

UNDERSTANDING CAPACITY & DECISION-MAKING VIDEO TRANSCRIPT

I'm Paul Bourque, President and CEO of the Investment Funds Institute of Canada. IFIC is preparing materials to assist advisors and firms in managing effective and productive relationships with their aging clients. It's important to remember that aging clients have special requirements in order to protect their financial well-being. For example, they may need help in preparing decision-making documents for when they're less able to manage their financial investments or perhaps to recognize signs of elder abuse or diminished capacity. IFIC is partnering with CARP to develop videos in three very important areas-- elder abuse, consent and decision-making, and elder-friendly practices for your firm. We hope these resources, along with other resources that are available at IFIC.ca, can help you in managing these very important relationships. Thank you for watching.

My name is Carole Cohen. I'm a geriatric psychiatrist, and I'm also a consultant to the Capacity Assessment Office at the Ministry of the Attorney General in Ontario. I was asked to talk to you today about the concept of capacity. So I hope I can be helpful and explain a very complicated concept and how you might encounter it and what you might do to assess it.

So capacity is a medical-legal concept. As a geriatric psychiatrist, I'm going to talk from my vantage point as to what it is and my understanding of it. It's an individual's ability to understand information and to understand options about their situation and to appreciate the consequences of choices they might make when they make a decision about a particular situation they're facing. So capacity is very much dependent on that person's situation. So it's very context and situation-specific.

If we're talking about finances, for instance, someone may be capable to manage a very small amount of money in a small estate, but they may have more difficulty if their finances are more complicated. So one needs to understand that individual's situation and the context on how they're operating.

The other thing that's really important to understand about capacity is, it's domain or task-specific. So someone can be capable of doing one thing and at the same time not be capable of something else. For instance, someone could be capable of granting a power of attorney, understanding what they're doing in signing that document and what powers they're giving another individual, but they may not be capable of themselves managing their own finances, which could be a more complicated task.

So capacity is domain and task-specific, and it's very much context and situation-specific. Across Canada, it's also, in some ways, jurisdiction-specific-- and I'm not going to speak to that today-- in that the laws differ from province to province and territory to territory. So it's very important to understand the laws in the jurisdiction where you operate.

That's a basic introduction to what capacity is. And who are the folks that might have difficulties with capacity? Who are the folks that might have some challenges and problems that make them incapable of managing their finances, giving instructions? There's usually four groups of individuals who have trouble with capacity.

The first group is individuals who have intellectual disability who may never have learned about financial concepts. They may never have understood what numbers are, how to add or subtract.

Other individuals who might have capacity issues might be individuals with psychiatric disorders. Not everyone who has a psychiatric disorder is going to be incapable, but sometimes, when people are acutely ill, in the context of their

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psychiatric illness, they may have trouble managing their finances, giving instructions, and may not be capable in all domains.

So individuals with intellectual disability, individuals with psychiatric disorders.

A large, large group is individuals who are aging and have other kinds of problems that come with aging. Those two major groups consist of people who have what we call neurocognitive disorders-- and those would be things like dementia, and I'll explain more about that-- and individuals who have other kinds of acquired brain injuries either due to a motor vehicle accident or other kinds of neurological disorders, Parkinson's disease, other kinds of things that might affect individuals' ability to understand and appreciate and think. So those are the kinds of folks who might have difficulties with their capacity.

It's really important to understand that not everyone who's older is going to be incapable of managing their affairs, granting a power of attorney, or be incapable of lots of other things that they might be asked to do day to day. So it's important to understand that capacity is not determined by a number of very important factors.

It's not determined by age. It's not determined by diagnosis. It's not determined by lack of education about something that someone has to make a decision about. So it's really important if someone hasn't been educated about a decision that they not be then questioned about it and found incapable. For instance, if a woman has never managed the family's finances and all of a sudden her husband dies, it may be very difficult for her to pick up the reins and make decisions about finances without having had the opportunity to be educated.

Just because someone agrees with us, agrees with a physician, agrees with a lawyer, or agrees with a financial advisor, doesn't mean they're capable either. Sometimes people are very good at nodding, saying yes, and their social graces may make it appear that they understand and appreciate everything we're talking about, but they may not, in fact, understand a lot. So it's really important to understand that those kinds of things don't, by themselves, determine capacity.

It's really also important to understand that basic cognitive tests that I might do as a geriatric psychiatrist-- there are certain tests, like the Mini-Mental State Exam or the MoCA, the Montreal Cognitive Assessment-- that's the test that Trump recently took when he was asked to sit and have his capacity, his cognition tested-- those kinds of things don't determine capacity. So a score on those tests-- which are scored out of 30-- are not going to determine whether someone is capable or not.

So those are the basic things to understand about capacity, who might be found incapable, what capacity is, and what capacity is not. So when you're interacting with a client, how might you decide whether they're capable of making a decision that you're asking them to make?

It's really important to think about how to set up the interview properly so that older individuals in particular or someone who might have different kinds of disabilities can interact with you in an appropriate way so that they can fully participate in the interview. You want to be thinking about the seating, such that they're comfortable, such that they can hear you. It's very important that people who have hearing disabilities wear their hearing aids if possible, because people's ability to understand and appreciate information can be really, really affected by poor hearing.

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You want to be able to have them comfortable. You might think about the time of the day that you interview them. Is the morning best for them? Is the afternoon best for them? You might want to think about whether they've had their pain medications, which might make them more comfortable, or whether they've had their pain medications and therefore are too groggy to participate in an interview and to make a decision with you.

You want to think about how you communicate with them, in terms of slowing things down, maybe using whole-body kinds of conversation so that you emphasize things with your hands and your body. Make sure that they can see you, hear you.

And then you want to be really listening to how they respond to your questions. So when you ask them information about themselves, you want to listen to the answers. You want to see how they respond to you. And you want to look beyond the social graces, which I've said many, many people can maintain. So you want to think about how you're going to get information from that individual about whether they truly are able to understand what you're talking to them about and appreciate the consequences of one decision versus another decision.

So the real thing that you have to concentrate on in that interview is how to probe what they understood, what they really took in, and to verify what they really are understanding about the situation. As we mentioned earlier, if it's a complex situation, it may take you a lot more time to do that probing and verifying, because you're going to want to slow things down and make sure they understand all the nuances and all the issues relevant to that decision. If it's a more straightforward decision, obviously, it's going to be simpler. So you want to be asking individuals questions, see what they understand, see if they can repeat things back to you, see if they can explain to you what you've explained to them.

What are the signs you might be looking for to give you a red flag that someone may have some cognitive difficulties, may have some problems with understanding and appreciating? You may want to look for whether they seem to have memory problems, whether they seem to be easily confused, whether they seem to be disorganized.

In particular, with clients you've known for a long time, you want to look for changes. Is this someone who always came extremely well-groomed and very organized and now seems disheveled, seems to be having trouble following the conversation, seems to be confused over what you're talking to them about? Is this someone who always made decisions in a certain way and is now making different kinds of decisions, decisions that seem rash or out of keeping with the previous decision-making style? Those are all kinds of things that you want to be thinking about as potential red flags that might make you question as to whether this person is truly able to understand and appreciate.

And you notice I keep using the word «able»? You want to make sure that someone is not lacking in understanding because they couldn't hear you or because they weren't educated about something that you're talking to them about. You want to make sure that what you're judging is their ability, their cognitive processes, the way their brain works and thinks about information, about decisions.

Can they really compare one decision to another? Can they compare and contrast? You have choice A, or you have choice B. Can they explain back to you what you've explained to them and talk to you about the pros and cons, the merits of one choice versus the merits of another choice?

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So the kinds of things you're going to be looking for are people who are really struggling. They're nodding their head, giving you vague responses. They don't really seem to be following what you're saying. They're having trouble really getting their head around all the decisions you're asking them to make.

They may need more time. They may need time to take away that information and look at it again. But you should be giving them the time, but also realizing that, at some point, they need to be able to express a choice, make a decision, and act on that decision. So those are some of the things you want to be thinking about when you're looking at someone, talking to someone, and thinking about someone.

So we've talked about the fact that there are a number of different groups that may be incapable for a variety of reasons. And I wanted to circle back and talk a little bit more about seniors and why they may be more at risk of having problems with capacity, cognitive difficulties.

As we age, unfortunately, we're more prone to a number of disorders that affect the elderly. And one of those is what I mentioned previously, neurocognitive disorders. The old name for that is dementia. And there are many types of dementia.

The most common type is Alzheimer's disease that you may have heard of. The other types of dementia might include vascular dementia, which relates to small strokes. People with Parkinson's often develop dementia later in their illness. Then there's other types of dementia, for instance, frontotemporal dementia, which has two variants, a behavioral variant and a language variant, which is a very interesting disease, often developing in younger individuals where they have more and more difficulty expressing themselves using language and then understanding things. And, finally, a very unusual form of dementia which is Lewy body dementia, where people have hallucinations and other kinds of unusual ideas.

Ultimately, all forms of dementia will lead to cognitive difficulties with memory, judgment, abstract reasoning, and, therefore, individuals who have dementia will have more and more difficulty making decisions. They might be able to make simple decisions and even complex decisions early on in their disease, but, as the disease progresses, it will be more and more difficult for people to make decisions, especially about finances, which can be quite complicated.

So people with dementia, sometimes it will come on very slowly, insidiously, and people around them might notice things, but they might not even notice things until something major has happened-- the person has gotten lost; there's been some other kind of incident. So sometimes you're going to be meeting people who don't have a formal diagnosis of dementia, so their family hasn't noticed or their doctor hasn't made a diagnosis. So you might be the first person picking up on problems that that individual is having. So you can't always assume that someone's going to come to you with a formal diagnosis who has dementia.

What we notice with people who have declining cognition, difficulties with reasoning, language, memory, is that, often, this puts them at risk. It puts them in a vulnerable situation. They're going to have more difficulties managing certain aspects of their life.

One of the most important things to think about is what we call instrumental activities of daily living, and that would include things such as managing finances, driving, and managing medications. These are often the kinds of things

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that are problematic early on in the dementia, so it may be that individuals' ability to manage their finances may be an early problem that they would have even before they're diagnosed with dementia. You may be picking up those problems earlier than other people do. So instrumental activities of daily living are a very important sign of cognitive impairment and difficulties.

If individuals have early dementia, cognitive impairment, it puts them at risk of vulnerability. They're more likely to be at risk of fraud. They're more likely to be at risk of elder abuse, because they may not completely understand what others are asking of them and what others are demanding of them. So in those early phases, either just at the time of diagnosis or before the diagnosis of dementia, individuals can be particularly vulnerable.

Another interesting aspect of dementia or cognitive impairment is that individuals don't always have the perception that they have a difficulty. It may be others around them that notice a problem, but they themselves may not notice a problem at all. So they may actually have quite a bit of confidence about their ability to make decisions and be overconfident, even though they have cognitive difficulties. So there's a mismatch between their actual abilities and their own perception of their abilities. And that's, again, a particularly problematic situation, a vulnerable situation for people to be in.

So as I've tried to explain, there's a lot of information here about capacity, capacity being a medical-legal concept. There is no test for capacity. So I can't give you a simple test, six questions to ask, and if someone gets those right or wrong that you know your client is capable or incapable.

The most important way to determine whether you think someone's capable of making a decision is to talk to them, to have an interview, to probe and verify, to listen carefully to their responses, and to really listen to what they're saying, how they're explaining their situation, and not just to let them get off with vague answers or nods, but to really keep probing and keep asking what they understand of that, why they're making one choice over another. And that's how you're going to begin to understand whether someone that you're dealing with is capable of making a decision.

What you're going to notice initially is that individuals who have early problems, in addition to those instrumental activity of daily living problems, often people have problems with higher-level cognitive functioning. So those difficulties might include things like judgment, abstract reasoning. So those kinds of things that are higher-level concepts, higher-level, more complicated situations might be more problematic early on in a disease. But those will be ones that you might not face with individuals who are making simple decisions.

So, again, that's why it's so important to think about capacity being context and situation-specific. The more complicated your individual's financial situation is, the higher level of capacity, the higher level of cognitive functioning they need to bring to that task.

So I know you're not all junior neuropsychologists, and I can't make you into a neuropsychologist in a brief time, but I hope I've given you some ideas about what red flags you should be looking for, how to sit and talk to your clients, and some ideas about who might be most at risk of having capacity problems and how to begin asking people questions so that you might be able to judge for yourself whether you think there's a capacity problem going forward.