

## 1 **Karin's Notes 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 (Karlawish)
  - Impact of Questioning an Older Adult's Decision-Making Capacity: Maximizing Self-Determination, Minimizing Harm (Kohn)
  - Panel discussions:
    - Role of Clinicians in Conducting Forensic Decision-Making Capacity Assessments with Older Adults
    - Decision-Making Capacity of Older Adults in the Justice System Context – separate panels on criminal and civil

## 2 **Intro keynote by Charles P. Sabatino**

- (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.)
- Fail to presume capacity = fail the client
- Welcome family but talk with client alone – collateral info important, but client is center
- Support client's capacity – enhance capacity by ensuring audio/visual and other supports are in place, enable supported decision making

## 3 **Sabatino keynote**

- There's not any one standard for capacity – standards have changed over the years as cultural norms and scientific understanding have evolved
- Screening tests are only one piece of a thorough and complete evaluation of abilities and capacities. And don't use the tools unless you have clinical training to know how to use the tests \*\* MMSE is inferior
- Not "capacity" – but "capacity to do \_\_\_\_" – need to address specific task that is at issue.

## 4 **Sabatino keynote**

- "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"
- The client's considered or habitual standards of behavior and values are what's important – not the standards and values held by others. Deviance from socially acceptable behaviors is not evidence of incapacity – need to know what their behaviors and history have been like. E.g. hoarding

## 5 **Sabatino keynote**

- Honor confidentiality and autonomy even in the face of incapacity – easy to slip into talking to family members/others to get things done faster or more smoothly. But clients should be at center of what is done even if it takes more time and attention on our part. Should be a high bar to overstep. Breaking confidentiality is counter to your role as the client's advocate.
- The best plan for maintaining capacity is to plan for incapacity – have a network, prepare supports in advance to maintain independence.

## 6 **Karlawish: research advances**

- From 1900 on: the word AUTONOMY > beneficence
- 1971, JAMA published letter from physician calling informed consent a legal gimmick
- 1987, AP investigation into guardianship as a rubber stamp system with no attention to capacity

- 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

#### 7 **1999 new term "Mild Cognitive Impairment"**

- Complaints (by patient or informant) of cognitive decline
- Documented cognitive decline, typically in one domain such as memory
- Relatively preserved IADLs – not dementia, but inefficient
- Often due to medical causes, but sometimes just cognitive aging
  - Cognitive aging – changes in the absence of disease.
  - Simple actuarial fact – the older you are the more likely you are to have cognitive impairment, either by aging or disease.
- Importance of collateral contacts – knowledgeable informants. People report stable abilities, but families/CG recognize changes.

#### 8 **Karlawish: research advances**

- Science evolves, 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
  - Can often be confused for Alzheimer's disease – also causes memory loss
  - But symptoms tend to progress slower than Alzheimer's
  - It only shows up in adults over 80 years old.
  - Underlying pathology/cause is completely different from other dementias
- LATE may occur in as many as 25% of adults over age 80.

#### 9 **Karlawish**

- From age 30 onward we observe changes in cognition without disease.
- Mild cognitive impairment = affecting selected functions
- Dementia = disabling cognitive impairments
- Notably, a diagnosis of cognitive impairment (MCI or dementia) does not determine whether a person lacks decisional capacity.
- Therefore, an understanding of the aging brain and cognitive impairment specifically, can and should inform a capacity assessment.

#### 10 **Karlawish: what to look at**

- Stereotype: dementia is difficulty with ADLs
- Really what is first concerning is IADLs

#### 11 **Financial example**

#### 12 **Assessing function/impairment**

#### 13 **Assessing function/impairment**

#### 14 **Karlawish: assessing capacity**

- Capacity to do what?
  - Never end a sentence with the word "capacity."
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- Have a plan: open-ended questions, multiple choice

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- Begin with assumption that person understands the key facts
  - Can they describe in their own words the situation, risk, benefits, reasons to do X, reasons to not do Y, etc.

#### 15 **Karlawish: assessing decisional abilities**

- It's not just cognitive testing: "Assessing cognition is distinct and separate from assessing decisional abilities – but they are related."
- Cognitive impairment does not mean lack of capacity: "Severity of cognitive impairment increases the odds of impaired ability but cannot substitute for an assessment of ability."
- Scores on cognitive tests have some correlation to, but are not definitive measures of decisional abilities.
- Key indicators of problems include time to complete a task, worsening credit rating.

#### 16 **Tools for specific types of decisions**

- Typically these are interview formats, guide to structured conversation, not yes/no
- These are not cognitive testing
- Scoring methods based on answers

#### 17 **Kohn: Impact of Assessing Capacity**

- Impact of capacity assessment on older adults and efforts to promote elder justice: maximizing self-determination, minimizing harm.
- What is at stake when justice system professionals question older adults' decisional capacity, and when clinicians offer judgments about individuals' decisional capacity.
- Collaboration and dialogue between policymakers, justice system professionals, and clinicians can ensure that capacity assessments have value, and do not lead to unintended or inappropriate consequences

#### 18 **Kohn: role and impact of assessment**

- Evidence:
  - of whether an individual is responsible for their own actions,
  - of whether another person is going to be held responsible for harming the individual (due to incapacity of individual harmed),
  - of whether individual is entitled to make future decisions, etc.
- Not only evidence, but also shape the proceedings and guide behavior – will person have capacity to testify, what cases are brought to trial, etc.
- Can be strategic, done for specific end, e.g. before doing a will to prevent the will being contested.

#### 19 **Kohn: impact – clinician responsibility**

- Big responsibility on clinicians as their assessments have huge impact
- Need to be domain specific – tied to tasks, which are tied to different abilities, e.g. level of understanding to enter into business contract is viewed as higher than for marriage or testamentary/will. Need to specify what understandings are needed for the specific capacity. What type of decision is it?

#### 20 **Kohn: impact – clinician responsibility**

- Need to apply correct legal standards
- Have to understand what is required and measure against that.
  - E.g. have to understand what requirements are for testamentary capacity in order to say whether

a person has testamentary capacity or not.

- Sometimes standards are clearly defined by law/statute, sometimes it's buried in case law, sometimes unclear.
- Standards are different between states and change over time, so standardized tools are challenging – should be skeptical of claims made by tools.

#### 21 **Kohn: impact – clinician responsibility**

- Need to consider abilities and limitations – need complete picture of the person, can the person make decisions with support, what kind of support, etc.
  - E.g. we all get input and advice for all kinds of life decisions – so need to look at what person can do with support, not just what they can do without support.
- “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.”

#### 22 **Kohn: impact – what helps**

- Interdisciplinary collaboration is key.
- Judges and lawyers should be specific in telling assessor what the assessment will be used for, and inform them of the legal standards involved.

#### 23 **Kohn: impact – what helps**

- Evaluators should push back when simply asked to “assess capacity”
  - need to ask specifically capacity to do what?
  - And for X, what does the law in this jurisdiction require for a person to have capacity to do X?
  - garbage question = garbage answer.
  - This pushback will improve outcomes for person being assessed but can also help change underlying system and educate legal profession and those requesting assessments to know more about what these assessments can and cannot do, can and cannot be relied upon for what.

#### 24 **Kohn: impact – what helps**

- Set high expectations for quality and completeness of assessment but also be realistic about the limitations of assessments and what questions they can answer and not.
- Uniform Law Commission currently working on uniform healthcare decisions act to clarify capacity threshold for healthcare POA.
- Definitely talk to attorney or judge to separate out different levels of authority, e.g. common law, judge-made law, case law.

#### 25 **Panel: clinician’s role**

Role of Clinicians in Conducting Forensic Decision-Making Capacity Assessments with Older Adults

- Eric Drogin, JD, PhD, ABPP, Harvard Medical School, Affiliated Lead of Psycholegal Studies, Psychiatry, Law, and Society Program, Brigham and Women’s Hospital
- Daniel Marson, JD, PhD, Professor Emeritus, Department of Neurology, Heersink School of Medicine, University of Alabama at Birmingham
- Laura Mosqueda, MD, FAAFP, AGSF, Professor of Family Medicine and Geriatrics, Keck School of Medicine of the University of Southern California, Director, National Center on Elder Abuse
- Facilitator: Lisbeth Nielsen, PhD, Director, Division of Behavioral and Social Research, National Institute on Aging

#### 26 **Panel: clinician’s role – best practices**

- 1 • 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.
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- 2 • Cognitive testing, including testing with specific tasks.
  - Laura Mosqueda: "Just like dementia does not equal lack of capacity, people can lack capacity without dementia."
  - Info from collaterals.
  - Relate all this data to legal questions posed to reach clinical judgment.

#### 27 Panel: clinician's role – consent/refusal

- Dan Marson:
  - It's important to get "assent" and establish alliance to do effective evaluation – want them to feel comfortable proceeding with you.
  - In more adversarial situations, informed consent is essential and in some senses more important.
  - As a clinician you want to be as neutral and congenial as possible – forensic situations are by their nature adversarial.

#### 28 Panel: clinician's role – consent/refusal

- Laura Mosqueda:
  - Assume capacity unless proven otherwise.
  - "We might have someone sign a consent in order to testing that proves they don't have the capacity to sign the consent" – want to respect the person.

#### 29 Panel: clinician's role – consent/refusal

- Eric Drogin –
  - Get involved in the informed consent process – you don't know if they're capable of consent until you do that.
  - If they understand, and they decline, you're done.
  - If informed consent isn't required, you might be able to make some observations, but need to be cautious and reflective and clear on what you can and cannot observe.
  - "Unwillingness to participate is not tantamount to disability in and of itself."

#### 30 Panel: clinician's role – key takeaways

- Laura:
  - Try to restore capacity. We're too quick to assess and not look at what we can do to help them get better, what medical causes need to be addressed, take into account sensory/accessible issues to help them do their best.
  - "I think we're in a wonderful time when we need to look at the policy and systems issues that can bring together clinicians, scientists, social services, law/justice to do better."
  - Multi-disciplinary teams: "King County in Washington is really good about it"

#### 31 Panel: clinician's role – key takeaways

- Eric
  - Functional assessment as to the statute and specific requirements of court order.
  - Assessments need to be geared to the needs of the individual, not their diagnosis.
  - Undue influence – need to assess client alone, and also have collateral sources.

#### 32 Panel: clinician's role – key takeaways

- Dan:
  - You as a clinician are trying to do your best to answer a question presented by the legal system. The ABA/APA handbooks are an excellent source of guidance.
  - Ultimately your clinical judgement has to be tied to the legal questions being posed, and what jurisdictional authority is going to decide.

### 33 Panel: criminal context

Decision-Making Capacity of Older Adults in the Criminal Justice System Context

- Judge Melinda J. Young, King County Superior Court
- Jane Walsh, Chief Deputy District Attorney, Elder and At-Risk Unit, Denver District Attorney's Office
- Candace J. Heisler, JD, Assistant District Attorney, San Francisco (Retired), Heisler and Associates
- Detective Larry "Skip" Swain, Elder Abuse Unit, Fresno County Sheriff's Office
- Michelle Gayette, APS Director, Assistant Director, Adult & Aging Services, North Dakota Human Services
- Randy Otto, PhD, ABPP, Associate Professor, University of South Florida
- Facilitator: Andy Mao, National Elder Justice Coordinator, and Deputy Director, Commercial Litigation Branch

### 34 Panel: criminal context

- 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.
  - Defense can move to dismiss for lack of evidence – needs to be sufficient and detailed theory of case.
  - Even if there's a plea, there have to be facts in evidence.
  - Can't assume the judge understands capacity issues and can connect the dots – they don't have in depth training and experience in these things, what the tests are what they mean, what the significance is, and how that plays into case.
  - At trial, jurors need to see sufficient cause to convict.

### 35 Panel: criminal context

- Jane Walsh (Denver DAO):
  - "Prosecutors have 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.
  - Aspects:
    - Suspect's exploitative conduct (often overlooked),
    - Instances of deception, influence, money trail, other actions, AV vulnerability, and
    - Collateral evidence – relationships prior to and during concerning events.

### 36 Panel: criminal context

- Heisler – was asked what would she tell prosecutors:
  - Often times victims will not present as having capacity issues, so need to look at regular standards, is there enough evidence to go forward.
  - Diagnosis not determining factor – it's the broader picture.
  - How does whatever medical condition going on impact their functioning.
  - People with good social skills and high education can be deceiving especially in short visit – they

can appear much more capable and more in depth conversation may be needed.

- Also have to establish did defendant know or should they have known about person's impairment.

### 37 Panel: criminal context

- Randy Otto – was asked what should lawyers look for in qualifications for someone to do a capacity assessment:
- “I want to avoid discipline wars, the title or license that a person has isn't key.”
- They should be licensed to do whatever it is they're doing, and they should demonstrate competence, but I would encourage lawyers to assess the prospective examiner's understanding in these areas: normal aging, aging that goes awry, impairments people are more vulnerable to and how those affect functioning,
- “By definition there is no impaired decision making without underlying impairment” – important that if you describe decision making as impaired, need to identify some kind of impairment in the underlying processes.
- “A neuropsychologist said tests are not capaci-meters. None of the screening tools get to capacity – they get to cognitive functioning which if impaired can affect decision making.” They're most helpful with grossly identifying people who are experiencing some kind of impairments.
- DMC is complex and specific. Surprised at how few attorneys aggressively vet – ask for sample of work, de-ID'd report, talk with them, identify atty's they've done work with for references. I'd like to encourage atty's to be more assertive with respect to investigating what examiner has in knowledge and experience.
- Det Skip Swain: For undue influence: “Never had a case that someone admitted to actions” – need to show pattern/links/evidence of actions. Half the case is the alleged perpetrator's activities.

### 38 Panel: criminal context

- In discussion of people 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 based on DV PO and have used it to put conservator in place specifically for this reason – don't have to have known scammer, but can lock finances down while temporary conservatorship is put in place – it's not incapacity in the normal sense but a lot of studies show the “doubt filter” is gone in the brain – they take everything in and believe it, and the scammers call multiple times a day.
  - Initially they are ex parte orders, takes 24-48 hours to get one for 20 days, then can ask for 6 months if needed, normally emergency conservatorship can be done in 72 hrs hours. Don't have to have capacity evaluation. Standard is probable cause that they're being defrauded or scammed in some way.

### 39 Panel: criminal context

- Another participant brought up Senior Safe Act gives banks and credit card companies the ability to freeze assets and present legitimate protections.

### 40 Panel: civil context

*Decision-Making Capacity of Older Adults in the Civil Justice System Context*

- Judge Lauren S. Holland, Lane County Circuit Court, Oregon Judicial Department
- Alison Hirschel, Director & Managing Attorney, Michigan Elder Justice Initiative
- Charles P. Golbert, Public Guardian, Office of the Cook County Public Guardian
- Rima Rivera, New York City Adult Protective Services, Human Resources Administration
- Bonnie Olsen, PhD, Vice Chair for Research, Professor of Clinical Family Medicine, Department of

Family Medicine, Keck School of Medicine of the University of Southern California

- Facilitator: Edwin Walker, Deputy Assistant Secretary for Aging, Administration for Community Living, US Department of Health and Human Services

41  **Panel: civil context**

- Relevance to civil cases, including guardianship, will contests and suits to compensate victims of financial exploitation.
- how decision-making capacity affects respective professional activities,
- what individuals in each profession need to know about decision-making capacity,
- how to assess the qualifications of clinicians,
- how clinicians do and should assess capacity in civil cases
- how these professionals can collaborate.
- Best practices for promoting the elders' dignity and independence.

42  **Panel: civil context**

- Allison – important to have rapport and establish relationship and have collateral e.g. can someone be there that knows them, to say this is a typical day, or usually they are much clearer than they are today, or they are much more confused than usual, etc.
- Bonnie – for activation of POA for bank only needs letter – shouldn't provide them with a lot of health information, but should say that a comprehensive assessment has been done. That comprehensive eval should include MSE, cog testing, collateral info, records, interview with person about their values, preferences. For court, if they use a form need to align content of report with what court is requesting. Should also offer opinion on less restrictive options that could be considered.

43  **Panel: civil context:**

- Retroactive capacity assessment
  - Sometimes just not enough information/evidence to form a good opinion.
  - Need concrete info, medical records, examples of functional ability and behaviors.
  - Issue is that current information may not apply, people change over time, diseases progress.

44  **Panel: civil context**

- Guardianship evaluation worksheet from USC: <https://www.justice.gov/file/1483601/download>
- Will be a webinar in June by national association of state courts - Bonnie's webinar scheduled for June 21. Look for the announcement in a couple weeks at <https://www.justice.gov/elderjustice/events>
- <https://eji.courtllms.org/> - finding the right fit – online training on decision making supports and gship
- [https://www.eldersandcourts.org/guardianship\\_conservatorship/resources-for-courts/Establishing-Guardianships](https://www.eldersandcourts.org/guardianship_conservatorship/resources-for-courts/Establishing-Guardianships)