



ANNOTATED CHECKLIST: Capacity Considerations in Planning & Litigation

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Annotated Checklist Surrounding Capacity Planning & Litigation

1) Capacity/Incapacity

Capacity Primer	
There is no global definition of mental 'capacity' ...	Capacity is time – task – and - situation specific Capacity is determined on a case-by-case basis
Capacity can fluctuate ...	Capacity and our courts allow for good days and bad days, all of which imposes a heightened onus on lawyers to probe and verify a client's capacity in every instance where instructions are being sought. Capacity can and does fluctuate.

Lawyers must be familiar with and attuned to issues associated with decisional capacity/incapacity – when being retained and instructed by a new client, when providing ILA, and when witnessing a change in an existing client during the course of a legal retainer. It is critical that lawyers be armed with the tools necessary to discharge their professional obligations, and to be aware of indicators of decisional incapacity to undertake a task.

Lawyers must understand the **requisite capacity for their clients in undertaking certain legal transactions**. At a minimum, lawyers must:

- Properly assess testamentary capacity: satisfying the *Banks v Goodfellow* criteria
 - Assessment requires the testator to have the ability to understand:
 1. The nature of the act of making a Will (or testamentary document) and its effects;
 2. The extent of the property of which one is disposing of; and
 3. The claims of persons who would normally expect to benefit under the Will (or testamentary document).
- Use the appropriate legal criteria to assess capacity to make a gift – a donor requires:

1. The ability to understand the nature of the gift; and
 2. The ability to understand the specific effect of the gift in the circumstances.¹
- Understand that the criteria for determining capacity must take into consideration the size of the gift in question – for gifts of significant value, relative to the estate of the donor – the test for testamentary capacity may apply.²
 - Capacity to undertake real estate transactions
 - Focus on individual’s capacity to contract:
 1. The ability to understand the nature of the contract; and
 2. The ability to understand the contract’s specific effect in the specific circumstances³

Capacity to Retain Counsel	
<input checked="" type="checkbox"/>	Considerations
<input type="checkbox"/>	<ul style="list-style-type: none"> ● Capacity is only assessed at the time the contract/retainer is created ● If a client’s capacity subsequently diminishes over time, such that the lawyer can no longer accept instructions, the retainer would not be voidable if it was signed at the time of capacity ● The requisite decisional capacity to instruct counsel involves the ability to understand the financial and legal issues involved

Capacity to Instruct Counsel	
<input checked="" type="checkbox"/>	Considerations
<input type="checkbox"/>	<p>There is a rebuttable presumption that an adult client <i>is</i> capable of instructing counsel ...</p> <p>It is important to note that the requisite capacity to instruct counsel involves the ability to <u>understand the financial and legal issues involved</u></p>

¹ See *Royal Trust Company v. Diamant* [1953] 3d D.L.R. 102 (B.C.S.C.), [*Royal Trust Company*]; *Bunio v. Bunio Estate* [2005] A.J. No. 218, at paras. 4 and 6.

² See *Re Beaney* (1978), [1978] 2 All E.R. 595 (Eng. Ch. Div.); *Mathieu v. Saint-Michel* [1956] S.C.R. 477, at 487.

³ *Bank of Nova Scotia v. Kelly* (1973), 41 D.L.R. (3d) 273 (P.E.I. S.C.), at 284; *Royal Trust Company v. Diamant*, *supra* note 1, at 6.

Capacity to Instruct Counsel	
✓	Considerations
☐	<p>To have the requisite decisional capacity to instruct counsel, the client must be able to:</p> <ul style="list-style-type: none"> • Understand the context of the decision-what one has asked the lawyer to do and why; and, • Know one’s own specific choices and be able to understand/process the information, advice, and options the lawyer presents to them; and, • Appreciate the consequences of one’s choices, i.e., appreciate the pros, cons, and potential results of the various options⁴

2) Factors & Red Flags Respecting Capacity/Incapacity

Some of the **factors that could involve decisional incapacity** include:

- Intellectual impairment
- Recent experiences: family conflict; family bereavement; and significant medical events such as a fall, hospitalization, surgery, or diagnosis involving cognitive impairment or decline
- Physical impairment of sight, hearing, mobility, or language barriers that may make a client reliant on others for assistance, dependent and/or vulnerable

Lawyer’s must also be aware/understand the **red flags for decisional capacity** in the context of a legal retainer, including:

- Cognitive, emotional or behavioural signs like memory loss, communication problems, lack of mental flexibility or fluidity, calculation difficulties, disorientation of time, person, and/or place
- Hesitation, confusion, difficulty remembering details, cognitive difficulties or any other difficulties in comprehension and reasoning abilities

⁴ See *Costantino v. Costantino*, 2016 ONSC 7279, and Ed Montigny when at ARCH Disability Law Centre, ‘Notes on Capacity to Instruct Counsel’

- Short-term memory experiences: frequently repeating questions, forgetting what is discussed in earlier conversations, inability to remember events of the past few days *** keeping in mind there is a difference between expected age-related forgetfulness and dementia
- Communication difficulties: trouble finding words, vague language, trouble staying on topic, or disorganized thought patterns
- Comprehension problems: difficulty repeating/retaining simple concepts, difficulty paying bills or managing finances, inability to readily identify assets
- Lack of awareness of risks to self and others
- Irrational behaviour, reality distortion, hallucinations or delusions and/or paranoia and fixation
- Poor grooming or hygiene: unusually unclean or unkempt in appearance or inappropriately dressed; changes in appearance
- Poor living conditions in comparison with client’s available assets

Addressing red flags will require a lawyer to ask probing questions, or make further inquiries and investigations with client agreement. The following guide may be helpful as a starting point:

Red flag	Potential Follow-up
Client has recently sustained a head injury	Consider asking clients for recent medical records, or letter from a medical professional detailing the extent of the injury and any limitations
Client displays emotional outbursts not consistent with legal situation	Consider asking probing questions about other stressors present in client’s life, who is involved in daily life, living arrangements, financial wherewithal etc., or other prevailing circumstances and concerns
Concerning third-party involvement in the professional relationship	Consider asking open ended questions about how a decision was reached, as well as the nature of the relationship with the third-party, how long the person has been involved in assisting with arrangements, circumstances and concerns

Client expresses inability to make decisions for themselves/fear of third-party reprisals or judgement	Consider asking the client direct, specific questions alone, not in the presence of the third-party to determine if they are dependent on the third-party or subject to threats or other forms of coercion
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Source: *Guide to navigating client capacity concerns - Lawyer* | Law Society of Ontario

Professionals must also understand and be alert to the existence of suspicious circumstances surrounding the execution and preparation of a planning document. These may loosely involve:

- Circumstances surrounding the preparation of a Will or other planning instrument;
- Circumstances tending to call into question the capacity of the testator/grantor; and
- Circumstances tending to show that the free will of the testator/grantor was overborne by acts of coercion or fraud.⁵

Examples of suspicious circumstances having an evidentiary impact include:

- Physical or mental disabilities of the testator;
- Secrecy in the preparation of a Will or other reluctances (testamentary or *inter vivos*);
- Seemingly “unnatural” dispositions;
- Preparation and execution of a Will where a beneficiary is involved;
- Lack of control of personal affairs by the testator;
- Drastic changes in the personal affairs of the testator;
- Isolation of the testator from family and friends;
- Marked changes in the testamentary plan; and
- Physical, psychological or financial dependency by the testator on beneficiaries.⁶

⁵ See *Vout v. Hay*, [1995] 2 SCR 876 (SCC).

⁶ Mary MacGregor, “2010 Special Lectures: Solicitor’s Duty of Care,” at 11.

3) Best Practices where Capacity is/may be in Issue

Best Practices where there are Capacity Concerns:

- Be alert to signs of incapacity
- Ask probing questions and not leading questions
- Don't answer for the client (difficult when obvious struggle)
- Don't make presumptions or assume answers
- Interview the client alone and take comprehensive, detailed notes. Make a written record of your meeting; consider AI tools available for taking meeting notes
- Use open-ended questions to confirm or elicit rationale for planning, understanding and appreciation
- Ask comprehensive questions to help elicit important information (both circumstantial and involving the psychology of the client)
- Ask client for their understanding of the effect of the transaction or agreement, so any inaccuracies can be corrected; recap and consider explaining the outcome in a scenario to check understanding
- Reporting letters – cover the essential matters discussed including the nature, extent and scope of services provided, as well as concerns
- Take extra time with older clients so they are comfortable with the setting and with the decision-making process to be undertaken
- Schedule several meetings to establish consistency if required
- Follow instincts – where capacity is at issue, consider and discuss obtaining a decisional capacity assessment to assist in protecting the client's plan
 - Where appropriate, request the opportunity to speak to, or receive information from a primary care provider; review medical records where available; obtain permission to speak with a health care provider who has frequent contact with the client to discuss any capacity or related concerns

If a client's capacity is unclear, or the client lacks capacity, the following steps may be considered by the lawyer

Step	Considerations
Determine if there is a substitute decision-maker	<ul style="list-style-type: none"> • Is one already in place for the client under a POA, a court/tribunal order or a guardianship?
Consider if a capacity assessment is required	<ul style="list-style-type: none"> • When unsure if a client has capacity to provide legal instructions/manage legal affairs, consider seeking client consent for a formal capacity assessment from a medical professional or certified assessor (in Ontario for example, under s. 16 of the Substitute Decisions Act, 1992) • Depending on the situation, it may be appropriate to take instructions from a client without a formal capacity assessment
Consider bringing a motion in a court or tribunal only if proceedings and circumstances support such a step	<ul style="list-style-type: none"> • May need to bring a motion for a determination of whether a client has capacity to seek the direction of the court or tribunal if a capacity assessment indicates the client lacks capacity
Take steps to ensure a substitute decision maker is in place if required	<ul style="list-style-type: none"> • If it's determined a client lacks capacity to provide legal instructions, or manage their legal matter, consider taking the necessary steps to protect your client's interests including, for example, having a lawfully authorized decision

Step	Considerations
	maker appointed, such as under a POA, as a litigation guardian, as a guardian of property/person, or other
Contact the Office of the Public Guardian and Trustee	<ul style="list-style-type: none"> • PGT may act as a statutory property guardian or SDM of last resort

Source: *Guide to navigating client capacity concerns - Lawyer | Law Society of Ontario*

Lawyers and paralegals should also consult and become familiar with their governing rules of professional conduct, if any, and how capacity concerns are treated therein.

For example, in Ontario s. 3.2-9 of the *Rules of Professional Conduct*⁷ and s. 3.02(13) of the *Paralegal Rules of Conduct* provide that licensees must, as far as reasonably possible, maintain a normal professional relationship with clients whose decision-making capacity is impaired. These Rules provide that where a client lacks the capacity to manage their legal affairs, licensees must safeguard their client's interests.⁸

To help maintain a normal client relationship, the Rules provide that licensees should consider what reasonable accommodations can be made to facilitate effective communication with the client to protect their rights and interests. Consideration of such reasonable accommodations may include, for example:

- Reducing all legal advice and client instructions to writing
- Conducting client meetings/obtaining instructions in the client's preferred communication medium (in person, in writing, virtually)
- Encouraging the client to ask questions and demonstrate understanding and appreciation

⁷ Law Society of Ontario, "Relationship to Clients - Client with Diminished Capacity," (October 2014), accessed online: <https://lso.ca/about-lso/legislation-rules/rules-of-professional-conduct/chapter-3>.

⁸ Safeguarding a client's interests may involve appointing a lawfully authorized representative, following the relevant procedures dictated by the licensee's area of practice, court rules, and governing legislation.

- Providing additional time for client instructions
- Offering regular breaks in client meetings
- Meeting with the client at different times of day
- Using an interpreter
- Where more complex communication factors consider involvement of an occupational therapist or suitable medical professional to assist the client
- Using simplified and clear language
- Facilitating the ability of the client to bring a support person⁹

4) Steps to be Considered in Mitigating Potential Issues

Mitigating Potential Issues		
✓	Step/Procedure	Considerations
☐	Maintain detailed records	Keep notes of all communications with your client and any third parties, including: <ul style="list-style-type: none"> • Date, time, location, and length of client interviews or meetings • All persons present in client interviews or meetings • Any red flags noted for capacity, undue influence, or duress, or other noticeable concerns and circumstances • Steps taken to address or resolve red flags, if any • Copies of documents consulted, such as medical records, if any • Consider recording virtual meetings with the client’s consent or use of AI meeting applications

⁹ Law Society of Ontario, “Guide to navigating client capacity concerns,” (August 14, 2024), accessed online: <https://lso.ca/lawyers/practice-supports-and-resources/topics/the-lawyer-client-relationship/guide-to-navigating-client-capacity-concerns>.

Mitigating Potential Issues		
<input checked="" type="checkbox"/>	Step/Procedure	Considerations
<input type="checkbox"/>	Continue to Monitor Client's Capacity	<p>Noting that capacity can fluctuate over time, the lawyer should continually assess whether the client demonstrates the capacity to provide the necessary instruction(s) at the time sought</p> <ul style="list-style-type: none"> • Capacity should be evaluated at the time instructions are given and again whenever a legal document is executed or instructions are sought
<input type="checkbox"/>	Discuss Contingency Planning	<p>If you suspect a client's capacity is likely to diminish over time:</p> <ul style="list-style-type: none"> • Discuss with the client the arrangements that may need to be made in the event the client lacks capacity in the future (ie., SDM/POA/Guardianship/Litigation Guardianship or other)
<input type="checkbox"/>	Be alert to undue influence	<p>A client's capacity, vulnerability, and susceptibility to undue influence should always be a top-of-mind issue for lawyers in all circumstances</p>

5) Understanding the Doctrine & Role of Undue Influence

The doctrine of undue influence founded in the law of equity is used by courts to set aside certain *inter vivos* gifts/wealth transfers, transactions, planning and testamentary documents, where, through exertion of the mind of the donor/testator/grantor, and the mind falls short of being wholly independent. Where one person has the ability to dominate the will of another, whether

through manipulation, coercion, or outright but subtle abuse of power, undue influence may be found.

Where the capacity of a client is at issue, chances are greater that undue influence, or other issues relating to capacity, may be inter-related. This is particularly important to be aware of when assisting clients suffering from declining, mental health concerns, or effect of loss and issues associated with experiencing grief. For this reason, professionals must understand and think about the hallmarks of undue influence, including:

- Exploitation, breach, abuse of trust, manipulation, isolation, alienation, sequestering, and dependency
- Actual violence, force, or confinement could equal coercion.
- Persistent verbal pressure or emotional abuse, particularly where a testator is in vulnerable circumstances
- Psychological pressures creating fear may be tantamount to undue influence

The Ontario Superior Court of Justice has provided a non-exhaustive list of indicators of undue influence in the decision of *Gironda v. Gironda*.¹⁰ Some of these indicators include the following:

- The testator is dependent on the beneficiary in fulfilling one's emotional or physical needs;
- The testator is socially isolated;
- The testator has experienced recent family conflict;
- The testator has experienced recent bereavement;
- The testator has made a new Will that is inconsistent with prior Wills; and
- The testator has made testamentary changes similar to changes made to other documents such as power of attorney documents¹¹

¹⁰ 2012 CarswellOnt 8612.

¹¹ *Ibid.*, at para. 56.

In the court decision of *Tate v. Gueguegirre*,¹² the Divisional Court made note of what may constitute, “significant evidence suggesting that [a] Will was a product of undue influence,” including the following:

- Increasing isolation of the testator, including a move from one’s home to a new city;
- The testator’s dependence on a beneficiary;
- Substantial pre-death transfers of wealth from the testator to the beneficiary;
- The testator’s failure to provide a reason or explanation for leaving his entire estate to the beneficiary and excluding others who would expect to inherit;
- The use of a lawyer chosen by the beneficiary and previously unknown to the testator;
- The beneficiary conveyed the instructions to the lawyer;
- The beneficiary received a draft of the Will before it was executed, and the beneficiary took the testator to the lawyer to have it executed;
- There were documented statements that the testator was afraid of the respondent¹³

When meeting with a client, indicators of undue influence must be considered. To detect undue influence, lawyers should have a solid understanding of undue influence, and of the facts that often indicate the presence of undue influence. While it is recommended that lawyers and other professionals develop their own protocol for detecting indicators of undue influence, professionals may wish to consider the following:

✓	Undue Influence Checklist
☐	Is someone attending appointments with the client, or is in some way significantly involved in their legal matter? If so, what is the nature of the relationship between this individual and the client?
☐	What are the familial circumstances of the client? Is the client well supported or perhaps, more supported by one family member? If so, is there a relationship of dependency between the client and this person?

¹² 2015 ONSC 844 (Div. Ct.).

¹³ *Ibid.*, at para. 9.

✓	Undue Influence Checklist
	<p>Is there family conflict?</p> <p>If there is no familial support, does the client benefit from some other support network or are they isolated?</p>
<input type="checkbox"/>	<p>If your client is isolated, do they live with one particular individual? Living Arrangements?</p>
<input type="checkbox"/>	<p>Is the client independent with respect to their personal care and finances, or do they rely on one particular individual, or a number of individuals, in that respect? Is there any connection between such individual(s) and the legal matter in respect of which the client is seeking legal assistance?</p>
<input type="checkbox"/>	<p>Have there been any recent changes in the planning document(s) in question? What was the timing of such changes and what was the reason for the change? For example, did any changes coincide with a shift in life circumstances, situations of conflict, or medical illnesses?</p> <ul style="list-style-type: none"> • If there have been recent changes in planning documents, it is prudent to inquire as to the circumstances under which previous planning documents came to be; whether independent legal advice was sought; whether the client was alone with their lawyer while providing instructions; who were with the witnesses to the document; and, why those particular witnesses were chosen.
<input type="checkbox"/>	<p>Have numerous successive planning documents of a similar nature been made by this client in the past?</p>
<input type="checkbox"/>	<p>Have different lawyers been involved in drafting planning documents? If so, why has the client gone back and forth between different counsel?</p>
<input type="checkbox"/>	<p>Has the client had any recent significant medical events? Does the client have a physical impairment of sight, hearing, mobility, or other?</p>
<input type="checkbox"/>	<p>Is the client physically dependent on another? Is the client vulnerable?</p>
<input type="checkbox"/>	<p>Is the client requesting to have another individual in the room while giving instructions or executing a planning document and if so, why? Who? Does it seem appropriate in all of the circumstances?</p>
<input type="checkbox"/>	<p>Are there any communication issues that need to be addressed? Particularly, are there any language barriers that could limit the ability to understand and appreciate the planning document and its implications? What are the languages spoken, read, written?</p>

✓	Undue Influence Checklist
☐	Overall, do the client’s opinions tend to vary? Have the client’s intentions been clear from the beginning and instructions remained the same? Check consistency and deviation.

When taking instructions from a client in respect of a planning document, there are some recommended guidelines to assist in minimizing the risk of the interplay of undue influence. These include the following:

✓	Guidelines to Avoid and Detect Undue Influence
☐	Interview the client alone
☐	Obtain comprehensive information from the client, which may include information such as: <ul style="list-style-type: none"> i. Intent regarding testamentary disposition; reasons for appointing a particular attorney/for writing or re-writing any planning documents; ii. Any previous planning documents and their contents, and copies of them
☐	Determine recent changes in relationships or living circumstances, including marital status, conjugal relationships, children, adopted or stepchildren, or other dependents
☐	Consider indicators of undue influence as outlined above, including relationships of dependency, abuse or vulnerability <ul style="list-style-type: none"> • Consider making a list of any indicators of undue influence as per the information compiled and including a consideration of the inquiries suggested herein, including corroborating information from third parties with appropriate client directions and instructions
☐	Take note of any indicators of capacity issues while being mindful of the distinction that exists between capacity and undue influence
☐	Address any recent health changes and determine whether the client has any physical impairments (such as hearing, sight, or mobility limitations)
☐	Consider evidence of the client’s intentions including indirect evidence of intention

✓	Guidelines to Avoid and Detect Undue Influence
□	Consider whether it is appropriate to decline a retainer where there remains significant reason to believe that undue influence may be at play and one cannot obtain independent instructions

Annotated Checklist: Litigation Consequences

Estate disputes are often impacted by high emotions, which often lead to a lack of objectivity in decision making ability.

Long, often life-time-held family resentments, feelings of inadequacy, and competition among siblings frequently prove to be a certain recipe for intractable disputes. Within these disputes are significant consequences that must be understood.

Some of these consequences include the following:

<p>1) Documentary Discovery & Evidentiary Hurdles</p>
<ul style="list-style-type: none"> • Deceased/relevant party may not have kept great records • Records may be lost/destroyed • Medical records – require time to obtain and review and many not exist
<p>2) Financial Strain</p>
<p>Monetary Retainer on Deposit: \$20,000.00 + Starting litigation costs: \$25,000+</p> <ul style="list-style-type: none"> • which may include preparing a Notice of Application and a supporting affidavit from the client; issuing an application with the court including service on opposing party; court appearance costs for a very simple appearance (time spent scheduling, preparing, appearing, and following up, time and cost at an hourly rate) <p>Cost of a lawyer’s hourly rate: could range from \$350 to \$2000 or more – law clerks \$150 - \$500+ per hour. Legal costs can include:</p> <ul style="list-style-type: none"> • Disbursements – copying, faxing, printing, binding materials, obtaining evidence from health care providers, digitally organizing materials, uploading etc. <p>Cost of routine court appearances: \$7,500+ for uncontested court appearances such as a timetabling appearance on an application</p>

- Including the cost of communicating with counsel, scheduling, preparing and filing material, confirmations, preparing or self-represented parties, obtaining an Order, attending court, etc.

Cost of a contested motion: \$10,000+

- Including the preparation of materials including Notice of Motion, affidavit, factum and book of authorities, scheduling, settlement negotiations, etc.

Cost of a contested matter (trial): \$100,000+

- Separate and elevated cost for appellate litigation costs for appeals of final judgments

Cost of one day of mediation: \$12K + for mediator, plus party counsel costs

- Including the preparation of a mediation brief, scheduling mediator, attendance at mediation, mediator's fee, preparing Settlement documents, i.e., Minutes of Settlement & Releases, and orders for dismissal and carrying out settlement initiatives to completion

Cost Awards/Orders, which are an award to be made in favour of a successful or deserving litigant, paid by the loser of a legal proceeding

- Payable by way of indemnity for allowable expenses and services incurred relevant to the case or proceeding
 - Partial award – at most, equals 66.6% of legal costs
 - Substantial – 1.5 times the partial costs award
 - Full award – more exceptional treatment (significant constraints on full indemnification)
- Unfounded allegations of fraud or improper conduct may warrant a costs award on a substantial indemnity basis (see *Hamilton v. Open Window Bakery Ltd.*, 2004 SCC 9, at para. 26)
- Negative behaviour can lead to a costs award of substantial indemnity costs – see *Estate of Felice Pipito (Re)* where S.F. Dunphy J., regarding conduct of the Applicant said: “I have rarely seen a litigant as clearly driven by spite, venom and antipathy to the opposing party as I observed in the case ... the vicious but entirely unproved personal attacks made by her on her opponents deserve sanction.”
- Reprehensible and outrageous, scandalous conduct deserving of rebuke may lead to a full indemnity costs award – see *Dewaele v.*

Roobroeck, 2021 ONSC 1604 where estate trustees took no meaningful steps to facilitate the realization of estate assets and failed to comply with court orders

3) Time Constraints

- Court Proceedings take time to initiate, to draft, to gather supporting evidence and to serve. Proceedings take an uncertain amount of time to process and filter through court and counsel time frames within the *Rules of Civil Procedure* and availability

Annotated Checklist for Dealing with Grieving Clients

The death of a loved one or the abuse of an older adult family member can cause unexpected emotions of grief, loss, remorse or regret, and sibling rivalry, amongst other issues.

Emotionally vulnerable clients may have expectations and needs that are not purely centered on legal results. As such, interacting with family often distracts clients from a purely legal focus and tends to cloud their reason and ability to navigate legal processes effectively. As a result, clients driven by emotion often place a greater reliance on their lawyer for objectivity and support.

Notably, Prolonged Grief Disorder is one which may affect capacity, or enhance vulnerability, it involves intense, painful emotions associated with a lack of adapting to the loss of a loved one that persists for more than 1(one) year in adults and more than 6 (six) months in adolescents or children.¹⁴

This condition is estimated to affect as many as 7% of bereaved individuals.¹⁵ In 2022, prolonged grief disorder (PGD), sometimes called complicated grief, was added to the Diagnostic and Statistical Manual of Mental Disorders (DSM-5), a volume published by the American Psychiatric Association that defines and classifies mental disorders.¹⁶ It is a mental disorder consisting of a distinct set of symptoms following the death of a family member or close friend.

The following guidance may assist professionals in assisting grieving and emotional client(s):

✓	Step	Considerations
☐	Practice effective communication	Understanding your client's mindset, building trust, managing

¹⁴ [Grief Reaction and Prolonged Grief Disorder](#)

¹⁵ [Grief Reaction and Prolonged Grief Disorder](#)

¹⁶ Eleanor Haley, MS and Litsa Williams, MA, LCSW-C, What's your grief? Lists to help you through *any* loss at page 32

		emotional responses, and considering your clients overall aptitude for litigation are critical components of a legal retainer
<input type="checkbox"/>	Education on grief and loss	Lawyers are not specifically trained to recognize the often-paralyzing symptoms of grief – education is important to become familiar with different types of grief and loss to better understand clients’ needs and how to address them. Timing and stages of grief factor prevalently into the cycle of the client retainer
<input type="checkbox"/>	Understand professional role	The lawyer’s role is to assist the client in making their best-possible legal decision – this must be the focus
<input type="checkbox"/>	Manage client expectations	Managing client expectations in the legal process is key – this often requires a lawyer to be firm and to redirect the client to remedies available in the circumstances of the legal proceedings You may need to remind your client from time to time that as a lawyer you can only assist with legal remedies – suggest other professionals that may be better able to assist and support clients’ emotional needs (therapy, medical professionals, grief coaches, etc.)

Six considerations for navigating clients through contentious proceedings in complex emotional circumstances:

1. **Communicate** – clearly communicate the legal parameters of the retainer. Explain both orally and in writing what you are able to do, and what you are not able to do.
2. **Educate** – educate the client on legal processes (pros/cons/risks), promoting understanding through the dissemination of information and the importing of knowledge. Help the client identify whether their goals can be achieved within the legal system, and at what cost (emotionally, financially, and within their relationships).
3. **Inform** – inform the client on all dialogue/interactions with legal representatives. Explain the consequences/impact of actions taken and not taken.
4. **Identify** – identify and explain consequences of time spent on matters that may not be strictly legal (unnecessary cost, effort, steps)
5. **Manage Expectations** – manage clients and their position in the court system. Resist using court systems inappropriately and/or vexatiously where a client wishes to use the process to exact retribution or cause financial or reputational harm. Take instructions regularly orally and in writing, document all instructions and communications with the client.
6. **Know when to Terminate a Retainer** – Terminate if you cannot maintain your professional integrity – you are not a hired gun. Always add value through subjective and objective approaches.

This checklist is intended for the purposes of providing information and guidance only. This checklist is not intended to be relied upon as the giving of legal advice and does not purport to be exhaustive. Kimberly A. Whaley, Whaley Estate Litigation Partners, 2025