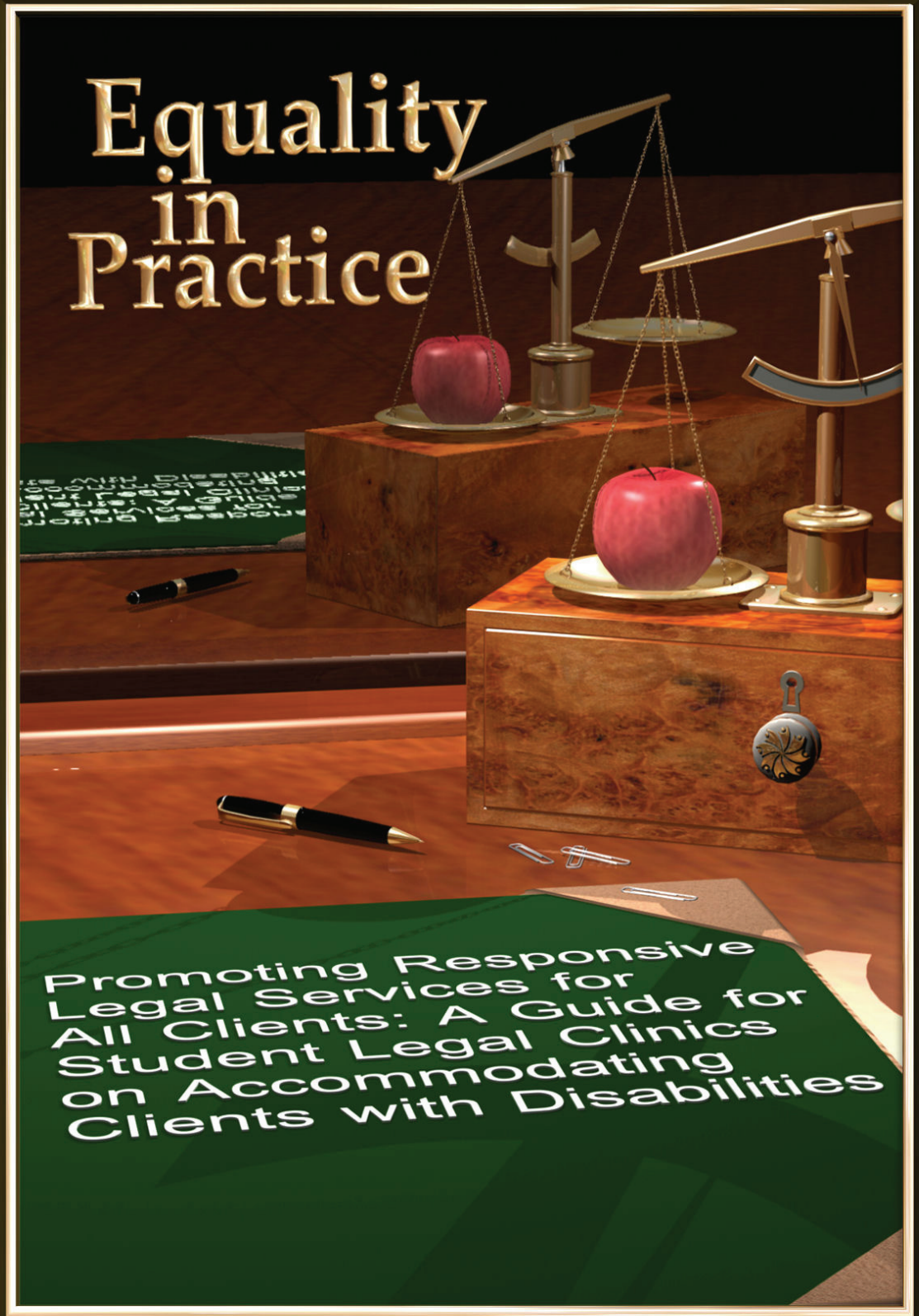
Equality in Practice



Promoting Responsive Legal Services for All Clients: A Guide for Student Legal Clinics on Accommodating Clients with Disabilities

In 2006, Reach Canada began a project entitled "Equality in Practice". It involves initiatives and products to inspire law professionals and Canadians with disabilities and their organizations to work together in the interests of equality in Canada's justice system.

In association with the Canadian Paraplegic Association and The Canadian Association of Independent Living Centres, Reach Canada has developed:

- ✓ A Handbook on Disability for Law Professionals (English and French)
- ✓ Understanding Justice — A Consumer's Guide to the System, For Canadians With Disabilities (English and French)
- ✓ A Service Provider's Companion to Disability and The Justice System (English and French)
- ✓ "Disability and Law" Resource Guide For Law Teachers (English)
- ✓ **Promoting Responsive Legal Services for All Clients: A Guide for Student Legal Clinics on Accommodating Clients with Disabilities** (English)
- ✓ Instructional Companion On Student Legal Clinic Services And Disability Issues (English)
- ✓ Audio CD (A Discussion About Justice in Canada) (English and French versions)

All of these materials are available at
www.reach.ca

Promoting Responsive Legal Services for All Clients: A Guide for Student Legal Clinics on Accommodating Clients with Disabilities

June 2007
Prepared for the Equality in Practice Project
by Virginia Bartley and Allan McChesney

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To try to ensure that we addressed real issues in a practical, accurate and current manner, the authors sought advice from several experts. Lawyers in Toronto with strong experience in serving clients having disabilities read a draft of the Guide and then assembled with the writers for intensive discussions. The reviewers' comments led to very significant refinements in the ways that we presented ideas and information in the Guide.

For their thoughtful advice we thank the following: Ena Chada - ARCH Disability Law Centre; Chantal Morton and Elisabeth Bruckmann - Parkdale Community Legal Services; Lora Patton - Community Legal Aid Services Programme at Osgoode Hall Law School; lawyers David Baker, Harry Beatty and Kate Sellar; and Bakerlaw's articling student, Georgina Stewart. Added thanks are in order to Elisabeth Bruckmann and Harry Beatty for nuggets of additional input that we incorporated into the Guide. We must as well express gratitude to the lawyers, staff and students of Queen's Legal Aid, who in May shared with the authors the first training session based on the draft Guide and on its Instructional Companion. That positive experience helped us to refine our thinking and writing.

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Preface: The Purpose And Background Of This Guide

This Guide to good practices was developed jointly by lawyers associated with Reach Canada and Queen's Legal Aid, as part of Reach Canada's Equality in Practice initiatives. Our goal was to devise guidance for students who volunteer, learn and work at student legal aid clinics. Our purpose was to influence them to provide appropriately responsive services for clients with disabilities, both now and when the students become lawyers. Delivery of "equality in practice" is promoted through several approaches taken in this Guide:

1. informing law students that a professional level of competence for lawyers (and for student caseworkers) includes striving to ensure that the legal needs of each unique client are met, including the legal needs of individuals who have disabilities;

2. informing student caseworkers that they must comply with relevant practice standards that bind lawyers, because these caseworkers are supervised by review counsel who are directly bound by law society Rules of Professional Conduct;

3. advising students that they should seek to comply with law society rules even if they did not apply to the students' clinic work, because following these rules will assist them to achieve a higher level of professionalism now and in later legal practice;

4. raising the awareness of student caseworkers about the fact that human rights legislation, law society rules and Supreme Court rulings form the basis for a lawyer's Duty to Accommodate the individual abilities and differences of clients in the delivery of legal services, including clients who face barriers that create disabling situations;

5. providing access to tools and advice that can help lawyers and caseworkers to accommodate clients and provide more responsive legal service - for instance by noting appropriate accommodations for clients' disabilities, tips on preferred language and terminology with respect to disabilities and lists of reference and advisory resources (relevant agencies, organizations, websites and publications) on disability and law issues;

6. offering training guidance (in a separate Instructional Companion) for review counsel and other supervisory and instructional staff (such as senior caseworkers and group leaders) at student legal aid clinics;

7. providing detailed reference materials for caseworkers respecting social assistance areas that are of concern to large numbers of clinic clients - specifically on laws and procedures pertaining to the securing of Ontario and Federal disability benefits.

Development of this Guide benefitted from expert reviews during the drafting process, primarily by reviewers from the following four categories:

- members of Reach Canada's Project Advisory Group (PAG) who are senior staff or board members of disability consumer organizations
- members of the PAG working with public sector organizations that include "disability and law" as one focus of their work
- members of the PAG who are lawyers and officials with (continuing) professional experience on disability-related matters in legal aid offices and clinics in the Ottawa area
- lawyers with (continuing) expertise on disability-related matters in legal aid clinics and/or in private practice in Toronto

The style of presentation used in the Guide is similar to that employed in the general reference handbook that Queen's Legal Aid makes available to its caseworkers. Of course the authors of the current Guide trust that the Guide's substance and format will be useful for training and reference purposes at all student legal clinics in Ontario, including the law clinic overseen by Queen's law faculty. We are encouraged to think so by the positive comments on the text's utility offered by lawyers from other clinics whom we consulted during reviews of our draft work. In the context of a particular law clinic, occasional supplementary sentences may be needed to make our words more closely helpful, either directly or by analogy. For instance, in Part One of this Guide we focus on student caseworkers, yet at many legal clinics casework is (also) done by community legal workers or other paralegal staff. As another example, Part Two of the Guide gives considerable detail on the law and procedures relevant to obtaining Ontario and Canadian disability benefits. We mention many forms and letters. Clinic supervisors who distribute or adapt Part Two for their clinic's purposes will no doubt wish to remind caseworkers about where in their own law clinic one can find electronic and physical precedents or templates for the documents described.

Review counsel, caseworkers and other clinic personnel interested in the subject domains covered by this Guide may wish to examine the following additional Reach Canada publications. They are (or soon will be) available through www.reach.ca:

1. "Disability and Law" Resource Guide for Law Teachers (Chapter 6)
2. A Handbook on Disability for Law Professionals
3. Understanding Justice - A Consumer's Guide to the System, For Canadians With Disabilities
4. A Service Provider's Companion to Disability and The Justice System

PART ONE: PROMOTING RESPONSIVE SOLICITOR/CLIENT RELATIONSHIPS IN THE STUDENT LEGAL AID CLINIC

INTRODUCTION

Although law studentt is important for the caseworkers to be aware of professional duties that will soon fully apply to them in legal practice. Stipulated case handling and oversight systems at the clinic are meant to ensure that matters are handled as professionally as possible. Clinic caseworkers should therefore act as if they are bound directly by the law society rules that are outlined below. In most instances, except where a rule would patently apply to only a qualified practising lawyer, caseworkers do have an obligation to abide by these rules. This duty arises through participation in the clinic and through the supervisory roles played by its review counsel.

Note as well that the observations made immediately below about lawyers in society are applicable either directly or by analogy to law students as caseworkers.

THE SOLICITOR IN THE SOLICITOR/CLIENT RELATIONSHIP

Lawyers play a powerful role in our society. They often play that role for people who are themselves powerful, acting as spokespeople for forces in the financial, commercial, educational and political spheres. Importantly however, lawyers (and sometimes student caseworkers) can also perform that role for people who are relatively powerless or in marginal situations. Lawyers (and caseworkers) can give voice to people who are affected adversely or even oppressed by societal forces, whether individually or through systemic causes.

To be truly professional, lawyers must be aware of much more than law; and such awareness and related action is demanded by the profession's governing bodies. Acting as spokespeople, giving voice

– if lawyers are to do these things fully, genuinely and effectively – they need to bring to their work a keen understanding of the social hierarchy and systems within which they operate. They need to be alert to the place that the legal profession occupies within the hierarchy. Lawyers need to recognize that they can play a role in creating, maintaining or breaking down barriers for their clients and for others who seek justice and fairness. They need to sharpen and sustain their awareness of wider issues that may affect their clients – issues related to gender, race, age, literacy, poverty and disability, to name only a few. They need to know how such issues often intersect to create complex, interconnecting consequences in their clients' lives – how, for example, poverty and disability are often closely intertwined, or race and poverty.

As officers of the court, as well as standard-bearers for justice and equality, lawyers need to be mindful of and vigilant in complying with articulated standards of professional practice. Understood richly, these standards provide tremendous guidance to lawyers on how to meet their obligations to be respectful of, and responsive to, every one of their clients.

In Ontario as in many places, law is a self-governing profession. So too is medicine, as are a small number of other identified professions. As members of a self-governing profession, lawyers have a regulatory and oversight body, one supported by annual fees and responsible for governing lawyers in their work. The body for lawyers in Ontario is the Law Society of Upper Canada which, while regulating lawyers' work, also offers guidance to lawyers and advises or assists members of the public who deal with lawyers. Should relevant difficulties arise, the Law Society also acts as a monitoring or professional disciplinary body.

The Law Society of Upper Canada has issued and continually updates Rules of Professional Conduct. These rules articulate standards of professional practice, primarily pertaining to the solicitor/client relationship. **Ontario lawyers are required to abide by the Rules of Professional Conduct. It is important to note that lawyers must also ensure that students and staff working under their supervision abide by these rules. Naturally, this includes caseworkers in student legal aid clinics.**

THE SOLICITOR/CLIENT RELATIONSHIP IN THE STUDENT LEGAL AID CLINIC CONTEXT

Review counsel, who act as clinic supervisors, are the lawyers or "solicitors" in solicitor/client relationships formed at the legal aid clinic. Thus clinic clients are actually clients of review counsel and not of student caseworkers. It is review counsel who are ultimately responsible for ensuring that legal services provided to clients meet the standards of professional conduct stipulated by the Law Society of Upper Canada, and it is review counsel who bear accountability for any failure to meet such standards.

Of course, it is student caseworkers who usually deal directly with clinic clients, providing legal services while pursuing clinical learning. Caseworkers here perform the work that falls to lawyers in the course of most solicitor/client relationships. If their work falls short of meeting standards of professional conduct there can be devastating consequences. For clinic clients, the consequences can include loss of an important right or benefit. For review counsel, the consequences can include a complaint to the Dean of the law school or to the Law Society of Upper Canada itself. If the complaint is a valid one, and if standards have not been met, then professional discipline can follow.

It is for these reasons that student caseworkers should be alive to the attributes of and obligations attached to the solicitor/client relationships, which bind them through review counsel. Not

coincidentally, it is for these reasons too that there are so many checks and balances, procedures and reports required by oversight activities at the clinic.

At this legal aid clinic, we want to serve clinic clients as well as possible and to teach student caseworkers about the roles and responsibilities they will assume when they become lawyers and begin to serve their own clients. We also want to demonstrate and help caseworkers learn the attributes of client-centred lawyering. This involves building effective solicitor/client relationships with clients by really listening to them. It includes working to understand the contexts in which clients' legal issues are situated, helping them communicate their needs and wishes within those contexts, appreciating what they want to achieve, and honouring their instructions. We want to encourage a nuanced understanding of the privileged positions that law students and lawyers occupy, as well as of the responsibilities that flow from these positions.

THE CLINIC CLIENT IN THE SOLICITOR/CLIENT RELATIONSHIP

As will be stressed repeatedly in this Guide and throughout caseworker training at the clinic, a lawyer must offer each and every client the best possible professional service. In doing so, the lawyer must take careful account of the client as an individual, in profound and far-reaching ways. We expect each caseworker to take this obligation to heart in dealings with clinic clients – as well as in dealings with people seeking legal help who may or may not become clients.

Of course, clients come to lawyers with a variety of legal issues. They also arrive with a variety of personal backgrounds, personal skills and abilities and personal aspirations. It is important to be aware that a client's legal issue can stand alone within the context of the client's life but it can also be part of a whole series of issues that connect with each other in direct and indirect ways. This is

particularly true in a clinic that serves clients who frequently present with complex and cross-cutting issues related to, for example, poverty, disability, ethnicity, race or gender.

It is also important to be aware that a client will bring with him/her the effects of all previous life experiences. Partly as a result of these experiences, clients who appear to share similar legal problems will have very individualized concerns and expectations, as well as highly individualized capacities to understand their legal problems and to convey instructions concerning them. Culture, language, literacy, gender, age, disability, trauma, anxiety, depression – all of these things and more can impact upon interactions within a solicitor/client relationship.

Student caseworkers are reminded that adaptations in practices and procedure need to be made to accommodate individual clients, including those with disabilities. These adaptations constitute neither changes to the essential nature of the solicitor/client relationship nor changes to the professional obligations associated with it. The fundamentals of the relationship remain the same. They become refined in their application, but only as individual circumstances warrant. Thus, the manner in which a lawyer enters and maintains (or ends) a solicitor/client relationship, and delivers legal services within it, will have to be adapted to ensure that the lawyer (or a student caseworker supervised by the lawyer) genuinely fulfills his/her role for each client.

Examples of adaptation to fit an individual's situation are given throughout this Guide. Many examples given here of how lawyers can adapt are related to providing legal services to clients who have disabilities. These examples are often generally applicable to a wide variety of clients' circumstances (for instance arranging the timing of meetings to be more convenient for the individual client). Moreover, since the law clinic serves many clients with disabilities, student caseworkers need to be alert to their foreseeable potential needs.

Further, as caseworkers will see below, the incidence of disability in society is high and most if not all lawyers will serve a number of clients with disabilities during the course of their professional work.

The Client with a Disability:

There are a many legal definitions of disability in Canada. The definition can change quite dramatically according to context. For example, human rights legislation contains its own definitions, as does legislation providing for disability benefits or specialized support programs. Further, the phrase "a client under a disability" has a specific meaning in the context of instructing counsel and managing personal affairs. For the purposes of the present guidebook, a client with a disability is one who has a condition that results in a functional limitation.

Definitions of disability aside, the statistics about people who identify themselves as having disabilities can be illuminating. Statistics Canada reported that in 2001-2002 there were 3.6 million Canadians (12.4% of the population) who self-reported some level of disability. As the incidence of disability rises with age, and as the population of Canada is aging, this number and proportion is only expected to increase. Indeed statistics reveal that, through accident, illness and the normal progression of aging, a very large percentage of us will, at some time in our adult lives, acquire a temporary or more permanent disability. It is important to be alert to the existence of disabilities, to their effects upon the individuals that they affect personally and to societal and other barriers that can turn a difference in abilities into a "disability" for an individual.

While most disabilities reported in 2001-2002 involved physical conditions, more than half a million Canadians reported having psychiatric disabilities. Data collected made it clear that people with disabilities were more likely than non-disabled people to have limited education and low employment rates, and that employed people with disabilities were more likely to have limited incomes. Data collected also revealed that women with disabilities were more adversely

affected economically than men with similar disabilities. Not surprisingly, people with multiple disabilities were more adversely affected again.

A client's condition can have wholly "physical" or wholly "mental" components, but can often have both in some combination. Of course, the nature and extent of the client's functional limitation depends upon the nature and extent of the condition. It also depends upon barriers encountered by the individual - be they concrete and physical hurdles or social barriers – and whether appropriate accommodations are made to prevent or remove such barriers.

Finding examples of concrete and physical barriers is easy:

- buildings and offices that are inaccessible to wheelchair users present an obvious physical barrier;
- counters that are too high for wheelchair users, and corridors that are too narrow for them, also present obvious physical barriers;
- heavy doors can present a physical barrier to wheelchair users, just as they can present a similar barrier to people with physical impairments that affect use of their arms or hands;
- telephone services that are perfectly sufficient for non-disabled people are not adequate for people with hearing disabilities;
- oral directions and announcements over intercom systems can also present a physical barrier to people with hearing disabilities;
- written correspondence that is perfectly sufficient for non-disabled people is not adequate for people with vision disabilities or with certain other print-related disabilities;
- traffic signals without auditory components present an additional physical barrier to people with vision disabilities;
- confusing, tiny or otherwise inadequate signage presents a physical barrier to people with partial vision and to people with intellectual disabilities, and

- buildings or offices where scented products are in common use present a physical barrier to people with chemical sensitivities.
- The list of examples of concrete and physical barriers can go on and on. Finding examples of social barriers is also easy.
- prejudice and fear often greet people with intellectual and psychiatric disabilities, manifesting themselves in differential treatment and interfering with the ability of many individuals to participate in the activities of daily life;
- insensitivity to, indifference about and lack of planning for the implications of disabilities make participation in the activities of daily life difficult for nearly all people with disabilities;
- many factors can have a negative impact upon a person with a disability who is seeking employment or services, such as (1) policies that limit the flexibility of work hours or office hours, (2) practices and procedures that rely heavily upon complex documentation and tight time lines, and (3) uninformed or negative attitudes of frontline staff and/or their managers.

All of these barriers represent failures to accommodate, and accommodation is a duty to be taken very seriously, particularly by a lawyer. Accommodation can be understood as the adjustment of a rule, practice, condition, or requirement to take into account the specific needs of an individual or group. To some degree it requires treating individuals differently.

Examples of appropriate specific accommodations that lawyers can provide to clients having disabilities may be found in the following sources:

- under the heading 'Communicating with Clients', below
- in Chapter 6 of "Disability and Law" Resource Guide for Law Teachers (Reach Canada, 2007) at www.reach.ca

- in Providing Legal Services to Persons with Disabilities (ARCH Disability Law Centre) at www.archdisabilitylaw.ca
- in part 4 of a booklet developed by the Community Legal Aid Services Programme at Osgoode Hall Law School (CLASP) – Legal Aid Ontario Accessibility Manual: Making legal services available for clients living with physical and/or mental disabilities (This publication came to our attention as we neared completion of the present Guide.)

The Duty to Accommodate:

➔ No one believes me.

➔ No one will listen to me.

➔ People want to talk about my health status even if it is not relevant to my legal problem.

➔ No one will provide me with the service I have asked for – in fact, they make it difficult to ask for or obtain service.

➔ People feel uncomfortable around me and try to refer me somewhere else.

➔ People assume that I will be a problem client, demanding and hard to serve.

➔ People try to refer me to medical professionals when I have asked for legal assistance.

➔ People unfamiliar with me dismiss my concerns - because they think I am crazy.

➔ People feel uncomfortable around me and try to avoid interacting with me.

➔ People assume that I will be difficult to serve so I get passed from one service provider to another.

➔ People believe that I am not intelligent because of a mental health concern.

- ➔ People believe that I am not capable of making decisions for myself.
- ➔ People assume that I will want them to be more than law caseworkers – they assume I will be overwhelming, needy, and exhaust their resources.
- ➔ People are afraid of me. People assume I am volatile and potentially violent.
- ➔ People assume that I cannot control my own behaviour.

These are just some of the experiences of clients with disabilities (and of many non-disabled people) who seek legal assistance. Among other things, the listed examples represent the personally-felt effects of failures to accommodate individuals.

In federal, provincial and territorial sectors, legislation and administrative law regimes have long been established to combat discrimination, through the Canadian Human Rights Act and through provincial and territorial human rights statutes that address areas within provincial or territorial jurisdiction.

The Canadian Charter of Rights and Freedoms (the Charter) also generally proclaims civil, political and other rights for all Canadians. Section 15 provides a specific proclamation that every person in Canada – regardless of race, religion, national or ethnic origin, colour, sex, age or physical or mental disability possesses a group of specified "equality rights". Governments and public agencies must not discriminate on any of the section 15 bases in the application of laws or in the delivery of services.

The Supreme Court of Canada has confirmed that pursuant to the Charter the responsibility to accommodate for disabilities applies not just to government but also to public sphere employers and to public sphere organizations providing services to the public. The Court has also expanded and strengthened the meaning and applicability of the "duty to accommodate".

In Ontario, the Ontario Human Rights Code provides that people with disabilities have the right to be free from discrimination in regard to services and facilities (and other matters). In offering legal services, therefore, lawyers, lawyers' offices and student legal aid clinics in Ontario should offer those services in a manner that precludes discrimination against people with disabilities. They should (and ARCH Disability Law Centre suggests that they must) actively accommodate clients up to the point where doing so would actually cause "undue hardship".

The Extent of the Duty to Accommodate:

For service providers, what is the extent of the duty to accommodate? The Ontario Human Rights Commission has stated its views on the matter through a document called "Policy and Guidelines on Disability and the Duty to Accommodate". It suggests that service providers should balance the following factors: (1) the appropriateness of different accommodation options for an individual, (2) the dignity implications of those options for the individual, and (3) their cost and their health and safety implications.

Note again the emphasis upon the individual. Accommodation is in its essence a process of considering the needs of a particular person having a disability with the purpose of providing equal access to services – as much as possible and short of undue hardship. Undue hardship is more than mere inconvenience. While unusual risks posed by an accommodation option or its effects on employees, other clients or overall agency administration are relevant considerations, the fact that the accommodation option requires expenditure of effort and financial resources does not excuse inaction.

For lawyers in Ontario, the Law Society of Upper Canada specifically addresses the issues of discrimination and accommodation in Rule 5.04. This rule clearly points out a lawyer's duty to respect the requirements of human rights laws. The lawyer has a specific

responsibility to honour the obligation not to discriminate in employment decisions or in professional dealings on the grounds of race, ancestry, place of origin, colour, ethnic origin, citizenship, creed, sex, sexual orientation, age, record of offences, marital status, family status or disability. The lawyer must also ensure that no one is denied services or receives inferior services on the basis of any of these grounds.

The commentary to Rule 5.04 reveals that the Law Society of Upper Canada has adopted a definition of discrimination expressed in rulings by the Supreme Court of Canada – differentiation on prohibited grounds. This definition includes differentiation through a rule, requirement or expectation that, while not intended to be discriminatory, can result in adverse effect discrimination. The commentary also makes it clear that a lawyer must first determine whether a rule, requirement or expectation resulting in adverse effect discrimination is reasonable and bona fide – imposed in good faith and both strongly and logically connected to business necessity. If so, then the lawyer must go on to determine whether the individual disadvantaged by the rule, requirement or expectation can be accommodated without causing undue hardship.

Again, emphasis is placed upon the individual. A client who has a disability will experience functional limitations quite specific to his or her unique condition and circumstances. For that reason, a lawyer, law office or legal clinic trying to accommodate the client must individualize efforts to accommodate. ARCH Disability Law Centre advises that, since accommodation is a duty, the expense of accommodation should be borne by the lawyer.

Disability-Related Resources:

This Guide provides only basic information about a solicitor/client relationship in which a client has a disability. Caseworkers who are interested in more details should become familiar with the website for Reach Canada, an organization that promotes equality and justice for persons with disabilities (including law students with disabilities),

through public and professional legal education, referral to lawyers and other means. Its website is: www.reach.ca. Caseworkers should certainly also become familiar with the website for ARCH Disability Law Centre, a specialty legal clinic operating out of Toronto and funded by Legal Aid Ontario. Its website is: www.archdisabilitylaw.ca. These websites provide valuable links to other resources for a lawyer seeking to provide either direct representation to a client with a disability, or simply effective referral advice. ARCH Disability Law Centre and some of its staff (present and former) have been very helpful in providing information and ideas for this chapter. So too have professional colleagues at Parkdale Community Legal Services, CLASP and other legal clinics in Ontario.

Student caseworkers can also generally refer to the following list of helpful websites, which has been adapted from Reach Canada and ARCH resource lists:

- Accessibility Ontario: www.gov.on.ca/citizenship/accessibility
- Advocacy Centre for the Elderly (ACE): www.advocacycentreelderly.org
- Canadian Association for Community Living: www.cacl.ca
- Canadian Association of the Deaf: www.cad.ca
- Canadian Council for the Blind: www.ccbnational.net
- Canadian Association of Independent Living Centres (CAILC): www.cailc.ca
- Canadian Council on Rehabilitation and Work: www.ccrw.org
- Canadian Hard of Hearing Association: www.chha.ca
- Canadian Human Rights Commission (CHRC): www.chrc-ccdp.ca
- Canadian Mental Health Association: www.cmha.ca

- Canadian Paraplegic Association (CPA): www.canparaplegic.org
- Council of Canadians with Disabilities: www.ccdonline.ca
- DAWN Ontario: Disabled Women's Network Ontario: www.dawn.thot.net
- Disabled Peoples International: www.dpi.org
- Enable Link/Canadian Abilities Foundation: www.enableink.org; www.abilities.ca
- Income Security Advocacy Centre (ISAC): www.incomesecurity.org
- Legal Aid Ontario: www.legalaid.on.ca (See particularly the specialized clinics.)
- Learning Disabilities association of Canada: www.ldac-taac.ca
- Learning Disabilities Association of Ontario: www/.ldao.ca
- Little People of America: www.lpaonline.org
- Mental Health Services Information Ontario: www.mhsio.on.ca
- Ministry of Community and Social Services: www.mcss.gov.on.ca
- National Educational Association of Disabled Students (NEADS): www.neads.ca
- Ontario Association of the Deaf: www.deafontario.ca
- Ontario Human Rights Commission (OHRC): www.ohrc.on.ca
- Persons with Disabilities Online (Government of Canada): www.pwd-online.ca
- Public Legal Education and Information Links: www.justice.gc.ca/en/ps/pad/resources/plei.html

While being careful to protect client confidentiality, caseworkers (or clinic review counsel) may wish do research online and then contact a locally-based agency (by phone or e-mail) for advice on serving a client having a disability. To give just two examples, in major cities there is probably a local affiliate of the Canadian Paraplegic Association and of the Canadian Association of Independent Living Centres.

Of course, individual enquires and a good web search will reveal many, many other websites and agencies, some of which will be very helpful in a particular client's situation.

THE SOLICITOR/CLIENT RELATIONSHIP ACCORDING TO THE LEGAL PROFESSIONS' RULES

A solicitor/client relationship must be a sound one for a lawyer to fulfill his or her proper role in it. It must be created and maintained according to the standards of professional conduct detailed in the rules that apply to the lawyer's practice. All lawyers should be familiar with the rules that govern them. We expect student caseworkers to become familiar with them too, as they are self-evidently relevant to work in a student legal aid clinic. Professional rules differ slightly from jurisdiction to jurisdiction, although they evidence much commonality. As noted at the beginning of this Guide and immediately above, for lawyers in Ontario the Rules of Professional Conduct are operative, and these can be found at www.lsuc.on.ca.

The Canadian Bar Association, a voluntary organization for lawyers (and law students) across the country, also has its own Code of Professional Conduct promoting national standards of professional conduct. These standards are very similar in content to the standards articulated by all provincial law societies. They can be accessed through www.cba.org.

The Nature of the Relationship:

Simply put, the role of a lawyer in a solicitor/client relationship is to gather all the facts pertinent to a client's legal situation, to analyze those facts in light of relevant statutory and common law and then to propose options for action that could make the situation better from the client's perspective. Once the client selects a particular action, the lawyer must initiate it and follow it through – keeping the client advised as steps are taken and aware of new options for action as these arise. An understanding of this role by all parties to it – of its nature, its scope and its limitations – is essential to its proper functioning. In the clinic context, understanding of this role by student caseworkers is also key to proper functioning.

General Principles of the Relationship:

In Ontario, the Rules of Professional Conduct acknowledge that rules cannot specifically address every situation that may arise in practice and thus must be understood broadly. A provision of these rules stipulates that they must be observed in spirit as well as in letter.

Rule 1.03 reveals general principles about standards of professional conduct and delivery of legal services. According to this rule, a lawyer is generally responsible to practise and discharge his/her responsibilities "honourably and with integrity". **Importantly, the rule provides that since a lawyer occupies a position of relative privilege in the legal and justice systems, s/he has a special responsibility to recognize the diversity of the Ontario community, to protect the dignity of individuals and to respect human rights laws.**

Rule 3.01 provides that a person who needs the services of a lawyer should be able to find one with a minimum of difficulty or delay. It also provides that while a lawyer has a general right to refuse to represent a client, this is a right to be exercised prudently, particularly if will likely be difficult for the client to obtain legal

services elsewhere. If, after meeting the client, the lawyer determines that s/he cannot assist, then the lawyer should assist the client with helpful referrals.

Taken together, these two rules and Rule 5.03 exhort lawyers to take on clients and cases to the fullest extent possible, even if doing so might cause the lawyer to rethink how s/he can effectively deliver the appropriate legal services. As has been noted above, difficulties with accommodation cannot sustain a decision to refer a client elsewhere. On the other hand, for example, a lawyer's lack of expertise or genuine lack of availability to assist the client can be appropriate reasons to refer a client elsewhere.

Establishing the Relationship:

Rule 1.02 cautions that it is not always clear when a solicitor/client relationship is formed. It can be formed without much formality, and neither an express understanding nor an exchange of money is required. An exchange of information alone can create it, or can at least create some obligation of confidentiality for a lawyer involved in the exchange.

The question of whether a solicitor/client relationship has been formed is an important one because a number of professional obligations flow from it. These include, as you will see below, obligations related to confidentiality, disclosure, conflicts of interest and withdrawal of services. Caseworkers must be of course become familiar with the procedures through which ongoing solicitor/client relationships are established between review counsel and our clinic's clients.

Trust and Confidentiality in the Relationship:

When considering a solicitor/client relationship, it is essential to take note that it is built on trust. Full and unreserved communication is essential, as a client must be free to tell a lawyer all the facts that

are relevant to a particular legal situation. In turn, the lawyer must be free to convey legal advice to the client in a complete and forthright manner.

To foster full and unreserved communication in solicitor/client relationships, lawyers are governed by specific rules providing that information divulged by a client must be maintained in strict confidence. Only a client can waive the protection afforded by rules about solicitor/client confidentiality. A lawyer cannot.

Rule 2.03 provides that a lawyer may disclose information divulged by a client only when the client impliedly or expressly authorizes this, or when the law requires it.

Unless a client directs otherwise, authorization to disclose can be implied when revelation of information is necessary during preparation of court documents or during court proceedings. It can also be implied when the client's lawyer works with other lawyers, students and staff and routinely shares information with them.

Authorization to disclose is express when, after the client receives enough information to make an informed decision, s/he specifically consents to revelation of information. Disclosure required by law is essentially limited to situations of imminent risk of death or serious bodily harm, although Rule 2.03 does provide additional guidance about other, very limited exceptions to the general tenet of non-disclosure.

Professional Competence within the Relationship:

Simply put, a lawyer is expected to deliver legal services to a client in a competent manner. This does not mean that the lawyer needs to be perfect, only that s/he has relevant skills and applies them on the client's behalf.

Rule 2.01 provides that a competent lawyer's skills include, among other things:

- knowing or learning the statutory and common law relevant to a client's legal situation;
- investigating the facts and issues involved;
- communicating regularly with the client in a manner that is appropriate to the client's age and abilities;
- describing options for action and their consequences to the client;
- implementing instructions received from the client through applying essential tools of the profession – including research, analysis, writing and drafting, negotiation, alternative dispute resolution, advocacy and general problem-solving;
- performing legal services for the client conscientiously, in a timely and cost-effective manner;
- recognizing any gaps in abilities to serve the client's needs and taking appropriate steps to fill those gaps;
- pursuing professional development to maintain and enhance legal knowledge, and
- adapting to changing professional requirements, standards, techniques and practices.

The list of skills included in this rule is an important one. It clearly alerts a lawyer to the obligation of staying current in legal knowledge. It alerts the lawyer to the obligation of treating his/her client as an individual, and to adapt to the client's unique needs when providing legal services. It also alerts the lawyer to the obligation of considering whether s/he can effectively assist the client before agreeing to do so. These obligations are, as the commentary to the rule points out, ethical considerations related to entering a retainer (which, simply put, is a contract for legal services).

Honesty and Candour within the Relationship:

The full and unreserved communication necessary in a solicitor/client relationship is also addressed in Rule 2.02, which provides that a lawyer must be honest and candid in advising a client. The rule goes on to explain that the lawyer must clearly disclose what s/he honestly thinks about the client's legal situation, the options for action open to the client and the consequences of selecting each of those actions. In addition, the lawyer must advise the client to settle or compromise when reasonably possible, and to attempt alternative dispute resolution when appropriate.

The responsibility of a lawyer is not, therefore, to tell a client what s/he wants to hear. It is not to tell the client what s/he must do. Rather, it is to take in the client's situation genuinely, listen to what the client wants, give straightforward advice considering all the facts and the law and then take action as instructed.

Conflicts of Interest within the Relationship:

Related to the issues of maintaining trust and assuring confidentiality in a solicitor/client relationship is the issue of avoiding conflicts of interest. A client is entitled to receive legal services from a lawyer without conflicts affecting those services.

Rule 2.04 defines a conflicting interest as (1) an interest that would be likely to affect a lawyer's judgment about or loyalty to a client, or (2) an interest that the lawyer might be prompted to prefer to the client's interest. According to this rule, a conflicting interest can be a relationship with the client or with others that has the potential to interfere with the duty to provide objective, disinterested and professional legal services to the client.

It is thus apparent that the spectre of a conflict of interest must be carefully assessed whenever a lawyer considers acting against a former client. Indeed, it must be carefully assessed even when no retainer was formally entered but the lawyer received confidential information from the potential client.

Because a legal aid clinic often offers the only available source of legal assistance for locally-based clients, from time to time questions about conflicts do arise. Our screening procedure should ensure that if a potential conflict exists, it is identified as early as possible and is carefully assessed by review counsel before further actions are taken.

To avoid a conflict of interest, a lawyer (or law clinic) should not represent more than one side in a dispute or act in a matter where there is or could be an incompatible interest.

Just as a client can waive the protection afforded by rules about solicitor/client confidentiality, s/he can also waive the protection afforded by rules about conflicts of interest. The client, after receiving enough information to make an informed decision, can consent to being represented by a lawyer whose other or previous work raises the possibility of such a conflict.

The important thing for a lawyer to remember is to consider the rules and seek advice as necessary before acting in cases where a conflict of interest is possible. The Law Society of Upper Canada has a special department staffed to answer vexing questions about interpretation of the rules. Senior, experienced lawyers are also an invaluable source of guidance.

Withdrawing from the Relationship:

Representation arising from a solicitor/client relationship can end for any number of reasons. In the most positive circumstances, a solicitor/client relationship can end because a legal situation is fully and satisfactorily resolved. In equally positive circumstances, it can end because of changes in the lives of the parties to it – a client moves or a lawyer is appointed to the Bench. In less positive circumstances, it can end because a conflict of interest manifests itself and, in truly negative circumstances, it can end due to loss of the mutual confidence that is its foundation.

There are rules governing how a lawyer can withdraw from representing a client, just as there are rules governing how the lawyer must act while entering or working in a solicitor/client relationship.

Rule 2.09 provides that a lawyer can withdraw from representing a client only for good cause and upon notice to the client that is appropriate in the client's circumstances. The client, on the other hand, has the unqualified right to terminate a solicitor/client relationship at will.

"Good cause" is an open sort of term, but the commentaries to Rule 2.09 provide that deceit by a client could constitute good cause, as could refusal by the client to accept and act upon a lawyer's professional advice. While the client is free to choose his or her own course of action, and indeed must choose it, there are occasions when the client's choice indicates a complete breakdown in a solicitor/client relationship and the lawyer must then terminate it. Lack or loss of the client's capacity to instruct counsel could constitute good cause, but difficulty in accommodating the client would not.

"Appropriate in the client's circumstances" is another open sort of term and subject to interpretation. Generally, a lawyer cannot withdraw from representing a client when doing so would be

tantamount to deserting the client at a critical stage, or to putting the client in a situation of disadvantage or peril. Specifically, the lawyer must do as much as possible to ensure that the client facing a criminal trial does not do so unrepresented or represented by counsel who lacks sufficient preparation time.

A lawyer should not make the reasons for withdrawing from representing a client publicly known. This holds true in criminal and civil matters. Active representation may cease, but solicitor/client confidentiality remains very much alive. When the lawyer withdraws from representing the client, s/he is not freed from the responsibilities associated with confidentiality and conflicts of interest. These are ongoing matters, subject to the rules governing the lawyer's practice.

THE SOLICITOR/CLIENT RELATIONSHIP IN PRACTICE

It is worth repeating what was stated above: the role of a lawyer in a solicitor/client relationship is to gather all the facts pertinent to a client's legal situation, to analyze those facts in light of relevant statutory and common law and then to propose options for action that could make the situation better from the client's perspective. Once the client selects a particular action, the lawyer must initiate it and follow it through – keeping the client advised as steps are taken and, as well, about new options for action as these arise. **Of course, the role of a caseworker in a student legal clinic is to stand in for a lawyer in direct dealings with a client, but working under close supervision from the lawyer at all times.**

Note the operative words "propose" and "from the client's perspective" in the previous paragraph. A lawyer must first understand a client's situation as fully as possible, then describe the choices open to the client (including doing nothing), and explain the consequences of those choices. However, it is the client and the client alone who must select the action to be taken.

While a solicitor/client relationship is reasonably simple to describe, it can be difficult to communicate its attributes to a client. It can be equally difficult to maintain on a day-to-day basis in practice.

When first meeting with a client, a lawyer should ensure that the client is truly aware of the nature, the scope and the limitations of a solicitor/client relationship. Some clients understand this quickly and well. Others do not. It is important to be clear and straightforward about mutual expectations and to revisit these as often as necessary for an effective and productive ongoing association.

For lawyers in Ontario, guidance and detailed information about practice issues are available from the Law Society of Upper Canada at www.lsuc.on.ca. The Society's Rules of Professional Conduct are accessible through this website, as is its Member Resource Centre, which offers practice management tools, including practical advice concerning ethical responsibilities. The Lawyers' Professional Indemnity Company (LAWPRO) offers additional practice management tools through "PracticePro". This can be accessed at www.lawpro.ca. Caseworkers should be familiar with at least the concrete matters noted below, and are encouraged to log on to these websites for additional information.

Screening Clients:

Each law office and student legal aid clinics, like ours, has its own specific procedures for screening clients. A lawyer (or clinic), when approached by a potential client, must decide very early whether or not to assist him/her. Before agreeing to assist, the lawyer (or caseworker) should interview the potential client carefully, making it clear that having the interview is not tantamount to agreeing to assist the client, and that a decision about whether to assist will be formally conveyed once the interview has been completed.

A good initial interview with a potential client allows a lawyer to obtain as much information as possible to determine if s/he can competently perform the work required. The interview allows the lawyer to appraise the nature and scope of the client's legal situation, to assess the legal knowledge and skills needed to meet the client's needs, and to consider potential conflicts of interest. It allows preliminary discussion about the client's hopes, the lawyer's prospective services and the costs of proceeding.

In essence, the screening process that is effected through an initial interview is a mutual vetting one. But it is also more than that. It is a process through which essential aspects of an ongoing solicitor/ client relationship can be discussed. Some of these aspects will doubtless later form part of a retainer.

Accommodating the needs of any client, including a client with a disability, can be fruitfully discussed during an initial interview – not because the fact that the client will need accommodation is relevant to the lawyer's decision about entering a retainer, but because delivery of professional legal services by the lawyer must be done in a way that meets the client's needs.

A client with a disability is best placed to know about any accommodation that s/he needs. If the disability is manifest in some way during an initial interview, a lawyer should ask about accommodation. While the lawyer should make inquiries in a sensitive manner, s/he should be as straightforward as possible. The goal is an open, candid and full discussion of accommodation needs and options.

There are a number of questions that a lawyer can ask when initially interviewing a client with a disability, or indeed any other client. The list of relevant questions will be dictated by the client's circumstances, but can include:

- If the client has a disability, how does the client prefer to be described vis-à-vis his or her disability? (See "A Caution About Language", below.)
- If the client has a disability, does s/he need to meet outside the office? (This question can be equally relevant to the client with child care issues, or to the client with other issues affecting his/her ability to travel to meet the lawyer.)
- Are there circumstances affecting the client that make it necessary to take breaks during appointments, or to have more and shorter or longer and fewer appointments?
- If the client has an intellectual disability, for example, or low literacy levels, does she or he need more time to read documents, digest information or consider options?
- Are there circumstances affecting the client that make it necessary to convey information orally as well as in writing?
- What technological aids could assist the client in his or her dealings with the lawyer?
- Are there circumstances affecting the client that might impinge upon his/her ability to provide full information, understand options for action and then issue clear instructions? If so, how can the lawyer assist in making the process as comfortable and unproblematic as possible?

A lawyer screening a client also has to consider how resolution of the client's legal situation might affect other aspects of the client's life. This is true whether the client has a disability or not. As an example, for the client with a disability, his/her tax or estate position might change as a result of receiving disability income support. As another example, the client who is charged with a criminal offence and has an intellectual difference that may be considered a "disability" might have a defence argument available about criminal responsibility in law. But a finding of "not criminally responsible" has

unique and long-range implications. The lawyer must be alert to such possibilities and consider them when deciding whether s/he can effectively assist the client.

If, after initially interviewing a client, a lawyer feels that s/he lacks the requisite legal knowledge (or experience) to assist the client, then of course the lawyer should refer the client elsewhere. The lawyer should make a sincere effort to provide specific referral advice so that the client can move on to obtain other assistance with minimal wasted effort.

Note that some student law clinics (including Queen's Legal Aid) have a policy of not generally providing legal advice or assistance to a client who has a severe mental condition, unless it becomes clear that the client cannot obtain assistance elsewhere – either through a member of the local Bar or from a local community legal clinic. Some clinic supervisors (including review counsel at Queen's law faculty) believe that the client will be best served by face-to-face dealings with a lawyer having more expertise and experience in this area. If a student caseworker at a clinic thinks that a client (or, during screening, a potential client) may have a severe mental disability, it is in any case prudent for him/her to consult review counsel immediately. Depending on clinic policy, review counsel may contact the Area Office of Legal Aid Ontario or another local legal clinic to assist the client in securing other legal representation. Of course, review counsel will use discretion in explaining their referral actions for the client.

Having earlier undertaken to advise a potential client about the outcome of an initial interview, a lawyer must do so, making it clear whether s/he will enter a retainer with the client. This can be done at the end of the interview or subsequently. If done subsequently, it should be done quickly. It is wise to remember that for many people the mere fact that they have met with a lawyer leads them to believe that an ongoing solicitor/client relationship has been formed. The

client who has made significant efforts to attend the initial interview may, because of that effort, be even more likely to believe that such a relationship has been formed. Similarly, an individual client with a disability that affects intellectual functioning or information processing may be more likely to believe it. This is especially true if the lawyer has, through advertising in print or on a website, held him/herself out as an advocate for people with disabilities.

On this latter note, it is important for a lawyer not to mislead a potential client. If the lawyer wants to advertise and openly offer legal services to people with disabilities, then s/he must be particularly willing and able to accommodate.

Entering, Amending and Terminating Retainers:

A solicitor/client relationship can be formed without much formality. A simple exchange of information can create obligations for a lawyer, even though no retainer has been formally entered.

Entering the Retainer:

Once a lawyer has made a decision to assist a client, and has advised the client of that decision, then the lawyer and the client will enter a retainer which is, as noted above, a contract for legal services.

Like any good contract, a retainer should be in plain language and clearly specify important aspects of the solicitor/client relationship to which it relates. It must be clearly understood by the parties to it. The lawyer has an obligation to ensure such understanding, and should go over the terms of the retainer with the client carefully, reading them aloud or explaining them as may be required in the client's circumstances. Once terms of the retainer have been spelled out and agreed upon, the lawyer and the client should both be clear about mutual expectations – including, as much as possible, anticipated services.

A standard retainer should, among other things:

- identify a client, a legal situation and a lawyer to which it pertains;
- outline the nature and scope of the legal services that the lawyer will provide to the client;
- detail any limitation on the legal services;
- set out expectations as to communication between the lawyer and the client;
- confirm how instructions are to be provided by the client and how actions are to be reported by the lawyer;
- explain how changes to its terms can be made;
- define the lawyer's obligation with respect to confidentiality and conflicts of interest;
- address any consent by the client to disclosure of information by or activity of the lawyer that might raise conflicts of interest;
- address the circumstances under which and the mechanisms by which it can be terminated;
- for arrangements outside a legal aid context, address anticipated fees, disbursements and billing schedules;
- for arrangements in a legal aid context, address coverage of any expenses (e.g. filing fees or photocopying costs) that may be involved in the legal matters being handled.

If there are circumstances affecting a client that will require accommodation in the delivery of legal services, the retainer should address these too, insofar as that may be possible.
Additions to the standard retainer can:

- set out anticipated accommodations as to communication between the lawyer and the client;

- detail any other sorts of anticipated accommodations (such as additional time for appointments or for decision-making);
- identify any support person involved with the client and confirm the role of the support person and its limitations (see below);
- address the issues of confidentiality and any conflicts of interest raised by the support person;
- address any anticipated problems with giving and taking instructions that might be related to the client's condition;
- detail possible circumstances unique to the particular solicitor/client relationship that might give rise to its termination or to temporary cessation of providing legal services.

Of course at student legal aid clinics, legal services are provided to clients free of charge. The retainer used by the clinic has been amended accordingly and the roles of student caseworkers and review counsel are explained in accordance with this situation.

Support Persons:

Sometimes, a client will attend a meeting with his/her lawyer accompanied by a support person. A support person can be an agency worker of some sort, a relative or a friend. His/her involvement can be very important – both to the client and to the lawyer. The support person can arrange meetings, ensure attendance, calm the client and interpret for the client when gaps in communication between the client and the lawyer become apparent.

However, a lawyer must make sure that a support person is only that – a support. S/he cannot take the role of a client and instruct the lawyer in lieu of the client. For this reason, if the lawyer decides to enter a retainer with the client, it is important that the lawyer develops a relationship with the client independent of the support person, and meets privately with the client on occasion, if at all possible.

A lawyer must be careful to ensure that the involvement of a support person does not breach the confidentiality of a solicitor/client relationship or raise issues of conflicts of interest.

If a lawyer is retained by a client, private information about the client will inevitably be disclosed - whether through admonitions to a support person orally and in the presence of the client, or through a letter, copied to the client – yet the lawyer has a duty to protect the client's confidentiality. The lawyer should provide a confidentiality agreement for the support person to sign. Such an agreement is an important addition to the client's file. (See "Maintaining Files", below.)

To underscore the importance of the observations given here, note that in some law offices and legal clinics in Ontario, support persons are never allowed to be present during a client interview. Legal clinic caseworkers who become aware of the existence of or potential need for a support person should consult with review counsel, who will make decisions and provide advice about participation by the support person, on a case-by-case basis.

As has been emphasized, it is a client who must instruct a lawyer about how to proceed on his/her own file. If a lawyer is retained by a client and a support person is involved, then the lawyer must be very clear about whose instructions are being given and about any potential conflicts of interest raised. As a result, a signed declaration from the support person describing and accepting the scope and the limitations of his/her supportive role can be an important addition to the client's file.

A signed declaration of "no conflict" from a support person can be an important addition to a client's file too. This document should include a statement that the support person has no direct or indirect interest, financial or otherwise, in the client's legal situation. While this document will not guarantee freedom from conflicts of interest (which can be quite hard to ascertain if they are not obvious financial ones) it will at least go some way to raising the issue to a conscious level – both for the support person and for the lawyer.

Interpreters:

When a client needs the assistance of an interpreter in the course of a solicitor/client relationship, many issues similar to those associated with support persons can arise - related to instructions, confidentiality and conflicts of interest. Professional interpreters are very aware of the nature and scope of their role, but this is not true of more amateur ones. In the same vein, lawyers experienced in using interpreters know how to proceed with them, but this is not true of inexperienced advocates.

Amateur interpreters, be they family members, friends or acquaintances of a client, need to be cautioned that they must interpret word for word what the client says to the lawyer and vice versa. They need to be cautioned that they cannot editorialize. The words being interpreted must be those of the client. Inexperienced lawyers need to remember that interpreters are only conduits for words from the client.

Whether there is a support person involved with a client, or an interpreter, or both, a lawyer should maintain eye contact with the client as though conversing directly with him/her. Questions should thus be directed to the client, not to the support person or the interpreter. And attention should be likewise be focused upon the client when s/he is giving answers.

Accommodations and Adjustments during the Course of the Retainer:

With respect to changing the terms of or terminating a retainer, it is important to note that a client's legal situation can change over time and that the client's wishes and instructions will likely do so as well. The terms of the retainer are not, therefore, written in stone. It is good practice to revisit them on a regular basis to make sure that the retainer accurately reflects the current agreements upon which it is based.

There are a number of actions a lawyer should take after entering a retainer. Some of these steps should be taken immediately,

depending upon a particular client's circumstances; others can be taken as work proceeds during the course of the retainer.

Immediately, of course, a lawyer should adapt his or her language when dealing with a client, and adapt his or her methods of communicating with the client as needed. If the client has a disability, the lawyer and client should discuss appropriate language to use respecting the client's disability, as soon as possible. More generally, the lawyer should assess the language best suited to effective communication with the client and then adopt this language in meetings and correspondence.

A lawyer should quickly talk to staff members and students in his/her office about any accommodation needed by the client, whether the client has a disability or not. If the client has a disability, the lawyer should arrange technological upgrades to telephones and computer systems to meet the client's needs, arranging to have staff members trained to work with the upgrades.

During the course of a retainer with a client who needs accommodations for one reason or another, a lawyer should routinely ask how accommodations are working. The lawyer should also (if appropriate given the client's circumstances) assess the client's understanding of information the lawyer has provided. In that regard, the lawyer should encourage questions from the client and from any support person.

In Ontario, Rule 2.02 (detailed below under "Assessing Capacity to Instruct") provides that a lawyer cannot hold him/herself out as representing a client who lacks capacity to instruct counsel. It is a matter of professional misconduct to do so (just as it is a matter of professional misconduct to carry out instructions from someone other than the client who is capable of providing instructions).

If a client loses the capacity to instruct counsel, then a lawyer must cease providing legal services under a retainer until capacity is regained or until other arrangements for instructing counsel are

made. However, the lawyer must ensure as much as practicable that the client's interests are not abandoned.

Assessing Capacity to Instruct:

As noted above, a lawyer is obliged to make sure that a client has capacity to instruct during the course of representation. Although it is not a common occurrence, on occasion the lawyer may determine that there is a need to assess this capacity. This is because when the lawyer acts upon instructions from the client, s/he is in a sense certifying that the client has given the lawyer authority to do so. As a result, capacity to provide that authority to the lawyer is essential and must be assessed where it appears in doubt.

Generally speaking, capacity to instruct involves (1) the ability to understand information relevant to making a decision and, (2) the related ability to appreciate the reasonably foreseeable consequences of the decision.

A client can make a decision that, to a lawyer, seems contrary to reason. If the client has capacity to make the decision, related instructions must be respected. In this regard, it is important to note that a condition or situation capable of affecting a client's mental processes does not affect capacity to instruct absent a causal connection between the two.

The concept of capacity to instruct is a contextual one. A lawyer must thus determine capacity with reference to a specific client's particular legal situation and the decisions that must be made respecting it. For example, the client might be capable of instructing counsel about disposition of his/her estate (knowing at least the extent of assets and the array of possible beneficiaries), but not capable of instructing counsel about the course of litigation.

As in other aspects of professional practice, there are rules to guide lawyers about their duty to test capacity. For lawyers in Ontario, Rule 2.02 provides that when a client's ability to make decisions is

impaired by minority, mental disability or some other factor a lawyer shall, as far as reasonably possible, maintain a normal solicitor/client relationship. Again, it is important to note the rule's emphasis on adaptation to an individual client's needs. This adaptation should be within the context of a "typical" solicitor/client relationship unless such an adaptation is not possible.

The commentary to Rule 2.02 reveals the existence of an operating assumption that a client has the requisite mental ability to make decisions and give instructions about his or her legal situation. However, this is not always the case, even initially. Further, capacity to instruct can wax and wane as an issue during the course of a retainer. The lawyer must be alert to the need to assess capacity if and as required.

The commentary to Rule 2.02 also provides that when a client lacks capacity to manage his or her own legal affairs, then a lawyer may need to take steps to have a lawfully authorized representative appointed to provide instructions. The lawyer has an ethical obligation to ensure that the client's interests are not abandoned or allowed to fade from importance because of incapacity to instruct.

Through its website, ARCH Disability Law Centre provides practical suggestions for a lawyer testing capacity. So too does the PracticePRO site, especially through an excellent article by Judith Wahl of the Advocacy Centre for the Elderly in Toronto. The article is called "Capacity and Capacity Assessment in Ontario".

Aside from developing familiarity with the context within which capacity to instruct is to be assessed, the lawyer assessing it should:

- make a client as physically comfortable as possible and remove other stressors as much as possible;
- use language and communications appropriate to the client, especially clear and concise questions that call for straightforward answers;

- give explanations using repetition and restatement as needed to help the client understand his or her legal situation, options and obligation to provide instructions;
- focus upon the client's understanding after receiving these explanations and not before;
- be aware of and evaluate any stereotypical assumptions about the client's disability;
- make complete records of attempts to test the client's capacity and any assessments following those attempts, and
- seek second opinions as needed – from the Law Society of Upper Canada, from Practice PRO, from lawyers experienced in assessing capacity and from community or other organizations that serve people with disabilities similar to those of the client.

Again, although the situation arises infrequently, on occasion a student caseworker at QLA will become aware of the existence of or potential existence of a capacity to instruct issue. The caseworker should immediately consult with review counsel, who will make decisions and provide advice as needed.

Terminating the Retainer:

Recall that in Ontario Rule 2.09 provides that a lawyer may terminate a retainer only for good cause and upon notifying a client appropriately, given the client's circumstances. The client, on the other hand, has the unqualified right to terminate the retainer at will. Further, recall that if the retainer is terminated, the lawyer ceases to represent the client but is not freed from the responsibilities of confidentiality and conflict of interest that arise because of a solicitor/client relationship.

Documentation to support any decision to terminate a retainer is important. If the retainer is terminated because a client fails to respond to correspondence, provide instructions or appear for appointments, trials or hearings, then a lawyer must have good records of the client's failure in the relevant file and communicate clearly, in writing if at all possible, the decision to terminate. If the retainer is terminated because the client lacks or loses capacity to instruct counsel, then the lawyer should carefully set out in the relevant file the manner in which the client's capacity was assessed. Again, the decision to terminate should be communicated clearly, in writing if possible, but in any event appropriately given the client's circumstances.

Remember that difficulty in providing ongoing accommodation will not be considered good cause for terminating a retainer. That is one reason why screening and early decision-making about appropriate accommodation are important. Clients can be uniquely vulnerable once retainers are terminated and, as a result, termination must be very carefully considered and clients' interests very carefully protected.

FOLLOWING INSTRUCTIONS AND MAINTAINING FILES DURING THE SOLICITOR/CLIENT RELATIONSHIP

LAWPRO, which insures the professional activities of most lawyers in Ontario, has for many years collected information about claims made against lawyers by their clients. That information dramatically reveals that the single most frequent cause for a claim is an allegation of failure to follow instructions.

Sometimes a lawyer may simply decide not to follow the instructions given by a client. This would be a clear failure to comply with the rules that govern the lawyer's practice. Remember – it is the client who selects a course of action to follow, not the lawyer. The lawyer

is retained to provide professional expertise and advice, but not to decide either the end sought by the client or the means by which to achieve that end.

More often, however, (and the claims studied by LAWPRO reveal this quite clearly), failure to follow a client's instructions occurs when a lawyer is truly uncertain about those instructions. If the lawyer acts or fails to act because of uncertainty, this too is a failure to comply with the rules governing the lawyer's practice. These rules require the lawyer to be competent and to manage his/her practice effectively.

Being competent and managing a practice effectively requires a lawyer to take good notes and carefully maintain a client's file. The lawyer should be able to look at the file and have information immediately at hand about all the relevant facts of the matter, all the people involved, all the options for action possible, all the actions selected, all the steps taken, all the consequences of those steps and all the steps yet possible or to be taken.

Thus, the first key word for a lawyer in maintaining a client's file is documentation. The second key word is organization.

Documentation:

Proper documentation has a number of components. These include, but are certainly not limited to:

- a notation about any limitation period that might affect a client's legal situation – (This notation should be clear and obvious to a lawyer any time the file is opened for review.);
- a copy of the retainer;
- written confirmation of mutual understandings about accommodation requirements (This might be a part of a retainer.);

- the lawyer's notes (see directly below) – (These notes, or memos to the file, should be made during and after each meeting or telephone call with the client. These notes should reveal not only what the client said, but also what the lawyer recommended, what the client's instructions were and what steps the lawyer and the client undertook to take, as well as timelines for those steps.);
- confirming letters written to the client after each meeting or telephone discussion – (These confirming letters, like the notes mentioned above, should reveal new information from the client or the lawyer, new recommendations from the lawyer, new instructions from the client and new reports on steps to be taken and their possible consequences.);
- reporting letters written to the client after steps are taken by the lawyer and whenever results of those steps become clear;
- reporting letters written to the client after steps are taken by the opposing party – (These reporting letters typically also append copies of correspondence received from the opposing party and requests for further meetings or instructions.);
- copies of any e-mail correspondence between the client and the lawyer;
- electronic media storage disks etc. related to the client's file;
- copies of any telephone message slips related to the client's file;
- copies of any correspondence sent by the lawyer on the client's behalf;
- copies of any pleadings, orders and other court or tribunal documents related to the client's file;
- copies of any medical reports and other professional assessments made with respect to the client's file;

- copies of any evidence related to the client's file;
- reporting letters written to the client after court or tribunal documents are filed or received, or after medical reports and other professional assessments are received by the lawyer. (These reporting letters typically also append copies of the documents involved.);
- documentation signed by any support person acknowledging (1) that it is the client who must instruct counsel, (2) that there are obligations associated with confidentiality and (3) that there is a need to be and remain free of conflicts of interest affecting the client's legal matter;
- if circumstances affecting a client suggest this is necessary or helpful, an explicit agenda for each meeting or telephone conversation between the client and the lawyer – an agenda discussed in advance as necessary and drafted by a lawyer prior to the meeting or conversation (This will help keep focus and manage time, which is an important concern for both the client and the lawyer.);
- a comprehensive docket – (This docket should detail all contacts between the lawyer and the client, as well as all steps taken by the lawyer on the client's behalf, including the contents and results of telephone calls and meetings, advice given, instructions received and actions performed.)

A lawyer's notes (or memos to the file) for a client, should be dated, include the client's name, the file number, the nature of the contact leading to the note (meeting, telephone call, conference, etc.) and the duration of the contact. Moreover, and importantly, they should cover any new facts related to the case, and new options for action open to the client and their consequences, any steps to be taken by the client and any instructions given to the lawyer.

A diary may be a further piece of important documentation. A client's detailed account of the daily or cyclical effects of an injury, trauma or disability can be a powerful aide memoire for the client. While care must be taken to ensure that rules of confidentiality and disclosure are observed - and borne in mind when planning litigation strategy - the diary can assist in both presentation of a case or preparation prior to a trial or hearing. The diary can also include information about medical or other service providers consulted, appointments with them, diagnoses they provide, medications or regimes they prescribe and their effects, etc.

Organization:

To ensure organization of a client's file, a lawyer's notes, correspondence, telephone message slips and other documentation should be carefully arranged in the file in chronological or some other order, so that the lawyer can access what s/he needs quickly and as needed. Often, the lawyer will keep separate files or sub-files for correspondence, research and pleadings, orders and other court or tribunal documents related to the client's file.

Communicating with Clients:

When thinking about communicating with clients, it is worth remembering that more often than not a client contacts a lawyer when the client is troubled about a legal situation. To be sure, there are legal situations that are more or less positive in nature – adopting a child, writing a will, purchasing a home – but even these situations can be fraught for the client and they can cause anxieties of one sort or another. Then there are situations that are much more clearly negative in nature – facing criminal charges, dealing with tax audits, collapsing an old but failing family business, initiating or defending a personal lawsuit, being denied or cut off social benefits – these are naturally particularly fraught.

One way to see a lawyer's role is that s/he can make a fraught legal situation in some way more understandable and easier to negotiate for

a client. That said, the lawyer is expected to maintain appropriate boundaries and to provide professional advice to the client. S/he is not expected to become a friend or, despite the nature of the information exchanged in a solicitor/client relationship, a confidante or personal counsellor.

A client's anxieties can raise many issues for a lawyer to consider. While for the lawyer the client is one of many, for the client his/her legal situation is of unique and perhaps immediate importance. As emotions run high, more time to explain options for actions and their consequences may be in order. As "case fatigue" sets in, more supportive and informative meetings or explanatory letters may be in order. The client's anxieties can lead to demanding or even apparently unreasonable requests or decisions. Lawyers are busy. So too are their staff. Stresses in a solicitor/client relationship can take their toll – on the client and the lawyer. Further, of course, some clients and lawyers are better communicators than others, some share good and some poor interpersonal chemistry, some clients are much older or younger than their lawyers, with vastly different life experiences, level of education, available social network supports etc.

Writing regular confirming and reporting letters, or providing confirmation and reports in other ways adapted to a client's needs, is one way a lawyer communicates with the client. So too is copying the client on letters written on his/her behalf, or otherwise effectively providing updating information. Returning the client's calls promptly is another way. Both of these are fairly obvious.

Written correspondence between a lawyer and a client should be complete but to the point. It should be a model of clarity, and adapted to the individual client's level of education and understanding. It goes without saying that it should also be correct. Proof-reading and error correction of written correspondence are essential. The lawyer's presentation of his/her work is a subtle but important form of communication.

In today's legal world, a lawyer's website is also a form of written communication with a client. The website should therefore be crafted and corrected just as carefully as any other written correspondence with the client. It should also be updated and made more navigable as often as necessary to avoid possible misunderstandings or communication hurdles arising from a lack of accessibility.

Doing what has been agreed upon is another important way a lawyer communicates with a client. To repeat an important point, the lawyer should have clear notes about steps s/he has undertaken to take on the client's behalf. These notes should reveal steps the client has undertaken to pursue as well. Finally, these notes should reveal any agreed-upon timelines for taking steps. The lawyer should take the steps agreed upon and then report to the client promptly. In virtually all cases, while reports can be made orally to provide immediate information, they should then be made in writing, though confirming letters. Additionally, the lawyer should follow up with the client, either orally or in writing, sometimes in both ways, to ensure the client's steps have been taken as well.

Excellent communication has other and less obvious attributes. It includes treating the client with respect at all times. It includes using language that is clear and understandable to the client – but not overly-familiar or disrespectful of the client's intelligence. In fact, it includes behaving professionally towards the client at all times – behaving courteously and patiently, explicitly and honestly.

It is wise to remember that attitudes are conveyed not only through a lawyer's behaviour, but also through the behaviour of his/her partners, associates, students and staff. They too must treat a client appropriately at all times; and the lawyer is responsible for ensuring this.

Finally, excellent communication has a physical and environmental component. A lawyer should take pains to ensure that his or her working environment reflects competence and proficiency and establishes an atmosphere that welcomes, reassures and genuinely

serves a client. The client should be free from worry about professionalism and confidentiality.

Office space should therefore be arranged to allow for quiet and unobstructed work; and files and papers should be carefully and neatly stored. Physical accessibility to and physical comfort within the lawyer's office are important.

The key concept for a lawyer in communicating appropriately with any client is adaptation to the client's unique needs. It is imperative that the lawyer gleans information completely, explains matters clearly - including options for action - receives informed instructions and then reports carefully upon the actions s/he took to comply with those instructions. **Circumstances that affect the client may call out for accommodation to ensure good communication on the part of the lawyer.**

Accommodation in communication can take a number of forms. It is worth stressing again that the best source of information about a client's accommodation needs is the client himself or herself. A lawyer should be straightforward in asking about this – it does no good to avoid a difficult subject when it is so central to a functioning solicitor/client relationship.

Examples of accommodation in communication, both direct and more subtle, are described below.

- For the client whose circumstances suggest this is necessary, accommodation will include allowing plenty of time to exchange information.
- For virtually all clients, accommodation will include taking the time to introduce office personnel properly, to describe carefully (and repeatedly if necessary) the way a lawyer will operate and the anticipated course of a client's legal situation.

- For the client with certain disabilities, accommodation will include advising staff at courts or tribunals where the client might appear about the need to provide interpreters, assistive devices or other measures.
- For the client with a mobility disability, accommodation will include removing physical barriers in an office – taking account of barriers resulting from architecture and from décor.
- For the client whose circumstances suggest this is necessary, accommodation will include scheduling meetings where they are easily accessible by public or private transit, or in buildings where there are parking places designated for use by persons with disabilities.
- Similarly, accommodation can include scheduling meetings in the client's home or workplace – as long as the meeting place allows for confidentiality.
- For the client with a hearing disability, accommodation can include use of a teletypewriter (TTY), the Bell Relay Service, written or real-time captioning, e-mail and sign language interpreters.
- For a client with a vision disability, accommodation can include use of Braille documents, audio tapes and voice-activated electronic assistive devices.
- If a lawyer has a website, for the client with a print-related disability or any other potential barrier to web access, accommodation can include crafting a truly accessible and user-friendly website.
- For the client whose circumstances suggest this is necessary, accommodation can include appropriate reminders about impending appointments, due dates, appearance dates, etc.

The list of possible accommodations in communication (and in providing legal services more generally) is really quite extensive.

A Caution about Language:

The so-called "medical model" of labeling can be distasteful or even wholly unacceptable to a client with a disability. The client may well resent being described as "suffering" from a disability, being a "victim" of it or being "handicapped" by it. Currently, the following seems to be more or less acceptable:

- referring to the client first, and thus saying a "person with a disability" rather than a "disabled person";
- referring to the client as a "consumer of disability-related services";
- using the term "non-disabled" for persons without disabilities, rather than "able-bodied";
- using the term "wheelchair-user" rather than referring to a person "bound" or "confined" to a wheelchair, and
- referring to "intellectual disability" or "developmental disability" rather than "mental retardation".

The list can go on, but the main points to take are (1) that a lawyer should be cautious in the language used to describe a client with a disability and, (2) the lawyer should ask the client about preferred terminology when the solicitor/client relationship is formed.

More extensive discussion of preferred language may be found in "Using Appropriate Words and Phrases Related to Disabilities", which is section 6.5 of the "Disability and Law" Resource Guide for Law Teachers, available at www.reach.ca.

FINAL REMINDERS AND TIPS

These reminders and tips are relevant for lawyers and student caseworkers alike.

- Explain and then confirm everything carefully. Re-explain and re-confirm as needed.
- Check and re-check any instructions provided by the client, especially if they seem out of line with previous instructions or earlier conversations.
- Check and re-check the client's outcome expectations – be candid and address unrealistic outcome expectations promptly and directly.
- Be as patient as possible in your dealings with the client, allowing the time needed to develop and maintain good communication.
- Explain your role carefully to the client.
- Avoid any inclination to become a confidante or counsellor to the client. Maintain appropriate professional boundaries and remind the client of these as needed.
- Be clear about mutual behavioural expectations, including expectations about how staff and students ought to treat the client and ought to be treated by the client.
- Consult with review counsel to ensure that staff and students are mentored so that they are comfortable in their respective roles, particularly as these may relate to clients needing accommodation for one reason or another.
- Be clear about the consequences of any failure by the client to meet mutual expectations.
- Keep a firm hand and address breaches of any behavioural expectations promptly and directly.

- Be alert to the signs of conditions or circumstances affecting the client that do not manifest themselves obviously or are not discussed by the client. Raise these for discussion if they become relevant to the client's legal situation, being sensitive to the client's responses in doing so.
- Where advisable with respect to a specific client's circumstances, make sure that review counsel, staff and fellow students are aware of the client's particular conditions or circumstances. Seek arrangement of a reporting regime if staff or students become aware of particular problems related to giving instructions, interactions with staff and the like. Do this with an eye to ensuring that the client is well-treated and well-understood.
- Where appropriate, obtain information about support persons to be contacted in the event of communication or other problems manifesting themselves during the solicitor/client relationship.

Thoughtful and responsive service – service that fully respects the requirements set out by professional rules and regulations, and service that is specifically geared to an individual client's needs – that is the measure of excellence for a lawyer (or student) representing clients who have disabilities.

PART TWO:
LAW AND PROCEDURES RELATED TO SECURING DISABILITY BENEFITS

A substantial portion of social assistance files at legal aid clinics involve appeals of decisions to deny disability benefits. Both the Ontario Disability Support Program Act and the Canada Pension Plan Act provide that an applicant may receive such benefits upon meeting certain qualifications. The former statute is provincial and thus addresses benefits for only Ontario residents. The latter act addresses benefits for people across Canada, provided that they have made sufficient contributions to the Canada Pension Plan.

Some social assistance cases involve appeals of decisions to vary or restrict access to funds provided under the Ontario Works Act, while still others involve appeals, claims or applications connected to other government benefits and assistance plans.

Please note that information in this chapter is current to May 2007.

PROVINCIAL DISABILITY BENEFITS

A client might be eligible for both provincial and federal disability benefits. Even if s/he is pursuing only a claim for provincial benefits, the client should be made aware of other benefits potentially available. It is important to note that provincial benefits are considered **last resort benefits.**

If a client can obtain any funds through federal benefits, workers' compensation, insurance or other programs, then his/her entitlement to provincial benefits can be strictly limited or reduced to zero. Other funds received can reduce entitlement to provincial benefits on a dollar-for-dollar basis. However, it is often necessary and advisable to pursue these other funds on behalf of clients, not only because

provincial disability benefits administrators will likely require that they do so, but also because the funds and any associated benefits may be valuable to clients in future years, even if they are fully offset from provincial benefits at present.

Eligibility for Income Support:

The government of Ontario administers the provincial disability benefits program through the Ministry of Community and Social Services (the Ministry). It stipulates the nature and scope of that program through the Ontario Disability Support Program Act (the ODSPA).

A low-income resident of Ontario who is unable to work or provide self-care can apply for disability benefits (**income support**) under the ODSPA. To qualify for such benefits, an applicant must meet the definition of **person with a disability**, which is set out in section 4 of the legislation as follows:

A person is a person with a disability … if,

a) the person has a substantial physical or mental impairment

b) that is continuous or recurrent and expected to last one year or more;

c) the direct and cumulative effect of the impairment on the person's ability to attend to his or her personal care, function in the community and function in a workplace, results in a substantial restriction in one or more of these aspects of daily living; and the impairment and its likely duration and the restriction in the person's activities of daily living have been verified by a person with the prescribed qualifications.

The details concerning "Person[s] with the prescribed qualifications" are given by **regulation**. Indeed, much of the important information respecting applications for and entitlements to disability benefits is similarly detailed in regulations.

It is evident that a caseworker must always be familiar with an important **statute** (like the ODSPA) affecting a client's legal matter. A caseworker must also be familiar with **any regulations** promulgated pursuant to that statute. Provincial legislatures and the federal parliament articulate general principles of law through statutes. Those general principles are applied through regulations. Regulations are "subordinate legislation", made by persons or bodies other than provincial legislatures and the federal parliament under authority conferred by law. One should look at the end of the Table of Contents of a statute to see how this authority is conferred. All Ontario statutes and regulations can be accessed through: http://www.e-laws.gov.on.ca, while all federal statutes and regulations can be accessed through: http://laws.justice.gc.ca.

The most important regulation for a client seeking disability benefits under the ODSPA is O. Reg. 222/98 (amended to O. Reg. 330/06).

Other important sources of information regarding benefits and income support programs such as ODSPA and Ontario Works (OW) are the **policy documents** developed by ministry staff to clarify the interpretation of statutes and regulations, both for themselves and for the general public. Policy documents are the government's interpretation of its legislation, and are not themselves legislation. Nevertheless, they are important to the understanding of how legislation is interpreted on a day-to-day basis. The policy documents for ODSPA and OW are found on the website of the Ministry of Community and Social Services at: http://www.mcss.gov.on.ca/mcss/english/pillars/social/ Additional more

specific policy documents for ODSPA, OW and CPP can be obtained on the web site of the legal aid Clinic Resource Office at: www.cro.on.ca

APPLYING FOR ONTARIO BENEFITS

The Disability Adjudication Unit:

The ODSPA empowers the Director of the disability benefits program to make decisions about applications for benefits and to delegate that decision-making power. The Disability Adjudication Unit (DAU) has this delegated power with respect to decisions about whether or not an applicant meets the definition of a "person with a disability", as discussed below.

ODSPA applicants must also meet the residency and financial eligibility requirements, including the ODSP asset and income tests, and provide information about their shelter costs, which are used to determine their shelter allowance. For ODSPA applicants who are already OW recipients, or who have applied for OW, this information will be collected by the OW office. But the DAU always makes the decision as to whether the applicant is a "person with a disability".

The DAU thus receives and assesses all applications for disability benefits under the ODSPA. It is staffed by both medically-trained people and laypeople. It not only makes initial decisions as to whether an applicant is a person with a disability under the ODSPA, it also renders follow-up decisions. It is essentially the opposing party for an applicant and will defend any decision it makes.

An applicant for disability benefits under the ODSPA must begin the process by submitting three forms to the DAU. These forms are provided to the applicant only after an initial screening by the Ministry to determine the applicant's financial eligibility. Taken together, the forms are referred to as the Disability Determination Package.

The Disability Determination Package (DDP):

The three forms that constitute the DDP are designed to provide information

respecting an applicant's condition or conditions in a standardized format. The three forms are:

1) **Health Status Report (HSR)** – This is completed by a prescribed medical professional (see the relevant regulation) and detail an applicant's medical condition(s) and treatment(s).

2) **Activities of Daily Living Index (ADI)** – This is also completed by a prescribed medical professional (see the relevant regulation) and addresses an applicant's ability to function in certain aspects of daily life.

3) **Self Report (SR)** – This is completed by an applicant personally and explains how the applicant's condition(s) affect his or her life and lifestyle.

Completion of the SR by the applicant is optional. While an SR can be helpful to the applicant's case if done well, it can also have a negative effect if done poorly, for instance if the applicant claims to have a disability or medical condition that is not confirmed by the Health Status Report.

If the DAU finds that an applicant **is a person with a disability** on the basis of the contents of the DDP, then benefits will be paid according to provincial regulations and Ministry guidelines. If the DAU finds that an applicant **is not a person with a disability**, it provides a written decision to this effect, giving the date of its negative decision as well as the reasons for it, and describing the process through which an appeal can be made.

THE APPEAL PROCESS FOR PROVINCIAL BENEFITS

Requesting an Internal Review:

The first step in the appeal process involves making a request that the DAU complete an **internal review** of its negative decision. An applicant must request an internal review within **10 days** of receiving that decision. The request must be in writing. If no request is submitted, the applicant cannot later appeal the DAU's negative decision. If a request is submitted late an internal review may still be conducted, but only if the applicant provides good reasons for delay.

A request for an internal review can include new medical evidence, but must include:

- the date of the negative decision from the DAU;
- the date the applicant received the decision;
- the applicant's DAU case number (and date of birth), and
- the applicant's signature.

An internal review results in a second written decision from the DAU, one which should be provided very quickly, within 10 days of the applicant's request. An initial negative decision is rarely reversed at this stage unless significant new medical information is submitted.

Filing an Appeal Form:

If an internal review results in a second negative decision from the DAU, the next step involves filing an **appeal form**. Appeal forms are filed not with the DAU (the opposing party) but with the Social Benefits Tribunal, which will ultimately hear the appeal (described below).

An appeal form must be filed with the Social Benefits Tribunal **within 30 days** of receiving the second negative decision from the DAU. If, as occasionally happens, the DAU does not provide its

second negative decision within ten days of the applicant's request for an internal review, the applicant can file an appeal form based on the initial negative decision. Thus, in such circumstances an applicant can file an appeal form within 40 days of making a written request for an internal review.

The appeal form is a simple document. A copy of the appeal form is provided to any applicant who receives a negative decision from the DAU, and copies are also available online. The appeal form itself is rarely significant in later proceedings. It simply moves the appeal process forward. As a result, it need not be particularly detailed. In fact, it should not be. It is far better to provide detail later, by way of additional medical evidence or written submissions.

Copies of any relevant letters to and from the DAU should be attached to the appeal form. If an appeal form is filed late, or if an applicant does not attach the required documents when filing it, the applicant should include an explanation with the appeal form. Late filing of an appeal form may be allowed, but only if the applicant provides good reasons for delay.

An appeal of a negative decision from the DAU is granted as of right (automatically) if an applicant makes a request for an internal review and files an appeal form in a timely manner.

The Social Benefits Tribunal:

The Social Benefits Tribunal (the SBT) is a quasi-judicial administrative tribunal that deals with appeals arising from decisions to deny, suspend, vary or cancel social assistance under the Ontario Works Act, as well as decisions to deny disability benefits under the ODSPA. It operates at arms-length from the DAU and the Ministry.

Its hearings are held across the province, and are typically conducted by single member panels.

The SBT is permitted to make only those decisions that the Director of the disability benefits program could make. Notably, the Director

may not make decisions on the constitutional validity of legislative and regulatory provisions and thus neither may the SBT. However, it is allowed to make decisions to deny an appeal, grant it outright, grant it in part or refer it for reconsideration. The ODSPA specifies particular instances when the SBT "shall" deny or refuse to hear an appeal. Hearings before the SBT are governed by the Statutory Powers Procedure Act and the SBT must meet the requirements of natural justice. All of its decisions must be in writing.

The SBT will send a copy of the appeal form to the DAU. An applicant need not do so. The ODSPA and associated regulations provide that the SBT should provide a notice of hearing to the applicant (and the DAU) within 60 days after an appeal form is filed. The notice of hearing details the date, time and location of the applicant's appeal hearing before the SBT. The SBT is obliged to give at least 30 days notice of a hearing. In practice, receipt of a notice of hearing is often delayed and hearing dates can be scheduled many months after an appeal form is filed.

Seeking Interim Assistance:

Emergency funds may be available to a needy applicant who is awaiting resolution of an appeal. Such funds, known as **interim assistance,** may be requested at the time an appeal form is filed or subsequently. There is another SBT-approved form to use when applying for interim assistance. It is available at QLA and online. In addition, it is attached to the appeal form for convenience. If an applicant does not wish to seek interim assistance, the application for interim assistance is simply detached and deleted from material filed with the SBT.

If an applicant is already receiving funds under the Ontario Works Act, or otherwise has access to sufficient funds to cover basic expenses, then interim assistance will likely not be provided. Further, if an applicant receives interim assistance but is ultimately unsuccessful on appeal to the SBT, some of the money received through interim assistance may be recoverable by the Ministry as an **overpayment** through deductions from monthly social assistance payments. For an applicant with a very

limited income, recovery of an overpayment can pose genuine hardship, so any decision to apply for interim relief should be carefully considered.

WORKING ON AN SBT FILE

Contacting the DAU and the SBT:

Immediately after being assigned to assist a client seeking disability benefits under the ODSPA, a caseworker should ensure that the DAU and the SBT have been notified that the law clinic is acting for the client. The clinic should have precedent/form letters for this notification process.

As the opposing party, the DAU is entitled to know who represents an applicant and to be advised about certain material the applicant will rely upon in the appeal. It is also required to divulge some of its own material.

The letter to the DAU should thus include a **Consent To Disclose Personal Health Information Form**, signed by a client and releasing the DAU to provide information relating to the client's application for disability benefits. Upon receiving it, the DAU should send to the law clinic copies of the DDP and of any other relevant documentation, particularly an **Adjudication Summary**, which provides reasons for the negative decisions from the DAU. All of these documents will help a caseworker determine the evidence necessary to strengthen the client's case at the appeal hearing.

In due course, the DAU should also provide its written submissions respecting a client's application and appeal. By regulation, these should be provided within 30 days after the DAU receives a copy of appeal form from the SBT.

In addition, as the tribunal before which a caseworker will appear to assist a client, the SBT is entitled to notice that the clinic has been retained. Once the SBT has such notice, it will provide us with ongoing information about the appeal hearing.

The letter to the SBT should thus include an **Agency Authorization Form**, signed by a client and advising the SBT that the legal aid clinic will act as the client's representative in the appeal process. The letter should also include a **Consent To Disclose Personal Health Information Form**, signed by the client, and a request for a copy of the appeal form filed by the client. A caseworker should be aware of the contents of the appeal form and all other documents available to a decision-maker, so that appropriate preparations can be made.

Completing the Disability Questionnaire:

A disability questionnaire should be completed for each client making an application for disability benefits. The questions are numerous and cover a variety of issues. Not all questions are relevant for all clients. However, the questionnaire is designed to ensure that relevant questions are asked and that useful information is collected and reported in one document. Copies of the disability questionnaire should be kept with other forms used at the clinic and available in electronic format.

A caseworker assigned to a client applying for disability benefits should quickly arrange to meet the client, discuss the appeal process and complete the disability questionnaire. The answers provided will be fundamental to pursuing new medical evidence and later to crafting submissions. The client should be made aware of this. The client should also be made aware that completing the questionnaire will take time and that some of the questions might seem unusual or uncomfortable. The caseworker should reassure the client about solicitor/client confidentiality.

A caseworker will have to be patient and sensitive to the kinds of issues that will be addressed and the kinds of problems that can be encountered with the client. Some clients may need to read or even complete the disability questionnaire on their own, at least initially. Some may need to meet on two or three occasions rather than on one to complete it. Some may need particular or repeated assurances or explanations. The caseworker will need to be observant, responsive, careful and flexible.

Obtaining New Medical Evidence:

If the DDP and previously submitted medical evidence did not satisfy the DAU that an applicant is a person with a disability under the ODSPA, then new medical evidence is likely required.

Because of DAU delays in processing applications, documents previously submitted can be quite dated. A client's condition(s) can also significantly change over time, and the client can have changed doctors or seen specialists after submitting a DDP. In any event, additional medical evidence, particularly evidence specifically addressing the ODSPA definition of a person with a disability and the Adjudication Summary issued by the DAU, can make all the difference in an appeal.

Note however that any new medical evidence must address a client's condition(s) as they were identified at the time the DDP was submitted – that is, the condition(s) assessed when the DAU reached its initial negative decision.

A caseworker must provide a **Consent To Disclose Personal Health Information Form**, signed by a client, to any individual or agency asked to divulge confidential health information. This means (as noted above) that the DAU and SBT should receive these forms with requests to release documents, and doctors or other treatment providers should also receive them with requests for medical or other private information.

Consent To Disclose Personal Health Information Forms are typically obtained when a caseworker is completing a disability questionnaire with a client, but they can be obtained at other times. A separate form should be obtained for each treatment provider. As work on a file progresses, additional forms can be signed as required.

Once a Consent To Disclose Personal Health Information Form is signed, it should quickly be provided to the relevant recipient, **along with an initial letter** (requesting new medical evidence) **and a response form**. Templates for these documents should be available at the legal clinic. The letter will indicate that the clinic has been retained because a client has applied for and been denied disability benefits. It should define a person with a disability under the ODSPA and ask its recipient to advise the law clinic whether any helpful medical evidence can be provided. It can and should be modified to suit the particular client's situation. This is also true for the response form.

Even if the initial letter meets with a positive response, a follow-up letter may be required to request specifically any new medical evidence available. (A template for a follow-up letter should be available at the clinic.)

Most doctors will charge a fee to provide new medical evidence (as they cannot bill OHIP for this service). See whether the clinic will assist in paying those fees, known as **disbursements**. A caseworker should check with review counsel about limiting the fees payable for any individual client.

Caseworkers must be very careful to keep track of letters sent to and responses received from treatment providers. Deadlines for submitting new medical evidence approach quickly and treatment providers are busy. Any **accounts** submitted for preparation of new medical evidence should be paid immediately and **thank you letters** are imperative.

Submitting New Medical Evidence:

If a caseworker intends to assist a client by presenting new medical evidence at an appeal hearing before the SBT, the **new evidence must be submitted to the DAU and the SBT as soon as possible and, in any event, at least 30 clear days prior to the appeal hearing**. (Weekend days and holidays are counted in the 30 days, but the day the evidence is sent and the day of the hearing are not.)

This allows the DAU, as the opposing party, an opportunity to review the evidence and prepare a response. On some occasions (because of the strength of new medical evidence) the DAU will decide that a client does, in fact, meet the definition of a person with a disability under the ODSPA. When this happens, the DAU changes its original negative decision to a positive one and no hearing is required. The local ODSP office will then contact the client and payments of retroactive and ongoing disability benefits will follow. A caseworker must advise the SBT if the DAU does change its decision, as the SBT will need to re-arrange its hearing schedule accordingly.

An SBT panel member has discretion to admit new medical evidence at an appeal hearing if it is not submitted in a timely way, but a caseworker should always try to meet the 30 clear day deadline if at all possible.

Making Written Submissions:

Written submissions, like new medical evidence, must be provided to the DAU and the SBT at least 30 clear days prior to the appeal hearing. Again the DAU is entitled, as the opposing party, to review the submissions and prepare a response.

When preparing written submissions, a caseworker should be familiar with relevant statutory provisions, associated regulations and Ministry guidelines.

There should be a template for written submissions to the SBT available at the law clinic. For the sake of clarity and precision, a caseworker should address only relevant case law and policy. Any template should be modified to suit a particular client's situation.

Preparing a Client:

As a client must meet the ODSPA definition of a person with a disability to be successful at an appeal hearing before the SBT, a caseworker should become familiar with the client's abilities and limitations as these relate to the definition.

Note that the client may have a number of conditions and be limited in some or all of the areas addressed in the ODSPA. An accumulation of factors can be considered when assessing whether the client is a person with a disability.

A client's condition(s) or circumstances may make it difficult to establish that s/he is a person with a disability according to the ODSPA. A caseworker should provide a memorandum of fact and law to review counsel and an opinion letter to the client prior to any appeal hearing before the SBT. The opinion letter will prepare the client for the hearing and its possible outcome. Material to support the memorandum of fact and law and opinion letter can be located on the Clinic Resource Office (CRO) website www.cro.on.ca. The CRO website provides standard legal memoranda, procedural memoranda and case law pertaining to provincial disability benefits claims as well as to various other areas of poverty law.

A caseworker should prepare for a client's appeal hearing before the SBT in the same way as for a hearing before the Ontario Rental Housing Tribunal or for a trial in a court. Once a hearing date has been scheduled and any written submissions filed, the caseworker should prepare a hearing binder and discuss it with review counsel. Preliminary statements and questions should be prepared. For an

SBT hearing these include a brief introduction (or opening statement), direct examination questions for the client and any witnesses, occasionally cross-examination questions for the opposing party and witnesses and a closing statement.

Another very important aspect of preparation is meeting with a client just prior to his/her appeal hearing to review the hearing process and the anticipated testimony. The client should be advised about what to expect – how many people might be present, what the layout of the hearing room might be, how long the hearing might last, what kinds of questions might be asked, whether a decision might be made immediately, etc.

As with any trial or hearing, this meeting is important to a caseworker as well as a client. The caseworker needs to review the questions s/he will ask the client, and to help the client understand what information the questions have been designed to elicit. The caseworker must do the same things with any witnesses to be called in addition to the client. Each person who will testify should have a separate meeting with the caseworker.

ATTENDING AN SBT HEARING

A caseworker, a client and any witnesses should arrive slightly early for an SBT hearing to address any questions or concerns.

The Hearing Setting:

An SBT appeal hearing is private and relatively informal. It usually takes place in a small room (not a courtroom) with only the SBT panel member, a caseworker, a client and perhaps a representative of the DAU present. The DAU is not always present, but it is typically present (in the person of a designated employee of the Ministry) when an issue of particular importance or complexity is being addressed in the appeal.

Because the hearing is private and relatively informal, it is common for the SBT panel member to intervene and to ask questions of a client and of any witnesses. These questions can be posed at any time during the hearing. A caseworker may pose redirect examination questions if the panel member poses questions that elicit new information from the client or witnesses.

A client should remain in the hearing room at all times. Any witnesses should remain outside the hearing room until it is time to testify. Thereafter, they may remain in the hearing room to support the client. The client may also have a supportive family member, friend or a personal support worker present as an observer.

Evidence at the Hearing:

There are essentially two ways to present evidence to the SBT at an appeal hearing. Evidence may be presented orally though testimony of a client and any witnesses, or it may be presented through documentation such as medical reports, as long as these have been submitted in a timely manner.

The rules of evidence are relaxed for hearing purposes at the SBT. However, witnesses will either testify under oath (swearing to tell the truth) or under affirmation (promising to tell the truth). An SBT panel member has limited discretion regarding admission of documents that have not been filed in a timely manner and can rule such documents inadmissible or grant an adjournment, allowing the DAU time to consider them.

The SBT has a general policy of not granting adjournments to allow further medical evidence to be submitted, so while there are exceptions, in most cases it is important to get medical evidence in to the SBT 30 days in advance of the hearing.

Adjournments are always discretionary and should generally be avoided, as it takes a great deal of time to arrange a new hearing date.

FOLLOWING AN SBT HEARING

Once an SBT appeal hearing has ended, a panel member will **reserve** a decision and provide it later, in writing. The panel member has 60 days to do this, according to the ODSPA and associated regulations. A caseworker should formally thank the panel member following a hearing, leave the hearing room and meet briefly with his or her client to answer any questions arising from the hearing.

A confirming letter should be sent to a client once a caseworker has spoken to review counsel following a hearing. The confirming letter should briefly explain what happened at the hearing and advise the client when to expect a decision on the appeal.

If a client is successful on appeal and an SBT panel member disagrees with the initial decision of the DAU – making a finding that the client is a person with a disability under the ODSPA – then two things will happen. First, the client will be re-assessed as to financial eligibility to receive disability benefits. (As noted above, these benefits are meant to be a last resort so if there are other funds available to the client then benefits will be reduced or refused.) Second, if the client meets financial eligibility guidelines and thus qualifies to receive benefits, these will be payable essentially from the date the client's application for benefits was completed (see the regulations in this regard). The local Ministry office will (or should) move relatively quickly to establish regular and retroactive payments for the client.

Reconsiderations, Appeals and Re-Applications:

If a client is unsuccessful on appeal there are three possible routes open. The client can request reconsideration by the SBT if there are grounds to do so arising from the conduct of the hearing or on the face of the decision. The client can **appeal** the SBT decision to the Divisional Court on a question of law. There is a 30 day time limit

for either requesting reconsideration or appealing to the Divisional Court. Although this time limit can be extended on a discretionary basis by both the SBT and the Court, it is important to comply with the 30-day time limit. Alternatively, the client can **re-apply** for benefits under the ODSPA, providing additional medical evidence to support the new application.

If a client is successful after reconsideration the benefits are payable retroactively, just as they would have been had the client been successful on appeal. The same is true is the client is successful on appeal to the Divisional Court. However, if the client simply re-applies for benefits and is successful on a second application, then the benefits are payable retroactively to only the date the client completed that second application.

(Please note that if a client successfully obtains disability benefits, the clinic may wish to seek **repayment of disbursements** paid to treatment providers for their medical reports. If so, a caseworker's closing letter to the client should include a specific request for repayment.)

FEDERAL DISABILITY BENEFITS

It is crucial to note that, while there are some similarities between making an application for provincial disability benefits under the Ontario Disability Support Program Act and making an application for a federal disability pension under the Canada Pension Plan Act, there are also some significant differences. These differences arise with respect to definitions, documents, deadlines and decision-makers.

ELIGIBILITY FOR A CPP DISABILITY PENSION

The Canadian government administers the federal disability pension program through Human Resources and Social Development Canada. It stipulates the nature and scope of the program through the Canada Pension Plan Act (CPPA).

Under the CPPA, a person is entitled to a **disability pension** if s/he, having been employed and having made contributions to the Canada Pension Plan in a prescribed manner, has stopped working because of being a **"disabled" person** as defined in subsection 42(2) of the CPPA as follows:

> 42(2) For the purposes of this Act,
>
> (a) a person shall be considered to be disabled only if [he] is determined in prescribed manner to have a severe and prolonged mental or physical disability, and for the purposes of this paragraph,
>
> (iii) a disability is severe only if by reason thereof the person in respect of whom the determination is made is incapable regularly of pursuing and substantially gainful occupation, and
>
> (iii) a disability is prolonged only if it is determined in prescribed manner that the disability is likely to be long continued and of indefinite duration or is likely to result in death…

As noted above, entitlement to a disability pension under the CPPA does not stop with that definition.

The sine qua non for receiving a disability pension under the CPPA is **making contributions** to the Canada Pension Plan through employment and self-employment earnings for and within a defined period of time. (Note that an applicant for a disability pension does not need to establish financial need, as does an applicant for disability benefits under the ODSPA. The CPPA deals with a pension rather than a benefit, a pension to which an applicant is entitled upon meeting certain requirements.)

Further, an applicant for a disability pension under the CPPA must establish that s/he made contributions in compliance with a defined **minimum qualifying period**.

Section 44 of the CPPA explains the benefits payable. Subsection 44 (2) defines the minimum qualifying period.

The regulations provide additional information, and there are special calculations to adjust the minimum qualifying period for persons who have left the labour force to raise children.

Another set of special calculations, called **credit-splitting**, may apply to persons who have had a divorce or separation, or whose partnership with another person has ended. Yet another set of special calculations applies to persons who have contributed to the Quebec Pension Plan, or to the pension plan of another country with which Canada has a reciprocal agreement.

Finally, the CPP "Record of Contributions" document, upon which any pension payable is calculated, may sometimes leave out contributions which the applicant has made, or which an employer was legally required to make on the applicant's behalf but did not provide. All of these possible circumstances should be carefully checked with each client.

The minimum qualifying period is calculated with reference to a **contributory period**.

The contributory period for disability pensions is addressed in paragraph 44(2)(b) of the CPPA. However, this paragraph refers to paragraph 44(1)(b), which raises the notion of a time when a person is "deemed to have become disabled".

The **deeming provisions** are complex and so are other provisions under the CPPA and its associated regulations. The Clinic Resource Office (CRO) website www.cro.on.ca provides standard legal memoranda, procedural memoranda and case law pertaining to federal disability pension applications, as well as various other areas of poverty law. In addition, the federal government website provides useful information at: www.hrsdc.gc.ca.

If a person is found eligible for a CPP disability pension, and has dependent children under 18, or between 18 and 25 and attending school, college or university, the children will be eligible for a Disabled Contributor's Child Benefit.

APPLYING FOR A PENSION

Human Resources and Social Development Canada – Income Security:

The CPPA empowers the Minister of Human Resources and Social Development Canada to make decisions about applications for disability pensions and to delegate that decision-making power. A department currently named Human Resources and Social Development Canada – Income Security Programs (HRSDC) has this delegated power. HRSDC thus receives and assesses applications for disability pensions. It is staffed by both medically-trained people and laypeople. It not only makes initial decisions about whether an applicant is a person who has a disability according to the CPPA, it also makes follow-up decisions. It is essentially the opposing party for an applicant and will defend any decision it makes.

An applicant for a disability pension must begin the process by submitting an application package to HRSDC, one that has a number of components. These forms are available online or at HRSDC and Service Canada offices.

If on reviewing the application package HRSDC finds that an applicant is a **"disabled" person** and has made sufficient contributions to the CPP within the qualifying period, then a disability pension will be calculated according to the applicant's contributions and paid according to federal regulations and departmental guidelines.

If HRSDC finds that an applicant **is non-disabled** or is ineligible because of insufficient contributions, it provides a written decision to

this effect, typically within three to six months of the date when the application package was submitted. HRSDC will also provide the reasons for its decision and describe the process through which an appeal can be made.

THE APPEAL PROCESS

Requesting a Reconsideration:

The first step in the appeal process involves making a request for a **reconsideration** by HRSDC. An applicant must request a reconsideration within **90 days** of receiving the initial negative decision. The request must be in writing. If no request is submitted, the applicant cannot later appeal the negative decision from HRSDC. If a request is submitted late a reconsideration may still be conducted, but only if the applicant provides good reasons for delay.

A request for reconsideration **can** include new medical evidence, but it **must** include certain specified information, described in correspondence provided to an applicant with the written initial negative HRSDC decision.

A reconsideration results in another written decision from HRSDC, which can take weeks to months to arrive. More often than not, the second decision simply affirms the initial negative decision.

Filing an Appeal:

If the reconsideration results in a second negative decision from HRSDC, the next step involves filing an **appeal**. Appeal forms are filed not with HRSDC (the opposing party) but with the Office of the Commissioner of Review Tribunals, as a Review Tribunal will ultimately be constituted to hear the appeal (described below).

An applicant must file an appeal in writing within **90 days** of receiving the second negative decision from HRSDC – that is, within

90 days of receiving the results of the request for a reconsideration. The form which an appeal must take is described in material provided to an applicant by HRSDC, along with the second negative decision. Late filing of an appeal may be allowed, but only if the applicant provides good reason for delay.

An appeal of a negative HRSDC decision is granted **as of right** (automatically) if an applicant makes a request for a reconsideration and files an appeal in a timely manner.

The Review Tribunal:

A Review Tribunal is a quasi-judicial administrative tribunal operated out of the Office of the Commissioner of Review Tribunals. A Review Tribunal deals with appeals arising from decisions to deny disability pensions under the CPPA. It operates at arms-length from the decision-maker being appealed. Its hearings are held across Canada and are typically conducted by three-member panels, at least one member of which is medically trained. One of the other two members will typically be legally trained, while the third and last will represent the community in some other manner.

The Office of the Commissioner of Review Tribunals will send a copy of the appeal to HRSDC. An applicant need not do so. The documentary requirements and the procedures to be followed in an appeal are specified in the Review Tribunal's Rules of Procedure.

Scheduling appeal hearings before a Review Tribunal can be quite slow. Caseworkers should make sure that the Office of the Commissioner of Review Tribunal is aware of hiatus and transition periods, as that office can be reluctant to reschedule hearings. Staff members at the Office of the Commissioner of Review Tribunals may consult with the law clinic before scheduling decisions are made.

WORKING ON A REVIEW TRIBUNAL FILE

Contacting HRSDC and the Review Tribunal:

Immediately after being assigned to assist a client seeking a disability pension under the CPPA, a caseworker should ensure that HRSDC and (as appropriate) the Office of the Commissioner of Review Tribunals have been notified that the clinic is acting for the client.

As the opposing party, HRSDC is entitled to know who represents an applicant and to be advised about certain material the applicant will rely upon in the appeal. It is also required to divulge some of its own material.

In order to obtain this material, a caseworker must provide a copy of a specific **HRSDC consent form**, signed by an applicant, along with a letter indicating that the legal aid clinic has been retained to assist the applicant. In due course, HRSDC will provide all documents it will rely upon in the appeal as well as its written submissions.

As the office in charge of the panel before which a caseworker will appear to assist a client, the Office of the Commissioner of Review Tribunals is entitled to notice that the clinic has been retained. Once the Office of the Commissioner of Review Tribunals has received such notice, it will provide ongoing information to the clinic about the appeal hearing.

The letter to the Office of the Commissioner of Review Tribunals should thus include an **Agency Authorization Form**, signed by a client and advising it that the clinic will act as the client's representative in the appeal process. The letter should also include another specific **Office of the Commissioner of Review Tribunals consent form**, signed by the client, and a request for

copies of any documents in the client's file. A caseworker should be aware of the contents of all documents available to a decision-maker, so that appropriate preparations can be made.

Completing the Disability Questionnaire:

A disability questionnaire should be completed for each client making an application for a disability pension. The questions are numerous and cover a variety of issues. Not all questions are relevant for all clients. However, the questionnaire is designed to ensure that relevant questions are asked and that useful information is collected and reported in one document.

A caseworker assigned to a QLA client applying for a disability pension should quickly arrange to meet the client, discuss the appeal process and complete the disability questionnaire. The answers provided will be extremely useful in pursuing new medical evidence and crafting submissions. The client should be made aware of this. The client should also be made aware that completing the questionnaire will take time and that some of the questions might seem unusual or uncomfortable. The caseworker should reassure the client about solicitor/client confidentiality.

A caseworker will have to be patient and sensitive to the kinds of issues that will be addressed and the kinds of problems that can be encountered with a client. Some clients may need to read or even complete the disability questionnaire on their own, at least initially. Some may need to meet on two or three occasions rather than on one to complete it. Some may need particular or repeated assurances or explanations. The caseworker will need to be observant, responsive, careful and flexible.

Obtaining New Medical Evidence:

If the application package and previously submitted medical evidence did not satisfy HRSDC that an applicant is a disabled person under CPPA, then new medical evidence is likely required.

Because of HRSDC delays in processing applications, documents previously submitted can be quite dated. A client's condition(s) can also significantly change over time, and the client can have changed doctors or seen specialists after submitting an application package. In any event, additional medical evidence, particularly evidence addressing the CPPA definition of a disabled person, can make all the difference in an appeal.

A caseworker must provide a **Consent To Disclose Personal Health Information Form**, signed by a client, to any individual or agency asked to divulge confidential information about the client. This means (as noted above) that HRSDC and the Office of the Commissioner of Review Tribunals should receive such forms along with requests to release relevant documents, and doctors or other treatment providers should also receive them along with requests for medical or other private information.

Consent To Disclose Personal Health Information Forms are typically obtained when a caseworker is completing a disability questionnaire with a client, but they can be obtained at other times. A separate form should be obtained for each treatment provider. As work on a file progresses, additional inquiries should be made and new forms signed as required.

Once a Consent To Disclose Personal Health Information form is signed, it should quickly be provided to the relevant recipient, **along with an initial letter** requesting new medical evidence and a **response form**. Templates for these documents should be available at the law clinic. The letter should indicate that the clinic has been retained because a client has applied for and been denied a disability pension. It should define a "disabled person" under the

CPPA and ask its recipient to advise whether any helpful medical evidence can be provided. It can and should be modified to suit the particular client's situation. This is also true for the response form.

Even if the initial letter meets with a positive response, a follow-up letter may be required to request specifically the new medical evidence available. A template for a follow-up letter should also be available at the law clinic.

Most doctors will charge a fee to provide new medical evidence (as they cannot bill OHIP for this service). The clinic might assist with this. If so, a caseworker should nonetheless check with review counsel about limiting the fees payable for any individual client.

Caseworkers must be very careful to keep track of letters sent to and responses received from treatment providers. Deadlines for submitting new medical evidence approach quickly and treatment providers are busy. Any accounts submitted for preparation of new medical evidence must be paid immediately and thank you letters are imperative.

Submitting New Medical Evidence:

New medical evidence should be submitted to HRSDC as it is received. HRSDC routinely reviews applications and will consider new evidence on a regular basis.

In any event, a caseworker should make every effort to provide new medical evidence and any written submissions to HRSDC and the Office of the Commissioner of Review Tribunals at least 30 days before the appeal hearing. This allows HRSDC, as the opposing party, an opportunity to review the evidence and prepare a response. However, the Review Tribunal **will** consider new medical evidence and written submissions provided at the hearing but the caseworker should try to meet the 30-day deadline if at all possible.

On some occasions (because of the strength of new medical evidence), HRSDC will decide that a client does, in fact, meet the definition of a disabled person under the CPPA. When this happens, HRSDC changes its initial negative decision to a positive one and no hearing is required. HRSDC will contact the client and payments of a retroactive and ongoing pension will follow. A caseworker must advise the Office of the Commissioner of Review Tribunals if HRSDC does change its decision, as it will need to arrange its hearing schedule accordingly.

In general, documentary requirements and the procedures to be followed in appeals for disability pensions are specified in the Review Tribunal Rules of Procedure.

Preparing a Client:

As a client must meet the CPPA definition of a disabled person to be successful at an appeal hearing before a Review Tribunal, a caseworker should become familiar with the client's abilities and limitations as these relate to the definition.

A client's condition(s) or circumstances may make it difficult to establish that s/he is a disabled person according to the CPPA. A caseworker should provide a memorandum of fact and law to review counsel and an opinion letter to the client prior to any hearing. The opinion letter will prepare the client for the appeal hearing and its possible outcome. Material to support the memorandum of fact and law and opinion letter can be located in on the Clinic Resource Office (CRO) website: www.cro.on.ca. The CRO website provides standard legal memoranda, procedural memoranda and case law pertaining to federal disability pension claims as well as various other areas of poverty law.

A caseworker should prepare for a hearing before a Review Tribunal in the same way as for a hearing before the Ontario Rental Housing Tribunal or a trial in a court. Once a hearing date has been scheduled and any written submissions filed, the caseworker should prepare a hearing binder and discuss it with review counsel. Preliminary statements and questions should be prepared. For a Review Tribunal hearing these include a brief introduction (or opening statement), direct examination questions for the client and any witnesses, occasionally cross-examination questions for the opposing party and witnesses and a closing statement.

Another very important aspect of preparation is meeting with a client just prior to his/her appeal hearing to review the hearing process and the anticipated testimony. The client should be advised about what to expect – how many people might be present, what the layout of the hearing room might be, how long the hearing might last, what kinds of questions might be asked, whether a decision might be made immediately, etc.

As with any trial or hearing, this meeting is important to a caseworker as well as a client. The caseworker needs to review the questions s/he will ask the client, and to help the client understand what information the questions have been designed to elicit. The caseworker must do the same things with any witnesses to be called in addition to the client. Each person who will testify should have a separate meeting with the caseworker.

ATTENDING A REVIEW TRIBUNAL HEARING

A caseworker, a client and any witnesses should arrive slightly early for a Review Tribunal hearing to address any questions or concerns.

The Hearing Setting:

A Review Tribunal appeal hearing is private and somewhat formal. It usually takes place in a small room (not a courtroom) with the three panel members, a caseworker, a client and perhaps a representative of HRSDC present.

It is very common for the Review Tribunal panel members to intervene and to ask questions of a client and any witnesses. These questions can be posed at any time during the hearing. A caseworker may pose his or her own additional questions if the panel members pose questions that elicit new information from the client or witnesses.

A client should remain in the hearing room at all times. Any witnesses should remain outside the hearing room until it is time to testify. Thereafter, they may remain in the hearing room to support the client. The client may also have a supportive family member, friend or a personal support worker present as an observer.

Evidence at the Hearing:

There are essentially two ways to present evidence to a Review Tribunal at an appeal hearing. Evidence may be presented orally though testimony of a client and any witnesses, or it may be presented through documentation such as medical reports. The rules of evidence are relaxed for appeal hearing purposes.

FOLLOWING A REVIEW TRIBUNAL HEARING

Once a Review Tribunal appeal hearing has ended, the panel members will reserve their decision and provide it later, in writing. A caseworker should formally thank the panel members following a hearing, leave the hearing room and meet briefly with a client to answer any questions arising from the hearing.

A confirming letter should be sent to a client once a caseworker has spoken to review counsel following a hearing. The confirming letter should briefly explain what happened at the hearing and advise the client when to expect a decision on the appeal. Typically, decisions of a Review Tribunal take a number of weeks to arrive.

If a client is successful on appeal and Review Tribunal panel members disagree with the initial decision of HDSRC – making a finding that a client is a disabled person under the CPPA who has made sufficient contributions to the CPP – then HRSDC will make an assessment as to the amount of pension payable to the client. HRSDC will (or should) move relatively quickly to establish regular and retroactive payments for the client.

Appeals:

If a client is unsuccessful on appeal to a Review Tribunal, the client may file an **application for leave to appea**l the negative decision of the Review Tribunal with the Pension Appeals Board (PAB). This must be done within 90 days of receiving the negative decision. The PAB is also established under the CPPA. If leave to appeal is granted (and this is a process which takes a very long time indeed), then the application for leave to appeal is **deemed to be a notice of appeal** and the client is scheduled for an appeal hearing before the PAB.

The appeal process becomes increasingly formal as an applicant moves from reconsideration, through an appeal before a Review Tribunal and then through an application for leave to appeal before the PAB. The documentary requirements and the procedures for the latter are specified in the Rules of Procedure of the PAB. The PAB usually sits in Ottawa, and only for a brief period of time each year. Cases can take a number of years to move towards an appeal

hearing before the PAB. The client must be made aware of this. The PAB can allow an appeal or dismiss it. Decisions of the PAB are final, save for those rare decisions that proceed to the Federal Court for review.

(If a client is successful on appeal to a Review Tribunal or to the PAB, the clinic may wish to seek **repayment of disbursements** paid to treatment providers for their medical reports. If so, a caseworker's closing letter to the client should include a specific request for repayment.)

OTHER SOCIAL ASSISTANCE CLAIMS

Under the Ontario Works Act (OWA), residents of Ontario with limited income may be eligible for social assistance in the form of **employment assistance** and **basic financial assistance**. These are defined respectively in sections 4 and 5 of the OWA.

Eligibility requirements are specified in the OWA and associated regulations. Decisions about social assistance under the OWA are made locally by a designated administrator, and can be internally reviewed and appealed in much the same way as decisions about provincial disability benefits. Decisions that cannot be appealed are specified in section 26 of the OWA.

Interim assistance is available and treated in much the same way as it is treated under the ODSPA.

Under the CPPA, the benefits available in addition to disability pensions include retirement and survivor's pensions, death, disabled contributor's child and orphan's benefits. These are defined and their eligibility requirements are specified in the CPPA and associated regulations. Decisions about these benefits may be reconsidered and appealed in the same way as decisions about federal disability pensions.