IV. Lawyer Assessment of Capacity

Lawyers must make capacity judgments in their everyday practice. There are at least two aspects to such assessments. First, the attorney must determine whether the prospective client has sufficient legal capacity to enter into a contract for the attorney’s services. Second, the attorney must evaluate the client’s legal capacity to carry out the specific legal transaction(s) under consideration. In either instance, the attorney must conduct an analysis of the legal elements of the capacity at issue in relation to the client’s presenting cognitive and emotional abilities.

This chapter outlines the lawyer’s task of observation, legal analysis, and capacity judgment. For many, if not most clients, these will be the only necessary steps, because clinical consultation or assessment will not be needed to reach a firm conclusion about capacity. The next chapter directly supplements this discussion by ensuring that clients are judged under circumstances that support and enhance their capacity. The remaining chapters describe the process of obtaining and using an informal clinical consultation or a formal clinical assessment, should the lawyer believe that step is necessary prior to forming a final conclusion about legal capacity.

The process described below focuses on key signs and factors to consider in a legal assessment of capacity. The process outlined is meant to structure and record observations leading to a legal judgment that is sufficiently comprehensive in scope, systematic in process, accountable if challenged, and documented.

Furthermore, the process is geared to blend in naturally to the case interview process, rather than adding a whole new costly element. When used with the worksheet at the end of this chapter, the process systematizes and documents what the lawyer already does implicitly. The worksheet is designed to be used by the lawyer either during the client interview as a note-taking device, or immediately afterwards as an analytic tool.

A. Observing Signs of Possible Diminished Capacity

There is no single indicator that provides a consistent, clear signal that an older adult is functioning with diminished capacity. However, there are markers that, when considered together, may reflect diminished capacity. These signs should not be taken in and of themselves to be proof of diminished capacity. Instead, they may indicate a need for further evaluation of capacity by an independent professional if the signs are present in sufficient number and/or severity.

In noting potential signs of incapacity, it is important to keep in mind that the focus is on decisional abilities rather than on cooperativeness or affability. It may be challenging to disentangle one’s reactions to a client’s interpersonal style from observations of the client’s cognitive, emotional, or behavioral problems.

This chapter describes each of the following steps that the lawyer should take in a thorough analysis of client capacity:

A. Observe and interpret signs of diminished capacity;
B. Evaluate understanding in relation to the specific legal elements of capacity for the transaction at hand;
C. Consider the degree of risk to the client and the ethical factors set out in the Comment to Rule 1.14;
D. Complete the legal analysis;
E. Document capacity observations; and
F. Take appropriate actions in response.

Observe with the following in mind:
- Focus on decisional abilities, not cooperativeness or affability.
- Pay attention to changes over time; history is important.
- Beware of ageist stereotypes.
- Consider whether mitigating factors could explain the behavior.
It can also be difficult to determine the meaning of cognitive, emotional, or behavioral anomalies in a new client. However, if a client is a returning one, it is critical to consider the history of interactions and pay attention to changes in functioning. A baseline of what is typical for any particular person is extremely helpful in assessing current decisional abilities. Be sensitive to gradual or sudden changes in functioning among returning clients.

Finally, it is useful to be sensitive to societal stereotypes about aging, commonly termed “ageism.” Aging stereotypes may be positive, idealizing old age; or negative, perhaps including the assumption that aging and diminished capacity are synonymous. Such beliefs could influence an appraisal of capacity. Hopefully, awareness of the possible signs of incapacity will help the lawyer to be more objective.

During the course of an interview, the attorney should be aware of specific cognitive, emotional, or behavioral anomalies that serve as “red flags.” These may indicate possible neurological or psychiatric illness that could diminish capacity. Most of the red flags will be observed during the interview or reported by third parties such as family members. It will not be necessary (and in most cases not appropriate) to use psychological screening instruments during preliminary capacity assessments.

During and immediately after a client interview, the attorney can document the signs observed, and also make notations about the nature and severity of these signs on the worksheet following this chapter.

### PART A OF WORKSHEET

**Observational signs of diminished capacity:**
- Cognitive signs
- Emotional signs
- Behavioral signs

Mitigating factors may alter weight of observations.

#### Possible Cognitive Signs of Incapacity

1. **Short-term Memory Loss**
   A client quickly may forget information discussed in the interview, repeating the same statements or asking the same question multiple times, with no indication that she or he has done so more than once. Also, while the client can discuss events from 10 years to 20 years ago, there may be more difficulty describing events of the past few days or weeks. For example, the client may be able to engage in brief casual conversation, such as a five-minute conversation about the weather or sports, but have trouble going beyond that in detail and begin to repeat questions already asked or forget your name or the purpose of the visit. The ability to engage in such small talk can lead family who live out of town to say that an impaired older adult “sounds just fine on the phone.”

2. **Communication Problems**
   A great deal can be learned by observing how the client uses language and communicates ideas. For example, a client may have repeated difficulty finding a particular word or naming common items even if they can talk about the item. For example, she may say “I brought my thing with the papers in it” instead of “I brought my notebook.” A common “cover” tactic for older adults with memory or communication problems is to defer to others excessively when asked direct questions, perhaps saying “My wife handles all the appointments, you’d have to ask her if we went,” or “I hardly ever call my own phone number; my son would remember because he uses it.”

   Clients who are asked direct questions may have trouble staying on the topic, frequently shifting to discussion of unrelated issues, or moving erratically or nonsensically between topics. Such problems can indicate trouble organizing thoughts such as is found in frontal dementia or in thought disorder (e.g., psychotic thinking). Repeated difficulty finding words and vague or disorganized language may indicate an inability to communicate a clear decision or to comprehend important or relevant information.

3. **Comprehension Problems**
   It is important to explore the client’s comprehension of information with other than yes/no questions. For example, difficulty repeating back or paraphrasing simple concepts is indicative of problems in comprehension. Repeated questioning could indicate poor memory or it could indicate poor comprehension. Many people with poor memory can paraphrase infor-
information immediately, while individuals with poor comprehension will have trouble even with this.

4. Lack of Mental Flexibility
A client may lack the capacity to understand or even acknowledge multiple alternatives or viewpoints other than her or his own, or have difficulty comprehending and adjusting to changes. This is different from simply being stubborn in that someone who is stubborn can typically acknowledge that other perspectives exist, and can provide reasons for not choosing them. For example, a stubborn person may not want to change a will for particular reasons, whereas an older adult lacking in mental flexibility may exhibit a general fear of making any changes for very vague reasons.

5. Calculation Problems
A client may have very basic difficulties with simple math problems that are far worse than expected given the level of education. An example of this is someone with a college degree who makes an error in adding dollar amounts together, or lines up columns of numbers incorrectly while adding or subtracting. The client may also present signs suggesting impairment in financial management abilities more broadly, e.g., lack of awareness of current financial assets or debts.

6. Disorientation
Disorientation can occur relative to space, time, or location. For example, a long-time client may have difficulty navigating through the attorney’s office building spatially or may get lost driving to the office even if he or she has been there several times over many years (spatial orientation). Once there, the client may not be able to identify where he or she is (orientation to place). The client may also not be aware of what time it is or what year it is, perhaps making references to events from several years ago as if the events were current (orientation to time).

Possible Emotional Signs of Incapacity

1. Significant Emotional Distress
A client may be persistently emotionally distressed during an interview or across interviews, beyond typical emotions expected given the circumstances, such that the individual’s emotional state makes it very difficult to address the relevant legal questions. For example, the client may appear extremely anxious, tearful, or seem depressed and appear to have no energy and respond very slowly to questions.

2. Emotional Lability/Inappropriateness
Rather than a steady emotional state, a client may also either show an extremely wide range of emotions during an interview (perhaps moving quickly from laughter to tears). Alternatively, a client may express feelings that seem highly inconsistent with what he or she is discussing (laughter when discussing death of a spouse, tears of distress while professing to be happy).

Possible Behavioral Signs of Incapacity

1. Delusions
Delusions are beliefs that are unlikely to be true, such as a belief that neighbors or the government are spying on oneself. Delusional thinking may be manifest more generally in expressions of feeling frightened or unsafe. Presence of delusions may call into question the extent to which decisions are founded on sound reasoning. For example, some delusional nursing home residents occasionally stop eating because of beliefs that their food is being poisoned. However, apparent delusions that seem more reality-based may warrant further exploration. Older adults commonly have concerns about relatives or facility staff stealing money or possessions from them, which unfortunately may be more reality based.

2. Hallucinations
Hallucinations are sensory experiences in the absence of physical stimuli that could be responsible for such experiences, such as hearing voices that no one else can hear. They are often auditory or visual, but can involve the other senses: smell, touch, and/or taste. An example is an older adult who seems to be having a conversation with another person who is not there. As with delusions, hallucinations may call into question the extent to which a decision is reality-based. However, it should be noted that high functioning older adults who are recently widowed and grieving sometimes report hearing a deceased spouse.
call their name or briefly seeing their image. Also, significant hearing or vision problems can place an older adult at risk for sensory misperceptions. When combined with isolation and anxiety, such misperceptions may appear hallucinatory or delusional in quality.

3. Poor Grooming/Hygiene

Individuals who are experiencing cognitive difficulties or serious emotional problems may not brush their hair, shave, or shower regularly, or have other grooming issues. For example, along with irregular bathing or shaving, a relatively common behavior among older adults with dementia is to wear multiple layers of clothing, perhaps several shirts or multiple pairs of pants. Attention to the appearance, clothing, and smell of a client gives clues to possible mental status changes.

**Functioning Beyond the Office**

Observations in the office setting are obviously quite limited. If the lawyer has the ability to interview clients in their home setting, there is a definite advantage in being able to see some of their functioning in their natural and familiar environment. The lawyer may in the natural course of contact with clients—and family members with whom your client has permitted communication—learn other information about the client’s level of functioning at home, particularly with respect to “activities of daily living” (ADLs) and “instrumental activities of daily living” (IADLs).

<table>
<thead>
<tr>
<th>ADLS</th>
<th>IADLS</th>
</tr>
</thead>
<tbody>
<tr>
<td>Dressing</td>
<td>Grocery shopping &amp; meal preparation</td>
</tr>
<tr>
<td>Bathing</td>
<td>Driving</td>
</tr>
<tr>
<td>Toileting</td>
<td>Housework</td>
</tr>
<tr>
<td>Eating</td>
<td>Managing money</td>
</tr>
<tr>
<td>Walking</td>
<td>Managing medication</td>
</tr>
<tr>
<td>Transferring bed/chaire</td>
<td>Using telephone &amp; mail</td>
</tr>
</tbody>
</table>

Such information may or may not be relevant to capacity. For example, an inability to write checks to pay the bills may be merely a physical deficit (and thus have nothing to do with decisional capacity), or it may be a result of failing to remember payment obligations or how to understand a bill (and thus be quite relevant to capacity for certain legal tasks). In any case, any additional information regarding client functioning in the home and community rounds out the total picture of the client’s abilities and deficits. The worksheet on page 23 provides a space for recording any such information about the client’s functioning beyond the office setting.

**Undue Influence**

Capacity assessment focuses on the fit between the individual’s cognitive, functional, and decisional abilities and the complexity and risk of the legal transaction at hand. On the other hand, undue influence refers to a dynamic between an individual and another person. It is certainly more challenging to assess such a dynamic, but there are certain factors to assess with the elderly client to gauge whether undue influence is at work. Lawyers might attend to whether the elderly client appears fearful, isolated, overly dependent or vulnerable, or seems overwhelmed by or unaware of financial information. It is also useful to determine the history of the relationship between the elderly client and any person who appears to be in a position of power: is it a long-term trustworthy relationship or is it a family member, caregiver, or acquaintance who has more recently become a “new best friend.”

**Mitigating/Qualifying Factors in Assessing Signs of Diminished Capacity**

In addition to noting potential signs of incapacity, there are a number of mitigating or qualifying factors that may influence observed signs. In most cases, the attorney will need to ask some follow-up questions to determine whether these mitigating factors are playing a role. If found, these factors indicate a need for alternative action, be it a referral to a physician, adjusting the approach to communication, or waiting until another time when the client is functioning better.

1. **Stress; Grief; Depression; Recent Stressful Events**

A client may at times seem confused, unable to pay attention to instructions, or unable to make decisions. It is important to ascertain stresses in the client’s life that could cause anxiety, depression, or inability to act. These potential signs of diminished capacity could go away when the transient stresses are alleviated.
2. **Reversible Medical Factors**

Signs of disorientation and confusion could be due to a host of medical conditions and medication factors that are reversible. Some common causes are related to medications: adverse medication reaction, interactions among too many medications (polypharmacy), and taking medications incorrectly. Also, older adults can be extremely sensitive to dietary insufficiency— inadequate nutrition, hydration, and deficiency in certain vitamins in the diet can lead to temporary cognitive changes. Further, persistent pain may impact cognition. A referral to a physician or geriatrician (physician specializing in older adults) prior to further action may be indicated.

Indeed, if the client has not had a complete physical in the past year, referral is always worthwhile.

3. **Normal Fluctuations in Mental Ability in Older Adults**

Normal mental status varies over the time of day depending on the situational stresses and available energy for the older client. Clinicians have learned to test older clients in mid-morning when the client is most alert, since fatigue could cause lower performances.

4. **Hearing and Vision Loss**

Losses in hearing and vision are normal in aging. Diminished functioning in the senses should not be generalized to mental incapacity. The amount of peripheral loss varies from person to person. Older adults learn ways to compensate for these losses. However, problems in hearing and vision could some-
time present a picture that the older client cannot attend, focus, or provide appropriate responses to questions. Suggestions for accommodating sensory changes are provided in the next chapter.

5. **Individual Differences and Variability Considerations**

Mental abilities can be influenced by a person’s education, life and job-related experiences, and sometimes socio-economic background. The styles and strategies used in mental performances can be further influenced by the client’s gender, personality, lifestyle choices, value system, and eccentricities. In addition, cultural and ethnic traditions in approaching personal, family, and medical issues may vary. From this perspective, the range of cognitive functions that is considered normal among older adults is large. These individual differences are important and need to be taken into account in evaluating potential mental capacity of older clients.

B. **Evaluating a Client’s Understanding in Relation to Legal Elements of Capacity**

Observation of signs of diminished capacity is only an initial step for the attorney evaluating a client’s capacity. The next and more substantive step is to evaluate the client’s legal capacity for the proposed transaction or situation at issue. This requires a direct comparison of the client’s understanding with each of the functional elements of capacity set out in statute or case law for the transaction or situation at hand.

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**Consider these mitigating factors that may be addressed to enhance capacity:**

- Stress, grief, depression, recent events
- Reversible medical factors
- Normal fluctuations in mental ability and fatigue
- Hearing and vision loss
- Education
- Socio-economic background
- Cultural and ethnic traditions

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**PART B OF WORKSHEET**

- Note the legal elements of capacity for the particular task at hand— e.g., testamentary capacity, contractual capacity, and donative capacity.
- Compare client’s understanding, appreciation, and functioning with the relevant legal elements.

Testamentary capacity, again, can serve as the illustrative case example. Although a client may
demonstrate signs of diminished capacity in introductory remarks and discussion, the real heart of the capacity issue involves the attorney’s judgment as to whether the client can satisfy the legal elements (usually four) constituent to making a will:

- Can the client describe what a will is?
- Does the client know the “objects of his/her bounty”—i.e., his/her natural heirs?
- Does the client know the nature and extent of his/her assets?
- Can the client describe a basic plan for distributing these assets to his/her heirs?

The client’s decisional process will be implicit and intuitive, as well as explicit and conscious. The attorney’s role is to present information, answer and ask questions, gently probe and query, and weigh client responses and thought processes. In addition, with client consent or in accordance with the rules of ethics, the attorney could solicit information from family members and other collateral sources, including fellow professionals. The decisional process may occur over the course of one or several meetings with the client. Ultimately, the attorney must form a judgment about the client’s understanding of the respective legal elements of the transaction at issue, and regarding the client’s capacity overall to undertake the transaction(s) at issue (in this example, to execute a will), or the client’s capacity to care for self or property under the elements set out in the state guardianship law.

C. Considering Factors from Ethical Rules

Not only must the lawyer assess the client’s understanding of the legal transaction, but also take into consideration the factors set out in the Comment to Rule 1.14 of the MRPC. The new rule and comment have not been adopted everywhere, yet they merit consideration because of their authoritative source.

The factors addressed in the comment derive from recommendations of a 1993 National Conference on Ethical Issues in Representing Older Clients and, in particular, from an article on representing clients with questionable capacity prepared for the conference by Peter Margulies. Margulies describes six factors—five of which Comment 6 to Rule 1.14 expressly refers to.

1. The client’s ability to articulate reasoning leading to a decision. The client should be able to state the basis for his or her decision. The stated reasons for the decision should be consistent with the client’s overall stated goals and objectives.

2. Variability of state of mind. Margulies defines this factor as the extent to which the individual’s cognitive functioning fluctuates.

3. Ability to appreciate consequences of a decision. For example, does a client recognize that without a given medical decision, he or she may physically decline or even die—or without a legal challenge to an eviction, he or she may be without a place to live.

4. The substantive fairness of the decision. Margulies maintains that while lawyers normally defer to client decisions, a lawyer nonetheless cannot simply look the other way if an older individual or someone else is being taken advantage of in a blatantly unfair transaction. To do so could defeat the very dignity and autonomy the lawyer seeks to enhance, and thus fairness is one element to balance. Of course, judging fairness risks the intersection of one’s own beliefs and values, so caution is required.

Yet, the reality is that when the desired legal plan conforms to conventional notions of fairness—e.g., equitable distribution of assets among all children—or the plan is consistent with the lawyer’s long-standing knowledge of the client and family, then capacity concerns wane propor-
tionately. Capacity may be diminished but ade-
quate for a legal transaction deemed to be very
low risk in the context of conventional fairness.

5. The consistency of a decision with the known long-
term commitments and values of the client. The
decision normally should reflect the client’s life-
long or long-term perspective. This will be easier
to determine if the lawyer-client relationship is
long-standing. At the same time, individuals can
change their values framework as they age. The
distinction is important.

6. Irreversibility of the decision. This factor is listed
in the Margulies article but not in the Comment to
Rule 1.14. Margulies notes that “the law histori-
cally has attached importance to protecting parties
from irreversible events,” and that “doing some-
thing that cannot be adjusted later calls for caution
on the part of the attorney.”36

Of these six factors, the first three are “functional”
in the sense that they reflect the cognitive functioning
of the individual. These may be supported by observa-
tion of the signs of diminished capacity described pre-
viously. The latter three are “substantive” in that they
look at the content and nature of the decision itself.
Under the Margulies approach, the latter three factors
may be thought of as substantive “levers” that modu-
late a kind of sliding scale of capacity. The greater the
concerns under the latter three substantive variables
(fairness, consistency with commitments, irreversibil-
ity), the greater the level of functioning demanded
under the first three variables (ability to articulate rea-
soning, variability of state of mind, and appreciation
of consequences).37 In other words, the higher the risk
(as measured by the client’s own values, the finality,
and fairness), the more one must probe to ensure deci-
sional capacity.

The Margulies paradigm has no direct evidence-
based validation in the psychological or medical liter-
ature, although the paradigm is consistent with the
psychological models previously described in Chapter
III, emphasizing functional and interactive (i.e., sub-
stantive) aspects of capacity. The paradigm rests upon
Margulies’ ethical analysis of the threshold for protec-
tive action, enhanced by an appreciation of the reali-
ties of legal counseling. A key strength is that the fac-
tors Margulies enumerates blend quite seamlessly
with the kind of issues that lawyers would typically
discuss in counseling clients. In that respect, the fac-
tors are very user-friendly for lawyers and amenable to
easy documentation in the lawyer’s notes. A careful
weighing and balancing of these factors along with the
specific elements of legal capacity for the transaction
at hand will assist the lawyer to make a preliminary
judgment of capacity.

D. Performing the Legal Analysis and
Categorizing the Legal Judgment

In making a capacity judgment at this stage (with-
out resorting to clinical consultation or formal assess-
ment), an attorney will need to weigh all the data
obtained up to this point as a whole. The completed
worksheet summarizes the lawyer’s observations
regarding cognitive, emotional, and behavioral func-
tioning; the presence of any mitigating factors affect-
ing the observations; the client’s decisional function-
ing in comparison to the applicable legal tests; and
task-specific factors recommended under the
Margulies/Fordham approach.

With these data, the lawyer should make a cate-
gorical assignment of the fit between the client’s abil-
ities and the legal capacity at issue. Unfortunately,
there is no simple score that will help the attorney eas-
ily to arrive at a conclusion. The conclusion is ulti-
mately a professional judgment that is aided by the
systematic consideration of signs of incapacity, the
client’s understanding of the legal transaction, and the
factors laid out in the Model Rule. In integrating these
sources of data to form a conclusion, the attorney may
consider the capacity classification schema in the box
on the next page.

If the attorney feels uncertain as to whether the
observed problems represent “mild” versus “more
than mild” issues, this would be an indication to con-
sult with a clinician as described in Chapter VI.

E. Documenting the Capacity Judgment

As in other client matters, the attorney should doc-
ument his or her observations and assessment regard-
ing client capacity. The worksheet provides that
documentation, although it may be advisable to further summarize key observations, conclusions, and reasonings in a case note, either in the space provided at the end of the worksheet or elsewhere in a case summary. In cases where the additional steps of consultation with a mental health professional or referral for formal assessment are necessary, the worksheet provides a first level of assessment. Once additional steps are taken (as described in Chapters VI and VII), the lawyer should document further analysis, judgment, and final disposition in the case file.

**F. Taking Actions Following Informal Capacity Assessment**

Following a preliminary capacity assessment, an attorney may need to weigh different courses of action. In the majority of cases, presumably there will be no issues of diminished capacity and the attorney can proceed with the legal representation without further concern. In the case of “mild problems” with capacity, the attorney may want to consider referring the client for a *geriatric medical evaluation* to ensure there are no medical problems which may be transiently affecting capacity and for which resolution could remove any lingering concerns.

In cases involving “more than mild problems” with capacity, the attorney also should consider a general geriatric work-up. However, in such cases it is likely that capacity issues will persist and will require either a formal referral to a clinician for capacity assessment or at least attorney consultation with a clinician for guidance and clarification. After taking such external steps, the attorney then can decide the best course of action concerning the representation.

In situations where “severe problems” with capacity exist, further representation by the attorney may be problematic. Withdrawal from direct representation, taking all reasonable steps to protect the client’s interests, or seeking to advance the client’s interests through representation of another party (e.g., a family member), may be indicated. If a client-lawyer relationship already exists before capacity becomes an issue, then protective action may be ethically appropriate under Model Rule 1.14(b).

A formal evaluation of capacity by a clinician will be useful in supporting these actions. Communication with the client about the capacity issues, as well as with family members and significant others where

**PART D OF WORKSHEET**

**Capacity Conclusions**

- **Intact**
  - No or very minimal evidence of diminished capacity.

- **Mild problems**
  - Some evidence of diminished capacity, but insufficient in attorney’s judgment to preclude representation or proposed transaction.

- **More than mild problems**
  - Substantial evidence of diminished capacity sufficient to warrant attorney consultation with mental health professional, or referral of client for a formal professional assessment of capacity.

- **Severe problems**
  - Client lacks the capacity to proceed with the transaction and the representation.

- Videotaping may, in fact, exaggerate the client’s deficits in decisional capacity.

- Unless the attorney videotapes all clients, the fact of videotaping may itself be used to raise doubts of capacity.

- The videotape cannot be edited to remove portions for any reason without risking ethical or legal violation of evidence tampering prohibitions.

Videotaping As Documentation?

The question is often asked whether videotaping of the client completing a legal transaction, such as a will signing or being questioned just before the transaction, is a good idea. Experienced practitioners have come to different conclusions on this question. In selected cases, videotape evidence of a client explaining his or her reasons behind a particular dispositive provision can provide a deterrence to a contest. But, there are several arguments against videotaping the client’s execution of a document:

- Videotaping may, in fact, exaggerate the client’s deficits in decisional capacity.

- Unless the attorney videotapes all clients, the fact of videotaping may itself be used to raise doubts of capacity.

- The videotape cannot be edited to remove portions for any reason without risking ethical or legal violation of evidence tampering prohibitions.

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A formal evaluation of capacity by a clinician will be useful in supporting these actions. Communication with the client about the capacity issues, as well as with family members and significant others where
G. Caution Against Lawyer Use of Psychological Instruments

Cognitive screening instruments have enjoyed wide acceptance and use in clinical settings, mainly because of their brevity and simplicity in administering, scoring, and interpreting. Several brief mental status questionnaires have been developed, the most popular of which is the 30-item Mini-Mental Status Examination (MMSE), although others are widely used, too. See the Cognitive Screening tests in Appendix 3.

The MMSE provides a quick but blunt assessment of overall cognitive mental status. It assesses orientation, attention, registration and immediate recall, language, and the ability to follow simple verbal and written commands. It provides a total score that places the individual on a 30-point scale of cognitive function. In clinical settings, the MMSE has been used to detect impairment, follow the course of an illness, monitor response to treatment, screen for cognitive disorders in epidemiological studies, and follow cognitive changes in clinical trials.

While this handbook argues that lawyers regularly engage in the legal assessment of capacity and should do so in a systematic manner, for a variety of reasons addressed below, it is generally not appropriate for attorneys to use more formal clinical assessment instruments, such as the MMSE.

Lack of Training
Lawyers generally do not have the education and training needed to administer these tests. Many factors must be taken into consideration when administering and interpreting psychological tests. A few examples include: limits to the validity and reliability of tests; impact of mental status, education level, environmental variables (e.g., lighting, noise), fatigue, sleep deprivation, and sensory deficits on test results; and impact of social and cultural issues on performance.

Limited Yield
For an attorney, the information yield of psychological screening instruments is very limited, compared with other sources of relevant information. At best, screening test scores will indicate that further psychological evaluation is needed, which could often be better determined on the basis of careful observation and a thorough interview.

Over-Reliance
There is a danger of over-reliance on single test scores. Single test scores can unfortunately appear to be objectively and numerically precise. A multidimensional approach to clinical assessment is considered the gold standard for formal assessment. Decisions should not be made on the basis of a single test score.

False Negatives and False Positives
Screening exams such as the MMSE pose a risk of producing both false positives and false negatives in conclusions about mental deficits related to relevant tasks. For example, a client with mobility problems (e.g., arthritis) may have a reduced MMSE score relat-
ed to difficulty drawing pentagons or folding a paper. This deficit has little relevance to the ability to prepare an advance directive. Such a conclusion would be a “false positive.” On the other hand, an individual who demonstrates excellent performance on the MMSE (knows the date, has good memory) but has a specific focused and unfounded delusion about a family member, which represents an acute psychosis, may lack testamentary capacity despite the high score. This is a “false negative.”

Practice Effects
When cognitive screening tests are used more than once, familiarity with the test can improve performance, even though one’s cognitive functioning has not improved.

Lack of Specificity to Legal Incapacity
In a number of studies, cognitive screening alone has been found lacking sensitivity or specificity to many decisional tasks, such as medical decision-making. It is likely to be much more relevant to evaluate the client’s understanding of the specific legal elements of capacity for the transaction at hand and consider the factors laid out in this chapter. Such an approach is much more consistent with a normal attorney-client interview and will likely be more defensible in the event of a malpractice claim.