



PRACTICE WATCH, by Barbara Buchanan, Practice Advisor

Acting for a client with dementia

AT SOME POINT in time, you may have a client, or a prospective client, who has a form of dementia. The person may be anxious to get his or her affairs in order by making a representation agreement, an enduring power of attorney, a new will, and taking other steps. How would you handle this? While every situation depends on the facts and this is not a comprehensive answer, here are some points to keep in mind.

BC CODE RULE 3.2-9 – CLIENT WITH DIMINISHED CAPACITY

Generally speaking, a person with dementia faces a decrease in capability over time, and the rate of progression can be uncertain. Read *BC Code rule 3.2-9* and commentary [1] to [5] regarding your ethical responsibilities when assisting a person

with diminished capacity. The starting point is that a lawyer must, as far as reasonably possible, maintain a normal lawyer-client relationship if a client's ability to make decisions is impaired because of a mental disability. A medical diagnosis of dementia – Alzheimer's being the most common form – does not always mean that a person does not have capacity to provide instructions to a lawyer for all legal services at all times. Further, in some cases, a person's symptoms may be found not to be attributable to dementia at all, but instead the result of another, treatable medical cause.

A person with dementia may be mentally capable of making some decisions about his or her legal affairs, but not others. Accordingly, capacity should

be assessed in the context of a particular decision to be made. While a letter from the person's doctor and the insight of family members or close friends may be of assistance, it is up to the lawyer to assess if the impairment prevents the person from giving instructions for a particular matter or entering into binding legal relationships.

A lawyer who believes a person to be incapable of giving instructions should decline to act, but it may be appropriate to take some protective steps (see commentary [2] to [5] of rule 3.2-9 where a failure to act could result in imminent and irreparable harm; where a lawyer has an ethical obligation to ensure that a client's interests are not abandoned; where the assistance of the Public Guardian and Trustee might be obtained; and where the

authority to disclose necessary confidential information in some circumstances may be implied).

To explore whether it is appropriate to provide the legal services requested, some questions to consider include:

- Does the person appear to have the ability to understand information relative to the decision that has to be made?
- Does the person appear able to appreciate the reasonably foreseeable consequences of the decision or lack of decision?
- Does the person appear to be acting of his or her own free will, or do you suspect undue influence?
- What common law tests, statutory tests and rules of court may be applicable?

Commentary [1] to rule 3.2-9 provides:

[1] A lawyer and client relationship presupposes that the client has the requisite mental ability to make decisions about his or her legal affairs

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and to give the lawyer instructions. A client’s ability to make decisions depends on such factors as age, intelligence, experience and mental and physical health and on the advice,

guidance and support of others. A client’s ability to make decisions may change, for better or worse, over time. The key is whether the client has the ability to understand the information relative to the decision that has to be made and is able to appreciate the reasonably foreseeable consequences of the decision or lack of decision.

A client who has capacity issues may be vulnerable to undue influence by a third party putting pressure on the client to make decisions that may not be in the client’s best interests. A lawyer has a responsibility to satisfy him or herself that the client’s instructions reflect the client’s true intent. The BC Law Institute (BCLI) published a guide in 2011, Recommended Practices for Wills Practitioners Relating to Potential Undue Influence: A Guide, which is available on the Law Society website (see Practice Support and Resources). The guide includes a checklist of recommended practices for screening potential undue influence that is useful, not only for will instructions, but for other personal planning documents and transactions as well.

COMMON LAW TESTS AND STATUTORY TESTS OF INCAPACITY

There is no one perfect, single test to determine capacity. Capacity should be assessed in the context of the decision to be made. For example, more capacity is required for a complex commercial transaction than for making decisions about clothing and food. There are common law tests of capacity for some matters (e.g. capacity to make a will, nominate a committee) and there are statutory tests that have been developed for some purposes (e.g. a representation agreement under the *Representation Agreement Act*, RSBC 1996, c 405; an enduring power of attorney under the *Power of Attorney Act*, RSBC 1996, c 370; or an advance directive to give or refuse consent to health care under the *Health Care (Consent) and Care Facility (Admission) Act*, RSBC 1996, c 18).

The BCLI published a Report on Common-Law Tests of Capacity (BCLI Report no. 73, September 2013) in which several common law tests of capacity are described: the capacity to make a will, to make a gift, to designate a beneficiary, to nominate a committee, to enter into a contract, to

FOLLOW THE CLIENT IDENTIFICATION RULES TO HELP THWART SCAM ATTEMPTS

Scammers continue to pretend to be BC lawyers’ legitimate new clients, either using the phony debt collection scam or other ruses. Whatever their stratagem, their end goal is usually to coerce a lawyer to deposit a fraudulent financial instrument (often a bank draft or certified cheque) into a trust account, and then to trick the lawyer into transferring funds electronically to the scamster before the lawyer finds out the instrument is no good. The scams range from the obvious to the very sophisticated and everywhere in between.

Protect yourself. Verify the client’s identity as required by Law Society Rules 3-91 to 3-102. Use a checklist and read the answers to the frequently asked questions on our website to assist you with compliance.

Get familiar with the common characteristics of these scams and the risk management tips on our website (go to Fraud: Alerts and Risk Management). Review the bad cheque scam names and documents web page as part of your firm’s intake process.

Appoint someone in your firm to keep lawyers and relevant staff up to date with new information from the Law Society. Since scammers may impersonate you, regularly perform internet searches of your own name and firm, to see what turns up. Margrett George and Surindar Nijjar from the Lawyers Insurance Fund, Practice Advisor Barbara Buchanan and the Continuing Legal Education Society of BC presented a free webinar for lawyers: *The bad cheque scam – don’t get caught*. Videos from the webinar are available on CLE’s website. Check out the archive of the client identification and verification rules online course (Roy Millen and Barbara Buchanan), originally webcast by CLE, and available in the practice resource section of our website.

Report potential new scams to bbuchanan@lsbc.org. Reporting allows us to notify the profession, as appropriate, and update the list of names and documents on our website.

retain legal counsel, to marry, to form the intention to live separate and apart from a spouse, and to enter into an unmarried spousal relationship.

For statutory tests of capability, look for the relevant statute and how the statute may have been interpreted by the court. The client may, for example, have the capacity to appoint a representative to help with decisions or to make decisions about personal care, health care, the routine management of financial affairs, and obtaining legal services and instructing counsel under section 7 (standard provisions) of the *Representation Agreement Act (RAA)* and to appoint a monitor. If the client is higher functioning, the client may be able to make a section 9 non-standard representation agreement for health care decisions under the *RAA* and an enduring power of attorney in relation to financial affairs pursuant to the *Power of Attorney Act*. There is a statutory presumption of capability in section 3 of the *RAA* that includes a provision about a person's way of communicating:

A client who has capacity issues may be vulnerable to undue influence by a third party putting pressure on the client to make decisions that may not be in the client's best interests.

3 (1) Until the contrary is demonstrated, every adult is presumed to be capable of

- (a) making, changing or revoking a representation agreement, and
- (b) making decisions about personal care, health care and legal matters and about the routine management of the adult's financial affairs.

(2) An adult's way of communicating with others is not grounds for deciding that he or she is incapable of understanding anything referred to in subsection (1).

Section 8 provides a statutory test of incapability for the standard section 7 agreement:

8 (1) An adult may make a representation agreement consisting

of one or more of the standard provisions authorized by section 7 even though the adult is incapable of

- (a) making a contract,
- (b) managing his or her health care, personal care or legal matters, or
- (c) the routine management of his or her financial affairs.

(2) In deciding whether an adult is incapable of making a representation agreement consisting of one or more of the standard provisions authorized by section 7, or of changing or revoking any of those provisions, all relevant factors must be considered, for example:

- (a) whether the adult communicates a desire to have a representative make, help make, or stop making decisions;
- (b) whether the adult demonstrates choices and preferences and can express feelings of approval or disapproval of others;
- (c) whether the adult is aware that making the representation agreement or changing or revoking any of the provisions means that the representative may make, or stop making, decisions or choices that affect the adult;
- (d) whether the adult has a relationship with the representative that is characterized by trust.

In order for a person to make a section 7 representation agreement, the section 8 statutory test seems to require a fairly low level of capacity in light of the many powers granted to a representative in the "routine management of financial affairs" (see section 7(b) and *Representation Agreement Regulation*, BC Reg 199/20001, s. 2). Section 8 provides that an adult may make a section 7 agreement even if the adult is incapable of making a contract (the legislation does not distinguish between contracts generally or contracts for necessities). However, a lawyer should typically not act for a person who is otherwise incapable of entering into a retainer agreement with the lawyer. The Ethics Committee has not, as yet, given an opinion on whether it would recommend a change to *BC Code* rule 3.2-9 to clarify whether a lawyer may

Services for lawyers

Practice and ethics advisors

Practice management advice – Contact **David J. (Dave) Bilinsky** to discuss practice management issues, with an emphasis on technology, strategic planning, finance, productivity and career satisfaction. email: daveb@lsbc.org tel: 604.605.5331 or 1.800.903.5300.

Practice and ethics advice – Contact **Barbara Buchanan, Lenore Rowntree** or **Warren Wilson, QC** to discuss ethical issues, interpretation of the *Code of Professional Conduct for British Columbia* or matters for referral to the Ethics Committee.

Call Barbara about client identification and verification, scams, client relationships and lawyer/lawyer relationships. Contact Barbara at: tel: 604.697.5816 or 1.800.903.5300 email: bbuchanan@lsbc.org. Contact Lenore at: tel: 604.697.5811 or 1.800.903.5300 email: lrowntree@lsbc.org. Contact Warren at: tel: 604.697.5857 or 1.800.903.5300 email: wwilson@lsbc.org.

All communications with Law Society practice and ethics advisors are strictly confidential, except in cases of trust fund shortages.

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Optum Health Services (Canada) Ltd. – Confidential counselling and referral services by professional counsellors on a wide range of personal, family and work-related concerns. Services are funded by, but completely independent of, the Law Society and provided at no cost to individual BC lawyers and articled students and their immediate families. tel: 604.431.8200 or 1.800.663.9099.

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Lawyers Assistance Program (LAP) – Confidential peer support, counselling, referrals and interventions for lawyers, their families, support staff and articled students suffering from alcohol or chemical dependencies, stress, depression or other personal problems. Based on the concept of "lawyers helping lawyers," LAP's services are funded by, but completely independent of, the Law Society and provided at no additional cost to lawyers. tel: 604.685.2171 or 1.888.685.2171.

◆
Equity Ombudsperson – Confidential assistance with the resolution of harassment and discrimination concerns of lawyers, articled students, articling applicants and staff in law firms or other legal workplaces. Contact Equity Ombudsperson, **Anne Bhanu Chopra**: tel: 604.687.2344 email: achopra1@novuscom.net.

act for a client for a section 7 representation agreement in a situation where the client may be otherwise incapable of making a contract. One of the recommendations in the BCLI *Report on Common-Law Tests of Capacity* (page 172) was that the government should amend the RAA to provide that a person with the mental capacity to make a section 7 representation agreement also has the mental capacity to retain and instruct legal counsel for the purpose of advising on and drafting the representation agreement.

In balancing a client's access to legal counsel with the capacity required in context of the decision to be made, a lawyer must keep in mind the ethical guidance set out in *BC Code* rule 3.2-9 and commentary [1] to [5]. As stated previously, the key is whether a lawyer is satisfied that a person has the ability to understand the information relative to the decision that has to be made, and whether that person is able to appreciate the reasonably foreseeable consequences of the decision or lack of decision. If the lawyer believes the person to be incapable of giving instructions, the lawyer should not act. It may be appropriate for the lawyer to take some protective steps, as described in the commentary to the rule.

COMMUNICATION ENHANCEMENT STRATEGIES

How a lawyer communicates with a client with diminished capacity contributes to a successful outcome. In addition to having dementia, the client may also be affected by poor hearing, failing eyesight, medications, mobility issues, other health problems, undue influence and family issues.

- Consider meeting the client on his or her home turf. Some individuals function better in a familiar environment and may have mobility and transportation issues. Meeting the client at home can reduce stress and make for a more productive meeting, as well as providing insight about the client's daily living.
- Meet the client alone in a quiet, comfortable location with good lighting. Background noise not only is distracting but can cause problems for individuals with hearing loss.

- Treat the client with respect. Do not refer to the client as "dear" or "honey." Explain confidentiality.
- Speak slowly and clearly. Repeat and summarize information. A person may be nodding their head in affirmation to questions or comments, but in reality has not understood. Check in. Ask open-ended questions to confirm the client's understanding and feelings (e.g. questions beginning with what, how, why, tell me) rather than closed questions only requiring a yes/no or one-word answer. Take notes of any responses that may be relevant to capacity and undue influence.
- A number of short visits may work better than long appointments.
- Take time to listen. Do not respond to text messages, emails and telephone

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calls during the client's visits. Put your phone on call forward or shut off the ringer.

- Be patient. Give the client time to respond to questions or make comments. Even without dementia, older clients may have problems with word retrieval and need more time to process information.
- Provide drafts of documents prior to your meeting so the client can read the documents beforehand. Consider using a large font (e.g. 14 to 16 point) and double-spacing.
- Ask what time of day the client is generally at his or her best and schedule the meeting accordingly. Remind the client about the meeting.
- Ask about family and friends. The client may want a support person present for the meetings. That is okay, as

long as there is time alone with the client to assess capacity, to screen for undue influence, and to take instructions.

- If the client's financial information is inaccurate or incomplete, obtain consent to contact the client's financial institution, accountant or other relevant contact. Consider meeting together with that professional and the client. During the meeting, focus on the client, not on the other person.
- Consider whether medications may affect the client's responsiveness. Ask the client for consent to contact his or her physician for a medical opinion, if appropriate, regarding the client's memory, cognitive ability and medications. In order to obtain useful information, provide the physician with the legal context of the capability required.

The Alzheimer's Society of BC is a resource for people with dementia, and for those who support them. It has developed two publications, *Freda's Story, Living Alone and Finding Help on the Dementia Journey* and *Cam and Sally's Story, Legal Planning and the Dementia Journey*, and is preparing a third, *Making Your Workplace Friendly, Information for Legal Professionals*. Check the [society's website](#) for the availability of the upcoming publication, or contact the Alzheimer Society at dementiafriendlybc@alzheimerbc.org or 604.742.4939.

The Public Guardian and Trustee also has resources on its website with respect to support for vulnerable adults. For some risk management tips, on the Law Society website see *Witnessing a signature? Stop. Read this First* (go to Lawyers Insurance Fund, Preventing Claims). *Continuing Legal Education of BC* is planning a June 2015 CLE-TV program about acting for clients with dementia. Check their website for details.

FURTHER INFORMATION

Contact Practice Advisor Barbara Buchanan at 604.697.5816 or bbuchanan@lsbc.org for confidential advice or more information regarding any items in Practice Watch. ❖