

I Think I Remember You: Ethics and Client Capacity

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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 advocates¹ 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.² Capacity can be impacted, often temporarily by emotional, psychological and health issues, or stress.

¹ Model Rules of Professional Conduct Preamble & Scope

² 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 Conduct³ (MRPC) don't directly define legal capacity. To define capacity, we need to infer the definition from the penumbra⁴ of client protections found in the rules.⁵

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.⁶ 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.⁷) 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/ 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.

⁴ See *Griswold v. Connecticut*, 381 U.S. 479 (1965)

⁵ That is a long way to go to incorporate a reference to contraception in this text.

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

⁷ *Black's Law Dictionary*, 9th 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.⁸

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

⁸ “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?⁹

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 things 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.

⁹ 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.¹⁰

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.

A Client with Diminished Capacity MRPC 1.14:

¹⁰ Pocket Guide of Culturally Competent Communication, https://www.mdanderson.org/documents/education-training/icare/ICAREguide_CultComp.pdf

(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)*

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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"> ▪ Repeats questions frequently ▪ Forgets what is discussed within 15-30 min. ▪ Cannot remember events of past few days
Language/Communication Problems	<ul style="list-style-type: none"> ▪ Difficulty finding words frequently ▪ Vague language, Disorganized ▪ Trouble staying on topic ▪ Bizarre statements or reasoning ▪ Difficulty using phone, email

	and/or other forms of communication
Comprehension Problems	<ul style="list-style-type: none"> ▪ Difficulty repeating simple concepts ▪ Repeated questioning
Lack of Mental Flexibility	<ul style="list-style-type: none"> ▪ Difficulty comparing alternatives ▪ Difficulty adjusting to changes
Disorientation	<ul style="list-style-type: none"> ▪ Trouble navigating office ▪ Gets lost coming to office ▪ Confused about day/time/year/season
Financial Management Abilities:	
<ul style="list-style-type: none"> ▪ Problems with Everyday Arithmetic 	<ul style="list-style-type: none"> ▪ More difficulty calculating: Sum of loose change Feet to inches conversion Tip in a restaurant
<ul style="list-style-type: none"> ▪ Decreased Understanding of Financial Concepts 	<ul style="list-style-type: none"> ▪ More difficulty understanding: Health care concepts like medical deductible Terms like interest rate, lien, and joint liability
<ul style="list-style-type: none"> ▪ Decreased Comprehension of Ordinary Financial Documents 	<ul style="list-style-type: none"> ▪ More difficulty: Identifying a bill that is overdue and needs prompt attention Finding details in a bank statement Completing sections of a check register
<hr/>	
<ul style="list-style-type: none"> ▪ Diminished Awareness of Financial Risks 	<ul style="list-style-type: none"> ▪ Trouble identifying key risk in investment proposal ▪ Overly focused on benefits/return, not risk
► Emotional Functioning	
Emotional Distress	<ul style="list-style-type: none"> ▪ Anxious ▪ Tearful/distressed ▪ Excited/pressured/manic
Emotional Lability	<ul style="list-style-type: none"> ▪ Moves quickly between laughter and tears ▪ Feelings inconsistent with topic
► Behavioral Functioning	
Delusions	<ul style="list-style-type: none"> ▪ Feels others out “to get” him/her, spying or organized against him/her ▪ Fearful, feels unsafe
Hallucinations	<ul style="list-style-type: none"> ▪ Appears to hear or talk to things not there ▪ Appears to see things not there

	<ul style="list-style-type: none"> ▪ Misperceives things
Poor Grooming/Hygiene	<ul style="list-style-type: none"> ▪ Unusually unclean/unkempt in appearance ▪ Inappropriately dressed
Markedly Inappropriate Social Behavior	<ul style="list-style-type: none"> ▪ Loss of empathy and interpersonal skills ▪ Lack of judgment; Loss of inhibition ▪ Lack of interest (apathy), which can be mistaken for depression

Other Observations + Notes from 3rd parties

Potential Undue Influence – Use Undue Influence Screen

Mitigating/Qualifying Factors Affecting Observations	Ways to Address/Accommodate
Stress, grief, depression, recent events affecting stability of client	<ul style="list-style-type: none"> ▪ Ask about recent events, losses ▪ Allow some time ▪ Refer to a mental health professional ▪ Help find support persons or groups
Medical Factors	<ul style="list-style-type: none"> ▪ Ask about nutrition, medications, hydration ▪ Refer to a physician
Time of Day Variability	<ul style="list-style-type: none"> ▪ Ask if certain times of the day are best ▪ Try mid-morning appointment
Hearing and Vision Loss	<ul style="list-style-type: none"> ▪ Assess ability to read or repeat simple information ▪ Adjust seating, lighting ▪ Use visual and hearing aids


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

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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?

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.