

Capacity to Consent to Sex



Legal Standards & Best Practices for Adult Protective Services

By Thomas F. Coleman, J.D.

Review

May 5, 2020

Dear Mr. Coleman,

I've just finished reading your paper on the Capacity to Consent to Sex, and I am very impressed! I think that it is a very thorough and significant piece.

You have done, in my opinion, what most trainers, writers of trainings, policy makers, and other professionals in the Adult Protective Services and related fields would like to do; but have neither the time nor expertise to pursue. That is to address the question of capacity to consent to sex from various state perspectives, as well as from a rather human perspective.

One note as a trainer and writer/interpreter for training materials; your paper is very well researched and documented as it should be. And, I can't resist adding, for something written by an attorney, is very understandable for we mere mortals who are not attorneys.

Thank you for giving me the opportunity to read your paper. It is terrific, and much needed information.

Kevin Bigelow
Consultant, Certificate Program
National Adult Protective
Services Association

Kevin Bigelow is a trainer and consultant specializing in the abuse, neglect, and exploitation of vulnerable populations and disaster preparedness for elderly persons and persons with physical or mental challenges. Working for Orange County CA government for 25 years, Kevin was an APS worker and supervisor, and later served as the Adult Services Training Coordinator and Emergency Management Coordinator for O.C. Social Services. Since he retired in 2011 Kevin gives, writes, and consults on trainings and e-learning pertaining to APS. Kevin is the Coordinator for the Certificate Program of the National Adult Protective Services Association.

** These opinions do not necessarily reflect those of the National Adult Protective Services Association nor those of San Diego State University's APS Workforce Innovations.*

Review

May 8, 2020

Dear Tom:

I am in agreement with Kevin Bigelow as to his comments about your paper.

You have taken a very delicate topic and provided a fascinating overview. It is clear that you took considerable time to research the concept of consent.

So I have no problem in attaching my name to any “endorsement” of this specific work.

I am humbled by the fact that you have reached out to me to be a “peer” critic.

Kind regards

Paul Greenwood

Board Member

National Adult Protective Services Association

Paul Greenwood, Criminal Justice

Paul Greenwood has been an attorney for over 40 years. For 13 years he worked as a legal aid lawyer in the UK. In 1991 he moved to San Diego with his wife and passed the California Bar. From March 1993 until March 2018 he worked as a deputy district attorney for the San Diego DA’s office. In January 1996 Paul established that office’s elder abuse prosecution unit and has prosecuted over 600 felony cases of elder or dependent adult abuse including homicides, neglect, physical and mental abuse, sexual assaults and financial exploitation. Paul has testified before the US Senate Social Committee on Aging and has been involved in assisting with the drafting of elder abuse legislation in California. Mr. Greenwood is now concentrating on motivating other prosecutors around the nation to get more involved in elder abuse prosecutions.

Abstract

Knowing the law on capacity, using best practices for assessments, and complying with mandates of the Americans with Disabilities Act, are essential to effective APS investigations, referrals, and social services.

The legal criteria for capacity to consent to sex vary considerably from state to state. The areas of inquiry during a clinical assessment process must match the legal criteria for capacity. The law is the driving force and foundation for an assessment of capacity. Because criteria vary with each state, there can be no uniform protocol throughout the nation for the types of questions that are asked or the areas of an individual's knowledge that are probed. An assessment professional must learn the legal criteria in the jurisdiction where the assessment is being done and use those criteria to guide the assessment process.

Inquiries into subjects that are not relevant in a particular state would be unnecessarily intrusive, discriminatory, and probably illegal. For example, in several states an individual does not need to know or understand risks or consequences of various types of sex. Nor is there a requirement for the person to understand proper places for sex to occur. Asking questions about such matters in those states would be a form of discrimination against people with disabilities. In other states, an individual must not only know about consequences but also must understand the moral implications of their behavior. In those states, until the law is changed to remove this consideration, any assessment that does not probe into an understanding moral consequences would be legally deficient.

However, there are areas where uniformity in all states is possible: (1) assessing an individual's understanding of voluntariness, including the ability to resist pressure and to comply when another person says no; (2) the need for assessment professionals to follow the mandates of the Americans with Disabilities Act in the assessment process; and (3) the use of best practices for interviewing people with disabilities.

This report is intended to help APS professionals gain a better understanding of the complexities of assessing capacity to consent to sex so they can provide a proper balance between respecting the freedom of, and providing protection to, their clients.

A Clarification on *Consent* Versus *Capacity to Consent*

When a report is received that an adult with apparent cognitive disabilities has engaged in sexual activity with another adult, the first question is whether the sexual encounter was consensual or not. The issue of capacity to consent does not arise when there is evidence that the elder or dependent adult objected to the activity. Everyone has the capacity to refuse to have sex.

It is only when there is evidence that the elder or dependent adult assented to the encounter, but facts suggest that he or she has cognitive or other disabilities that would preclude informed consent or true voluntary action that further investigation into legal capacity to consent is necessary.

An APS professional is always concerned about whether a particular sexual encounter was truly consensual. If there is evidence of force, duress, or undue influence, or that the adult objected to the sexual encounter, then an investigation into the individual's capacity to consent to sex may not be necessary. It is worth repeating that everyone has the capacity to say no to sex.

However, if there are indications that the encounter may have been consensual, but also evidence suggesting any apparent consent may be more illusory than real due to cognitive or other disabilities, then an APS professional should investigate the individual's capacity to consent to sex and possibly refer the matter for a team analysis or a qualified mental health professional with expertise in assessing capacity to consent to sex.

An APS investigation into capacity to consent to sex is also necessary when there is no specific complaint of a past sexual encounter but there is a concern about an individual's capacity to consent to future sexual activity. An investigation into capacity should be initiated if such a concern is genuine and there are facts suggesting the adult may be susceptible to undue influence or lacks a basic understanding of sexuality or the right of either partner to a sexual act to say no and to have that decision respected.

This report is intended to assist APS professionals when situations arise indicating that an investigation into capacity to consent to sex is appropriate and necessary.

Contents

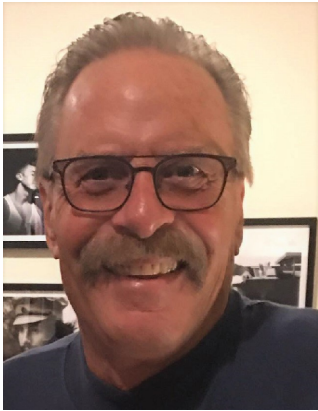
Abstract	i
About the Author	ii
The Politics of Incapacity	iii
Capacity to Consent to Sex	1
Criteria for Capacity	3
Presumption of Capacity	7
Sufficiency of Evidence	8
Investigating Suspected Abuse	8
Assessment Methodology	11
Americans with Disabilities Act	11
Professional Best Practices	11
Conclusion	14
Endnotes	15
Bibliography	27
Resources from Spectrum Institute	31

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This report is online at:
<https://spectruminstitute.org/aps-capacity-sex.pdf>

About the Author



Thomas F. Coleman graduated with honors from Loyola University School of Law in Los Angeles in 1973. That year he was licensed to practice law in California. A few years later, Coleman was admitted to practice before the United States Supreme Court. Coleman has practiced law for the past 47 years with all three branches and at all levels of government.

Coleman has used his legal skills to protect the rights of vulnerable populations, including sexual minorities, seniors, and people with disabilities. His research, education, and advocacy efforts have focused heavily on sexual civil liberties. The perspective of his work has included freedom of sexual expression as well as freedom from sexual victimization.

In the 1970s, Coleman was co-chair of the National Committee for Sexual Civil Liberties – a multi-disciplinary team of professionals advocating for decriminalization of private sexual conduct of consenting adults. During that era, he was publisher and editor of the *Sexual Law Reporter* – a national periodical educating lawyers and judges about important issues in this emerging field of law.

In the early 1980s, Coleman served as executive director of the Governor’s Commission on Personal Privacy in California. The commission studied and made recommendations to advance the privacy rights of sexual minorities, seniors, and people with disabilities. For the following several years, he was a member of the California Attorney General’s Commission on Minority Violence. In coordination with his work on this commission, Coleman successfully lobbied for the addition of “age, disability, and sexual orientation” to a hate crime law in California – a first in the nation.

Coleman was counsel of record in successful appeals in sexual civil liberties cases before the Supreme Court of California and the Supreme Court of the United States.

In the 1980s and 1990s, Coleman engaged with all three branches of government to protect the rights of nontraditional families, including unmarried couples regardless of gender.

Coleman founded Spectrum Institute in 1987, a nonprofit organization promoting respect for human diversity. The Disability and Abuse Project of Spectrum Institute is headed by Dr. Nora J. Baladerian. The project focuses on physical, sexual, and emotional abuse of people with intellectual or developmental disabilities. Its mission is to disseminate information on how to reduce the risk of abuse, to promote healing for victims, and to seek justice for those who have been victimized.

Coleman was the lead author of a report released in 2013 titled “Abuse of People with Disabilities: Victims and Their Families Speak Out.” The report addressed the findings of the largest survey on disability and abuse in the United States. The survey had more than 7,200 respondents. It was designed and administered by Dr. Baladerian and our colleague Jim Stream, executive director of The Arc of Riverside. The report has been widely cited.

Since 2013, Coleman has been directing the Disability and Guardianship Project, protecting the rights of seniors and people with disabilities in guardianships and conservatorships.

More Information:

<https://tomcoleman.us/>

<https://spectruminstitute.org/>

<http://www.unmarriedamerica.org/Archives/>

The Politics of Incapacity

A National Call to Action

Capacity is a central feature in American law. It is foundational to transactions involving property transfers, employment, education, health care, purchases of goods and services, testamentary gifts, marriage, and sex. Capacity is often associated with the issue of consent.

The criteria for capacity for decision-making in any of these areas is primarily the responsibility of state legislatures. In other words, setting standards for whether someone has the capacity to make a decision is a political question.

Definitions and procedures for determining capacity and incapacity are established by a vote of state legislators. Courts give the legislative branch great deference on such matters, only intruding to redefine standards or adjust procedures when the legislative branch has violated the constitution.

The issue of capacity to consent to sex has been a political hot potato in American society since the nation was founded. Religion and psychiatry have had a major influence in the politics of sex.

Sexual conduct that was considered sinful or deviant was often made criminal by legislative bodies. Virtually all sexual conduct outside of marriage or that could not lead to procreation was at one point in history made criminal in all 50 states. Until the early 1960s, capacity to consent to sex was not debated very much.

The so-called sexual revolution of the 1960s and the movement for women's rights of the 1970s gave visibility to the issue of consent to sex. A crusade to recognize the sexual rights of consenting adults emerged during these two decades. I joined that crusade in 1972 while I was attending law school in Los Angeles.

Although I was then 22 years old, as a gay man the law treated me and all other gay men and lesbians as though we were minors. Consent to sex was irrelevant since all homosexual activity was criminal. Just as a 15 year-old was deemed to lack the capacity to consent to sex, so too were adults deemed incapable of engaging in lawful homosexual activity.

It was not until 1976 that the California Legislature voted to remove this conclusive presumption of incapacity for homosexual conduct. Such reform did not happen in most other states until the 1980s and beyond. It took a decision from the U.S. Supreme Court in 2003 to finally recognize the legal capacity of adults to engage in lawful homosexual activity.

The capacity of teenagers to engage in consenting sexual behavior has been a matter of politics too. Below a certain age, an individual is deemed by law to lack the legal capacity to consent to sex. Setting the age for a teenager to have sexual consent capacity has been a decision dominated by political considerations.

In California, the legislature determined decades ago that individuals below the age of 18 lack the legal capacity to consent to sex. That political decision remains the law in California to this day. In New York, political considerations caused the legislature there to set the age of consent at 17. Most other states have drawn the line at 16 years of age. All of these decisions on sexual consent capacity are political.

Issues involving disability and capacity to consent to sex are also political. State legislatures have had free reign to establish criteria for determining whether an adult has the capacity to consent to sex.



Other than declaring that the decision of two adults to engage in mutually consenting sexual conduct in private is protected by the federal constitution, the United States Supreme Court has remained silent on how this constitutional right applies to adults with cognitive or developmental disabilities. Thus, the issues of sex, capacity, and disability remain a political matter to be decided by state legislatures.

As this report shows, the criteria for capacity to consent to sex vary widely from state to state. Considering that consenting adult sexual conduct is protected by the federal constitution, this seems strange – especially in a nation whose residents have a great degree of mobility.

Most state legislative bodies set these legal standards decades ago and have not revisited them. Many of these political decisions were made prior to the passage of the Americans with Disabilities Act. Nearly all of them predate the enactment of the Convention on the Rights of Persons with Disabilities by the United Nations.

Some states require people with disabilities to have a firm understanding of the moral implications and social ramifications of engaging in various types of sex with another consenting adult. Such a legal requirement smacks of disability discrimination and carries an aura of religious intolerance.

The Americans with Disabilities Act is a federal law that prohibits state and local governments from discriminating on the basis of disability. The Supreme Court has said that the liberty provision of the 14th Amendment of the United States Constitution protects the sexual rights of consenting adults.

The adoption of these federal protections call for a national conversation to reconsider criteria used to determine legal capacity of someone with a disability to consent to sex. Since the ADA went into effect nearly 30 years ago, and the Supreme Court ruled on the constitutional right to consenting sex 17 years ago, the time for

this conversation is overdue.

The antiquated patchwork of state laws on capacity to consent to sex should be brought into conformity with federal constitutional requirements and statutory prohibitions against disability discrimination. They also should be reevaluated in light of progressive standards developed by other nations as they follow the directives of the U.N. Convention on the Rights of Persons with Disabilities.

Organizations concerned with protecting the rights of seniors and people with disabilities should join with those who provide services to these populations to initiate such a national conversation. It is time for a *Summit on Disability, Sex, Consent, and Capacity*.

Organizations that should participate in such a summit include the National Adult Protective Services Association, National Council on Disability, AARP, National Disability Rights Network, American Civil Liberties Union, National Organization for Women, The Arc of the United States, TASH, National Association of Social Workers, Vera Institute, National Guardianship Association, National Center for State Courts, American Psychological Association and the American Bar Association.

The longer we wait to for a summit, the longer it will take for those on the front lines of the capacity assessment process to have sensible standards to guide them. Delay will also interfere with front-line workers being able to properly balance respect for sexual freedom with protection from sexual abuse.

May 5, 2020



p.s. Conversations about antiquated incapacity laws on a wide range of topics should also be occurring at the state level. California officials will receive a report on this matter later this year. <https://spectruminstitute.org/capacity/>

Capacity to Consent to Sex

Legal Standards and Best Practices for Adult Protective Services

By Thomas F. Coleman, J.D.
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According to the National Adult Protective Services Association:¹ “Adult Protective Services (APS) is a social services program provided by municipalities nationwide serving seniors and adults with disabilities who are in need of assistance. APS workers frequently serve as first responders in cases of abuse, neglect or exploitation, working closely with a wide variety of allied professionals such as physicians, nurses, paramedics, firefighters and law enforcement officers.”

“In order to give consent a person must have the capacity to do so.”

Commonwealth v. Burke (1983) 390 Mass. 480, 484

APS agencies have two distinct functions with respect to elders and dependent adults who have been abused or neglected or who are at risk of such. One involves investigative activities. The other involves case management activities involving social services or referrals.² While APS may not provide social services to an adult without his or her consent, such is not required for an investigation when a report has been received of possible criminal victimization.³

The goals of APS are both remedial and preventive.⁴ These goals may be accomplished through investigations, the direct provision of short-term social services, or by linking the elder or dependent adult with appropriate community-based resources.⁵

Investigations into suspected sexual abuse are remedial because, if substantiated, they may lead to justice for the victim as well as referrals to services that will address the trauma or other harm the victim may have suffered. However, even when there is no specific allegation of sexual abuse, information may come to the attention of APS raising a concern about potential future victimization because an adult appears to lack the capacity to consent to sex.⁶ In these situations, the role of APS in making referrals or providing direct social services is primarily preventive.

Legal issues concerning an individual’s capacity to consent to sex may arise in both contexts. The legal requirements for capacity would generally be the same regardless of whether an APS worker is functioning as an investigator or acting as a case manager.

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As will be explained in greater detail, the evidentiary standards will vary according to the function an APS worker is serving. Very little evidence is needed for a cross-referral to law enforcement for suspected criminal activity. More evidence may be needed in order to trigger other types of case management interventions.

“Legal capacity for consent is not an ‘on/off’ switch. It is more like a dimmer or strobe, fading or on and off sporadically, or both.”

Indiana Health Law Review (2015)
Vol. 12, p. 477

For both APS workers and allied professionals, regardless of the function they are serving, capacity to consent to sex involves a hybrid mix of legal standards and clinical practices. While this report primarily focuses on the former, it also contains references to literature explaining best practices for mental health and social service professionals who conduct capacity assessments.⁷

An assessment by an APS worker of an individual’s capacity to consent to sex is not an easy task. “Problems center on inconsistent legal and clinical criteria, current inadequate methods of psychological assessment, and the need to promote basic human rights, while protecting people from harm.”⁸ The purpose of this paper is to make the task less daunting by providing a framework for understanding the basics of this complex topic. Further reading, including some of the references cited in the bibliography, is advised.

Regardless of the context or purpose of an inquiry into capacity to consent to sex, it is important to keep in mind that:⁹

“Capacity is a state and not a trait. It can vary over time. At one point in time, an individual with intellectual disabilities may be found incapable of having sexual relations due to knowledge deficits. Subsequently, if that individual receives sufficient training, education, counseling, and exposure to various social situations it may be possible to remedy the knowledge deficits. In a case like this, a repeat sexual consent capacity assessment may yield a finding that the individual has achieved capacity.”

An APS Trainer’s Manual emphatically states: “APS workers do not make capacity determinations.”¹⁰ The manual explains that when it comes to an individual’s capacity to make decisions, the role of an APS worker “is to screen for capacity issues” and then to make appropriate referrals if there appear to be problems.

In contrast, the Adult Protective Services Workforce Innovations (APSWI) has developed a “Core Competency Training Curriculum” for APS professionals.¹¹ APSWI is a project of the University of San Diego School of Social Work. One core competency area of the training program is “Elder Sexual Abuse.” Another is “Assessing APS Clients’ Decision-Making Capacity.”

The latter training module is intended to help an “APS professional assess their clients’ decision-making capacity by identifying the factors that affect capacity, understanding the uses and limitations of the tools available to complete capacity assessments, and understanding the value and purpose of a formal capacity evaluation.”¹²

Regardless of whether APS workers conduct capacity assessments or merely screen for capacity issues, in terms of capacity to consent to sex they need information on legal issues they may confront as they perform their jobs. This article identifies such legal issues, noting that they will vary depending on whether they arise in connection with an investigation, a referral, or providing social services.

The mandate of APS in each state is established by legislation in that jurisdiction. In California, for example, the duties of APS involve a broad range of services. Welfare and Institutions Code Section 15600 states:

“[A]dult protective services . . . shall receive referrals or complaints from public or private agencies, from any mandated reporter submitting reports pursuant to Section 15630, or from any other source having reasonable cause to know that the welfare of an elder or dependent adult is endangered, and shall take any actions considered necessary to protect the elder or dependent adult and correct the situation and ensure the individual's safety.”

A generalized referral of potential risk should trigger an investigation to determine if the individual is endangered and, if so, to develop a case plan to alleviate the problem. This is a different situation than APS receiving a complaint regarding a specific instance of abuse or neglect.¹³

There are two aspects to APS investigations: (1) verifying facts for purposes of assessing social service needs; and (2) verifying facts for purposes of making a referral to law enforcement. While concerns regarding sexual-consent capacity may arise in both types of investigations, evidentiary requirements will vary depending on whether the focus is criminal victimization or social service needs.

Criteria for Capacity

Since sexual relations between two consenting adults in private is constitutionally protected,¹⁴ such conduct cannot be the basis for a finding of sexual abuse or criminal sexual conduct. The Due Process Clause of the Fourteenth Amendment protects the right of two individuals to engage in fully and mutually consensual private sexual conduct.¹⁵ However, this “does not affect a state's legitimate interest and indeed, duty, to interpose when consent is in doubt.”¹⁶

Sexual abuse or assault exists if factual consent is lacking. The same is true if legal consent is absent because an adult lacks the capacity to consent to sex.¹⁷ It is therefore imperative that APS workers should be aware of the legal criteria in their state regarding capacity to

consent to sex.

As a manual for prosecutors in Illinois explains: “[T]here is no “bright line” for establishing how severe a cognitive impairment must be to render an individual incapable of consent.”¹⁸

“An accurate application of the definitional turns on the particular. Context is everything.”

The National Center for Victims of Crime defines sexual assault as an act committed against an individual who is "unwilling or unable to physically, mentally, or legally consent". Because sexual crimes are not regulated by federal law, each state has its own definition. There is considerable variability among the states as to how victims are defined. Forty-five states specify that individuals with significant cognitive disabilities may be incapable of legally consenting to a sexual act.¹⁹

New Criminal Law Review (2014)
Vol. 17, No. 1, p. 103

An investigation into factual consent looks backward to determine and evaluate specific circumstances. When conducting an investigation into reported or suspected sexual abuse, an APS worker must determine whether an individual: (1) engaged in a specific sexual act or acts; (2) with a particular person; (3) on a specific date; and (4) with consent, namely, as a matter of free will. Although the exact definition of consent may vary from state to state, it generally depends on whether an adult was acting out of free will or whether the conduct was based on force, duress, or undue influence.²⁰

A recent article published in the Archives of Neuropsychology has general information about capacity to consent to sex from which APS workers should build their knowledge base.²¹

“Sexual consent capacity is the ability to voluntarily make a reasoned decision whether or not to engage in sexual activities. This is distinct from other types of capacities in the following ways: (a) the nature of sexual relationships—within which these decisions are made—are often fluid and do not often develop in a logical way, (b) the decision is often made in the moment versus extended time to weigh options, consult others, (c) substitute decision-makers or guardians are rarely, if ever, appointed to an older adult specifically to make sexual decisions, and (d) it is one of the least-developed capacity domains in terms of assessment and diagnostic strategies.”

Because legal criteria on capacity to consent to sex vary from state to state and may be quite nuanced, the article emphasizes that professionals should become familiar with the legal standards in the jurisdiction in which they are located. These standards will guide APS workers whether the issue of capacity arises while conducting investigations, making referrals, or providing social services.²²

“A legal definition of sexual consent across states generally involves three elements, with some exceptions by state (ABA/APA, 2008; Lyden, 2007;

Tang, 2015). First, does the individual possess the ‘knowledge’ needed to make the decision? This covers areas such as basic knowledge of sexual activities in question, illegal sexual activities, and appropriate times/places for sexual activities present. Second, does the individual demonstrate ‘voluntariness’ or the ability to make a decision without undue influence or coercion (i.e., autonomy)? This may include the ability to take self-protective measures against coercion when making a sexual decision. Third, does the individual display a ‘reasoned understanding’ or demonstrate an ability to take into account relevant knowledge (i.e., nature of the situation) and weigh the risks and benefits of engaging in it (i.e., appreciate the potential consequences)? There is a fourth criterion that is applied in nine states—appreciating the moral quality of the sexual activity in question. This is a controversial criterion, as its interpretation in the courts has been questioned due to the subjective nature of morality; however, this ‘highest threshold’ criterion remains in place in some states (Tang, 2015).”

The Illinois prosecutor’s manual explains that, in terms of legal standards for determining capacity to consent to sex, the criteria of a state will fall into one of six categories:²³ (1) nature of conduct; (2) nature and consequences; (3) morality; (4) totality of circumstances; (5) evidence of mental disability; and (6) judgment. All six tests include a requirement that the conduct must be voluntary.

Since there is no national standard for capacity to consent to sex, an adult may be deemed to have sexual consent capacity in one state and not in another. Therefore, a preliminary assessment of capacity by an APS worker or a more thorough evaluation by a mental health professional may or may not include an inquiry into whether an individual understands risks and consequences of a particular sex act or is aware of the potential moral repercussions of engaging in such. The scope and depth of an assessment will depend on the criteria for capacity in the state in which the evaluation is being conducted.

Stanford Law School has an excellent publication listing the relevant statutes in each state on capacity to consent to sex.²⁴ Below are a list of states that appear to fall within each of these various standards for capacity to consent to sex.

Nature of conduct. This test requires that a person have an understanding of the sexual nature of any sexual conduct as well as the voluntary aspect of such activity, in order to be considered capable of consent. States that use this test include: Montana, Nebraska, Nevada, New Jersey,²⁵ North Carolina, Ohio, Oregon,²⁶ Rhode Island, South Carolina, Texas, and Utah. Florida also appears to use this test.²⁷

Nature and Consequences. In addition to understanding both the nature and consequences of a sexual act, the individual must understand the potential risks of sexual behavior, such as unwanted pregnancy or sexually transmitted infections. States that use this test include: Alabama,²⁸ Alaska,²⁹ Arizona,³⁰ Arkansas, California,³¹ Indiana, Iowa,³² Kansas,³³ New Hampshire,³⁴ New Mexico, North Dakota,³⁵ Oklahoma, Pennsylvania, Tennessee, Vermont,

Virginia, and Wyoming.³⁶

Morality test. This test necessitates that a person have a moral understanding of sexual activity in addition to understanding its nature and consequences for consent to be valid. States that use this test include: Colorado, Hawaii, Idaho,³⁷ Illinois, New York, and Washington.³⁸

Totality of Circumstances. This test requires the fact finder to examine all of the relevant circumstances to determine whether the victim was capable of consenting to the sexual acts in question. Illinois uses an adaptation of this test.³⁹

Evidence of mental disability. This test must consider “evidence of mental disability.” States that use this test include: Connecticut,⁴⁰ Maryland, Massachusetts, Michigan, Mississippi, Missouri, South Dakota, West Virginia, and Wisconsin.⁴¹

Judgment test. This test is used to determine whether the individual can give knowing and intelligent consent to sexual activity. This test is used in Georgia and Minnesota.

Aequitas, the prosecutor’s resource on violence against women, has published a chart that references state statutes pertaining to criminal sexual conduct based on the incapacity of the victim to consent.⁴² The developmental disability column includes statutes in 44 states that criminalize sexual conduct when the victim has a “mental disease or defect” that renders him or her incapable giving consent. This is a valuable reference document for APS workers to use when issues of sexual-consent capacity arise in the course of their duties. However, there is no substitute for an APS worker being aware of the specific criteria used in his or her state on whether legal consent is lacking due to an alleged victim’s mental incapacity.

APS professionals are not required to become experts in determining an individual’s capacity to consent to sexual activity. However, understanding the test used in their jurisdiction will guide them in determining the types of information that should be gathered to either share with law enforcement when they make a referral for possible criminal investigation or when they are deciding if an individual needs APS services to minimize the risk of sexual abuse in the future.⁴³

It is important for APS workers to remember that an assessment of capacity to consent to sex is different than an evaluation of capacity to make health care or financial decisions. Competence in one area does not automatically mean there is global competence or that someone has capacity in a different area of decision-making.⁴⁴

It is also important to consider the role of supported decision-making in evaluating capacity to consent to sex. Under the Americans with Disabilities Act, people with disabilities are entitled to have assistance and support in their roles as employees, tenants, students, consumers, and service recipients. Just as someone with a disability is entitled to help as they vote in an election, or serve on a jury, or shop at a store, so too should they be entitled to support from trusted friends or relatives as they exercise their right to sexual expression.⁴⁵

Capacity cannot be evaluated in a vacuum. Any capacity assessment should consider whether an individual has trustworthy persons in their lives who can help them make responsible sexual decisions or sound an alert if something dangerous happens or is about to occur. It is one thing if there is no support system, but quite another if one exists.

A recent law review article had this to say about supported-decision making as a way to enhance capacity to make sexual decisions:⁴⁶

“Sexual incapacity doctrines are perhaps the most important form of sexual regulation, as they control access to sex by designating who is legally capable of sexual consent. Most states have adopted sexual incapacity tests for adults that focus narrowly on assessing an individual's cognitive abilities. These tests serve an important protective function for people with temporary cognitive impairments, such as those rendered incapable due to alcohol or drugs. However, this comes at the cost of barring many people with persistent cognitive impairments, such as Down Syndrome or Alzheimer's Disease, from any sexual activity. This is despite the fact that said individuals often still have sexual desires and are able to engage in sexual decisionmaking with support from caregiving networks . . . Sexual incapacity doctrine should grant legal capacity to adults with persistent cognitive impairments if they are embedded in an adequate decision-making support network.”

Presumption of Capacity

Another legal consideration that applies when an APS worker is conducting an investigation, making a referral, or providing social services is the presumption that every adult has the capacity to consent to sex. This presumption may not apply if an adult has been placed into a conservatorship or guardianship and the court has determined that the adult lacks the capacity to consent to sex.⁴⁷ Without such a judicial determination, the presumption of capacity to consent exists, although it can be rebutted by evidence obtained during an APS investigation.⁴⁸

An article in a journal on sexuality and disability had this to say about sexual consent and the presumption of capacity:⁴⁹

“There is a presumption in American law that an individual has the prerequisite capacity to engage in a sexual relationship once he/she reaches the age of consent (Carney, Neugroshel, Morrison, et al., 2001; Orel, 1998). An adult is entitled to all of his or her rights and privileges under the law, unless limitations are imposed by a court of law or by a professional judgment acceptable under the law (Stavis, 1991). However, there are consent capacity questions about an individual with cognitive impairments (LaRue & Markee, 1995; American Psychological Association, 1992). Cognitive impairments can include intellectual disabilities and other conditions such as dementia, traumatic brain injury, and a developmental disability. New York Penal Law

Section 130 (1997) points out that persons who engage in a sexual relationship with each other must both be consenting.”

As discussed within, the amount of evidence necessary for an APS worker to make a judgment call that an adult lacks capacity to consent to sex will vary according to the role the APS worker is fulfilling. Very little evidence is needed to cross-report suspected sexual abuse to law enforcement. More evidence may be needed for an APS worker to sustain a report of such abuse for purposes of removing an adult from his or her residence or to open a case plan for the purpose of providing short-term social services.

Sufficiency of Evidence

In addition to knowing the legal criteria to determine whether incapacity exists, APS workers must also be aware of the evidentiary standard required for them to take action. These evidentiary standards are established by statute or departmental regulations.

The quantity of evidence falls along a continuum. At the lowest level, there is a hunch based on little more than a gut feeling. Then comes reasonable suspicion, the amount of evidence generally required to open an investigation. Next is probable cause, the quantum of proof necessary for an arrest or search warrant. Then comes preponderance of evidence, where the scales tip slightly more in favor of a finding of fact than against it.

The next level of proof is that of clear and convincing evidence – the amount of evidence necessary to place an adult into a guardianship or conservatorship. For evidence to be clear and convincing, there should be no significant ambiguity as to the incapacity of the individual.⁵⁰ Then comes the highest standard – beyond a reasonable doubt – a requirement for a judge or jury to find a defendant guilty of a crime.

The standards of proof most relevant to APS investigations would be reasonable suspicion and preponderance of evidence. Reasonable suspicion is the standard for making a referral to law enforcement for a possible criminal investigation.⁵¹

In the context of child welfare, “suspected abuse” includes circumstances where “it is objectively reasonable for a person to entertain a suspicion, based upon facts that could cause a reasonable person in a like position, drawing when appropriate on his or her training and experience, to suspect child abuse.”⁵² The term “reasonable suspicion” is defined the same way for APS workers who are investigating possible elder or dependent adult abuse.⁵³

Depending on the jurisdiction, preponderance of evidence may be the agency’s standard for opening a case to develop a plan for direct services or for making referrals to other agencies for financial assistance, education, counseling, or other social services.

Investigating Suspected Abuse

The issue of capacity to consent to sex may come to the attention of APS workers when they

receive information of possible abuse from mandatory reporters or from others. The issue of capacity may also arise as APS workers are conducting investigations or developing a case plan for reasons unrelated to sex. In either event, once the issue arises, an APS worker must take appropriate action.

Once an APS worker has information regarding possible sexual victimization of an elder or dependent adult, California law requires the worker to “take any actions considered necessary to protect the elder or dependent adult and correct the situation and ensure the individual's safety.” (Welf. & Inst. Code § 15600(1).) One such action is a duty to cross-report to the law enforcement agency in that jurisdiction any known or *suspected* instance of criminal activity. (Welf. & Inst. Code § 15640(a)(1).) Cross-reporting, however, does not relieve APS of its duty to conduct its own independent investigation into suspected abuse.⁵⁴

“Sexual activity among patients with disabilities is a public policy question as controversial as they get.”

Whittier Law Review
(2001) Vol 23, p. 545

If a worker has a reasonable suspicion that an elder or dependent adult lacks the capacity to consent to sex, then cross-reporting to law enforcement is mandatory. The duty to report does not require probable cause or preponderance of evidence. Reasonable suspicion triggers the duty to cross-report. Even though this is a low evidentiary threshold, it requires more than a hunch. The worker must have objective facts, viewed through the lens of his or her professional experience, to suspect that one of the requirements for capacity to consent was lacking.

In California, that would require some evidence that the action was not truly voluntary or that the alleged victim did not understand the nature of the sexual act or the potential consequences of engaging in such behavior. In other states, fewer or more criteria would guide the evidentiary evaluation. In order for the suspicion to be reasonable, it would be necessary for the APS worker to have had training on the legal criteria in that jurisdiction on the issue of capacity to consent to sex.

An investigation of a specific instance of suspected criminal sexual abuse based on incapacity to consent has two areas of inquiry. The first focus is on the elder or dependent adult to determine if a sexual act in fact occurred, if it appears to have been done voluntarily, and whether the individual had the capacity to legally consent. If there is evidence that consent or capacity is lacking, then the focus shifts to the state of mind of the other adult. A sex crime has not occurred if he or she reasonably believed that the senior or dependent adult consented and had the capacity to consent.

Therefore, during an APS investigation into possible criminal sexual victimization, the APS worker must gather evidence not only about the mental and adaptive abilities of the elder or dependent adult, but also about the circumstances of the sexual activity and the state of mind of the other party.⁵⁵

In California, for example, Penal Code Section 261 (rape based on incapacity to consent) is not violated unless there is evidence that the alleged victim was “incapable, because of a mental disorder or developmental or physical disability, of giving legal consent, and this is known or reasonably should be known to the person committing the act.” The state of mind of the alleged perpetrator can be demonstrated through admissions or by circumstantial evidence.

However, even if an investigation indicates that the other adult did not have a criminal state of mind, that does not require APS to close the case. Even if an elder or dependent adult has the capacity to consent to sex, there may still be a need to determine whether actual consent was given. Part of this investigation may involve an inquiry into whether any apparent consent was given as a result of undue influence. While criteria and assessment practices to determine the presence of undue influence is beyond the scope of this article, this is an issue about which APS workers should be familiar.⁵⁶

If the elder or dependent adult is sexually active and generally appears to lack the capacity to consent, a real risk of future harm exists. Therefore, if there is sufficient evidence of lack of capacity and significant future risk, an APS worker may decide to develop a service plan with the consent of the elder or dependent adult.⁵⁷ Such a service plan would focus on ways to increase capacity to consent through education or to reduce risk through counseling or preventive measures.⁵⁸

If the risk of future harm is significant and the senior or dependent adult will not consent to a service plan, the APS worker should determine if the individual’s lack of capacity to consent to sex warrants a referral to the public guardian or a recommendation to a family member to initiate a guardianship or conservatorship. If the risk is real, capacity to consent to sex is clearly lacking, and the individual refuses to participate in a service plan, court intervention may be appropriate.⁵⁹

However, it is important to note that with respect to sexual activities, there is no surrogate decision-maker.⁶⁰ A guardian or conservator may not consent to sex on behalf of the adult who is under his or her care. The adult either does or does not have the capacity to consent to sex. If the ability to consent is a global problem and not situation specific, a court may declare that an adult lacks the capacity to consent to sex in all situations.

In California, for example, Welfare and Institutions Code Section 15640 authorizes an APS worker to cross-report to any public agency given responsibility for investigating elder or dependent adult abuse. This would include a regional center providing services to an adult with developmental disabilities. The regional center may recommend that a family member initiate a conservatorship proceeding. A referral can also be made to the office of the public guardian which, in turn, can investigate to determine if a petition for conservatorship should be filed.

Furthermore, Welfare and Institutions Code Section 15600 directs that APS “shall take any actions considered necessary to protect the elder or dependent adult and correct the situation

and ensure the individual's safety.” This is a very clear and broad mandate that gives APS wide discretion in deciding how to help someone who may lack the capacity to consent to sex.

Assessment Methodology

A federal commission has cautioned that an evaluation of decision-making capacity should not begin and end with an individual’s status of having a mental disability.⁶¹ A more thorough evaluation is necessary.⁶²

While the legal criteria for incapacity will vary from state to state, the process used to evaluate capacity should conform to best practices recommended by professional associations or follow evidenced-based practices documented in academic journals.

While a referral to a professional for an expert evaluation of capacity to consent to sex may be helpful, it is not necessary. Since a jury in a criminal trial may make a determination on this issue without expert testimony,⁶³ it would seem that an APS worker should be able to do the same for purposes of deciding whether to cross-report or provide social services.

Americans with Disabilities Act

A foundational part of methodology is compliance with the requirements of the Americans with Disabilities Act. As a government agency, APS must conform its practices to Title II of the ADA and corresponding federal regulations.⁶⁴

Once an APS worker becomes aware that an elder or dependent adult has a disability that may interfere with effective communication or meaningful participation in APS services, a duty arises to initiate an interactive process with the individual so that, with consent, accommodations are made to enhance communication and participation. This duty arises when an APS worker knows or reasonably should know that such a disability exists.⁶⁵ The duty to provide reasonable accommodations is not limited to situations when a request is made.⁶⁶

Government agencies are usually able to provide accommodations for individuals with mobility disabilities or who are blind, deaf, or hard of hearing. They are often not so good at developing and providing accommodations to seniors with cognitive disabilities or adults with intellectual or developmental disabilities. A consultation with family members or service providers who are familiar with the individual is probably a good place to start. A referral to the agency’s ADA coordinator or to an ADA-aware mental health professional with expertise in the individual’s condition would also be an appropriate way to develop an ADA disability accommodation plan.

Professional Best Practices

APS programs are encouraged to use standardized and validated assessment tools.⁶⁷ The

challenge is to find tools that are evidence-based, effective, and ADA compliant.⁶⁸ Academically sound and professionally approved capacity assessment tools that will withstand scrutiny in court need to be developed.⁶⁹ In the meantime, there are a few assessment tools from which APS workers could obtain some guidance.

The British Psychological Society has published guidance on making capacity assessments in the United Kingdom.⁷⁰ This document includes sections on the law, pre-assessment preparations, and completing an assessment of capacity. There are suggestions on note taking, working alone or with a team, using psychometric inventories, and best practices in drawing together conclusions and recommendations. Appendix A includes a mental capacity assessment checklist. Appendix B gives suggestions on increasing capacity.

The American Psychological Association and American Bar Association jointly published a handbook providing guidance to mental health professionals regarding the assessment of capacity of older adults in a variety of decision-making contexts.⁷¹

As a visual aid, the British Institute of Learning Disabilities has a CD-ROM containing 178 pictures that can be arranged in sequence to form stories. The pack is recommended for use in assessing the capacity of people with learning disabilities. “The stories can be created either by the person with learning disabilities or by the professional. The pack also contains a capacity assessment form to help determine whether the person with learning disabilities has the capacity to consent to a specific sexual relationship.”⁷²

Although other assessment tools exist, portions of them would not be appropriate for use in states that do not require an individual to have knowledge of the consequences of sexual activity in order for sexual consent capacity to exist.⁷³

APS workers generally only need tools to help them screen for *indications* of incapacity. They do not need to become experts in doing capacity assessments. If a problem with capacity is identified, after applying the state’s legal criteria and using professional best practices for a *preliminary* assessment, the next step most likely would be to refer the individual for a more formal capacity assessment by a qualified mental health professional.⁷⁴

It bears repeating that whatever capacity assessment tools an APS worker or other professional uses must reference the legal criteria of that state. A generalized assessment process that probes into issues not relevant to that state’s capacity standards would not only be inappropriate but could be illegal.

For example, some capacity assessment professionals suggest that questions should be asked to determine whether an individual understands the risks and consequences of particular sexual behaviors.⁷⁵ Such questions are legally irrelevant in states that have not adopted the “nature and consequences” standard. Therefore, asking such questions in those states would be tantamount to discrimination on the basis of disability and could constitute violations of the ADA or corresponding state nondiscrimination laws.

In addition to using the proper assessment tool to elicit information on capacity, it is also important that appropriate and effective methods be used when interviewing someone with a developmental or cognitive disability. An APS worker should acquire skills on how to interview seniors with cognitive challenges or adults of any age with intellectual or developmental disabilities. Such skills are crucial in order to elicit accurate and reliable information.⁷⁶

The Intellectual Disability Rights Service, an advocacy organization in Australia, provides several suggestions for maximizing the effectiveness of an interview of someone with an intellectual disability:⁷⁷

- Find out in advance the person's communication and support needs and make reasonable adjustments
- Interview in person wherever possible
- Respect the person and make no assumptions about abilities
- Talk to the person, not at them or through others
- Explain things slowly
- Use simple language and short sentences
- Deal with one idea at a time

The organization added a few more considerations:

Create a favorable environment

- Avoid loud or busy environments
- Minimize disruptions such as phone calls
- Allocate more time and allow regular breaks

Body language

- Display relaxed body language
- Maintain eye contact (unless culturally inappropriate) and do not obscure your face when speaking
- Be aware of your non-verbal cues (frowns, shrugs, nods)

To start

- Build rapport
- Establish ground rules about checking understanding regularly
- Focus on what the person has to do
- Let the person tell the story in their own words and time

It is important for an interviewer to be a good listener. Be patient in order to maintain trust. Remember that inconsistencies or incorrect statements may indicate memory problems rather than deliberate falsehoods. Be aware that agitation may be due to frustration at not understanding. Allow free recall and then clarify.

Adults with intellectual disabilities are vulnerable to misleading questions, especially those

that assume certain information to be true.⁷⁸ The onus is on the interviewer to avoid such questions.⁷⁹ An interview will be more effective if the interviewer exhibits trustworthiness, engagement, acceptance, empathy, and honesty.⁸⁰ The use of an unbiased and skilled intermediary may also be a valuable tool to help elicit accurate information.⁸¹

Some guidelines suggest that interviewers: (1) avoid abstract concepts; (2) use simple sentences; (3) use open-ended questions; (4) phrase questions positively and avoid negatives; (5) be aware that some persons tend to acquiesce while others are nay-sayers; (6) avoid induced acquiescence; and (7) consider rephrasing questions in different ways to verify the validity of a prior response.⁸²

Another important reminder when interviewing an elder or dependent adult is not to rush them. Vulnerable adults need more time to understand the nature of the task, comprehend and think about the questions, and put answers into words. Furthermore, many such victims will not be able to concentrate for long periods and therefore interviewers need to take account of this.⁸³

Conclusion

The right of an adult of any sexual orientation to engage in mutually agreeable sexual conduct with other adults should be respected by APS workers. However, APS may receive reports or acquire information suggesting that an elder or dependent adult may have been a victim of sexual abuse in the past or may be at risk of such abuse now or in the future. When such information comes to their attention, APS workers have a duty to inquire.

In order for such inquiries to be meaningful, APS workers should not only investigate the facts but should know the law regarding capacity to consent to sex.

It is worth reiterating that APS workers do not need to become experts in capacity assessments. However, they do need to know the basics, in terms of legal criteria for determining capacity, as well as understanding best practices to elicit facts involving adults who may have significant cognitive and communication disabilities.

APS workers must also be aware of their duty to provide reasonable accommodations under the Americans with Disabilities Act so that elders and dependent adults will have effective communications and meaningful participation in APS services, whether those services involve investigations, referrals, or short-term social services.

Knowing the law on capacity, using best practices for assessments, and complying with the ADA mandates are essential to effective APS investigations, referrals, and social services.

Finally, even if a finding of abuse is unwarranted, short-term social services may be necessary to help someone with limited capacity develop a plan for safe and healthy sexual expression. If an APS worker is not comfortable with this, a referral should be made to a qualified professional who is.⁸⁴

Endnotes

1. “Get Help” section of the website of the National Adult Protective Services Association. <http://www.napsa-now.org/get-help/>
2. Once APS receives a call or report, the response falls into one of these categories: consultation, referral to community based agencies, or an APS investigation. “Adult Protective Services: Interventions and Outcomes,” Social Services Agency, County of Santa Clara (CA) <https://www.sccgov.org/sites/ssa/daas/aps/Pages/interventions.aspx>
3. “An elder or dependent adult who has been abused may refuse or withdraw consent at any time to preventive and remedial services offered by an APS agency. However, APS is required to conduct an investigation when there is an allegation that a crime has been committed, regardless of whether the elder or dependent adult wants the investigation to go forward or not.” Website, California Department of Social Services,” <https://cdss.ca.gov/inforesources/adult-protective-services>
4. Manual of Policies and Practices, Adult Protective Services Program, California Department of Social Services, Manual Letter No. APS-01-01 (1991) Ch. 33-105.
5. Section 33-110 of the California Manual explains that APS services include: response to reports of known or suspected abuse or neglect; investigations; time-limited case management and arrangement for delivery of services; emergency shelter/in-home protection; tangible resources; and needs assessment through the use of multidisciplinary personnel teams.
6. For purposes of this paper, the term “sex” is intended to mean sexual relations between two or more adults of the same or different genders, including intercourse, oral sex, anal sex, mutual masturbation, and any touching of the genitals, buttocks, or female breast. It does not include solitary masturbation or viewing of sexually explicit books, videos, or other digital media involving adult sexual conduct. By definition, this does not include having sex with or viewing media involving someone under the age of consent.
7. Section 33-130 of the California Manual explains that the term “assessment” means activity to gather and document information relevant to the situation of an elder or dependent adult and to appraise the individual’s service needs based upon that information.
8. Kennedy, “Legal and Psychological Implications in the Assessment of Sexual Consent in the Cognitively Impaired Population,” *Assessment* (2003) Vol. 10, No. 4, p. 352.
9. Martin Lyden, “Assessment of Sexual Consent Capacity,” *Sexual Disability* (2007) 25:3-20, p. 5.

10. APS Trainer's Manual, p. 94. (2015) Central California Adult Services Training Academy, California State University Fresno, Social Welfare Evaluation, Research, and Training Center with funds from the APS Training Contract, California Department of Social Services (CDSS).
<https://theacademy.sdsu.edu/wp-content/uploads/2015/09/aps-overview-trainer-manual-in-person.pdf>
11. "About Us" section of the website of Adult Protective Services Workforce Innovations. <https://theacademy.sdsu.edu/programs/apswi/>
12. APSWI Webpage, "Core Curriculum Module 17: Assessing APS Clients' Decision-Making Capacity."
<https://theacademy.sdsu.edu/programs/apswi/core-competency-areas/assessing-aps-clients-decision-making-capacity-elearning/>
13. Section 33-510 of the California Manual clarifies that when a report of known or suspected abuse against an elder or dependent adult is received and is within the jurisdiction of the agency, APS workers have a duty to investigate when a violation of the Penal Code has been alleged. Allegations of sexual activity involving an adult suspected to lack capacity to consent would fall into this category and therefore require an investigation.
14. *Lawrence v. Texas* (2003) 539 U.S. 558; Sexual Rights of Individuals with Developmental Disabilities, Joint Position Statement of AAIDD and The Arc (2008)
<https://www.aaidd.org/news-policy/policy/position-statements/sexuality>
15. Constitutional considerations aside, the right to sexual expression is a basic human right recognized by developed nations around the world. A Canadian government agency has cautioned that "Human rights principles to keep in mind in matters related to consent and capacity are inclusive design, individualized assessment, respect for dignity, autonomy, confidentiality, opting for the least intrusive and restrictive options wherever possible, and integration and full participation wherever possible." "Policy on preventing discrimination based on mental health disabilities and addictions," Ontario Human Rights Commission, January 21, 2014.
16. *Anderson v. Morrow* (9th Cir. 2004) 371 F.3d 1027, 1032-1033.
17. Capacity is integral to consent. No consent is obtained where an individual is *incapable* of consenting. In the context of criminal law, proof of incapacity, therefore, is a substitute element for nonconsent. (Benedet and Grant, "Hearing the Sexual Assault Complaints of Women with Mental Disabilities: Consent, Capacity, and Mistaken Belief," *McGill Law Journal* (2007) Vol. 52, p. 269.)
18. "Protocol for Prosecutors, *supra*, p. 82.
http://www.icjia.state.il.us/assets/ifvcc/Model%20Protocols/PWD_OA_Prosecutor_Protocol_113018.pdf

19. Wacker, Parish, and Macy, “Sexual Assault and Women with Cognitive Disabilities: Codifying Discrimination in the United States,” *Journal of Disability Policy Studies* (Sept. 2008) Vol. 19, No. 2, pp. 86-94.

20. California criminal law defines ‘consent’ in the following way: “In prosecutions . . . in which consent is at issue, “consent” shall be defined to mean positive cooperation in act or attitude pursuant to an exercise of free will. The person must act freely and voluntarily and have knowledge of the nature of the act or transaction involved.” (Penal Code Section 261.6.)

21. Syme and Steele, “Sexual Consent Capacity Assessment with Older Adults,” *Archives of Clinical Neuropsychology* (Sept. 2016) Volume 31, Issue 6, Pages 495–505, <https://doi.org/10.1093/arclin/acw046>

22. Ibid.

23. “Protocol for Prosecutors: Responding to Victims with Disabilities and Older Adults Who Experience Sexual Assault, Domestic Violence, Abuse, Neglect, or Exploitation,” Illinois Criminal Justice Information Authority (2014), p. 83.
http://www.icjia.state.il.us/assets/ifvcc/Model%20Protocols/PWD_OA_Prosecutor_Protocol_113018.pdf

24. Linder, “Capacity to Consent to Sexual Activity Among Those with Developmental Disabilities,” *Stanford Intellectual & Developmental Disabilities Law and Policy Project* (2018).
<https://www-cdn.law.stanford.edu/wp-content/uploads/2018/11/Ann-Linder-Capacity-to-Consent-to-Sexual-Activity-Among-those-with-Developmental-Disabilities.pdf>

25. New Jersey is among the states where capacity to consent to sex only requires a person to understand the sexual nature of an act and that the person’s decision to engage in the sexual behavior is voluntary. There is no requirement for an individual to understand the potential risks and consequences of the behavior. (*State of New Jersey v. Olivio* (1991) 123 N.J. 550, 589 A.2d 597)

26. *State v. Reed* (Or. 2005) 339 Or. 239, 244. “We conclude that ORS 163.305(3) refers to a mental defect that prevents one from appraising the nature of one's own conduct. The ‘appraisal’ must constitute an exercise of judgment and the making of choices based on an understanding of the nature of one's own conduct. Further, in circumstances such as those presented in this case, we view that standard in the context of interactions with other persons, such as offers and proposals from other persons to engage in certain kinds of conduct.”

27. *Dinkens v. State* (Fla. Dist. Ct. App. 2008) 976 So. 2d 660. “[A] person who commits sexual battery upon a person of 12 years of age or older without that person's ‘consent’ commits a first-degree felony when the victim is ‘mentally defective’ and the offender has reason to believe this or has actual knowledge of this fact. Section

794.011(1)(a), Florida Statutes (2006), provides that "[c]onsent' means intelligent, knowing, and voluntary consent and does not include coerced sub-mission. . . . Section 794.011(1)(b), Florida Statutes (2006), provides that "[m]entally defective' means a mental disease or defect which renders a person temporarily or permanently incapable of appraising the nature of his or her conduct."

28. *Smith v. State* (Ala. Crim. App. 1976) 345 So. 2d 325, 327 "The capacity to consent to intercourse presupposes the mental capability to form an intelligent opinion on the subject, with an understanding of the act, its nature, and its possible consequences."

29. *Jackson v. State* (Alaska Ct. App. 1995) 890 P.2d 587, 592 "[A] mere understanding of the physical act of sex is not equivalent to an appreciation of the nature and consequences of the victim's conduct. . . To appreciate the nature and consequences of engaging in an act of sexual penetration, the victim must have the capacity to understand the full range of ordinary and foreseeable social, medical, and practical consequences that the act entails."

30. *State v. Inzunza* (Ariz. Ct. App. 2014) 316 P.3d 1266. "Our supreme court has defined a 'mental disorder' as a condition that prevents a victim from understanding the nature of the sexual act and its possible consequences. . . "[O]ur legislature has further specified that a victim has a 'mental defect' preventing consent if she "is unable to comprehend the distinctively sexual nature of the conduct or is incapable of understanding or exercising the right to refuse to engage in the conduct with another."

31. *People v. Lewis* (1977) 75 Cal.App.3d 513, 519. "*People v. Griffin* (1897) 117 Cal.5 583, 585 still states the correct test: '[L]egal consent presupposes an intelligence capable of understanding the act, its nature, and possible consequences.'"

32. *State v. Sullivan* (Iowa 1980) 298 N.W.2d 267, 272 "In short, subsection 709.4(2) protects those who are so mentally incompetent or incapacitated as to be unable to understand the nature and consequences of the sex act. Such persons cannot give the meaningful 'consent' required by the enactment. There is abundant authority from other jurisdictions to support our view that the capacity to 'consent' in these situations presupposes an intelligence capable of understanding the act, its nature and possible consequences."

33. *Penn v. State* (Kan. Ct. App. 2012) 281 P.3d 598. "If an individual can comprehend the sexual nature of the proposed act, can understand he or she has the right to refuse to participate, and possesses a rudimentary grasp of the possible results arising from participation in the act, he or she has the capacity to consent. Anything more open-ended would become impermissibly vague."

34. *State v. Frost* (N.H. 1996) 141 N.H. 493, 497 "We hold that a complainant is 'mentally defective' within the meaning of RSA 632-A:2, I(h) only if he or she (1) suffers from a 'mental disease or defect' and (2) is incapable of freely arriving at an independent choice whether or not to engage in sexual conduct. The second prong addresses a person's

capacity to appraise in a meaningful way the physical nature and consequences of his or her sexual conduct, including its potential to cause pregnancy or disease. The emphasis is on the individual's capacity — capacity to learn about physical consequences and to make a decision based on whatever evaluative process the person chooses to employ, as long as the decision is legitimately the person's own . . . We decline the State's invitation to expand the scope of the Degrenier test. To impose a requirement that a complainant be capable of understanding and evaluating the potential emotional and moral consequences of sexual activity, including the 'societal environment and taboos,' would require of 'mentally defective' persons something that we do not require of others whom society permits to engage in sexual relations without criminalizing their partners' conduct. . . The complainant's ability to 'appraise the nature of his or her conduct,' in order to be found legally capable of consenting, is limited to whether the complainant had the capacity to understand the immediate physical consequences of the charged sexual conduct, including the sexual nature of that conduct and its potential for causing pregnancy or disease."

35. *State v. Mosbrucker* (N.D. 2008) 758 N.W.2d 663, 668 "The language of our statute "incapable of understanding the nature of his or her conduct" arguably may be broad enough to encompass the moral and societal consequences of sexual intercourse. However we believe that would be an amorphous construction of the statutory language and we decline to adopt it. But the statutory language is surely broad enough to encompass knowledge of the practical consequences of sexual intercourse such as unwanted pregnancy and sexually transmitted diseases, and we conclude the intermediate construction better reflects the legislative intent to balance the individual's right to sexual freedom with society's interest in protecting the individual with a mental disease or defect from conduct the nature of which he or she is incapable of understanding."

36. California would also appear to use the nature and consequences test. In California, a person is legally incapable of consenting to intercourse when a mental disorder or developmental or physical disability renders him or her "unable to understand the act, its nature, and possible consequences." (*People v. Miranda* (2011) 199 Cal.App.4th 1403, 1416.)

37. *State v. Hamlin* (Idaho Ct. App. 2014) 324 P.3d 1006, 1014 "In short, a person deemed to lack capacity in one area of functioning will not necessarily lack capacity in other areas. Thus, not all 'vulnerable adults' or, as is relevant here, all mentally retarded adults, are incapable of validly consenting to sexual behavior. "

38. New York's highest court has ruled that "an understanding of coitus encompasses more than a knowledge of its physiological nature. An appreciation of how it will be regarded in the framework of the societal environment and taboos to which a person will be exposed may be far more important. In that sense, the moral quality of the act is not to be ignored." (*People v. Easley* (1977) 42 N.Y.2d 50)

39. *People v. McMullen* (Ill. App. Ct. 1980) 91 Ill. App. 3d 184, 189-190. "Although the victim in this case apparently knew what an act of sexual intercourse entails, had some

understanding of the physical nature of sexual activity, and knew ‘where babies come from,’ that is not the end of the inquiry of whether she was capable of giving effective consent. . . In this case, the evidence showed that although the victim seemed to understand the physical nature of sexual activity, she did not understand how such activity can affect a person's life and how illicit sexual activity is regarded by other people. Thus, she was unable to understand the social and personal costs of the act. Her inability to understand this important facet of the consequences and nature of sexual activity, combined with other testimony concerning her mental deficiencies, is sufficient to support a guilty verdict based upon her incapacity to consent to intercourse.”

40. *Kortner v. Martis* (2014) 312 Conn. 1. “[T]he fact that Kendall was a conserved person at the time of her relationship with the defendant is not determinative of whether she had the capacity to consent. Instead, the final determination of whether Kendall had the ability to consent to sexual conduct is a factual question that the jury must decide based on all of the evidence, including the fact that she was a conserved person.”

41. *State v. Perkins* (Wis. Ct. App. 2004) 277 Wis. 2d 243, 256. Noting the “lack of any statutory language defining the requisite mental illness or deficiency,” the court observed: “The jury is not asked to diagnose the victim's mental illness or deficiency — the State only has to prove that the victim suffered from a mental illness or deficiency that rendered the victim incapable of appraising his or her conduct. . . . The testimony established, among other things, that H.V. is unable to have coherent conversations, cannot remember events shortly after they happen, and needs assistance maintaining her daily life. A jury could reasonably conclude, based on the evidence presented, that H.V. suffered from a mental illness that rendered her incapable of appraising her conduct.”

42. Rape and Sexual Assault Analyses and Laws, *Aequitas* (April 2014), p. 53.
<https://www.evawintl.org/Library/DocumentLibraryHandler.ashx?id=360>

43. The Illinois prosecutor’s manual suggests questions that may be asked to determine if an individual understands the nature of sexual conduct and possible consequences. “Protocol for Prosecutors,” p. 84.
http://www.icjia.state.il.us/assets/ifvcc/Model%20Protocols/PWD_OA_Prosecutor_Protocol_113018.pdf

44. United States Supreme Court Harry Blackmun once observed: “A person who is ‘competent’ to play basketball is not thereby ‘competent’ to play the violin . . . Competency for one purpose does not necessarily translate into competence for another purpose.” (*Godinez v. Moran* (1993) 509 U.S. 389, 413.)

45. Part of that support includes appropriate sex education as well as a person centered planning process that acknowledges the needs of an individual to sexual expression. “Consumer Social/Sexual Planning Statement,” Association of Regional Center Agencies, Sacramento, California (June 15, 2002).

46. Boni-Saenz, “Sexuality and Incapacity,” *Ohio State Law Journal* (2015) Vol 76, pp. 1202-1253
47. Dinerstein, “Sexual Expression for Adults with Disabilities: The Role of Guardianship,” *Impact* (Spring/Summer 2010) Feature Issue on Sexuality and People with Intellectual, Developmental, and Other Disabilities. Vol. 23, No. 2.
<https://ici.umn.edu/products/impact/232/10.html>
48. If an adult is in a guardianship and the court order does not restrict sexual activity, a guardian who stops or frustrates such activity by the adult would be guilty of abuse. If this violation of the individual’s rights is found to have occurred, an APS worker should report the problem to the probate court and possibly to law enforcement as well. Graves, “Let’s Talk About Sex: A Call for Guardianship Reform in Washington State,” *Seattle Journal for Social Justice* (2015) Vol. 14, Issue 2, pp. 477-520.
49. Martin Lyden, “Assessment of Sexual Consent Capacity,” *Sexuality and Disability* (January 2007)
https://www.researchgate.net/publication/225595404_Assessment_of_Sexual_Consent_Capacity
50. The “clear and convincing evidence” test requires a finding of high probability, based on evidence that is so clear as to leave no substantial doubt. (*Conservatorship of Wendland* (2001) 26 Cal.4th 519, 552.)
51. Section 33-130 of the California Manual explains that in the context of elder or dependent adult abuse, “reasonable suspicion means an objectively reasonable suspicion that a person would entertain, based upon facts that could cause a reasonable person in a like position, drawing when appropriate upon his or her training and experience, to suspect abuse.”
52. *Stecks v. Young* (1995) 38 Cal.App.4th 365, 371.
53. “‘Reasonable suspicion’ means an objectively reasonable suspicion that a person would entertain, based upon facts that could cause a reasonable person in a like position, drawing when appropriate upon his or her training and experience, to suspect abuse.” “Mandatory Reporting Requirements: The Elderly – California,” RAINN (Rape, Abuse, and Incest National Network) (March 2020)
https://apps.rainn.org/policy/policy-state-laws.cfm?state=California&group=5&_ga=2.163361916.1932617546.1587390129-1295138143.1587390129
54. “APS California Cross-Reporting and Referral Guide,” APS Guidelines to Supplement Regulations (2015), Section MPP 33-405.2 2.
55. Information is gathered to determine if maltreatment has occurred through interviews with the client, alleged perpetrator, other involved parties, and review of relevant documents and records. Evidence typically gathered during investigation includes: client statements; direct observations; physical evidence; corroborating evidence (e.g., witness

statements, physician records, documents); circumstantial evidence; unobserved/third-party suspicions; and client history. “National Voluntary Consensus Guidelines for State Adult Protective Services Systems,” Administration for Community Living (2019).

56. Plotkin, Spar, and Howwitz, “Assessing Undue Influence,” *The Journal of the American Academy of Psychiatry and the Law* (2016) Vol. 44, No. 3, pp. 344-351. https://www.researchgate.net/publication/308398759_Assessing_Undue_Influence; Turkat, “Psychological Aspects of Undue Influence,” *American Bar Association, Probate and Property* (Jan/Feb 2003) pp. 36-40. https://www.americanbar.org/content/dam/aba/publications/probate_property_magazine/v17/01/2003_aba_rpte_pp_v17_1_jan_feb_turkat.pdf

57. The focus of this type of an inquiry would not be limited to whether the individual lacked capacity on a particular date. Rather, if the APS worker has a reasonable suspicion that the lack of capacity may be a permanent condition, then the inquiry would be very broad and look into whether the individual has demonstrated sexual capacities or incapacities over a period of years. (*Patel v. Kent School District* (Wash. Ct. App. 2013) No. 67711-0-I, p. 13, fn. 11.)

58. Dukes and McGuire, “Enhancing capacity to make sexuality-related decisions in people with an intellectual disability,” *Journal of Intellectual Disability Research* (2009) Vol. 53, Part 8, p. 727. “[T]ailored sexuality education can improve capacity to make sexuality-related decisions.”

59. The National Guardianship Association’s Standards of Practice state that “the guardian shall ensure that the [ward] has information about and access to accommodations necessary to permit sexual expression . . . to the extent the [ward] possesses the capacity to consent to the specific sexual activity. However, having a guardian regulate the sexual activities of an adult is problematic. . . The chance that an appointed guardian would be immediately available to make a decision concerning their ward's sexual activity would be very small. Although guardians are given major decision-making powers on behalf of a ward, they are not required to stay in close proximity to the ward so they may not be available for quick decisions every time the individual wants to engage in sex. Second, oftentimes appointed guardians are family members who, as discussed above, disapprove of elderly sexual activity or are the abusers themselves. Therefore, in order to maintain an older person's sexual autonomy, guardianship may need to be coupled with education to help guardians understand that sexual behavior is normal and beneficial-perhaps even essential-for the elderly individual's health and well-being.” Tang, “When ‘Yes’ Might Mean ‘No’: Standardizing State Criteria to Evaluate Capacity to Consent to Sexual Activity for Elderly with Neurocognitive Disorders,” *The Elder Law Journal* (2015) Vol. 22, p. 477.

60. “[A] surrogate decision maker, who has been appointed to represent the incompetent person, cannot consent to the sexual activity. Fact: there is no such thing as surrogate consent for sexual activity; to the contrary, it is a crime.” Eddy, “Sexuality and People

with Mental Disabilities: The Issues, the Law, and the Guardian,” Intermediate Course, National Guardianship Association (2007).

61. “Making health care decisions,” President’s Commission for the Study of Ethical Problems in Medicine and Biomedical and Behavioral Research. Volume One. US Government Printing Office, Washington, DC (1982).

62. California Probate Code Section 810 declares “A person who has a mental or physical disorder may still be capable of contracting, conveying, marrying, making medical decisions, executing wills or trusts, and performing other actions.” The statute also emphasizes that the focus should be on mental functioning. “A judicial determination that a person is totally without understanding, or is of unsound mind, or suffers from one or more mental deficits so substantial that, under the circumstances, the person should be deemed to lack the legal capacity to perform a specific act, should be based on evidence of a deficit in one or more of the person’s mental functions rather than on a diagnosis of a person’s mental or physical disorder.”

63. The existence of capacity to consent is a question of fact. A lay juror is able to assess the extent of a victim's mental disability. (*People v. Miranda* (2011) 199 Cal.App.4th 1403, 1413.) The appellate court in *Miranda* observed that “there is a nationwide consensus that expert testimony on this issue is not required.”

64. Americans with Disabilities Act. Findings: “Physical or mental disabilities in no way diminish a person's right to fully participate in all aspects of society.” Purpose: “To provide a clear and comprehensive national mandate for the elimination of discrimination against individuals with disabilities.” 42 U.S. Code § 12101.

65. The ADA requires more than physical access: it requires public entities to provide “meaningful access” to their programs and activities. Courts give substantial deference to ADA regulations adopted by the Department of Justice. A public entity must take steps to ensure effective communication with program participants. What triggers the duties of a public entity under the ADA is knowledge that someone has a disability, either because: (1) the disability is obvious; or (2) the entity has been informed of the disability. (*Robertson v. Las Animas County Sheriff's Department* (10th Cir. 2007) 500 F.3d 1185.)

66. If an APS agency is part of a department of state or local government receiving federal funds for any purpose, then APS also has obligations under Section 504 of the Rehabilitation Act of 1973. A request for accommodation is not necessary to trigger duties under Section 504. It is knowledge of the disability that creates liability if no action is taken by a public entity. To determine what type of accommodations may be needed, the entity has “a duty to gather sufficient information from the disabled individual and qualified experts” once an entity knows of the disability. Such notice exists where the need for an accommodation is obvious. Once put on notice, the entity “is required to undertake a fact-specific investigation to determine what constitutes a reasonable accommodation.” (*A.G. v. Paradise Valley Unified School Dist. No. 69* (9th Cir. 2016) 815 F.3d 1195.)

67. “National Voluntary Consensus Guidelines for State Adult Protective Services Systems,” Administration for Community Living (2019), p. 20.
68. The British Psychological Society has published guidance on making capacity assessments in the United Kingdom. “What makes a good assessment of capacity?” Guidance, May 2019. This document includes sections on the law, pre-assessment preparations, and completing an assessment of capacity. There are suggestions on note taking, working alone or with a team, using psychometric inventories, and best practices in drawing together conclusions and recommendations. Appendix A includes a mental capacity assessment checklist. Appendix B gives suggestions on increasing capacity. <https://www.bps.org.uk/sites/www.bps.org.uk/files/Policy/Policy%20-%20Files/What%20makes%20a%20good%20assessment%20of%20capacity.pdf> In 2008, the American Psychological Association and American Bar Association jointly published a handbook for psychologists on the “Assessment of Older Adults with Diminished Capacity.” <https://www.apa.org/pi/aging/programs/assessment/capacity-psychologist-handbook.pdf>
69. “There are no commonly accepted standards for determining one’s capacity to consent to sexual activity and no assessment tools exist for this purpose. Moreover, statutory definitions of capacity to consent vary from conservative to liberal across jurisdictions. Determining whether a person has capacity to consent to sex necessitates striking a balance between individual autonomy and beneficence, which can be complicated in long term care settings where ageist taboos regarding sexuality can influence this balance. We will discuss factors that one might consider when determining whether an individual has the capacity to consent to sexual behavior, preliminary guidelines, and recommendations for the development of instruments and standards for capacity assessment.” Spalding, Katz, Gallegos, and Eelstein, “Issues in Assessment of Sexual Consent Capacity in Older Adults,” *Innovative Aging* (Nov. 2018) Volume 2, Issue suppl_1. <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC6229410>
70. “What makes a good assessment of capacity?” Guidance, May 2019. <https://www.bps.org.uk/sites/www.bps.org.uk/files/Policy/Policy%20-%20Files/What%20makes%20a%20good%20assessment%20of%20capacity.pdf>
71. “Assessment of Older Adults with Diminished Capacity” APA/ABA (2008). <https://www.apa.org/pi/aging/programs/assessment/capacity-psychologist-handbook.pdf>
72. “Exploring sexual and social understanding: an illustrated pack designed for working with people with learning disabilities,” British Institute for Learning Disabilities (2007). <https://www.scie-socialcareonline.org.uk/exploring-sexual-and-social-understanding-an-illustrated-pack-designed-for-working-with-people-with-learning-disabilities/r/a11G0000017u3BIAQ>
73. Weiss, “The Social Sexual Awareness Scale (SSAS): Administration, Scoring Criteria, and sample answers,” *The American Journal of Forensic Psychology* (Jan. 2006) Vol. 24, Issue 1, pp. 41-52.

74. Unless specifically qualified or authorized by state law, an APS worker does not carry out clinical health or capacity assessments, but rather screens for indications of impairment, and, as needed, refers the client on to qualified professionals (physicians, neuropsychologists, etc.) to administer thorough evaluations. “National Voluntary Consensus Guidelines for State Adult Protective Services Systems,” Administration for Community Living (2019), p. 22.
75. A study conducted by Kennedy and Niederbuhl (2001) examined the views of over 300 American psychologists on the criteria required for determining capacity to consent to sexual relationships. (<https://www.ncbi.nlm.nih.gov/pubmed/11708936>) The results demonstrated that the following abilities were judged absolutely necessary to demonstrate capacity: (1) the individual can say or demonstrate ‘no’; (2) the individual knows that having intercourse can result in pregnancy; (3) the individual can make an informed choice when given options; (4) the individual knows that having intercourse or other sexual relations can result in obtaining a disease; (5) the individual can differentiate between appropriate and inappropriate times and places to engage in intimate relations; (6) the individual can recognise individuals or situations which might be a threat to him or her; (7) the individual will stop behaviour if another person tells him or her ‘no’. Several of these criteria would be irrelevant in a state that does not require an understanding of the risks and consequences of particular sexual behavior. From a psychological perspective they may be relevant to treatment or risk reduction, but from a legal perspective the use of them in an evaluation would be discriminatory.
76. “Interviewers need special skills in order to interview alleged victims who have ID. In addition to using more open-ended questions, interviewers should speak in shorter sentences.” Cedarborg and Lamb, “Interviewing alleged victims with intellectual disabilities,” *Journal of Intellectual Disability Research* (2008) Vol. 52 part 1 pp 49–58.
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81. . Hepner, Woodward, and Stewart, “Giving the Vulnerable a Voice in the Criminal Justice System: The Use of Intermediaries With Individuals With Intellectual Disability,” *Psychiatry, Psychology and Law* (2015) Vol. 22, No. 3, 453-464.

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83. Milne and Bull, “Interviewing Victims of Crime, Including Children and People with Intellectual Disabilities,” *Practical Psychology for Forensic Investigations and Prosecutions* (2006), Chapter 1, pp. 14-15.

84. “In some circumstances a person may need practical support with physically expressing their sexuality e.g. obtaining pornographic materials such as magazines or DVDs. This must be handled in a dignified and sensitive manner and be part of an agreed and recorded strategy with the individual. It may be necessary to seek specialist advice on the best way to support the individual with this.” “PRACTICE GUIDE 4: sexual activity where a person may have limited capacity to consent,” Wrochaster County Council. Adapted from 'Sexuality and Dementia' published on the Alzheimer Scotland website. <https://www.alzscot.org/our-work/dementia-support/information-sheets/sexuality-and-dementia>

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<https://disabilityandabuse.org/resources/OVC-ReportFirst-Response-To-Victims-Of-Crime-Who-Have-Disabilities.pdf>

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