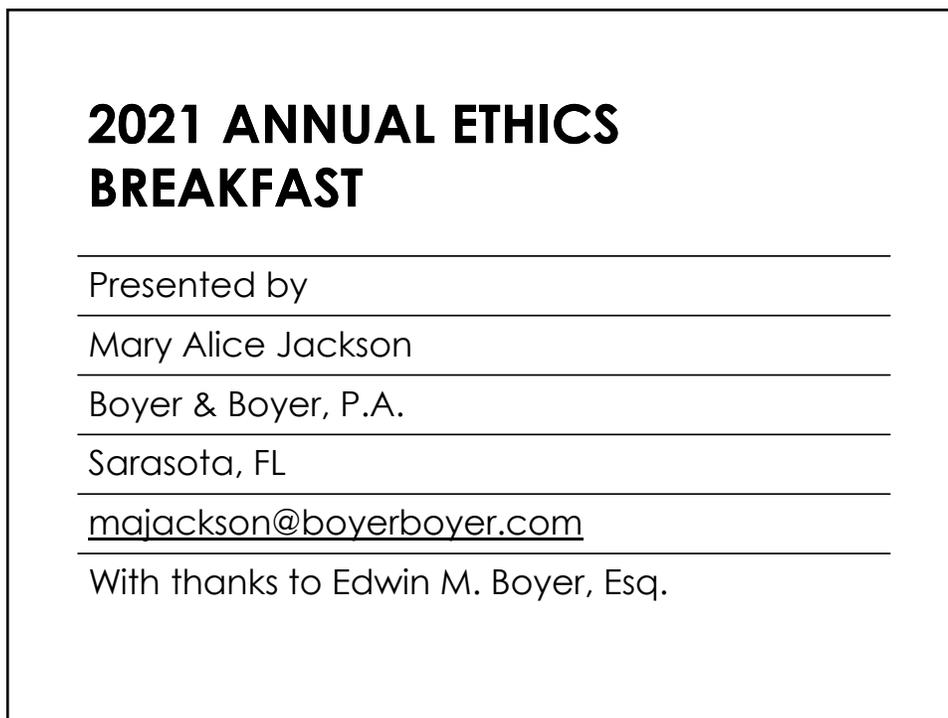
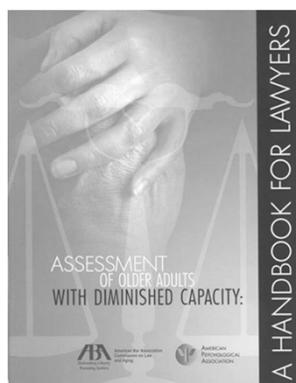


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2

**NEW EDITION**



3

**“Established...by the  
individual, a parent,  
grandparent, legal  
guardian or a court...”**

42 U.S.C. 1396p(d)(4)(A)  
SNT Fairness Act (emphasis added)

4

## CAPACITY TO SIGN A TRUST

- Contractual Capacity
  - Ability to understand the nature and effect of the particular agreement and the business being transacted

5

## HELPING GINNY

- Ginny is a 62-year-old resident of a nursing home. During routine gallbladder surgery a few years ago, she suffered a stroke. She has been living in the NH, on Medicaid, since that time. Ginny and her husband divorced 2 years ago. They have just put their home on the market. Per the divorce agreement, Ginny will receive  $\frac{1}{2}$  of the net proceeds; her share will be \$180k.

6

## HELPING GINNY

- You are contacted by Ginny's sister, Kathleen, who is her Agent under a DPOA. Kathleen wants a consult about protecting Ginny's Medicaid. Ginny has one child, Caroline, who is 24. You discuss the possibility of creating a d(4)(A) trust. Ginny has no guardian, living parent, grandparent. Her divorce case is over and Kathleen wants to avoid returning to court. She tells you that Ginny has the capacity to understand the concept and purpose of a SNT.

7

## HELPING GINNY

- You schedule a Zoom call with Ginny. She is confined to her room, COVID positive but asymptomatic. Her demeanor is somewhat childlike. She has spoken with Kathleen and Caroline, and appears to understand the benefits of a SNT. She'd like a private room, and periodic massages, and new clothes. You explain the Medicaid payback provisions. Ginny tells you that she wants Caroline to have any remaining trust assets after Medicaid is paid. She answers all your questions but asks none. Ginny retains you to create a SNT.

8

## READY TO GO FOR GINNY

- A year later, Kathleen contacts you to say that there is a contract on the home. They waited until after the first months of COVID to list it. You prepare the SNT; Kathleen talks with Ginny and then makes arrangements for you to go to the NH for the signing. At the last minute, you are ill and can't go, but your firm's associate attorney agrees to handle the signing. Kathleen has flown in from out-of-state; she and Caroline are with Ginny. The nursing home has forgotten about your meeting and hastily makes arrangements for Ginny to be seated near a window so the signing can go further.

9

## IT RAINS, IT POURS

- Your associate stands outside the window on the phone with Ginny. Everyone has been prepped earlier in the week. Kathleen hands the trust to Ginny to sign, and your associate asks Ginny to confirm she understands what she is signing. She says yes, but then says wouldn't it be nicer if she could give the money to charity? She wants to preserve her Medicaid, but charities need money, don't they? Kathleen gets impatient and tells Ginny to sign the trust, and she does. The Associate reports back to you that he has the signed trust, but he's concerned about how the signing went down. The house is scheduled to close the next day.

10

## ISSUE SPOTTING

- Initial contact with sister
- Sister had apparent authority
- Impact on receipt of funds on Medicaid eligibility
- Capacity assessment during Zoom call with Ginny
- Document signing was year after conversation with Ginny
- Attorney overseeing signing not familiar with Ginny
- Kathleen seemed to push Ginny into signing
- No SNT, no Medicaid

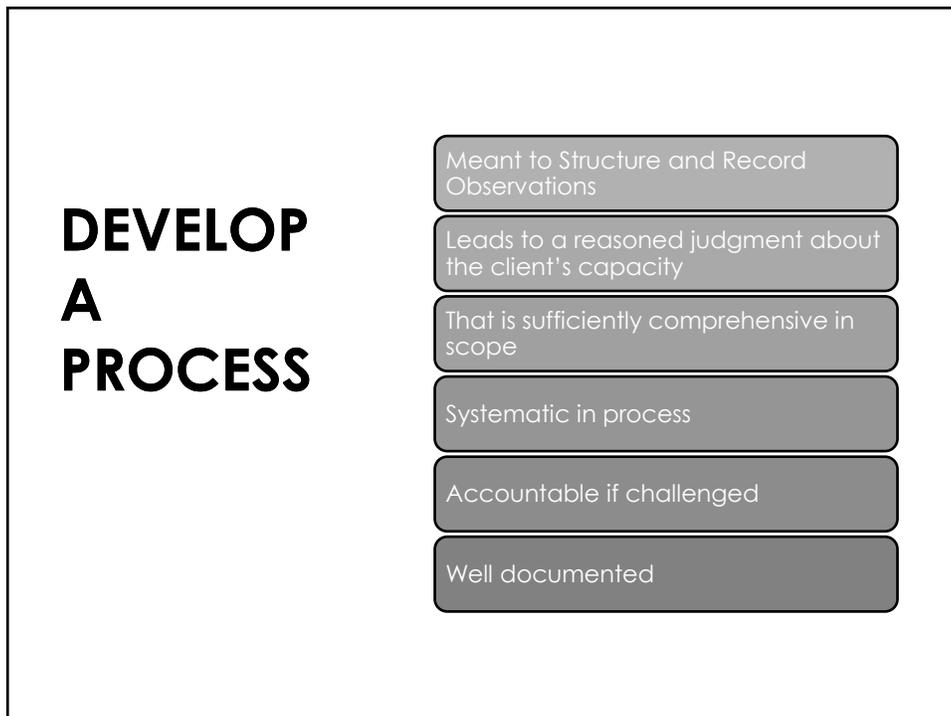
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## WHAT ELSE?

12



13



14

## ELEMENTS OF CAPACITY

May be partial or complete

Do not measure it based on diagnosis alone – Relate diagnosis to a legal standard

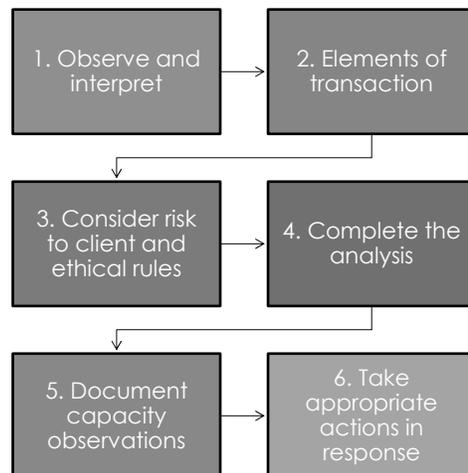
Determined based on functional impairment over time

Evaluate risk of harm

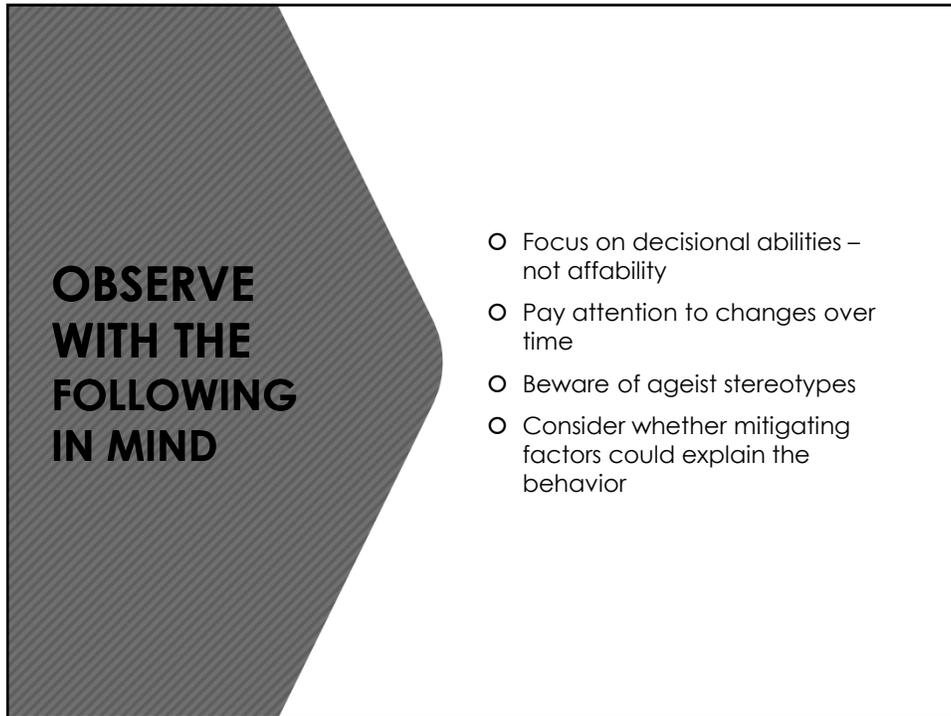
Use findings, not labels

15

## SIX STEP ANALYSIS OF CLIENT CAPACITY



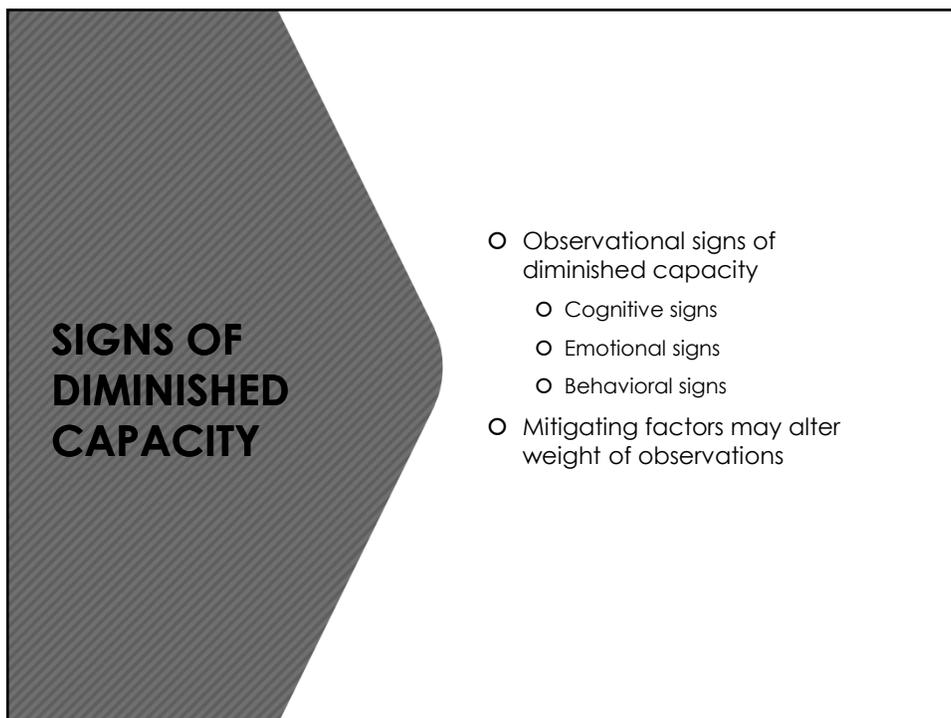
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**OBSERVE  
WITH THE  
FOLLOWING  
IN MIND**

- Focus on decisional abilities – not affability
- Pay attention to changes over time
- Beware of ageist stereotypes
- Consider whether mitigating factors could explain the behavior

17



**SIGNS OF  
DIMINISHED  
CAPACITY**

- Observational signs of diminished capacity
  - Cognitive signs
  - Emotional signs
  - Behavioral signs
- Mitigating factors may alter weight of observations

18

○ Stress; grief; depression; stressful events;

○ Reversible medical factors

○ Normal fluctuations in mental ability and fatigue

○ Hearing and vision loss

○ Education

○ Socio-economic background

○ Cultural and ethnic traditions

**POTENTIAL MITIGATING FACTORS**

19

**MARGULIES/FORDHAM CRITERIA**  
**62 Fordham L.Rev. 1073 (1994)**

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Ability to articulate reasoning leading to a decision

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Variability of state of mind

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Appreciating consequences

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Substantive fairness of decision

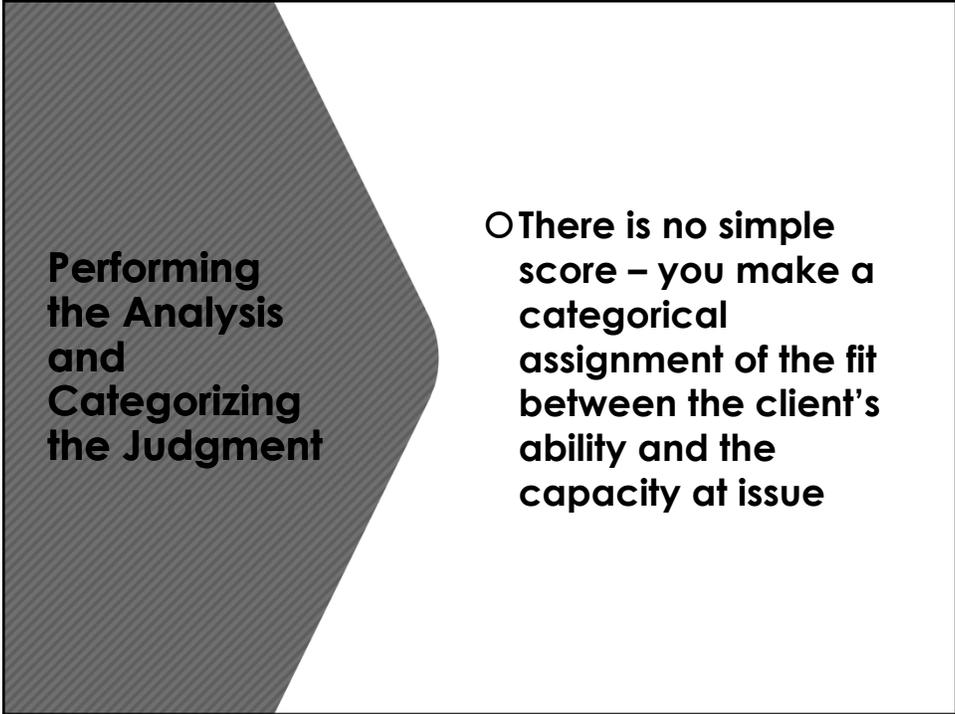
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Consistency with lifetime values

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Irreversibility of the decision

20



**Performing  
the Analysis  
and  
Categorizing  
the Judgment**

- **There is no simple score – you make a categorical assignment of the fit between the client's ability and the capacity at issue**