


Assessing Civil Competency: What Are the Mental Capacity Standards in Civil Litigation?

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Emin Gharibian, PsyD

Civil competency is an area that gets significantly less attention than competency in criminal proceedings. It's definitely not a topic that you are going to see on Law & Order anytime soon.

We regularly get questions about civil competency and the mental capacity standards in civil litigation. While the standards for competency civil litigation have some things in common with the [standards for competency in criminal proceedings](#), they have their own unique set of legal standards.

In this blog post, we're going to talk about the California rules and regulations in various civil competency proceedings and how an expert assesses for competency in these cases.

The three most common types of civil competency cases are:

1. Testamentary Capacity (e.g. completing and executing a will)
2. Contractual Capacity
3. Medical Decision Capacity (e.g. informed consent and treatment decision making)

What is Competency in Civil Litigation?

It's important to remember that decisions regarding civil competency are legal decisions that are made by the trier of fact. This means that the decision can be informed by an expert's knowledge, but it's ultimately the job of the court to make the legal decision.

There are some differences between civil competency in the four areas we mentioned earlier, but for the most part, they share one overarching thing in common:

In order for a decision to be a competent decision, the individual has to have the ability to understand and appreciate the consequences of his or her actions with regard to the decision they made.

The most important thing to highlight here is that the decision that the individual makes is not important.

What's important is their rationale for making such a decision. The individual has to understand the situation and issues that they are facing when they are making the decision.

They also need to generate various courses of action and appraise and consider the risks and benefits of the decision they want to make.

This standard is outlined in California Probate Code Section 811, which states that there needs to be evidence of a mental function deficit that “significantly impairs the person’s ability to understand and appreciate the consequences of his or her actions with regard to the type of act or decision in question.”

If there is a psychological or medical condition, the condition has to limit their ability to make a rational decision. For example, an individual can have Alzheimer’s Disease but still be capable of making rational decisions depending on the severity of the disease.

This standard is outlined in California Probate Code Section 810, which states that “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.”

What is Testamentary Capacity?

Testamentary capacity is a person’s ability to execute a will or trust. This is probably the most common form of capacity that comes up in civil proceedings.

California Probate Code Section 6100.5 outlines the standard for testamentary capacity:

An individual is not mentally competent to make a will if at the time of making the will if the following is true:

The individual does not have sufficient mental capacity to be able to:

- Understand the nature of the testamentary act (e.g. the purpose of the will).
- Understand and recollect the nature and situation of the individual’s property (e.g. understand what they have to give away).
- Remember and understand the individual’s relations to living descendants, spouse, and parents, and those whose interests are affected by the will.

A will or trust can also be challenged if you can prove that the individual who executed the will was the victim of undue influence.

Undue influence is when an individual is able to persuade another’s decisions due to the relationship between the two parties. Generally, one of the parties is in a position of power over the other due to elevated status, higher education, or emotional ties.

The more powerful individual uses this advantage to convince the other individual into making decisions that might not be in their long-term best interest.

Here is an example of when a will might be contested:

Grandma Amy has Lewy Body Dementia. She starts to experience auditory and visual hallucinations. She also has delusional beliefs that her children are government spies and they are conspiring to steal her money. In her demented state, she writes a will and decides to leave her multi-million-dollar estate to her church.

Her children retain an attorney to contest the will on the grounds that she was not competent when she wrote the will due to the symptoms she was experiencing as a result of Lewy Body Dementia.

What is Contractual Capacity?

Contractual capacity is an individual's ability to sign a contract.

California Probate Code Section 812 states that an individual lacks the capacity to make a decision unless they are able to understand and appreciate all of the following:

- The rights, duties, and responsibilities created by or affected by the decision.
- The probable consequences for the decision-maker and, where appropriate, the persons affected by the decision.
- The significant risks, benefits, and reasonable alternatives involved in the decision.

Just like with wills and trusts, under California Civil Code Section 39, contracts can be canceled if the individual was of "unsound mind". This means that they were unable to manage their own financial resources or resist fraud or undue influence.

Here is an example of when a contract might be contested:

Grandpa Jack is 85-years-old and has Alzheimer's Disease. He decides to sell his very lucrative business because he has difficulty with managing the business and keeping track of the business' finances. His accountant states that he will buy the business from him and makes him an offer. The offer is substantially less than what the business is truly worth.

The accountant uses his position of authority and influence to convince Grandpa Jack to sell the business anyway. Grandpa Jack ends up selling the business for considerably less than it's worth.

His children (who live out of state) learn about this and retain an attorney to contest the contract on the grounds that Grandpa Jack was not competent when he signed the contract and that he was the victim of undue influence.

What is Medical Decision Capacity?

Physicians and medical providers have to determine if an individual can provide informed consent for a treatment or procedure.

California Probate Code Section 813 states that an individual is capable of consenting to medical treatment if they are able to do all of the following:

- Respond knowingly and intelligently to questions regarding medical treatment.
- Can rationally participate in the treatment decision process.
- Understand all of the following items related to basic medical treatment information:
 - The nature and seriousness of the illness, disorder, or defect that the person has.
 - The nature of the medical treatment that is being recommended by health care providers.
 - The degree and duration of any benefits and risks of any medical intervention that is being recommended by health care providers, and the consequences of lack of treatment.
 - The nature, risks, and benefits of any reasonable alternatives.

If they don't have the capacity to make a medical decision, then health care providers will look to a surrogate decision-maker under an Advanced Healthcare Directive.

Here is an example of when medical decision capacity might be contested:

Grandma Jill has Alzheimer's Disease and schizophrenia. She also has a growth in her intestine that can be potentially cancerous. A simple biopsy is required in order to determine if the growth is benign or cancerous.

Due to her psychotic symptoms, she believes that the doctors are evil spirits that are trying to take her soul. She doesn't consent to treatment and refuses to allow her doctors to do the biopsy. If the growth is cancerous and is not treated, it can be fatal.

In this case, her capacity to make medical decisions can be challenged and an Advanced Healthcare Directive can be issued.

How Does an Expert Assess for Capacity?

A common question we get asked by attorneys and family members is how do we go about assessing for capacity. Our methods for assessing for capacity depend on the type of capacity that needs to be assessed.

We'll review the most common types of capacity that are assessed in civil litigation.

How do you Assess for Testamentary Capacity?

This type of capacity can be challenging to assess for because the individual that needs to be assessed is usually deceased.

In most cases, the family of the deceased contests the will after they find out that they are either not in the will or if they are getting less of an inheritance that they thought they were going to get. In these cases, the assessment involves a meticulous review of records and interviews with collateral sources.

We have to show that the individual didn't have the capacity **at the time that the will was drafted.**

We might review medical or hospital records around the time the deceased wrote the will. We can also interview people (e.g. neighbors, friends, acquaintances) that knew the deceased or interacted with the deceased around the time they wrote the will.

For example, the individual's medical doctor might have written down that the individual's thinking, reasoning, and memory was progressively getting more impaired during follow up medical visits. This could've potentially impacted their ability to make a rational decision when they drafted the will.

The individual's neighbors might report that the individual was very paranoid, was withdrawn, and was talking about government conspiracies around the time the will was drafted. This could have also impacted their ability to make a rational decision when they drafted the will.

What if the individual is not deceased?

If the individual is still alive, we will review medical records and interview collateral sources such as the individual's medical doctor, family members, or friends.

We will also interview the individual to determine the following:

- Do they understand the nature and purpose of the will or trust?
- Do they understand and recollect their assets? (e.g. property they own, businesses under their name, money they have saved in the bank, or stock and bonds they own)
- Do they remember and understand their relationships to family members or other parties that they want to be included in their will or trust?

We can also administer neuropsychological tests to determine if the individual has impairments in cognitive functioning that could potentially impact their ability to execute a will or trust.

Ultimately, it is up to the trier of fact to weigh the evidence provided by the expert to determine if the individual lacked testamentary capacity when they drafted their will or are about to draft a will.

How do you Assess for Contractual Capacity?

In these situations, the individual might also be deceased. If this were the case, we would use a similar method that we discussed in the section above.

But what if the person is not deceased?

If the person is still alive, we need to establish that they were not competent when they wrote or agreed to the contract.

This would also involve reviewing pertinent medical records and interviews with collateral sources that were familiar with the individual around the time the contract was drafted.

We would also interview the individual and ask questions to determine if they had a rational understanding of the contract they entered. For example, we can ask them to explain the contract to us, explain the consequences of the decisions they made, and ask to them explain reasonable alternatives and why they didn't choose any of them.

If the individual has long-standing mental health or medical condition (e.g. Alzheimer's Disease, schizophrenia, or intellectual disability), we can use psychological and neuropsychological testing to help establish that the presence of the condition and how it impacted the ability to make a rational decision.

Once again, it is up to the trier of fact to weigh the evidence provided to determine if the individual lacked capacity when they entered into the contract.

How do you Assess for Medical Capacity?

Medical capacity is easier to assess since the person is not deceased.

The method would involve a very similar strategy as outlined above. We'd start by reviewing their medical and mental health history to determine if there are any conditions that can impact their ability to make rational decisions.

We would then interview the individual and ask them questions to determine if they have a rational understanding of the decisions they are making. For example, they would also need to know the consequences of not doing the treatment.

They would also need to know other reasonable alternatives that they have available to them and why they may or may not choose those options.

If we're asked to assess for cognitive impairment due to a neurological condition, then we can also use neuropsychological testing to determine how the condition is impacting the individual's thinking, reasoning, memory, or concentration and attention.

It's important to keep in mind that an individual is allowed to make any decision they want so long as it's one that is rational and they have an understanding of the consequences of making that decision.

For example, if an individual has cancer and it would be terminal if it is not treated, they can refuse treatment as long as they have a rational understanding of the consequences of refusing treatment.

For instance, they might be refusing treatment because they would rather die in the peace and comfort of their home rather than have to undergo months of radiation therapy and side effects of treatment while in the hospital. If they understand these consequences and their decision is rational, then they can refuse treatment.

On the other hand, if the same individual has a delusional disorder and they believe that the chemotherapy is a plot by the government to control their mind, then they clearly don't have a rational understanding of the consequences of refusing treatment.

Conclusion

Competency in civil proceedings is an area that gets significantly less attention than competency in criminal proceedings.

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[You can read more about how we assess for civil competency and the benefits of retaining an expert to evaluate for civil competency here.](#)