

Client Capacity Judgments and Legal Practice

by Virginia George

ALTHOUGH ATTORNEYS SELDOM RECEIVE FORMAL TRAINING IN CLIENT CAPACITY ASSESSMENT, they make capacity judgments on a regular basis. In the context of litigation, capacity may be the sole issue in controversy, such as in a conservatorship case or a challenge to a will, trust or donative transfer based upon an allegation of legal incapacity. Additionally, in the growing area of elder law, attorneys are frequently in need of assessing a client's capacity, not just for representation purposes, but to determine causes of action, case viability and trial strategies.

An informal assessment of capacity must begin with the assumption that the client has the capacity to make decisions and engage in legal acts or transactions regardless of the client's age, the decision proposed, or previously diagnosed medical conditions. This assessment should blend in with the initial consultation. It should not be announced to the client, as such notice may cause the client to become uncomfortable and may impact the client's behavior during the meeting. During and immediately after consultation, the attorney should document any signs of incapacity. These notes may be used to analyze specific signs under the appropriate capacity standard, establish a baseline of signs for comparison in future assessments, and to defend against possible future challenges that the client did or did not have the requisite capacity to engage in the decision, act, or transaction. If possible, a team of two persons should perform the informal assessment for both note-taking accuracy and providing better opportunities to observe subtle signs of incapacity.

In non-adversarial situations, such as estate planning or the handling of specific transactions, issues of capacity are confronted more informally in the daily practice setting. In this arena, attorneys by necessity make determinations of a client's capacity by assessing at least two points:

First, the lawyer must determine whether a prospective client has sufficient legal capacity to enter into a contract for the lawyer's services. Failing this, representation cannot proceed. California Civil Code §38 holds that "A person entirely without understanding has no power to make a contract of any kind..." The phrase "entirely without understanding" means a want of capacity to understand or comprehend contractual transactions of the type involved.

Second, the lawyer must evaluate the client's legal capacity to carry out the specific legal transactions desired as part of the representation — such as making a will, buying real estate, executing a trust, and bestowing a gift.

Depending upon one's practice, the presence of adequate capacity for the typical adult client is usually fairly obvious. However, with the growing number of Americans entering their 60s and beyond, capacity evaluations will be on the rise in the coming years.

THE INCREASING PREVALENCE OF CAPACITY QUESTIONS

Due to the aging demographic bubble, the increase of longevity due to a number of factors and the greater incidence of dementia that accompanies the aging process, the incidence of cases in which

capacity is an issue will substantially increase in the future. The term "dementia" implies no specific cause, nor does it represent an inevitable part of normal aging. However, the prevalence of dementia is estimated to double every five years in the elderly; growing from a disorder that affects 1 percent of persons age 60 and older, to a condition afflicting approximately 30 to 45 percent of persons age 85 years and older. Alzheimer's disease is the most common affliction affecting the brain, accounting for 60 to 70 percent of dementia cases. While new drug therapies are emerging to slow the progress of Alzheimer's, the disease continues to remain incurable and irreversible.

AMERICAN BAR ASSOCIATION'S MODEL RULES OF PROFESSIONAL CONDUCT

The ABA's Model Rules of Professional Conduct (MRPC), as revised in 2002, acknowledge a lawyer's assessment functions, and even suggest a duty to make informal capacity judgments in certain cases. For the first time, the revised rule attempts to give some guidance to lawyers faced with this particular task. *MRPC 1.14: Clients with Diminished Capacity*, recognizes: first, the goal of maintaining a normal attorney-client relationship; second, the discretion to take protective action in the face of diminished capacity; third, the discretion to reveal confidential information to the extent necessary to protect the client's interests.

LAWYER ASSESSMENT OF CAPACITY

While California has not yet adopted any rule or guideline clarifying how an attorney can make an informal capacity assessment,

California courts and ethics committees have turned in the past to the ABA Model Code on questions about which of the California rules are “silent or obscure.” As such, attorneys may take into account the factors set forth below when assessing the capacity of a client:

- *Ability to articulate reasoning behind the decision*
- *Variability of state of mind*
- *Ability to appreciate consequences of the decision*
- *Irreversibility of the decision*
- *Substantive fairness of the decision*
- *Consistency with lifetime commitments*

These factors appear in the “Comment” section to Rule 1.14 as a general guide. They derive from recommendations of a 1993 National Conference on Ethical Issues in Representing Older Clients, and in particular, from an article on representing clients with questionable capacity prepared for the conference by Professor Peter S. Margulies.

Additionally, a collaborative effort between the American Bar Association and the American Psychological Association culminated in the publication of a highly informative guide entitled “*Assessment of Older Adults with Diminished Capacity: A Handbook for Lawyers.*” The handbook offers ideas for effective and ethical practices for attorneys who are in need of balancing the sometimes-competing interests between goals of client autonomy and legal protection, particularly when confronting the challenging work with older adults with diminished capacity.

OBSERVING SIGNS OF POSSIBLE DIMINISHED CAPACITY

There is no single indicator that provides a consistent, clear signal that an older adult is functioning with diminished capacity. However, there are markers that, when considered together, may reflect diminished capacity. While any signs should not be taken in and of them- ▶



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selves to be proof of a lack of capacity, they may indicate a need for further evaluation of capacity by an independent professional if the signs are present in sufficient number and/or severity.

In noting potential signs of incapacity, it is critical to keep in mind that the focus is on decisional abilities rather than on client cooperativeness or affability. It may, at times, be challenging to disentangle one's reactions to a client's interpersonal style from observations of the client's cognitive, emotional and/or behavioral problems.

Additionally, it is useful to be sensitive to societal stereotypes about aging (commonly termed "ageism"). Aging stereotypes may be positive, idealizing old age; or negative, including the assumption that aging and diminished capacity are synonymous. While such beliefs could influence an accurate appraisal of capacity, awareness of the possible signs of incapacity will hopefully help the lawyer to be more objective.

During the interview, the attorney should be aware of specific cognitive, emotional or behavioral anomalies that serve as potential "red flags" (which may indicate possible neurological or psychiatric illnesses) that could diminish a client's capacity. These signs and their severity should be documented during and immediately after a client interview. The following overview, with illustrative examples, will assist in observing possible signs of diminished capacity:

POSSIBLE COGNITIVE SIGNS OF INCAPACITY

- *Short-term memory loss: Client forgets information discussed in the interview, repeating the same statements or asking the same question multiple times with no indication that s/he has done so more than once.*
- *Communication problems: Client is asked a direct question and has trouble staying on topic, frequently shifting to discussion of unrelated issues, or moving erratically or nonsensically between topics.*
- *Comprehension problems: Client has difficulty in repeating back or paraphrasing simple concepts.*

- *Lack of mental flexibility: Distinguished from being stubborn, a client may lack the capacity to understand or even acknowledge multiple alternatives or viewpoints other than his/her own, or have difficulty comprehending and adjusting to changes.*

- *Calculation problems: Client has very basic difficulties with simple math problems that are far worse than expected given his/her level of education. For example, someone with a college degree who lines up columns of numbers incorrectly while adding or subtracting.*

- *Disorientation: Client can become disoriented relative to space, time or location. For example a long-time client may have difficulty navigating through the attorney's office building spatially or get lost driving to the office even if s/he has been there several times over many years. Or, the client may make reference to events from several years ago as if the events were current.*

POSSIBLE EMOTIONAL SIGNS OF INCAPACITY

- *Significant emotional distress: Client may appear anxious, tearful, or seem depressed and appear to have no energy and respond very slowly to questions.*

- *Emotional lability/inappropriateness: Client may show an extremely wide range of emotions during an interview (such as moving quickly from laughter to tears). Alternatively, client may express feelings that appear highly inconsistent with what s/he is discussing (such as laughter when discussing death of a spouse or tears of distress while professing to be happy).*

POSSIBLE BEHAVIORAL SIGNS OF INCAPACITY

- *Delusions: Client holds beliefs that are unlikely to be true; such as a belief that s/he is being spied on by neighbors or the government. This may also manifest more generally in expressions of feeling frightened or unsafe. However, apparent delusions that seem more reality-based may warrant further exploration; such as concerns about relatives or nursing home facility staff stealing money or possessions from the client, which may be more reality-based.*

- *Hallucinations: Client can have auditory or visual experiences, such as hearing voices that no one else can hear. An example is an older adult who seems to be having a conversation with*

another person who is not there. May also involve other senses such as smell, touch or taste.

- *Poor grooming/hygiene: Along with irregular bathing or shaving, for example, a relatively common behavior among older adults with dementia is to wear multiple layers of clothing, such as several shirts or pairs of pants.*

MITIGATING FACTORS

In addition to noting potential signs of incapacity, attorneys should be aware of a number of mitigating factors that may influence observed signs. If found, these factors may indicate a need for alternative action: such as referral to a physician, adjusting the approach to communication, or waiting until another time when the client is functioning better. Those factors include:

- *Stress, grief, depression or recent stressful events*
- *Reversible medical factors*
- *Normal fluctuations in mental ability in older adults*
- *Hearing and/or vision loss*
- *Individual differences and variability considerations such as socio-economic background or cultural and ethnic traditions*

CONCLUSION

In the coming years, the senior population will increase exponentially. Attorneys will need to be versed in evaluating their clients' capacities both initially and potentially throughout the course of their representation. Awareness of how to generally assess capacity and the need to do so will result in improved representation as well as increased sensitivity to this important and respected segment of our population. ♦

—Virginia M. George, supervising attorney and director of the John F. Kennedy University Elder Law Clinic, is also a board member of the Contra Costa County Bar Association.



MCLE SELF-STUDY

1. In litigation, the issue of client capacity may be the sole matter in controversy. **T or F**
2. The concept of “ageism” refers only to negative stereotypes about aging. **T or F**
3. The assessment of capacity must begin with the assumption that the client has the capacity to make decisions and engage in legal acts, regardless of the client’s age. **T or F**
4. The attorney should document any signs of potential client incapacity both during and immediately after the client interview. **T or F**
5. It is advisable for a team of two persons, including the attorney, to do the initial client capacity assessment. **T or F**
6. California Civil Code §38 holds that “A person entirely without understanding has no power to make a contract of any kind...” **T or F**
7. The prevalence of dementia in the elderly population appears to be on the decline. **T or F**
8. In 2002, the ABA’s Model Rules of Professional Conduct were revised to acknowledge a lawyer’s assessment functions and suggested a duty to make informal capacity judgements in certain cases. **T or F**
9. According to the ABA Model Code, one factor attorneys may consider when assessing the capacity of a client is the client’s ability to appreciate the consequences of his or her decision. **T or F**
10. A recent collaboration between the American Bar Association and the American Psychological Association resulted in the publication of a guide

entitled “*Assessment of Older Adults with Diminished Capacity: A Handbook for Lawyers.*” **T or F**

11. Only one indicator exists that provides a clear signal that an older adult is functioning with diminished capacity. **T or F**
12. When assessing a client’s capacity, attorneys must take care to focus on decisional abilities rather than on client cooperativeness or affability. **T or F**
13. Possible cognitive signs of incapacity include short-term memory loss and disorientation. **T or F**
14. A client who appears anxious or tearful may be exhibiting signs of significant emotional distress. **T or F**
15. Possible behavioral signs of incapacity could include poor grooming or hygiene. **T or F**
16. Delusions that are more reality-based warrant further exploration, such as the client’s concerns about relatives stealing his/her money or possessions. **T or F**
17. If mitigating factors are present during the interview, one alternative would be to postpone the interview until the client is functioning better. **T or F**
18. Stress and grief play no role in assessing a client’s capacity or lack thereof. **T or F**
19. If the signs of potential client incapacity are present in sufficient number and/or severity, they may indicate a need for further evaluation of capacity by an independent professional. **T or F**
20. Depending upon an attorney’s contact and nature of representation of a client, capacity assessment may be an ongoing concern as the client ages. **T or F**

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