

Competency and Capacity: What's The Difference

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Poll #1 Who Is Here?

What Discipline Best Describes You?

- ▶ APS
- ▶ Criminal and Civil Justice Professionals
- ▶ Health Care and Mental Health
- ▶ Advocates
- ▶ Other

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Disclaimer

- ▶ Nothing said in this presentation is intended to be legal or clinical advice.
- ▶ As you know every case is different and unique and should be evaluated individually.
- ▶ You should consult your legal advisor about the applicability of ideas expressed here to your jurisdiction.

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Capacity and Competency

- May be issues in many different court settings
 - Criminal
 - Civil
 - Probate
- May raise different issues related to court's function
 - Criminal—serve as a witness, participate in one's defense, legal defense of insanity
 - Civil—file a legal action oneself, serve as a witness, execute certain documents (wills, contracts, POAs)
 - Probate—needs protection, extent of retained rights

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Competency and Capacity

- Capacity is a major component of neglect, financial abuse, and sexual abuse cases
- Critical to evaluation of many APS cases
- Defines prosecutor's case theory
 - Victim had capacity and did not consent
 - Victim lacked capacity
 - Capacity unclear but defendant used deception, duress, or undue influence
- Defense of consent hinges on V's capacity

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Competency

- A court finding that a person has the ability to do or not do something - **legal determination**
- Ability of defendant to stand trial
 - Understand nature of charges and assist in defense
- Ability to understand and waive legal rights (e.g., Miranda warning; right to counsel; enter a guilty plea)
- Ability to testify as a witness
 - Distinguish truth from fantasy
 - Able to communicate information so as to be understood

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Two Aspects of Capacity

- ▶ The ability to do = Executive Capacity
- ▶ The ability to decide = Decisional Capacity
- ▶ Referral for capacity evaluation must specify the specific actions or decisions to be assessed. (Falk, E. & Hoffman, N. (2014) "The Role of Capacity Assessments in Elder Abuse Investigations and Guardianship," Clinics in Geriatric Medicine, 30: 851-868)

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Case example

- ▶ Mr. Jones is an 84-year-old gentleman being assessed for capacity related to a guardianship petition. He currently manages all IADL's without assistance, believes he is doing well in this regard
- ▶ He has had multiple hospitalizations in recent months due to poor management of diabetes that have resulted in life threatening conditions (coma, head trauma, malnutrition)
- ▶ Question #1: Does he retain the decisional capacity to make medical decisions? (Decide)
- ▶ Question #2: Does he retain the executive capacity to manage his daily activities including management of his medical conditions? (Do)

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Capacity

- ▶ Focuses on person's abilities to do things and decide things
 - ▶ handle finances (do)
 - ▶ make medical decisions (decide)
 - ▶ take medications reliably (do)
 - ▶ give informed consent (decide)
 - ▶ drive a car (do)
 - ▶ decline social services (decide)
- ▶ May have capacity to do/decide one thing, but not another

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Competency

- Competence to testify requires a minimal ability to observe, recollect and communicate information and understand the duty to tell the truth
- Determination of competency in many cases likely to require an expert's assessment of capacity

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Poll Question #2

- Older adults are presumed competent to make their own decisions and testify
- True
- False

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Legal Presumptions

Until the contrary is demonstrated, individuals are presumed to be capable of making their own decisions and competent to testify

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Language Intersection of Law & Medicine

- Competency vs Capacity
- Consent vs Decisional Capacity

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How Much is Enough Capacity?

- On a continuum vs. dichotomous
- Degree of complexity of decision/task
- Consequences to individual (risk)
- Diagnosis (dementia, intellectual disability, psychosis) does not indicate/prove incapacity
- Capacity must be individually assessed
- May fluctuate (time of day, meds, situation, fatigue, pain)

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Capacity Assessment

- Assessment by trained professional
- Psychologist or Physician (in California)
- Also social worker & nurse in some other states
- Not a *clinical* assessment
- Not a *legal* determination
- Purpose is to provide opinion to the Court

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Components of Capacity Assessment

- Cognitive Functioning
- Psychiatric Symptoms
- Values, Preferences, Experience, Literacy, Education, Culture
- Interview regarding decision making
- Effort to enhance capacity

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Case Components

Capacity Assessment of Mr. Jones pertaining to guardianship and elder abuse criminal case

- Cognitive assessment reveals mild to moderate dementia, likely 2nd to poorly controlled diabetes
- No significant psych symptoms but lack of insight into his care needs
- Values autonomy and living in own home, has managed finances and other IADL's independently throughout his life, values relationships with neighbors
- Rejects offers for in home care, assistance with finances, other services

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Executive Function

- Plan
- Organize
- Consequences
- Judgment
- Alternatives
- Insight
- Reason

Person can have deficits in executive function without having dementia or memory impairment (Dyer et al)

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Steps Taken to Enhance Capacity? Outcomes?

- Hired/family caregiver: affordable, accepted
- Discontinued driving
- Home delivered meals
- Bookkeeper/private fiduciary
- Blister packed medications
- Housekeeping services
- Adult Daycare Program

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Poll Question #3

- Decision Making Capacity does not include:
- Understand the decision to be made
- Describe the pros and cons of various options
- Make a decision that does not appear to be in their best interest
- Understand the benefits and risks of a decision
- Express a choice

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Interview Regarding Decision Making

Understand – facts underlying issue, why and what of situation

Appreciate – Consequences of the decision, benefits & risks of the decision to oneself, in context of one's abilities and limitations

Reason – Alternatives considered, pro's & con's

Express Choice – Not necessarily verbal, Consistency of the decision

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Case Example Interview for Decisional Capacity

- Q: Tell me about the medical conditions you have and what you need to do to manage them.
- A: I have diabetes and need to take my medications and be careful about what I eat
- Q: What would happen if you didn't do this?
- A: I could get really sick and maybe die
- Q: Are there any reasons not to take the medication? Or foods that you shouldn't eat but eat any way?
- A: I ALWAYS take my medication, it's important and I make sure I do every day. Diet is harder because I really like ice cream and fast food so I only eat those once in a while for special occasions. It's not easy but I think I do a pretty good job.
- Q: What happened over the past few months that landed you in the hospital several times?
- A: I was only in the hospital one time and that was because a tripped and fell, nothing to do with diabetes.
- Q: Would you show me how you take your medications?
- A: Sure, watch this.

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Conceptual Framework for Capacity Assessment

- Functional Elements
- Diagnosis
- Cognitive Underpinnings
- Psychiatric and Emotional Factors



Legal Standard

- Values and Preferences
- Risk Considerations
- Steps to Enhance Capacity

Keck Medicine
of USC

Source: Assessment of Older Adults with Diminished Capacity: A Handbook for Psychogeriatric Assessment Committee on Law and Aging, American Psychological Association

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Capacity

- Capacity can fluctuate
 - Medical condition, illness
 - Medication
 - Time of day
 - Events in a person's life, e.g., grief, loneliness
- Experience and education may be relevant
 - Literacy and education may relate to ability to understand complex financial transactions
 - Language capacity may be relevant to ability to understand

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Relationship Between Capacity and Competency

- A person may lack capacity but be competent
- A person may be found legally incompetent but have some capacity
 - Able to dress and bathe
 - A finding that a person needs a guardian does not establish if a person is incompetent to testify in court
- Determining capacity in older adults with complex impairments can be difficult

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Poll Question #4

- Consent requires
 - Mental capacity to make a reasoned choice
 - A full understanding of the true nature of the transaction
 - A free choice not the result of undue influence
 - All of the above

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Elements of Consent

- Elements
 - Mental capacity
 - Knowledge of true nature of act
 - Acted freely and voluntarily

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Undue Influence

- Psychological process, not one event
- Based on the nature of the relationship between influencer and victim
- Most often seen in financial exploitation cases but can also be present in sexual abuse, emotional/psychological abuse and neglect
- Victim may be susceptible to undue influence due to cognitive impairment, grief, illness, loneliness, emotional dependence, inexperience handling finances, fear etc.

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Undue Influence

- "Soundness of mind and body does not imply immunity from undue influence. It may require greater ingenuity to unduly influence a person of sound mind and body, and more evidence may be required to show that such a person was overcome than in the case of one weak of body and mind. But history and experience teach that minds of strong men and women have been overborne, and they have been by a master mind persuaded to consent to what in their sober and normal moments, and free from undue influence, they would not have done."

Estate of Olson, 19 Cal. App. 379, 386 (1912)

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Essential Elements of Undue Influence

- Victim characteristics leading to vulnerability
- Influencer's Power: must be in a position of power or authority. Examine the dynamic interplay between the victim and the perpetrator
- Improper actions: affirmative steps/actions to persuade
- Unfair, unnatural or unethical transactions or outcomes

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Common Tactics of Undue Influence

- **Grooming** establishing trust, dependency, fear
- **Withholding** information, not disclosing.
- **Intimidating**, threatening, coercing.
- **Charming, Kissing up**, getting overly close.
- **Exploitive**: acting while person is *most* vulnerable.
- **Deceiving**, making false promises.
- **Undermining** Confidence

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The Expert Assessment for Undue Influence

- ▮ Includes all that would go into a capacity evaluation –
- ▮ Capacity to resist undue influence?
- ▮ Plus-
 - ▮ Assessment of the nature of the relationship btwn victim & influencer
 - ▮ Mechanism of influence

From: Assessment of Older Adults with Diminished Capacity: A Handbook for Psychologists © American Bar Association Commission on Law and Aging- American Psychological Association

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Questions?

- ▮ Thank You!

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