



Diminished Capacity: How to Recognize It and What to Do About It?

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*Assessment of Older Adults with Diminished Capacity:
A Handbook for Lawyers*

available at:

http://www.apa.org/pi/aging/diminished_capacity_part1.pdf

Unavoidable capacity determinations outside the courtroom:

- Does the client have the capacity to contract for my services?
- Does the client have the capacity to complete the legal transaction?

Lawyers need a conceptually sound and consistent process for answering these questions.

Poll 1

Have you had a client in the last two years whose capacity to execute a legal document was in question?

Yes

No

The lawyer's assessment of capacity is a "legal" assessment, involving:

- 1. An initial assessment component and, *if necessary,***
- 2. Use of a clinical consultation or formal evaluation by a clinician, and,**
- 3. A final legal judgment about capacity by the lawyer.**

Become familiar with three facets of diminished capacity:

A. Ethical guidelines for assessing client capacity. (p. 2, 3, 8)

B. Approaches to capacity in state guardianship and conservatorship laws. (p. 7-8)

A. Standards of capacity for specific legal transactions. (p. 5-6)

A. Ethical Guidelines

MRPC 1.14 -- Client with Diminished Capacity

1.14(a) Says Act Normal...

...the lawyer shall, “as far as reasonably possible, maintain a normal client-lawyer relationship....”

1.14(b) Except when you can't...

Lawyer may take reasonably necessary protective action, including ... seeking the appointment of a guardian....

But only if 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
- the client cannot adequately act in the client's own interest.

Poll 2

Under Model Rule 1.14, can a lawyer take protective action for a client, even over the explicit objection of the client?

Yes

No

B. Tests of Incapacity Under State Guardianship Law:

Mix 'n Match Variations

- 1. Disabling Condition (often long list)**
- 2. Functional Behavior Deficit (focusing on essential needs or endangerment)**
- 3. Cognitive Functioning Deficit**
- 4. Necessity for Court Intervention (or least restrictive alternative requirement)**

Mix 'n Match

1997 UGPPA:

**Cognitive
Test**

an individual who . . . is unable to receive and evaluate information or make or communicate decisions to such an extent that

+

**Essential
Needs test**

the individual lacks the ability to meet essential requirements of physical health, safety, or self-care, even with appropriate technological assistance.

Mix 'n Match

Example
not in text

North Dakota Cent. Code § 30.1-26-01(2)

**Disabling
condition**

+

any adult person who is impaired by reason of mental illness, mental deficiency, physical illness or disability, or chemical dependency

Cognitive

+

to the extent that the person lacks capacity to make or communicate responsible decisions

**Essential
Needs**

concerning that person's matters of residence, education, medical treatment, legal affairs, vocation, finance, or other matters,

Endangerment

or which incapacity endangers the person's health or safety.

Mix 'n Match

D.C. Code § 21-2011(11):
“Incapacitated individual” means

**Cognitive
Test**

an adult whose ability to receive and evaluate information effectively or to communicate decisions is impaired

+

**Behavioral
Test**

to such an extent that he or she lacks capacity to manage all or some of his or her financial resources or to meet all or some essential requirements for his or her physical health, safety, habilitation, or therapeutic needs

+

**Necessity
Test**

without court-ordered assistance or the appointment of a guardian or conservator

Questions?

C. Task Specific Legal Definitions

Testamentary Capacity requires that the client:

- (1) Understand the nature of the act of making a will.
- (2) Have a general understanding of the nature and extent of his or her property.
- (3) Have a general recognition of those persons who were "the natural objects of his bounty."
- (4) Understand the distribution scheme.
- (5) Appreciate all of the above elements in relation to each other.

38 AMJUR POF 3d 227

Contractual Capacity

The test of mental capacity to contract is whether the person in question possesses sufficient mind to understand, in a reasonable manner, the nature, extent, character, and effect of the particular transaction in which she is engaged

**Butler v. Harrison 578 A.2d 1098,
*1100 (D.C.,1990)**

Contractual Capacity

- Courts generally assess the party's ability to understand the nature and effect of the act and the business being transacted
- Accordingly, if the act or business being transacted is highly complicated, a higher level of understanding may be needed to understand its nature and effect, in contrast to a very simple contractual arrangement.

Walsh, A., et al., *Mental Capacity: Legal & Medical Aspects of Assessment & Treatment*, 2d ed. (1994)

Donative Capacity

Degree of capacity required to make a gift or conveyance is **less than** that required for the conduct of ordinary business. However, the capacity required to make a gift may be held **greater than** that required for testamentary purposes because a gift operates in the present....

The requisite capacity to make a gift is "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."

62 AMJUR POF 3d 197

Incapacity to Make a Healthcare Decision

D.C. Code

"Incapacitated individual" means an adult individual who lacks sufficient mental capacity to *appreciate* the nature and implications of a health-care decision, *make a choice* regarding the alternatives presented or *communicate* that choice in an unambiguous manner.
DC ST § 21-2202 (5)

Uniform Health Care Decisions Act:

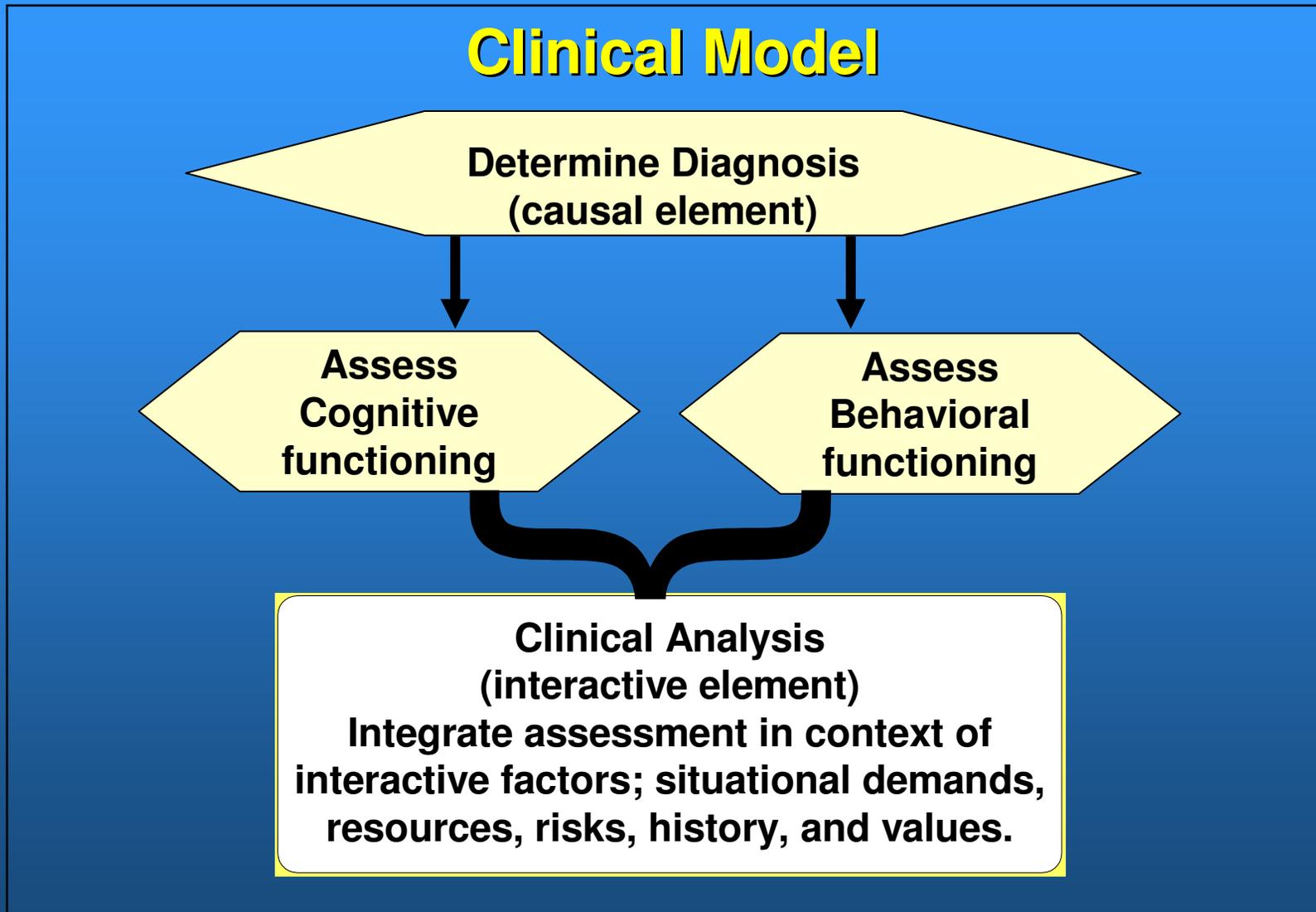
"Capacity" means an individual's ability to *understand* the significant benefits, risks, and alternatives to proposed health care and to *make* and *communicate* a health-care decision.

Poll 3

Can an individual lack the capacity to make a health care decision yet still have capacity to appoint a health care agent or proxy?

Yes

No



Legal capacity vs. Clinical capacity



Questions?

Lawyer's Screening Process

Benchmark: *the client's own habitual or considered standards of behavior and values*

Preliminaries:

- 1. Interview Client Alone, engender trust**
- 2. Accommodate Sensory Changes**
- 3. Accommodate Cognitive Changes**
- 4. Presumption of Capacity must be overcome**

Basic Considerations:

- 1. Focus on decisional abilities, not cooperativeness or affability.**
- 2. Pay attention to changes over time; history is important.**
- 3. Beware of ageist stereotypes.**
- 4. Consider whether mitigating factors could explain the behavior.**

Part A of Worksheet

Observing possible **cognitive** signs of diminished capacity:

1. Short-term memory problems
2. Language/Communications Problems
3. Comprehension problems
4. Lack of mental flexibility
5. Calculation/Fin. Mgt. Problems
6. Disorientation

Part A of Worksheet

Observing possible **emotional** signs
of diminished capacity:

1. Emotional distress
2. Emotional lability

Part A of Worksheet

Observing possible **behavioral** signs
of diminished capacity:

1. Delusions
2. Hallucinations
3. Poor grooming/hygiene

Part A of Worksheet

Also consider:

- **Functioning beyond the office: ADLs and IADLs**
- **Signs of undue influence**
- **Mitigating Factors, e.g.**
 - **Stress, grief, depression**
 - **Medical**
 - **Time of Day**
 - **Hearing/Vision Loss**
 - **Educational/Cultureal/Ethnic barriers**

Part B of Worksheet

Notes the Relevant Legal Elements
of Task at Hand, **e.g....**

1. Testamentary capacity
2. Contractual capacity
3. Donative capacity

Part C of Worksheet

Task-Specific Factors

Margulies/Fordham Paradigm

Functional components

1. Ability to articulate reasoning behind decision
2. Variability of state of mind
3. Ability to appreciate consequences of decision

Substantive components

4. Irreversibility of decision/Risk
5. Substantive fairness
6. Consistency with lifetime commitments of client

Referred to in New Model Rule 1.14 – Comment [6]

Part D of Worksheet

Preliminary Conclusions about Client Capacity

- [] **Intact:** No or very minimal evidence of diminished capacity
- [] **Mild problems:** Some evidence of diminished capacity
- [] **More than mild problems:** Substantial evidence of diminished capacity
- [] **Severe problems:** Client lacks capacity to proceed with representation and transaction

Questions?

Poll 4

In responding to the Mini-Mental Status Exam, if you count backwards from 100 by 7's, you eventually get to:

56

54

51

49

Consultations & Referrals

Consultation:

A lawyer's conversation with a clinician to discuss concerns about the client's presentation. Usually client is not identified and consultation does not require client consent.

Referral:

A formal referral to a clinician for evaluation, which may or may not result in a written report. Requires client consent.

Potential Uses of Clinical Opinion

- **Expert testimony in a subsequent deposition or courtroom hearing.**
- **Clarification of the areas of diminished capacity and of retained strengths.**
- **Affirmation of the client's capacity.**
- **Justification of the attorney's capacity concerns to disbelieving clients and family members.**
- **Expert advice on strategies to compensate for identified mental deficits.**
- **Indication of the need for protective action.**
- **Recommendation for follow-up testing (anticipated restoration of capacity).**

Who is an appropriate clinician?

The most important criterion is the clinician's experience and knowledge in the assessment of older adults

Who is an appropriate clinician? Some examples

Physician – Any MD ?

Geriatrician – MD aging specialist

Geriatric Psychiatrist/Gero-Psychologist – Mental health aging specialists

Forensic Psychologist/Psychiatrist – MH specialist in law

Neurologist – MD specialist in brain function

Neuropsychologist – Psychol. Specialist in cognitive functioning

Geriatric Assessment Team – Multidisciplinary team

Checklist for Referral Letter

1. **Client background**
2. **Reason client contacted lawyer, date, whether new or old client.**
3. **Purpose of referral:**
 - **Capacity to do what?**
 - **Nature of the legal task to be performed, elemental component.**
4. **Relevant legal standard(s).**
5. **Medical and functional information known.**

Checklist for Referral Letter

6. Living situation; family make-up and contacts; social network.
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.

The testing situation

One to three meetings, interview followed by some structured tests (number and specific tests may vary).

Tests may take one to several hours, depending on complexity of issue at hand and the type of professional consulted.

Client should be tested alone, but interview may involve collateral sources.

Test should tap into a variety of cognitive, behavioral, and integrated functioning.

Common Elements of a Clinical Evaluation Report

p. 37

<i>Element</i>	<i>Summary</i>
1. Demographic Information	Age, race, gender, education, etc.
2. Legal Background / Referral	Legal issue at hand, referral question
3. History of Present Illness	Medical history, current symptoms, etc.
4. Psychosocial History	Occupation, current living situation, family history of psychiatric and medical illness, etc
5. Informed Consent	Statement of client's consent to the evaluation
6. Behavioral Observations	Appearance, speech, mood, etc
7. Tests Administered	List of tests given
8. Validity Statement	Opinion of extent to which test results are valid
9. Summary of Testing Results	Test scores, standard scores, performance ranges
10. Impression	Diagnosis; Interpretation of test results; Interpretation of psycholegal capacities.
11. Recommendations	If appropriate, statements of recommended clinical action

Clinical versus Legal Capacity Outcomes

The lawyer, or the court if an issue before the court, makes the final determination of legal capacity.

Alas, there is no *capacimeter!*

Appendices

1. Capacity Assessment Algorithm (p.42)
2. Case Examples (p. 43)
3. Brief Guide to Psychological & Neuropsychological Instruments (p. 59)
4. Dementia Overview, by the Alzheimer's Association (p. 67)

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