

Capacity Worksheet for Lawyers

Source: *Assessment of Older Adults with Diminished Capacity: A Handbook for Lawyers*, by the ABA Commission on Law and Aging and the American Psychological Association (2005).

Please read and review the handbook prior to using the worksheet.

Client Name: _____ **Date of Interview:** _____

Attorney: _____ **Place of Interview:** _____

A. OBSERVATIONAL SIGNS

◆ Cognitive Functioning	Examples
Short-term Memory Problems	Repeats questions frequently Forgets what is discussed within 15-30 min. Cannot remember events of past few days
Language/Communication Problems	Difficulty finding words frequently Vague language Trouble staying on topic Disorganized Bizarre statements or reasoning
Comprehension Problems	Difficulty repeating simple concepts Repeated questioning
Lack of Mental Flexibility	Difficulty comparing alternatives Difficulty adjusting to changes
Calculation/Financial Management Problems	Addition or subtraction that previously would have been easy for the client Bill paying difficulty
Disorientation	Trouble navigating office Gets lost coming to office Confused about day/time/year/season
◆ Emotional Functioning	Examples
Emotional Distress	Anxious Tearful/distressed Excited/pressured/manic
Emotional Lability	Moves quickly between laughter and tears Feelings inconsistent with topic

◆ Behavioral Functioning	Examples
Delusions	Feels others out “to get” him/her, spying or organized against him/her Fearful, feels unsafe
Hallucinations	Appears to hear or talk to things not there Appears to see things not there Misperceives things
Poor Grooming/Hygiene	Unusually unclean/unkempt in appearance Inappropriately dressed

Other Observations/Notes of Functional Behavior

Other Observations/Notes on Potential Undue Influence

Mitigating/Qualifying Factors Affecting Observations	Ways to Address/Accommodate
Stress, Grief, Depression, Recent Events affecting stability of client	Ask about recent events, losses Allow some time Refer to a mental health professional
Medical Factors	Ask about nutrition, medications, hydration Refer to a physician
Time of Day Variability	Ask if certain times of the day are best Try mid-morning appointment
Hearing and Vision Loss	Assess ability to read/repeat simple information Adjust seating, lighting Use visual and hearing aids Refer for hearing and vision evaluation
Educational/Cultural/Ethnic Barriers	Be aware of race and ethnicity, education, long-held values and traditions

B. RELEVANT LEGAL ELEMENTS - The legal elements of capacity vary somewhat among states and should be modified as needed for your particular state.

General Legal Elements of Capacity for Common Tasks	Notes on Client's Understanding/ Appreciation/Functioning Under Elements
<p><i>Testamentary Capacity</i> - Ability to appreciate the following elements in relation to each other:</p> <ol style="list-style-type: none"> 1. Understand the nature of the act of making a will. 2. Has general understanding of the nature and extent of his/her property. 3. Has general recognition of those persons who are the natural objects of his/her bounty. 4. Has/understands a distribution scheme. 	
<p><i>Contractual Capacity</i> The ability to understand the nature and effect of the particular agreement and the business being transacted.</p>	
<p><i>Donative Capacity</i> An intelligent perception and understanding of the dispositions made of property and the persons and objects one desires shall be the recipients of one's bounty.</p>	
<p><i>Other Legal Tasks Being Evaluated & Capacity Elements:</i></p>	

C. TASK-SPECIFIC FACTORS IN PRELIMINARY EVALUATION OF CAPACITY

The more serious the concerns about the following factors...	The higher the function needed in the following abilities...
<p>Is decision consistent with client's known long-term values or commitments?</p>	<p>Can client articulate reasoning leading to this decision?</p>
<p>Is the decision objectively fair? Will anyone be hurt by the decision?</p>	<p>Is client's decision consistent over time? Are primary values client articulates consistent over time?</p>
<p>Is the decision irreversible?</p>	<p>Can client appreciate consequences of his/her decision?</p>

D. PRELIMINARY CONCLUSIONS ABOUT CLIENT CAPACITY - After evaluating A, B, and C above:

<input type="checkbox"/> Intact - No or very minimal evidence of diminished capacity	<i>Action:</i> Proceed with representation and transaction
<input type="checkbox"/> Mild problems - Some evidence of diminished capacity	<i>Action:</i> (1) Proceed with representation/transaction, or (2) Consider medical referral if medical oversight lacking, or (3) Consider consultation with mental health professional, or (4) Consider referral for formal clinical assessment to substantiate conclusion, with client consent
<input type="checkbox"/> More than mild problems - Substantial evidence of diminished capacity	<i>Action:</i> (1) Proceed with representation/transaction with great caution, or (2) Medical referral if medical oversight lacking, or (3) Consultation with mental health professional, or (4) Refer for formal clinical assessment, with client consent
<input type="checkbox"/> Severe problems - Client lacks capacity to proceed with representation and transaction	<i>Action:</i> (1) Referral to mental health professional to confirm conclusion (2) Do not proceed with case; or withdraw, after careful consideration of how to protect client's interests (3) If an existing client, consider protective action consistent with MRPC 1.14(b)

CASE NOTES: Summarize key observations, application of relevant legal criteria for capacity, conclusions, and actions to be taken: