

Representing Substitute Decision Makers

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As noted in Anita Szigetti and Ruby Dhand's article in this issue, there are a number of serious issues to consider when representing an individual with mental health or capacity issues. Lawyers must also be alert to obligations they may have toward a person with capacity issues who is acting 'against' their client. One obvious situation where this obligation would apply is when a lawyer is representing or advising a substitute decision maker (SDM).

I define SDM as any person with legal authority to make particular types of decisions, such as decisions about personal care or property, on behalf of another person who has been declared incapable of making that specific type of decision (the incapable person). The most common types of SDMs are attorneys for property or personal care, statutory guardians for property or personal care, or court appointed guardians of property or the person.

It is not difficult to imagine the types of disputes that could arise between an incapable person and the person making decisions on their behalf. Frequently the incapable person finds the restrictions and limitations of living with an SDM onerous and the SDM can easily become the target of their frustration. The SDM can create problems by exerting too much control, refusing to consult the incapable person, or refusing to share financial or other information. The SDM/incapable person relationship is often further complicated by the fact that SDMs are frequently also relatives, adding a complex family dynamic to the mix. If these SDM/incapable person disputes are not dealt with prop-



erly, they can lead to a breakdown of not only the SDM/incapable person relationship, but also the family relationship, which may have serious long-term ramifications for both parties. In most cases the incapable person has the most to lose.

Given the vulnerable status of an incapable person, any lawyer, including those representing a SDM, have an obligation to consider how the advice they provide might impact upon the vulnerable incapable person.

Lawyers representing SDMs must also realize that within the framework of SDM/incapable person relationship, as defined by the *Substitute Decisions Act, 1992*, the SDM has no rights to protect. SDMs have only obligations toward the incapable person. It is the incapable person who has rights to enforce against the SDM. Lawyers representing a SDM therefore have a duty to remind the SDM of these obligations and must ensure that they do not encourage a SDM to take any action that would violate the rights of the incapable person or conflict with the obliga-

tions the SDM has toward the incapable person.

In general, the obligations of a SDM can be summarized as the need to:

- exercise their powers diligently and in good faith for the incapable person's benefit (s. 32. (1); s. 66. (1))
- explain to the incapable person what their powers and duties are (s. 32. (2), s. 66. (2))
- encourage the incapable person to participate to the best of their abilities in the SDM's decisions about property or personal care (s. 32. (3), s. 66. (5))
- realize the goals and wishes of the incapable person to the extent possible (s. 66. (4)).
- foster the incapable person's independence (s. 66. (8))
- choose the least restrictive and intrusive course of action that is available and appropriate (s. 66. (9)).

To the extent that the dispute with the incapable person can be traced to the failure of the SDM to live up to one or more of these obligations, the SDM's lawyer has a duty to encourage the SDM to co-operate with the incapable person's attempts to protect their rights.

When an incapable person turns to a lawyer it is generally because attempts to resolve their dispute with the SDM informally have failed. At this point, the SDM can either agree to co-operate with the incapable person's lawyer to help resolve the dispute, or they can seek legal counsel themselves. While there may be a wide range of reasons why a SDM would seek legal assistance when dealing with a conflict within the SDM/incapable person relationship, few turn to a lawyer because they want to co-operate. The four most common reasons SDMs turn to a lawyer appear to be:

1) *The SDM assumes there is absolutely no way the incapable person could ever be capable of contacting or instructing anybody, so any claims made on their behalf must be false.*

This is problematic. A lawyer representing a SDM has a duty to remind the SDM of their obligation to promote the incapable person's independence and autonomy. If a SDM has closed their mind to the possibility that the incapable person could ever be capable and refuses to support any attempts to promote or assess the incapable person's capacity, they are obviously failing to carry out one of the key

obligations of a SDM. A Lawyer representing a SDM should explain that capacity is fluid and can change over time and encourage an SDM to at least consider the prospect that the incapable person may, in fact, be capable.

B) A closely related assumption SDMs often make is that an incapable person cannot instruct counsel and therefore no lawyer can act on their behalf; any lawyer who purports to represent an incapable person must simply be taking advantage of a vulnerable person for their own personal gain. Therefore, the SDM can simply ignore them.

A lawyer representing a SDM must clarify that just because a person has been declared incapable of making personal care or financial decisions, does not mean they are incapable to instruct counsel. Individual lawyers must decide for themselves whether their client is capable to instruct them.

Lawyers representing SDM's also have a duty to inform the SDM that there are indeed many valid reasons for a lawyer to represent an incapable person and there are many perfectly competent and ethical lawyers defending the interests of incapable persons. A lawyer representing a SDM must make an effort to help the SDM understand that the incapable person may have legitimate concerns. It would be highly ethically questionable for a lawyer to allow a SDM to continue to dismiss any and all claims of the incapable person as rants prompted by an unscrupulous lawyer.

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C) The incapable person wants to engage in activities the SDM considers too risky. They cannot believe any reasonable person would argue that the incapable person should be allowed to take such risks.

Although this conflict of opinion can arise in any SDM/incapable person relationship it is most common when the SDM is also a relative. In such cases a basic conflict can arise between a family member's generally over-protective instincts and the duty of a SDM to promote autonomy and independence which can involve allowing the incapable person to take certain risks. Lawyers representing 'family member

SDMs' must be extra vigilant to ensure that they are not inadvertently helping the SDM impose the degree of control they want to exert as a family member, rather than instructing the SDM to promote independence as they are required to.

D) In some cases a SDM does not want the incapable person to ask questions or assert their capacity since they fear that their (the SDM's) actions with respect to the incapable person's property or living situation may not withstand the scrutiny of the court or the probing questions of the incapable person's lawyer.

Of course no lawyer should help a SDM hide financial fraud or other improper behaviour. The lawyer has an obligation to remind the SDM of their fiduciary obligations and the need to account for their actions. In particular a lawyer should never help a SDM undermine an incapable person's attempts to assert their capacity, and therefore keep the individual vulnerable, simply to protect a SDM from the

consequences of their improper actions. This would place the lawyer on ethical thin ice, to say the least.

When dealing with individuals with capacity issues, lawyers cannot just proceed as they do with other clients. Matters involving a person with capacity issues can present unique practical and ethical challenges. This is true whether a lawyer is representing the person with capacity issues or another party. While all lawyers have a duty to protect the interests of their client, ideally, rather than working as 'opposing counsel', lawyers representing incapable persons and lawyers representing SDMs or other involved parties should strive to work together to promote and protect the rights and autonomy interests of individuals with capacity issues.

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