



NOVA SCOTIA
BARRISTERS' SOCIETY

MEMORANDUM TO COUNCIL

From: Lawrence Rubin and the Professional Standards (Wills, Powers of Attorney and Personal Directives) Committee

Date: November 26, 2021

Subject: Professional Standards (Wills, Powers of Attorney and Personal Directives) Standard – Capacity¹

For: **Approval** **Introduction X** **Information**

DATE	Council	Introduction
November 26, 2021		
	Council	Approval

Rationale:

The Committee is of the opinion that it is vital that a lawyer assess the capacity of a person when giving instructions and executing a Will, Power of Attorney or Personal Directive.

An equity lens was applied when drafting and reviewing this proposed standard. That said, concurrent with the introduction of this proposed standard for Member comment, the Committee has submitted it for review in accordance with the Society's Equity Lens Application in Policy Development guideline.

Exhibit:

Proposed Standard – Planning for Assets in Multiple Jurisdictions

¹ No number is attached to this standard at this time. This is the third standard the Committee has presented to Council for introduction. As of the date of this memorandum, the Committee has not discussed a numbering scheme or the order of the initial standards that are set out in its Workplan.

EXISTING STANDARD	PROPOSED STANDARD	RATIONALE
N/A	<p style="text-align: center;">Capacity</p> <p>Standard</p> <p>A lawyer must assess the capacity of a person when giving instructions and executing a Will, Power of Attorney and Personal Directive.¹</p> <p>Footnote</p> <p>¹ See Code of Professional Conduct reproduced below for reference as our Code of Professional Conduct identifies (Section 3.2-9) the two critical factors in determining whether a client has the capacity to instruct: whether they can <u>understand the information</u> needed to make a decision, and whether they can <u>appreciate the consequences</u> of that decision.</p> <p><i>Clients with Diminished Capacity -Practice Notes These are guiding principles to assist with meeting the Standard taken from our Code of Professional Conduct</i></p> <p>When a client's ability to make decisions is impaired because of minority or mental disability, or for some other reason, the lawyer must, as far as reasonably possible, maintain a normal lawyer and client relationship.</p> <p>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. A client's ability to make decisions depends on such factors as age, intelligence, experience and mental and physical health and on the advice, guidance and support of others. A client's ability to make decisions may change, for better or worse, over time. A client may be mentally capable of making some decisions but not others. The key is whether the client has the ability to understand the information relative to the decision that has to be made and is able to appreciate the reasonably foreseeable consequences of the decision or lack of decision. Accordingly, when a client is, or comes to be, under a disability that impairs their ability to make decisions, the lawyer will have to assess whether the impairment is minor or whether it prevents the client from giving instructions or entering into binding legal relationships.</p> <p>A lawyer who believes a person to be incapable of giving instructions should decline to act. However, if a lawyer reasonably believes that the person has no other agent or representative and a failure to act could result in imminent</p>	<p>The rationale for this standard is the same as the standard itself, that all lawyers must assess the capacity of a person when giving instructions and executing a Will, Power of Attorney or Personal Directive.</p>

and irreparable harm, the lawyer may take action on behalf of the person lacking capacity only to the extent necessary to protect the person until a legal representative can be appointed. A lawyer undertaking to so act has the same duties under these rules to the person lacking capacity as the lawyer would with any client.

If a client's incapacity is discovered or arises after the solicitor-client relationship is established, the lawyer may need to take steps to have a lawfully authorized representative, such as a litigation guardian, appointed or to obtain the assistance of the Office of the Public Trustee to protect the interests of the client. Whether that should be done depends on all relevant circumstances, including the importance and urgency of any matter requiring instruction. In any event, the lawyer has an ethical obligation to ensure that the client's interests are not abandoned. Until the appointment of a legal representative occurs, the lawyer should act to preserve and protect the client's interests.

In some circumstances when there is a legal representative, the lawyer may disagree with the legal representative's assessment of what is in the best interests of the client under a disability. So long as there is no lack of good faith or authority, the judgment of the legal representative should prevail. If a lawyer becomes aware of conduct or intended conduct of the legal representative that is clearly in bad faith or outside that person's authority, and contrary to the best interests of the client with diminished capacity, the lawyer may act to protect those interests. This may require reporting the misconduct to a person or institution such as a family member or the Public Trustee.

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 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.

Commentary

Decisional capacity includes at least four components:

- (i) understanding information relevant to the decision;
- (ii) appreciating the information (applying the information to one's own situation);
- (iii) using the information in reasoning; and
- (iv) expressing a consistent choice

To make a will:

- ability to understand the nature and effect of making a will;
- ability to understand the extent of the property in question; and
- ability to understand the claims of persons who would normally expect to benefit under a will of the testator

To make a Power of Attorney:

- ability to understand the consequences of making a Power of Attorney;
- ability to understand the extent of the decisions to be made or that may be necessary in the future; and
- ability to appreciate the consequences of allowing another individual to make your decisions

To make a Personal Directive

- ability to understand the consequences of appointing someone to make your medical and personal decisions when you are no longer capable to do so; and
- type of Decision to be made- make one's own decision about accepting services, where they will reside, medical treatment (consent to treatment)

Applicable Legislation

Adult Capacity and Decision-making Act, S.N.S. 2017, c.4, s.31.

Adult Protection Act, R.S.N.S. 1989, c. 2

Hospitals Act, R.S.N.S. 1989, c. 208

Involuntary Psychiatric Treatment Act, S.N.S. 2005, c. 42

Personal Directives Act. 2008, c. 8, s. 1.
Powers of Attorney Act. R.S., c. 352, s. 1.
Probate Act, S.N.S. 2000, c. 31, amended 2001, c. 5, ss. 12 – 33, 2002, c. 5, s. 47; 2004, c. 3, s.31; 2007, c.9, s. 35; 2007, c.50; 2009, c.5, s. 26; 2001, c. 8, s. 20; 2013, c. 3, s. 13
Public Trustee Act, R.S.N.S. 1989, c. 379
Trustee Act, R.S.N. S. 1989, c. 479
Wills Act. R.S., c. 505, s. 1.

Case Law

The following is a List of some (this is not an extensive list) relevant Nova Scotia cases & SCC Decisions

Decision	Brief Description	Significance
<p><i>Banks v. Goodfellow</i>, [1870] 5 QB 549</p>	<p>The English High Court laid out the benchmark test for assessing testamentary capacity. To this day, it has stood the test of time. Subsequent cases have served to focus and clarify aspects of it. The recent decision of the Ontario Superior Court of Justice in <i>Kay v Kay Sr.</i> is such a case.</p>	<p>Recently there is consideration for reviewing this <i>Gold Standard</i>, see for example: Himel, S, Hull, I M, et al. "Time To Update The Test For Testamentary Capacity" (2017) CanLIIDocs 133; 95-1. Canadian Bar Review</p>
<p><i>Devlin Estate (Re)</i>, 2021 NSSC 151</p>	<p>The case Challenges the validity of a holograph will.</p>	<p>The court provides a helpful review of the law regarding testamentary capacity; what constitutes suspicious circumstances and how do they affect proof</p>

			of the mental capacity of the testator	
	<i>Vout v. Hay</i> , [1995] S.C.J. No. 58,	The leading case from the Supreme Court of Canada	The propounder of the will has the burden of establishing that the testator had a disposing mind and memory as essentials of testamentary capacity .	
	<i>Kay v. Kay Sr.</i> , 2019 ONSC 3166	The court provides a helpful review of the law regarding testamentary capacity, as set out in <i>Banks v Goodfellow</i> , specifically the weight that is to be given to the drafting lawyer's assessment and a posthumous testamentary capacity assessment.	It emphasizes that testamentary capacity is to be determined based on the facts and circumstances of each case . The drafting lawyer's assessment plays a major role in assessing capacity. A posthumous testamentary capacity assessment may also be given considerable weight if it is conducted around the time the deceased's capacity was in question and if the assessor's review of	

			the deceased's life around the time, they signed the will.
	<i>Nieuwland v. Yorke Estate</i> , 2011 NSSC 19	The applicant asserted that her mother lacked the necessary testamentary capacity to create a valid will at the time that the document was executed.	Diminished capacity does not mean there is a <i>lack of capacity</i> and the courts should strive to give effect to the intentions of testators.
	<i>Beirsto v. Stirling</i> , 2007 NSSC 350 - 2007-11-23	At paragraph 25 reference is made to post operative confusion	This is not atypical, particularly in elderly people, and not indicative of permanent diminished capacity .
	<i>McInnis v. McGuire</i> , 2014 NSSC 437	Code of professional Conduct 3.2-9 discussed	When a client's ability to make decisions is impaired because of minority or mental disability, or for some other reason, the lawyer must, as far as reasonably possible, maintain a normal lawyer and client relationship.

	<p><i>Kerfont v. Fraser</i>, 2010 NSSC 293</p>	<p>The burden of proving testamentary capacity is on the party propounding the will.</p>	<p>If the plaintiffs can satisfy the Court that there is evidence of suspicious circumstances, surrounding the execution the burden of proving testamentary capacity reverts to the propounders of the will.</p>	
	<p><i>McGrath v. Joy</i>, 2020 ONSC 7454</p>	<p>Case involves suicide notes alleged to be a holograph will</p>	<p>Discusses <i>Vout v. Hay</i>, 1995 CanLii 105 SCC, Sopenka J. speaking for the court, outlined the evidentiary burden when suspicious circumstances exist; The burden with respect to testamentary capacity will be affected as well if the circumstances reflect on the mental capacity of the testator to make a will</p>	

	<p><i>Vernon v. Sutcliffe, 2014 NSSC 376</i></p>	<p><i>Application to remove the lawful attorneys was dismissed. Conduct of attorney pre-dating incapacity of donor is reviewable under s.5 (c) of the Powers of Attorney Act.</i></p>	<p><i>It is preferable but not always necessary for a court to have expert opinion evidence to establish a state of "legal incapacity". To remove an attorney under the Powers of Attorney Act, the court must gauge the attorney's duty towards the donor according to the attorney's abilities and remove the attorney only upon a finding of misfeasance or compelling evidence of misconduct or neglect, as stated by LeBlanc, J. in Isnor Estate, Re, 2001 CanLII 25721 (NS SC).</i></p>	
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For more general information please visit the following additional resources articles & commentary

"Assessing Capacity in Canada: Cross-Provincial Examination of Capacity Legislation", Kimberly A. Whaley, Whaley Estate Litigation Partners (2019) seniorfirst.bc.ca

"A Lawyer's Duties and Obligations Where Capacity, Undue Influence, and Vulnerability are at Issue In A Retainer", Kimberly A. Whaley, Step Canada 2018 National Conference, Toronto

Estate Litigation, Brian A. Schnurr, loose-leaf, 2nd ed. (Toronto: Carswell, 1994) (2016, revision 8), ch. 2.1(c).

"Powers of Attorney: Moving Towards Best Practices in Canada", Laura Watts and Kevin Zakreski, (Paper delivered at the Canadian Bar Association Canadian Legal Conference, St. John's, 13-15 August 2006) online: <http://www.beli/ccel>

Public Trustee's Office services webpage

Legal Information Society of Nova Scotia's website: Power of Attorney

Law Reform Commission / "Final Report" regarding the Powers of Attorney Act (April 2015).

Law society of Upper Canada: Determining Competency – Mental Health

Nova Scotia Barristers' Society, Code of Professional Conduct, Halifax: Nova Scotia Barristers' Society, 2012, rule 3.2-9 "Clients with Diminished Capacity"

Time To Update The Test For Testamentary Capacity, Himel, S, Hull, I M, et al., (2017) CanLIIDocs 133; 95-1. Canadian Bar Review

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