The Legal Advocate and the Questionably Competent Client in the Context of a Poverty Law Clinic

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The Legal Advocate and the Questionably Competent Client in the Context of a Poverty Law Clinic

Abstract
Advocates representing the poor must, above all, take into account the extreme vulnerability of their clients. This challenge is heightened where one suspects that a client may lack the capacity to provide appropriate instructions. This article considers the issue of how competency should be defined and the options available where incompetency is determined. Ultimately, advocacy must include personal empowerment as well as legal representation.

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Advocates representing the poor must, above all, take into account the extreme vulnerability of their clients. This challenge is heightened where one suspects that a client may lack the capacity to provide appropriate instructions. This article considers the issue of how competency should be defined and the options available where incompetency is determined. Ultimately, advocacy must include personal empowerment as well as legal representation.

Les personnes qui représentent des gens pauvres doivent avant tout tenir compte de la vulnérabilité extrême de leurs clients. Ce défi s'intensifie lorsque l'on entretient des doutes au sujet de la capacité d'un client à donner des directives appropriées. Le présent article examine la question de la définition de la capacité et discute des choix possibles une fois l'incapacité établie. En définitive, les interventions doivent à la fois viser l'habilitation du client et la représentation juridique.

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I. INTRODUCTION

A tiny woman with a greyish complexion and frail appearance comes into the clinic. "Jane" has been eligible for social assistance benefits as a permanently unemployable person as the result of a thyroid condition for the past five years but suddenly has been deemed to be ineligible. She asks for assistance appealing the director's decision. We agree to represent her. Eventually, she reveals that the real reason she cannot work is because she has at least two forms of cancer but her family doctor and specialists refuse to admit it. She is convinced that the doctors are conspiring against her. She suddenly begins talking about suing the doctors and alerting the media. Although her doctors have previously diagnosed her with depression, paranoia, and hypochondria, she adamantly refuses to see a psychiatrist.

"Alice," who is in her late thirties, has not worked since 1989 when she was in her first motor vehicle accident. Before she could completely recover, she was involved in a second motor vehicle accident. Since that time she claims to be in constant pain. Currently on welfare, she wants us to appeal a decision that she is ineligible for family benefits as a permanently unemployable person (PUE). We agree to represent her. Her family doctor lists her primary condition as "chronic pain syndrome." The Medical Advisory Board (MAB), which makes recommendations to the Director of Income Maintenance, notes in its assessment that chronic pain syndrome does not appear in *Dorland's Illustrated Medical Dictionary*\(^1\) and "is generally not clinically recognized." Alice has seen several specialists. As we begin to gather medical evidence on her behalf, medical reports consistently state that there is no physical explanation for her pain. Several doctors gently suggest that she is suffering from depression and, rather than physiotherapy, she is in need of psychotherapy. Ignoring her doctor's advice, she continues to visit her physiotherapist three times a week with very limited success. She cannot be persuaded to see a psychiatrist.

What is the role of the legal advocate in a poverty law clinic

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\(^1\) (Philadelphia: Saunders, 1994).
when one suspects that a client may be unable to provide appropriate instructions? Advocates representing the poor must, above all, take into account the extreme vulnerability of their clients. The majority of legal aid clients possess few resources, but face many constrictions. Most of those who will approach a poverty law clinic for assistance represent the socially isolated: they are the aged; the lonely; the uneducated; the unskilled. Clients may not have any relatives or friends in their communities on whom they can rely for emotional or financial support. Illiteracy is common and the client’s education often consists primarily of what he or she has learned in the struggle to survive. Many clients recognize that they are being targeted by the current provincial government and that the social “safety net” is deteriorating rapidly. They come to the clinic frustrated, angry, afraid, and, above all, confused as to why they must continuously fight for what little they have.

The legal advocate in a legal aid clinic must listen to the client’s concerns. Where the legal advocate fears that the client’s requests might place the client in an even greater position of vulnerability, the advocate may be reluctant to take the client’s instructions. The first step must be to determine whether the client is, in fact, capable of giving directions. Where the client appears to be incapacitated, the advocate must then decide if a guardian is required, what type of guidance the advocate should provide, and how the client’s best interests should be ascertained. Unfortunately, the advocate must undertake the major responsibility of providing competent service for an incompetent client without adequate guidance from the Rules of Professional Conduct established by the Law Society of Upper Canada.\(^2\) Unlike the Model Rules of Professional Conduct instituted by the American Bar Association,\(^3\) the Law Society of Upper Canada rules do not directly address the issue of the client who is unable to advise his or her representative according to the principles of informed consent.

Much of the literature available on the relationship between a lawyer and a mentally ill client occurs in the context of criminal law where the dilemma revolves around whether or not to raise the defence of insanity. The defence of insanity has important consequences for the client because it may mean the difference between being detained in a prison or detained in a medical facility. The liberty of the client is what is ultimately at stake. The strategies available to the legal advocate in


the context of social assistance law may also impact upon the client’s quality of life. One’s standard of living is dramatically affected if his or her family benefits, which are available to persons without dependents but who meet the criterion of being “permanently unemployable,” are arbitrarily cut off. The difference between being on welfare and being on family benefits as a PUE person is that on welfare one is forced to perform job searches, and on family benefits one need not fear being cut off for failing to perform these searches to the satisfaction of welfare workers. Also, in Ontario, a person on general welfare receives roughly $520 per month including a shelter allowance of $325, while a family benefits recipient receives approximately $900 per month including shelter, and is entitled to other benefits including being allowed to attend school.

Another important issue, in which a client may be in need of psychiatric care or counselling, is the dignity and autonomy of the client. To be reliant on a social assistance allowance means to be accountable to others for many things. An allowance cheque is certainly not without cost to the recipient; the price is often dignity and the right to privacy. Recipients must produce their bankbooks, passports, and leases at the caseworker’s request. They must notify their worker when they want to leave the province and obtain their worker’s permission to buy a car. Recipients can have their cheques suspended until they move into a less expensive apartment or until the landlord confirms that rent is being paid. Their cheques may be reduced solely on the basis that they are living with another person of the opposite sex. Many clients, especially those with a history of being undermined and misunderstood by their welfare or family benefits worker, will be likely to resist or resent any proposal from their legal advocate that a mental disorder may exist. To suggest, therefore, that there is really no doctor conspiracy or no pain, for example, may further alienate the client from needed assistance. Instead of being recognized as a source of help, the advocate may appear to be part of the very institution which the client perceives to have neglected or abused them. The alternative, however, may be to offer largely ineffective representation in which the client has virtually no hope of being found eligible for benefits. The representative in a poverty law clinic must define the duties of advocacy, as well as take into account the clinic’s ultimate goal of empowerment.
II. DEFINITION OF ADVOCACY

*Black's Law Dictionary* vaguely defines an advocate as:

one who assists, defends, or pleads for another. One who renders legal advice and aid and pleads the cause of another before a court or a tribunal, a counsellor. A person learned in the law, and duly admitted to practice, who assists his client with advice, and pleads for him in open court. An assistant; adviser; a pleader of causes.

If to be an advocate generally means to speak out on behalf of another, what voice is the advocate to use?

Although the lawyer has the exclusive privilege of presenting the arguments and only the client can provide evidence, the most powerful role in the client-attorney dynamic is inevitably that of decisionmaker. Traditionally, the approach to decisionmaking was such that the client decided the goals of the lawsuit while the attorney controlled the means to achieve those results: “the client determines such ‘ends’ as whether to settle a civil suit or to plead guilty in a criminal case, and the attorney decides, even contrary to the client’s express wishes, what legal and constitutional arguments or defences to raise.” Marcy Strauss notes the irony that although attorneys were instrumental in securing a patient’s right to information regarding their medical condition and treatment during the 1950s, only in recent years have attorneys adopted this model of ensuring that their clients are informed for themselves. Currently, the concept of basing one’s strategies on the client’s instructions is being advanced as the ideal model for the advocate-client relationship: “The supposition that lawyers know what is best for their clients is no longer as accepted as it may have been in the past; instead, the profession has grown in the realization that the most effective lawyering decisions are made by clients themselves.”

This concept of the lawyer taking instructions from a client is referred to as the doctrine of “informed consent,” and possesses four essential elements: disclosure of information; comprehension of

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5 Ibid. at 55.
7 Ibid.
information; voluntary consent; and competence to consent. In the context of medical care, “the requirement for informed consent is met when competent patients have received and understood information relevant to their condition and proposed procedures and have freely authorized the implementation of those procedures.” The doctrine of informed consent has been consistently and appropriately praised for the way it promotes the autonomy of the individual, the protection of a person’s rights, and self-scrutiny by professionals. The doctrine is particularly germane in the context of a poverty law clinic which is strongly committed to empowering clients. Clients are empowered not only by an increased allowance cheque but also by the advocate’s recognition of the validity of their requests, concerns, and reactions. The legal advocate must recognize that “the foundation of the principle of autonomy is respect for the individual; if the individual is competent to make the decision in question, and is given sufficient information to make the decision, her decision—no matter how wrong it may seem to others—must be respected.”

III. DEFINITION OF INCOMPETENCY

Unfortunately, the doctrine of informed consent is unhelpful when the client is incompetent. Legislation has recognized, generally in the context of management of property, that individuals are not always capable of making decisions for themselves. As the doctrine of “informed consent” requires that the client be competent, it is necessary that the legal advocate be permitted to make an assessment about his or her client’s ability to offer instructions.

The Ontario Mental Health Act defines a mentally competent person as a person who has the “ability to understand the subject-matter in respect of which consent is requested and is able to appreciate the consequences of giving or withholding consent.” Similarly, the Health Act...
The Questionably Competent Client

Care Consent Act, 1996\textsuperscript{15} defines “mentally capable” in section 4 as possessing the means “to understand the information that is relevant to making a decision...and [being] able to appreciate the reasonably foreseeable consequences of a decision or lack of decision.” D. Don Welch provides an interesting definition of competency. He suggests:

Competency is the measure of whether persons possess the capability for autonomous action. Incompetence means that persons are not able to exercise self-determination in a meaningful way. When persons are not able to understand their own situations, when they are unable to comprehend the likely results of alternative procedures, then those persons are not autonomous in the context of the particular purpose and setting at hand.\textsuperscript{16}

These definitions, which focus on the client’s ability to act in his or her own best interest in a given situation, present an interesting challenge for the legal advocate. What situations must the client understand? For the purposes of the legal advocate, should an incompetent client only be one who is unable to fully grasp the nature or potential outcome of his or her legal situation? Marc Schiffer concludes, legitimately, that the level of comprehension required to stand trial as the accused is minimal.\textsuperscript{17} Under section 672.22 of the Criminal Code,\textsuperscript{18} there is a presumption of fitness to stand trial unless the court is satisfied on the balance of probabilities that the accused is unfit to stand trial. Under section 2 of the Criminal Code the state of being “unfit to stand trial” is defined as an inability to understand the nature, object, and possible consequences of the proceedings or communicate with counsel. The client should know what he or she is charged with, the consequences of a conviction, what an oath is, the penalty for lying, the purpose of a trial, and the people in a courtroom, and what pleas are possible.\textsuperscript{19}

Interestingly, Schiffer notes that although the general consensus among the profession is that the client should be able to instruct counsel, the term “instruct counsel” is a misnomer as “in reality it has been said a defendant only supplies counsel with whatever information he may have concerning the case to enable counsel to in turn advise him and handle


\textsuperscript{16} Welch, supra note 9 at 1625.

\textsuperscript{17} M.E. Schiffer, Mental Disorder and the Criminal Trial Process: The Pre-Trial and Post-Trial Stages (LL.M. Thesis, Faculty of Law, University of Toronto, 1976).

\textsuperscript{18} R.S.C. 1985, c. C-46.

\textsuperscript{19} Schiffer, supra note 17 at 100-06.
his defence."\textsuperscript{20} Finally, the client's ability to concentrate and participate should also be assessed.\textsuperscript{21} This minimal requirement of fitness is based on principles articulated in \textit{R. v. Swain},\textsuperscript{22} which is considered to be a leading case governing fitness. Chief Justice Lamer noted:

\begin{quote}
Given that the principles of fundamental justice contemplate an accusatorial and adversarial system of criminal justice which is founded on respect for the autonomy and dignity of human beings, it seems clear to me that the principles of fundamental justice must also require that an accused person have the right to control his or her own defence...Thus, an accused who has not been found unfit to stand trial must be considered capable of conducting his or her own defence.\textsuperscript{23}
\end{quote}

Both Jane and Alice were cognizant that they needed legal representation to appeal the decisions which had rendered them ineligible for social assistance. They walked into the clinic of their own volition. Both women came to understand that they would need to prove the reasons why they could not work as of the date they applied and that they must be unable to work for a prolonged period of time. Both women understood the consequences of not persuading the Board as to the correctness of their appeal. In essence, both clients understood the nature of their legal situation. What they seemed to have difficulty comprehending, however, was the nature of their medical situation. For the purposes of the legal advocate, does a difficulty understanding a non-legal element which strongly impacts on their legal situation potentially render a person incompetent?

\textbf{A. Determining Incompetency}

According to Dr. Stephen A. Kline, "[t]he issue of determining competency is one of the most demanding and vexatious [issues] facing psychiatrists in day-to-day clinical practice."\textsuperscript{24} Dr. Angus McDonald suggests that an assessment of competency should extend beyond a simple test:

\begin{quote}
It is the focus on the relatively easy issues—such as, does the accused realize what he or she has been charged with—rather than on the more difficult issue of his or her ability to
\end{quote}

\textsuperscript{20} Ibid. at 102.
\textsuperscript{22} [1991] 1 S.C.R. 933.
\textsuperscript{23} Ibid. at 972.
instruct and/or participate in the court proceedings, that leads many lawyers to see fitness when many psychiatrists are much more doubtful.\textsuperscript{23}

Dr. McDonald notes that many individuals who are mentally ill can understand the basic principles of a trial but may have severe concentration defects or suffer hallucinations "to an extent that the proceedings in court cannot be attended to in a meaningful way."\textsuperscript{26} An assessment of competency may be further complicated by varying degrees of confusion:

Competence is often not a steady state phenomenon. It may fluctuate markedly. The quality and quantity of the information presented, the effect of the setting, and the relationship with the examining clinician all have profound effects on any assessment. Considerable expertise and often numerous visits are necessary to obtain the essential information in this dynamic environment.\textsuperscript{27}

Obviously, the average legal advocate lacks the training to perform psychological tests to measure a client's level of competency. What other avenues are available? Dr. Bruce Quarrington suggests that:

Clearly, the average legal advocate will not possess first hand knowledge of the client's daily activities. Realistically, throughout the time the file remains open, the legal advocate may have, in fact, very limited contact with the client. The interactions that do take place are likely to occur in the context of the legal clinic itself or over the telephone. The initial intake interview lasts an average of only twenty minutes and should not be the basis for any quick conclusions as to competency as many clients are legitimately agitated by their legal predicament and may have initial difficulty grasping their options. Many revelations which have not made sense initially, have later been clarified as the result of phone calls. Determining a client's competency on the basis of the initial interview does the client an enormous disservice and is contrary to the clinic's

\textsuperscript{25} A. McDonald, "Fitness to Stand Trial: A Legal and Ethical Dilemma" (1988) 8(3) Health L. Can. 71 at 72.

\textsuperscript{26} Ibid.

\textsuperscript{27} Kline, supra note 24 at 6.

\textsuperscript{28} B. Quarrington, "Approaches to the Assessment of Mental Competency" (1994) 15 Health L. Can. 35 at 35.
commitment to empowering clients. The advocate must be conscious of his or her own biases and allow room for the clarification of issues of confusion.

Clearly, the legal advocate is not in a position to determine competency through assessing the client’s activities as he or she does not fit into the category of “familiars.” Should the advocate be encouraged to discuss the client’s mental capacity with those who interact with the client in everyday situations? Rule 4 of the LSUC Rules stresses the importance of confidentiality: “The lawyer has a duty to hold in strict confidence all information concerning the business and affairs of the client acquired in the course of the professional relationship, and should not divulge any such information unless expressly or impliedly authorized by the client or required by law to do so.” Commentary 3 instructs the lawyer to refrain from even disclosing that one has been retained by the client. Therefore, the only way the legal advocate will be able to discuss the client’s state of mind with a friend or family member is with the permission of the client. Alice’s family members were reluctant to participate in the hearing even to the extent that they would not be available to confirm in front of the Review Board that pain has affected Alice’s life. In Jane’s case, however, we worked with a representative from a community group who was given permission to contact us by the client, who signed a consent to release information form. Jane’s situation, unfortunately, demonstrated that the existence of a person who is able to clarify the client’s mental competence, is not always beneficial to the legal advocate or the client. In the end, Jane was extremely unhappy and felt patronized by her mental health advocate, who became a significant source of stress to the client. Eventually, we were asked by the client to cease communicating with the mental health advocate. Even if the legal advocate has the client’s permission to discuss the case with another person, the advocate must be reasonably

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29 Ibid.
30 Rules, supra note 2 at 11.
31 Ibid.
32 Jane was unaware that her mental health advocate believed Jane had a mental disorder and was committed to protecting her from being hurt by this process. Jane merely perceived the woman as an advocate from her community centre for the socially isolated.
33 Jane called us in considerable distress a few days after the hearing. She had initially allowed her mental health advocate to make a photocopy of the submissions we prepared for her case. When she asked for the copy to be given to her, the centre refused. Because Jane was extremely upset that they had a copy of her medical reports, the centre agreed to return the copy to us and we promised it would be destroyed.
sure that the confidante has the client's best interests in mind and will continue to respect the client's rights and decisions before he or she acts on that person's recommendations.

B. Test for Incompetency

Given the role, responsibilities, and limitations of the legal advocate, the test for impairment should be based solely upon the client's ability to relate to his or her advocate. Although there is no Canadian equivalent, Rule 1.14 of the American Bar Association's Model Rules bases the test of incompetency on the client's "ability to make adequately considered decisions in connection with the representation."34 The legal advocate should, therefore, focus on how these decisions are reached, rather than on the perceived quality of the decisions:

The most important task for the legal standard of competency is to distinguish effectively between foolish, socially deviant, risky, or simply "crazy" choices made competently, and comparable choices made incompetently. Although incompetent behaviour may be restrained, identical competent behaviour may not. This distinction fosters and protects autonomy, dignity, and responsibility. A person may have a right to choose to harm himself or to forego benefits, but a person who harms himself, not by choice but because of illness, should be restrained. To make this distinction, competence has been defined in terms of process and not in terms of result.35

If the client is able to relay that his or her thought process is based on a correct understanding of his or her legal situation, then the client's instructions must be respected, even to the client's detriment.

C. Options Available for Advocates of Incompetent Clients

Once the lawyer is convinced that his or her client's decision making ability is impaired what options are available? Paul Tremblay outlines the range of choices available to the lawyer whose client's judgement is impaired. The legal advocate might (1) follow the client's wishes as if he or she were any other competent client; (2) seek a guardian for the client, either by serving as petitioner or by recruiting a third party to accomplish this task; (3) seek unofficial consent from a family member or close friend; (4) seek to persuade the client to make

34 Supra note 3 at 45.
35 Tremblay, supra note 8 at 537-38.
different and "better choices" (an approach that arguably is inappropriate with unimpaired clients); (5) proceed as a de facto guardian, simply making choices for the client without actual consent; or (6) withdraw.36

The appropriateness of these options for the legal advocate must be carefully measured against the LSUC Rules. The Rules stress the importance of confidentiality of information, competence of service, and ethics in advocacy.

D. Withdrawal of Services

The option of the legal advocate to withdraw his or her services may be appropriate where one feels that he or she is unable to provide effective representation. Commentary 3 of LSUC Rule 2 concludes, "[i]t follows that the lawyer should not undertake a matter without honestly feeling competent to handle it, or able to become competent without undue delay, risk or expense to the client."37 Laura A. Naide in an essay entitled "Incompetent Clients" notes:

When dealing with an incompetent client, an attorney is required to play many roles. Although in representing incompetent clients the same issues are often raised in each case, the attorney's obligation ultimately hinges on the type and degree of disability from which his client suffers. Because the incompetent client is in a weaker position than someone who would be considered competent by the courts, the attorney is required to take on greater responsibility in order to provide full representation to his client.38

Incompetent clients demand that the advocate confront his or her own personal biases and develop an awareness of the challenges clients with mental disorders may experience. In her article, "Tips for Lawyers Representing Psychiatric Survivors," Lilith Finkler explains that psychiatric survivors may, for example, measure time differently and that their medication may interfere with their ability to concentrate, pronounce words, or coordinate movements.39 Stan Delaney also warns advocates: "Many people with psychiatric problems are under a great deal of pressure and stress. Every effort should be made not to rush

36 Ibid. at 519-20.
37 Rules, supra note 2 at 3.
people into making decisions or commitments.\textsuperscript{40} The advocate must, therefore, be committed to demonstrating patience.

While withdrawing permits the advocate to effectively avoid the situation, this option may leave the client in a state of increased vulnerability. Clients on or requiring social assistance cannot afford to hire a lawyer and legal aid certificates are becoming increasingly scarce. Nevertheless, in the context of appealing decisions made by the provincial Director of Income Maintenance, legal representation is not mandatory. A person who has been denied family benefits may represent himself or herself before the Social Assistance Review Board (SARB). The applicant would be asked questions by the board and allowed to state the reasons why he or she should have an allowance. The applicant, however, would be dependent upon the board asking the right questions and eliciting the information that the applicant wants to relay. An advocate, therefore, has an important role in the context of a SARB hearing. The advocate can prepare written submissions with exhibits for the board which clearly outline the facts and the argument. The advocate should stress the importance of the case to the board, cite appropriate supporting case law, and prepare the client to answer questions. Many clients may be reluctant or unprepared to discuss the impact of their medical condition on their daily lives, and practicing speaking on these issues can make a positive difference during the hearing.

IV. THE LEGAL ADVOCATE AND MEDICAL TREATMENT

An advocate in a poverty law clinic should assist the mentally ill client whenever appropriate, given the vulnerability of the client. To define the incompetent client as one who is in need of protection forces us to examine what the legal advocate must protect. What are the objectives of representation? Clearly, the role of the legal advocate is to ensure that the client receives representation in the issue for which the advocate has been retained. Should the legal advocate also seek medical treatment for the client?

Under the \textit{Mental Health Act}, a person may be involuntarily examined by a psychiatrist only where a physician, justice of the peace, or a peace officer has a reasonable cause to believe that the person has:

threatened or attempted or is threatening or attempting to cause bodily harm to himself or herself; has behaved or is behaving violently towards another person or has caused or is causing another person to fear bodily harm; or has shown or is showing a lack of competence to care for himself or herself and ... is apparently suffering from mental disorder of a nature or quality that will likely result in serious bodily harm to the person; serious bodily harm to another person; or imminent and serious physical impairment of the person.\textsuperscript{41}

This high threshold of involuntary commitment to a psychiatric facility means that one cannot be forced to receive treatment unless the mental disorder is such that it creates a situation of potential danger. As the \textit{Mental Health Act} is strongly influenced by a policy of community rather than institutional care, even when the criteria of risk are met, the legislation allows for a person to be detained for a maximum of seventy-two hours unless a certificate of involuntary admission is completed. Once a person is officially admitted, the initial period of detention for two weeks can be extended one additional month under a first certificate of renewal, two months under a second certificate of renewal, and three additional months under a third or subsequent renewal.\textsuperscript{42} All patients have access to an appeal process. Even though the person is involuntarily detained, he or she may refuse treatment if found mentally competent to make decisions about medical care.\textsuperscript{43} Melody Martin explains:

\begin{quote}
These situations ..., the high threshold for commitment, and the even higher threshold for treatment ... are the result of a determination about the appropriate balance of values; but while these high standards provide important procedural protection for the mentally ill person, they can be a source of great frustration for concerned parties who are unable to secure adequate care for the mentally ill person ... \textsuperscript{44}
\end{quote}

Unless the client’s mental disorder is of a sufficient severity to be dangerous, or render the person incompetent to make informed decisions, the advocate cannot ensure that the client receives medical treatment, even if the advocate perceives this type of assistance to be appropriate.

\section*{V. MODELS OF ADVOCACY}

Where the legal advocate continues to represent an incompetent

\begin{footnotesize}
\begin{itemize}
\item \textsuperscript{41} \textit{Mental Health Act}, supra note 13, s. 15(1)(a-f).
\item \textsuperscript{42} \textit{Ibid.} s. 20(4).
\item \textsuperscript{43} Supra note 15, s. 10.
\item \textsuperscript{44} \textit{Martin}, supra note 12 at 76.
\end{itemize}
\end{footnotesize}
client, the legal advocate must decide the type of service he or she will offer. Warren Lehman distinguishes primarily between the extremes: advocates as "hired guns," who assume complete responsibility for the client’s interests, and advocates as "technicians," who are consulted not for their advice, but only for their knowledge of the rules. Both extremes give rise to important ethical concerns.

Martin refers to the model of taking all clients’ instructions, regardless of rationality or outcome, as the “cab driver” model: “the ‘cab-driver’ model implies that the client, as the employer of the lawyer (as he would a cab driver) at any point, as long as the lawyer remains within the outer ethical boundaries that constitute the ‘rules of the road.’” The refusal to make a distinction between a competent and an incompetent client is often premised on the notion that the advancement of autonomy is the advocate’s highest priority: a finding of incompetency is equivalent to the undesirable deprivation of rights. Proponents of this model argue that for the legal advocate to suggest that someone is incapable of making decisions may be tantamount to disloyalty and inevitably forces the advocate into the role of adversary. This argument, however, “confuses questions of capacity with questions of consent.” Autonomy is derived from the individual’s ability to make informed choices. If the client is incapable of understanding the outcome of his or her decisions, then the client is not exercising autonomy, and the advocate is not protecting it.

Following the “cab-driver” model, in Jane’s case we may have been instructed to argue that the medical report forms filled out by her doctor were incorrect, as they do not contain a reference to cancer. In Alice’s case, we may have been instructed to argue that she was unable to work because of injuries she sustained in a motor vehicle accident, although medical evidence denied that there is anything organically wrong with her. This model, however, presents two ethical dilemmas for the advocate: under Rule 10, Commentary 2(g), the advocate must not “knowingly assert something for which there is no reasonable basis in evidence,” and secondly, the legal advocate is also instructed to “raise fearlessly every issue, advance every argument, and ask every question, however distasteful which the lawyer thinks will help the

46 Martin, supra note 12 at 103.
47 Tremblay, supra note 8 at 538.
48 Martin, supra note 12 at 103.
49 Rules, supra note 2 at 34.
client's case and to endeavour to obtain for the client the benefit of every remedy and defence authorized by law.”50 If the advocate were to argue the issue of a doctor conspiracy or the existence of a physical injury refuted by medical evidence, the client would likely lose credibility before the board. The board may suspect that the client is trying to deceive them. Both Jane's and Alice's cases illuminate the importance of being able to determine mental capacity: “[a]dherence to conventional informed consent practise in [some] cases is not only painful to the lawyer but may be morally irresponsible. The dilemma is plain: it may be morally wrong to intervene, and morally wrong not to intervene.”51 Like withdrawing, the “cab-driver” model only permits the advocate to find an easy answer to a difficult moral issue.

A. The Appointment of a Guardian

Where the advocate feels that the client cannot make informed decisions, a reasonable solution may be the appointment of a guardian: “[w]herever it is possible, by the provision of appropriate supports, to enhance the decisionmaking ability of an individual, that is the course most in line with the values of our society. If that ability cannot be enhanced to the point of competency, and as a result the individual is at risk, plenary or partial guardianship may be necessary.”52 Commentary 1 of Rule 2 of the LSUC Rules declares that competence “goes beyond formal qualifications of the lawyer to practice law. It has to do with the sufficiency of the lawyer's qualifications to deal with the matter in question, and includes knowledge and skill and the ability to use them effectively in the interests of the client.”53 Section 52 of the Substitute Decisions Act, 199254 allows, on application, the appointment of a guardian for a person who is incapable of personal care and, as a result, needs decisions to be made on his or her behalf. Under the legislation, the powers of the guardian extend to settling and commencing proceedings on a person's behalf.55 Tremblay, however, wisely cautions:

50 Ibid. at 33.
51 Tremblay, supra note 8 at 540.
52 H. Savage & C. McKague, Mental Health Law in Canada (Toronto: Butterworths, 1987) at 197.
53 Rules, supra note 2 at 3.
55 Ibid. s. 59(2)(b), (c).
Short of imprisonment or commitment, appointment of a guardian is the most serious restriction of a person's liberty. The paternalistic and benign purposes of guardianship do not blunt its harsh consequences. A lawyer's decision to impose guardianship on a client without his consent or understanding is particularly difficult to justify given the lawyer's obligations of loyalty and zeal.56

Where the advocate is directly responsible for this deprivation of rights, he or she should consider the impact of the guardian's decisions, as it is the client who must ultimately live with the consequences of the instructions made on his or her behalf.

The Health Care Consent Act, 1996 requires that the decision to give or refuse treatment on an incapable person's behalf, must be made in accordance with two primary principles: if the person knows of a wish applicable to the circumstances expressed while capable and after attaining the age of 16, this wish must be recognized; if, however, the person is unaware of the incapable person's preferences, the person shall act in the incapable person's best interests.57 Welch stresses:

When a substitute decision-maker must be used, as in the case of incompetent patients, every effort must be made to apply the patient's values and concerns. A broader, holistic view of an individual's interests ..., physical, psychological, social, financial, and spiritual ... subsumes a scientific, medically indicated view of best interests into a substituted judgement perspective. Only an effort to stand in that patient's shoes will begin to reveal the totality of the patient's interests.58

Similarly, the Substitute Decisions Act, 1992 also instructs that the person determining another's best interests shall take into consideration the values and beliefs that the decisionmaker knows the incapable person held when capable, and believes he or she would continue to hold if capable.59 This position corresponds to a poverty law clinic's commitment to respect the autonomy of the clients:

Even if incompetent, a person still has beliefs, values, and preferences. The patient is a person with rituals of meaning, symbols of interpretation, and some developed sense of self. Even for persons incompetent to exercise autonomous judgement, these personal attributes remain important. The whole purpose behind obtaining consent from someone else on behalf of an incompetent person, the very reason we do not simply give the researcher or the physician unfettered discretion to do what is best, is to attempt to make the elements that comprise a unique personality ..., the patient's desires, needs, priorities, and beliefs ... as close to controlling in the decision as they would be if that person were competent.60

56 Tremblay, supra note 8 at 559-60.
57 Health Care Consent Act, supra note 15, s. 21(1) 1. & 2.
58 Welch, supra note 9 at 1637-38.
59 Substitute Decisions Act, supra note 54, s. 66(4)(a).
60 Welch, supra note 9 at 1639.
A guardian must also take into account whether the decision is likely to improve the quality of the person's life, prevent the quality of the person's life from deteriorating, or reduce the rate at which the quality of the person's life is likely to deteriorate. The final factor to consider includes whether the benefits of any decision will outweigh the risk of harm of an alternative decision. Where the guardian fails to perform this duty satisfactorily, the court may terminate the guardianship.

While the existence of a guardian protects the advocate from making decisions on behalf of the client, the advocate may be placed in the highly uncomfortable position of becoming the client's opposition. When the advocate brings an application for the assessment of an individual, this individual may resist and oppose the petition. Advocates must rely on their interactions, which will violate lawyer-client confidentiality, to provide evidence. Tremblay explains:

Thus, viewed from its harshest perspective, the process looks like this: the client hires the lawyer to serve as his loyal agent and confidante; the lawyer promises him that those expectations are warranted and will be fulfilled; the lawyer then uses her client's confidences to bring a court proceeding that will deprive him of all his rights, and will require him to obtain another lawyer to defend against it; and all the while the lawyer plans to resume representing him once this distraction is over.

Despite the obvious awkwardness of this process, the risk of alienating the client may outweigh the consequences of ineffective representation. The legal advocate should explain to the client his or her concerns of otherwise violating key principles of professional ethics. If the client can be made to understand that the process of assessment is ventured only to ensure that his or her best interests are recognized, the relationship between the advocate and client may not be irreparably damaged.

If the advocate is convinced that a guardian should be appointed, an alternative to the advocate making the application would be to encourage a third party to request the initial assessment. Although the referral approach allows the advocate to avoid the complication of directly opposing the client, the advocate will likely be placed in the ironic position of having to defend the client's capacity to make decisions. LSUC Rule 3 asserts that "[t]he lawyer must be both honest and candid when advising clients." There remains, therefore, the important issue of the client's confidentiality and trust being breached:

61 Health Care Consent Act, supra note 15, s.42(2)(c)(1)(i)-(iii).
62 Ibid. s. 42(2)(c)(2).
63 Tremblay, supra note 8 at 560-61.
64 Rules, supra note 2 at 7.
It is incorrect to assume that the duties of loyalty, zeal and confidentiality only restrain the lawyer from harming her client directly. Even if the lawyer's actions are not a priori harmful, they may be unacceptable. The lawyer's ethical duties promote client choice and the question of 'harm' is one of individual client perception, not one of objective measure.65

The advocate's option to initiate the appointment of a guardian either personally or through a third party forces the advocate to violate important ethical obligations in order to observe other key principles.

B. The Advocate as Guardian

A fourth option available to the legal advocate in representing an incompetent client is for the advocate to be appointed as the client's official guardian. This option, however, is completely inappropriate in the context of a community legal aid clinic, as it places the advocate in a clear position of authority over the client. Assuming this position of superiority clearly contradicts any clinic's dedication to respecting the autonomy of the client. The role of guardian can have different responsibilities from the role of advocate. While the advocate has an obligation to consult with the client regarding what the advocate should do on his or her behalf, the guardian's role is to determine the best interests of the client and act accordingly. This shift in responsibility from taking instructions to giving them can result in the advocate disregarding many important ethical rules which should ordinarily govern the advocate-client dynamic:

In assuming the guardian role, attorneys frequently shun many of the required obligations by not conducting pre-hearing investigation, by first speaking with the client just hours before the hearing, and by substituting their judgement for that of the client. Scholars have advanced several reasons for this disregard of traditional representation obligations, including insufficient medical knowledge, a desire to see that the sick get treatment, and the absence of a clearly defined role for the attorney.66

The client is generally placed at a clear disadvantage when a legal advocate determines what is in his or her best interest. The statutory guidelines instruct that another's best interests should ideally be based on the values of the person exhibited when they were capable. In most cases, the legal advocate will not have known the client when he or she was capable. Therefore, the client's best interests will be established

65 Tremblay, supra note 8 at 562.

solely on the advocate's perception of how a reasonable person would or should respond. As stated earlier, the advocate is unlikely to know the client outside the narrow context of the clinic. As the role of guardian is to exercise discretion on another's behalf, the advocate is no longer clearly accountable to anyone for poor quality service. LSUC Rule 2(b) asserts that "[t]he lawyer should serve the client in a conscientious, diligent and efficient manner, and should provide a quality of service at least equal to that which lawyers generally would expect of a competent lawyer in a like situation and should avoid unsatisfactory professional practice."67 Commentary 8 lists numerous examples of what may constitute unsatisfactory professional practice such as a "[f]ailure to keep the client reasonably informed"68 and "[f]ailure to keep appointments with clients without explanation or apology."69 Where the advocate fails to offer a high quality of service, to the detriment of the client, who will complain? It is unlikely that clients will have the means to complain. Furthermore, given their state of incompetence, they will lack credibility. It is extremely important, therefore, that the advocate's actions be monitored so that the advocate's professional responsibilities are held to a strict standard.

C. Other Approaches to Advocacy

The remaining options for the legal advocate with a client whose competence is highly questionable consist of different approaches to advocacy. LSUC Rule 10 addresses directly the concept of the lawyer as advocate and explains that the lawyer must represent the client "resolutely and honourably within the limits of the law."70 The concept of acting "resolutely and honourably" is extremely vague and offers little guidance to advocates who are representing clients who may be unable to make sound decisions.

One interpretation of acting "honourably" may mean that the role of advocate is to take an automatically contradictory stance to that of the opposition. This model presumes that once the client seeks the help of the advocate with any particular issue, the client will want to oppose any position raised by the other side. In the context of criminal

67 Rules, supra note 2 at 3.
68 Ibid. at 4.
69 Ibid.
70 Ibid. at 33.
law, for example, "the 'default position' of the criminal defence lawyer (in the absence of instructions of the client) should always be to oppose the position that the Crown is advancing." In the context of social assistance law, the advocate would act on the client's instructions to, for example, appeal the decision of the Director of Income Maintenance to render a person ineligible for benefits as a permanently unemployable person. Once the client directs the advocate to appeal the decision, the advocate would feel obligated to vigorously argue that the client cannot seek remunerative employment. The challenge with this model is how vigorously must the advocate argue? If the advocate assumes that the only instruction the incompetent client can reasonably make is for the advocate to pursue a specific result, the advocate may feel that any argument, including that the client possesses a mental disorder, may be fair game. Although this model technically complies with Commentary 2 of Rule 10, the argument that Jane's sincere belief of having cancer is proof of mental incapacity which prevents her from working would be likely to result in a humiliating experience for the client, with devastating emotional consequences.

A second interpretation of the professional standard of representing a client honourably may exist in the model that the client should be persuaded to choose the most beneficial option. A primary responsibility of the advocate is to ensure that clients are informed of their options so that they can make educated decisions based on that information. The advocate is to respect an informed decision. Encouraging a client to change his or her decision may be tantamount to coercion, given that the lawyer is generally considered to be an expert and is, therefore, in a position of authority over the client. In the context of poverty law, manipulation contradicts the commitment of a community clinic to encourage clients to take back control over their lives. Unfortunately, it is in the environment of poverty law where this model may be most easily implemented. Clients often have only minimal education and can be intimidated by their situation. How the advocate presents the options will directly impact upon the client's decision. Most clients are simply too relieved at finally having access to assistance to question the quality or means of representation. Many clients will even encourage the advocate to make their decisions for them.

A third possible interpretation of the standard of representing a client honourably, is for the lawyer to assume the role of unofficial guardian to determine the client's best interests in the context of the

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71 Martin, supra note 12 at 103.
issue for which he or she has been retained:

The lawyer would consider herself as responsible for the mentally ill client. The responsibility would be centred upon the client's legal situation and the client's mental and physical state would be within the purview of the lawyer's responsibility to the extent that these states influence or interact with the client's legal situation. The lawyer's responsibility would be based upon the fact that the mentally ill client, by virtue of his mental disorder, and regardless of his fitness, is in a more vulnerable position relative to the legal process than is the average 'ordinary' client.\(^7\)

This model is rooted in the concept of paternalism which has been defined as "interference with a person's liberty of action justified by reasons referring exclusively to the welfare, good happiness, needs interests or values of the person being coerced."\(^7\) The advocate might override the client's instructions based on what the advocate believes to be the more favourable option available to the client. This option has been historically favoured by lawyers even where the client has been competent to act as it permits advocates to protect their professional reputation: "Attorneys are trained and expected to exercise such judgement: to follow every whim of their clients would make them little more than 'mouthpieces.'"\(^7\) The other main argument frequently advanced in favour of the advocate being a decisionmaker is efficiency: "[m]ost typically, proponents of this argument raise the spectre of a never-ending trial punctuated by frequent interruptions and objections by the client and lengthened by constant recesses for attorney-client conferences."\(^7\)

The concept of paternalism in the setting of a legal aid clinic is inappropriate for the same reasons this model would be easy to execute. The client and advocate will often represent different levels of education, income, and standards of living. Also, there may exist differences in language, race, and culture. Given that the advocate and client will have a diverse range of experiences, the advocate is not in a good position to determine what option is in the best interests of the client. Clients of a legal aid clinic may demand a significant amount of reassurance and patience. Consultation may also require the exertion of extra effort, as many do not have telephones, and those who do rarely have answering machines. Nevertheless, the advocate must keep in mind that the service the advocate offers to the client extends beyond

\(^7\) Ibid. at 106-07.
\(^7\) Strauss, supra note 6 at 321.
\(^7\) Ibid. at 322.
\(^7\) Ibid. at 323.
achieving the desired outcome and includes the treatment of the client. The very fact of the client's vulnerability should suggest to the advocate that the rules of professional ethics must be meticulously observed.

VI. CONCLUSION

In 1993, the United Kingdom Law Commission released a study entitled *Mentally Incapacitated Adults and Decision-Making: Medical Treatment and Research.* The paper was guided by the following principles for reform: people should be enabled and encouraged to make decisions which they are able to make; the intervention of substitute decisionmakers should be as limited as possible and concerned to achieve what the person himself would have wanted; and proper safeguards should be provided against all forms of abuse. Although the study relates specifically to raising consciousness in the medical profession, the legal profession can also benefit from considering these same principles.

While the LSUC *Rules of Professional Conduct* attempt to offer guidance to the legal advocate with respect to quality of service, these guidelines fail to consider the specific needs of the questionably competent client. In most cases, the competence of a client is irrelevant; all clients deserve to benefit from the same strict standard of professionalism. Clients, however, could be better served if their advocates could represent their interests with a degree of certainty of how these interests may be determined. The LSUC *Rules* should assist the legal advocate in determining if the client is able to understand their legal situation and what to do where incompetency is suspected. The *Rules* should narrow the options currently available and attempt to define in what capacity the advocate can most serve the client honourably.

If the client is able to make informed decisions regarding his or her legal representation, the doctrine of informed consent must govern the advocate-client dynamic. The demand of voluntary and educated consent encourages communication that may protect both parties from future misunderstandings, clarifies each party's role and their mutual expectations, and makes the autonomy of the individual a clear priority. Finally, informed consent strengthens the integrity of a profession that

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77 *Ibid.* at 3.
has been plagued with the distrust of the public.78

Ultimately, we did not challenge or suppress Jane’s theory of the existence of a medical conspiracy. We argued that she was unable to engage in employment based on the symptoms that her family doctor listed on the medical report form she submitted to the medical advisory board. We included previous medical reports and a recent report in our possession, with the permission of the client, that included a diagnosis of a variety of conditions, including depression and hypochondria. While Jane resented some of the diagnoses of her physicians, she agreed with our suggestion that the reports would be helpful, as they demonstrated a prolonged history of medical illness. We promised that she would have the opportunity to relay to the board how she felt about the quality of medical treatment she had received. The board ultimately granted her appeal noting, “[e]ven if the conditions identified by the MAB in themselves do not render the Appellant permanently unemployable, the Appellant’s testimony showed that her physical conditions ... have had a profoundly negative mental impact on her and made the Appellant paranoid. She was remarkably unfocused, convinced her physical conditions were fatal.”79

In Alice’s case, again we carefully explained her options: we could argue the existence of physical injuries although we had no collaborating medical evidence, or we could focus on her doctor’s diagnosis of chronic pain syndrome. Our research into chronic pain syndrome established that the condition has a strong psychological component. We explained the definition and theories of chronic pain syndrome to the client and reassured her that the existence of a psychological component does not diminish the reality of her pain. The client appreciated the fact that we took the time to explain to her the significance of her medical condition and felt reassured that she fit into the profile of a chronic pain client, after doctors had seemed to undermine her complaints of pain. At the hearing, Alice enthusiastically participated in my closing statement, vigorously agreeing to my statements of the impact of chronic pain syndrome. She was clearly empowered by the experience.80

While a tension exists between the advocate’s desire to take the vulnerable client’s instructions and the desire to protect the client from an undesirable outcome, ultimately, the most important rule of

78 Strauss, supra note 6 at 338.
79 Medical Advisory Board, File No. P0313-23 (Feb. 1996), Chair Ghosh [unreported].
80 In the end, Alice was found to be eligible for PUE benefits.
professional conduct is established under Rule 1:

Integrity is the fundamental quality of any person who seeks to practise as a member of the legal profession. If the client is in any doubt as to the lawyer's trustworthiness, the essential element in the true lawyer-client relationship will be missing. If personal integrity is lacking the lawyer's usefulness to the client and reputation within the profession will be destroyed regardless of how competent the lawyer may be.\[81\]

Ultimately, by carefully explaining what options are available and taking our client’s instructions, we justified our clients' trust in our ability to advocate on their behalf. While a favourable decision by the SARB is obviously desirable, a significant victory also exists in simply treating the client with respect and dignity.

\[81\] Rules, supra note 2 at 1.