

Legal capacity is separate from a medical diagnosis. The legal presumption is that everyone has ability to make decisions until proven otherwise. Capacity is decision-specific and context-sensitive. People can have capacity for some things and not others. Legal capacity is not all-or-nothing and is not static. Capacity can change slowly or quickly and can fluctuate within or between days.

Decision Making Capacity

Probate Code §810

- Presumption that everyone has ability to make decisions

Capacity to Execute Advance Health Care Directive

Probate Code §4609

- Ability to understand the nature and consequences of a decision
- Ability to make and communicate a decision
- Ability to understand its significant benefits, risks, and alternatives

Capacity to Contract

Includes Powers of Attorney for Finances (Civil Code)

- Highest standard
- Ability to understand and appreciate to the extent relevant, ALL of the following:
 - The rights, duties, and responsibilities created by, or affected by, the decision
 - The probable consequences for the decision-maker, and where appropriate, the persons affected by the decision
 - The significant risks, benefits and reasonable alternatives involved in the decision

Capacity to Execute Will

Testamentary Capacity (Probate Code §6100.5)

- Ability to understand the nature of the testamentary act
- Ability to understand and recollect the nature and situation of the property,
- Ability to remember and understand his or her relations to living relatives and others

Capacity to Give Informed Consent

Medical Procedures (Probate Code §813)

- Ability to understand the nature of a particular medical treatment, participate in that treatment, and respond knowingly and intelligently to queries about the medical treatment

What Can Medical Providers Do? DOCUMENT!

- It is important to document patients' specific cognitive deficits (alertness and attention, information processing, thought processes, and ability to modulate mood and affect).
- Documentation of specific deficits (as well as the frequency, severity, and duration) is important evidence for a determination of previous and/or current legal capacity. Judicial determination cannot be made without this documented evidence.
- Deficits show significant impairment to lose the presumption of capacity. Document!