PBP LAWYERS

The Ongoing History of Section 3 Counsel: Origins of the Role and a Path Forward

By: Alexander Procope[1]

Introduction

Courts rely on the appointment of section 3 counsel to represent allegedly incapable individuals in guardianship and power of attorney litigation in Ontario. Experience shows, however, that the role of section 3 counsel has been contorted by tensions between the autonomy of the client and the interests in protecting the vulnerable. These tensions have shaped the historical development of the role of section 3 counsel and are ongoing in several respects.

I hope to convince you that section 3 counsel is not so complex. This paper presents a simple but robust framework for understanding the role: client-centred advocacy.

I argue that a client-centred approach is instructions-based advocacy grounded in the *Rules of Professional Conduct*. It contributes to the conscious avoidance of paternalism and the need for accommodation of disability in keeping with lawyers' human rights obligations. Finally, it keeps section 3 counsel's focus on the client's "interests" rather than notions about the client's "best interests".

Diverging from this approach conflates the role of counsel with distinct roles in the administration of justice, such as litigation guardian, witness, receiver, capacity expert, or judge. It may also perpetuate the historic exclusion of the disabled from the legal right to be recognized as a person before the court. Confusion over section 3 counsel's role only adds to the serious professional responsibility challenges that can arise when advocating on behalf of individuals with diminished capacity.

I will review the law reform initiatives that led to the *SDA*; highlight some key professional obligations; discuss what, if anything, is the point of "deemed" capacity; review how a client-centred approach helps resolve common ethical dilemmas of the client who provides very limited or no instructions; and propose that any remaining concerns for the vulnerable are addressed by other parties in the adversarial process and, limited appointments of litigation guardians, *amicus curiae* ("*amicus*"), and, where necessary, the *parens patriae* jurisdiction of the court.

If you rarely represent incapable, allegedly incapable or potentially incapable clients but want suggestions on how to deal with section 3 counsel while representing another party, you might consider skipping to the concluding checklist under the heading: "How to treat your section 3 counsel: a guide for other parties".

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What follows builds on various prior discussions on the role of counsel appointed for allegedly incapable persons,[2] which I encourage everyone with an interest in this topic to review and consider.

What is Section 3 Counsel

The *Substitute Decisions Act, 1992* ("*SDA*")[3] provides for legal proceedings typically relating to the affairs of allegedly mentally incapable individuals. Common issues in dispute in these proceedings surround the validity of a power of attorney; appointing guardians; holding guardians, attorneys for property, and attorneys for personal care to account; and removing attorneys and replacing guardians.

SDA proceedings are subject to the *Rules of Civil Procedure*, which define "disability" to include being "mentally incapable within the meaning of section 6 or 45 of the *[SDA]* in respect of an issue in the proceeding".[4] Guardianship proceedings are expressly exempted from the general rule that a party under disability must be represented by a litigation guardian.[5]

The mental incapacity of the person at the centre of *SDA* proceedings may be alleged in the pleadings or may have previously been confirmed by a court. Section 3 of the *SDA* provides for counsel to be appointed for unrepresented parties whose capacity is at issue as follows:

> *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.*[6]

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[2] D'Arcy Hiltz, "The Role of Counsel Pursuant to Section 3 of the Substitute Decisions Act" (2009), online: Whaley Estate Litigation Partners <welpartners.com/resources/WEL_Hiltz_Paper_Section3Counsel_24Nov2009.pdf> [unpublished]; Marshall Swadron, "Representing the Incapable Client in Capacity Proceedings" (Paper presented to the LSUC Estates and Trusts Summit November 2009), online: Law Commission of Ontario <www.lco-cdo.org/wp-content/uploads/2011/01/ccel-papers_4B%20-%20Marshall%20Swadron.pdf> [unpublished]; Kimberley A. Whaley and Ameena Sultan, "Between A Rock and A Hard Place: The Complex Role and Duties of Counsel Appointed Under Section Three of the Substitute Decisions Act, 1992" [2012] 40 Advocates' Q., 408; Clare Burns, "A Riddle Wrapped In a Mystery, Inside an Enigma. The Developing Role of Section Three Counsel" (Paper presented to the LSUC Estates and Trusts Summit November 2013) [unpublished].

[3] *Substitute Decisions Act, 1992*, S.O. 1992, c. 30 ("*SDA*"). It is important to note that the *SDA* deals with mental incapacity only, not physical incapacity.

[4] *Rules of Civil Procedure*, R.R.O. 1990, Reg. 194 ("*Rules of Civil Procedure*"), subrule. 1.03(1). The definition of disability also includes minors and absentees, which are not relevant to this paper.

[5] *Rules of Civil Procedure*, rule 7.01.

[6] *SDA*, subsection 3(1). Counsel appointed under this section is referred to as "section 3 counsel" throughout this paper. Interestingly, *SDA* permits proceedings beyond the guardianship proceedings currently excluded from the litigation guardian requirement in Rule 7.01 of the *Rules of Civil Procedure*.

In practice, section 3 orders are often made on the consent of the parties other than the unrepresented allegedly incapable person at an early appearance before the court.

These orders generally track the language of section 3 and direct the Public Guardian and Trustee ("PGT") to appoint counsel. They also confirm that the client is deemed capable of retaining and instructing counsel and that the client is responsible for the legal fees unless a Legal Aid certificate is issued, which also tracks the language of the *SDA*.[7] Counsel for the PGT contacts the potential lawyer and confirms the appointment and the appointed lawyer proceeds from there.

The PGT provides a summary of the role within an information update published online which suggests that the lawyer consider the *Rules of Professional Conduct* and commentaries, case law, scholarly works and continuing education material.[8] There is no specific guidance in the *Rules of Professional Conduct* on the role and if or how it differs from counsel otherwise retained is not well-defined elsewhere.

The Challenges in Defining the Role

There continues to be widespread confusion about the nature of the role of counsel for clients who are allegedly incapable, partially incapable or wholly incapable.[9]

In 2012, Kim Whaley and Ameena Sultan reviewed nearly everything that had been said to that date about section 3 and related roles in Ontario. Interestingly, many of the authorities, rules and interpretations they uncovered contradict each other in practice. For example, if your duty is to only act on capable instructions, without them, you have no mandate to ensure the law is complied with. It is similarly difficult to justify obtaining further evidence in order to test the evidence if your client gives you capable instructions not to.[10]

More recently, in 2017, the Law Commission of Ontario's Legal Capacity, Decision-making and Guardianship final report confirmed that the confusion about section 3 counsel continues:

> The LCO has heard that there is widespread confusion about the nature of the appropriate role of Section 3 counsel. Some parties may understand the Section 3 Counsel as having a "best

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[7] *SDA*, subsection 3(2).

[8] Public Guardian and Trustee, "Arranging Legal Representation under Section 3 of the Substitute Decisions Act, 1992 Information Update" (accessed 2019-10-04), online: Attorney General <www.attorneygeneral.jus.gov.on.ca/english/family/pgt/legalrepduty.php>. The suggestion in the Information Update that the lawyer can act without instructions will be discussed in detail below under the heading: "Clients that cannot or do not provide any current instructions" .

[9] Many of the professionalism issues facing section 3 counsel are also faced by counsel retained to act for a person with diminished capacity in any legal proceeding, but that topic is beyond this scope of this paper.

[10] Kimberley A. Whaley and Ameena Sultan, "Between A Rock and A Hard Place: The Complex Role and Duties of Counsel Appointed Under Section Three of the Substitute Decisions Act, 1992" [2012] 40 Advocates' Q., 408 at 464 to 467.

interests" type of responsibility in the role, and others at times may see the role as analogous to an *amicus* appointment.[11]

Uncertainty about whether the role differs from traditional instructed advocacy was also a challenge with the evolution of the role of counsel for minors charged with criminal offences. It is now the generally accepted view that criminal defence counsel is ethically obliged to act on the capable instructions of minor clients.[12]

No such consensus exists respecting section 3 counsel. My own experiences have confirmed how easily the role can be contorted into other roles. Among other things, I have been asked to opine on my client's capacity, review passing of accounts applications when my client is clearly incapable of making property decisions, and execute minutes of settlement that my client clearly cannot execute.

The statutory language of "deemed" capacity to "retain and instruct" has also proven difficult to interpret and to apply in practice. Similar language appears in the *Health Care Consent Act, 1996*,[13] the *Mental Health Act*,[14] and the *Prevention of and Remedies for Human Trafficking Act*[15] but there is no consistent interpretation of this language.

I propose that much of the difficulty in interpreting the role is rooted in confusion about the concepts of a client's "interests" with a client's "best interests".[16] The other parties and the court will often have the client's best interests in mind, while counsel, including section 3 counsel, is there to advocate for the client's subjective interests.

The Historical Roots of Section 3

The client interests and best interests uncertainty persists in practice despite the fact that client-centred advocacy was foundational in Ontario's current substitute decision-making regime when it was developed and codified in the 1980s and 1990s.

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[11] Law Commission of Ontario, "Legal Capacity, Decision-making and Guardianship Final Report" (2017), online: Law Commission of Ontario <www.lco-cdo.org/wp-content/uploads/2017/03/CG-Final-Report-EN-online.pdf> at 236 to 238.

[12] See Larry C. Wilson, "The Role of Counsel in the Youth Criminal Justice Act" (2003), 40:4 Alb L. Rev. 1029 at 1029 to 1032 and 1034.

[13] S.O. 1996, c. 2, Sched. A ("*HCCA*"), section 81, applicable to various Consent and Capacity Board matters.

[14] R.S.O. 1990, c. M.7, 43, section 43, applicable to persons under 16 regardless of alleged mental incapacity.

[15] 2017, S.O. 2017, c. 12, Sched. 2, section 9. This section does not appear to have been interpreted at all.

[16] Beyond what may be inherent to the references to the lawyer's fiduciary duties to a client, only the term "interests" as opposed to the phrase "best interests" appear in the *Rules of Professional Conduct* in relation to the role as an advocate.

The Review of Advocacy for Vulnerable Adults final report ("O'Sullivan Report")[17] and the Advisory Committee on Substitute Decision Making for Mentally Incapable Persons final report ("Fram Report"),[18] both in 1987, were part of a law reform initiative that led to an overhaul of Ontario's capacity and substitute decision making laws.[19] Each of these committees included diverse and divergent groups and the reports were the result of extensive consultations. It appears that there was a recognition in them of a need for client-centred advocacy from lawyers specifically for allegedly incapable persons. Both reports also highlighted a need in Ontario for advocacy for adults that were vulnerable due to being physically disabled, frail and elderly, psychiatrically disabled, and developmentally handicapped.[20]

The O'Sullivan report (which examined the need for non-legal advocacy for vulnerable adults) began its findings with highlighting the basic principles of advocacy, the first of which stated as follows:

> (a) Advocacy must be Client Directed
>
> One of the basic principles of advocacy is that it be client directed or "instruction-based": the actions of an advocate must be guided by the instructions of a client and the advocate must serve the client on a voluntary and consensual basis. An advocate should not substitute for a client's instructions his or her own personal or professional view of what course of action is in the "best interests" of the client. This principle of advocacy was discussed as follows in the submission received from the Psychiatric Patient Advocate Office:
>
> > Central to advocacy is the determination of the interest of the client and the servicing of those interests. Generally, an advocate becomes fully acquainted with the client's problem, and canvasses options and strategies for dealing with that problem. An advocate then discusses these options and strategies with the client, advises the client, and then takes instructions from the client. Advocacy thus implies what may be called "client sovereignty" virtually as a matter of definition.
>
> However, the obligation to take instructions is not synonymous with blindly or inappropriately following a client's directions. Obviously, an advocate will not act on instructions that are illegal or impossible to carry out. In addition, the authority of an advocate in a given situation cannot be any greater than that of his or her client: if, for example, the client has been found to be financially incompetent, an advocate cannot assist that individual to enter into a contract.[21]

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[17] Sean O'Sullivan, "You've Got a Friend: A Review of Advocacy in Ontario" (Toronto: Ontario Ministry of the Attorney General, 1987).

[18] Advisory Committee on Substitute Decision Making for Mentally Incapable Persons, Final Report (Toronto: Ontario Ministry of the Attorney General 1987).

[19] Law Commission of Ontario, "Legal Capacity, Decision-making and Guardianship Final Report" (2017), online: Law Commission of Ontario <www.lco-cdo.org/wp-content/uploads/2017/03/CG-Final-Report-EN-online.pdf> at 13 and 14.

[20] O'Sullivan report, at 53 to 55 and Fram Report, for example, at page 115: "Fundamental justice demands that an individual, who may have his or her right to manage property removed, has a right to be heard."

[21] O'Sullivan report, at 44

The Fram Report looked specifically at substitute decision making and made various proposals, some of which were implemented in the *SDA*, including the following recommendations:

> 3.4 In a legal proceeding in which the mental capacity of a person is an issue, the court should have authority to direct that legal representation be provided for the allegedly incapable person. The office of the Public Guardian and Trustee should be responsible for arranging for representation.
>
> 3.5 Whether or not the provision of legal representation is directed by the court, a person alleged to be mentally incapable should be free to choose his or her own legal counsel and to reject counsel proposed by the Public Guardian and Trustee.
>
> 3.6 To ensure that legal counsel will be free to act and to preclude prejudging the issue of mental capacity, a person whose mental capacity is an issue should be deemed to have capacity to retain and instruct counsel.[22]

The Fram Report went on to describe the role of counsel for the allegedly incapable person, including an instructions-based starting point, as follows:

> D. Counsel for Persons Who are Alleged Incapable
>
> A court finding of the mental incapacity of an individual has grave consequences for the individual with respect to fundamental rights and freedoms. Personal care and/or financial decisions are taken away and transferred to someone appointed to act as substitute decider. The substitute often determines how the person who is incapable is to live.
>
> It is assumed that the majority of applications for conservatorship and guardianship will be unopposed because the subject of the application is mentally incapable of understanding the nature of the proceedings. However, the court needs the power to direct the provision of legal representation for a person who contests an application or simply when representation is warranted. Such representation by a lawyer ensures that an individual's rights are protected as much as possible and may prevent needless determinations of incapacity. The office of the Public Guardian and Trustee is appropriate to make such arrangements.
>
> A lawyer can only act on a client's instructions. In a proceeding where the mental capacity of a person is at issue, it is, therefore, necessary to deem the person capable of retaining and instructing counsel. Otherwise the issue of incapacity is predetermined under existing civil procedure rules involving the appointment of a litigation guardian.[23]

Finally, the commentary to the draft legislation that would become (and is nearly identical to) the current *SDA* section 3, included the following explanations:

> A determination by a court of the mental incapacity of an individual is a very serious legal procedure. If the court determines that the person is mentally incapable of managing

[22] Fram report, page 16

[23] Fram Report at 92 and 93 [emphasis added].

property and appoints a conservator, the individual loses his or her right to manage that property. A determination that a persona is mentally incapable of personal care has even graver consequences. The powers that can be conferred by the court on a guardian may permit the guardian to decide many aspects of how the person who is incapable is to live. The vast preponderance of applications for conservatorship and guardianship are likely to be unopposed because the person subject to the application is mentally incapable of understanding the nature of the proceedings. The provisions of the draft are intended to ensure that only appropriate persons apply for conservatorship or guardianship that the plan of property management or the guardianship plan is suited to the needs of the individual, and that only the powers that are needed in particular circumstances are given to the guardian.

Where an application for conservatorship or guardianship is being contested, or where the court on reviewing the written materials becomes concerned, clause (a) would permit the court to direct that legal representation be provided for the person. The Public Guardian and Trustee would arrange for the legal representation. Of course, this does not mean that the person would lose the right to participate in the selection of counsel. Similar powers exist to direct legal representation where the court may appoint legal representation for a minor where there is a custody dispute.

Clause (b) helps resolve for mental incapacity proceedings two major problems related to the legal representation of persons who are allegedly mentally incapable. The first is that under the existing law litigation guardian, a person appointed to instruct legal counsel, can be appointed for them: the second, is that a lawyer may not take their case because there is a good chance that he or she will not be paid.

The first problem arises because, in court proceedings, the plaintiff or defendant should be able to instruct legal counsel on how to proceed. If there is any doubt regarding a party's mental capacity, the court can be asked to appoint a litigation guardian. A litigation guardian is only appointed after the court has determined that the person lacks the mental capacity to instruct counsel. Rules 7.03, 7,04, 7,05, 7.06 and 7.07 of the Rules of Civil Procedure deal with the appointment, removal and duties of a litigation guardian.

However, where the sole issue before a court is the mental capacity of the person, as in a guardianship or conservatorship application, no litigation guardian can properly be appointed since this appointment would predetermine the issue in question. For these persons, the deeming provision ensures essential representation to challenge the removal of fundamental rights and freedoms. It is potentially problematic for counsel representing persons whom they feel lack the ability to give instructions, but a lawyer should provide the best service possible under the circumstances, acting on whatever instructions he/she is able to obtain.

The second problem relates to how the legal counsel acting for a person who is allegedly incapable is to collect his or her fees. In the existing situation, if a lawyer acts for a client, and the client is later found to be mentally incapable, the estate will sometimes refuse to pay the fees of the lawyer. Section (2) clarifies that the estate will have the responsibility for legal fees to the extent of its assets. Application for a Legal Aid certificate may be made for person for

> whom legal representation is provided. More important than the livelihood of a lawyer, is the fact that the state of law results in lawyers refusing to act for a person who is allegedly incapable. Just when the person needs counsel to protect themselves from losing control of their lives, the law makes it a gamble for the lawyer to act.
>
> This is totally unsatisfactory. Whether or not the person is found incapable, the person should have a right to be represented. That representation should be paid for out of the assets, if any, of the person's estate. Several provisions of the Rules of Civil Procedure protect the conservator, the guardian and the estate. The Rules of Civil Procedure give the judge the power to award costs in the proceeding. The bill of the lawyer can be assessed by an assessment officer to determine whether services billed were performed. The Report of the Ontario Courts Inquiry recommends (Recommendation 120) that the Solicitors Act be amended to spell out the principle that solicitor and client assessments of costs should reflect the value of work done. If this is done it would provide a further measure of protection of property.[24]

The Fram Report recommended that certain tasks be performed by the proposed non-legal advocates, such as meeting with the allegedly incapable person to explain the application for guardianship and to confirm whether the person opposes some or all of the application.[25] The non-legal advocate regime was never implemented, however, such that these tasks currently fall to the proposed guardian, capacity assessor or counsel.

The Fram and O'Sullivan reports are a good starting point but are not a complete framework for the role of section 3 counsel, especially considering judicial interpretations limiting the application of "deemed" capacity. Beyond the commentary to each proposed part of section 3 there is little discussion about the practical concerns that could arise for legal representatives of allegedly incapable individuals. The reference above to capacity being the "sole" issue before the court is telling: it may be that the committee did not foresee how complex guardianship litigation would become under the new proposed legislation. It is therefore necessary to look to other sources for more fulsome guidance on the role of section 3 counsel.

Lawyers' Professional Responsibilities

SDA section 3 appoints counsel, so the primary source of guidance is to look at the role of counsel retained in more normal circumstances. Fundamentally, the nature of the counsel role is representation at the direction of an instructing client.

The relationship between a lawyer and client is that of agent and principal, largely governed by the customs of the profession.[26] The customs of the legal profession in Ontario are generally represented in the ethical rules of the Law Society. The Supreme Court of Canada has confirmed: "The governing body enacts rules of professional conduct on behalf of those it represents. These rules must be taken as

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[24] Fram Report at 183 to 184.

[25] Fram Report at 74 to 76.

[26] *Scherer v. Paletta* (1966), 57 D.L.R. (2d) 532 at 534 (Ont. C.A.).

expressing the collective views of the profession as to the appropriate standards to which the profession should adhere."[27]

The current references in the *Rules of Professional Conduct*[28] that are particularly important for the section 3 counsel role are set out as follows:

Lawyers must maintain a normal client relationship as far as reasonably possible

> Client with Diminished Capacity
>
> 3.2-9 When a client's ability to make decisions is impaired because of minority, mental disability, or for some other reason, the lawyer shall, as far as reasonably possible, maintain a normal lawyer and client relationship.[29]
>
> Commentary
>
> [1] A lawyer and client relationship presupposes that the client has the requisite mental ability to make decisions about their legal affairs and to give the lawyer instructions… [emphasis added]
>
> [1.1] When a client is or comes to be under a disability that impairs their ability to make decisions, the impairment may be minor or it might prevent the client from having the legal capacity to give instructions or to enter into binding legal relationships…
>
> …
>
> [3] A lawyer with a client under a disability should appreciate that if the disability of the client is such that the client no longer has the legal capacity to manage their legal affairs, the lawyer may need to take steps to have a lawfully authorized representative appointed, for example, a litigation guardian, or to obtain the assistance of the Office of the Public Guardian and Trustee or the Office of the Children's Lawyer to protect the interests of the client. In any event, the lawyer has an ethical obligation to ensure that the client's interests are not abandoned.
>
> …
>
> [5] When a lawyer takes protective action on behalf of a person or client lacking in capacity, the authority to disclose necessary confidential information may be implied in some circumstances. (See Commentary under rule 3.3-1 (Confidentiality) for a discussion of the relevant factors). If

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[27] *Macdonald Estate v. Martin*, [1990] 3 S.C.R. 1235 at 1244.

[28] *Rules of Professional Conduct*.

[29] This rules reflects the obligations under human rights laws in Ontario, and is further supported by rule 6.3.1-1, which states that a lawyer has a special responsibility to respect the requirements of human rights laws in force in Ontario and, specifically, to honour the obligation not to discriminate on the grounds of …age… or disability with respect to professional employment of other lawyers, articled students, or any other person or in professional dealings with other licensees or any other person.

the court or other counsel becomes involved, the lawyer should inform them of the nature of the lawyer's relationship with the person lacking capacity.

Limited scope retainers are permitted but create additional obligations

Legal Services Under a Limited Scope Retainer

3.2-1A.1 When providing legal services under a limited scope retainer,[30] a lawyer shall confirm the services in writing and give the client a copy of the written document when practicable to do so.

Commentary

…

[5.3] Where the limited services being provided include an appearance before a tribunal, a lawyer must be careful not to mislead the tribunal as to the scope of the retainer, and should consider whether disclosure of the limited nature of the retainer is required by the rules of practice or the circumstances.

[5.4] A lawyer should also consider whether the existence of a limited scope retainer should be disclosed to the tribunal or to an opposing party or, if represented, to an opposing party's counsel and whether the lawyer should obtain instructions from the client to make the disclosure.

The lawyer must preserve confidentiality

Confidential Information

3.3-1 A lawyer at all times shall hold in strict confidence all information concerning the business and affairs of the client acquired in the course of the professional relationship and shall not divulge any such information unless

(a) expressly or impliedly authorized by the client;

(b) required by law or by order of a tribunal of competent jurisdiction to do so;

(c) required to provide the information to the Law Society; or

(d) otherwise permitted by rules 3.3-2 to 3.3-6.

[30] Rule 1.1-1 defines "limited scope retainer" as the provision of legal services by a lawyer for part, but not all, of a client's legal matter by agreement between the lawyer and the client. This definition is difficult to apply to counsel for a person with significant cognitive deficits that can communicate simple wishes but little else.

Commentary

[1] A lawyer cannot render effective professional service to the client unless there is full and unreserved communication between them. At the same time, the client must feel completely secure and entitled to proceed on the basis that, without any express request or stipulation on the client's part, matters disclosed to or discussed with the lawyer will be held in strict confidence.

[2] This rule must be distinguished from the evidentiary rule of lawyer and client privilege, which is also a constitutionally protected right, concerning oral or documentary communications passing between the client and the lawyer. The ethical rule is wider and applies without regard to the nature or source of the information or the fact that others may share the knowledge.

…

[9] In some situations, the authority of the client to disclose may be inferred. For example, some disclosure may be necessary in court proceedings, in a pleading or other court document…

[10] The client's authority for the lawyer to disclose confidential information to the extent necessary to protect the client's interest may also be inferred in some situations where the lawyer is taking action on behalf of the person lacking capacity to protect the person until a legal representative can be appointed. In determining whether a lawyer may disclose such information, the lawyer should consider all circumstances, including the reasonableness of the lawyer's belief that the person lacks capacity, the potential harm that may come to the client if no action is taken, and any instructions the client may have given to the lawyer when capable of giving instructions about the authority to disclose information. Similar considerations apply to confidential information given to the lawyer by a person who lacks the capacity to become a client but nevertheless requires protection.

…

Justified or Permitted Disclosure

3.3-1.1 When required by law or by order of a tribunal of competent jurisdiction, a lawyer shall disclose confidential information, but the lawyer shall not disclose more information than is required.

…

3.3-3 A lawyer may disclose confidential information, but must not disclose more information than is required, when the lawyer believes on reasonable grounds that there is an imminent risk of death or serious bodily harm, and disclosure is necessary to prevent the death or harm.

…

3.3-5 A lawyer may disclose confidential information in order to establish or collect the lawyer's fees, but the lawyer shall not disclose more information than is required.

When acting as an advocate the lawyer must balance advocacy with duties to the court

> Advocacy
>
> 5.1-1 When acting as an advocate, a lawyer shall represent the client resolutely and honourably within the limits of the law while treating the tribunal with candour, fairness, courtesy, and respect.
>
> Commentary
>
> …
>
> [3] The lawyer's function as advocate is openly and necessarily partisan. Accordingly, the lawyer is not obliged (except as required by law or under these rules and subject to the duties of a prosecutor set out below) to assist an adversary or advance matters harmful to the client's case.
>
> …
>
> [7] The lawyer should never waive or abandon the client's legal rights, such as an available defence under a statute of limitations, without the client's informed consent.

Lawyers should not be advocates and witnesses unless the matter is purely formal or undisputed

> Submission of Evidence
>
> 5.2-1 A lawyer who appears as advocate shall not testify or submit their own affidavit evidence before the tribunal unless
>
> > (a) permitted to do so by law, the tribunal, the rules of court or the rules of procedure of the tribunal, or
> >
> > (b) the matter is purely formal or uncontroverted. [31]
>
> Commentary
>
> [1] A lawyer should not express personal opinions or beliefs or assert as a fact anything that is properly subject to legal proof, cross-examination, or challenge. The lawyer should not in effect appear as an unsworn witness or put the lawyer's own credibility in issue. The lawyer who is a necessary witness should testify and entrust the conduct of the case to another lawyer…

The above-noted rules and commentary will be referenced in the discussions below.

Counsel appointed at the Consent and Capacity Board

For further background when considering the role of section 3 counsel, it is also helpful to review the similar role of appointed counsel at the Consent and Capacity Board ("CCB").

[31] There is, however, some judicial authority for a lawyer to seek the appointment of a litigation guardian on the basis of the lawyer's own affidavit, see *Evans v Evans*, 2017 ONSC 5232.

At the CCB, there appears to be an historical overlap or conflation between the role of appointed counsel and the role of *amicus*. Typically, however, the involvement of both counsel and *amicus* begins with an appointment of counsel under section 81 of the *HCCA*, which provides as follows:

> 81 (1) If a person who is or may be incapable with respect to a treatment, managing property, admission to a care facility or a personal assistance service is a party to a proceeding before the Board and does not have legal representation,
>
> (a) the Board may direct Legal Aid Ontario to 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.[32]

The Consent and Capacity Board Policy Guideline 2 sets out the process for the appointment of counsel.[33] Clause 4.2 states that the CCB will promptly issue an order to Legal Aid Ontario for the subject of an application unless there is a clear indication that the person does not wish to be represented by counsel or will arrange for their own legal representation.

It is worth noting that the difference between a client's subjective interests and other views of the client's best interests can be stark in CCB disputes, where a client may be resisting the collective recommendations (or paternalism) of an entire health care team. There, for example, lawyers frequently represent clients resisting medical treatment, including psychiatric treatment. The client would be silenced if that lawyer declines putting forward the client's objections because, for example, the lawyer agrees with the doctor that the resistance itself is a result of the symptoms.

Clause 5 of the above-noted policy guideline states that where a lawyer withdraws from representation, the Board may order counsel to remain for the hearing as *amicus*.[34] Rule 8.1 of the CCB Rules of Practice states that "The Board may appoint a legal representative to participate in the hearing, or part of the hearing as *amicus curiae*, or friend of the Board, to assist the Board. The Board may define the role of *amicus curiae* on a case by case basis. *Amicus curiae* is not a party to the proceeding."[35]

Each of the processes that the CCB sets out for itself appear to address situations where a person may be before them and not resisting incapacity findings or where that person insists on representing him or herself but is doing so poorly.

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[32] *HCCA*, section 81. See also: *Mental Health Act*, R.S.O. 1990, c. M.7, section 43, which provides that persons under the age of 16 in certain hearings before the CCB are also deemed capable of retaining and instructing counsel.

[33] CCB policy guideline 2

[34] Presumably the lawyer must consent to an appointment as *amicus*. See also Daniel Moore, "The Role of Patient's Counsel before the Board" (Paper presented at the Law Society of Upper Canada, Practice Before the Consent and Capacity Board 2015) at 20: there are concerns that asking discharged counsel to remain as *amicus* above a client's objection is inappropriate.

[35] Consent and Capacity Board "Rules of Practice" (accessed October 2, 2017), online: Consent and Capacity Board <www.ccboard.on.ca/english/legal/documents/CCB_Rules_of_Practice_June_19_2019__FINAL-S.pdf>, rule 8.

Because applications to the CCB are limited in scope, there is often little difference between the role of counsel and *amicus***.** Typically, the party alleging the incapacity will put forward the relevant clinical records and opinions and the lawyer will challenge the findings and probe the evidence with cross-examination of the adverse party. Legal Aid Ontario routinely provides funding for lawyers appointed by the CCB, whereas *amicus* appointments are funded on identical terms paid by Legal Aid Ontario but from Ministry of the Attorney General funds. In either case, the amount of funding available for the lawyer to provide services for an individual matter is the same and ultimately from the same source.

With the funding and role of counsel and *amicus* at the CCB being so similar, it should not be a surprise that there has been some fluidity between the roles where the client is not able to provide any instructions. For example, in the 2017 case of *Re NS,* appointed counsel alerted the CCB that she was uninstructed: "but made submissions in an effort to ensure the Board would not be led into legal error and to highlight evidence and submissions of both the moving and responding parties to the extent they may assist the Board in ruling on the Motion."[36] The CCB also routinely accepts a transition from counsel for an incapable or allegedly incapable individual into the role of *amicus*.[37]

Amicus appointments appear to be more prevalent recently. The CanLii database provides coverage of Consent and Capacity Board decisions from June 1, 2003 to the present.[38] There was one set of reasons[39] referring to *amicus* in each of 2003, 2004, 2005, 2006 and 2007. The references to *amicus* in 2016, 2017 and 2018 appear an average of 9 times per year.

The trend of more frequent *amicus* appointments may have two contributing factors. First, the CCB likely became more acutely aware that *amicus* may be necessary following the procedural fairness issues raised in *Bon Hillier v. Milojevic*.[40] Second, lawyers that practice before the CCB highlight that remaining client-centred means not acting without instructions. As lawyer Anita Szigeti summarized in 2015:

> Whatever personal opinion counsel might hold in respect of any particular matter before the Board is entirely irrelevant to the proceeding. Our own thoughts should never be heard or known during a proceeding. Giving voice to our own personal observations or musings risks usurping the role of the Board and silencing the very client we have been appointed to represent. We must seek out and act only on our clients' instructions, to the extent it is possible to ascertain any such instructions, however basic. We must never, ever, represent to the Board that we are retained on an instructed basis if or where we are not…

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[36] See, for example, *NS (Re)*, 2017 CanLII 92628 (ON CCB).

[37] See, for example, *LC (Re)*, 2016 CanLII 26022 (ON CCB); *AM (Re)*, 2019 CanLII 46815 (ON CCB).

[38] "Consent and Capacity Board – Ontario" (accessed October 2, 2017), online: *CanLII* <www.canlii.org/en/on/onccb/>.

[39] These numbers may not accurately reflect *amicus* appointments at the CCB since reasons for decisions are not always requested or produced.

[40] See, *Bon Hillier v. Milojevic*, 2009 CanLII 70504 (ON SC); *Bon Hillier v. Milojevic*, 2010 ONSC 435 and *Hillier v. Milojevic*, 2010 ONSC 4514 at paras 43 to 47.

Notwithstanding a common practice at the CCB to permit participation and submissions from appointed counsel who has no instructions, Ms. Szigeti concludes that:

> With respect to that Board, there is no basis in the jurisprudence or in the legislation to support the view that s. 81 counsel is permitted, let alone under any obligation, to represent or advocate in a client's "best interest" as subjectively perceived by the lawyer. Counsel is to represent a client's instruction, and absent any instruction, there is no authority on which to act.[41]

Ms. Szigeti's assessment reflects guidance to appointed CCB counsel from the Ontario Court of Appeal in *Gligorevic v. McMaster*,[42] to the extent that a client declines the appointed lawyer's services, which will be discussed in more detail below.

What is the implication of being deemed capable of retaining and instructing counsel?

In Ontario, it is important to note that there is no legal concept of global incapacity.[43] Moreover, there is rarely a bright line between a person being capable and incapable in many *SDA* related disputes. First, individuals can remain presumptively capable despite allegations of incapacity. In lengthy power of attorney and guardianship litigation, these individuals and their would-be substitute decision-makers can be living in a state of legal limbo for months or years while a dispute is ongoing. Second, individuals can be capable of instructing counsel on one issue but incapable of instructing on other issues or at one time or another even in the same dispute. This is related to the difficult issue that individuals previously found to be incapable may need lawyers to seek to compel their guardians or attorneys to act or cease to act in a certain way, or to terminate guardianships. Finally, individuals that are, in fact, incapable respecting property or personal care may want their wishes and preferences advanced and duly addressed in the selection of a guardian and in the proposed guardian's plans.

There is an aspect of paternalism involved when a lawyer decides to filter the client's voice based on the lawyer's determination of client capacity with respect to guardianship issues. Avoiding this challenge appears to be partially what the Fram Committee hoped by recommending that the client have "deemed" capacity to retain and instruct counsel: "*It is potentially problematic for counsel representing persons whom they feel lack the ability to give instructions, but a lawyer should provide the best service possible under the circumstances, acting on whatever instructions he/she is able to obtain.*"[44]

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[41] Anita Szigeti, "The Role of Patient's Counsel before the Board" (Paper presented at the Law Society of Upper Canada, Practice Before the Consent and Capacity Board 2015) at 7. See also, Marshall Swadron, "Representing the Incapable Client in Capacity Proceedings" (Paper presented to the LSUC Estates and Trusts Summit November 2009), online: Law Commission of Ontario <www.lco-cdo.org/wp-content/uploads/2011/01/ccel-papers_4B%20-%20Marshall%20Swadron.pdf> [unpublished] at 12, discussed in more detail below.

[42] *Gligorevic v. McMaster*, 2012 ONCA 115 at para. 105.

[43] Law Commission of Ontario, "Legal Capacity, Decision-making and Guardianship Final Report" (2017), online: Law Commission of Ontario <www.lco-cdo.org/wp-content/uploads/2017/03/CG-Final-Report-EN-online.pdf> at 62. Presumptions of capacity in different areas of decision making are set out in various statutes and generally otherwise at common-law with respect to other types of decisions.

[44] Fram Report at 184.

Interestingly, the deemed capacity language in the *SDA* has been largely eroded by case law interpreting the role of section 3 counsel.

Deemed capacity to instruct counsel has in the past been conceived of as a means of avoiding even the consideration of what the client is capable of instructing the lawyer to do. For example, in 2009, Marshall Swadron wrote:

> Deemed capacity to instruct removes the requirement that the lawyer be satisfied that the instructions provided by a client are capable. Where capacity is the issue in the proceeding, a client who wishes to dispute the allegation of incapacity is entitled to do so. For the lawyer to impose a threshold of capacity upon a client in such cases would deprive the client of representation. Moreover, the client may be incapable in some aspects of their decision-making but capable in others. An incapable client may also have prior capable wishes and in most cases will express wishes and preferences, even if incapable, that are applicable to matters in issue in the proceeding. The role of counsel for the incapable person includes advancing these wishes and preferences.[45]

This interpretation is reflected in the CCB Policy Guideline 2 (discussed above), clause 3.1 of which states as a general principle: "The deemed capacity to instruct counsel is not a rebuttable presumption; the person is capable. The deemed capacity includes the right to represent oneself and to terminate existing representation", in reference to the constitutional right of individuals to choose their own counsel.[46]

The above approach appears to be contrary to the *obiter* commentary in *Banton v. Banton,* one of the earliest cases that mentioned the role of section 3 counsel as follows: "Counsel must take instructions from the client and must not, in my view, act if satisfied that capacity to give instructions is lacking."[47] It is worth noting that the *Banton* case involved counsel for an allegedly incapable person taking instructions primarily from or in the presence of another family member rather than directly from his purported client.[48] Thus, this issue arose in egregious circumstances where the lawyer failed to take rudimentary steps to ensure that the instructions were in fact the instructions of his client. *Banton v. Banton* appears to be the first case in Ontario that commented on the tension between lawyers' obligations to represent a client instructions and the deemed capacity provisions of the *SDA*.

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[45] Marshall Swadron, "Representing the Incapable Client in Capacity Proceedings" (Paper presented to the LSUC Estates and Trusts Summit November 2009), online: Law Commission of Ontario <www.lco-cdo.org/wp-content/uploads/2011/01/ccel-papers_4B%20-%20Marshall%20Swadron.pdf> [unpublished] at 4 and 5.

[46] Consent and Capacity Board, "Policy Guideline 2" (September 1, 2017), online: Consent and Capacity Board <http://www.ccboard.on.ca/english/legal/documents/Policy%20Guideline%202%20Sep%202017.pdf> [emphasis added].

[47] *Banton v. Banton*, 1998 CanLII 14926 (Ont. Ct. Gen Div) at para 121.

[48] *Banton v. Banton*, 1998 CanLII 14926 (Ont. Ct. Gen Div) at para 120.

D'Arcy Hiltz reviewed this tension and proposed interpreting "deemed capacity" as a shield from any objections of other parties to the allegedly incapable person having counsel. [49] This shield would not go so far as to remove the professional obligation on section 3 counsel to ensure that the individual has the requisite capacity to instruct or to obligate the counsel to represent the person absent instructions. While this interpretation would have simplified things, unfortunately, *SDA* proceedings continue to be side-tracked by motions to resist the appointment of or to remove section 3 counsel.[50]

Since *Banton,* any value of the deemed capacity principle has continued to be downplayed. The recent case of *Sylvester v. Britton* confirmed the proposition that counsel should not act if satisfied that the client lacks capacity to give instructions, notwithstanding the deemed capacity provision.[51] The court did, however, go on to acknowledge that cognitive deficiencies or incapacity in other realms of decision making do not preclude capacity to instruct as follows:

> [74] There is, in my view, a distinction to be drawn between a situation in which no instructions can be provided, for example the client is in a coma or speaks only gibberish, and where the client is able to articulate what they want even if they cannot fully appreciate the legal process, risks and costs associated with that position. In the former situation, there are no instructions to be had and as Cullity J. indicated in *Banton*, it is not for counsel to surmise what those instructions should be. However, in the latter case, counsel must assess the degree of comprehension and the cogency of the instructions obtained to determine capacity to instruct.
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> [75] The court should only intrude on that determination 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. In that case, the Court will be acting to protect the vulnerable party and the integrity of the court process.
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> [76] In future, it may be preferable for s. 3 counsel in similar circumstances to swear an affidavit outlining the steps taken to satisfy himself or herself as to the client's capacity to provide instructions. That affidavit could be provided to the court in a sealed envelope as is done where matters of solicitor client privilege are at stake.[52]

The *obiter* suggestion that section 3 counsel should submit confidential information to the court by way of affidavit, in response to a party's motion impugning their role, is a troubling one, given that the other party is typically adverse in interest. This is not the first time that a court was less than strident with

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[49] D'Arcy Hiltz, "The Role of Counsel Pursuant to Section 3 of the Substitute Decisions Act" (2009), online: Whaley Estate Litigation Partners <welpartners.com/resources/WEL_Hiltz_Paper_Section3Counsel_24Nov2009.pdf> [unpublished] at 8 to 12.

[50] See, for example, *Sylvester v. Britton*, 2018 ONSC 6620; *Miziolek v. Miziolek*, 2018 ONSC 2841, and *Kwok v. Kwok*, 2019 ONSC 3549.

[51] *Sylvester v. Britton*, 2018 ONSC 6620 at paragraph 61.

[52] *Sylvester v. Britton*, 2018 ONSC 6620 at paragraphs 74 to 76.

protecting section 3 counsel's lawyer-client communications.[53] Disclosure of the lengths that section 3 counsel may have to go through to confirm instructions (multiple meetings to confirm consistent positions, use of simplistic language, difficulty in reviewing the evidence with the client, and determinations of whether the client can or should present any evidence) can prejudice the alleged incapable client.[54] This protection of confidentiality issue for section 3 counsel deserves additional judicial guidance given the impact it could have on the communications necessary for a functioning legal system.[55] It is also worth considering to what impact "deemed" capacity or actual capacity to instruct a lawyer to disclose confidential information should have on the suggested lawyer's disclosure.

Current case law appears to be interpreting "deemed" capacity to retain and instruct counsel as a more of a presumption of capacity. Interestingly, none of these cases have addressed the interpretation issue identified by Wendy Griesdorf that that the difference in language from "presumed" capable in section 2 of the *SDA* to "deemed" in section 3 must reflect some legislative intent.[56]

The client-centred approach I propose avoids the controversy over the deemed capacity to instruct issue to a large extent. This approach does not accept that capacity to instruct counsel can be construed in global terms such as a client being either capable or not of instructing counsel. I propose that the apparent categorial direction in the above cases can be reconciled with lawyers' professional obligations. To do so we need to interpret the proposition "if the capacity to instruct counsel is lacking, the lawyer must not act" with the slightly more precise "section 3 counsel is not to act on incapable instructions".

This approach acknowledges that there may yet be a role for section 3 counsel notwithstanding incapacity to instruct counsel on one thing or another. To illustrate this possibility, a guardianship case

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[53] See, for example, *Salzman v. Salzman,* 2011 ONSC 3555 at paras 15 to 18. I should acknowledge that I worked at the law firm representing Ms. Salzman as section 3 counsel.

[54] In contrast, even a lawyer delivering incriminating physical evidence of a crime has a duty to protect confidentiality including the client's identity and has no obligation to assist the authorities in gathering physical evidence of a crime, see commentary 4 and 5 to rule 3.3-5 of the *Rules of Professional Conduct*.

[55] Cf. *Foster Wheeler Power Co. v. Société intermunicipale de gestion et d'élimination des déchets (SIGED) inc.*, [2004] 1 SCR 456, 2004 SCC 18 (CanLII) at paragraph 34: "Although the relevant jurisprudence consists for the most part of criminal law cases, it still clearly establishes the fundamental importance of solicitor-client privilege as an evidentiary rule, a civil right of supreme importance and a principle of fundamental justice in Canadian law that serves to both protect the essential interests of clients and ensure the smooth operation of Canada's legal system, as stressed by Arbour J. in *Lavallee, Rackel & Heintz v. Canada (Attorney General)*, [2002] 3 S.C.R. 209, 2002 SCC 61 (CanLII), at para. 49 (see also *Maranda*, *supra*, at para. 11). The lawyer's obligation of confidentiality is necessary to preserve the fundamental relationship of trust between lawyers and clients. Protecting the integrity of this relationship is itself recognized as indispensable to the continued existence and effective operation of Canada's legal system. It ensures that clients are represented effectively and that the legal information required for that purpose can be communicated in a full and frank manner (*R. v. Gruenke*, 1991 CanLII 40 (SCC), [1991] 3 S.C.R. 263, at p. 289, *per* Lamer C.J.; *Royer*, *supra*, at pp. 891-92)."

[56] Wendy Griesdorf, "SDA Section 3 Survival Kit: an Invisible Plan, a Golden Lasso and a Bat Phone" (2018) 38:1 E.T.P.J. 1 at 2. See also, the presumption of consistent expression discussion in *Agraira v. Canada (Public Safety and Emergency Preparedness)*, [2013] 2 SCR 559, 2013 SCC 36 at paras. 81 to 88 and R. Sullivan, ed., *Driedger on the Construction of Statutes*, 3rd ed. (Markham, Ont.: Butterworths, 1994) at p. 163.

may be easily resolved if the allegedly incapable person creates a new power of attorney. Section 3 counsel could draft such a document,[57] but should not do so unless satisfied that the client is capable of appointing the attorney. Moreover, even if the client is not capable of creating a new power of attorney, potential roles for a section 3 counsel in a guardianship case could remain available. This role for section 3 counsel where the lawyer only has a limited mandate to represent the client will be discussed in more detail below in the section below: "Clients that express wishes or preferences but do not actively participate in the litigation".

Clients that express goals contrary to the lawyer's view of best interests

Section 3 counsel should act on instructions, not on the lawyer's views of what would be best for the client. Acting on the lawyer's subjective interpretation of the client's best interests is comparable to acting as a litigation guardian (without the exposure to legal costs, among other things). While this principle sounds simple enough, challenges arise where a client takes positions that are difficult to justify based on all the evidence or the hard facts at hand.

For example, a client may insist on living at home with personal care provided by a family member that is manifestly inadequate. All lawyers have duties to provide diligent and thorough services to clients.[58] To that end, section 3 counsel would likely explore the client's reasons for wanting to live at home, and the client's responses to the evidence that the care is inadequate. Section 3 counsel would likely engage in discussions to educate the client on the legal issues and explore options respecting how to proceed, as in a normal lawyer-client relationship. Following these discussions, the lawyer may personally conclude that the client is not making a "good" decision and that the client is not appreciating the consequences of the shelter and personal support decision –triggering capacity concerns regarding capacity in those realms of personal care and possibly capacity to instruct counsel.

Does the above scenario preclude a lawyer from taking any steps, or mandate one course of action or another? A client-centred approach would begin with determining the client's goals which are, in-essence, the lawyer's instructions.

It is well-established that capacity is time and task specific. For lawyers seeking instructions, this means they have to ask themselves what the client is asking them to do and whether the client has capacity to instruct them to do that thing. Clare Burns summarized the approach to different capacities as follows:

> Thus, for example, there are different standards in the law with respect to the capacity a person must have to make an *inter vivos* gift, make a testamentary gift, or get married. Even within those standards, the assessment of capacity will be linked to the time of the act (such as the date of the execution of a will) and what the surrounding circumstances were.
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> Accordingly, whether a person can instruct counsel will depend upon the complexity of the advice being given by the lawyer, the matters about which instructions must be given, and the

[57] Although this task is probably best left to an independent lawyer that can act as a witness if the validity of the new power of attorney is likely to be challenged.

[58] See for example, rule 3.2-1 of the *Rules of Professional Conduct*.

> surrounding circumstances. The more complex the advice or the subject matter of the issue is, the greater the capacity the client must have to be able to instruct counsel.[59]

The client's goal in the above scenario could simply be a desire to stay at home and receive personal care from a specific family member. Clearly there is a concern with the capacity of the presumed capable client to make these personal care decisions, but this does not necessarily result in the goal of achieving these interests being impossible. The lawyer can and may be obligated to advocate for a resolution that sees the client able to remain at home notwithstanding the client's wisdom[60] or whether it is a capable personal care decision[61]. Even if the decision is foolish and the client is incapable respecting it, there may also be a solution that achieves the client's goal – such as involving additional home care supports, providing personal care training to the family member, making modifications to the home, or some other solution – that meets the interests of all the parties while satisfying any concerns that the court may have.

If the client's wishes are so unrealistic that no evidence can be assembled to support them, section 3 counsel will not likely have much to say to the parties or judge, beyond identifying the wishes.

The client-centred approach is preferable to alternative approaches. Consider, for example, if the lawyer says, "I do not think your choice to live at home is in your best interests or is not a capable personal care decision, therefore it is not a capable instruction and I will not act on it". Such an approach would rob the client of his or her voice in the proceedings, by the very person who is meant to speak for the client. The court and other parties would not have the benefit of knowing the client's actual wishes. Consider further that the lawyer says to the parties and court something along the lines of, "my client says she wants to stay at home, but I do not have capable instructions". In that situation, everyone may be superficially informed of the client's views, but the lawyer has undermined the client by signalling that they are not wishes that must be complied with or seriously considered. These other interpretations result in the client being wholly silenced or the client's interests being soft-peddled. In either case, nobody is advocating to achieve the client's goal. These are not the roles of a legal representative.

Discussions about the lawyer's views on the client's best interests informed by the lawyer's professional experience should be reserved to confidential meetings with the client. They can assist the lawyer in assessing whether the instructions the client is providing are indeed capable instructions. Once the client provides those instructions, however, the lawyer's role in the courtroom and to the other parties is to advance only the client's interest. Just as a criminal lawyer should not start a trial by signalling to

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[59] Clare Burns, "A Riddle Wrapped In a Mystery, Inside an Enigma. The Developing Role of Section Three Counsel" (Paper presented to the LSUC Estates and0 Trusts Summit November 2013) [unpublished] at 3 to 4. See also *R. v. Morrissey*, 2007 ONCA 770 at para. 31, which confirmed that the ability to instruct criminal defence counsel has been found to not require the ability to provide instructions that are in the accused's best interests in a criminal law context.

[60] The Supreme Court of Canada has confirmed in *Starson v. Swayze*, [2003] 1 SCR 722 at para. 76, in relation to the CCB's review of capacity, a competent person has the right to make decisions that any reasonable person would deem foolish.

[61] *SDA*, subsection 2(2): "A person who is sixteen years of age or more is presumed to be capable of giving or refusing consent in connection with his or her own personal care."

the judge that the lawyer personally believes the client is guilty of the offence, nor should the lawyer for a potentially incapable person indicate that she or he believes the client is actually incapable if that is contrary to the client's interests.

A lawyer's professional obligations require that the client be represented resolutely and honourably within the limits of the law while treating the tribunal with candour, fairness, courtesy, and respect. The Supreme Court has discussed the ethical obligation for resolute advocacy as follows:

> [72] The importance of resolute advocacy cannot be overstated. It is a vital ingredient in our adversarial justice system — a system premised on the idea that forceful partisan advocacy facilitates truth-seeking: see e.g. *Phillips v. Ford Motor Co.* (1971), 1971 CanLII 389 (ON CA), 18 D.L.R. (3d) 641, at p. 661. Moreover, resolute advocacy is a key component of the lawyer's commitment to the client's cause, a principle of fundamental justice under s. 7 of the Canadian Charter of Rights and Freedoms: *Canada (Attorney General) v. Federation of Law Societies of Canada*, 2015 SCC 7 (CanLII), [2015] 1 S.C.R. 401, at paras. 83-84.
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> [73] Resolute advocacy requires lawyers to "raise fearlessly every issue, advance every argument and ask every question, however distasteful, that the lawyer thinks will help the client's case": *Federation of Law Societies of Canada*, Model Code of Professional Conduct (online), r. 5.1-1 commentary 1. This is no small order. Lawyers are regularly called on to make submissions on behalf of their clients that are unpopular and at times uncomfortable. These submissions can be met with harsh criticism — from the public, the bar, and even the court. Lawyers must stand resolute in the face of this adversity by continuing to advocate on their clients' behalf, despite popular opinion to the contrary. [62]

Treating a court with candour and fairness should not be used as an excuse to provide your client with less than resolute advocacy. The example of a client with psychosis helps to highlight the lawyer's duties here. This client is the subject of a personal care guardianship application with overwhelming evidence of incapacity to make a shelter decision. Among other things, the client has tremendous anxiety from a delusional belief that his parents are poisoning him. The proposed guardianship plan includes the client living with his parents. The client's concerns are minimized in the application material, but he makes them clear to section 3 counsel. Guardians are, however, obliged to consider even an incapable person's current wishes, if they can be ascertained.[63] The client's current wishes here may be wholly based on a delusion, but the cause of the beliefs do not result in any less subjective suffering the client would endure if forced to live with his parents. There is certainly room for advocacy for this client's preferences regardless of the cause of those preferences.

Situations where the lawyer is concerned that the client's position may be the subject of undue influence are more delicate, but I argue that the same approach should be taken. As a starting point, section 3 counsel should not accept any instructions that are obviously the product of undue influence. For example, a client that takes a position only when parroting statements of a family member in the background during or immediately prior to a meeting, should not be seen a providing an independent

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[62] *Groia v. Law Society of Upper Canada*, [2018] 1 SCR 772, 2018 SCC 27.

[63] *SDA*, paragraph 66(4)(b)

position when doing so. Beyond the most obvious cases, however, a client's position has value and should at least be on the table in a capacity dispute, even if the position is warped or misconceived.[64] Any more filtering of the client's voice requires section 3 counsel to make inferences about the client's individual will and there is no simple measure for that. Moreover, where the lawyer makes such inferences, it usurps the role of the court. Only the court has the overall authority to balance all the evidence, perspectives and allegations and make a decision on undue influence.

Section 3 lawyers in alleged undue influence cases will, undoubtedly, struggle to deal with suspicious circumstances. On one hand, the potential presence of such circumstances should not trigger the lawyer to shift from the role of advocate to that of a judge. On the other hand, the lawyer should not ignore or attempt to supress evidence of undue influence. In fairness[65], and perhaps as a good strategic decision, problematic evidence in the record should be acknowledged but confidential lawyer-client communications should generally not be the source of that evidence.[66] I note that communications to section 3 counsel from another party are not likely to be confidential or privileged, so there may be additional sources of evidence to address inappropriate behavior beyond the lawyer-client communications.

A best interests approach of counsel subordinates the rights of the individual client to be fully recognized in the law.[67] I submit that it reflects a paternalistic and potentially ageist-ablest approach. Paternalistic attitudes, however, should actively be avoided in the implementation of laws that affect older adults, the disabled and the allegedly disabled.[68] All parties involved in *SDA* proceedings ought to be particularly sensitive to these issues since disability or perceived disability are at the core of the dispute where section 3 counsel is appointed.

Clients that express wishes or preferences but do not actively participate in the litigation

The court has acknowledged that there is value in having section 3 counsel communicate the wishes and preferences of incapable people to the court for consideration.[69] However, communicating such

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[64] See, for example, *N.L. v. R.R.M.*, 2016 ONCA 915 at paras 32 to 36 in the parental alienation context.

[65] See *Rules of Professional Conduct*, rule 5.1-1 discussed above regarding the lawyer as advocate.

[66] See *Rules of Professional Conduct*, rule 3.3 and 5.2-1 discussed above regarding confidentiality and the lawyer as advocate.

[67] Cf. *Convention of the Rights of Persons with Disabilities*, 30 March 2007, UNTS, vol. 2515, article 12.

[68] Ageism and paternalism were identified as factors contributing to the implantation gap in the law with respect to reporting crimes to police and health services among other legal regimes: Law Commission of Ontario, "A Framework for the Law as it Affects Older Adults: Advancing Substantive Equality for Older Persons Through Law, Policy and Practice" (2012) at 157, see also, chapter IV at 144 where it is suggested that "laws, rather than simply taking a neutral stance in terms of ageism, should actively recognize the existence of ageism and paternalism and include proactive measures to prevent or address it; see also Canadian Centre for Elder Law "CONVERSATIONS ABOUT CARE: The Law and Practice of HealthCare Consent for People Living with Dementia in British Columbia" online: <www.bcli.org/wordpress/wp-content/uploads/2019/02/HCC_report-Final_web_Mar-29-2019.pdf> at 166.

[69] *Abrams v. Abrams*, 2008 CanLII 67884 (ON SC) at paras. 14 and 53.

preferences as a wish or a preference as opposed to a capable instruction before any capacity findings are made implicitly signals that the lawyer thinks the client is incapable of providing instructions.

This risk of prejudicing the client can be overcome by the interpretation of a client wish as his or her position on the issue and instructions to share that position with the court and other parties. In this sense, the lawyer did receive capable instructions – instructions to share the client's position. A client may not wish to participate in the proceeding beyond stating a basic position[70] or may not be able to participate beyond that.

The *Rules of Professional Conduct* do not provide tremendous guidance on what constitutes instructions. Edgar Andre Montigny discusses an approach that a lawyer can take in is his paper "Notes on Capacity to Instruct Counsel" as follows:

> It is not necessary that a client understand all the details necessary to pursue their case. Just as any person can hire an expert to handle complex affairs that are beyond their personal expertise, a client can rely on their lawyer or representative to understand the specific details and processes involved in their case. A client need only:
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> a) understand what they have asked the lawyer to do for them and why,
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> b) be able to understand and process the information, advice and options the lawyer presents to them, and
>
> c) appreciate the pros, cons and potential consequences of the various options.
>
> Capacity is task specific. The test must be applied to the specific issue at hand. For instance, a person may be incapable to manage finances, due to an inability to process numerical information. This does not mean that they are also incapable of instructing counsel. It is necessary in every case to examine the precise conduct in question, to determine the essential elements of that conduct, and to inquire as to the client's ability to understand the nature and quality of those elements so that an informed decision can be made. As long as that understanding is present, then any other form of mental health issue, however great, is irrelevant. It follows, therefore, that the criteria to determine whether a mental health issue is relevant are not universal. Rather they will vary from case to case simply because the essential elements of conduct inevitably vary from case to case.[71]

There are certain instructions that the lawyer is obligated to obtain and act upon, while other matters can be within the lawyer's purview of professional decision making. This topic has not been discussed in detail in *SDA* cases, such that we must look elsewhere for guidance.

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[70] There is a legitimate question of why a client with cognitive issues, for example, and elderly parent with Alzheimer's disease, should be dragged through a dispute between two or more feuding family members.

[71] Ed Montigny, "Notes On Notes on Capacity to Instruct Counsel" (accessed October 2, 2019), online: ARCH Disability Law Centre <www.archdisabilitylaw.ca/sites/all/files/Notes%20on%20Capacity%20to%20Instruct%20Counsel%20-%20FINAL%20-%20Feb%2011%2011.doc> at 3 and 4

In the criminal law context, the Supreme Court of Canada has confirmed that defence lawyers do not always require express approval for every decision made in the conduct of the defence, but there are decisions such as whether or not to plead guilty, or whether or not to testify that defence counsel are ethically bound to discuss with the client and regarding which they must obtain instructions.[72] Beyond these important decisions, the decisions of counsel on how to conduct the proceeding will be given some deference.[73]

Lawyers are, of course, free to accept instructions on litigation strategies and steps but they may not be required to do so. Accepting a wider range of instructions may be reserved for more sophisticated clients especially where the decisions require significant additional legal costs.

Lowering expectations for sophisticated instructions may also be considered part of an accessible legal practice. The *Rules of Professional Conduct* oblige lawyers to maintain a normal lawyer-client relationship "as far as reasonably possible"[74] suggesting that some flexibility should be applied to maintain the normal relationship. Further, one of the central concepts of human rights jurisprudence is the duty to provide individualized accommodation of disabilities to the point of undue hardship.[75] Lawyers are service providers under Ontario's *Human Rights Code*, and they also have a "special responsibility to respect the requirements of human rights law in force in Ontario, and to honour the obligation not to discriminate on the ground of … disability with respect to professional dealings with other members of the profession or any other person."[76] If a client's cognitive limitations impact the ability to provide detailed and complex instructions to section 3 counsel, lowering the expectations for the instructions in circumstances where some minimal direction from the client can be obtained may be an accommodation obligation on the lawyer.

Section 3 counsel should be very careful to make it clear (without prejudicing their client's interests) what issues the lawyer has instructions or positions on. I suggest this in light of: the obligation to act on capable instructions only; the duties of candour to the court; and the duties to not mislead other parties or the court when the lawyer is on a limited scope retainer. Receiving capable instructions to address one issue in a proceeding while not having capable instructions to address another could be seen as, and is, at least very similar to a limited scope retainer. The parties and court should not be misled by thinking that a lawyer is taking steps to protect a client (from for example, a financially abusive relative), if the lawyer does not have some authority to do so.

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[72] *R. v. B.(G.D.)*, 2000 SCC 22, at para. 34.

[73] *R. v. White*, 1997 CanLII 2426 (ON CA), 114 C.C.C. (3d) 225 at 247.

[74] *Rules of Professional Conduct*, rule 3.2-9.

[75] ARCH Disability Law Centre, "Providing Legal Services to People with Disabilities" (accessed October 2, 2019) online: ARCH Disability Law Centre <www.archdisabilitylaw.ca/sites/all/files/Providing%20Legal%20Services%20to%20People%20with%20Disabilities-FINAL-Dec%2017%2010.doc> at 4 to 5.

[76] *Ontario Human Rights Code*, R.S.O. 1990, c. H. 19, section 1; *Rules of Professional Conduct*, rule 2.1-1 commentary [4.1] and rule 6.3-1-1.

Some clients may, however, not fuss over having money misappropriated by friends or relatives, may not want to pursue them legally or may not be capable of managing their property. Moreover, it may not be obvious to section 3 counsel where the line is between capable and incapable for that type of decision and probably does not have to draw that line if the client is not the one seeking relief from the court. The lawyer should, however, be clear with the other parties and court if the lawyer has no instructions to pursue any particular type of issue.

If the section 3 counsel believes the client to be incapable respecting an issue that would require a litigation guardian (for example, a fiduciary accounting issue) the lawyer should take a very careful approach if alerting the court or the PGT of a concern that the vulnerable person is at risk and not taking steps to protect him or herself. Ideally, this does not conflict with the actual interest of your client. If it does conflict with, for example, your client's wish to avoid a capacity assessment or guardianship you should say simply that you have no instructions to take any such steps – remembering section 3 counsel is not a litigation guardian. The lawyer with no instructions would not have actual client interests as a barrier. Section 3 counsel could, in the process of seeking direction to confirm the end of his or her role, alert the PGT and court to the concerning circumstances evident in the record, the fact that section 3 counsel has no instructions, and point out that it may be up to another party or the court with its *parens patriae* jurisdiction to take it from there.

Clients that cannot or do not provide any current instructions

The question of whether there is any role for section 3 counsel in a proceeding where the client cannot or does not provide any instructions has never had a clear answer. These clients could be entirely unable to communicate, unable to communicate in a manner responsive to the issues in the proceeding, or refuse to engage with the lawyer in any meaningful way. Sometimes, it may be difficult to tell the difference between inability and refusal to communicate. The common factor, however, is that a client is not expressing wishes or participating in a proceeding that may have significant impact on the client's rights and day-to-day life.

I argue that the lawyer's professional obligations preclude acting (beyond what may be necessary to ensure a client is not abandoned) since client-centred advocacy requires at least some level of client instructions.

However, the opposing suggestion that appointed lawyers should ensure that the procedural, statutory and evidentiary requirements are met, even with no instructions, has been present for decades. This counsel-*amicus* hybrid role is routinely taken at the CCB and the PGT has indicated that it is appropriate for many years. The 2011 version of the PGT's "information update", noted above, included the following statement:

> The lawyer should ensure that the evidentiary and procedural requirements are tested and met, even where no instructions, wishes or directions at all can be obtained from the client.[77]

This suggestion has been identified as being inconsistent with direction from the court going back to 1999, that the lawyer is not to act without capable instructions.[78] To date, the PGT continues to publish the "information update" but has more recently softened this language as follows:

> Depending on the circumstances, the lawyer should consider testing whether the evidentiary and procedural requirements are met, even where no instructions, wishes or directions at all can be obtained from the client.[79]

There are compelling reasons to end any role of section 3 counsel for a client that cannot or does not provide any instructions: First, the *Rules of Professional Conduct* provide no mandate to act or guidance on how to do so. Second, *SDA* proceedings are usually complex, such that it is difficult to identify a presumptive instruction. When the lawyer does act under the guise of representing a client, it can be persuasive and dangerous. Third, the lawyer's efforts can be costly to the client, while nobody is ultimately responsible for directing the lawyer instigating those costs. Finally, the lawyer's efforts may end up being a fishing expedition or misleading. I will address each of these below in more detail.

The *Rules of Professional Conduct*

The *Rules of Professional Conduct* are clear that a lawyer-client relationship presupposes that the client has the ability to manage their legal affairs and to give the lawyer instructions.[80] Also, lawyers cannot waive or abandon a client's legal rights, such as the right to cross-examine, without the client's informed consent.[81] It is finally worth noting that "ascertaining client objectives" is included in requirements of being a competent lawyer,[82] which is difficult to do without any communication from the client.

The lawyer has an additional obligation to ensure that the client's interests are not abandoned if the client no longer has the capacity to manage legal affairs, and the lawyer may breach confidentiality and obtain the assistance of the PGT or Children's Lawyer to protect the interests of the client.[83] The

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[77] The Office of the Public Guardian and Trustee, "INFORMATION UPDATE: DUTY OF THE PUBLIC GUARDIAN AND TRUSTEE TO ARRANGE LEGAL REPRESENTATION UNDER SECTION 3 OF THE SUBSTITUTE DECISIONS ACT, 1992." (2007), at 5 and 6, available online: www.attorneygeneral.jus.gov.on.ca/english/family/pgt/legalrepduty.php.

[78] D'Arcy Hiltz, "The Role of Counsel Pursuant to Section 3 of the Substitute Decisions Act" (2009), online: Whaley Estate Litigation Partners <welpartners.com/resources/WEL_Hiltz_Paper_Section3Counsel_24Nov2009.pdf> [unpublished] at 10, footnote 6.

[79] Public Guardian and Trustee, "Arranging Legal Representation under Section 3 of the Substitute Decisions Act, 1992 Information Update" (accessed 2019-10-04), online: Attorney General <www.attorneygeneral.jus.gov.on.ca/english/family/pgt/legalrepduty.php> [emphasis added].

[80] *Rules of Professional Conduct*, rule 3.2-9, commentary [1].

[81] *Rules of Professional Conduct*, rule 5.1-1 commentary [7].

[82] *Rules of Professional Conduct*, rule 3.1-1(b).

[83] *Rules of Professional Conduct*, rule 3.2-9 commentary [3] and [5].

confidentiality rules also permit disclosing confidential information from a person who lacks the capacity to become a client but nevertheless requires protection.[84] It is noteworthy that none of these commentaries refer to a client's best interests, but rather refer only to a client's interest – which as noted above is difficult to ascertain without any client communication.

The Court of Appeal commented on the PGT information update in *Gligorevic v. McMaster*[85] in the context of a defence that a lawyer was taking action to avoid abandoning the purported client. In that case, ineffective assistance of counsel was raised (among other grounds) of appeal from a decision of the CCB. Counsel had been appointed pursuant to section 81 of the *HCCA*. The appellant had declined the services of the appointed lawyer prior to the hearing, but the appointed lawyer did not point this out to the CCB and instead indicated a willingness to proceed. The appellant's request for an adjournment so that counsel of choice could represent him was denied. The Court confirmed that declining the appointed counsel's services was a form of instructions in itself and that the appointed lawyer had no authority to represent the appellant before the Board.[86]

The appointed counsel in that case attempted to rely on the April 6, 2003 Information Bulletin from the PGT which stated: "…The lawyer must ensure that the evidentiary and procedural requirements are tested and met, even where no instructions, wishes or directions at all can be obtained from the client."[87] The court rejected this suggestion stating:

> [100] The PGT's involvement in providing legal representation in proceedings under the Act for persons alleged to be incapable is a laudable service to the administration of justice. Undoubtedly, the provision of such representation greatly assists both affected patients and the Board in most cases. But guidelines or directions to counsel from the PGT cannot override a patient's express wishes, especially in light of the presumption of capacity to retain and instruct counsel set out in s. 81(1)(b) of the Act.
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> [101] This is not a case where the patient would not or could not give instructions by reason of a mental disorder. This is a case where the patient expressly and consistently rejected representation by the PGT appointee. In the face of that rejection, PGT counsel [*sic*] could not simply proceed, ostensibly as Mr. Gligorevic's counsel and against his wishes, to conduct the hearing. The effect of the Board order directing the PGT to appoint counsel was exhausted once PGT counsel was appointed and Mr. Gligorevic rejected her services.
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> [102] In these circumstances, what action was reasonably necessary? In my view, at a minimum, it was incumbent on PGT counsel to inform the Board that her retainer had been denied by Mr. Gligorevic and, consequently, that she had no authority from him to represent his interests or provide him with assistance at the Board capacity hearing. Had this information been disclosed, the Board's consideration of PGT counsel's adjournment request may well have been different.

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[84] *Rules of Professional Conduct*, rule 3.3-1 commentary [10]

[85] *Gligorevic v. McMaster*, 2012 ONCA 115.

[86] *Gligorevic v. McMaster*, 2012 ONCA 115 at para 91.

[87] *Gligorevic v. McMaster*, 2012 ONCA 115 at para 98 and 99.

> In any event, such disclosure would have ensured that the Board was under no misapprehension regarding PGT counsel's role.
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> [103] Further, in my view, PGT counsel was obliged to withdraw from further participation as appointed counsel for Mr. Gligorevic at the capacity hearing. The Superior Court justice considered, and rejected, this course of action, stating: "I am not satisfied in any case that it would have been responsible for counsel having been appointed by the PGT under the Board's order, to have withdrawn and thus abandoned the Appellant." With respect, I disagree.
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> [104] It is not a question of "abandonment". PGT counsel had no authority to act from Mr. Gligorevic. Quite the opposite. It is important to remember that PGT counsel was appointed as Mr. Gligorevic's counsel, not as a friend of the court. For this reason, the bulletin is replete with references to the appointee's "client".
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> [105] Under s. 81(1)(b) of the Act, Mr. Gligorevic was deemed capable for the purpose of retaining and instructing counsel. That deemed capacity necessarily extended to the decision to refuse to retain counsel. The bulletin recognizes, correctly, that it was not open to counsel to speculate on and to proceed according to her personal conception of Mr. Gligorevic's best interests.

The Court of Appeal, above, interestingly seems to draw a distinction between a client who rejects a lawyer with a client who would not or could not give instructions by reason of a mental disorder. There may be no difference between the two ethically but, in any event, the Court leaves open the possibility that the appointed lawyer could have a role if the client does not reject the lawyer.

The idea that a lawyer can act without instructions to ensure that the client's interests are not abandoned was also recently addressed where a lawyer commenced proceedings to prevent family substitute decision-makers from removing life support for the lawyer's wholly incapable client. This suggestion was rejected by the Ontario Court of Appeal as follows:

> [29] Ms. Masgras contends that her perceived obligation to protect Mr. Ferreira gave her the right to act in such a fashion. In addition to her reliance on the *Rules of Professional Conduct*, to which I have referred above, Ms. Masgras also relies on the decision in *Canada (Attorney General) v. Federation of Law Societies of Canada*, 2015 SCC 7 (CanLII), [2015] 1 S.C.R. 401. In particular, Ms. Masgras relies on the various references in that decision to the "lawyer's duty of commitment to the client's cause".
>
> [30] Ms. Masgras fundamentally misunderstands the principles enunciated in that case. That decision does not support Ms. Masgras' proposition that a lawyer is entitled to take whatever steps s/he wishes in furtherance of what the lawyer thinks is the client's "cause". What Ms. Masgras appears not to understand is the fundamental principle that lawyers must act in accordance with the instructions of their clients. Lawyers do not have a carte blanche to take steps of their own volition under the guise of furthering the client's perceived cause. In particular, lawyers do not have the right to institute proceedings without being armed with instructions from their clients to do so.

> [31] Simply put, Ms. Masgras had no authority to take the steps that she did. In doing so, Ms. Masgras breached the basic principles that apply to the conduct of lawyers, particularly their duty to act honourably.[88]

It appears from the above cases that any obligation to ensure that a client's cause is not abandoned applies to clients that once had the requisite legal capacity necessary to instruct the lawyer but lose it before the lawyer's work is complete. It likely follows that the lawyer that never had directions from a purported client cannot take any steps on behalf of the client.

Acting without instructions is dangerous

There is an attraction to the notion that a lawyer may take certain steps to protect a client by virtue of the role of counsel *per se*. These actions could be sorted into two categories. First, a legal procedural step intended to preserve the client's rights pending instructions. Second, the lawyer could act on a presumption of what the client would want if capable and fully informed, which could otherwise be characterized as an implied instruction. In place of an implied instruction, the lawyer could attempt to justify taking action as part of a duty to the court. The second category are necessarily based on the lawyer's subjective concept of what the lawyer ought to do unless squarely identified in the *Rules of Professional Conduct*.

There is little dispute about a lawyer's authority to act within in the first category. The lawyer is using professional experience and knowledge of the legal system to confirm that the client is not prejudiced pending the lawyer obtaining instructions. The second category, however, deserves a closer look, as it appears to be common despite the seemingly clear direction in the *Rules of Professional Conduct*.

All lawyers acting without instructions beyond preserving client's rights in order to obtain instructions must begin with some implied instructions or under a perceived duty as an officer of the court. The presumption could be, for example, that the client does not want unnecessary incapacity findings, or that the evidence should meet the requirements of the legislation. Either of these may appear to be safe presumptions, but are not always so. The subject of a guardianship application may believe he or she is capable or that a capacity assessment is an unjustified indignity, yet accept the assistance of a guardian. Civil litigation[89] arises in private disputes that the parties feel strongly about. Settlements routinely resolve a majority of cases without any legal determinations about the issues or tests to be met.

Moreover, any client could have disparate positions on similar disputes in a guardianship or power of attorney proceeding. It is not safe for a lawyer to make assumptions about what the client "would want." One person might wish to live at home at any cost, while another may be fine with moving to

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[88] *Ferreira v. St. Mary's General Hospital*, 2018 ONCA 247; leave to appeal ref'd, *Georgiana Masgras v. St. Mary's General Hospital, et al.*, 2018 CanLII 92112 (SCC).

[89] The contrast with criminal proceedings is noteworthy. *Criminal Code*, R.S.C., 1985, c. C-46 section 672.24 requires the court to appoint counsel to represent an unfit accused. The appointment of counsel is mandatory (see *R. v. Verma*, 2011 BCCA 52). The ethical basis to take uninstructed steps raises issue in that role as well and is certainly worth exploring in more detail (see for example, the discussion about counsel's actions in *R. v. Szostak*, 2012 ONCA 503 at paras 60 to 80). Interestingly, there is no comparable "deemed capacity to instruct" provision or mechanism for the appointment of a litigation guardian in criminal proceedings.

congregate care. One person could be incensed at a meddling relative accessing his or her financial or health records, while another may not care. A parent may be content to have an adult child live in the parent's home rent-free, or not pursue theft by attorney, or otherwise. It is impossible to presume what position a client would take on many of the issues that come up in *SDA* proceedings. These cases can involve very personal decisions impacting the very core of a person's life and subjectively experienced dignity and autonomy. Instructions and wishes cannot be ascribed in these cases and should only valid if they are expressed in some way by the affected person.

The role of section 3 counsel may carry a certain air of benign neutrality from which the court or other parties draw comfort in acrimonious disputes. However, this air could distort the voices supporting one adverse party or group over another. This issue was raised by Marshall Swadron when describing the uninstructed lawyer as "the legal equivalent of a loose cannon on the deck of a ship" who could "tilt the balance amongst the parties."[90] There are roles for independent parties in litigation (for example, mediators, experts and judges), but counsel is not one of them.

The costs of uninstructed litigation

We can assume that the PGT's Information Update suggests more than a review of the application evidence, management plan and guardianship plan on their face. PGT counsel routinely reviews guardianship applications and sends a letter to the parties and the court flagging non-compliance with the *SDA*, among other helpful suggestions, regardless of whether section 3 counsel is appointed.[91]

In the context of a contested power of attorney and guardianship application, there are, however, many steps that could be taken to test the evidence beyond a paper review, such as:

- obtaining responding capacity assessment reports;
- obtaining independent expert assessments on various financial and personal care issues;
- advertising to lawyers for information about other powers of attorney;
- obtaining and reviewing health records;[92]
- interviewing health care providers, family and friends;
- seeking direction for the production of and reviewing financial records;
- compelling evidence of third parties;
- conducting cross-examinations and pursuing undertakings;

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[90] Marshall Swadron, "Representing the Incapable Client in Capacity Proceedings" (Paper presented to the LSUC Estates and Trusts Summit November 2009), online: Law Commission of Ontario <www.lco-cdo.org/wp-content/uploads/2011/01/ccel-papers_4B%20-%20Marshall%20Swadron.pdf> [unpublished] at 12. Appointed counsel attempting to sway a proceeding without instructions is exactly what happened in *AC (Re)*, 2013 CanLII 49105 (ON CCB), a case that I was personally involved in, where the appointed lawyer purported to agree with doctors over family members about life-sustaining medical treatments for her client without any instructions.

[91] The PGT must be served with and is a party to every guardianship application for a court-ordered guardian under the *SDA*, see *SDA* sections 69(1),(3) and (8).

[92] *Personal Health Information Protection Act, 2004*, S.O. 2004, c. 3, Sched. A, section 41(1)(c) includes authority for disclosure of personal health information to a legal representative authorized by a court order to represent the individual in a proceeding.

- compelling accountings or to direct attorneys or guardians to do or refrain from doing; particular things on behalf of the incapable client;
- if converted from application to action, conducting discovery and trial.

The scope of what can be justified under the mandate of testing the evidence can be extensive, contribute to lenghty delay and result in significant costs.

Parties are generally responsible for the costs of proceedings, which are ultimately in the discretion of the court.[93] Litigation guardians may personally face exposure to the costs of litigation, whereas obtaining costs paid personally from a lawyer requires a more stringent test. [94] Allowing uninstructed section 3 counsel to determine what steps should be taken could expose all the parties to increased costs without instructions from the party instigating those costs.

It is worth noting that the lawyer in a *Solicitors Act* assessment of fees may have to justify unnecessary steps in a proceeding, but the steps all relate to advancing the client's "interests" or taken "by the desire of the client after being informed by the solicitor that they were unnecessary and not calculated to advance the client's interests."[95] The section 3 counsel without evidence of his or her client's actual interests or informed consent will have a difficult time justifying his or her bill.

Lawyers may also not feel comfortable determining what steps to take without instructions. Since the lawyer's recovery of fees in a case pursuant to *SDA* subsection 3(2) is not a guarantee, section 3 counsel's personal financial interest is engaged beyond a normal retainer if an uninstructed step to test the evidence results in a significant cost that the judge may not see as reasonable in hindsight.

In the face of the uncertainty inherent to a lawyer acting without instructions, section 3 counsel might be inclined to ask the court to define the role in the absence of client instructions. If doing so, consider that the court's role is distinct from the independent representation of one of the parties and the judge may see the section 3 role as a defender of the allegedly incapable person's best interests. Section 3 counsel should be prepared to justifiably resist if directions from the court seem to push beyond the lawyer's professional obligations. It is also a concern that in seeking direction from the court, the lawyer may be acting more as an *amicus* than counsel.[96]

<u>The uninstructed lawyer's efforts may be for naught</u>

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[93] *Courts of Justice Act*, R.S.O. 1990, c. C.43, section 131.

[94] *Rules of Civil Procedure*, rule 57.06 and 5.07.

[95] See for, example, *Solicitors Act*, R.S.O. 1990, c. S.15, section 7.

[96] The Supreme Court of Canada has criticized the blending of the role of *amicus* with defence counsel in *R. v. Imona-Russell*, 2013 SCC 43 at paras to 62 to 84.

To assess what due diligence might be necessary for an uninstructed lawyer to test the evidence, it is important to consider what legal issues might be in dispute in a guardianship application. An application for guardianship of personal care could, for example, consider:

- the closeness of the applicant and proposed guardian to the incapable person;[97]
- the suitability of one proposed guardian over another;
- the most recent prior capable wishes respecting the incapable person's health care, nutrition, shelter, clothing, hygiene or safety;[98]
- if there is no applicable prior capable wish, guardians are required to make decisions that consider the values and beliefs that the person held while capable respecting the incapable person's health care, nutrition, shelter, clothing, hygiene or safety;[99] and
- the guardianship plan, that the guardians must act in accordance with, also requires information about the incapable persons' wishes respecting employment, education, training, recreational, social and cultural activities.[100]

The issues that the *SDA* engages could profoundly impact a person's life. For example, they could determine whether a person's home is sold or maintained. They could result in a person living near (or far) from friends or family and can thus be a tool to promote or enforce social isolation in feuding families. They could even potentially impact whether a person receives life-sustaining medical treatments.

Although not a guardianship application, the *Friedberg et al. v. Korn* case provides an example of how disputes about prior capable wishes are litigated. In that case, a power of attorney for personal care appeared to provide a clear prior capable wish. However, based on a review of an entire record of evidence, including examination of the lawyer who drafted the power of attorney for personal care containing the disputed wish, the court concluded that the wish was not a prior capable wish applicable to the circumstances.[101]

Section 3 counsel could theoretically justify a full review of the person's life to confirm whether evidence of wishes, values, and beliefs is accurate. This would essentially turn the lawyer into more of a receiver or private investigator rather than a legal representative. What then is a lawyer to do? A lawyer might consider only chasing leads that the lawyer is informed of. For example, section 3 counsel could write letters to anyone he or she is aware of to request evidence of prior capable wishes. This would be

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[97] *SDA*, paragraph 57(3)(c).

[98] *SDA*, subsections 66(2.1) and (3); *HCCA* section 21(1).

[99] *SDA*, paragraph 66(4)(a); *HCCA* section 21(2).

[100] *SDA*, ss. 66(15) and 70(b); and "Form 3 – Guardianship Plan" (November 2014), online: Ontario "Central Forms Repository" < www.forms.ssb.gov.on.ca/mbs/ssb/forms/ssbforms.nsf/MinistryDetail?OpenForm&ACT=RDR&TAB=PROFILE&ENV=WWE&NO=004-0242E>.

[101] *Friedberg et al. v. Korn*, 2013 ONSC 960 ("*Friedberg et al. v. Korn*"). Interestingly, a lawyer appeared on this appeal despite that the subject of it could not give him instructions and was permitted to make submissions either as appointed counsel or as *amicus:* paragraphs 44 to 47.

a more a passive and less costly approach but could overlook, for example, the independent evidence that might be available in clinical health records. All this is to say that there is a concern that the lawyer may not be performing due diligence if passively waiting for potential (and potentially self-serving) witnesses to identify relevant evidence.[102]

Another problem with a more passive approach is that corroborating evidence may always be necessary to supplement documentation.[103] This was revealed to be a problem in *Friedberg et al. v. Korn*. Moreover, evidence of "wishes" can also appear in forms or other health records but these too may not be accurate, sufficient evidence of a wish or comply with legal requirements for health care consent.[104] Relying on documentation alone even in powers of attorney or business records may not be sufficient.

When to look to other roles such as *amicus* or a litigation guardian

The role of section 3 counsel is straightforward where, as the Fram committee envisioned, the sole issue before the court is the capacity of the client and the client instructs the lawyer to oppose the incapacity finding. Challenges arise in cases with a more complex set of interconnected issues. For example, a common dueling power of attorney dispute involves the following circular set of issues:

- A property guardianship appointment to overcome an existing continuing power of attorney appointment requires a capacity assessment.
- No capacity assessment or guardianship is necessary if there is a valid power of attorney appointment, but the attorney is alleged to have breached fiduciary duties such that the attorney should be removed.
- The issue of whether the attorney should be removed depends on reviewing financial and other records to determine if financial irregularities occurred.
- The feuding other parties may not have authority to delve into the financial affairs of the grantor and the grantor's chosen attorney.
- The grantor may not wish to obtain financial records, compel the attorney to pass accounts or take any steps that could be in the grantor's best interest, which brings everyone back to the question about the grantor's current capacity to make manage his or her property.

In the above scenario, other parties may be looking to section 3 counsel to confirm the presumptively capable client's position but each party (including the allegedly incapable person) can insist that one issue needs to be resolved before another, resulting in an impasse. These cases are especially difficult where the allegedly incapable client refuses to undergo a capacity assessment but the lawyer has concerns that the client would be found incapable if an assessment were performed. Other parties and

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[102] This risk would not be borne by the lawyer with direction limiting the review by the court if acting as *amicus*.

[103] *Friedberg et al. v. Korn*, 2013 ONSC 960 at paras 68 to 73.

[104] See, for example, Judith Wahl, Mary Jane Dykeman & Tara Walton, "Health Care Consent, Advance Care Planning, and Goals of Care Practice Tools: The Challenge to Get it Right", Law Commission of Ontario, online: < www.lco-cdo.org/wp-content/uploads/2010/10/ACE%20DDO%20Walton%20Formatted%20Dec%202%2C2016%20LCO.pdf> at 62 to 69.

the court may push section 3 counsel to take one step or another to resolve the impasse, as if the allegedly incapable person is responsible for providing a solution to the family feud.

A client-centred approach helps section 3 counsel focus on the individual interests of the client. If the client is not putting forward his or her interest, the client-centred lawyer should do nothing purportedly on behalf of the client as discussed above.

In certain cases, the lawyer's duty of candour to the court and obligation to act honourably may justify alerting the court to the needs of a vulnerable client for protection (so long as it does not prejudice the client's interest). This would potentially assist the court in exercising its *parens patriae* jurisdiction.

The client-centred approach need not stifle the administration of justice. In most cases, the adversarial system will function on its own without the participation of the allegedly incapable person. If the court is, for example, satisfied that all necessary perspectives will be explored by the parties that are actively participating in the litigation, then there may be no need for an additional lawyer to be involved. If necessary, the additional mechanisms of a litigation guardian and *amicus* are available to address any failures of the adversarial system. In the right case there may even be a role for all three: counsel, a litigation guardian and *amicus* in the same proceeding. The different roles can be distinguished as follows for *SDA* proceedings:

Counsel	**Litigation Guardian**	***Amicus***
Section 3 counsel should be appointed to determine whether the subject of the application has a position on the issues and, if agreeable to the person, advance those positions. If the lawyer reports no instructions or retainer to act on particular issues, all parties should consider whether a litigation guardian or *amicus* would be necessary to comply with rule 7.08 or the needs for procedural fairness.	A section 3 appointment does not preclude the appointment of a litigation guardians in *SDA* proceedings. If there is some evidence of incapacity, consider whether a litigation guardian should be appointed to deal with that individual issue, such a consolidated financial accounting issue. This may assist in overcoming an impasse such as the one described above and an overall determination of the proceeding on its merits.	*Amicus* could be considered where the subject of an application does not oppose it or insists on representing him or herself but is doing a poor job and there are no represented parties such that the adversarial process may fail. *Amicus* could be appointed to meet the particular needs of the judge hearing the case, for example, to provide the missing perspective on a point of law or otherwise test the application evidence.

The appointment of *amicus* appears to be underused in *SDA* power of attorney and guardianship proceedings. Among other venues, *amicus* has appeared in CCB hearings and appeals, family law

matters,[105] motions for the appointment of litigation guardians in civil proceedings,[106] and in criminal matters. In *R. v. Imona-Russell*, the Supreme Court of Canada outlined the test a judge must apply when deciding whether to appoint *amici*. The court stated as follows, at paras. 47-48:

> 47. Thus, orders for the appointment of *amici* do not cross the prohibited line into the province's responsibility for the administration of justice, provided certain conditions are met. First, the assistance of *amici* must be essential to the judge discharging her judicial functions in the case at hand. Second, as my colleague Fish J. observes, much as is the case for other elements of inherent jurisdiction, the authority to appoint *amicus* should be used sparingly and with caution, in response to specific and exceptional circumstances (para. 115). Routine appointment of *amici* because the defendant is without a lawyer would risk crossing the line between meeting the judge's need for assistance and the province's role in the administration of justice.
>
> 48. So long as these conditions are respected, the appointment of *amicus* avoids the concern that it improperly trenches on the province's role in the administration of justice.[107]

The key is that *amicus* is essential for the judge to discharge his or her judicial functions. Those functions can require a full challenge of the evidence in the adversarial system. Individuals also have a right to represent themselves and may not direct a lawyer to act on their behalf. In these cases, continuing without some adversarial presence against an incapable individual may result in a procedurally unfair hearing, necessitating the appointment of *amicus*.[108]

Acting on the direction of the court, rather than a client, the role of *amicus* can be as flexible as needed, for example, representing unrepresented interests before the court; informing the court of some fact or circumstance that the court may otherwise be unaware of; or advising the court on a point of law.[109] When justifying steps taken as *amicus*, the appointed lawyer can also refer to the direction of the court in defence of the actions taken where the non-instructing client did not provide any direction.[110]

The litigation guardian and *amicus* options should certainly not be overlooked in complex *SDA* disputes.

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[105] See, for example, *Morwald-Benevides v. Benevides*, 2019 ONSC 1136.

[106] See, for example, *626381 Ontario Ltd. v. Kagan, Shastri*, 2013 ONSC 4114.

[107] 2013 SCC 43, [2013] 3 S.C.R. 3.

[108] For a detailed discussion of the issue of representation of allegedly incapable persons at the Consent and Capacity Board, please see *R.C. v. Dr. Klukach*, 2018 ONSC 7415 at paras. 48 to 57.

[109] *R.C. v. Dr. Klukach*, 2018 ONSC 7415, at paras. 54 and 55.

[110] There has been push back from Attorney General's office to the use of *amicus*, for example in *R. v. Imona-Russell*, 2013 SCC 43, [2013] 3 S.C.R. 3 and *Morwald-Benevides v. Benevides*, 2019 ONSC 1136, *supra* since the Attorney General typically funds *amicus*. Similar resistance on behalf of the incapable person may too be justified if they are funding the needs of the justice system from his or her own funds. Whether the court can order one or more person to pay for *amicus* is beyond the scope of this paper but worth exploring.

Conclusion

The Law Society of Ontario has not provided substantial direction on determining capacity to instruct counsel or the role of counsel where a client is capable to instruct on one issue but incapable of others. This would be of assistance and should address some of the challenging situations that *SDA* proceedings present, along with an approach that incorporates human rights obligations of lawyers.

In the meantime, the client-centred approach described above will permit section 3 counsel to represent clients ethically, while interacting with other parties and the courts within a defined framework to avoid confusion about the section 3 counsel role.

How to treat your section 3 counsel: a guide for other parties

1. **Facilitate, rather than obstruct, section 3 counsel's private and confidential access to the client**. Lawyers require confidential access to their client to ensure that the instructions obtained are independent and any risk of undue influence is minimized. A dispute over access to the client wastes money, casts the interfering party in a poor light, and may preclude the independent expression of the person's wishes that may be relevant throughout a dispute. All parties have a role to play in ensuring that this threshold level of access is available.
2. **Provide information that will assist the section 3 counsel**. Section 3 counsel are often starting with very little information about the practicalities of meeting with the client. Section 3 counsel already has the benefit of at least one party's positions on the issues, but more specific details about the client can help prepare section 3 counsel to make the most of meetings. For example, how does the allegedly incapable person typically communicate to arrange meetings, are there independent caregivers involved, are there any notable communication disabilities like hearing or sight deficits, is the person more cognitively aware in the morning rather than the evening, or does the person tend to fatigue after a certain duration of conversation.
3. **Do not attempt to direct section 3 counsel.** Section 3 counsel like any other counsel has full authority to determine the parameters of their relationship with the client. It is perfectly legitimate for other parties to ask section 3 counsel to explore certain topics with the client, while recognizing that the ultimate decision on when and how to do so lies with counsel.
4. **Do not ask the allegedly incapable person about the discussions with counsel.** There is little benefit to a factual dispute about a client's position. Section 3 counsel is there to advance the incapable person's position independently. This will most often be the best evidence and other parties need to understand that sometimes people say different things to different people or in different contexts.
5. **Do not ask section 3 counsel to provide evidence of incapacity.** The burden of establishing incapacity is generally on the party alleging it and an issue for a judge to determine. Section 3 counsel has no role and may be professionally obliged not to assist another party or the court in determining whether the client is incapable. Even confirming what the lawyer thinks the client is capable of doing could imply that the client is incapable of other relevant things so section 3 counsel may be choosing words very carefully by necessity.
6. **Do not presume that section 3 counsel is mandatory throughout.** It may be that the issues in dispute can be determined without the participation of another lawyer. If the allegedly incapable person has had access to counsel, had their wishes shared and the sides of a dispute are otherwise represented then a lawyer without instructions to do more than present the client's position may not add value to the court's determination of the issues.
7. **Facilitate prompt payment of section 3 counsel.** Litigation is expensive, and attempts to thwart section 3 counsel by limiting his or her access to funding are not uncommon. Disputes over cost can reveal confidential information to adverse parties. Section 3 counsel should be paid promptly in the first instance if funds are available. If necessary, the court may review the costs after the dispute is resolved or they can go into the assessment process.