ASSESSMENT
of Older Adults
WITH DIMINISHED CAPACITY:
A Handbook for Lawyers

American Bar Association Commission on Law and Aging

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About the American Bar Association Commission on Law and Aging

The mission of the American Bar Association (ABA) Commission on Law and Aging is to strengthen and secure the legal rights, dignity, autonomy, quality of life, and quality of care of elders. It carries out this mission through research, policy development, technical assistance, advocacy, education, and training.

The ABA Commission consists of a 15-member interdisciplinary body of experts in aging and law, including lawyers, judges, health and social services professionals, academics, and advocates. With its professional staff, the ABA Commission examines a wide range of law-related issues, including: legal services to older persons; health and long-term care; housing needs; professional ethical issues; Social Security, Medicare, Medicaid, and other public benefit programs; planning for incapacity; guardianship; elder abuse; health care decision-making; pain management and end-of-life care; dispute resolution; and court-related needs of older persons with disabilities.

About the American Psychological Association

The American Psychological Association (APA) is the largest scientific and professional organization representing psychology in the United States and is the world's largest association of psychologists. Through its divisions in 53 subfields of psychology and affiliations with 59 state, territorial, and Canadian provincial associations, APA works to advance psychology as a science, as a profession, and as a means of promoting health, education, and human welfare. The APA Office on Aging coordinates the association's activities pertaining to aging and geropsychology (the field within psychology devoted to older adult issues). The Committee on Aging (CONA) is the committee within the APA governance structure dedicated to aging issues. Its six expert geropsychologists are selected for three-year terms. Together, the Office on Aging, CONA, and association members promote the health and wellbeing of older adults and their families through expanded scientific understanding of adult development and aging and the delivery of appropriate psychological services to older adults.

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Assessment of Older Adults with Diminished Capacity: A Handbook for Lawyers represents the first work product of the ABA/APA Assessment of Capacity in Older Adults Project Working Group, established in 2003 under the auspices of the Task Force on Facilitating APA/ABA Relations.

In June 2003, a two-day meeting, *Legal and Psychological Perspectives on Assessment of Capacity in Older Adults: An ABA-APA Dialogue*, brought together a group of attorneys, psychologists, and a probate judge to discuss professional needs. Among the issues identified was a need for a handbook for attorneys on working with older adults with diminished capacity with a focus on attorney assessment. Subsequent to the meeting, the ABA/APA Assessment of Capacity in Older Adults Project Working Group was formed. The group met again in December 2003. At that meeting an outline for the handbook was developed and chapter authors were identified.

Members of the ABA/APA Working Group are: Nancy Coleman, M.S.W, M.A.; Deborah DiGilio, M.P.H.; Barry Edelstein, Ph.D.; Gregory Hinrichsen, Ph.D.; Daniel Marson, J.D., Ph.D.; Jennifer Moye, Ph.D.; Leonard Poon, Ph.D.; David Powers, Ph.D.; Charles Sabatino, J.D.; and Erica Wood, J.D. Daniel Marson and Jennifer Moye contributed case examples. Jennifer Moye was the editor of this handbook.

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Executive Summary

With the coming demographic avalanche of Boomers reaching their 60s and the over-80 population swelling, lawyers face a growing challenge: older clients with problems in decision-making capacity. While most older adults will not have impaired capacity, some will. Clear and relatively obvious dementias will impair capacity, and the prevalence of such dementias increases with age. But what about older adults with an early stage of dementia or with mild central nervous system damage? Such clients may have subtle decisional problems and questionable judgments troubling to a lawyer. This handbook offers a conceptual framework and practice tips for addressing problems of client capacity, in some cases with help from a clinician.

Some might argue that without training in mental disorders of aging and methods of formal capacity evaluation, lawyers should not be making determinations about capacity. Yet lawyers necessarily are faced with an assessment or at least a screening of capacity in a rising number of cases involving specific legal transactions and, in some instances, guardianship. Even the belief that "something about a client has changed" or a decision to refer a client for a formal professional capacity evaluation represents a preliminary assessment of capacity.

The 2002 revision of the ABA's Model Rules of Professional Conduct, Rule 1.14, concerning the client with diminished capacity, recognizes the bind in which this places the attorney, and provides some guidance. 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. However, the critical question is: how does the lawyer reach a reasonable belief that the client has diminished capacity? This handbook seeks to respond.

The handbook represents a unique collaboration of lawyers and psychologists. While it is a joint project of the ABA Commission on Law and Aging and the APA, its applicability is broad. It can be of use to elder law attorneys, trusts and estates lawyers, family lawyers, and general practitioners. It introduces lawyers to a wide spectrum of mental health professionals, including, but extending beyond, licensed psychologists. Interdisciplinary partnerships between lawyers and clinicians promise more informed approaches for helping older clients meet their legal needs.

The handbook is not a practice standard meant to outline compulsory actions. Instead, it offers ideas for effective practices and makes suggestions for attorneys who wish to balance the competing goals of autonomy and protection as they confront the challenges of working with older adults with diminished capacity. The handbook includes helpful discussion of the following 16 key questions.

1. What are legal standards of diminished capacity? (Ch. II, pp. 5 – 8). In everyday legal practice, lawyers need to be familiar with 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.

2. What are clinical models of capacity? (Ch. III, pp. 9 – 12). While psychologists and other health professionals may use different terms than lawyers, conceptually the clinical model of capacity has striking similarities to the legal model.

3. What signs of diminished capacity should a lawyer be observing? (Ch. IV, pp. 13 – 16). There is no single marker of diminished capacity, but there are "red flags" that may indicate problems. Attorneys should be alert to cognitive, emotional, or behavioral signs such as memory loss, communication problems, lack of mental flexibility, calculation problems, disorientation and more, as described.

Capacity Worksheet for Lawyers (pp. 23 - 26)

This capacity worksheet helps you identify and organize:

- **Observational signs of diminished capacity.**
- **Mitigating factors affecting capacity.**
- **Transaction-specific elements of legal capacity.**
- **Task-specific factors in evaluating capacity.**
- **Preliminary conclusions about client capacity.**

4. What mitigating factors should a lawyer take into account? (Ch. IV, pp. 16 – 17). Factors such as stress, grief, depression, reversible medical conditions, hearing or vision loss, or educational, socio-economic, or cultural background can influence a determination or can call for alternative action–such as a referral to a physician or an adjusted approach to communication.

5. What legal elements should a lawyer consider? (Ch. IV, pp. 17 - 18). A lawyer can compare the client's understanding with each of the elements of capacity set out in statute or case law for the specific transaction or situation at hand. For instance, state law may require that for making gifts, a person must have an understanding of the property dispositions made and the persons and objects of his or her bounty.

6. What factors from ethical rules should a lawyer consider? (Ch. IV, pp. 18 – 19). A lawyer must take into account key questions specific to the task at hand (many of which are set out in the Comment to Rule 1.14) concerning the nature of the decision (consistency with long-term values, fairness, irreversibility) and the functioning of the individual (ability to articulate reasoning, variability of state of mind, and appreciation of consequences). The more serious the concerns about the decision and the risk involved, the higher the functioning needed.

7. How might a lawyer categorize judgments about client capacity? (Ch. IV, pp. 19 - 20). There is no simple score that will help the lawyer easily to come to a conclusion about client capacity. Rather, it is a professional judgment integrating all of the factors above. It might be helpful to categorize the results in the schema on page vii.

8. Should a lawyer use formal clinical assessment instruments? (Ch. IV, pp. 21 - 22). It is generally *not appropriate for lawyers to use formal clinical assessment instruments* such as the Mini-Mental Status Examination (MMSE), as they are not trained in using and interpreting these tests, the information yielded is limited, and the results may be misleading.

9. What techniques can lawyers use to enhance client capacity? (Ch. V, pp. 27 – 30). Lawyers can use practical approaches to accommodate sensory and cognitive changes that become more prevalent with age, and to build trust and confidence. Lawyers must be sensitive to age-related changes without losing sight of the individuality of each older client, and must not assume impairments in older clients but be prepared to address these issues when they arise. It is a fine line to walk. The handbook lists many tips to engender trust and bolster decision-making ability, and to accommodate hearing, vision, and cognitive loss. It also describes an approach to strengthen client engagement in the decision-making process.

10. What are the pros and cons of seeking an opinion of a clinician? (Ch. VI, pp. 31 - 32). If there are "more than mild problems" a lawyer may find it helpful to seek the independent judgment of a physician or other clinician. Moreover, in cases of ongoing or anticipated family or other conflict a lawyer may seek a formal assessment to preempt future litigation such as a will contest. A referral to a clinician requires client consent, and can be quite traumatic for the client, as well as unsettling for the lawyer-client relationship. Also, it is expensive. However, a formal assessment generally is very valuable in clarifying specific areas of diminished capacity, eliciting advice on strategies to enhance capacity, identifying the need for protective action, justifying concerns to family members, and providing evidence in subsequent depositions or court hearings. The handbook offers ideas for ways to suggest an assessment to clients.

11. What if the client's ability to consent to a referral is unclear? (Ch. VI, pp. 34 – 36). The lawyer could wait until the client is stabilized or has a lucid interval to seek consent–or at least "assent." Under one possible interpretation of the Model Rules, the

- **Intact. No or very minimal evidence of diminished capacity.**
- **Mild problems. Some evidence of diminished capacity, but insufficient to preclude representation or proposed transaction.**
- **More than mild problems. Substantial evidence of diminished capacity. Warrants consultation with or referral to mental health professional.**
- **Severe problems. Client lacks capacity to proceed with the transaction and the representation.**

lawyer might make a very limited disclosure of otherwise confidential information to seek assistance from a clinician, since this is a "protective action." The lawyer needs to use good judgment and limit information revealed to what is absolutely necessary. The lawyer should seek a clinical consultation without identifying the client whenever possible.

12. What are the benefits for the lawyer of a private consultation with a clinician? (Ch. VI, p. 31). Sometimes a lawyer may seek a consultation with a clinician to discuss and clarify capacity issues before proceeding with representation or with a formal mental health assessment. This approach is private, and does not involve the client or require client consent, as the client is not identified. The consultation is simply professional advice to the lawyer, paid for by the lawyer. It often can save considerable time, money, and angst.

13. How can a lawyer identify an appropriate clinician to make a capacity assessment? (Ch. VI, pp. 32 - 33). The most important question in identifying an appropriate clinician is *how much experience the professional has with the assessment of capacity of older adults.* Types of professionals most likely to have such a background include: physicians, geriatricians, geriatric psychiatrists, forensic psychologists and psychiatrists, gero- and neuropsychologists, neurologists, and geriatric assessment teams. Lawyers with a large geriatric clientele may already have–or should develop–such contacts. Lawyers can investigate mental health resources through the local Area Agency on Aging, through local affiliates of the American Psychiatric Association and American Psychological Association, or through state or local medical societies or university medical centers.

14. What information should a lawyer provide to a clinician in making a referral? (Ch. VI, pp. 33 - 36). The care with which the lawyer crafts the referral request will bear directly on the usefulness of the results. A referral letter should clearly set out: client background; reason client contacted the lawyer; whether a new or old client; the purpose of the referral (the legal task to be performed); the relevant legal standard for capacity to perform the task at hand; any known medical and functional information about the client; the living situation and any environmental/social factors that may affect capacity; and client values and preferences. The lawyer should request that the *evaluator contact him/her by telephone before proceeding with any written report*, to determine whether such a report would be useful. A written report might not be advisable if litigation is possible and the assessment provides potential adverse evidence.

15. What information should the lawyer look for in an assessment report? (Ch. VII, pp. 37 - 39). While capacity reports differ among clinicians, common elements include: demographic information; legal background and referral questions; history of present illness and any psychosocial history; a statement of informed consent to the evaluation; behavioral observations; tests administered and extent to which the test results are considered valid; a summary of test results with scores and performance ranges; a diagnosis or opinion on the question of capacity for the legal task(s) at hand; and any recommendations for clinical actions to treat symptoms.

16. How does a clinical capacity evaluation relate to the lawyer's judgment of capacity? (Ch. VII, pp. 39 - 41). The ultimate question of capacity is a legal–and in some cases a judicial–determination, not a clinical finding. A clinical assessment stands as strong evidence to which the lawyer must apply judgment taking into account all of the factors in the case at hand.