

## Sexual Consent Capacity Among Older Adults in Long Term Care: An Approach to Assessment

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### Abstract

Long-term care providers often face the challenging task of balancing an older resident's rights to autonomy and privacy regarding participation in sexual activity with their duty to protect all residents. When an older adult has some degree of cognitive impairment, the assessment of sexual consent capacity becomes even more challenging. In response, a comprehensive, objective, and interdisciplinary approach to assessment, that includes knowledge, reasoning, and voluntariness, is recommended. An understanding of individual state's case laws is also important. Some unique aspects of sexual consent capacity, aside from medical and financial consent capacity, are also identified.

### Introduction

Studies suggest that many older residents in long-term care settings including nursing homes maintain interest, and participation, in a variety of sexual activities [1,2]. A significant ethical issue for nursing home care providers is to balance an individual resident's rights to autonomy and privacy with the facility's obligation to protect all of their residents from harm. For older long-term care residents with cognitive impairment, making a formal assessment of their sexual consent capacity (i.e. sexual decision-making ability) can present significant challenges [3]. Three primary components of sexual consent capacity include the older adult's knowledge, reasoning, and voluntariness. The use of a comprehensive, objective, integrated assessment model [4], including professionals from various disciplines and a review of states' case law, is recommended.

### A Recommended Approach to Assessment

Making a determination of sexual consent capacity is often challenging. Various experts [3-6] recommend the use of an interdisciplinary team. Members may include, when appropriate, psychiatrists, internists and other physicians, psychologists, social workers, professional counselors, nurses, nursing aides, physical therapists, occupational therapists, ombudsmen, and family members. Encouraging professionals to remain objective, devoid of the typically negative, ageist attitudes regarding sexual expression among older adults [1] are essential. Consultation with a legal expert is also advisable. Because the literature regarding the application of federal and state law to sexual consent capacity is limited [7], knowledge of individual states' case law becomes requisite for team members. Obtaining consent or assent from the identified older adult is essential, as is helping the older adult understand the confidentiality of the assessment results and the potential outcome.

Initial steps in assessment typically include a comprehensive clinical interview with the identified, older resident. If the older adult has any limitation in their ability to communicate verbally, accommodations can be made. Various professionals can be involved in the associated cognitive assessment, review of records, functional capacity

assessment, social history review, and behavioral observations. Psychologists can be helpful in conducted neuropsychological testing, when required. Nursing staff, physical therapists, occupational therapists, as well as other medical professionals, can be helpful in determining if an older resident has any physical risks or limitations (e.g. arthritis, heart disease, chronic pain, sedating medications; challenges with balance or ambulation) that may affect their participation in sexual activity or require accommodations. Collateral interviews with family members and potential sexual partners also can be arranged when needed. Behavioral observations become critically important, especially when an older resident is unable, or limited in the ability, to communicate verbally; the inability to communicate verbally does not automatically preclude one from having appropriate sexual consent capacity.

### Underlying, Essential Constructs

Based upon previous approaches to assessment [3,5,6], functional sexual consent capacity among older institutionalized adults has three underlying constructs: knowledge, reasoning, and voluntariness. Knowledge of sexual activity includes an understanding of general social norms regarding the time, place, and context for participation in sexual activity (e.g. heavy petting and removing clothing is not appropriate in the hallway), as well as an understanding of any related, potential risks. Within a long term care setting, these risks may include not only the potential for contracting sexually transmitted infections, but coercion, gossip, or outright rejection from other residents, family, and staff members. Knowledge also includes an understanding that forcing someone to engage in sexual activity is illegal.

The underlying construct of reasoning includes the ability of the older resident to make an informed decision about participating in sexual activities based upon the aforementioned risks, as well as their own personal beliefs, morals, and values. (For example, the older resident can be asked, "What are your wishes for a romantic relationship right now?") Reasoning also includes having an awareness of a potential partner's feelings about participation in sexual behavior, both through verbal and non-verbal cues, as well as how a partner might say "no." The ability to differentiate reality from fantasy (or lies)

is also essential (e.g. does the older resident mistake a potential romantic partner for their deceased spouse?) Various conditions can impair an older resident's ability to reason, including the presence of dementia, medication side-effects, traumatic brain injury, and mental disorders. Neuropsychological assessment may be needed to better assess an older resident's ability to reason.

Lastly, voluntariness represents the ability of the older resident to engage in sexual activity without coercion, unfair persuasion, and threats from others, including other residents, family members, and staff. Voluntariness also includes knowing that their participation in sexual activity represents a conscious choice, and subsequently having the verbal or non-verbal ability to communicate "no" to unwanted sexual activity. (For example, with a resident who was non-verbal the examiner might ask, "Can you show me how you would let Mr. X know that you wanted to stop kissing him?") If the older resident has experienced sexual abuse or trauma in the past, it is vital to help them understand the voluntary nature of their participation, and the participation of others, in any future sexual activity.

### Unique Features

Sexual consent capacity has some unique features that distinguish it from other forms of capacity, such as medical consent capacity. Specifically, sexual consent capacity functions on a continuum [4]. An older resident may be capable of making the decision to engage in one type of sexual activity, but not another. For example, a resident's sexual consent capacity may be deemed appropriate and intact for participation in hand holding and kissing, but not for intercourse. Unlike medical and financial consent capacity, sexual consent capacity also must be determined in the moment. Sexual consent capacity cannot be determined ahead of time, or by a surrogate or proxy. In other words, an older resident in long-term care can prepare a living will ahead of time to help determine her end of life care decisions, but she cannot designate a power of attorney or other surrogate ahead of time to make decisions regarding her future sexual consent capacity.

As noted by the American bar association [3], decisions about participation in sexual activities are often made in alone, without consultation or input from family members or professionals. Decisions about engaging in sexual activity with partners also tend to change as those relationships change over time. Similarly, when an older resident participates in a formal evaluation of sexual consent capacity, the

official determination should not be considered permanent or static [4,6]. Changes in the older resident's health, relationship, or cognitive status can all call for a new assessment.

### Conclusion

Providing older adults in long-term care with autonomy and privacy regarding their sexual expression is essential. However, administrators and health care providers need to balance an individual residents' rights to participate in sexual activity with the safety of all residents in the facility. The use of a comprehensive, integrated, objective, and interdisciplinary approach to the assessment of sexual consent capacity appears essential. Clinical interviews and various forms of assessment are typically needed, and existing states' case laws must also be considered. Additional empirical research is needed to test the effectiveness of this approach.

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### References

1. Doll GM (2013) Sexuality in nursing homes: Practice and policy. *J Gerontol Nurs* 39: 30-37.
2. Lester PE, Kohen K, Stefanacci RG, Feuerman M (2016) Sex in nursing homes: A survey of nursing home policies governing resident sexual activities. *J Am Med Dir Assoc* 17: 71-74.
3. American Bar Association/American Psychological Association (2008) Assessment of older adults with diminished capacity: A handbook for psychologists. ABA/APA, Wash, DC.
4. Syme ML, Steele D (2016) Sexual consent capacity assessment with older adults. *Arch Clin Neuropsychol* 31: 495-505.
5. Lichtenberg PA, Stzepek DM (1990) Assessments of institutionalized dementia patients' competencies to participate in intimate relationships. *Gerontologist* 30: 117-120.
6. Wilkins JM (2015) More than capacity: Alternatives for sexual decision making for individuals with dementia. *Gerontologist* 55: 716-723.
7. Tang SL (2015) When 'yes' might mean 'no': Standardizing state criteria to evaluate the capacity to consent to sexual activity for elderly with neurocognitive disorders. *Elder Law J* 22: 449-490.