

Recognizing and Addressing Legal Capacity Issues on Helplines

LEGAL HELPLINES TIP SHEET • February 2020

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The Basics

We assess client capacity every time we communicate with a client. The essence of client capacity is the ability to communicate in such a way that the client is able to make informed choices regarding the objectives or goals of the representation and understand the means by which we seek to achieve those goals. Helplines and hotlines should incorporate questions that assess capacity and document communication into work flow and practice.

Helplines and hotlines have both unique challenges and advantages in assessing capacity. Not being face-to-face with the client limits the channels of communication, forcing us to rely on verbal communication. However, helplines and hotlines have the advantage of being able to easily utilize standardized intake and interview questions, often in an electronic format, to assess and document capacity without breaking eye contact with the client.

Understanding and Assessing Capacity

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 decide about the objective or goal of the representation.

At a minimum a client needs the capacity to enter into an attorney-client relationship for a helpline or hotline to be able to help the caller. For this, the caller needs to be able to do several things:

- Identify themselves;
- Know that they have a problem;
- Understand that you are a lawyer and can help them; and
- Demonstrate that they want you to help and understand that if there are costs involved, they must pay those costs.

If the helpline provider is creating documents for the client to sign, there is an ethical obligation to try to assure that the client understands the legal effect of the documents. Legal advice given to a client who fails to understand how to use that advice helps no one.

Ethical Issues

Model Rules of Professional Conduct

The Model rules of Professional Conduct¹ do not define capacity. Capacity is inferred from looking at several rules:

¹ americanbar.org/groups/professional_responsibility/publications/model_rules_of_professional_conduct/model_rules_of_professional_conduct_table_of_contents/

- 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 explained about the material risks of and reasonably available alternatives to the proposed course of conduct.”
- Rule 1.4 (b) says “a lawyer shall explain a matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation.”
- And rule 1.2 (a) says a lawyer “shall abide by a client’s decisions concerning the objectives of representation.”

A lawyer must be able to communicate with the client in a way that the client can make informed decisions about the objective or goals of the representation.

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.” Rule 1.14 (or your state’s complement to it) and the comments to that rule provide the best guidance on what to do when you are struggling with communicating with a client because the client has difficulty understanding. Some of the best advice is in the comments to the rules.

Third-Party Callers

We assess capacity every time we communicate with or about a client. If the call is initiated by a third-party caller, you should always ask why the client didn’t initiate the call. The answer to that may give an indication of challenges with capacity (and determine whether you can talk to the third-party caller). When we communicate with third-parties, we need to listen for clues about capacity concerns for the ultimate client and be aware that you will need to make your own determination of legal capacity, rather than solely relying on the information provided by the third-party.

Undue Influence

There are four 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; and 4) an outcome that is unexpected or unfair.

In a helpline and hotline setting, look for third party callers, signs that the client is being coached on answers, a person in a position of influence or authority, and an outcome that might be seen as abusive or unfair.

Practice Tip

Evidence of undue influence is not necessarily an indicator of a lack of capacity. The client’s vulnerability may be based on need for assistance from caregivers, from being isolated, or from a sense of obligation to the person exerting influence. Our goal here is to avoid enabling undue influence. At times, we need to explain to clients why a certain action may be a bad idea and why we will not assist with taking the action.

Assessing Capacity in the Hotline/Helpline Environment

Assessment of capacity is a judgement call on the part of the attorney. Using a consistent set of questions that screen for concerns of capacity should guide the judgement. Ultimately, the attorney must decide if the caller’s capacity is:

- Intact—with no or minimal evidence of dismissed capacity. If this is the case, proceed.

- 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. Likely these clients need to meet face to face with an attorney before advice or assistance is offered.
- Severe Problems—politely decline and suggest medical or mental health consultations. If you have concerns, consider the protections under rule 1.14 (or your states version) and if appropriate, consider reporting to adult protective services.

The ABA Commission on Law and Aging publishes a handbook, “Assessment of Older Adults with Diminished Capacity: A Handbook for Lawyers” available for free as a download.² Included in that publication is a checklist for assessing capacity. The Screening Tool at the end of this Tip Sheet has a modified version of that checklist, specifically for hotline and helpline workflow and process.

Guiding Principles

- When in doubt, arrange for the caller to meet face to face with a lawyer. Face to face meetings enhance communication.
- When necessary, decline. It is better to say “I’m sorry” than to be sorry when something goes wrong.
- Try to leave the client better off than they were before they called.
- Do no harm.
- When in doubt on capacity, explain the inability to help as your problem, not the client’s. Say, “I am not able to clearly understand. I am sorry, I wish I could do more, but the best I can do is recommend that you take the following actions.”

Mitigating Factors

Capacity is not constant, and several factors can result in a temporary decline:

- **Stress, grief, depression, or recent events.** Listen for clues and ask about other events in the caller’s life.
- **Medical factors.** Pain, nutrition, hydration, and medication can impact capacity. If you are concerned about capacity, ask about the caller’s health. When appropriate, encourage callers to seek medical care.
- **Time of Day Variability.** Ask when the best time of day is to talk. Ask family members or caregivers when the person is at their best and make a note of it in the case notes.
- **Hearing or vision loss.** Look for signs that the person is having difficulty hearing your conversation, such as asking you to repeat things or to talk louder. If the caller is having difficulty reading documents, consider the impact of vision.
- **Educational/Cultural/Ethnic Barriers.** Always be aware of challenges of education. Is the client unable to understand because they lack a general understanding or life experience, or because of a challenge with memory or cognition? Be aware of cultural values that defer certain choices or decisions from the person to other family members or inhibit communication with strangers or across genders. Language issues can also appear to be capacity issues—if you have concern, use a qualified interpreter.

² [apa.org/pi/aging/resources/guides/diminished-capacity.pdf](https://www.apa.org/pi/aging/resources/guides/diminished-capacity.pdf)

Capacity Assessment Screening Tool for Helplines & Hotlines

This screening tool captures observational signs of capacity and indicates where helpline and hotline providers should make notes of such signs. 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.

Cognitive

Cognitive Functioning	Observations	Practice Tip
Short-Term Memory Problems	Caller is repeating questions, forgets what was discussed, and/or can't remember recent events.	<p>If you are documenting questions and answers in the case notes as you talk with the caller, you can look for these patterns of behavior. Look for inconsistent answers, repeated questions, and inability to remember or follow the discussion. Ask about recent or upcoming events or holidays.</p> <p>Note: If you use a call screener or call back scheduler, the case notes should start with that first contact. When the advice call is made you should repeat some questions to confirm short term memory and consistency of answers. Inconsistencies or inability to remember prior answers should raise concerns.</p>
Language or Communication Problems	Caller has difficulty finding the right word, using vague wording or talking around the issue.	Look for difficulty staying on topic, being very disorganized, or bizarre statements or reasoning. Note these observations in the case notes.
Comprehension Problems	Caller has difficulty understanding simple concepts and repeats questions that have been answered.	Concerns are raised by answers that are inconsistent with the question asked, or inability to answer questions or make choices that the person should be able to answer. There is a careful balancing between questions from the client that seek clarification, and questions that show a lack of understanding.
Lack of Mental Flexibility	Caller provides answers that indicate that they are hyper-focused on one issue or answer and seems unable to consider or compare other options.	This is different from simply being stubborn in that someone who is stubborn can typically acknowledge that other perspectives exist, and can provide reasons for not choosing them. A stubborn person may not want to change a will for particular reasons, whereas an older adult lacking in mental flexibility may exhibit a general fear of making any changes for very vague reasons.

Calculation/Financial Management Problems	Caller makes comments that they are experiencing difficulty paying bills or paying bills on time.	While few people will know their exact bank balance, can the person give a general idea of cash on hand, or bills? Often, the first outward sign of a decline in mental capacity is unpaid bills, and general financial disarray. If the call is about difficulty managing money, ask questions to assess the person's general understanding of their finances. If the answers are incomplete or confusing, further review of capacity is needed.
Disorientation	Caller does not seem oriented to person, place, and time. Orientation to person is shown by the person knowing who they are and being able to identify immediate family. Orientation to place is shown by the caller being able to describe where they live, how long they have been there, and who lives with them.	Ask questions about difficulty calling in or getting lost near home. Orientation to time starts with knowing the date and time (on a call back was the person able to remember the scheduled call back.) Ask questions about date, season, recent or upcoming holidays, or events.

Behavioral

Behavioral Functioning	Observations	Practice Tip
Delusions	Caller believes that someone is spying on them, or out to get them, or that the system is targeting them.	A delusion is a strongly held personal belief that has no rational basis in fact. These clients feel genuinely unsafe, and investigation will show no rational basis for their fear.
Hallucinations	Caller is hearing or seeing things or people who are not there.	Some forms of mental illness or dementia result in the person hearing or seeing things or people who are not there. Listen to the story the client tells, especially if they tell you no one believes me, or no one else saw or heard what they saw or heard. The perception feels very real to the client, but not to other persons present.
Poor Hygiene or Grooming	Caller mentions that others are complaining that they need to shower, wash, or change clothes. The caller may also mention that they are receiving complaints about their home living conditions.	This is the hardest one to assess over the phone (unless using video conferencing). These signs merit additional investigation.

Emotional

Emotional Functioning	Observations	Practice Tip
Emotional Distress	Caller shows signs of anxiousness, crying, or other distress.	Listen for signs the caller is excited, pressured or manic (hyper-excitabile.)
Emotional Lability	Caller has emotional reactions that are inconsistent with the issue being discussed.	Listen for signs such as laughing at things that are sad or crying at things that are not, or someone who rapidly shifts between emotional states.

Extra Scrutiny

Some acts merit extra concerns about capacity:

- Is the decision consistent with known long-term values and commitments, and if not, can the client explain the reason for the change?
- Is the decision objectively fair, or will anyone be hurt? If so, are the callers' actions consistent over time, or can the client explain reasons for the change?
- Is the decision irreversible? Signing a deed giving away a home raises greater concerns than signing a will gifting the home at death, because one is unchangeable, and the other is changeable. Does the client recognize the irreversible nature of the act?

Additional Resources

- [Understanding Legal Capacity and Ethics](#), National Center on Law and Elder Rights
- [Legal Ethics: Helplines & Hotlines](#), National Center on Law & Elder Rights
- [Assessment of Older Adults with Diminished Capacity: A Handbook for Lawyers](#), American Bar Association Commission on Law and Aging
- [Judicial Determination of Capacity of Older Adults in Guardianship Proceedings](#), American Bar Association Commission on Law and Aging
- [Assessment of Older Adults with Diminished Capacity: A Handbook for Psychologists](#), American Bar Association Commission on Law and Aging
- [ABA Model Rules of Professional Conduct](#)
- [Undue Influence](#), California Elder Justice Coalition

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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