

News

Capacity to instruct a question with aged clients

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Lawyers can only act for clients if clients can lucidly instruct them and as Canada's population ages, questions about their capacity to instruct are expected to increase.

"It's an issue more lawyers have to spend more time thinking about. It raises ethical and legal issues," said Darrel Pink, executive director of the Nova Scotia Barristers' Society in Halifax.

In Nova Scotia, for example, an entire section of the law society's code of conduct is devoted to clients with diminished capacity. Section 3.2-9 identifies the two critical factors in determining whether a client has the capacity to instruct: whether they can understand the information needed to make a decision, and whether they can appreciate the consequences of that decision.

"The standard for capacity to instruct counsel is not a high one," noted Edgar Montigny, a staff lawyer with ARCH Disability Law Centre in Toronto. "The client



Perez

should be able to identify the issue that concerns them and express their wishes in relation to that issue. They need not understand the relevant law or legal processes."

Clients do not need to agree with their lawyer, even when one course of action is significantly preferable to another.

"The legal test for capacity focuses on ability, not wisdom," said Mercedes Perez, an associate with Swadron Associates in Toronto. "Clients can make foolish

decisions that are contrary to the lawyer's recommendation and still be capable."

There is no single test to assess legal capacity. Rather, numerous tests have been enshrined in legislation or established in common law. "Capacity depends upon the issue at hand," said Geoffrey White, an estate lawyer in Kelowna, B.C. "As a lawyer, we need to identify the issue and the applicable legal test of capacity: to make a will, to make a power of attorney, to give instructions for litigation."

Getting a medical assessment with the client's consent will be helpful, but not definitive.

"It is important to remember that capacity tests are legal tests, not medical tests," said Perez. "Even if a client has a diagnosis of learning disability, intellectual disability, cognitive disability or mental disorder, that client may still be capable of instructing counsel. Even clients subject to guardianship orders may be capable of instructing counsel."

Red flags regarding capacity to instruct include forgetfulness,

uncertainty, disorientation, lack of insight, excessive repetition, and a fixation on issues. Repeatedly coming back to an unsound plan may also indicate the client does not recognize risks, and inconsistency is another warning sign, noted Montigny.

"If a client changes their goals or instructions frequently, forgets or contradicts previous instructions, or changes the 'facts' or history of their matter regularly, they may not understand the information pertaining to their case well enough to allow them to make decisions or provide consistent instructions," said Montigny.

However, lawyers shouldn't rush to judgment on this issue. Issues including vision, hearing, mobility or speech problems could be at the heart of the problem. Also, old age alone does not correlate with a lack of capacity. It is important—and legally imperative—to accommodate the client's challenges. White recommends lawyers take very good notes, identify the best time of day for clients to meet, ask open-

ended questions, and have clients confirm advice in their own words. A follow-up meeting to re-confirm any instructions is recommended.

Such accommodations are likely to cost more, and it is not always clear whether these costs should be borne by the client, with their permission, or the lawyer. In part it will depend on the nature of the extra effort, but lawyers should be prepared to assume these expenses.

"Because the lawyer has a duty to accommodate, the costs of such accommodation must be paid by the lawyer. These are not usually disbursements that can be charged back to the client," said Perez, an adjunct professor at Osgoode Hall Law School where she co-instructs a law and psychiatry course.

Once a lawyer is convinced their client does not have the capacity to instruct, their obligation does not end there. "If the client cannot give an instruction, then we must consider whether they need a legal representative appointed for them, and take steps to protect them in the meantime," said White.