

# CLIENT CAPACITY, LEGAL ETHICS, AND DEMENTIA INFORMED LAWYERING 2023

## DSBA CLE VIA ZOOM

SPONSORED BY THE ELDER LAW SECTION OF THE DELAWARE STATE BAR ASSOCIATION AND THE  
DELAWARE DIVISION OF SERVICES FOR AGING AND ADULTS WITH DISABILITIES (DSAAPD)

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**WEDNESDAY, MAY 10, 2023 | 12:30 P.M. – 3:45 P.M.**

**3.0 Hours CLE credits with 1.0 Hours in Enhanced Ethics  
for Delaware and Pennsylvania Attorneys**

### ABOUT THE PROGRAM

This session will explore how and why attorneys assess capacity and the ethical obligations of an attorney when a client has diminished capacity.

Dementia Informed Lawyering Dementia and other causes of diminished capacity change the way lawyers need to communicate with our clients, and can result in unexpected behaviors. This session will offer guidance on effective communication and how to carefully respond to a client who is experiencing unexpected or disruptive behaviors. This session includes developments since the 2019 CLE seminar on these topics co-sponsored by DSAAPD (Division of Services for Aging and Adults with Disabilities) and the Elder Law Section of the Delaware State Bar Association as this is an emerging area of understanding.

### CLE SCHEDULE

12:30 p.m. – 3:45 p.m. (15 minute break at 2 p.m.)

#### Presenter

David Godfrey, JD, Director  
*American Bar Association, Commission on Law & Aging*

This seminar is sponsored by DSAAPD – For more information about the Division of Services for Aging and Adults with Physical Disabilities, please visit: <https://dhss.delaware.gov/dsaapd/>

**Visit <https://www.dsba.org/event/client-capacity-legal-ethics-dementia-informed-lawyering-2023/> for all the DSBA CLE seminar policies.**

# Presenter

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David Godfrey, JD, Director  
*American Bar Association,  
Commission on Law & Aging*

**DAVID GODFREY, JD**, is Director of the ABA Commission on Law and Aging in Washington DC. He is responsible for the managing the research, training, and policy work of the Commission. Prior to joining the Commission, he was responsible for elder law programming at the Access to Justice Foundation in Kentucky. Mr. Godfrey earned his B.A. with honors at Rollins College in Winter Park, Florida, and his J.D. *cum laude* from the University of Louisville School Of Law in Kentucky. He served on the board of the National Academy of Elder Law Attorneys – and was named a Fellow of the Academy in 2019.

## Ethics and Client Capacity

David Godfrey, JD, Director, ABA Commission on Law and Aging, Washington, DC.

### Introduction

Rule 1.14 of Model Rules of Professional Conduct provides guidance for a lawyer working with a client with diminished capacity, but the rules don't expressly talk about what capacity is. The goal here is to define decisional capacity, explore how a definition of capacity can be inferred from the Model Rules of Professional Conduct, offer practical steps or tools for assessing capacity and explore representing a client with diminished capacity.

Every lawyer works with clients with diminished capacity. Either new clients who at intake lack the ability to understand the issues and make informed choices, or clients who over the course of the representation experience a decline in neurocognitive ability as a result of illness or injury. This is more common when working with clients who are very young, or vulnerable or of advanced age, but it can happen with any client at any time. As counselors and zealous advocates<sup>1</sup> it is our responsibility to be constantly aware of our client's neurocognitive capacity.

### Defining Capacity

Every time we communicate in an interactive way with a client, formally or informally, we are assessing the clients' neurocognitive capacity. Most of the time, it happens subconsciously - automatically. We say things and look for responses, answers to questions, statements, or questions that our brains use to confirm that we are understood and that we are understanding. Assessing capacity is really understanding the other persons understanding of what is being discussed.

Decisional capacity is the ability to make and communicate an informed choice. Capacity is situational. You may have capacity to make one choice, and not another. A fundamental question is the ability to make what decision or choice? Capacity is not an on/off switch – part of the reason we have moved from “competency” to “capacity” is that competency was largely seen as something you had or didn't have. Capacity is a spectrum of ability from none to very high. Capacity is transient, it can be gained, it can be lost, and it can be regained. Most of us have had a day when we were so sick that we just couldn't understand the things we normally understand. When our health improved our capacity returned. Capacity can be gained, as long as a person is able to learn, they can gain new capacities.<sup>2</sup> Capacity can be impacted, often temporarily by emotional, psychological and health issues, or stress.

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<sup>1</sup> Model Rules of Professional Conduct Preamble & Scope

<sup>2</sup> One of the characteristics of Alzheimer's and similar neurocognitive illnesses is a decline or loss of the ability to learn, in addition to a decline in short and long term memory, communication, and decisional ability. Psychology Today, What Are Cognitive Functions?, Drew M. Altschul Ph.D., June 2020, <https://www.psychologytoday.com/us/blog/reverse-causation/202006/what-are-cognitive-functions>



All of us will at one time or another, will become concerned that our client has diminished capacity. Sometimes it will be obvious, other times it will be subtle concerns over being able to communicate and understand one another. The Model Rules of Professional Conduct<sup>3</sup> (MRPC) don't directly define legal capacity. To define capacity, we need to infer the definition from the penumbra<sup>4</sup> of client protections found in the rules.<sup>5</sup>

A good starting point is to look at the definitions or Terminology in Model Rule of Professional Conduct 1 (e) defining informed consent:

“(e) "Informed consent" denotes the agreement by a person to a proposed course of conduct after the lawyer has communicated adequate information and explanation about the material risks of and reasonably available alternatives to the proposed course of conduct.”

Traditional dictionary definitions of capacity describe the volume of a place or thing, and circularly refer to legal capacity as competence to stand trial.<sup>6</sup> Capacity or competence to stand trial is one definition of capacity, but it is limited in scope to having the ability needed to protect Constitutional rights in litigation (primarily in a criminal matter, generally defined as the ability to understand the charges, proceedings and participate in defense.<sup>7</sup> ) This definition does not help us if we are trying to decide if a client has capacity to execute a will, or sign a deed to a real estate. Understanding competence to stand trial presents the same challenge of assessing client capacity. When capacity to stand trial is challenged, the courts will order an expert evaluation, a luxury seldom available in routine civil practice.

The concept of informed consent comes up in many areas of the law, in the Model Rules, in statutory law, and in case law both civil and criminal. For consent to be “informed” it requires the client to understand the risks and benefits of the choice, the long-term consequences of the choice, and being able to make and communicate a choice. The key to informed consent is interactive communication between the client and lawyer to an extent that the client understands the issues, options, risks, and consequences.

Communication is covered in MRPC 1.4:

(a) A lawyer shall:

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[https://www.americanbar.org/groups/professional\\_responsibility/publications/model\\_rules\\_of\\_professional\\_conduct/model\\_rules\\_of\\_professional\\_conduct\\_table\\_of\\_contents/](https://www.americanbar.org/groups/professional_responsibility/publications/model_rules_of_professional_conduct/model_rules_of_professional_conduct_table_of_contents/) Many states edit the rules when adopting them, check the rules in your state. The model rules and the comments to them provide meaningful guidance as long as a state rule is not materially different.

<sup>4</sup> See *Griswold v. Connecticut*, 381 U.S. 479 (1965)

<sup>5</sup> That is a long way to go to incorporate a reference to contraception in this text.

<sup>6</sup> <https://www.merriam-webster.com/dictionary/capacity>

<sup>7</sup> *Black's Law Dictionary*, 9<sup>th</sup> Ed, Brian Garner, pg. 272, (1999)

- (1) promptly inform the client of any decision or circumstance with respect to which the client's informed consent, as defined in Rule 1.0(e), is required by these Rules;
  - (2) reasonably consult with the client about the means by which the client's objectives are to be accomplished;
  - (3) keep the client reasonably informed about the status of the matter;
  - (4) promptly comply with reasonable requests for information; and
  - (5) consult with the client about any relevant limitation on the lawyer's conduct when the lawyer knows that the client expects assistance not permitted by the Rules of Professional Conduct or other law.
- (b) **A lawyer shall explain a matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation. (Emphasis added)**

To do this, lawyers need to take the steps necessary to communicate legal concepts, no matter how complicated, in a manner the client can understand. This requires breaking complex matters into simpler parts, relating the legal concepts to concepts the client can understand. We need to not just talk to our clients, we need to talk with them, asking questions and evaluating their answers. It is important to ask follow-up questions that probe into deeper understanding and check short term memory.

A core principle of legal ethics is that the client, decides what the goal of the representation should be, and has a voice in deciding how that goal should be reached. These should be treated as to separate issues.

MRPC 1.2 (a), allocating authority between the lawyer and the client that reads as follows:

- (a) Subject to paragraphs (c) and (d), a lawyer shall abide by a client's decisions concerning the objectives of representation and, as required by Rule 1.4, shall consult with the client as to the means by which they are to be pursued. A lawyer may take such action on behalf of the client as is impliedly authorized to carry out the representation. A lawyer shall abide by a client's decision whether to settle a matter. In a criminal case, the lawyer shall abide by the client's decision, after consultation with the lawyer, as to a plea to be entered, whether to waive jury trial and whether the client will testify.

For example, if a client is being sued for collection on a credit card, the possible objectives (goals) might be to negotiate a plan to pay off the debt, to litigate that the debt as legally unenforceable, to agree to a judgement or allow a default, or to declare bankruptcy. The client would decide which of these options to pursue. If the client wishes to litigate that the debt is not legally enforceable raising a statute of limitations defense. The lawyer would then decide in consultation with the client on discovery, motion practice, expert witnesses or ultimately taking it to trial. The lawyers' expertise should carry heavier weight in deciding the means to carry out the objective, than in deciding the objective.

## Inferring a Definition of Capacity from the Model Rules.

The client has capacity if you are able to communicate in a manner, that allows the client to give informed consent, based on understanding the issue, the options, the risks and benefits, the probable outcome, consequences, and the client is able to determine the objective of the representation. If the client is unable to do this they have diminished capacity and Rule 1.14 guides your representation.

There are some areas of the law, where there is an established definition for capacity.<sup>8</sup>

Testamentary Capacity	Typically, at the time of executing a will, the testator must have capacity to know the natural objects of their bounty, to understand the nature and extent of their property, and to connect these elements sufficiently to make a disposition of property according to a rational plan. The testator does not have to have capacity consistently over time- only at the time the will was executed. Whether the testator is of “sound mind” or is the terminology that is still commonly used.
Capacity to Execute a Power of Attorney	The standard of capacity for creating a power of attorney has traditionally been based on the capacity to contract. However, some courts have also held that the standard is similar to that for making a will.
Contractual Capacity	Courts generally assess the party’s ability to understand the nature and effect of the act and the business being transacted. If the act or business being transacted is highly complicated, a higher level of understanding may be needed to comprehend its nature and effect.
Capacity to Convey Real Property	To execute a deed, a grantor typically must be able to understand the nature and effect of the act at the time the conveyance is made.
Make a Gift	The nature of the property, to whom they wish to give it, what rights they want to transfer, and the irrevocable nature of the transfer.

Other legal acts have specific definitions of capacity articulated by statutes and courts in different jurisdictions. The standards listed above are general examples, and attorneys should look to their specific state statutes and case law for guidance. In absence of a clear standard in a statute or case law, an attorney should confirm that the client understands the essential elements of the legal action, understands the available options, has made a choice and understands the consequences of the choice being made.

### Case Example: Contractual Capacity

Ed was living with dementia. He would get lost two blocks from the home he had lived in for 40 years. His kids took his car away from him. A couple of days later he took a taxi to the nearest car dealer and said, I like the red one, call Mike at Bank Zero, I have lots of money, Ed drove the Red car home (getting lost along the way.) A week later, Ed’s son took the new Red car away, saying “call anytime you need a ride, we will take you anywhere you want to go.” After a couple

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<sup>8</sup> “Assessment of Older Adults with Diminished Capacity: A Handbook for Lawyers”, American Bar Association, (2005)

of days Ed got bored, took a taxi to the car dealer, and said, I like the blue one, I always wanted to own a blue car, call Mike at Bank Zero, I have lots of money. The salesman asked about the Red car, and Ed said, “my son is driving it.” Ed drove the Blue car home (getting lost along the way.) Ed’s son called arguing that the contract for the blue car should be void due to lack of capacity.

Did Ed have capacity to contract?

What if Ed had said, I want to the blue one, it should be fast enough to get me to into orbit so I can go home to Mars?

What if he tried to pay for it with a bag of magic beans? Or demanded that it should be free, claiming that as a space alien invading earth he claimed everything on earth as his?<sup>9</sup>

## **Everyone Has Diminished Capacity**

**Capacity is task specific; it is transient, it is a spectrum.**

When assessing capacity, we need to first determine what the task is that we are asking the person to do. The skills and abilities needed are task specific. The ability to make one kind of decision is no assurance of the ability to make a different decision, and the inability to perform one task, tells us little about the ability to make decisions on another task.

Capacity is transient, it can increase and decrease and return. For most adults’ capacity builds through childhood and adulthood. Unless an illness or injury strike, research tells us that adults continue the ability to learn and develop new skills into old age. How we learn, how we organize and recall information changes as we grow older, but we continue to be able to learn unless illness or injury occur.

Capacity is a spectrum, from low levels of ability to the highest level of ability. At the low end a person may be unable to understand and make decisions, at the other end are the top experts in any given field. The same applies to physical abilities, one person may be barely able to catch the ball, but may still be able to play baseball, another person may be a major league baseball player. They both have the capacity to play baseball, but at vastly different levels. An equivalent in legalese, it is one thing to manage \$20 a week in spending money, another all together to manage the budget for a billion-dollar a year business. Just because a person can’t do one, does not mean they can’t do the other. The limits are easily reached of each persons’ skills and abilities.

When we look at capacity this way, we realize that we all have diminished capacity when we are trying to do a task outside of our life experience and knowledge, or when our ability is impaired by illness, injury, medication, or stress.

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<sup>9</sup> I had a client who believed he was a 200-year-old space alien.

## **Supported Decision Making**

Supported decision making (SDM) is a person centered and person driven decision-making model based on the premise that everyone has the right to make decisions regarding our lives and that we all seek support in making at least some decisions. The core of SDM is that every person selects advisors or supporters that they trust to help them understand and make choices about something. The role of the supporter is to explain the question, issue, or choice in a manner the person can understand, offer options, explain the implications or risks and benefits of the options, make a recommendation, but leave the ultimate choice up to the person, to question, but not criticize poor choices, and to help the person as needed carry out the choice.

I will offer myself as an example of an adult who needs support in making some decisions. The one time I replaced a kitchen faucet there was water ankle deep in the kitchen the next afternoon. I always call in a trusted expert when plumbing work needs to be done. I rely on the support of that person to explain what needs to be done, the options for doing it, for a recommendation on how best to do it, the risks of the options, and to allow me to make the ultimate choice of how to proceed. My plumber is my household water management supporter.

As lawyers, we support our clients legal decision-making ability every day, and we do this with every client (if not why do they need us?) The difference is as we move down the spectrum of capacity on a given task, the greater the supports that are needed. By actively practicing the skills of supported decision making we can leverage the capacity of our clients.

## **Communication Accommodations**

Challenges with communication are often mistaken for a lack of capacity. As lawyers with an ethical obligation under MROC 1.4 to communicate in a way that our clients can understand, we need to go beyond the norm to accommodate the communication needs of our clients. Language fluency is often a challenge, engaging skilled translators will often facilitate communication. Literacy, education, and life experience can interfere with communication, lawyers must become skilled at culturally competent communication.<sup>10</sup>

Challenges with hearing and vision can be misinterpreted as a lack of capacity and every lawyer should be ready to accommodate sensory differences. There are specialized systems and tools used by persons with developmental, emotional, and mental health conditions to facilitate communication. Not all persons communicate the same way. Asking the client, and persons around the client, what is the most effective way to communicate can help accommodate communications.

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<sup>10</sup> Pocket Guide of Culturally Competent Communication, [https://www.mdanderson.org/documents/education-training/icare/ICAREguide\\_CultComp.pdf](https://www.mdanderson.org/documents/education-training/icare/ICAREguide_CultComp.pdf)

## **A Client with Diminished Capacity MRPC 1.14:**

(a) When a client's capacity to make adequately considered decisions in connection with a representation is diminished, whether because of minority, mental impairment or for some other reason, the lawyer shall, as far as reasonably possible, maintain a normal client-lawyer relationship with the client.

(b) When 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 cannot adequately act in the client's own interest, the lawyer may take reasonably necessary protective action, including consulting with individuals or entities that have the ability to take action to protect the client and, in appropriate cases, seeking the appointment of a guardian ad litem, conservator or guardian.

(c) Information relating to the representation of a client with diminished capacity is protected by Rule 1.6. When taking protective action pursuant to paragraph (b), the lawyer is impliedly authorized under Rule 1.6(a) to reveal information about the client, but only to the extent reasonably necessary to protect the client's interests.

A starting point here and really the highlight of paragraph “a,” is “to the extent possible, maintain a normal attorney client relationship.” This means your client, is still your client, and you owe that client all of the normal attorney client protections, plus you are charged by Rule 1.14 with taking extra steps to protect a client with diminished capacity from harm. A client with an impairment is protected by the same rules regarding competence of the lawyer, allocation of authority, diligence, communication, reasonable fees, conflicts, confidentiality, safekeeping of property, and declining or terminating representation (MRPC 1.1-1.18) as every other client. It is important to remember that our loyalties are owed to the client, and we held by rule 1.14 with safeguarding a client with diminished capacity beyond what we would for a client without diminished capacity.

Paragraph “b”, directs attorneys to take reasonable protective steps when working with a client with diminished capacity. Two points on this section. The rule tells us little, please read the extensive comments to fully understand this section. Reading the rule and not reading the comments is like reading the Constitution and never reading a Supreme Court opinion on the Constitution. Second, the last part of this rule causes the most ethical difficulties for a lawyer. Basic rules of conflicts and confidentiality make it difficult, often impossible to serve as a guardian, or guardian ad litem, for a person you have previously had an attorney client relationship with. If appointment is necessary, the safe practice is to consult with other professionals as allowed in rule 1.14 and in the comments and let someone else to file and serve. Otherwise, the representation is fraught with conflicts and confidentiality issues. Critics of lawyers and guardianship are increasingly filing ethics complaints on this.

Paragraph “c” provides limited exceptions to confidentiality to allow an attorney to seek advice or consultation when representing a client with diminished capacity. It is important to

remember that this is limited, and should not result in taking a position in conflict with your client. If the client says, I don't need a guardian, you should not disclose confidences that support the need for a guardian. The petitioner has the burden of proof, not the defendant. As a lawyer for the defendant or respondent, attorney client privilege protects much of what you know from being used as a witness against your client.

A threshold question is often; "Does the client have the capacity to enter into an attorney client relationship?" Breaking this decision into its essential elements this requires that the client understand that they have a problem, that they want help with that problem, and that they trust the lawyer to help them. Ask the client, what do you need help with? Why do you think you need help? Who do you want to help you with this? If the client is able to offer reasonable answers these questions and you want to help them, document the questions and answers, and proceed. If they are unable to answer these questions, but you believe they have a legal issue, and need legal help, ask a Court for an appointment to represent the person. Comatose adults are often represented by attorneys, based on appointment by a Court. If the client lacks capacity and you proceed with representation without a Court appointment, you run the risk that of the Court refusing to recognize your representation or the court denying payment of your fee.

#### **Case Example:**

Trisha has mid-stage dementia, and her finances are a mess. You are introduced to her as a lawyer and she says, "I don't know what happened, but they say I am going to lose my home, please help me!" Does she have capacity to engage a lawyer?

What if she says, "there is nothing wrong, I always pay my bills, go away, and leave alone!" and you are standing there with a copy of the foreclosure or eviction notice in your hand? She will be materially hurt by the loss of housing. It is appropriate to ask the Court to appoint you as a guardian-ad-litem for Trish.

The official comments to MRPC 1.14 offer some meaningful guidance,

[7] If a legal representative has not been appointed, the lawyer should consider whether appointment of a guardian ad litem, conservator or guardian is necessary to protect the client's interests. Thus, if a client with diminished capacity has substantial property that should be sold for the client's benefit, effective completion of the transaction may require appointment of a legal representative. In addition, rules of procedure in litigation sometimes provide that minors or persons with diminished capacity must be represented by a guardian or next friend if they do not have a general guardian. In many circumstances, however, appointment of a legal representative may be more expensive or traumatic for the client than circumstances in fact require. Evaluation of such circumstances is a matter entrusted to the professional judgment of the lawyer. In considering alternatives, however, the lawyer should be aware of any law that requires the lawyer to advocate the least restrictive action on behalf of the client.

What if the person has a guardian or conservator?

Look to comment 4 of MRPC 1.14:

[4] If a legal representative has already been appointed for the client, the lawyer should ordinarily look to the representative for decisions on behalf of the client. In matters involving a minor, whether the lawyer should look to the parents as natural guardians may depend on the type of proceeding or matter in which the lawyer is representing the minor. If the lawyer represents the guardian as distinct from the ward and is aware that the guardian is acting adversely to the ward's interest, the lawyer may have an obligation to prevent or rectify the guardian's misconduct. See Rule 1.2(d).

If the issue is that the person wants to challenge the need for the guardian or conservator, or abuse, neglect or exploitation by a guardian or conservator; listen to the persons' reasons and answers to your questions. If the guardian does not agree and you believe the Person has capacity, file a motion and a notice of appearance, and be prepared to present evidence that your client wants and needs your help. Ask the Court to appoint you if the Court believes the client lacks capacity to engage you.

There are two risks in starting without a court appointment, the Court may dismiss for lack of capacity of the person to enter into an attorney client relationship, or in the end, the Court may refuse to approve payment of fees citing that at the time of hiring the attorney, the person didn't have the legal right to enter into a contract for services.

Anytime you represent a client with diminished capacity, you are well advised exercise great care and to meticulously document the file. There is an increased risk of professional liability or ethics complaints when the clients' ability to fully engage with the lawyer is compromised.

Unfortunately, there are cases of attorneys taking advantage of clients who have a compromised ability.

**The official comments to MRPC 1.14 offer some meaningful guidance, on working with a client with diminished capacity.**

#### Taking Protective Action

[5] If a lawyer reasonably believes that a client is at risk of substantial physical, financial or other harm unless action is taken, and that a normal client-lawyer relationship cannot be maintained as provided in paragraph (a) because the client lacks sufficient capacity to communicate or to make adequately considered decisions in connection with the representation, then paragraph (b) permits the lawyer to take protective measures deemed necessary. Such measures could include: consulting with family members, using a reconsideration period to permit clarification or improvement of circumstances, using voluntary surrogate decision-making tools such as durable powers of attorney or consulting with support groups, professional services, adult-protective agencies or other



individuals or entities that have the ability to protect the client. In taking any protective action, the lawyer should be guided by such factors as the wishes and values of the client to the extent known, the client's best interests and the goals of intruding into the client's decision-making autonomy to the least extent feasible, maximizing client capacities and respecting the client's family and social connections.

[6] In determining the extent of the client's diminished capacity, the lawyer should consider and balance such factors as: the client's ability to articulate reasoning leading to a decision, variability of state of mind and ability to appreciate consequences of a decision; the substantive fairness of a decision; and the consistency of a decision with the known long-term commitments and values of the client. In appropriate circumstances, the lawyer may seek guidance from an appropriate diagnostician.

### **Using the Capacity Worksheet for Lawyers**

The Capacity Worksheet for Lawyers is meant to be used either during the client interview as a note-taking device, or immediately afterwards as an analytic tool. The Worksheet allows observations to be structured and recorded, systematic in process, accountable if challenged, and documented. It also helps the process to blend in naturally to the case interview process, rather than adding a whole new element. This Practice Guide provides an overview for each section of the Worksheet, and tips on completing it.

### **Section A: Observational Signs of Diminished Capacity**

This section of the Worksheet documents observational signs of diminished capacity, including cognitive, emotional, and behavioral signs. There are examples of behavior for each of the listed signs. There is no single indicator that provides a consistent, clear signal that an older adult has diminished capacity. However, when considered together, multiple signs may reflect diminished capacity. These signs should not be taken in and of themselves to be proof but may indicate a need for further evaluation of capacity by an independent professional.

In noting potential signs of incapacity, it is important to keep in mind that the focus is on decisional abilities rather than on cooperativeness or pleasantness. Attorneys should avoid letting stereotypes about aging influence their observations.

### ***Notes on Functionality***

This field is meant for an attorney to record observations about the client's functioning beyond the office setting. To get this information, it is beneficial for an attorney to interview clients in their home setting. Alternatively, an attorney may get information in the natural course of contact with clients—and family members with whom your client has permitted communication.

Activities of daily living to note include dressing, bathing, eating, and walking. Limitations in these do not directly suggest any cognitive impairment but are important for a complete

picture. Instrumental activities of daily living to note include managing money, grocery shopping, meal preparation, and medication management. These functions do involve cognitive abilities to different degrees.

### ***Mitigating Factors Affecting Capacity***

In completing this section of the Worksheet, attorneys should note if there are any mitigating or qualifying factors that may influence the observed signs. Follow-up questions can help determine whether the mitigating factors such as those listed on the Worksheet are playing a role. For example, grief from the loss of a spouse, or recently experiencing abuse could cause communication problems, emotional distress, and other observed signs. If found, these factors indicate a need for alternative action, be it a referral to a physician, adjusting the approach to communication, or waiting until another time when the client is functioning better.

### **Section B: Transaction-Specific Elements of Legal Capacity**

This section of the Worksheet requires that the attorney note the legal elements of capacity for the particular task at hand (check statutes and case law) and compare them with the client's understanding, appreciation, and functioning with the relevant legal elements.

This process may occur over the course of one or several meetings with the client. Ultimately, the attorney must form a judgment about the client's understanding of the respective legal elements of the transaction at issue, and regarding the client's capacity overall to undertake the transaction(s) at issue.

### **Section C: Task-Specific Factors in Evaluating Capacity**

This section of the Worksheet is designed to take into consideration the ethical factors set out in the Comment to Rule 1.14 of the MRPC. Utilizing the criteria, attorneys should consider the following:

- Ability to articulate reasoning behind the decision (*the client should be able to state the basis for their decision and the stated reasons should be consistent with the overall stated goals and objectives*);
- Variability of state of mind (*the extent to which the individual's cognitive functioning fluctuates*);
- Appreciation of consequences (*for example, does the client understand that without a legal challenge to an eviction, he or she may be without a place to live*);
- Substantive fairness of decision (*while lawyers normally defer to client decisions, before taking action a lawyer should consider the if the action may or will injure others, and if so, further review the action before deciding to move forward*);

- Consistency with lifetime values (*decision normally should reflect the client's lifelong or long-term perspective*); and
- Irreversibility of the decisions (*important to protect individuals from irreversible events, and calls for caution on the part of the attorney*).

Of these six factors, the first three are “functional” in the sense that they reflect the cognitive functioning of the individual. These may be supported by observation of the signs of diminished capacity described previously. The latter three are “substantive” in that they look at the content and nature of the decision itself. A careful weighing and balancing of these factors along with the specific elements of legal capacity for the transaction at hand will assist the lawyer to make a preliminary judgment of capacity.

### Section D: Preliminary Conclusions about Client Capacity

After evaluating sections, A, B, and C of the Worksheet, an attorney will need to weigh all the data obtained up to this point. With the collected data, the lawyer should make a categorical assignment of the fit between the client's abilities and the legal capacity at issue. Unfortunately, there is no simple score that will easily generate a conclusion. The Worksheet provides four conclusory options with suggested actions for each. The conclusion is ultimately a professional judgment that is aided by the systematic consideration of signs of incapacity, the client's understanding of the legal transaction, and the factors laid out in the Model Rule. If the attorney feels uncertain as to whether the observed problems represent “mild” versus “more than mild” issues, this would be an indication to consult with a clinician.

## ATTORNEY ASSESSMENT WORKSHEET

This worksheet is from *Assessment of Older Adults with Diminished Capacities: A Handbook for Lawyers* (2020)

It has been reproduced with minor changes from *Assessment of Older Adults with Diminished Capacity: A Handbook for Lawyers*.

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Please read and review the Handbook prior to using the worksheet.

### A. OBSERVATIONAL SIGNS

► Cognitive Functioning	Examples
Short-term Memory Problems	<ul style="list-style-type: none"> <li>▪ Repeats questions frequently</li> <li>▪ Forgets what is discussed within 15-30 min.</li> <li>▪ Cannot remember events of past few days</li> </ul>

Language/Communication Problems	<ul style="list-style-type: none"> <li>▪ Difficulty finding words frequently</li> <li>▪ Vague language, Disorganized</li> <li>▪ Trouble staying on topic</li> <li>▪ Bizarre statements or reasoning</li> <li>▪ Difficulty using phone, email and/or other forms of communication</li> </ul>
Comprehension Problems	<ul style="list-style-type: none"> <li>▪ Difficulty repeating simple concepts</li> <li>▪ Repeated questioning</li> </ul>
Lack of Mental Flexibility	<ul style="list-style-type: none"> <li>▪ Difficulty comparing alternatives</li> <li>▪ Difficulty adjusting to changes</li> </ul>
Disorientation	<ul style="list-style-type: none"> <li>▪ Trouble navigating office</li> <li>▪ Gets lost coming to office</li> <li>▪ Confused about day/time/year/season</li> </ul>
Financial Management Abilities:	
<ul style="list-style-type: none"> <li>▪ Problems with Everyday Arithmetic</li> </ul>	<ul style="list-style-type: none"> <li>▪ More difficulty calculating: Sum of loose change Feet to inches conversion Tip in a restaurant</li> </ul>
<ul style="list-style-type: none"> <li>▪ Decreased Understanding of Financial Concepts</li> </ul>	<ul style="list-style-type: none"> <li>▪ More difficulty understanding: Health care concepts like medical deductible Terms like interest rate, lien, and joint liability</li> </ul>
<ul style="list-style-type: none"> <li>▪ Decreased Comprehension of Ordinary Financial Documents</li> </ul>	<ul style="list-style-type: none"> <li>▪ More difficulty: Identifying a bill that is overdue and needs prompt attention Finding details in a bank statement Completing sections of a check register</li> </ul>

<ul style="list-style-type: none"> <li>▪ Diminished Awareness of Financial Risks</li> </ul>	<ul style="list-style-type: none"> <li>▪ Trouble identifying key risk in investment proposal</li> <li>▪ Overly focused on benefits/return, not risk</li> </ul>
<b>► Emotional Functioning</b>	
Emotional Distress	<ul style="list-style-type: none"> <li>▪ Anxious</li> <li>▪ Tearful/distressed</li> <li>▪ Excited/pressured/manic</li> </ul>
Emotional Lability	<ul style="list-style-type: none"> <li>▪ Moves quickly between laughter and tears</li> <li>▪ Feelings inconsistent with topic</li> </ul>
<b>► Behavioral Functioning</b>	

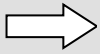
Delusions	<ul style="list-style-type: none"> <li>▪ Feels others out “to get” him/her, spying or organized against him/her</li> <li>▪ Fearful, feels unsafe</li> </ul>
Hallucinations	<ul style="list-style-type: none"> <li>▪ Appears to hear or talk to things not there</li> <li>▪ Appears to see things not there</li> <li>▪ Misperceives things</li> </ul>
Poor Grooming/Hygiene	<ul style="list-style-type: none"> <li>▪ Unusually unclean/unkempt in appearance</li> <li>▪ Inappropriately dressed</li> </ul>
Markedly Inappropriate Social Behavior	<ul style="list-style-type: none"> <li>▪ Loss of empathy and interpersonal skills</li> <li>▪ Lack of judgment; Loss of inhibition</li> <li>▪ Lack of interest (apathy), which can be mistaken for depression</li> </ul>
<b>Other Observations + Notes from 3<sup>rd</sup> parties</b>	
<b> Potential Undue Influence – Use Undue Influence Screen</b>	
<b>Mitigating/Qualifying Factors Affecting Observations</b>	<b>Ways to Address/Accommodate</b>
Stress, grief, depression, recent events affecting stability of client	<ul style="list-style-type: none"> <li>▪ Ask about recent events, losses</li> <li>▪ Allow some time</li> <li>▪ Refer to a mental health professional</li> <li>▪ Help find support persons or groups</li> </ul>
Medical Factors	<ul style="list-style-type: none"> <li>▪ Ask about nutrition, medications, hydration</li> <li>▪ Refer to a physician</li> </ul>
Time of Day Variability	<ul style="list-style-type: none"> <li>▪ Ask if certain times of the day are best</li> <li>▪ Try mid-morning appointment</li> </ul>
Hearing and Vision Loss	<ul style="list-style-type: none"> <li>▪ Assess ability to read or repeat simple information</li> <li>▪ Adjust seating, lighting</li> <li>▪ Use visual and hearing aids</li> </ul>

Social/Environmental Factors	<ul style="list-style-type: none"> <li>▪ High anxiety level in unfamiliar environment</li> <li>▪ Presence of others causing stress</li> <li>▪ Help find personal/social supports</li> </ul>
Educational/Cultural/Ethnic Barriers	<ul style="list-style-type: none"> <li>▪ Be aware of race, ethnicity, education, long-held values and traditions, and your own implicit biases</li> <li>▪ Help find peer supporters</li> </ul>
What other decision supports does the client need to maximize decision-making abilities?	

**B. RELEVANT LEGAL ELEMENTS** - The legal elements of capacity vary somewhat among states and should be modified as needed for your particular state.

What are the Legal Task(s) at Issue?	
What are the Capacity Elements of the Task(s)? This requires your state-specific research. (See Chapter V.)	Notes on Client's Understanding/ Appreciation/Functioning Under Elements

### C. TASK SPECIFIC FACTORS IN PRELIMINARY EVALUATION OF CAPACITY

The more serious the concerns about the following factors...		The higher the function needed in the following abilities...
Is decision consistent with client's known long-term values or commitments?		Can client articulate reasoning leading to this decision?
Is the decision objectively fair? Will anyone be hurt by the decision?		Is client's decision consistent over time? Are primary values client articulates consistent over time?

Is the decision irreversible?	Can client appreciate consequences of his/her decision?
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Differences in our life experience and that of our clients and cognitive bias can interfere with our assessment of capacity. It is important to understand the cultural experiences of our clients, and how that changes their interaction, communication, or sharing of information.

When working with clients with diminished capacity it is important to:

- Adjust your pace to that of the client, most often we need to slow down.
- To eliminate distractions and environmental impediments to communication.
- Begin with simple questions.
- Allow extra time for word finding.
- Discuss one issue at a time, clearly signal a change of subject.
- Repeat, feed back and ask questions that confirm understanding.
- Provide notes for follow-up, ask if there is anyone you can share this with that they trust to help.
- Schedule at times and in places that are best for the client (house calls are common.)

In assessing capacity, it is also important to look for signs of undue influence. Undue influence is pressure from a person in a position of power or authority to change the normal free choice of the individual, often to the advantage of the influencer. To be unduly influenced the person must have some capacity, though many statutes or cases look for vulnerability, this is not a total lack of capacity.

- Financial exploitation is the unauthorized use or taking of the money or property of a vulnerable adult for the benefit of another person.
- Lack of capacity – theft from a person who is unable to form informed consent
- Undue influence is the exertion of influence, over a vulnerable adult, with the intent to override or change the choice or free will of the person, for the benefit of another person.
- Fraud is a theft involving an intentional lie or misstatement of the fact, or withholding of a material fact, with the intent that the person will rely on it to the benefit of another person.

### **Conclusion:**

As lawyers, we assess capacity, or understanding, every time we communicate with a client. Understanding client capacity is essential to fulfilling our core ethical obligations to

communicate with a client, to allow the client to determine the objective of the representation, to enable the client to provide informed consent. Ethical obligation extends to clients with diminished capacity.



# Dementia-Informed Advocacy

David Godfrey, JD, Director ABA Commission on Law and Aging, Washington, DC

## Introduction:

Changes in cognitive function that are the symptoms described as dementia require changes in attorney-client interaction to facilitate the relationship most effectively. Dementia is a term used to describe a decline in cognitive ability due to changes in the brain structure, or body or brain chemistry. Cognitive function includes memory, with short- and long-term memory often being impacted differently, the ability to understand, the ability to make informed choices, the ability to communicate (communicate ideas, thoughts, memories, and feelings), and ability to learn.

This Issue Brief provides a framework for dementia-informed lawyering and advocacy, built from the model of trauma-informed advocacy. Advocates and attorneys working with older adults living with dementia can use this model to deploy dementia-informed strategies to provide quality, person directed legal and elder rights assistance to individuals.

## Understanding Dementia

The first step to providing dementia-informed advocacy is to understand the basics of dementia. The most common cause of dementia is diagnosed as Alzheimer's disease. Alzheimer's is diagnosed based on two factors: the presence of amyloid plaques – a form of protein deposits in brain tissue, accompanied by a decline in cognitive ability. It is possible to have an accumulation of amyloid plaques and not have a noticeable decline in cognitive ability. And it is possible to have a decline in cognitive ability and not have amyloid plaques. Other illnesses cause dementia, generally in smaller numbers. Fully understanding the changes in a person's cognition and behavior is essential in diagnosis of cause, as some causes result in recognized patterns of behavior.

Dementia effects each person differently. Evaluating the limits of what the person can understand, decide, and communicate needs to be done individually with each person.

The ability of a person with cognitive impairment may vary from day to day, and from morning to night. If the person is having an "off" day, talk with them again before determining what the person can understand and what they cannot. "Sundowners syndrome" is the classic explanation for a person with dementia experiencing a decline in ability later in the day. However, it is not universal. Just as some people are morning people, and some people are night owls, the time of day when each person will be at their best will vary and is sometimes predictable. Often, if you ask, the person or their trusted caregivers will tell you when the individual is at their best.

## Learning More About Dementia

Understanding the basics of what causes changes in cognitive decline prevents over generalization or mischaracterization. Attorneys and advocates working with clients with specific diagnoses will benefit from doing research and background reading to improve understanding of how the illness may affect the attorney-client relationship. Some reliable sources and resource centers include:

- [National Alzheimer's and Dementia Resource Center](#)
- [NIH National Institute on Aging: Alzheimer's Disease & Related Dementias](#)
- [U.S. Department of Health & Human Services: Alzheimers.gov](#)

- [The Alzheimer's Association](#)

## Forming & Maintaining an Attorney Client-Relationship

Changes in cognitive function, or a diagnosis does not prevent the formation of an attorney client relationship or end an attorney client relationship. Changes in cognitive function heighten awareness of the need to communicate effectively, to work with the client, and meet the client where they are cognitively. Rule 1.14 of the Model Rules of Professional Conduct (MRPC) direct lawyers to “[as far as reasonably possible, maintain a normal client-lawyer relationship with the client.](#)” The comments to the MRPC Rule 1.14 should be read in detail to fully understand how to apply Rule 1.14.

## Communication and Behavioral Accommodations

Individuals living with dementia may experience communication barriers and behavioral changes that require accommodations to maintain an effective attorney-client relationship. This section discusses strategies and practices for continuing person-directed representation when the client is experiencing common behavioral changes.

### Aphasia

Aphasia is a technical term for having difficulty finding the right word.<sup>1</sup> Word finding is a challenge for many persons living with dementia. This may result in long pauses as the person struggles to put their thoughts into words. Attorneys and advocates should give the person time and may want to plan for longer meeting times with the client to accommodate the need for word finding. Sometimes the words will come more easily when the person relaxes, and advocates can apply [trauma-informed strategies](#), such as making sure the person feels comfortable in the space you are meeting in and previewing what the meeting will cover. If the person uses the wrong word, the attorney or advocate can take steps to figure out in context what the person means, politely rephrase, and confirm understanding. Difficulty finding the right word does not mean a lack of ability to understand.

### Delusions

Delusions are strongly held beliefs that have no basis in fact and cannot be verified by outside evidence.<sup>2</sup> Some individuals living with dementia develop delusions. The belief is often a part of the person’s perceived reality, and they will hold the belief despite evidence to the contrary. Facts or reasoning will generally not change the person’s belief.

Advocates and attorneys should engage in a careful balancing of respect for the client, with a lawyer’s obligation to the truth. One strategy is to acknowledge the person’s belief as being real to them, while not agreeing or confirming the belief as true. Reasoning or arguing with the person will likely not change the person’s beliefs and may damage the relationship of trust.

### Hallucinations

Persons living with dementia sometimes experience hallucinations, and may see, hear, smell, taste or feel things that don't exist outside their mind.<sup>3</sup> The perception is very real to the person, and it is part of their reality. The most common hallucinations are the presence of persons who are not there or sometimes people will hear sounds that others can hear, such as a crying baby, or music; or smell

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<sup>1</sup> NIH National Institute of Neurological Disorders and Stroke, [Aphasia Information Page](#).

<sup>2</sup> Alzheimer’s Association, [Suspicious and Delusions](#)

<sup>3</sup> Alzheimer’s Association, [Hallucinations](#)

smoke, or believe that a taste is off. Similar to addressing delusions, presenting facts or arguing may not be effective in changing the person's perceptions.

Often the best option is to acknowledge what the person is perceiving, apologize for not being aware, and asking the person how they want to proceed. Some additional options that may be helpful include:

- Move to another room to get away from the person or sound that is disturbing the client
- Provide time to allow the sound they hear to stop or for the person they see to go away
- Make a change in the setting, open and close windows, or doors, or move the furniture around to help dispel the hallucinations.

There are options for medical treatments for some individuals who experience hallucinations. If the person or their caregivers are concerned, they should consult an expert who fully understands the person's health.

### Memory

Often the first change that is noticed in a person living with dementia is a decline in short term memory.<sup>4</sup> People with dementia may start to lose things that they never lost before, forget to deposit income, or pay bills, or pay the same bill more than once. They may get lost in familiar surroundings, especially if there has been a change.

When working with a client living with dementia, attorneys and advocates should take steps that can accommodate memory loss. Clients may ask the same question that has already been answered and may forget the information that was provided to them in previous meetings. Some practices that can be helpful to a client with dementia include:

- When a question is repeated, politely answer, and move on. Avoid saying we already discussed that.
- Provide a list of key points or a list of follow up items to bring to their next meeting
- Provide reminder calls the day before and a several hours before scheduled meetings
- Help the individual make notes. Many persons with early to moderate dementia or mild or moderate cognitive impairment develop coping strategies such as maintaining calendars with detailed notes, post it notes, stacks of paper, or calendar reminders
- Engage with trusted family or friends, as directed by the client. The client may rely on family or friends to support them, such as by keeping track of paperwork and appointments. Advocates may ask the client if it is okay to talk with a family member or friend to help with the appointment.

Long term memory can be deep and is often the last to fade. An important tool is to let the client talk. While they are telling stories of things long past, they can also provide insight on the direction of their case and share information that may be helpful for their case.

### Emotions

Persons living with dementia may experience changes in emotional responses. The person may laugh at things others find tragic or experience sadness and tears in times of joy. Changes in brain structure and

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<sup>4</sup> Alzheimer's Association, [Memory Loss & Confusion](#)

brain chemistry cause behaviors to change. Advocates and attorneys should be aware of and prepared for potential emotional responses and remain emotionally level and accepting when possible.

A person living with dementia may experience a lowering of inhibitions and say or do things that are considered inappropriate. This can include changes in language, such as swearing, making comments that are out of character for the person, and displaying physical acts of aggression or anger.<sup>5</sup> Physically aggressive behavior is rare, but not out of the realm of reality. Dementia can reduce the normal level of restraint. While this is rare, advocates should always keep personal safety in mind with physical barriers and routes of escape. Advocates should maintain professional demeanor but evaluate when they may need to take steps to secure their own safety and avoid vicarious trauma. Written workplace violence policies can help advocates navigate potential violent situations and identify unacceptable behavior.

### Late-Stage Dementia

In the late stages of dementia, the person may be unable to respond to their environment. Some persons lose muscular control and have difficulty or become unable to walk or transfer without assistance. They may lose the ability to eat without assistance. They may sit and stare – sometimes described as a catatonic state.

Always be aware, that we don't always know what the person can understand. Don't say anything that you would not want to person to hear when in the room with them. Talking to the person can be comforting and assuring. Familiar voices and often music is comforting at this stage.

Part of maintaining a normal attorney client relationship, is visiting your client. You will feel better as a professional at having been there for your client. It also allows you to observe the environment, the care they are receiving, and how they are being treated. Be there and be an advocate for your client.

### Self-Care & Addressing Vicarious Trauma

Advocates and attorneys working with individuals living with dementia will want to give these clients extra time for meeting and may need a little time after the meeting to decompress. Working with clients with dementia can be emotionally draining. Effectively communicating across barriers can take significant attention and energy. Taking a few minutes to go for a walk or recharge and refresh can be helpful before starting back into work.

Deploying strategies to address vicarious trauma or burnout, can be use useful. Talking through the experience in a trusting environment can help restore advocates ability to help others.

Alzheimer's and many other causes of dementia are progressive and terminal. Working with clients through the progression of the illness can be difficult. Be aware of your grief and engage in practices that help you heal.

### Takeaway Tips for Working with a Person with Cognitive Impairment

- Let others in your office know that you are meeting with a client with dementia and may need extra time before, during and after the meeting.
- Before a meeting, take a few minutes to prepare and determine the most critical issues, how best to communicate, and develop a back-up plan if the person is having a challenging day.

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<sup>5</sup> Alzheimer's Association, [Aggression & Anger](#)

- Prepare to slow down and move at the client's pace.
- Talk where the person is most comfortable. This may be the office, or it may be the person's home. Ask the client and their family or caregivers where they are most comfortable.
- Reduce distractions. Turn off background noise or glaring light.
- Slow down, and talk slowly and clearly.
- Maintain an adult tone and communication style.
- Talk about one issue or one question at a time.
- Limit the agenda.
- End the meeting when the person is tired- multiple meetings may be needed.
- Allow the person to talk and provide insight on their preferred direction of their case.
- Recap what you have covered in a meeting or call.
- Provide the person with brief notes on key points.
- Send follow up questions and reminders of the next meeting.

#### Additional Resources:

*ACL Support for People with Dementia, including Alzheimer's Disease*

<https://acl.gov/programs/support-people-alzheimers-disease/support-people-dementia-including-alzheimers-disease>

Assessing Legal Capacity: Strategies for an Elder Rights-Centered Approach, NCLER

<https://vimeo.com/542850488>

[https://ncler.acl.gov/getattachment/legal-training/upcoming\\_event/Capacity-Assessment-Ch-Summary.pdf.aspx?lang=en-US](https://ncler.acl.gov/getattachment/legal-training/upcoming_event/Capacity-Assessment-Ch-Summary.pdf.aspx?lang=en-US)

*Assessment of Older Adults with Diminished Capacities: A Handbook for Lawyers*, 2nd Edition, ABA Commission on Law and Aging, <https://www.americanbar.org/products/inv/book/411701219/>

Becoming a "Dementia-Capable" Attorney, Elissa Meyer <https://www.mnbar.org/hennepin-county-bar-association/resources/hennepin-lawyer/articles/2020/04/23/becoming-a-dementia-capable-attorney>

*How to Say It to Seniors: Closing the Communication Gap with Our Elders*, David Solie <https://www.davidsolie.com/books-cds/book-information/>

National Alzheimer's and Dementia Resource Center <https://nadrc.acl.gov/>

National Institute on Aging, National Institute on Health <https://www.nia.nih.gov/>

The Problem of Alzheimer's, Dr Jason Karlawish <https://www.jasonkarlawish.com/> (One of the best books on understanding the history, politics, and medicine of dementia.)



AMERICAN **BAR** ASSOCIATION

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Commission on  
Law and Aging

# I Think I Remember You: Ethics and Capacity

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Commission on  
Law and Aging

Standard disclosure the opinions in this program may not reflect the policy of the American Bar Association.

Nothing in this should be considered legal or ethical advice.

When in doubt on an ethical question call the Delaware Ethics Hotline at 302-651-3931.

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# What is Capacity



The ability  
to make an  
informed  
decision or  
choice



# Capacity

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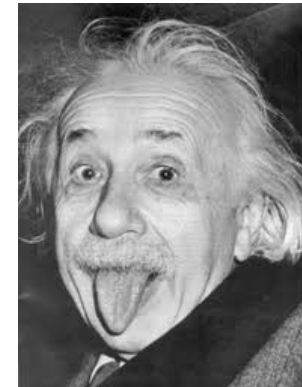
Capacity is:

- A spectrum



Spectrum

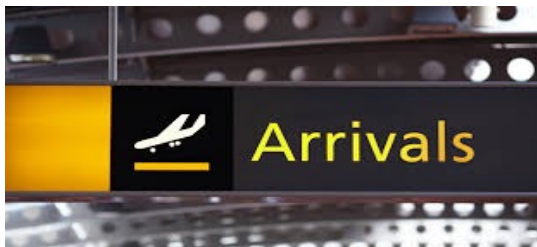
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# Capacity Task Specific & Transient



Situational



Transient



# Capacity Can Be Impacted By

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Illness  
Pain  
Lack of sleep  
Medication  
Substance Use / Abuse  
Stress  
Time of day  
Grief  
Depression  
Mental health





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Adults have a  
right to make  
bad choices,  
As long as they  
understand

# How Do We Assess Capacity

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We do it every time we communicate interactively

There is no simple test

- A caution on simple tests, most are screening, many have cultural bias

Look to the totality of the circumstances the client's ability to communicate and give informed consent

When in doubt, seek guidance before proceeding



# Assessing Capacity: Lawyers

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Lawyers need to make an independent judgement on legal capacity.

- Essential that you meet privately with the client
- Capacity is complex, when there are concerns multiple meetings can help with understanding.
- Confirm the client's ability to understand and make informed choices





# Capacity & Guardianship

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While other professionals assess capacity,

**Only a court order modifies or restricts legal capacity**

- A person with a guardian or conservator, may be able to communicate choices, preferences, beliefs and values.
- All persons should be supported in making decisions
- Reasonable accommodations include communications accommodations
- Communications differences are too often misinterpreted as a lack of ability



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Commission on  
Law and Aging

# Fundamental Questions

**That they need help,**

**You could Help,**

**They want you to help**

**That you may expect to be paid**

## **Unavoidable capacity determinations:**

- 1. Does the client have the capacity to contract for my services?**
- 2. Does the client have the capacity to complete the legal transaction?**

**Lawyers need a conceptually sound and consistent process for answering these questions.**



# Can a Person with a Guardian hire a lawyer?

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- Look to the state statute
- Document the Person's ability to ask for help
- File a motion and an entry of appearance
- Getting paid, will require approval by the judge
  - Courts are cautious because there has been abuse
- Ask the Court to appoint you at the request of the Person with a guardian



# Specific legal standards

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## Testamentary Capacity:

- At the time executing a will, the individual must know the natural objects of their bounty, to understand the nature and extent of their property, and to connect these elements sufficiently to make a disposition of property according to a rational plan.

Whether the testator is of “sound mind” or is the terminology that is still commonly used.

# Power of Attorney

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## Capacity to Execute a Power of Attorney:

- The standard of capacity for creating a power of attorney has traditionally been based on the capacity to contract. However, some courts have also held that the standard is similar to that for making a will.
- The document names an agent
- The agent can bind them to decision
- They can revoke the appointment
- The nature of the authority they are delegating



# Contractual Capacity

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Courts generally assess the party's ability to understand the nature and effect of the act and the business being transacted.

If the act or business being transacted is highly complicated, a higher level of understanding may be needed to comprehend its nature and effect.



# Capacity to Convey Real Property

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To execute a deed, a grantor typically must be able to understand the nature and effect of the act at the time the conveyance is made.

In other words:

- Transferring rights in the real property to another.
- No longer having the right to use or occupy.
- Not being able to reclaim use or occupancy.



# Capacity, if Not Stated

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**Understand essential legal elements**

**Understand options**

**Understands consequences of choice**

**Able to make a choice**



# Case Example: Edna and Bill

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Edna and Bill have been married for 62 years. They arrive for your meeting and Edna does the talking, saying that they want to leave everything to each other, then when second one dies, in equal shares to their three children. Edna wants to be named as the agent in a power of attorney and as health care agent for Bill. For her power of attorney and health care surrogate Edna wants to name their oldest son. You ask Bill what he wants, he says, “whatever Edna says will be fine.” You ask Bill the names of his children, and he responds, “ask Edna.” You ask him what bank their life savings is in, and he turns to Edna and says, “you know that don’t you?”

# What are the Red Flags?

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- A: Edna's speaking for both of them
- B: Edna's choice for her agents
- C: Bill's deferring to Edna
- D: Bill's inability to answer basic questions
- E: All of the above





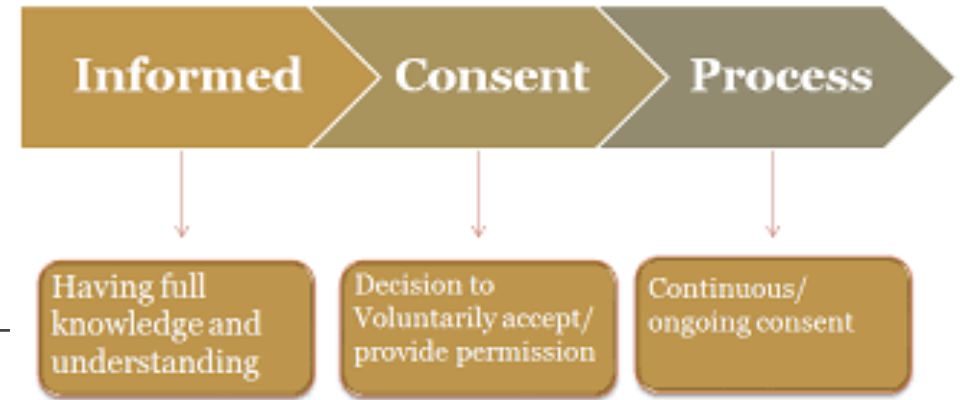
# What Do The Model Rules Say About Capacity?

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# MRPC 1.0 Terminology

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"Informed consent" denotes the agreement by a person to a proposed course of conduct after the lawyer has communicated adequate information and explanation about the material risks of and reasonably available alternatives to the proposed course of conduct.

# Model Rules of Professional Conduct 1.4

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(a) A lawyer shall:

(3) keep the client reasonably informed about the status of the matter;

(b) A lawyer shall explain a matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation.



# MRPC 1.2: Scope Of Representation & Allocation Of Authority Between Client & Lawyer

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(a) Subject to paragraphs (c) and (d), a lawyer shall abide by a client's decisions concerning the objectives of representation and, as required by Rule 1.4, shall consult with the client as to the means by which they are to be pursued. A lawyer may take such action on behalf of the client as is impliedly authorized to carry out the representation. A lawyer shall abide by a client's decision whether to settle a matter. In a criminal case, the lawyer shall abide by the client's decision, after consultation with the lawyer, as to a plea to be entered, whether to waive jury trial and whether the client will testify.



# How do We Get To Capacity From That?

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A client has capacity if we are able to communicate in a way that the client can understand, to the degree necessary for the client to give informed consent regarding the objectives (goals) of the representation.

If not, the client has diminished capacity.



# MRPC 1.14 A Client With Diminished Capacity

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## *Client-Lawyer Relationship*

(a) When a client's capacity to make adequately considered decisions in connection with a representation is diminished, whether because of minority, mental impairment or for some other reason, the lawyer shall, as far as reasonably possible, maintain a normal client-lawyer relationship with the client.



# Part B

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## MRPC 1.14 (b)

(b) When 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 cannot adequately act in the client's own interest, the lawyer may take reasonably necessary protective action, including consulting with individuals or entities that have the ability to take action to protect the client and, in appropriate cases, seeking the appointment of a guardian ad litem, conservator or guardian.



# Part C

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(c) Information relating to the representation of a client with diminished capacity is protected by Rule 1.6. When taking protective action pursuant to paragraph (b), the lawyer is impliedly authorized under Rule 1.6(a) to reveal information about the client, but only to the extent reasonably necessary to protect the client's interests.



# MRPC 1.14 Comment 1

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[1] The normal client-lawyer relationship is based on the assumption that the client, when properly advised and assisted, is capable of making decisions about important matters. When the client is a minor or suffers from a diminished mental capacity, however, maintaining the ordinary client-lawyer relationship may not be possible in all respects. In particular, a severely incapacitated person may have no power to make legally binding decisions. **Nevertheless, a client with diminished capacity often has the ability to understand, deliberate upon, and reach conclusions about matters affecting the client's own well-being.** For example, children as young as five or six years of age, and certainly those of ten or twelve, are regarded as having opinions that are entitled to weight in legal proceedings concerning their custody. **So also, it is recognized that some persons of advanced age can be quite capable of handling routine financial matters while needing special legal protection concerning major transactions.**

# MRPC 1.14 Comments 2 – 3

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[2] The fact that a client suffers a disability does not diminish the lawyer's obligation to treat the client with attention and respect. Even if the person has a legal representative, the lawyer should as far as possible accord the represented person the status of client, particularly in maintaining communication.

[3] The client may wish to have family members or other persons participate in discussions with the lawyer. When necessary to assist in the representation, the presence of such persons generally does not affect the applicability of the attorney-client evidentiary privilege. Nevertheless, the lawyer must keep the client's interests foremost and, except for protective action authorized under paragraph (b), must look to the client, and not family members, to make decisions on the client's behalf.

# MRPC 1.14: Comment 5

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Such measures could include:

- consulting with family members, using a reconsideration period to permit clarification or improvement of circumstances, using voluntary surrogate decision-making tools such as durable powers of attorney or
- consulting with support groups, professional services, adult-protective agencies or other individuals or entities that have the ability to protect the client.

In taking any protective action, the lawyer should be guided by such factors as the wishes and values of the client to the extent known, the client's best interests and the goals of intruding into the client's decision-making autonomy to the least extent feasible, maximizing client capacities and respecting the client's family and social connections.

# Presence of 3<sup>rd</sup> Parties

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Confidentiality under MRPC 1.6 applies no matter who is present or how you learn about your client (but only covers the lawyer and staff.)

Attorney Client Privilege – shields lawyers from being called as a witness about things their clients told them with a reasonable expectation of privacy

The general rule, is the 3<sup>rd</sup> party must be essential to the communication, to preserve the expectation of privacy.

- Look at the comments to Rule 1.14 for exceptions

Best practice, is to always spend some time communicating with the client alone



# How Do We Assess Capacity?

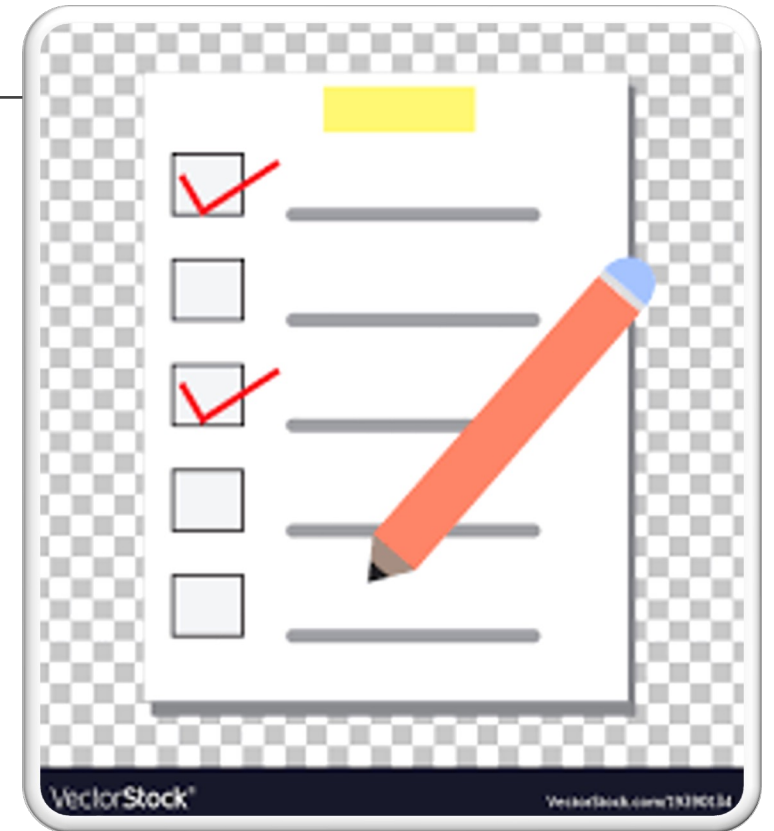
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We do it every time we communicate interactively

There Is No Simple Test,

Look To The Totality Of The Circumstances – The Clients Ability To Communicate And Give Informed Consent

When In Doubt, Seek Guidance Before Proceeding



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# Can You Enter Into An Attorney Client Relationship With A Client With Diminished Capacity?

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**Yes,**

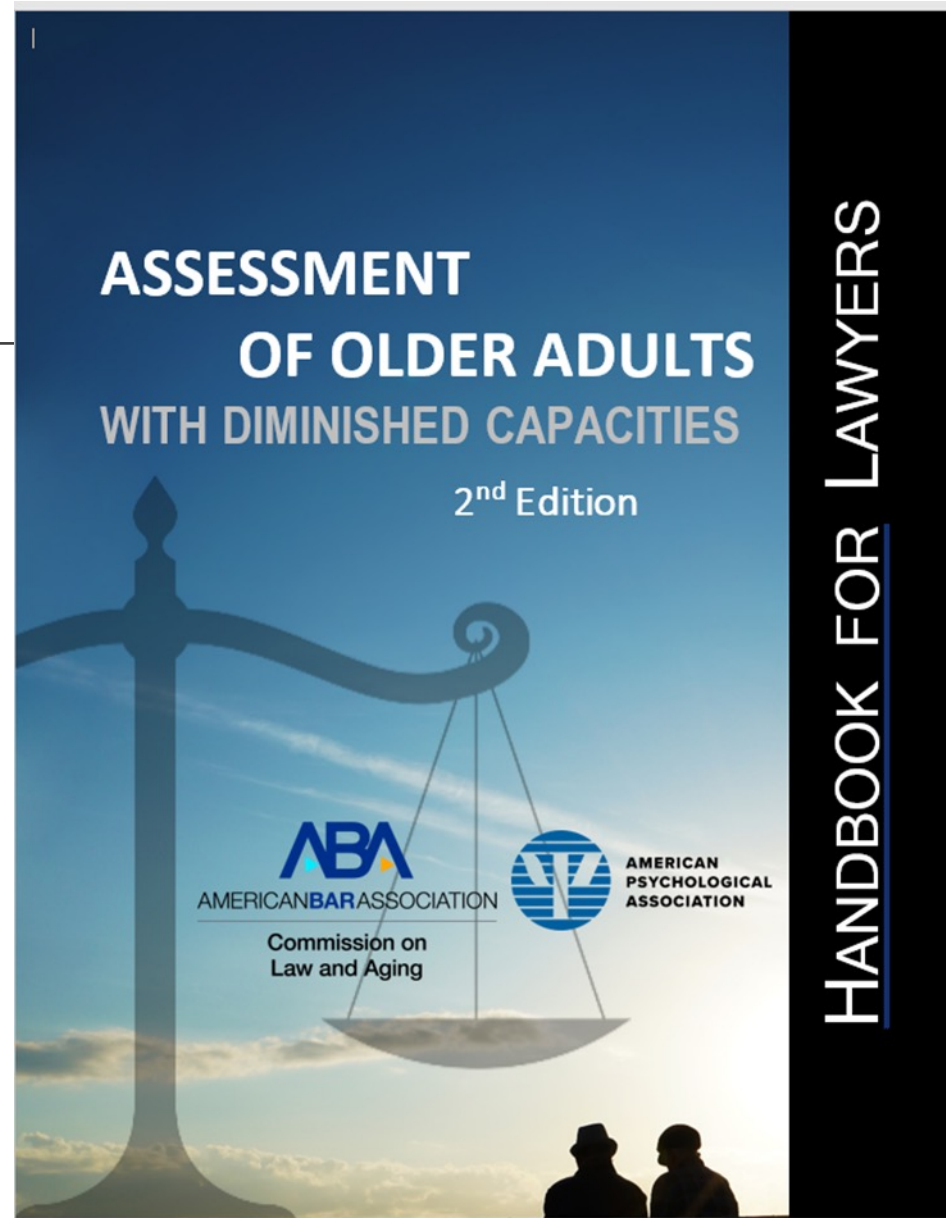
**Client has sufficient capacity**

**Client lacks capacity and is at risk of harm – Ask the Court to appoint you**



Available at:

<https://www.americanbar.org/products/inv/book/411701219/>



## A. OBSERVATIONAL SIGNS

► Cognitive Functioning	Examples
Short-term Memory Problems	<ul style="list-style-type: none"><li>▪ Repeats questions <u>frequently</u></li><li>▪ Forgets what is discussed within 15-30 min.</li><li>▪ Cannot remember events of past few days</li></ul>
Language/Communication Problems	<ul style="list-style-type: none"><li>▪ Difficulty finding words <u>frequently</u></li><li>▪ Vague language, Disorganized</li><li>▪ Trouble staying on <u>topic</u></li><li>▪ Bizarre statements or reasoning</li><li>▪ Difficulty using phone, email and/or other forms of communication</li></ul>
Comprehension Problems	<ul style="list-style-type: none"><li>▪ Difficulty repeating simple <u>concepts</u></li><li>▪ Repeated questioning</li></ul>
Lack of Mental Flexibility	<ul style="list-style-type: none"><li>▪ Difficulty comparing <u>alternatives</u></li><li>▪ Difficulty adjusting to changes</li></ul>
Disorientation	<ul style="list-style-type: none"><li>▪ Trouble navigating <u>office</u></li><li>▪ Gets lost coming to <u>office</u></li><li>▪ Confused about day/time/year/season</li></ul>



# Uncomfortable Facts

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- #1 Research shows that financial judgement peaks at age 52



# #2 Decline in Capacity

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Credit Scores, on average start to decline 7 years before a person is diagnosed with Alzheimer's

- Collections or judgements, credit utilization, timely payment

Unpaid bills are most common,

Unusual spending is less common



Financial Management Abilities:	
<ul style="list-style-type: none"> <li>Problems with Everyday Arithmetic</li> </ul>	<ul style="list-style-type: none"> <li>More difficulty calculating: Sum of loose <u>change</u> Feet to inches conversion Tip in a restaurant</li> </ul>
<ul style="list-style-type: none"> <li>Decreased Understanding of Financial Concepts</li> </ul>	<ul style="list-style-type: none"> <li>More difficulty understanding: Health care concepts like medical deductible Terms like interest rate, lien, and joint liability</li> </ul>
<ul style="list-style-type: none"> <li>Decreased Comprehension of Ordinary Financial Documents</li> </ul>	<ul style="list-style-type: none"> <li>More difficulty: Identifying a bill that is overdue and needs prompt <u>attention</u> Finding details in a bank statement Completing sections of a check register</li> </ul>
<ul style="list-style-type: none"> <li>Diminished Awareness of Financial Risks</li> </ul>	<ul style="list-style-type: none"> <li>Trouble identifying key risk in investment <u>proposal</u></li> <li>Overly focused on benefits/return, not risk</li> </ul>



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► Emotional Functioning	
Emotional Distress	<ul style="list-style-type: none"> <li>▪ Anxious</li> <li>▪ Tearful/<u>distressed</u></li> <li>▪ Excited/pressured/manic</li> </ul>
Emotional Lability	<ul style="list-style-type: none"> <li>▪ Moves quickly between laughter and <u>tears</u></li> <li>▪ Feelings inconsistent with topic</li> </ul>



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► Behavioral Functioning	
Delusions	<ul style="list-style-type: none"> <li>▪ Feels others out “to get” him/her, spying or organized against him/<u>her</u></li> <li>▪ Fearful, feels unsafe</li> </ul>
Hallucinations	<ul style="list-style-type: none"> <li>▪ Appears to hear or talk to things not <u>there</u></li> <li>▪ Appears to see things not <u>there</u></li> <li>▪ Misperceives things</li> </ul>
Poor Grooming/Hygiene	<ul style="list-style-type: none"> <li>▪ Unusually unclean/unkempt in appearance</li> <li>▪ Inappropriately dressed</li> </ul>
Markedly Inappropriate Social Behavior	<ul style="list-style-type: none"> <li>▪ Loss of empathy and interpersonal skills</li> <li>▪ Lack of judgment; Loss of inhibition</li> <li>▪ Lack of interest (apathy), which can be mistaken for depression</li> </ul>



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### **Other Observations + Notes from 3<sup>rd</sup> parties**

☐

**Potential Undue Influence – Use Undue Influence Screen**



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Mitigating/Qualifying Factors Affecting Observations	Ways to Address/Accommodate
Stress, grief, depression, recent events affecting stability of <u>client</u>	<ul style="list-style-type: none"> <li>▪ Ask about recent events, <u>losses</u></li> <li>▪ Allow some <u>time</u></li> <li>▪ Refer to a mental health <u>professional</u></li> <li>▪ Help find support persons or groups</li> </ul>
Medical Factors	<ul style="list-style-type: none"> <li>▪ Ask about nutrition, medications, <u>hydration</u></li> <li>▪ Refer to a physician</li> </ul>
Time of Day Variability	<ul style="list-style-type: none"> <li>▪ Ask if certain times of the day are <u>best</u></li> <li>▪ Try mid-morning appointment</li> </ul>
Hearing and Vision Loss	<ul style="list-style-type: none"> <li>▪ Assess ability to read or repeat simple <u>information</u></li> <li>▪ Adjust seating, <u>lighting</u></li> <li>▪ Use visual and hearing <u>aids</u></li> </ul>
Social/Environmental Factors	<ul style="list-style-type: none"> <li>▪ High anxiety level in unfamiliar environment</li> <li>▪ Presence of others causing <u>stress</u></li> <li>▪ Help find personal/social <u>supports</u></li> </ul>
Educational/Cultural/Ethnic Barriers	<ul style="list-style-type: none"> <li>▪ Be aware of race, ethnicity, education, long-held values and traditions, and your own implicit <u>biases</u></li> <li>▪ Help find peer supporters</li> </ul>

### C. TASK SPECIFIC FACTORS IN PRELIMINARY EVALUATION OF CAPACITY

The more serious the concerns about the following factors...	The higher the function needed in the following abilities...
<p>Is decision consistent with client's known long-term values or commitments?</p> <p>Is the decision objectively fair? Will anyone be hurt by the decision?</p> <p>Is the decision irreversible?</p>	<p>Can client articulate reasoning <u>leading</u> to this decision?</p> <p>Is client's decision consistent over time? Are primary values client <u>articulates</u> consistent over time?</p> <p>Can client appreciate consequences of his/her decision?</p>



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**D. PRELIMINARY CONCLUSIONS ABOUT CLIENT CAPACITY** - After evaluating A, B, and C above:

<input type="checkbox"/> <b>No or minimal</b> evidence of diminished capacity.	<i>Action:</i> Proceed with representation and transaction
<input type="checkbox"/> <b>Mild concerns</b> – Some evidence of diminished capacity, but less than substantial.	<i>Action Options:</i> <ul style="list-style-type: none"><li>(1) Proceed with representation/transaction,</li><li>(2) Explore decision support strategies to reinforce capacity,</li><li>(3) Consider medical referral if medical oversight lacking,</li><li>(4) Consider consultation with mental health professional,</li><li>(5) Consider referral for formal clinical assessment to substantiate conclusion, with client <u>consent</u></li></ul>
<input type="checkbox"/> <b>More than mild concerns</b> about capacity even with decision supports, or decision-support is not available.	<i>Action Options:</i> <ul style="list-style-type: none"><li>(1) Explore decision support strategies further to reinforce capacity,</li><li>(2) Medical referral if medical oversight lacking,</li><li>(3) Consultation with mental health professional,</li><li>(4) Refer for formal clinical assessment, with client <u>consent</u></li></ul>
<input type="checkbox"/> <b>Severe concerns</b> – Client fairly lacks capacity to proceed with representation and transaction	<i>Action Options:</i> <ul style="list-style-type: none"><li>(1) Referral to mental health professional to confirm <u>conclusion</u></li><li>(2) Do not proceed with case; or withdraw, after careful consideration of how to protect client's <u>interests</u></li><li>(3) If an existing client, consider protective action consistent with MRPC 1.14(b)</li></ul>



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# New In Legal Capacity Assessment: Role of Decision Supports

A recognition of the role of decisions supports in enhancing capacity

“A series of relationships, practices, arrangements and agreements, of more or less formality and intensity, designed to assist an individual with a disability to make and communicate decisions about the individual’s life.”

# Implicit Bias

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When people meet, they form initial impressions that are shaped by visible characteristics such as sex, age, race, and bodily appearance. These traits tend to be associated with cultural stereotypes and with bias.

And certain stereotypes are so deeply ingrained in our culture that people do not realize that they shape perceptions and behavior.

# Avoid Assumptions

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Ageism = assumptions based on appearance or actual age of what a person is like, and may have no connection to the reality of the person

Ableism = assumptions based on apparent physical or communications differences

Differences in culture, life experience and education, shape our responses to questions

Recognizing these impacts as a valid part of legal capacity assessment is new in the past decade



# How Bias Can Show Up in an Assessment

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## Language/Communication

- Language and communication barriers could be easily mistaken for diminished capacity.
- Even for clients with some English language abilities, the availability of interpreters is paramount during every client interaction
- Interpreters are not optional. Family members are not interpreters

## Behaviors

- Certain everyday behaviors differ from culture to culture. For example, some clients may be more quiet and reserved or more reluctant to look others in the eye.
- Remember to keep your own cultural upbringing in mind when encountering others behavior

## Management of Finances

- While an inability to manage basic finances may be a sign of diminished capacity, it might also be a result of the clients lived experiences
- Consider educational background, literacy, etc.
- This could account for their inabilities but not signal diminished capacity





# Ethical Issues in Representing Fiduciaries

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In What Capacity?

As an individual

As a fiduciary

# Rule 1.16

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## Rule 1.16: Declining or Terminating Representation

(a) Except as stated in paragraph (c), a lawyer shall not represent a client or, where representation has commenced, shall withdraw from the representation of a client if:

(1) the representation will result in violation of the rules of professional conduct or other law;

(b) Except as stated in paragraph (c), a lawyer may withdraw from representing a client if:

(1) withdrawal can be accomplished without material adverse effect on the interests of the client;

(2) the client persists in a course of action involving the lawyer's services that the lawyer reasonably believes is criminal or fraudulent;

(3) the client has used the lawyer's services to perpetrate a crime or fraud;

(4) the client insists upon taking action that the lawyer considers repugnant or with which the lawyer has a fundamental disagreement;

# In Their Capacity as a Fiduciary

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**Must advise the client of their duty as a fiduciary**

**Duty of Care** – how would a reasonable person proceed

**Duty of Loyalty** – Put the principle or beneficiary first – avoid conflicts of interest

**Duty to Act Lawfully** – Not commit fraud or a crime, comply with laws, reporting, record keeping, taxes

**Duty to Act With/In Good Faith** – honesty, transparency, accountability



# Discussion Example

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David is successor trustee of George's Living Trust, George recently died.

There are four Beneficiaries of the trust, David, Karen, Gary, and Dale.

One of the assets in the trust is a house that has been in the family for 40 years, George purchased it for \$25,000.

David would like to "buy" the house, for \$100,000, figuring that is 4 times what George paid for it, and each of his siblings would receive \$25,000, what Dad paid for the house in the 1970's.

# In Advising David as a Fiduciary

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1: David says he will get a friend who is a real estate broker to value the house at \$100,000 saying that it needs repairs.

2: His siblings live at a distance and are not really concerned about the money, he says, just prepare the deed, and he will sign it as trustee?

3: You check the tax records as part of preparing the deed and find that the tax value is over \$200,000.

Why shouldn't you follow his directions – he is your client?

Why shouldn't he do this?

# UNDUE INFLUENCE AND VULNERABLE ADULTS

SANDRA D. GLAZIER  
THOMAS M. DIXON  
THOMAS F. SWEENEY



---

Use of power and control to

Exploit trust, dependency and fear

Substitution of one person's will for the  
true desires of another

Purpose: gaining control

# Unique Definitions

**Financial exploitation is the unauthorized use or taking of the money or property of a vulnerable adult for the benefit of another person.**

**Lack of capacity – theft from a person who is unable to form informed consent**

**Undue influence is the exertion of influence, over a vulnerable adult, with the intent to override or change the choice or free will of the person, for the benefit of another person.**

**Fraud is a theft involving an intentional lie or misstatement of the fact, or intentional withholding of a material fact, with the intent that the person will rely on it to the benefit of another person.**

R=Required O= Optional	Vulnerability	Person in a position of power or influence	Intentional lie, or material misstatement of fact or withholding of fact	Theft or use of money or property for the benefit of another
Financial Exploitation	R	O	O	R
Lack of Capacity	R Unable to form informed consent			R
Undue Influence	R Must have capacity	R	O	R
Fraud	O	O	R	R

**Screening Questions** should be direct, but not conclusive. Asking clients if they have been exploited or defrauded is not useful if clients do not understand or relate their experiences to those terms. Start with general questions and then turn some of the possible indicators into questions. Delve deeper if appropriate.

- Who makes decisions about your money and property? How is that going?
- How do you get cash when you need it? Any problems with that?
- Does anyone have access to your bank account? How is that going?
- Have you noticed any suspicious or unusual items on your bills?
- Have you noticed money missing from your bank accounts or checks missing from your checkbook?
- Are any of your belongings missing from your home?
- Have you signed documents that you did not understand or want to sign because someone encouraged, forced, or deceived you?
- If you have a power of attorney, does your agent do things that you do not want your agent to do?
- Does your paid caregiver make you pay extra for things that the caregiver is supposed to do or get for you anyway?
- Did you want that person to come with you to this appointment? Did that person insist that you come see me? Did that person take you to see other lawyers before me?
- Do you live with anyone? When did that person move in? Why? Whose name is on the title (lease)? Does that person pay a share of your mortgage (rent) and household expenses?

# About the ABA Commission on Law and Aging

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*The ABA Commission on Law and Aging leads the association in strengthening and securing the legal rights, dignity, autonomy, quality of life and quality of care of older adults. The Commission accomplishes its work through research, policy development, advocacy, education, training and through assistance to lawyers, bar associations and others working on aging issues.*

*My goal is for the Commission to empower advocates to be more effective advocates for their clients.*

*You can support our work [https://www.americanbar.org/groups/law\\_aging/](https://www.americanbar.org/groups/law_aging/)*

*ABA membership for legal aid, public interest, solo and small firm lawyers is \$150 a year or less,*

*And includes access to a library of over 600 CLE accredited webinars. [www.Americanbar.org](http://www.Americanbar.org)*





Thank You! [David.Godfrey@Americanbar.org](mailto:David.Godfrey@Americanbar.org)

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# Helping the Person with Dementia Dementia-Informed Advocacy

David Godfrey, JD., Director,  
ABA Commission on Law and Aging

May 2023



# About the ABA Commission on Law and Aging

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# Key Lessons

- Overview of how dementia changes communication and responses
- Strategies for communication with persons living with dementia to provide quality, person-directed legal assistance and advocacy
- Understanding changes in behavior by persons living with dementia and ways to work through unexpected behaviors and remain a strong advocate for the person



# Dementia Basics for Advocates



# What is Dementia?

- Dementia is a global term for illnesses that result in a decline in neurocognitive function.
- There are some causes of neurocognitive decline that are reversible.
- Alzheimer's and other causes of dementia are terminal and progressive.
- *From:*  
<https://www.nia.nih.gov/health/alzheimers/basics>

# Poll #1

- Have you had a close family member with dementia?
  - a) Yes
  - b) No
  - c) Not sure

# Diagnosing Alzheimer's



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- Alzheimer's is diagnosed based on two factors,
  1. Amyloid plaques—a form of protein deposits in brain tissue
  2. A measurable decline in cognitive ability
- It is possible to have an accumulation of amyloid plaques and not have a noticeable decline in cognitive ability.
- It is also possible to have a decline in cognitive ability and not have amyloid plaques.
- 15 years ago, diagnosis during lifetime was impossible

*From: "The Problem of Alzheimer's" by Dr. Jason Karlawish and*  
[nia.nih.gov/health/what-alzheimers-disease](https://nia.nih.gov/health/what-alzheimers-disease)

# Rapidly Developing Area of Science

- The focus has been on stopping the development of amyloid plaques or removing them
- Current research is moving up-stream
- Looking at what is causing the amyloids to form
  - One hypothesis is that amyloids are a response to injury or illness in the brain. Part of the brains healing mechanism.
  - Prevention may lie in preventing what is causing amyloids to be formed.



## Alzheimer's and Other Causes

- There are an estimated 6.5 million persons living with Alzheimer's-caused dementia in the United States
- There are other causes of dementia, and different causes result in unique changes in personality and behavior
- Currently incurable
  - The best treatments currently available slow the progression of symptoms in some people for some causes



## As Advocates We Need to Know

- The fundamentals of dementia
- Progressive decline in cognitive ability, including:
  - Memory
  - Language
  - Decision making
  - Organizing and sequencing information
  - The ability to learn
  - Social judgement
  - Personality
  - Behaviors



# Discussion Case

## Mildred

- Mildred has been widowed for about a fifteen years, she is 82 and lives alone. She has some forgetfulness – and has asked her family to monitor her finances and remind her on days that they are picking her up. Recently her son went to pick her up, forgetting to call, and found his Mildred in bed with the 25-year-old gardener, doing things he never thought his mother did (kids can be oblivious to the obvious.) He accompanied her on a doctor's visit the next day and forced her to explain to the doctor what was happening. She said, well he is so handsome. Her son's reaction was, "mother you have never been like this!"

# We Have A Likely Cause

- The primary characteristic of frontal lobe dementia is a decline in inhibitions leading to significant changes in social behavior.
- The impact on memory tends to be slower to progress.
- It has a less impact on communication than other causes.
- In the early stages, safety and an avoiding criminal activity are the greatest concerns.



## Person-Centered Approach

- The impact on or changes experienced by each person will be different
- Accommodations and support allow most persons to live full lives until later stages of the illness
- A diagnosis is not destiny
- We are not sure if it is a loss of ability to form a thought, or a loss of ability to communicate a thought?



## Learning More

- Understanding the basics of what causes cognitive decline prevents overgeneralization or mischaracterization
- Reliable sources of information & resources:
  - [National Alzheimer's and Dementia Resource Center](#)
  - [NIH National Institute on Aging: Alzheimer's Disease & Related Dementias](#)
  - [U.S. Department of Health & Human Services: Alzheimers.gov](#)
  - [The Alzheimer's Association](#)

## Poll #2

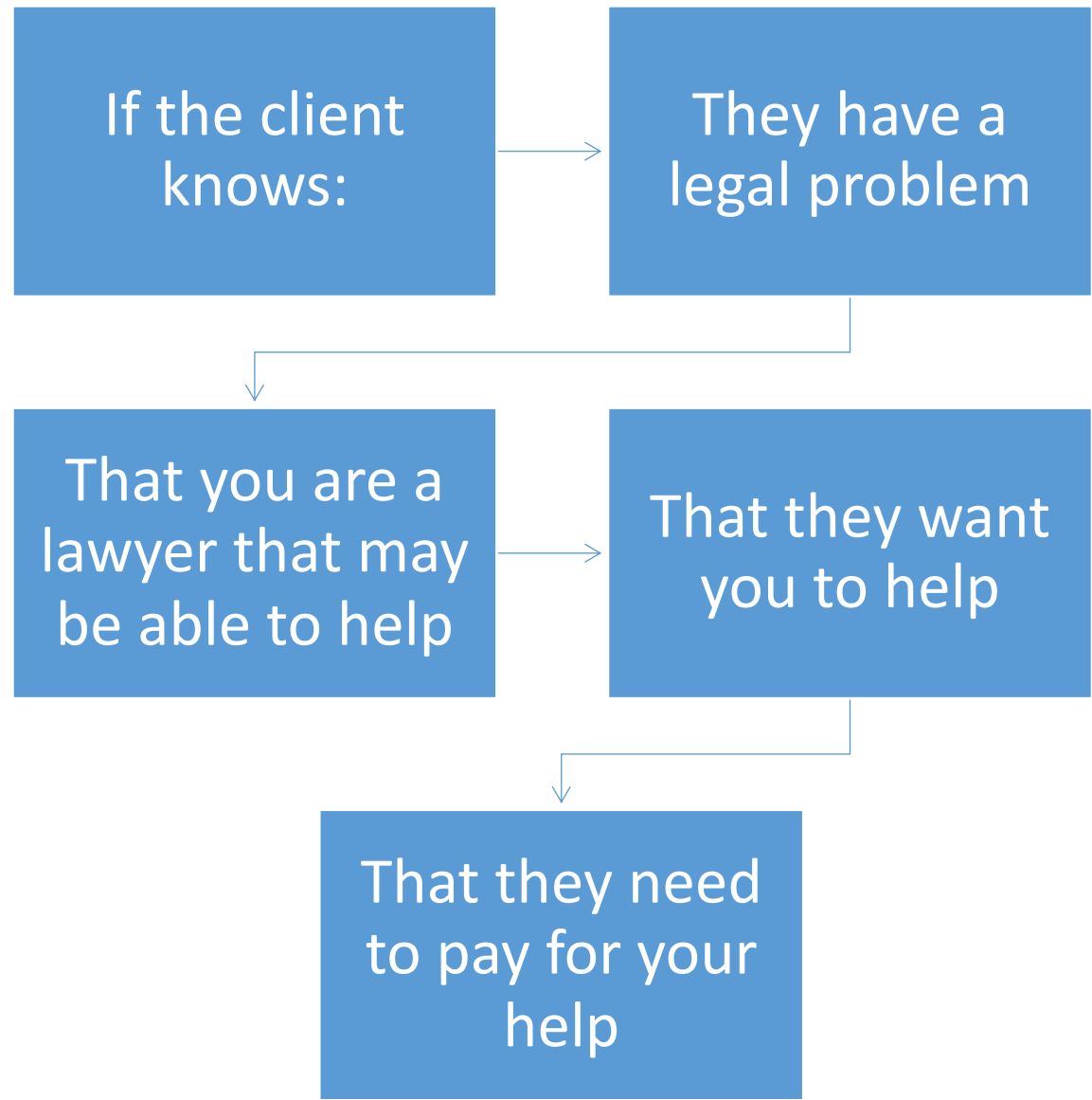
- Have you had training in the various causes of dementia in later life?
  - a) Yes
  - b) No
  - c) Some, but I would like to learn more

# Forming & Maintaining an Attorney-Client Relationship

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## Capacity to Hire a Professional





# Attorney-Client Relationship (1 of 2)

## Model Rules of Professional Conduct 1.14

Changes in cognitive function or a diagnosis does not prevent the formation of an attorney-client relationship or end an attorney-client relationship.

Changes in cognitive function heighten awareness of the need to communicate effectively, to work with the client, and meet the client where they are cognitively.

# Attorney-Client Relationship (2 of 2)

## Model Rules of Professional Conduct 1.14



Rule 1.14 of the Model Rules of Professional Conduct direct lawyers to “as far as reasonably possible, maintain a normal client-lawyer relationship with the client.”

The comments to the rule 1.14 should be read in detail to fully understand how to apply rule 1.14.



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# Tips for Working with a Person with Cognitive Impairment

# Differences and Timing

- Dementia effects each person differently
  - Avoid assumptions
- Assess understanding each time
- Best time of the day—ask:
  - The person
  - Trusted family members
  - Trusted caregivers
  - Be aware of impact of medication



# Preparing for Meetings

- Before you meet, take a few minutes to prepare:
  - What are the most critical issues
  - How best to communicate
  - Have a back-up plan if the person is having a bad day
  - Prepare yourself to slow down and move at the client's pace

# Assessing the Space

- Talk where the person is most comfortable.
  - This may be your office, or it may be their home. Ask the client and their family or caregivers where they are most comfortable.
- Reduce distractions:
  - Turn off background noise
  - Beware of glare



# Communication



- Slow down—talk slowly and clearly.
  - Simple direct questions and explanations
- Maintain an adult tone and communications style.
  - Avoid being patronizing or “baby talk”
- Limit the agenda—focus on one issue
  - Switching from one issue to another is difficult for many persons living with dementia





# When to Stop

- End the meeting when the person shows signs of being tired, confused, or frustrated, and seems unable to refocus
- You may need to break an issue up into multiple meetings



# Sometimes It Takes Time

- Allow the person to talk
  - May need time to warm up to the subject
- Talking may help the person organize thoughts or focus communications
- The stories they tell are important to them
  - And will help you understand what is important to the person and what they want
- A helpful book on this:
  - [How to Say It to Seniors: Closing the Communication Gap with Our Elders](#), by David Solie





Recap what you have covered



Provide the person with brief notes on key points

Written notes are helpful (be mindful of literacy)  
Provide lists of things you need



Ask if there is someone helping or supporting them



Send follow up questions and reminders of the next meeting



Call the day before and the day of the next meeting

Don't let no-shows end the relationship

# When Finished

# Poll #3

- Do you meet with clients (choose all that apply):
  - a) In your office
  - b) In their homes
  - c) In care settings
  - d) Virtually
  - e) Other

# Cultural Considerations

- In some cultures:
  - Cognitive change is seen as progression into an advanced state of consciousness or wisdom
  - Changes in mental health are seen as a failure or viewed with great shame
  - Delusions or hallucinations are seen as evil spirits
- Always ask how the person and family for their view
- Honor strongly held cultural beliefs



# Communication and Behavioral Accommodations



# Memory

- A decline in memory is a classic symptom of dementia
- Short-term memory is often impacted first
  - Long-term memory is often the least effected
- Expect that persons with dementia are going to forget things
- Questions will be Repeated
- Repeated stories or statements
- Misplacing things

# Accommodations for Memory Loss

- Answer repeated questions, change the subject, and move on.
  - Avoid saying, “we already answered that.”
- Written reminders
- Phone reminders
- Note taking, calendars, organizers
- Supportive family and friends
- Allowing the person to talk—telling stories can sometimes result in recall
- Stay steady and even



## Case Example

You asked Bill where he lived before moving here, and he answers, “oh you know, that city, down near the end of the Mississippi River, with the big Mardi Gras parades.”

# Aphasia

- A technical term for difficulty finding the right words
  - Most people have some minor challenges
  - Normal increase with age
- Dementia increases difficulty with word finding beyond the norm
- Allow more time for responses
- When necessary, assure the person that this happens to everyone
- The harder we try, the harder it is—relax
  - “it will come to me/you in a minute”



# Word Finding

- Find meaning in context
- Encourage the person to describe what they can't find the word for
- Talk about other aspects of the issue, and see if the word comes to them
- Feed back to confirm understanding
- Thought formation and communication are not always tied together
  - The person may know what the answer is but struggle to communicate it



# Discussion Case

## Jamie

- During your meeting Jamie becomes very distracted and agitated. Jamie says, sssshhh, they are listening in. They are always listening in, and using everything I say to undermine me.
- Jamie goes on convinced that the doctors are conspiring with the Judge to take control and steal money so they can split it to pay for their fancy cars.

# Delusions

- Delusions are strongly held beliefs that have no basis in fact and cannot be verified by outside evidence.
- Some persons living with dementia develop delusions.
- The person will hold the belief despite evidence to the contrary.
- The belief is a part of the persons perceived reality.
- Facts or reasoning will likely not change the person's belief.

# Acknowledge

- Acknowledge while not agreeing or confirming
  - “I understand you believe that.”
  - “It must be terrible when that happens”
- Balance respecting the client and a commitment to verifiable truth
- Search for evidence or verification
  - Ask the client for help
  - Ask outside sources for help
  - Sometimes they are correct



## Case Example (2)

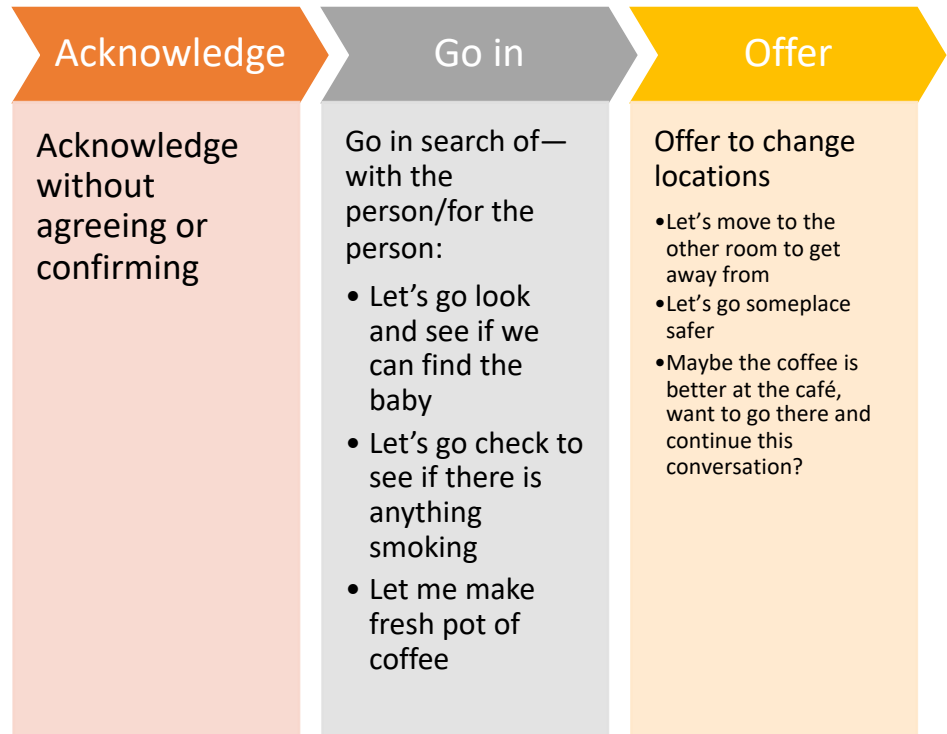
During your meeting with Ted, he is convinced that someone is spraying poison under his house, making him sick. You consider reaching out to the county health inspector to make a visit, the local/state environmental protection agency to inspect, local law enforcement to visit, or have a friend or family member help secure openings into the space under his house.

# Hallucinations

- Hallucinations occur when someone sees, hears, smells, tastes, or feels things that don't exist outside their mind.
- The perception is very real to the person, it is part of their reality.
- Facts or reasoning won't change the person's perceptions.
- The most common hallucinations are the presence of persons who are not there.
  - Often persons who had an important role in the persons life
- Sometimes people will perceive sensations that others don't such as hearing a crying baby or music; smelling smoke; or belief that a taste is off.



# Accommodations for Hallucinations



# Emotions

- Anxiety – feelings of dread, fear, uneasiness
  - Acknowledge and talk about the persons feelings
  - Professional therapy may help
  - Seek expert advice on medication
  - Change the subject, change the setting, do something that brings the person joy.
- Emotional lability is a neurological condition that extreme mood swings, uncontrollable laughing or crying, often at inappropriate times.
  - Don't be shocked or surprised
  - Avoid embarrassment
  - Support the person



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# More Changes in Emotions

## Rapid changes in emotional state

- From happiness to sadness, or sadness to happiness
- Hear the person out
- Allow the person to express how they are feeling
- Acknowledge—then, if possible, move on—if the person is not ready to move on, hear them out and reschedule

## Depression

- Feelings of sadness, tearfulness, emptiness, or hopelessness
- Angry outbursts, irritability, or frustration, even over small matters
- Loss of interest or pleasure in most or all normal activities
- Sleep disturbances, including insomnia or sleeping too much

# Supporting on Emotions

- Remain emotionally steady
- Empathy more than sympathy
- Hear the person out – this may take time
- Acknowledge how they feel – “It is really difficult when \_\_\_\_.”
- Suggest that they seek advice from a qualified medical professional
- Ask what you can do to help them move forward
- Reschedule if the person is really having a bad day.



# Behaviors

## Lowering of Inhibitions

- May say or do things that are socially inappropriate
- Outbursts of swearing or prejudice
- Sexually explicit language or actions

Don't engage in the same behavior

Maintain a professional demeanor

# Physical Aggression

- Physically aggressive behavior is rare, but it can happen. Fight, freeze, or flight responses to stress include:
  - Striking out in frustration
  - Violent acts—can happen
  - Ask family and caregivers if this has happened before
- Maintain your safety – office safety policy?
- Engage the person, family, and caregivers in safety planning

# What is the challenge with this layout?



# Late/End-Stage Dementia

- In the late stages of dementia, the person may be unable to respond to their environment.
- Some persons lose muscular control and have difficulty or become unable to walk or transfer without assistance.
- May lose the ability to eat without assistance.
- Some lose the ability to swallow due to a decline in neuromuscular control.
- They may sit and stare – often described as a catatonic state.



# Working With and Around Persons With Advanced Dementia

- Avoid saying anything in the persons presence that would be upsetting
- Don't talk about the person in their presence
- Do talk with them or to them even if they are unable to respond
- Many find music comforting
- Avoid leaving the person alone in silence when awake
- For lawyers, visit your client, explain what is happening, why, how it affects them, and what you are doing to protect them

# Dementia is Terminal

- Terminal means the person will die with or from Alzheimer's or similar dementias
- For families and caregivers (including lawyers and other advocates) the loss and grief are often two-fold
  - The illness slowly takes away the manifestation of the person you knew
  - Then the death of the person



# Understand and Acknowledge

- It is normal to grieve the loss of a client
- No two people experience this the same way
- Allow yourself the time to heal
- Let others in your office know what is happening
- Even if you don't think it shows, it does




# Prepare and Allow Time (1 of 2)

- Take time to prepare emotionally before engaging with a person living with dementia
- Make sure your office and colleagues know you are working with a person with dementia and may need extra time
- Effectively communicating can be exhausting



# Prepare Yourself Emotionally

- Working with clients with dementia can be emotionally draining.
  - The client may remind you of past experiences or raise anxiety about the future.
  - Some clients will say things that are shocking, disturbing, or funny when it is not appropriate.
  - Be aware of your reactions and responses.
- 

# Self-Care

- Take time and engage in activities that help you recover and restore.
- Many people find it helpful to have someone to talk with about experiences and feelings
- Beware of your own needs
  - Engage in practices that help you heal



# Conclusion

- Dementia is complicated and a rapidly advancing area of medial and scientific research
- Being aware is essential, not being an expert
- Understanding the changes in memory, personality, and behavior is crucial
- Managing our response enhances our ability to be an advocate for the person living with dementia

# Thank You!

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