

Diminished Capacity Introduction to Legal Concepts

September 6, 2024



Chief Justice's Commission
On Professionalism



Why is this topic important?*

26%

**US Population
diagnosed
with a mental illness**

16.5%

**US population
over the age of 65+**

22.2%

**US Population
under
the age of 18**

* All statistics are rough estimates coming from various publicly available data from including the CDC, APA, NIH, and Census Bureau

Why is this topic important?*

1.5%

US Population
diagnosed as
intellectually disabled

10%

US population of 65+
individuals
that have some form
of dementia

12.5%

US Population
with some diagnosed
neuro-divergence

* All statistics are rough estimates coming from various publicly available data from including the CDC, APA, NIH, and Census Bureau

Why is this topic important?

64%

**Jail inmates with
documented
mental illness**

54%

**State prison inmates
with documented
mental illness**

45%

**Federal Prison inmates
with documented
mental illness**

• What is Diminished Capacity?

Diminished capacity is a condition where a person may not be capable of making effective decisions about one's life. It can also manifest as also a loss or lack of competency. Capacity can refer to your ability to decide things (decisional capacity) or your ability to take effective action (executorial capacity)






Legal Incomptence


and



- Legal Incapity



are defined *slightly* differently
Constitutionally, statutorily, and
through caselaw depending on each
practice area



Later presenters
are going to go into
greater depth about
these differences
and the nuances
involved



Who may have Diminished Capacity?

Any individual with a condition or mental state that impacts an individual's ability to make adequately considered decisions in connection with representation whether because of minority, mental impairment, or for some other reason

Who may have Diminished Capacity

Commonly Understood Conditions:

- Schizophrenia
- Bipolar Disorder
- Developmental Disability
 - Infancy
 - Dementia



Who may have Diminished Capacity

Other conditions that deserve attention:

- TBI
- Depressive Disorders
- Learning Disabilities
- Anxiety Disorder and/or PTSD
- Autism or other Neuro-divergence
 - Personality Disorders




Who may have Diminished Capacity

Other conditions that deserve attention:

- Chemo, Long Covid, or other conditions that can cause transient brain fog
 - Chronic Fatigue Syndrome
- Individuals on medication that may influence cognition (opiates, benzos, psych meds, etc.)
- Early Dementia that may only affect people during certain times of day (sundowning)

Having a diagnoses
or condition does
NOT necessarily
not mean that a
person has
diminished capacity





**When does this issue
come up in your practice?**



**More often than
you may think.**



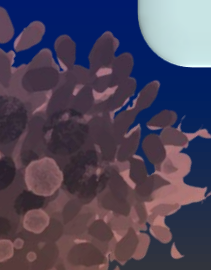


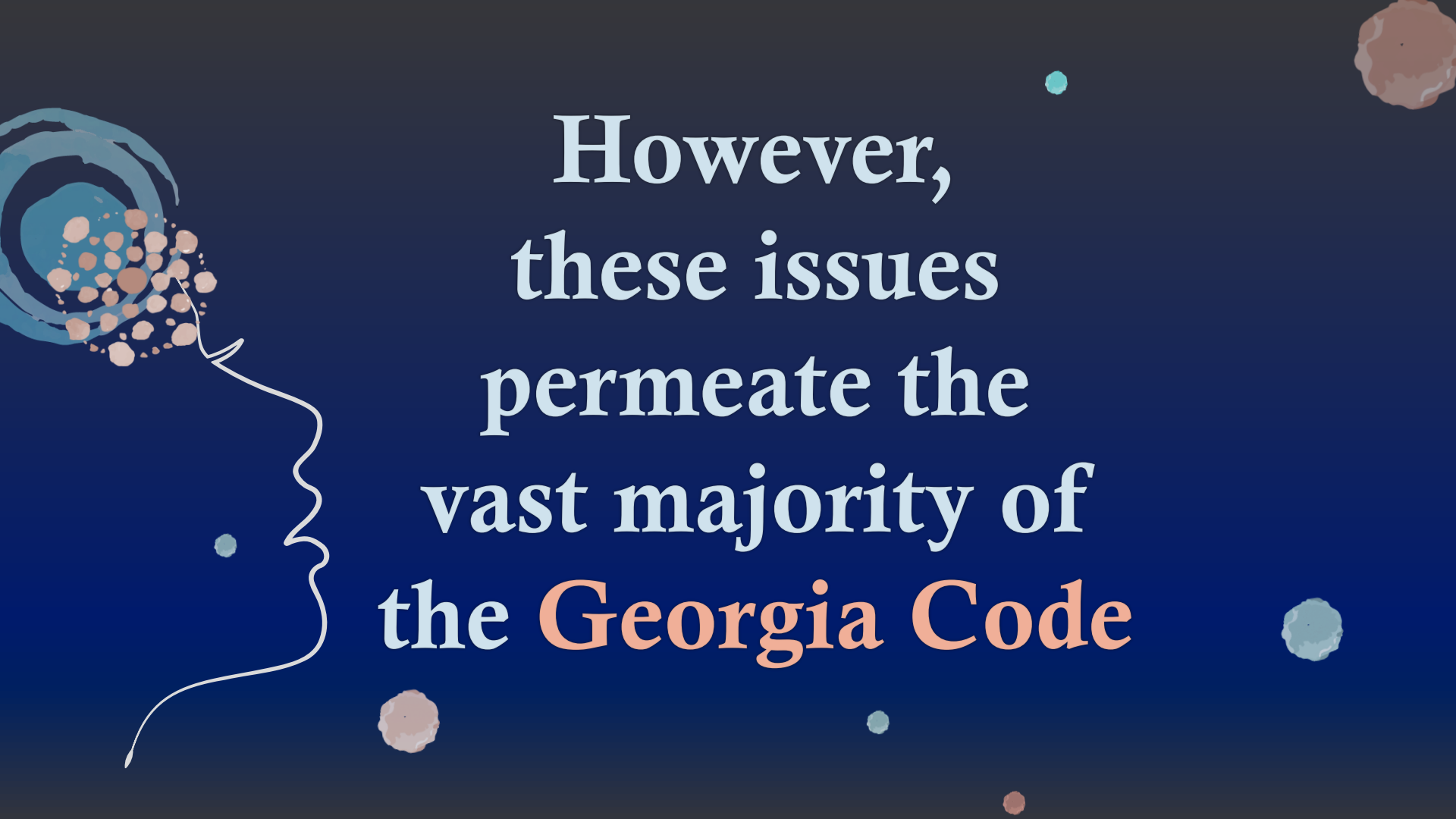
Where we think this issues comes up

**Criminal Law
and
Competency**

**Probate Law
and
Guardianship**

**Family Law
and
Juveniles**





However,
these issues
permeate the
vast majority of
the **Georgia Code**

Title 8

Buildings and Housing

Title 9

Civil Practice

Title 10

Commerce and Trade

Title 11

Commercial Code

Title 13

Contracts

Title 14Corporations, Partnerships,
and Associations**Title 15**

Courts

Title 16

Crimes and Offenses

Title 17

Criminal Procedure

Title 19

Domestic Relations

Title 20

Education

Title 24

Evidence

Title 29

Guardian and Ward

Title 30

Handicapped Persons

Title 31

Health

Title 33

Insurance

Title 35Law Enforcement Officers
and Agencies**Title 37**

Mental Health

Title 38Military, Emergency Management,
and Veterans Affairs**Title 39**

Minors

Title 40Motor Vehicles
and Traffic**Title 42**

Penal Institutions

Title 43Professions
and Businesses**Title 44**

Property

Title 47Retirement
and Pensions**Title 49**

Social Services

Title 51

Torts

Title 53Wills, Trusts, and
Administration of Estates

Legal areas in
which diminished
capacity *most*
likely will come
into play



Criminal Law

- Competency to Stand Trial
 - Civil Commitment
- Ability to represent oneself (*Faretta*)
- Criminal Responsibility (NGRI)*

*In Georgia, unlike most States,
there is no standalone diminished capacity defense

Criminal Law

- Ability to represent oneself (*Faretta*)
- Ability to refuse medication (*Sell* and *Harper*)
- Ability to waive rights such as *Miranda* / *Jackson Denno*
- Witness ability to perceive and if State's witness possible *Brady* / *Giglio* material
- Mitigation

Juvenile Law

Delinquency

- Competency to stand trial
- Competency to waive rights
- Ability to intelligently discuss options with attorney
 - Transfers from Juvenile Court to Superior court
- Witness competency and if State's witness possible *Brady/Giglio* material


Juvenile Law

Dependency

- Ability to make decisions in relation to custody and or dependency
 - Ability to express one's own wishes
 - Ability to intelligently discuss options with attorney (both for parent and child)
- Responsibilities of Child's Attorney vs. Guardian ad Litem



Probate Law

- Testamentary Capacity
 - Conservatorship
 - Guardianship
 - Ability to make medical and financial decisions
 - Power of Attorney
 - Civil Commitment
 - Trusts
- 

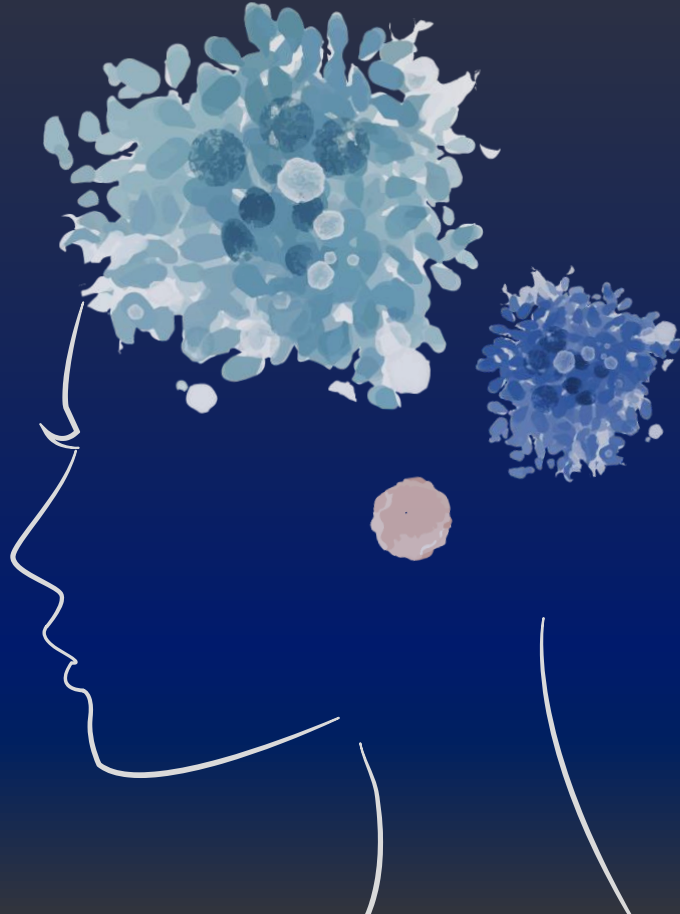
Civil Practice

- Ability to take an oath and testify at trial or in a deposition
- Ability to sign a contract, settle a case make financial decisions, or independently make legal decisions
- Ability to engage an attorney
- Need to request a guardian
- Power of Attorney Issues



One small of example
out of **many**
in which examples of
different
practice areas
have different rules

Title 24 Evidence





OCGA § 24-6-601

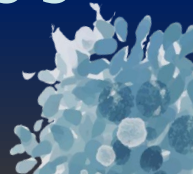
**Except as otherwise provided
in this chapter, every person is
competent to be a witness**





OCGA § 24-6-603 (a)

Before testifying, **every witness shall be required to declare that he or she will testify truthfully by oath or affirmation** administered in a form calculated to awaken the witness's conscience and impress the witness's mind with the duty to do so.





OCGA § 24-6-603 (b)

Notwithstanding the provisions of subsection (a) of this Code section, in all proceedings involving **dependency** as defined by Code Section 15-11-2, in all **proceedings involving termination of parental rights** under Article 4 of Chapter 11 of Title 15, and in all **criminal proceedings in which a child was a victim of or witness to any crime**, the child shall be competent to testify, and the child's credibility shall be determined as provided in this chapter.

**But throughout
the legal practice
there is one area
that is the same**



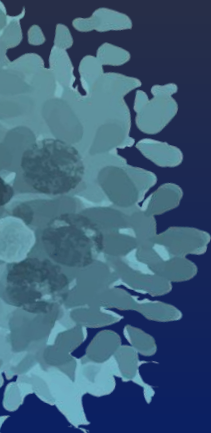


Client Communication

Client Directed Client Centered Representation*

Clients with diminished capacity
are still in charge
of their case unless and
until a Court decides otherwise

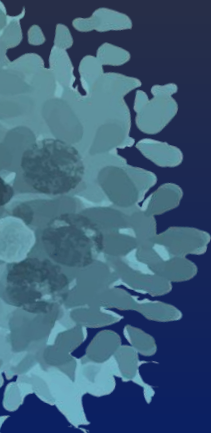
* This is different when you have a best interest's role
as opposed to a client centered one



Client Directed Client Centered Representation*

Even if a Court decides the issue of
incompetence or the need for
guardianship, your role as advocate
and counselor to the client him or
herself does not go away

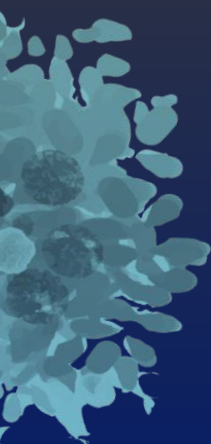
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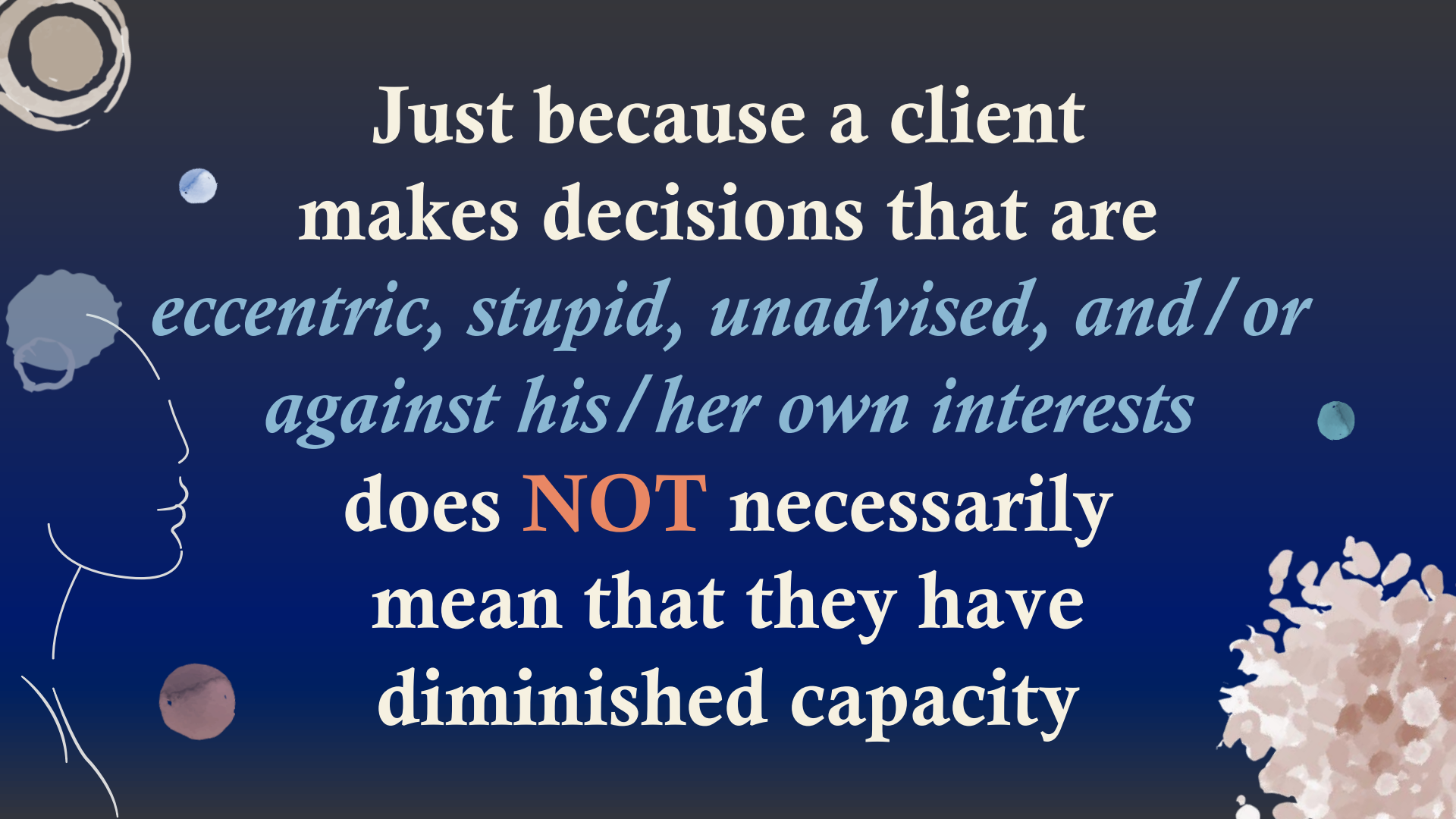


Client Directed Client Centered Representation*

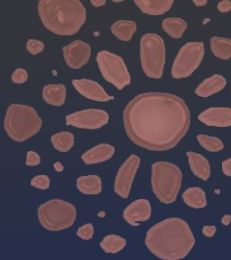
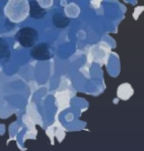
Even if your client is incompetent, diminished, has a guardian, or someone else has a power of attorney, the client is still in charge of some decisions

* This is different when you have a best interest's role as opposed to a client centered one





Just because a client
makes decisions that are
*eccentric, stupid, unadvised, and/or
against his/her own interests*
does **NOT** necessarily
mean that they have
diminished capacity



We are talking about clients, but much of this applies to witnesses as well

- Even if your witness can testify, should he or she?
- Could he or she withstand cross?
- How do you cross a witness with diminished capacity?
- When crossing a witness where is the line between professionalism and zealous representation?
- Do you need to prepare your witness in a different way?
- Does the witness need special accommodations that could be provided?
- Does the witness need a guardian?
- Does the witness need a lawyer?



Your colleagues, opposing
counsel, and judges may have
Diminished Capacity

When that happens there are no easy
answers, but you need to ask the questions
Ethically, Professionally, and Humanely



You are a Lawyer Not a Doctor*



*Or a Social Worker, PA, NP, Educational Expert



Get Help

What is the condition?

How does it manifest itself in your client?

Can the effects of it be mitigated or accommodated?

Could the mental status of your client change throughout case or even throughout the day?

This isn't
easy,
but ...



There is Guidance



From the law itself

From the ethic rules

**From your colleagues
and mentors**

**From the presenters
and panelists here today**



Thank

You