



ELDER JUSTICE
DECISION-MAKING CAPACITY
SYMPOSIUM

ELDER JUSTICE DECISION-MAKING CAPACITY RESOURCE GUIDE



Honoring the wishes of a person with capacity demonstrates respect for the individual.
Honoring the wishes of a person without capacity is a form of abandonment.



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Disclaimer: The resources contained in this Resource Guide do not constitute an endorsement of any of those resources nor do they constitute legal advice. The opinions, findings, and conclusions or recommendations expressed in this document do not necessarily represent the official position, policies, or views of the U.S. Department of Justice.

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Introduction

Over the past 20 years, tremendous strides have been achieved in understanding the brain generally, and in particular the aging brain,¹ with implications for decisional capacity.² The law presumes that adults have decisional capacity, although this presumption can be rebutted. At times, individuals, organizations, or government entities challenge the validity of an individual's actions based on allegations that the person lacked the decision-making capacity to take the action in question (e.g., executing a will). Determining whether someone has decisional capacity is informed by a capacity assessment. Capacity assessments are assessments of a person's ability to perform certain tasks or to make certain decisions.³ These decisions may be central to a determination in a criminal or civil dispute. Assessment of capacity combines the disciplines of law, psychology, medicine, and ethics.⁴ Approaches to capacity assessment continue to evolve. Discussions of when capacity should even be questioned, the impact of evaluating capacity on the individuals involved, and enhancing decision supports have become more prominent and nuanced in recent years.

Every day the lives of older adults are profoundly and negatively impacted in both the criminal and civil justice systems based on mistaken assumptions and inadequate assessments of their capacity to make decisions for themselves. To raise awareness of these issues, the Elder Justice Initiative hosted the *Elder Justice Decision-Making Capacity Symposium: The Role of Decision-Making Capacity in Elder Justice Cases that Reach Civil and Criminal Courts*, a virtual Symposium, April 19-21, 2022. Attended by more than 1500 elder justice professionals from all 50 states and the District of Columbia, the symposium addressed access to justice issues for older adults when elder abuse cases involve possible diminished decision-making capacity. There was a rich [agenda](#) with 20 speakers ([see biographical sketches](#)) over the three days. Information and resources related to the symposium can be found on the Elder Justice Website's [Symposium page](#).

The Elder Justice Initiative developed this Resource Guide as a companion piece to the Symposium. It is a compilation of relevant materials from numerous sources. It is not intended to be exhaustive, but to provide a broad spectrum of information of interest to elder justice professionals and clinicians⁵ in the context of decision-making capacity.

A legend for all acronyms and abbreviations used in this Resource Guide is in [Appendix A](#).

Basic Concepts

Purpose of Capacity Assessments

Capacity assessments have different purposes and may inform clinical and legal decision making. Relatively few disputes about a person’s capacity reach the courts. However, because an individual’s decision-making capacity can have a critical impact on the outcome of a court case, it was the focus of the Department of Justice’s symposium and this accompanying Resource Guide.

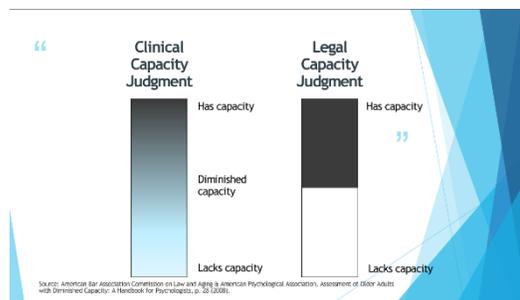
Defining Clinical vs. Legal Decision-Making Capacity

The concept of decision-making capacity is based on Applebaum and Grisso’s (1988)⁶ four-prong model stipulating that for a decision to be valid the examinee¹ must have the ability to 1) understand, 2) appreciate, 3) reason, and 4) communicate a choice.

Clinical Capacity, as used here, refers to the functional determination by a clinician of whether an individual has the ability to adequately make a specific decision.⁷ Decision-making capacity involves the ability to take in information, understand the ramifications of that information through appreciation and reasoning, and then use that information to make a rational, self-interested decision⁸ that is consistent with their goals. Clinical capacity alone does not change the legal status of an individual.⁹

Legal Capacity¹⁰ is concerned with an individual’s ability to undertake and complete a specific task and/or to make a particular situational decision which is recognized at law.¹¹ Legal decisional capacity is a legal determination by the court as to whether diminished capacity limits a person’s ability to make a legally relevant decision or action.¹² The court may consider a clinical capacity assessment as evidence. A legal determination of incapacity may change the legal status of an individual and provides a trigger for state actions to limit the individual’s right to make decisions for themselves.¹³ It may also undermine some forms of consent in criminal cases.¹⁴

One key difference between clinical and legal capacity is that clinical capacity lies on a continuum based on the strengths and weaknesses of a person’s decision-making ability whereas legal capacity is generally dichotomous¹⁵ (e.g., “has capacity” or “lacks capacity” to make a type of decision or perform a type of act).¹⁶



10 Things Everyone Should Know about Decision-Making Capacity

There are multiple misconceptions about decision-making capacity.¹⁷ Below is a list of key points about decision-making capacity that everyone should know.

1. Adults are presumed to have decision-making capacity.¹⁸

¹ Note that for expediency this Resource Guide uses the term *examinee* when referring to individuals whose decision-making capacity is being assessed.

2. Decision-making capacity is decision specific (i.e., always ask “capacity for what?”), therefore, a person can have capacity in one domain but not another.¹⁹
3. Decision-making capacity may fluctuate with time and context (e.g., complexity of the decision, consequences of the decision).²⁰
4. Decision-making capacity can be stable or change over time (i.e., diminished decision-making capacity may be temporary, reversible, or progressive).²¹
5. Because decision-making capacity is domain-specific, assessment techniques differ depending on the domain of capacity being assessed (i.e., no one-size-fits-all approach will accurately provide a basis for determining a person’s capacity).²²
6. Having decision-making capacity is more than simply being “alert and oriented”, although being alert and oriented may be a component of capacity.
7. Decision-making capacity is not determined by the mere presence of dementia or other mental disorder, although these conditions can compromise someone’s decision-making capacity.²³
8. A determination of decision-making capacity should not be based solely upon interviews or tests,²⁴ as these approaches typically do not assess a person’s functional skills.²⁵
9. A determination regarding decision-making capacity should never be based on the outcome of a single test or tool,²⁶ including the Mini Mental Status Examination (MMSE).²⁷
10. Diminished decision-making capacity is not an element of undue influence. A person can have intact decision-making capacity and still be unduly influenced.²⁸

Types of Decision-Making Capacity Issues that Reach the Courts

There are multiple types of decision-making capacity with relevance to the courts. The following lists are illustrative and not exhaustive.

In the Criminal Context

- Capacity to consent to a sex act
- Capacity to make a gift or transfer wealth
- Capacity to refuse personal in-home care offered by a caregiver
- Testimonial capacity (capacity to testify, sometimes referred to as competency to testify)²⁹

In the Civil Context

- Capacity to live independently (the capacity to manage or arrange assistance with all personal affairs)
- Capacity to accept or refuse services offered by Adult Protective Services (APS)
- Capacity to identify and select a surrogate decision-maker (e.g., POA³⁰, POLST, Advanced Directive)
- Contractual capacity
- Donative (gift-giving) capacity
- Financial capacity (the capacity to manage financial affairs and/or make financial decisions)³¹
- Capacity to make healthcare decisions³²
- Testamentary capacity (capacity to make a will)³³

In the guardianship context, the past few decades have seen a change in the concept of decision-making capacity from a global concept to a domain-specific conceptualization. Pursuant to state law and current concepts, courts are no longer tasked with asking “Does this person have capacity”, but rather, “Does this person have capacity to ...?” There is also greater recognition that diminished capacity may affect other types of civil and criminal cases.

Here are some other domains of capacity with less relevance to the courts:

- Capacity to consent to or refuse participation in research
- Driving capacity³⁴
- Voting capacity³⁵

Scholars have noted a lack of data and research in the realm of decision-making capacity assessment³⁶ as well as decision-making capacity more broadly. There has been considerably more research on the following domains of decision-making capacity than on other domains:³⁷

- Treatment consent capacity
- Testamentary capacity
- Financial capacity
- Research participation (consent)

Understanding Decision-Making Capacity Assessments

To facilitate elder justice professionals’ understanding of capacity assessments, this section provides an overview of various aspects of capacity assessment.³⁸

Forensic Evaluation

It is important to understand how a decision-making capacity assessment for a court proceeding (forensic evaluation) differs from an evaluation that takes place for the purpose of treatment planning. Learn about forensic evaluation in [Appendix B](#).

Professionals who Assess Capacity

There is no consensus on which professionals are most qualified to conduct capacity assessments.³⁹ Clinicians in many professions conduct capacity assessments as described in Table 1.⁴⁰ In some situations, such as guardianship, state statute stipulates [who is qualified](#) to conduct the capacity assessment that the court will consider. However, for most types of court cases or legal issues involving decision-making capacity, there is no guidance on who should perform a capacity assessment.

Professional	Role Defined
Primary Care Physician, Internist, Family Physician	Board-certified MD or Doctor of Osteopathic Medicine (DO) trained in the recognition and treatment of acute and chronic illnesses in patients across the lifespan.
Geriatrician	MD or DO who specializes in the health of and the diagnosis and treatment of diseases and conditions of older adults including dementia. Board Certified.
Geropsychiatrist	A psychiatrist (MD or DO) who specializes in the diagnosis and treatment of mental illness and mental conditions of older adults. Board Certified.
Neurologist	MD or DO who specializes in the diagnosis and treatment of disease of the nervous system; often called on to diagnose dementia. Board Certified.
Neuropsychologist	A clinical psychologist (PhD or PsyD) with specialized training in the use of standardized tests for the assessment, diagnosis, and treatment of examinees with cognitive, neurologic, medical, developmental, or psychiatric disorders, particularly brain/behavior relationships. May be Board Certified.

Geropsychologist ⁴¹	A clinical psychologist (PhD or PsyD) with specialized training in the mental health of older adults; focuses on the cognitive, behavioral, and developmental changes that accompany aging. May be Board Certified.
Forensic Psychologist	A clinical psychologist (PhD or PsyD) who utilizes data from tests and collateral sources to provide the court with information relevant to a legal dispute. May be Board Certified.
Forensic Psychiatrist	A psychiatrist (MD or DO) who has additional training in the application of law to psychiatry.
Psychologist	A clinician (PhD or PsyD) who specializes in the study of mind and behavior or in the assessment and treatment of mental, emotional, and behavioral disorders. ⁴²
Forensic Neuropsychologist	A clinical neuropsychologist (PhD or PsyD) who utilizes data from a neuropsychological evaluation to provide the court with information relevant to a legal dispute. ⁴³
Licensed Social Worker	A licensed social worker (MSW, PhD, DSW) clinically trained to practice social work, including the biopsychosocial assessment and treatment of mental, emotional, and behavioral disorders.
Multidisciplinary Assessment Team	A team made up of professionals from different disciplines (e.g., medicine, psychology, social work) who work together to assess an individual whose decision-making capacity is in dispute. In Kentucky, for example, an Interdisciplinary Team (IDT) consists of a physician who will do the medical evaluation, a psychologist who will assess mental capacity, and a social worker who will review the individual's social environment and ability to function. ⁴⁴

Interview Questions When Selecting a Clinician

An academic degree does not necessarily convey whether the clinician is qualified to conduct a decision-making capacity assessment. Therefore, when looking for such a clinician, consider asking questions about the clinician's qualifications and experience, such as:⁴⁵

- How long have you conducted such assessments of decision-making capacity?
- Have you had any training in assessing decision-making capacity of older adults?
- How many older adults have you assessed for this type of capacity?
- What assessment approach and tools do you generally use?
- What is your experience working with and writing reports for the courts?
- How many visits with the examinee are usually required and of what duration is each?
- Do you have any professional references or sample redacted reports that you could provide?

Contents of the Referral Letter for a Decision-Making Capacity Assessment

At times, the clinician will not meet with the entity or person requesting the capacity assessment, but rather will receive a referral letter. Referrals for capacity assessments typically originate from lawyers, social services, family, and medical professionals.⁴⁶ The referral letter is a critical piece of the capacity evaluation process because it communicates basic information about the examinee and what the referring party needs to know. To ensure clear communication between the requester and the examiner, the requester should consider addressing the following with the examiner:⁴⁷

- The examinee's name, age, gender, residence, ethnicity, and primary language (if not English).⁴⁸
- The purpose of the referral, including the type of capacity (or capacities) at issue.
- The relevant legal standard(s).
- Whether the examinee has been ordered by the court or is compelled by law to participate.⁴⁹
- The party responsible for payment for the evaluation.
- The person responsible for contacting the examinee to schedule the assessment, where the assessment will take place, and the deadline for making the initial contact.
- Whether the examinee or authorized person has signed releases allowing the clinician access to all needed records.⁵⁰
- Whether the examinee has any impairments (e.g., visual, inability to write due to a stroke) that necessitate accommodations or that could impact testing.⁵¹
- The examinee's medical history, medications (prescription, over the counter, and as needed), treating physicians, current disabilities, and any mental health factors involved (if known).
- The examinee's living situation; family make-up and contacts; social networks; and a list of people who could serve as collateral interviews.
- Any environmental or social factors of which the examiner should be aware.
- Direction as to whether the examiner should provide a written report.⁵²
- Direction as to whether the examiner should provide an opinion as to whether the individual has decision-making capacity in a particular domain.⁵³
- Relevant due dates.
- Who should receive any report that may be written, including names and addresses.

Components of a Typical Decision-Making Capacity Assessment

Decision-making capacity and the factors that are assessed as part of a capacity assessment are tailored to the examinee and examination. However, there are factors that most clinicians will address as part of a decision-making capacity assessment. Examiners typically will:⁵⁴

- Seek to understand (or clarify) the referral question.
- Know the legal standard.
- Conduct a thorough clinical interview with the examinee.
- Collect collateral information from multiple sources (e.g., interviews, depositions, affidavits).
- Engage in a record review (e.g., medical records, financial, education record, employment, and other relevant documents).
- Consider relevant medical factors.

- Assess the examinee’s cognitive (including executive functioning⁵⁵), emotional, and behavioral functioning.
- Assess the examinee’s functional abilities.
- Consider the examinee’s values as they may affect his or her decision-making.⁵⁶
- Assess for and identify any risk conditions and how any risk might be mitigated.
- Identify retained capacities.
- Identify supports that are in place.
- Identify any steps to enhance capacity.
- Make a clinical judgment of capacity (not a legal determination of capacity).

Retrospective Decision-Making Capacity Assessments

There are times when a clinician is asked to opine about the decision-making capacity of an individual at some point in the past (e.g., 2 months or 2 years prior to the evaluation), when the transaction or alleged crime occurred, whether the victim is alive or deceased.⁵⁷ In theory, a retrospective capacity assessment can be done, but it depends heavily upon the individual circumstances of a case.⁵⁸ Some resources addressing retrospective capacity assessment include:

[Cognitive Capacity and Consent](#) (11-minute video, EJI)

[The Prosecutor’s Resource: Elder Abuse](#) (Aequitas, 2017)

[Prosecuting Elder Abuse Cases: Basic Tools and Strategies](#) (NCSC, 2012)

Mart, E. G., & Alban, A D. (2011). *The practical assessment of testamentary capacity and undue influence in the elderly*. Sarasota, FL: Professional Resource Press.

Shulman, K., Herrmann, N., Peglar, H., Dochylo, D., Burns, C., & Peisah, C. (2021). The role of the medical expert in the retrospective assessment of testamentary capacity. *The Canadian Journal of Psychiatry*, 66(3), 255-261.

Instruments Used in a Capacity Assessment

When assessing decision-making capacity, examiners consider information from multiple sources. In some cases, examiners may employ tests (although assessments of capacity should never be based on test results alone). As part of an assessment, however, clinicians use a range of instruments.⁵⁹ Mart and Alban (2011) assert that “Test selection is in large part a matter of professional judgement and personal taste.”⁶⁰ Typically instruments have relevance for specific types of decision-making capacity. For a list of instruments used to assess various domains of decision-making capacity, see [Appendix C](#).

The Basis of Clinical Judgments

Factors that contribute to clinical judgments of decision-making capacity include:⁶¹

- The examinee’s understanding of the situation and issue(s).
- The examinee’s ability to generate various courses of action, provide rational reasons for various courses of action, and appraise advantages and disadvantages associated with different courses of action.
- The presence or absence of emotional, behavioral or cognitive impairments that may compromise the examinee’s decision-making capacity in some way.
- The examinee’s ability to make a reasoned and rational choice free from impairment and undue influence.
- Whether the examinee’s state at the time of interest reflects some change in functioning.
- The examinee’s decision-making process (the clinician’s judgment about the examinee’s decision-making capacity decision should *not* be based on cultural or personal values, political or religious beliefs etc., but rather, the quality of the examinee’s decision-making process).⁶²

What to Look for in an Evaluation Report

Clinicians must avoid jargon and strive to use language, terms, and concepts that legal professionals can understand. Each evaluation report will be unique in some way, but there are some common elements:⁶³

- A description of when and where the evaluation took place.
- How much time the examiner spent with the examinee.
- A statement describing the consent/notification process and the examinee’s understanding of it.
- Relevant demographic information.
- Any aspects of the evaluation that limited the examiner’s ability to offer opinions.⁶⁴
- Sources of information that were accessed, reviewed (collateral data sources, third-party informants, relevant records), and those that were sought but not available.
- A list of tests administered, provision of relevant test scores, a discussion the limitations of any test that were employed, all using language and concepts that the reader can understand.⁶⁵
- A rich description of the examinee’s emotional, behavioral, and cognitive functioning (as opposed to simply providing diagnoses), and how any observed impairments impact the examinee’s decision-making.
- A description of the examinee’s response style⁶⁶ if it is relevant.
- A discussion of the examinee’s decision-making abilities.
- Recommendations as to how the examinee’s capacity can be maximized (e.g., by identifying strategies to reduce risk and/or what supports could be put in place to enhance capacity).
- Discussion of the prognosis, including whether the underlying condition is static or dynamic.
- Discussion of the need for a follow-up evaluation and if so, when.

Additional Aspects of Decision-making Capacity

Guardianship and Less Restrictive Options

Decision-making capacity is at the heart of court determinations regarding whether a guardian should be appointed to make decisions on behalf of an individual. For comprehensive information on guardianship and the way it intersects with decision-making capacity, see the resources listed below.



Whether under guardianship or utilizing alternatives to guardianship, finding even small ways a person can be involved in decision-making is important in facilitating feelings of self-efficacy and preservation of a person's autonomy.



Guardianship generally:

[Guardianship and Supported Decision-Making](#) (ABA COLA)

[Guardianship](#) (EJI Guardianship webpage)

[State Guardianship Statutes](#) (see statutory reviews section of this Resource Guide)

The Fourth National Guardianship Summit took place in May 2021. Delegates from key stakeholder organizations approved 22 [final recommendations](#) to improve and reform the adult guardianship system in the United States. The summit recommendations, background papers and concise issue briefs explore issues that intersect with decision-making capacity concepts, all available here: [Fourth National Guardianship Summit](#)

Resources on Less Restrictive Alternatives to Guardianship

[Least Restrictive Alternative References in State Guardianship Statutes](#) (ABA, 2018)

[What are less restrictive options to guardianship?](#) (EJI Guardianship webpage)

See [Appendix D](#) for a list of alternatives to guardianship

Elder Justice Court Models and Initiatives

Elder court initiatives across the country are striving to meet the needs of older adults interacting with the court system. No two models are exactly the same, but most fall into one of three categories: elder justice centers, elder protection courts, and network collaborations. Generally, elder justice centers offer wrap-around services including assistance with navigating the court system. Elder justice courts have a specialized docket designed to serve older adults and accessibility features. Network collaborations include multidisciplinary teams (MDTs) and other stakeholder collaborations that include court representatives on the team and provide assistance with court system navigation for older adults.

Information about Specific Elder Justice Courts

[Elder Law Court](#) Superior Court of CA, Ventura County

[Elder Justice Center](#) Tampa, FL

[The Circuit Court of Cook County Elder Justice Center](#) Chicago, IL

[Elder Advocacy Program](#) New York, Chautauqua, and Cattaraugus Counties

[Nashville's Family Safety Center](#) and [Jean Crowe Advocacy Center](#) Nashville, TN

Elder Courts Resources and Articles

[A Multi-Site Assessment of Five Court-Focused Elder Abuse Initiatives](#)

[10 Tips on Creating an Elder Court](#)

[Elder Protection Courts: Judicial Perspective, Holistic Approach](#)

[Court Guide to Effective Collaboration on Elder Abuse](#)

[Elder Protection Courts: Responding to the Now, Anticipating the Future](#)

[Senior Justice: Elder Courts](#)

[Effective Court Practices for Abused Adults](#)

[Abused Seniors Turn to Alameda Court for Help](#)

Funding Options for Decision-Making Capacity Assessments

Forensic capacity assessments typically are not Medicare reimbursable.⁶⁷ There are times when the capacity assessment initially has a clinical purpose and subsequently becomes relevant for the courts, and in those situations the assessment might be covered by Medicare or other insurance. However, often other forms of payment are required.⁶⁸ Possible funding options include:

- An elder abuse multidisciplinary team (MDT) ([MDT Locator](#)) may have access to a qualified clinician and may have funding for capacity assessments.

- Victims Of Crime Act (VOCA) and other grant funding may be available for capacity assessments. For example, capacity assessments for crime victims are [Allowable Expenses](#) (see p. 2) under VOCA as capacity assessments facilitate the provision of victim services and help service providers and investigators to interact with the victims (working through adult protective services, law enforcement, prosecutors, MDTs, and other victim serving organizations). Each state's VOCA victim assistance program, however, has the discretion to determine how VOCA Victim Assistance program funding is distributed to different victim service programs. Individuals interested in VOCA funding are encouraged to contact the state [VOCA Victim Assistance Administrator](#).

Statutory Reviews

State Guardianship Statutes

[Capacity Definition & Initiation of Guardianship Proceedings](#) (ABA COLA, 2020)

[Role of Clinical Evaluation Professionals in Adult Guardianship Proceedings: Survey of State Statutes](#) (ABA COLA, 2016)

[Conduct and Findings of Guardianship Proceedings](#) (standard of proof and what judges are required to consider; ABA COLA, 2020)

[Least Restrictive Alternative References in State Guardianship Statutes](#) (ABA COLA, 2018)

[What Statutes Require of Clinicians When Assessing Capacity in Guardianship Cases](#) (EJI, 2022)

State Criminal Statutes

[State Criminal Elder Abuse Statutes](#) (also available on the [EAGLE](#)) (EJI)

Adult Protective Services Statutes

[Types of Abuse Defined in Adult Protective Services Statutes](#) (ABA COLA, 2021)

[Adult Protective Services Reporting Chart](#) (ABA COLA, 2019)

Resources for Specific Categories of Professionals

Judges and Court Personnel

[Judge's Guide: Abuse in Later Life](#) (Judicial Council of California, 2015)

[Handbook for Judges: Judicial Determination of Capacity of Older Adults in Guardianship Proceedings](#) (ABA COLA/APA, 2007)

National Probate Court Standards (Standard 3.3.9 Determination of Incapacity, pp. 56-58, is available on the [NCSC website](#)) (NCSC, 2013)

[Elder Abuse Pocket Reference: A Medical/Legal Resource for California Judicial Officers](#) (Judicial Council of California, 2012)

[Elder Abuse Desk Guide for Judges and Court Staff](#) (Elder Justice Navigator Project, 2018)

[Guardianship Evaluation Worksheet Toolkit](#) (EJI webpage)

Additional Resources within this Resource Guide

Learn about [Forensic Evaluation](#)

[Guardianship](#)

[Less Restrictive Alternatives](#)

[Elder Justice Court Models and Initiatives](#)

[What to Look for in an Evaluation Report](#)

Civil Lawyers

[Understanding Legal Capacity and Ethics](#) (NCLER, July 2018)

[Assessment of Older Adults with Diminished Capacity: Handbook for Lawyers \(2nd ed.\)](#) (ABA COLA/APA) (Hard copy is available for purchase through the [ABA Shop](#))

Model Rules of Professional Conduct, [Rule 1.14: Client with Diminished Capacity](#) and [Comment](#) (ABA)

[The Fourth National Guardianship Summit: Maximizing Autonomy and Ensuring Accountability and Recommendations](#) (2021)

[Working with People with Dementia and Assessing Client Capacity](#) (Wood & Tilly, 2017)

Remedies for Elder Financial Exploitation

[Civil Recovery in Elder Financial Exploitation Cases](#) (ABA COLA)

[The Model Civil Provisions on Elder Financial Exploitation](#) (NCVC, 2017)

Additional Resources within this Resource Guide

[Contents of the Referral Letter for a Decision-Making Capacity Assessment](#)

[Guardianship](#)

[Less Restrictive Alternatives](#)

[State Guardianship Statutes](#)

[What to Look for in an Evaluation Report](#)

Criminal Prosecutors

[The Prosecutor’s Resource: Elder Abuse](#) (Aequitas, 2017)

[Prosecuting Elder Abuse Cases: Basic Tools and Strategies](#) (NCSC, 2012)

[Abuse by Guardians](#) (EJI webpage)

National Institute on the Prosecution of Elder Abuse Webinar Recordings (NCALL, forthcoming)

EJI Prosecutor Webinars and Training Videos

[Dementia and Other Mild Cognitive Impairment](#)

[Cognitive Capacity and Consent](#)

[Cognitive Capacity Evaluation and Screening Tools](#)

[Consent and Other Common Defenses](#)

[Overcoming Defenses](#)

[Undue Influence](#)

[Cognitive Capacity Evaluators and How to Find Them](#)

[Working with Older Victims: When the Victim has Dementia](#)

Additional Resources within this Resource Guide

Learn about [Forensic Evaluation](#)

Elder Abuse [Criminal Statutes](#)

[Content of the Referral Letter for a Decision-Making Capacity Assessment](#)

[What to Look for in an Evaluation Report](#)

Law Enforcement

[Elder Abuse Guide for Law Enforcement](#) (NCEA)

[Elder Abuse Investigations: Training for Law Enforcement and Other Investigators](#) (NCALL, 2021)

[Responding to Elder Abuse Victims with Alzheimer's disease or Other Dementias](#) (EJI, 2018)

[Approaching Alzheimer's: First Responder Training Program](#) (Alzheimer's Association)

[Law Enforcement: Building Stronger Cases with Elder Abuse Multidisciplinary Teams](#) (EJI, 2020)

[Working Together: How Community Organizations and First Responders Can Better Serve People Living with Dementia](#) (ACL, NADRC, RTI International)

[Abuse by Guardians](#) (EJI webpage)

Additional Resources within this Resource Guide

Elder Abuse [Criminal Statutes](#)

[Contents of the Referral Letter for a Decision-Making Capacity Assessment](#)

[What to Look for in an Evaluation Report](#)

Adult Protective Services

[Capacity Screening in Adult Protective Services: Guidance and Resources](#) (APS TARC)

[What Data Reveals About Administering Capacity Assessments](#) (EJI, 2020)

[Neuropsychological Correlates of Performance Based Functional Status in Elder Adult Protective Services Referrals for Capacity Assessments](#) (NCEA & NCPEA)

[Dementia-Specific Training for APS and Community Workers](#) (Alzheimer's Association)

[Module #17: Assessing Adult Protective Services Clients' Decision Making Capacity](#) (NCEA and NAPSA)

[Number of States in Which APS can Petition for Guardianship and Number of States in Which APS may serve as a Guardian](#) (APS TARC)

ACED (Assessment of Capacity for Everyday Decision-making) and SPACED (Short Portable Assessment of Capacity for Everyday Decision-making)⁶⁹ manuals are available by contacting Professor Jason Karlawish at Jason.karlawish@gmail.com

Additional Resources within this Resource Guide

[APS Statutory Reviews](#)

[Guardianship](#)

[Less Restrictive Alternatives](#)

[Contents of the Referral Letter for a Decision-Making Capacity Assessment](#)

[What to Look for in an Evaluation Report](#)

Clinicians

Decision-Making Capacity Assessment Guidelines

[Assessment of Older Adults with Diminished Capacity: A Handbook for Psychologists](#) (APA/ABA COLA, 2008)⁷⁰

[The Assessment of Capacity for Everyday Decision-Making \(ACED\)](#) (NAPSA)

Compilation of State Capacity Declaration Forms

[Capacity Declaration Forms](#) (EJI, 2022)

Additional Resources within this Resource Guide

Learn about [Forensic Evaluation](#)

[Contents of the Referral Letter for a Decision-Making Capacity Assessment](#)

[What to Look for in an Evaluation Report](#)

Capacity Assessment Training

“Given the implications of a capacity assessment – loss of autonomy – the absence of guidelines and training is unethical.”⁷¹

The reliability of clinicians’ judgments of examinees’ decision-making capacity is notably low.⁷² This is likely due, at least in part, to the law’s failure to adequately define or operationalize some capacities (e.g., to vote, to determine one’s residence, to gift).⁷³ There are, of course some notable exceptions (e.g., testamentary capacity is well-defined).⁷⁴ Although the reliability of clinicians’ judgments does increase when training is provided,⁷⁵ few clinicians report they have received any formal training or preparation on how to perform them.⁷⁶

To maximize the quality of evidence offered to the courts, clinicians conducting capacity assessments can benefit from training.⁷⁷ Further, the availability of well-qualified professionals to conduct capacity assessments is uneven within and across states,⁷⁸ suggesting the need to increase the number of clinicians qualified to assess decision-making capacity through training.

Three live training courses are described below, followed by several online trainings, and a list of relevant books.

Live Courses (fees may apply)

- The **Older Adult Capacity Assessment Course** (10 hours of CE) helps psychologists and other mental health professionals expand their work as experts in legal cases that fall under the jurisdiction of probate court. Offered through Wayne State University’s Department of Psychology and the Institute of Gerontology, the course is taught by Institute of Gerontology Director Peter Lichtenberg, Ph.D., ABPP, and University of Louisville professor Benjamin Mast, Ph.D., ABPP. Drs. Lichtenberg and Mast are board-certified clinical geropsychologists with years of experience conducting capacity assessments and providing expert testimony in court

hearings. The instructors provide background, review actual cases, and discuss capacity assessment approaches across ten topics. The course aims to strengthen participants' skills and confidence about performing expert work in civil legal cases involving financial capacity, guardianship, and conservatorship, as well as in report writing and testifying in depositions and at trial. The live on-line course is delivered in weekly, one-hour increments⁷⁹ and is taught periodically for a nominal fee. Contact Professor Peter Lichtenberg (p.lichtenberg@wayne.edu) for more information.

- The curriculum titled **Serving Texans: A Detailed Assessment Model for Evaluating Adult Mistreatment and Functional Capacity** provides a comprehensive overview of elder mistreatment epidemiology, an evidence-based model for in-person and remote functional capacity assessments, guidance for working on multidisciplinary teams to ensure the most reasonable next steps for the older adult's safety, and training on court testimony related to elder mistreatment assessments. This training is currently available only to residents affiliated with UTHealth. Contact Professors Jason Burnett (Jason.Burnett@uth.tmc.edu) or Julia Hiner (julia.a.hiner@uth.tmc.edu) for more information about the program.
- For the past 7 years, the University of California-Los Angeles has provided a 3-day (4 hours per day) capacity training for geropsychiatrists. Day one familiarizes geropsychiatrists with what decision-making capacity is and how it is assessed. Day 2 pertains to the basics of report writing and testifying in court. And Day 3 is a mock hearing where the geropsychiatrists practice testifying in court with practicing attorneys and an active-duty judge. Contact Janet Morris (janet@janetmorrislaw.com) for more information.

Online Courses (available for a fee)

- [Assessing Decisional Capacity](#) (Rush University Medical Center Online Training)
- [Assessment of Capacity in Older Adults— Module 1: Foundations of Capacity and ABA-APA Model and Legal Concepts and Guardianship](#) (APA)
- [Assessment of Capacity in Older Adults](#) (APA)
- [Continuing Education Resources](#) (APA)

Books

- Bush, S. S., & Heck, A. L. (2018). *Forensic Geropsychology: Practice Essentials*. Washington, DC: American Psychological Association.
- Demakis, G. (2012). *Civil Capacities in Clinical Neuropsychology*. New York, NY: Oxford.
- Moye, J. (2020). *Assessing Capacities of Older Adults: A Casebook to Guide Difficult Decisions*. Washington, DC: American Psychological Association.
- Reimers, K. (2019). *The Clinician's Guide to Geriatric Forensic Evaluations*. Academic Press.

When Clinicians Should Decline a Referral to Conduct a Decision-Making Capacity Assessment in the Court Setting⁸⁰

Professional competence is at the core of a decision-making capacity assessment,⁸¹ and all clinicians assessing capacity should practice only in areas in which they are competent. There are times when it is

appropriate for a clinician to decline a referral. When considering whether to do so, clinicians might ask themselves:

- How experienced am I in conducting capacity assessments?
- Have I completed relevant training, can I access [materials](#) that provide guidance in assessing capacity, or can I access supervision when conducting this evaluation?
- Are there other more qualified individuals in my area who can provide the assessment?
- If I complete the capacity assessment, is there a potential conflict of interest? For example, do I have an ongoing professional relationship with this person (or their family members or the alleged abuser) that could be harmed because of my performing a capacity assessment? (See [Forensic Evaluation](#))

Clinicians Serving on Elder Abuse Multidisciplinary Teams

The growing recognition of the importance of capacity assessments conducted by highly-trained clinicians is reflected in the Office for Victims of Crime's (OVC) grant program, *OVC [FY 2019](#) and [FY 2021](#) Transforming America's Response to Elder Abuse: Enhanced Multidisciplinary Teams (E-MDTs)*⁸² for *Older Victims of Financial Exploitation and Abuse*, ensuring MDTs have access to clinicians who can conduct capacity assessments in elder abuse cases. OVC has funded 23 E-MDTs across the country and funded training and technical assistance for the E-MDTs through the [National MDT Technical Assistance Center](#). The Elder Justice Initiative's [MDT Technical Assistance Center](#) offers consultation and resources on elder abuse MDTs nationwide.

Resources Relevant to All Elder Justice Professionals

EJI Decision-Making Capacity Webinars

[Digging Deeper: When Consent is Not Consent](#) (September 6, 2018)

[What Data Reveals About Administering Capacity Assessments](#) (October 8, 2020)

[The Neuroscience Behind Financial Scams](#) (July 14, 2020)

[Increasing Access to Capacity Assessments via New Technologies](#) (October 26, 2018)

[Forensic Interviewing with Older Adults](#) (December 8, 2017)

[Assessing Cognitive Capacity in Elder Abuse Cases](#) (August 21, 2017)

Other Decision-Making Capacity Webinars and Media for Professionals

[The rise of predatory scams — and how to prevent them](#) (Ted Talk by Jane Walsh, 2021)

[Assessing Legal Capacity: Strategies for an Elder Rights-Centered Approach](#) (NCLER, 2021)

[Issues in Capacity: Balancing Empowerment and Protection](#) (NCLER, 2020)

[Understanding Decisional Capacities of Older Adults](#) (APS TARC, 2021)

[Our Aging Brains: Decision-making, Fraud, and Undue Influence](#) (Center for Law, Brain & Behavior at Massachusetts General Hospital and Petrie-Flom Center for Health Law Policy, Biotechnology, and Bioethics at Harvard Law School) (April, 2018)

[Rethinking Alzheimer's Care](#) (USC Podcast Series, 2021)

[Guardianship: Remedy vs. Enabler of Elder Abuse](#) (NCEA, 2021)

[Ten Ways to Reduce Guardianship Abuse through Enactment of the Uniform Guardianship, Conservatorship, and Other Protective Arrangements Act \(UGCOPAA\)](#) (NCEA, 2021)

[Financial Capacity and Financial Exploitation](#) (SIFMA, 2018)

National Organizations and Websites

[Capacity Assessment](#) (ABA COLA)

[NIA Encourages New Research on Decision Making](#) (NIA 2017)

[Research on Tools to Detect Cognitive Changes](#) (NIA)

[National Plans to Address Alzheimer's Disease](#) (ASPE)

[Alzheimer's Association](#)

[National Guardianship Association](#)

[National Resource Center for Supported Decision Making](#)

[Center for Public Representation](#)

[National Disability Rights Network](#)

Resources for Professionals to Share with the General Public

Planning Ahead

[Legal and Financial Planning for People Living with Dementia](#) (NIA)

[Considering a financial caregiver? Know your options](#) (CFPB)

[Planning for Diminished Capacity and Illness](#) (CFPB)

[Planning for Peace of Mind: Social Security Advance Designation](#) (CFPB)

[Thinking Ahead Roadmap](#) (University of Minnesota and AARP)

[Choosing a trusted contact person can help you protect your money](#) (CFPB)

[Establishing a Trusted Contact](#) (FINRA)

Increase Your Knowledge

[Managing Someone Else's Money](#) (CFPB)

[How at Risk for Abuse Are People with Dementia?](#) (UC Irvine)

[Finding the Right Fit: Decision-making Supports and Guardianship](#) (NCSC Online Training)

[10 Warning Signs of Alzheimer's](#) (Alzheimer's Association video)

[10 Warning Signs of Alzheimer's](#) (Alzheimer's Association pamphlet)

[Understanding Alzheimer's and Dementia](#) (Alzheimer's Association video)

[Understanding Alzheimer's and Dementia](#) (Alzheimer's Association pamphlet)

[Aging and Financial Decision Making](#) (FINRA Investor Education Foundation)

[What if Your Guardian is Not Doing What They Should?](#) (NCEA)

[Adult Protective Services, What You Must Know](#) (NCEA & NAPSA)

Glossary

Clinical Terminology

Activities of Daily Living - The activities of daily living (ADLs) is a term used to collectively describe fundamental skills required to independently care for oneself,⁸³ and typically include dressing, bathing, eating, toileting, walking (e.g., transferring between bed and chair).

Agency - The state of being active, usually in the service of a goal, or of having the power and capability to produce an effect or exert influence.⁸⁴ Agency refers to the human capability to influence one's functioning and the course of events by one's actions.⁸⁵

Alternatives to Guardianship – Ways of providing support to persons who need decision-making assistance without appointing a guardian/conservator.⁸⁶

Assessment (vs. screen) - Assessment is a process for defining the nature of that problem, determining a diagnosis, and developing specific treatment recommendations for addressing the problem or diagnosis. Screening is a process for evaluating the possible presence of a particular problem. The outcome is normally a simple yes or no.⁸⁷

Autonomy - Individual Autonomy is an idea that is generally understood to refer to the capacity to be one's own person, to live one's life according to reasons and motives that are taken as one's own and not the product of manipulative or distorting external forces, to be in this way independent.⁸⁸

Board Certified - Connotes special competency acquired through an organized sequence of formal education, training, and experience, culminating in certification by a professional organization (board).⁸⁹

Capacity – Capacity is defined as the ability to perform a task — or make a decision. State laws set out standards of legal capacity for various tasks — to consent to treatment, make a will or deed, make a gift or contract.⁹⁰

Capacity Assessment - Assessments of the ability to perform certain tasks or to make certain decisions.⁹¹ The main difference between neuropsychological assessment and a capacity assessment is the emphasis on functioning and assessing the specific capacity in question.⁹²

Capacity Declaration Form – Available in many states, capacity declaration forms are typically completed by physicians or other designated experts to assist the court in determining whether an individual is in need of a guardian or conservator.⁹³ (For a list of states with a publicly available capacity declaration form, see [Capacity Declaration Forms](#) (EJI, 2022))

Clinical Capacity (as opposed to legal capacity) - A clinical assessment and opinion as to whether a person has the requisite ability to perform a task or make a decision⁹⁴ which does not change the legal status of an individual.

Clinical Interview – A capacity assessment starts with a good clinical interview in which the clinician seeks to understand the person's history, values and concerns or fear.⁹⁵

Clinical Judgment – The analysis, evaluation, or prediction of the presenting signs and symptoms in an individual with a disease, disorder, dysfunction, or impairment. It includes assessing the appropriateness

of particular treatments and the degree or likelihood of clinical improvement. These conclusions are derived from the expert knowledge of health or mental health professionals, as opposed to conclusions drawn from actuarial tables or statistical methods.⁹⁶

Clinician – As used here, the term is used represent a range of professionals who conduct capacity assessments. There are many different professions that fall under the term clinician (see [Table 1](#)).

Cognitive Underpinnings – Cognitive processes underlying many functional impairments associated with decision-making.⁹⁷

Collateral Interview - Individuals who may have any information relevant to the referral questions should be invited to participate in an interview as part of a capacity assessment.⁹⁸

Competent - The ability to act in the circumstances, including the ability to perform a job or occupation, or to reason or make decisions.⁹⁹

Consent - A concurrence of wills. Express consent is that directly given, either orally or in writing. Implied consent is that manifested by signs, actions, or facts, or by inaction or silence, which raise a presumption that the consent has been given.¹⁰⁰

Data - Facts and statistics collected for reference or analysis.¹⁰¹ As used here, information in a capacity evaluation report that supports the findings.

Decisional Style – An individual’s style of decision making, for example, a more collaborative and/or deferential style of decision making as opposed to dominant cultural beliefs about individualism and self-reliance.¹⁰²

Decisional (Decision-Making) Capacity - The ability of an individual to make their own decisions.¹⁰³

Degree of Support Available – As part of a capacity assessment, the clinician must take into consideration the degree of support available to the examinee that does or could increase their decision-making capacity.¹⁰⁴

Dementia - The loss of cognitive functioning — thinking, remembering, and reasoning — to such an extent that it interferes with a person's daily life and activities.¹⁰⁵

Diagnosis (medical, psychological, psychiatric) - A medical term, meaning the discovery of the source of a patient’s illness or the determination of the nature of his disease from a study of its symptoms.¹⁰⁶

Diminished Capacity - The definition of diminished capacity in everyday legal practice depends largely on the particular transaction or decision at hand, as well as the jurisdiction in which one is located.¹⁰⁷

Elder Abuse - An intentional act or failure to act by a caregiver or another person in a relationship involving an expectation of trust that causes or creates a risk of harm to an older adult.¹⁰⁸

Executorial Capacity – An individual’s ability to implement a decision.¹⁰⁹

Executive Functioning - The term executive functions refers to the higher-level cognitive skills you use to control and coordinate your other cognitive abilities and behaviors.¹¹⁰

Financial Capacity – The capacity to manage money and financial assets in ways that meet a person’s needs, and which are consistent with his or her values and self-interest.¹¹¹

Forensic - Forensic means used in or suitable to courts of justice. Forensic may also refer to something of, relating to, or involving the scientific methods used for investigating crimes. This is also sometimes termed forensic science.¹¹²

Forensic Assessment - The primary purpose of a forensic assessment is to provide information about some aspect of the examinee to assist the courts in arriving at their legal decisions.¹¹³

Forensic Evaluation Report - A report prepared during an investigation into an alleged offence by a person with specialized knowledge or training, setting out the results of a forensic examination in the form of facts or opinions or a combination of both.¹¹⁴

Forensic Evidence - Evidence that can be used in a court based on science.¹¹⁵

Forensic Psychiatry - A subspecialty within psychiatry at the interface of mental health issues and the law. This includes matters of civil, criminal, and administrative law as well as evaluation and specialized treatment of individuals involved with the legal system.¹¹⁶

Forensic Psychology - The application of clinical psychology to legal matters.¹¹⁷

Functional Capacity - The constituent activities that an individual must be able to do to successfully manage the simple activities (activities of daily living) and higher order responsibility (instrumental activities of daily living) for living on one’s own.¹¹⁸

Higher-Order Cognitive Abilities – Cognitive abilities such as judgment, insight, and decision-making.

Clinical History - Gathering information from relevant sources about an individual’s history.¹¹⁹

Incapacity (incapacitated) – A lack of physical or mental abilities that results in a person's inability to manage his or her own personal care, property, or finances.¹²⁰

Independent Living – The ability to manage ADLs and IADLs (without dependence on others) that enable older adults to live safely in the community.¹²¹

Informed Consent - Informed consent occurs when there is agreement to an interaction or action rendered with knowledge of relevant facts, such as the risks involved or any available alternatives.¹²² For example, the consent from a patient for treatment after they have been given all the information about their condition or illness.¹²³

Instrument (assessment Instrument) - Any test, interview, questionnaire, or other tool for the evaluation of ability, achievement, interests, personality, psychopathology, or the like.¹²⁴

Instrumental Activities of Daily Living (IADLs) - Higher order and more cognitively complex activities that allow an individual to live independently in a community such as grocery shopping and meal preparation, driving, housework, managing money, managing medication, using telephone, mail, and email.¹²⁵

Interview for Decisional Abilities (IDA) – A semi-structured tool for use by adult protective services (APS) workers as part of their comprehensive assessments of APS clients to guide caseworkers in

gathering information on the ability of suspected victims of adult mistreatment to make decisions about the risks they face.¹²⁶

Involuntary Intervention – Interventions imposed on clients of APS when an APS client refuses services but lacks the capacity to do so. Involuntary interventions can only be imposed when a judge orders the involuntary intervention.¹²⁷

Lack of Insight (Anosognosia) - A neurologically based failure to recognize the existence of a deficit or disorder, such as cognitive impairment, hearing loss, poor vision, or paralysis.¹²⁸

Least (less) Restrictive Alternative – A mechanism, course of action, or environment that allows a person to live, learn, and work in a setting that places as few limits as possible on the person’s rights and personal freedoms as is appropriate to meet the needs of the person.¹²⁹

Legal Capacity (as opposed to clinical capacity) - Legal decisional capacity is a legal determination by the court as to whether diminished capacity limits a person’s ability to make a legally relevant decision or action¹³⁰ and changes the legal status of an individual.¹³¹

Neurocognitive Disorders - Neurocognitive disorder is a general term that describes decreased mental function due to a medical disease other than a psychiatric illness. It is often used interchangeably with “dementia”, but the terms are not synonymous.¹³²

Neurodegenerative Disease - Any disease characterized by progressive nervous system dysfunction and loss of neural tissue. Alzheimer’s disease, amyotrophic lateral sclerosis, and Parkinson’s disease are examples of neurodegenerative diseases. Also called neurodegenerative disorder.¹³³

Neuropsychological Assessment - An evaluation of the presence, nature, and extent of brain damage or dysfunction derived from the results of various neuropsychological tests.¹³⁴

Neuropsychological Assessment Battery (NAB) - An integrated battery consisting of 33 tests for assessing cognitive skills in adults (ages 18–97) with a variety of neurological disorders. The tests are organized in six modules, including five domain-specific modules (comprised of tests for attention, language, memory, spatial ability, and executive functions) and a screening module.¹³⁵

Neuropsychological Test - Any of the various clinical instruments for assessing cognitive impairment, including those measuring memory, language, learning, attention, and visuospatial and visuoconstructive functioning. Examples are the Trail Making Test, Stroop Color–Word Interference Test, and Complex Figure Test.¹³⁶

Neuroscience and the Law - A field of interdisciplinary study that explores the effects of discoveries in neuroscience on legal rules and standards.¹³⁷

Normative Data –Group averages with regard to particular variables or factors, such as the scores of females on a specific test or the language skills of 10-year-olds.¹³⁸

Prognosis - A prediction of the future course, duration, severity, and likely outcome of a condition.¹³⁹

Recommendation – As part of a capacity assessment report, the clinician’s suggestions or advice on what is the best thing to do.

Record (or Document) Review¹⁴⁰ - To corroborate an individual's version of the truth, the clinician will conduct a record review including review of school records, work performance appraisals, etc.

Referral Letter for a Capacity Assessment – The letter sent by a lawyer or APS to a clinician requesting that the clinician perform a capacity assessment.

Restoration of Capacity – Guardianship is modified (to limit the scope of the guardian's authority) or terminated by the court.¹⁴¹

Retrospective Capacity Assessment – A capacity assessment to determine whether a person possessed decision-making capacity at some time in the past.¹⁴²

Risk - The probability or likelihood that a negative event will occur, such as the risk that a disease or disorder will develop.¹⁴³

Screening Test (vs Assessment) – Screening is a process for evaluating the possible presence of a particular problem. The outcome is normally a simple yes or no. Assessment is a process for defining the nature of that problem, determining a diagnosis, and developing specific treatment recommendations for addressing the problem or diagnosis.¹⁴⁴

Sliding Scale Concept – The more complex the decision, the more capacity required.¹⁴⁵

Undue influence (in the context of elder abuse) - Undue influence is a psychological process that may be used against an older person as a means of committing two forms of elder abuse: financial exploitation or sexual abuse.¹⁴⁶ It is also a legal concept.¹⁴⁷

Values - As part of a capacity assessment, values refer to an underlying set of beliefs, concerns, and approaches that guide personal decisions.¹⁴⁸

Legal Terminology¹⁴⁹

Admissible Evidence - As applied to evidence, the term means that it is of such a character that the court or judge must admit it.¹⁵⁰

Case law - The aggregate of reported cases forming a body of jurisprudence; the law of a particular subject as evidenced or formed by adjudicated cases (as opposed to statutes and other sources of law).¹⁵¹

Common law - The part of English law that is derived from custom and judicial precedent rather than statutes.¹⁵²

Cause of Action - A set of predefined factual elements that allow for a legal remedy. The factual elements needed for a specific cause of action can come from a constitution, statute, judicial precedent, or administrative regulation.¹⁵³

Court Order - an order that has been written by the judge of the court and needs to be obeyed.¹⁵⁴

Capacity to Consent to Research - The elements include: (a) ability to comprehend all of the relevant information regarding research (the goal, requirements for/impact on the individual, potential risks, potential benefits to individual, potential benefits to society); (b) ability to appreciate the costs risks and

benefits to the individual, specifically; (c) ability to reason (in appropriately balancing risks, benefits with their personal values in arriving at a decision); and (d) ability to effectively express the decision.¹⁵⁵

Capacity to Drive - Ability to safely operate a motor vehicle on public roadways (i.e., the individual is not impaired due to physical or mental disorders).¹⁵⁶

Capacity to Engage in Sexual Relations - The elements include: (a) knowledge regarding sexual activity and possible consequences, including risk and benefits; (b) decisions regarding sexual activity demonstrate reasoning that is consistent with the individual's values; and (c) decisions are voluntary and free of coercion.¹⁵⁷

Capacity to Live Independently - The elements include: (a1) ability to receive information, (a2) ability to evaluate information, and (a3) ability to make and effectively communicate decisions; and (b) these abilities are at a level that permit the individual to provide adequately for self-care, health and safety (even if achieved with appropriate assistance).¹⁵⁸

Contractual Capacity - The elements include: (a) ability to understand the nature of the contract being entered into and (b) the effects of the contract or business agreement (potential risks and benefits).¹⁵⁹

Cross-examination - The term used when a witness is examined by the opposing party in the case before the court.¹⁶⁰

Daubert Standard – Criteria that must be evaluated by the judge relating to scientific evidence, including general acceptance, known error rate, peer review, testable theory or technique.¹⁶¹

Discovery – The formal process of exchanging information between the parties about the witnesses and evidence they will present at trial.¹⁶²

Donative Capacity – The ability to understand the value of what a person has and the consequences of giving it to someone else.¹⁶³

Exhibit - A document, photograph, object, animation, or other device formally introduced as evidence in a legal proceeding.¹⁶⁴

Expert Testimony (expert witness) - The testimony given by a person with expertise in a particular field.¹⁶⁵

Financial Capacity – The elements include: (a) ability to receive information, (b) ability to evaluate information, and (c) ability to make decisions (may be with the benefit of technological assistance) related to finances.¹⁶⁶

Guardianship - The appointment by a court of a person or entity to make personal and/or property decisions for an individual whom the court finds cannot make decisions for themselves.¹⁶⁷

Impeach - In the law of evidence, to call in question the veracity of a witness, by means of evidence presented for that purpose.¹⁶⁸

Inadmissible - That which, under the established rules of law, cannot be admitted or received.¹⁶⁹

Intestate – Without a will;¹⁷⁰ not having made a will before one dies.¹⁷¹

Legal Standard – The legal question, relevant legal statutes, and case law necessary for completing the assessment.¹⁷²

Litigation - A judicial controversy. A contest in a court of justice, for the purpose of enforcing a right.¹⁷³

Medical Capacity – The elements include: (a) ability to understand the significant benefits, risks, and alternatives to proposed health care, and (b) ability to make and communicate healthcare decisions.¹⁷⁴

Motion - Request to a court for a desired ruling or order. A motion can be written or spoken, as the relevant rules require. Various motions can be made throughout a case, but only after the initial complaint has been filed.¹⁷⁵

Opinion (Expert Opinion) - A statement of opinion made by a witness to provide an evaluation of facts in evidence using the expert’s qualified prior experience to shed additional insight on the matter.¹⁷⁶

Petition - A formal application in writing made to a court or other official body requesting judicial action of some character.¹⁷⁷

Probate - The act or process of proving a will.¹⁷⁸

Probate Court - A court that has jurisdiction chiefly over the probate of wills and administration of deceased persons' estates.¹⁷⁹

Probative - Evidence that is useful in addressing an issue that is before a court of law.¹⁸⁰

Rules of Evidence - Rules of evidence are, as the name indicates, the rules by which a court determines what evidence is admissible at trial.¹⁸¹

Standard of Proof - A standard of proof refers to the duty of the person responsible for proving the case. There are different standards of proof in different circumstances. The three primary standards of proof are proof beyond a reasonable doubt, preponderance of the evidence and clear and convincing evidence.¹⁸²

Statutory Law – Law that exists in legislatively enacted statutes especially as distinguished from common law.¹⁸³

Testamentary Capacity – The elements include: (a) knowledge of wills and their purposes; (b) knowledge of all “natural” potential heirs; (c) knowledge of the varied aspects of one’s estate; (d) a coherent plan for distribution of the estate, whether the plan is highly detailed or based on general principles.¹⁸⁴

Testimony - Evidence of a witness; evidence given by a witness, under oath or affirmation; as distinguished from evidence derived from writings, and other sources.¹⁸⁵

Witness – A person who has knowledge of an event. A witness is a person whose declaration under oath (or affirmation) is received as evidence for any purpose, whether such declaration be made on oral examination or by deposition or affidavit.¹⁸⁶

Appendix A: List of Acronyms and Abbreviations

Acronym	Full Phrase
ACED	Assessment of Capacity for Everyday Decision-making
ACL	Administration for Community Living
ADL	Activities of Daily Living
ASPE	Assistant Secretary for Planning and Evaluation (HHS)
APS	Adult Protective Services
ABA COLA	American Bar Association Commission on Law and Aging
CEJC	California Elder Justice Coalition
CFPB	Consumer Financial Protection Bureau
EAGLE	Elder Abuse Guide for Law Enforcement
EJI	Elder Justice Initiative
FINRA	Financial Industry Regulatory Authority
IADL	Instrumental Activities of Daily Living
LTC	Long-Term Care
MDT	Multidisciplinary Team
NAPSA	National Adult Protective Services Association
NASUA	National Association of State Units on Aging
NCALL	National Clearinghouse on Abuse in Later Life
NCEA	National Center on Elder Abuse
NCLER	National Center on Law and Elder Rights
NCOA	National Council on Aging
NCSC	National Center for State Courts
NCVC	National Center for Victims of Crime
NIA	National Institute on Aging
OVC	Office for Victims of Crimes
POA	Power of Attorney
POLST	Physician Orders for Life Sustaining Treatment
SEC	Securities and Exchange Commission
SIFMA	Securities Industry and Financial Markets Association
SPACED	Short Portable Assessment of Capacity for Everyday Decision-making
VOCA	Victims of Crime Act

Appendix B: Forensic Evaluation

Forensic evaluations are evaluations conducted by a clinician that will be used to assist triers of fact (generally judges and juries). The role of forensic clinicians is to assist counsel/juries/courts in understanding and deciding forensic issues involving decision-making capacity¹⁸⁷ in part by clinically evaluating medical-legal capabilities for attorneys/courts and in part by presenting evidence and opinions in court.¹⁸⁸ Forensic practitioners have an ethical obligation to understand the laws governing the case they are involved with.¹⁸⁹ People without training in forensics may not know the proper way to conduct these assessments, which includes in part knowing the relevant statute and understanding the legal issue. Clinicians must avoid using jargon. Any limitations associated with the forensic evaluation must be conveyed to the court in the report and in testimony rather than waiting for the deposition or cross examination.¹⁹⁰

Although the court may not be required to utilize a clinician with forensic training (e.g., forensic psychologist or psychiatrist), there are many advantages. As presented in the following Table, it is useful to understand the difference between a forensic evaluator (addressing a psycholegal issue such as decision-making capacity) and a therapeutic clinician (addressing individual treatment issues).

Finally, it is important to recognize that at times, a physician or a therapist may be asked to conduct a capacity assessment of their patient/client explicitly because they “know” this person well. However, that dual role presents a number of potential ethical concerns, even with the patient’s/client’s consent.

12 Principles Distinguishing Forensic from Therapeutic Responsibilities¹⁹¹	
Forensic Evaluator	Therapist
Forensic evaluator is answerable to the lawyer or court, not to the litigant	The therapist is answerable to the client
Forensic evaluator must inform the litigant that communication between the forensic evaluator and the litigant is not privileged (protected) ¹⁹²	Therapist-patient privilege applies
Forensic evaluator is neutral, objective, detached and provides a “dispassionate assessment of the legal issue”	The clinician is a care provider and support to the client
Forensic evaluator must be “competent” in forensic evaluation procedures and psycholegal issues	The therapist must be knowledgeable about assessment and treatment
Forensic evaluator must know the relevant law and how it relates to a particular psycholegal assessment and generate psycholegal hypotheses (i.e., the issue is defined by the law)	The therapist must generate diagnostic hypotheses and courses of treatment based on the client’s point of view
Forensic evaluator engages in a high degree of scrutiny and verification of the information generated by the litigant which necessitates verification of litigant’s version of the facts through collateral interviews with multiple sources and extensive record review, etc.	Therapy is based on information from the client (accuracy is not paramount)

Forensic evaluator seeks to achieve accuracy of the historical truth of the matter and therefore imposes structure on the assessment process; also, timelines and goals are determined by the legal rules and therefore structured interviews are used, supplemented by battery of psychological tests and forensic history and impairment questionnaires	Less rigid timeframe and goals for therapy
Forensic evaluator works within an adversarial system	The therapist works in a non-adversarial context
Forensic evaluator gathers and presents information to the courts to aid the trier of fact (judge or jury) and is therefore neutral, independent, and honest	The sole purpose for the therapist is to aid the client
Forensic evaluator assesses, clinically judges, and reports on their findings and opinions	The therapist suspends judgment of the client
Forensic evaluator provides a detailed written report to the court	The therapist has only non-sharable case notes
Forensic evaluator provides information to lawyers, courts, or juries in an adversarial setting, therefore they are detached and skeptical and their expert testimony would not harm the litigant because there is no therapeutic relationship between the litigant and the forensic evaluator	The therapist is guided by beneficence and non-maleficance

Appendix C: Instruments for Assessment of Decision-Making Capacity

Instruments for Assessment of Decision-Making Capacity ¹⁹³	
Domain of Capacity	Instrument
Capacity to Refuse Personal In-home Care Services offered by a Caregiver	
Capacity to Refuse Intervention for Problems with Instrumental Activities of Daily Living (IADLs)	Assessment of Capacity for Everyday Decision-Making (ACED) ¹⁹⁴
Contractual Capacity	
Donative Capacity	
Financial Capacity	Current Financial Capacity Form ¹⁹⁵
	Decision-Making Interview for Guardianship: Four Vignettes Assessing Social Judgement in Financial Situations ¹⁹⁶
	Direct Assessment of Functional Status ¹⁹⁷
	Financial Capacity Instrument (FCI) ¹⁹⁸
	Financial Capacity Instrument – Short Form (FCI-SF) ¹⁹⁹
	Financial Competence Assessment Inventory (FCAI) ²⁰⁰
	Financial Competence Assessment Tool (FCAT) ²⁰¹
	Financial Decision-Making Questionnaire (FDMQ) ²⁰²
	Hopemont Capacity Assessment Interview (HCAI)
	Hopemont Capacity Assessment Interview: Three Vignettes Assessing Social Judgment in Financial Situations ²⁰³
	Independent Living Scales (Managing Money subscale) ²⁰⁴
	Lichtenberg Financial Decision Rating Scale (LFDRS) (Financial Decision Tracker) ²⁰⁵
	Measure of Awareness of Financial Skills (MAFS) ²⁰⁶
	Property and Finance Capacity Assessment (PFCA) ²⁰⁷
Semi-Structured Clinical Interview for Financial Capacity (SCIFC) ²⁰⁸	
Guardianship	Decision-Making Instrument for Guardianship (DIG) ²⁰⁹
Independent Living	Adult Functional Adaptive Behavioral Scale (AFABS) ²¹⁰
	Direct Assessment of Functional Status (DAFS) ²¹¹
	Independent Living Scales (ILS) ²¹²
	Multidimensional Functional Assessment Questionnaire (MFAQ) ²¹³
	Philadelphia Geriatric Center Multilevel Assessment Inventory (MAI)

	Texas Functional Living Scales (2001) ²¹⁴
Sexual Capacity	Sexual Consent and Education Assessment (SCEA) ²¹⁵
Testamentary Capacity	Legal Capacity Questionnaire ²¹⁶
	Semi-Structured Interview for the Assessment of Testamentary Capacity ²¹⁷
	Testamentary Capacity Instrument ²¹⁸
	Contemporaneous Assessment Instrument ²¹⁹
Treatment Consent Capacity	Aid to Capacity Evaluation (ACE) ²²⁰
	Assessment of Capacity to Consent to Treatment (ACCT) ²²¹
	Capacity Assessment Tool (CAT)
	Capacity to Consent to Treatment Interview (CCTI) ²²²
	Competency Interview Schedule (CIS)
	Decision Assessment Measure
	Hopemont Capacity Assessment Interview (HCAI) ²²³
	MacArthur Competence Assessment Tool – Treatment (MacCAT-T) ²²⁴

Note. This is not a comprehensive list of tools. The purpose in listing these tools is not to suggest that these are the only or the best tools, but is designed to educate readers about these instruments by conveying the breadth of tools available to a clinician and where gaps exist. Lawyers are advised against requesting that clinicians use any one particular tool.

Appendix D: Less Restrictive Alternatives by Type of Need

Less Restrictive Alternatives by Type of Need²²⁵		
Financial Alternatives	Healthcare/Personal Care Alternatives	Independent Living
Financial Power of Attorney	Healthcare Power of Attorney or Advanced Directive	Adult Day Care
Representative Payee or VA Fiduciary	Healthcare Default Surrogate Law (a.k.a. Family Consent Law)	Supported Housing
Joint Accounts, especially Convenience Accounts	Supported Decision-Making	Assisted Living
Trusts	Psychiatric Advance Directives	Home Health and Home Attendants
Alerts and Monitoring Services	Statutes authorizing court to order one-time or short-term protective arrangements (e.g., health care consent, nursing home placement)	Supported Decision-Making
Voluntary Account Restrictions	POLST, MOLST and similar protocols (medical orders for life-sustaining treatment)	
Bill Paying/Money Management Programs		
Supported Decision-Making		

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- ¹ Institute of Medicine (2015). [Cognitive aging: Progress in understanding and opportunities for action](#). Washington, DC: The National Academies Press.
- ² Lichtenberg, P. A. (2016). Financial exploitation, financial capacity, and Alzheimer's disease. *American Psychologist*, 71(4), 312-320.; Moye, J. (2020). *Assessing capacities of older adults: A casebook to guide difficult decisions*. Washington, DC: APA.
- ³ Rothke, S. E., Demakis, G. J., & Amsbaugh, H. M. (2019). State statutes regarding the role of psychologists in performing capacity evaluations for guardianship determinations. *Professional Psychology: Research and Practice*, 50(4), 228–239.
- ⁴ Bush, S. S. (2018). Ethical issues in forensic geropsychology. In S.S. Bush & A.L Heck (eds.), *Forensic Geropsychology: Practice Essentials*. Washington, DC: APA.; Falk, E., & Hoffman, N. (2014). The role of capacity assessments in elder abuse investigations and guardianships. *Clinics in Geriatric Medicine*, 30(4), 851-868.; Karlawish, J. (2008). Measuring decision-making capacity in cognitively impaired individuals. *Neurosignals*, 16(1), 91-98.; Moye, J. (2020). *Assessing capacities of older adults: A casebook to guide difficult decisions*. Washington, DC: APA.
- ⁵ As used in this Resource Guide, the term “clinician” refers to any professional who assesses decision-making capacity.
- ⁶ Appelbaum, P. S., & Grisso, T. (1988). Assessing patients' capacities to consent to treatment. *New England Journal of Medicine*, 319(25), 1635-1638.; see also Grisso, T. (2003). *Evaluating competencies: Forensic assessments and instruments* (2nd ed.). Kluwer Academic/Plenum Publishers.
- ⁷ Moye, J., Marson, D. C., & Edelstein, B. (2013). Assessment of capacity in an aging society. *American Psychologist*, 68(3), 158-171.
- ⁸ Hoffman, N. (2018). The assessment of testamentary capacity and undue influence in the older adults. In S.S. Bush and A.L. Heck (eds.), *Forensic Geropsychology: Practice essentials* (pp. 213- 234; see p. 214). Washington, DC: American Psychological Association.
- ⁹ Demakis, G. J. (2013). State statutory definitions of civil incompetency/incapacity: Issues for psychologists. *Psychology, Public Policy, and Law*, 19(3), 331.; GeroCentral [Evaluating Capacities](#); Karlawish, J. (2014). An Overview of the Assessment of Everyday Decision Making (ACED). NAPSA [webinar](#); (see also Karlawish, J. (2014 [ppt](#), ACED and SPACED manuals available from Jason.karlawish@gmail.com); Moye, J., & Wood, E. (2020). Understanding legal and clinical capacities. In J. Moye (ed.), *Assessing capacities of older adults: A casebook to guide difficult decisions*. Washington, DC: APA.
- ¹⁰ This Resource Guide uses the phrase "legal capacity" to refer to a judicial determination of capacity or a determination of capacity using a legal standard spelled out in statute or case law. The same phrase is used in the disability rights community to indicate that the assumption of capacity extends to persons with disabilities (see [United Nations](#) and [Legal Capacity and Persons with Disabilities](#)).
- ¹¹ Purser, K., & Sullivan, K. (2019). Capacity assessment and estate planning-the therapeutic importance of the individual. *International journal of law and psychiatry*, 64, 88-98.
- ¹² Darby, R. R., & Dickerson, B. C. (2017). Dementia, Decision-Making, and Capacity. *Harvard review of psychiatry*, 25(6), 270-278.
- ¹³ Sabatino, C. P., & Basinger, S. L. (2000). Competency: Reforming our legal fictions. *Journal of Mental Health and Aging*, 6(2), 119-144.
- ¹⁴ Horton, D. & Kress Weisbord, R. (2021). Inheritance crimes. *Washington Law Review*, 96, 561-612.
- ¹⁵ Otto, R. K. (in press). Issues in assessing competence and decision-making capacity in legal contexts. *Practice Innovations*.
- ¹⁶ Graphic Source: Moye, J. A., & Wood, E. (2017). Assessment of Capacity in Older Adults — [Module 1: Foundations of Capacity and ABA-APA Model and Legal Concepts and Guardianship](#). Webinar offered by the APA Office of Continuing Education in Psychology.
- ¹⁷ Ganzini, L., Volicer, L., Nelson, W. A., Fox, E., & Derse, A. R. (2005). Ten myths about decision-making capacity. *Journal of the American Medical Directors Association*, 6(3), S100-S104.
- ¹⁸ [Assessment of Older Adults with Diminished Capacity: A Handbook for Psychologists](#) (APA/ABA COLA, 2008)

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- ¹⁹ Morgan, J. E., Marcopulos, B. A., & Matusz, E. F. (2019). Capacity evaluations in older adults: Neuropsychological perspectives. In L. D. Ravdin & H.L. Katzen (eds.), *Handbook on the Neuropsychology of Aging and Dementia* (pp. 253-261). Springer, Cham.; see also Charlie Sabatino (2022). Ten Maxims from Poor Richard's Almanac, 2022 Version on Mental Capacities and the Law. Invited Speaker, [Elder Justice Decision-Making Symposium](#).
- ²⁰ Karlawish, J. (2014). An Overview of the Assessment of Everyday Decision Making (ACED). NAPSA [webinar](#). Capacity is often unstable and requires repeated assessment (Cohen, D., Schultz, I. Z., Sepehry, A. A., & Stewart, A. M. (2018). Assessment of Competence in Older Adults. In R.J. Gatchel, I.Z. Schultz, C.T. Ray (eds.), *Handbook of Rehabilitation in Older Adults* (pp. 433-459). Springer, Cham.; Chelune, G. J., & Duff, K. (2019). The assessment of change: Serial assessments in dementia evaluations. In L. D. Ravdin & H.L. Katzen (eds.), *Handbook on the Neuropsychology of Aging and Dementia* (pp. 61-76). Springer, Cham.; Morgan, J. E., Marcopulos, B. A., & Matusz, E. F. (2019). Capacity evaluations in older adults: Neuropsychological perspectives. In L. D. Ravdin & H.L. Katzen (eds.), *Handbook on the Neuropsychology of Aging and Dementia* (pp. 253-261). Springer, Cham.
- ²¹ Marson, D. C., Huthwaite, J. S., & Herbert, K. (2004). Testamentary Capacity and Undue Influence in the Elderly: Jurisprudent Therapy Perspective. *Law and Psychology Review*, 28, 71-96.
- ²² [Assessment of Older Adults with Diminished Capacity: A Handbook for Psychologists](#) (APA/ABA COLA, 2008)
- ²³ Marson, D. (2016). Conceptual models and guidelines for clinical assessment of financial capacity. *Archives of Clinical Neuropsychology*, 31(6), 541-553.; Morgan, J. E., Marcopulos, B. A., & Matusz, E. F. (2019). Capacity evaluations in older adults: Neuropsychological perspectives. In L. D. Ravdin & H.L. Katzen (eds.), *Handbook on the Neuropsychology of Aging and Dementia* (pp. 253-261). Springer, Cham.; Reimers, K. (2019). The Clinician's guide to geriatric forensic Evaluations Academic Press.; Otto, R. K. (in press). Issues in assessing competence and decision-making capacity in legal contexts. *Practice Innovations*.
- ²⁴ Morgan, J. E., Marcopulos, B. A., & Matusz, E. F. (2019). Capacity evaluations in older adults: Neuropsychological perspectives. In L. D. Ravdin & H.L. Katzen (eds.), *Handbook on the Neuropsychology of Aging and Dementia* (pp. 253-261). Springer, Cham.
- ²⁵ Cohen, D., Schultz, I. Z., Sepehry, A. A., & Stewart, A. M. (2018). Assessment of Competence in Older Adults. In R.J. Gatchel, I.Z. Schultz, C.T. Ray (eds.), *Handbook of Rehabilitation in Older Adults* (pp. 433-459). Springer, Cham.; Mart, E. G., & Alban, A D. (2011). The practical assessment of testamentary capacity and undue influence in the elderly. Sarasota, FL: Professional Resource Press.
- ²⁶ Cohen, D., Schultz, I. Z., Sepehry, A. A., & Stewart, A. M. (2018). Assessment of Competence in Older Adults. In R.J. Gatchel, I.Z. Schultz, C.T. Ray (eds.), *Handbook of Rehabilitation in Older Adults* (pp. 433-459). Springer, Cham.
- ²⁷ Pachet, A., Astner, K., & Brown, L. (2010). Clinical utility of the mini-mental status examination when assessing decision-making capacity. *Journal of geriatric psychiatry and neurology*, 23(1), 3-8.
- ²⁸ Mart, E. G., & Alban, A D. (2011). The practical assessment of testamentary capacity and undue influence in the elderly. Sarasota, FL: Professional Resource Press.
- ²⁹ Otto, R. K., Sadoff, R. L., & Fanniff, A. M. (2011). Testimonial capacity. In E.Y. Drogin, F.M. Dattilio, R.L. Sadoff, & T.G. Gutheil (eds), *Handbook of Forensic Assessment: Psychological and Psychiatric Perspectives*, 187-203.
- ³⁰ Marett, C. P., & Mossman, D. (2015). Autonomy vs abuse: Can a patient choose a new power of attorney? *Current Psychiatry*, 14(3), 37-40.
- ³¹ Heck, A. (May 2019). Decision-making capacity and older adult. Presentation at the Virginia Coalition for the Prevention of Elder Abuse (Richmond, VA). Nothing that the term "Financial Decision-Making Capacity" encompasses many types of abilities including protect and spend small amounts of cash, manage and use checks, give gifts and donations make or modify a will, and buy or sell real property.
- ³² Wright, M. S. (2020). Dementia, autonomy, and supported healthcare decisionmaking. *Maryland Law Review*, 79, 257-324.; noting that physicians assess capacity and render a decision. Except in extreme circumstances, treatment capacity is unlikely to reach the courts (see p. 269).
- ³³ Kenepp, A., Johnson, E., Lee, G. J., Sunderaraman, P., Denburg, N. L., & Nguyen, C. M. (2021). A Comprehensive Approach to Assessment of Testamentary Capacity. *Frontiers in Psychology*, 12, 789494-789494.
- ³⁴ Schultheis, M. T., DeLuca, J., & Chute, D. (Eds.). (2011). *Handbook for the assessment of driving capacity*. Academic Press.
- ³⁵ Karlawish, J. H., Bonnie, R. J., Appelbaum, P. S., Lyketsos, C., James, B., Knopman, D., ... & Karlan, P. S. (2004). Addressing the ethical, legal, and social issues raised by voting by persons with dementia. *JAMA*, 292(11), 1345-1350.

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- ³⁶ Block, C. K., Johnson-Greene, D., Pliskin, N., & Boake, C. (2017). Discriminating cognitive screening and cognitive testing from neuropsychological assessment: implications for professional practice. *The Clinical Neuropsychologist*, 31(3), 487-500 (see p. 489); Cohen, D., Schultz, I. Z., Sepehry, A. A., & Stewart, A. M. (2018). Assessment of Competence in Older Adults. In R.J. Gatchel, I.Z. Schultz, C.T. Ray (eds.), *Handbook of Rehabilitation in Older Adults* (pp. 433-459, see p. 445). Springer, Cham.; Purser, K. (2017). Capacity Assessment and the Law. Springer.; Wood, S. (2007). The role of neuropsychological assessment in capacity evaluations. In Qualls, S. H., & Smyer, M. A. (Eds.). (2008). *Changes in decision-making capacity in older adults: Assessment and intervention* (Vol. 2) (pp. 191-204). John Wiley & Sons.; Wood, S., Bally, K., Cabane, C., Fassbind, P., Jox, R. J., Leyhe, T., ... & Trachsel, M. (2020). Decision-making capacity evaluations: the role of neuropsychological assessment from a multidisciplinary perspective. *BMC geriatrics*, 20(1), 1-5.
- ³⁷ Moye, J., Armesto, J. C., & Karel, M. J. (2005). Evaluating capacity of older adults in rehabilitation settings: conceptual models and clinical challenges. *Rehabilitation Psychology*, 50(3), 207-214.; O'Connor, D. (2010). Personhood and dementia: Toward a relational framework for assessing decisional capacity. *The Journal of Mental Health Training, Education and Practice*, 5(3), 22-30; Usher, R., & Stapleton, T. (2022). Assessment of older adults' decision-making capacity in relation to independent living: A scoping review. *Health & Social Care in the Community*, 30(2), e255-e277.; Wood, S., Bally, K., Cabane, C., Fassbind, P., Jox, R. J., Leyhe, T., ... & Trachsel, M. (2020). Decision-making capacity evaluations: the role of neuropsychological assessment from a multidisciplinary perspective. *BMC geriatrics*, 20(1), 1-5.
- ³⁸ Moye, J. (2020). *Assessing capacities of older adults: A casebook to guide difficult decisions*. Washington, DC: APA. Observing that what sets the assessment of capacities apart from neuropsychological assessment is that it focuses on function and emphasizes supports and all means to enhance function (p. 4)). Therefore, this Resource Guide purposefully uses the term capacity assessment.
- ³⁹ Purser, K., & Sullivan, K. (2019). Capacity assessment and estate planning-the therapeutic importance of the individual. *International Journal of Law and Psychiatry*, 64, 88-98.
- ⁴⁰ APA/ABA COLA (2008). [Assessment of Older Adults with Diminished Capacity: A Handbook for Psychologists](#). Washington, DC; American Psychological Association.; Falk, E., & Hoffman, N. (2014). The role of capacity assessments in elder abuse investigations and guardianships. *Clinics in Geriatric Medicine*, 30(4), 851-868.
- ⁴¹ Bush, S. S., & Heck, A. L. (2018). Introduction. In S. S. Bush & A. L. Heck (eds.), *Forensic Geropsychology: Practice Essentials*. Washington, DC: American Psychological Association.
- ⁴² What advantages a psychologist is their use of objective (standardized) testing that allows a comparison of the individual against others similarly situated (age, SES, etc.).
- ⁴³ Morgan, J. E., Marcopulos, B. A., & Matusz, E. F. (2019). Capacity evaluations in older adults: Neuropsychological perspectives. In L. D. Ravdin & H.L. Katzen (eds.), *Handbook on the Neuropsychology of Aging and Dementia* (pp. 253-261). Springer, Cham.
- ⁴⁴ Examples include N.C. Gen. Stat. § 35A-1111 (2021); KRS § 387.540 (2021). See also Kentucky Guardianship Association, Inc., [Competent](#).
- ⁴⁵ ABA COLA/APA (2021). [Assessment of Older Adults with Diminished Capacity](#) (2nd ed.) Washington, DC: American Bar Association and American Psychological Association. See p. 50
- ⁴⁶ Cohen, D., Schultz, I. Z., Sepehry, A. A., & Stewart, A. M. (2018). Assessment of Competence in Older Adults. In R.J. Gatchel, I.Z. Schultz, C.T. Ray (eds.), *Handbook of Rehabilitation in Older Adults* (pp. 433-459). Springer, Cham.
- ⁴⁷ ABA COLA/APA (2021). [Assessment of Older Adults with Diminished Capacity](#) (2nd ed.) Washington, DC: American Bar Association and American Psychological Association. See p. 52; Michele Nelson, PhD, personal communication, 1/26/22 (currently serves as the Richmond MDT's forensic psychologist).
- ⁴⁸ Purser, K. J., & Rosenfeld, T. (2014). Evaluation of legal capacity by doctors and lawyers: the need for collaborative assessment. *The Medical Journal of Australia*, 201(8), 483-485.
- ⁴⁹ Even if compelled, clinicians are encouraged to go through informed consent procedures. See Jamieson, G. (2018). Decision-Making Capacity and Consent in the Older Adult. In N. Nagaratnam et al. (eds.), *Advanced Age Geriatric Care* (pp. 25-32). Cham, Switzerland: Springer Nature.
- ⁵⁰ This will allow the clinician, who is on a tight timeline, to have access to needed records immediately rather than waiting until the evaluation appointment.
- ⁵¹ Clinicians may need to use different tests depending on the older adult's abilities. There are many practical limitations to testing. For example, a person who has had a stroke cannot use their hand, has aphasia, or visual

impairments. For the Clock Drawing test, sometimes it's hard to tell whether the drawn clock is the result of visual impairments or cognition. At times, test that do not require writing are required such as non-verbal IQ tests. Test data may be biased by things that have nothing to do with cognition. When this happens, the report must reflect these limitation by qualifying the data. Michele Nelson, PhD, personal communication, 1/26/22 (currently serves as the Richmond MDT's forensic psychologist).; Heck, A. (May 2019). Decision-making capacity and older adult. Presentation at the Virginia Coalition for the Prevention of Elder Abuse (Richmond, VA). Observing that the context of the assessment will guide selection of capacity instruments.

⁵² Reimers, K. (2019). *The Clinician's guide to geriatric forensic Evaluations*. Academic Press. See p. 179, recommending clinicians only write a report if the retaining attorney requests a report.

⁵³ Mart, E. G., & Alban, A D. (2011). *The practical assessment of testamentary capacity and undue influence in the elderly*. Sarasota, FL: Professional Resource Press.; Otto, R. K. (in press). Issues in assessing competence and decision-making capacity in legal contexts. *Practice Innovations*.

⁵⁴ APA/ABA COLA (2008). [Assessment of Older Adults with Diminished Capacity: A Handbook for Psychologists](#). Washington, DC: American Psychological Association.; Falk, E., & Hoffman, N. (2014). The role of capacity assessments in elder abuse investigations and guardianships. *Clinics in Geriatric Medicine*, 30(4), 851-868.; Adult Protective Services Core Competencies MODULE # 17: ASSESSING ADULT PROTECTIVE SERVICES CLIENTS' DECISION MAKING CAPACITY (NCEA and NAPSA); Moye, J., & Naik, A. D. (2011). Preserving rights for individuals facing guardianship. *JAMA*, 305(9), 936-937.

⁵⁵ Executive Functions (University of California San Francisco Weill Institute for Neurosciences) <https://memory.ucsf.edu/symptoms/executive-functions>

⁵⁶ For more see, APA/ABA COLA (2008). [Assessment of Older Adults with Diminished Capacity: A Handbook for Psychologists](#). Washington, DC; American Psychological Association.

⁵⁷ Mart, E. G., & Alban, A D. (2011). *The practical assessment of testamentary capacity and undue influence in the elderly*. Sarasota, FL: Professional Resource Press.

⁵⁸ Mart, E. G., & Alban, A D. (2011). *The practical assessment of testamentary capacity and undue influence in the elderly*. Sarasota, FL: Professional Resource Press. (see pp. 19-21, 24); Kenep, A., Johnson, E., Lee, G. J., Sunderaraman, P., Denburg, N. L., & Nguyen, C. M. (2021). A Comprehensive Approach to Assessment of Testamentary Capacity. *Frontiers in psychology*, 12, 789494-789494.

⁵⁹ Moye, J. (2015). [Decision-Making Capacity in Long-Term Care Residents](#). *Annals of Long Term Care*.

⁶⁰ Mart, E. G., & Alban, A D. (2011). *The practical assessment of testamentary capacity and undue influence in the elderly*. Sarasota, FL: Professional Resource Press. (see p. 28)

⁶¹ Otto, R. (2022). Presentation at the American Psychology and Law Society conference (Denver, CO).

⁶² Mart, E. G., & Alban, A D. (2011). *The practical assessment of testamentary capacity and undue influence in the elderly*. Sarasota, FL: Professional Resource Press.

⁶³ Heck, A. (May 2019). Decision-making capacity and older adult. Presentation at the Virginia Coalition for the Prevention of Elder Abuse (Richmond, VA).; Cohen, D., Schultz, I. Z., Sepehry, A. A., & Stewart, A. M. (2018). Assessment of Competence in Older Adults. In R.J. Gatchel, I.Z. Schultz, C.T. Ray (eds.), *Handbook of Rehabilitation in Older Adults* (pp. 433-459). Springer, Cham.; Corrigan, M. (2019). Factors Associated with Decision Making Capacity in Older Adults (Doctoral dissertation, Trinity College Dublin).; Otto, R. (2022). Presentation at the American Psychology and Law Society conference (Denver, CO); APA/ABA COLA (2008). [Assessment of Older Adults with Diminished Capacity: A Handbook for Psychologists](#). Washington, DC; American Psychological Association (see pp. 13-14).; Michele Nelson, Richmond Forensic Psychologist (currently serves as the Richmond MDT's forensic psychologist); personal communication 1/26/22.; ABA COLA/APA (2021). [Assessment of Older Adults with Diminished Capacity: Handbook for Lawyers \(2nd ed.\)](#). Washington, DC: American Bar Association and American Psychological Association.; Dudley, K. C., & Edmonds, N. (2018). Psychology's role in guardianship and conservatorship evaluations. In S. S. Bush & A. L. Heck (Eds.), *Forensic geropsychology: Practice essentials* (pp. 257-279). American Psychological Association.

⁶⁴ See [Ethical Principles of Psychologists and Code of Conduct](#), Section 9 (APA, 2017).

⁶⁵ Reimers, K. (2019). *The Clinician's guide to geriatric forensic Evaluations*. Academic Press. (see p. 110, observing that the use of an instrument that has not been normed with older adults should be noted as a limitation).

⁶⁶ Moye, J., Armesto, J. C., & Karel, M. J. (2005). Evaluating capacity of older adults in rehabilitation settings: Conceptual models and clinical challenges. *Rehabilitation Psychology*, 50(3), 207.

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- ⁶⁷ Hoffman, N. (2018). The assessment of testamentary capacity and undue influence in the older adults. In S.S. Bush and A.L. Heck (eds.), *Forensic Geropsychology: Practice essentials* (pp. 213- 234; see p. 224). Washington, DC: American Psychological Association.; S. H. Qualls & M. A. Smyer (Eds.), *Changes in decision-making capacity in older adults: Assessment and intervention* (pp. 3–24). John Wiley & Sons, Inc. (see p. 210).
- ⁶⁸ Heck, A. (May 2019). Decision-making capacity and older adult. Presentation at the Virginia Coalition for the Prevention of Elder Abuse (Richmond, VA).
- ⁶⁹ The [Short Portable Assessment of Capacity for Everyday Decision-Making](#) (SPACED)
- ⁷⁰ See also [Capacity Toolkit](#) (New South Wales AG's Office, 2008)
- ⁷¹ Purser, K. (2017). *Capacity Assessment and the Law* (p. 2). Springer.
- ⁷² Corrigan, M. (2019). Factors Associated with Decision Making Capacity in Older Adults (Doctoral dissertation, Trinity College Dublin).; Sorrentino, R. (2014). Performing capacity evaluations: What's expected from your consult. *Current Psychiatry*, 13(1), 41-44.; Sullivan, K. (2004). Neuropsychological assessment of mental capacity. *Neuropsychology Review*, 14(3), 131-142.; Marson, D. C., McInturff, B., Hawkins, L., Bartolucci, A., & Harrell, L. E. (1997). Consistency of physician judgments of capacity to consent in mild Alzheimer's disease. *Journal of the American Geriatrics Society*, 45(4), 453-457.; Moye, J., Marson, D. C., & Edelstein, B. (2013). Assessment of capacity in an aging society. *American Psychologist*, 68(3), 158-171.
- ⁷³ Otto, R. K. (in press). Issues in assessing competence and decision-making capacity in legal contexts. *Practice Innovations*.
- ⁷⁴ Otto, R. (n.d). Psychological and psychiatric assessment of decision-making capacity. Unpublished manuscript.
- ⁷⁵ Marson, D. C., Sawrie, S. M., Snyder, S., McInturff, B., Stalvey, T., Boothe, A., ... & Harrell, L. E. (2000). Assessing financial capacity in patients with Alzheimer disease: A conceptual model and prototype instrument. *Archives of neurology*, 57(6), 877-884.; Marson, D. C., McInturff, B., Hawkins, L., Bartolucci, A., & Harrell, L. E. (1997). Consistency of physician judgments of capacity to consent in mild Alzheimer's disease. *Journal of the American Geriatrics Society*, 45(4), 453-457.; Moye, J., Marson, D. C., & Edelstein, B. (2013). Assessment of capacity in an aging society. *American Psychologist*, 68(3), 158-171.
- ⁷⁶ GeroCentral [Evaluating Capacities](#); Charles, L., Parmar, J., Brémault-Phillips, S., Dobbs, B., Sacrey, L., & Sluggett, B. (2017). Physician education on decision-making capacity assessment: current state and future directions. *Canadian Family Physician*, 63(1), e21-e30.; Seyfried, L., Ryan, K. A., & Kim, S. Y. (2013). Assessment of decision-making capacity: views and experiences of consultation psychiatrists. *Psychosomatics*, 54(2), 115-123.
- ⁷⁷ Cohen, D., Schultz, I. Z., Sepehry, A. A., & Stewart, A. M. (2018). Assessment of Competence in Older Adults. In R.J. Gatchel, I.Z. Schultz, C.T. Ray (eds.), *Handbook of Rehabilitation in Older Adults* (pp. 433-459, see p. 455). Springer, Cham.; Purser, K. (2017). *Capacity Assessment and the Law* (p 19). Springer.; Rothke, S. E., Demakis, G. J., & Amsbaugh, H. M. (2019). State statutes regarding the role of psychologists in performing capacity evaluations for guardianship determinations. *Professional Psychology: Research and Practice*, 50(4), 228-239.
- ⁷⁸ Sivers-Teixeira, T., Sadamitsu, K., Stevens, G.D., Penate, C., Olsen, B. (2020). Inconsistent Capacity Assessment Access for APS: California and National Survey Results. *Innovation in Aging*, 4(1), S1.; see also Rothke, S. E., Demakis, G. J., & Amsbaugh, H. M. (2019). State statutes regarding the role of psychologists in performing capacity evaluations for guardianship determinations. *Professional Psychology: Research and Practice*, 50(4), 228 –239 (see p. 231).
- ⁷⁹ Peter Lichtenberg, personal email communication (2.10.22)
- ⁸⁰ APA/ABA COLA (2008). [Assessment of Older Adults with Diminished Capacity: A Handbook for Psychologists](#). Washington, DC; American Psychological Association (see p. 34).
- ⁸¹ Bush, S. S., Allen III, R. S., & Molinari III, V. A. (2017). *Ethical practice in geropsychology*. Washington, DC: American Psychological Association.; see also Bush, S. S., Allen, R. S., Heck, A. L., & Moye, J. (2015). Ethical issues in geropsychology: Clinical and forensic perspectives. *Psychological Injury and Law*, 8(4), 348-356.
- ⁸² E-MDTs are characterized by expanded membership, including forensic accountants, neuropsychologists, medical personnel, and other appropriate professionals, so that case-related efforts more comprehensively incorporate the needs of older victims of financial exploitation and other forms of elder abuse.
- ⁸³ Edemekong P.F., Bomgaars, D.L., Sukumaran, S., Levy, S.B. (2021). *Activities of Daily Living*. StatPearls Publishing, Treasure Island (FL).
- ⁸⁴ <https://dictionary.apa.org/agency>
- ⁸⁵ <https://albertbandura.com/albert-bandura-agency.html>

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- ⁸⁶ Diller, R., & Salzman, L. (2021). Stripped of Funds, Stripped of Rights: A Critique of Guardianship as a Remedy for Elder Financial Harm. *University of Pennsylvania Journal of Law and Social Change*, 24(2), 149.
- ⁸⁷ National Library of Medicine. Substance Abuse Treatment: Addressing the Specific Needs of Women [Internet]. <https://www.ncbi.nlm.nih.gov/books/NBK83253/#:~:text=Screening%20is%20a%20process%20for,a%20simple%20yes%20or%20no.&text=Assessment%20is%20a%20process%20for,addressing%20the%20problem%20or%20diagnosis>.
- ⁸⁸ <https://plato.stanford.edu/entries/autonomy-moral/>
- ⁸⁹ [Certification Matters; A look at psychologists' specialty areas](#)
- ⁹⁰ Sabatino, C., & Wood, E. (2018). The Ten Commandments of Mental "Capacity" and the Law. *Bifocal*, 40(1). [ABA website](#)
- ⁹¹ Rothke, S. E., Demakis, G. J., & Amsbaugh, H. M. (2019). State statutes regarding the role of psychologists in performing capacity evaluations for guardianship determinations. *Professional Psychology: Research and Practice*, 50(4), 228–239.
- ⁹² Michele Nelson, Richmond Forensic Psychologist (currently serves as the Richmond MDT's forensic psychologist); personal communication 1/26/22.
- ⁹³ See e.g., <https://www.courts.ca.gov/documents/gc335.pdf>
- ⁹⁴ Moye, J. (2020). *Assessing capacities of older adults: A casebook to guide difficult decisions*. Washington, DC: APA.
- ⁹⁵ Moye, J. (2015). [Decision-Making Capacity in Long-Term Care Residents](#). *Annals of Long Term Care*.
- ⁹⁶ <https://dictionary.apa.org/clinical-judgment>
- ⁹⁷ See for example, Del Missier, F., Mäntylä, T., & De Bruin, W. B. (2012). Decision-making competence, executive functioning, and general cognitive abilities. *Journal of Behavioral Decision Making*, 25(4), 331-351.
- ⁹⁸ Guy, L. S., & Zelechowski, A. D. (2017). [Civil Forensic Assessment](#). In R. Roesch & A. N. Cook (eds.), *Handbook of Forensic Mental Health Services*. New York, NY: Routledge.
- ⁹⁹ <https://www.law.cornell.edu/wex/competent#:~:text=More%20generally%2C%20it%20refers%20to,adjudicate%20the%20case%20before%20it>.
- ¹⁰⁰ Black's Law Dictionary Online <https://thelawdictionary.org/consent/> (the capacity to understand consent to sexual activity is important in determine whether a crime has taken place.; ABA COLA/APA (2021). [Assessment of Older Adults with Diminished Capacity: Handbook for Lawyers \(2nd ed.\)](#). Washington, DC: American Bar Association and American Psychological Association (see p. 23).; *Cowen v. Paddock*, 62 Hun, 022, 17 N. Y. Supp. 355. Consent is an act of reason, accompanied with deliberation, the mind weighing as in a balance the good or evil on each side. 1 Story, Eq. Jur.
- ¹⁰¹ Google dictionary
- ¹⁰² Moye, J., Armesto, J. C., & Karel, M. J. (2005). Evaluating capacity of older adults in rehabilitation settings: conceptual models and clinical challenges. *Rehabilitation Psychology*, 50(3), 207.
- ¹⁰³ <https://plato.stanford.edu/entries/decision-capacity/>; Karlawish <https://www.uptodate.com/contents/assessment-of-decision-making-capacity-in-adults>
- ¹⁰⁴ Pinsker, D. M., Pachana, N. A., Wilson, J., Tilse, C., & Byrne, G. J. (2010). Financial capacity in older adults: A review of clinical assessment approaches and considerations. *Clinical Gerontologist*, 33(4), 332-346.
- ¹⁰⁵ NIA [What is dementia?](#); NIA [Dementia Nomenclature Working Group](#)). According the Alzheimer's Association, the correct phrase is "persons living with dementia" or "persons living with Alzheimer's disease and related dementias.
- ¹⁰⁶ Black's Law Dictionary Online <https://thelawdictionary.org/diagnosis/>
Said to be little more than a guess enlightened by experience. . *Swan v. Railroad Co.*, 79 Hun, 012, 29 N. Y. Supp. 337.
- ¹⁰⁷ ABA COLA/APA (2021). [Assessment of Older Adults with Diminished Capacity: Handbook for Lawyers \(2nd ed.\)](#). Washington, DC: American Bar Association and American Psychological Association (see p. 6).; The behaviors needed to demonstrate capacity varies depending on the transaction (see ABA COLA/APA (2021). [Assessment of Older Adults with Diminished Capacity: Handbook for Lawyers \(2nd ed.\)](#). Washington, DC: American Bar Association and American Psychological Association (see p. 11).

Warning Signs of Diminished Financial Capacity (Triebel & Marson, in *Generations*, 2012)

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- Memory Lapses: increasing memory lapses resulting in failure to fulfill financial obligations (failing to pay bills, paying the same one several times);
 - Disorganization: increasing disorganization and misplacement of financial and other documents in the home setting, with associated failures such as missing tax and other deadlines;
 - Declines in Checkbook Management Skills: changes in a person's ability to use a checkbook and check register to carry out everyday transactions;
 - Arithmetic Mistakes: noticeable declines in everyday math skills, such as those employed when making change to pay for things at the store, or when computing an appropriate tip in a restaurant;
 - Conceptual Confusion: increasing confusion and loss of general knowledge regarding basic financial terms and concepts such as mortgage, will, or annuity;
 - Impaired Judgment: loss of judgment about financial investments and use of money, manifested frequently as a new and abiding interest in get-rich-quick schemes, as well as unfounded anxiety about the nature and extent of one's personal wealth.

¹⁰⁸ CDC (2016). [Elder Abuse Surveillance](#): Uniform Definitions and Recommendations Core Data Elements. Atlanta, GA: Centers for Disease Control and Prevention.; see also [APA Dictionary](#), noting harm to an adult aged 65 or older caused by another individual. The harm can be physical (violence), sexual (nonconsensual sex), psychological (causing emotional distress), material (improper use of belongings or finances), or neglect (failure to provide needed care).

¹⁰⁹ Falk, E., & Hoffman, N. (2014). The role of capacity assessments in elder abuse investigations and guardianships. *Clinics in Geriatric Medicine*, 30(4), 851-868.

¹¹⁰ <https://memory.ucsf.edu/symptoms/executive-functions>

¹¹¹ Marson, D. C., Hebert, K., & Solomon, A. C. (2012). Assessing civil competencies in older adults with dementia: Consent capacity, financial capacity, and testamentary capacity. In G. J. Larrabee (Ed.), *Forensic neuropsychology: A scientific approach* (pp. 401–437). Oxford University Press.; Moye, J., & Marson, D. C. (2007). Assessment of decision-making capacity in older adults: An emerging area of practice and research. *The Journals of Gerontology Series B: Psychological Sciences and Social Sciences*, 62(1), P3-P11.; Moye, J., Marson, D. C., & Edelstein, B. (2013). Assessment of capacity in an aging society. *American Psychologist*, 68(3), 158-171.

¹¹² <https://www.law.cornell.edu/wex/forensic>

¹¹³ [Comtemporary Trends: Forensic Psychology 337](#)

¹¹⁴ <https://www.lawinsider.com/dictionary/forensic-report>; see also [The Forensic Psychology Report](#) (ABA); [Forensic Report Checklist](#) (2010)

¹¹⁵ Black's Law Dictionary Online <https://thelawdictionary.org/forensic-evidence/>

¹¹⁶ Forensic Psychiatry (Northwestern University, Northwestern Medicine, Feinberg School of Medicine, Department of Psychiatry & Behavioral Sciences). Retrieved from <https://www.psychiatry.northwestern.edu/education/fellows/forensic-psychiatry.html#:~:text=Forensic%20psychiatry%20is%20a%20subspecialty,involvement%20with%20the%20legal%20system.>

¹¹⁷ [The Forensic Psychology Report](#) (ABA)

¹¹⁸ Barrash, J. (2018). Competency and capacity in the aging adult. In M. Rizzo, S. Anderson, & B. Fritsch (Eds.), *The Wiley handbook on the aging mind and brain* (pp. 723–741). Wiley Blackwell (see p. 729); see also Taking a functional approach to capacity means that a person should be supported to maximize their ability to make the decision themselves, or to maximize their participation in the decision-making process. ([Sage Advocacy](#))

¹¹⁹ In the medical setting: a narrative or record of past events and circumstances that are or may be relevant to a patient's current state of health. Informally, an account of past diseases, injuries, treatments, and other strictly medical facts. <https://medical-dictionary.thefreedictionary.com/Clinical+history>

¹²⁰ <https://www.law.cornell.edu/wex/incapacity>

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- ¹²¹Edemekong, P. F., Bomgaars, D. L., Sukumaran, S., & Levy, S. B. (2021). Activities of daily living. In StatPearls [internet]. StatPearls Publishing.
- ¹²² https://www.law.cornell.edu/wex/informed_consent
- ¹²³ <https://thelawdictionary.org/consent-informed/> but not quite the right definition for this purpose
- ¹²⁴ <https://dictionary.apa.org/assessment-instrument>
- ¹²⁵ Hui Jun Guo & Amit Sapra (2019). [Instrumental Activity of Daily Living \(IADL\)](#). StatPearls.
- ¹²⁶ Abrams RC, Ansell P, Breckman R, Karlawish J, Lachs M, Holt-Knight D, Needell N, Rogers G, LoFaso V. The Interview for Decisional Abilities (IDA): A tool to assess the decisional capacity of abused and neglected older adults. *J Elder Abuse Negl*. 2019 Mar;31(3):244-254. doi: 10.1080/08946566.2019.1573392. Epub 2019 Feb 27. PMID: 30810485.
- ¹²⁷ See e.g., [Adult Protective Services, What You Must Know](#) (NCEA)
- ¹²⁸ APA Dictionary Online <https://dictionary.apa.org/anosognosia>
- ¹²⁹ National Guardianship Association (2016). *The Fundamentals of Guardianship: What Every Guardian Should Know*. Chicago, IL: American Bar Association.
- ¹³⁰ Darby, R. R., & Dickerson, B. C. (2017). Dementia, Decision-Making, and Capacity. *Harvard Review of Psychiatry*, 25(6), 270-278.
- ¹³¹ Legal decision-making capacity links legally recognized standards for decision making to one's functional ability to meet those standards which will differ depending on the decision at hand (Moye, J., Marson, D. C., & Edelstein, B. (2013). Assessment of capacity in an aging society. *American Psychologist*, 68(3), 158-171.)
- ¹³² NIH <https://medlineplus.gov/ency/article/001401.htm>
- ¹³³ <https://dictionary.apa.org/neurodegenerative-disease>
- ¹³⁴ <https://dictionary.apa.org/neuropsychological-assessment>
- ¹³⁵ <https://dictionary.apa.org/neuropsychological-assessment-battery> Among the tests included in the domain-specific modules are five whose cognitive demands resemble those in the everyday environment and are designed to assess cognitive daily living skills: Driving Scenes (in the Attention module), Bill Payment (Language module), Daily Living Memory (Memory module), Map Reading (Spatial module), and Judgment (Executive Functions module). [published in 2003 by U.S. neuropsychologists Robert A. Stern and Travis White]
- ¹³⁶ <https://dictionary.apa.org/neuropsychological-test>; [Contemporary Trends: Forensic Psychology 337](#)
- ¹³⁷ Petoft et al. (2019). [A Historical Overview of Law and Neuroscience: From the Emergence of Medico-Legal Discourses to Developed Neurolaw](#); see also Fordam's [Neuroscience and Law Center](#); [MacArthur Foundation Research Network on Law and Neuroscience](#); [Neuroforensics](#) (The National Academies 2018 Proceeding)
- ¹³⁸ <https://dictionary.apa.org/normative>; cornerstone of neuropsychological assessment
- ¹³⁹ <https://psychologydictionary.org/prognosis/>
- ¹⁴⁰ Fink, J. W. (2017). Beyond the tests: Record review, interview, and observations in forensic neuropsychology. In S. S. Bush, G. J. Demakis, & M. L. Rohling (Eds.), *APA Handbook of Forensic Neuropsychology* (pp. 41–55). American Psychological Association. <https://doi.org/10.1037/0000032-003>
- ¹⁴¹ Wood, E., Teaster, P., & Cassidy, J. (2017). [Restoration of Rights in Adult Guardianship Research & Recommendations](#). Washington, DC: ABA Commission on Law and Aging with the Virginia Tech Center for Gerontology.; [Restoration in Adult Guardianship Statutes](#) (ABA 2013)
- ¹⁴² APA/ABA COLA (2008). [Assessment of Older Adults with Diminished Capacity: A Handbook for Psychologists](#). Washington, DC; American Psychological Association (see p. 14); Most commonly a retrospective mental state examination with a deceased ("unavailable") subject (who is not a litigant) (Otto, R. (2022). Presentation at the American Psychology and Law Society conference (Denver, CO).)
- ¹⁴³ <https://dictionary.apa.org/risk>
- ¹⁴⁴ National Library of Medicine. Substance Abuse Treatment: Addressing the Specific Needs of Women [Internet]. <https://www.ncbi.nlm.nih.gov/books/NBK83253/#:~:text=Screening%20is%20a%20process%20for,a%20simple%20Oyes%20or%20No.&text=Assessment%20is%20a%20process%20for,addressing%20the%20problem%20or%20diagnosis>.
- ¹⁴⁵ "...more stringent requirements for competence should be applied to more important decisions." Kolva & Rosenfeld, (2012). *Legal Perspectives on Civil Capacity and Competence*. In G. Demakis (ed.), pp. 17-36. Washington, DC: APA.
- ¹⁴⁶ [Elder abuse: The impact of undue influence](#). (NCLER 2017)
- ¹⁴⁷ Black's Law Dictionary Online <https://thelawdictionary.org/undue-influence/>

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- ¹⁴⁸ APA/ABA COLA (2008). [Assessment of Older Adults with Diminished Capacity: A Handbook for Psychologists](#). Washington, DC; American Psychological Association (see p. 26).
- ¹⁴⁹ Disclaimer: Definitions for various forms of decision-making capacity are a matter of state law, and are defined here for demonstrative purposes only.
- ¹⁵⁰ <https://thelawdictionary.org/admissible/#:~:text=Proper%20to%20be%20received.,allow%20it%20to%20be%20introduced.>
- ¹⁵¹ <https://thelawdictionary.org/case-law/>
- ¹⁵² Google definition
- ¹⁵³ https://www.law.cornell.edu/wex/cause_of_action
- ¹⁵⁴ <https://thelawdictionary.org/court-order/>
- ¹⁵⁵ Barrash, J. (2018). Competency and capacity in the aging adult. In M. Rizzo, S. Anderson, & B. Fritzsich (Eds.), *The Wiley handbook on the aging mind and brain* (pp. 723–741). Wiley Blackwell.
<https://doi.org/10.1002/9781118772034.ch34> (Disclaimer: These are typical standards, but specific standards may vary by state and the evaluator must determine the standards for the specific capacity in the relevant state.)
- ¹⁵⁶ Barrash, J. (2018). Competency and capacity in the aging adult. In M. Rizzo, S. Anderson, & B. Fritzsich (Eds.), *The Wiley handbook on the aging mind and brain* (pp. 723–741). Wiley Blackwell.
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- ¹⁵⁷ Barrash, J. (2018). Competency and capacity in the aging adult. In M. Rizzo, S. Anderson, & B. Fritzsich (Eds.), *The Wiley handbook on the aging mind and brain* (pp. 723–741). Wiley Blackwell.
<https://doi.org/10.1002/9781118772034.ch34> (Disclaimer: These are typical standards, but specific standards may vary by state and the evaluator must determine the standards for the specific capacity in the relevant state.)
- ¹⁵⁸ Barrash, J. (2018). Competency and capacity in the aging adult. In M. Rizzo, S. Anderson, & B. Fritzsich (Eds.), *The Wiley handbook on the aging mind and brain* (pp. 723–741). Wiley Blackwell.
<https://doi.org/10.1002/9781118772034.ch34> (Disclaimer: These are typical standards, but specific standards may vary by state and the evaluator must determine the standards for the specific capacity in the relevant state.)| see also [Assessment of Capacity to Live Independently](#) (Veterans Affairs)
- ¹⁵⁹ Barrash, J. (2018). Competency and capacity in the aging adult. In M. Rizzo, S. Anderson, & B. Fritzsich (Eds.), *The Wiley handbook on the aging mind and brain* (pp. 723–741). Wiley Blackwell.
<https://doi.org/10.1002/9781118772034.ch34> (Disclaimer: These are typical standards, but specific standards may vary by state and the evaluator must determine the standards for the specific capacity in the relevant state.) see also Barnett, R. E. (2011). Contracts is Not Promise; Contract is Consent. *Suffolk UL Rev.*, 45, 647.
- ¹⁶⁰ <https://thelawdictionary.org/cross-examination/>
- ¹⁶¹ [Contemporary Trends: Forensic Psychology 337](#)
- ¹⁶² [Discovery](#) (ABA)
- ¹⁶³ Gibb, T. S., Hybels, M. I., & Hussain, K. (2020). Applying the Narrative Coherence Standard in Non-Medical Capacity Assessments. *AJOB neuroscience*, 11(1), 31-33 (see p. 32).
- ¹⁶⁴ <https://www.law.cornell.edu/wex/exhibit#:~:text=A%20document%2C%20photograph%2C%20object%2C,evidence%20in%20a%20legal%20proceeding.>
- ¹⁶⁵ <https://thelawdictionary.org/expert-testimony//>; Otto, R. K., DeMier, R., & Boccaccini, M. (2014). *Forensic Reports and Testimony: A Guide to Effective Communication for Psychologists and Psychiatrists*. Hoboken, NJ: John Wiley & Sons.; Brodsky, S.L., & Gutheil, T.G. (2016). *The Expert Expert Witness: More Maxims and Guidelines for Testifying in Court* (2nd ed.). Washington, DC: American Psychological Association.
- ¹⁶⁶ Barrash, J. (2018). Competency and capacity in the aging adult. In M. Rizzo, S. Anderson, & B. Fritzsich (Eds.), *The Wiley handbook on the aging mind and brain* (pp. 723–741). Wiley Blackwell.
<https://doi.org/10.1002/9781118772034.ch34> (Disclaimer: These are typical standards, but specific standards may vary by state and the evaluator must determine the standards for the specific capacity in the relevant state.)
- ¹⁶⁷ <https://www.justice.gov/elderjustice/guardianship>
- ¹⁶⁸ <https://thelawdictionary.org/impeach/>
- ¹⁶⁹ <https://thelawdictionary.org/inadmissible/>
- ¹⁷⁰ <https://thelawdictionary.org/intestate/>
- ¹⁷¹ Google definition

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- ¹⁷²Wood, S., & O'Bryan, M. (2012). Assessment of civil capacities: An evaluative framework and practical recommendations. In Demakis pp. 185-205.
- ¹⁷³ <https://thelawdictionary.org/litigation/>
- ¹⁷⁴ Barrash, J. (2018). Competency and capacity in the aging adult. In M. Rizzo, S. Anderson, & B. Fritsch (Eds.), *The Wiley handbook on the aging mind and brain* (pp. 723–741). Wiley Blackwell.
<https://doi.org/10.1002/9781118772034.ch34> (Disclaimer: These are typical standards, but specific standards may vary by state and the evaluator must determine the standards for the specific capacity in the relevant state.)
- ¹⁷⁵ <https://www.law.cornell.edu/wex/motion>
- ¹⁷⁶ <https://dictionary.thelaw.com/expert-opinion/>
- ¹⁷⁷ <https://www.law.cornell.edu/wex/petition>
- ¹⁷⁸ <https://thelawdictionary.org/probate/>
- ¹⁷⁹ <https://www.merriam-webster.com/dictionary/probate%20court>
- ¹⁸⁰ [Contemporary Trends: Forensic Psychology 337](#)
- ¹⁸¹ <https://www.law.cornell.edu/wex/evidence>
- ¹⁸² <https://www.hg.org/legal-articles/different-standards-of-proof-6363>
- ¹⁸³ Google definition
- ¹⁸⁴ Barrash, J. (2018). Competency and capacity in the aging adult. In M. Rizzo, S. Anderson, & B. Fritsch (Eds.), *The Wiley handbook on the aging mind and brain* (pp. 723–741). Wiley Blackwell.
<https://doi.org/10.1002/9781118772034.ch34> (Disclaimer: These are typical standards, but specific standards may vary by state and the evaluator must determine the standards for the specific capacity in the relevant state.)
- ¹⁸⁵ <https://thelawdictionary.org/testimony/>
- ¹⁸⁶ <https://thelawdictionary.org/witness-n/>
- ¹⁸⁷ Marson, D. (August 2020). Financial Capacity and Undue Influence in Civil Cases Involving Older Adults. DC Bar Virtual Conference (Washington, DC).
- ¹⁸⁸ Marson, D. (August 2020). Financial Capacity and Undue Influence in Civil Cases Involving Older Adults. DC Bar Virtual Conference (Washington, DC).
- ¹⁸⁹ Mart, E. G., & Alban, A D. (2011). *The practical assessment of testamentary capacity and undue influence in the elderly*. Sarasota, FL: Professional Resource Press.
- ¹⁹⁰ Mart, E. G., & Alban, A D. (2011). *The practical assessment of testamentary capacity and undue influence in the elderly*. Sarasota, FL: Professional Resource Press.
- ¹⁹¹ Greenberg, S. A., & Shuman, D. W. (2007). When worlds collide: Therapeutic and forensic roles, 38(2), 129 – 132.; Greenberg, S. A., & Shuman, D. W. (1997). Irreconcilable conflict between therapeutic and forensic roles. *Professional Psychology: Research and Practice*, 28(1), 50-57.
- ¹⁹² Consent for a forensic evaluation is different from consent for a clinical evaluation. The clinician must inform the examinee of the nature and purpose of the evaluation, how the information will be used, and who will have access to it. See Hoffman, N. (2018). The assessment of testamentary capacity and undue influence in the older adults. In S.S. Bush and A.L. Heck (eds.), *Forensic Geropsychology: Practice essentials* (pp. 213- 234). Washington, DC: American Psychological Association.
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- ¹⁹⁴ Karlawish, J., & Lai, J. (2008). *Manual for the assessment of capacity for everyday decision-Making (ACED)*.; Lai, J. M., Gill, T. M., Cooney, L. M., Bradley, E. H., Hawkins, K. A., & Karlawish, J. H. (2008). Everyday decision-making ability in older persons with cognitive impairment. *The American Journal of Geriatric Psychiatry*, 16(8), 693-696.
- ¹⁹⁵ Wadley et al., (2003), cited in Marroni et al. Marroni, S. P., Radaelli, G., Silva, I. G. D., & Portuguese, M. W. (2017). Instruments for evaluating financial management capacity among the elderly: An integrative literature review. *Revista Brasileira de Geriatria e Gerontologia*, 20, 582-593.
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- ¹⁹⁷ APA/ABA COLA (2008). [Assessment of Older Adults with Diminished Capacity: A Handbook for Psychologists](#). Washington, DC; American Psychological Association p. 77 one subscale

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- ¹⁹⁸ APA/ABA COLA (2008). [Assessment of Older Adults with Diminished Capacity: A Handbook for Psychologists](#). Washington, DC; American Psychological Association p. 77
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- ²⁰² Cole and Denberg (2008), cited in Marroni Marroni, S. P., Radaelli, G., Silva, I. G. D., & Portuguez, M. W. (2017). Instruments for evaluating financial management capacity among the elderly: An integrative literature review. *Revista Brasileira de Geriatria e Gerontologia*, 20, 582-593.
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