Capacity for What?

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Capacity Basics…

Determining Capacity is Hard and Consequential

- Capacity is the "black hole" of legal ethics—Peter Margulies, Fordham Law Review
- No bright line test
- Ombudsmen and lawyers are not trained to assess capacity
- People in residents' lives frequently make assertions about their capacity with little regard for the profound consequences of alleging they are incapacitated

People are Presumed to Have Capacity

Individuals challenging a resident's capacity must prove that the individual lacks capacity; the resident should not have to prove they have capacity.

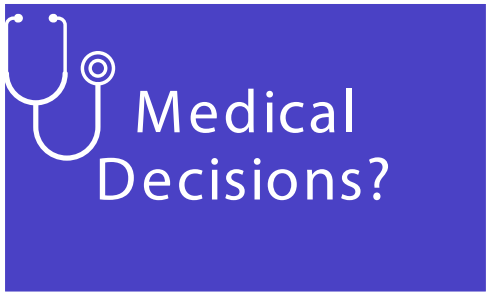
While state laws differ, generally, in the absence of a judicial determination in a guardianship hearing or a triggering event in a legal document like a power of attorney, residents are considered to have legal capacity.

The fact that a resident has executed powers of attorney or that the resident's home has identified a responsible party does not mean the resident loses the ability to make decisions for himself or herself.

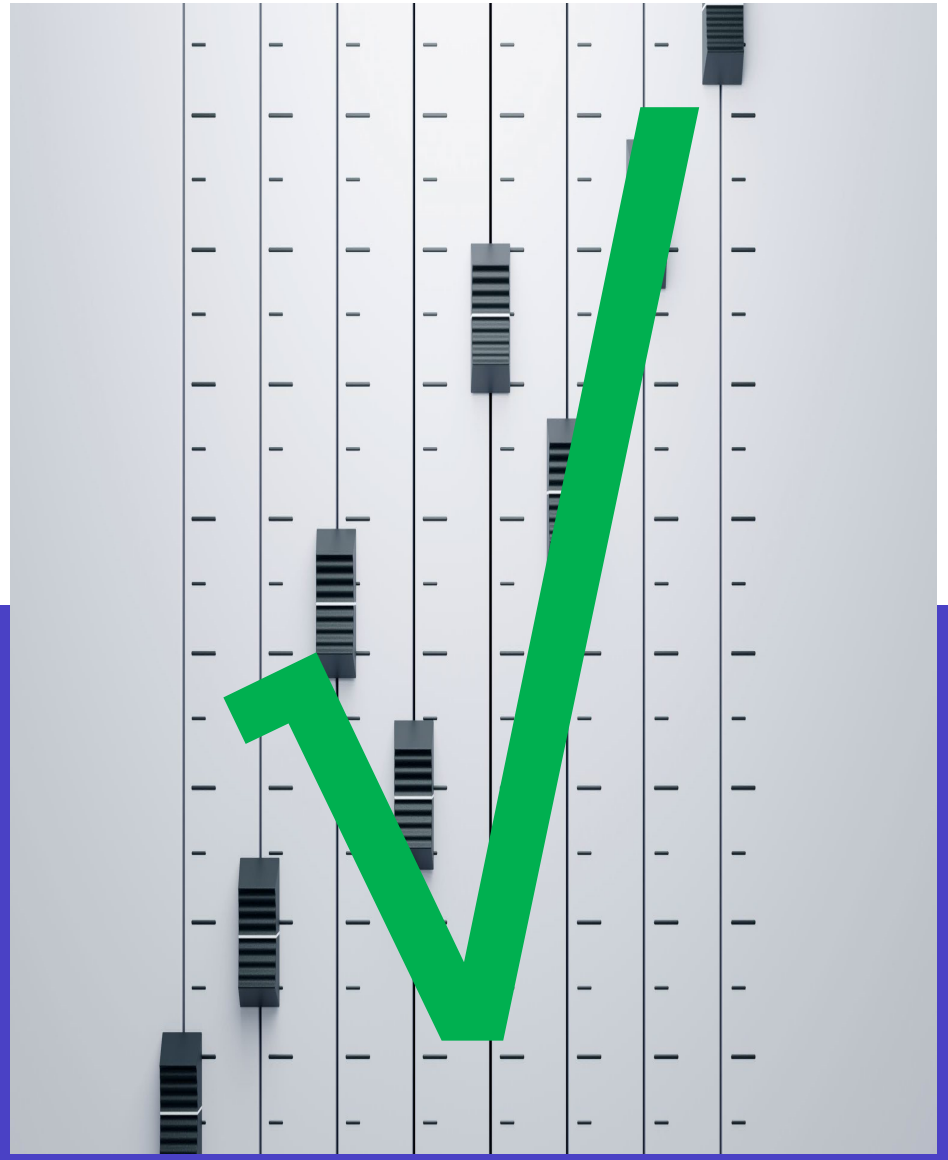
Myth:

Capacity is a binary, all or nothing, on/off switch

Fact: Capacity is Domain Specific




ON



So how do I know what level of capacity is required for each domain?

Sometimes state laws explain what levels of capacity is necessary to execute a will, sign a POA, enter a contract, or take other actions.

Sometimes case law provides guidance on what capacity is required for a specific task.

Sometimes, there is no clear definition or guidance

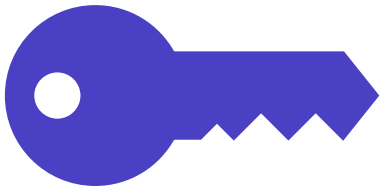
Fact: Capacity Can Come and Go

- Reversible causes of delirium are outlined by the acronym “DELIRIUM”
  - Drugs, including any new medications, increased dosages, drug interactions, over-the-counter drugs, alcohol, etc.
  - Electrolyte disturbances, especially dehydration and thyroid problems.
  - Lack of drugs, such as when long-term sedatives (including alcohol and sleeping pills) are stopped, or when pain drugs are not being given adequately.
  - Infection, commonly urinary or respiratory tract infection.
  - Reduced sensory input, which happens when vision or hearing are poor.
  - Intracranial (referring to processes within the skull) such as a brain infection, hemorrhage, stroke, or tumor (rare).
  - Urinary problems or intestinal problems, such as constipation or inability to urinate.
  - Myocardial (heart) and lungs, such as heart attack, problems with heart rhythm (arrhythmia), worsening of heart failure, or chronic obstructive lung disease.

Source: Healthinaging.org

Fact: "Bad" Decisions are Not the Same as Lack of Capacity

We all have the right to – and do sometimes – make bad decisions!



The key is whether the resident understands the consequences of his or her actions.

Assessing Capacity …

Doctors, lawyers, and social workers assess capacity differently and use different terminology

Doctors look at whether a person possesses functional autonomy, working memory, orientation, attention, and calculation and assess whether a person is suffering from loss of significant intellectual functioning (ability to think, remember, reason) or from cognitive impairment (ability to learn).

Lawyers look at whether a person understands their circumstances, appreciates the consequences of their actions, and recalls important facts and information

Social workers often look at individual's functional abilities—the reality of their daily choices and circumstances – or rely on quick tests like the Mini-Mental State Examination (MMS) or the Brief Interview for Mental Status (BIMS) assessments.

So how good are those assessments?

- Mini-Mental State Exam —11 questions or tasks, 30 points total, 24-30 = no impairment; 18-23 = mild impairment; 0-17 = severe impairment
- Brief Interview for Mental Status (BIMS) —word recall and naming date, month and year. 13-15 = no impairment, 8-12 = moderate impairment, 0-7 = severe impairment
- Neuropsychological Evaluation —comprehensive assessment of a wide range of cognitive abilities; testing often takes several hours and requires expert analysis

Mini Mental State Exam

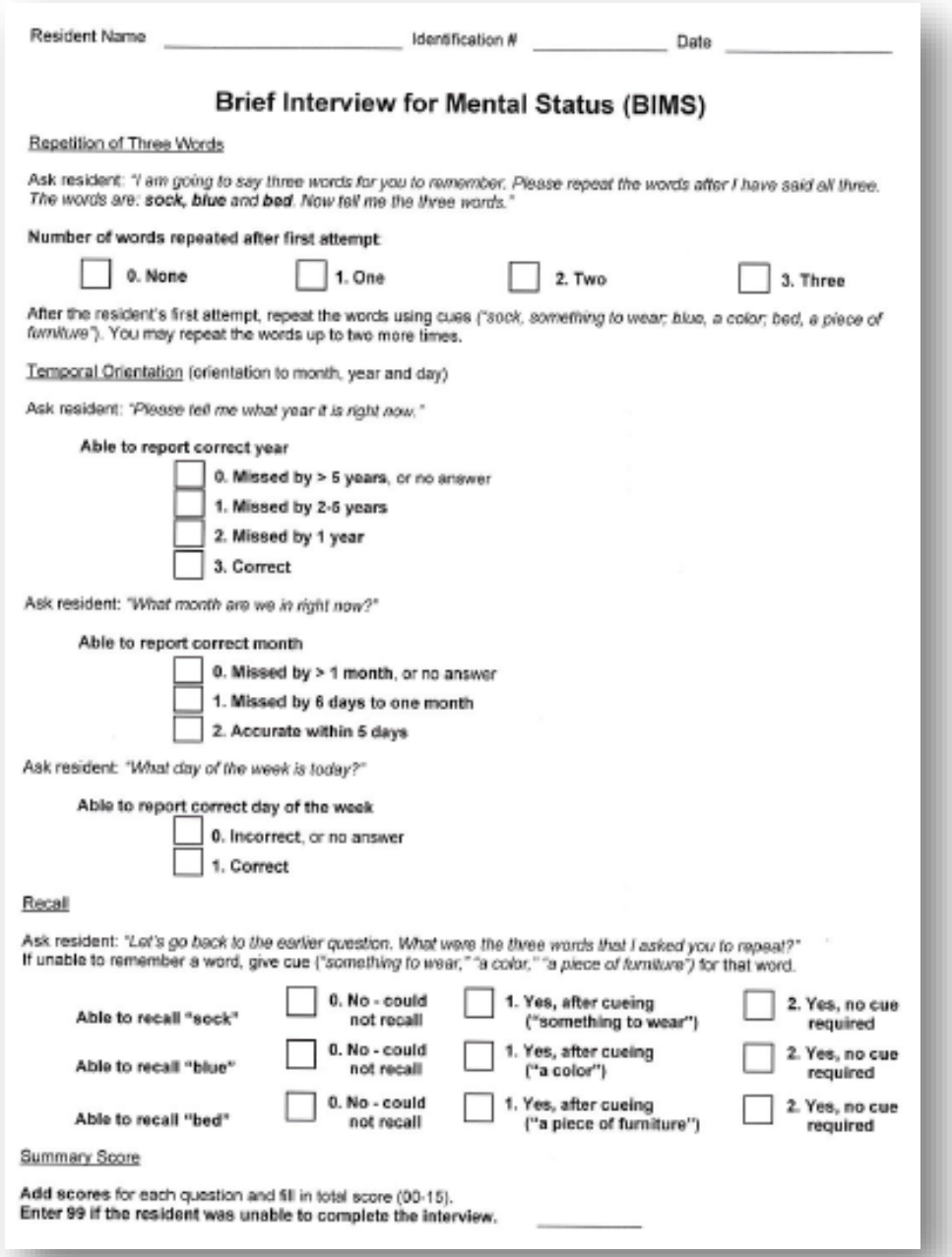
Mini-Mental State Examination (MMSE)

Patient's Name: _____ Date: _____

***Instructions:* Ask the questions in the order listed. Score one point for each correct response within each question or activity.**

Maximum Score	Patient's Score	Questions
5		"What is the year? Season? Date? Day of the week? Month?"
5		"Where are we now: State? County? Town/city? Hospital? Floor?"
3		The examiner names three unrelated objects clearly and slowly, then asks the patient to name all three of them. The patient's response is used for scoring. The examiner repeats them until patient learns all of them, if possible. Number of trials: _____
5		"I would like you to count backward from 100 by sevens." (93, 86, 79, 72, 65, …) Stop after five answers. Alternative: "Spell WORLD backwards." (D-L-R-O-W)
3		"Earlier I told you the names of three things. Can you tell me what those were?"
2		Show the patient two simple objects, such as a wristwatch and a pencil, and ask the patient to name them.
1		"Repeat the phrase: 'No ifs, ands, or buts.'"
3		"Take the paper in your right hand, fold it in half, and put it on the floor." (The examiner gives the patient a piece of blank paper.)
1		"Please read this and do what it says." (Written instruction is "Close your eyes.")
1		"Make up and write a sentence about anything." (This sentence must contain a noun and a verb.)
1		"Please copy this picture." (The examiner gives the patient a blank piece of paper and asks him/her to draw the symbol below. All 10 angles must be present and two must intersect.) 
30		TOTAL

(Adapted from Rovner & Folstein, 1987)



Resident Name _____ Identification # _____ Date _____

Brief Interview for Mental Status (BIMS)

Repetition of Three Words

Ask resident: *"I am going to say three words for you to remember. Please repeat the words after I have said all three. The words are:* ***sock, blue*** *and* ***bed****. Now tell me the three words."*

Number of words repeated after first attempt:

☐ **0. None** ☐ **1. One** ☐ **2. Two** ☐ **3. Three**

After the resident's first attempt, repeat the words using cues (*"sock, something to wear; blue, a color; bed, a piece of furniture"*). You may repeat the words up to two more times.

Temporal Orientation (orientation to month, year and day)

Ask resident: *"Please tell me what year it is right now."*

Able to report correct year

☐ **0. Missed by > 5 years**, or no answer
☐ **1. Missed by 2-5 years**
☐ **2. Missed by 1 year**
☐ **3. Correct**

Ask resident: *"What month are we in right now?"*

Able to report correct month

☐ **0. Missed by > 1 month**, or no answer
☐ **1. Missed by 6 days to one month**
☐ **2. Accurate within 5 days**

Ask resident: *"What day of the week is today?"*

Able to report correct day of the week

☐ **0. Incorrect**, or no answer
☐ **1. Correct**

Recall

Ask resident: *"Let's go back to the earlier question. What were the three words that I asked you to repeat?"*
If unable to remember a word, give cue (*"something to wear," "a color," "a piece of furniture"*) for that word.

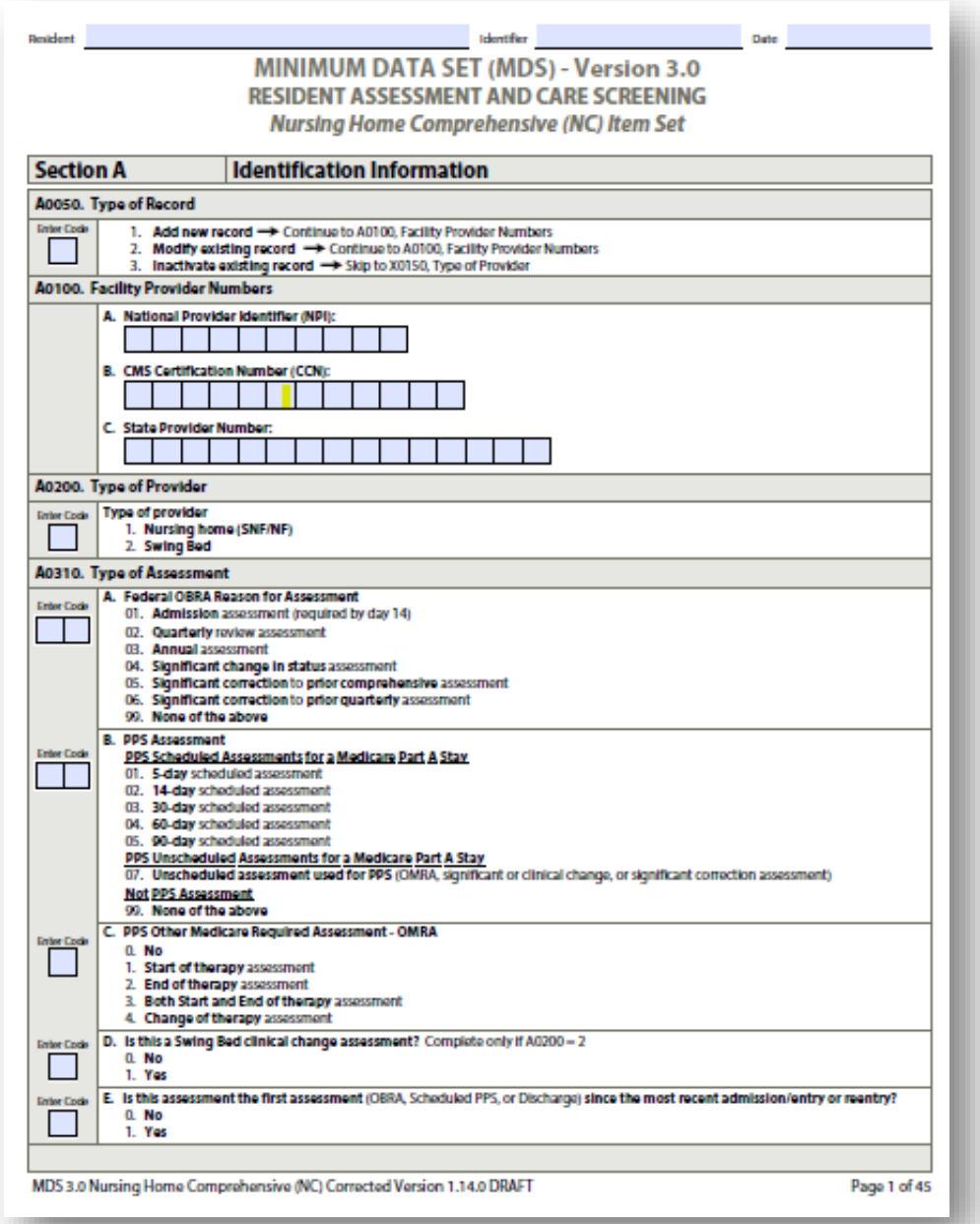
Able to recall "sock"	☐ **0. No - could not recall**	☐ **1. Yes, after cueing ("something to wear")**	☐ **2. Yes, no cue required**
Able to recall "blue"	☐ **0. No - could not recall**	☐ **1. Yes, after cueing ("a color")**	☐ **2. Yes, no cue required**
Able to recall "bed"	☐ **0. No - could not recall**	☐ **1. Yes, after cueing ("a piece of furniture")**	☐ **2. Yes, no cue required**

Summary Score

Add scores for each question and **fill** in total score (00-15).
Enter 99 if the resident was unable to complete the interview. _____

BIMS

MDS 3.0 Cognitive Assessment



Resident _____ Identifier _____ Date _____

MINIMUM DATA SET (MDS) - Version 3.0
RESIDENT ASSESSMENT AND CARE SCREENING
Nursing Home Comprehensive (NC) Item Set

Section A — Identification Information

A0050. Type of Record

Enter Code ☐
1. **Add new record** → Continue to A0100, Facility Provider Numbers
2. **Modify existing record** → Continue to A0100, Facility Provider Numbers
3. **Inactivate existing record** → Skip to X0150, Type of Provider

A0100. Facility Provider Numbers

A. **National Provider Identifier (NPI):** ☐☐☐☐☐☐☐☐☐☐

B. **CMS Certification Number (CCN):** ☐☐☐☐☐☐☐☐☐☐☐☐

C. **State Provider Number:** ☐☐☐☐☐☐☐☐☐☐☐☐☐☐☐☐

A0200. Type of Provider

Enter Code ☐
Type of provider
1. **Nursing home (SNF/NF)**
2. **Swing Bed**

A0310. Type of Assessment

Enter Code ☐☐
A. Federal OBRA Reason for Assessment
01. **Admission** assessment (required by day 14)
02. **Quarterly** review assessment
03. **Annual** assessment
04. **Significant change in status** assessment
05. **Significant correction** to **prior comprehensive** assessment
06. **Significant correction** to **prior quarterly** assessment
99. **None of the above**

Enter Code ☐☐
B. PPS Assessment
PPS Scheduled Assessments for a Medicare Part A Stay
01. **5-day** scheduled assessment
02. **14-day** scheduled assessment
03. **30-day** scheduled assessment
04. **60-day** scheduled assessment
05. **90-day** scheduled assessment
PPS Unscheduled Assessments for a Medicare Part A Stay
07. **Unscheduled assessment used for PPS** (OMRA, significant or clinical change, or significant correction assessment)
Not PPS Assessment
99. **None of the above**

Enter Code ☐
C. PPS Other Medicare Required Assessment - OMRA
0. **No**
1. **Start of therapy** assessment
2. **End of therapy** assessment
3. **Both Start and End of therapy** assessment
4. **Change of therapy** assessment

Enter Code ☐
D. Is this a Swing Bed clinical change assessment? Complete only if A0200 = 2
0. **No**
1. **Yes**

Enter Code ☐
E. Is this assessment the first assessment (OBRA, Scheduled PPS, or Discharge) **since the most recent admission/entry or reentry?**
0. **No**
1. **Yes**

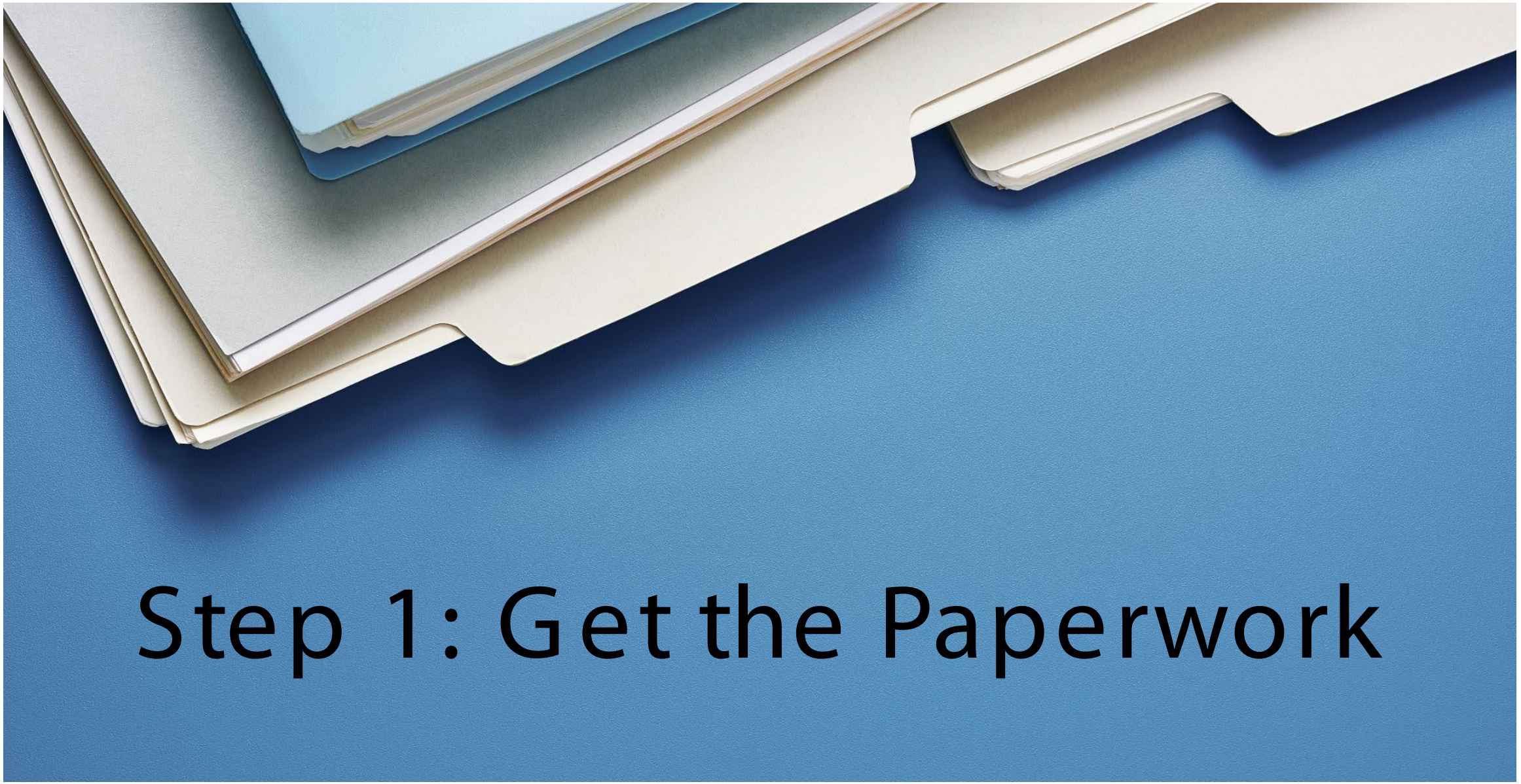
MDS 3.0 Nursing Home Comprehensive (NC) Corrected Version 1.14.0 DRAFT — Page 1 of 45

MDS 3.0

- Section C (Cognitive Patterns) is intended to determine the resident's attention, orientation, and ability to register and recall new information.
- All residents are interviewed in this section if they are at least sometimes understood verbally or in writing; otherwise, staff completes the assessment without an interview
- Incorporates the BIMS with directions how to administer it and suggestions about what might affect residents' responses
- Looks at memory and recall including issues like location of room, staff names, orientation (season? place?), daily decision-making skills, signs of delirium

Residents
vs.
Their Fiduciaries

...who is in charge?



Step 1: Get the Paperwork

There are Many Types of Fiduciaries
- Most of Them Have Paperwork -

Guardian

(terms may differ in different states)

Conservator

(terms may differ in different states)

Power of Attorney

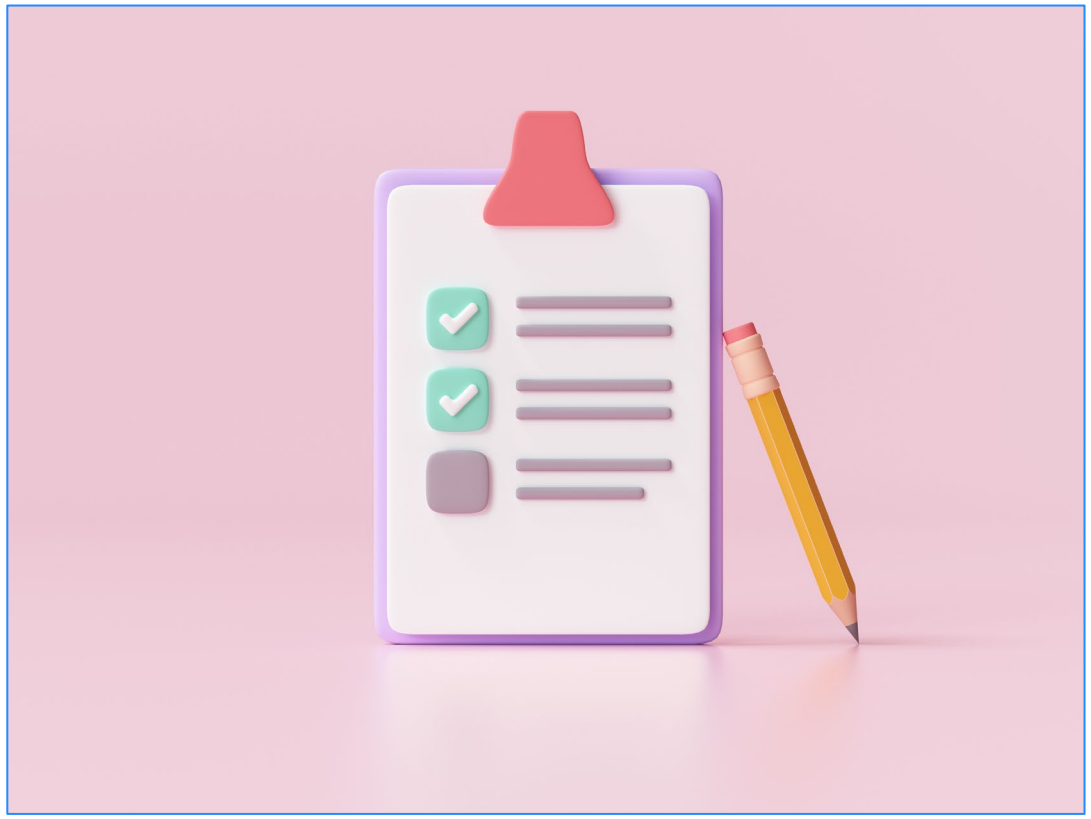
(finances or health care)

Representative Payee

"Responsible Party"

Trustee

Read the Docs Narrowly & Precisely



- Each of the documents that gives a fiduciary power is (supposed to be written) with specificity
- The words in it (or not in it) matter a lot (ex: power to make gifts in POA)
- Sometimes there is even a definition section that explains the meaning of ambiguous words


Step 2:
Determine
Who Has
Authority

What power does the Agent have? Or not have?

- Who is the named agent?
- Have the agent's powers been "activated"?
- Have the agent's powers expired?
- What specific power is the agent given?
- What powers are not given to the agent?
- What powers are unclear?
- Does the document say anything about honoring the resident's wishes, interests, desires, choices, etc?

POWER OF ATTORNEY - PURCHASING

KNOW ALL MEN BY THESE PRESENTS: That I/We the undersigned, Emily Miller, whose address is [redacted] Drive, Ypsilanti MI 48197, do hereby make, constitute, and appoint Michael Miller, her hus band whose full residence address is [redacted] International Drive, Ypsilanti MI 48197 as our true and lawful Attorney-In-Fact, and in my name, place and stead and on our behalf to do any and all things necessary to effectuate the purchase of a certain piece of real property commonly known as [redacted], Ann Arbor, MI 48103 and legally described as:

Township of Lodi, County of Washtenaw and State of Michigan

I/We hereby grant said Attorney-in-Fact the power to execute on my/our behalf purchase agreements, contracts, closing statements, mortgage notes and mortgages, and any and all other documents incident to the purchase of the above property.

I/We do hereby confirm and ratify any and all acts of said Attorney-in-Fact to do anything which I/we might do if personally present in regard to the purchase of the above property.

[redacted] and a chord which bears South 51 degrees 20 minutes 09 seconds West 29.59 feet; thence North 38 degrees 52 minutes 30 seconds West 142.23 feet to the Point of Beginning.

Tax parcel number: [redacted]

I/We hereby grant said Attorney-in-Fact the power to execute on my/our behalf purchase agreements, contracts, closing statements, mortgage notes and mortgages, and any and all other documents incident to the purchase of the above property.

I/We do hereby confirm and ratify any and all acts of said Attorney-in-Fact to do anything which I/we might do if personally present in regard to the purchase of the above property.

IN WITNESS HEREOF, I/we have hereunto set my/our hands and seals this 29th day of August, 2014.

Dated: September 08, 2014

Purchaser(s):

Emily Miller

Can the resident and the agent both have decision-making power?

- Sometimes!
- A resident with a durable power of attorney can still make decisions for himself or herself as long as he or she has capacity. Depending on how the document is written, the agent may also have the power to act for the resident. Merely executing a power of attorney does not deprive a person of the right to make decisions for themselves (that would not make sense in any case since the person has to have capacity to execute the document and wouldn't immediately lose legal capacity once it is executed!).
- If a guardianship is limited or another legal agent has limited powers over the resident, the agent may be able to act exclusively in some areas but the resident might retain the right to make decisions in other areas.

Do Not Exclude the Resident!

Even if you have already confirmed that the fiduciary has valid power over the issue you are trying to resolve, you need to confer with the resident (see federal ombudsman rules discussed on another slide)

If the resident is not happy with the decisions the agent is making, the resident may be able to revoke the power of attorney or rep. payee arrangement or terminate or modify a guardianship or conservatorship.

Using federal law to determine who can exercise resident rights

Federal law has a lot to say about residents and resident representatives exercising resident rights!

42 C.F.R. 483.10(b):

- The resident has the right to designate a representative
- The resident representative can exercise any resident rights that have been delegated to them
- The resident retains the right to exercise any rights not delegated to a resident representative (unless limited by state law)
- Facilities must honor the decisions of resident representatives if the representative has been empowered by the court or the resident has delegated rights to the representative. Facilities cannot expand the right to make decisions for the resident beyond what is required by the court or delegated by the resident
- If the facility thinks the representative is not acting in the best interest of the resident, the facility should report those concerns
- The rights of a resident determined to be incapacitated devolve to their representatives only to the extent the court determines is necessary
- Resident representatives must consider the resident's wishes and preferences

Federal Ombudsman Regulations define "Resident Representative"

- Resident representative means any of the following:
- (1) An individual chosen by the resident to act on behalf of the resident … to support the resident in decision-making; access medical, social or other personal information of the resident; manage financial matters; or receive notifications;
- (2) A person authorized by State or Federal law (including but not limited to agents under power of attorney, representative payees, and other fiduciaries) to act on behalf of the resident … to support the resident in decision-making; access medical, social or other personal information of the resident; manage financial matters; or receive notifications;
- (3) Legal representative, as used in section 712 of the Act; or
- (4) The court-appointed guardian or conservator of a resident.
- (5) Nothing in this rule is intended to expand the scope of authority of any resident representative beyond that authority specifically authorized by the resident, State or Federal law, or a court of competent jurisdiction

When should ombudsmen rely on the determination of the resident representatives?

- The Ombudsman or representative of the Office shall ascertain the extent of the authority that has been granted to the resident representative under court order (in the case of a guardian or conservator), by power of attorney or other document by which the resident has granted authority to the representative, or under other applicable State or Federal law.
- Regardless of the source of the complaint…support and maximize resident participation in the process of resolving [the complaint].
- Ombudsmen can investigate complaints concerning resident welfare and rights related to the appointment or activities of resident representatives

Let's Practice

So…what if…

The resident's son is the healthcare power of attorney. The resident wants to eat ice cream and go for a walk outside every day. His son directs the nursing home not to permit either activity because the resident is diabetic and at risk of falling. Who wins?

The resident's son is the healthcare power of attorney. The resident wants to order magazines and a newspaper. The son disagrees because the resident has limited funds. Who wins?

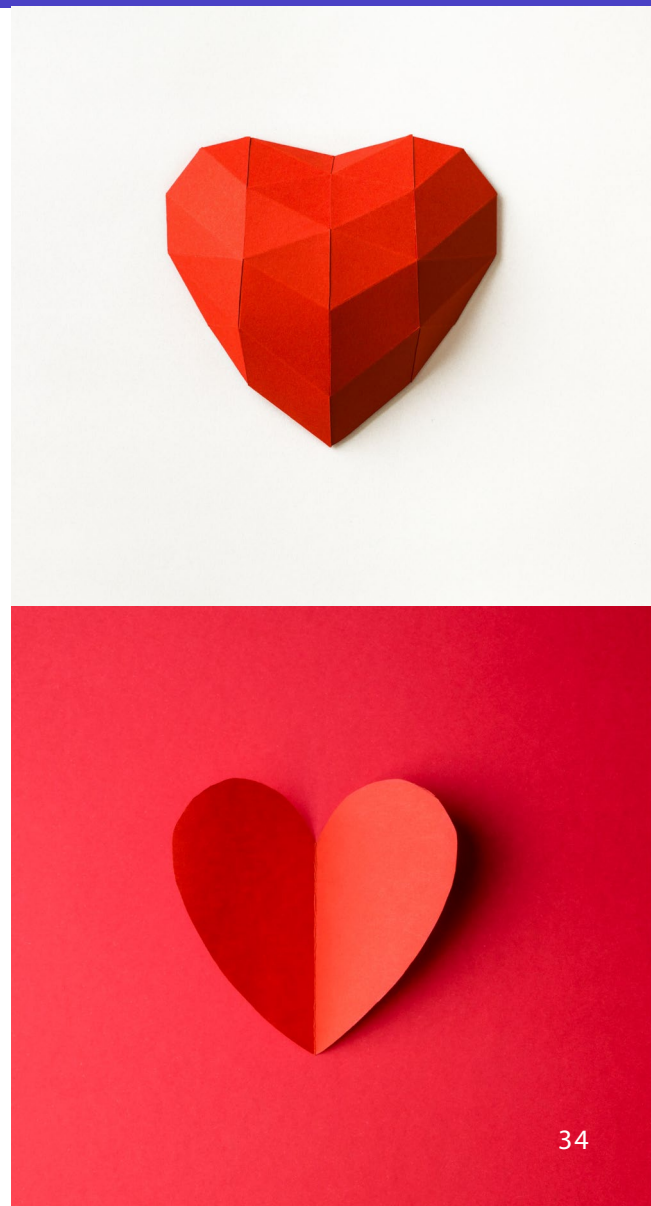
More what ifs…

The resident's niece is her guardian. The guardian directs the nursing home that the resident needs to wear a bib over her clothes because she sometimes spills food. The resident objects. Who wins?

The resident's financial power of attorney directs the nursing home to block calls and visits from certain relatives in a family with long-standing tensions. The POA claims there may be the possibility of future exploitation if the calls or visits occur. The resident objects. Who wins?

A matter of the heart…

- Sam (a retired psychologist who has short-term memory deficits and whose son is his guardian) and Sadie (a resident with some cognitive deficits whose son is her healthcare POA) fall in love in the nursing home and ask to share a room. The nursing home worries there might be a sexual relationship, an issue the couple has not broached.
- Sam's son is supportive but the facility attorney says a guardian cannot consent to an individual's sexual relationship and the resident cannot consent because he has a guardian.
- Sadie's son is apoplectic that Sadie is "dishonoring" his late father and instructs the nursing home to ensure Sam and Sadie are separated. The nursing home complies.



A matter of the heart continued…

- Sadie's son claims he is taking her to lunch but instead drives her to her late husband's grave, berates her, and tries to drop her off at a different nursing home.
- Sadie resists, the police are called, and when Sadie returns to her original nursing home, she revokes her son's healthcare power of attorney, and names her daughter as her healthcare POA. Her daughter supports her relationship and Sam and Sadie excitedly plan a commitment ceremony.
- The nursing home allege that Sam and Sadie lack capacity to engage in a relationship. The home separates Sam and Sadie.
- Sam says that he knows he has short term memory issues but the one thing he never forgets is that he loves Sadie.

Who decides if Sam and Sadie can pursue their loving relationship?

Takeaways…

- There are a lot of gray areas. Advocate for residents' rights whenever residents have clear rights to make decisions for themselves, when their representatives are not acting in their best interests, or when there is at least a colorable argument that the resident retains the right in question
- Understand that capacity may need to be frequently reassessed and residents may regain the right to make decisions.
- Help residents obtain legal representation if you cannot resolve the issue. Lawyers can help in myriad ways including terminating or modifying guardianships, revoking or executing documents, and enforcing rights.
- Capacity is worth fighting about! It's the key to resident autonomy!

Thank you!

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