

# Capacity to Consent to Sexual Activity

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# Disclaimer

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- This is not legal advice and should not be relied on.
- The law varies from state to state, consult attorneys in your state
- The opinions expressed are mine, and may not reflect the opinion or policy of the American Bar Association.

# What Is Capacity

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- “the ability to do something : a mental, emotional, or physical ability”



# Tell me More!

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- The ability to understand,
- Including risks and benefits,
- Make a choice,
- Communicate the choice.



# More than, Less than

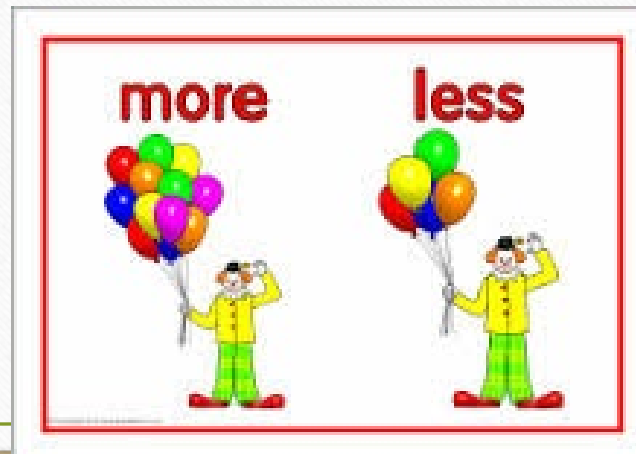
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## More Than

- Being able to say yes
- Not saying no

## Less Than

- Being able to justify the choice
- Being able to explain in detail



# What Capacity is Not

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- A requirement to act in one's best interest
- A requirement to make the choice that other's think you should make
- A requirement to be able to justify the choice you are making



# Volition – Center for Practical Bioethics

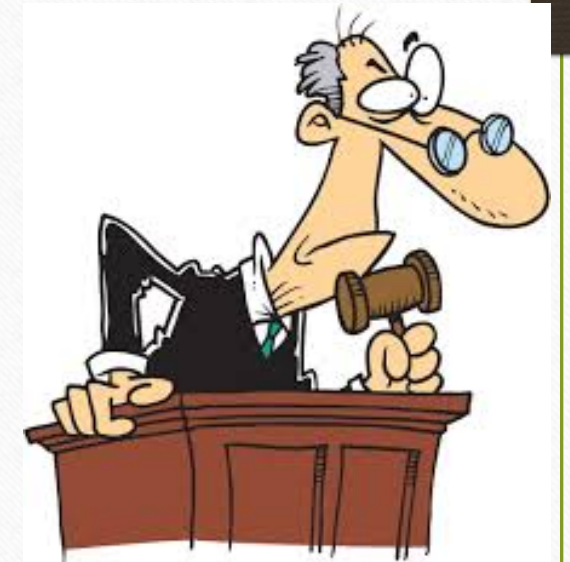
- A resident's clear, unequivocal, unforced willing participation in an intimate relationship or sexual activity.
- Freedom from coercion is a trait of volition.



# Sexual Contact without Consent is a Crime

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- All states recognize spousal or marital rape as a crime
- Minors are deemed “incapable of consent” without regard to individual abilities – until the age of consent
- Sexual contact with a person who is unconscious is a crime



# Red Flags

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- Sexual contact with staff or care providers – automatic NO
- Any significant imbalance within the relationship - not an automatic No but a caution.

**! ALERT !**  
**RED FLAG WARNING**

# No universally Accepted Criteria

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- For most adults capacity can be safely assumed
- For persons with advanced dementia, significant developmental concerns or serious mental illness capacity should not be assumed



# 1: Knowledge of Relevant information – including risks and benefits

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- Potential risks
- The right to say no
- The ability to end a relationship



## 2: Understanding or Rational Reasoning that reveals a decision is consistent with the individuals values

- Past behavior
- Values
- Beliefs
- If inconsistent – can the person describe reasoning for the change



### 3: Voluntariness

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- Not coercion,
  - Unfair persuasion, or
  - Inducement
  - Differences in capacity, raises a risk



# Privacy

- Privacy is essential
- Information
- Space
- Guardians –need to be involved – if the guardianship order includes personal decisions – NGA standards – Guardian shall assure consensual – ensure safety and health
- Other fiduciaries – ?



## When in doubt

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- Ask for a professional assessment by a psychologist or psychiatrist

**THE MIND IS LIKE AN  
ICEBERG, IT FLOATS  
WITH ONE-SEVENTH  
OF ITS BULK ABOVE  
WATER.**



Sigmund Freud  
Austrian neurologist