

Lawyers' doubts about client capacity:

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This is an abridged version of a Continuing Professional Development paper delivered by Jonathan Wells QC

It happens that a lawyer may have doubts about the capacity of the client, by reason of mental illness or disability, to give instructions on the subject of the retainer. Where the client is unwilling to share the lawyer's doubts, or is otherwise unwilling or unable to authorise the lawyer to obtain an independent expert assessment of their mental capacity, the lawyer is confronted with a dilemma. In the absence of an assessment, the capacity of the client to give instructions is in doubt, yet the interests of the client may be in imminent need of protection.

One thing is clear: lawyers are not qualified to undertake a psychiatric or psychological diagnosis, and mental disability cannot – and should not – readily be assumed from behaviour that may be scatty, obsessed, eccentric, selfish or thoughtless.

The dilemma is not uncommon, yet guidance for lawyers has been hard to come by. As long ago as 1987, the American professor Paul R. Tremblay in 1987 threw down the gauntlet in a seminal article¹:

The legal profession thus far has offered little meaningful guidance to those lawyers – and there are many – who find themselves in this quandary. The ethical standards promulgated by the American Bar Association² seek to address this point, but in a fashion that on analysis is less than coherent³. ... Courts have seldom, if ever, addressed this question in the context of civil representation of clients whose competence might be borderline.⁴

Little progress has been made. The notion of acting in a client's "best interests" stalks the American *Model Rules of Professional Conduct* (1983), Rule 1.14.

What are our options?

Professor Tremblay considered that the choices available to a lawyer faced with a questionably competent client were "reasonably finite":⁵

- (1) **Formal Guardianship:** seek the appointment of a guardian for her client, either directly or through a family member or close friend?
- (2) **Third party instructions:** seek unofficial consent from a family member or close friend?
- (3) **Persuasion:** seek to persuade her client to make different and 'better' choices?
- (4) **De facto guardianship:** proceed as a de facto guardian, making choices for her client without actual consent?
- (5) **Ignore doubts:** continue to presume competence irrebuttably, following her client's requests regardless of consequences?
- (6) **Withdraw:** simply withdraw?

A Way Forward?

How do we choose? Are there any principles by which we may be guided?

We can start with the law. The law usually has something to say on the topic, and it seems unhelpful to develop an ethical framework which the law might not support.

What follows draws initially on some of the work set out in Section I of the Law Society's *Statement of Principles with Guidelines*, 2012.⁶

The Retainer

The legal relationship between lawyer and client is essentially one of agency.⁷ Agency "is the fiduciary relationship which exists between two persons, one of whom expressly or impliedly manifests assent that the other should act on his behalf so as to affect his relations with third parties, and the other of whom similarly manifests assent so to act or so acts pursuant to the manifestation".⁸

The contract between the lawyer and the client (the retainer) for the provision

of legal services by the lawyer is central to most aspects of the lawyer-client relationship. It will contain both express and implied terms, pursuant to which the lawyer will owe duties of loyalty, competence and confidentiality; principally, a duty to use skill and diligence to carry out the lawful instructions of their clients.

Lawyers occupy positions of knowledge and influence which result in their clients placing trust in them with respect to their private and business affairs, but which present opportunities for exploitation, coercion and paternalism. The resultant agency relationship carries a heightened obligation of loyalty and integrity. Maintaining loyalty to the client's interests as the client defines them requires a measure of self-restraint that is central to the lawyer's role.⁹

The Client's Personal Autonomy

Within this relationship of heightened integrity, the client entrusts their personal autonomy to the lawyer to be upheld, not overridden.

A lawyer's respect for client autonomy is reflected in – perhaps even derived from – the legal relationship, which is grounded in agency. The lawyer as agent cannot, in the absence of the principal's consent, make decisions or take action as a principal. There is no such implied term in a lawyer's retainer.¹⁰

Even if an intending client's mental competence might be seen as affecting the capacity to enter into a retainer with the lawyer, there is no principle that responds to that circumstance by conferring the powers of the principal on the putative lawyer-agent. Accordingly, the lawyer will respect the autonomy and integrity of a client, or intending client, and their right to pursue their own lawful interests¹¹, including the choice of an unpopular option¹², or of one which the advising lawyer considers unwise or otherwise "not

an ethical framework

in the client's best interests". Lawyers do not act on their own, or anyone else's perception, of a client's "best interests". A family or community expectation cannot prevail over client autonomy.

Some would argue that personal autonomy assumes the ability to 'reflect critically' or to make a rational choice, leaving no room for the person whose ability to 'reflect critically', or to make a rational choice, is compromised or in doubt. But the moment we define personal autonomy in terms of *rational* choice, those with mental disability start to be seen as less than human, and precisely because their autonomy is compromised. The reason – not always articulated – is that once autonomy is seen as compromised (by disability) there is less reason to respect it, and it is seen as justifying decision-making by another (rational) person, acting in the 'best interests' of the 'disabled' client.

This has bedevilled Human Rights thinking for years. If you do not have full ability to make a rational choice, is your personal autonomy of less value, and is your 'right to dignity' (which is grounded in the inherent value of the human person as a moral and rational being) is in less need of protection?¹³

But a person's autonomy – their capacity as human beings to make choices about their lives – is to be honoured and respected *however disabled in body or mind*.

This is a simple principle of justice, and our business as lawyers is justice.

People with disabilities – especially the mentally ill or disabled¹⁴ – are often patronised, ignored, unheard and dishonoured. Our commitment as lawyers is to honour unconditionally¹⁵ their "inalienable preciousness"¹⁶ as human beings; to pay attention to them, helping to overcome their invisibility in the community; to listen to them, and to hear them.

The nature of the Lawyer's commitment to Client Autonomy

So where do these thoughts take us? Remember, we are in a state of doubt as to whether our client does have capacity to instruct. We should not assume that they are disabled, and we want to act in a way that honours them, whether disabled or not. In other words, can we move forward in a way which would be appropriate, whether or not they were disabled? Can we tackle Professor Tremblay's options with any greater confidence, with some better sense of the priorities?

- **Formal Guardianship:** *seek a guardian for her client, either directly or through a family member or close friend.*

There is no exception to the fiduciary agent's duty of confidentiality¹⁷, or to the professional duty of confidentiality¹⁸, based on a client's, or a prospective client's, questionable capacity to instruct.¹⁹ The duty extends to communications between lawyers and prospective clients.²⁰ ASCR r 9 admits only of an exception to confidentiality (r 9.2.5) where disclosure is necessary to prevent imminent serious physical harm to the client or another.²¹ Disclosure for the purpose of having a Guardian appointed assumes as certain that which is in doubt, and constitutes an unacceptable failure to protect client autonomy. One need only reflect on the legitimate response of the client should it turn out that they are not mentally disabled. It is incompatible with the function and duties of a fiduciary agent to act without instructions to qualify or remove a client's freedom to decide. It demeans, rather than honours, the client as an autonomous human being. It makes the lawyer an opponent of the client.

- **Third party instructions:** *seek unofficial consent from a family member or close friend*

However harmless this might seem, and however helpful to the client it might be expected to be, client confidentiality and client autonomy cannot be compromised by unilateral action. It assumes, as well, that the chosen family member or friend has the client's best interests at heart. This cannot be assumed.

- **Persuasion:** *seek to persuade her client to make different and 'better' choices.*

No ethical principle can support exploitation of the power the practitioner has by reason of skill, learning and experience. The option assumes that the lawyer knows what is best for the client (what is in their 'best interests') and works to secure the client's consent to the suggested course by an exercise of power.

The way forward proposed by the Guidelines is a patient and conscientious pursuit of effective communication in the conduct of an equal relationship between lawyer and client, seeking always to create the best environment for the client to do justice to themselves.²²

- **De facto guardianship:** *proceed as a de facto guardian, making choices for her client without actual consent*

This is the "best interests" ground for unilateral intervention. Professor Tremblay points to a complete lack of accountability and control, its failure to recognise client autonomy, and its invitation to overreaching by the lawyer. He regretted that the ABA's published standards²³ seemed to legitimate this type of 'unilateral usurpation of client decision making'.²⁴ The Guidelines reject this option for the same reasons as are summarised in 1) above.

- **Ignore doubts:** *continue to presume competence absolutely, following her client's requests regardless of consequences*

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Lawyer's doubts about client capacity: an ethical framework (cont)

It is the contention of this paper, and a constant theme of the Guidelines (Sections 2 and 3) that a client's difficulties in communicating instructions should not too readily be assumed to be attributable to incompetence, or that any evident mental impairment either renders the client incompetent to give instructions or will consistently do so.²⁵ But that does not mean the possibility should be ignored. On the contrary, the client is dishonoured by the failure to protect them from harm through inattention to difficulties.²⁶

• Withdraw

This is difficult for any concerned lawyer to accept. It reflects the "hard case" - client autonomy versus client detriment. If respect for autonomy means the lawyer in doubt must desist from acting until the client's mental state is somehow expertly assessed, then honouring the client's humanity means something different. It involves enabling the client to identify, retain and exercise such autonomy as they have. It involves searching out and establishing a means of communication that will best enable the client to reclaim their autonomy, and thus to do themselves justice. It means *not* abandoning the client.

In all but a handful of rare cases, careful exploration and communication will often allay any doubts about capacity to instruct.

Taking Stock

There are few right answers; there is only earnest endeavour and conscientious engagement. It is possible, however, to summarise the stage reached.

First, the ethical line need not necessarily be drawn between mere respect for client autonomy and paternalism. The honouring of a client's humanity draws no lines.

Second, patient and sensitive steps taken by the lawyer, to obtain effective instructions from a questionably competent client, including steps of the kind contemplated

in the Guidelines, are acts of justice, giving honour to the client's humanity.

Third, the disposition towards the client that justice reflects, offers an approach to the hard case (where client autonomy competes with imminent detriment) which is consistent with the lawyer's duties as a fiduciary agent. An answer it offers to Professor Tremblay's Option 1 (*withdrawal*) is: the just lawyer does not abandon her client, but stands with him unless or until the client says otherwise. **B**

Endnotes

- 1 Paul R. Tremblay, "On Persuasion and Paternalism: Lawyer Decisionmaking and the Questionably Competent Client", 1987 Utah L. Rev. 515 (Tremblay)
- 2 Referring to: the *Model Code of Professional Responsibility* (1969) [ABA Model Code], EC 7-12; and *Model Rules of Professional Conduct* (1983) [ABA Model Rules], Rule 1.14. Since then the proposals of the E2K Commission (or variations of those proposals) have been progressively adopted in most States. A most helpful summary of the current American position is provided in an article by Ronald M. Hager, Senior Staff Attorney National Disability Rights Network (NDRN), entitled: "Practical Ethics: Serving Clients With Limited Cognitive and Limited Communication Ability" October 2009; <http://209.203.251.64/conf09/Ethics.pdf>
- 3 The author notes in section III.A.1 of the article that "EC 7-12's guidance approves of lawyer usurpation of client decisionmaking authority in court, but seemingly not elsewhere, and always with the client's best interests in mind. It recognizes, however, that some decisions are exclusively for the client or his representative." (at 541).
- 4 at 518-9. Other writings include: Luban, "Paternalism and the Legal Profession" [1981] Wisc L.R. 454; Linda F Smith, "Representing the Elderly Client and Addressing the Question of Competence" 14 J. Contemp. L. (1988); *Restatement of the Law Governing Lawyers, the Third*, (American Law Institute, 2000), Section 14, commentary paras c-d; section 24; section 51, commentary para f; Bradley Wendel, *Professional Responsibility* (second edition, Aspen publishers, 2007), pp 43-44; 48-49; David Luban & Deborah L Rhode, *Legal Ethics* (5d, 2009), Ch XI, section - Informed Consent and the Partially Competent Client
- 5 Tremblay, at 519-520
- 6 <http://www.lawsocietysa.asn.au/PDF/ClientCapacityGuidelines.pdf>
- 7 Dal Pont, "Law of Agency", Butterworths, 2001, para 1.35 (Dal Pont on Agency); Bowstead & Reynolds on Agency, 18th edition, 2006, para 6-032ff; Dal Pont, "Lawyers' Professional

Responsibility", Fifth edition, 2013, para 3.70 (Dal Pont on Lawyers)

- 8 Bowstead & Reynolds on Agency, 18th edition, 2006, para 1-001; compare, the American *Restatement, Third*, § 1.01, which includes the element of 'control': "the relationship which results from the manifestation of consent, by one person to another, that the other shall act on his behalf and subject to his control, and consent by the other so to act"; discussed in Bowstead & Reynolds, at para 1-017, and in Dal Pont on Agency, at para 4.3.
- 9 Dal Pont on Lawyers, chapters 4 & 6; Dal Pont on Agency, Chapters 11 & 12; Ysaiah Ross, "Ethics in Law: Lawyers' Responsibility and Accountability in Australia", 4th edition, Butterworths, 2005, Ch 12. See also, Deborah L Rhode & Geoffrey C Hazard, Jr, "Professional Responsibility and Regulation" (Foundation Press, second edition, 2007) p 48; Bradley Wendel: "Professional Responsibility" (Aspen publishers, second edition, 2007);
- 10 There are statutory exceptions – such as, s 269W, *Criminal Law Consolidation Act 1935*
- 11 *The Convention on the Rights of Persons with Disabilities*: Article 3, principle (a)
- 12 or even just not preferred by others, whether family or community
- 13 Margaret Somerville, "The Ethical Imagination – Journeys of the Human Spirit", (Melbourne University Press, 2006) *The Convention on the Rights of Persons with Disabilities* has resulted from this very devaluation
- 14 Reminder: mental illness is not necessarily to be equated with mental incapacity.
- 15 Raimond Gaita, *A Common Humanity: Thinking about Love & Truth & Justice* (the Text Publishing Co, 1999) (Gaita), at p 53
- 16 Gaita, at p 4.
- 17 Even where mental disability is clearly established, and doubts removed by expert opinion, the lawyer's loyalty is to the client, and the carriage of a formal application better left to others (*R v P* [2001] NSWCA 473 (CA), approving *Church v Price* [2000] NSWSC 754). Yet the consequential modification of the duty of confidentiality in those circumstances is pragmatic rather than principled. As to the operation of s 40, *Legal Practitioners Act 1981*, see Appendix
- 18 *Australian Solicitors Conduct Rules (ASCR)*, r 9
- 19 cp. Dal Pont on Lawyers, paragraph 10.135
- 20 Dal Pont on Lawyers, paragraph 11.125; *Kirby v Centro Properties Ltd (No 2)* (2012) 87 ACSR 229, at [18] (Bromberg J)
- 21 Dal Pont on Lawyers, paragraph 10.105
- 22 Section 4
- 23 These are American standards, as to which, see footnote 2 above
- 24 Tremblay, at 521
- 25 Section 3
- 26 Tremblay, at 555-6