

SEC's Third Annual Senior Summit

What Financial Services Firms Need To Know About The Senior Investor



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What is “Legal Incapacity”?

- State guardianship laws define for purposes of permitting State to intervene.
- Definition determined by prevailing values, knowledge, and even economic & political culture of the time.
- State case law or state legislation defines capacity for individual transactions.



Incapacity under Guardianship Laws ***- Two to Four Elements -***

- 1. Disabling Condition (often long list)**
- 2. Functional Behavior Deficit
(focusing on essential needs or endangerment)**
- 3. Cognitive Functioning Deficit**
- 4. Necessity for Court Intervention (or
least restrictive alternative
requirement)**

Example

D.C. Code § 21-2011

Incapacitated individual means

Cognitive

an adult whose ability to receive and evaluate information effectively or to communicate decisions is impaired

+

**Functional /
Essential
Needs**

to such an extent that he or she lacks capacity to manage all or some of his or her financial resources or to meet all or some essential requirements for his or her physical health, safety, habilitation, or therapeutic needs

+

**Necessity/
Least Restr.**

without court-ordered assistance or the appointment of a guardian or conservator



Example

Md. Code, Estates & Trusts § 13-705

Guardian of the person shall be appointed if...

**Cognitive
Test**

+

**Functional /
Essential
needs**

+

**Disabling
condition**

+

**Necessity /
Least Restr.**

- Person...lacks sufficient understanding or capacity to make or communicate responsible decisions concerning his person,
- including provisions for health care, food, clothing, or shelter,
- because of any mental disability, disease, habitual drunkenness, or addiction to drugs,
- and that no less restrictive form of intervention is available which is consistent with the person's welfare and safety.



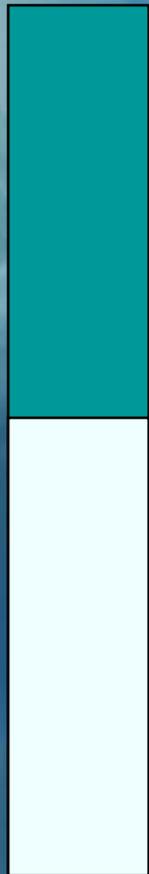


Courts also articulate legal tests of capacity for specific tasks or transactions

- e.g.
- Medical Consent
 - Testamentary Capacity
 - Contractual Capacity
 - Donative Capacity
 - Financial Capacity
 - Sexual Consent Capacity
 - Driving Capacity
 - Other Tasks

Vary by state and by court and tend to be general & conceptual

Task Specific Legal capacity vs. Clinical capacity



Has capacity

Lacks capacity



Has capacity

Diminished capacity

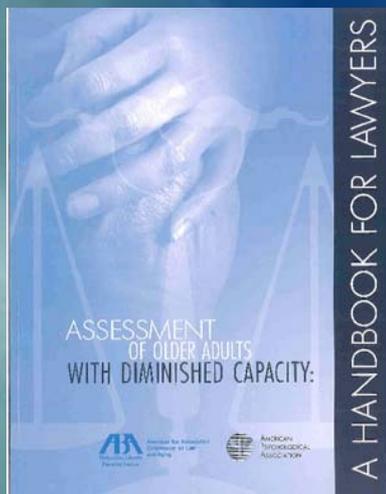
Lacks capacity



The APA-ABA Collaboration

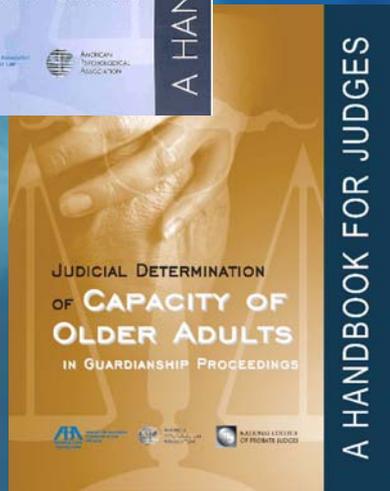
Assessment of Older Adults With Diminished Capacity: A Handbook for Lawyers (2005)

- ABA Commission on Law and Aging (COLA) & APA



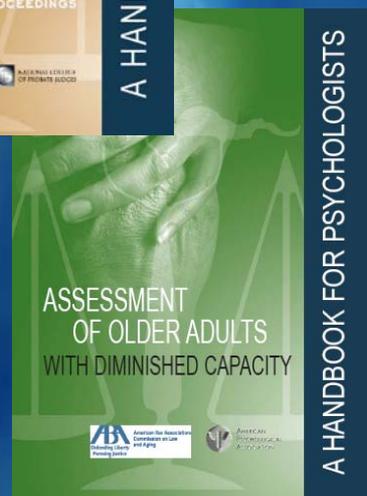
Judicial Determination of Capacity of Older Adults in Guardianship Proceedings: A Handbook for Judges (2006)

- ABA-COLA, APA & NCPJ



Assessment of Older Adults With Diminished Capacity: A Handbook for Psychologists (2008)

- ABA-COLA & APA





Lawyers & FAs Face Similar Issues

- Litigation -- challenging or defending capacity.
- But capacity most often arises in transactional services.
 - Does the Client have capacity...
 - to contract for my services?
 - to complete the legal transaction?
 - to do _____ (fill in the blank).
- Need a conceptually sound and consistent process for collecting/weighing relevant information.
- *Core approach of Handbook*: A tool to collect relevant observations and make a rough determination + guidance in working with mental health professionals.



Task-Specific Factors recommended in Model Rules of Ethics for Lawyers

- 1. Ability to articulate reasoning behind decision**
- 2. Variability of state of mind**
- 3. Ability to appreciate consequences of decision**
- 4. Irreversibility of decision**
- 5. Substantive fairness (Anyone being harmed?)**
- 6. Consistency with lifetime commitments of client**



Undue Influence

- An exploiter uses his/her power to *deceptively* gain control over the decision making of a victim. Typically involves financial exploitation.
- Mental incapacity is a risk factor.
- It is a legal conclusion, generally requiring the court to find:
 - 1) a special relationship between the parties based on confidence and trust; and
 - 2) intentional and improper influence or persuasion of the weaker party by the stronger.



Undue Influence

Several clinical/forensic models in the literature-- e.g. Brandle *et al.* identify these perpetrator tactics:

- 1) Isolate from people & and information
- 2) Create fear
- 3) Prey on vulnerabilities
- 4) Create dependency
- 5) Create lack of faith in own abilities
- 6) Induce shame and secrecy
- 7) Perform intermittent acts of kindness
- 8) Keep unaware