

Closing the Justice Gap for Older Adults Part Two: Representing Clients with a Range of Decisional Capabilities

- Introduction:
 - Tovah Kasdin, Administration for Community Living
 - Francis Nugent, Legal Services Corporation
- Jim Berchtold, Justice in Aging
- Emily Miller, Michigan Advocacy Program (CVLAP)

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Housekeeping

- All on mute. Use Questions function for substantive questions and for technical concerns.
- Problems getting on the webinar? Send an e-mail to NCLER@acl.hhs.gov.
- Written materials and a recording will be available at NCLER.acl.gov. See also the chat box for this web address.

About NCLER

The National Center on Law and Elder Rights (NCLER) provides the legal services and aging and disability communities with the tools and resources they need to serve older adults with the greatest economic and social needs. A centralized, one-stop shop for legal assistance, NCLER provides Legal Training, Case Consultations, and Technical Assistance on Legal Systems Development. Justice in Aging administers the NCLER through a contract with the Administration for Community Living's Administration on Aging.

Introductions

- Francis Nugent, Legal Services Corporation
- Tovah Kasdin, Office of Elder Justice and Adult Protective Services at ACL

About Justice in Aging

Justice in Aging is a national organization that uses the power of law to fight senior poverty by securing access to affordable health care, economic security, and the courts for older adults with limited resources.

Since 1972 we've focused our efforts primarily on populations that have traditionally lacked legal protection such as women, people of color, LGBT individuals, and people with limited English proficiency.

About the Crime Victims Legal Assistance Program

- Funded by the Victims of Crime Act (VOCA).
- Staff are embedded throughout Michigan in LSC funded field offices.
- Free legal assistance in civil cases.
 - Client must be 60+ or “vulnerable adult.”
 - Client must be survivor of abuse, neglect, or exploitation.
- No need for police report or conviction.

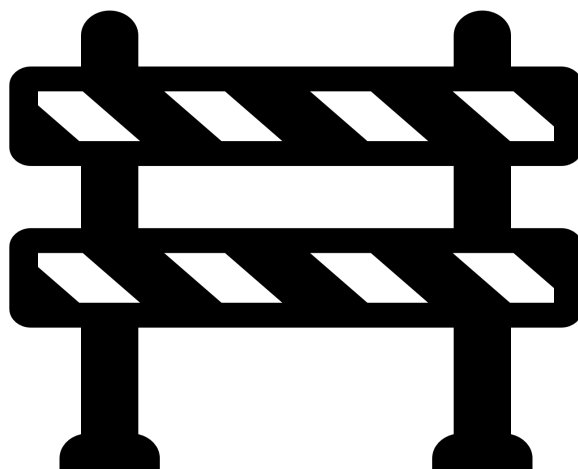
Key Lessons

- Impaired decisional capability does not normally prevent representation or a productive attorney-client relationship.
- The involvement of third-party supporters for older adults does not violate the ethical rules and can actually help the lawyer.
- An appointed fiduciary does not mean an older adult is unable to retain an attorney or control their own case.
- Lawyers are required by law and ethics to remove barriers to communication and access to services to promote access to justice. There are many ways to do this.

Access to Justice Barriers

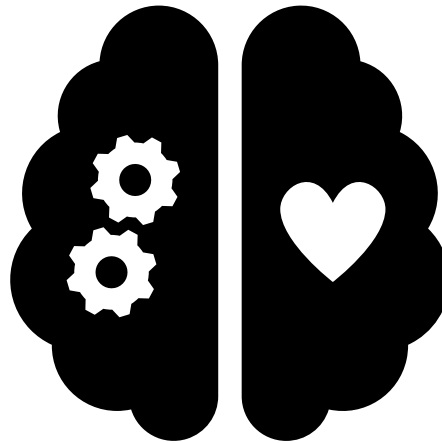
- Older adults and individuals with cognitive impairments face barriers when attempting to access and sustain legal services for an array of reasons:
 - Questioned decisional capability and unconscious bias;
 - Reliance on informal supports like third parties;
 - Misunderstandings regarding the rights of individuals with appointed fiduciaries; and
 - Need for modification of standard practices and procedures.
- Representation of older adults with impaired decisional capability can also present unique challenges for legal services attorneys.

What are the barriers and the challenges?



And how do we overcome them?

Barrier 1: Decisional Capability & Bias



Terminology

- “Decisional capability” is the ability to make an informed decision or choice.
- Why “capability” instead of “capacity?”
 - “Capacity”
 - Implies a maximum level that’s fixed and frozen.
 - Implies a binary choice – on/off, yes/no, capacity/incapacity.
 - Divorced from context – capacity to do what?
 - “Decisional Capability”
 - The quality of being “capable” and able to do something.
 - Implies potential that can be developed and improved under the right conditions and with the right supports.
 - Wedded to context – the ability to do something specific (make a decision).

Decisional Capability is:

- A spectrum
 - Comatose to genius – not all or nothing, not on/off.
- Not static
 - It can vary and change day to day, become stronger or weaker, return, and be developed.
 - It can be adversely affected by medications, illness, pain, stress, diet, dehydration, lack of sleep, substance abuse, time of day, grief, mental health, hearing, or vision loss.
- Domain specific
 - The capability to do what?

Decisional Capability to Do What?

Money
Management?

Medical
Decisions?

Selling
Property?

Choosing
Visitors?

Intimate
Relationships?

Signing
Contracts?

Executing a
Will?

Smoking?

Executing
Powers of
Attorney?

Living
Arrangements?

Signing a
Retainer?

Settling
Litigation?

Decisional Capability is NOT:

- Synonymous with or proven by:
 - Memory loss or medical diagnosis
 - Remember – it’s a spectrum, not static, and domain specific.
 - Bad decisions, refusal to follow advice, refusal to act in one’s “best interest”
 - “Dignity of risk”
 - Appointment of a fiduciary
 - #FreeBritney
 - A checklist or a test
 - A useful tool does not take the place of reason, insight, and judgment.
 - Old age

Implicit Bias

- Implicit bias refers to subconscious attitudes and stereotypes that affect a person's perceptions and behaviors in an unconscious manner.
 - Developed over a lifetime as cognitive shortcuts – ways your brain categorized information and evidence.
 - Everyone has them – even individuals who consciously reject stereotypes, racism, ethnocentrism, etc.
 - Test yourself with one of the Implicit Association Tests from Harvard's Project Implicit (www.implicit.harvard.edu).

Ageism

- “Ageism” is the stereotyping of and discrimination against people because they are old.
 - Globally 1 in 2 people are ageist (WHO).
 - Linked to earlier death, poorer physical and mental health, increased likelihood of risky behavior, lower quality of life.
- On meeting someone, we categorize three things first: gender, race, age.
 - Think about the last time you heard a joke about someone’s age, saw a negative and stereotypical portrayal in a movie or on TV.
- Ironically, the only “ism” we all experience (if we’re lucky).

How Bias & Ageism Impact Legal Representation

- Unconscious bias and ageism change how we communicate and interact and negatively impact assessment of decisional capability.
- What ageist stereotypes have crept into your practice/office?
 - 62% of low-income older adults experienced at least one civil legal problem in 2021. 91% did not receive enough or any help ([LSC Justice Gap Report](#)).
- Implicit bias can be un-learned
 - See people as individuals
 - Be mindful of your responses and reflect
 - Purposefully increase your exposure

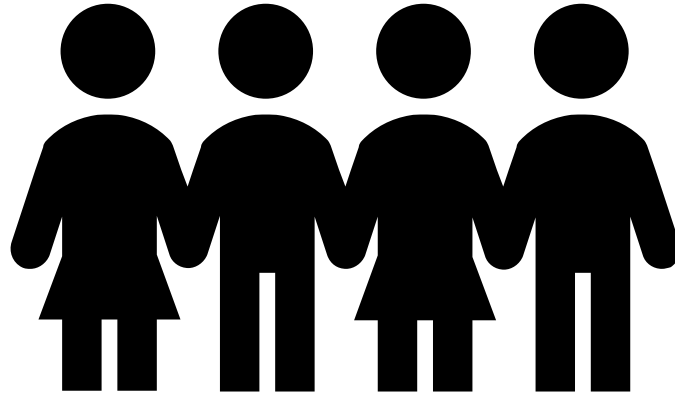
ABA Model Rules of Professional Conduct

- Model rules require only that lawyer is able to communicate sufficiently with client to allow client to understand to the degree needed for the client to give informed consent regarding the object (goal) of the representation.
 - Rule 1.0 – “informed consent” is “the agreement by a person to a proposed course of conduct after the lawyer has communicated adequate information and explanation about the material risks of and reasonably available alternatives to the proposed course of conduct”
 - Rule 1.4 – “A lawyers shall . . . keep the client reasonably informed about the status of the matter. . . . A lawyer shall explain a matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation.”
 - Rule 1.2 – “[A] lawyer shall abide by a client’s decisions concerning the objective of representation”
- Rule 1.14 – “When a client’s capacity to make adequately considered decisions . . . is diminished, . . . the lawyer shall, as far as reasonably possible, maintain a normal client-lawyer relationship with the client.”

Common Concerns

- Can I form an attorney-client relationship with the client?
 - Almost always yes – intent and conduct (Restatement), request and agreement (Model Rules)
- Can the client sign a retainer agreement?
 - Almost always yes – degree of “contractual capacity” depends on complexity of transaction.
- Does the client have the requisite “legal capacity” for the transaction being contemplated?
 - Are there supports that would address concerns and allow the client to complete the transaction?
- Other practical considerations

Barrier 2: Third Parties



Celebrate Third Parties!

- Older adults and individuals that are neurodiverse often rely on informal supports (non-fiduciary relationships) to maintain independence and autonomy. The arrangement helps resolve issues such as:
 - Lack of access to communicative technology (like a phone or email)
 - Lack of transportation
 - Services lacking the necessary accommodations to serve their needs (ex: ASL interpreters)
 - Desire for support and guidance when making big decisions

Third Party = Solicitation?

- Despite informal supports being a good thing in other aspect of their lives, informal supports can prevent clients from accessing legal assistance.
- Solicitation concerns result in clients being turned away **at intake** because a third party (without a fiduciary role) calls on behalf of the individual to request help.
- Legal offices are concerned that the third party does not have authority to speak on the individual's behalf and following up with the client would result in ethical violations due to solicitation.

What Even is Solicitation?

- It is communication that is initiated by the lawyer to a potential client.
- Solicitation rules were largely created to protect clients from predatory attorneys seeking to take advantage of people who are vulnerable and in need of help.

ABA Model Rules of Professional Conduct

- Rule 7.3(b): A lawyer shall not solicit professional employment by live person-to-person contact when a significant motive for the lawyer's doing so is the lawyer's or law firm's pecuniary gain.

Public Interest Exception

Model Rule 7.3

- Because non-profit legal aid offices are not allowed to charge clients fees for services, they are not motivated by pecuniary gain.
- This distinction exempts them from this rule, provided they do not engage in behaviors that are harassing, fraudulent, or seeking to exert undue influence.
- United States Supreme Court has repeatedly confirmed that public interest lawyering should not be subject to solicitation restrictions (ex: *NAACP v. Button*).
- Many States Codes of Professional Conduct are identical or have similar exceptions.

LSC Rule on Solicitation

45 CFR 1638

- 1638.3 Prohibition

- (a) Recipients are prohibited from representing a client as a result of in-person unsolicited advice

- 1638.4 Permissible Activities

(a) This part does not prohibit recipients or their employees from providing information regarding legal rights and responsibilities or providing information regarding the recipient's services.

(b) A recipient may represent an otherwise eligible individual seeking legal assistance from the recipient as a result of information provided as described in § 1638.4(a), provided that the request has not resulted from in-person unsolicited advice.

(c) This part does not prohibit representation or referral of clients by recipients pursuant to a statutory or private ombudsman program that provides investigatory and referral services and/or legal assistance on behalf of persons who are unable to seek assistance on their own, including those who are institutionalized or are physically or mentally disabled.

LSC Generic Info Exception

1638.4 Permissible Activities

- (a) This part does not prohibit recipients or their employees from providing information regarding legal rights and responsibilities or providing information regarding the recipient's services

- LSC Advisory Opinion 2020-2004: An LSC grantee may represent an individual the grantee *initiated contact with over the telephone or via text message* so long as the communication provides only generic, form material that is not tailored to the individual receiving it or the specific facts relating to the individual's legal issues. [AO-2016-001](#). The initial communication may advise that lawyers are available but may not advise that "you should get a lawyer for this type of proceeding."

What Does That Mean? (1 of 2)

- When a third party contacts a legal aid office on behalf of a potential client, the legal aid office can follow up via phone or text with the potential client and explain, generically, what rights the potential client has and that free lawyers are available to assist them.
- If the client responds to the general information and asks for one of those lawyers to assist them, you can then proceed to do the client's intake.

LSC Ombudsman Exception

- (c) This part does not prohibit representation or referral of clients by recipients pursuant to a statutory or private ombudsman program that provides investigatory and referral services and/or legal assistance on behalf of persons who are unable to seek assistance on their own, including those who are institutionalized or are physically or mentally disabled.


LSC believes that Congress intended to prohibit legal services programs from soliciting clients who are otherwise able to independently seek legal aid but **Congress did not intend to prohibit assistance to those served by Federal & State ombudsman programs for individuals who are unable to seek independently the legal and other care that they need.** Federal Register, Vol 62, No. 76, Pg. 19424 (April 21, 1997)

What Does That Mean? (2 of 2)

- If a legal services office receives a client referral from an “ombudsman program,” that office is allowed to reach out directly to the client and proceed with providing advice and representation.
- What is an ombudsman program?

Third Party Caution

- While third parties (who are not fiduciaries) can help clients *get in the door* for intake, they have a limited role after that point.
- They are not entitled to documents, updates, decision making power, access to meetings, an explanation of your advice, etc.
- Boundaries with third parties will clarify
 - Client identification
 - Conflicts of interest
 - Confidentially
 - Decisional capabilities




Why am I left in the waiting room?

Understanding the Four C's of Elder Law Ethics

Prepared by:
ABA Commission on Law and Aging
Washington, DC • www.americanbar.org/aging • 2017

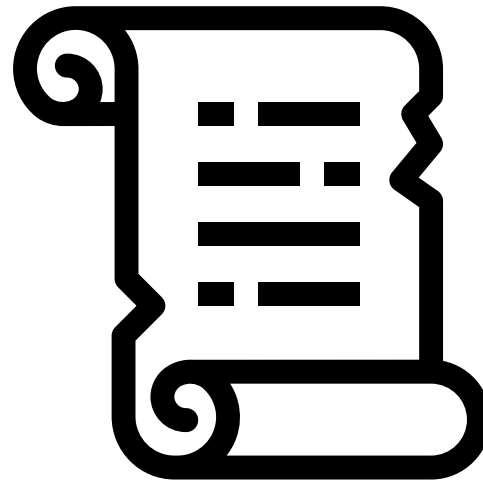
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[Why am I left in the waiting room? Understanding the Four C's of Elder Law Ethics](#)

Barrier 3: Appointed Fiduciaries



Types of Fiduciaries

- Financial Power of Attorney
- Health Care Power of Attorney
- Representative Payee
- Guardian
- Conservator
- Trustee
- Responsible Party
- Special Fiduciary
- Next Friend
- Others under state law

Fiduciary Foibles

- Clients may have an appointed fiduciary that legal services offices will need to figure out how to navigate. This can raise many questions:
 - **Who am I supposed to listen to?**
 - Are they friend or foe?
 - What type of fiduciary are they?
 - Have their powers activated?
 - What powers do they have?

Ground Rule—Listen to Your Client

- Friend or foe, active or inactive, guardianship or POA, **you still need to take direction from your client**, unless your client has no decisional capability *at all*.
- *If the fiduciary is a foe*, you need not include them in anything beyond those things that would include opposing parties (ex: service of process, notice of hearings, etc.).
- *If the fiduciary is a friend*, think of them as a convenient stand-in to help facilitate the procedure of the case and to help support the client's decision making, but not as the client.

ABA Model Rules of Professional Conduct (1 of 2)

- Rule 1.14(a): When a client's capacity to make adequately considered decisions in connection with a representation is diminished, whether because of minority, mental impairment or for some other reason, **the lawyer shall, as far as reasonably possible, maintain a normal client-lawyer relationship with the client.**

Read the Fiduciary Documents

- Even though your client is your north star, you still need to get a copy of and carefully review the fiduciary paperwork.
- Each of the documents that gives a fiduciary power is (supposed to be) written with specificity.
- The words in it (or not in it) matter a lot (ex: the existence of gifting powers in POA).
- Sometimes there is even a definition section that explains the meaning of ambiguous words.

Barrier 4: Modification of Standard Practices and Procedures



ADA Accessibility

- No individual shall be discriminated against on the basis of disability – Title III of the ADA
- Law offices are required to afford ADA protections to individuals with “mental impairments,” which can include impairments that impact decisional capabilities and limit life activities like “learning, reading, concentrating, thinking, writing, communicating, [and] interacting with others.”
- This requires making reasonable modifications to policies, practices, and procedures that create barriers to making services accessible to individuals with impairments.

ABA Model Rules of Professional Conduct (2 of 2)

- Preamble: A Lawyer's Responsibilities
 - “A lawyer’s conduct should **conform to the requirements of the law**, both in professional service to clients and in the lawyer’s business and personal affairs.”
 - “[A] lawyer should seek improvements of . . . **access to the legal system** [A]ll lawyers should devote professional time and resources . . . to ensure **equal access** to our system of justice for all those who because of **economic or social barriers** cannot afford or secure adequate legal counsel.”
- Rule 8.4 Misconduct
 - “It is professional misconduct for a lawyer to engage in conduct that the lawyer knows or reasonably should know is . . . **discrimination on the basis of . . . disability [or] age**”

Ideas at Intake

- All staff trained on basic communication techniques, the aging process, disability concerns, implicit bias and avoiding stereotypes.
- Forms in large print, electronic/screen readable, plain language.
- Assistance with reading and filling out forms.
- Optional online intake, phone intake, walk-in intake, etc.

Ideas at Initial Interview

- Meet with new client alone. Explain in advance to relatives or friends. Do not talk past client or about client to family members.
- Be aware of environment. Face client, get attention before speaking, be alert for signs of hearing loss. If using a computer, make sure it doesn't block eye contact.
- Begin meetings with small talk to build rapport, relax client, and enhance client comfort. Simple questions requiring brief responses help gauge understanding and optimal pace.
- Give up the need for constant control – employ client-centered interviewing, fewer closed-ended questions – listen without interruption – “I'd like to hear what's on your mind,” “What brings you to the office today?” And guide from there.
- Discuss confidentiality.
- Manage expectations and set parameters.
- Create a communication plan.

Ideas for Appointments

- Whenever possible, conduct business where client is at (home, hospital, facility, etc.) – makes client more relaxed, optimizes decision-making, and provides attorney with clues about “real world” functioning and issues.
- Schedule appointments for times when the client is at peak performance. Try speaking with client on several different occasions, at different times of day.
- Schedule multiple, shorter appointments rather than one lengthy appointment.
- Provide time for rest and bathroom breaks.

Ideas to Promote Communication and Understanding (1 of 2)

- Conduct business at a slower pace. Allow extra time for responses to questions.
- Discuss one issue at a time. Break information into smaller, manageable segments. Use basic terms, avoid legalese, acronyms, slang, and shorthand.
- Repeat, paraphrase, summarize, and check periodically for accuracy of communication and comprehension.
- Provide summary notes and information sheets to facilitate later recall, include key points, decisions to be made, and documents to bring to next meeting.
- Get as many source documents as possible, get client's permission to speak with family members, etc.

Ideas to Promote Communication and Understanding (2 of 2)

- Communicate regularly or in accordance with a set schedule you've established. Identify the best means of communication and stick to it.
- Request reasonable accommodations with the court like assistive technologies, interpreters (including transliterator), real-time transcriptions, relocating a proceeding to a physically accessible courtroom, continuance, limiting/controlling pace of examination.
- Decision supports work to maximize the capacity of the person by helping them to understand the issues and options, and help the person reach a personal choice. Goal is to maximize decision-making autonomy.

Questions?

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Case Consultations

Case consultation assistance is available for attorneys and professionals seeking more information to help older adults. Contact NCLER at ConsultNCLER@acl.hhs.gov.