

Understanding Legal Capacity and Ethics

PRACTICE GUIDE • July 2018

David Godfrey and Charles Sabatino, American Bar Association Commission on Law & Aging

This Practice Guide is part of our Skills-Based Training curriculum, focused on providing practical tools for working with older adults.

American Bar Association Commission on Law & Aging

The ABA Commission on Law and Aging is a collaborative and interdisciplinary leader of the 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.

Introduction

Attorneys who work with older adults will inevitably face the challenge of determining whether a client or a potential client has decision-making capacity. While most older clients will not have impaired capacity, some will. Clear and relatively obvious dementias will impair capacity, and the prevalence of such dementias increases with age. However, clients with early stages of dementia or mild cognitive impairment may have subtle decisional challenges. This Practice Guide and accompanying training offers a conceptual framework and practice tips for addressing questions of client capacity.

The Basics

There are a few key items to remember when addressing questions of capacity:

- The law presumes that adults have capacity.
- Attorneys and advocates should focus on their client's ability to make decisions—not on whether the person is odd, uncooperative or socially outgoing.
- Advocates should be careful not to let stereotypes associated with aging drive their determination of capacity.
- In a legal setting, the lawyer makes the final determination, even if that determination is to get an assessment from a medical professional.

Legal Standards of Diminished Capacity

There are three facets of legal thinking about diminished capacity: standards of capacity for specific legal transactions under statutory and case law; standards of diminished capacity in state guardianship law; and ethical guidelines for assessing capacity, as set out in Model Rule 1.14 and the comments to the rule.

Standards of capacity for specific legal transactions

The law generally presumes that adults have capacity unless they have been adjudicated as incapacitated, for example, through guardianship or conservatorship. The definition of “diminished capacity” varies, depending on the transaction or nature of the decision. Definitions of legal capacity are set out in either state statutory and/

or case law; therefore, attorneys should be familiar with specific state-based standards. Examples of common transaction-specific legal standards include the following:

Testamentary Capacity	Typically, at the time of executing a will, the testator must have capacity to know the natural objects of their bounty, to understand the nature and extent of their property, and to connect these elements sufficiently to make a disposition of property according to a rational plan. The testator does not have to have capacity consistently over time—only at the time the will was executed. Whether the testator is of “sound mind” or is the terminology that is still commonly used.
Capacity to Execute a Power of Attorney	The standard of capacity for creating a power of attorney has traditionally been based on the capacity to contract. However, some courts have also held that the standard is similar to that for making a will.
Contractual Capacity	Courts generally assess the party’s ability to understand the nature and effect of the act and the business being transacted. If the act or business being transacted is highly complicated, a higher level of understanding may be needed to comprehend its nature and effect.
Capacity to Convey Real Property	To execute a deed, a grantor typically must be able to understand the nature and effect of the act at the time the conveyance is made.

Other legal acts have specific definitions of capacity articulated by statutes and courts in different jurisdictions. Again, the standards listed above are general examples, and attorneys should look to their specific state statutes and case law for guidance. In absence of a clear standard in a statute or case law, an attorney should confirm that the client understands the essential elements of the legal action, understands the available options, has made a choice and understands the consequences of the choice being made. On the most basic level, a lawyer’s obligation to assess a client’s capacity is essential to a lawyers’ obligation under Model Rule of Professional Conduct 1.4 (b) to “explain a matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation.” Rule 1.2, directs the lawyer to follow the client’s decisions regarding the objective or goals of the representation. Doing this requires that the client understand the options.

Guardianship

State guardianship and conservatorship laws rely on broader and more encompassing definitions of incapacity. The criteria for a finding of incapacity differ among the states, but in all states, the law starts with the presumption of capacity. The burden of proof is on the party bringing the petition to establish sufficient diminished capacity to justify the appointment of a guardian or conservator. Varying factors or tests that are used in some states include disabling condition, functional behavior as to essential need, and/or cognitive functioning. In most states, there is an added threshold finding that guardianship is necessary and is the “least restrictive alternative.”

NCLER’s [training](#) and [Chapter Summary](#) on guardianship offer more in-depth information on guardianship and standards of capacity.

Model Rule 1.4

[Model Rules of Professional Conduct, Rule 1.14: Clients with Diminished Capacity](#), recognizes: first, the goal of maintaining a normal client-lawyer relationship; second, the discretion to take protective action in the face of diminished capacity; and third, the discretion to reveal confidential information to the extent necessary to protect the client’s interests. The rule triggers protective action when an attorney reasonably believes that a client

has diminished capacity, that there is a potential for harm to the client, and that the client cannot act in his or her own interest.

While the Rule provides some ethical guidance, it leaves open the question of how an attorney can reach a reasonable belief that the client has diminished capacity. Lawyers are familiar with assessing risk and identifying what is in one's interest, but usually they are neither familiar with nor trained in evaluating diminished capacity. The accompanying Capacity Worksheet for Lawyers is designed to help attorneys collect relevant information and make preliminary capacity judgments for purposes of identifying appropriate next steps. It is not intended to take the place of a clinical capacity assessment. The comments to Rule 1.14 provide guidance when an attorney believes a client has diminished capacity.

Using the Capacity Worksheet for Lawyers

The Capacity Worksheet for Lawyers that accompanies this Practice Guide is meant to be used either during the client interview as a note-taking device, or immediately afterwards as an analytic tool. The Worksheet allows observations to be structured and recorded, systematic in process, accountable if challenged, and documented. It also helps the process to blend in naturally to the case interview process, rather than adding a whole new element. This Practice Guide provides an overview for each section of the Worksheet, and tips on completing it.

Section A: Observational Signs of Diminished Capacity

This section of the Worksheet documents observational signs of diminished capacity, including cognitive, emotional, and behavioral signs. There are examples of behavior for each of the listed signs. There is no single indicator that provides a consistent, clear signal that an older adult has diminished capacity. However, when considered together, multiple signs may reflect diminished capacity. These signs should not be taken in and of themselves to be proof, but may indicate a need for further evaluation of capacity by an independent professional.

In noting potential signs of incapacity, it is important to keep in mind that the focus is on decisional abilities rather than on cooperativeness or pleasantness. Attorneys should avoid letting stereotypes about aging influence their observations.

Notes on Functionality

This field is meant for an attorney to record observations about the client's functioning beyond the office setting. To get this information, it is beneficial for an attorney to interview clients in their home setting. Alternatively, an attorney may get information in the natural course of contact with clients—and family members with whom your client has permitted communication.

Activities of daily living to note include dressing, bathing, eating, and walking. Limitations in these do not directly suggest any cognitive impairment but are important for a complete picture. Instrumental activities of daily living to note include managing money, grocery shopping, meal preparation, and medication management. These functions do involve cognitive abilities to different degrees.

Mitigating Factors Affecting Capacity

In completing this section of the Worksheet, attorneys should note if there are any mitigating or qualifying factors that may influence the observed signs. Follow-up questions can help determine whether the mitigating factors such as those listed on the Worksheet are playing a role. For example, grief from the loss of a spouse, or recently experiencing abuse could cause communication problems, emotional distress and other observed signs. If found, these factors indicate a need for alternative action, be it a referral to a physician, adjusting the approach to communication, or waiting until another time when the client is functioning better.

Section B: Transaction-Specific Elements of Legal Capacity

This section of the Worksheet requires that the attorney note the legal elements of capacity for the particular task at hand (check statutes and case law) and compare them with the client's understanding, appreciation, and functioning with the relevant legal elements.

This process may occur over the course of one or several meetings with the client. Ultimately, the attorney must form a judgment about the client's understanding of the respective legal elements of the transaction at issue, and regarding the client's capacity overall to undertake the transaction(s) at issue.

Section C: Task-Specific Factors in Evaluating Capacity

This section of the Worksheet is designed to take into consideration the ethical factors set out in the Comment to Rule 1.14 of the MRPC. Utilizing the criteria, attorneys should consider the following:

- Ability to articulate reasoning behind the decision (*the client should be able to state the basis for their decision and the stated reasons should be consistent with the overall stated goals and objectives*);
- Variability of state of mind (*the extent to which the individual's cognitive functioning fluctuates*);
- Appreciation of consequences (*for example, does the client understand that without a legal challenge to an eviction, he or she may be without a place to live*);
- Substantive fairness of decision (*while lawyers normally defer to client decisions, before taking action a lawyer should consider the if the action may or will injure others, and if so, further review the action before deciding to move forward*);
- Consistency with lifetime values (*decision normally should reflect the client's lifelong or long-term perspective*); and
- Irreversibility of the decisions (*important to protect individuals from irreversible events, and calls for caution on the part of the attorney*).

Of these six factors, the first three are “functional” in the sense that they reflect the cognitive functioning of the individual. These may be supported by observation of the signs of diminished capacity described previously. The latter three are “substantive” in that they look at the content and nature of the decision itself. A careful weighing and balancing of these factors along with the specific elements of legal capacity for the transaction at hand will assist the lawyer to make a preliminary judgment of capacity.

Section D: Preliminary Conclusions about Client Capacity

After evaluating sections A, B, and C of the Worksheet, an attorney will need to weigh all the data obtained up to this point. With the collected data, the lawyer should make a categorical assignment of the fit between the client's abilities and the legal capacity at issue. Unfortunately, there is no simple score that will easily generate a conclusion. The Worksheet provides four conclusory options with suggested actions for each. The conclusion is ultimately a professional judgment that is aided by the systematic consideration of signs of incapacity, the client's understanding of the legal transaction, and the factors laid out in the Model Rule. If the attorney feels uncertain as to whether the observed problems represent “mild” versus “more than mild” issues, this would be an indication to consult with a clinician.

Working with Clinicians

Knowing how to work with clinical consultants or formal evaluators is extremely important if your conclusion leads you to seek consultation or evaluation. The Handbook for Lawyers in the Resources below provides extensive guidance for working with clinicians.

Conclusion

Assessing capacity is something lawyers do every time they communicate with a client and try to confirm that the client understands the options and the choice that is being made. When it is unclear if the client is able to understand, extra steps should be taken to understand the client's ability to understand. The model rules of professional conduct offer guidance for working with a client with diminished capacity. Clinical approaches to capacity differ from legal approaches in important ways. Legal definitions of capacity tend to set forth general conceptual definitions, e.g. Capacity to do X requires the ability to appreciate the nature and consequences of X and the functional abilities to perform X. Clinical approaches evaluate the multiple cognitive, emotional, and physical elements that are necessary to do X. Clinical assessment measures these elements on a sliding scale that does not necessarily result in a Yes/No answer to capacity. While the law is gradually becoming more nuanced in its approach to capacity, it still normally seeks a yes or no answer.

Additional Resources

- David Godfrey, ABA Commission on Law & Aging: david.godfrey@americanbar.org
- Charles P. Sabatino, ABA Commission on Law & Aging: charles.sabatino@americanbar.org
- [Assessment of Older Adults with Diminished Capacity: A Handbook for Lawyers](#)
- [Competency: Reforming Our Legal Fictions](#) by Charles Sabatino and Suzzanna L. Bassinger, Journal of Mental Health and Aging, pp. 119- 144 (2000)
- NCLER Legal Basics Training: [Supported Decision-Making](#)
- NCLER Advanced Training: [Older Adults and Health Care Decision-Making in Clinical Settings](#)
- NCLER Legal Basics Training: [Overview of Guardianship and Alternatives to Guardianship](#)
- [ABA Model Rules of Professional Conduct](#)
- [Judicial Determination of Capacity of Older Adults in Guardianship Proceedings](#)
- [Assessment of Older Adults with Diminished Capacity: A Handbook for Psychologists](#)

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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Capacity Worksheet for Lawyers

Source: *Assessment of Older Adults with Diminished Capacity: A Handbook for Lawyers*, by the ABA Commission on Law and Aging and the American Psychological Association (2005).

Please read and review the handbook prior to using the worksheet.

Client Name: _____ **Date of Interview:** _____

Attorney: _____ **Place of Interview:** _____

A. OBSERVATIONAL SIGNS

◆ Cognitive Functioning	Examples
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	Difficulty finding words frequently Vague language Trouble staying on topic Disorganized Bizarre statements or reasoning
Comprehension Problems	Difficulty repeating simple concepts Repeated questioning
Lack of Mental Flexibility	Difficulty comparing alternatives Difficulty adjusting to changes
Calculation/Financial Management Problems	Addition or subtraction that previously would have been easy for the client Bill paying difficulty
Disorientation	Trouble navigating office Gets lost coming to office Confused about day/time/year/season
◆ Emotional Functioning	Examples
Emotional Distress	Anxious Tearful/distressed Excited/pressured/manic
Emotional Lability	Moves quickly between laughter and tears Feelings inconsistent with topic

◆ Behavioral Functioning	Examples
Delusions	Feels others out “to get” him/her, spying or organized against him/her Fearful, feels unsafe
Hallucinations	Appears to hear or talk to things not there Appears to see things not there Misperceives things
Poor Grooming/Hygiene	Unusually unclean/unkempt in appearance Inappropriately dressed

Other Observations/Notes of Functional Behavior

Other Observations/Notes on Potential Undue Influence

Mitigating/Qualifying Factors Affecting Observations	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
Medical Factors	Ask about nutrition, medications, hydration Refer to a physician
Time of Day Variability	Ask if certain times of the day are best Try mid-morning appointment
Hearing and Vision Loss	Assess ability to read/repeat simple information Adjust seating, lighting Use visual and hearing aids Refer for hearing and vision evaluation
Educational/Cultural/Ethnic Barriers	Be aware of race and ethnicity, education, long-held values and traditions

B. RELEVANT LEGAL ELEMENTS - The legal elements of capacity vary somewhat among states and should be modified as needed for your particular state.

General Legal Elements of Capacity for Common Tasks	Notes on Client's Understanding/ Appreciation/Functioning Under Elements
<p><i>Testamentary Capacity</i> - Ability to appreciate the following elements in relation to each other:</p> <ol style="list-style-type: none"> 1. Understand the nature of the act of making a will. 2. Has general understanding of the nature and extent of his/her property. 3. Has general recognition of those persons who are the natural objects of his/her bounty. 4. Has/understands a distribution scheme. 	
<p><i>Contractual Capacity</i> The ability to understand the nature and effect of the particular agreement and the business being transacted.</p>	
<p><i>Donative Capacity</i> An intelligent perception and understanding of the dispositions made of property and the persons and objects one desires shall be the recipients of one's bounty.</p>	
<p><i>Other Legal Tasks Being Evaluated & Capacity Elements:</i></p>	

C. TASK-SPECIFIC FACTORS IN PRELIMINARY EVALUATION OF CAPACITY

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

D. PRELIMINARY CONCLUSIONS ABOUT CLIENT CAPACITY - After evaluating A, B, and C above:

<input type="checkbox"/> Intact - No or very minimal evidence of diminished capacity	<i>Action:</i> Proceed with representation and transaction
<input type="checkbox"/> Mild problems - Some evidence of diminished capacity	<i>Action:</i> (1) Proceed with representation/transaction, or (2) Consider medical referral if medical oversight lacking, or (3) Consider consultation with mental health professional, or (4) Consider referral for formal clinical assessment to substantiate conclusion, with client consent
<input type="checkbox"/> More than mild problems - Substantial evidence of diminished capacity	<i>Action:</i> (1) Proceed with representation/transaction with great caution, or (2) Medical referral if medical oversight lacking, or (3) Consultation with mental health professional, or (4) Refer for formal clinical assessment, with client consent
<input type="checkbox"/> Severe problems - Client lacks capacity to proceed with representation and transaction	<i>Action:</i> (1) Referral to mental health professional to confirm conclusion (2) Do not proceed with case; or withdraw, after careful consideration of how to protect client's interests (3) If an existing client, consider protective action consistent with MRPC 1.14(b)

CASE NOTES: Summarize key observations, application of relevant legal criteria for capacity, conclusions, and actions to be taken: