

# Representing Clients with a Range of Decisional Capabilities

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Older adults who are perceived to have impaired decisional capability are frequently met with barriers when attempting to access and sustain legal services. These barriers can arise for any number of reasons. Attorneys might, for instance, assume that older adults who may have cognitive impairments lack the ability to form the client-lawyer relationship or make decisions about their case. Or attorneys might feel ill-equipped to navigate the unique dynamics that can sometimes arise in cases involving older adults, such as the involvement of caregivers, family, friends, and even appointed fiduciaries. But ensuring older adults are not turned away at legal services offices is an important step toward improving access to representation in legal matters and court proceedings, particularly in matters that have a significant impact on their lives. This tip sheet will highlight some of the barriers faced by older adults seeking legal services and provide legal services offices and attorneys suggestions for overcoming those barriers.

## Key Lessons

- Decisional capability is a spectrum, not static, and domain specific—and it should always be presumed.
- Implicit bias and stereotypes about older adults can negatively impact how decisional capability is viewed.
- 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. And there are many ways to do this.

## BARRIER: Bias and Misconceptions about Decisional Capability

At intake and throughout representation, attorneys and staff might question the older adult's ability to retain a lawyer, to form a client-lawyer relationship, and to make basic decisions about their case. This is frequently due to misconceptions about what decisional capability actually is and when it might come into play. Views regarding decisional capability can also be colored by stereotypes and ageist assumptions about older adults and their abilities. Remember that impaired decisional capability does not normally prevent representation or a productive attorney-client relationship.

## TIPS FOR UNDERSTANDING DECISIONAL CAPABILITY

- Always presume that an older adult has decisional capability and is able to make important decisions about their life and legal matters.
- Remember that decisional capability is not an on/off, all-or-nothing proposition. It's a spectrum (from comatose to genius). It's not static and can vary from day to day (or even hour to hour) and can be impacted by medications, physical and mental health, and all types of life stressors. It's also domain specific and must be considered in relation to the particular decision at hand.
- Remember that decisional capability is not synonymous with memory loss or a medical diagnosis. It's also not synonymous with bad decisions, refusal to follow advice, or acting against one's own "best interest." People with no cognitive impairment make objectively questionable decisions all the time. Older adults have that same right.
- Study your state's version of Model Rule of Professional Conduct 1.14 and structure your interactions with older adults who may be cognitively impaired according to the rule's direction to maintain a normal client-lawyer relationship as far as reasonably possible.
- Think creatively and value supports that allow your older adult client to accomplish their legal goals. See yourself as a facilitator, not a gatekeeper.

## TIPS FOR ELIMINATING BIAS AND OVERCOMING AGEIST STEREOTYPES

- Think about conducting a system-wide self-assessment of your legal services office to identify any changes needed to combat ageism and ensure your offices are open, accessible, and friendly to older adults, including those with cognitive impairments.
- Implement ongoing trainings for all attorneys and staff on eliminating implicit bias and avoiding ageist stereotypes. Consistent focus will be needed to shift your office culture toward bias elimination. A one-time training will almost certainly not be enough.
- Encourage all legal services staff to take the Implicit Association Tests from [Harvard's Project Implicit](#), especially those relating to older adults.
- Train attorneys and staff to see older adults as individuals and to be mindful of and reflect on their words, responses, and interactions with older adults.
- Purposefully increase your (and your office's) exposure to older adults by expanding representation and developing outreach and educational programs that meet older adults where they work, live, and recreate. Ensure that programs focus on their unique issues and needs.

## BARRIER: Third-Party Involvement and Solicitation Concerns

Older adults and individuals who are neurodiverse often rely on informal supporters (family, friends, caregivers) to help them as they navigate the world so that they can maintain their independence and autonomy. For lawyers and legal services offices, the involvement of these third-party supporters can sometimes raise unique challenges—like when an adult daughter visits your office to apply for legal help for her ageing mother, or when a close friend of an older adult wants to be included in all client meetings and kept apprised of case developments, and the list goes on. But the involvement of third-party supporters for older adults, when approached correctly, does not violate the ethical rules and can actually help the lawyer.

## TIPS FOR NAVIGATING THIRD-PARTY INVOLVEMENT

- Remember that the client (the older adult) is the person whose interests are most at stake. The client is the one – and the only one – to whom the lawyer has professional duties of competence, diligence, loyalty, and confidentiality.
- See the benefit of third-party supporters and, after discussing their involvement with your client, utilize their assistance to help facilitate and coordinate client communication, transportation, services and accommodations, and other supports (and supporters) when your client wants assistance making decisions.
- Train legal services attorneys and staff on the various issues surrounding third-party involvement and the ethical and LSC rules regarding solicitation, and develop internal policies and procedures to guide responses to third-party inquiries and requests for legal assistance.
- Develop and maintain relationships with statutory and private ombudsman programs that work with older adults, and create internal policies and procedures to allow those ombudsman programs to refer older adults to your office for legal assistance quickly and efficiently.
- Stock your law office with copies of the ABA pamphlet “[Why am I left in the waiting room? Understanding the Four C’s of Elder Law Ethics](#).” Provide a copy of the pamphlet to all third-party supporters and review the pamphlet with clients and supporters to verify understanding, answer questions, and make sure everyone is on the same page.
- Remember that your older adult client is the final word when it comes to deciding the level of third-party involvement and the goals of the representation.

## BARRIER: Appointed Fiduciaries

An older adult client might have an appointed fiduciary (maybe even multiple fiduciaries). These fiduciaries might be people the client has designated—for example, a family member who the older adult has granted power of attorney for finances or healthcare—but they could also be people someone else has appointed for the older adult—like a guardian or conservator. The involvement of a fiduciary might pose some unique challenges for the legal services attorney, but fundamentally the fiduciary’s involvement does not alter the lawyer’s role. The existence of a fiduciary does not mean the older adult is unable to retain an attorney or control their own case.

## TIPS FOR NAVIGATING FIDUCIARIES

- Remember that you take direction from your client (the older adult).
- If the fiduciary is a foe (such as a person who has caused mistreatment), include them only as you would any other opposing party. In other words, follow the normal procedural rules relating to service, notice of hearings, and the like.
- If the fiduciary is a friend, and after consultation with your client, utilize the fiduciary as appropriate to help facilitate the procedure of the case and support your client’s decision making (always remembering, though, that the fiduciary is not the client).
- Obtain a copy of the documents appointing the fiduciary and verify that the fiduciary’s powers have been activated.
- Study the documents appointing the fiduciary to understand the powers that have been granted (and the powers that have not been granted).

- When a fiduciary and a client have a disagreement, you may need to mediate a solution knowing that ultimately you serve the client (not the fiduciary).
- Even a well-intentioned fiduciary is still self-interested and may be acting conservatively (against a client's wishes) out of fear, so helping fiduciaries balance risk and dignity for clients can be central to resolving those conflicts.

## **BARRIER: Standard Practices and Procedures**

The standard operating procedures and practices of many legal services offices can (inadvertently) create barriers for older adults, including those who are perceived to have impaired decisional capability. From an older adult's perspective, every step of the process—from intake with its multiple hoops to representation with its hurried pace—can potentially pose a challenge. But law offices and lawyers have both a legal and ethical obligation to remove barriers to accessing services and to increase access to the legal system. Rethinking and revising business-as-usual practices to focus on the unique needs of older adults is the perfect place to start.

### **TIPS FOR INTAKE**

- Train intake staff on basic communication techniques, the aging process, disability concerns, implicit bias, and avoiding stereotypes.
- Ensure that intake forms have large print with plenty of space to write. Make available electronic versions of forms that are screen readable. Make sure all forms are written in plain language.
- Make staff available to assist older adults with reading and filling out forms when needed.
- Create multiple doors for intake—online intake, phone intake, walk-in intake, etc.

### **TIPS FOR THE INITIAL INTERVIEW**

- Meet with new client alone. Explain this in advance to relatives or friends. Do not talk past your older adult client or about the client to family members.
- Be aware of the environment. Face the older adult client, get their attention before speaking, and be alert for signs of hearing loss. If you are using a computer, make sure the computer doesn't block or divert eye contact.
- Begin the meetings with small talk to build rapport, relax the client, and enhance the client's comfort. Simple questions requiring brief responses will help you to gauge the client's understanding and the optimal pace for the interview.
- Give up the need for constant control. Employ client-centered interviewing. Utilize initial open-ended questions—such as “I'd like to hear what's on your mind,” “Start wherever you think is important,” or “What brings you to the office today?”—and listen without interruption. Redirect the client to important points as needed. Utilize closed-ended questions to follow up, clarify details, and guide the interview.
- Discuss confidentiality.
- Manage expectations and set parameters.
- Create a communication plan.

## TIPS FOR SCHEDULING APPOINTMENTS

- Whenever possible, conduct business where the client is at (home, hospital, care facility, etc.). This will help relax the client and hopefully optimize decision-making. It also provides the attorney with clues about “real world” functioning and other observable issues.
- Schedule appointments for times when the client is at peak performance. Try speaking with the client on several different occasions, at different times of day, to find the time that works best. Be flexible.
- Schedule multiple, shorter appointments rather than one lengthy appointment.
- Build additional time into appointments for rest and bathroom breaks.

## TIPS FOR PROMOTING COMMUNICATION AND UNDERSTANDING

- 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 the next meeting.
- Get as many source documents as possible. Get the client’s permission to speak with family members and others to obtain facts and details as needed.
- Communicate regularly or in accordance with a set schedule you’ve established with the client. Identify the best means of communication and stick to it.
- Request reasonable accommodations with the court, such as assistive technologies, interpreters (including transliterator), real-time transcriptions, relocating a proceeding to a physically accessible courtroom, continuance when necessary, and limiting/controlling the pace of examination.
- Utilize decision supports to maximize the capacity of the client and help them understand the issues and options and reach a personal choice. Remember that the goal is to maximize decision-making autonomy.

**Please contact [ConsultNCLER@acl.hhs.gov](mailto:ConsultNCLER@acl.hhs.gov) for free case consultation assistance. Sign up for our email list and access more resources at [NCLER.acl.gov](https://www.acl.gov).**

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