



Legal Issues and Alzheimer's Webinar Series

Part 1: For Legal Professionals *Working with People with Dementia and Assessing Client Capacity*

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Topics for Today

- Dementia basics
- “Dementia Capable” legal services
- Counseling clients with dementia
- Capacity assessment basics
- Clinical referrals for further assessment
- MRPC 1.14
- Best practices for law office



Dementia Capable Legal Services

- Identify persons with (possible) dementia
- Assess client capacity on a periodic basis
- Know the local services available to help people with dementia and their caregivers
- Provide linkages to other community-based services that are dementia-capable

The Basics

- People with dementia may have the capacity to manage their own legal and financial affairs right now
- If the person with dementia has the legal capacity he/she should actively participate in planning
- As dementia advances, he/she will need to rely on others to act in their best interest

What is Dementia?

- Progressive decline in cognition and/or behavior from a prior level of functioning
- Decline in two or more: memory, reasoning, language, visual perceptual processes, executive functions, social interpersonal behaviors, personality
- Interferes with customary activities and social relationships, causing dependence, alienation
- Caused by brain disease

4 Common Types of Dementia con't

1) Dementia of the Alzheimer Type:

Initial Symptoms: Most often Short Term Memory Loss: Forgets conversations; repetitive comments/questions. Also reduced motivation.

Later Symptoms: word-finding difficulty, visual perception disorders, reasoning problems

4 Common Types of Dementia con't

2) **Dementia of the Frontotemporal Lobar Degeneration**

Type (2 forms):

- a) **Primary Progressive Aphasia:** Early Symptoms:
Word-finding deficits;
Later Symptoms: reading, spelling errors;
behavioral changes; short term memory loss
- b) **Behavioral Variant Frontotemporal Dementia;**
Early symptoms: personality change, poor
judgment, inappropriate emotions, odd food habits
Later Symptoms: memory loss; also can have
motor symptoms (tremor, etc.)

Note: Common dementia diagnosis in persons under age 60

4 Common Types of Dementia con't

- 3) **Lewy Body Dementia:** Prominent visuospatial deficits; visual hallucinations (usually pleasant, non-threatening); symptoms fluctuate; motor symptoms (parkinson-like)

- 4) **Vascular Dementia:** Many types of symptoms: aphasia, behavior, executive functions, motor symptoms; depend on brain location of stroke
Related to chronic cardio and cerebrovascular risk factors (heart disease, hypertension, high cholesterol); progressive loss of function due to multiple successive cerebrovascular events (“mini strokes”)



Key Cognitive Impairments Related to Executive Function

- Short term memory
- Reasoning and logic
- Decision making skills

Alzheimer's Association

10 Warning Signs

1. Abnormal forgetting
2. Difficulty performing familiar tasks
3. Language problems
4. Loss of Initiative
5. Poor judgment
6. Problems with abstract thinking
7. Misplacing things
8. Changes in behavior
9. Personality changes
10. Disorientation

Source: Alzheimer's Association

http://www.alz.org/alzheimers_disease_10_signs_of_alzheimers.asp

Advance Care Planning (ACP)

- Planning early gives the best chance for the person with dementia to participate
- Eliminates guesswork and stress for families
- Join us December 4 for our session on *Advance Care Planning and Dementia*

Have You Had These Cases?

- Daughter says mom wants to change will to drafted to give all to recent new friend
- Tenant says landlord evicting him because landlord in league with CIA
- Man says guardian taking his money, doesn't need guardian
- Son says dad denied Medicaid waiver but dad clueless

Need for Capacity Assessment Framework

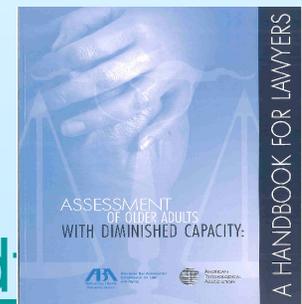
You make capacity judgments all the time.

- **Intake & screening** – Are we turning away cases we shouldn't?
- **Capacity for lawyer-client relationship** – What if it's questionable?
- **Capacity for legal transactions** – How to assess?

Seat of pants or sound conceptual framework

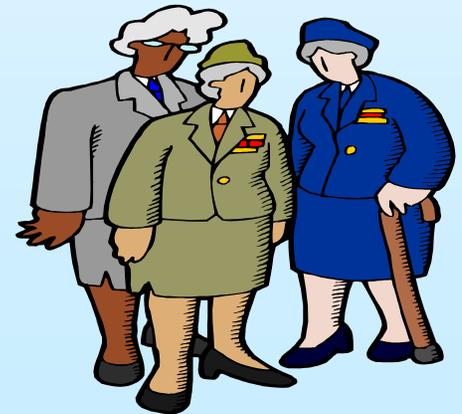
ABA-APA framework/checklist

<http://www.apa.org/pi/aging/resources/guides/diminished-capacity.pdf>



Basics for Capacity Assessment

- Begin with presumption of capacity
- Focus on decisional abilities, not cooperativeness or affability; not eccentricity
- Pay attention to changes over time; history is important
- Beware of ageist stereotypes



Tips on Counseling/Communicating With Clients with Dementia

- Set the Stage for Success
 - Do accessibility check or “walk through” of office
 - Have signage or someone available to greet client & direct to meeting
 - Use good lighting; watch glare



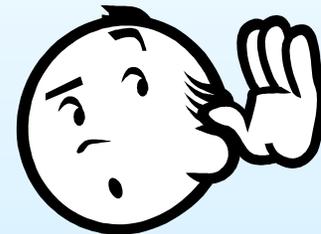


Tips on Counseling/Communicating With Clients with Dementia

- Engender trust
 - Interview client alone; stress confidential nature of attorney-client relationship
- Do not talk past client or about client to family members

Tips on Counseling/Communicating With Clients with Dementia

- Face the client
- Get attention before you begin to speak
- Don't assume hearing loss but be alert for signs
 - Screen out background noise
 - Speak in low pitch, at moderate rate; do not shout
 - Do not drop volume at end of sentence
- Use hands and expressions to emphasize



Tips on Counseling/Communicating With Clients with Dementia

- Be flexible, patient, allow more time
 - Word finding difficulty, repetition, loss of reading and writing ability, loss of ability to speak in clear sentences.
- Be sensitive to non-verbal communication





Tips on Counseling/Communicating With Clients with Dementia

- Break down information bit by bit
- Rephrase; paraphrase; use “active listening”
- Do not make important points in passing
- Give written summaries
- Use large clear print

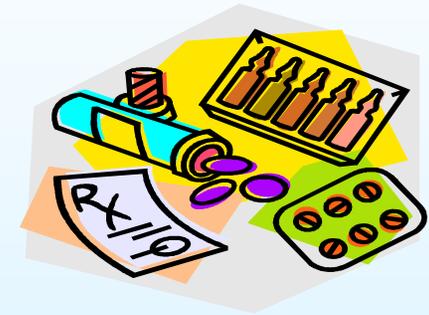
Red Flags for Diminished Capacity = Part A of Worksheet

- **Cognitive** – memory, language, comprehension, disorientation
- **Emotional** – distress, instability
- **Behavioral** – delusions, hallucinations



Screen Out Other/Temporary Factors = Part A of Worksheet

- Screen out the six “D” factors =
 - Drugs – effects of medications
 - Disorientation
 - Diet – malnutrition
 - Dehydration
 - Delirium
 - Depression



Screen Out Other/Temporary Factors

- Stress
- Grief
- Pain
- Urinary tract infection
- Hearing & vision loss
- Educational/cultural/ethnic/literacy factors



Apply Legal Tests of Capacity – Part B of Worksheet

- ***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 the agreement and business transacted
- ***Donative capacity*** – understand nature and purpose of gift, nature & extent of property given.
- ***Capacity to . . .*** Convey real property, execute power of attorney or advance directive



Applying Legal Tests of Capacity – Assess Through Interview Process

- Give & take of interview process allows attorney to evaluate client understanding
- Does client know what a will is; can client describe basic plan of distribution?
- May take more than one meeting
- Attorney must form a judgment of client understanding.





Ethics Guideline Factors to Consider— Part C of Worksheet

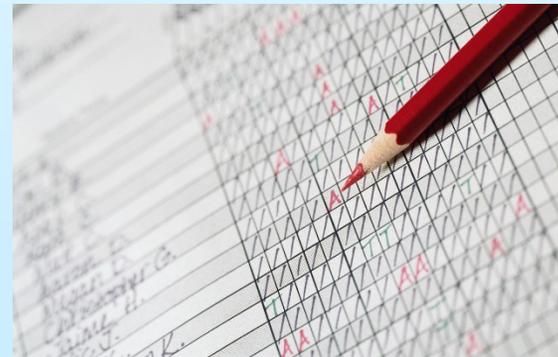
- Ability to articulate reasoning behind decision
- Variability of state of mind
- Appreciation of consequences
- Substantive fairness of decision
- Consistency with long-term values
- Irreversibility of decision

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

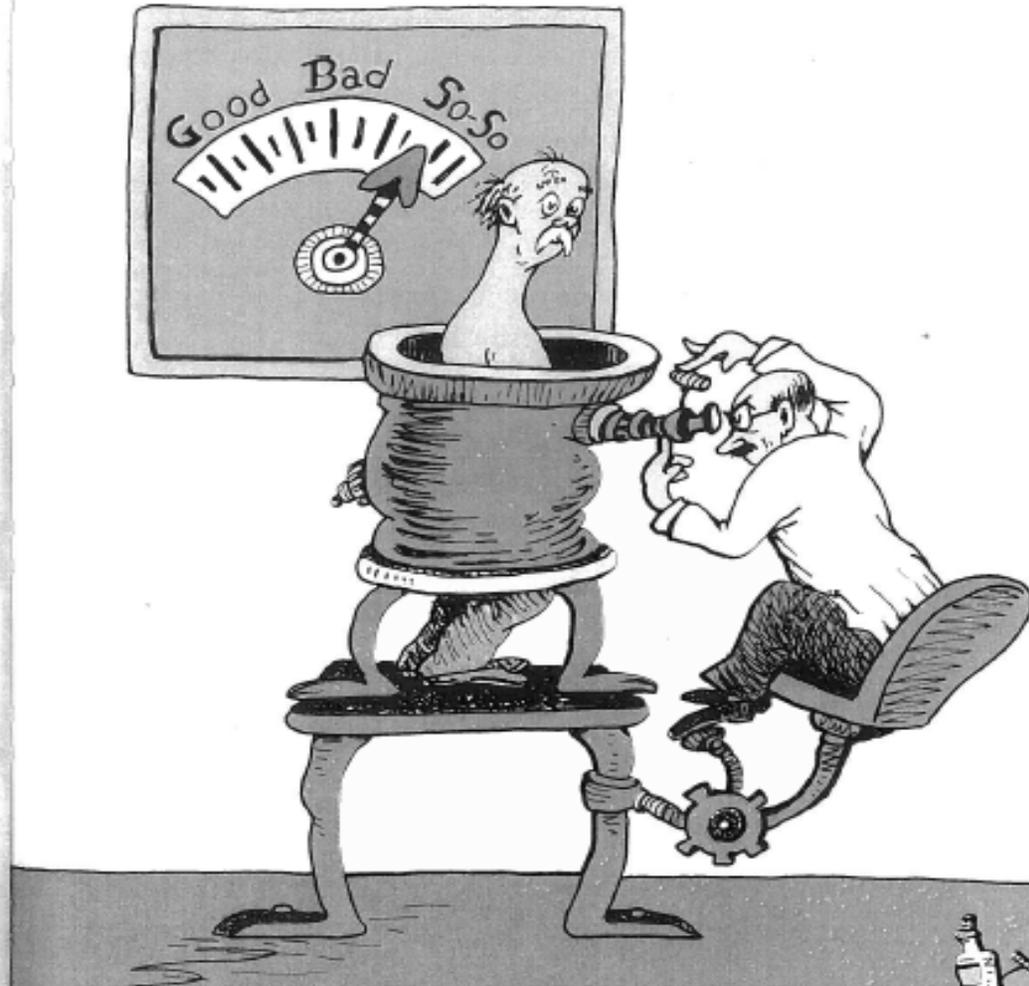


Is it a good idea for an attorney to use the Mini-Mental Status Exam (MMSE) in assessing client capacity?

- Yes
- No



No “Capaci-Meter”



Preliminary Conclusions About Client Capacity – Worksheet Part D

- ***Intact*** – Proceed with representation
- ***Mild Problems*** – Proceed, or consider medical referral; or clinical capacity assessment referral
- ***More Than Mild Problems*** – Medical referral, or clinical capacity assessment referral
- ***Severe Problems*** – Do not proceed; consider mental health referral; consider protective action

Referrals for Further Assessment

Consultation:

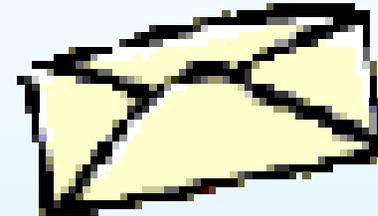
A lawyer's conversation with a clinician to discuss concerns about the client's presentation. Usually client is not identified and consultation does not require client consent.

Referral:

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

Checklist for Your Clinician Referral Letter

- Client background
- Reason client contacted lawyer
- Purpose of referral
- Relevant legal standard
- Medical & functional information known
- Living situation
- Environmental & social factors
- Client's values and preferences if known



Who is an Appropriate Clinician?

- 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
- Multidisciplinary Geriatric Assessment Team



Clinical versus Legal Capacity Determinations

The lawyer (or the court if it is an issue before the court, like guardianship) makes the final determination of legal capacity, not the clinician.

Alas, there is no capacimeter!



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** . . .

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.”

What is “Protective Action”?

- “Consulting with individuals or entities that have the ability to take protective action”
- “In appropriate cases, seeking the appointment of a guardian ad litem...”
- “. . . Conservator or guardian.”
- MRPC 1.14(b)
- Other actions listed in Commentary to MRPC 1.14 – use reconsideration period, use voluntary surrogate decision-making tools, consulting with support groups or professional services, APS.

Limits on “Protective Action”

- Reveal information only to extent necessary to protect
- Guided by client’s wishes and values to extent known; best interests
- Intrude to least extent feasible
- Maximize capacities
- Respect client’s family and social connections

Conclusion: Best Practices for Law Offices

- All staff trained on dementia recognition & diminished capacity
- All staff trained in basic communication techniques, aging process, disability concerns, & avoiding stereotypes
- Do walk-through/wheel through/ checklist to ensure elder/disability friendly office
- Interview client alone (unless client asks for support person); stress confidentiality

Conclusion: Best Practices for Law Offices con't

- Develop ongoing relationship with capacity assessment specialists
- Be familiar with legal tests of capacity for common legal transactions
- Understand MRCP 1.14 and commentary
- Review Lawyer Capacity Assessment Handbook and worksheet; use as framework

Next Steps

- Attend upcoming webinars in series on Legal Resources and Dementia:
 - December 4 – Advance planning
 - December 12 – Spotting legal issues; finding legal resources (*for Aging Network Professionals*)
 - TBD – Elder abuse, neglect and exploitation of individuals with dementia
- Identify local dementia resources:
 - Alzheimer’s organization
 - Clinician / Diagnostic clinic
 - Area Agency on Aging
- Offer expertise in Alzheimer policy efforts:
 - National Alzheimer Plan / State Alzheimer Plan



Online Resources

- Assessment of Older Adults with Diminished Capacity: Handbook for Lawyers
 - <http://www.apa.org/pi/aging/resources/guides/diminished-capacity.pdf>
- Caregiver Information
 - <http://alzheimers.gov>
- AoA Dementia Webinar Series
 - http://www.aoa.gov/AoARoot/AoA_Programs/HPW/Alz_Grants/index.aspx

Questions??

- To ask a question, use your phone pad and follow the operator's prompt

Thank you

- Thank you for joining us today
- Please register for the next 2 webinars for legal professionals in our series:
 - Registration to open soon
 - Dec. 4: Advance financial and health care planning with clients with Alzheimer's
 - TBD (Jan 2013): Elder abuse, neglect and exploitation and clients with Alzheimer's



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