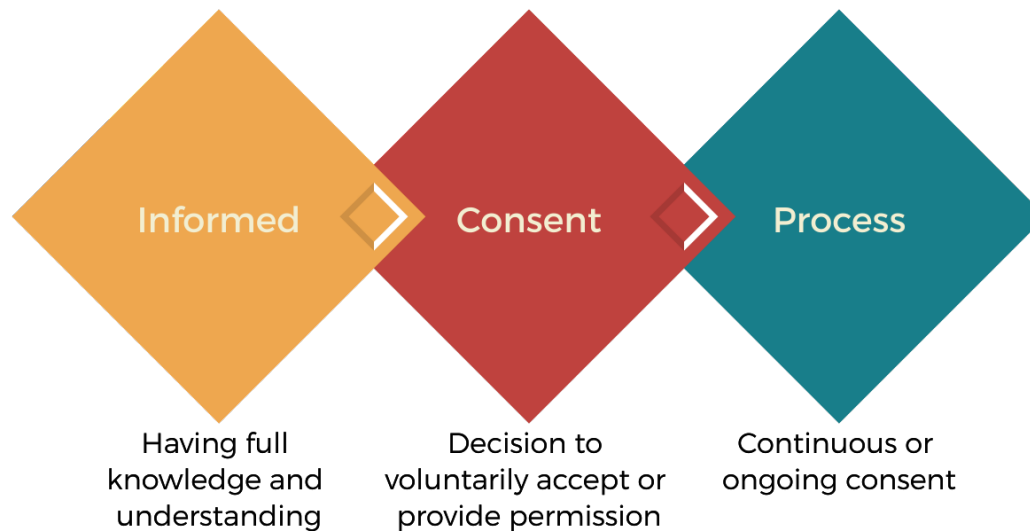
Legal Capacity & Ethics

What Do the Model Rules Say About Capacity?



MRPC 1.0 Terminology

- **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.



MRPC 1.4: Communication

- (a) A lawyer shall:
 - (3) keep the client reasonably informed about the status of the matter.
- (b) A lawyer shall explain a matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation.

MRPC 1.2: Scope Of Representation & Allocation Of Authority Between Client & Lawyer

- (a) Subject to paragraphs (c) and (d), **a lawyer shall abide by a client's decisions concerning the objectives of representation and, as required by Rule 1.4, shall consult with the client as to the means by which they are to be pursued.**

How Do We Get to Capacity from That?

- A client has capacity if we are 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 not, the client has diminished capacity.

MRPC 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.

MRPC 1.14 (b)

- (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.

MRPC 1.14: Comment 1

- Nevertheless, a client with diminished capacity often has the ability to understand, deliberate upon, and reach conclusions about matters affecting the client's own well-being.
- So also, it is recognized that some persons of advanced age can be quite capable of handling routine financial matters while needing special legal protection concerning major transactions.

MRPC 1.14: Comment 2

- The fact that a client suffers a disability **does not diminish the lawyer's obligation to treat the client with attention and respect.** Even if the person has a legal representative, the lawyer should, as far as possible, accord the represented person the status of client, particularly in maintaining communication.

MRPC 1.14: Comment 3

- The client may wish to have family members or other persons participate in discussions with the lawyer.
- Nevertheless, the lawyer must keep the client's interests foremost and, except for protective action authorized under paragraph (b), must look to the client, and not family members, to make decisions on the client's behalf.

MRPC 1.14: Comment 5

- Such measures could include:
 - consulting with family members, using a reconsideration period to permit clarification or improvement of circumstances, using voluntary surrogate decision-making tools such as durable powers of attorney; or
 - consulting with support groups, professional services, adult-protective agencies or other individuals or entities that have the ability to protect the client.
- In taking any protective action, the lawyer should be guided by such factors as the wishes and values of the client to the extent known, the client's best interests, and the goals of intruding into the client's decision-making autonomy to the least extent feasible, maximizing client capacities, and respecting the client's family and social connections.

Presence of 3rd Parties

- Confidentiality under MRPC 1.6 applies no matter who is present or how you learn about your client (but only covers the lawyer and staff)
- Attorney Client Privilege – shields lawyers from being called as a witness about things their clients told them with a reasonable expectation of privacy
- The general rule is the 3rd party must be essential to the communication to preserve the expectation of privacy.
 - Look at the comments to Rule 1.14 for exceptions
- Best practice is to always spend some time communicating with the client alone

Accommodating Cognitive Impairments

Accommodating Cognitive Impairments (1 of 3)

- 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.

Accommodating Cognitive Impairments (2 of 3)

- 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.

Accommodating Cognitive Impairments (3 of 3)

- 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. Multiple testing sessions can also assist in identifying the client's performance rhythms & cycles.
- 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.

New In Legal Capacity Assessment: Role of Decision Supports

- A recognition of the role of decisions supports in enhancing capacity
- Decision Supports:
 - “A series of relationships, practices, arrangements and agreements, of more or less formality and intensity, designed to assist an individual with a disability to make and communicate to others decisions about the individual’s life.”

Avoiding Implicit Bias in Capacity Assessments

Implicit Bias (1 of 2)

- 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.
- And certain stereotypes are so deeply ingrained in our culture that people do not realize that they shape perceptions and behavior.

Implicit Bias (2 of 2)

- Consequently, people may implicitly exhibit bias toward people with darker skin, women, people with disabilities, or members of other groups.
- Implicit bias can take hold even for individuals who consciously reject stereotypes, racism, ethnocentrism, etc.

Avoid Assumptions

- Ageism = assumptions, based on appearance or actual age, of what a person is like & may have no connection to the reality of the person
- Ableism = assumptions based on apparent physical or communications differences
- Differences in culture, life experience and education, shape our responses to questions
- Recognizing these impacts as a valid part of legal capacity assessment is new in the past decade

How Bias Can Show Up in an Assessment

- **Language/Communication**
 - Language and communication barriers could be easily mistaken for diminished capacity.
 - Even for clients with some English language abilities, the availability of interpreters is paramount during every client interaction.
 - Interpreters are not optional. Family members are not interpreters.
- **Behaviors**
 - Certain everyday behaviors differ from culture to culture. For example, some clients may be more quiet and reserved or more reluctant to look others in the eye.
 - Remember to keep your own cultural upbringing in mind when encountering others behavior.
- **Management of Finances**
 - While an inability to manage basic finances may be a sign of diminished capacity, it might also be a result of the clients lived experiences.
 - Consider educational background, literacy, etc.
 - This could account for their inabilities, but not signal diminished capacity.

Trauma-Informed Practices

What is a Trauma-Informed Practice?

- Trauma-informed practices seek to not let trauma experienced by a client, and any related trauma responses, impact the delivery of services and reduce re-traumatization
- At their core, trauma-informed practices acknowledge and validate the lived experiences of clients and work to provide culturally competent and relevant services
- 2 Step Process
 - Observing what is going on with the client
 - Adjusting our approach to make the client more comfortable and reduce re-traumatization

Trauma-Informed Practices in Capacity Assessments

- Experiencing an environment or scenario similar to the traumatic event or recounting the traumatic event can trigger a client to feel a variety of emotions that may impede the capacity assessment.
 - Example: Agitation, stress, short answers to questions, distraction, unable to answer questions, disinterest in subject, flat emotions, blank stares, shut down appearance
- All of these emotional responses may be trauma responses—the body’s way of responding to a traumatic trigger. The body is trying to protect itself.
- These reactions may also color a capacity assessment, leading to a determination of diminished capacity, which may or may not be correct.

Practices to Support Clients Dealing with Trauma

- Offer Accommodations
 - Different space for interviewing?
 - Breaking interviewing up into several sessions
- Self Soothing Practices
 - Drawing, drinking water, taking a walk, or break from assessment
- Transparency
 - Making sure clients know what is going to happen in meeting
 - Previewing the case ahead of time
 - Ask permission to take notes
- Considering Trauma in relation to capacity
 - Consider how trauma may be impacting client's functioning in the moment

Addressing Barriers to Communication

Barriers to Communication

- May include:
 - Language fluency
 - A need for sign-language
 - Deficits in client hearing or vision
 - Difficulty using writing instruments
 - Difficulty producing speech
- Interpreters, glasses, hearing aids, amplifiers, written questions, and other interventions may overcome such problems.

Practice Tips: Hearing & Vision

- Vision
 - Ask how you can help
 - Larger type, non-gloss
 - Be aware of lighting
- Hearing
 - Ask what accommodations are helpful & eliminate background noise
 - Ask about hearing appliances – often an issue in care settings

Practice Tips: Communication Assistance

- In writing
- In pictures
- Read documents
- Screen readers, brail readers, and other technologies

Practice Tips: Language Access

- Ask about interpreters – you may need an interpreter to know you need an interpreter
- Avoid letting differences in language be interpreted as a lack of understanding
- Confirm interpreter is speaking correct dialect of the language

Other Practice Tips

- Setting – meet the person where they are most comfortable, where it is easiest for the person to communicate
- Trusted personal supporters

Promising Practices

- Every time you have a conversation with a client, ask questions that test their understanding of legal issues and the choices the client is making
- In doing this, we confirm or assess understanding (capacity) every time
- Build into intake and interview templates elements of legal capacity that your client needs to have an understanding of
- Ask questions that are informed by your clients' life experiences/education

When in Doubt

- Do a follow up visit with the client
- In accordance with the comments to MRPC 1.14, consult with other professionals
- Ask the person who they turn to for help or support
- Make sure the communications are culturally appropriate for the person.

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