ASSESSING CAPACITY

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Objectives

- Realize determining capacity in older adults with complex impairments can be difficult
- Describe the Six Pillars of Capacity Assessment
- Explain how capacity impacts Guardianship and Power of Attorney decisions
Challenging Task Upon Us

- Balancing ethical and legal guidelines for respect of individual’s autonomy with the additional charge of protecting individuals from harm.

- Law deems adults are competent unless proven otherwise, and burden of proof for incompetency is high (Moberg & Kniele, 2006).

Capacity vs. Competency

- Capacity
  - Status of individual defined by *functional* deficits judged to be sufficiently great that the person currently cannot meet the demands of a *specific* decision-making situation, weighted in light of its potential consequences (Grisso and Applebaum, 1998).

- Competency
  - A legal construct established and governed by the courts.
Although courts ultimately determine competency, opinions of medical and mental health practitioners often elicited regarding person’s decision making or functional abilities.

Types of Capacities

- Work
- Drive
- Parent
- Make medical decisions
- Provide informed consent
- Care for one’s self or property
- Designate a will or other legal contract
Limitations to Capacity Decisions

- Global vs. Specific deficits
  - Issues with only certain abilities (driving), or incapable of making any self-decisions?

- Permanent vs. Temporary deficits
  - Deficits based on dementia compared to delirium and psychiatric functioning
  - Example of stroke speaks to importance of addressing the temporal limits to incapacity

Limitations, cont...

- Will environmental supports influence deficits?
  - Positive Influence: Support services allow patient structure to stay in home
  - Negative Influence: Undue influence, exploitation, or threat can directly affect the autonomy, functioning, and well being of those with diminished capacity

- Importance of ‘bad decisions’ and needs/values of the patient
Clinical Professionals with Possible Expertise

- Geriatricians, Geriatric Psychiatrists, or Geropsychologists
- Neurologists
- Neuropsychologists or Psychologists
- Nurses
- Occupational Therapists
- Primary Care Physicians and Internists
- Psychiatrists
- Social workers

Historical Precedent for Assessing Capacity

- Requirement for mental competence arose in Mid-17th century English courts as reaction to defendants who stood mute instead of entering a plea of guilt or innocence.

- In such cases, courts impaneled juries to decide whether the accused was obstinately mute, or not possessing capacity to respond (ex *visitatione Dei* [by visitation of God]).

- Consequence of assessment:
  - Defendants found mute *ex visitatione Dei* were spared
  - “Obstinately mute” defendants were punished

Fast Forward A Couple Hundred Years

- 1960s-1970s, “physical illness” or “physical disability” was a sufficient disabling condition
  - Some state statues opened a very wide door by including “advanced age” and the catch-all “or other cause.”

Still Not Perfect Many Years Later...

- Historically, decisional capacity determined by unreliable clinical interview or general mental status evaluation (Markson, 1994; Marson, McInturff, Hawkins, Bartolucci, & Harrell, 1997; Rutman & Silberfeld, 1992).

- Characteristics shown to influence capacity judgment
  - provider’s personal values, experience, theoretical orientation, thoughts on age (Clemens & Hayes, 1997)
  - gender of physician (Roter & Hall, 2004)
  - patient-physician racial concordance (Cooper et al., 2003)
  - verbal and nonverbal behaviors (Beck, Daughtridge, & Sloane, 2002; Roter, Frankel, Hall, & Sluyter, 2006)
  - respect for or liking of patients (Beach, Roter, Wang, Duggan, Cooper, 2006; Hall, Morgan, Stein, & Roter, 2002)
Inconsistency of Methods Used to Determine Capacity

- Clinicians focus on different cognitive abilities in predicting capacity (Marson, Hawkins, McInturff, & Harrell, 1997).

- Low agreement between physicians with different specialty training who provided ratings of consent capacity in older adults with AD (Marson et al., 1997).
  - Agreement improved when physicians were trained to evaluate specific legal standards (Marson et al., 2000).

- Standardized cognitive testing improves reliability, though generalizability may still be in doubt.
  - Does impaired memory actually lead to inability to complete a will?

Six Pillars of Capacity

- 2006/2008 - American Bar Association Commission on Law and Aging – American Psychological Association
  - Judicial Determination of Capacity of Older Adults in Guardianship Proceedings
  - Assessment of Older Adults with Diminished Capacity

- Not prescriptive or definitive, but a tool considered a framework that judges and psychologists may find useful and effective in capacity determination.
Six Pillars

1. Medical Condition
2. Cognition
3. Everyday Functioning
4. Values and Preferences
5. Risk and Level of Supervision
6. Means to Enhance Capacity

1. Medical Condition Producing Functional Disability

- What is the medical cause of the individual's alleged incapacities and will it improve, stay the same, or get worse?
- Today, judges require information on the specific disorder causing diminished capacity.
Context of Capacity Evaluations

Causes of cognitive impairment in older adults

- Dementia
  - Alzheimer's disease
  - Vascular disease
  - Lewy Body disease
  - Parkinson's disease
  - Alcohol abuse
  - Undiagnosed TBI and/or stroke
  - Combinations of the above
- Delirium
Confusion

- **Common Psychosocial Causes**
  - Transfer trauma (a recent move that has the individual disoriented)
  - Recent death of a spouse or loved one
  - Recent stressful event
  - Depression and anxiety
  - Insomnia

- **Common Miscommunication Problems**
  - Difficulty understanding English
  - Decisions impacted by religious, cultural, or ethnic background
  - Low educational or reading level; illiterate
  - Difficulty hearing or seeing

- **Common Medication Problems**
  - Anti-cholinergics, anti-depressants, anti-psychotics, movement disorder drugs, anxiolytics (benzodiazepines, barbiturates), anti-histamines, opioids, steroids

Six Pillars

1. Medical Condition
2. Cognition
3. Everyday Functioning
4. Values and Preferences
5. Risk and Level of Supervision
6. Means to Enhance Capacity
2. Cognitive Functioning Component

- In what areas is the individual's decision-making and thinking impaired and to what extent?
  - An incapacitated person as defined by Uniform Guardianship and Protective Proceedings Act of 1997 (UGPPA)
    - is unable to receive and evaluate information or make or communicate decisions to such an extent that the individual lacks the ability to meet essential requirements for physical health, safety, or self-care, even with appropriate technological assistance.

- Consider areas of strength and weakness and the severity of impairment.
  - Includes alertness or arousal, as well as memory, reasoning, language, visual-spatial ability, and insight.

How to Assess Cognitive Functioning

- In House Options/Screens
  - Montreal Cognitive Assessment (MOCA)
  - Mini-Mental Status Exam (MMSE)
  - Mini-Cog
  - Saint Louis University Mental Status Exam (SLUMS)

- Refer for Neuropsychological Evaluation
Six Pillars

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3. Everyday Functioning Component

- What can the individual do and not do in terms of everyday activities? Does the individual have the insight and willingness to use assistance or adaptations in problem areas?

- Inadequate Standard: “Incapable of taking care of herself”
  - vague standard that invites judgments of incapacity based upon the court’s opinion of the reasonableness of one’s behavior

- Appropriate standard: operational definition related to essential needs, such as “inability to meet personal needs for medical care, nutrition, clothing, shelter, or safety”
Everyday Functioning

- **Care for Self**
- **Financial Management**
  - Includes resisting exploitation, coercion, and undue influence
- **Civil or Legal**
  - Retain legal counsel, voting
  - Make decisions about legal documents
- **Medical Decision Making**
  - Choosing appropriate treatment, facility, and caregivers, contact for help if ill or emergency
  - Make advance directive, manage medications
- **Home and Community Life**
  - Maintain safe/clean shelter, able to be left alone, use transportation, maintain personal relationships, use phone and mail
  - Avoid environmental dangers, such as the stove and poisons, and obtain appropriate emergency help

Everyday Functioning and Functional Assessment

- **How do clinicians define everyday functioning?**
  - Activities of daily living (ADL; grooming, toileting, eating)
  - Instrumental activities of daily living (IADL; manage finances, health, and functioning in the home and community)

- **How is functioning assessed by clinicians?**
  - Informal (observation or asking family, ADL/IADL rating scales) versus formal testing (occupational therapy)
ADL/IADL Rating Scales

- Functional Assessment Questionnaire (FAQ)
- Adult Functional Adaptive Behavior Scale (AFABS)
- Barthel Index
- Direct Assessment of Functional Status (DAFS)
- Functional Independence Measure (FIM)
- Index of ADL (K-ADL)
- Kenny Self Care Evaluation
- Multidimensional Functional Assessment Questionnaire (MFAQ)
- Philadelphia Geriatric Center Multilevel Assessment Inventory (MAI)
- Physical Self-Maintenance Scale

K-ADL

| ACTIVITIES          | INDEPENDENCE: (0 POINTS) NO starvation, direction or personal assistance | DEPENDENCE: (7 POINTS) Needs help with eating more than one part of the body, getting in or out of the bed or wheelchairs, toileting
|---------------------|--------------------------------------------------------------------------|-----------------------------------------------------------------|
| BATHING             | (0 POINTS) Bathes self completely or needs help in bathing only a single part of the body, such as the back, genital areas or disabled extremity | (7 POINTS) Needs help with bathing more than one part of the body, getting in or out of the bed or wheelchairs, toileting
| POINTS: ______   |                                                                 |                                                                 |
| DRESSING            | (0 POINTS) gets clothes from closet and puts on clothes and other garments completely with fasteners. May need help tying shoes. | (7 POINTS) Needs help with dressing self or needs help with completely dressing.
| POINTS: ______   |                                                                 |                                                                 |
| TOILETING           | (0 POINTS) Goes to toilet, gets on and off, arranges clothes, clears genital area without help. | (7 POINTS) Needs help transferring to the toilet, cleaning self or using bedpans or commodes.
| POINTS: ______   |                                                                 |                                                                 |
| TRANSFERRING        | (0 POINTS) Moves in and out of bed or chair unassisted. Mechanical transferring is acceptable. | (7 POINTS) Needs help in moving from bed to chair or requires complete transfer.
| POINTS: ______   |                                                                 |                                                                 |
| COSTUMING           | (0 POINTS) Exchanges complete control over perspiration and defecation. | (7 POINTS) Is partially or totally incontinent of bowel or bladder.
| POINTS: ______   |                                                                 |                                                                 |
| FEEDING             | (0 POINTS) Gets food from shelf into mouth without help. | (7 POINTS) Needs partial or total help with feeding or requires parental feeding.
| POINTS: ______   |                                                                 |                                                                 |

TOTAL POINTS = _____ + 6 = High (patient independent) 0 = Low (patient very dependent)

Katz Index of Independence in Activities of Daily Living (K-ADL)

FAQ

Changes in Your Daily Life (FAQ)

Please fill out this activity to put a score in the column best describing your situation:

<table>
<thead>
<tr>
<th>Activity</th>
<th>Normal (0)</th>
<th>Never did, but would do now (1)</th>
<th>Never did, would have difficulty now (1)</th>
<th>Has difficulty, but does by self (1)</th>
<th>Requires assistance (2)</th>
<th>Dependent (3)</th>
</tr>
</thead>
<tbody>
<tr>
<td>1. Writing checks, paying bills, balancing checkbook</td>
<td></td>
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<td>2. Assembling tax records, business affairs, or papers</td>
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<td>3. Shopping alone for clothes, household necessities, or groceries</td>
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<td>4. Paying a game of skill or working on a hobby</td>
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<td>5. Heating water, making a cup of coffee, turning off stove</td>
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<td>6. Preparing a balanced meal</td>
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<td>7. Keeping track of current events</td>
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<tr>
<td>8. Paying attention to, understanding, discussing TV, books, magazines</td>
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<tr>
<td>9. Remembering appointments, family occasions, holidays, medications</td>
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<tr>
<td>10. Traveling out of neighborhood, driving, arranging to take public transportation</td>
<td></td>
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<td></td>
</tr>
</tbody>
</table>

Subtotals: ___________________________ ___________________________ ___________________________ ___________________________ ___________________________ ___________________________ ___________________________ ___________________________ ___________________________ ___________________________
TOTAL: ___________________________


Six Pillars

1. Medical Condition
2. Cognition
3. Everyday Functioning
4. Values and Preferences
5. Risk and Level of Supervision
6. Means to Enhance Capacity

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4. Consistency of Choices of Values, Preferences, and Patterns

- Knowledge of values is essential in the guardianship plan.

- Key areas to consider include matters such as:
  - Does the individual want a guardian? Who should it be?
  - Does the individual prefer that decisions be made alone or with others?
  - What makes life good or meaningful for an individual?
  - What overarching concerns drive decisions?
  - What are the individual’s strong likes, dislikes, hopes, and fears? Religious beliefs or cultural traditions?

Choices, Values, Preferences

- Are the person’s choices consistent with long-held patterns or values and preferences?
  - Do not mistake eccentricity for diminished capacity
  - Long-held choices must be respected, yet weighed in view of new medical information that could increase risk, such as a diagnosis of dementia
Six Pillars

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5. Risk of Harm and Level of Supervision Needed

- **What is the level of supervision needed? How severe is the risk of harm to the individual?**
- Must consider condition’s risk in the context of environmental supports and demands
- Most state statutes require no other feasible option than guardianship, or that the imposition of a guardianship is the least restrictive alternative for addressing the proven substantial risk of harm.
- The level of supervision to mitigate risk should match the risk of harm to the individual.
Capacity Assessment and Guardianship

- **Guardian**
  - A person, agency, or institution appointed by the court to make personal decisions for another. Authority is not absolute.
    - Guardian under court supervision and is required to file report each year to court of receipts, payments, other financial transactions made that year

- Guardian of the person (Guardian) vs. Guardian of the estate (Conservator)

- Full Guardianship (Plenary) vs. Limited Guardianship
  - Court assigns either all duties to another, or only those powers incapacitated or partially incapacitated individual is incapable of exercising

- Results of capacity assessment directly influencing guardianship decision
  - Minimal or no diminished capacity → less restrictive alternatives, dismiss petition.
  - Severely diminished capacities on all fronts → plenary guardianship.
  - Mixed strengths and weaknesses → limited guardianship.
Capacity Assessment and Durable Power of Attorney

- **Durable power of attorney (DPA)**
  - Effective alternative to guardianship, allowing an individual to plan for the control of his or her financial affairs in the event of incapacity.
  - Enables delegated authority to act for the individual even after person loses capacity to make decisions, and is effective until revoked by the individual or until their death.

- In order for a person to establish a DPA, mental capacity necessary to understand and sign the document
  - Typically capacity gauged by attorney representing the individual, based on State statutes for capacity for making any contract
  - Determination of incapacity by a health specialist prior to completing DPA would exclude the individual from establishing a DPA, consequently guardianship is required

Guardianship vs. Durable Power of Attorney?

- 85 year old patient with Alzheimer’s disease
  - Struggling to handle bills, cash checks, make decisions

- Capacity at time of signing influences eligibility

- Sound capacity at time of signing → DPA
- Incapacity at time of signing → Guardianship
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6. Means to Enhance Capacity

- The mere existence of a physical disability should not be a ground for guardianship
- since most physical disabilities can be accommodated with appropriate medical, functional, and technological assistance directed by the individual.
What treatments might enhance the individual's functioning?

Key interventions are:
- Education, training, or rehabilitation
- Mental health treatment
- Occupational, physical, or other therapy
- Home or social services
- Medical treatment, operation, or procedure
- Assistive devices or accommodation

If Assistance with Finances Needed

- Bill paying services
- Utility company third party notification
- Shared bank accounts (with family member)
- Durable Power of Attorney for finances
- Trusts for management of property
- Representative Payee
- Adult protective services
Assistance for Unsafe Living Environment

- Senior shared housing programs
- Adult foster care
- Community residential care
- Assisted living
- Nursing home
- Continuing Care Retirement Communities (CCRCs)

Assistance with Daily Activities

- Care management
- Home health services
- Home care services
- Adult day care services
- Respite care programs
- Meals on wheels
Assistance with Daily Activities, cont...

- Transportation services
- Food and prescription drug deliveries
- Medication reminder systems
- Telephone reassurance programs
- Emergency call system ("lifeline")
- Home visitors and pets on wheels
- Daily checks on the person by mail carriers

Assistance with Medical Treatment if no Consent Possible

- Health Care Advance Directive
- Surrogate decision making by an authorized legal representative, a relative, or a close friend
Proposed Standards

- Ideal capacity evaluation would include:
  - Medical Review or Diagnosis
  - Detailed structured interview with patient and informants
  - Neuropsychological Testing
  - Functional Ability Assessment
    - On-road driving evaluation, OT for cooking or financial management
  - Review of Legal Standards

- Identification adaptations and environmental supports to complete tasks

Examples

- Financial affairs
  - Decision making capacity via interview
  - Examination of executive functioning and calculation skills
  - Functional measure of mathematical and everyday financial skills

- Driving
  - History of driving issues via interview
  - Examination of attention, visual spatial skills, reaction time, motor skills
  - On-road driving evaluation

Moberg & Kniele (2006)
The 5 W’s of a Capacity Assessment

- What:
  - What types of decisional or functional processes are in question?
  - What data are needed?
  - Am I an appropriately qualified evaluator?

- Who:
  - Who is the client?
  - What is the older adult’s background?
  - Who is requesting the evaluation?
  - Who are the interested parties?
  - Who sees the report?
  - Is the court or litigants involved?

- When:
  - How urgent is the request?
  - Is there a court date?
  - What is the time frame of interest?
  - Is the individual medically stable?

- Where:
  - In what context / setting does the evaluation take place?

- Why:
  - Why now?
  - What is the history of the case?
  - Will a capacity evaluation resolve the problem?

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THANK YOU!

QUESTIONS?

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www.utahmemory.org
Medications Leading to Confusion

<table>
<thead>
<tr>
<th>Class</th>
<th>Uses</th>
<th>Examples of More Problematic Medicines</th>
</tr>
</thead>
<tbody>
<tr>
<td>Anticholinergic</td>
<td>Block the action of the neurotransmitter acetylcholine</td>
<td>Atropine, Scopolamine, and many Antihistamines such as Chlorpheniramine, Cypromeprazine, Dextrochlorpheniramine, Diphenhydramine, Hydroxyzine, Promethazine</td>
</tr>
<tr>
<td>Antidepressants</td>
<td>Depression</td>
<td>Amitrityline, Doxepin</td>
</tr>
<tr>
<td>AntiParkinson drugs</td>
<td>Parkinson’s disease symptoms</td>
<td>Levodopa (L-dopa or Sinemet), Bromocriptine</td>
</tr>
<tr>
<td>Antipsychotics</td>
<td>Hallucinations, Delusions</td>
<td>Chlorpromazine, Haloperidol, Thioridazine, Thiothixene</td>
</tr>
<tr>
<td>Barbiturates</td>
<td>Sleep and Anxiety</td>
<td>Phenobarbital, Secobarbital</td>
</tr>
<tr>
<td>Benzodiazepines</td>
<td>Sleep and Anxiety</td>
<td>Chlordiazepazone, Diazepam, Flurazepam, Nizazepam</td>
</tr>
<tr>
<td>Histamine-2 (H2) Blockers</td>
<td>Block the action of gastric acid secretion</td>
<td>Cimetidine, Famotidine, Nizatidine, Ranitidine</td>
</tr>
<tr>
<td>Nonsteroidal antiinflammatory drugs (NSAIDs)</td>
<td>Pain</td>
<td>Ibuprofen, Indomethacin</td>
</tr>
<tr>
<td>Opioids</td>
<td>Pain</td>
<td>Morphine, Propoxyphone, Meperidine</td>
</tr>
<tr>
<td>Steroids</td>
<td>Inflammation, Pulmonary disease</td>
<td>Prednisone, Dexamethasone, Methylprednisolone</td>
</tr>
</tbody>
</table>

Temporary and Reversible Causes of Confusion

- Causes of Delirium
  - Drugs > 6 meds or > 3 new meds or use of drugs that cause confusion
  - Electrolytes Low sodium, blood sugar, calcium, etc
  - Lack of Drugs, Water, Food Pain, malnutrition, dehydration
  - Infection or Intoxification Sepsis, urinary track infection, pneumonia; alcohol, metals, solvent
  - Reduced Sensory Input Impaired vision, hearing, nerve conduction
  - Intracranial Causes Subdural hematoma, meningitis, seizure, brain tumor
  - Urinary Retention/Fecal Impaction Drugs, constipation
  - Myocardial Heart Attack, heart failure, arrhythmia
- Other Causes of Confusion
  - Liver or kidney disease Hepatitis, diabetes, renal failure
  - Vitamin deficiency Folate, nicotinic acid, thiamine, vitamin B12
  - Post surgical state Anesthesia, pain