

Understanding and Navigating Client Competency when working with Aging Clients: Considerations for Pre-Mortem Legal Planning and Fiduciary Representation

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Distinction Between Capacity and Competency

- Capacity: capable of making a specific decision
- Competence: global assessment and legal determination made by a judge in court
- Capacity is a necessary component of competence.
- Ethically challenging – fluid, contextual



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When/Why is this distinction important?

- Any time someone is temporarily or permanently incapacitated
- Essential to keep the person's best interests in mind and protect them from (potential) abuse
- Important for health care and financial decisions, estate planning, challenges to wills, trusts, donative transfers, and guardianships
- What is the cause of the problem and the prognosis?



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Normal Aging

- Vision changes
- Hearing changes
- Balance changes
- Cognitive changes
- Body temperature regulation



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Source: Ferrini, R. L., & Ferrini, A. F. (2013). *Health in the later years* (5th ed.). McGraw-Hill

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Non-normative Aging

- Chronic Illnesses
- Cognitive Diseases



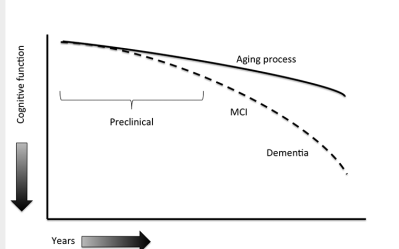
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Source: Ferrini, R. L., & Ferrini, A. F. (2013). *Health in the later years* (5th ed.). McGraw-Hill

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Normal versus Pathological Cognitive Aging

The continuum of Alzheimer's disease



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NORMAL AGING	ALZHEIMER'S DISEASE
<ul style="list-style-type: none"> • Making a bad decision once in a while • Missing a monthly payment 	<ul style="list-style-type: none"> • Making poor judgments and decisions a lot of the time • Problems taking care of monthly bills
<ul style="list-style-type: none"> • Forgetting which day it is and remembering later • Sometimes forgetting which word to use • Losing things from time to time 	<ul style="list-style-type: none"> • Losing track of the date or time of year • Trouble having a conversation • Misplacing things often and being unable to find them

Source: <https://www.nia.nih.gov/health/infographics/forgetfulness-normal-or-not>

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1. Memory loss
2. Difficulty performing familiar tasks
3. Problems with language
4. Disorientation to time and place
5. Poor or decreased judgment
6. Problems keeping track of things
7. Misplacing things
8. Changes in mood and behaviour
9. Challenges understanding visual and spatial information
10. Withdrawal from work or social activities

10 warning signs of dementia

If these signs are new, they may be a sign of dementia.
Dementia is not a normal part of aging.
Speak to your doctor or contact your dementia and Alzheimer association.

www.alzint.org

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Reversible Medical Factors

- Vitamin Deficiencies
- Infections
- Medication interactions
- Inadequate hydration
- Nutritional Inadequacies

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Why is Pre-Mortem Legal Planning Important?

- Physician and attorney communication
- End-of-life plans
- Autonomy for PWD
- Promotes protection from financial exploitation



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Financial Management

- More difficult as dementia progresses
- PWD may hide abilities to protect independence
- Be aware of the signs of financial problems and financial abuse
- Opportunity to discuss advance planning options



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\$7,242

Average Out-of-Pocket
Expenses for Family
Caregivers in 2021



The Cost of Caregiving

Family Caregivers in the
U.S. Provide \$470 Billion
in Unpaid Care

Source: Making the Invisible 2021 Update: Charting a Path Forward
AARP Public Policy Institute

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Source: www.aarp.org

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Preliminary Considerations

- Life expectancy of client
- Planning time
- Ability for client to participate in estate planning process
- Competency of client



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Plan for Lifetime Needs

- Wills
- Trusts
- Advance medical directives/guardianship
- Durable medical power of attorney
- Advance directives
- Living Will, DNR
- Asset management
- Bill paying
- Tax implications *or* gifting assets



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Plan for Last Arrangements

- Obituary
- Funeral service
- Cremation vs. burial
- Gravesite vs. mausoleum
- Burial insurance or pre-need arrangements
- Client's wishes regarding organ donation



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Fiduciary Representation

What is a Fiduciary?

- Acts only in best interest
- Manages money and property carefully
- Keeps money and property separate from theirs
- Keeps good records



Who can act as a fiduciary?

- Trustees, executors/administrators, POA, representative payees, guardian/conservator (in determination of incapacity)

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Tests of Diminished Capacity in State Guardianship Laws

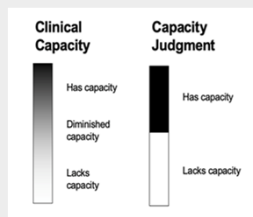
- Disabling condition
- Functional behavior deficit
- Cognitive functioning deficit
- Necessity for court intervention



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Capacity and an Aging Population

- Increasing demand for assessments
- Challenging situations
- Assessment is not black and white



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How can an attorney represent a client who cannot effectively communicate or understand the information provided?

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Legal Capacity Counseling

- Medical conditions
- Assess functional behavior (ADLs vs. IADLs)
- Assess Cognition
- Necessity resulting from risk of physical harm

ADLs	IADLs
Dressing	Grocery shopping & meal preparation
Bathing	Driving
Toileting	Housework
Eating	Managing money
Walking	Managing medication
Transferring between bed/chair	Using telephone, mail, and email

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If Diminished Capacity is Suspected

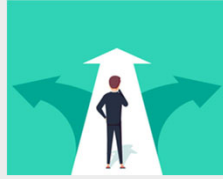
- Identify areas where support is needed
- Assess if cognitive concerns are temporary or reversible
- Ask client about existing formally executed decision-supports
- Ask if client wishes to appoint a legal supporter or surrogate
- Ask client if they have family or friends that can provide support



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A Legal Assessment of Capacity

- An initial assessment
- Clinical consultation or formal evaluation by clinician
- Final legal judgement about capacity by lawyer



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(Source: Assessment of Older Adults with Diminished Capacities: A Handbook for

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Assessing Capacity

- Not following conversation
- Asking the same question
- Lack of ability to find words
- Comprehension problems
- Disorientation
- Emotional reaction doesn't match situation



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(Source: Assessment of Older Adults with Diminished Capacities: A Handbook for Lawyers, 2021)

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Evaluating Capacity

- Does the client have the capacity to contract for services?
- Does the client have capacity to understand and complete transactions?
- What type of supports does the client have to help address concerns about capacity?



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(Source: Assessment of Older Adults with Diminished Capacities: A Handbook for Lawyers, 2021)

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Analyzing Capacity

- Look for signs of diminished capacity
- Evaluate based on specific transaction
- Consider ethical obligations and risk to the client
- Complete legal analysis and make judgement
- Document and take appropriate action

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Undue Influence



Figure 1

UNIDUE Page 1

UNIDUE INFLUENCE SCREENING TOOL

California Influence Screening Tool (CISIT)TM

Client's Name: _____ Date: _____

The purpose of CISIT is to assist attorneys in identifying potential undue influence in a transaction. It is not a diagnostic tool. It is a screening tool. It is not a substitute for a full investigation. It is a starting point for further inquiry. It is not a guarantee of results. It is a tool to be used in conjunction with other information and professional judgment.

Client's Vulnerability	Examples / Comments
Age or declining health or physical ability	
Isolation or lack of help or care	
Problems with hearing, vision, or speaking abilities (or impaired ability to communicate)	
Problems concerning will or testamentary disposition of assets	
Diminished ability	
Dependent or poor judgment	
Overlooked interests (e.g., gift, assets, etc.)	
Has dependent family members	
Isolated from others	
Isolation or professional assistance	
Information or should have been obtained (reliability of other person's words)	
No apparent vulnerability	

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Figure 2

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Possible Signs of Cognitive Incapacity

- Decreased short term memory
- Communication barriers
- Comprehension challenges
- Lack of mental flexibility
- Lack of financial awareness
- Disorientation



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Possible Signs of Emotional Incapacity

- Significant emotional distress
- Emotional Inappropriateness



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(Source: Assessment of Older Adults with Diminished Capacities: A Handbook for Lawyers, 2021)

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Possible Signs of Behavioral Incapacity

- Delusions
- Hallucinations
- Poor hygiene
- Inappropriate social behaviors



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(Source: Assessment of Older Adults with Diminished Capacities: A Handbook for Lawyers, 2021)

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If Capacity Cannot be Determined

- Rule 3-501.2
- Rule 3-501.6
- Rule 3-501.14



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(Source: Assessment of Older Adults with Diminished Capacities: A Handbook for Lawyers, 2021)

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Facilitating Trust with Older Clients

- Be mindful of meeting location and time
- Adapt pace of conversation
- Be mindful of vision and hearing limitation
- Confirm understanding of discussion



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(Source: Assessment of Older Adults with Diminished Capacities: A Handbook for Lawyers, 2021)

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Techniques to Enhance Client Capacity

- Foster trust and confidence
 - Participation, confidentiality, respect, encouragement, time
- Be mindful of sensory changes
- Adapt to cognitive impairments
 - Simplify, pace, time, cues, rephrase
- Strengthen client engagement in decision-making
 - Gradual counseling – clarification, reflection, feedback, further investigation, etc. (Smith, 1988)



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Supporting Aging Clients

- Enhance client capacity for decision-making
 - Be mindful of observing/interpreting signs of diminished capacity while considering mitigating factors
- Consider and encourage advanced care planning (dementia-directive.org)
- Offer shared decision making
- Powers of Attorney
- Guardianship



deLima Thomas et al., 2018; Mejia et al., 2019

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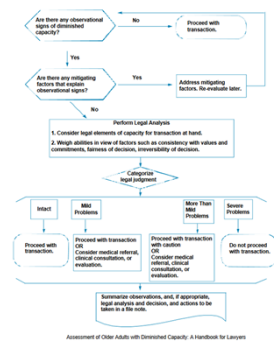
Acknowledgements

- Mollie George, M.A.
- Antonio Carranza, JD
Program Coordinator Legal Assistance Developer
MEDICAID AND LONG-TERM CARE, STATE UNIT ON AGING
Nebraska Department of Health and Human Services
- Mary L. Wilson, JD, Buford Law
- Jenifer Acierno, JD
Agency Legal Counsel
Nebraska Department of Veterans' Affairs
- Margaret Schaefer, JD
Centralized Intake Managing Attorney
Legal Aid of Nebraska
- Ann C. Mangiameli, JD
Attorney at Law
Managing Attorney, Health, Education & Law Project
Legal Aid of Nebraska



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Appendix 1: Capacity Assessment Algorithm for Lawyers



Assessment of Older Adults with Diminished Capacity: A Handbook for Lawyers

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Action Steps

Possible Action Steps Following Preliminary Assessment

- Intact Capacity**
- Proceed normally
- Mild problems**
- Proceed normally
 - Consider medical referral or
 - Informal mental health consultation or
 - Formal capacity assessment
- More than mild problems**
- Proceed with great caution
 - Consider medical referral or
 - Informal mental health consultation or
 - Formal capacity assessment
- Severe problems**
- Formal capacity assessment
 - Decline representation or withdraw
 - Protective action if appropriate



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Questions/Comments?



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