



## **CHECKLIST: “RED FLAGS” FOR DECISIONAL INCAPACITY IN THE CONTEXT OF A LEGAL RETAINER**

In general, and particularly given our current demographics, it is advisable for lawyers to be familiar with and attuned to issues associated with decisional incapacity. When taking on a new client, providing independent legal advice, or when witnessing a change in an existing client, lawyers must be equipped with the tools to know their client and be alive to certain indicators of incapacity so as to facilitate the development of a protocol. While indicators are not determinative of a person’s capacity or incapacity, there are some “red flags” and suggested ‘best practices’ which may assist in the navigation of this complex concept of capacity. For information on the factors criteria to determine requisite decisional capacity in select areas see WEL’s Capacity Checklist: Re Estate Planning Context and Summary of Capacity Criteria.

### **RED FLAGS FOR INCAPACITY**

- Be alert to cognitive, emotional or behavioural signs such as memory loss, communication problems, lack of mental flexibility, calculation problems or disorientation of time person and/or place
- Hesitation or confusion on the part of the client, difficulty remembering details, cognitive difficulties or any other difficulties in comprehension
- Short-term memory problems: repeats questions frequently, forgets what is discussed earlier in conversation, cannot remember events of past few days (but remember there is a difference between normal age-related forgetfulness and dementia)
- Communication problems: difficulty finding words, vague language, trouble staying on topic or disorganized thought patterns
- Comprehension problems: difficulty repeating simple concepts and repeated questions
- Calculation or financial management problems, i.e. difficulty paying bills
- Significant emotional distress: depression, anxiety, tearful or distressed, or manic and excited, feelings inconsistent with topic etc.
- Intellectual impairment
- Cannot readily identify assets or family members
- Experienced recent family conflict
- Experience recent family bereavement
- Lack of awareness of risks to self and others
- Irrational behaviour or reality distortion or delusions: may feel that others are “out to get” him/her, appears to hear or talk to things not there, paranoia
- Poor grooming or hygiene: unusually unclean or unkempt in appearance or inappropriately dressed
- Lack of responsiveness: inability to implement a decision
- Recent and significant medical events such as a fall, hospitalization, surgery, etc.

- Physical impairment of sight, hearing, mobility or language barriers that may make the client dependent and vulnerable
- Poor living conditions in comparison with the client's assets
- Changes in the client's appearance
- Confusion or lack of knowledge about financial situation and signing legal documents, changes in banking patterns
- Being overcharged for services or products by sales people or providers
- Socially isolated
- Does the substance of the client's instructions seem rational? For example, does the client's choice of beneficiaries of a testamentary interest, or of attorneys named in a power of attorney, seem rational in the circumstances?
- Keep an open mind – decisions that seem out of character could make perfect sense following a reasonable conversation
- Keep in mind issues related to capacity including, **undue Influence**. See WEL's Undue Influence Checklist
- Notably, the overall prevalence of dementia in a population aged 65 and over is about 8% while in those over 85 the prevalence is greater than 30%. It is only at this great age that the prevalence of dementia becomes significant from a demographic perspective. However, this means that great age alone becomes a red flag<sup>1</sup>
- Family members who report concerns about their loved one's functioning and cognitive abilities are almost always correct, even though their attributions are very often wrong. The exception would be a family member who is acting in a self-serving fashion with ulterior motives<sup>2</sup>
- A dramatic change from a prior pattern of behaviour, attitude and thinking – especially when associated with suspiciousness towards a family member (particularly daughters-in-law). Paranoid delusions, especially those of stealing, are common in the early stages of dementia<sup>3</sup>
- Inconsistent or unusual instructions. Consistency is an important hallmark of mental capacity. If vacillation in decision-making or multiple changes are not part of a past pattern of behaviour, then one should be concerned about a developing dementia<sup>4</sup>
- A deathbed will where there is a strong likelihood that the testator may be delirious<sup>5</sup>
- Complexity or conflict in the milieu of a vulnerable individual<sup>6</sup>

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<sup>1</sup> Per Kenneth I. Shulman, M.D., F.R.C.P.C., Professor, University of Toronto, Department of Psychiatry, Sunnybrook Health Sciences Centre

<sup>2</sup> *Ibid*

<sup>3</sup> *Ibid*

<sup>4</sup> *Ibid*

<sup>5</sup> *Ibid*

<sup>6</sup> *Ibid*

## BEST PRACTICES:

- Be alert to the signs of incapacity and always ask probing questions not leading questions
- Interview the client alone and take comprehensive, detailed notes
- Use open-ended questions to confirm or elicit understanding and appreciation
- Ask comprehensive questions which may help to elicit important information, both circumstantial and involving the psychology of the client
- Have clients re-state information in their own words and revert back to earlier discussions
- Take more time with older clients so they are comfortable with the setting and decision making process to be undertaken
- Follow your instincts. Where capacity appears to be at issue consider and discuss obtaining a decisional capacity assessment which may be appropriate. Also, it may be appropriate to request the opportunity to speak to or receive information from a primary care provider, review medical records where available or obtain permission to speak with a health care provider that has frequent contact with the client to discuss any capacity or other related concerns. Be sure to obtain the requisite instructions and directions from the client given issues of privilege
- Be mindful of the Law Society of Ontario, *Rules of Professional Conduct*, <http://www.lsuc.on.ca/lawyer-conduct-rules/>, particularly the Rules related to capacity

*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*

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