Excerpts From

Assessment of Older Adults with Diminished Capacity: A Handbook for Lawyers

American Bar Association/American Psychological Association
Assessment of Capacity in Older Adults Project Working Group

*[**Note to Capacity Assessment Workgroup.** This handbook is premised in large part on a Model Rule of Professional Conduct adopted by the ABA which allows attorneys to interact with clients who have diminished mental capacity differently than they do with clients who do not have such mental challenges. This rule has been rejected by the California Supreme Court. Under the Rules of Professional Conduct in California, a lawyer has the same professional and ethical duties to all clients, regardless of whether they have diminished capacity. A duty of loyalty and confidentiality exists for all attorney-client relationships. Lawyers must advocate for the wishes of their clients, even if the lawyer disagrees with the client's wishes and thinks that the direction given by the client to the attorney is not in the best interest of the client. As a result of the differing rules of the ABA and the California State Bar, much of the material in this handbook is not appropriate for California lawyers. Furthermore, there is virtually nothing in the handbook about how lawyers can use capacity assessments to strengthen their client's case in a conservatorship proceeding or how a lawyer can challenge capacity assessments by medical and mental health professionals that recommend a conservatorship for their client. The excerpts that appear below are some of the generic information that is relevant to California despite its divergence from the ABA model rule on diminished capacity.]*

The ABA-APA Working Group on the Assessment of Capacity in Older Adults was established in 2003 under the auspices of the Task Force on Facilitating ABA-APA Relations. *Assessment of Older Adults with Diminished Capacity: A Handbook for Lawyers* represents the first work product of the ABA/APA Assessment of Capacity in Older Adults Project Working Group, established in 2003 under the auspices of the Task Force on Facilitating APA/ABA Relations.

Some might argue that without training in mental disorders of aging and methods of formal capacity evaluation, lawyers should not be making determinations about capacity. Yet lawyers necessarily are faced with an assessment or at least a screening of capacity in a rising number of cases involving specific legal transactions and, in some instances, guardianship. Even the belief that "something about a client has changed" or a decision to refer a client for a formal professional capacity evaluation represents a preliminary assessment of capacity.

The handbook is not a practice standard meant to outline compulsory actions. Instead, it offers ideas for effective practices and makes suggestions for attorneys who wish to balance the competing goals

of autonomy and protection as they confront the challenges of working with older adults with diminished capacity.

Although lawyers seldom receive formal training in capacity assessment, they make capacity judgments on a regular basis whether they realize it or not. In the context of litigation, capacity may be the sole issue in controversy–such as in a guardianship action or a challenge to a will, trust, or donative transfer based on an allegation of legal incapacity. In this context, the lawyer's role is fairly straightforward–to advocate fairly but zealously for the conclusion that represents the interests of the party he or she represents.

Model Rule 1.14. The ABA's Model Rules of Professional Conduct (MRPC), as revised in 2002, acknowledge the lawyers' assessment functions, and indeed, suggest a duty to make informal capacity judgments in certain cases. For the first time, the revised rule attempts to give some guidance to lawyers faced with that task. Rule 1.14: Clients with Diminished Capacity, recognizes:
first, the goal of maintaining a normal client-lawyer relationship; second, the discretion to take protective action in the face of diminished capacity; and third, the discretion to reveal confidential information to the extent necessary to protect the client's interests

[Comment to Capacity Assessment Workgroup] The California State Bar asked the California Supreme Court to adopt **Model Rule 1.14** in California. **The Supreme Court declined to do so.**

A report published by the Probate and Mental Health Advisory Committee of the California Judicial Council in 2018 found the Supreme Court's action to be instructive to lawyers who are appointed to represent clients in conservatorship proceedings. The committee observed that it had not found any support "for the proposition that a trial court, having created an attorney-client relationship [by appointing counsel] has the authority to modify the terms of that relationship – including ethical uties or standards of representation – set forth by the Legislature in statute . . . or by the Supreme Court in the California Rules of Court . . . and the California Rules of Professional Conduct. . . It is perhaps worth noting in this context that of the 70 new or amended rules of professional conduct for which the State Bar requested Supreme Court approval in 2017, the Court declined to approve only one: proposed rule 1.14, regarding a lawyer's obligations in representation of clients with diminished capacity." (SPR18-33 (Guardianship and Conservatorship: Court Appointed Counsel) See committee comments on Judicial Council website: https://www.courts.ca.gov/documents/W19-08.pdf

It is clear that lawyers appointed to represent conservatees and proposed conservatees in California must treat clients who may have diminished capacity the same as they treat all other clients – even when they represent such clients in conservatorship proceedings. There are no exceptions. A lawyer representing a client in a conservatorship proceeding must advocate for the stated wishes of the client, or if those wishes cannot be determined then to take action to protect his or her existing rights. The lawyer must adhere to ethical duties of loyalty and confidentiality. The lawyer may not insert his or her opinion about what is best for the client and then advocate for the lawyer's own opinion on this matter. This is a huge departure from Model Rule 1.14 and therefore anything in this workbook that is premised on that rule will be omitted from this document.]

Legal Standards of Diminished 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. 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.

Lawyers need to be familiar with three facets of diminished capacity: (1) **Standards of capacity** for specific legal transactions; (2) Approaches to capacity in state **guardianship and conservatorship** laws; (3) **Ethical guidelines** for assessing client capacity.

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.

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. 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.

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.

Clinical Models 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.

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?"

Assessment of Causal Component. The diagnosis will almost always be one found in the *Diagnostic and Statistical Manual of Mental Disorders – IV (DSM-IV)*,29 which lists and describes currently recognized psychiatric disorders.

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.

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.

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.

Interactive Component. 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).

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.

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.