

Skills Training Series: Understanding Legal Capacity and Ethics

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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 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 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

- Lawyers assess capacity every time they communicate with a client.
- The law presumes that adults have capacity.
- Attorneys and advocates should focus on their client's ability to make decisions.
- 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.

Capacity Worksheet

- For more details see: [ABA Handbooks on Capacity Assessment](#).
- More information will be available at www.ncler.acl.gov, or email us at ConsultNCLER@acl.hhs.gov.

Section 1: Defining Capacity

What is Capacity?

- Capacity is the ability to make an informed decision.
- Capacity is a spectrum.
- Capacity is situational.
- Capacity is transient – not static.

Specific legal standards

- Testamentary Capacity:
 - At the time executing a will, the individual must 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.
- Whether the testator is of “sound mind” or is the terminology that is still commonly used.

Power of Attorney

- 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.
- In other words:
 - Transferring rights in the real property to another.
 - No longer having the right to use or occupy.
 - Not being able to reclaim use or occupancy.

Capacity, if Not Stated

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

Ethics of Capacity

- Model Rule of Professional Conduct 1.4:
 - Obligation to communicate with a client, in a manner the client can understand.
- Model Rule of Professional Conduct 1.2:
 - The client selects the objectives of the representation.
- If both are met, the client has capacity.
- If not, MRPC 1.14:
 - A client with diminished capacity guides the attorney client relationship

Case Example: Edna and Bill

Edna and Bill have been married for 62 years. They live in an income based apartment. They have less than \$10,000 in savings, and an apartment full of furniture and memories. They arrive for your meeting and Edna does all of the talking, saying that they want to leave everything to each other, then when second one dies, in equal shares to their three children. Edna wants to be named as the agent in a power of attorney and as health care surrogate for Bill. For her power of attorney and health care surrogate Edna wants to name their oldest son. You ask Bill what he wants and he says, “whatever Edna says will be fine.” You ask Bill the names of his children, and he responds, “ask Edna.” You ask him what bank their life savings is in, and he turns to Edna and says, “you know that don’t you?”

Poll #1: What are the Red Flags?

- A: Edna's speaking for both of them
- B: Edna's choice for her agents
- C: Bill's deferring to Edna
- D: Bill's inability to answer basic questions
- E: All of the above

Section 2: Ethics of a Client with Diminished Capacity

MPRC 1.14 (1 of 3)

Model Rule of Professional Conduct 1.14 Client with Diminished Capacity:

- Model Rule was updated from a client with a disability to focus on mental capacity
- “The lawyer shall, as far as reasonably possible, maintain a normal client-lawyer relationship with the client.”

MRPC 1.14 (2 of 3)

- (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 (3 of 3)

- (c) Information relating to the representation of a client with diminished capacity is protected by Rule 1.6. When taking protective action pursuant to paragraph (b), the lawyer is impliedly authorized under Rule 1.6(a) to reveal information about the client, but only to the extent reasonably necessary to protect the client's interests.

Comments to 1.14 [1]

- In particular, a severely incapacitated person may have no power to make legally binding decisions.
 - 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.

Comments to 1.14 [5] Taking Protective Action (1 of 3)

- If a lawyer reasonably believes that a client is at risk of substantial physical, financial or other harm unless action is taken, and that a normal client-lawyer relationship cannot be maintained as provided in paragraph (a) because the client lacks sufficient capacity to communicate or to make adequately considered decisions in connection with the representation, then paragraph (b) permits the lawyer to take protective measures deemed necessary.

Comments to 1.14 [5] Taking Protective Action (2 of 3)

- Protective 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
 - Consulting with support groups, professional services, adult-protective agencies or other individuals or entities that have the ability to protect the client (see next slide)

Comments to 1.14 [5] Taking Protective Action (3 of 3)

- In taking any protective action, the lawyer should be guided by factors like:
 - 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.

Case Study

Everyone thinks that Pat has dementia, except Pat. Pat is sometimes confused, she always very verbal. She tells you her family is trying to kill her and take her money. Pat has agreed to sell her home to her new neighbor for half of what she bought it for 40 years ago, probably 10% of what it is worth today. She says she would sooner sell it to her neighbor than have her family get their hands on it. You are concerned about her capacity.

Poll #2: What Can You Do?

- A: Enter into an attorney client relationship with Pat?
- B: Recommend that Pat see an expert for further evaluation?
- C: Consult with other professionals about her comments
- D: Advise she take a week to think before entering the contract
- E: Add a no-penalty cancellation & close months later

Section 3: Capacity Worksheets

How to Use the Worksheets

- Guided interview
- Post interview documentation
- Reminder of what to ask, what to look for

Cognitive Function

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

Emotions

Emotional Functioning	Examples
Emotional Distress	Anxious Tearful/distressed Excited/pressured/manic
Emotional Ability	Moves quickly between laughter and tears Feelings inconsistent with topic

Behavior

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 or Qualifying Factors

Mitigating/Qualifying Factors Affecting Observations	Ways to Address/Accommodate
Stress, Grief, Depression, Recent Events affecting stability of the client	<p>Ask about recent events, losses</p> <p>Allow some time</p> <p>Refer to a mental health professional</p>
Medical Factors	<p>Ask about nutrition, medications, hydration</p> <p>Refer to a physician</p>
Time of Day Variability	<p>Ask if certain times of the day are best</p> <p>Try mid-morning appointment</p>
Hearing and Vision Loss	<p>Assess ability to read/repeat simple information</p> <p>Adjust seating, lighting</p> <p>Use visual and hearing aids</p> <p>Refer for hearing and vision evaluation</p>
Educational/Cultural/Ethnic Barriers	<p>Be aware of race and ethnicity, education, long-held values and traditions</p>

Legal Capacity

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>	

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...
Is decision consistent with client's known long-term values or commitments?	Can client articulate reasoning leading to this decision?
Is the decision objectively fair? Will anyone be hurt by the decision?	Is client's decision consistent over time? Are primary values client articulates consistent over time?
Is the decision irreversible?	Can client appreciate consequences of his/her decision?

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

<p>o <u>Intact</u> - No or very minimal evidence of diminished capacity</p>	<p><i>Action:</i> Proceed with representation and transaction</p>
<p>o <u>Mild problems</u> - Some evidence of diminished capacity</p>	<p><i>Action:</i></p> <ol style="list-style-type: none"> (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
<p>o <u>More than mild problems</u> - Substantial evidence of diminished capacity</p>	<p><i>Action:</i></p> <ol style="list-style-type: none"> (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
<p>o <u>Severe problems</u> - Client lacks capacity to proceed with representation and transaction</p>	<p><i>Action:</i></p> <ol style="list-style-type: none"> (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)

Working With Clinicians

- Find the right expert in your area
- Consultation – as allowed in 1.14
- Referral – asking the client to voluntarily be evaluated
- What the evaluation will be used for
- What elements are of concern

See Handbook for Checklist

Checklist of Lawyer Referral Letter Elements:

- Client background: name, age, gender, residence, ethnicity, and primary language if not English.
- Reason client contacted lawyer; date of contact; whether new or old client.
- Purpose of referral: assessment of capacity to do what? Nature of the legal task to be performed, broken down as much as possible into its elemental components.
- Relevant legal standard for capacity to perform the task in question.
- Medical and functional information known: medical history, treating physicians, current known disabilities; any mental health factors involved; lawyer's observations of client functioning, need for accommodations.
- Living situation; family make-up and contacts; social network.
- Environmental/social factors that the lawyer believes may affect capacity.
- Client's values and preference to the extent known; client's perception of the problem.
- Whether a phone consultation is wanted prior to the written report.

See Handbook for Checklist

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- 7. Environmental/social factors that the lawyer believes may affect capacity.**
- 8. Client's values and preference to the extent known; client's perception of problem.**
- 9. Whether a phone consultation is wanted prior to the written report.**

Additional Resources

- [NCLER Basics Trainings](#)
- [ABA Handbooks on Capacity Assessment](#)

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