



CONSENT AND CAPACITY IN INDIAN COUNTRY

Elder Abuse and the Connection to Consent, Capacity, and Undue Influence

An older adult's ability to make their own decisions, consent, capacity, and undue influence are several factors to consider in elder abuse cases and guardianship. Some older adults may experience challenges with being unable to receive and evaluate information, make or communicate decisions, or perform activities of daily living (ADLs). The following information will help understand capacity assessment and guardianship proceedings of American Indian/Alaska Native (AIAN) older adults.¹

- **Consent** is an act of reason and deliberation by a person who possesses and exercises sufficient mental capacity to make a decision.
 - Consent generally consists of 3 elements; does the person have:
 - i. Capacity to make decisions;
 - ii. Knowledge of the true nature of the act;
 - iii. Ability to act freely and voluntarily according to their own will.
- **Capacity** is an element of consent and must be established in many cases of elder abuse.
 - To have capacity, one must have the cognitive ability to make decisions and engage in activities of daily living.
 - The law presumes that adults have capacity and are legally competent unless a court decides otherwise.
- **Undue Influence** is a situation where an individual uses their role and power to exploit, create dependency, or instill fear over another person.
 - Victims may not realize that undue influence has occurred. When questioned about decisions, the victim may side with the perpetrator.²

SIX PILLARS OF CAPACITY OF OLDER ADULTS

A comprehensive assessment of capacity for guardianship proceedings requires collecting information in 6 areas:

MEDICAL CONDITIONS

Medical conditions are disabling conditions that include physical illness, physical disability, advanced age, or neurological and psychiatric conditions.

- Judges now require a specific diagnosis or condition underlying diminished capacity.
- Some conditions causing incapacity may be temporary or reversible.

COGNITIVE FUNCTIONING

Cognitive functioning includes abilities such as reasoning, communicating, demonstrating visual-spatial abilities, alertness, and insight.

- Many state laws include cognitive functioning as a component of statutory standards.

MEDICAL CONDITIONS

Everyday functioning is one's ability to provide for their essential needs.

- There are two categories of everyday functioning:
 - o ADLs are fundamental skills of self-care that include eating, driving, dressing, grooming.
 - o Instrumental activities of daily living (IADLs) are activities related to independent living that include managing finances, health, social, community activities and relationships.

CONSISTENCY OF CHOICES

Consistency of choices with values, preferences, and patterns reflect an older adult's capacity. Choices that are linked with lifetime values are rational for an individual even if outside the norm. These values may impact the elder's preference for whom is named guardian.

RISK OF HARM AND SUPERVISION

Risk of harm and level of supervision needed is to determine what degree of supervision will address the individual's needs and mitigate the risk of harm.

MEANS TO ENHANCE FUNCTIONING

Means to enhance functioning if an older adult has a disability, providing accommodations and appropriate medical, psychosocial, and educational interventions need to be considered. A disability alone should not be a ground for guardianship since most can be accommodated with appropriate interventions.

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Techniques to Enhance Elder Client Capacity

- Functional limitations and cognitive impairments do increase with age, and many older adults are not limited by diminished capacity or physical conditions.
- Legal professionals should be informed and equipped to manage these issues and not assume all older clients are impaired.³

Lawyer's Assessment of Capacity

- A lawyer's capacity assessment can guide law enforcement and prosecutors when determining if the victim provided consent and are able to participate in the investigation or legal process.
- Capacity evaluations help clarify any cognitive deficits or neurodevelopmental disorders that may deem an older adult incompetent or unable to consent.
- Some diseases, such as Alzheimer's, impact memory and other cognitive domains while verbal and social skills remain intact.³

Formal Capacity Assessment

- A legal capacity assessment is more comprehensive than a lawyer's assessment. This type of evaluation provides valid and reliable evidence of a person's decision-making and functional abilities. The court will ultimately decide if an older adult lacks capacity and to what extent.³

Cultural Considerations for Capacity Assessment

- Persons from diverse backgrounds may not perceive structured tests as being aligned with their worldviews.
- Cultural variables such as language, economic status, familial roles, and perceptions of institutions (e.g., hospitals) can impact assessing capacity.
- AIANs memories are related to an oral tradition of storytelling.
- Without the story or where the facts come from, questions often do not make sense.
- Words the elderly patient is expected to remember need to be relevant to his/her life.
- Some words may be challenging to remember.
- Reasoning processes may be less linear-sequential-analytic and more global and holistic.⁴

Cognitive Impairment Test Issues

- Issues with the current cognitive impairment test include:
 - o Cognitive tests are often based on middle-class Euro-American norms and are not culturally relevant to AIANs.
 - o AIAN cultural norms may see cognitive decline as a normal part of the aging process and dying.⁵
 - o Many AIAN also utilize cultural resources, beliefs, extended family, traditions, and spirituality as physical and emotional supports that do not equate with mainstream cognitive tests.⁴

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