

Decision-Making Capacity And Older Adults

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GEROPARTNERS

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Learning Goals

- Become familiar with decision-making capacity as a construct
- Learn the legal implications of decision-making capacity
- Understand the standards against which capacity is compared
- Appreciate the steps involved in conducting a decision-making capacity evaluation
- Realize the ethical implications of decision-making evaluations
- Learn about issues unique to financial decision-making in particular

Organization of Presentation

- Section I: Issues relevant to all types of decision-making capacities
- Section II: Issues specific to financial decision-making capacity

Autonomy and Freedom

- Western culture places great importance on issues of freedom and self-direction
 - Declaration of Independence
 - Bill of Rights
 - Constitutional guarantee of Freedom of Speech
- Society values an individual's right to make his or her own decisions
- Revoking someone's autonomy requires careful thought and consideration

Exceptions

- Under certain circumstances, it is necessary to disallow a person to make autonomous decisions
 - Unable to provide for his or her own health, care, safety, or therapeutic needs without help
 - Unable to manage property or financial affairs

Tough Questions

- When does a person reach the point where they cannot make decisions or act for themselves?
- Who makes that determination?
- How is that conclusion reached?

Myths

1. Doctors decide whether a person is competent or incompetent
2. “Competency” and “Capacity” are just different words for the same idea
3. A person is always either completely competent or incompetent—no in-between
4. There is one universal test for capacity
5. A 5-minute interview is enough to determine if a person has capacity or not

Myths cont.

5. A diagnosis of mental illness automatically means a person is incompetent
6. Competency evaluations should be conducted the same way with everyone in all circumstances
7. If a person is found incapable once, they will always be incapable

Competency vs. Capacity

- “Competency” is a legal term
 - Involves a moral and social judgment that a person cannot handle their own affairs
 - Can only be determined by a judge
 - Judge usually takes recommendations from evaluators but is not required to

Competency vs. Capacity cont.

- “Capacity” is a clinical term
 - Refers to a person’s particular abilities in a specific area
 - Example: A person has the capacity to construct a will (i.e., testamentary capacity)
 - Determination made by healthcare professionals

Fundamental Tenets of Capacity

- Individuals are presumed capable of managing their own affairs until proven otherwise
- Burden of proof is on the legal and healthcare systems

Current Legal Trend

- State legal definitions of competency:
 - Moving away from generalized concept of incompetence
 - Analogy: One circuit breaker for entire fuse box
 - Moving toward more specific construct of individuals' ability to perform certain tasks
 - Several individual breakers in fuse box
 - Each has different threshold

Virginia Law

- § 37.1-134.6 of the Virginia Code
- “Incapacitated person” means an adult who has been found by a court to be incapable of *receiving and evaluating information* effectively or *responding to people, events, or environments* to such an extent that the individual lacks the capacity to (i) meet the essential requirements for his *health, care, safety, or therapeutic needs* without the assistance or protection of a guardian or (ii) *manage property or financial affairs* or provide for his or her support or for the support of his legal dependents without the assistance or protection of a conservator... A finding that a person is incapacitated shall be construed as a finding that the person is “mentally incompetent...” [emphasis added]

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Virginia Law cont.

- This definition of incompetence is not domain-specific
- One may lose their overall “competence” by meeting any single criterion

Types of Capacities (Civil)

- Medical decision-making
 - Capacity to consent to treatment
 - Capacity to refuse treatment
 - Capacity to release medical information
- Other decision-making
 - Capacity to manage finances (at different levels)
 - Capacity to enter into contracts (e.g., mortgage, marriage)
 - Capacity to execute a will
 - Capacity to select surrogate decision-maker

Types of Competencies (Criminal)

- Competency to testify
- Competency to stand trial
- Competency to be executed

Virginia Law cont.

- Illness does not imply incapacity by itself
 - Major mental illness
 - Traumatic Brain Injury
 - Dementia

The Construct of Capacity cont.

- “Capacity” is a combination of the following:
 1. **Cognition**
 2. **Task-specific skills**
 3. **Contextual factors**
 - Environmental demands
 - Risk/benefit ratio

The Construct of Capacity cont.

- Capacity is always considered in the context of:
 - A particular decision
 - At a particular time
 - Under particular circumstances

The Construct of Capacity cont.

- Central to the notion of capacity: Person-Environment (P-E) Fit
- All capabilities are a function of the demands of the environment versus the resources of the individual

The Construct of Capacity cont.

- “Capacity” is a combination of the following:

1. **Cognition**

2. **Task-specific skills**



Person



3. **Contextual factors**

- Environmental demands
- Risk/benefit ratio



Environment

Ethical Issues

- We have a responsibility to prevent two types of mistakes:
 1. Mistakenly *preventing* capacitated patients from directing the course of their treatment
 2. *Failing to protect* incapacitated patients from the harmful effects of their decisions

Ethical Issues cont.

- When considering whether or not an individual possesses capacity to perform a certain task, we must strive to do the following:
 - Rehabilitate (to the extent possible) any skills that affect capacity
 - Revoke a person's independence only to the degree necessary (least restrictive alternative)
 - Maximize the individual's level of control over their own decisions

Ability vs. Support



Ethical Issues cont.

PHYSICIAN DETERMINATION OF INCAPABILITY

I certify that this patient is incapable of informed consent for:

- Psychoactive Medications
- Other Proposed Treatment _____
- Withholding or Withdrawing of Treatment (additional form required)
- Releasing of Information (additional form required)

Physician.: _____ Date: _____

Concurring Physician: _____ Date: _____

Assessing Capacity

- Components:
 - Cognitive evaluation
 - Specific capacity evaluation
 - Clinical interview
- Serial evaluations are preferable to single evaluations when the person's capacity is presumed or found to fluctuate

Assessing Capacity cont.

- Cognitive testing
 - Considerations for older adults (normal aging)
 - Decreased processing speed
 - Diminished ability to attend to simultaneous stimuli
 - Sensitive to ceiling and floor effects dep. on population
 - Myriad individual differences (cultural, cohort, language, education, etc.)
 - Need tests specifically normed for older adults

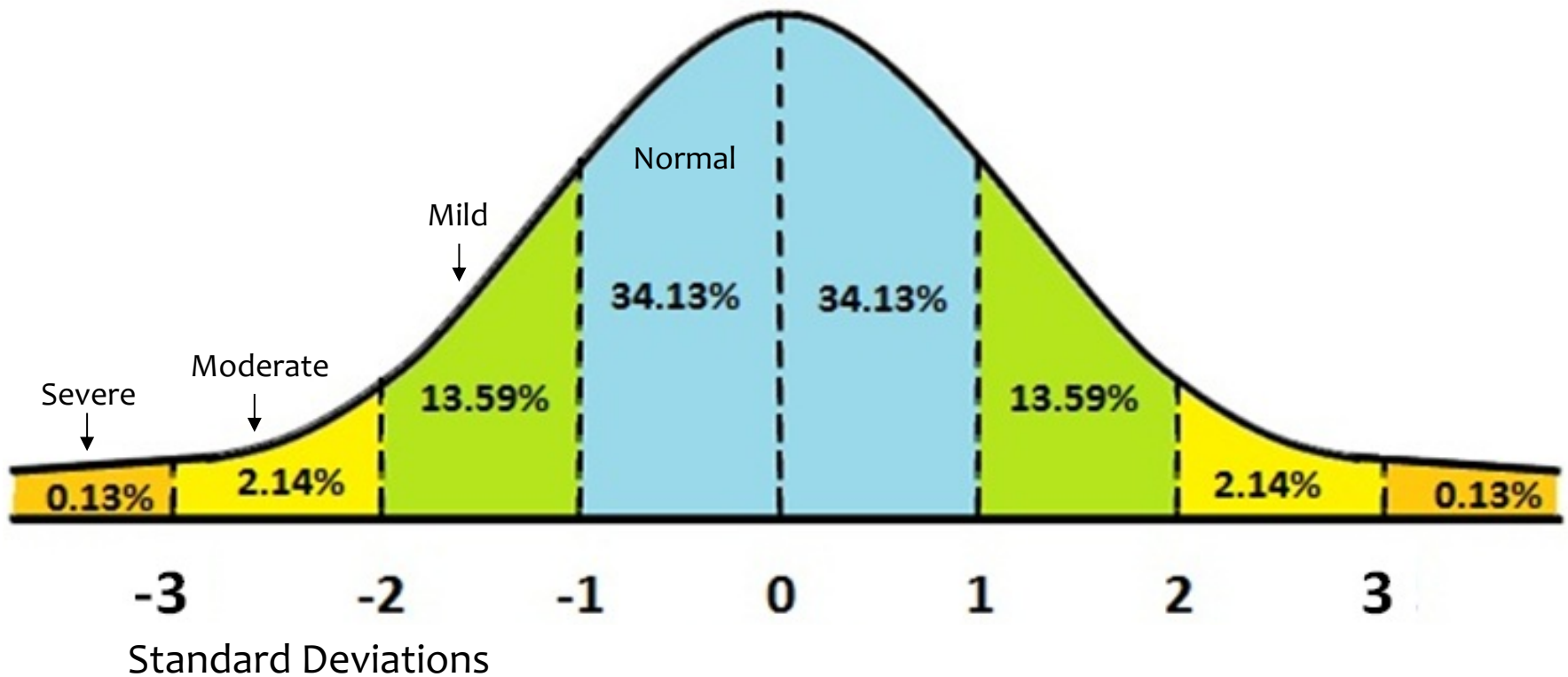
Assessing Capacity cont.

- Cognitive testing cont.
 - Typical areas to be assessed:
 - Attention/registration
 - Memory (working, short-term, long-term)
 - Language (expressive and receptive)
 - Visuoconstructional praxis
 - Executive functioning
 - Each has relevance to most capacities
 - Differential diagnosis of cognitive impairment can shed light on *anticipated stability or reversibility of decline*

Assessing Capacity cont.

- Cognitive testing cont.
 - What is considered “impaired?”
 - Standards differ, but it is most often considered to be between 1 and 2 SD below the mean ($z = -1.0$ to -2.0)

The Normal Curve and Impairment



Assessing Capacity cont.

- Specific capacity evaluation
 - Determined by performance on instruments that realistically simulate “real life” scenarios
 - i.e., instruments that are high in “ecological validity”

Assessing Capacity cont.

- Specific capacity evaluation cont.
 - Instruments will differ across capacities to be tested
 - Most frequent: Medical decision-making capacity
 - Some other types:
 - * Capacity to give informed consent
 - * Testamentary capacity (make a will)
 - * Donative capacity (give a gift)
 - * Capacity to manage finances

Assessing Capacity cont.

- Specific capacity evaluation cont.
- Common instruments:
 - MacCAT-T (Grisso & Appelbaum, 1998): Medical decision-making
 - Aid to Capacity Evaluation Etchells et al. (1990): Medical decision-making
 - Hopkins Competency Assessment Test (Janofsky et al., 1992): informed consent, advanced directives

Assessing Capacity cont.

- Content of instruments
 - Direct questions about condition/situation
 - “What problems are you having now?”
 - “What is the treatment for _____?”
 - Hypothetical problem-solving situations
 - “Suppose you were experiencing _____, what would you do next?”

Assessing Capacity cont.

- Standard for capacity
 - Based on work of Appelbaum and Grisso (1998)
 1. Ability to communicate a choice
 2. Ability to understand relevant information*
 3. Ability to appreciate the situation and its consequences
 4. Ability to manipulate information rationally

*For medical decision-making capacity, the notion of understanding *Risks, Benefits, and Alternatives* of proposed treatment is considered here

Cognition

**Specific Task
Ability**

Context

- Env. Demands
- Risk/benefit ratio

- 1.Choice
- 2.Understanding
- 3.Appreciation
- 4.Reason

**Level of
Decision-making
Capacity**

Assessing Capacity cont.

- Bottom line: Clinicians must always advocate for least restrictive intervention possible
 - E.g., Least restrictive intervention: Power of Attorney for Healthcare Decisions
 - E.g., Most restrictive intervention: Legal Guardianship

Financial Decision-Making Capacity

- The term encompasses many types of abilities
 - Protect and spend small amounts of cash
 - Manage and use checks
 - Give gifts and donations
 - Make or modify a will
 - Buy or sell real property

Financial Decision-Making Capacity cont.

- Deposit, withdraw, dispose, invest money
- Establish and use credit
- Pay, settle, prosecute, or contest a claim
- Enter into a contract or financial commitment
- Continue or start operating a business
- Employ others
- Resist exploitation, coercion, undue influence

Financial Decision-Making Capacity cont.

- Most often, capacity to make financial decisions (AKA “financial capacity”) is considered to be all-encompassing
- Accordingly, most referrals and evaluations often treat it the same way
- Must ask ourselves, “What does financial capacity mean for this person?”

Evaluating Financial Capacity

- Overall process:
 1. Referral clarification
 2. Planning and conducting the assessment
 3. Synthesis of data
 4. Communication of findings

Evaluating Financial Capacity cont.

- 1. Referral clarification
 - Encourage referral source to be as specific as possible
 - Which area(s) of financial capacity?
 - Under what circumstances?

Evaluating Financial Capacity cont.

- 2. Planning and conducting assessment (context, cognition, and specific task ability)
 - (A) *Context*: interview reveals environmental demands, as well as potential risks and benefits
 - This will vary widely from person to person
 - These results guide selection of capacity instrument

Evaluating Financial Capacity cont.

■ 2. Assessment cont.

(B) *Cognition*: choice of instrument/battery will depend on context (high/low env. demand, high/low risk)

- E.g., MMSE has a very low ceiling, not ideal for determining whether a person should continue to run a business
- More often will use more specific cognitive screening batteries
 - * Dementia Rating Scale-2 (DRS-2)
 - * Repeatable Battery for the Assessment of Neuropsychological Status (RBANS)

Evaluating Financial Capacity cont.

- 2. Assessment cont.

(C) *Specific Task Ability*: choice of instrument will depend on context and referral question

- Content of items must be similar in type and difficulty to tasks the individual would most likely experience
- Referral questions that are larger in scope will require a more comprehensive instrument
 - * e.g., Independent Living Scales (ILS)

Evaluating Financial Capacity cont.

Example Instrument

- *Independent Living Scales (ILS; Loeb, 1996)*—
Money Management subtest
 - Brief (approx. 20-25 min.)
 - Covers basic but broad-based categories of financial management
 - Low ceiling
 - Normed for institutional and community elderly, as well as other populations

Evaluating Financial Capacity cont.

- 3. Synthesis of data
 - Aggregate context (interview), cognition, and specific task findings
 - Compare against decision-making standards
 1. Ability to communicate a choice
 2. Ability to understand relevant information
 3. Ability to appreciate the situation and its consequences
 4. Ability to manipulate information rationally

Evaluating Financial Capacity cont.

- Alternative standards for possessing financial decision-making capacity:
 1. Knowledge
 2. Skill
 3. Judgment
- Less preferable to Choice, Understanding, Appreciation, Reason

Evaluating Financial Capacity cont.

- * Choice
- * Understanding
- * Appreciation
- * Reason

More objective

- * Knowledge
- * Skills
- * Judgment

More subjective

Evaluating Financial Capacity cont.

- 4. Communication of findings
 - Conclusion of report should address:
 - Do they have capacity to independently manage finances (as you have defined it for this evaluation)? Yes/No
 - If no, what standard(s) was/were not met (1-4) and why?
 - Is this deficiency likely to improve? If yes, what would help?
 - What assistance needs to be offered to the patient?
 - What can the patient still manage him/herself?

Evaluating Financial Capacity cont.

- 4. Communication of findings (cont.)
 - Keep in mind that stating a patient is not capable of participating in any aspect of financial decision-making can lead to guardianship proceedings
 - Finding even small ways a person can be involved in financial decision-making is important
 - Helps feelings of self-efficacy
 - Helps preserve person's legal autonomy

Guardianship

- The most restrictive intervention for an incapacitated individual
- Usually reserved for the most impaired and vulnerable individuals
- Requires that a person be declared legally incompetent

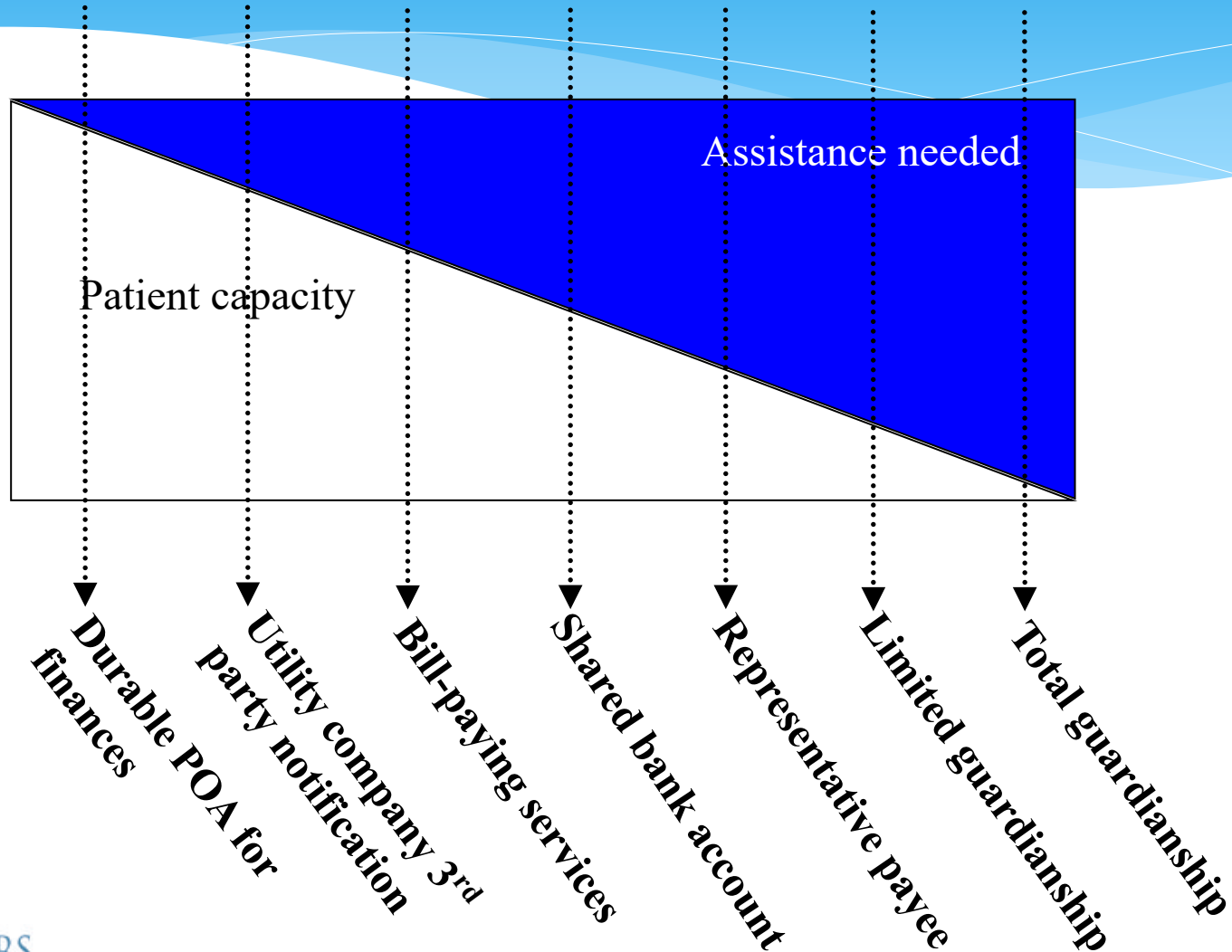
Guardianship cont.

- If an individual is appointed a guardian simply because they cannot manage their finances, all other facets of his or her life are affected by being deemed legally incompetent
- Difficult to legally vacate or terminate a need for guardianship

Least to Most Restrictive Options



Least to Most Restrictive Options



Limitations on Guardianship

- A judge can impose any limitations on a guardianship as s/he sees fit
- This is referred to as a Limited Guardianship
- Helps to preserve some of the autonomy of an individual and avoids a finding of legal incompetence
- Judges will often include these limitations on the recommendation of the evaluator

Limitations on Guardianship cont.

- Common limitations:
 - Have and spend certain \$ per time period
 - Manage and use checkbook
 - Plan a budget and direct guardian in expenditures
 - Purchase and give gifts to others (not to exceed \$\$ per month)
 - Make gifts or donations to organizations of his choosing (not to exceed \$\$ per month)
 - Make or modify a will

Limitations on Guardianship cont.

- Make decisions concerning a particular purchase
Deposit, withdraw, dispose, or invest monetary assets
- Establish and use credit
- Pay, settle, prosecute, or contest a claim
- Enter into a contract, financial commitment, or lease agreement
- Continue or participate in operation of a business
- Manage property and investments

From A Caregiver Perspective

- When does a person reach the point where they cannot make decisions or act for themselves?
- Caregivers should be alert to changes in thinking or behavior of their loved one
 - Trouble balancing checkbook
 - Difficulty remembering to turn off stove
 - Expressing bizarre or unusual beliefs

From A Caregiver Perspective cont.

- When to intervene:
 - When dangerous behavior or self-neglect emerges
 - When the potential for danger or self-neglect becomes evident
 - Consequences of poor decision-making could be large (e.g., major medical problems because of refusing necessary care) or small (e.g., poor credit rating because of late bills)
 - Intervention should be only as “large” as the problem is

From A Caregiver Perspective cont.

- Who to call:
 - For smaller day-to-day problems (e.g., trouble performing activities of daily living, remembering to do important things), caregivers should consult directly with a mental health professional (e.g., a psychologist or psychiatrist)
 - Evaluate the problem
 - Suggest strategies for coping

From A Caregiver Perspective cont.

- Who to call:
 - For larger issues (e.g., damaging financial behavior, refusal of medical care), an elderlaw attorney should be consulted
 - Lawyer will review legal options, which could include limited guardianship or conservatorship (for specific issues)
 - An evaluation will probably be recommended and the results taken before a judge to determine whether the person qualifies

From A Caregiver Perspective cont.

- Who to call:
 - In cases of serious and global incapacity (e.g., dementia that impacts all decision-making, major mental illness), an elderlaw attorney should be consulted to pursue a finding of incompetency
 - Evaluation will be performed
 - Results will be placed before a judge, who will make the determination of competence
 - Assignment of a guardian or other arrangements will considered at this time

Summary

- Evaluating decision-making capacity can (and should) be complex
- A person's capacity to make any given decision depends upon their cognition, their ability to execute relevant tasks, and contextual factors.
- Individuals should retain as much control over their own decisions as reasonably possible

Recommended Resources

- American Bar Association Commission on Law and Aging & American Psychological Association. (2005). *Assessment of older adults with diminished capacity: A handbook for lawyers*. Washington, DC: American Bar Association and American Psychological Association.
- American Bar Association Commission on Law and Aging & American Psychological Association. (2006). *Judicial determination of capacity of older adults in guardianship proceedings*. Washington, DC: American Bar Association and American Psychological Association.
- Baker, R.R., Lichtenberg, P.A., & Moye, J. (1998). A practice guideline for assessment of competency and capacity of the older adult. *Professional Psychology: Research and Practice*, 29, 149-154
- National Center for Cost Containment (1997). *Assessment of competency and capacity of the older adult: a practice guideline for psychologists*. U.S. Department of Veterans Affairs.

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