

# CAPACITY, CONSENT, AND MEDICAL DECISION-MAKING A PRIMER FOR SURGEONS

## CAPACITY: WHAT IS IT?

Capacity is the *degree* to which someone has the *ability* to understand relevant information and reasonably consider possible outcomes of a decision (or indecision).

- Capacity is specific for the time that the decision is made and can change depending on circumstances.
- A patient may have capacity to make one type of decision but lack capacity to make others.

A patient who has capacity, is able to give their consent (or not) to treatments and is *legally entitled* to make their own decisions.

## WHY IS CAPACITY CLINICALLY IMPORTANT?

Capacity assessments guide the ethical priorities for treatments:

1. If the patient **HAS CAPACITY**: this *requires respect* of the patient's decision (autonomy); *the patient is the judge* of what is/isn't of best interest (beneficence/non-maleficence).
2. If the patient **DOES NOT HAVE CAPACITY**: Best-Interest Standard (see below under "key concepts") guides care, through the substituted judgment provided by surrogate decision makers.

## ASSESSING CAPACITY: GROUND RULES

Assessing capacity is a clinical determination, not a legal one.

Because clinical context matters, the clinician responsible for providing the treatment options is usually the best person to determine capacity. (e.g., the surgeon performing the operation is the best clinician to determine how the relevant clinical details integrate into understanding how the four components of capacity (see "CURA" mnemonic below).

Capacity is NOT a psychiatric diagnosis, although in some cases, psychiatric consultation may be helpful.

## ASSESSING CAPACITY: TIPS/TRICKS FOR ASSESSING CAPACITY IN REAL LIFE

4 key components of capacity – A patient has capacity if they can "CURA"

1. **Communicate** a choice.
2. **Understand** the relevant information about the diagnosis and proposed treatment choices.
3. **Reason** and deliberate around the treatment.
4. **Appreciate** the risks, benefits, and burdens of the proposed treatments.

## USEFUL QUESTIONS TO ASK THE PATIENT.

- What do you and your doctor think will happen to you if you decide to accept the recommended treatment? What are the possible risks and benefits of this treatment option?
- What are the alternative treatments available and what are the possible risks and benefits of each?
- What do you and your doctor think will happen to you if you do not accept any of the treatment options?

## KEY CONCEPTS AND TERMS TO KNOW:

### Competency

- Competency is a legal determination by a judge of a person's capacity to make decisions
- Competency proceedings such as conservatorship and guardianship are legal interventions in which a person's decision-making capacities are determined

### Conservatorship/Guardianship

- Conservatorship/Guardianship orders are individualized. A person may retain rights to make certain decisions.
- The specific guardianship order **MUST** be reviewed by the medical team. Medical decision-making may or may not be one of the decision-making powers removed from a ward and assigned to a guardian.

### Surrogate Decision Making

- "Substituted judgement": make decisions on behalf of a patient using the patient's values and preferences, as previously expressed by the patient.
- Person designated by patient, or the legal next-of-kin (varies by state)

### Best-Interest Standard

- This standard applies when making decisions for patients who lack capacity and a surrogate decision maker. It involves choosing options that maximize benefits and minimize harms based on what is known/inferred about the patient's values and preferences.
- Recommend 2 physician documentation of decision-making process.



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