

Autonomy, Capacity and Undue Influence: The Right To Decide v. Abuse

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Overall Objectives

To bridge ethical, medical and legal
views of capacity and autonomy.

To describe how capacity is assessed.

To describe various conditions that
impair capacity.

To describe common forms of
undue influence.

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The Orange County/UCI



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The Forensic Center

A collaboration between 9 agencies:

- ▶ UCI College of Medicine
- ▶ Adult Protective Services
- ▶ District Attorney's Office
- ▶ Sheriff
- ▶ Public Administrator/Public Guardian
- ▶ Human Options
- ▶ Community Service Programs
- ▶ Long-Term Care Ombudsman
- ▶ HCA Older Adult Services

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Part One: The Conceptual Basis

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Objectives For Part One

To understand capacity definitions

To be able to list the component skills of capacity

To be able to list three causes of incapacity

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Four Concepts Are Critical To Understanding Abuse

Autonomy

Vulnerability

Undue Influence

Capacity

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**AUTONOMY:
TO GOVERN ONE'S SELF.**

**AUTONOMY IS THE HIGHEST
PRINCIPLE IN LEGAL,
PSYCHOLOGICAL AND
MEDICAL ISSUES**

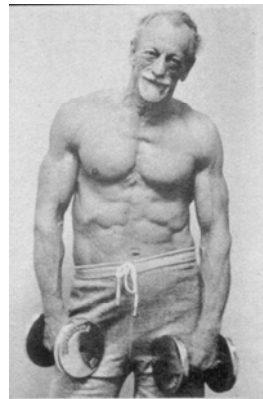
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**AUTONOMY MEANS YOU HAVE THE
RIGHT TO MAKE YOUR OWN DECISIONS,
*GOOD OR BAD,
STUPID OR SMART,*
WHETHER OTHERS AGREE OR NOT,
AS LONG AS YOU HAVE THE CAPACITY
TO MAKE THEM AND YOU ARE NOT
UNDULY INFLUENCED.**

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**You Can Choose To
Live This Way....**

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Or This Way...

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**You can give all your
money
to your heirs**

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**Or you can give it to a
stranger...**

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**As Long As You Have

Capacity

and

You are not unduly influenced**

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**But if you lack these, you could
be subject to**

**ABUSE from others
or
NEGLECT of yourself**

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Autonomy Became The Dominant Principle In The 1960's

Before then, the dominant principle was beneficence.

Disability cases and end of life cases changed things.

Other principles expanded this, such as informed consent and full disclosure.

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Vulnerability:

Any Condition Severe Enough That Another Person Could Use It To Unduly Influence You or Take Advantage of You.

Lack of capacity is one of them.

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Most Vulnerable Conditions Are Diagnosable Disorders

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Undue Influence

exerting inappropriate influence over a vulnerable person in order to change his/her decision or behavior.

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Capacity: The Legal Definition

**Varies From State to State
Depends upon the kind of
transaction involved**

Most Involve Two Things

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Key Phrase in California Probate Code 812 The Person Must "Understand and Appreciate"

- **"Understand"** can be assessed by having person re-state key facts regarding decision or act or process information adequately.
- **"Appreciate"** requires ability to relate information to one's own circumstance, to identify consequences to self and others of the decision, to weigh risks against benefits for self.

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Capacity: The Psychological Counterpart

The ability to adequately process information

(The understand portion)

In order to

Make and appreciate a decision based on that information

(The appreciate portion)

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Capacity Is Not Absolute:

**It Is Relative To The Complexity
Of The Decision To Be Made**

**You can have capacity to make one
kind of decision but not another.**

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Capacity Relates To Being Able To Make a “Decision”

What’s a “Decision”?

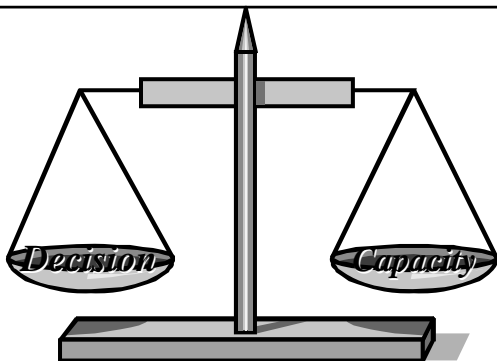
The rational evaluation of alternatives a person may select, choosing the one that is best for oneself and understanding the implications of that choice.

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Issue: How Much Capacity Is “Enough” Capacity?

**Well....what are you trying to
decide?**

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A Balancing Act

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Everyday Decisions Involving Different Levels Of Decision

- What do you want for lunch?
- Where should we go on vacation?
- What is a good investment today?
- Should I change jobs?
- Do you want to have sex?
- Which Would You Let A 12 Year-old Decide?

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Legal/Medical Decisions Of Different Levels

Testamentary capacity

Do you want to get married?

Contractual capacity

Having open heart surgery

Participation in research.

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Assessment of Capacity Is The Most Common Question Asked In Referrals To The Forensic Center

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Capacity Is Not The Same As Diagnosis

**A diagnosis such as dementia, mental retardation
or mental illness does not tell you the person's
capacity.**

Capacity must be individually assessed.

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Capacity Is Not The Same As IQ

**Regardless of IQ, capacity still has to be
tested.**

**IQ measures, in many respects, acquired
knowledge and is an averaged score.**

**Capacity assessment measures, in a sense, the
“machinery of the brain”.**

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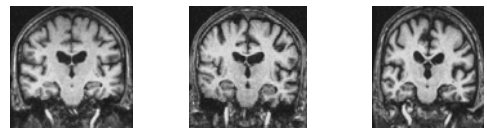
Capacity Is Not Equivalent To Physical Changes In The Brain

**Brain scans neither prove
nor disprove capacity.**

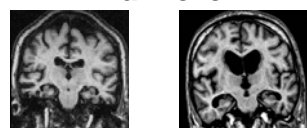
**They do provide good
correlative evidence**

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What's The Capacity Here?



And Here?



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Capacity Is Not The Same As Competency

Capacity is a clinical term

Competency is a legal term

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Four Conditions That Impair Capacity Under The Law

Cognitive Impairment

Severe Mood Disturbance

Perceptual Distortion

Thought Processing Defects

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**In geriatrics, about 75% of the
problems with capacity are due
to cognitive issues.**

Source: UCI/OC Forensic Center

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Assessing Capacity: A Three-Step Process

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Step One: Can The Person Process Information And Think Logically In General?

(Does the machinery work?)

**You have to actually test for it.
Common mistake is to assume person is OK.**

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Processing Information For Capacity Purposes Requires At A Minimum

- 1. Attention, concentration, orientation**
- 2. Short-term memory: auditory, visual**
- 3. Learning ability**
- 4. Long-term memory and retrieval**
- 5. Language: comprehension and fluency**
- 6. Reading, writing, arithmetic**
- 7. Fund of knowledge: current events and basic understanding.**

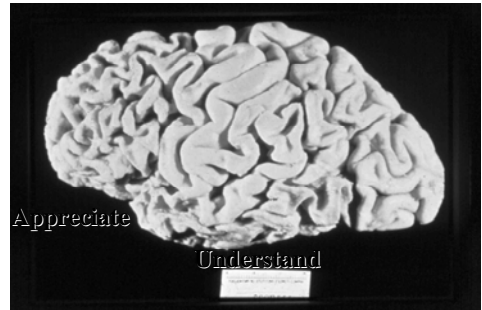
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Can The Person Think Logically, Rationally and Abstractly In General?

These abilities are collectively referred to as
“Executive Functions”

logic	organizing
consequences	reasoning
judgment	alternatives
insight	planning

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Step Two: Ruling Out (Or In) Other Deficits That Impair Capacity

Evaluation of serious mood disturbances
(e.g., depression).

Evaluation of perceptual disturbances
(e.g., hallucinations).

Evaluation of thought processing deficits
(e.g., delusions).

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Step Three : The Interview Appreciating *This* Decision (Also Gets At Undue Influence)

Reasons for the decision

Consequences of the decision

Benefits and risks of the decision

Alternatives considered

Consistency of the decision

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To Prove Abuse Based On Lack Of Capacity, You Have To “Connect The Dots”

1. The person to the disorder.
2. The disorder to how it affected capacity.
3. The (lack of) capacity to that specific act.
4. The lack of capacity to the time of the specific event.

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Examples From Abuse Cases

Why don't you want to take your medication?

Why do you want to get married?

Why did you have sex with the bus driver?

Why are you leaving all your money to the church?

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Useful References

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Case Example

Dan lives with his wife of 37 years; he is 78 years old. You are involved because the wife complained to neighbors that Dan won't let her use the phone, go shopping for food and he won't take his medicines. You were called by the neighbor. You find that Dan is cognitively intact and says he is doing these things because he is being "zapped" by satellites controlled by the government. He dresses with foil under his clothes to stop the zapping. He refuses to go to the doctor.

Does he have capacity?

What do you do?

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