TAB 4

Part 2: Establishing the Professional Relationship with the Older Client and their Family

The Retainer

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Special Lectures 2010

A Medical-Legal Approach to Estate Planning, Decision-Making, and Estate Dispute Resolution for the Older Client

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The Retainer[1]

Marshall Swadron[2]

This paper addresses the retainer of the lawyer engaged to act on behalf of the older client in capacity-related matters. It considers the different means by which the lawyer may be engaged, including appointments under section 3 of the *Substitute Decisions Act, 1992.* It also considers conflicts of interest, the need to ensure independence and the role of counsel. While this paper relates to the older client, the principles discussed may be applied more broadly to other clients in capacity-related matters.[3]

What is a capacity-related matter?

Capacity-related matters are concerned with whether a person is capable of making decisions or, in the event of incapacity, who should be making decisions and how they should be made. In Ontario such proceedings are conducted in the Superior Court of Justice under the *Substitute Decisions Act, 1992* (*SDA*)[4] and before the Consent and Capacity Board under the *Health Care Consent Act, 1996* (*HCCA*).[5]

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[1] This paper is to be presented at the 2010 Special Lectures of the Law Society of Upper Canada: *A Medical-Legal Approach to Estate Planning, Decision-Making, and Estate Dispute Resolution for the Older Client* in Toronto on April 14, 2010. The title was selected by program Co-Chair Brian Schnurr, likely because it has not yet been used by John Grisham. Alternate titles considered were "Well begun is half done" and "An ounce of prevention is worth a pound of cure."

[2] Marshall Swadron is a lawyer with Swadron Associates in Toronto. The author would like to thank Mercedes Perez, also of Swadron Associates, for her assistance in preparing this paper, portions of which have been adapted from the author's prior paper, "Representing the incapable client in capacity proceedings" delivered at the 12th Annual Estates and Trusts Summit of the Law Society of Upper Canada held in Toronto on November 13, 2009. Lawyers with Swadron Associates also acted in some capacity in the cases cited at footnotes 28, 37, 41 and 45.

[3] The principles in the paper do not apply to older clients in other contexts, however, as age is not a determinant of capacity.

[4] *Substitute Decisions Act, 1992*, S.O. 1992, c. 30

[5] *Health Care Consent Act, 1996*, S.O. 1996, c. 2, Sched. A

Where the rights and obligations of an incapable person are determined in other contexts, representation generally occurs through a litigation guardian,[6] designated representative[7] or similar devices.[8] The significance of the role of counsel in capacity-related matters is that the lawyer-client relationship is unmediated, although it may still be necessary to deal with others in respect of the financial aspects of the retainer.

When considering the scope of the retainer, a bright line should be drawn between capacity-related matters and matters affecting the client's property. A lawyer must be satisfied as to a client's capacity to manage property before accepting a retainer to act in respect of that property. Should both types of issues present themselves in the same retainer, the property-related issues must be deferred until the capacity-related issues are resolved, subject to interim orders of the court.

Rules of Engagement

This section of the paper considers different means by which a lawyer may be engaged, including engagement by the client, by a guardian or attorney or by others. It also considers appointments of counsel under section 3 of the *SDA* and section 81 of the *HCCA*.

It should be made clear at the outset of this section that regardless of the manner in which a lawyer is retained or who is responsible for the financial aspects of the retainer (or even, in some cases, who is paying the fees), the lawyer's only client is the older person. In this

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[6] Rules of Civil Procedure, R.R.O. 1990, c. 194, Rule 7.

[7] Immigration Appeal Division Rules (SOR/2002-230), section 19 under the *Immigration and Refugee Protection Act,* S.C. 2001, c. 27.

[8] See, for example, the *Absentees Act*, R.S.O. 1990, c. A.3.

regard, it matters little who has brought the lawyer to the dance as long as the lawyer leaves with the right partner.

Engagement by the client

Direct engagement of a lawyer by the older client is consistent with the personal autonomy and dignity of the client. There is no case that establishes the capacity threshold required to retain a lawyer in a capacity-related proceeding. Courts have held, however, that the tests for capacity in the *SDA*[9] and *HCCA*[10] can be applied to the subject matter of other decisions.[11] This would require that the client have the ability to understand that his or her capacity or decision-making are in issue and to appreciate that the client can have a say in the outcome.

A lawyer acting for a client whose capacity is at issue should take the same prudent measures as would be taken in any case to secure the payment of fees. This will include preparing written retainer agreements establishing the scope of the retainer and the manner in which fees are to be determined and obtaining a retainer deposit. The Rules of Professional Conduct require that fees be fair and reasonable and disclosed in a timely fashion.[12]

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[9] *SDA,* sections 6 (property) and 45 (personal care)

[10] *HCCA,* section 4 (treatment, admission to long-term care and personal assistance services)

[11] *Zabawskyj v. Zabawskyj*, [2008] O.J. No. 1650 (S.C.J.) at paragraphs 9 and 10

[12] *Rules of Professional Conduct,* Law Society of Upper Canada, Rule 2.08

Where a client lacks capacity to enter into a financial arrangement with a lawyer, terms for payment may be established or confirmed through a guardian[13] or attorney for property. If there is no guardian or attorney, or where the person with control of the client's finances declines to arrange for payment, the financial terms of the retainer can be established by the court in the context of the proceeding. Where a third party refuses to make the client's funds available to the client for the purpose of paying the lawyer, this can be addressed by motion for directions in the same manner as would a denial of access to the client.

A more difficult situation arises where the older client controls his or her own property but the lawyer is not satisfied that the client is capable in respect of the financial aspects of the retainer. Depending on the client's instructions, it may not be open to the lawyer to confirm the financial terms of the lawyer's engagement with another party. In such cases the lawyer must be guided by prudence. This will include adhering to all professional obligations[14] and being prepared, ultimately, to accept scrutiny of the accounts by the client, an attorney or guardian, a judge, an assessment officer or all of the above.

A different problem can arise in proceedings in the Superior Court of Justice or before the Consent and Capacity Board to terminate a guardianship of property.[15] In these cases the client does not control his or her assets at the time of the retainer. If the application is successful, management of the client's property will revert to the client, at which point payment of the lawyer's account can become an issue, with the lawyer becoming a victim of his or her own success. It is prudent in such cases to ensure that both the client and the

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[13] This includes the Public Guardian and Trustee as statutory guardian of property under sections 15 and 16 of the *SDA*.

[14] *Rules of Professional Conduct,* Law Society of Upper Canada, Rule 2.08

[15] *SDA,* ss. 20 and 28 and *Mental Health Act,* s. 60

guardian agree to the financial terms of the retainer and to either seek a deposit from the guardian of property at the outset of the case or to render interim accounts.[16]

Engagement by a guardian, attorney or others

Guardians and attorneys for property have a duty to encourage an incapable person to participate, to the best of his or her abilities, in the guardian's decisions about the property.[17] When these decisions are no longer within the exclusive power of the guardian or attorney but are instead before the court, this duty can be fulfilled by arranging for counsel for the older client in the capacity-related proceeding. The role of the guardian or attorney can include assisting the incapable person in the selection of counsel and making arrangements for payment.

The guardian or attorney should avoid any attempt to influence the older client's instructions and under no circumstances should usurp those instructions. In *Woolner v. D'Abreau*,[18] Ms. D'Abreau had granted a continuing power of attorney for property to lawyer Mr. Woolner. Ms. D'Abreau then executed a new power of attorney in favour of lawyer Mr. Marcovitch, who demanded that Mr. Woolner turn Ms. D'Abreau's property over to him. Mr. Woolner, however, had concerns about Ms. D'Abreau's capacity to give a new continuing power of attorney and requested that she undergo an assessment of her capacity to give a new power of attorney. Counsel for Ms. D'Abreau opposed this request and Mr. Woolner applied to court for a determination of the issue. After an initial adjournment, Ms. D'Abreau consented to the assessment and was found capable.

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[16] The practice of the PGT has been to refuse requests for deposits for reasons that are unclear.

[17] *SDA*, subsection 32(3)

When the matter came back to court on the issue of costs, Mr. Justice Brown cited the principle of proportionality and the conduct of the parties to deny Mr. Woolner his costs. Further proceedings were then required to determine whether Ms. D'Abreau ought to be responsible for the fees charged to her by her own lawyer in circumstances where the proceedings were of questionable benefit to her. Upon assigning Ms. D'Abreau independent counsel, Mr. Justice Brown determined that the lawyer retained by Mr. Marcovitch to represent Ms. D'Abreau had proceeded without Ms. D'Abreau's instructions in opposing the capacity assessment and disallowed the larger part of his fees.[19]

Other family members or friends may also assist the older client in retaining counsel. The nature of the assistance can be as minimal as looking up a telephone number or contacting a lawyer referral service through to providing funds for the retainer of an independent lawyer. Where funding offered comes with strings attached, however, it must be rejected.

Appointments under section 3 of the Substitute Decisions Act, 1992

The *SDA* lacks a purposes section. A fair reading of the Act supports the conclusion that it is intended to enhance the autonomy and participation of individuals in their own decision-making. Where a person who is the subject of a proceeding under the *SDA* does not have representation, the court can order that it be arranged. Section 3 of the *SDA* provides as follows:

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

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[18] *Woolner v. D'Abreau*, 2008 CanLII 70463 (Ont. S.C.J.)

[19] *Woolner v. D'Abreau*, 2009 CanLII 4860 (ON S.C.)

(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.

Responsibility for legal fees

(2) If legal representation is provided for a person in accordance with clause (1) (a) and no certificate is issued under the *Legal Aid Services Act, 1998* in connection with the proceeding, the person is responsible for the legal fees.

Proceedings under the *SDA* include applications for the appointment of guardians of property[20] and personal care, [21] temporary guardianship applications,[22] applications to terminate guardianship orders[23] and applications for directions respecting decisions by a guardian or attorney.[24] Capacity is potentially in issue in each type of proceeding under the *SDA*.

Upon receipt of direction from the court, the Public Guardian and Trustee (PGT) is responsible for arranging for legal representation. In practice, direct appointments are also made directly by the court. In some cases, counsel previously retained by the person whose capacity is in issue may nonetheless seek an appointment under section 3. This can occur where a guardian or attorney for property refuses to pay counsel or where counsel is having difficulty obtaining access to the client (i.e. where the client is in the custody of a party who does not recognize counsel's role). The PGT may be asked prospectively to agree to a lawyer continuing to act should the court direct that a lawyer be appointed.

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[20] *SDA*, section 22

[21] *SDA*, section 55

[22] *SDA*, sections 27 and 62

[23] *SDA*, sections 28 and 63

[24] *SDA*, sections 39 and 68

A similar provision for the appointment of counsel before the Consent and Capacity Board is found in subsections 81(1), (2) and (2.1) of the *HCCA* (as amended in late 2009), which provide as follows:

> **Counsel for incapable person**
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> 81. (1) If a person who is or may be incapable with respect to a treatment, managing property, admission to a care facility or a personal assistance service is a party to a proceeding before the Board and does not have legal representation,
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> (a) the Board may direct Legal Aid Ontario to arrange for legal representation to be provided for the person; and
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> (b) the person shall be deemed to have capacity to retain and instruct counsel.
>
> **Responsibility for legal fees**
>
> (2) If legal representation is provided for a person in accordance with clause (1) (a) and no certificate is issued under the *Legal Aid Services Act, 1998* in connection with the proceeding, the person is responsible for the legal fees.
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> **Same**
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> (2.1) Nothing in subsection (2) affects any right of the person to an assessment of a solicitor's bill under the *Solicitors Act* or other review of the legal fees and, if it is determined that the person is incapable of managing property, the assessment or other review may be sought on behalf of the person by,
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> (a) the person's guardian of property appointed under the *Substitute Decisions Act, 1992*; or
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> (b) the person's attorney under a continuing power of attorney for property given under the *Substitute Decisions Act, 1992*.

Arranging representation does not extend to the payment of counsel. In cases where counsel has accepted an appointment under section 3 of the *SDA* or section 81 of the *HCCA*, the incapable person is responsible for the legal fees if he or she does not otherwise qualify for legal aid.[25] The PGT is not itself responsible for payment of counsel's legal fees unless it also acts as a guardian of property or interim guardian of property for the incapable

[25] *SDA*, subsection 3(2) and *HCCA*, subsection 81(2)

person. Under either statute, the lawyer is responsible for assisting his or her client to complete an application for a legal aid certificate.[26]

Legal Aid

Both section 3 of the *SDA* and section 81 of the *HCCA* premise the client's obligation to pay the lawyer's fees upon no certificate being issued under the *Legal Aid Services Act, 1998*.[27] Where a client has access to sufficient funds to retain counsel on a private-retaining basis, the client will likely be ineligible for legal aid. The availability of legal aid can be beneficial, however, to a client whose only asset is real property (i.e. a home), the value of which will not be realized until its sale. Legal Aid will secure itself by a lien against the real property and the client will receive the benefit of the dramatically reduced rates paid to lawyers by Legal Aid Ontario. Where a contributory certificate for Legal Aid is issued, the lawyer is obliged to inform the client of the lower cost consequences of accepting the legal aid certificate versus proceeding with a private retainer. To do otherwise puts the lawyer's own financial interests ahead of those of the client.[28]

Legal Aid Ontario has established a tariff in respect of proceedings before the Consent and Capacity Board such that payment, if modest, is nonetheless predictable.[29] The treatment of lawyers' accounts following appointments of counsel under section 3 of the *SDA*, however,

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[26] If legal aid is required, information provided by the PGT to lawyers accepting an appointment indicates that "Regarding payment of legal fees in the absence of a private retainer, the lawyer must assist his or her client to complete an application for a legal aid certificate and submit it to the Area Director of the Legal Aid Office indicated on the materials from the PGT in advance of the return date of the Court or Board proceeding wherever possible."

[27] *Legal Aid Services Act, 1998*, S.O. 1998, c. 26

[28] *Law Society of Upper Canada v. Aldo Tollis*, 2009 ONLSHP 33 (CanLII)

[29] Ontario Regulation 107/99 under the *Legal Aid Services Act, 1998*, Table II, Part G

warrants a caveat to lawyers who might consider accepting such retainers. Legal Aid has no tariff applicable to guardianship proceedings and funds them so infrequently that it lacks the expertise required to assess the value of the services rendered. In addition to accepting hourly rates that may be a quarter of their usual rates, lawyers should be prepared, subject to a review and appeal process,[30] to have their accounts reduced by Legal Aid to the actual time spent in court or mediation plus a small number of hours of preparation time regardless of the amount of time actually required. Travel and other disbursements are reduced or simply disallowed. Legal Aid may reduce accounts despite the agreement of the contributing client and the parties to the guardianship application.[31] Arbitrary rules respecting the timing of delivery of accounts can result in delays or disallowance of payment.[32] Lawyers asked to act in court proceedings under the *SDA* might reasonably insist upon alternate payment arrangements.

Approval of a lawyer's accounts

Where an older client is determined to be capable of managing property, he or she retains exclusive authority to determine payment of counsel subject to assessment under the *Solicitors Act*.[33] Where it is determined in the course of a proceeding that the older client is not capable of managing property, the court may fix the fees of the lawyer representing the client in connection with any interim or final disposition of the proceeding or confirmation

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[30] Ontario Regulation 106/99 under the *Legal Aid Services Act, 1998*, sections 46 and 47

[31] Legal Aid Ontario may even take issue with fees that are fixed by the court if Legal Aid did not receive notice of the hearing.

[32] Ontario Regulation 106/99, sections 39(1) and 42

[33] *Solicitors Act*, R.S.O. 1990. c. S.15

of any settlement. Should such a request be made, supporting material should be filed.[34] The amount of the lawyer's fees may also be addressed by a guardian of property, an attorney for property whose authority is not disputed or referred for assessment.

Conflicts of interest

Conflicts of interests in the legal profession are a self-standing area of study.[35] As demonstrated by the cases discussed below, the failure to ensure that representation of the older client is independent and free of conflict can lead to disastrous consequences. Guardianship proceedings under the *SDA* arising from personal injury cases are particularly fraught. A lawyer may attempt to rove between representation of the brain-injured victim, his or her litigation guardian and, upon the settlement of the claim, the proposed guardian of property. Another scenario is the "family lawyer".[36] While the trends of urbanization and specialization have made this latter phenomenon less common, the same lawyer may serve more than one generation of the same family and continue to do so despite diverging interests when capacity issues arise.

Current clients of the lawyer

The potential divergence between the interests of current clients is illustrated by *Piscione v. Borg*.[37] The plaintiffs in that case included a brain-injured man (Piscione) and his mother

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[34] A costs outline (Form 57B) supported by copies of the lawyer's accounts (with any privileged material redacted) is generally sufficient.

[35] See Perell, Paul M., *Conflicts of Interest in the Legal Profession*, (Butterworths: Toronto & Vancouver, 1995)

[36] This is not meant to describe a lawyer who practices family law but describes instead the legal equivalent of the family physician.

[37] *Piscione v. Borg*, [1997] O.J. No. 2281 (Gen. Div.)

(Borg) who was both a claimant under Part V of the *Family Law Act*[38] and her son's guardian of property[39] and litigation guardian. After the plaintiffs' lawyers reached a tentative settlement, they initiated an application in the son's name to terminate the guardianship and restore his ability to make his own property decisions. The mother, concerned that the guardianship was being terminated to avoid scrutiny of the settlement, opposed the lawyers' role. In response to an argument that the law firm's only client was the son, Madam Justice Greer wrote the following at paragraph 16:

> At the return of the Application the following day, Mr. Adair took the position that I had misapprehended that Lerner's were in a position of conflict because they had been retained by one and were now acting for another. It is his position that Lerner's has had one client only, Joseph Piscione, and that Borg was never a client of Lerner's. I completely reject Mr. Adair's position in this regard. One has to only examine the legal status of Borg in the litigation proceeding and the statutes under which she was appointed Committee and later confirmed as her son's guardian, to understand what her status was. While incapable, Piscione was unable to form any intent to hire counsel, instruct counsel or provide counsel with a retainer. All of that was done by Borg as his Committee. Borg then, is legally responsible for the steps taken in the action, and is the only person who can sign the Minutes of Settlement releasing the Defendants for the monies paid over to Lerner's for her son's damages.

In *Ziskos v. Miksche*,[40] joint representation of an older client who was the subject of a guardianship application under the *SDA* and her nephews who were bringing the application was found to be an obvious conflict of interest. In that case, Madam Justice Spies wrote the following at paragraph 21:

> On the issue of representation of Johanna Miksche, Cynthia Spencer took the position that for Mr. Polten to represent Mrs. Miksche as a respondent and his other clients as applicants in the same cross application was a conflict of interest. She stated that it was imperative that Mrs. Miksche be represented by counsel of her own to ensure that her rights were fully protected in both applications. I agree with

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[38] *Family Law Act,* R.S.O. 1990, c. F.3

[39] The mother was originally appointed the son's committee under the former *Mental Incompetency Act,* R.S.O. 1990, c. M.9 and was confirmed as his guardian under the *SDA*.

[40] *Ziskos v. Miksche*, [2007] O.J. No. 4276 (S.C.J.)

> this position. This should have been obvious to Mr. Polten from the outset. Instead he continued to represent that he acted for Mrs. Miksche and even claims costs to deal with this conflict issue in the amount of $7,600.

Former clients of the lawyer

DeMichino v. DeMichino[41] is an example of a conflict of interest arising from obligations to former clients in a guardianship proceeding brought at the conclusion of a personal injury action. The lawyer for the injured plaintiff was initially retained by Mr. DeMichino's family members to represent them in connection with guardianship issues. Once a tentative settlement was reached, however, the lawyer applied for the appointment of Mr. DeMichino's common law spouse and her niece as guardians of property, without notice to Mr. DeMichino's other immediate family members.[42] The material in support of the application suggested that the family members had been estranged for many years. A hearing was held to determine whether the PGT, in failing to bring the omission of notice to the court's attention, was liable for any part of the costs of the subsequent proceeding to replace the guardians. Mr. Justice Stinson declined to make such an award but was critical of the personal injury lawyer, writing at paragraph 7,

> Despite the requirements of s. 69(6) of the SDA, Mr. Neinstein did not serve any of Mr. Michele DeMichino's family members with notice of the guardianship application. (I pause to note that his actions in bringing the guardianship application on behalf of Ms. Banushefski and Ms. Makedonas exclusively, and without notice to other family members, would appear to be in direct conflict with the signed retainer agreement previously given to him in connection with guardianship issues.)

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[41] *DeMichino v. DeMichino* (2009), 94 O.R. (3d) 379 (S.C.J.)

[42] Subsection 69(6) of the *SDA* also required service of the application on family members of the alleged incapable person in any event.

In *Weinstein v. Weinstein*,[43] the beneficiaries under Mrs. Weinstein's will sought to set aside an order sought by Mr. Weinstein to encroach upon a trust for the purpose of equalizing net family property. The equalization application had been brought without notice to the beneficiaries. The litigation guardian appointed for Mrs. Weinstein, who was incapable due to Alzheimer's disease, and counsel for the litigation guardian both had longstanding relationships with Mr. Weinstein and the equalization application had been unopposed. The order was set aside. In assessing the role of counsel for the litigation guardian, Mr. Justice Sheard wrote the following at pages 237 to 238:

> Regarding Angus McKenzie, Mr. Bell says that he had a conflict of interest and therefore he should not have been counsel for a party under a disability in proceedings that, had her position been properly presented, should have been adversarial rather than consensual. Mr. McKenzie apparently had concerns as to whether acting for Betty Weinstein in the application would constitute a conflict of interest. He therefore asked a junior lawyer in his firm to research the point. In a memorandum to Mr. McKenzie dated July 17, 1992, she replied "it appears that in your capacity as solicitor for other members of the Weinstein family whose interest in this matter may be affected, a potential conflict of interest exists in this matter". Nevertheless Mr. McKenzie decided to act as counsel for Betty, apparently because Wallace asked him to. In a memorandum from McKenzie to J.H. Little, dated July 28 he says: "Wallace Weinstein had called me and asked me to act as counsel for Betty Weinstein on the application. In my opinion, there would be no conflict of interest and accordingly I told Wallace that I would be pleased to act as he requested."
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> Mr. McKenzie had had a long relationship with both Wallace and Betty as their solicitor. After Betty became disabled by Alzheimer's during the 1980s, her role as client had to diminish, but Mr. McKenzie continued in his professional relationship with Wallace. For example, he prepared a will for Wallace, signed March 31, 1992, in which Mr. McKenzie, described in the will as "my solicitor, Angus Le Roy McKenzie" is named the sole executor and trustee.
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> On August 5, 1992, Mr. McKenzie in a letter to David Aston took the initiative of suggesting that the draft order, which was to be presented to Mr. Justice McGarry on the 12th, be expanded beyond the objects requested in the notice of application, by directing immediate payment of one-half the assets of the Betty S. Weinstein Trust to Wallace.
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> It would have been more seemly if Mr. McKenzie had not participated in the application. In his ostensible function as counsel for Betty it would appear that he was primarily concerned with the interests of his client Wallace. Indeed, as has

[43] *Weinstein v. Weinstein* (1997), 35 O.R. (3d) 229 (Gen. Div.)

> been mentioned, it was at Wallace's request that he had assumed the role of counsel for the litigation guardian of the disabled respondent Betty.

The lawyer's own interest

Conflicts involving the lawyer's own interest can occur where transactions handled by the lawyer are impugned or where a lawyer may have made an error in the client's representation. In these circumstances the lawyer has a professional obligation to refer the client to independent lawyers.[44]

A lawyer can also be prevented from acting as counsel for a client by virtue of being a witness in the proceeding. In the case of *Kasstan v. Ontario (Public Trustee)*,[45] a motion to disqualify a lawyer from acting was granted where the lawyer had served as guardian of the person of the plaintiff at times material to the action. In granting the disqualification order, Mr. Justice McCartney wrote the following, at paragraph 19:

> In the present case, Clara Kasstan, at all relevant times complained of, had been found incapable of handling any of her own affairs. Decision making in her life had been taken over by The Public Guardian and Trustee on the one hand (property decisions) and by Mary D. Bird on the other hand (personal care decisions). Furthermore her two personal representatives were clearly at odds as to what should be done, and that is what has given rise to this action. Mary D. Bird is the crucial witness in the Plaintiff's case, and so intricately bound up in it that it would be offensive to the rule that counsel must be and must be perceived to be independent, to allow her, or her firm, to continue on the case. Further, there is no prejudice to the Plaintiff in the sense that the case has just begun, and it would not be difficult for new counsel to pick up where the earlier counsel had left off. And as far as the Plaintiff's right to be represented by counsel of her choice is concerned, it seems to me that removal is inevitable, and it is clearly in the Plaintiff's best interests to instruct new counsel at an earlier rather than a later date.

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[44] *Rules of Professional Conduct,* Law Society of Upper Canada, Rule 6.09

[45] *Kasstan v. Ontario (Public Trustee)*, [2000] O.J. No. 820 (S.C.J.)

Steps taken by a lawyer in the course of a capacity-related proceeding can have the effect of causing the older client to lose his or her advocate. For example, where a lawyer in a capacity-related proceeding prepares a continuing power of attorney for property or power of attorney for personal care for the client, the lawyer may unwittingly become a witness if the validity of the power of attorney is disputed. To avoid the prospect of the older client losing his or her advocate in the midst of a capacity-related proceeding, any documents delegating decision-making powers or which otherwise might be challenged should be prepared by another lawyer.

The Role of Counsel

Ensuring Independence

A lawyer's professional obligations require that the lawyer have unmediated, direct access to a client for the purpose of obtaining instructions. When a lawyer represents a client who does not live independently or who lacks control of his or her living circumstances, ensuring client access can be a challenge. In guardianship proceedings, feuding relatives may even restrict access to the subject of the application. A lawyer cannot accept such limitations upon access, nor can the lawyer accept a purported termination of the lawyer's retainer that may have been obtained by improper means. The lawyer should in such circumstances move for directions before the court to seek an order for unimpeded access to the client or similar direction from the Board.

The simplest means of obtaining independent instructions is to ensure that no other person is present at the lawyer's meetings with the client. If the lawyer cannot be assured that the client is alone during telephone conversations, the lawyer should avoid taking instructions

by telephone. Written instructions should be taken in person rather than by mail. It also follows that a lawyer should not use family members as interpreters but instead, where one is required, the lawyer should engage an independent interpreter.

Concerns of undue influence sometimes result in variations of the problem of client access. A client may insist or "instruct" the lawyer that the client will meet with the lawyer only in the presence of a party to the proceeding whose interest is potentially in conflict. Effort should be made in such cases to explain to the client that such an insistence could interfere with the lawyer's duty to the court or the Board to ensure that the client's instructions are independent. The lawyer seeking exclusive access to a client can also enlist the assistance of counsel for the other party seeking to be present, assuming the party is represented, to facilitate such access. If the issue cannot otherwise be resolved, direction from the court or Board can be sought.

Instructions vs. Best Interests

Once reasonable precautions are taken to ensure that the client is free to express his or her wishes, the lawyer shall, in the words of subrule 2.02(6) the *Rules of Professional Conduct*, "as far as reasonably possible, maintain a normal lawyer and client relationship."[46] This includes documenting the terms of the retainer and significant instructions, reporting regularly and maintaining all professional obligations including confidentiality.[47]

In a normal solicitor-client relationship, a client is free to give instructions that may be considered contrary to the client's best interests. While the lawyer may advise the client of

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[46] *Rules of Professional Conduct,* Law Society of Upper Canada, Subrule 2.02(6)

[47] The nature of the obligation of confidentiality is discussed further below.

the potential adverse consequences of pursuing such a course of action, it would be inappropriate for the lawyer to disregard the client's instructions on the basis that they are contrary to what the lawyer believes to be in the client's best interests. The same applies where a client is under disability. Once instructions are obtained, the lawyer must "represent the client resolutely and honourably within the limits of the law."[48] For the lawyer to abandon this principle in favour of the lawyer's notion of the client's best interests will effectively silence the client.

There is a misconception that, in the absence of instructions, the role of counsel appointed under section 3 of the *SDA* or section 81 of the *HCCA* is to act in the best interests of the person alleged to be incapable.[49] There is no statutory or jurisprudential support for this position.[50] Moreover, the legitimacy of the adjudicative process depends on lawyers refraining from imposing their personal views respecting their clients' circumstances.

If a lawyer is unable to obtain instructions, the lawyer cannot act.[51] The client, however, is entitled to every opportunity to provide instructions, including, where appropriate, more than one visit and possibly several approaches to the issue. As capacity can fluctuate, inquiries should be made respecting the best time of day to meet with a client and whether the client is functioning below their usual base-line on the day of a visit. If there is a reasonable prospect of improvement, such as in the period of time following a stroke,

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[48] *Rules of Professional Conduct,* Rule 4.01

[49] This is based on the author's experience and some general articles respecting power of attorney challenges.

[50] On the contrary, please see the discussion below respecting the case of *Banton v. Banton* (1998), 164 D.L.R. (4th) 176 (Ont. Ct. Gen. Div.).

[51] There may be scope for a lawyer who is unable to secure instructions to serve as *amicus curiae* but this is not the subject of this paper.

counsel may ask caregivers to let the lawyer know if the client's condition improves so as to warrant a further attempt to obtain instructions.

Deemed Capacity

Deemed capacity to retain and instruct counsel in section 3 of the *SDA* and section 81 of the *HCCA* relieve the lawyer from establishing these facts in order to act. For the lawyer to impose a threshold of capacity upon a client in such cases would, in borderline cases, deprive the client of representation. Moreover, the client may be incapable in some aspects of their decision-making but capable in others.

In a guardianship application, instructions may be as minimal as not wanting to undergo a capacity assessment or to be found incapable.[52] In an application before the Consent and Capacity Board under the *HCCA*, a client may wish to avoid a particular treatment or admission to a care facility or object to a particular person being appointed as a decision-maker. In each of these situations, a lawyer is able to act on the instructions and seek to achieve the outcome sought by the client.

Deemed capacity does not lessen the obligation of counsel to ensure that instructions come directly and independently from the client. On the subject of deemed capacity and the role of appointed counsel, Mr. Justice Cullity wrote the following in the *Banton* case:[53]

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[52] Capacity assessments can have significant implications in the context of guardianship proceedings, particularly where the evidence of incapacity is poor or a finding of incapacity may open the door to a guardianship order that displaces a valid continuing power of attorney for property. A lawyer for a person alleged to be incapable should not routinely consent to orders for assessment. It is of no benefit to the lawyer, whose client is deemed capable of providing instructions, to have the opinion of a capacity assessor on the issue.

[53] *Banton, supra*, at page 218

> The position of lawyers retained to represent a client whose capacity is in issue in proceedings under the *Substitute Decisions Act, 1992* is potentially one of considerable difficulty. Even in cases where the client is deemed to have capacity to retain and instruct counsel pursuant to section 3(1) of the Act, I do not believe that counsel is in the position of a litigation guardian with authority to make decisions in the client's interests. Counsel must take instructions from the client and must not, in my view, act if satisfied that capacity to give instructions is lacking. A very high degree of professionalism may be required in borderline cases where it is possible that the client's wishes may be in conflict with his or her best interests and counsel's duty to the Court.

In the *Banton* case, Mr. Banton's lawyer acknowledged that despite the fact that Mr. Banton's capacity was in issue he took his instructions over the telephone and that they were conveyed to him on most occasions by Mr. Banton's wife and not Mr. Banton. Mrs. Banton also vetted Mr. Banton's affidavit and attended all meetings between the lawyer and Mr. Banton. Mr. Banton's children were kept incommunicado on the basis of Mrs. Banton's advice to the lawyer that these were Mr. Banton's instructions. The lawyer's actions were considered by the Court to demonstrate excessive zeal as well as partisanship toward Mrs. Banton whose influence was such that the Court described Mr. Banton as a "mere puppet."[54]

Deemed capacity to retain implies the capacity to discharge counsel or decline representation. Reasons for declining the appointment may range from not wanting to have someone speak on the client's behalf to not wanting to pay for a lawyer. Counsel cannot be forced upon a person who does not wish to be represented.

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[54] *Banton, supra*, at page 219

Confidentiality

In the circumstances of the subject matter of the retainer, the lawyer's confidentiality obligations[55] in capacity-related proceedings are personal to the older client and are not transmitted to a guardian or attorney absent the consent of the client or an order of the court. Demands by third parties for disclosure of the file of a lawyer engaged by an older client in a capacity-related proceeding are, accordingly, improper. Confidentiality obligations heighten counsel's duty to the court, particularly when conveying the older client's position in a proceeding in the absence of affidavit material.[56] Even in assessment proceedings a lawyer must disclose only that information that is necessary to establish the services that were performed.

Conclusion

Representing the older client in capacity-related proceedings requires, in the words of Mr. Justice Cullity, a very high degree of professionalism. The first step in achieving this standard is at the stage of the retainer. If done properly, not only can the pitfalls in the cases discussed above be avoided but counsel can enhance the dignity and autonomy of the older client and contribute to the just resolution of the proceeding.

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[55] *Rules of Professional Conduct,* Law Society of Upper Canada, Subrule 2.03

[56] Please see the discussion of the *Banton* case above. The court's inability to look behind the instructions that counsel for the older client bring to a capacity-related proceeding places the lawyer in a position of great trust. One remedy available where a question is raised respecting the position taken by counsel for the older client may be the appointment of independent counsel as occurred in *Woolner v. D'Abreau,* above.