Guardianship-Related Neuropsychological Examinations:

A Practical Guide

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Course Outline

1. Case Examples
2. Important Legal Terms
3. First Encounters: Examinee Approach and Informed Consent
4. The Neuropsychological Examination: General Considerations
5. Test Selection: Issues, Screening and Comprehensive Measures
6. Guidelines for Dementia Assessment
7. Summary Points

Case #1: Jane

- 90yo widow, spouse died 1993
- Close personal friend is POA
- Gradual deterioration and problems with housecleaning and bills unpaid. Stubborn refusal of help.
- Victim of a financial scam where she was sending money out of the country.
- License was eventually revoked in 2007. However, Jane refused to quit driving.
- Ex-stepson visits from CA. Alarmed, files PfG.
- "I have a stepson that's interested in getting in on my money.“
- Denies any medical problems that might be impacting her decision making capacity

Case #2: Barbara

- 85-year-old retired business owner.
- PfG by daughter, alleging “inability to adequately provide for nutrition, health, housing, or physical safety”
- “My daughter is crazy, she’s had several strokes and is unstable”
- Barbara assigns POA to friend of her incarcerated son.

Case #3: Dorothy

- 86-year-old, Ph.D. in art history
- Supporting drug-addict daughter resulted in near foreclosure of her home.
- Sold home, took train to Texas on "grand adventure"
- Ended up in WA, rented hotel room. Later found unconscious with near fatal UTI.
- Niece from Ohio comes to visit.
- RN staff observes undue influence and manipulation.

Commonalities?

- Each angry and denying need for protection.
- Each seem, in casual interviewing, to be intact and reasonable
- General disagreement between petitioner, patient, family, and medical staff.
- Screening exams provide little clarity.
- ***All need expert, comprehensive, and objective assessment.***

Some Important Legal Terms

Competence

- A status where one is considerable capable to make binding amendments to their rights, duties and obligations, such as getting married, entering into contracts, making gifts, or writing a valid will.
- "*A threshold requirement, imposed by society, for an individual to retain decision making power in a particular activity or set of activities.*" D. Marson, J.D., Ph.D.
- Legal incapacity is also referred to as *incompetence.*
- An individual subject to a guardianship petition is referred to as an ***Alleged Incapacitated Person*** (AIP).
- Competence has multiple contexts, such as medical decision making, financial management, driving, etc.

Competence in American Case Law

4 Issues Specific to Medical Decision-making

Ability to *Understand*

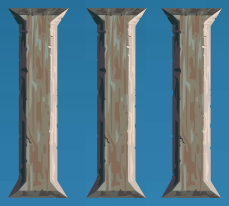
- The ability to comprehend diagnostic and treatment-related information and to demonstrate that comprehension; involves ability to attend, encode, store, and retrieve newly presented words and phrases.

Competence in American Case Law

Ability to *Appreciate*

- The ability to determine the significance of treatment information relative to one's own situation, focusing on beliefs about the actual presence of the diagnosis and the possibility that treatment would be beneficial; involves insight, judgment, and foresight

Competence in American Case Law



Ability to *Reason*

- The process of comparing alternatives in light of consequences, through integrating, analyzing, and manipulating information; involves the ability to provide rational reasons for a treatment decision, to manipulate information rationally, to generate consequences of treatments for one's life, and to compare those consequences in light of one's values

Competence in American Case Law

Ability to *Make a Choice*

- The ability to communicate a decision about treatment. Especially applies to individuals who cannot or will not express a choice, or who are ambivalent.

Incapacity: Legal Foundations

- Based on the policy of *parens patriae*, allowing the state to adopt the role of protector of weaker and more vulnerable members of society.
- Individuals may have an inherent physical condition which prevents them from caring for themselves, and may act in ways that are contrary to their interests.
- Such persons are vulnerable through dependency and deserve the protection of the state against the risks of abuse or exploitation.
- Consistent with APA principle of ***beneficence***, but often conflicts with ***autonomy***.

The Ward's Loss of Rights

- To marry or divorce
- To vote or hold elected office
- To enter into a contract or make or revoke a will
- To appoint someone to act on your behalf (POA)
- To sue or be sued other than through a guardian
- To possess a license to drive
- To buy, sell, own, mortgage, or lease property
- To consent to or refuse medical treatments
- To decide who shall provide care or service
- To make decisions regarding social aspect of your life

Guardian ad Litem

- A guardian ad litem (GAL) is a temporary guardian serving only for the duration of a legal action.
- The court appoints these special representatives for the AIP.
- Such court-appointed GALs must be specially certified, and are often attorneys.
- The GAL have extensive power and responsibility during the course of their duties.

Legal Guardian

- An individual recommended by the GAL and appointed by the court to represent the interests of incompetent persons in legal, financial, and medical actions.
- Given the legal responsibility to care for a child or adult who is incapable of taking care of themselves due to age or incapacity.

Legal Guardian (cont)

- The appointed individual is often responsible for both the care of the ward and their affairs.
- Also referred to as a "conservator" when referring to an adult in need of care.
- Potential guardians must meet requirements of
  - No felony records or bankruptcies
  - Recommendation as suitable by the court
  - Over age 18
  - Resident of the state and reasonably close proximity

Certified Professional Guardians

Requirements

- be at least 18 years of age
- be of sound mind
- have no felony or misdemeanor convictions involving moral turpitude
- have completed mandatory training
- be a resident of Washington State or one who has appointed a resident agent
- be authorized to act as a fiduciary, guardian, or limited guardian in this state, if a corporation; and
- be a person who the court finds suitable
- possess an AA or Bachelor's degree from an accredited institution and at least 2-4 years experience working in a discipline pertinent to the provision of guardianship services

Power of Attorney

- A **POA** is an authorization to act on someone else's behalf in a legal or business matter.
- The person authorizing the other to act is the ***principal***, *granter* or *donor* (of the power), and the one authorized to act is the ***agent*** or ***attorney-in-fact.***
- It is presumed the granter has capacity to appoint a POA.
- The POA is frequently used in the event of a principal's illness or disability, or when the principal can't be present to sign necessary legal documents.

Power of Attorney (cont)

- A POA can be flexible, enacted immediately, only if or until the principal is judged incapacitated, or “durable” if it continues despite incapacity of the principal.
- No standard form exists. If the POA doesn't terminate per its terms when prepared, it is permanent unless revoked or a court order changes it.
- There are a lot of poorly written P’sOA out there.
- A POA may be specific to finances, health care, or both.
- Grants broad authority to an agent, and is very much like signing a blank check.
- Few if any requirements to be a POA.

Testamentary Capacity

- Describes a person's legal and mental ability to make a valid will.
- This concept has also been called ***sound*** **mind and memory** or ***disposing*** **mind and memory**.
- Requires that the person comprehend the nature and extent of his or her property, the persons who are the natural objects of his or her bounty, and the dispositive effect of the act of executing the will.
- Those who would challenge a validly executed will must demonstrate that the testator (or testatrix) did not know the consequence of his/her conduct when s/he executed the will.

Undue Influence

- Loss of free agency regarding property disposition through contemporaneous psychological domination by an advisor which results in an excessive benefit to the advisor.
- One person taking advantage of a position of power over another person.
- Free will to bargain is not possible.
- Creates a ground for nullifying a will or invalidating a gift.
- The most common ground for will contests, and often accompanied by a capacity challenge
- Most jurisdictions place the burden of proving undue influence on the party challenging the will.

First Encounters

Examinee Approach and Informed Consent

Practical Suggestions on First Encounters

- Often scheduled by others, such as GAL or family.
- Examinee often confused and unsure, with varying levels of resistance.
- Some are fearful you are there to take them away.
- Offer a careful but concise explanation of who you are, why they are here, and what they should expect. This may need repeating. (see handout)
  - Resistance-countering techniques: not side-taking, not relying on what people say, your chance to put the issue to rest, willing to advocate, etc.

First Encounters: Practical Suggestions (continued)

- Check for hearing, vision, and motor deficits.
- Avoid glare and inadequate illumination.
- Use large print.
- Make sure they are fed, hydrated, not having just taken sedating medication, or in process of major transition.
- Encourage rest, toileting, and nutrition breaks.
- Avoid computer-administered testing unless they are familiar, comfortable, and capable.
- Why all this effort?
  - ACCURACY OF MEASUREMENT IS KEY!

Elements of Informed Consent

- The GAL holds the court-granted authority, not the AIP
- Need to minimally seek AIP's ***assent,*** if not written consent.
- Standard clinical intake forms often too cumbersome
- Sample informed consent/assent document

The Neuropsychological Examination

General Considerations

More Things to Keep in Mind

- Dementia assessment and deficit measurement is a core activity of neuropsychologists.
- Functional capacity is just as, if not more, important than diagnosis when making these judgments.
- MRIs, EEGs, and other neurological measures do not address this key forensic issue.
- Assessing the functional impact of illness is the unique strength and benefit of neuropsychological testing.
- Patient and situational variations demand a flexible battery approach.

General Considerations (cont)

- Need to have useful and accurate tests that serve several goals:
  - Provide general indices of functioning.
  - Generate sufficient data for accurate diagnosis.
  - Measurement domains known to impact ADLs
  - Offer direct assessment of functional capacity
  - Assess quickly and efficiently, avoiding exhaustion
  - Allow for repeated measures by other evaluators, now or in the future.
  - HAVE ADEQUATE NORMS FOR THOSE OF ADVANCED AGE!

General Considerations (cont)

- Geriatric assessment is fraught with threats to test validity and reliability.
- Non-standard administrations are relatively common.
- You MUST select a test battery that reflect attention to these threats.
- Providing an accurate and credible assessment is the driving force in test selection.
- Any threats to validity must be recognized, explained, and described as requiring caution in interpretation.
- Strongly question your inclusion of any test that does not have appropriate normative data for your examinee.

Test Selection

Issues, Screening and Comprehensive Measures

Issues in Measurement

- There is no “capacimeter.”
- There is no consensus protocol for assessment.
- Clinicians lack conceptual models and instruments for assessing capacity in guardianship.
- Clinicians are often confused about the conceptual basis and standards for incapacity.
- In the absence of specific training on capacity standards judgment agreement between physicians has been near chance (57% agreement; Marson, McInturff, Hawkins, Bartolucci, & Harrell, 1997).

Issues in Measurement

- This is an emerging field that needs direction.
- Some conditions (i.e., CVA, TBI) may need specific determinations, while degenerative dementias are almost always global.
- Capacity-specific measures have been developed, but almost exclusively in the context of research.

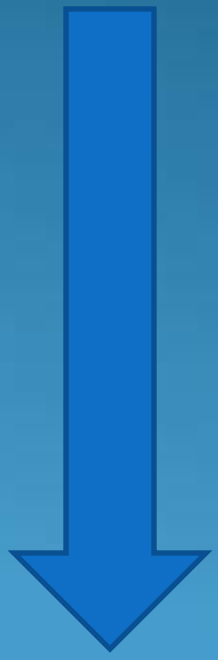
Tests Used in Research

- MacArthur Competence Tool for Treatment
- Capacity to Consent to Treatment Instrument (CCTI)
- Hopemont Capacity Assessment Instrument
- Financial Capacity Instrument
- Measure of Awareness of Financial Skills
- Hopkins Competency Assessment Test
- Direct Assessment of Functional Status
- Everyday Problems Test
- Decisionmaking Instrument for Guardianship

CCTI's Five Legal Standards

1. Knowing a decision needs to be made
2. Making a reasonable decision
3. Understanding the personal and future impact of a choice
4. Demonstrating logical reasoning in the decision process
5. Comprehension of the treatment context and choices

Less Complex/Stringent



More Complex/Stringent

CCTI Research

- Healthy persons and those with very mild dementia score similarly on the first two, simplest concepts.
- Those with Alzheimer's performed much lower on the last three concepts than normals.
- Executive deficits and, to a lesser extent, memory were very important in predicting competencies.

Issues in Measurement (cont)

- Few, if any, are commercially available or meet basic forensic criteria for inclusion.
- The Bad News: We are left with using familiar tools to do the best we can.
- The Good News: The best we can do is actually pretty good, and usually far more than to what the courts are accustomed in such cases.
- You have 1-2 hours, so choose wisely.

Do Neuropsych Tests Predict Functional Capacity?

- NP test instruments do not purport to assess competency as a whole, but rather sample the cognitive functions serving as the foundation for effective living and decision making.
- Although capacity is not perfectly predicted by NP tests, there is a clear relationship between ADL competence and cognitive impairment.
- The MMSE (Karlawish et al, 2005) demonstrates this, as do tests specifically addressing **semantic memory** and **executive function** (Marson et al, 1995; Marson et al, 1996; Cahn-Weiner et al, 2007).
- A clear and positive association between competence and **disease awareness** has also been reported (Cairns et al, 2005).
  - This not surprising, as the capacity to act requires some degree of awareness.

Screening Measures Worth Considering

Whys, Whens, and Whats

Why Use Screening Measures?

- Lawyers and judges are familiar with them.
- Many AIPs have already been tested, allowing for comparison from past assessments.
- It allows future examiners a chance to do the same.
- If you don't use them, you will be asked why you didn't.
- Legal professionals often assume an MMSE constitutes a formal neuropsych exam. Your exam will put screening measures in the proper context and place.
- They are good "warm up" exercises for the real deal.

When to use Screening Measures

- Included in almost all assessments.
- After rapport development.
- When some explanation has been offered of the testing process.
- Often at the conclusion of the interview, but before formal testing is started.

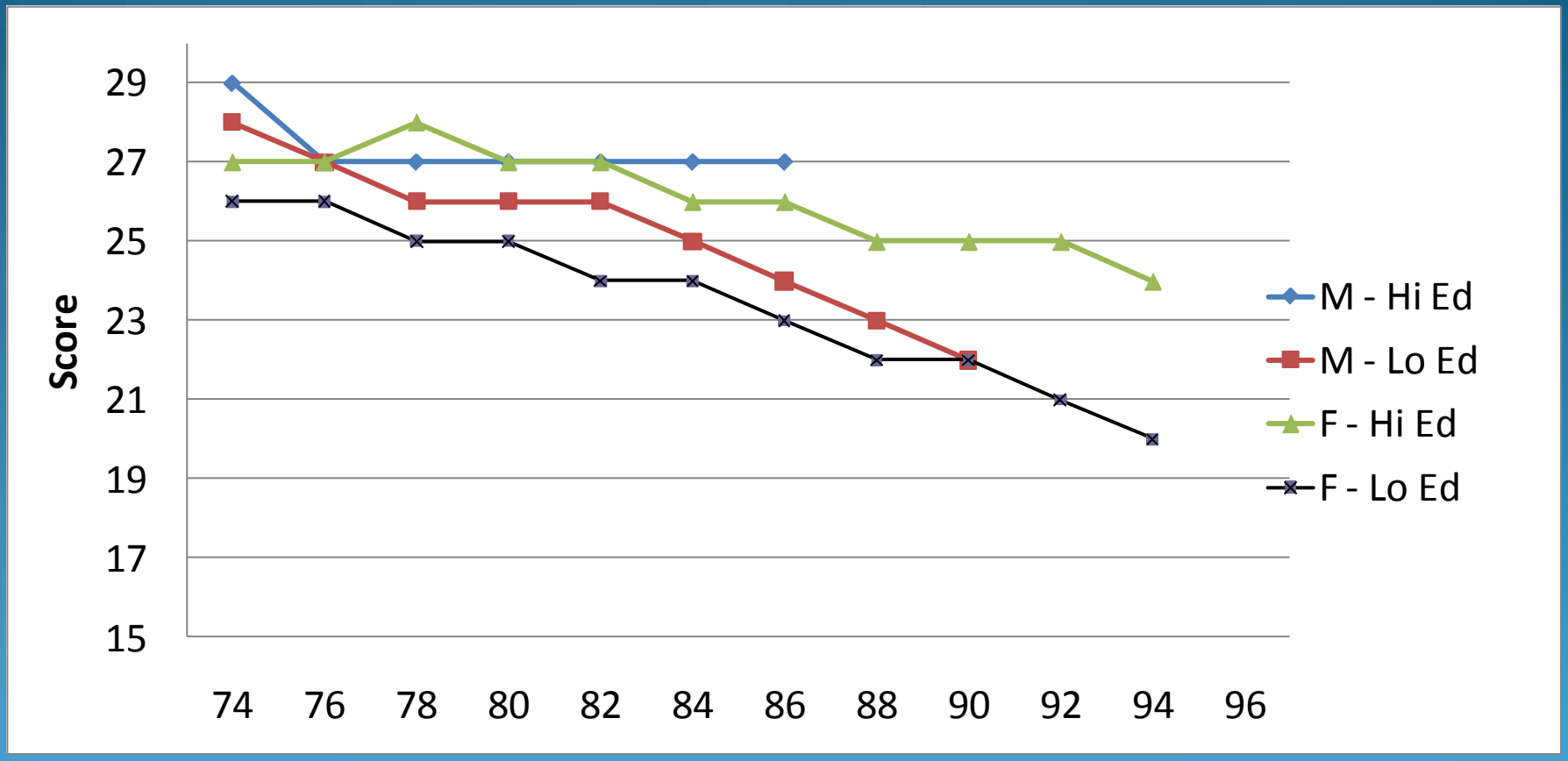
What Measures are Worth Considering?

Mini-Mental Status Examination

- Scores between 21-26 may be atypical, but poor predictors of competency
- Scores below 19 are usually much better at predicting incompetence.
- Age and education make a difference!

Normal MMSE Scores in the Very Old

From Dufouil et al. (2000). Neurology, 55, p 1609-1613



Short Blessed Test

- 28-point test similar to the MMSE
- Primarily assessing orientation and ST memory
- Low scores are better
  - 0 – 4 is normal
  - 5 - 10 mild, needs further exam
  - >10 “Impairment consistent with dementia”
- Good alternative when motor or visual impairment exists, as all verbal responses.

Alzheimer's Disease Assessment Scale – Cognitive Portion (ADAS-Cog)

- Widely used in drug treatment trials
- Assesses memory, language, construction, and orientation
- Total scores ranging from 0 to 70

Neuropsychological Battery of the Consortium to Establish a Registry for Alzheimer's Disease (CERAD)

- Seven subtests along with the MMSE and portions of the ADAS-Cog
- Lacks an overall summary measure

“Test Your Memory”

British Medical Journal, June 2009. "Self administered cognitive screening test > (TYM) for detection of Alzheimer's disease: cross sectional study.

- 50 point test with various memory, naming, and drawing tasks.
- Self-administered paper and pencil test
- Administered to 540 normal controls, 108 Alzheimer's, 31 patients with non-Alzheimer's dementias.
- TYM detected 93% of cases of Alzheimer's disease.
- An intriguing choice in diagnosis, but unclear use in capacity literature.

St. Louis University Mental Status Examination (SLUMS)

- 30 point measure
- Basic orientation, 5-word memory list, animal naming, calculations, digit span, clock drawing, story recall.
- More sensitive than MMSE when detecting MCI
- Norms differ for age and education

Recommended Domains to Assess

(from Moye, 2007)

1. **Sensory acuity**
2. **Motor skills**
3. **Attention** (Attend to a stimulus and concentrate over brief time periods)
4. **Working memory** (Attend to material over short time periods and hold 2 ideas in mind)
5. **Short-term memory (**Encode, store, and retrieve information)
6. **Long-term memory (**Remember information previously stored)

Recommended Domains to Assess
(from Moye, 2007)

7. **Understanding** (Comprehend written, spoken, or visual information, receptive language)
8. **Communication** (Express self in words, writing, or signs, expressive language)
9. **Arithmetic** (Understand basic quantities; make simple calculations)
10. **Verbal reasoning** (Compare 2 choices to reason logically about outcomes)
11. **Visual–spatial reasoning** (Perceive visual–spatial relations and solve visual problems)
12. **Executive function** (Plan for the future, demonstrate judgment, and inhibit inappropriate behavior)

The Dilemma…

- We have the technology, but a thorough assessment of each area requires a complex and lengthy battery.
- Clinical examinations of often frail elderly under less-than-ideal conditions makes this nearly impossible.
- Clinical discretion is required when deciding on an approach to assessment, including which domains are assessed and how.
- Every job is a custom job.

Don’t Forget about Premorbid Functioning

- A very important part of any study attempting to document functional decline.
- Often estimated from demographics, but also with reading recognition (WRAT, NART), expressive vocabulary (WAIS Vocab), and one or more regression formulas (i.e., OPIE, etc.)
- Norm problems with examinees over 90.
- Routinely include this component in your exams in some form or fashion.

Single- and Multiple-Domain Tests Worth Considering

Mattis Dementia Rating Scale

- 144-point test with five subscales, including attention, executive functioning, construction, abstract reasoning, and memory.
- Includes an overall summary measure useful for severity rating.
- Normative data up to 105-years-old
- The DRS Total tends to be a significant predictor of longitudinal institutionalization and mortality outcomes
- I use it in most all examinations.

Repeatable Battery for the Assessment of Neuropsychological Status (RBANS)

- Some solid subtests
- Best for younger and higher functioning persons
- Good when repeated exams are expected
- Higher demands on vision and motor output
  - Complex drawing, coding, etc.
  - Sensory and motor deficits quickly eliminate the test
- Some domain overlap and ceiling effect problems
- There are richer tests of each domain (JLO, BNT, Rey CFT, Digit Span, etc.)

Memory

- Wechsler Memory Scale
  - Too taxing and time-consuming for frail examinees
  - I will extract Logical Memory, as this has relevance to recall of conversations, agreements, etc.
  - Sometimes use Family Pictures for a non-motor visual memory check.
- Verbal Learning Tests (AVLT, CVLT, SRT, etc.)
  - Good norms (i.e., AVLT MOANS studies)
  - Can also be lengthy to administer
- Memory Test for Older Adults
  - 30-40 minute admin time, up to 84yo, drawing tasks, worth it?

Language

- Boston Naming Test
  - Norms up to 97
  - Demonstrated sensitivity to DAT, but not as sensitive as memory
- Token Test
- WAIS-IV Verbal Comprehension subtests
  - Norms up to 90

Attention/Working Memory

- WAIS Digit Span, Arithmetic, Letter-Number Sequencing
- WMS Spatial Span
- Some battery tests already include this (DRS, RBANS)

Executive Functioning

- Particularly important to assess.
- High correlation to:
  - Treatment consent and understanding consequences (Dymek et al 2001; Marson et al, 1996)
  - Activities allowing independence in the community (Cahn et al, 1998)
  - Successful completion of basic domestic tasks (Bedard, et al, 2001)
  - Ability to recognize and understand the mental state of others and use this to understand and predict their actions (“Theory of mind, ” Rowe et al, 2001)

Executive Functioning

- Wisconsin Card Sorting Test
- Category Test
- Various verbal fluency tests
  - COWAT-FAS to 80-95, CFL to 90-97; Animal Naming to 80-95; Animals/Fruits/Vegetables to “90+”
- Trail Making
- Tower of London
- Stroop Test
- Delis–Kaplan Executive Function System (D–KEFS)

Reasoning

- WAIS Similarities, Comprehension, Picture Arrangement, and Matrix Reasoning subtests
- KBIT-2 Matrices
- Verbal Reasoning subtest of the Cognitive Competency Test

Construction/ Visual-Motor Integration

- WAIS-IV Block Design
- Draw a Clock Test
- Rey Complex Figure Test

Independent ADLs

- Everyday functioning is perhaps the most salient element in capacity determination.
- Ultimately, the court is interested in what the individual can and cannot do.

Independent Living Scales (ILS)

- 5 Primary subtests:
  - Memory/Orientation
  - Managing Money
  - Managing Home and Transportation
  - Health and Safety
  - Social Adjustment
- TOTAL ILS Score
  - Problem Solving (applying knowledge in novel situation)
  - Performance/Information (following correct procedures)

Depression

- Depression and dementia may share common underlying pathology.
- Depression is associated with white matter hyperintensities, and often presents with executive dysfunction.
- Peak incidence of depressive disorders occurred within several years prior to and following the onset of dementia.
- The effects of depressive symptoms on neuropsychological functioning in the elderly are pervasive.
- Measuring depression must take into account visual and motor deficits when responding to self-report measures.
- The Geriatric Depression Scale is simple, easy to administer, and well-validated.

Motivation and Effort

- Malingering is relatively uncommon.
- There may be many reasons why information or test data may not be a valid representation of the examinee's actual neuropsychological status:
  - sensory deficits, fatigue, medication side effects, physical illness, frailty, discomfort or disability, poor motivation, financial disincentives, depression, anxiety, undue influence, poor comprehension of test instructions, or general lack of interest.
- Neuropsychologists must, in any setting, attempt to assess the sources of error and to limit and control them to the extent that they are able.

Guidelines for the Competent Neuropsychological Evaluation of Dementia

Look in your handouts for these guidelines

Summary Points

- Experts in assessment, neuropsychologists are in a uniquely capable of contributing to the differential diagnosis and quantification of severity of dementia.
- A physician/psychologist diagnosis of “dementia” or “memory loss” alone cannot be considered sufficient to support a guardianship action.
- Neuropsychological data can be vital in resolving discrepancies of self-reported versus observed functioning, and/or disagreements between parties as to the presence, nature, and severity of presumed cognitive deficiency.

Summary Points (cont)

- Brief mental status examinations and screening instruments are not adequate for diagnosis in most cases, and rarely provide sufficient detail to clarify important legal decisions regarding competency.
- The neuropsychological exam is thorough and can lend overwhelming credibility to the case at hand, especially in contested cases.
- Clinical and legal professionals should be vigilant in finding ways to enhance capacity if possible, and thus eliminate the need for or limit the scope of the guardianship.

Summary Points (cont)

- There is no “capacimeter”
- NP tests do not directly assess legal capacity, but rather the substrates of reasoned thinking and action.
- Many NP tests help predict IADL.
- Comprehensive neuropsychological evaluations include in-depth assessments of multiple cognitive domains.
- Some cognitive constructs are more ecologically valid than others.

Summary Points (cont)

- **Memory** deficits are very sensitive to diagnosis, relevant to competency, and relatively easy to detect.
- However, deficits in **executive skills** are more predictive of functional independence and care requirements.
  - Executive deficits at initial assessment is associated with more rapid decline in IADLs, and may be a sentinel indicator of widespread cortical involvement and poor prognosis.
  - Adequate assessment of executive functioning requires sophisticated assessment procedures best suited for expert neuropsychological consultation.
- **Self-awareness of deficit** is also important.

Summary Points (cont)

- Bioethical principles emphasize both **respect for individual autonomy** and **beneficence.**
- Many guardianship cases involve conflict between these basic principles.
- Guardianships are intensely intrusive legal interventions, and are never to be taken lightly.
- However, failing to act beneficently when needed constitutes a form of abandonment.
- Constraints on autonomy must be supported by strong clinical evidence rather than conjecture, and considered only when neuropsychological evidence of incapacity is clear and convincing.