

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



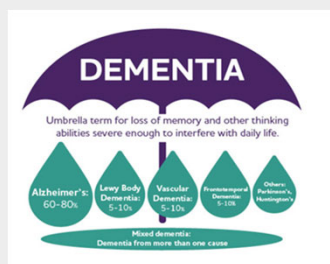
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Source: Ferrini, R. L., & Ferrini, A. F. (2013). *Health in the later years* (5th ed.). McGraw-Hill

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Non-normative Aging

- Chronic Illnesses
- Cognitive Diseases



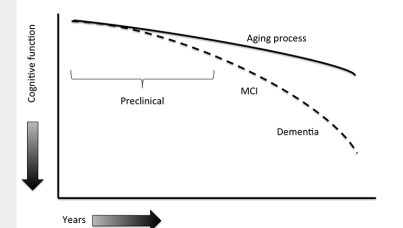
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Source: Ferrini, R. L., & Ferrini, A. F. (2013). *Health in the later years* (5th ed.). McGraw-Hill

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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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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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Source: <https://www.nia.nih.gov/health/de-memory-problems-always-mean-alzheimers-disease>

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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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The Cost of Caregiving

\$7,242
Average Out-of-Pocket Expenses for Family Caregivers in 2021

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

Source: Valuing 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

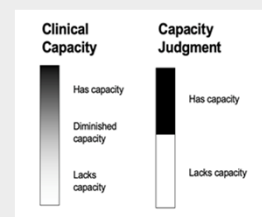
- Disabling condition
- Functional behavior deficit
- Cognitive functioning deficit
- Necessity for court intervention



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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

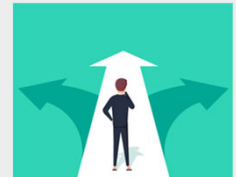
- Identify areas where support is needed
- Assess if cognitive concerns are temporary or reversible
- Ask client about existing formally executed decision-supports
- Ask if client wishes to appoint a legal supporter or surrogate
- Ask client if they have family or friends that can provide support



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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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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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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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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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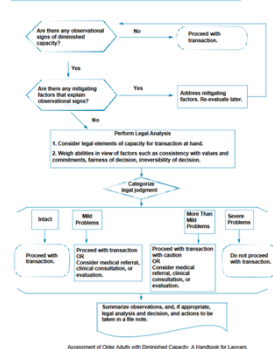
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Appendix 1: Capacity Assessment Algorithm for Lawyers



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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