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THE CAPACITY TO RETAIN COUNSEL & POTENTIAL CONSEQUENCES OF BEING RETAINED BY AN INCAPABLE CLIENT

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When meeting with a new elderly or otherwise vulnerable client, capacity is often top of mind for lawyers, especially if the client's capacity must be assessed before counsel can provide assistance. For example, if a client wants to make a will, a power of attorney for property, or a power of attorney for personal care, it is the lawyer's responsibility to first confirm that the client has capacity. However, there is another capacity inquiry that lawyers really ought to consider when meeting with vulnerable prospective clients - whether the individual has sufficient capacity to actually retain counsel.

Capacity to retain counsel is something that lawyers in Ontario ought to be mindful of in light of their professional obligations under the *Rules of Professional Conduct*;[1] however, this concept is seldom addressed in case law. As such, this article will explore capacity to retain counsel in two contexts - first, for hearings under the *Substitute Decisions Act, 1992* (the "**SDA**"),[2] and second, in other types of legal proceedings. Lastly, this article addresses one potential consequence of being retained by a client incapable of doing so - the risk of a retainer agreement being declared void.

Retaining Counsel for a Capacity Hearing

Proceedings under the SDA typically focus on an individual's capacity related to personal care and/or finances. While individuals are presumed to be capable,[3] the court may find that a person lacks capacity following a hearing, in which case a guardian of property or a guardian of the person may be appointed, even if the incapable individual is opposed to the appointment(s).[4]

For such proceedings, capacity to retain counsel appears to be a non-issue, since the SDA empowers the court to have counsel appointed for the individual whose capacity is at issue in the proceeding. Subsection 3(1) of the SDA provides:

> ***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.*

However, it appears that section 3 may not empower the court to appoint counsel for a person found to be incapable during SDA proceedings. A motion seeking the appointment of section 3 counsel under an application made under the SDA may fail if the court determines that there are reasonable grounds

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[1] Law Society of Ontario, *Rules of Professional Conduct* (Amendments current to June 28, 2022), online: <https://lso.ca/about-lso/legislation-rules/rules-of-professional-conduct> [*Rules*].

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

[3] *Ibid*, s. 2.

[4] *Ibid*, ss. 22, 55.

to believe that the individual is incapable of entering into a solicitor-client relationship and that the appointment therefore would not be in the individual's best interests.[5]

Capacity to Retain Counsel in Other Contexts

In situations that are not governed by the SDA, the law surrounding the capacity standard to retain counsel is unclear, although there is a growing body of case law addressing capacity to instruct counsel.[6] Having said that, because mental capacity is task-specific,[7] it is not safe to assume that capacity to retain counsel is synonymous with capacity to instruct counsel.[8] It is important to ascertain what is required for each respective task and the nature of the related decisions before considering the applicable capacity standard.

To have capacity to instruct counsel, the person must:

1) understand what they have asked the lawyer to do for them and why;

2) be able to understand and process any information, advice and options that the lawyer presents; and

3) be capable of appreciating the advantages, drawbacks, and potential consequences related to their options.[9]

For assessing capacity to retain counsel, the Court of Queen's Bench of Alberta has posed a similar question: "Did the client, at the time of entering into the retainer agreement, have the capacity to understand its terms and form a rational judgment of its effect on his or her interests?"[10] It appears that this precise issue has not yet been addressed in Ontario, although the Superior Court of Justice has touched on capacity to retain counsel in passing.[11]

Another element of capacity to retain counsel that has yet to be addressed in Ontario is the criteria for assessing this capacity standard. Criteria articulated in other contexts, however, such as the factors used by the Ontario Court of Appeal for assessing capacity to commence a legal claim, could prove useful. Those factors include:

(a) a person's ability to know or understand the minimum choices or decisions required to make them;

(b) an appreciation of the consequences and effects of his or her choices or decisions;

(c) an appreciation of the nature of the proceedings;

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[5] See *Miziolek v. Miziolek*, 2018 ONSC 2841 (Ont. S.C.J.).

[6] See *Gefen v. Gefen et. al.*, 2022 ONSC 6259 (Ont. S.C.J.) at paras. 60-64 [*Gefen*], affirmed 2023 ONCA 406.

[7] See *Carmichael v. GlaxoSmithKline Inc.*, 2020 ONCA 447 at para. 86 [*Carmichael*].

[8] See, for example, *Sylvester v. Britton*, 2018 ONSC 6620 at para. 71 [*Sylvester*], where the court noted that it is possible for a person to be capable of instructing counsel, even if that individual lacks capacity to manage his or her property and finances.

[9] *Constantino v. Constantino*, 2016 ONSC 7279 at para. 47; see also *Gefen*, *supra* note 6 at paras. 60-64.

[10] *Guardian Law Group v LS*, 2021 ABQB 591 at para. 57 [*Guardian*].

[11] See, for example, *Kingdon v. Kramer*, 2015 ONSC 397.

(d) a person's ability to choose and keep counsel;

(e) a person's ability to represent him or herself;

(f) a person's ability to distinguish between the relevant and irrelevant issues; and

(g) a person's mistaken beliefs regarding the law or court procedures.[12]

Since capacity must be assessed on a case-by-case basis, there may also be other relevant factors to consider, including those specific to the individual's circumstances and the retainer itself. The Court of Queen's Bench of Alberta noted that "[t]he fact-specific nature of capacity precludes an authoritative list of considerations."[13]

Consequences of Being Retained by an Incapable Client

If a lawyer ends up being retained by a client who lacks the capacity to validly do so, there is a risk that the retainer agreement signed by the client could be declared unenforceable. After all, counsel is responsible for assessing whether a client has capacity to retain counsel at the outset of the solicitor-client relationship. As noted in the *Rules of Professional Conduct*, an impairment suffered by a client with diminished capacity may prevent that person from "entering into binding legal relationships."[14]

The validity of a retainer agreement signed by an incapable client has arisen in a few cases. In *Guardian Law Group v. LS*, for example, a man made a power of attorney appointing an attorney for property after he had retained counsel to represent him at a capacity hearing; his attorney for property refused to pay counsel's account on the basis that the client lacked capacity to retain counsel.[15] Similarly, in *Zeppieri & Associates v. Pellecchia*, a law firm sued a client who refused to pay her lawyer's account; the client defended the claim, arguing that she lacked capacity and that the retainer agreement was invalid.[16]

Like any other contract, a client could escape the terms of a retainer agreement due to incapacity. However, the agreement should not be declared void unless the client can prove his or her incapacity, the agreement is unfair to the client, and the client's incapacity was known (or should have been known) to counsel.[17] Returning to the court's decision in *Guardian*, Justice Jones suggested using the following questions to determine whether a retainer agreement ought to be declared void for incapacity:

(a) Were there sufficient indicia of incapacity known to the lawyer to establish a suspicion that the client lacked the requisite capacity?

(b) If yes, did the lawyer take sufficient steps to rebut a finding of actual or constructive knowledge of incapacity?[18]

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[12] *Carmichael*, *supra* note 7 at paras. 94, 96.

[13] *Guardian*, *supra* note 10 at para. 74.

[14] *Rules*, *supra* note 1, r. 3.2-9 Commentary at para 1.1 (emphasis added).

[15] *Guardian*, *supra* note 10.

[16] *Zeppieri & Associates v. Pellecchia*, 2021 ONSC 3791.

[17] *Guardian*, *supra* note 10 at paras 43-45.

If a lawyer is concerned that a prospective client lacks capacity to retain them, Justice Jones recommended taking a number of steps to investigate that individual's capacity, including:

a) obtaining consent to speak with the client's family doctor or, if applicable, psychologist;

b) obtaining consent to request the client's medical records; and/or

c) reviewing past capacity assessments.

It may even be desirable to request a new capacity assessment specific to the retainer, recognizing that such an assessment also has the potential to negatively impact the prospective client's autonomy.[19]

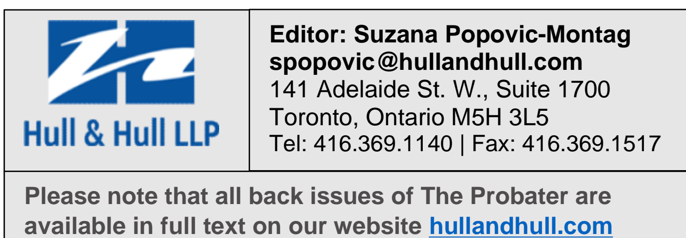
Justice Jones also noted that counsel may take steps to mitigate the potential impact of any incapacity, such as simplifying a retainer agreement in order to make it easier for the client to understand. After taking steps to determine whether the client has capacity to retain and instruct counsel and, if appropriate, also taking steps to mitigate incapacity, Justice Jones held that the court should not cancel a retainer agreement if it is clear that the lawyer had a reasonable basis to conclude that the client had capacity to retain counsel.

It also could be argued that assessing whether a retainer agreement is void for incapacity ought to be reserved for extreme cases. In *Sylvester v. Britton,* Justice Raike observed that the court should only intrude with respect to a determination of capacity made by counsel "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."[20] However, Justice Jones noted in *Guardian* that "where a client later challenges the retainer it is not sufficient to simply defer to counsel's determination."[21] Hence, it may be necessary to respond to challenges to a retainer agreement made by a vulnerable client.

Conclusion

For counsel who assist vulnerable clients on a regular basis, it is advisable to put some kind of practice in place to assess capacity to retain counsel at the outset of the retainer in light of the risk that a client or a client's representative may one day challenge a retainer agreement. At the same time, we need to balance our professional obligation to assist clients with diminished capacity and strive to maintain a normal solicitor-client relationship with those who may have capacity issues but are nevertheless capable of retaining us.[22]

In the apt words of Benjamin Franklin, "[a]n ounce of prevention is worth a pound of cure." Steps taken to assess capacity also ought to be adapted to each individual client in light of the fact that at this time, there is no clearly-set capacity standard to retain counsel recognized in the province of Ontario.



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[19] See, for example, *Gefen v Gefen et al*, 2022 ONSC 3378.

[20] *Sylvester*, *supra* note 8 at para. 75.

[21] *Guardian*, *supra* note 10 at para. 55.

[22] *Rules*, *supra* note 1, r. 3.2-9.