

Capacity and Consent: Key Concepts for Law Enforcement Investigations

Candace Heisler, JD

APSIL

This webinar is sponsored by the Adult Protective Services Program at the Illinois Department on Aging under a grant awarded by the Administration on Community Living.

Trained case workers at local provider agencies conduct investigations and provide support in resolving reports of abuse, neglect, financial exploitation, or self-neglect involving adults with disabilities (age 18 – 59) and other older adults (age 60+) living in community-based (non-institutional settings).



Disclaimer

- This presentation is provided for general information purposes only and does not constitute legal or professional advice.
- The views expressed in this presentation are those of the speaker and may not necessarily represent the policy interpretations and procedures issued by the Adult Protective Services Program at the Department on Aging.

Session Objectives

- Define capacity and competency
- Understand that a person who has a developmental or intellectual disability or been diagnosed with dementia can still be interviewed, provide credible information, and testify



Key Terms

- Capacity
- Competency
- “Valid” Consent
- Undue Influence

Related Concepts:

- Assessment
- Cognitive Decline/Diminished Capacity
- Financial Capacity
- Susceptibility/Vulnerability

Be Self-Aware

Personal biases may lead to possible misconceptions and preconceptions that could interfere with investigations in abuse cases.

- Ableism/Ageism
- Blind Spots
- Cognitive Bias
- Tunnel Vision
- Victim Blaming

“...you cannot enter into an investigation with a philosophy that dictates the outcome. Objectivity is paramount; this is the first principle of detective work that each of us must learn. It sounds simple, but our presuppositions are sometimes hidden in a way that makes them hard to uncover and recognize.”

— J. Warner Wallace



Common Misconceptions

- Capacity and competency are the same concept.
- A capacity assessment ends with an all or nothing determination.
- A person lacks capacity if they have a cognitive impairment.
- Lack of capacity is always a permanent condition.
- Capacity should always be questioned if a person makes a decision others see as “unwise”.

Differences Between Capacity and Competency

Capacity = Medical Context

- Ability to make decisions.
- Fluid in nature.
- Capacity is assessed by a medical practitioner who is familiar with an individual.

Competency = Criminal/Legal Context

- Ability to engage in certain legally significant actions (e.g., form criminal intent, understand charges, confess, stand trial, assist counsel, waive rights, or enter a plea).
- Legal competence to make reasoned decisions is presumed unless demonstrated to be otherwise.
- Competence is determined by a judge on a case-by-case basis.

These terms should not be used in an interchangeable manner in documentation.



Competency

- A judicial determination as to the legal status of an adult.
- It is an “all or nothing” proposition and arises in criminal cases, involuntary civil commitments, and guardianship proceedings.
- Examples for suspects and defendants:
 - waive Miranda rights
 - make a knowing confession
 - determine fitness to stand trial
 - testify
 - enter a guilty plea

Capacity

- Clinical/medical term denoting a person's physical and/or cognitive abilities to do or decide something.
- Varies by the complexity of the act or decision, time of day, medications, illness, fatigue, trauma, and grief.
 - Life experience may be relevant.
 - Education and literacy may be related to a person's ability to understand complex financial matters.
 - Language barriers may exist for limited-English speakers making them appear less capable.
 - High-functioning individuals who have an intellectual disability or been diagnosed with dementia may use social skills as "masking" so they appear more capable.

Legal Contexts Requiring Capacity

Some instances in which capacity issues might arise:

- Accepting/refusing medical treatment
- Designating an agent**
- Obtaining a driver's license
- Hiring an attorney
- Giving a gift**
- Entering into a contract**
- Consenting to a sexual relationship**
- Conveying real property**
- Getting married
- Making a will
- Managing financial affairs
- Accepting APS services

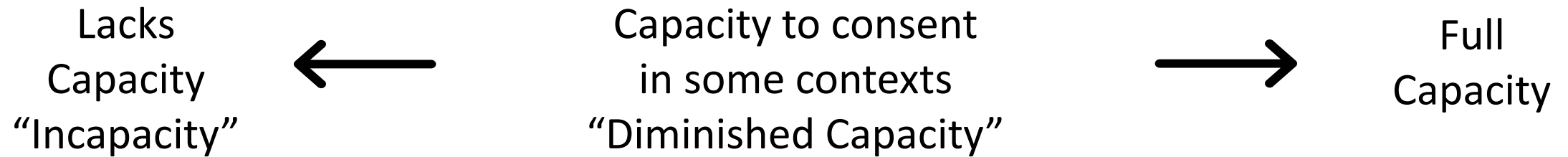
**Issue often present in criminal cases

Elements of Capacity

Is a person able to understand what they are doing in the moment and accept any consequences of their decisions and actions?

- Understanding
- Appreciation
- Reasoning
- Express a choice

Decision-making Capacity: A Continuum



Cognitive decline is widely under-recognized.

Diminished Capacity – Things to Know

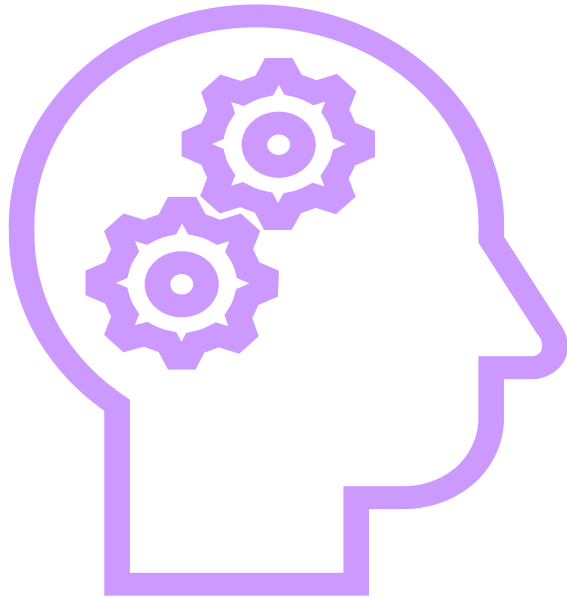
Risk Factors for Abuse:

- Dependency
- Isolation

Warning Signs:

- Short term memory lapses
- Disorientation (time/place)
- Communication/planning issues
- Comprehension issues (math)
- Disorganization
- Erratic behavior
- Self-neglect (grooming/hygiene)

Functional Deficits ≠ Cognitive Deficits



Capacity is task-specific in nature so a person can lack capacity in one area but still have capacity in another.

A person can have functional deficits (e.g., physical disability) but be able to report accurately, fully participate in an interview, and testify about abuse.

Assessing Capacity (1)

- Various screening tools may be used by a trained professional as part of a capacity assessment.
- An assessment on its own may provide useful information about how a person functions, but **it does not**:
 - constitute a medical diagnosis,
 - prove that someone is legally competent,
 - indicate whether an interview is possible, or
 - predict the accuracy of information obtained through questioning.

Assessing Capacity – APS Functions

- If it reasonably appears to the APS provider agency that a victim lacks capacity, the APS provider agency may act in that person's best interests to ameliorate any risk of ongoing harm.
- A victim lacks capacity to consent to services if the APS provider agency reasonably determines that the person is unable to receive and evaluate information or unable to communicate decisions relating to assessment of the reported incident. See 320 ILCS 20/9(d-5).

Documentation - Assessments



- Responders should fully document all information that is learned about any screening to assess capacity of an individual in an abuse case:
 - list the tool that was administered for the assessment,
 - include the name of the person who administered the assessment and information about their training and experience,
 - (if the tool that was administered can be viewed by the investigator): indicate how each question was answered (or not), or photograph the completed tool, and
 - any score or conclusion drawn from the test by the person who administered it.
- Since assessments and screenings may be subject to legal protections, law enforcement should check with the prosecutor regarding the need for a subpoena or court order to view or copy any such information.
- **Law enforcement responders should not administer any assessment or screening tests without specialized training and agency approval.**
- Responders should not offer personal opinions about an assessment.

Dementia (1)

- Umbrella term for many diseases causing cognitive impairments.
- Renamed “major neurocognitive disorder” (NCD) in the *Diagnostic and Statistical Manual of Mental Disorders* (DSM).
- The term “dementia” still appears in statutes and is commonly used in legal settings.

Not normal brain aging.

Dementia (2)

- Dementia illnesses irreversible and usually progressive in nature with different patterns of decline.
- Dementias affect different parts of the brain so the affected area determines which abilities will be impaired.
- Dementias affect a variety of mental functions, such as memory, language, problem-solving, concentration, visual perception, motor skills, personality, and emotional and mental health.

Not all dementias affect memory.

Conditions Affecting Capacity

Reversible

- Malnutrition or Dehydration
- Delirium, Infections, or Illness
- Medication Levels
- Anxiety or Stress
- Depression, Fatigue, or Grief
- Financial Literacy

Irreversible

- Developmental Disabilities
- Intellectual Disabilities
- Dementias
 - Alzheimer's Disease
 - Lewy Body Dementia
 - Frontotemporal Dementia
 - Vascular Dementia

Ongoing interventions may improve adaptive functioning for individuals who have developmental and intellectual disabilities.

Dementia and Emotional Memory

People with dementia may retain emotional memories about directly-experienced traumatic events through the early stages of disease progression.

- Emotions affect cognitive processes, including perception, attention, learning, memory, reasoning, and problem-solving
- Emotions help retention (encoding) and retrieval of information.

For interviews:

- Schedule interviews at times when an individual will tend to be at their best.
- Be patient, provide reassurance, and show respect.
- Keep an open mind – do not discount person's ability to recall, describe, and testify.
- Understand that a person may not be able to describe events chronologically.
- Get help from APS workers.

Documentation – Disability/Dementia



- Responders should fully document all information that is learned about any cognitive condition or diagnosis of dementia for a victim or perpetrator of abuse:
 - list all sources of information,
 - include the name of person who made the diagnosis and information about their training and experience,
 - describe how how functional abilities of the person are affected (e.g., memory, speech, ability to conduct activities of daily living, manage finances, etc.),
 - attempt to find out information about medications and any care providers for the person, and
 - ask if an agent under a power of attorney is making decisions or if a guardian has been appointed for the person.
- Responder should document observations in factual terms and only use diagnostic terms if quoting a source.
- Responders should not attempt to distinguish dementia from delirium, disability, or other condition.

Testifying (1)

Older adults, like all adults, are presumed to be competent to testify, unless shown otherwise.

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Legal Standard to Testify:

- Does the person understand the duty to be truthful?
- Can the person communicate in a manner that can be understood?
- Does the person have personal knowledge about relevant information?

Testifying (2)

Court Challenges:

- An objection may be raised disputing the competency of a prospective witness in a case. + ●
- Each case is unique so the form and manner of inquiry is left in the court's discretion. ○
- Competency and credibility are different concepts. A person may be competent to testify, but a judge or jury may not believe the witness.

Disability/Dementia:

- A person who has an intellectual disability or been diagnosed with dementia is not automatically incompetent to testify.
- Victims may well be able to meet the legal standard to testify depending on their individual abilities and the progression of disease for those diagnosed with dementia.



Summary Points

- Be aware that societal biases may re-enforce beliefs that individuals who have cognitive conditions:
 - should not be believed
 - are unreliable reporters and witnesses
 - will be unable to testify
- Capacity and competency are different concepts with usage depending on medical or legal (civil and criminal) contexts

Additional Resources (1)

- https://www.americanbar.org/content/dam/aba/administrative/law_aging/2011_agin_g_arta2251_undueflu_tb.authcheckdam.pdf
- https://www.americanbar.org/groups/law_aging/resources/capacity_assessment/
- <https://www.apa.org/pi/aging/resources/guides/diminished-capacity.pdf>
- <https://apstarc.acl.gov/getattachment/Education/Briefs/CapacityScreeningBrief.pdf.aspx?lang=en-US>

Additional Resources (2)

- https://ncea.acl.gov/NCEA/media/Publication/NCEA_DecisionMaking.pdf
- https://ncler.acl.gov/getattachment/Legal-Training/upcoming_event/Identifying-Undue-Influence-Ch-Summary.pdf.aspx?lang=en-US
- https://ncler.acl.gov/getattachment/Legal-Training/upcoming_event/Undue-Influence-Slides.pdf.aspx?lang=en-US
- <https://www.justice.gov/file/1517976/download>

Other Presentations

- Segments on:
- Abuse, Neglect, and Exploitation of Older Adults and Adults with Disabilities
- Tips for Interviewing Older Adults and Adults with Disabilities:
- Overview and Rapport Building
- Medical Issues in Abuse/Neglect:
- Bruising and Medications, Pressure Ulcers, and Strangulation and Suffocation
- Powers of Attorney
- Abuse Investigation Case Study



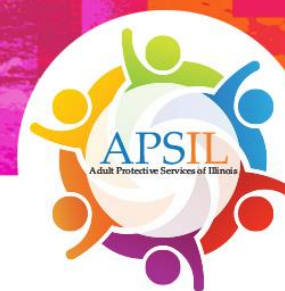
For More Information

To report abuse, call:

1-866-800-1409, Adult Protective Services Hotline (24-Hour)

Additional Resources:

- <https://www2.illinois.gov/aging/ProtectionAdvocacy/Pages/abuse.aspx>
- <https://www2.illinois.gov/aging/Engage/Pages/default.aspx>



**Thank you for the work you do
to investigate allegations of
abuse to protect older adults
and adults with disabilities!**