

Cognition and Decision-Making Capacity

Elder Abuse Council – July 12, 2022



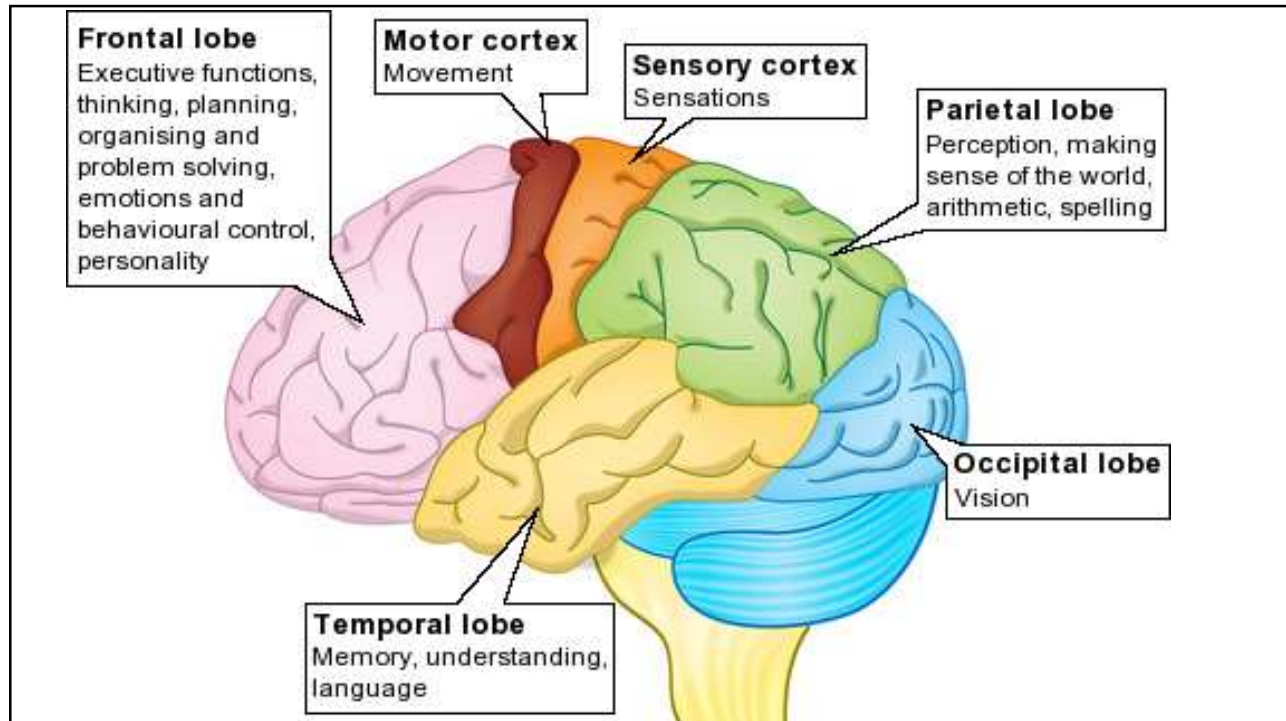
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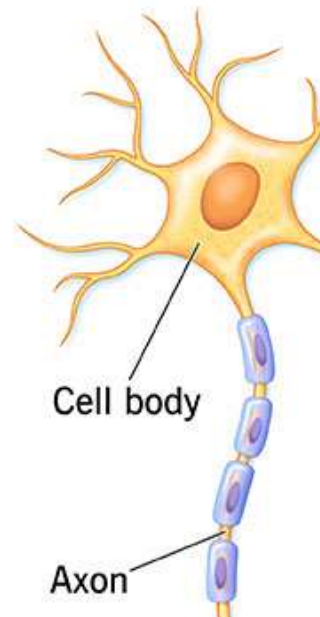
- About cognition
- How cognition relates to capacity
- Highlights from the DOJ Elder Justice Initiative's Symposium on Decision-Making Capacity (April 2022)



Brain cells

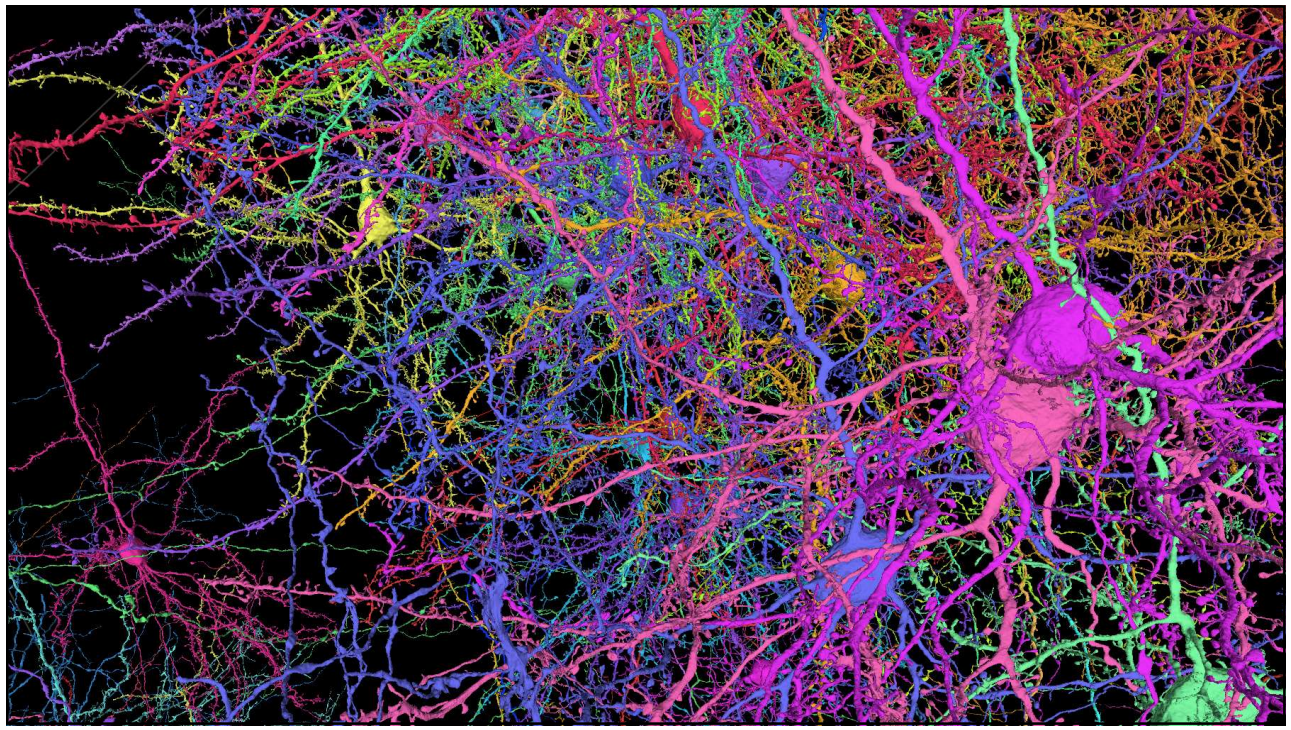
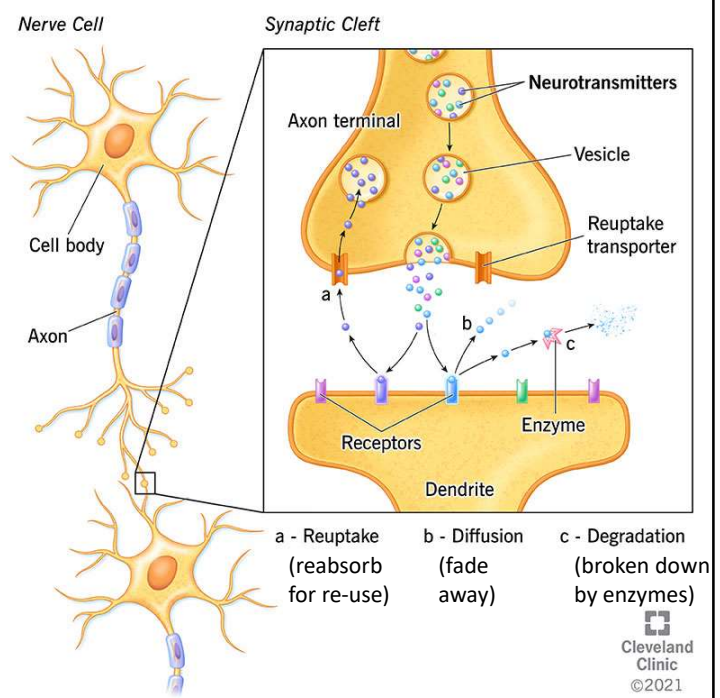
- 100 BILLION nerve cells or neurons
- Each of these has up to 10,000 connections with other neurons
- Neurons are even more outnumbered by glia and microglia cells

Nerve Cell



Neurotransmitters

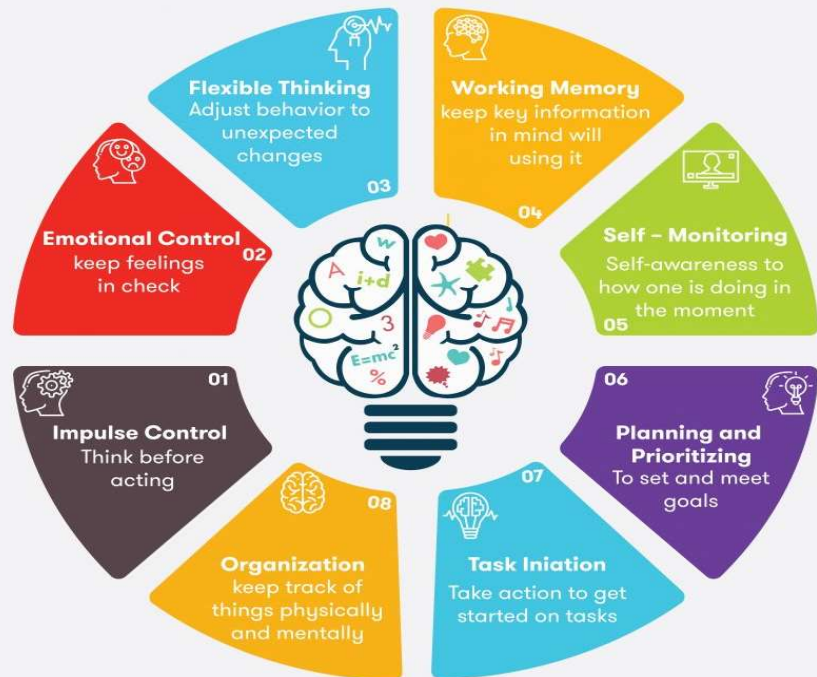
- Neurotransmitter systems run discrete brain circuits
- These circuits regulate thoughts and behaviors



Areas/aspects of cognitive processing

- Sensation
- Perception
- Alertness
- Orientation
- Attention
- Processing speed
- Language: read, speak, listen
- Thinking
- Learning
- Short-term working memory
- Long-term retrieval
- Comprehension/knowledge
- Reasoning: fluid, logical, abstract
- Creativity, imagination
- Planning
- Problem solving

Executive functioning



Cognitive aging

Some things get better with age:

- More extensive vocabularies
- Greater knowledge of the depth of meaning of words
- Accumulated learning and experiences.

Some things get worse:

- Blood flow in the brain decreases
- Inflammation in the brain increases
- Neuron connections weaken

Impact of aging on cognitive processes

- Processing speed decreases
- Slower to find words and recall names
- More problems with multitasking
- Less able to focus / pay attention
- Reaction time is slowed
- Take longer to learn a new task

Executive function shows a significant decline beginning at age 60:

Age-related decline in executive function appears to be a relatively selective cognitive deterioration, generally sparing language and memory function.

Cognitive changes: dementia and MCI

Dementia

- Progressive decline in cognition and/or behavior from a prior level of functioning, caused by brain disease
- Decline in two or more areas: memory, reasoning, language, visual perceptual processes, executive functions, social interpersonal behaviors, or personality.
- Interferes with customary activities and social relationships, causing dependence, alienation.

Mild cognitive impairment (MCI)

- Memory problems or decline in one area.
- Study in 1999 showed of people diagnosed with MCI, after 4 years, about 50% developed dementia.

Aging and memory: what's normal/not?

Normal age-related changes	Signs of more significant changes
Making a bad decision once in a while	Making poor judgments and decisions a lot of the time
Missing a monthly payment	Problems taking care of monthly bills
Forgetting which day it is and remembering it later	Losing track of the date or time of year
Sometimes forgetting which word to use	Trouble having a conversation
Losing things from time to time	Misplacing things often and being unable to find them

Metamemory

- Metamemory is knowledge and awareness of your own memory, including the contents and processes of your memory.
 - *For example, you may realize that you've forgotten the date of a friend's birthday, but you're 90% sure it's in July.*
- Metamemory also includes the strategies you use to help you remember something.
 - *So if you're reminded that your friend's birthday is on July 8th, you may make a mental note of the date and the fact that 8 follows 7 to help you remember next time.*

Impact on self-awareness / insight

- Metamemory deficit in older adults is a potential indicator of impaired decision making.
- Some people may have shock and denial around a diagnosis that may impact their insight.
- Anosognosia is not denial, but an inability to recognize disease or deficits

Anosognosia

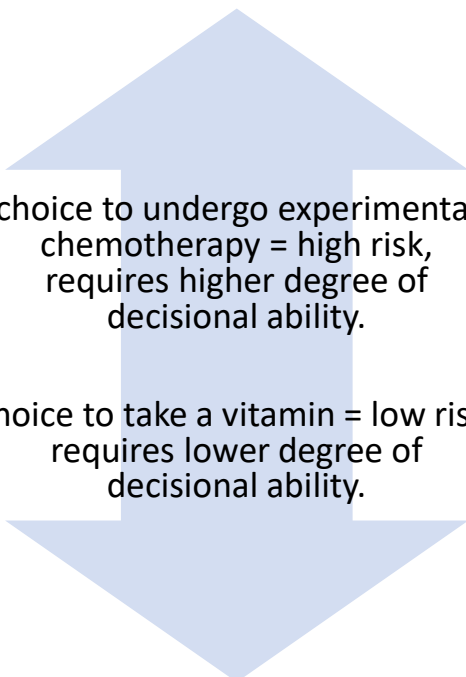
- 60% of people with MCI
- 80% of people with Alzheimer's

Capacity

- **Capacity** – refers to a continuum of decision-making abilities
 - capacity is at the heart of being “at risk”
 - capacity can be measured and is related to cognition
 - but it is not the same as cognition
 (*Marson & Ingram, 1996; Moye & Marson, 2007*)
- **Decisional capacity** – the ability to complete a specific task or make a specific decision such as driving a car or refusing medical treatment
 (*Buchanan, 1990; Charland, 2008*)

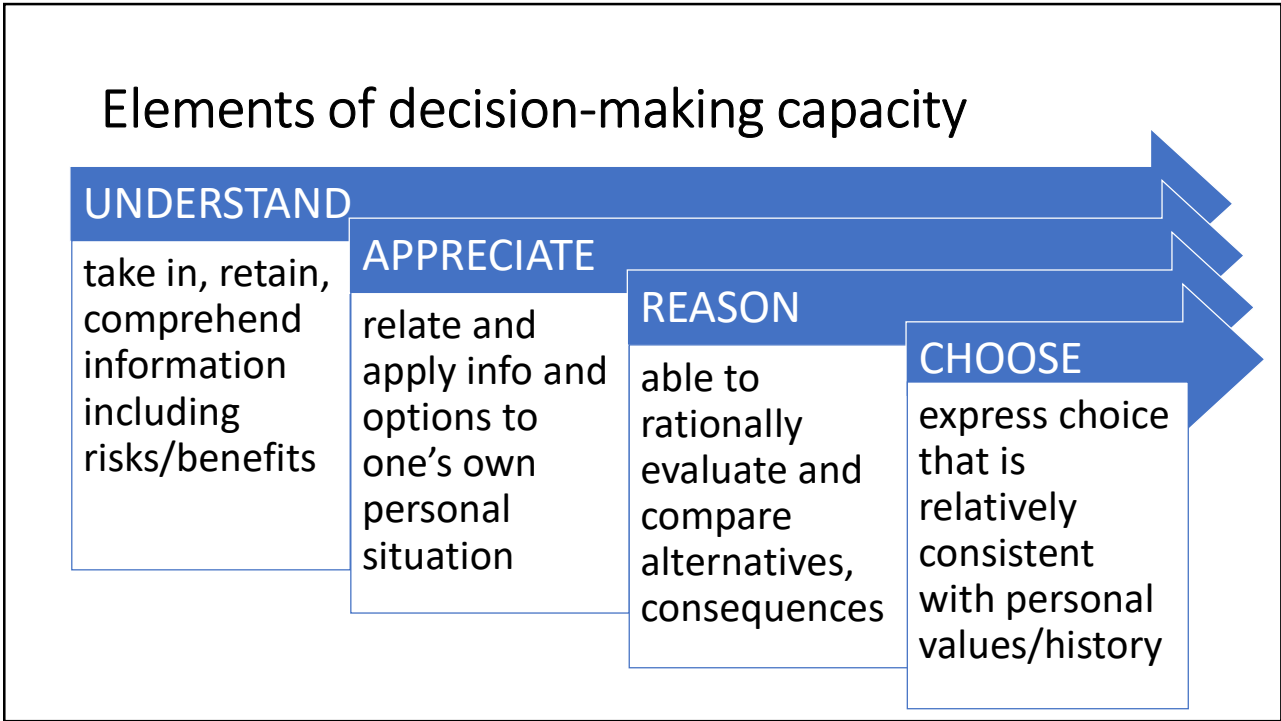
Context of decisions

- The bar is higher for decisional ability when:
 - The decision/situation is more complex,
 - The expected consequences are more serious, or
 - The risk of harm involved is higher.
- Difficult cases are where a partially impaired individual makes a moderately risky decision.



choice to undergo experimental chemotherapy = high risk, requires higher degree of decisional ability.

choice to take a vitamin = low risk, requires lower degree of decisional ability.



Cognition and understanding

Cognitive tasks involved:

- Alertness
- Attention
- Orientation
- Sensation
- Perception
- Receptive language
- Registration / recall
- Episodic memory
- Verbal fluency
- Learning
- Executive functioning

UNDERSTAND

take in, retain, comprehend information including risks/benefits

Hot spots in testing:

- *Episodic memory*
- *Executive functioning*
- *Verbal memory*
- *Phonemic fluency (e.g. naming animals)*

Cognition and appreciating

Cognitive tasks involved:

- Attention
- Memory
- Comprehension/knowledge
- Long-term retrieval
- Self-awareness
- Insight
- Reasoning
- Judgment
- Executive functioning

APPRECIATE

relate and apply info and options to one's own personal situation

Hot spots in testing:

- *Working memory*
- *Episodic memory*
- *Processing speed*

Cognition and reasoning

Cognitive tasks involved:

- Attention
- Memory
- Comprehension/knowledge
- Long-term retrieval
- Calculation
- Visuospatial
- Reasoning
- Judgment
- Executive functioning
- Creativity/imagination
- Planning
- Problem solving

REASON

able to rationally evaluate and compare alternatives, consequences

Hot spots in testing:

- *Executive function*
- *Episodic memory*
- *Expressive language*

Cognition and choosing

Cognitive tasks involved:

- Attention
- Memory
- Creativity/imagination
- Planning
- Problem solving
- Executive functioning
- Visuospatial
- Motor control
- Expressive language

CHOOSE

express choice
that is
relatively
consistent
with personal
values/history

Hot spots in testing:

- *Executive function*
- *Episodic memory*
- *Working memory*
- *Expressive language*

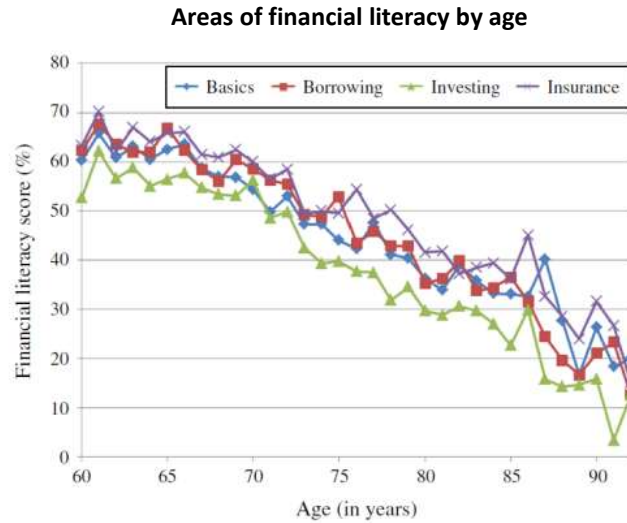
Financial abilities

- **Financial capacity** – ability to make informed decisions on financial issues. (*Marson, 2000*)
- **Financial literacy** – ability to identify, understand, interpret, and use written materials to function effectively in regard to finances.
 - Lower financial literacy is associated with poor savings and investment behaviors, limited wealth, and mental health complaints. (*Lusardi & Mitchell, 2007; Boyle et al., 2013*)
- **Financial performance** – e.g., credit cards, home equity loans, mortgages and car loans.
 - Peaks in middle age: decision-making “sweet spot” is age 53.3. (*Agarwal, et al, 2009*)

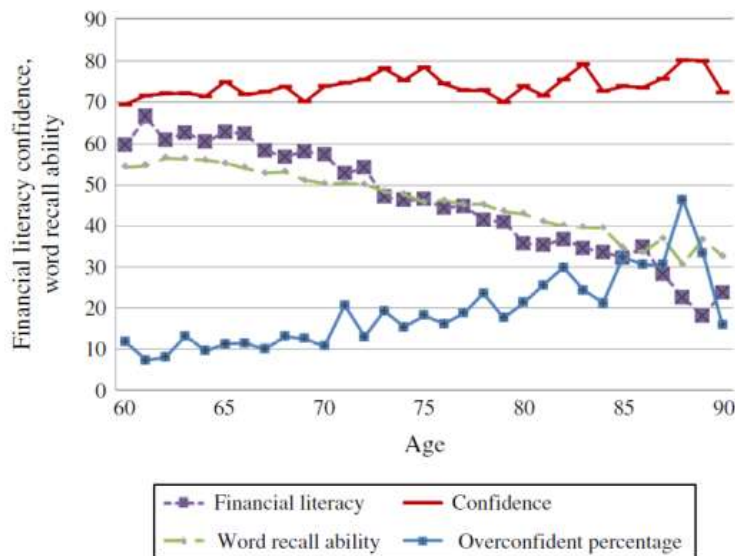
Financial literacy

“A decline in financial and health literacy is subsequently associated with poorer decision making, higher susceptibility to scams, and lower psychological well-being.” (Yu *et al*, 2021)

- Diminished financial decision-making abilities due to MCI or dementia:
 - 1 in 5 people aged 75 to 79
 - 1 in 2 people in their 80s



Confidence vs abilities



Financial capacity warning signs

- Memory lapses – forgetting to pay bills, or multiple payments.
- Disorganization – difficulty staying on top of finances.
- Math mistakes – people with mild cognitive impairment make four times more financial errors. (Roush, 2014)
- Confusion – trouble understanding basic financial terms.
- Impaired judgment – e.g. interest in investments that don't make sense.

Misconceptions

- *“A diagnosis of dementia equates to a lack of decision making ability”*
 - Regions of the brain supporting decision-making capacity are not necessarily affected in early stages of neurodegeneration.
 - Even if some decisional abilities are impacted, people with Alzheimer's tend to want to be involved in decisions, especially when they perform better on cog tests.
- *“Lack of capacity is permanent”*
 - Some deficits can be remediated (not likely with dementia).
- *“Lacking one type of capacity means lacking all others”*
 - Capacity is decision-specific – depends on the complexity of the situation/decision.

Evaluating decision-making capacity

- Defined as “a clinical assessment and opinion as to whether a person has the requisite ability to perform **a task** or to make **a decision** that is being questioned by another.”
(Moye, 2020)
- Our view of capacity has changed over time – and so have our legal and clinical approaches.
(American Bar Association Commission on Law and Aging and American Psychological Association, 2021)

Assessment should include:

- clinical and functional data
- contextual factors of a person’s life
- cognitive and functional abilities
- mental and physical health conditions
- values and personal history
- the level of risk associated with a decision
- supportive and compensatory resources available

**“Capacity assessments
are ultimately human judgments
occurring in a social context.”**

(Moye, Marson)

Highlights from the DOJ symposium

Elder Justice Decision-Making Capacity Symposium: The Role of Decision-Making Capacity in Elder Justice Cases that Reach Civil and Criminal Courts, April 19-22, 2022

- Advances in Aging Brain Research and Its Relevance for Decision-Making (Jason Karlawish, U.Penn Memory Center)
- Impact of Questioning an Older Adult's Decision-Making Capacity: Maximizing Self-Determination, Minimizing Harm (Nina Kohn, Yale/Syracuse)
- Panel discussions:
 - Role of Clinicians in Conducting Forensic Decision-Making Capacity Assessments with Older Adults (Eric Drogin, Laura Mosqueda, Daniel Marson)
 - Decision-Making Capacity of Older Adults in the Justice System Context – separate panels on criminal and civil

Keynote by Charles P. Sabatino, JD

Fail to presume capacity = fail the client

- Not “capacity” – but “capacity to _____”
 - Need to address specific task/decision that is at issue.

(Sabatino led the ABA Commission on Law and Aging, and was editor and co-writer of 2nd edition of Assessment of Older Adults with Diminished Capacities: Handbook for Lawyers, published in 2021.)

Sabatino keynote, continued

“A true assessment seeks the big picture, with all its variability, intermittency, and nuance – each person is a challenging and complex constellation of abilities and limitations in a cultural, social, biological, and environmental context.”

Sabatino keynote, continued

- Screening tests are only one piece – don’t use the tools unless you have clinical training to know how to use the tests (and MMSE is inferior).
- Client’s standards of behavior and values are what’s important – not those of others (e.g. hoarding).
- *“Honor confidentiality and autonomy even in the face of incapacity.”*

Karlawish: evolution of thinking/research

- 1990s: capacity was considered kind of like pornography – “we know it when we see it.”
- Since then, a lot of scholarship has developed around defining and assessing capacity.
- At the same time, there was increasing prevalence and awareness of Alzheimer’s and dementia.

Karlawish: research advances

“Science evolves and changes how we see disease and cognitive aging.”

LATE, or Limbic-predominant Age-related TDP-43 Encephalopathy

- Identified in 2019 – article in journal *Brain* in March 2022.
- Can often be confused for Alzheimer’s disease – also causes memory loss.
- But symptoms tend to progress slower than Alzheimer’s.
- Underlying pathology/cause is completely different from other dementias.
- It only shows up in adults over 80 years old.
- **May occur in as many as 25% of adults over age 80.**

Karlawish: assessing capacity

- Capacity for what? *“Never end a sentence with the word ‘capacity.’ ”*
- Have a plan: open-ended questions, multiple choice
- Begin with assumption that person understands the key facts
- ***It’s not just cognitive testing:*** *“Assessing cognition is distinct and separate from assessing decisional abilities – but they are related.”*
- *“Severity of cognitive impairment increases the odds of impaired ability but cannot substitute for an assessment of ability.”*

Karlawish: ability vs impairment

	<u>Able to perform activity of daily living (ADL), e.g., pay bills?</u>		
		YES	NO
<u>Able to decide how to manage IADL impairment</u>	YES	living independently	dependent and ok
	NO	living independently <i>...but</i>	dependent and not OK

concerning?

Kohn: role and impact of assessment

- The assessment is not only evidence, but also shapes the proceedings and guide behavior:
 - Will the person have capacity to testify,
 - What cases are brought to trial, etc.
 - *“Big responsibility on clinicians, as their assessments have huge impact.”*
- Can be strategic or done for specific end – e.g., evaluate capacity before doing a will, to prevent the will being contested.
- Need to understand and apply correct legal standards.

Kohn: minimizing harm

“The very act of assessing a person is consequential in and of itself – having one’s capacity questioned and their deficits probed can be demeaning, demoralizing, stigmatizing, scary, and can have practical consequences.

Giving people a chance to demonstrate what they CAN do can help counter some of the harm to dignity that’s associated with capacity assessments.”

Panel: clinician's role – best practices

- Not only do you need to know specific decision you're assessing, but what is the underlying issue?
- Are there family/other conflicts that are going to be a challenge down the road?
- Thorough clinical interview looking at every day context as well as clinical evidence.
- Cognitive testing, including testing with specific tasks.
- Info from collaterals.
- Relate all this data to legal questions posed to reach clinical judgment.

Panel: clinician's role – best practices

“Just like dementia does not equal lack of capacity, people can lack capacity without dementia.”

Laura Mosqueda

Panel: clinician's role – consent/refusal

- Dan Marson:
 - Important to get “assent” and establish alliance – want them to feel comfortable.
 - In more adversarial situations, informed consent is essential, more important.
- Laura Mosqueda:
 - Assume capacity unless proven otherwise – want to respect the person.
 - “We might have someone sign a consent in order to do testing that proves they don’t have the capacity to sign the consent.”
- Eric Drogin:
 - Get involved in the informed consent process – you don’t know if they’re capable of consent until you do that. “Unwillingness to participate is not tantamount to disability in and of itself.”
 - If informed consent isn’t required, you might be able to make some observations, but need to be cautious, reflective, clear on what you can and cannot observe.

Panel: clinician's role – key takeaways

- Laura Mosqueda:
 - “We need to look at the policy and systems issues that can bring together clinicians, scientists, social services, law and justice to do better.”
 - **Multi-disciplinary teams: “King County in Washington is really good about it”**
- Eric Drogin:
 - Functional assessment as to the statute and specific requirements of court order, and geared to needs of individual and not their diagnosis.
 - Undue influence – need to assess client alone, and also have collateral sources.
- Dan Marson:
 - You as a clinician are trying to do your best to answer a question presented by the legal system – your clinical judgment has to be tied to legal questions/authority. The ABA/APA handbooks are an excellent source of guidance.

Panel: criminal context

- Jane Walsh (Denver DAO):
 - “Prosecutors have a tetris effect of cases are coming down all the time.”
 - Have to think about structure of case and what kind of case it’s going to be.
- Judge Mindy King (King Co superior court, worked in KCPAO financial crimes):
 - “As a judge, I don’t know what I don’t know – I am reliant on the other players to know what is an issue and what the issues are.”
 - Details needs to be spelled out clearly – should be spelled out as if the judge is a juror in the case. And jurors need to see sufficient cause to convict.

Panel: criminal context

- Candace Heisler (retired assistant DA San Francisco):
 - Often times victims won’t present as having capacity issues. People with good social skills and high education can look great, especially in short visits.
- Randy Otto (University of South Florida):
 - “By definition there is no impaired decision making without underlying impairment”
- Det. Larry “Skip” Swain (Fresno Co. Sherriff’s Office Elder Abuse Unit)
 - Regarding undue influence: “Never had a case that someone admitted to actions” – need to show pattern/links/evidence of actions.

From participant discussion

- Lots of discussion about victims who have been scammed multiple times but are seen as still having capacity.
- Comment by a participant from Alaska:
 - Alaska has financial abuse protective orders to put conservator in place specifically for this reason – can lock finances down while temporary conservatorship is put in place. Don't have to have known scammer or capacity evaluation. Standard is probable cause that they're being defrauded/scammed.
- Another participant brought up Senior Safe Act – gives banks and credit card companies the ability to freeze assets and present legitimate protections.

Symposium materials

Symposium Agenda: <https://www.justice.gov/file/1473151/download>

Resource Guide: <https://www.justice.gov/file/1493656/download>

Literature Review: <https://www.justice.gov/file/1493666/download>

*** Speakers also discussed guardianship issues, alternatives etc. – more info to come at the October meeting of the Elder Abuse Council*

General Resources

- AARP/University of Minnesota (2022). Thinking Ahead Roadmap: a guide for keeping your money safe as you age. <https://thinkingaheadroadmap.org/>
- APA (2021). Guidelines for the evaluation of dementia and age-related cognitive change. <https://www.apa.org/practice/guidelines/guidelines-dementia-age-related-cognitive-change.pdf>
- Jennifer Moye, ed (2020). Assessing capacities of older adults: a casebook to guide difficult decisions. <https://www.apa.org/pubs/books/assessing-capacities-older-adults>
- NIA (2020). Cognitive health and older adults. <https://www.nia.nih.gov/health/cognitive-health-and-older-adults>
- GeroCentral (2021). Evaluating capacities. <https://gerocentral.org/clinical-toolbox/clinical-issues/decision-making-capacity/>
- New Retirement Foundation (2021). Age-related financial vulnerability. <https://www.newretirement.com/retirement/age-related-financial-vulnerability-why-making-financial-decisions-might-be-more-difficult-as-you-get-older/>
- FINRA Foundation (2022). What You Don't Know Can Hurt You: Misjudging memory skills can adversely impact financial decision making in old age. <https://www.finrafoundation.org/sites/finrafoundation/files/Insights-Brief-Memory-Unawareness.pdf>

Thank you!

*This presentation and my personal notes
from the symposium are on my website:*

<https://agingcareconsult.com/for-professionals>

(scroll down to Elder Abuse Council section).

If I can help you with a case or consult on a question, please email!



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