



**OBA ELDER LAW DAY SERIES**

**Serving the Baby Boomer Generation: Your Aging Client Base**

**Capacity to Instruct Counsel**

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## CAPACITY TO INSTRUCT COUNSEL

### 1. INTRODUCTION<sup>1</sup>

Current and evolving statistics confirm that our population is aging rapidly. With age and longevity can come an increase in the occurrence of medical issues affecting executive functioning in the brain. Certain diseases and disorders, such as dementia in varying types and degrees, delirium, delusional disorders, Alzheimer's, related cognitive disorders and other conditions involving reduced functioning and capability, also can become more prevalent with age and longevity.<sup>2</sup> There are a wide variety of disorders that may affect decisional capacity and in turn, increase an individual's susceptibility to becoming vulnerable and dependent. Factors affecting decisional capacity can include, normal aging, disorders such as depression, which can often remain untreated, or, undiagnosed, schizophrenia, bipolar disorder, psychotic disorders, delusions, debilitating illnesses, senility, drug and alcohol abuse, and addiction.<sup>3</sup> These sorts of issues, unfortunately, invite the opportunity for abuse, elder abuse, and exploitation.

A client's capacity, vulnerability, and susceptibility to undue influence should always be a live issue for lawyers, not just estates, trusts and elder law lawyers, as some may assume.

Lawyers are obligated to ensure in *any retainer* that clients have the requisite decisional capacity to: 1) retain counsel, and, 2) give instructions to counsel to execute any documents necessary to resolve the specific matter for which counsel is retained. In the litigation context, a person must also have the requisite capacity to commence a lawsuit.

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<sup>1</sup> See also Kimberly A. Whaley and Kate Stephens, "A Lawyer's Duties and Obligations Where Capacity, Undue Influence and Vulnerability are at Issue in a Retainer" (2018) 48 Adv. Q 385.

<sup>2</sup> Kimberly Whaley *et. al*, *Capacity to Marry and the Estate Plan* (Aurora: Canada Law Book, 2010) at 70. <http://www.canadalawbook.ca>.

<sup>3</sup> Kimberly Whaley *et. al*, *Capacity to Marry and the Estate Plan* (Aurora: Canada Law Book, 2010) at 1.

## 2. BRIEF SUMMARY: LEGAL CAPACITY

You may be asking: What are the signs of diminished capacity? What steps can I take to proactively ensure I don't miss any signs of diminished capacity? What do I do once I notice signs? These are all good questions, however, in order to recognize the “red flags” and understand the warning signs of having a client with diminished capacity, one must first understand what “capacity,” or correspondingly, “incapacity” really means.

It is an understatement to suggest that issues of capacity are complex.

First, it is important to remember that capacity is defined or determined upon factors of mixed law and fact, and by applying the evidence available to the applicable factors/criteria for decision specific capacity. Notably, there is no test for a finding of incapacity, as much as there is a standard to be applied to be considered in an assessment of requisite mental capacity to make a certain decision at a particular time.

There is also no single legal definition of capacity. Each particular task or decision undertaken has its own corresponding capacity characteristics. However, it is important to remember that, in general, all persons are presumed or deemed capable of making decisions at law.

There is a statutory presumption in Ontario, section 2 of the *Substitute Decisions Act, 1992*:

### **Presumption of Capacity**

2(1)A person who is eighteen years of age or more is presumed to be capable of entering into a contract.

(2) A person who is sixteen years of age or more is presumed to be capable of giving or refusing consent in connection with his or her own personal care.

(3) A person is entitled to rely upon the presumption of capacity with respect to another person unless he or she has reasonable grounds to believe that the other

person is incapable of entering into the contract or of giving or refusing consent, as the case may be.<sup>4</sup>

With this presumption, is a reminder of the importance of respecting the presumption of an older adult's autonomy and decision-making capabilities. Autonomy, or "self-determination," refers to the ability of competent individuals to make decisions over their own lives. For autonomy to be meaningful, a competent individual's decisions should be respected even when those decisions conflict with what others believe to be reasonable. Autonomy includes, but is not limited to, having the freedom to make decisions about one's own health care, finances, and living arrangements.

The relevant period to assess capacity is the time at which a decision in issue is made.<sup>5</sup> Legal capacity can fluctuate over time. Capacity is situation-specific, in that the choices that a person makes in granting a power of attorney, or, making a Last Will & Testament are considered by a court in its determination of capacity.<sup>6</sup> For example, if a mother appoints her eldest child as an attorney under a Power of Attorney document, this choice may be viewed with less suspicion and concern for potential diminished capacity than if she appoints her recently-hired gardener.<sup>7</sup>

### **3. WHEN YOUR CLIENT SHOWS SIGNS OF DIMINISHED CAPACITY: ETHICAL CONSIDERATIONS**

You have an older client in the middle of litigation who has started to forget recently learned information such as meeting dates, or is asking for the same details repeatedly and is not remembering the details later. The client may be on medication, or have hearing and vision problems, or has recently suffered emotional/physical upheaval, or loss of a loved one. The client has started having challenges keeping track of monthly bills. She has also stopped engaging in her usual social activities and is not as chatty as she once

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<sup>4</sup> *Substitute Decisions Act, 1992*, SO 1992, c 30 at s 2.

<sup>5</sup> Kimberly Whaley *et. al*, *Capacity to Marry and the Estate Plan* (Aurora: Canada Law Book, 2010) at 46.

<sup>6</sup> Kimberly Whaley *et. al*, *Capacity to Marry and the Estate Plan* (Aurora: Canada Law Book, 2010) at 48.

<sup>7</sup> Kimberly Whaley *et. al*, *Capacity to Marry and the Estate Plan* (Aurora: Canada Law Book, 2010) at 48.

was when she visits you and has frequent changes in mood with an increase in confusion, suspicion, depression, fear, and anxiety.

Some capacity considerations:

**a) Does the client have the requisite capacity to instruct you?**

While there is a rebuttable presumption that an adult client is capable of instructing counsel, it is important to note that the requisite capacity to instruct counsel involves the ability to understand the financial and legal issues at hand. As a lawyer, you will have to make a delicate and complex determination requiring careful consideration and analysis.

In the family law case of *Evans v Evans*,<sup>8</sup> the Ontario Superior Court of Justice found that evidence indicating an individual's current mental status which prevents one from dealing with the "process" is not sufficient to prove incapacity to instruct counsel. Rather it must specifically address the issue of whether one can make *decisions* regarding the "process."

Overall, in order to have the capacity to instruct counsel, the client must be able to:

- 1) understand the context of the decision: what one has asked the lawyer to do and why; and
- 2) know one's own specific choices: be able to understand and process the information, advice and options the lawyer presents to them; and,
- 3) appreciate the consequences of one's choices: i.e. appreciate the pros, cons, and potential results of the various options.<sup>9</sup>

In *Evans*, the court found that the respondent: lacked the ability to focus, know or understand the choices and decisions that were required of her due to her mental health issues; was unable to understand and appreciate her choices and the decisions she had

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<sup>8</sup> 2017 ONSC 5232,

<sup>9</sup> See *Costantino v Costantino* 2016 ONSC 7279 and Ed Montigny when at ARCH Disability Law Centre, "Notes on Capacity to Instruct Counsel", [www.archdisabilitylaw.ca/?q=notes-capacityinstruct-counsel-0](http://www.archdisabilitylaw.ca/?q=notes-capacityinstruct-counsel-0)

to make, and was unable to concentrate on the decisions that she had to make. She was unable to instruct counsel.<sup>10</sup>

The British Columbia Supreme Court noted in *Pavlick v Hunt and Gagnon*,<sup>11</sup> that capacity to instruct counsel involves “the exercise of judgment in relation to the claims in an action and possible settlement, as a reasonable person would be expected to do”.<sup>12</sup>

It is up to the lawyer to make the assessment and decide if the client has the capacity to instruct counsel.

The Ontario Superior Court of Justice in the case of *Sylvester v Britton*,<sup>13</sup> noted that a distinction should be drawn “between a situation in which no instructions can be provided, for example the client is in a coma or speaks only gibberish, and where the client is able to articulate what they want even if they cannot fully appreciate the legal process, risks and costs associated with that position.”<sup>14</sup> In the latter situation, counsel must “assess the degree of comprehension and the cogency of the instructions obtained to determine capacity to instruct.”<sup>15</sup>

Also, the court in *Sylvester v Britton*<sup>16</sup> suggested counsel should consider swearing an affidavit which outlines the steps taken to be satisfied of the client’s capacity to provide instructions however lawyers must always be careful to avoid breaching solicitor-client privilege. I have seen this done, but I am uncertain whether I would do this in practice.

The court also concluded that where a lawyer decides that their client has the requisite capacity to instruct them, courts generally should only intrude on that assessment with “great reluctance and where the evidence demonstrates a strong likelihood that counsel has strayed from his or her obligations to the client and to the court.”<sup>17</sup>

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<sup>10</sup> *Evans v Evans* 2017 ONSC 5232 at para 40.

<sup>11</sup> 2005 BCSC 285.

<sup>12</sup> *Pavlick v Hunt and Gagnon*, 2005 BCSC 285 at para 22.

<sup>13</sup> 2018 ONSC 6620.

<sup>14</sup> *Sylvester v Britton*, 2018 ONSC 6620 at para 74.

<sup>15</sup> *Sylvester v Britton*, 2018 ONSC 6620 at para 74.

<sup>16</sup> 2018 ONSC 6620.

<sup>17</sup> *Sylvester v Britton*, 2018 ONSC 6620 at para 75.

**b) Does the client have the requisite capacity to litigate?**

In the litigation context, if a client does not have, or no longer has, the capacity to litigate, a litigation guardian will likely need to be appointed.

Litigation guardians are necessary to protect parties “under disability,”<sup>18</sup> but also to protect opposing parties and court procedures. The criteria for considering whether a litigation guardian is required, is found under Rule 7 of the *Rules of Civil Procedure* is:

- i) The person must appear to be mentally incapable with respect to an issue in the case and,
- ii) As a result of being mentally incapable, the person requires legal representation to be appointed by the Court.<sup>19</sup>

A discussion of the issue of whether a client requires a litigation guardian and therefore lacks capacity to instruct counsel personally, is found in the Ontario decision of *Costantino v Costantino*.<sup>20</sup> This was a family law case where the husband’s lawyer applied to be removed as his solicitor as he was unwilling to continue to represent his client and none of the husband’s family members were willing to act as his litigation guardian. The court had to decide whether the husband was incapable with respect to making decisions about the proceeding and whether to appoint the Public Guardian and Trustee to act as his litigation guardian. The court identified several factors to be considered when determining whether a person is capable of commencing an action (or continuing an action) or whether a litigation guardian is required:

- a) A person’s ability to know or understand the minimum choice or decisions required to make them;
- b) An appreciation of the consequences and effects of one’s choices or decisions;

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<sup>18</sup> See Rule 7 of the *Rules of Civil Procedure* RRO 1990, Reg. 194.

<sup>19</sup> Rule 7 of the *Rules of Civil Procedure* RRO 1990, Reg. 194

<sup>20</sup> 2016 ONSC 7279.

- c) An appreciation of the nature of the proceeding;
- d) A person's ability to choose and keep counsel;
- e) A person's ability to represent oneself;
- f) A person's ability to distinguish between relevant and irrelevant issue; and,
- g) A person's mistaken beliefs regarding the law or court procedures.<sup>21</sup>

These factors have since been applied in several other cases including *Huang v Braga*,<sup>22</sup> *Hengeveld v Ontario (Transportation)*,<sup>23</sup> *Carmichael v Glaxosmithkline Inc.*<sup>24</sup> and more recently in *Smith v. Smith*,<sup>25</sup> and *McDonald v. Styles*.<sup>26</sup>

This paper only addresses the standards, or, factors applied to determine or establish the requisite capacity to instruct counsel and litigate. Other decisions also have their own standards or factors to be applied, for example, to enter into a contract, to execute a Will, to transfer property, to execute a Power of Attorney document, etc. For a more fulsome list of the standards or factors applied for each decision see the checklists in the attached Appendices, or on our website.

### **c) Should you require/recommend a capacity assessment?**

If a lawyer is uncertain about the capacity of one's own client to make a decision, then the lawyer may wish to decline the retainer or discuss with the client the merits and risks of undergoing a capacity assessment of the client's decisional capacity with respect to the particular task/decision contemplated.

A lawyer should take care to provide information on whether, and in what ways the assessment will assist and whether an assessment is recommended/warranted in order

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<sup>21</sup> *Costantino v Costantino*, 2016 ONSC 7279 at para 57.

<sup>22</sup> 2016 ONSC 6306.

<sup>23</sup> 2017 ONSC 3600.

<sup>24</sup> 2020 ONCA 447 (CanLII).

<sup>25</sup> 2022 ONSC 6457 (CanLII).

<sup>26</sup> 2022 ONSC 3141 (CanLII).

to take on or fulfill a given retainer since a finding of incapacity represents a significant loss of independence for an individual. There is a delicate balance to consider and requiring a capacity assessment must be reasonable in the circumstances.

In *Bajwa v. Singh*,<sup>27</sup> the 98-year-old plaintiff commenced a claim to recover money that was alleged to have been loaned to the defendants. While neither party raised the issue of capacity, the Ontario Superior Court grew concerned during the testimony of the plaintiff when they were unable to recite their age, could not state why they were at trial, or state the correct year of their late husband's death.<sup>28</sup> The court made an interim order for additional evidence concerning the plaintiff's capacity and ordered another hearing, which invited the Public Guardian and Trustee to provide submissions on the appropriate next steps.

In a subsequent decision,<sup>29</sup> the court ordered the plaintiff to undergo a capacity assessment for the purpose of determining whether she required a litigation guardian to continue in the proceeding. The court highlighted that there is "no single definitive test to be applied in assessing whether a litigant has the capacity to instruct counsel," and proceeded to highlight some of the most important factors in assessing the requisite decisional capacity to instruct counsel. The court provided that these factors include:

- a. The person's ability to understand and appreciate:
  - i. the nature of the proceedings and the ultimate issue in the proceedings;
  - ii. the financial risks and benefits of the lawsuit, including how either a positive or negative outcome will affect them financially;
  - iii. the available options, including the option to proceed to judgment or to try to settle;

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<sup>27</sup> 2022 ONSC 2151.

<sup>28</sup> *Ibid.*, at paras. 19-22.

<sup>29</sup> *Bajwa v. Singh*, 2022 ONSC 3720.

- iv. the position taken by their family members about the issues in this proceeding;
  - v. the factors which may be motivating their family members;
  - vi. the social risks and benefits of this proceeding, including its impact on their relationships with their family members.
- b. The person's ability to assess the comparative risk of the available alternatives, and a reasonable range of possible outcomes, both positive and negative.
  - c. The person's ability to make a reasoned choice regarding this proceeding, the rationality of their choice, and the stability of their choice.

In the end, the court determined the plaintiff lacked capacity to instruct counsel, but dismissed the lawsuit after finding the defendants credibly established that the payments in question were gifts.<sup>30</sup>

#### **d) Section 3 Counsel**

A lawyer, the court, and the parties' may consider the appointment of a "Section 3 Counsel." Section 3 of the *Substitute Decisions Act*, 1992 provides for the appointment of counsel for unrepresented parties whose capacity is in issue in a guardianship proceeding. The provision-Counsel for person whose capacity is in issue:

#### **Counsel for person whose capacity is in issue**

3(1) If the capacity of a person who does not have legal representation is in issue in a proceeding under this Act,

- (a) The court may direct that the Public Guardian and Trustee arrange for legal representation to be provided for the person; and
- (b) The person shall be deemed to have capacity to retain and instruct counsel.

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<sup>30</sup> *Bajwa v. Singh*, 2023 ONSC 4063 at para. 50.

It is important to note that lawyers appointed as Section 3 Counsel are not to make decisions for the client as a litigation guardian or substitute decision maker.

For a more fulsome discussion of Section 3 Counsel see the paper I wrote “Between a Rock and a Hard Place: The Complex Role and Duties of Counsel Appointed Under Section 3 of the *Substitute Decisions Act*, 1992,”<sup>31</sup> or a recent paper by Alex Procope presented at the Law Society of Ontario’s 2019 Estates and Trust Summit called: “The Ongoing History of Section 3 Counsel: Origins of the Role and a Path Forward.”

Some ethical considerations:

**e) Should you get the client’s family members involved?**

First, remember that it is presumed that every person has the legal capacity to make decisions in their own interest. Mental incapacity must be proven before a person is deprived of this decision-making power.

Second, remember your duty of confidentiality. The issue of confidentiality and older adults is challenging. Often older adults have family members who are highly involved with and assist them. However, a lawyer must adhere to the duty of confidentiality, except where the client gives permission to divulge information to particular individuals.

It is essential when dealing with older adult clients to ensure that privacy rights are not compromised because of age, despite the otherwise well-meaning intentions of family members or other individuals.

**f) Has the client executed a Power of Attorney document and appointed an attorney?**

Proactive advice is always helpful. *Before* a client becomes incapable, or shows signs of diminished capacity, it is a good idea to have a conversation with the client to find out if the client has executed a Power of Attorney document and determine who the appointed

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<sup>31</sup> Kimberly Whaley and Ameena Sultan, “Between a Rock and a Hard Place: The Complex Role and Duties of Counsel Appointed Under Section 3 of the *Substitute Decisions Act*, 1992” (2012) 40:3 Adv Q 408.

attorney is. Or, if the older adult does not have the capacity to grant one, a family member can apply for a court order appointing that family member as a guardian.

In a scenario where your client lacks the requisite capacity to litigate and a guardian has been appointed with the express authority to act as a litigation guardian, section 7.01(1.1) (a) of the *Rules of Civil Procedure* states that the guardian *shall* act as the litigation guardian. Or, if there is no guardian, an attorney under a Power of Attorney with the express authority to act as a litigation guardian shall act as the litigation guardian pursuant to section 7.01(1.1)(b) of the *Rules of Civil Procedure*.<sup>32</sup>

**g) Remember: who is the client?**

Some conflicts that can arise when dealing with an older adult client: conflicts involving spouses and their wishes versus the older adult's wishes and interest; conflicts involving family members from different generations and their wishes versus the older adult's interests; and conflicts involving a fiduciary (such as an attorney under a power of attorney or guardian) who may have interests that are different than the older adult.

In situations of conflict of interest, it is important to remember the duty owed to the client, as well as the presumption that the client has the capacity to make decisions. Where the capable older adult is being bullied into making legal decisions by a spouse or adult child, the lawyer's duty is to the older adult client.

Family members may have good intentions when assisting an older adult with legal issues, but lawyers must be aware of, and cognizant of red flags in respect of undue influence, incapacity issues, and potentially financial abuse when dealing with older adult clients.

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<sup>32</sup> The initial appointment of a litigation guardian for a plaintiff or applicant occurs without a court order upon the filing of an affidavit with the court setting out the information outlined in Rule 7.02(2). Where the party under a disability is a defendant or respondent to a proceeding, Rule 7.03(1) states that a litigation guardian must be appointed by motion to the court unless the exceptions set out in Rule 7.03(2), (2.1), or (3) apply. See also the *Substitute Decisions Act, 1992*, SO 1992, c 30 at section 59(2).

The most frequent perpetrators of financial abuse of older adults are unfortunately family members, including adult children, or even spouses (especially in the predatory marriage context where unscrupulous individuals prey upon older adults with diminished reasoning ability for their own financial profit). Remember who the client is and protect the clients' interests resolutely.

**h) What if the older adult client requests to take a legal position that you believe is not in their best interests?**

Notably, one must remember a person is capable until deemed incapable.

Clients can make whatever decision they want, even if it seems unreasonable or foolish. A capable person is entitled to be unwise in one's decision-making. Lawyers can provide advice as to why the legal position may not be a wise one, however, ultimately the decision belongs to the client.

#### **4. GUIDANCE FROM THE *RULES OF PROFESSIONAL CONDUCT***

The *Rules of Professional Conduct* provide some guidance to a lawyer facing clients with potential capacity challenges.

In particular, Rule 3.2-9 provides some guidance to lawyers acting for clients with diminished capacity. This rule (and accompanying commentary) provides that a lawyer in dealing with a client who may have compromised capacity, is required to maintain as much of a regular or "normal" solicitor-client relationship as possible. This presumes that the client in question has the requisite capacity to retain and instruct counsel such that the lawyer may be retained and act on his/her behalf.<sup>33</sup>

This Rule, requiring maintaining a "normal" solicitor-client relationship with a client who may have some capacity challenges, would also require that a lawyer be bound by the Rule respecting confidentiality as the duty of confidentiality is owed "to every client without exception." The duty survives the professional relationship and continues indefinitely

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<sup>33</sup> The Law Society of Ontario, *Rules of Professional Conduct*, Rule 3.2-9

after the lawyer has ceased to act for the client, whether or not differences have arisen between them.<sup>34</sup>

Rule 3.7 requires a lawyer to only withdraw from representing a client “for good cause.”<sup>35</sup> If a lawyer has ascertained that the client is capable of instructing the lawyer, and undertaking the particular transactions, then the lawyer should continue to act. Notably, capacity is fluid. A client’s ability to make decisions can change and fluctuate over time. Therefore, it is incumbent on lawyers to probe and investigate the capacity of clients, and potential clients, and to decline to act where the lawyer does not believe that the client has the capacity to retain and instruct counsel. As for situations where capacity later becomes an issue, there are options short of withdrawal, including seeking a litigation guardian (as set out in Rule 2.02 (6)).

Rule 5.1 requires that a lawyer act honestly and ensure fairness in representing clients. This holds for clients who have potential capacity challenges as well.

While clients with potentially compromised capacity pose challenges for their lawyers, a lawyer who acts for a client is still required to abide by all the duties as set out in the *Rules of Professional Conduct*.

## 5. RED FLAGS & BEST PRACTICES FOR LAWYERS

When meeting with a client, it is advisable for lawyers to consider indicators of incapacity and develop their own protocol for detecting such indicators. While these items are not determinative of a person's capacity or incapacity, below are some "red flags" and best practices to keep in mind.

Consider whether your client is:

- Showing signs of intellectual impairment, memory problems, disorientation, poor attention?

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<sup>34</sup> The Law Society of Ontario, *Rules of Professional Conduct*, Rule 3.3-1.

<sup>35</sup> The Law Society of Ontario, *Rules of Professional Conduct*, Rule 3.7.

- Unaware of risks to self and others?
- Irrational behaviour, reality distortion, delusions?
- Unresponsive and an inability to make a decision?
- Cannot easily identify assets or family members?
- Accompanied to appointments by an individual who appears significantly involved in the legal matter? And, if so, what the nature of the relationship between the individual and your client is?

Consider what are the familial circumstances of your client?

- Is the client well supported; more supported by one family member; if so, is there a relationship of dependency between the client and this person?
- Is there conflict within your client's family?
- Has the client made any gifts? If so, in what amount, to whom, and what was the timing of any such gifts?
- Have there been any recent changes in the person's estate planning document(s) or corporate management? What was the timing of such changes and what was the reason for the change? For instance, did any changes coincide with a shift in life circumstances, situations of conflict, or medical illnesses?
- Have different lawyers been involved? If so, why has the client gone back and forth between different lawyers?
- Does the substance of the corporate transaction or legal or litigation steps the client is asking you to do seem rational?
- Has the client had any recent significant medical events? Does the client have a physical impairment of sight, hearing, mobility or other?
- Have any medical opinions been provided in respect of whether a client has any cognitive impairment, vulnerability, dependency? Is the client in some way susceptible to external influence?

- Are there any communication issues that need to be addressed? Particularly, are there any language barriers that could limit the grantor's ability to understand and appreciate the planning document at hand and its implications?
- Interview the client alone and ask probative open-ended questions;
- Take detailed notes;
- Consider declining the retainer where there remains a significant reason to believe that undue influence may be at play and you cannot obtain instructions; and,
- Be mindful of your rules under the *Rules of Professional Conduct*.

## 6. CONCLUDING REMARKS

It is easy to see the difficulty for lawyers to balance the various duties they owe to their clients when vulnerability, capacity, and undue influence are at issue in a retainer.

In every case, a lawyer has the ultimate duty of ensuring that his or her client has the requisite capacity to retain and instruct counsel, as any defence or assertion of a client's legal rights must rest on the foundation of a valid lawyer-client relationship. It may not always be possible to detect every instance of incapacity, but a lawyer must always be satisfied that they can act for a given client and fulfill all the duties and obligations owed to that client.

*This paper is intended for the purposes of providing information only and is to be used only for the purposes of guidance. This paper is not intended to be relied upon as the giving of legal advice and does not purport to be exhaustive.*

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