

FUNDAMENTAL PRINCIPLES TO GUIDE CAPACITY ASSESSMENT

The Ten Commandments of Mental "Capacity" and the Law

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"Capacity" is an evolving term in elder and disability law. Capacity is defined as the ability to perform a task or make a decision. State laws set out standards of legal capacity for various tasks — to consent to treatment, make a will or deed, make a gift or contract.

Clinicians provide evidence on capacity for lawyers and courts. In guardianship, a judge makes a broader determination in which a finding of "incapacity" can result in a drastic loss of rights.

But recent changes have called the legal term "capacity" into question. The U.N. Convention on the Rights of Persons with Disabilities in Article 12 recognizes that "persons with disabilities enjoy legal capacity on an equal basis with others in all aspects of life" and that governments must take measures to assist individuals in exercising their capacity. The emerging principle of supported decision-making focuses on providing the needed support to help people make decisions. Finally, the 2017 Uniform Guardianship, Conservatorship and Other Protective Arrangements Act (UGCOPAA), approved by the Uniform Law Commission for adoption by state legislatures, does not use the term "capacity" — rather, it guides courts in determining whether there is a "basis" for the appointment of a guardian, taking into account needed supports and supported decision-making.

That said, the term "capacity" still remains in widespread use in the legal and clinical fields. Basic principles of capacity woven throughout the American Bar Association/American Psychological Association handbooks on "capacity assessment" offer key practice tips to enhance self-determination. In that context, the "Ten Commandments" below are fundamental to elder and disability law.

I. Thou shalt presume capacity.

As a legal and ethical matter, capacity of all adults is presumed. Under international legal standards, persons with any kind of disability enjoy legal capacity on an equal basis with others in all aspects of life. Where one's capacities are questioned in a court of law or elsewhere, the burden of establishing any diminution is on the party challenging capacity to put forward sufficient evidence to meet a requisite burden of proof.

II. Thou shalt talk to the client alone.

A private meeting with the client or prospective client helps the lawyer identify the client, assess the prospective client's abilities and limitations, determine needs for supports, and understand his or her wishes, unencumbered and uninfluenced by others.

III. Thou shalt take steps to maximize client abilities.

Often overlooked are strategies that can enhance client abilities by, for example, adjusting the time or place of meetings or improving the visual or auditory environment, or in myriad other ways. The Model Rules of Ethics commentary to Rule 1.14 advises that, in taking any protective action, the lawyer should seek to maximize the client's capacities. Accomplishing that before getting to the point of needing protective action is equally important, if not more so.

IV. Thou shalt not worship any one standard for capacity.

There is no universal standard for assessing capacity. State law definitions in guardianship laws vary by state. Case law definitions of capacity to perform different legal acts vary. Clinical approaches to capacity can vary by discipline and testing modality. It is the quality and depth of assessment that is most important.

V. Thou shalt not covet the mini-mental status exam.

In addition to the widely known Mini-Mental Status Exam (MMSE), there are a variety of other cognitive screening tests that clinicians may use. Screening tools such as the MMSE are often given too much weight, and they do not in themselves provide sufficient evaluation of capacity. While lawyers have a role in screening for capacity, the use of these clinical tools is not advisable absent professional clinical credentials.

VI. Thou shalt not end any query with only the word "capacity." Yea, the proper query shall be, "Capacity to do What?"

Capacity is task-specific and must be examined with a focus on the action or function being questioned. The lack of ability to perform one act (e.g., consent to health care decisions) does not mean that the individual lacks the ability to perform a different, even related, act (e.g., appoint a proxy to make health care decisions).

VII. Thou shalt seek the big picture, with all its variability, intermittency, and nuance.

Each human being presents a unique and changing constellation of abilities and limitations, operating within cultural, social, biological, and environmental influences. Assessing capacity requires grasping the interaction of a much larger set of factors than is commonly appreciated.

VIII. Thou shalt honor thy client's own considered or habitual standards of behavior, goals, and values, not those held by you or others.

A person's deviance from behaviors considered socially acceptable or rational is not a valid standard for assessing capacity. It is the person's own considered or habitual standards or goals that form the baseline for assessment. It is not the decision itself that bears examination but rather the process by which the decision was reached, and the extent to which it is in accord with the client's longstanding values and preferences.

IX. Thou shalt honor thy client's confidentiality and autonomy even in the face of incapacity.

In the face of a client's diminished decisional and communication abilities, it is easy to slip into relying on or communicating with others to accomplish representation. But, obligations of confidentiality are no less strict for such clients, absent a justification for protective action pursuant to Model rule 1.14. The objectives and means of representation should still be driven by the client's goals and values.

X. Thou shalt plan ahead to ensure that one's wishes are respected.

Many of the problems and challenges posed by diminished decisional abilities are best met by planning ahead to ensure that effective supports are in place. Thus, the most important commandment is to plan well before the problems arise. This may include, among other things, planning for supportive housing and long-term support services, identifying a network of helpers, or appointing surrogate decision-makers for financial and health matters. There is no such thing as fail-safe planning, but without planning, the prospects for preserving personal autonomy dim significantly.



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