

Senior Legal Helplines – Recognizing and Addressing Legal Capacity Issues on Helplines

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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 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 Points

- We assess capacity every time we communicate with a client
- The core of client capacity is being able to communicate in such a way that the client is able to give informed consent to the goals or objectives of the representation
- Assessing capacity should be integrated into the case flow and documented in the case notes
- When in doubt, try to arrange a face-to-face meeting with the client, or decline

Understanding Capacity

Definitions

- Capacity is the ability to make an informed choice.
- We assess capacity by communicating with a client in a manner that makes it possible for the client to make a decision about the objective or goal of the representation.
- Assessing the clients understanding of the communication is the essence of assessing capacity.

Capacity is a Spectrum

Capacity: Task Specific & Transient



Situational



Transient



Capacity Can Be Impacted By:

- Illness
- Pain
- Lack of sleep
- Medication
- Substance Use / Abuse / Addiction
- Stress
- Time of day
- Grief
- Mental health

Engaging a Lawyer

- Threshold determination – can the person enter into an attorney-client relationship?
 - Have a legal problem
 - You are a lawyer
 - Trust you to help
 - Will pay necessary costs

Legal Capacity

- Understand essential legal elements
- Understand options
- Understands consequences of choice
- Able to make a choice

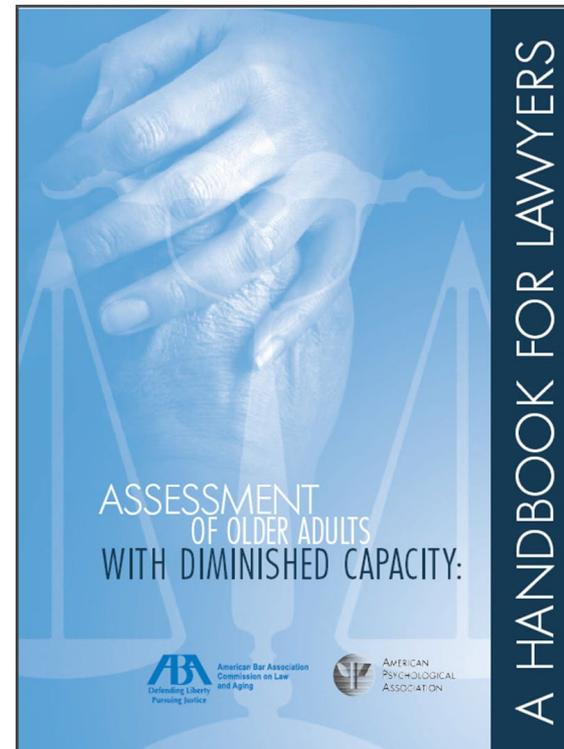
Capacity in the Hotline/Helpline Setting

Capacity and the Hotline Process

- With every contact with the client, providers should document questions and answers and any concerns about capacity
- Everyone who talks with the client is a part of this process

Available Free on the ABA Website

[Assessment of Older Adults with Diminished Capacity: A Handbook for Lawyers—available here](#)



Observational Signs: Short-Term Memory Problems

- Signs:
 - Repeating questions
 - Forgetting what was discussed
 - Not remembering recent events
 - Caller may not remember why the call is happening
- Practice Tips
 - Document these patterns of behavior in the case notes (should be documented from first contact)
 - Ask about recent or upcoming holidays/events
 - Repeat some questions to confirm consistency of answers

Observational Signs: Language or Communication Problems

- Signs:
 - Difficulty finding the right words
 - Using vague wording
 - Talking around the issue
 - Difficulty staying on topic/very disorganized
 - Bizarre statements or reasoning
- Practice Tips:
 - Note all observations in the case notes

Observational Signs: Comprehension Problems

- Signs:
 - Difficulty understanding simple concepts
 - Repeating questions that have been answered
 - Answers inconsistent with the question asked
 - Inability to answer questions or make choices that they should be able to
- Practice Tips:
 - There is a difference between questions from the caller that seek clarification and questions that show a lack of understanding.

Observational Signs: Lack of Mental Flexibility

- Signs:
 - Caller is hyper-focused on one issue or answer
 - Unable to compare other options

Observational Signs: Calculation or Financial Management Problems

- Signs:
 - Difficulty paying bills or paying bills on time
- Practice Tips:
 - Ask questions that produce clues.
 - Often the first outward sign of a decline in mental capacity is unpaid bills/financial disarray .
 - Even if the caller does not know exact bank balance, can they provide a general idea of cash on hand/bills?
 - If the call is about difficulty managing money, ask questions to assess the persons general understanding of their finances. If the answers are incomplete or confusing, further review of capacity is needed.

Observational Signs: Disorientation

- Signs:
 - Lack of orientation to person (knowing who they are and being able to identify immediate family)
 - Lack of orientation to place (being able to describe where they live, how long they have been there, and who lives with them)
 - Lack of orientation to time (knowing the date and time)
- Practice Tips:
 - Ask questions about difficulty calling in or getting lost near home
 - Ask questions about date, season, recent or upcoming holidays or events
 - Seriously disoriented clients may not be able to identify the current season of the year or even what decade it is

Emotional Functioning

- Signs of Emotional Distress
 - Anxiousness, crying, or other distress
 - Caller is excited, pressured, or manic (hyper-excitable)
- Signs of Emotional Lability
 - Emotional reactions that are inconsistent with the issue being discussed, such as laughing at things that are sad, or crying at things that are not
 - Caller rapidly shifts between emotional states

Behavioral Functioning: Delusions

- A delusion is a strongly held personal belief that has no rational basis in fact.
- Signs:
 - Caller believes that someone is spying on them, or out to get them, or that the system is targeting them.
 - Caller may refer to beliefs or experiences that are obviously impossible (“People come to my house every night and change the wallpaper”).
- Practice Tips:
 - These callers feel genuinely unsafe, and investigation will show no rational basis for their fear.

Behavioral Functioning: Hallucinations

- Signs:
 - The caller is hearing or seeing things or people who are not there.
 - Caller refers to things or people who are not present (“My husband [who is known to be deceased] is waiting in the kitchen and he says I should go make dinner”).
- Practice Tips:
 - Listen to the story the caller tells, especially if they tell you “no one believes me” or that no one else saw or heard what they saw or heard.
 - The perception feels very real to the caller, but not to other persons present.

Behavioral Functioning: Poor Hygiene or Grooming

- **Signs:**
 - Caller says that others are complaining that they need to shower, wash, or change clothes.
 - Caller is receiving complaints about home living conditions, but the caller does not know why people are concerned.
- **Practice Tips:**
 - This is the hardest one to assess in the helpline/hotline setting (unless using video conferencing).
 - Can merit additional investigation.

Other Notes or Observations

- In communicating with the client, make note of anything that strikes you as inconsistent or unusual.
- Ask questions to see if there are rational explanations
- **All of this should be documented in the case notes**

Common Elements of Undue Influence

1. A person who is vulnerable
 2. A person in a position of power or influence
 3. An effort by the person in a position of power or influence to get the vulnerable person to act
 4. An outcome that is unexpected or unfair
- Be especially careful with third party callers
 - Listen for signs the client is being coached on answers

Severe Signs

- Severe short-term memory loss
 - Caller repeats simple questions over and over or may demonstrate that he/she has completely forgotten what was discussed earlier in the session.
 - The caller may not remember why the call is happening.
- Severe Communication Problems
 - Caller has difficulty finding words, or may use extremely vague or even nonsensical language.
 - Note: mild word-finding problems are extremely common in older adults. The inability to summon up a technical term is NOT necessarily a reason to halt the call, as long as the client is able to get their meaning across.

Additional Severe Signs

- Severe Comprehension Problems
 - The client may appear to be listening but not seem to understand even the most basic concepts presented. A key way to assess comprehension is to ask simple questions about the information being presented.
- Severely Fluctuating Attention and Consciousness
 - Caller may be unable to stay awake or attend even minimally to what is being said

Mitigating Factors

- Stress, grief, depression, recent events
- Medical factors
- Time of day variability
- Hearing or vision loss
- Educational/cultural/ethnic barriers

Extra Scrutiny

- Is the decision consistent with known long-term values and commitments?
- Is the decision objectively fair, or will anyone be hurt?
- Is the decision irreversible?

Judgment Call

- Intact
 - With no or minimal evidence of diminished capacity
- Mild Problems
 - Some evidence of diminished capacity.
 - Proceed with caution, taking extra steps such as conferring with other professionals, suggesting that the client seek a medical or clinical assessment, and careful consideration of the long term impact of the decisions the client is making.
- More than mild problems
 - Only proceed with great caution—for a helpline/hotline, likely these callers need to meet face-to-face with an attorney before advice or assistance is offered.
- Severe Problems
 - Politely decline
 - Suggest medical or mental health consultations—if you have concerns, consider the protections under Rule 1.14 (or your state’s version) and if appropriate reporting to adult protective services.

Ethical Issues

- Capacity is inferred from looking at several rules from the Model Rules of Professional Conduct (MRPC).
 - Rule 1.0 (e) defines informed consent as “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.”
 - Rule 1.4 (b) says a “a lawyer shall explain a matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation.”
 - Rule 1.2 (a) says a lawyer “shall abide by a client's decisions concerning the objectives of representation.”

Client with Diminished Capacity

- Rule 1.14 offers guidance on a lawyers' actions when a client has diminished capacity, starting with “to the extent possible maintain a normal attorney-client relationship.”
 - The [comments](#) provide the best guidance on what to do when you are struggling with communicating with a client when the client has difficulty understanding.

The Advantage of a Hotline / Helpline

- Working from templates or standard questions does not break eye contact
- Develop standard questions for every intake
- Develop specific questions for common issues that document the legal elements being asked

What To Do

- The judgment call on capacity falls to the attorney
- When in doubt
 - Try to arrange an in-person meeting
 - Many times communication is clearer face-to-face
 - Better to turn them down than let them down
 - Avoid enabling abuse, neglect, exploitation, or undue influence
- Shift the burden to yourself
 - “I am sorry, I am having trouble understanding and I think it would be better for us to meet, or for you to meet with one of my legal aid colleagues.”

Questions?



Type your questions in the question box on the webinar interface.

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