III. Clinical Models of Capacity

Why consider the clinical perspective on capacity?
In most situations, the lawyer will determine that the client has legal capacity and will proceed with the transaction without the need for an assessment by a clinical health professional. For clients who do require a clinical assessment, later chapters of this handbook will discuss how to work with clinicians and interpret clinical reports.

This section summarizes models of capacity from the clinical perspective. A comparison of legal and clinical models of capacity reveals many similarities. A basic understanding of a clinical perspective on capacity may help the attorney to make decisions about a client’s legal capacity.

Which clinical health professionals evaluate capacity?
Most often, when a lawyer seeks clinical consultation, the clinician will be a physician, although psychiatrists, psychologists, and other mental health professionals also may evaluate capacity. Clinicians use models of capacity that combine clinical practice standards with law and clinical research. The remainder of this section summarizes key elements of these models, including a general conceptual model for capacity and specific “domain” models of capacity.

A. General Clinical Model of Capacity
Regardless of the capacity that is being evaluated, clinicians must address four questions: What is the diagnosis that is causing the problem? What are the client’s cognitive strengths and weaknesses? What are the client’s behavioral strengths and weaknesses? Who is the client and what is the life situation with which they are contending? A widely cited model of capacity (“the Grisso model”) that is often used by psychologists labels these key components of capacity as causal, functional (cognitive and behavioral), and interactive. These components are similar to those found in legal guardianship standards.

Key Points
- In most cases, it will not be necessary to consult with a clinician.
- Knowledge of clinical models of capacity can be useful.
- Many legal and clinical concepts of capacity are similar.
- There is an emerging consensus on clinical models of capacity.

A Comparison of Guardianship Standards and Clinical Models of Capacity

<table>
<thead>
<tr>
<th>Legal Model</th>
</tr>
</thead>
<tbody>
<tr>
<td>Disabling Condition</td>
</tr>
<tr>
<td>Cognitive Functioning</td>
</tr>
<tr>
<td>Behavioral Functioning</td>
</tr>
<tr>
<td>Necessity Component—</td>
</tr>
</tbody>
</table>

<table>
<thead>
<tr>
<th>Clinical Model</th>
</tr>
</thead>
<tbody>
<tr>
<td>Causal Component</td>
</tr>
<tr>
<td>Cognitive Functioning</td>
</tr>
<tr>
<td>Behavioral Functioning</td>
</tr>
<tr>
<td>Interactive Component</td>
</tr>
</tbody>
</table>

1. Causal Component

- **Definition of Causal Component**
The causal component is the diagnosis that is the cause of the incapacity—for example, Alzheimer’s disease or schizophrenia.

- **Relationship to Legal Standard**
The causal component corresponds to the disabling condition test in guardianship law (Chapter II, B). Information about the likely cause of incapacity is very important information for the attorney. Once the diagnosis is established, it usually indicates the prognosis and likely patterns of symptoms. Usually the most important question is: “will this person get better, stay the same, or get worse?” The diagnosis might
also suggest to the attorney why a given client is frequently changing his or her mind. An answer to this latter question is especially relevant to the Comment to Model Rule 1.14, which asks for consideration of the client’s variability of state of mind.

For example, an individual comes into a lawyer’s office to change a will but seems confused. Knowledge of the cause of the confusion could help to guide the lawyer’s actions. A diagnosis of delirium (a condition in which an individual has marked difficulties focusing, usually caused by a medical problem) indicates that confusion is likely temporary and should clear up with appropriate medical treatment. A diagnosis of depression could suggest that a change of mind may be due to feelings of hopelessness or distorted thinking that should also improve with appropriate treatment. Thus, information on the diagnosis not only names the cause of any impairment, but indicates whether the impairment is temporary or permanent, will get better, worse, stay the same, or will improve with treatment.

### Assessment of Causal Component

Knowing the diagnosis helps answer:
- What is causing the problem?
- Is it temporary or permanent?
- Will it get better or worse?
- Could it improve with treatment?
- What treatment could help?
- Is there is no clinical impairment or illness?

### 2. Cognitive Functioning

- **Common Cognitive Problems**
  
  An individual may have cognitive problems with attention, memory, understanding or expressing information, reasoning, organizing, planning, or other areas. These problems could be caused by a cognitive disorder, such as dementia, or a psychiatric disorder such as schizophrenia.

- **Relationship to Legal Standard**
  
  This cognitive element of capacity is found in guardianship law, particularly based on the 1982 or 1997 Uniform Guardianship and Protective Proceedings Act, which emphasize an individual’s ability to “receive and evaluate information or make or communicate decisions” or “sufficient understanding or capacity to make/communicate decisions.”

- **Assessment of Cognition**
  
  Cognitive symptoms are assessed by clinicians through clinical interview and/or formal testing.

### 3. Functional Behavior

- **Importance of Functional Behavior**
  
  Many traditional clinical assessments end once the person’s diagnosis and cognition are assessed (e.g., a typical neuropsychological or neurological assessment). But, when legal capacity is questioned, it is important to have specific, direct information about the individual’s abilities for the capacity in question, be it making a will, making a medical decision, living at home, driving, or any other task.

  Information about cognitive and functional performance together explains the person’s capacity for the transaction in question. For example, in evaluating the capacity to manage finances, information about both memory and abilities to pay bills may be relevant. It is important to consider both pieces of information. Sometimes an individual can demonstrate how to do something during clinical examination but poor memory makes it impossible to remember the task at home. Conversely, a person may have trouble on a standard memory test (e.g., remembering a list of words), but is quite able consistently to name a health care proxy despite the memory problem.

---

III. Clinical Models of Capacity
• **Relationship to Legal Standard**
  This functional element of capacity is found in guardianship law in clauses that describe the need to adequately manage one’s person or property. The element is also found in all types of transaction-specific legal standards that characterize the specific skills or abilities necessary for the transaction at hand.

• **Assessment of Functional Behavior**
  Functional behavior is assessed through the reports of family members, direct observation, and/or performance-based testing. More and more clinicians turn to functional instruments—also called capacity instruments—to do such assessments. Capacity instruments are described in Appendix 3.

### 4. Interactive Component

• **Definition of Interactive Component**
  Some lawyers may object to the clinical model thus far, arguing: “But I have known my client for years, and what is being requested is consistent with his values even though he may look a little confused,” or “But in this situation, naming a reliable and conscientious adult child as an agent under a durable power of attorney is such a low risk that it doesn’t matter if my client cannot pass your tests.”

  These contextual factors (e.g., the history, the risk in the situation) are also part of a clinical model of capacity and a good clinical evaluation of capacity. The so-called *interactive* component of capacity takes into account personal, physical, psychosocial, and situational demands placed on the individual. The interactive component also incorporates the resources available to the individual, risks of the specific situation, and the person’s values and preferences. The outcome of a clinical evaluation of capacity is never merely a diagnostic statement or report of test results, but an integration of these with the particulars of the client’s life and situation.

• **Relationship to Legal Standard**
  The interactive component is clearly recognized in legal concepts of capacity, particularly in statutory pre-conditions for guardianship that require a finding that guardianship is the least restrictive alternative given the person’s circumstances.

• **Assessment of Interactive Factors**
  The interactive component is assessed through direct questioning (of the client and, if appropriate, family) about the situation, the person’s resources, history, values, preferences, and knowledge of the services and clinical interventions tried (e.g., bill paying services or treatment for depression). The clinician may need to speak to the lawyer and other sources to gather information about interactive factors.

![Clinical Model Diagram](image)

**Clinical Model**

- **Determine Diagnosis**
- **Assess Cognition**
- **Assess Function**

**Clinical Analysis**

Integrate components in context of interactive factors: situational demands, resources, risks, history, and values.

### B. Specific Domain Models of Capacity

Just as the law has transaction-specific models of legal capacities, clinicians also recognize “domain”-specific models of capacities. The word “domain” is used to connote a cohesive area of cognitive or functional behavior.

**Consent Capacity**

A widely accepted taxonomy of the functional abilities needed for medical decision-making capacity is: Understanding, Appreciation, Reasoning, and Expression of Choice.\(^{30}\)

*Understanding* is the ability of the individual to comprehend diagnostic and treatment-related information.

*Appreciation* refers to the ability to relate the treatment information to one’s own situation. In usual clinical practice, appreciation translates into the client’s belief that a well-considered medical diagnosis is valid and that treatment may be beneficial.
Reasoning is the ability to evaluate treatment alternatives by comparing risks and benefits in light of one’s own life. Sometimes reasoning is defined by the ability of the client to provide “rational reasons” behind a treatment choice.

Expressing a choice is the ability to communicate a consistent decision about treatment.

Financial Capacity
An often-used model of the functional abilities important for financial capacity examines knowledge, skills, and judgment. Knowledge for finances involves the ability to describe facts, concepts, and events related to financial activities such as knowledge of currency, bank statements, investments, and other personal financial data.

Skills involve the ability to demonstrate practical procedures and routines important for financial management such as making change and writing checks.

Judgment involves the ability to make reasonably sound financial decisions in novel or ambiguous social situations, such as being sensitive to fraud, invulnerable to coercion, and prudent in making investments.

Independent Living
For many older adults with dementia, a critical assessment concerns whether the individual is safe to live independently. A model for assessing the abilities important for independent living focuses on a range of key skills and judgment.

Skills important to demonstrate for independent living have been described as “instrumental activities of daily living” (IADL). IADLs involve the ability to manage the home, health, money, transportation, meals, and communication.

Judgment relates to insight and decision-making essential to independent living, such as ability to handle emergencies, compensate for areas of incapacitation, exhibit motivation for daily life, and minimize risk to self and others.

These domain models have been especially important in guiding researchers in their development of tests that assess specific functional behaviors and guide actual clinical assessments.