Handling Incompetency Hearings:
Guardianship Training for Clerks and
Assistant Clerks of Superior Court

Medical Assessment of Incapacity

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Overview

- Medical Definitions of Incapacity
- Cognitive and Functional Incapacity
- Causes of Cognitive Differences
  - Normal Aging Changes
  - Dementia and Alzheimer's Disease
  - Depression, Substance Abuse, Delirium
  - Developmental Disability
  - Medical Illnesses
- Cognitive Screening, Assessment and Testing
- Functional Assessment of Capacity

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Capacity to Do What?

- Make a health care decision?
- Live independently?
- Refuse APS intervention?
- Execute a legal document?
- Provide for essential needs?
- Manage property and finances?
- Drive?
- Vote?
- Marry?

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Clarification of Terms

Legal	***Clinical***
• Competence	• Capacity
• Function = *thinking* + *decision-making* + *everyday behavior*	• Function = *everyday behavior* • Cognition = *thinking* + *decision-making*

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Guardianship

1997 Uniform Guardianship and Protective Proceedings Act

(Cognitive)

"An individual who . . . Is unable to receive and evaluate information or make or communicate decisions to such an extent that. . ."

(Functional)

". . . the individual lacks the ability to meet essential requirements of physical health, safety, or self-care, even with appropriate technological assistance."

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Cognitive / Decision-Making Capacity

- No universal definition or clear markers of diminished capacity
- Task-specific and time-limited
- Situational and contextual
- Presumption of capacity

Requires:

- Possession of a set of *values and goals*
- Ability to *communicate and understand* the information
- Ability to *reason and deliberate* about choices

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Informed Consent in Health Care

- Not an “all or nothing” determination
- Assessment is an ongoing process
- Standards vary according to what is at stake
  - Level of risk
  - Simplicity of decision
- More important to have a “good decision” than to discover if someone really has capacity

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Evaluation of Informed Consent

- Knowledge (from the health care provider)
  - Nature and purpose of proposed intervention
  - Potential benefits and risks
  - Alternative approaches
  - Benefits and risks of alternatives
- Understanding
- Reasoning
- Appreciation
- Voluntariness
- Ability to express a choice

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Variable Standards for Informed Consent

- Level of risk
- Simplicity of decision
- Discrepancy of risks and complexity of different possible decisions

Refusal may require higher level of capacity than consent, especially when applicable levels of risk or benefit are significantly different.

Reid, W.H. *J. Psych. Prac.*, July 2001, 276-278.

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Health Care Power of Attorney

- Medical Decisions
  - Routine
  - Complicated
  - Research
- Standard:

  Lacks sufficient understanding or capacity to make or communicate decisions related to health care
- Physician determined

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Inherent Tension with Concept of Diminished Capacity

Balance between:

desires to protect persons from potentially harmful decisions

and

deeply held beliefs about the inviolability of individual choice

In other words, does the person have the wherewithal to make "bad" decisions?

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Signs of Potential Impairment During Interview

- Poor short term memory
- Language difficulties
- Comprehension problems
- Disorientation -- space, time or location
- Calculation problems
- Lack of mental flexibility
- Significant emotional distress
- Emotional lability or inappropriateness
- Delusions
- Hallucinations
- Poor grooming

Note consistency over these domains; everyone is entitled to a bad day!

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Mitigating Factors Affecting Observations

- Stress, grief, depression, recent events affecting stability of client
- Medical factors
- Time of day variability
- Hearing and vision loss
- Educational / cultural / ethnic barriers

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Cognitive Dysfunctions

- Short-Term Memory Problems
- Language / Communications Problems
- Comprehension Problems
- Lack of Mental Flexibility / Executive Function
- Calculation Problems / Financial Management
- Disorientation

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Causes of Cognitive Differences

- Normal aging
- Dementia/Alzheimer’s Disease
- Minimal Cognitive Impairment
- Depression or “pseudo-dementia”
- Substance abuse
- Other psychiatric disorders
- Delirium
  - Medical illness
  - Medications
- Developmental disabilities

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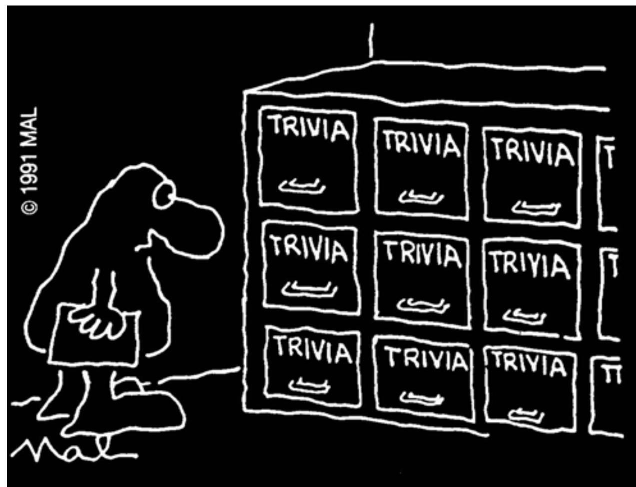
Normal Aging Changes in Memory



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Cognitive Changes with Aging

Least Affected

- Language and vocabulary
- Abstract reasoning and problem solving
- Visual-spatial ability
- Recall of events in the personal past

Most Affected

- Episodic memory
- Timed memory tests
- Tests requiring focused attention
- Processing of new information (“working memory”)
- Recall

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Differences in Decision-Making with Aging

- Less information requested
- Less complete rationales offered
- More immediate decision reached
- Importance of context with shorter working memory
- Greater reliance on habitual/automatic modes of responding

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Sensory Changes with Aging

- ⬇ sense of smell
- ⬇ high frequency hearing
- ⬇ near vision
- ⬆ time to adapt to light changes
- ⬇ contrast sensitivity
- ⬆ sensitivity to glare

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Physical Changes with Aging

- Changes in posture and gait
- Loss of height and bone mass
- Changes in body composition
- Changes in drug metabolism and clearance
- Decreased sleep efficiency
- Decreased response to temperature extremes
- Increased susceptibility to chronic diseases

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Appreciate Aging Physiology

- Appropriate environment
  - Furniture
  - Lighting
  - Room temperature
  - Noise level
  - Speaking voice
- Sensitivity to physiological needs
  - Sleep, rest
  - Thirst, hunger
  - Bathroom breaks

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Optimize Performance

- Interview client alone
- Deal with one issue at a time
- Minimize distractions and interruptions
- Use caution with analogies
- Clarify understanding along the way
- Know client's value framework
- Presume capacity

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Dementia: Broadly Defined

- General term for a brain disease that causes loss of intellectual abilities
- Significant decline in mental functions, like memory, learning, judgment, abstract thinking, executive function
- Severe enough to impair social or occupational functioning
- NOT normal aging

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Diagnosis of Dementia

- Complete health history
- Physical and neurological examination
- Mental status assessment
- Laboratory evaluation
- Brain imaging
- Other testing as indicated

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Alzheimer’s Disease: Impacts

- Alzheimer’s is the most common dementia in people over 65 years old
- Afflicts an estimated 4.5 million Americans
- Frequency increases dramatically with age
- By 2050, estimate 13-14 million Americans if no preventive treatments become available

“Alzheimer’s Disease is the Kleenex® of the dementias”

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Alzheimer’s Disease

- Specific, progressive, irreversible brain disease caused by the accumulation of abnormal proteins
- Defined as including memory impairment PLUS one or more of the following:
  - Problems with language
  - Problems with movement or actions
  - Problems with recognition
  - Impaired judgment
  - Impaired abstract reasoning
  - Impaired sequencing ability
  - Personality change

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Alzheimer’s Disease

A bilities (Activities of Daily Living)
B ehavior
C ognition
and
Communication

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Communication Changes

Early Stage
- Difficulty with word finding and keeping pace with others, repetitiveness

Middle Stage
- Increased difficulty speaking correctly and comprehending language of others

Late Stage
- Vocabulary reduced to a few words or phrases; increased reliance on nonverbal cues

Terminal Stage
- Occasional word/phrase or mute

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Adapted from Rush Alzheimer's Disease Center, 1999

Vascular (Multi-infarct) Dementia

- Secondary to multiple small strokes
- Commonly accompanies other post-stroke neurological symptoms
- Associated with vascular risk factors
- Step-wise progression
- Difficulties other than memory and language may be most prominent initially, e.g., mood, judgment and reasoning

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Dementia with Lewy Bodies

- Specific tissue abnormalities
- Early prominence of psychiatric symptoms esp. visual hallucinations, delusions and depression
- Relative initial sparing of higher cortical functions
- Marked fluctuations in mental status
- Presence of gait disorder and other extrapyramidal signs

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Dementia with Parkinson's Disease

- Cardinal symptoms: tremor, rigidity, postural instability, bradykinesia
- Dementia occurs in up to 40% of patients
- Generally correlated with later stages
- Judgment and reasoning may be affected early on

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Frontotemporal Dementias (Pick's Disease)

- Specific tissue abnormalities
- Prominent early loss of language functions
- Initial sparing of memory, calculations, visual-spatial functions
- Behavioral disinhibition common early on

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Other Types of Dementia

Jacob-Creutzheldt Disease

- Rare, rapidly progressive, related to Mad Cow Disease

Huntington's disease

- Hereditary (autosomal dominant)
- Involves abnormal body movements

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Mild Cognitive Impairment

Memory complaints with objective memory impairment, BUT:

- Not dementia
- General cognitive function not impaired
- No disability in activities of daily living

Very unstable over time, with >40% reverting to normal within 2-3 years*, 34% developing AD over 4-5 years*

* Larrieu, S., et al., *Neurology,* 2002, 59(10), 1594-9.
**Bennett, DA., et al. *Neurology,* 2002, 59(2), 198-205.

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Depression (“Pseudodementia”)

- NOT part of normal aging
- Characterized by at least one of the following:
  - Persistent sad mood
  - Loss of interest or pleasure in most activities
- May co-exist with dementia
- Treatable

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Depression in Older Adults

- May present differently than in younger
- Cognitive difficulties common
  - Decreased attention span
  - Problems with attention, motivation and concentration
- Somatic complaints common
- Sadness may be absent
- Irritability common, esp. in males
- Impacts physical and social health

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Alcohol Abuse in Older Adults

- Associated with high mortality and morbidity
- Brain dysfunction and dementia prevalent
  - Abstinence may lead to some functional recovery
- “Early onset” vs “late onset”
  - 2/3 “early onset” with long-standing alcoholism
  - 1/3 “late onset” beginning after age 60
  - Women overrepresented in late group
  - Late onset more likely to report depression or loneliness and to deny a problem

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"Late Onset" Alcohol Abuse

- Three common scenarios
  - Longstanding functional alcoholic with functional or cognitive decline unrelated to alcohol now no longer able to compensate
  - Social drinker with increased vulnerability to alcohol effects despite no change in drinking habits
  - Social drinker increases drinking related to a recent stressor

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Drug Abuse in Older Adults

- Prescription more than illicit drug misuse or abuse
- Benzodiazepines
  - Use overall increases with age
  - More common in older women than men
  - Increased risk of MVA's, falls, cognitive impairment and functional impairment
- Narcotics
  - Abuse rare
  - Problems most commonly occur when used for wrong purpose, excessive dosages or when concomitant mental disorder

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Other Psychiatric Disorders

- Anxiety Disorders
- Obsessive-Compulsive Disorders
- Mood Disorders with Psychosis
- Bipolar disorder
- Schizophrenia / Late-Onset Schizophrenia
- Personality Disorders
- Adjustment Disorders
- (Developmental Disabilities)

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Delirium

- Medical syndrome
- Disturbance of attention, orientation and perception
- Clouding of consciousness
- Sudden onset, fluctuating course
- *Generally reversible*
- Common in persons with dementia

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Causes of Delirium

- **D** Drugs
- **E** EKG (Cardiac)
- **L** Liver
- **I** Infection
- **R** Renal
- **I** Iatrogenic
- **U** Urinary
- **M** Metabolic

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Common Medical Conditions

- Heart Disease
- Cancer
- Strokes
- Infections
- Musculoskeletal Disorders
- Neurological Diseases
- Mobility Disorders/Falls
- Diabetes
- Peripheral Vascular Disease
- Diseases of the Eye

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Remember: *Medical illnesses, both acute and chronic, and/or their therapies, may effect cognitive functioning*

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Cognitive Impairment ≠ Diminished Capacity

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Assessment of Legal Capacity

Functional components

- Ability to articulate reasoning behind decision
- Variability of state of mind
- Ability to appreciate consequences of decision

Substantive components

- Irreversibility of decision
- Substantive fairness/injury risk to someone
- Consistency with lifetime commitments of client

The more serious the concerns, the higher the level of function needed

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Living Alone vs Relocation

- Potential risks: fire, malnutrition, dehydration, neglect of hygiene, medication noncompliance, financial exploitation, disorientation and paranoia
- Fear, upset, refusal to move elsewhere
- Others must weigh risks and benefits
- What are the options?
- Requires assessment of *global functioning*

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Capacity Assessment

Cognitive / Decisional Capacity
Related to specific decisions

Functional / Global Capacity
Related to broader issues,
e.g., guardianship, exploitation

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Global Capacity Evaluation

Causal
- Diagnosis

Functional
- Cognitive and/or behavioral aspects
- What the person can and cannot do

Interactive
- Social and/or environmental considerations
- Standard of living, resources, supports

Transactional
- Personal history and values
- Autonomy vs risk-taking continuum

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Functional / Global Capacity Assessment

- Comprehensive and systematic
- Determine both the incapacities and the capacities
  - Relative to person's own habitual standards of behavior and values
  - Relative to the tasks at hand and the context of how the person lives
- Preserve function with available services, new skills or assistive devices

Finding incapacity in one area does not imply global incapacity

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Functional Status – Managing Activities of Daily Living

Basic ADL's

- Bathing
- Dressing
- Grooming
- Toileting
- Transfer
- Continence
- Feeding

Instrumental ADL's

- Telephone use
- Transportation
- Shopping
- Meal preparation
- Housework
- Handy man work
- Laundry
- Medication management
- Money management

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Potential Retained Abilities

Personal Decisions

- Relationships
- Living arrangements
- Employment
- Health treatment
- Care of minor health problems
- Contact service providers
- Social, religious, community activities

Financial Decisions

- Limited money management
- Maintain personal property
- Contracts for social activities
- Residential contracts
- Contracts for health, legal services, etc.
- Consult with guardian about finances

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Means to Enhance Functioning

- Education, training, or rehabilitation
- Mental health treatment
- Occupational, physical, or other therapy
- Home or social services
- Medical treatment, operation, or procedure
- Assistive devices or accommodation

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Evaluating Global Capacity

- A low cognitive screening test (e.g., Mini-Mental State Exam) score alone does not demonstrate *incapacity*, nor does a high score indicate *functional capacity*.
- *History* must be independently *corroborated* by individuals familiar with the person's actual functioning.
- *Personal observations* of current functioning provide important information about capacity.
- *Repeated observations* of the individual add validity to the capacity assessment.
- *Formal testing* may enhance informal means of assessing capacity but cannot replace actual observations and examples of past functioning and behavior.

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Role of the Primary Care Physician

- Diagnostic work-ups and treatments
- Evaluations of mental status
- Impressions of cognitive and functional status based on keeping appointments, medication compliance, etc.
- Longitudinal perspective
- Familiarity with past values and behaviors
- Relationships with family members and other key informants

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Eccentricity vs Impairment

*Capacity must be judged according to a standard set by **that person's own habitual or considered standards of behavior and values,** rather than by conventional standards held by others.*

Silberfeld, M. and Fish, A. *When the Mind Fails, 1994.*

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Autonomy vs Safety

*Tolerance of **acceptable safety risk**, or the desire to protect a loved one from potential harm, must be balanced against the desire to protect a loved one's **autonomy** and individual choice.*

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Undue Influence

Compromises *voluntariness* through:

- Isolation
- Dependency
- Emotional manipulation and/or
- Exploitation of a vulnerability
- Acquiescence
- Loss

Adapted from Bennett Blum, The "Undue Influence Worksheet" and "IDEAL" Protocol, 2005.

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"Six Pillars of Capacity"

- Medical Condition
- Cognitive Functioning
- Everyday Functioning
- Values and Preferences
- Risk and Level of Supervision
- Means to Enhance Capacity

Judicial Determination of Capacity in Guardianship Proceedings (ABA)

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The Global Capacity Evaluation

Ideally performed by a specialized multidisciplinary team, e.g., geriatrician or geriatric psychiatrist, nurse, psychologist and/or social worker

- Interview primary caregivers and other key informants about individual's ADL's, IADL's, memory, behavior and preferences
- Review medical records, including medications
- Detailed medical interview and targeted physical examination (e.g., sensory functions, balance and gait, manual dexterity)
- Assess home environment and directly observe functioning within the home, preferably on more than one occasion
- Screening tests of cognitive status and executive functions

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Global Capacity Evaluation (cont'd)

- Tests of simple pertinent functional skills
- Referral for detailed neuropsychological testing and/or formal testing by occupational therapist as indicated
- Synthesis of data including consideration of all components:
  Functional, Causal, Interactive and Transactional
- Final Report
  - Coordinated recommendations to optimize independence, safety and dignity in the least restrictive environment in accordance with past values, and in view of potential changes over time
  - Answers to the specific questions supported by systematic data
  - Specific management recommendations and resources addressing all pertinent components

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Summary

- Decisional or cognitive capacity in law is analogous to informed consent in health care and requires understanding, reasoning, appreciation, voluntariness and ability to express a choice.
- Alzheimer's Disease, the most common dementia, is irreversible. Depression, delirium, substance abuse and other medical and psychiatric disorders may also cause cognitive changes, some of which may be, at least in part, reversible.
- Cognitive impairment or a low cognitive screening test score is not analogous to diminished capacity.
- Global functional capacity assessment evaluates an individual's thinking and everyday living skills in relation to the individual's values and past behaviors and habits; it identifies capacities and how they might be preserved, as well as incapacities.

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Thank you.

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