

Today's Presentation

- **Introduction to Topic – Lori Stiegel**
- **Fundamental Principles; Legal and Judicial Perspective on Capacity – Erica Wood**
- **Clinical Perspective on Capacity – Dan Marson**
- **Undue Influence – Lori Stiegel**

Relevance of Capacity to Elder Abuse & Undue Influence

- Diminished capacity increases vulnerability to abuse, neglect, exploitation, and undue influence
 - Decreases judgment (recognizing, self-protecting, seeking help)
 - Increases dependency and exposure to abusers & exploiters
- Diminished capacity may temporarily result from abuse, neglect, or exploitation

Relevance of Capacity to Elder Abuse & Undue Influence

- Right of self-determination may be undermined by:
 - Incapacity
 - Undue influence
- Basis for legal decisions
 - Appointment of guardian/conservator
 - Undoing transactions
 - Proving consent was apparent, not actual

Legal/Judicial Perspective on “Capacity”



Definitions—Oxford Universal Dictionary

- *Capacity* ~1480 [selected definitions]
 - Mental receiving power; ability to take in impressions, ideas, knowledge. 1485
 - Active power of mind, talent. 1485
 - The power, ability, or faculty for anything in particular. 1647
 - Law. Legal qualification. 1480

Capacity – *Elusive* Concept: What is it?

- Not global; decision-specific; time limited
- Never put a period after word “capacity.”
- Fluctuating, questionable
- Influenced by external factors
- No “bright line” – no “capaci-meter”
- “Like a lava lamp” – can’t pin down, keeps changing
- “More like a dimmer control” than on-off switch



Capacity Basics

**Start with
presumption
of capacity**

**Task-specific,
not global**

**Decisional
abilities, not
outcome, age,
cooperativeness**

**Beware of
ageist and
disability
stereotypes**

**Find ways to
support capacity**

**Diagnosis does
not equal
capacity.**

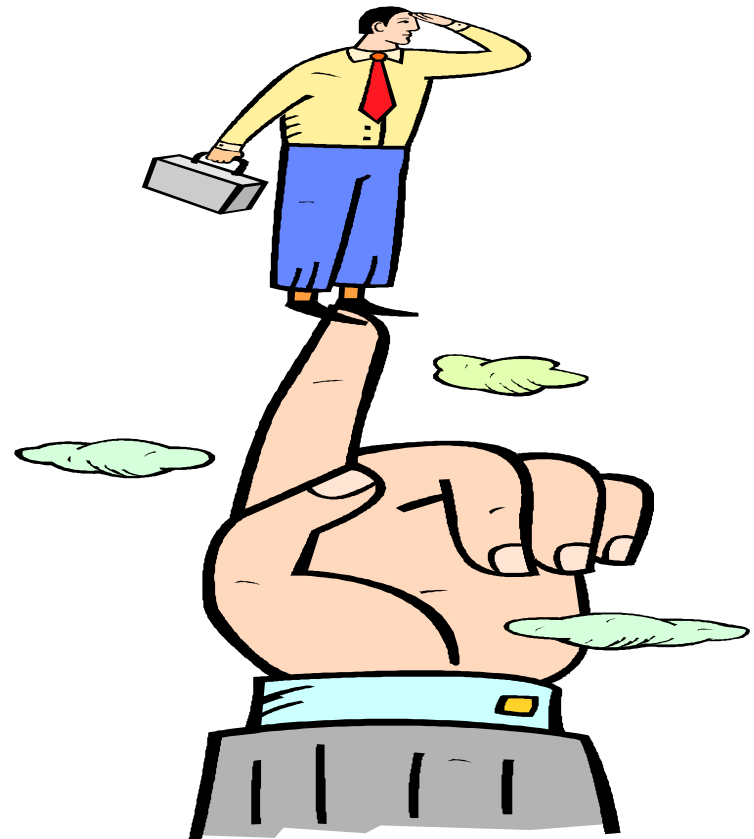
Key Principle: Supported Decision-Making

- People with disabilities use trusted others to help them understand & make ***own decisions*** instead of guardian/surrogate
- High visibility trend – moving from ***surrogate to supported*** decision-making
- ***Identify and emphasize supports*** before and as key part of determination of capacity.
- U.N. Convention on Rights of Persons with Disabilities
- National Resource Center on Supported Decision-Making

What is **Surrogate** Decision-Making?



What is **Supported** Decision-Making?



Clinical Capacity Judgment



Has capacity

Diminished
capacity

Lacks capacity

Legal Capacity Judgment



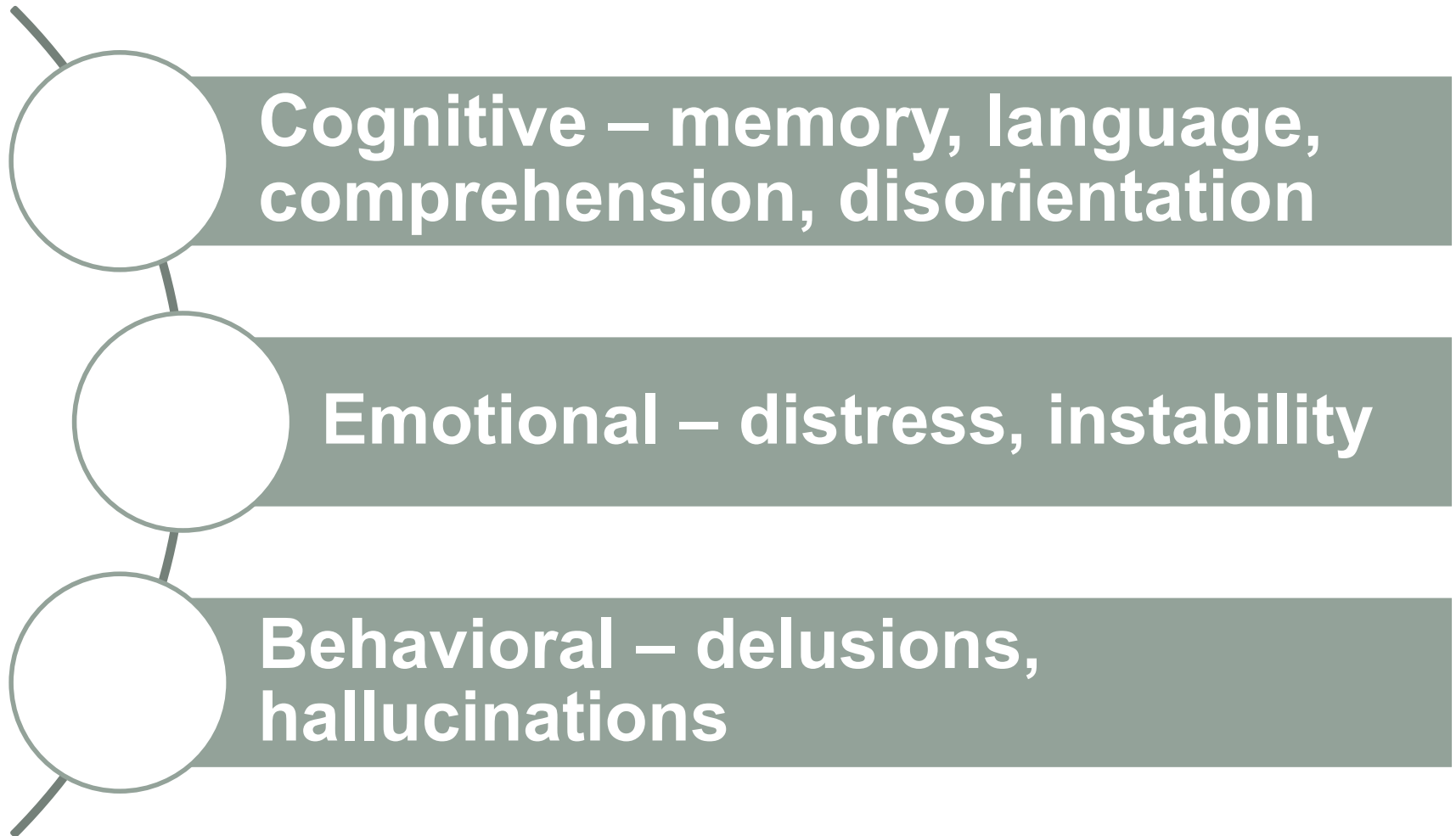
Has capacity

Lacks capacity

Legal vs Judicial vs Clinical Capacity

- Lawyers, APS & other professionals routinely make judgments about “capacity.”
- Their judgment only reaches court if dispute arises or petition for guardianship. Court as crucible for ultimate determination.
- Lawyers, APS, other professionals rely on clinical judgments as evidence. Court is final arbiter.
- “Capacity” vs “abilities, limitations, needs for supports.”

Red flag observations to look more closely



Screen Out Temporary or Reversible Factors

- Screen out the “D” factors =
 - ❖ **D**rugs
 - ❖ **D**ehydration
 - ❖ **D**iet
 - ❖ **D**epression
 - ❖ **D**isorientation
 - ❖ **D**elirium
 - ❖ **D**ig

Delirium vs Dementia

- **Delirium** = clinical syndrome characterized by sudden onset of impaired attention, disorganized thinking or incoherent speech.
- **Dementia** = syndrome characterized by decline in memory in association with either decline in other cognitive abilities or personality change.

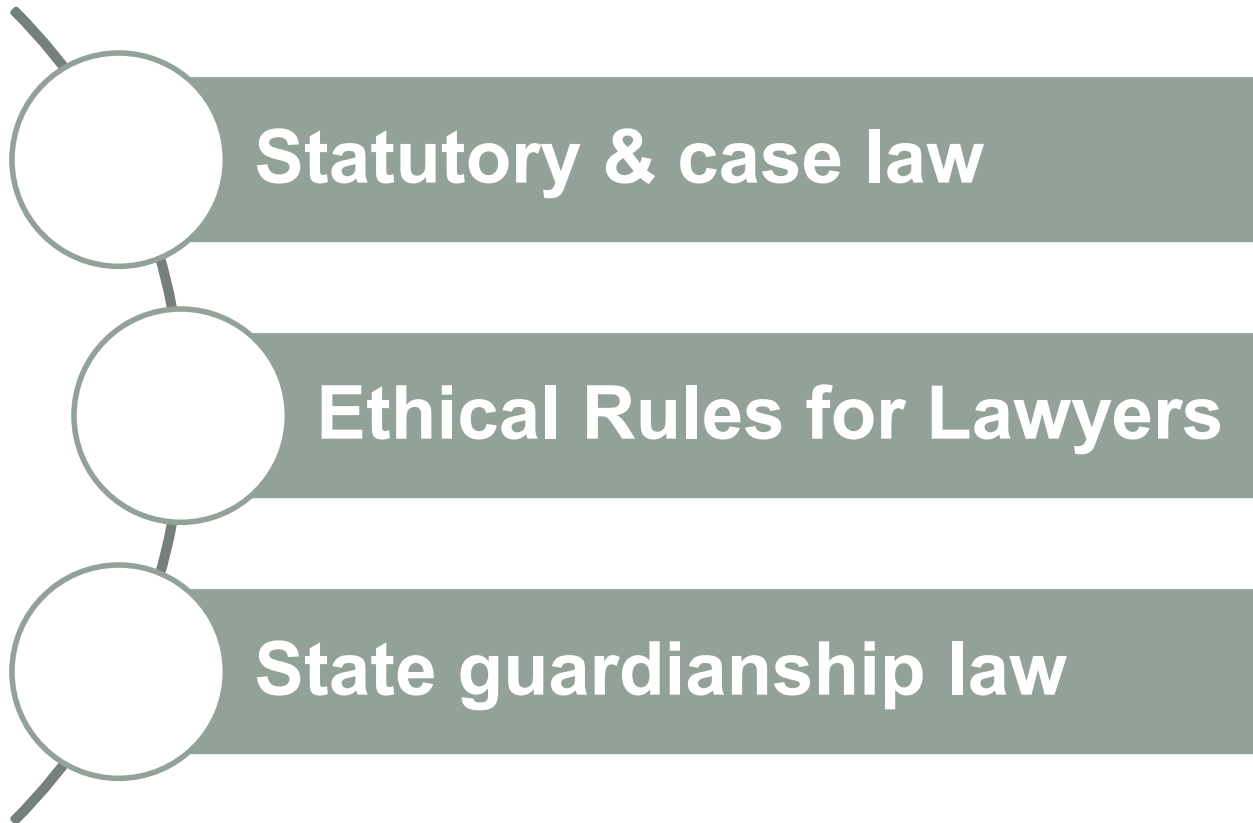


Screen Out Other/Temporary Factors

- Stress
- Grief
- Pain
- Confusion from medical conditions, such as urinary tract infection
- Hearing & vision loss
- Educational/cultural/ethnic/literacy factors



Three Sources of Guidance on Legal “Capacity”



Legal Standards of Capacity in State Law

- ***Testamentary capacity*** – understand nature of act of making will; nature & extent of property; recognition of natural objects of bounty; distribution scheme
- ***Contractual capacity*** – understand nature & effect of agreement & business transacted
- ***Donative capacity*** – understand nature & purpose of gift, nature & extent of property given
- ***Capacity to . . .*** Convey real property, execute power of attorney, vote, marry
- ***Capacity to drive***

Applying Legal Standards in Interview Process

- Give & take of interview process allows attorney or other professional to evaluate understanding and need for supports.



- ***Tips on counseling/communicating*** with clients with dementia
 - Do not talk past client
 - Engender trust; interview client alone
 - Break down information bit by bit; rephrase; paraphrase, use “active listening”
 - Use plain language; give written summaries in clear print
 - Be alert to signs of hearing loss

Ethical Guidelines for Lawyers in Assessing Capacity

- ***Comment 6 to Rule 1.14*** – Factors in determining diminished capacity
 - Ability to articulate reasoning behind decision
 - Variability of state of mind
 - Appreciation of consequences
 - Substantive fairness of decision
 - Consistency with long-term values
 - Irreversibility of decision

The greater the risk, the higher level of understanding and appreciation needed (“sliding scale of capacity”)

Capacity in Guardianship Context – Least Restrictive Alternative; Limited Orders

- Guardianship as removing self-determination and personhood.
- Key principle = “least restrictive alternative”
- Key principle = limited orders
- Included in most state statutes but practice may not reflect
- Importance of fine-tuning assessment of abilities.

New ABA Tool for Lawyers on Supported Decision-Making

**PRACTICAL Tool for Lawyers:
Steps in Supporting Decision-Making**

Jointly produced by the
Commission on Law and Aging,
Commission on Disability Rights,
Section on Civil Rights and Social Justice, and
Section on Real Property, Trust and Estate Law

ABA
Defending Liberty
Pursuing Justice

Background Resource Guide

**PRACTICAL Tool for Lawyers:
Steps in Supporting Decision-Making**

Definition of “Incapacitated Person” under State Guardianship Codes

- Four elements
 - **Medical condition**
 - **Functional element**
 - **Cognitive element**
 - **Harm; necessity**
- State provisions mix & match elements



1997 Uniform Guardianship & Protective Proceedings Act

- (Cognitive)
“An individual who . . . Is unable to receive and evaluate information or make or communicate decisions to such an extent that. . .”
- (Functional)
“. . . the individual lacks the ability to meet essential requirements of physical health, safety, or self-care, even with appropriate technological assistance.”

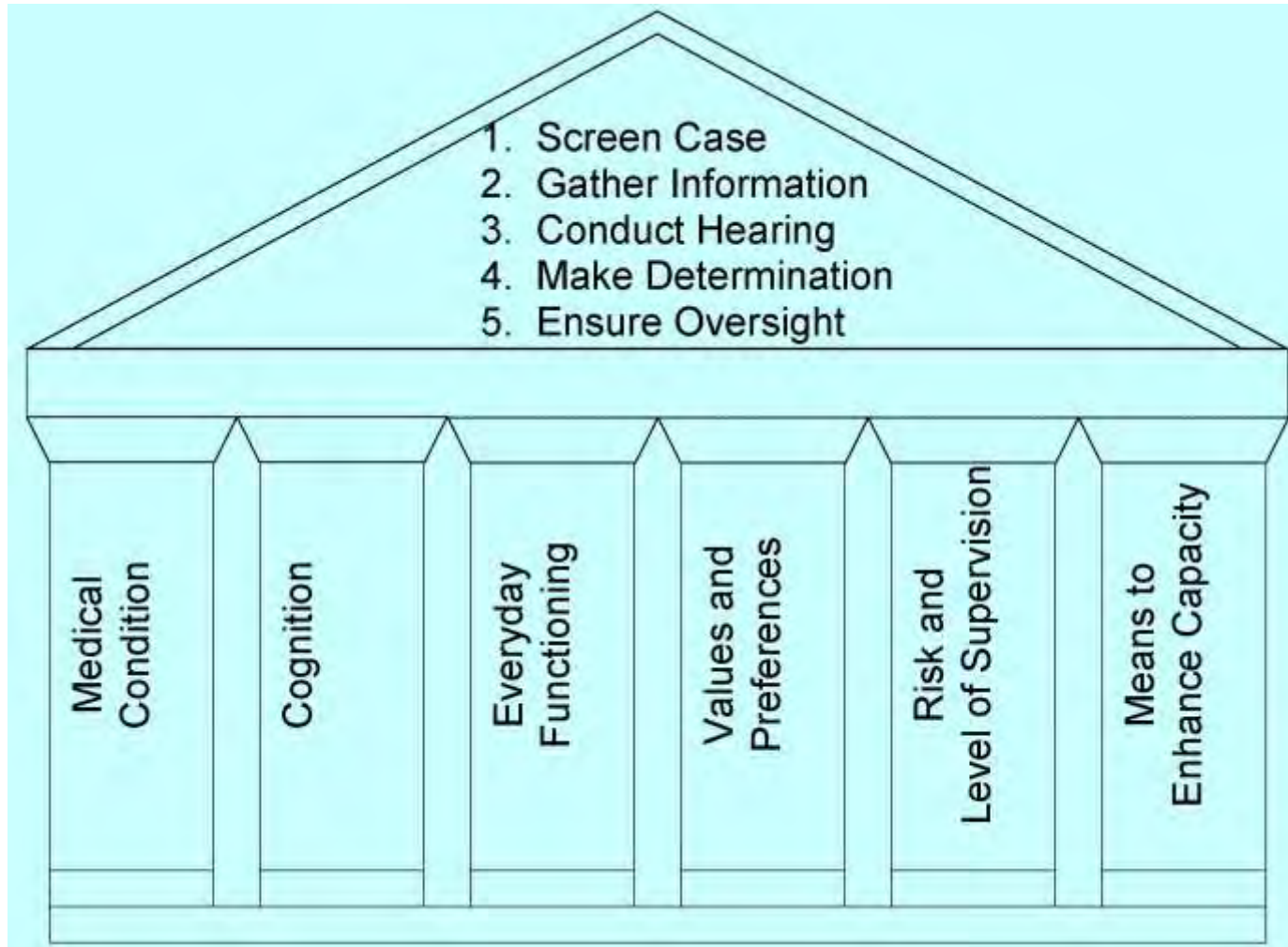
“MCFVRE” for Judges

- M = Medical condition
- C = Cognitive capacity
- F = Functional capacity
- V = Values
- R = Risks
- E = Means to Enhance capacity



ABA-APA Handbook for Judges on Capacity Assessment in Guardianship

Six Pillars of Capacity Assessment



Most clinical statements don't include all six pillars

Typical statement, few words:

*Patient has a history of stroke complicated by confusion.
Patient is mentally and physically ill patient and is not able to make any decisions.*

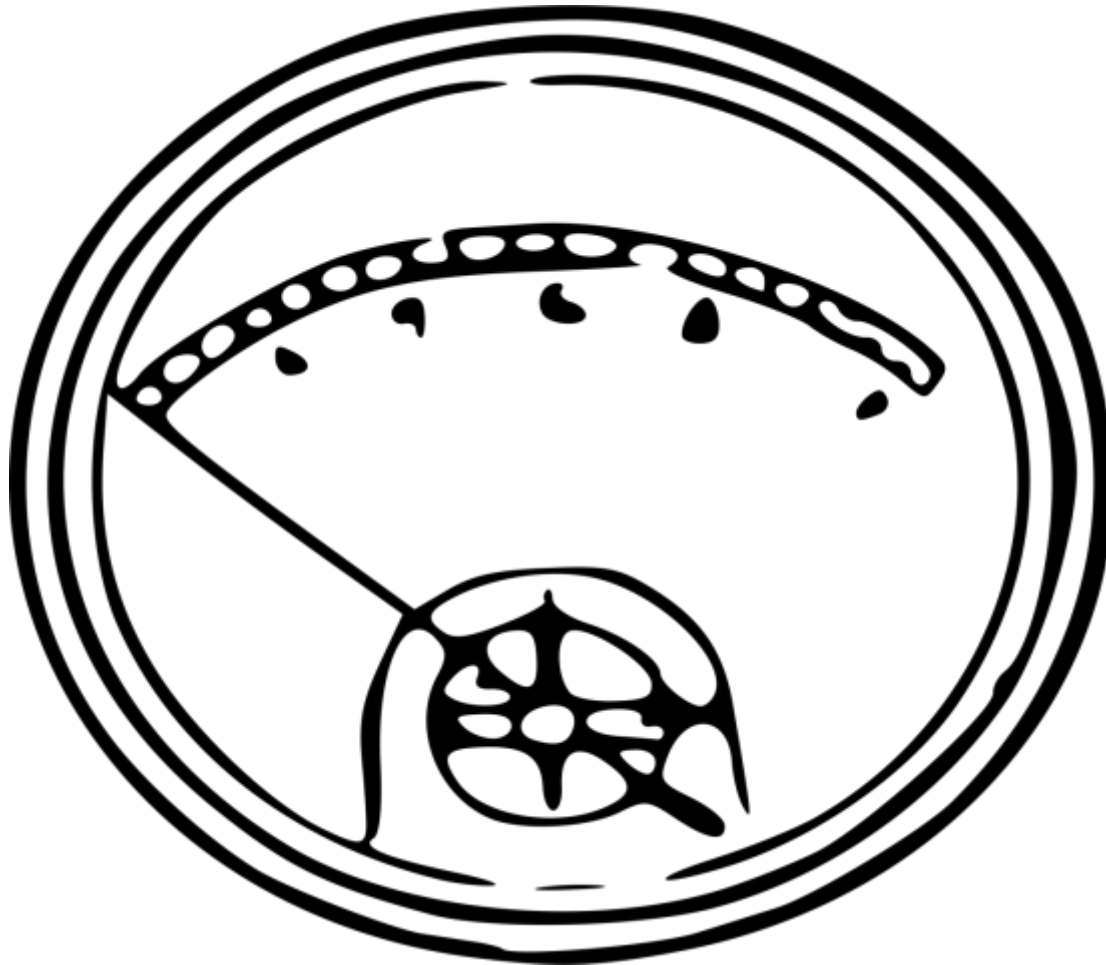
Or fewer words ...

Patient has dementia Alzheimer's type confirmed by multiple MD's and consultants.

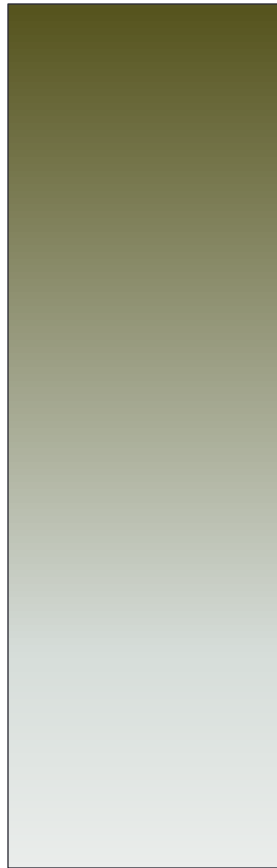
Is it is good idea for a lawyer or APS professional to use the Mini-Mental Status Exam (MMSE) in assessing client understanding? Or for judge to rely on it?



No “Capaci-meter” to determine abilities, limitations, needs for support



Clinical Capacity Judgment



Has capacity

Diminished
capacity

Lacks capacity

Legal Capacity Judgment



Has capacity

Lacks capacity

Clinical Perspective on Capacity

Outline for Clinical Capacity Section

- Capacity and Financial Exploitation
- Clinical Assessment of Capacity in an Aging Society
- Some Capacity Concepts
- What are the “Financial Competencies”?
- Clinical Assessment of Capacity

Capacity and Financial Exploitation

DIMINISHED FINANCIAL CAPACITY

IS LINKED TO POOR FINANCIAL DECISIONS
AND OUTCOMES FOR OLDER ADULTS

IS OFTEN THE BASIS FOR
ELDER FINANCIAL EXPLOITATION



- Astor in 1953 (age 51) and elderly lady with AD (died in 2007 at age 105).
- Son Anthony Marshall and a lawyer Francis Morrissey had her sign a series of codicils to her 2002 will, allowing Marshall to redirect her fortune to his own foundation.
- Marshall and Morrissey prosecuted by the Manhattan district attorneys' office. Found guilty in 2009 of grand larceny



- In Feb 2011 Rooney obtained a TRO against his stepchildren Chris and Christina Aber.
- In March 2011 Rooney stated that he was financially and emotionally abused by unnamed family members.
- Control of Rooney's finances was subsequently assigned to a court appointed conservator.

“To those seniors and especially elderly veterans like myself, I want to tell you this: You are not alone and you have nothing to be ashamed of...If elder abuse happened to me, it can happen to anyone.”

Mickey Rooney

Testimony to Senate Special Committee on Aging, March 2, 2011

Clinical Assessment of Capacity in an Aging Society

“AS OUR SOCIETY AGES, CLINICAL ASSESSMENT OF HIGHER ORDER FUNCTIONAL CAPACITIES HAS BECOME INCREASINGLY IMPORTANT.

IN AREAS LIKE FINANCIAL CAPACITY, MEDICAL DECISION MAKING CAPACITY, MEDICATION COMPLIANCE, AND DRIVING, SOCIETY HAS A STRONG INTEREST IN ACCURATELY DISCRIMINATING INTACT FROM IMPAIRED FUNCTIONING.”

Marson et al. (2000) *Archives of Neurology*, 57: 877-844

Clinical Capacity Assessment and Aging

- Unprecedented aging society
- Older population vulnerable to cognitive disorders affecting decision-making ability
- Persons with diminished capacity vulnerable to poor decision-making and exploitation
- Clinicians called upon by families, attorneys, agencies to make judgments of capacity used in various ways



PERSONAL PLANNING

If You Fear “Losing It”

New legal tactics let you name friends
to take over your affairs as needed

By FRANCINE RUSSO

Time Magazine
September 3, 2001

Multiple Professions Must Deal With Older Adult Capacity Issues

- Clinicians: can patient consent to treatment?
- Researchers: can subject participate in research?
- Attorneys: can client enter into a contract? make a will?
- Accountants: can client contract for services? understand tax return?
- Real estate: can client enter into listing agreement? contract of sale?
- Brokers:
 - can client enter into financial service contract?
 - understand different forms of risk/return?
 - enter into simple or complex investment vehicles?
- Adult protective:
 - can client manage finances and own affairs?
 - does client need protection?

Capacities Clinicians Evaluate

- Financial capacity: manage financial affairs
- Independent living: manage all personal affairs
- Treatment consent capacity: make medical decisions
- Research consent capacity: research participation
- Driving capacity: operate a motor vehicle
- Testamentary capacity: make a will
- Contractual capacity: enter into a contract
- Vocational capacity: conduct one's profession

Some Capacity Concepts

Capacity vs. Competency?

- Related but not interchangeable terms
- “Capacity” traditionally a clinical term
- “Competency” traditionally the legal term
- “Competency” has fallen out of favor and has been replaced by “legal capacity”
- Current usage: *clinical capacity v. legal capacity*

Clinical Capacity

- denotes a clinical status determined by clinician
- clinician makes clinical capacity judgment based on patient's functional, cognitive, and behavioral abilities
- clinical judgment does not:
 - alter legal capacity status
 - permit transfer of decisional authority to another (exception: DPAs)
- clinical judgment/findings of capacity one key form of evidence used in legal capacity proceedings

Legal Capacity

- denotes a legal status determined by a judge
- judgment based on clinical/lay evidence, case/statutory law, principles of justice, and other non-clinical factors
- judgment of “incapacity” alters legal status by removing rights of self determination for specific matter
- judgment of “incapacity” requires transfer of decisional authority to a court appointed proxy: guardian/conservator

Diagnosis Does Not Determine Incapacity

- *What does a diagnosis of vascular dementia tell you about a person's capacity to drive?*
- Diagnosis relevant to issue of driving capacity
- But not determinative of driving capacity issue
- **Key Inquiry:**
 - **Have to examine *functional abilities* constituent to driving**
 - **Using car controls, visual field of view, observing and understanding road signs, navigating in traffic, parking**

Cognitive Impairment Does Not Determine Incapacity

- *What does a MMSE score of 22 tell you about a person's capacity to make a medical treatment decision for herself?*
- Cognitive impairment relevant to medical decision-making capacity
- But not by itself determinative of consent capacity
- **Key Inquiry:**
 - Have to examine *functional abilities* constituent to consent capacity
 - Understanding medical information, reasoning about treatment choices, appreciating personal consequences of treatment choices

What are the
'Financial' Capacities?

'Financial' Capacities

- Financial capacity:
 - Capacity to manage all of one's financial affairs
 - Subject of conservatorship proceedings in probate court
- Contractual capacity:
 - Capacity to enter into agreements binding under law
 - Includes business contracts, marriage
- Testamentary capacity:
 - Capacity to make a will, or amend an existing will
 - Often treated separately from financial capacity
- Donative capacity:
 - Capacity to make a gift to another person or entity

Conservatorship

- State legal intervention to protect property and assets of individuals unable to handle financial affairs
- Court jurisdiction is over the person's estate
- Court assesses person's capacity to manage finances
- If incapable, court assigns a conservator and transfers control over person's financial affairs to another
- Like guardianship, represents a severe loss of liberty
- Depending on jurisdiction, conservatorship may not affect TC

Clinical Assessment of Capacity

Clinical Assessment of Capacity

- A challenging and elusive enterprise?
 - No current gold standard
 - Dx and cognitive impairment not sufficient
 - Lack of conceptual knowledge re capacity
 - Lack of capacity assessment training
 - Lack of objective instruments?

Method for Clinical Assessment of Capacity

A clinical capacity judgment is a categorical clinical judgment based on specific kinds of clinical evidence relevant to the capacity in question.

Steps in a Clinical Capacity Assessment

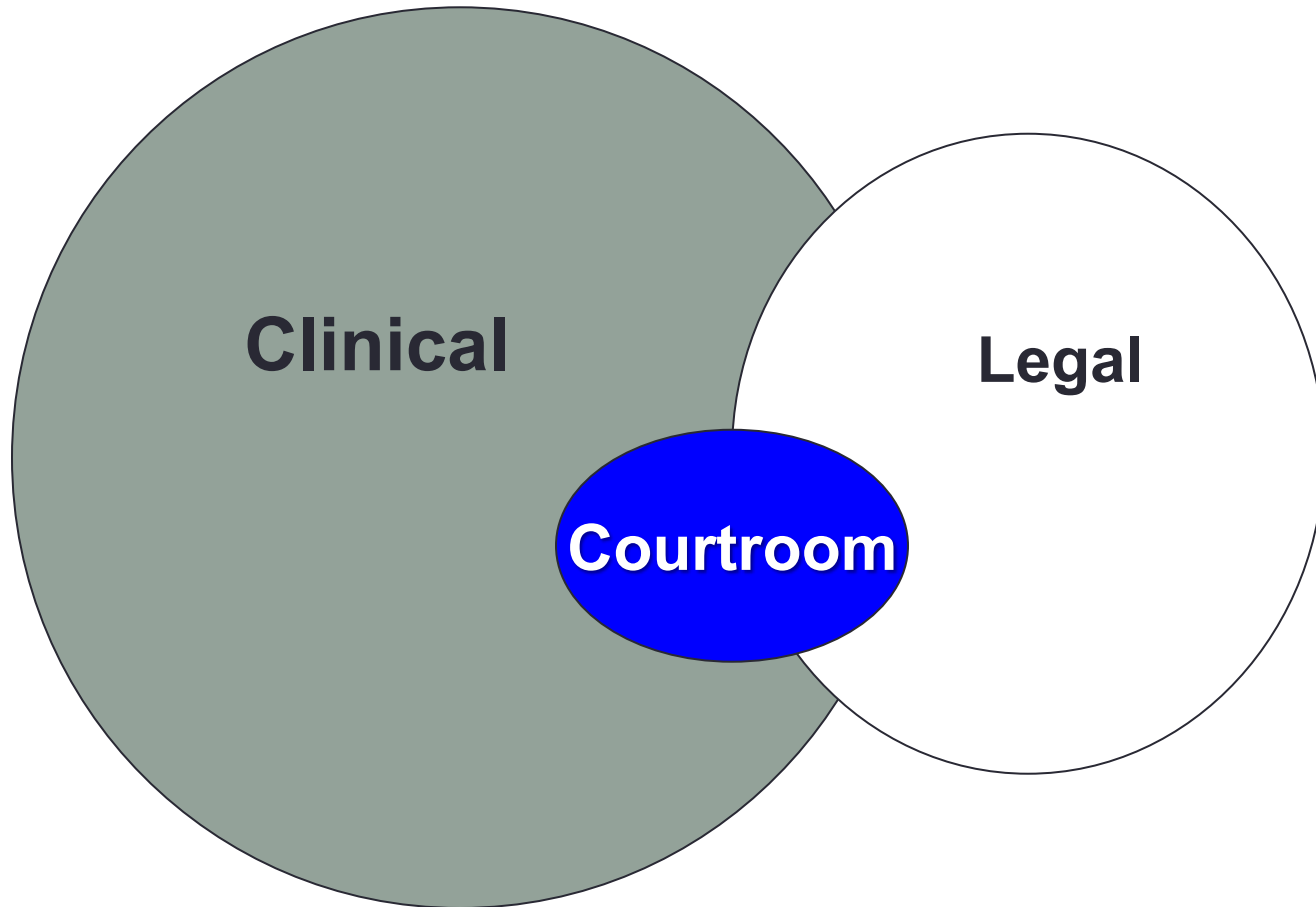
1. Receive and discuss capacity referral
2. Identify capacity issues and their context
3. Obtain informed consent
4. Review records
5. Conduct interviews and testing
6. Assess functional abilities—congruent or incongruent with environmental demands of capacity?
7. Consider other relevant evidence:
 - Diagnosis, cognitive functioning, personal values, level of risk present
8. Possible to enhance or support capacity?
9. Integrate all clinical information and form opinion(s)
10. Make categorical judgment:
 - Is person capable, marginally capable, or incapable for task/activity?
11. Document your judgment and clinical reasoning in report

Significant Clinical Responsibility

Clinical assessment of capacity is serious clinical task:

- Deciding whether or not to limit a person's autonomy
- In many cases clinical judgment may have the effect of legal adjudications
- Clinician represents society in deciding the autonomy vs. protection issue for the patient
- **Ultimately a moral judgment by clinician**

Clinical, Legal, and Courtroom Assessments of Capacity



MCI: Persons with specific cognitive impairment(s) but without sufficient functional decline to warrant diagnosis of dementia. Estimated 20%+ of older adult population.

Undue Influence

Undue Influence: Psychological Definition

- Use of power and control
- Exploit trust, dependency and fear
- Substitution of one person's will for the true desires of another
- Purpose: deceptively gaining control

Source: Margaret Singer

Undue Influence: Vulnerability

- Anyone can be a victim of UI, but vulnerability is enhanced by being:
 - Lonely/isolated
 - Unsophisticated, uninformed
 - Sick
 - Cognitively impaired
 - Substance-abusing
 - Fatigued, exhausted, distracted
 - Frightened
 - Dependent
- Individuals who experience UI may:
 - Have decision-making capacity
 - Have diminished decision-making capacity
 - Lack decision-making capacity

Source: Undue Influence: The Criminal Justice Response (YWCA of Omaha, 2006)

Undue Influence: Dynamics

- Method of exploiting or sexually abusing
- Can happen to adult of any age
- Easier to commit if capacity diminished
- Pattern of tactics akin to cults, brainwashing, domestic violence, & grooming for sexual abuse
- Victim doesn't recognize it
- Victim identifies with perpetrator

Source: Undue Influence: The Criminal Justice Response (YWCA of Omaha, 2006)

Undue Influence: Common Tactics



Undue Influence: Generic Legal Definition

- S -- Victim subject to UI
- O – Perpetrator had opportunity to exercise UI
- D – Perpetrator had disposition to exercise UI
- R -- Result appears to be effect of UI

Undue Influence: Identifying & Proving

- Evidence about Victim's
 - Health
 - Personal and financial losses
 - Behavior patterns
 - Education, language
 - Isolation
 - Opportunities to obtain independent advice

Source: Undue Influence: The Criminal Justice Response (YWCA of Omaha, 2006)

Undue Influence: Identifying & Proving

- Evidence about Recent Changes in Victim's Circumstances
 - Death of a spouse
 - Diagnosis of serious medical condition
 - Loss of assets
 - New "best friend"
 - Activities
 - Visits with family, friends

Source: Undue Influence: The Criminal Justice Response (YWCA of Omaha, 2006)

Undue Influence: Identifying & Proving

- Evidence about Suspect's Situation
 - What financial decisions does suspect make?
 - What financial tasks does suspect handle?
 - Can suspect survive without victim's assets?
 - Knowledge of victim's abilities and limitations?
 - Misrepresentations by suspect?
 - Interactions between suspect and victim?

Source: Undue Influence: The Criminal Justice Response (YWCA of Omaha, 2006)

Undue Influence: Identifying & Proving

- Evidence about Parties' Relationship
 - How long?
 - Is this an unlikely pairing?
 - How dependent is victim on suspect?
 - Does victim have family, friends, neighbors?
 - Openness of victim's & suspect's relationship
 - Misrepresentations regarding the relationship

Source: Undue Influence: The Criminal Justice Response (YWCA of Omaha, 2006)

Undue Influence: Selected Resources

- *Gaslight* (1944 version, Warner Home Video)
- Brandl, Heisler, Stiegel, *Undue Influence: The Criminal Justice Response* (YWCA Omaha, 2006), available from NCALL, www.ncall.us/justice/undue-influence
- Brandl, Heisler, Stiegel, “The Parallels Between Undue Influence, Domestic Violence, Stalking, and Sexual Assault,” Journal of Elder Abuse and Neglect, Vol. 17, No. 3 (2005)
- NLRC Webinar: “The Role of Undue Influence in Elder Abuse,” <http://www.nclc.org/national-elder-rights-training-program/the-role-of-undue-influence-in-elder-abuse.html>

Undue Influence: Selected Resources

- Nievod, “Undue Influence in Contract & Probate Law,” Cultic Studies Journal (1993)
http://www.icsahome.com/infoserv_articles/nievod_abraham_undue_influence_law.htm
- Quinn, Goldman, Nerenberg, Piazza, “Undue Influence: Definitions & Applications” (2010) – which includes Lisa Nerenberg’s excellent literature review:
www.courts.ca.gov/UndueInfluence.pdf
- Quinn, “Undoing Undue Influence,” Generations, Vol. 19, No. 11 (Summer 2000)

Undue Influence: Selected Resources

- Bennett Blum's UI Web page:
http://www.bennettblummd.com/undue_influence.html
- NCEA Web page: www.ncea.aoa.gov/ (search: UI)
- NCEA/ABA charts on APS laws (includes UI):
http://www.americanbar.org/groups/law_aging/resources/elder_abuse.html
- ABA/APA manuals on capacity assessment:
http://www.americanbar.org/groups/law_aging/publications.html