

The Capacity Conundrum

Understanding dementia and other cognitive disorders impact on legal capacity

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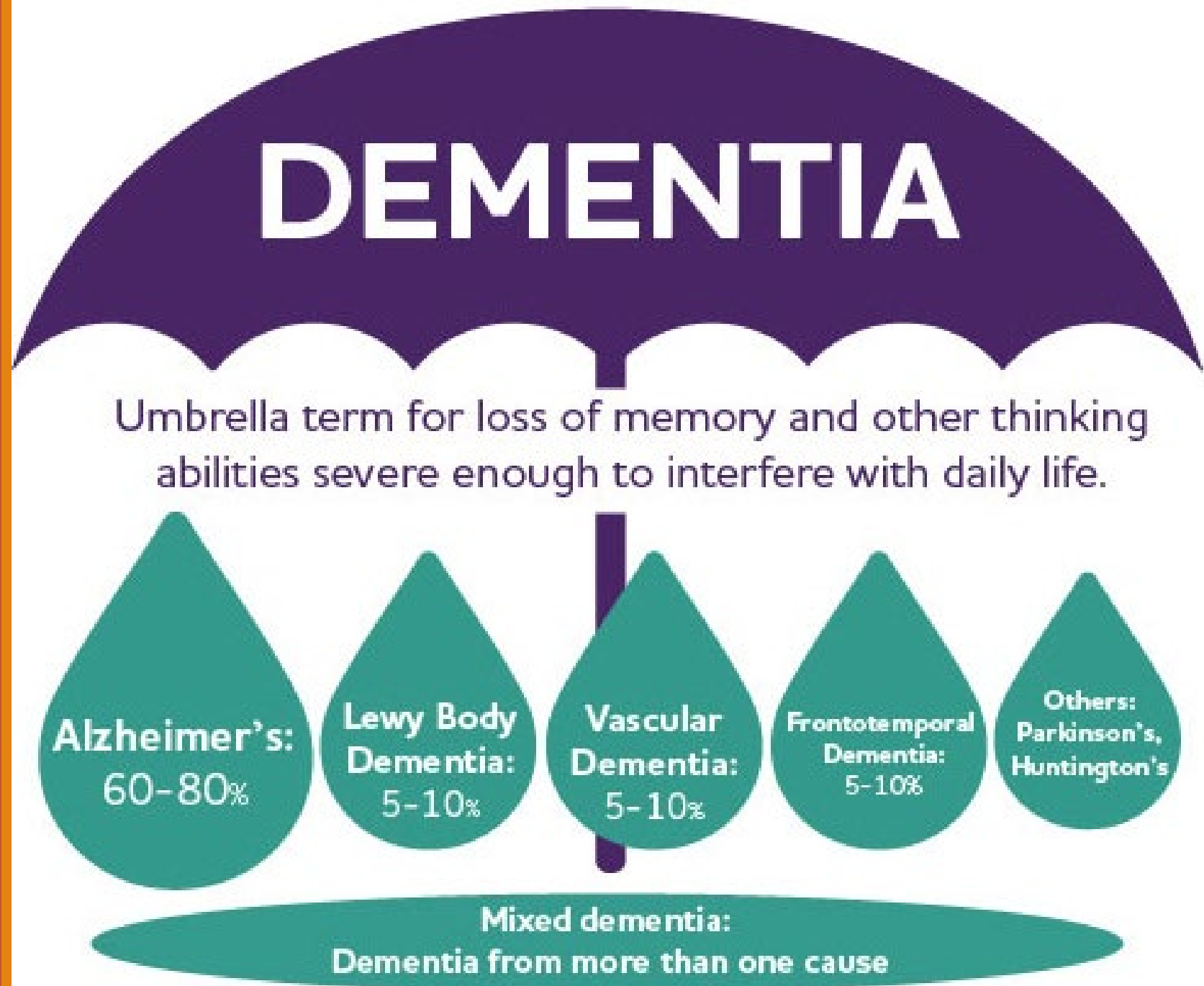
Disclosures

- Owner and Executive Director – Mt. Diablo Memory Center

Objectives

1. Medical diagnosis of dementia
2. Understanding disease severity and its impact on capacity
3. Identifying and supporting clients with diminished capacity
4. Working with Medical Experts
5. Case report

What is Dementia?



Dementia Facts

- 70+ different types of dementia causes
- Each disease has differing course and prognosis
- Alzheimer's Dementia 50-70% of all cases
- Age 65 = > 13% chance
- >2% increase per year of life
- Age 85 = >30% + chance



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Dementia Diagnosis It's Not so simple!

Dementia Diagnosis

DSM- V : Major Neurocognitive Disorder

Evidence of significant cognitive decline from a previous level of performance in one or more cognitive domains: learning and memory, language, executive functions, attention, perceptual-motor, social cognition

Cognitive deficits interfere with independence in everyday activities

Deficits do not occur exclusively in the context of delirium

Deficits are not better explained by another mental disorder

Major Neurocognitive Disorder (Formally Dementia??)

2013- DSM V published

- Dementia removed as a diagnostic term because it was deemed too “stigmatizing”
- Replaced with Major Neurocognitive D/O
- Change overly complicated decades of previously established diagnostic nosology
- Medical professionals largely continue to use ICD terminology
- Psychologist/Neuropsychologist are mixed

Dementia Diagnosis

ICD-10 : World Health Organization

Dementia (F00-F03) is a syndrome due to disease of the brain, usually of a chronic or progressive nature, in which there is disturbance of multiple higher cortical functions, including memory, thinking, orientation, comprehension, calculation, learning capacity, language, and judgement. Consciousness is not clouded. The impairments of cognitive function are commonly accompanied, and occasionally preceded, by deterioration in emotional control, social behaviour, or motivation. This syndrome occurs in Alzheimer disease, in cerebrovascular disease, and in other conditions primarily or secondarily affecting the brain.

Dementia Diagnosis – Not so simple!

Primary Care

- Patient and family interview
- Medical Evaluation
- Labs?
- Medical Imaging?
- Cognitive Screening?
- Total visit time: 15-30 min

Suboptimal Diagnostic Sensitivity

Dementia Diagnosis – Not so simple!

Neurologist Evaluation

- Patient and family interview
- Medical and neurological evaluation
- Comprehensive laboratory panel (probable)
- Cognitive screening (probable)
- Brain imaging (probable)
- Total visit time: 30-60 min

Greater Diagnostic Sensitivity

Dementia Diagnosis – Not so simple!

Neuropsychological Evaluation

- Patient and family interview
- Medical history reviewed
- Medical imaging reviewed
- Comprehensive neuropsychological evaluation
- Total visit time: 1-6 hours

Greatest Diagnostic Sensitivity (in conjunction with thorough medical evaluation)



Clinical Diagnosis of Dementia

- Possible Diagnosis
Clinical history consistent with symptoms and history
- Probable Diagnosis
Additional objective clinical evidence (e.g. neuropsychological testing, brain scan, lab data)
- Definitive Diagnosis
Biopsy or autopsy

Cognitive Screening

MONTREAL COGNITIVE ASSESSMENT (MOCA)
(EVALUACIÓN COGNITIVA MONTREAL)

NOMBRE: _____
Nivel de estudios: _____
Sexo: _____

Fecha de nacimiento: _____
FECHA: _____

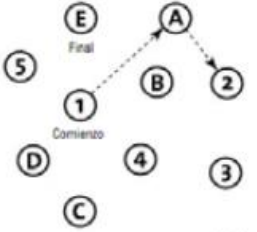
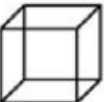
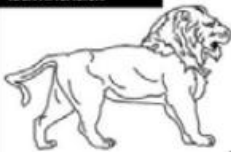
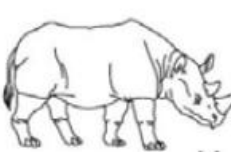
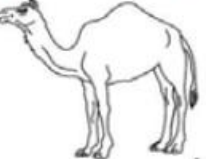
VISUOESPACIAL / EJECUTIVA   Copiar el cubo [] [] []		Dibujar un reloj (Once y diez) (3 puntos) [] [] [] Contorno [] Números [] Aguja []	Puntos
IDENTIFICACIÓN  []  []  []		Sin puntos	
MEMORIA Lea la lista de palabras, el paciente debe repetirlas. Haga dos intentos. Recuerde las 5 minutos más tarde. 1º intento: [] ROSTRO [] SEDA [] IGLESIA [] CLAVEL [] ROJO [] 2º intento: [] [] [] [] []	Sin puntos		
ATENCIÓN Lea la serie de números (1 número/seg.) El paciente debe repetirla. [] 2 1 8 5 4 El paciente debe repetirla a la inversa. [] 7 4 2	Sin puntos		
Lea la serie de letras. El paciente debe dar un golpecito con la mano cada vez que se diga la letra A. No se asignan puntos si ≥ 2 errores. [] F B A C M N A A J K L B A F A K D E A A A J A M O F A A B			
Restar de 7 en 7 empezando desde 100. [] 93 [] 86 [] 79 [] 72 [] 65 4 o 5 sustracciones correctas: 3 puntos, 2 o 3 correctas: 2 puntos, 1 correcta: 1 punto, 0 correctas: 0 puntos.			
LENGUAJE Repetir: El gato se escondió bajo el sofá cuando se fueron a dormir en la sala. [] Espere que el examinador le entregue una vez que él se lo pida []			
Fluidez del lenguaje. Decir el mayor número posible de palabras que comiencen por la letra "P" en 1 min. [] (N ≥ 11 palabras)			
ABSTRACCIÓN Similitud entre p. ej. manzana-naranja = fruta [] tren-bicicleta [] reloj-regla			
RECUERDO DIFERIDO Debe acordarse de las palabras SIN PISTAS Optativo: Pista de categoría [] Pista elección múltiple []	ROSTRO [] SEDA [] IGLESIA [] CLAVEL [] ROJO []	Puntos por recuerdo SIN PISTAS únicamente	
ORIENTACIÓN [] Día del mes (fechal) [] Mes [] Año [] Día de la semana [] Lugar [] Localidad []			
© Z. Nasreddine MD Versión 07 noviembre 2004 www.mocatest.org Normal $\geq 28 / 30$ TOTAL [] /30 Añadir 1 punto si tiene ≤ 12 años de edad			

Figura 5. Montreal Cognitive Assessment (MoCA test)

- Montreal Cognitive Assessment (MOCA)
- St. Louis University Mental Status (SLUMS)
- Mini- Mental Status Examination (MMSE)

Fecha de nacimiento:
FECHA:

TOTAL _____/30
Añadir 1 punto si tiene ≤ 12 años de estudios

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- Approx. 10 min. administration
- Score out of possible 30 points
- < 26 considered abnormal
- 0-10 Severe to Moderate
- 11- 20 Moderate to Mild
- 20-25 Mild

Person,
Woman, Man,
Camera, TV

Cognitive Screening



- 5-10 min brief cognitive tests
- NOT – Tests of mental acuity or intelligence
- Designed to be “easy”
- “Passing” ≠ “Normal”
- Insensitive, especially for mild stages of cognitive impairment
- High False negatives- especially for individuals with higher levels of education and intelligence



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Dementia and Legal Capacity

HOW DOES DISEASE SEVERITY CORRELATE WITH DIMINISHED CAPACITY

Dementia and Legal Capacity

Correlating Dementia Severity and Diminished Capacity

- A diagnosis of dementia does not render an individual incapacitated
- What about non-dementia neuropsychological conditions? (e.g. MCI)
- Neuropsychological Impairment Continuum
 - Increase in Severity = Decrease in Capacity

MOCA and Capacity



Internal Quantitative Analysis

(Observational, unpublished clinic review)

2018-2020 Medico-Legal Chart Review

Testamentary capacity referral question

Selected cases where MOCA was given



10 total cases for review

Diagnostic Findings and Capacity

Diagnosis	Frequency	+ Testamentary	- Testamentary
Dementia	6	4	2
MCI	4	3	1

Cognitive Severity Continuum

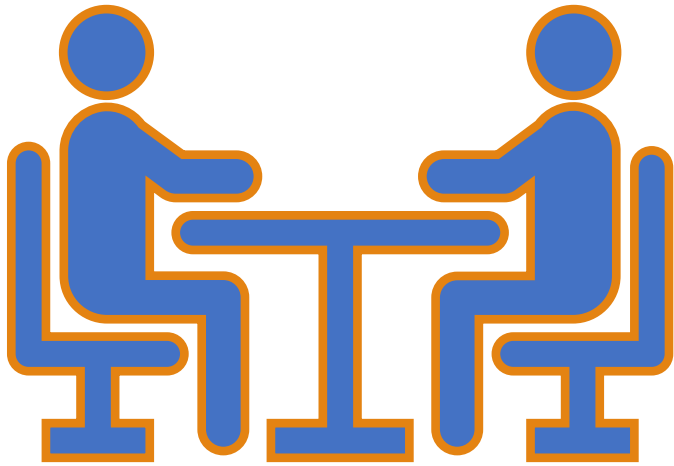
MOCA SCORE	FREQUENCY	+ TESTAMENTARY CAP	NO TESTAMENTARY CAP
0-10	2	0	1
11-15	3	1	2
16-20	4	2	2
21 +	2	2	0

MOCA and Capacity

1. MOCA 14/30, + testamentary capacity, Dementia
 - Could articulate basic testamentary concepts, beneficiaries and assets
 - Had good recall of estate plan
2. MOCA 18/30, No testamentary capacity, Dementia
 - Could articulate basic testamentary concepts
 - Confusion on family relationships
 - Minimal understanding and recall of assets
3. MOCA 20/30, No testamentary capacity, MCI
 - Understood basic testamentary concepts, beneficiaries and assets
 - No recall of recent and significant estate changes



Neuropsychologist Perspective Identifying and Supporting Clients with Diminished Functional Capacity



Client Observations

- Observe client's behavior from the very first contact
 - Advise staff to provide observational notes
 - Who scheduled the appointment?
 - Did client have any challenges with appointment instructions? (e.g. paperwork, driving directions)
- Observe client before start of appointment
 - Does staff observe any confusion?
 - Is client able to recall attorney name, reason for appointment?
 - Who is doing the talking?

“When Does the Evaluation Start?”



Face to Face

- Ask to only hear from client first
- Assess ability to provide information
 - Demographics
 - Date
 - Family information
 - Occupation
- Correlate information with family/loved one
- Can client discuss recent events (e.g. news, recent trips)
- Ask open ended questions

Enhancing Client Capacity



Support clients with diminished vision and hearing

Video conference (e.g. Zoom) is particularly challenging

Enlarge forms

Voice amplifier



Consider time of visit



Consider home visit



Is client recovering from recent illness or surgery?

Optimizing Medical Expert Partnership



Partnering With A Medical Expert

Clinical vs. Forensic Evaluation

- Clinical is medically necessary (billable to insurance)
- Forensic – answer a legal question to assist attorney or trier-of-fact
- Forensic evaluation is typically more rigorous (e.g. record review, symptom validity testing, more extensive testing)
- Clinical evaluation limited by insurance company restrictions on allowed billable time
- A clinical evaluation **may** answer questions pertaining to a patient's capacity, especially if there are concerns about safety and welfare. However, the issue of legal capacity cannot be the sole basis for the referral.

Medical Expert Referrals

- Legal capacity evaluation is not considered medically necessary
 - Cannot be billed through insurance
 - Do not attempt backdoor legal evaluation
- Define referral question
 - What is the capacity in question
 - Clarify the legal standard (Probate code, Burden of proof)
 - Helpful to have a short referral letter with a summary narrative and documentation of all requests and questions
- Helpful Records (if available)
 - Petitions and responses
 - Court Investigator Report
 - Medical Records
 - Depositions of loved ones

Medical Expert Referrals

- Helpful Records
 - Financial Capacity: General accounting of client's assets and holdings
 - Trusts and Estate Plan:
 - Prior copies of estate plan
 - Copy or summary of proposed estate plan changes
- Collateral Information
 - Interview of other family members generally not performed
 - May interview impartial friend or family member

Types of Experts

- Neuropsychologist

- Psychologist

- Ph.D. or Psy.D.
- Training and experience regarding non-medical mental health interventions, consultation and treatment
- In California, not able to prescribe medication

- Psychiatrist

- Medical doctor (MD or DO)
- Rx Prescribers
- Training and experience related to medical aspects of psychiatric disorders

What Is A Neuropsychologist?

- Licensed psychologist (Ph.D. or Psy.D.)
- Specific expertise, training and experience in the understanding of brain-related disorders and their impact on behavior (functioning)
- Title is not regulated by state licensing board

What Is A Neuropsychologist?

- Qualifications:
 - Pre-doctoral internship with emphasis/rotation in NP
 - 2-year post-doctoral fellowship in NP
 - Membership in neuropsychology-related societies and organizations
 - Demonstrated continuing education in the field
 - Board certification (ABN or ABCN) –[Not required but demonstrates more rigorous evaluation of credentials and experience]

Neuropsychological Evaluation

- Comprehensive Interview
- Review of relevant medical history and assessments
- Full battery may not be necessary for a capacity evaluation
- Battery length: 1-10 hours (varies with client capacity, age, medical status)
- Test battery objectively evaluates all cognitive functioning domains
- Legal Capacity examination will differ based on referral question
 - General questioning regarding estate planning, financial, testamentary concepts
 - Specific inquiry into specific decision or contested issue
- Specific assessment of decision making and independent living (e.g. conservatorship evaluation)
 - e.g. Home safety, financial, basic reasoning and judgement

Neuropsychological Evaluation

➤ Assessment of functional domains

1. Attention and concentration
2. Memory and learning
3. Visual-spatial (spatial judgment, visual construction)
4. Language (fluency, naming, vocabulary)
5. Intellectual
6. Sensory and motor
7. Executive function (decision making, planning, problem solving, processing of information)
8. Emotional/Psychological

When to Consider Medico-Legal Evaluation

- Suspicion of cognitive impairment that raises concerns about client's capacity
- Production of defensible work product (antemortem evaluation)
 - High family conflict
 - Significant change from previous decisions
 - High probability of future litigation
- Concerns for undue influence
- Genuine concern for client's current health or cognitive functioning
 - This may be able to be billed through insurance if it is for medical purposes
- Postmortem analysis of individuals capacity at time of making decision



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Case: “Marvel”

93 year old female, moderate dementia, assisted living

- No immediate family, moderate estate
- Local niece has served as POA for several years
- Client/niece’s attorney notified by out-of-town nephew’s attorney of intent of client to change POA
- Referred to evaluate client’s contractual capacity to designate agent/trustee

“Marvel”

- No prior visits by nephew but within the last year would visit approximately 1x/month
- Nephew had contacted niece (his sister) requesting money from her and then from Marvel's funds
- Had convinced Marvel that she was receiving poor care and convinced her to move in with him and his wife
- Attempted to remove Marvel from AL facility but was blocked by staff
- Shortly thereafter, niece received notice from attorney

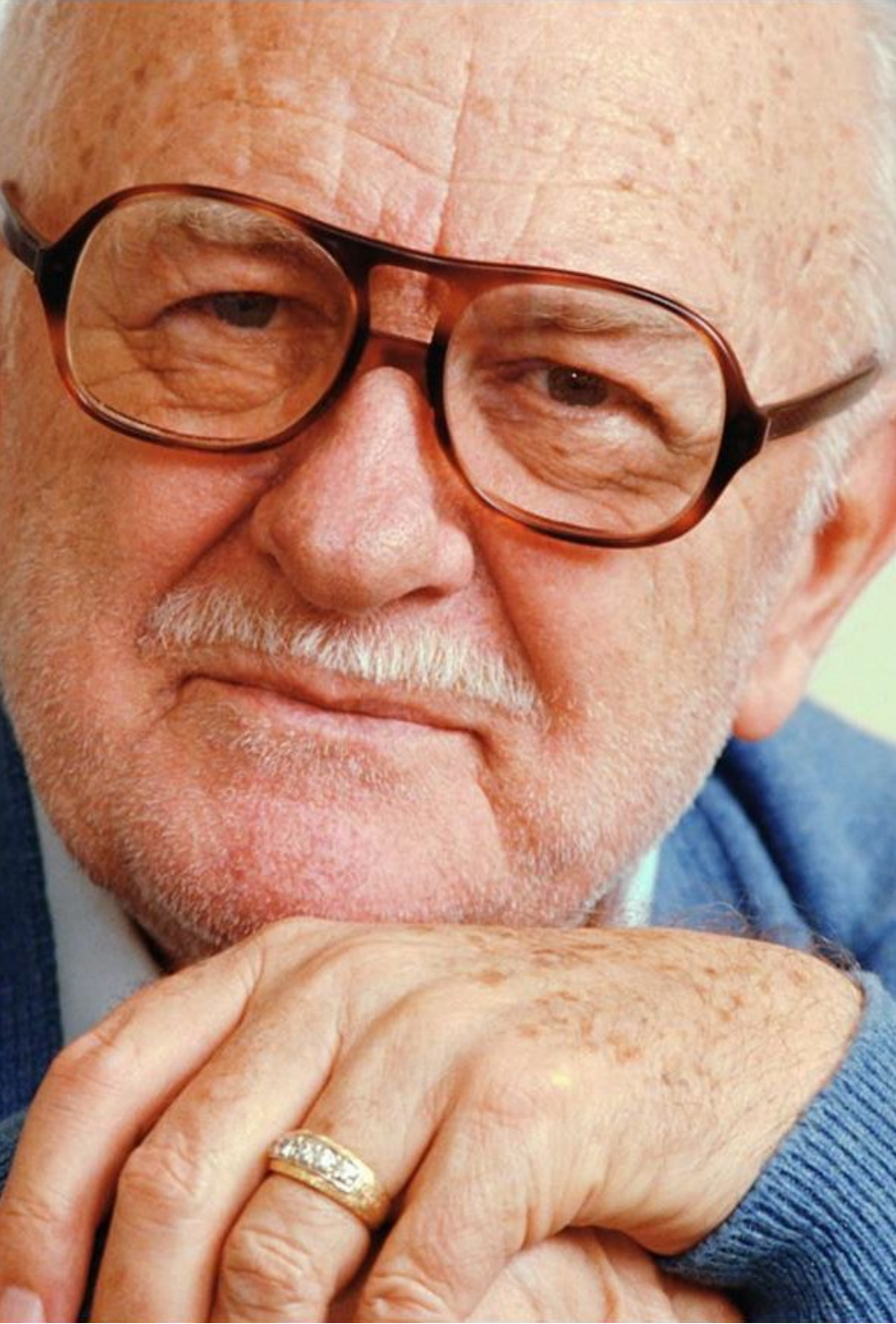
“Marvel”

Brief neuropsychological and capacity assessment

- Moderate to severe cognitive deficits
- Difficulty identifying family members
- No insight into self care needs (e.g. would wear soiled underwear)
- Could not explain purpose or consequence of a DPOA

Attorney petitioned court for conservatorship of person and estate

Judge assigned niece as conservator



Case: “Ray”

78 y.o., widower, retired financial services/planning

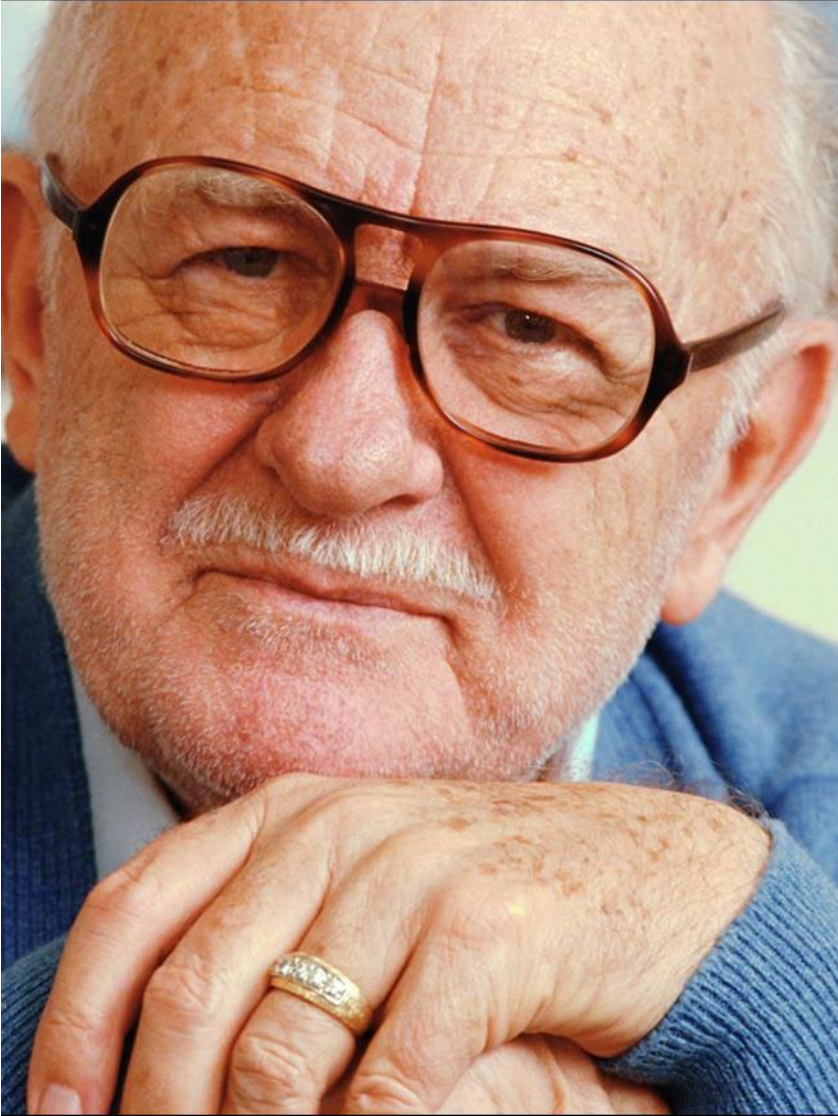
Upper middle class, living comfortable retirement but not wealthy

Continues to live alone with support from two daughters who live close

Generally healthy

- Hypertension, high cholesterol, pre-diabetic

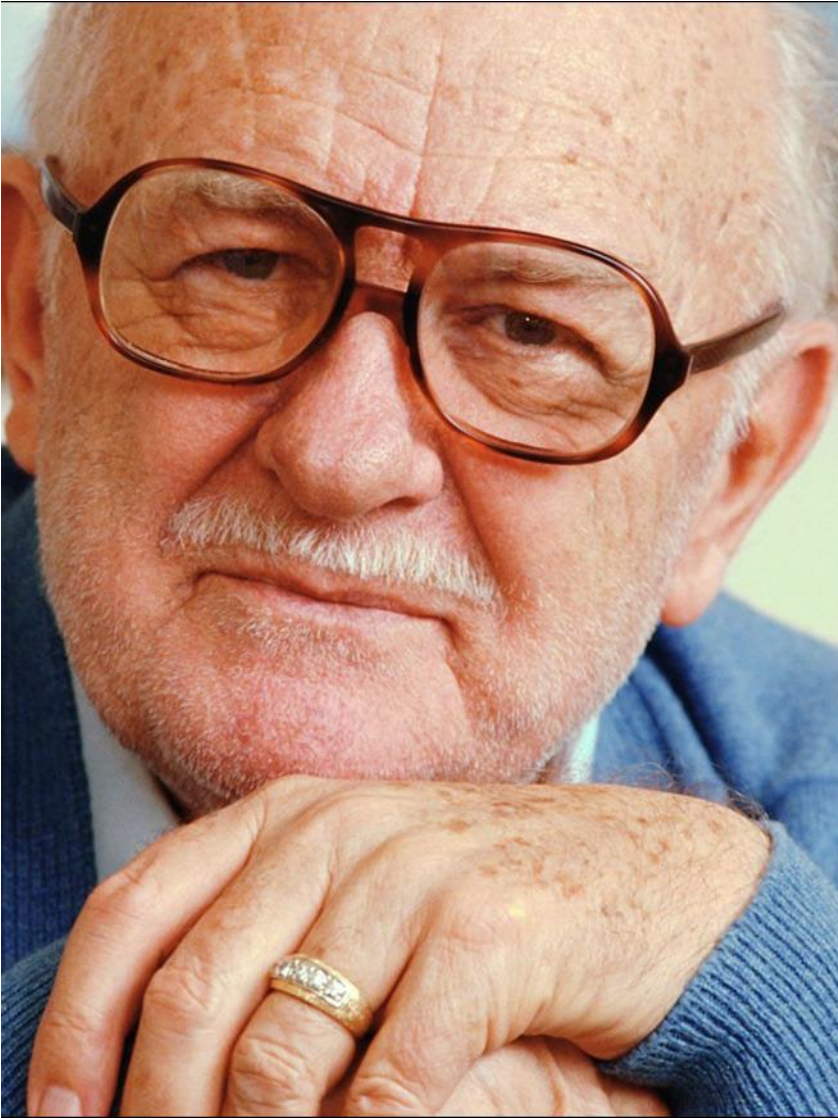
Rx – statin, anti-hypertensive, vitamins



Case: “Ray”

Risk factors

- Living alone
- Retired professional
 - Financial services
- Vascular cognitive decline
- Has financial assets



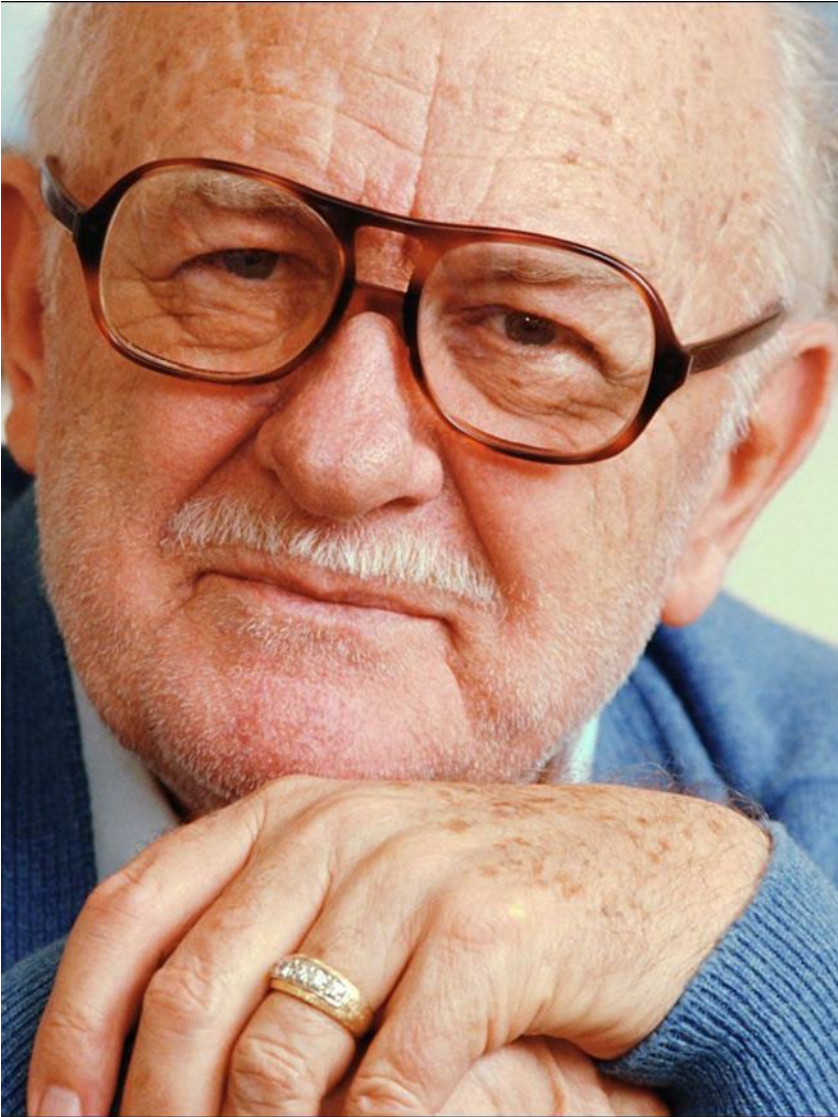
Case: “Ray”

Victimized by several financial scams

- Jamaican lottery scam
- Jailed grandchild scam
- Sweepstakes scams

Daughters only alerted once family friend witnessed confrontation at grocery store Western Union counter

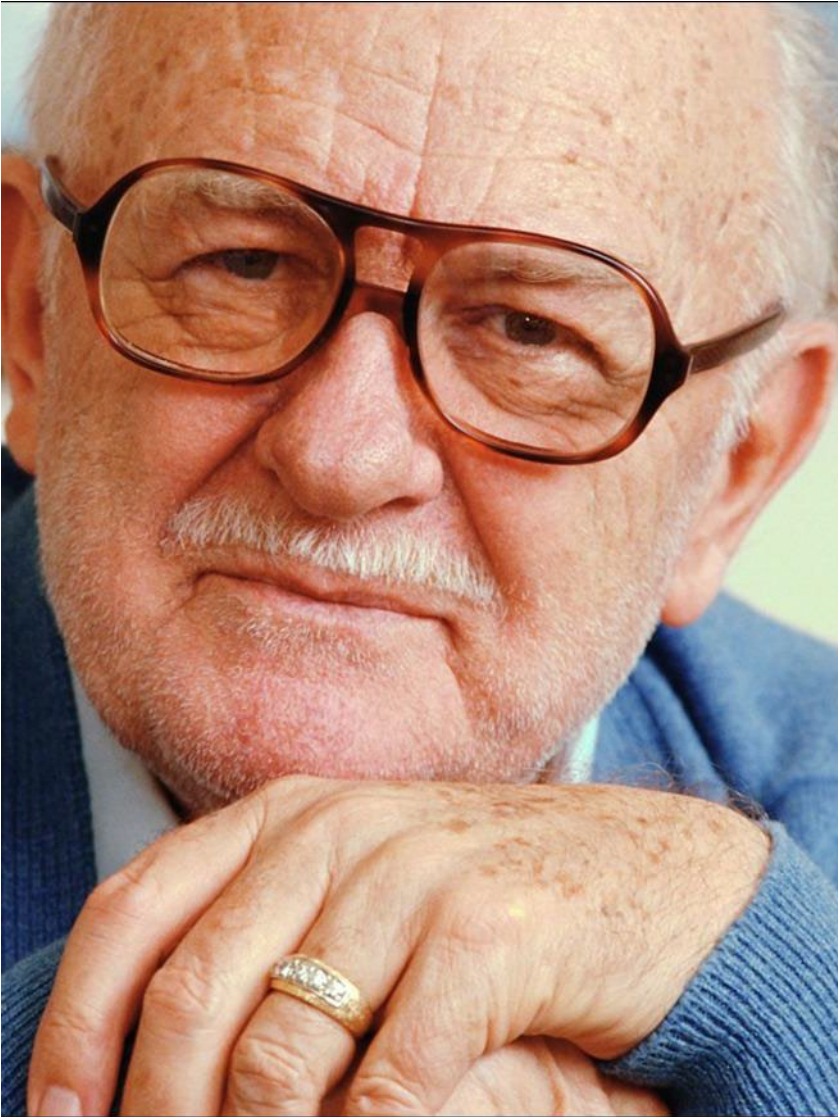
Total loss \$90k, possibly more



Case: “Ray”

Ray’s Behavior

- Daughters confronted him
 - Although not convinced he was being scammed indicated he would stop sending money
- Refused to allow daughters access to bank accounts
- Daughters not convinced and utilized “trade craft” to gather further information
- Neighbor/friend witnessed phone interaction
- Local police were notified



Case: “Ray”

Daughters consulted family attorney

DPOA for finance previously drafted

Attorney met with Ray

- Ray agreed to undergo evaluation to “prove” he can make his own decisions

Attorney referral

- Evaluate cognitive functioning
- Financial capacity
- Invoke capacity clause of DPOA (if necessary)

“Ray”

Why is his history of being a financial planner a “risk factor”?

During interview, he could explain in theory why people thought he was being scammed

Admitted that he thought he had a better than 50-50 chance that the lottery would eventually pay off

Evaluation showed Mild Cognitive Impairment, not dementia

Passed financial capacity evaluation, except simulated credit card management task

Does he have capacity to continue to manage his affairs?

Conclusions for Ray

I opined that Ray **does not** have the capacity to continue to manage his financial affairs

- He is unable to reason logically
- He is unable to act in his own best interest

Family attorney able to convince Ray to allow daughter to serve as POA

Immediate steps were taken to secure/change bank accounts

In Summary.....

“I used to think that the brain was the most wonderful organ in my body. Then I realized who was telling me this.”

- Emo Philips

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