

COMMITTEE: Ethics Committee

DATE: September 2013

BC CODE RULE 3.2-9: CAPACITY ISSUES

A lawyer asked a number of questions concerning clients who have diminished capacity:

1. To what extent can a representative or an attorney stand in the shoes of a client of diminished capacity?
2. How much and what type of confidential information can be disclosed to a duly appointed representative or attorney of a client suffering from diminished capacity?

The lawyer referred to the Committee's opinion of June 2007 regarding a lawyer's authority to disclose confidential information to a patient's committee pursuant to the *Patients Property Act*. That opinion stated:

CHAPTER 5: WHETHER A LAWYER MAY RELEASE A CLIENT'S WILL AND OTHER INFORMATION TO PUBLIC GUARDIAN AND TRUSTEE

A lawyer who is in-house counsel to the Public Guardian and Trustee asked whether it is proper for lawyers who hold confidential information of a patient, including the patient's will, to disclose that information to a committee appointed for the patient pursuant to the *Patients Property Act*. The lawyer posed the questions in this way:

- Does a Committee have the right to all information about the assets which are the subject of the committee'ship, including all information included in a solicitor's files?
- Is that right one which the solicitor ought to recognize and therefore to provide the information without requiring the committee to obtain a court order directing the solicitor to provide the information?

The Committee noted that, subject to some limitations, section 15 of the *Patients Property Act* gives the committee of a patient "all the rights, privileges and powers with regard to the estate of the patient as the patient would have if of full age and of sound and disposing mind." For that reason, it was the Committee's view that it is proper for a lawyer to provide confidential information of a client who is a patient to the client's committee without the authority of a court order. However, it was the Committee's view that it is not wrong for a lawyer to require the committee to obtain a court order compelling the lawyer to provide the information. It would be appropriate for a lawyer

to require the committee to obtain such an order when the lawyer is uncertain whether there is an identity of interest between the client and the committee, or for some other good reason.

It was the Committee's view that the wording in the *Power of Attorney Act* and the *Representation Agreement Act* is not sufficiently clear that it would be appropriate to conclude that a lawyer may provide a donor or an adult, as the case may be, with confidential or privileged information without regard to the contents of the specific power of attorney or representation agreement itself. However, in the Committee's opinion a lawyer may provide a representative with confidential or privileged information under S. 18 (2) of the *Representation Agreement Act* if the information is that contemplated in either 18 (1)(a) or 18 (1)(b) of the *Act*.

The Committee would be prepared to express an opinion on the propriety of a lawyer disclosing confidential information on the basis of a document prepared in accordance with either Act after reviewing the document in question.

Section 18 of the *Representation Agreement Act* provides:

18 (1) A representative may request information and records respecting the adult for whom the representative is acting, if the information or records relate to

- (a) the incapacity of adult, or
- (b) an area of authority granted to the representative.

(2) A representative has the same right to information and records described under subsection (1) as does the adult for whom the representative is acting.