The concept of legal mental capacity lies at the interface of the law and psychiatry. A number of psychiatric conditions can affect an individual’s capacity to make various decisions and actions. Examples of such decisions and actions include making a will or trust, managing financial affairs, making a healthcare decision, entering into a contract, and consenting to sexual relations (for example, in a nursing home).

The Due Process in Competency Determinations Act (DPCDA) provides guidance as to the determination of capacity. DPCDA is embodied in sections 810–813 of the California probate code. In addition, sections 6100–6105 of the code provide criteria for the determination of testamentary capacity.

According to DPCDA, when it comes to the determination of incapacity, it is the deficit, not the diagnosis, that matters. This is to say that individuals with a mental illness such as dementia or schizophrenia do not necessarily lack capacity merely because they have a diagnosis. Rather, whatever the diagnosis, there must be some identifiable deficit in mental function that substantially interferes with judgment.

Another precept in DPCDA is that there must be a correlation or link between the identified mental deficit and the decision or act in question. This is what I call the “So What?” test. For example, an elderly woman who wishes to sell her home may have a long-term memory deficit for when World War II was fought, but so what? With respect to her ability to sell, this gap in her memory in and of itself would not cause incapacity. If this same individual did not remember owning a home, then that would be a different matter.

Four broad areas of mental functioning are mentioned in DPCDA. These are:

- Alertness and attention
- Information processing
- Thought processes
- Ability to modulate mood and affect

A deficit in any one of these areas could affect capacity. An example of a deficit in alertness and attention is someone who is drowsy from a sedating medication. Under information processing, an example is someone with dementia who does not remember either what his
assets are or who are his natural heirs. Under thought processes, an example is someone with schizophrenia who hears voices telling her to do things she would not otherwise do. And under ability to modulate mood and affect, an example is someone with bipolar disorder who foolishly enters into a bad business deal due to euphoria accompanied by disinhibition of behavior.

Many mental disorders can affect capacity. Examples of such disorders are dementia, depression, schizophrenia, bipolar disorder, and substance abuse. In my experience, dementia is the most common cause of lack of capacity among seniors.

For attorneys gauging a client, clues to impairment in mental functioning, and thus to impaired capacity, include the following:

◆ Known history of a mental disorder
◆ Known history of a medical or neurological disorder that may cause a mental disorder (for example, stroke)
◆ Report by a client or third party of either symptoms or signs of a disorder
◆ Marked decline in functioning
◆ Marked personality change
◆ Troubling or problematic decisions or actions
◆ Suspicious circumstances (that is, circumstances suggestive of someone taking advantage of the client)
◆ Abnormalities evident in the interview (for example, confusion)

In the setting of a formal evaluation of capacity, a careful and thorough examination should be performed. This should be done in an atmosphere conducive to the evaluator doing his or her best. At the same time, detailed and probing questions should be asked so that the presence or absence of capacity can be accurately determined.

Patrick Fitzsimmons, M.D., is a board-certified psychiatrist and medical-legal consultant in Los Gatos. Visit his Web site at www.FitzsimmonsMD.com or contact him at Patrick@FitzsimmonsMD.com.