

## II. Legal Standards of Diminished Capacity

This chapter describes legal approaches to defining diminished capacity and incapacity. Read in tandem with the next chapter on the clinical models of capacity, the explanation highlights the similarities and contrasts between the two approaches to capacity.

Historically, the law's approach to incapacity reflects a long-standing paradox. On the one hand, our legal system has always recognized situation-specific standards of capacity, depending on the particular event or transaction—such as capacity to make a will, marry, enter into a contract, vote, drive a car, stand trial in a criminal prosecution, and so on.<sup>6</sup> A finding of incapacity in any of these matters could nullify or prevent a given legal act. On the other hand, at least until very recently, determinations of incapacity in the context of guardianship proceedings were routinely quite global, absolute determinations of one's ability to manage property and personal affairs. A finding of incapacity under guardianship law traditionally justified intrusive curtailments of personal autonomy and resulted in a virtually complete loss of civil rights.<sup>7</sup>

**Lawyers need to be familiar with three facets of diminished capacity:**

- **Standards of capacity for specific legal transactions.**
- **Approaches to capacity in state guardianship and conservatorship laws.**
- **Ethical guidelines for assessing client capacity.**

### A. Standards of Capacity for Specific Legal Transactions

The law generally presumes that adults possess the capacity to undertake any legal task unless they have been adjudicated as incapacitated in the context of guardianship or conservatorship, or the party challenging their capacity puts forward sufficient evidence of incapacity to meet a requisite burden of proof. The definition of “diminished capacity” in everyday legal

practice depends largely on the type of transaction or decision under consideration.<sup>8</sup> Depending on the specific transaction or decision at issue, as well as the jurisdiction in which one is located, legal capacity has multiple definitions, set out in either state statutory and/or case law. Lawyers must be familiar with the specific state-based standards.

**Consider state legal standards for the specific transaction at hand. The definition of “diminished capacity” in everyday legal practice depends largely on the type of transaction or decision under consideration.**

As described in Chapter III, the evaluation of capacity by clinicians parallels this legal transaction-specific analysis, but instead of “transactions,” clinicians categorize functions into “domains.”

Examples of common transaction-specific legal standards include the following:

#### *Testamentary Capacity*

Typically, the testator at the time of executing a will must have capacity to know the natural objects of his or her bounty, to understand the nature and extent of his or her property, and to interrelate these elements sufficiently to make a disposition of property according to a rational plan.<sup>9</sup> The terminology that the testator must be of “sound mind” is still commonly used. The test for testamentary capacity does not require that the person be capable of managing all of his or her affairs or making day-to-day business transactions. Nor must the testator have capacity consistently over time. Capacity is required at the time the will was executed. Thus, a testator may lack testamentary capacity before and/or after executing a will, but if it is made during a “lucid interval,” the will remains valid.<sup>10</sup> Finally, even a testator who generally possesses the elements of testamentary capacity may have that capacity negated by an “insane delusion” (i.e., irrational perceptions of particular persons or events”) if the delusion materially affects the will.<sup>11</sup>

### ***Donative Capacity***

Capacity to make a gift has been defined by courts to require an understanding of the nature and purpose of the gift, an understanding of the nature and extent of property to be given, a knowledge of the natural objects of the donor's bounty, and an understanding of the nature and effect of the gift. Some states use a higher standard for donative capacity than for testamentary capacity, requiring that the donor knows the gift to be irrevocable and that it would result in a reduction in the donor's assets or estate.<sup>12</sup>

### ***Contractual Capacity***

In determining an individual's capacity to execute a contract, courts generally assess the party's ability to understand the nature and effect of the act and the business being transacted.<sup>13</sup> Accordingly, if the act or business being transacted is highly complicated, a higher level of understanding may be needed to comprehend its nature and effect, in contrast to a very simple contractual arrangement.

### ***Capacity to Convey Real Property***

To execute a deed, a grantor typically must be able to understand the nature and effect of the act at the time the conveyance is made.<sup>14</sup>

### ***Capacity to Execute a Durable Power of Attorney***

The standard of capacity for creating a power of attorney has traditionally been based on the capacity to contract. However, some courts have also held that the standard is similar to that for making a will.<sup>15</sup>

### ***Decisional Capacity in Health Care***

Capacity to make a health care decision is defined by statute in most states under their advance directives laws. Typical of these legal definitions is the following from the Uniform Health Care Decisions Act:

"Capacity" means an individual's ability to understand the significant benefits, risks, and alternatives to proposed health care and to make and communicate a health-care decision.<sup>16</sup>

Decisional capacity in health care is rooted in the concept of *informed consent*.<sup>17</sup> The concept is based

on the principle that a patient has the right to prevent unauthorized contact with his or her person, and a clinician has a duty to disclose relevant information so the patient can make an informed decision. The lack of informed consent is often an issue in medical malpractice claims. Informed consent requires that one's consent to treatment be competent, voluntary, and informed. Capacity is only one element of the test of informed consent. A person may have capacity to make a treatment decision, but the treatment decision will lack informed consent if it was either involuntary or unknowing.

While it is up to clinicians to evaluate a patient's capacity for medical treatment, lawyers need to be knowledgeable about this as well. For example, a lawyer may need to determine a client's capacity to execute an advance directive for health care or to establish in court a client's capacity to make a particular health care decision. The test of capacity to execute a health care directive is generally parallel to that of capacity to contract. However, because the capacity to contract is such a malleable test, depending upon the nature, complexity, and consequences of the act at issue, lawyers and judges have few road signs in seeking an answer to the question of capacity for many of these transactions. Accordingly, the clinical models of capacity discussed in Chapter III help to supplement legal notions with scientifically grounded indicators.

### ***Capacity to Mediate***

In referring a client to mediation or representing a client in a mediation, a lawyer should be familiar with the capacity to mediate. The *ADA Mediation Guidelines* name several factors to be considered by mediators:

The mediator should ascertain that a party understands the nature of the mediation process, who the parties are, the role of the mediator, the parties' relationship to the mediator, and the issues at hand. The mediator should determine whether the party can assess options and make and keep an agreement.<sup>18</sup>

### ***Other Legal Capacities***

A host of other legal acts have specific definitions of capacity articulated and honed by statutes and

courts in different jurisdictions. For instance, lawyers may wrestle with client capacity to drive, to marry, to stand trial, to sue and be sued, or to vote.

## B. Diminished Capacity in State Guardianship Law

State guardianship and conservatorship laws rely on broader and more encompassing definitions of incapacity, a finding of which permits the state to override an individual's right to make decisions and to appoint someone (a guardian or conservator) to act as the person's surrogate decision-maker for some or all of the person's affairs.<sup>19</sup> The criteria for a finding of incapacity differ among the states, but in all states, the law starts with the presumption of capacity. The burden of proof is on the party bringing the petition to establish sufficient diminished capacity to justify the appointment of a guardian or conservator.

The law of guardianship has evolved extensively from its English roots. Originally, the law required a finding that the alleged incapacitated person's status was that of an "idiot," "lunatic," "person of unsound mind," or "spendthrift." Present day notions of incapacity instead use a combination of more finely-tuned medical and functional criteria. Since the 1960s, a common paradigm for the definition of incapacity under guardianship laws has been a two-pronged test that required: (1) a finding of a disabling condition, such as "mental illness," "mental disability," "mental retardation," "mental condition," "mental infirmity," or "mental deficiency"; and (2) a finding that such condition causes an inability to adequately manage one's personal or financial affairs.<sup>20</sup>

Historically the disabling condition prong of the test was quite broad. Many states included "physical illness" or "physical disability" as a sufficient disabling condition, and some opened a very wide door by including "advanced age" and the catch-all "or other cause." Such amorphous and discriminatory labels invited overly subjective and arbitrary judicial determinations. Over time, states sought to refine both prongs of this test to make the determination of incapacity less label-driven, more specific, and more focused on how an individual functions in society.<sup>21</sup> For example, only a few states still include the pejorative term "advanced age" in their definition.<sup>22</sup>

Likewise, the second prong of the test— inability to manage one's affairs—has been honed by many states to focus only on the ability to provide for one's "essential needs" such as "inability to meet personal needs for medical care, nutrition, clothing, shelter, or safety."<sup>23</sup>

In more recent years "cognitive functioning" tests have emerged in many states to supplement or replace one or both prongs of the traditional test. For example, in the 1997 Uniform Guardianship and Protective Proceedings Act, a cognitive functioning test replaces the disabling condition language in the definition of incapacity:

"Incapacitated person" means an individual who, for reasons other than being a minor, is *unable to receive and evaluate information or make or communicate decisions to such an extent* that the individual lacks the ability to meet essential requirements for physical health, safety, or self-care, even with appropriate technological assistance.<sup>24</sup>

These three tests—disabling condition, functional behavior, and cognitive functioning—have been used by states in a variety of ways.<sup>25</sup> Some combine all three.<sup>26</sup> Most states have added threshold requirements for guardianship intervention—most commonly a finding that the guardianship is "necessary" to provide for the essential needs of the individual (i.e., there are no other feasible options) or that the imposition of a guardianship is "the least restrictive alternative."<sup>27</sup>

### Four varying tests of incapacity under state guardianship law:

- **Disabling condition.**
- **Functional behavior as to essential needs.**
- **Cognitive functioning.**
- **Finding that guardianship is necessary and is "least restrictive alternative."**

**State guardianship laws today *permit or prefer limited forms* of guardianship rather than plenary guardianship.**

In addition to defining the elements of diminished capacity for purposes of guardianship, most state laws have finally recognized that capacity is not always an all or nothing phenomenon, and have enacted language allowing for “limited guardianship” in which the guardian is assigned only those duties and powers that the individual is incapable of exercising. Thus, judges, as well as lawyers who draft proposed court orders, need to understand and identify those specific areas in which the person cannot function and requires assistance. Under the principle of the least restrictive alternative, the objective is to leave as much in the hands of the individual as possible.

### C. Ethical Guidelines for Assessing Capacity

The first chapter of this handbook noted the importance of Rule 1.14 of the Model Rules of Professional Conduct, revised in 2002, which describes the special ethical responsibility of lawyers in representing clients with diminished capacity. It also noted that, although the Model Rules do not define capacity, the Comment to Rule 1.14 identifies

the following factors that the lawyer should “consider and balance” in determining the extent of a client’s diminished capacity:

#### **Comment 6 to Rule 1.14—Capacity Factors**

- **The client's ability to articulate reasoning leading to a decision.**
- **Variability of state of mind.**
- **Ability to appreciate consequences of a decision.**
- **The substantive fairness of a decision.**
- **The consistency of a decision with the known long-term commitments and values of the client.**

These factors are explored further in Chapter IV. The task of the lawyer will be to integrate these factors, along with the state’s specific standards for the legal transaction at hand or the specific criteria for a determination of incapacity under state guardianship law—into a process of preliminary capacity assessment. This challenging task is explored in Chapter IV, after the summary of the clinical model of capacity.