V. Techniques Lawyers Can Use to Enhance Client Capacity

Clients with evidence of diminished capacity may still be able to make or participate in making a legal decision. The Comment to Model Rule 1.14 notes that “a client with diminished capacity often has the ability to understand, deliberate upon, and reach conclusions about matters affecting the client’s own well-being.” How can a lawyer maximize the capacity of an older client who may be limited by one or more of the cognitive, emotional, behavioral, or mitigating factors described in Chapter IV?

This chapter describes an approach of “gradual counseling” by which the attorney may help the client to understand and make choices through a process of clarification, reflection, and feedback that is respectful of client values.

A key message of this chapter is that attorneys must be sensitive to age-related changes without losing sight of the individuality of each older person. Although functional limitations do increase with age, most older adults do not have physical, sensory, or cognitive impairments. Therefore, one must not assume impairments in older clients, but one must be prepared to address these issues when they arise. Moreover, attorneys should examine their own attitudes toward aging to ensure that “ageism” does not inadvertently influence their judgments about client capacity. Lawyers also should be alert to ethnic and cultural factors that might be a barrier to communication, subliminally affecting perceptions of client abilities and behavior.

Finally, attorneys should do everything possible to make their office and their counseling approach “elder friendly” and accessible to individuals with a range of disabilities. Under the Americans with Disabilities Act (ADA), law offices as “public accommodations” are required to make reasonable modifications to their policies, practices, and procedures to make services available to people with disabilities. Beyond this, many older clients whose impairments do not reach the level covered under the ADA will be aided by the kinds of techniques listed below to optimize their functioning.

A. Engendering Client Trust and Confidence

Attorneys can take steps to build the trust of older clients, allowing them to be at their best during the interview process and bolstering their decision-making ability.

- Upon introduction, take time to “break the ice” and, if appropriate, make a few brief remarks about areas of common interest such as weather, sports, or mutual connections.
- Interview the client alone to ensure confidentiality and to build trust. However, consider the important role support persons can play. If the client is more at ease with a friend or family member in the room, consider including the support person for a portion of the interview or at least during an introductory phase. Be sure to talk to the client rather than past the client to the others.
- Stress the confidentiality of the relationship. Some older adults may be fearful of losing control of their affairs if they divulge information. Assure the client that information will not be shared with others, including family members, without prior consent.
- Encourage maximum client participation to increase a sense of investment in the process.
- Respond directly to the client’s feelings and words, making the client feel respected and valued, which enhances trust.
- Use encouragement and verbal reinforcement liberally.
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- Take more time with older clients so they are comfortable with the setting and the decision-making process to be undertaken.
- Conduct business over multiple sessions to increase familiarity and opportunities for trust building.

B. Accommodating Sensory Changes

While not all older adults have hearing and vision loss, these deficits are common for a substantial proportion of Americans over the age of 65. Sensory problems, particularly in hearing, sometimes result in older individuals pretending that they know what is under discussion, becoming socially withdrawn, and in some instances, depressed. As stated in Chapter IV, lawyers should not mistake sensory loss for mental confusion. Rather, sensory changes and the older adults’ response to them are mitigating factors that should be taken into consideration when assessing signs of diminished capacity.

To address hearing loss
- Minimize background noise (e.g., close the office door, forward incoming calls) as individuals with hearing loss have difficulty discriminating between sounds in the environment.
- Look at the client when speaking. Many individuals with hearing loss read lips to compensate for hearing loss.
- Speak slowly and distinctly. Older adults may process information more slowly than younger adults.
- Do not over-articulate or shout as this can distort speech and facial gestures.
- Use a lower pitch of voice because the ability to hear high frequency tones is the first and most severe impairment experienced by many older adults with compromised hearing.
- Arrange seating to be conducive to conversation. Sit close to the client, face-to-face, at a table rather than on the far side of a desk.
- Focus more on written communication to compensate for problems in oral communication. Provide written summaries and follow-up material.
- Have auditory amplifiers available.

To address vision loss
- Increase lighting.
- Reduce the impact of glare from windows and lighting as older adults have increased sensitivity to glare. Have clients face away from a bright window.
- Do not use glossy print materials, as they are particularly vulnerable to glare.
- Format documents in large print (e.g., 14- or 16-point font) and double-spaced as presbyopia (blurred vision at normal reading distance) becomes more prevalent with age.
- Give clients additional time to read documents, as reading speed is often slower.
- Give the client adequate time to refocus his or her gaze when shifting between reading and viewing objects at a distance, as visual accommodation can be slowed.
- Be mindful of narrowing field of vision. A client may not be aware of your presence in the room until you are directly in front of him or her.
- Have reading glasses and magnifying glasses available on conference tables.
- Arrange furnishings so pathways are clear for those with visual or physical limitations.

C. Accommodating Cognitive Impairments

For clients with some evidence of cognitive impairment who may be in the murky gray area of
“questionable capacity,” the practical steps suggested below may offer significant support:

- Begin the interview with simple questions requiring brief responses to assess client understanding and optimal pace, as reaction time is often slower among older adults, particularly for more complex tasks.
- Conduct business at a slower pace to allow the client to process and digest information, as information-processing speed declines with age.
- Allow extra time for responses to questions, as “word-finding” can decline with age.
- Break information into smaller, manageable segments.
- Discuss one issue at a time, as divided attention between two simultaneous tasks, as well as the ability to shift attention rapidly, shows age-related decline.
- Provide cues to assist recall rather than expecting spontaneous retrieval of information.
- Repeat, paraphrase, summarize, and check periodically for accuracy of communication and comprehension. The importance of repeated testing for comprehension has been documented in research of informed consent procedures showing that comprehension is sometimes incomplete even when individuals state that they understand. This inconsistency is more pronounced among older adults, particularly those with low vocabulary and education levels.42
- If information is not understood, incompletely understood, or misunderstood, provide corrected feedback and check again for comprehension.
- Provide summary notes and information sheets to facilitate later recall. Include key points, decisions to be made, and documents to bring to next meeting.
- Schedule multiple, shorter appointments rather than one lengthy appointment, as older adults may tire more easily than younger adults. Multiple testing sessions can also assist in identifying the client’s performance rhythms and cycles.
- Whenever possible, conduct business in the client’s residence. This often makes the client more relaxed, optimizes decision-making, and provides the attorney with clues about “real-world” functioning.

D. Strengthening Client Engagement in the Decision-Making Process

Linda F. Smith, in her seminal article “Elderlaw: Representing the Elderly Client and Addressing the Question of Competence,” describes a technique of gradual counseling that is useful in compensating for age-related differences in memory and problem-solving ability, and when there are questions about capacity. It provides a method for inquiring into and understanding the client’s decision-making process, and may assist such clients in thinking through their underlying concerns, goals and values, and choosing a consistent course of action.

The attorney for the limited client should engage the client in a process of gradual decision-making, which will involve clarification, reflection, feedback, and further investigation….Gradual counseling requires the attorney to repeatedly refer to the client’s goals and values in assessing each alternative and in discussing the pros and cons of an alternative. This will involve a great deal of clarifying and reflecting of the clients’ thoughts and feelings….The attorney should proceed to explain each relevant option and elicit the client’s reactions.43

Smith outlines steps in the process of “gradual counseling” and maintains that if attorneys are vigilant in pursuing these steps with a client of questionable capacity, it may assist a limited client in reaching an informed decision:44
### Gradual counseling:
- Identify goals
- State problem
- Ascertain values
- Compare options to goals
- Give feedback

- Confirm or reconfirm the client’s basic **goal** or problem to be solved.
- **Get feedback** from the client to ensure he or she agrees with the lawyer’s statement of the problem. Listen for important client **values**.
- Ascertain the **most important** values the client expresses. Restate these values and confirm with the client. Recognize that the values of an older client may differ from those of the attorney.

For example, a young attorney may begin to doubt the competence of her elderly client who does not wish to contest a right to income or benefits or does not wish to take a relatively simple legal action to preserve his assets. However, if the particular client has a limited life expectancy, minimal need for assets, or an emotional focus upon internal or spiritual things, that client’s decision may be quite reasonable. Because the underlying values are so important, throughout the counseling process the attorney should continue to reflect the feelings and thoughts that the client expresses . . . to understand the client’s values as fully as possible.\(^{45}\)

- Describe the **best option** for attaining the client’s goal. Ask for the client’s feeling about that option.
- **Explain each relevant option**, and get the client’s reaction. This will enable the attorney to see whether the client understands the information and how the client responds. It will also check for consistency of values. The attorney may need to “present fewer choices and only the most salient features for or against each alternative.” This “weeding out” may allow a client of questionable capacity to reach a reasoned judgment.
- Give the client **feedback** that might be helpful. For example, if the client appears inconsistent in goals or decisions over time, pointing this out may help the client to remember and focus. If a client chooses a course that seems harmful, the attorney could express worry and concern, and get the client’s reactions to this.
- Even when there is no clearly enunciated choice by the client, the lawyer still may be able to find capacity for the limited decision at hand from the client’s reactions during the course of the session.

Such a “gradual counseling” approach is respectful of the client’s autonomy. Moreover, an attorney taking these steps will be assured that he or she has made a thorough attempt to find client capacity before taking any more precipitous action. However, if despite all of these techniques and accommodations, the client’s capacity for the decision or transaction is still questionable, the attorney may need assistance from a clinician.