

# Nevada Task Force on Alzheimer's Disease Capacity to Consent

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

NATIONAL  
CENTER ON  
**LAW &  
ELDER  
RIGHTS**

**ABA**  
AMERICAN **BAR** ASSOCIATION  

---

Commission on  
Law and Aging



AMERICAN **BAR** ASSOCIATION

---

Commission on  
Law and Aging

Standard disclosure: the opinions in this program may not reflect the policy of the American Bar Association, the Administration for Community Living or the National Center on Law and Elder Rights.

Nothing in this should be considered legal or ethical advice.

.

# Questions Posed

- What are the criteria used by health care providers to determine if an individual living with dementia has competency/capacity? Are there different levels of capacity (e.g., capacity to execute a health care power of attorney versus signing a legal contract)? Which types of health care providers have the authority to make this determination? What training do these providers receive about determining capacity? Are there universally accepted standards/training protocols?
- What non-medical professionals can determine an individual lacks competency (judges, lawyers)? What criteria are used to make this determination specific to individuals living with dementia? What training do these professionals receive? Are there universally accepted standards?
- Are cultural backgrounds, recognition of heterogeneity of older adults living with dementia and differing interpretations of questions being taken into account when determining if an individual has capacity?
- Some health care providers are reluctant to assess decision-making capacity for individuals living with dementia. What are the implications of not assessing capacity for individuals living with dementia once diagnosed?
- SDM – what is it –
- Guardianship – physician certificate

## What is Capacity

---



The ability  
to make an  
informed  
decision or  
choice

# Fundamental Question

---

Capacity to do what?



We all lack the capacity to make some decisions.



AMERICAN **BAR** ASSOCIATION

Commission on  
Law and Aging

# Capacity

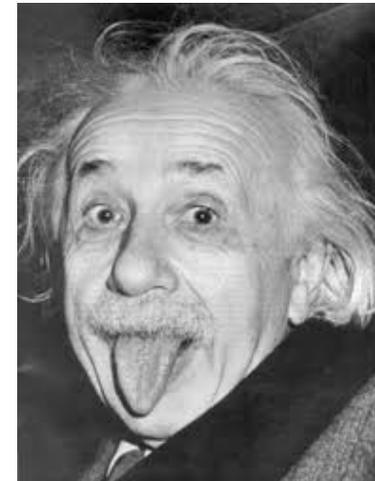
---

Capacity is:

- A spectrum

Spectrum

---

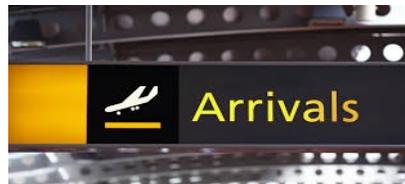


# Capacity Task Specific & Transient

---



Situational



Transient



# Capacity Can Be Impacted By

---

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





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

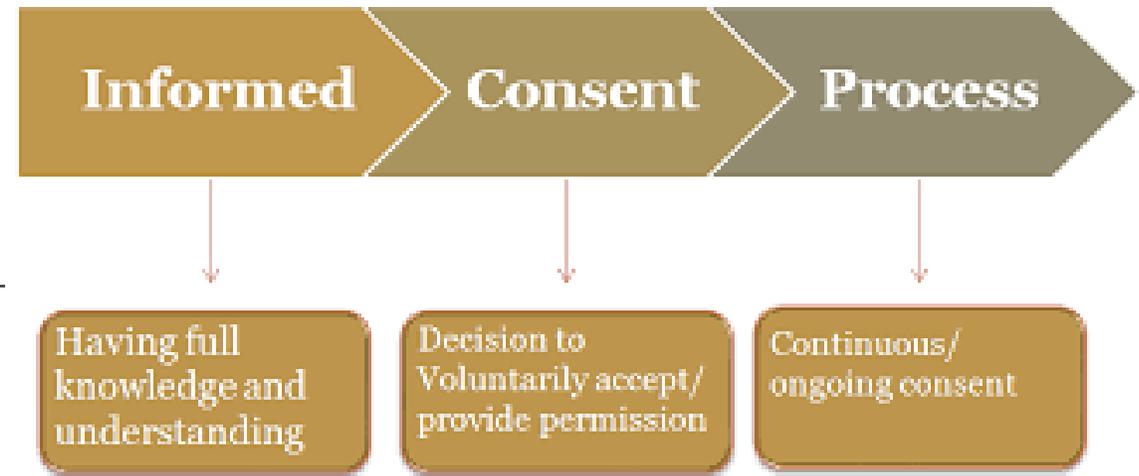
# How to Judges and Lawyers Define Capacity based on the Model Rules of Professional Conduct?

---



# MRPC 1.0 Terminology

---



"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.

# MRPC 1.4 Communication

---

(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

---

(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?

---

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.



## How do we do this?

When we communicate interactively

We unconsciously look for signs of understanding or misunderstanding

We need to slow down and consciously look for understanding

Ask questions that confirm understanding

Verify answers against outside sources

# How Do We Assess Capacity?

---

There Is No Simple Test,

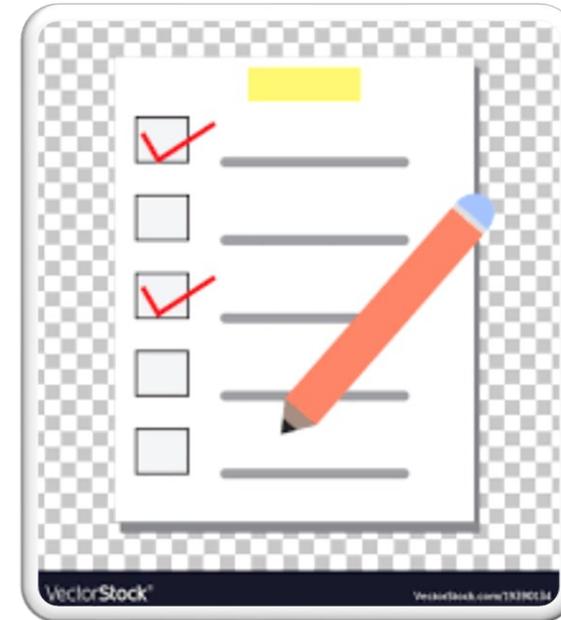
Look To The Totality Of The Circumstances – The Clients Ability To Communicate And Give Informed Consent

When In Doubt, Seek Guidance Before Proceeding



---

Commission on  
Law and Aging



# ASSESSMENT OF OLDER ADULTS WITH DIMINISHED CAPACITIES

2<sup>nd</sup> Edition

**ABA**  
AMERICAN BAR ASSOCIATION

Commission on  
Law and Aging



AMERICAN  
PSYCHOLOGICAL  
ASSOCIATION

HANDBOOK FOR LAWYERS

---

Available at:

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

# What is in the book?

---

Legal definitions of capacity

A check list

Troubling Signs to look for

Descriptions of Screening  
Tools and Assessment Tools

Guidance on finding an  
expert to do an assessment



# Health Care – from a legal perspective

---

The treating Physician decides if the patient can provide informed consent.

- At the time of treatment, does the patient understand the
  - Nature of the illness or injury
  - risks and benefits of the proposed treatment
  - the possible outcomes?

If not, turn to named health care agent, or closest available family

May enter into the medical records that the patient is unable to consent as a standing medical order

- Can be disputed by the patient
  - I have had this conversation

# What Training Do Judges and Lawyers Receive on Assessing Legal Capacity?

---

We are working on it . . . Not enough

Won't I know it when I see it?

Covering

- We all do it
- Some are very good at it



# Other's Who Assess Capacity

Physicians, Nurses, Physician Assistant,

Social Workers

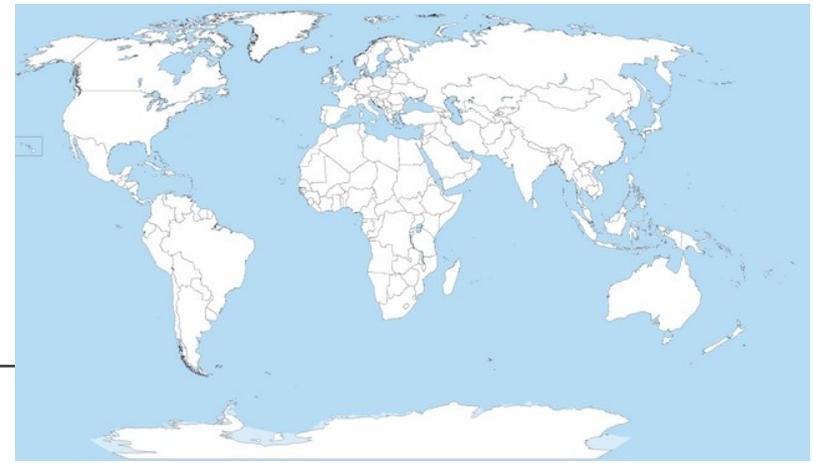
Psychologists

Civil and Criminal legal assessments

- Court appointed professionals – most often psychologists
- Criminal –
  - Ability to stand trial – understand the charges and assist counsel
  - Not legally responsible by reason of mental disease or defect
- Civil – guardianship, challenges to validity of documents signed – will challenges, fraud, undue influence

# Cross Cultural Issues

---



Things that can be misinterpreted as lack of capacity

- Language
- Response roles

Challenges with screening tools and diagnostic assessments

- Differing education and life experiences
- This is why these tools should only be used and interpreted by persons with specialized training
- Training for Mini Mental – includes factors of culture, education, life experience



# A Diagnosis

---

HAS NO EFFECT ON LEGAL RIGHT

# Questions

---

Speaker contact

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

